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

COURT (PLENARY)

CASE OF LITHGOW AND OTHERS v. THE UNITED KINGDOM

(Application no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81)

JUDGMENT

STRASBOURG

8 July 1986

In the case of Lithgow and Others*,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. W. GANSHOF VAN DER MEERSCH,
Mr. J. CREMONA,
Mr. G. WIARDA,
Mr. Thór VILHJÁLMSSON,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. J. GERSING,
Mr. A. SPIELMANN,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 28 June, 24-26 and 28 September, 23 and 25 October 1985, 27-30 May and 24 June 1986,

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

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 18 May 1984, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case originated in the

* Note by the Registrar: The case is numbered 2/1984/74/112-118. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

following seven applications against the United Kingdom of Great Britain and Northern Ireland, lodged with the Commission between 1977 and 1981 under Article 25 (art. 25) by the persons indicated:

- no. 9006/80: Sir William Lithgow;
- no. 9262/81: Vosper Ltd. (now Vosper PLC - "Vosper");
- no. 9263/81: The English Electric Company, Ltd. ("English Electric") and Vickers Ltd. (now Vickers PLC - "Vickers");
- no. 9265/81: Banstonian Company ("Banstonian") and Northern Shipbuilding & Industrial Holdings Ltd. ("Northern Shipbuilding");
- no. 9266/81: Yarrow PLC (formerly Yarrow and Company Ltd.
- "Yarrow"), Sir Eric Yarrow, M & G Securities Ltd. and Mrs. Monique Augustin-Normand;
- no. 9313/81: Vickers;
- no. 9405/81: Dowsett Securities Ltd. ("Dowsett"), FFI (UK Finance) PLC (now Investors in Industry PLC
- "Investors") and The Prudential Assurance Company Ltd. ("Prudential").

Sir William Lithgow and Sir Eric Yarrow are British citizens and Mrs. Augustin-Normand is a French citizen; the remaining applicants are all companies incorporated and registered in the United Kingdom.

The expression "the applicants" hereinafter designates all the above-named persons other than Sir Eric Yarrow, M & G Securities Ltd. and Mrs. Augustin-Normand whose complaints were declared inadmissible by the Commission (see paragraph 102 below).

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The request sought a decision from the Court as to the existence of violations of Articles 6 para. 1, 13, 17 or 18 (art. 6-1, art. 13, art. 17, art. 18) of the Convention or of Article 1 of Protocol No. 1 (P1-1) (taken alone or in conjunction with Article 14 of the Convention) (art. 14+P1-1).

3. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants all stated that they wished to take part in the proceedings pending before the Court and designated the lawyers and, in the case of Vickers, the company's Commercial Director who would represent them (Rule 30).

4. The Chamber of seven judges to be constituted included, as ex officio members, Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the then President of the Court (Rule 21 para. 3 (b)). On 22 May 1984, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. R. Ryssdal, Mr. Thór Vilhjálmsson, Mr. W. Ganshof van der Meersch, Mr. L. Liesch and Mr. E. García de Enterría (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

On the same day, the Chamber decided under Rule 50 to relinquish jurisdiction forthwith in favour of the plenary Court.

5. The President of the Court consulted, through the Registrar, the Agent of the United Kingdom Government ("the Government"), the Commission's Delegate and the applicants' representatives on the necessity for a written procedure (Rules 37 para. 1 and 50 para. 3). Thereafter, in accordance with the President's Orders and directions, the following documents were lodged at the registry:

- on 30 October 1984, individual memorial of Sir William Lithgow; - on 31 October 1984, joint memorial of the applicants and individual memorials of Vosper, English Electric and Vickers, Yarrow, and Vickers; - on 5 November 1984, memorial of the Government and individual memorial of Dowsett, Investors and Prudential; - on 15 November 1984, individual memorial of Banstonian and Northern Shipbuilding.

By letter of 15 January 1985, the Secretary to the Commission indicated that its Delegate did not propose to reply in writing to these memorials.

6. After consulting, through the Registrar, the Agent of the Government, the Commission's Delegate and applicants' representatives, the President directed on 18 December 1984 that the oral proceedings should open on 24 June 1985.

7. On 30 May 1985, the Court (presided over by Mr. Ryssdal, who had on that day succeeded Mr. Wiarda) held a preparatory meeting when it drew up a list of requests and questions which were communicated shortly thereafter by the Registrar to the Government, the Commission and the applicants.

8. The hearings were held in public at the Human Rights Building, Strasbourg, from 24 to 26 June 1985.

There appeared before the Court:

- for the Government:

Mr. M. EATON, Legal Counsellor,
Foreign and Commonwealth Office, *Agent*,
Mr. R. ALEXANDER, Q.C.,
Prof. R. HIGGINS, Barrister-at-Law,
Mr. N. BRATZA, Barrister-at-Law, *Counsel*,
Mr. H. WHITAKER,
Mr. J. KEELING,
Dr. G. DAVIS,
Mr. J. KNOX, Department of Trade and Industry,
Mr. R. GARDINER, Law Officers' Department, *Advisers*;

- for the Commission:

Mr. J.A. FROWEIN, *Delegate*;

- for Sir William Lithgow:

Mr. J. MACDONALD, Q.C.,
Mr. N. MARYAN-GREEN, avocat,

Mr. J. MCNEILL, Advocate, *Counsel*,
Mr. D. ROSS MACDONALD, Solicitor,
Mr. C. HARDCASTLE,
Mr. C. GLADSTONE,
Mr. D. BROCK, Hardcastle & Co. Ltd., *Advisers*;
- for Vosper:
Mr. A. LESTER, Q.C.,
Mr. M. MENDELSON, Barrister-at-Law,
Mr. D. PANNICK, Barrister-at-Law, *Counsel*,
Mr. J. HOWISON, Solicitor;
- for English Electric and Vickers:
Mr. R. SOUTHWELL, Q.C.,
Miss M. SIMMONS, Barrister-at-Law,
Prof. I. DELUPIS, Barrister-at-Law, *Counsel*;
- for English Electric:
Mr. M. LESTER, Director of Legal Affairs, Solicitor;
- for Vickers:
Mr. C. FOREMAN, Commercial Director, *Representative*,
Mr. N. BEVINS, Company Secretary, *Adviser*;
- for Banstonian and Northern Shipbuilding:
Mr. R. GRAUPNER, Solicitor,
Mr. T. EDWARDS, Rea Brothers PLC, *Adviser*;
- for Yarrow:
Prof. F. JACOBS, Q.C., *Counsel*,
Mr. A. MALLINSON,
Mr. D. ROWE, Solicitors;
- for Dowsett, Investors and Prudential:
Mr. A. LESTER, Q.C.,
Mr. D. PANNICK, Barrister-at-Law, *Counsel*,
Mr. A. FOYLE, Solicitor.

The Court heard addresses by Mr. Alexander for the Government, by Mr. Frowein for the Commission and by Mr. J. Macdonald, Mr. A. Lester, Mr. Southwell, Mr. Graupner and Prof. Jacobs for the applicants, as well as replies to questions put by it and certain of its members.

During the course of the hearings, various documents, including written replies to questions put by the Court (see paragraph 7 above), were filed by the Government and the applicants.

AS TO THE FACTS

9. The applicants in the present case had certain of their interests nationalised under the Aircraft and Shipbuilding Industries Act 1977 ("the

1977 Act"). Whilst not contesting the principle of the nationalisation as such, they claimed that the compensation which they received was grossly inadequate and discriminatory and alleged that they had been victims of breaches of Article 1 of Protocol No. 1 (P1-1) to the Convention, taken alone and in conjunction with Article 14 (art. 14+P1-1) of the Convention. They also invoked Article 6 (art. 6) and - in one case - Article 13 (art. 13) of the Convention. Certain claims of violation of Articles 17 and 18 (art. 17, art. 18) of the Convention, which had been made before the Commission, were not pursued before the Court.

I. RELEVANT LEGISLATION

A. Background to the 1977 Act

1. The nationalisation proposals

10. In its election manifesto published on 8 February 1974, the Labour Party stated that its political programme included nationalisation of the United Kingdom aircraft and shipbuilding industries. It had made previous statements to that effect in 1971, 1972 and 1973.

At a general election held on 28 February 1974, the Labour Party gained office from the Conservatives and formed a government; it did not then have an overall majority in the House of Commons. On 31 July 1974, the Secretary of State for Industry announced that the shipbuilding and shiprepair industries would be taken into public ownership and that legislative provisions for safeguarding their assets would be effective from that date; details of the Government's proposals for nationalising those industries were set out in a discussion paper published on the same day.

A further general election was held on 10 October 1974, at which the Labour Party was returned with an overall majority. On 29 October, the Queen's Speech at the opening of Parliament referred to the Government's intention to bring the aerospace industry into public ownership and a statement concerning safeguarding provisions for its assets was made in the House of Commons on 4 November. On 15 January 1975, the Government published a consultative document relative to their plans for the nationalisation of that industry.

11. The above-mentioned discussion paper and consultative document contained particulars of the companies to be nationalised and stated that "fair compensation" would be paid, though without giving details of the compensation terms. Both documents set out the political, economic and social considerations that motivated the nationalisation proposed; essentially, the Government considered that it would put the industries

concerned - which had been in receipt of substantial Government assistance and were heavily dependent on Government contracts - on a sounder organisational and economic footing and bring to them a desirably greater degree of public control and accountability.

2. The Parliamentary proceedings and subsequent developments

12. On 17 March 1975, the Secretary of State for Industry announced in the House of Commons the forthcoming introduction of an Aircraft and Shipbuilding Industries Bill to give effect to the nationalisation proposals. He indicated, for the first time, the basis on which compensation would be determined, namely by reference to the value of the securities of the companies to be acquired: securities quoted on a recognised Stock Exchange were to be valued at their average price during the six months ending on 28 February 1974, whilst the value of unquoted securities was to be determined, by agreement or arbitration, as if they had been quoted during that period. Details of the safeguarding provisions were also given.

13. A Bill on the lines announced was duly published, providing for the securities of forty-three companies to pass into the ownership of public corporations. Although the Bill received its first reading on 30 April 1975, it lapsed at the end of the Parliamentary session due to lack of time. The Government then reviewed the proposed compensation terms (including the choice of the valuation reference period) in the light of representations received, but decided not to change them, notably on account of the uncertainty which this would have created, of the extent of share dealings that had taken place on the basis of the terms already announced and of the fact that in the alternative reference periods canvassed share prices were likely to have been distorted by the commitment to nationalisation.

14. A second Bill, in essentially the same terms as the first, was introduced in November 1975. It gave rise to protracted proceedings in the House of Commons, covering such matters as the principle and the scope of the nationalisation measure and the compensation terms. In February 1976, the Government themselves announced the exclusion from the ambit of the Bill of Drypool Group Ltd.; this shipbuilding company had become insolvent after February 1974 and the Government considered that it would be unjustifiable to pay its shareholders the full value of the shares during the compensation reference period.

Having received its third reading in the House of Commons on 29 July 1976, the Bill passed to the House of Lords where, after further lengthy debates, various amendments were made which were not acceptable to the Government; in particular, certain shiprepairing and warship-building companies were excluded and a provision was inserted whereby the Arbitration Tribunal - which was to assess compensation in default of agreement - would have been able to award "fair compensation" if it considered that this would not be provided under the statutory formula. The

ensuing disagreement between the two Houses of Parliament over the amendments could not be resolved by the end of the session and the second Bill therefore also lapsed.

15. A third Bill in the same terms as the second was introduced into the House of Commons on 26 November 1976, completed all procedural stages there by 7 December and was then introduced into the House of Lords under a special procedure whereby it could pass into law without the assent of that House. It received the Royal Assent and came into force on 17 March 1977. The compensation terms enacted were essentially identical to those provided for in the first Bill; the same applied to the interests to be nationalised, except for the exclusion of Drypool Group Ltd. and also - following an amendment accepted by the Government during the proceedings on the third Bill - of certain companies whose business consisted solely of shiprepairing. In the final event, thirty-one companies (four aerospace and the remainder shipbuilding, marine engineering or shipbuilding training) were listed for nationalisation in the 1977 Act.

16. The Parliamentary debates were characterised throughout by opposition concentrated, in particular, on the alleged unfairness of the compensation terms. The criticisms - which were substantially identical to those made by the applicants in the present proceedings and were all withdrawn or rejected after debate - related, inter alia, to the use of a hypothetical Stock Exchange method of valuation for unlisted shares; the choice of the valuation reference period; the absence of provision for taking account of growth in the companies concerned, or fall in the value of money, after the reference period; the non-inclusion in the compensation formula of any equivalent of the "control premium" (see paragraph 98 below); and the fact that the valuation of certain acquired companies might be related to the stock market quotation of their parent companies' shares.

Government spokesmen, for their part, maintained that the terms were fair. They argued, amongst other things, that it was proper to value securities at a date before they were affected by the possibility of nationalisation; that the subsequent performance of a particular company would normally have been in prospect at the reference period and hence reflected in the imputed share price; that it was reasonable that the Government should benefit from any improvements in the companies after the end of the reference period since they accepted the risk of any deterioration, short of bankruptcy; that it was fallacious to assume that there was a correlation between share values and the rate of inflation; that the choice of reference period protected shareholders against the subsequent fluctuations in market prices; that the terms on which compensation was being offered were not those on which a willing buyer acquired control of a company from a willing seller, since this was not a transaction of that kind but a nationalisation by Act of Parliament; and that regard would be had to the quotation of a parent company's shares only where the acquired

company’s activities constituted a "very substantial" part of the whole undertaking. The Government also acknowledged that the settlement of compensation would take some time, but expressed their intention of making payments on account as large and as quickly as possible and within six months of passage of the companies into public ownership.

17. In May 1979 - at which time compensation negotiations were still in progress (see paragraphs 33-35 below) -, a further general election was held and the Conservative Party returned to office. The new Government reviewed, in the light of representations made, the compensations terms contained in the 1977 Act but decided not to change them. In a written answer the new Secretary of State for Industry announced this to the House of Commons on 7 August 1980, in the following terms:

> "We recognise that some previous owners and many members of this House and of the public believe that the terms of compensation imposed by the 1977 Act were grossly unfair to some of the companies and we share this view. We have explored every possibility to right the injustice done by the previous Government but to our very great regret we have concluded that amending legislation to establish new compensation terms retrospectively would be unjust to the many people who sold shares on the basis of the previous terms."

The new Government also considered, but decided against, any immediate denationalisation of certain of the companies that had passed into public ownership.

B. The 1977 Act

18. Sections 19 and 20 of the 1977 Act provided that, on a date to be specified by the Secretary of State for Industry ("Vesting Day"), the securities of the companies engaged in the aircraft and shipbuilding industries which were listed in Schedules 1 and 2, together with certain other assets appurtenant to their activities, should vest in "British Aerospace" or "British Shipbuilders", two public corporations established under the Act. The dates subsequently so specified were, for aerospace companies, 29 April 1977 and, for shipbuilding companies, 1 July 1977.

The Act also made provision for compensation to be paid to the former holders of securities of the acquired companies, for the safeguarding of the assets of the nationalised undertakings, for the appointment of stockholders’ representatives and for the establishment of an Arbitration Tribunal.

1. Compensation

19. Under section 35(3), the amount of compensation payable was, generally, an amount equal to the "base value" of the nationalised securities, less any deduction which was appropriate by virtue of section 39 (see paragraphs 23-24 below). For securities listed on the London Stock Exchange, the "base value" was, under section 37(1), the average of their

weekly quotations during the six months between 1 September 1973 and 28 February 1974 ("the Reference Period", the second date being that of the general election referred to in paragraph 10, second sub-paragraph, above). For securities not so listed and issued before the end of the Reference Period, the "base value" was "such as may be determined by agreement between the Secretary of State and the stockholders' representative" (see paragraph 28 below) "or, in default of such agreement, as may be determined by arbitration under this Act to be the base value which the securities would have had under section 37 ... if they had been listed" on the Stock Exchange throughout the Reference Period (section 38(1)). The "base value" of unlisted securities issued after the end of the Reference Period was, generally, their issue price (section 38(10)).

Among the reasons given by the Government for the choice of this reference period were: the need to avoid a period when the value of the shares was distorted by the prospect of nationalisation; subject to this, the need to take as recent a period as possible; and the general decline in share prices between mid-1972 and March 1975, when the compensation terms were announced, making it desirable to choose a period reflecting the mid-point of the share market over those years.

In determining the "base value" of unlisted securities, the Arbitration Tribunal (see paragraphs 29-32 below) was to have regard to "all relevant factors"; when the acquired company was the subsidiary of a company all or part of whose shares were listed on the Stock Exchange and carried on an undertaking which "formed a substantial part of the undertakings of the group of companies of which the company and the parent company were members", one of those factors was the stock market quotation of the parent company's shares (section 38(3) and (6)).

During negotiations, the Secretary of State, whilst having some scope for judgment, could not offer by way of compensation more than was possible under the statutory formula. The Arbitration Tribunal, for its part, was in no way bound by the amount offered or contended for in negotiations. In determining compensation, no regard was had to any grants to the nationalised undertakings from public funds.

20. Under section 36, compensation was not payable until the "base value" of the nationalised shares and the amount of any deduction to be made under section 39 (see paragraphs 23-24 below) had been determined. However, it was provided that, at any time after Vesting Day, "such sum may be paid on account of compensation ... as the Secretary of State thinks fit ...". The payments on account made to the applicants in the present case were unconditional.

21. (a) Compensation was to take the form of government stock, known as "Compensation Stock" (section 35(1)). Interest thereon was to accrue from Vesting Day (Schedule 5). The rate of such interest was to be

determined by the Treasury, as were the conditions as to repayment, redemption and other matters (section 40).

(b) Compensation was not subject to tax on receipt, but disposal or redemption of Compensation Stock gave rise to liability to capital gains tax, the gain being calculated by reference to the cost of acquisition by the shareholder of the nationalised shares. However, by virtue of section 54 of the Finance Act 1976, the replacement of Compensation Stock by new business assets could give rise to an entitlement to "roll-over relief", whereby liability to tax would be deferred until the new assets, or their successors, were ultimately disposed of. Such relief was available only where the recipient of the Compensation Stock was a company and where the nationalised concern had been either a subsidiary, at least 75% owned, of that company or a wholly-owned subsidiary of a consortium consisting of five or fewer companies; it could not be claimed by a private individual, regardless of the size of his shareholding in the nationalised concern. These criteria were intended to limit the ambit of "roll-over relief" to cases where the shares in the nationalised company had been held as a business asset rather than as a purely financial investment.

2. Safeguarding provisions

22. During the course of the Parliamentary proceedings on the various Bills, Government spokesmen stated that the undertakings to be nationalised were to continue to operate as normal commercial concerns until Vesting Day. And, in fact, all the companies with which the present case is concerned did so.

Although the undertakings remained private property until Vesting Day, the 1977 Act contained a number of safeguarding provisions whose general aim was to ensure that, between the end of the Reference Period (28 February 1974) and that Day, there was no abnormal action by the existing owners or management which might be detrimental to the public sector. The provisions, whose broad effect is summarised below, did not apply if the action in question had been approved by the Secretary of State for Industry; retroactive approval was possible in certain circumstances, notably in respect of "material transactions" (see paragraph 24 below). The Government gave assurances that the safeguarding provisions would not be used in such a way as to penalise reasonable action taken in the normal course of business and in good faith.

23. Holders of securities of the acquired companies were entitled to dividends and interest thereon for all periods up to Vesting Day. However, limits were in effect imposed on the amount of dividends and interest paid pursuant to resolutions passed between the end of the Reference Period and Vesting Day: if the date of the resolution lay between 28 February 1974 and the "Safeguarding Date" (generally 17 March 1975, being the date of the statement in Parliament outlining the compensation terms and safeguarding

provisions; see paragraph 12 above), the amount of any payments in excess of the permissible maximum fell, under section 39, to be deducted from the compensation payable for shares under section 35; if the date of the resolution was after the Safeguarding Date and before Vesting Day, the directors of the acquired company were personally liable to the relevant public corporation for any such excess (section 23). For a dividend, the permissible maximum was generally either the net revenue of the company for the period in respect of which the dividend was declared or the amount of the most recent ordinary dividend previously paid (whichever was the less); for interest, it was the minimum necessary to avoid default on obligations or the carrying over of interest for subsequent payment (section 24). During the Parliamentary debates, the Government gave assurances that higher payments would be authorised if the circumstances warranted.

24. British Aerospace and British Shipbuilders were protected against losses occasioned by "material" or "onerous" transactions entered into by an acquired company between the end of the Reference Period and Vesting Day. Broadly speaking, a "material transaction" was one, such as a special dividend, that involved the direct or indirect transfer of company assets to shareholders and an "onerous transaction" was one that was unusual or unreasonable and foreseeably caused loss to the company (sections 30 and 31). If the transaction had been entered into between 28 February 1974 and the Safeguarding Date - or in certain cases the "Initial Date" (31 July 1974 for the shipbuilding industry or 4 November 1974 for the aerospace industry) -, the net loss caused thereby to the relevant public corporation fell, under section 39, to be deducted from the compensation payable for shares under section 35; if the transaction had been entered into after the Safeguarding Date - or the Initial Date - and before Vesting Day, that corporation could institute proceedings before the Arbitration Tribunal (see paragraphs 29-32 below) to recover from the directors or the parties to the transaction the loss caused thereby and, in the case of an "onerous transaction", to have the same declared void (sections 30 and 31).

25. There was also a general prohibition on the transfer away by an acquired company of certain assets, coupled with the possibility for the relevant public corporation to institute proceedings before the Arbitration Tribunal to have the damage suffered as a result of the transfer made good by the directors or the parties thereto (section 28). If the transfer had been effected after the Initial Date, the corporation could recover the assets, either by acquiring certain additional companies or by acquiring the assets themselves (sections 26 and 29).

26. The Secretary of State could in certain circumstances (notably insolvency) remove a company from the list of companies to be nationalised (section 27).

27. Questions arising as to the amount of the appropriate deduction to be made from compensation under section 39 were to be determined by

agreement between the Secretary of State and the Stockholders' Representative (see paragraph 28 below) or, in default of such agreement, by the Arbitration Tribunal. The latter also had jurisdiction over various other issues arising under the safeguarding provisions.

3. The Stockholders' Representative

28. Section 41(1) of the 1977 Act provided that a Stockholders' Representative was to be appointed in respect of each acquired company "to represent the interests of holders of securities of that company in connection with the determination of the base value of those securities". He was to be appointed by the holders of the securities at a meeting held within a prescribed time-limit, failing which, by the Secretary of State; he could be removed by resolution passed at a meeting of the security holders (Schedule 6). His remuneration and expenses were to be met by the Secretary of State.

The raison d'être for the institution of Stockholders' Representative was that it was considered essential, in order to prevent negotiations and arbitration being rendered unworkable by a multiplicity of individual claims, that they be conducted, on behalf of the former owners, exclusively by a nominee representing their collective interests. As a result, although the individual shareholders had voting rights at stockholders' meetings, they had no direct standing in compensation negotiations.

According to Sir William Lithgow, the Representative was not obliged to seek the stockholders' consent before agreeing to compensation in negotiations or to refer the question of compensation to arbitration if so requested by them; in this applicant's view, a stockholder had, in practice, no means of ensuring that the Representative complied with his wishes, save for the aforesaid possibility of removal. According to the Government, stockholders would have had a remedy in the domestic courts against a Representative for failure to comply either with his obligations under the 1977 Act or with his common-law obligations as agent. They further maintained that he could not refuse to institute arbitration proceedings if so directed by the stockholders or, probably, a majority of them and that, as a matter of pure practice, he would not agree the quantum of compensation in negotiations without their consent.

4. The Arbitration Tribunal

29. Section 42 of the 1977 Act established the Aircraft and Shipbuilding Industries Arbitration Tribunal. For the hearing of any proceedings, the Tribunal was to consist of a legally-qualified president (appointed by the Lord Chancellor or, in the case of Scottish proceedings, the Lord President of the Court of Session) and two other members (appointed by the Secretary of State after consultation with all the Stockholders' Representatives), one being of experience in business and the other in finance.

Criteria for the selection of members of the Tribunal - relating to their standing and experience and including a requirement that they should not have any connection with the companies nationalised - were worked out in consultation with the Stockholders' Representatives, who were also invited to make proposals as to suitable members.

Members of the Tribunal were to hold office "for such period as may be determined at the time of their respective appointments". The appointor of a member could declare his office vacant "on the ground that he is unfit to continue in his office" but, by virtue of section 8(1) of the Tribunals and Inquiries Act 1971, this power was exercisable only with the consent of the Lord Chancellor or the Lord President of the Court of Session. Provision was also made for resignation, vacation of office on grounds of bankruptcy or replacement in case of illness.

30. The Tribunal's jurisdiction was limited to the issues specified in the 1977 Act; these included various claims and questions arising under the safeguarding provisions and, in the context of compensation, determination of the "base value" referred to in section 38(1) and of the deductions to be made therefrom under section 39 (see paragraphs 19 and 23-24 above). In assessing the "base value", the Tribunal could hear argument about the weight to be attached to any relevant factor, but not about the alleged unfairness of the statutory formula, by which it was bound.

The jurisdiction in relation to "base value" and deductions arose only "in default of agreement" between the Secretary of State and the Stockholders' Representative, but the latter was free to refer the question of compensation to the Tribunal at any moment after Vesting Day. In the view of the Government - which was contested by Sir William Lithgow -, there was no legal bar to access to the Tribunal by an individual shareholder, unless and until agreement had been reached in negotiations. Thereafter, he could not seise the Tribunal even if he considered that the sum agreed was too small under the statutory formula.

31. The procedure before the Tribunal was governed by The Aircraft and Shipbuilding Industries Arbitration Tribunal Rules 1977 and The Aircraft and Shipbuilding Industries Arbitration Tribunal (Scottish Proceedings) Rules 1977, made by the Lord Chancellor and the Lord Advocate, respectively. These statutory instruments provided for proceedings similar to those of a court; in particular, hearings were generally to be held in public.

32. An appeal on any question of law - but not on the quantum of compensation - lay from the Tribunal to the Court of Appeal in England or the Court of Session in Scotland and thereafter, with leave, to the House of Lords (Schedule 7). Furthermore, a Stockholders' Representative could, according to the Government, test in the ordinary courts whether the Secretary of State, in formulating a compensation offer, had erred in law by misinterpreting or misapplying the 1977 Act.

C. Procedure followed in the implementation of the 1977 Act

33. On the passing of the 1977 Act, Messrs. Whinney Murray & Co., a leading firm of chartered accountants appointed by the Government to advise them in the compensation procedures, set about valuing the companies concerned by issuing a questionnaire to all of them. According to the Government, it was not possible to seek the cooperation of the companies or their shareholders at an earlier date because there was no certainty as to when or in what form the strongly contested legislation would be passed.

34. Compensation for those shares in the acquired companies which were listed on the Stock Exchange was agreed before, and paid on, 1 July 1977, the relevant Vesting Day. As regards the remaining, unquoted, shares, Messrs. Whinney Murray & Co. provided the Department of Industry with preliminary valuations on most of the companies during January 1978 and on the remainder during April 1978, for the purpose of calculating payments on account of compensation which were made during those months.

On various dates between December 1977 and May 1978, the accountants supplied the Department with full valuation reports, factual information wherefrom was sent for comment to the company concerned and to the Stockholders' Representative acting on behalf of the holders of its securities (see paragraph 28 above). The Department and the Representatives exchanged memoranda on various dates between March and October 1978 and negotiations between them followed. Further payments on account of compensation were announced in July and November 1978 and, in some cases, in 1979.

35. Between July 1978 and 7 August 1980 (being the date of the new Government's announcement that they had decided not to change the compensation terms; see paragraph 17 above), various settlements were reached but, with the exception of the Kincaid case (see paragraphs 40-45 below), none of them related to the acquired companies with which the present proceedings are concerned. Shortly after the aforesaid announcement, the Minister of State indicated in a series of meetings with Stockholders' Representatives that, within the confines of the statutory formula, the Department of Industry would be prepared to settle the remaining cases at amounts somewhat beyond those already offered in negotiations. Settlements regarding the other companies with which the present proceedings are concerned were reached by the end of 1980.

36. In the compensation negotiations the Department of Industry and their advisers used the following four methods of arriving at a hypothetical Stock Exchange quotation for unlisted shares.

(a) For most of the profitable companies an earnings-based valuation was applied. This method, which involved considering the company's historic and prospective post-tax earnings (as at the Reference Period) and applying

thereto an appropriate multiplier (price/earnings ratio) assessed by comparison with listed companies, was used in all the cases with which the present proceedings are concerned, other than the Vosper Thornycroft and the Yarrow Shipbuilders cases (see paragraphs 46-53 and 70-75 below). Since stock market quotations are not dependent solely on earnings, the Government's accountants, in preparing their valuations, reviewed, where appropriate, the figure arrived at by the above method against the criteria of asset-backing and dividend yield.

(b) Where the acquired company was a subsidiary carrying on the main part of the total undertaking of a company all or part of whose shares were listed on the Stock Exchange, a parent-company-related valuation was employed, in view of section 38(6) of the 1977 Act (see paragraph 19 above). This method, which involved deducting from the parent company's average capitalisation during the Reference Period a valuation for the non-vesting elements in the group, or apportioning the capitalisation according to the contribution to group earnings of the vesting and the non-vesting elements, was used in the Vosper Thornycroft and the Yarrow Shipbuilders cases.

(c) In certain other cases, where the company acquired was not making a profit, recourse was had to an assets-based valuation, based on the hypothesis of an open-market sale of the assets during the Reference Period.

(d) One other unprofitable company was valued by a share-capital-related method that is at a discount to the nominal value of its issued share capital.

II. THE NATIONALISATIONS GIVING RISE TO THE PRESENT PROCEEDINGS

A. Introduction

37. The present proceedings arise from the nationalisation under the 1977 Act of the seven undertakings described below. Save for the preference shares in Kincaid (see paragraph 40 below), none of the shares in the companies concerned was listed on the Stock Exchange, so that, with that exception, compensation fell to be assessed on the basis of a hypothetical Stock Exchange quotation (see paragraph 19 above).

38. The descriptions of the seven undertakings include particulars of profits and assets which, except where otherwise stated, are taken from the company's audited accounts. Pre-tax profits have been shown as the post-tax figures are not in the Court's possession in every case. Figures for net assets do not include amounts in respect of deferred taxation and for this reason differ from the figures appearing in the Commission's report.

References to cash in hand or equivalent are to gross amounts, that is without taking account of any outstanding liabilities.

39. Reference is also made below to various estimates submitted by the applicants, both to the Commission and to the Court, concerning the value of their nationalised interests. This material was not generally challenged or commented on by the Government. This was not because they accepted it as correct, but because they considered that it was inappropriate to do so since those estimates did not reflect the statutory formula, which formula, in their view, was consistent with the requirements of the Convention.

B. The Kincaid case

1. The nationalised undertaking

40. On 1 July 1977, there vested in British Shipbuilders the preference and the ordinary shares in John G. Kincaid & Company Ltd. ("Kincaid"), which manufactured marine diesel engines at Greenock. The preference shares were listed on the Stock Exchange and no complaint was made in the present proceedings regarding the compensation received therefor. Sir William Lithgow, who is a shipbuilder by profession and was the largest single shareholder in the company, owned 186,320 - or slightly over 28% - of its 662,500 issued ordinary shares.

41. (a) Kincaid’s pre-tax profits for the following years, ending on 31 December, were:

1971 - £860,000
1972 - £595,000
1973 - £387,000
1974 - £1,258,000
1975 - £1,740,000
1976 - £1,356,000.

In the half-year to 30 June 1977, the pre-tax profits were, according to the Commission’s report, approximately £700,000.

Kincaid had no Government orders and required no special Government subsidies.

From 1974 to Vesting Day a total of £513,000 was paid in dividends on the ordinary shares; according to Sir William Lithgow, Government-imposed dividend restraint resulted in £1,953,000 being added to company funds between the Reference Period and Vesting Day.

(b) Kincaid’s net assets were:

at 31 December 1972 - £3,679,530
at 31 December 1973 - £3,723,528
at 30 June 1977 - £5,988,096.

At the hearings before the Court, Sir William Lithgow declared that Kincaid had cash reserves of £5.058 million at 30 June 1977.

42. Sir William Lithgow, however, stated that during the Reference Period Kincaid had net assets of approximately £9,500,000 and he supplied a valuation, prepared after the proceedings before the Commission, indicating that the value of the company at 28 February 1974, calculated in accordance with the 1977 Act on the basis of a hypothetical Stock Exchange quotation, was in the region of £8,750,000 to £10,250,000. He further estimated that the net assets attributable to ordinary shareholders as at Vesting Day were worth at least £18,000,000. All these various figures took account of revaluations of the company's premises and plant, effected by a firm of chartered surveyors, indicating that they were worth substantially more than the amounts shown in the balance sheet. The cash reserves at 30 June 1977 were described by Sir William Lithgow as surplus to Kincaid's requirements.

2. The compensation negotiations

43. Messrs. Whinney Murray & Co.'s valuation report on Kincaid - suggesting a figure in the range of £3,000,000 to £3,300,000 - was submitted to the Department of Industry in February 1978; it was based on earnings (see paragraph 36 (a) above). The report took no account of a revaluation of fixed assets, effected after the end of the Reference Period. Memoranda were exchanged between the Department and the Stockholders' Representative in August 1978 and formal negotiations then began. The Department offered £2,750,000 and the Representative claimed £5,500,000. Subsequent discussions focused in particular on the question whether a different accounting treatment would have been followed had Kincaid's ordinary shares been listed on the Stock Exchange. By February 1979, the gap between the parties had narrowed (£3,500,000 being offered by the Department and £4,700,000 claimed by the Representative) and, after further negotiation, agreement was reached, subject to the former shareholders' approval, at a figure of £3,809,375.

44. After the Stockholders' Representative had recommended acceptance of this figure, a meeting of the shareholders was held on 21 November 1979 to consider a resolution approving the agreement. Sir William Lithgow and eight other stockholders were present but he abstained from voting, as he considered that the information available about the settlement was insufficient and that the figure did not represent Kincaid's value during the Reference Period or at Vesting Day. All the votes cast were in favour and the resolution was thus carried. The Stockholders' Representative ratified the settlement on the following day and on 4 December 1979 British Shipbuilders issued a notice to all the former shareholders, informing them of the agreed compensation.

45. Compensation payments in respect of Kincaid's ordinary shares were made as follows:

- in January 1978, a first payment on account (section 36(6) of the 1977 Act; see paragraph 20 above), of £1,450,000;
- in November 1978, a second payment on account, of £800,000;
- shortly after the settlement in November 1979, the final payment, of £1,559,375.

All these payments were effected by the issue of 9 3/4 % Treasury Stock 1981, bearing a running yield of about 10% per annum.

The total compensation received by Sir William Lithgow for his ordinary shares was £1,071,340. He stated that he sustained on this sum, which he expended on trading assets, a liability to capital gains tax of £207,752.

C. The Vosper Thornycroft case

1. The nationalised undertaking

46. On 1 July 1977, there vested in British Shipbuilders the shares in Vosper Thornycroft (UK) Ltd. and Vosper Shiprepairers Ltd. (hereinafter together referred to as "Vosper Thornycroft"), which were primarily engaged in naval shipbuilding and also operated a shiprepair business. Both of these companies were wholly-owned subsidiaries of Vosper and their activities formed a substantial part of the latter's business. The shares of Vosper were listed on the Stock Exchange, but it was nevertheless a tightly-controlled subsidiary of a private unlisted company, David Brown Holdings Ltd.

Various organisational changes had taken place in the Vosper Group between 1974 and 1977. In brief, its trading activities, which had previously been carried on mainly by one subsidiary company, were first transferred to the parent company and then, on 15 March 1977, transferred back to two subsidiaries, one - Vosper Thornycroft (UK) Ltd. - dealing with shipbuilding and the other - Vosper Shiprepairers Ltd. - with shiprepair. The second transfer had the object (which was not fulfilled) of avoiding nationalisation of the shiprepair business.

47. (a) The pre-tax profits of Vosper Thornycroft, or its predecessors, for the following years, ending on 31 October, were:

1971 - £622,000
1972 - £1,321,000
1973 - £1,658,000
1974 - £3,262,000
1975 - £4,059,000
1976 - £5,536,000.

According to the Commission's report, in the part-year to 30 June 1977, the pre-tax profits were £5,236,000, giving an annual pre-tax profit rate at Vesting Day of £7,850,000.

Between 1972 and 1974, Vosper Thornycroft received £2,108,000 by way of Government shipbuilding grants.

Vosper Thornycroft obtained a substantial amount of business from the United Kingdom Ministry of Defence; however, according to the valuation report referred to in the following paragraph, during the period 1971-1976 United Kingdom Government contracts contributed only 17% of profits, 83% being contributed by exports and other business, and exports amounting to 64% of turnover.

(b) According to the Commission's report, the net assets of Vosper Thornycroft, as appearing from the accounts, were £5,857,000 as at 31 October 1972 and £25,633,000 as at 30 June 1977. At the hearings before the Court, Vosper stated that Vosper Thornycroft's net assets at Vesting Day included £5,500,000 in cash.

(c) The average market capitalisation of Vosper's ordinary shares during the Reference Period was £4,500,000; on 30 June 1977, the capitalisation was £5,800,000.

48. Vosper has submitted a valuation report on Vosper Thornycroft, prepared by a chartered accountant who was also the Stockholders' Representative in this case and made on the hypothesis of an open-market sale of the business as a going concern on Vesting Day by a willing seller to a single willing buyer. The report analysed Vosper Thornycroft's profit record, assets, liabilities, cash flow and future prospects and concluded that its value as at Vesting Day was £37,700,000. This figure was reached by estimating the maintainable post-tax profit level and applying thereto a price/earnings multiplier, adjusted to take account of the "control premium" (see paragraph 98 below); the adjustment was lower than average as it was considered that the number of potential purchasers would have been limited.

During the compensation negotiations, the Stockholders' Representative prepared another valuation, based this time on the hypothesis that the shares of Vosper Thornycroft had been the subject of a public offer for sale on Vesting Day, which resulted in a figure of £35,400,000. The valuation made allowance for the fact that shares offered for sale to the public would be offered at a price below that at which it was estimated they would stand if already listed on the Stock Exchange.

2. The compensation negotiations

49. Messrs. Whinney Murray & Co.'s valuation report on Vosper Thornycroft - suggesting a figure in the range of £4,200,000 to £4,600,000, subject to deductions of £1,139,200 under section 39 of the 1977 Act - was submitted to the Department of Industry in December 1977; for the reasons indicated in paragraph 36 (b) above, it was based on the stock market capitalisation of Vosper, the parent company, during the Reference Period. In March 1978, they made a further report to the Department, concerning the group reorganisations, and in June 1978 memoranda were exchanged

between the Department and the Stockholders' Representative. The Department indicated in their memorandum that they valued Vosper Thornycroft at £3,757,000, without taking into account deductions which they considered fell to be made under section 39 in respect of dividends paid for the year 1973-1974 in excess of the permissible maximum and in respect of the 1976-1977 group reorganisation, which was alleged to constitute a "material transaction" (see paragraphs 23 and 24 above). In view of the uncertainty as to the amount of the deductions, they deferred making an offer of compensation. The Stockholders' Representative, in his memorandum, claimed compensation of £35,400,000, based on a Vesting Day valuation of the shares.

50. Four negotiating meetings were held between July 1978 and March 1979. The amount of the deduction for the excessive dividend was agreed and the Department of Industry agreed to forego, in the context of a negotiated settlement, the claim for a deduction arising out of the reorganisation. On this basis, they made, on 1 March 1979, their first formal offer of compensation, in the sum of £3,500,000 net of deductions.

51. Following the general election of May 1979 (see paragraph 17 above) and after representations had been made to the new Government, the Department of Industry made, in September 1979, a revised offer of £4,500,000. Further representations and preparation for arbitration ensued. At a meeting in August 1980, the Minister of State at the Department increased the offer to £4,800,000 net of deductions and indicated that a further 10% increase might be possible.

At a further meeting on 17 September 1980, the Stockholders' Representative - who had apparently previously made his case primarily on the basis that compensation should be based on Vesting Day value - indicated for the first time his view of a Reference Period valuation, on the basis of the statutory formula. He gave a figure of £10,000,000 and indicated that he would expect the Arbitration Tribunal to award around £6,000,000. The Minister of State finally agreed at the meeting to raise the Government's offer to £5,300,000, but no further.

52. On 19 September 1980, the Stockholders' Representative wrote to the Minister of State: he regretted the Government's decision not to offer more or to alter the statutory compensation terms despite their acknowledgement that they were grossly unfair, but he recognised that the final offer was the maximum likely to be recovered by arbitration. To mitigate the effects of further delay, he was prepared to recommend acceptance of the offer. On 7 October 1980, Vosper authorised him to accept it.

53. Compensation payments in respect of Vosper Thornycroft's shares were made as follows:

- in April 1978, a first payment on account, of £650,000;
- in November 1978, a second payment on account, of £700,000;

- shortly after the settlement in October 1980, the final payment, of £3,950,000.

The payments on account were effected by the issue of 9 3/4% Treasury Stock 1981, with a running yield of about 10% per annum, and the final payment, by the issue of 10% Exchequer Stock 1983, with a running yield of slightly under 11%.

D. The BAC case

1. The nationalised undertaking

54. On 29 April 1977, there vested in British Aerospace the shares in British Aircraft Corporation (Holdings) Ltd. ("BAC"), which was the major aerospace manufacturer in the United Kingdom. Half of its shares were owned by English Electric, a wholly-owned subsidiary of The General Electric Company PLC ("GEC"), and half by Vickers. The shares of GEC and Vickers are quoted on the Stock Exchange, but the activities of BAC did not constitute a substantial part of the latter's undertaking. BAC was not itself listed in the 1977 Act as one of the companies to be nationalised but it was taken into public ownership - in the place of a subsidiary, British Aircraft Corporation Ltd., that was so listed - on the ground that it owned certain works that had previously belonged to that subsidiary (sections 26 and 27; see paragraphs 25 and 26 above).

55. (a) BAC's pre-tax profits for the following years, ending on 31 December, were:

1972 - £ 6,571,000
1973 - £13,742,000
1974 - £24,207,000
1975 - £30,003,000
1976 - £39,912,000
1977 - £53,644,000.

BAC received no special Government subsidies. Over 70% of its 1977 production was exported.

(b) BAC's net assets were £32.4 million at the end of 1972, £75,620,000 at the end of 1976 and £80,575,000 at the end of 1977. At the hearings before the Court, the former owners of BAC said that it had cash in hand of £57.8 million at the end of 1976 and of £98.7 million at the end of 1977.

56. English Electric and Vickers stated that BAC was one of the most successful companies of the 1970's in the United Kingdom. They pointed, for example, to the growth in sales, profits, assets and order books between 1973 and 1977 and to future prospects, and asserted that a company with such earnings growth would have commanded on the Stock Exchange a substantial price/earnings ratio and a market value considerably over net asset value. They submitted a valuation indicating that BAC's value as at

Vesting Day was at least £275,000,000 and that this figure should be increased by not less than 30% to take account of the "control premium" (see paragraph 98 below), giving an overall value of at least £350,000,000.

2. The compensation negotiations

57. Negotiations in this case were marked throughout by a basic difference of approach between the Stockholders' Representative and the Department of Industry. The Representative adopted the "discretionary approach", according to which the Secretary of State had a discretion as to the amount of compensation he could agree in negotiations, the statutory compensation formula being binding only on the Arbitration Tribunal; on this basis, the Reference Period was not relevant to the negotiations and compensation could and should be based on market value at Vesting Day. The Department, on the other hand, adopted the "statutory approach", according to which negotiations could be conducted only in terms of the statutory formula; on this basis, negotiated compensation would be related to the value which BAC's shares would have had if they had been quoted during the Reference Period and the performance of the company thereafter was irrelevant save in so far as it could have been foreseen by a prudent investor.

58. On 15 April 1977, the Stockholders' Representative indicated to the Department of Industry, as a preliminary view, that on the basis of the 1976 profits, BAC's capitalisation in the stock market would be likely to be in the region of £150,000,000 to £165,000,000, excluding any "control premium" which would take the figure up to at least £200,000,000. On 15 August 1977, he revised this figure to £250,000,000. There followed correspondence in which Department and Representative argued, respectively, for the "statutory approach" and the "discretionary approach". The Department added that it was the large amount of detailed work needed to reach a reasoned view on the base value of the shares at the Reference Period that was holding up the opening of negotiations.

59. Messrs. Whinney Murray & Co.'s valuation report on BAC - suggesting a figure in the range of £31,000,000 to £35,000,000, subject to deductions of £13,736,000 under section 39 of the 1977 Act - was submitted to the Department of Industry in January 1978; it was based on earnings (see paragraph 36 (a) above). On 25 January 1978, the Government announced a first payment on account of compensation, in the sum of £6,100,000; GEC and Vickers issued a joint statement in which, basically, they objected to the small size of the payment. After receiving the factual part of the valuation report, the Stockholders' Representative wrote, on 9 February 1978, to the Department saying that, attempting to arrive at a figure which was "fair and reasonable in all the circumstances" and having regard, inter alia, to profit trend, growth in order books, exports and cash

flow, he assessed the value of BAC at £255,100,000, a figure which would have to be substantially higher to take account of any "control premium".

In May 1978, the Department sent to the Stockholders' Representative a memorandum indicating that in their view the appropriate method of valuation was by a capitalisation, through the application of an appropriate price/earnings ratio, of the post-tax earnings for the year ending on 31 December 1972 (namely £3,300,000); from the base value thus established deductions fell to be made, under section 39 of the 1977 Act (see paragraphs 23-24 above), in respect of certain dividends paid in 1974. The memorandum did not contain any offer of compensation because, according to the Government, the "discretionary approach", for which the Stockholders' Representative continued to argue in intervening correspondence, was not within the terms of the Act.

Maintaining that approach, the Representative gave to the Department on 6 July 1978 a report with his estimate of a stock market valuation of BAC on Vesting Day, namely £275,000,000. According to English Electric and Vickers, a representative of the Department accepted that they would probably have arrived at a similar figure if they were attempting a Vesting Day stock market valuation and stated that BAC's growth from 1973 to 1977 had been "spectacular". However, the Department reaffirmed that, on the basis of legal advice, they could only negotiate on the "statutory approach".

60. On 7 August 1978, the Stockholders' Representative, without renouncing the "discretionary approach", wrote to the Department with his view of the hypothetical stock market value of BAC in 1974. This was that a figure of £255,000,000 would have given a prospective dividend yield of just under 4%, dividend cover of 1.7 times and a prospective price/earnings ratio of just over 20, figures which would not have been abnormal for a share with the growth rate of BAC. He added that at £200,000,000 the shares would have been very reasonably valued.

There were then discussions as to whether BAC's profits after the Reference Period had been predictable. On 29 September 1978, the Stockholders' Representative said that cutting valuation during the Reference Period to the bone would still leave a figure of £175,000,000. The Department accepted that the 1973 earnings could be used as a base for estimating what prospective earnings would have been during the Reference Period.

61. On 16 November 1978, the Department of Industry made a preliminary offer of some £51,000,000, after deduction under section 39 of the 1977 Act of £19,700,000 relating to dividends totalling £31,810,000 paid by BAC in respect of the years 1973 to 1976, primarily a special dividend of £15,000,000 paid in February 1974 out of reserves and deemed to be a "material transaction" under section 30 (see paragraph 24 above). They indicated that if the matter went to arbitration, they would argue that

£51,000,000 was the appropriate valuation. In December 1978, however, they offered £81,000,000 and in March 1979 the Stockholders' Representative indicated that £127,000,000 would be acceptable as a compromise.

62. After the general election of May 1979 (see paragraph 17 above), there were further discussions. In September 1979, the Department indicated that, in the context of a negotiated settlement, it might be possible to reduce the section 39 deduction to £15,000,000 and that they could increase their offer to £85,000,000. The Stockholders' Representative indicated that £115,000,000 would be an acceptable compromise.

In November 1979, however, he submitted a memorandum in which he reverted to the "discretionary approach". He added that the stockholders' merchant bankers had unequivocally advised that "the 'base value' of BAC's securities during the 'relevant' period, calculated as if by an arbitrator under the Act, would be at least £140,000,000". He also argued that the Department, in their restriction of dividend distributions during the period from 1974 to Vesting Day, had gone beyond what was necessary or prudent; there was therefore justification for retroactive approval by the Secretary of State of the 1974 special dividend, so that it would not be deductible from compensation (see paragraphs 22-24 above). This request did not meet with a favourable response and, in the final event, £19,700,000 was deducted under section 39.

63. After further correspondence and discussion, the Department, in August 1980, made a final offer of £95,000,000, net of deductions. On 18 August 1980, the Stockholders' Representative stated that he was prepared to recommend acceptance and agreement at the figure in question was duly reached.

64. Compensation payments in respect of BAC's shares were made as follows:

- on 10 February 1978, a first payment on account, of £6,100,000;
- on 2 August 1978, a second payment on account, of £3,550,000;
- on 5 December 1978, a third payment on account, of £30,350,000;
- on 28 August 1980, the final payment, of £55,000,000.

The payments on account were effected by the issue of 9 3/4% Treasury Stock 1981, carrying a running yield of about 10% per annum, and the final payment, by the issue of 10% Exchequer Stock 1983, carrying a running yield of about 11%.

E. The Hall Russell case

1. The nationalised undertaking

65. On 1 July 1977, there vested in British Shipbuilders the shares in Hall Russell & Company Ltd. ("Hall Russell"), a limited company

registered in Scotland, which carried on a shipbuilding and shiprepair business in Aberdeen and was wholly-owned by Banstonian, an unlimited company. Banstonian was a wholly-owned subsidiary of Northern Shipbuilding, of which there were in turn four shareholders.

66. (a) Hall Russell's pre-tax profits for the following years, ending on 31 March, were, according to the Commission's report:

1972 - £425,000
1973 - £480,000
1974 - £151,000
1975 - £177,000
1976 - £498,000
1977 - £825,000.

In the three months to 30 June 1977, pre-tax profits were £292,374.

Between 1973 and 1975, Hall Russell received £657,000 by way of Government shipbuilding grants.

(b) Hall Russell's net assets were £1,358,000 as at 31 March 1973 and £1,622,573 as at 30 June 1977. In their memorial filed with the Court, the former owners of Hall Russell said that it had £3,355,000 available in cash on Vesting Day.

67. Banstonian and Northern Shipbuilding stated that Hall Russell was a sound, successful and growing undertaking and that this was confirmed by its results after nationalisation. By reference to a valuation report, prepared in October 1978 for the purposes of the compensation negotiations and taking into account the earnings record, the value of the net tangible assets and the dividend yield, they submitted that if Hall Russell had been valued as at Vesting Day, they should have received compensation of £3,500,000.

2. The compensation negotiations

68. Messrs. Whinney Murray & Co.'s valuation report on Hall Russell - suggesting a figure in the range of £900,000 to £1,000,000 - was submitted to the Department of Industry in March 1978; it was based on earnings (see paragraph 36 (a) above). In October 1978, memoranda on the valuation were exchanged between the Department and the Stockholders' Representative. The former offered £800,000. The latter maintained that section 38 of the 1977 Act (see paragraph 19 above) gave the Secretary of State a discretion in settling compensation, and that the only fair basis was value at Vesting Day, namely £3,500,000.

In November 1978, the Stockholders' Representative put forward a Reference Period valuation of £2,500,000 - £3,000,000. In March 1979, the Government offered £1,000,000. This offer was subsequently increased to £1,500,000 and settlement at that figure was concluded in November 1980.

69. Compensation payments in respect of Hall Russell's shares were made as follows:

- on 7 February 1978, a first payment on account, of £300,000;

- on 1 August 1978, a second payment on account, of £100,000;
- on 5 December 1978, a third payment on account, of £250,000;
- on 21 November 1980, the final payment, of £850,000.

The payments on account were effected by the issue of 9 3/4 % Treasury Stock 1981, carrying a running yield of about 10% per annum, and the final payment, by the issue of 10% Exchequer Stock 1983, carrying a running yield of slightly under 11%.

F. The Yarrow Shipbuilders case

1. The nationalised undertaking

70. On 1 July 1977, there vested in British Shipbuilders the shares in Yarrow (Shipbuilders) Ltd. ("Yarrow Shipbuilders"), which was engaged in building in Glasgow warships and other specialist vessels. This company was a wholly-owned subsidiary of Yarrow, whose shares were listed on the Stock Exchange, and its activities comprised a substantial part of the latter's business.

In 1968, Yarrow, which had previously owned all the shares in Yarrow Shipbuilders, had, allegedly in response to Government pressure, sold 51% of them to another company for £1,800,000. Yarrow Shipbuilders had subsequently incurred losses and in 1971 Yarrow had repurchased the shareholding for £1, a loan of £4,500,000 having been negotiated from the Ministry of Defence to replace working capital eroded by the losses. It was a condition of the loan that, on returning to profitability, Yarrow Shipbuilders could distribute profits by way of dividend to the parent company only with the prior authority of the Secretary of State for Defence. By 1973/1974, the loan could have been repaid, but Yarrow decided not to do so; the dividend restrictions accordingly applied throughout the Reference Period.

71. (a) The pre-tax profits of Yarrow Shipbuilders for the following years, ending on 30 June, were:

1971 - £308,000
1972 - £607,000
1973 - £3,025,000
1974 - £7,088,000
1975 - £5,619,000
1976 - £4,887,000
1977 - £3,123,000.

According to Yarrow, the post-tax profits from the Reference Period to Vesting Day totalled some £12,000,000; during this period Yarrow Shipbuilders was authorised by the Secretary of State for Defence to pay dividends of only £2,600,000 to its parent company, with the result that £9,400,000 of the profits remained within the company and were included

in the shareholders' funds obtained by the Government on nationalisation. The yield which Yarrow was allowed to obtain from its subsidiary in this period was said to have been only about one-third of what it should have been.

In addition to the 1971 loan from the Ministry of Defence, Yarrow Shipbuilders received between 1972 and 1977 £3,114,000 by way of Government shipbuilding grants. They all related to export contracts, such contracts having always played a significant role in the company's turnover.

(b) Yarrow stated that the value of Yarrow Shipbuilders' net tangible assets, in accordance with accounting standards, was £1,327,000 at 30 June 1973 and that it was shown in the accounts as at 30 June 1977 to be £10,500,000.

(c) The average market capitalisation of Yarrow's ordinary shares during the Reference Period did not exceed £4,800,000.

72. Yarrow has submitted a valuation report prepared by a firm of chartered accountants, according to which a fair value for Yarrow Shipbuilders as at Vesting Day was £16,000,000. The valuation method employed was to consider what a single willing buyer, obtaining 100% control, would have paid. Two alternative approaches were used: the first involved estimating the maintainable post-tax profit level and capitalising it by the application of a price/earnings multiplier, giving a value of £16,320,000; the second involved applying a price/earnings multiplier to the latest reported after-tax earnings, giving a value of £15,750,000. The report commented that "the net asset value of a company which is carrying on business as a going concern is generally not a major determinant in valuing its shares. The purchaser does not normally buy the shares in the expectation that its assets are to be sold, but expects them to be used in the business to earn profits".

In the alternative, Yarrow claimed that, as had been contended by the Stockholders' Representative at the outset of the compensation negotiations (see paragraph 73 below), Yarrow Shipbuilders' value in the Reference Period was £17,500,000.

2. The compensation negotiations

73. In September 1977, the Stockholders' Representative supplied the Department of Industry with a factual memorandum about Yarrow Shipbuilders. Messrs. Whinney Murray & Co.'s valuation report on the company - suggesting a figure in the range of £2,800,000 to £3,200,000 - was submitted to the Department in December 1977. It was based on the stock market capitalisation of the parent company, Yarrow, during the Reference Period. This was not only because the major part of Yarrow's activity was carried on by Yarrow Shipbuilders (see paragraph 36 (b) above) but also because the accountants considered that "without the financial backing of Yarrow and being unable to pay dividends under the

terms of the [Ministry of Defence] loan, a purely nominal value for [Yarrow Shipbuilders] might result". They also took the view that Yarrow Shipbuilders could not be valued on the normal criteria of earnings, dividend yield or asset backing, and noted that the stringent dividend restrictions "affected the standing and worth" of both the subsidiary and the parent.

In March 1978, negotiations opened with an exchange of valuations between the parties: the Department's was £2,800,000, whilst the Representative's was £17,500,000, being an earnings-based valuation arrived at on a view of the prospective profits of Yarrow Shipbuilders for the year to June 1974 and on the assumption of an offer for sale of the shares on the stock market immediately before the Reference Period.

During subsequent negotiations, points discussed included the possibility that further dividend payments in respect of the period up to Vesting Day could be authorised; whether it should be assumed that the Ministry of Defence loan would have been refinanced if the shares of Yarrow Shipbuilders had been listed on the Stock Exchange; the appropriateness of an offer-for-sale approach to valuation; the relevance of the parent-company-related method of valuation; and the effect of the dividend restriction (if any) on the stock market capitalisation of Yarrow.

74. In July 1978, the Government offered £4,000,000 and in September the Stockholders' Representative put forward an alternative claim of £12,000,000. Further offers were made by the Government in August 1979 and August 1980, and in October 1980 compensation was finally agreed at £6,000,000. This figure was accepted by Yarrow as it had been advised that arbitration proceedings might have resulted, under the terms of the 1977 Act, in the award of an amount not exceeding its own total capitalisation of not more than £4,800,000.

75. Compensation in respect of Yarrow Shipbuilders' shares was paid as follows:

- in February 1978, a first payment on account, of £1,400,000;
- in December 1978, a second payment on account, of £850,000;
- on 21 October 1980, the final payment, of £3,750,000.

The payments on account were effected by the issue of 9 3/4% Treasury Stock 1981, with a running yield of about 10% per annum, and the final payment, by the issue of 10% Exchequer Stock 1983, with a running yield of slightly under 11%.

G. The Vickers Shipbuilding case

1. The nationalised undertaking

76. On 1 July 1977, there vested in British Shipbuilders: (a) the shares in Vickers Shipbuilding Group Ltd., a wholly-owned subsidiary of Vickers;

and (b) certain other shipbuilding interests of Vickers which had, by operation of section 20 of the 1977 Act (see paragraph 18 above), vested in Vickers Shipbuilding Group Ltd., as assets appurtenant to its activities. The business thus nationalised (collectively referred to as "Vickers Shipbuilding") specialised in the design and construction of sophisticated warships. The activities of Vickers Shipbuilding did not constitute more than one-quarter of the total undertaking of Vickers.

77. (a) The pre-tax profits of Vickers Shipbuilding for the following years, ending on 31 December, were:

1972 - £2,618,000
1973 - £2,177,000
1974 - £5,515,000
1975 - £4,841,000
1976 - £3,746,000.

In the half-year to 30 June 1977, pre-tax profits were £3,948,000.

Vickers Shipbuilding was in receipt of small amounts by way of Government shipbuilding grants, all of which related to export contracts.

(b) The net assets of Vickers Shipbuilding amounted to £14,337,000 as at 31 December 1972; as at 30 June 1977 its net tangible assets (that is, making no allowance for deferred tax, the amount of which is not shown in the information before the Court) were £32,431,000.

78. Vickers have submitted a valuation which, taking into account profit record, future prospects and net assets, indicated that, on the basis of a transaction between a willing buyer and a willing seller, the value of Vickers Shipbuilding as at Vesting Day was not less than £25,000,000. This figure was reached by estimating the maintainable post-tax profit level and applying thereto a price/earnings multiplier, adjusted to take account of the "control premium" (see paragraph 98 below).

2. The compensation negotiations

79. By virtue of section 38(7) of the 1977 Act, the shares of Vickers Shipbuilding Group Ltd. had to be valued on the assumption that during the Reference Period it had owned the interests which vested in it under section 20 (see paragraph 76 above). The compensation negotiations were therefore conducted on the basis that Vickers Shipbuilding had been a single enterprise at all relevant times and financial data so treating it, prepared by the auditors of Vickers for use in the negotiations, were agreed in March 1978. Certain other preliminary matters (including one related to taxation) arose, and were ultimately settled.

80. Messrs. Whinney Murray & Co.'s valuation report on Vickers Shipbuilding - suggesting a figure in the range of £11,500,000 to £12,700,000 - was submitted to the Department of Industry in May 1978; it was based on earnings (see paragraph 36 (a) above). Formal negotiations opened in the following month with an exchange of memoranda: the

Department offered compensation of £10,550,000 and the Stockholders' Representative claimed £20,060,000. The Department subsequently increased their offer to £13,500,000, whilst the Representative indicated that £17,000,000 was the lowest acceptable figure. In November 1978, the Department stated that they were not prepared to increase their offer further and that, in the event of arbitration, they would take their stand at a lower figure; the Stockholders' Representative replied that resort would be had to arbitration. In September 1979 - after the general election of May 1979 (see paragraph 17 above) -, Vickers was informed that the new Government had decided not to change the compensation terms and had confirmed the Department's negotiating limit of £13,500,000.

81. In the same month, the Stockholders' Representative instituted proceedings before the Arbitration Tribunal (see paragraphs 29-32 above). Written pleadings were exchanged, in which the Stockholders' Representative contended for compensation of £16,695,999 and the Department, of £12,210,000. The hearing started in September 1980. However, on 26 September 1980, compensation was agreed between the parties at a figure of £14,450,000.

82. In January 1978, the Department of Industry had informed Vickers that no payment on account of compensation, pursuant to section 36(6) of the 1977 Act, would then be made because discussions on the taxation matter (see paragraph 79 in fine above) were not then concluded.

Compensation in respect of the nationalised undertaking was subsequently paid as follows:

- in April 1978 or thereabouts, a first payment on account, of £4,000,000;
- in July 1978 or thereabouts, a second payment on account, of £1,250,000;
- in November 1978 or thereabouts, a third payment on account, of £3,200,000;
- in March 1980 or thereabouts, a fourth payment on account, of £3,150,000;
- in September 1980 or thereabouts, the final payment, of £2,850,000.

The first three payments on account were effected by the issue of 9 3/4% Treasury Stock 1981, bearing a running yield of about 10% per annum, and the fourth payment on account and the final payment, by the issue of 10% Exchequer Stock 1983, bearing a running yield of about 11%.

H. The Brooke Marine case

1. The nationalised undertaking

83. On 1 July 1977, there vested in British Shipbuilders the shares in Brooke Marine Ltd. ("Brooke Marine"), which carried on at Lowestoft a

shipbuilding business specialised in the construction of small naval vessels. Those shares were owned as to 74.39% by Dowsett, as to 21.34% by Investors and as to 4.27% by Prudential. The securities which vested included 196,000 shares issued to the owners in March 1976, following their exercise of an option, exercisable by that date, to convert debenture stock into new shares.

84. (a) Brooke Marine's pre-tax profits for the following years, ending on 31 March, were:

1973 - £427,000

1974 - £523,000

1975 - £792,000

1976 - £711,000

1977 - £865,000.

According to the Commission's report, in the three months to 30 June 1977, the pre-tax profits were £270,000.

Between 1973 and 1977, Brooke Marine received £888,000 by way of Government shipbuilding grants. About 70% of its turnover came from exports.

(b) Brooke Marine's net assets amounted to £1,049,000 as at 31 March 1973 and to £4,870,000 as at 30 June 1977. At the hearings before the Court, the former owners of Brooke Marine stated that its net assets at Vesting Day included £2.2 million in cash.

85. During 1973-1974, Brooke Marine had negotiations with the Vickers Shipbuilding Group and Vosper Thornycroft Ltd. concerning a possible purchase of Brooke Marine - at a figure between £2,500,000 and £3,000,000 - by one or other of these companies. The negotiations lapsed due to the prospect of nationalisation.

86. Dowsett, Investors and Prudential have submitted a valuation report, prepared by a firm of chartered accountants, which indicated that, on the basis of a sale by a willing seller to a single willing buyer of the business as a going concern at Vesting Day, a fair valuation of Brooke Marine as at that day was £5,000,000. This figure was reached by estimating the maintainable post-tax profit level and applying thereto a price/earnings multiplier, adjusted to take account of the "control premium" (see paragraph 98 below). The Government did not accept that either the profits figure or the multiplier used was appropriate.

2. The compensation negotiations

87. Prior to Vesting Day, Brooke Marine had had contacts with the Department of Industry about matters connected with compensation.

In the first place, the Department declined, on 28 January 1975, to give an assurance that, in the fixing of compensation, account would be taken of certain development work in respect of which the Chairman of Brooke Marine had requested approval in the previous December. Such approval had been sought in order to preserve compensation rights and, possibly, to ensure compliance with the safeguarding provisions to be included in the nationalisation Act, details of which had not yet been announced. However, according to its former owners, Brooke Marine's note of a meeting held between the company and the Department in June 1975 recorded an assurance by the latter that compensation would take into account changes in circumstances since February 1974 (the end of the Reference Period).

In the second place, in view of the safeguarding provisions (see paragraphs 22-23 above), Brooke Marine, which had previously had a policy of retaining profits for investment in the development of its business, sought and obtained - with some exceptions - authorisation for the payment in the period up to July 1977 of certain dividends. According to its former owners, the company would have sought authorisation to pay higher dividends but for discussions with the Department of Industry which led it to believe that permission would be refused and that retained dividends would be taken into account under the statutory formula. According to Brooke Marine's accounts, the total dividends authorised for the three years to 31 March 1975, 1976 and 1977 amounted to £190,000, whereas profits after tax for the same period amounted to £1,388,758.

88. In January 1978, the Stockholders' Representative wrote to the Department protesting at the amount of the payment on account of compensation offered by the Government (£350,000), which he described as "derisory" in relation to the value of Brooke Marine.

Messrs. Whinney Murray & Co.'s valuation report on the company - suggesting a figure in the range of £860,000 to £960,000 - was submitted to the Department in March 1978: the newly-issued shares (see paragraph 83 in fine above) were, pursuant to section 38(10) of the 1977 Act (see paragraph 19 above), valued at their issue price; the Reference Period value of the remaining shares was assessed on an earnings basis (see paragraph 36 (a) above). The factual part of the report was transmitted to the Stockholders' Representative: according to Dowsett, Investors and Prudential, it contained some errors and important omissions, a view which was expressed in correspondence with the Department; according to the Government, there were no material inaccuracies.

89. In July 1978, formal negotiations opened: the Stockholders' Representative sent to the Department a memorandum claiming compensation of £4,500,000, to which they responded with an offer of £806,000. After various meetings, the Department indicated, in March 1979, that they might be prepared to raise their offer, mentioning a figure of £1,400,000 to £1,500,000. During the negotiations, the Department

contended that the value of Brooke Marine's shares during the Reference Period would have been adversely affected by the existence of claims arising from certain unfavourable contracts and of the options to convert debenture stock into shares (see paragraph 83 above). According to the Department, the 1977 Act made no provision for taking into account, in determining the value, the worth of the options during the Reference Period. This view was not accepted by the Stockholders' Representative and it was subsequently agreed that the matter should not be further discussed in negotiations.

90. In November 1979, the Department made a revised offer of £1,250,000. In further negotiations points discussed included whether section 38 of the 1977 Act required the Secretary of State (in assessing the hypothetical Stock Exchange value) to take account of the likely or only of the inevitable consequences of a company being listed; and whether the takeover negotiations with the Vickers Shipbuilding Group and Vosper Thornycroft Ltd. (see paragraph 85 above) would have been the subject of a public announcement if the shares of Brooke Marine had been listed.

In August 1980, the Minister of State at the Department of Industry indicated that the Government's absolute ceiling was £1,500,000, but, after further contacts, the offer was again raised, in December 1980, to £1,800,000. On 11 December 1980, the Stockholders' Representative accepted this offer.

91. Compensation in respect of the Brooke Marine shares was paid as follows:

- in January 1978, a first payment on account, of £350,000;
- in July 1978, a second payment on account, of £50,000;
- in November 1978, a third payment on account, of £250,000;
- in December 1980, the final payment, of £1,150,000.

The payments on account were effected by the issue of 9 3/4% Treasury Stock 1981, carrying a running yield of about 10% per annum, and the final payment, by the issue of 10% Exchequer Stock 1983, with a running yield of slightly under 11%.

III. GENERAL BACKGROUND INFORMATION

A. Inflation, share prices and interest rates

92. Inflation in the United Kingdom, as measured by the official Retail Price Index, was relatively rapid in the years 1974-1980. At the start of the Reference Period (September 1973) the Index stood at 94.8. The figures for January in each of the following years were as follows:

1974 – 100
1975 - 119.9

1976 - 147.9
1977 - 172.4
1978 - 189.5
1979 - 207.2
1980 - 245.3.

In April 1977, June 1977 and December 1980, the Index stood at 180.3, 183.6 and 275.6, respectively.

The applicants recognised that inflation played some part in the increase in value which their nationalised undertakings were said to have shown between the end of the Reference Period and Vesting Day.

93. Share prices on the Stock Exchange did not follow the same pattern. The general level of share prices reached a high point in mid-1972, when the Financial Times Ordinary Share Index stood at over 500, and then declined to a low point in early January 1975, when that Index stood at under 150. Thereafter, the general trend was upwards for some time.

The trend between the end of the Reference Period (28 February 1974) and the vesting dates under the 1977 Act (29 April and 1 July 1977) can be illustrated by reference to monthly average figures for the Financial Times Industrial Ordinary Share Index. In February 1974, the average for this Index was 316.5. The Index declined steadily during 1974, to an average of 160.1 in December. In January 1975, it rose slightly to 183.7; thereafter, there was a rapid rise, to 262.6 in February, 292.6 in March (when the compensation terms were first announced; see paragraph 12 above), 314.9 in April and 339.0 in May. After a decline between then and August, there was a more or less steady increase, until an average of 406.6 was reached in May 1976. There was then an overall decline until October 1976, when the monthly average was 293.6. Prices then rose again, the average figure in November 1976 (when the third Bill was introduced into Parliament) being 301, in April 1977 (the month of the aerospace industry Vesting Day) being 415.1 and in July 1977 (the month of the shipbuilding industry Vesting Day) being 443.1.

The economic situation in the United Kingdom during the period leading up to the general election of February 1974 was affected by a number of events, including a substantial rise in the price of oil, and industrial conflict in November and December 1973 and in February 1974. Prices and dividends were subjected to control under the Counter-Inflation Act 1973.

94. The general level of interest rates rose between the vesting dates under the 1977 Act and the settlement of compensation claims. On both vesting dates, the Bank of England’s minimum lending rate stood at 8%; it rose to a peak of 17% from November 1979 to June 1980. The average rate from July 1977 to December 1979 was 10.4% and from July 1977 to December 1980, 12.1%.

B. Methods of valuation and compensation

95. During the proceedings before the Commission and the Court reference was made to a number of different methods of valuation of, and of compensating for, property nationalised or compulsorily acquired. The following is a brief outline of those methods.

1. Methods of share valuation

96. A Stock Exchange valuation for listed shares merely involves looking at the price for the shares on the Stock Exchange on the specified date or dates.

97. The method laid down by the 1977 Act for valuing unlisted shares (the hypothetical Stock Exchange valuation) involved estimating what price the shares would have had on the Stock Exchange had they been listed during the Reference Period. The estimate would be made by reference to the price of any comparable quoted shares and account would be taken of all information about the company that would have been available to Stock Exchange investors during that period. Thus, Messrs. Whinney Murray & Co. based their valuations primarily on data appearing in the companies' latest published accounts, which covered periods prior to the Reference Period, but they also made certain assumptions as to the interim - and more up-to-date - statements that would have been supplied to the stock market if the companies' shares had been listed. However, questions might arise concerning the precise information that would have been available to investors and the extent to which they might have foreseen an undertaking's future performance (see, for example, paragraph 57 above). Furthermore, it is implicit in this method that the company's shares would be held by a number of different persons; accordingly, when valuing a wholly-owned subsidiary on this basis, hypothetical assumptions may have to be made as to what its business policies would have been if its shares had been more widely owned.

98. An alternative method is to consider what a single willing buyer would pay a willing seller (or sellers) for the whole of the shares in question. Here again, account would be taken of all the information that would be available to a buyer at the relevant time and an estimate would be made by reference to comparable quoted shares. However, this method could differ from the hypothetical Stock Exchange valuation method in three respects. Firstly, it might be assumed that a single buyer in takeover negotiations might have more complete information than a Stock Exchange investor. Secondly, it would not be necessary to assume that the ownership of the shares was different from the reality or to make consequent assumptions as to the company's business policies. Thirdly, the price payable by a single buyer gaining control of a company would normally be materially higher than the Stock Exchange price, since the latter merely represents what would be paid for a small parcel of shares and does not reflect the market value of a controlling shareholding; guidance as to the

additional amount (the "control premium") may be obtained from the premiums over previous market prices paid on successful takeover bids which, according to the applicants, averaged 34% in the first half of 1977.

2. Compensation methods used in previous nationalisations

99. The compensation provisions contained in the 1977 Act, whilst from many aspects similar to those contained in previous United Kingdom nationalisation legislation, differed therefrom in the following particular respects:

(a) there was no choice of reference periods during which the nationalised shares were to be valued;

(b) the reference period was, with certain exceptions, further removed in time from the vesting dates than the period fixed under earlier legislation, although the latter had always preceded those dates;

(c) there was, in section 38(6) of the 1977 Act (see paragraph 19 above), an express requirement that when valuing a subsidiary the Arbitration Tribunal was to have regard in certain circumstances to the stock market quotation of the parent company.

Furthermore, under earlier measures using share valuation methods a substantial proportion of the securities nationalised had been listed on the Stock Exchange and thus provided a comparison for valuing the unquoted securities. In the case of the 1977 Act, on the other hand, there was no quoted aerospace company and only one of the acquired shipbuilding companies, which was relatively small, had all its shares listed; however, a number of the companies nationalised were subsidiaries whose activities formed a substantial part of the business of a parent, such as Vosper and Yarrow, whose shares were listed.

3. Compensation rights in other cases of compulsory acquisition

100. Subject to the ultimate supremacy of Parliament, it is a rule of United Kingdom constitutional law that compensation is generally payable where property is taken by the Crown in the exercise of common-law powers. Furthermore, "unless the words of a statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation" (Attorney-General v. De Keyser’s Royal Hotel [1920] Appeal Cases 508 at p. 542).

101. The legislation on the compulsory purchase of land for public purposes provides for payment of compensation, the normal basis being the open-market value of the land with a willing seller. The value falls to be assessed, so the House of Lords held in Birmingham Corporation v. West Midland Baptist (Trust) Association [1969] 3 All England Law Reports 172, at the date when possession of the property is taken, or the date when compensation is agreed or assessed, whichever is the earlier, and not (as had

previously been the practice) at the date of the "notice to treat", which might be considerably earlier. Works carried out after the "notice to treat" are excluded from the valuation, but, with some exceptions, account is taken of the possibility of development of the land.

PROCEEDINGS BEFORE THE COMMISSION

102. The Commission received the application of Sir William Lithgow (no. 9006/80) on 30 May 1980, that of Vosper (no. 9262/81) on 16 September 1977, that of English Electric and Vickers (no. 9263/81) on 5 February 1981, that of Banstonian and Northern Shipbuilding (no. 9265/81) on 3 February 1981, that of Yarrow, Sir Eric Yarrow, M & G Securities Ltd. and Mrs. Augustin-Normand (no. 9266/81) on 6 February 1981, that of Vickers (no. 9313/81) on 25 March 1981 and that of Dowsett, Investors and Prudential (no. 9405/81) on 4 June 1981.

All the applicants complained that the compensation which they had received for their interests nationalised under the 1977 Act was grossly inadequate and discriminatory and that they had thus been victims of breaches of Article 1 of Protocol No. 1 (P1-1), taken alone and in conjunction with Article 14 (art. 14+P1-1) of the Convention. Allegations of breach of Article 6 (art. 6) of the Convention were also made by each applicant, and certain of them invoked Articles 13, 17 and 18 (art. 13, art. 17, art. 18).

On 28 January 1983, the Commission declared the applications admissible, save as regards the complaints of Sir Eric Yarrow, M & G Securities Ltd. and Mrs. Augustin-Normand (application no. 9266/81). On 10 October 1983, the Commission ordered the joinder of the applications in pursuance of Rule 29 of its Rules of Procedure.

103. In its report adopted on 7 March 1984 (Article 31) (art. 31), the Commission expressed the opinion that there had been no breach of:

- Article 1 of Protocol No. 1 (P1-1) (thirteen votes to three);

- Article 14 (art. 14) of the Convention (fifteen votes with one abstention);

- Articles 6, 13, 17 or 18 of the Convention (art. 6, art. 13, art. 17, art. 18) (unanimously).

The full text of the Commission’s opinion and of the two dissenting opinions contained in the report is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

104. At the hearings of 24-26 June 1985, the Government requested the Court to decide and declare:

> "1. that there has been no breach of the rights of any of the applicants under Article 1 of Protocol No. 1 (P1-1) to the Convention;
>
> 2. that there has been no breach of the rights of any of the applicants under Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1) on any of the grounds relied upon by the applicants;
>
> 3. that there has been no breach of the rights of any of the applicants under Article 6 (art. 6) of the Convention on such grounds as may still be relied upon by the applicants; and
>
> 4. that there has been no breach of the applicant's rights under Article 13 (art. 13) of the Convention in the [Kincaid] case."

AS TO THE LAW

I. ARTICLE 1 OF PROTOCOL NO. 1 (P1-1)

A. Introduction

105. The applicants did not contest the principle of the nationalisation as such. However, they alleged that, for various reasons, the compensation which they had received was grossly inadequate and that on that account they had been victims of a violation of Article 1 of Protocol No. 1 (P1-1), which reads as follows:

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

The applicants' allegation was contested by the Government and rejected by a majority of the Commission.

106. The Court recalls that Article 1 (P1-1) in substance guarantees the right of property (see the Marckx judgment of 13 June 1979, Series A no. 31, pp. 27-28, para. 63). In its judgment of 23 September 1982 in the case of Sporrong and Lönnroth, the Court analysed Article 1 (P1-1) as comprising "three distinct rules": the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, is concerned, amongst other things, with the right of a State to control the use of property (Series A no. 52, p. 24, para. 61). However, the Court made it clear in its James and Others judgment of 21 February 1986 that the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (Series A no. 98, p. 30, para. 37 in fine).

107. The applicants were clearly "deprived of (their) possessions", within the meaning of the second sentence of Article 1 (P1-1); indeed, this point was not disputed before the Court. It will therefore examine the scope of that sentence's requirements and then, in turn, whether they were satisfied.

B. Were the applicants deprived of their property "in the public interest" and "subject to the conditions provided for by law"?

108. The applicants contended that a taking of property for compensation which - as in the present case, so they alleged - was unfair because it represented only a fraction of the property's value at the date of taking could not be regarded as being "in the public interest", within the meaning of the second sentence of Article 1 of Protocol No. 1 (P1-1). They further contended that if - as here, in their view - the compensation was arbitrary because it bore no reasonable relationship to that value, the taking could not be regarded as having been effected "subject to the conditions provided for by law", within the meaning of the same sentence.

109. The Court is unable to accept the first of these contentions. The obligation to pay compensation derives from an implicit condition in Article 1 of Protocol No. 1 (P1-1) read as a whole (see paragraph 120 below) rather than from the "public interest" requirement itself. The latter requirement relates to the justification and the motives for the actual taking, issues which were not contested by the applicants.

110. As regards the phrase "subject to the conditions provided for by law", it requires in the first place the existence of and compliance with adequately accessible and sufficiently precise domestic legal provisions

(see, amongst other authorities, the Malone judgment of 2 August 1984, Series A no. 82, pp. 31-33, paras. 66-68). Save as stated in paragraph 153 below, the applicants did not dispute that these requirements had been satisfied.

It is true that the word "law" in this context refers to more than domestic law (ibid., p. 32, para. 67). However, the applicants' contention in this respect (see paragraph 108 above) is, in the Court's view, so closely linked to the main issues in the present case, which are dealt with in paragraphs 123-175 below, that it would be superfluous also to examine this question under this phrase of Article 1 (P1-1).

C. "General principles of international law"

111. The applicants argued that the reference in the second sentence of Article 1 (P1-1) to "the general principles of international law" meant that the international law requirement of, so they asserted, prompt, adequate and effective compensation for the deprivation of property of foreigners also applied to nationals.

112. The Commission has consistently held that the principles in question are not applicable to a taking by a State of the property of its own nationals. The Government supported this opinion. The Court likewise agrees with it for the reasons which are already set out in its above-mentioned James and Others judgment (Series A no. 98, pp. 38-40, paras. 58-66) and are repeated here, mutatis mutandis.

113. In the first place, purely as a matter of general international law, the principles in question apply solely to non-nationals. They were specifically developed for the benefit of non-nationals. As such, these principles did not relate to the treatment accorded by States to their own nationals.

114. In support of their argument, the applicants relied first on the actual text of Article 1 (P1-1). In their submission, since the second sentence opened with the words "No one", it was impossible to construe that sentence as meaning that whereas everyone was entitled to the safeguards afforded by the phrases "in the public interest" and "subject to the conditions provided for by law", only non-nationals were entitled to the safeguards afforded by the phrase "subject to the conditions provided for ... by the general principles of international law". They further pointed out that where the authors of the Convention intended to differentiate between nationals and non-nationals, they did so expressly, as was exemplified by Article 16 (art. 16).

Whilst there is some force in the applicants' argument as a matter of grammatical construction, there are convincing reasons for a different interpretation. Textually the Court finds it more natural to take the reference to the general principles of international law in Article 1 of Protocol No. 1 (P1-1) to mean that those principles are incorporated into that Article, but

only as regards those acts to which they are normally applicable, that is to say acts of a State in relation to non-nationals. Moreover, the words of a treaty should be understood to have their ordinary meaning (see Article 31 of the 1969 Vienna Convention on the Law of Treaties), and to interpret the phrase in question as extending the general principles of international law beyond their normal sphere of applicability is less consistent with the ordinary meaning of the terms used, notwithstanding their context.

115. The applicants also referred to arguments to the effect that, on the Commission's interpretation, the reference in Article 1 (P1-1) to the general principles of international law would be redundant since non-nationals already enjoyed the protection thereof.

The Court does not share this view. The inclusion of the reference can be seen to serve at least two purposes. Firstly, it enables non-nationals to resort directly to the machinery of the Convention to enforce their rights on the basis of the relevant principles of international law, whereas otherwise they would have to seek recourse to diplomatic channels or to other available means of dispute settlement to do so. Secondly, the reference ensures that the position of non-nationals is safeguarded, in that it excludes any possible argument that the entry into force of Protocol No. 1 (P1) has led to a diminution of their rights. In this connection, it is also noteworthy that Article 1 (P1-1) expressly provides that deprivation of property must be effected "in the public interest": since such a requirement has always been included amongst the general principles of international law, this express provision would itself have been superfluous if Article 1 (P1-1) had had the effect of rendering those principles applicable to nationals as well as to non-nationals.

116. Finally, the applicants pointed out that to treat the general principles of international law as inapplicable to a taking by a State of the property of its own nationals would permit differentiation on the ground of nationality. This, they said, would be incompatible with two provisions that are incorporated in Protocol No. 1 (P1) by virtue of Article 5 thereof (P1-5): Article 1 (art. 1) of the Convention which obliges the Contracting States to secure to everyone within their jurisdiction the rights and freedoms guaranteed and Article 14 (art. 14) of the Convention which enshrines the principle of non-discrimination.

As to Article 1 (art. 1) of the Convention, it is true that under most provisions of the Convention and its Protocols nationals and non-nationals enjoy the same protection but this does not exclude exceptions as far as this may be indicated in a particular text (see, for example, Articles 5 para. 1 (f) and 16 (art. 5-1-f, art. 16) of the Convention, Articles 3 and 4 of Protocol No. 4 (P4-3, P4-4)).

As to Article 14 (art. 14) of the Convention, the Court has consistently held that differences of treatment do not constitute discrimination if they have an "objective and reasonable justification" (see, as the most recent

authority, the Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, pp. 35-36, para. 72).

Especially as regards a taking of property effected in the context of a social reform or an economic restructuring, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals (see paragraph 120 below).

117. Confronted with a text whose interpretation has given rise to such disagreement, the Court considers it proper to have recourse to the travaux préparatoires as a supplementary means of interpretation (see Article 32 of the Vienna Convention on the Law of Treaties).

Examination of the travaux préparatoires reveals that the express reference to a right to compensation contained in earlier drafts of Article 1 (P1-1) was excluded, notably in the face of opposition on the part of the United Kingdom and other States. The mention of the general principles of international law was subsequently included and was the subject of several statements to the effect that they protected only foreigners. Thus, when the German Government stated that they could accept the text provided that it was explicitly recognised that those principles involved the obligation to pay compensation in the event of expropriation, the Swedish delegation pointed out that those principles only applied to relations between a State and non-nationals. And it was then agreed, at the request of the German and Belgian delegations, that "the general principles of international law, in their present connotation, entailed the obligation to pay compensation to non-nationals in cases of expropriation" (emphasis added).

Above all, in their Resolution (52) 1 of 19 March 1952 approving the text of the Protocol (P1) and opening it for signature, the Committee of Ministers expressly stated that, "as regards Article 1 (P1-1), the general principles of international law in their present connotation entail the obligation to pay compensation to non-nationals in cases of expropriation" (emphasis added). Having regard to the negotiating history as a whole, the Court considers that this Resolution must be taken as a clear indication that the reference to the general principles of international law was not intended to extend to nationals.

The travaux préparatoires accordingly do not support the interpretation for which the applicants contended.

118. Finally, it has not been demonstrated that, since the entry into force of Protocol No. 1 (P1), State practice has developed to the point where it

can be said that the parties to that instrument regard the reference therein to the general principles of international law as being applicable to the treatment accorded by them to their own nationals. The evidence adduced points distinctly in the opposite direction.

119. For all these reasons, the Court concludes that the general principles of international law are not applicable to a taking by a State of the property of its own nationals.

D. Entitlement to compensation

120. The question remains whether the availability and amount of compensation are material considerations under the second sentence of the first paragraph of Article 1 (P1-1), the text of the provision being silent on the point. The Commission, with whom both the Government and the applicants agreed, read Article 1 (P1-1) as in general impliedly requiring the payment of compensation as a necessary condition for the taking of property of anyone within the jurisdiction of a Contracting State.

Like the Commission, the Court observes that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes. As far as Article 1 (P1-1) is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle.

In this connection, the Court recalls that not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest", but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. This latter requirement was expressed in other terms in the above-mentioned Sporrong and Lönnroth judgment by the notion of the "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights (Series A no. 52, p. 26, para. 69). The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden" (ibid., p. 28, para. 73). Although the Court was speaking in that judgment in the context of the general rule of peaceful enjoyment of property enunciated in the first sentence of the first paragraph, it pointed out that "the search for this balance is ... reflected in the structure of Article 1 (P1-1)" as a whole (ibid., p. 26, para. 69).

Clearly, compensation terms are material to the assessment whether a fair balance has been struck between the various interests at stake and, notably, whether or not a disproportionate burden has been imposed on the person who has been deprived of his possessions.

E. Standard of compensation

121. The Court further accepts the Commission's conclusion as to the standard of compensation: the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1 (P1-1). Article 1 (P1-1) does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value (see the above-mentioned James and Others judgment, Series A no. 98, p. 36, para. 54).

In this connection, the applicants contended that, as regards the standard of compensation, no distinction could be drawn between nationalisation and other takings of property by the State, such as the compulsory acquisition of land for public purposes.

The Court is unable to agree. Both the nature of the property taken and the circumstances of the taking in these two categories of cases give rise to different considerations which may legitimately be taken into account in determining a fair balance between the public interest and the private interests concerned. The valuation of major industrial enterprises for the purpose of nationalising a whole industry is in itself a far more complex operation than, for instance, the valuation of land compulsorily acquired and normally calls for specific legislation which can be applied across the board to all the undertakings involved. Accordingly, provided always that the aforesaid fair balance is preserved, the standard of compensation required in a nationalisation case may be different from that required in regard to other takings of property.

122. Whilst not disputing that the State enjoyed a margin of appreciation in deciding whether to deprive an owner of his property, the applicants submitted that the Commission had wrongly concluded from this premise that the State also had a wide discretion in laying down the terms and conditions on which property was to be taken.

The Court is unable to accept this submission. A decision to enact nationalisation legislation will commonly involve consideration of various issues on which opinions within a democratic society may reasonably differ widely. Because of their direct knowledge of their society and its needs and resources, the national authorities are in principle better placed than the international judge to appreciate what measures are appropriate in this area and consequently the margin of appreciation available to them should be a wide one. It would, in the Court's view, be artificial in this respect to divorce the decision as to the compensation terms from the actual decision to nationalise, since the factors influencing the latter will of necessity also influence the former. Accordingly, the Court's power of review in the present case is limited to ascertaining whether the decisions regarding compensation fell outside the United Kingdom's wide margin of

appreciation; it will respect the legislature's judgment in this connection unless that judgment was manifestly without reasonable foundation.

F. Did the compensation awarded to the applicants meet the standard identified by the Court?

1. Issues common to all the applicants

(a) Approach to the case

123. The applicants criticised the Commission for having, in its report, looked solely at the compensation system, as such, established by the 1977 Act; in their view, it should rather have examined the consequences of applying that system, but had failed to do so.

The Government, on the other hand, submitted that if the valuation method laid down by the legislation were a proper one, then it would of necessity have produced compensation that was real and effective. For them, the value of nationalised property could only be determined by the application of a proper valuation method.

124. In proceedings originating in an individual application (Article 25) (art. 25) the Court has to confine itself, as far as possible, to an examination of the concrete case before it (see, amongst numerous authorities, the Ashingdane judgment of 28 May 1985, Series A no. 93, p. 25, para. 59). In the present case, the applicants' complaint is that the 1977 Act resulted in the payment of compensation which was not reasonably related to the value of their property when it was taken. This raises issues concerning both the terms and conditions of the legislation and its effects. The Court must therefore direct its attention in the first place to the contested legislation itself, and the effects of the legislation must be considered in the context of terms and conditions which Parliament had to determine in advance and which had to be of general application to the nationalised companies.

(b) The system established by the 1977 Act

(i) Compensation based on share values

125. Parliament decided to base compensation on the value of the shares in the nationalised companies. Since, under the 1977 Act, it was the shares themselves that passed into public ownership, this decision, which was not as such contested by the applicants, appears to the Court to be appropriate. There are, moreover, well-established techniques for valuing shares, notably in the field of taxation.

The principal alternative would have been to base compensation on the value of the underlying assets but, as the Government pointed out, this would have necessitated, by reason of the different accounting practices as regards book values, a costly and time-consuming revaluation of the assets concerned. Moreover, in valuing a business which is to continue to operate as a going concern earnings may often be a more important factor than assets. In any event the chosen method did enable account to be taken of asset values, in addition to the other relevant factors (see paragraph 36 above).

126. The Court thus concludes that Parliament's decision was not in principle inconsistent with the requirements of Article 1 (P1-1).

(ii) The hypothetical Stock Exchange quotation method of valuation

127. The 1977 Act provided that the "base value" for compensation purposes of securities listed on the London Stock Exchange was to be the average of their weekly quotations during the Reference Period. The "base value" of unquoted securities was, in general, to be the base value which they would have had if they had been listed on the Stock Exchange throughout the Reference Period (see paragraph 19 above). The applicants - whose complaints all related to shares in the latter category - contended that the prescribed method was a distorted and untrue basis for valuation.

128. Notwithstanding the complexities involved in treating, for valuation purposes, shares which were not quoted as if they were quoted, the Court notes that the chosen method had a distinct advantage. Being based on the impression which a Stock Exchange investor might be presumed to have formed about the company in question, it enabled account to be taken, in an objective manner, of all relevant factors such as historic and prospective earnings, asset-backing, dividend yield and the price of any comparable quoted shares (see paragraphs 36 and 97 above). It is also a method that had been used previously, notably in the United Kingdom Iron and Steel Acts 1949 and 1967.

As the applicants pointed out, it is true that, by resorting to the information assumed to be available to investors, the system involved having regard in the first place to material that had already been published, some of which could and did relate to periods prior to the valuation reference period. However, in practice assumptions were also made as to the other - and more up-to-date - information that would have been supplied to the stock market if the shares in question had been listed (see paragraph 97 above). Moreover, utilisation of the chosen method did not prevent account being taken, in the course of the compensation negotiations, of a company's prospective earnings after the end of the Reference Period.

129. The applicants suggested that a more appropriate method would have been to estimate the price which their shares would have fetched on a sale by private treaty between a willing seller and a willing buyer. However,

the Court, like the Commission, observes that even in the valuations prepared on this basis and supplied to it by the applicants recourse was had to comparisons with analogous quoted shares, notably for such purposes as the selection of an appropriate price/earnings ratio.

Apart from the fact that compensation assessed by the hypothetical Stock Exchange quotation method contained no element representing the special value of a large or controlling shareholding - a matter dealt with by the Court in paragraphs 148-150 below -, the principal difference between the methods would appear to be that a purchaser by private treaty might be assumed to have more complete information about a company than a Stock Exchange investor (see paragraph 98 above). However, the Court does not consider that this difference is of such moment as to lead to the conclusion that the United Kingdom acted unreasonably and outside its margin of appreciation in opting for the hypothetical Stock Exchange quotation method. This is especially so if one bears in mind that a degree of artificiality would also have been involved in an assumption that there would have been a willing buyer for large shareholdings in a company engaged in the particular industries concerned.

130. The Court thus concludes that recourse to the method in question was not in principle contrary to Article 1 (P1-1).

(iii) The Reference Period

131. The compensation which the applicants received was based on the value of their shares during the reference period laid down by the 1977 Act, namely 1 September 1973 to 28 February 1974 (see paragraph 19 above). This period antedated by more than three years the formal transfer of the shares (see paragraph 18 above), whereas the applicants maintained that in order to be "reasonably related" to the value of the property taken, compensation had to be assessed by reference to the value at the time of taking.

In selecting the valuation reference period, the Government sought to take a period which was as recent as possible and was also not untypical, provided always that it was not one in which the value of the shares could have been distorted by the announcement of the nationalisation or of the compensation terms: experience showed that such an announcement was liable to affect the value of the property in question, with the result that an objective valuation, free of such influences, could only be effected if the valuation date or period preceded the announcement.

132. The Court notes in the first place that the Reference Period terminated on the date of the election of the Labour Government (see paragraphs 10 and 19 above). That was the date on which the prospect of nationalisation became a reality, even though, as the applicants pointed out, the precise identity of the undertakings that would pass into public

ownership was not known for certain until the 1977 Act received the Royal Assent.

The applicants argued that the sole justification for selecting a reference period preceding vesting day was to exclude the artificial influence on the value of the property caused by the threat or fact of nationalisation. They asserted that in the present case the prospect of nationalisation had not affected the profits or assets of their companies and that any impact it might have had on the value of their shares could, under the hypothetical quotation method, have been left out of account.

The Court would point out that the possibility of distortion cannot be assessed after the event and with the benefit of hindsight. In its opinion, the Government did not act unreasonably in assuming, at the time when the legislation was in the process of preparation and adoption, that the nationalisation programme would have a distorting effect on the value of the shares to be acquired. Indeed, in the circumstances which prevailed, particularly the decline after February 1974 in the value of shares generally as evidenced by the Financial Times Industrial Ordinary Share Index (see paragraph 93 above), the selection of certain later valuation reference periods might not have been universally welcomed.

133. The Court also notes that there are a number of precedents for the utilisation of a valuation reference period antedating vesting date.

Thus, such a system was incorporated in previous United Kingdom nationalisation legislation to which the applicants referred and which they admitted did provide fair and just compensation. What is more, as the Government pointed out, in none of that legislation was proof of actual distortion of prices or values a condition precedent to the operation of the system.

134. The applicants also laid considerable stress on the references in international-law cases to valuation as at vesting date. The Court, however, does not find these references to be persuasive. Some of the cases cited did not raise issues comparable to those in the present case; moreover, in many international cases the date of the nationalisation announcement and the date of taking were, in fact, one and the same, with the result that there was no period during which a threat of impending nationalisation could have caused distortion. In any event, international practice does not show that only the vesting date can be taken as the basis for valuation.

135. For these reasons, the choice of the Reference Period was not, in the Court's view, in principle inconsistent with Article 1 (P1-1).

(iv) Conclusion regarding the system established by the 1977 Act

136. The Court thus concludes that, as regards the compensation system established by the 1977 Act, as such, none of its components can be regarded as in principle unacceptable in terms of Protocol No. 1 (P1).

(c) The effects of the system established by the 1977 Act

(i) Introduction

137. The applicants have furnished to the Court copious material in support of their plea that there was a gross disproportionality between the compensation awarded and the actual value of their nationalised undertakings on Vesting Day. Whilst the Government have not in general commented on this material, they have indicated that they are not to be taken as having accepted it as correct (see paragraph 39 above).

The Court notes that the alleged disproportionality is basically attributable to three general effects of the system established by the 1977 Act; it will examine these effects in turn.

(ii) Absence of allowance for developments between 1974 and 1977 in the companies concerned

138. The applicants contended that they had not received fair compensation because, under the 1977 Act, the shares in the nationalised companies fell to be valued as at the Reference Period. They complained that the effect of this provision was to exclude any allowance for subsequent developments in the companies' fortunes up to Vesting Day and, in particular, for the growth that occurred in the undertakings with which the present case is concerned.

The Commission expressed the view that it was within the bounds of Article 1 of Protocol No. 1 (P1-1) for the British legislature to see the growth after the commencement of the nationalisation process as growth for which compensation would not necessarily be due.

139. This complaint calls for the following initial observations on the part of the Court.

(a) When a nationalisation measure is adopted, it is essential - and this the applicants accepted - that the compensation terms be fixed in advance. This is not only in the interests of legal certainty but also because it would clearly be impractical, especially where a large number of undertakings is involved, to leave compensation to be assessed and fixed subsequently on an ad hoc basis or on whatever basis the Government might at their discretion select in each individual case. The Court recognises the need to establish at the outset a common formula which, even if tempered with a degree of inbuilt flexibility, is applicable across the board to all the companies concerned.

(b) Compensation based on Reference Period values remained payable not only in respect of companies whose fortunes improved between then and Vesting Day but also in respect of companies whose fortunes declined. The public sector thus not only reaped the benefit of any appreciation but also bore the burden of any depreciation. It is true, as the applicants pointed out, that in the course of the legislative process certain companies might

have been excluded from the nationalisation programme and that in fact Drypool Group Ltd., which had become insolvent, was so excluded (see paragraphs 14-15 above). However, this one case does not alter the fact that, as regards the companies which were actually nationalised, there was also a risk that remained at the end of the day with the public sector; indeed it appears probable that some of the nationalised companies, other than those with which the present proceedings are concerned, did decline in value between 1974 and 1977.

(c) Admittedly, such growth in the applicants' companies as may have occurred in the period in question may have been partly attributable to their efforts, notably in fulfilment of their statutory obligations to shareholders. However, it cannot be excluded that it was also partly attributable to a wide variety of factors some of which were outside the applicants' control, such as the very prospect of nationalisation and the provision of Government financial assistance to ensure the companies' continuing viability.

(d) Under the hypothetical Stock Exchange quotation method of valuation, future developments in the companies' fortunes were taken into account as one of the "relevant factors", to the extent that those developments could have been foreseen by a prudent investor in the Reference Period (see paragraph 97 above).

140. The applicants emphasised at the hearings before the Court that the duty to ensure fairness as regards the quantum of compensation was a continuing duty. Accordingly, a compensation formula which might have been fair when initially selected should be modified if, as here, it ceased to be so as a result of supervening developments.

141. The Court would observe that the long interval between the Reference Period and Vesting Day was solely the result of a very thorough democratic Parliamentary process during which criticisms substantially identical to those made by the applicants in the present proceedings were exhaustively discussed (see paragraphs 13 and 16 above). In particular, the possibility of amending the statutory compensation formula to take account of intervening developments was fully debated and rejected.

142. Whilst these historical facts are not of themselves decisive, the Court notes that the discussions at the time highlight the following difficulties which would have been involved in modifying the proposed system.

(a) Any amendment would have undermined the legal certainty created by the initial choice of compensation formula.

(b) The announcement of the compensation terms had created certain public expectations, on the basis of which share dealings had taken place.

(c) Between 1974 and 1977 the Financial Times Industrial Ordinary Share Index fluctuated; at times - and in particular between the end of the Reference Period and March 1975 (when the compensation terms were first announced) - it stood below the figure obtaining at the end of the Reference

Period (see paragraph 93 above). The selection of a different date or period might therefore have been disadvantageous for former owners; indeed, retention of the reference period initially chosen served to protect them against any adverse effects of a decline in stock market prices.

(d) The Court has already observed that the United Kingdom Government did not act unreasonably in selecting, with a view to ensuring that the valuation of the applicants' shares be effected free of any distorting influences, a valuation reference period that preceded the announcement of the nationalisation (see paragraph 132 above). Since the risk of distortion continued to exist until the shares passed into public ownership, to have opted, by way of modification of the original terms, for a later reference period would have left room for those influences to take effect.

143. In coming to its conclusion on this aspect of the case, the Court attaches particular importance to the considerations that nationalisation is a measure of a general economic nature in regard to which the State must be allowed a wide margin of appreciation (see paragraph 122 above) and that it requires the adoption of legislation laying down a common compensation formula (see paragraph 139 above). Moreover, the system established by the 1977 Act has been found not to be in principle unacceptable in terms of Protocol No. 1 (P1) (see paragraph 136 above). In view of these factors and also of the aggregate of the other considerations set out in paragraphs 139 and 141-142 above, the Court is of the opinion that there are sufficiently cogent reasons to regard the decision to adopt provisions making no allowance for intervening developments in the companies concerned as one which the United Kingdom was reasonably entitled to take in the exercise of its margin of appreciation.

(iii) Absence of allowance for inflation

144. The applicants referred to the facts that the 1977 Act tied the amount of compensation to Reference Period values and that compensation was not paid until some years later. Seen in combination, these facts, it was argued, meant that they had not received fair compensation since no account had been taken of the fall in the value of money between 1974 and the date of payment, a period of high inflation (see paragraph 92 above).

145. As regards the facts underlying this complaint, the Court observes that compensation bore interest - at a rate reasonably close to the average Bank of England minimum lending rate - as from Vesting Day (see paragraphs 21 (a) and 94 above), thus providing some shelter against inflation during the period from then until the date of payment. Furthermore, after Vesting Day, all the applicants received payments on account of compensation and did not have to wait until its amount had been finally determined (see paragraphs 45, 53, 64, 69, 75, 82 and 91 above).

Again, as regards the period between the Reference Period and Vesting Day, the applicants were not deprived of income from their investments

since they remained entitled to dividends on the acquired securities in respect of that period. It is true that the safeguarding provisions contained in the 1977 Act imposed restrictions in this connection but, broadly speaking, they did no more than limit the amount of such dividends to the amount paid in respect of the period immediately preceding the Reference Period (see paragraph 23 above). Moreover, a higher rate was payable with the authority of the Secretary of State for Industry.

146. The information supplied to the Court reveals that in the interval between the Reference Period and Vesting Day share prices did not increase to the same extent as the Retail Price Index (see paragraphs 92-93 above). Accordingly, to have adjusted compensation by reference to that Index would have provided the applicants with an advantage not available to other investors in securities.

The Commission pointed out that the most that could have been demanded would have been that compensation be linked to the general level of share prices. It is true that between the Reference Period and the respective Vesting Days there was, according to the Financial Times Industrial Ordinary Share Index, a certain increase in share values generally (see paragraph 93 above). However, matters of this kind cannot be judged with hindsight: by effectively freezing the value of the nationalised shares at the Reference Period figure, the 1977 Act not only excluded account being taken of any increase in the share price index but also protected the applicants against any adverse effects of subsequent fluctuations in that index.

147. The Court thus considers that, in the circumstances prevailing, the decision to adopt provisions that excluded any allowance for inflation was one which the United Kingdom was reasonably entitled to take within its margin of appreciation.

(iv) Absence of an element representing the special value of a large or controlling shareholding

148. The applicants referred to the facts that, under the 1977 Act, their shares were valued by the hypothetical Stock Exchange quotation method and that Stock Exchange prices represented merely what would be paid for a small parcel of shares (see paragraph 98 above). Taken in combination, these facts, it was argued, meant that they had not received fair compensation since the amounts paid to them included no element representing the special value attaching to their large - and in most of the cases controlling - shareholdings in the companies concerned.

149. As the Government rightly pointed out, a nationalisation measure cannot be assimilated to a takeover bid: the nationalising State is proceeding by compulsion and not by inducement. Accordingly, there is, in the Court’s view, no warrant for holding that the applicants’ compensation should have been aligned on the price that might have been offered in such a bid.

It is true that in a sale by private treaty between a willing seller and a willing buyer the price paid for the applicants' securities might have included an element representing the special value attributable to the size of their shareholdings. However, to have assessed compensation on this basis would have involved assuming that a buyer could be found for the large blocks of shares in question, an assumption which, in the case of these particular industries, would have been at least questionable.

Finally, the Court does not consider that the United Kingdom was obliged under Article 1 of Protocol No. 1 (P1-1) to treat the former owners differently according to the class or size of their shareholdings in the nationalised undertakings: it did not act unreasonably in taking the view that compensation would be more fairly allocated if all the owners were treated alike.

150. In these circumstances, the Court considers that the decision to adopt provisions that excluded from the compensation an element representing the special value of the applicants' large or controlling shareholdings was one which the United Kingdom was reasonably entitled to take within its margin of appreciation.

(v) Conclusion regarding the effects of the system established by the 1977 Act

151. In the light of the foregoing, the Court concludes, as regards the issues common to all the applicants, that the effects produced by the system established by the 1977 Act were not incompatible with Article 1 of Protocol No. 1 P1-1).

In reaching this conclusion, the Court has also had regard to certain aspects of the method of payment of compensation which were advantageous to the former owners: thus, interest, at a reasonable rate, accrued on compensation as from Vesting Day, payments on account were made as early as practicable and the balance was paid as soon as the final amount had been determined (see paragraphs 20-21 and 45, 53, 64, 69, 75, 82 and 91 above).

2. Issues specific to individual applicants

152. In addition to the common issues dealt with above, certain of the applicants alleged that, by reason of factors specific to their individual cases, their award of compensation failed to meet the requirements of Article 1 of Protocol No. 1 (P1-1). Their complaints, which were contested by the Government and rejected by the Commission, will be considered in turn.

(a) Alleged disparity between compensation and Reference Period values (Kincaid and Yarrow Shipbuilders cases)

153. By way of alternative plea, Sir William Lithgow and Yarrow PLC asserted that the compensation they received did not represent even the value as at the Reference Period of their shares in Kincaid and Yarrow Shipbuilders, respectively.

154. The Court notes that this complaint amounts in essence to a submission that the 1977 Act was misapplied.

It has, however, to be pointed out that the sums offered by the Department of Industry at the close of the negotiations were agreed to by the respective Stockholders' Representatives, as an acceptable valuation within the confines of the statutory formula. Furthermore, the Arbitration Tribunal could have been seised in both cases of a claim by the Representative that the former owners were entitled under that formula to more than was being offered. Admittedly, such a course might not have been open to Sir William Lithgow himself, although this point is disputed (see paragraph 30 above). However, the other Kincaid shareholders raised no objection (see paragraph 44 above) and he was in any event bound - and, for the reasons developed in paragraphs 193-197 below, legitimately so - by the collective system established by the 1977 Act.

155. In these circumstances, the Court sees no reason to doubt that the results of the agreements were reasonable valuations, within the confines of the statutory formula. It accordingly rejects this complaint.

(b) Incidence of capital gains tax (Kincaid case)

156. Sir William Lithgow complained of the fact that although the Treasury Stock which he received by way of compensation was not subject to tax on receipt, disposal or redemption thereof rendered him liable to capital gains tax (see paragraphs 21 (b) and 45 above). In his view, his compensation was thus not "effective", in that it did not enable him to purchase equivalent replacement assets.

157. This complaint does not appear to the Court to be well-founded. As the Commission pointed out, the applicant would also have been potentially liable to such tax had he disposed before 1977 of his original shareholding in Kincaid. It cannot be regarded as unreasonable that the same applied on the redemption or earlier disposal of the Compensation Stock which he received in exchange for his shares.

(c) Use of an earnings-based method of valuation (Kincaid case)

158. Sir William Lithgow complained of the fact that the compensation paid for his ordinary shares in Kincaid had been assessed by reference to its earnings rather than to its assets, and by reference to historic rather than prospective earnings. This, he said, had deprived him of the value attributable to these other factors.

159. The Court does not consider that recourse to the earnings-based method, as such, can be regarded as inappropriate in terms of Article 1 of

Protocol No. 1 (P1-1). It is a route that is commonly used, especially in the context of the stock market, in valuing companies which, like Kincaid, are profitable. Moreover, neither Kincaid's prospective earnings nor its assets were actually disregarded: Messrs. Whinney Murray & Co. took the company's prospects into account in preparing their suggested valuation (see paragraph 43 above) and they reviewed that valuation against, inter alia, the criterion of asset-backing.

Above all, the Court notes that the 1977 Act provided that the "base value" of unlisted securities was to be determined having regard to "all relevant factors" (see paragraph 19 above). It did not prescribe any particular route to be used for that purpose, this being a matter for negotiation or, in default, for decision by the Arbitration Tribunal. It was therefore open to the Kincaid Stockholders' Representative - whether or not to Sir William Lithgow himself (see paragraph 154 above) - to argue in the course of the compensation negotiations that greater weight should be attached to the company's assets or prospective earnings and, if he failed to obtain satisfaction, to refer the matter to arbitration. However, the Stockholders' Representative did not do so, having, after consulting the shareholders, accepted the Government's offer (see paragraph 44 above).

160. This complaint has therefore to be rejected.

(d) Use of the parent-company-related method of valuation (Yarrow Shipbuilders case)

161. Yarrow complained of the fact that the compensation paid for its shares in its subsidiary Yarrow Shipbuilders had been assessed, solely so it said, by reference to the stock market price of its own (Yarrow's) shares in the Reference Period. It referred to the restrictions, which were already operative during the Reference Period, imposed by the terms of the Ministry of Defence loan on the payment of dividends by the subsidiary to the parent (see paragraph 70 above). As a result of those restrictions, Yarrow was deprived of income with which to pay dividends to its own shareholders and the price of its shares was therefore depressed. A valuation of Yarrow Shipbuilders based on that price therefore failed to reflect its profitability and prospects, factors which at the time were unknown to the stock market. The effect of this valuation method was that the compensation comprised no allowance for profits totalling £9,400,000 which Yarrow Shipbuilders had been obliged to retain as a result of the dividend restrictions (see paragraph 71 (a) above).

162. The Court does not consider that in the present case recourse to the method complained of was unacceptable in terms of Article 1 of Protocol No. 1 (P1-1). As the Commission rightly observed, it is reasonable, when valuing a subsidiary whose activities, like those of Yarrow Shipbuilders, represent a substantial part of the total activities of the parent (see paragraph 70 above), to have regard to the price of the latter's shares.

Furthermore, it has to be recalled that the 1977 Act did not prescribe any specific route for arriving at the "base value" of unlisted securities: as the Commission pointed out, the stock market price of a parent company’s shares was but one of the "relevant factors" to be taken into account (see paragraph 19 above). Accordingly, the Yarrow Shipbuilders Stockholders’ Representative could have argued in the negotiations that too much weight was being attached to this factor and too little to the subsidiary’s earnings, prospects and retained profits. Indeed, the Court notes that in the Parliamentary debates it was stated on behalf of the Government that the effects of the Ministry of Defence loan terms on the valuation of the nationalised concern would be covered by the phrase "all relevant factors" (Official Report, 16 March 1976, cols. 1789-1792, 25 October 1976, cols. 198-199, and 5 November 1976, cols. 1659-1664). Again, if the Stockholders’ Representative failed to obtain satisfaction on this point in the negotiations, he could have referred the matter to arbitration. However, he did not do so, having, after consulting Yarrow, accepted the Government’s offer (see paragraph 74 above).

Finally, as to the effects of this valuation method, it appears to the Court that the Government, in addition to relying on the stock market price of Yarrow’s shares, must have made some allowance for the earnings, prospects and retained profits of the subsidiary itself: the compensation of £6,000,000 finally paid did actually exceed the total capitalisation of Yarrow during the Reference Period, which was not more than £4,800,000 (see paragraphs 71 (c) and 74 above). That full allowance may not have been made for these items is, in the Court’s view, justified by the fact that Yarrow Shipbuilders was particularly dependent on Government financial assistance, in the form either of the Ministry of Defence loan itself or of shipbuilding grants (see paragraph 71 (a) above).

163. The Court is thus unable to accept this complaint.

(e) Operation of the safeguarding provisions (BAC case)

164. English Electric and Vickers complained of the fact that, under the safeguarding provisions contained in the 1977 Act, a sum of £19,700,000 in respect of certain lawfully-paid dividends had been deducted from the "base value" of their shares in BAC (see paragraphs 22-24 and 61-62 above). They alleged that this deduction was unfair and had, notably, deprived them of much of the income from the shares for the years 1973 to 1976.

165. The Court notes that the dividends in question were paid pursuant to resolutions all of which were passed after 28 February 1974, the date from which the relevant safeguarding provisions took effect. The deduction would not have been made if the dividends had been approved by the Secretary of State for Industry (see paragraph 22 above). However, it appears that, with minor exceptions, no such approval was sought until the

matter was raised by the BAC Stockholders' Representative during the course of the compensation negotiations (see paragraph 62 above).

Furthermore, there is nothing to suggest that the deduction was not in accordance with the terms of the 1977 Act: the Stockholders' Representative could otherwise have referred the matter to the Arbitration Tribunal (see paragraph 27 above), but he did not do so.

Finally, the Court would observe that the safeguarding provisions were not unreasonable per se: it was clearly necessary to prevent any dissipation of the nationalised undertakings' assets between the end of the Reference Period and Vesting Day (see paragraph 22 above). Neither does the Court consider that, when seen in terms of income yield, the result of applying those provisions can be regarded as unreasonable in terms of Article 1 of Protocol No. 1 (P1-1). The broad effect was that the amount of post-Reference Period dividends was, subject to the discretionary powers of the Secretary of State, limited to the amount paid in the immediately preceding period (see paragraph 23 above). Ensuring continuity of dividend levels in this way is consonant with the notion that any growth in the fortunes of a nationalised company after the Reference Period should accrue to the benefit of the public sector just as that sector bore the risk of any decline (see paragraph 139 (b) above).

166. For these reasons, the Court concludes that this complaint has to be rejected.

(f) Alleged excessive delay in paying compensation and alleged insufficiency of payments on account (Vickers Shipbuilding case)

167. Vickers complained of excessive delay in the payment of compensation and of insufficiency of the payments on account, matters which were said to have retarded the implementation of major restructuring plans.

168. The Court notes from the Parliamentary debates (see paragraphs 12-16 above) the controversial nature of the 1977 Act. Until it received the Royal Assent on 17 March 1977, there was no certainty as to the form it would take and it would therefore have been virtually impossible to commence the compensation negotiations before that date. The Vickers Shipbuilding negotiations were concluded on 26 September 1980 and the final payment of compensation was made shortly thereafter, so that, reckoning from Vesting Day (1 July 1977), the period to be taken into account for the purposes of this complaint is some three and a quarter years (see paragraphs 76 and 81-82 above).

Formal negotiations in this case were not opened until June 1978; however, the interval between the Royal Assent and that date is accounted for by the preparation not only of Messrs. Whinney Murray & Co.'s valuation report but also of financial data treating the component parts of Vickers Shipbuilding as a single enterprise (see paragraphs 33 and 79-80

above). These were complex matters. Again, the period between September 1979 and September 1980 is accounted for by the fact that the Vickers Shipbuilding Stockholders' Representative had instituted proceedings before the Arbitration Tribunal (see paragraph 81 above). In these circumstances and having regard to the size of the nationalised undertaking, the Court does not find that the overall period - of which some fifteen months were devoted to negotiations - was unreasonable.

169. As regards the payments on account, it has to be recalled that they were made unconditionally (see paragraph 20 above) and thus necessarily had to be limited in amount. Moreover, by November 1978 (some five months after the opening of formal negotiations) Vickers had received £8,450,000 on account - that is, more than half of the total compensation of £14,450,000 finally agreed - and a further payment on account, of £3,150,000, was made in March 1980, whilst the arbitration proceedings were pending (see paragraph 82 above). Above all, the totality of the compensation bore interest as from Vesting Day (see paragraph 21 (a) above) and this, bearing in mind the dates of the payments on account, must have mitigated the effects of the inevitable delay in making the final payment.

170. The Court is accordingly unable to accept these complaints.

(g) Alleged particular inappropriateness of the Reference Period in the Brooke Marine case

171. The former owners of Brooke Marine alleged that the compensation provisions in the 1977 Act were particularly inappropriate in their case because during the Reference Period, but not at Vesting Day, the value of their shares in that company was adversely affected by the existence of certain unfavourable contracts and of options to convert debenture stock into shares (see paragraph 89 above).

172. The Court agrees with the Commission that this complaint cannot be sustained. Firstly, it is necessary, in a nationalisation measure, to establish a common formula that is applicable across the board (see paragraph 139 (a) above) and the fact that, for each individual company, the most favourable valuation date is not chosen cannot be regarded as contrary to Article 1 of Protocol No. 1 (P1-1) (see, mutatis mutandis, the above-mentioned James and Others judgment, Series A no. 98, pp. 41-42, para. 68). Secondly, this particular complaint amounts in substance to a claim that valuation should have been effected as at Vesting Day, whereas the Court has already held that the utilisation for this purpose of an earlier period was neither in principle nor by reason of its effects incompatible with the said Article (see paragraphs 136 and 151 above).

(h) Disparity between compensation paid and cash in hand (Kincaid, Vosper Thornycroft, BAC, Hall Russell and Brooke Marine)

173. Sir William Lithgow and the former owners of Vosper Thornycroft, BAC, Hall Russell and Brooke Marine contrasted the amount of compensation which they had received with the amount of cash which the company concerned had in hand on Vesting Day (see paragraphs 41 (b), 47 (b), 55 (b), 66 (b) and 84 (b) above).

174. The Court is not persuaded that this factor establishes that the appropriate standard of compensation had not been met. The amount of cash in hand at Vesting Day is not a determining factor where the value of the shares which are to pass into public ownership has effectively been frozen at the start of the nationalisation process. In any event, a company's current asset position has to be determined by reference not only to cash in hand but also to such items as its liabilities and advance payments received on contracts (see paragraph 38 above).

G. Conclusion on Article 1 of Protocol No. 1 (P1-1)

175. In the light of the foregoing, the Court concludes that no violation of Article 1 of Protocol No. 1 (P1-1) has been established in the present case.

The Court is unable to accept the applicants' contention that since the Government had recognised that "the terms of compensation imposed by the 1977 Act were grossly unfair to some of the companies" (see paragraph 17 above), it was no longer open to them to argue that fair compensation had been paid. The statement in question was made as an expression of opinion in a political context and is not conclusive for the Court in making its appreciation of the case.

II. ARTICLE 14 OF THE CONVENTION, TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL NO. 1 (art. 14+P1-1)

A. Introduction

176. Certain of the applicants alleged that, by reason of factors specific to their individual cases, they had been victims of discrimination, contrary to Article 14 of the Convention, taken in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1). The former Article (art. 14) reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

These allegations, contested by the Government, were rejected by the Commission.

177. Before considering in turn the various complaints, the Court would recall that Article 14 (art. 14) does not forbid every difference in treatment in the exercise of the rights and freedoms recognised by the Convention (see the "Belgian Linguistic" judgment of 23 July 1968, Series A no. 6, p. 34, para. 10). It safeguards persons (including legal persons) who are "placed in analogous situations" against discriminatory differences of treatment; and, for the purposes of Article 14 (art. 14), a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, amongst many authorities, the Rasmussen judgment of 28 November 1984, Series A no. 87, p. 13, para. 35, and p. 14, para. 38). Furthermore, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law; the scope of this margin will vary according to the circumstances, the subject-matter and its background (ibid., p. 15, para. 40).

B. Alleged discrimination as compared with the owners of other undertakings nationalised under the 1977 Act

1. Incidence of capital gains tax (Kincaid case)

178. Sir William Lithgow alleged that he had been the victim of discrimination, in that he was liable to capital gains tax on the disposal of the Compensation Stock which he received, whereas those former owners of undertakings nationalised under the 1977 Act who were corporations were entitled to defer that liability under the "roll-over relief" provisions in the Finance Act 1976 (see paragraphs 21 (b) and 45 above).

179. The Court is unable to accept this claim. As the Commission pointed out, "roll-over relief" would not have been available to a corporation holding, as did Sir William Lithgow, only 28 per cent of the shares in the nationalised company (see paragraphs 21(b) and 40 above). He was thus treated no differently from former owners in a situation analogous to his own.

2. Use of an earnings-based method of valuation (Kincaid case)

180. Sir William Lithgow complained of the fact that, whereas the shares of certain non-profitable companies had been valued for compensation purposes by reference to their assets, the ordinary shares in Kincaid had been valued by reference to its earnings (see paragraph 36 above). He alleged that the former method would have been more favourable in his case and that there had been discrimination as far as Kincaid, a profitable company, was concerned.

181. The Court recalls that the 1977 Act laid down no specific route for arriving at the value of unlisted securities (see paragraph 159 above). It provided that compensation therefor was to be determined, by negotiation or by arbitration, by reference to their hypothetical Stock Exchange quotation, having regard to all relevant factors. This global method was applied to the Kincaid ordinary shares just as it was to all the other unquoted shares involved. Again, if the Kincaid shareholders had not accepted the negotiated settlement, it would have been open to their Representative to submit the matter to arbitration, just as it would have been to other Stockholders' Representatives in similar circumstances. In these respects, therefore, the Court agrees with the Commission that the holders of Kincaid ordinary shares, including Sir William Lithgow, were treated no differently from the other owners concerned.

It is of course true that the statutory formula did comprise an element of flexibility which could and did result in its being applied differently to different companies. However, this enabled account to be taken of dissimilarities between them and, notably, of the relative importance in each case of the various factors considered; thus, it is clear that earnings will provide a more appropriate route to valuation if the company is profitable, but that assets will do so if it is not. The differences in the application of the global method therefore had an objective and reasonable justification.

3. *Similar treatment of growing and declining companies (Vosper Thornycroft, Hall Russell and Brooke Marine cases)*

182. The former owners of Vosper Thornycroft, Hall Russell and Brooke Marine alleged that they had been victims of discrimination, in that the same treatment had been applied both to nationalised companies which were growing and to those which were in decline. This was demonstrated, in particular as regards Vosper Thornycroft, by the fact that, when measured against Vesting Day values or earnings, the compensation paid for the former companies was proportionately less than that paid for the latter companies.

183. The Court has already held that the choice of the reference period for the valuation of the companies nationalised under the 1977 Act, and hence the exclusion of any allowance for subsequent developments, were based on reasonable grounds (see paragraphs 131-135 and 138-143 above). Consequently, whether or not it falls within the ambit of Article 14 (art. 14),

the difference said by the applicants to result from the similar treatment of both growing and declining companies can be regarded as having an objective and reasonable justification.

4. Use of the parent-company-related method of valuation (Yarrow Shipbuilders case)

184. Yarrow alleged that it had been the victim of discrimination, in that its shares in its subsidiary Yarrow Shipbuilders had been valued for compensation purposes by reference to the stock market price of its own (Yarrow's) shares, whereas unquoted shares in other nationalised companies had been valued not by this means but, in particular, by reference to the earnings of those companies (see paragraph 36 above). In support of this claim, Yarrow pointed out that, whether the computations were made on Reference Period or on Vesting Day figures, the compensation which it received represented a lesser multiple or proportion of the nationalised company's profits or assets than did the compensation paid to other former owners.

185. For the reasons given in paragraph 181, first sub-paragraph, above, the Court agrees with the Commission that Yarrow was treated no differently from the other owners concerned, in the sense that in each case the same global method was applied and the same possibility of resort to arbitration was available.

The Court also considers that the differences, as between Yarrow and the other owners, in the application of the global method had an objective and reasonable justification. In applying the hypothetical Stock Exchange quotation method, it is clear that, if the company to be valued has a parent whose shares are listed and if the former's activities comprise a substantial part of the latter's business, the quoted price of those shares can provide a more appropriate and less artificial route to valuation than other factors.

C. Alleged discrimination as compared with the owners of undertakings nationalised under earlier legislation (Vosper Thornycroft and Brooke Marine cases)

186. The former owners of Vosper Thornycroft and Brooke Marine alleged that they had been victims of discrimination, in that the compensation terms laid down by the 1977 Act differed in a number of respects from those laid down by earlier United Kingdom nationalisation legislation (see paragraph 99 above).

187. Quite apart from the question whether these applicants were placed in a situation analogous to persons deprived of their possessions under the earlier legislation, the Court considers that the difference complained of does not raise an issue under Article 14 (art. 14). The Parliaments of the

Contracting States must in principle remain free to adopt new laws based on a fresh approach.

D. Alleged discrimination as compared with persons deprived of their possessions under compulsory purchase legislation (Vosper Thornycroft and Brooke Marine cases)

188. The former owners of Vosper Thornycroft and Brooke Marine further alleged that they had been victims of discrimination, in that under the 1977 Act compensation did not fall to be assessed by reference to the value of their property as at the date of taking, whereas this was generally the case as regards property acquired under United Kingdom compulsory purchase legislation (see paragraph 101 above).

189. The Court recalls in any event that the functions fulfilled by compulsory purchase legislation and by a nationalisation statute are different. For the reasons given in paragraph 121, third sub-paragraph, above, it agrees with the Commission that the two situations referred to by these applicants are not sufficiently analogous to give rise to an issue under Article 14 (art. 14).

E. Conclusion on Article 14 (art. 14) of the Convention

190. Having regard to the foregoing, the Court concludes that in the present case there was no violation of Article 14 of the Convention, taken in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1).

III. ARTICLE 6 PARA. 1 OF THE CONVENTION (art. 6-1)

191. Certain of the applicants alleged, on various grounds, that they had been victims of a breach of Article 6 para. 1 (art. 6-1) of the Convention, which, so far as is relevant, reads as follows:

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

These allegations were contested by the Government. The Commission expressed the unanimous opinion that this provision had not been violated.

A. Applicability of Article 6 para. 1 (art. 6-1)

192. The Court notes in the first place that the applicants' right to compensation under the 1977 Act, derived from their ownership of shares in the companies concerned, is without doubt a "civil right" (see, mutatis

mutandis, the above-mentioned Sporrong and Lönnroth judgment, Series A no. 52, p. 29, para. 79).

In the second place, the Court recalls that Article 6 para. 1 (art. 6-1) extends only to "contestations" (disputes) over (civil) "rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law; it does not in itself guarantee any particular content for (civil) "rights and obligations" in the substantive law of the Contracting States (see the above-mentioned James and Others judgment, Series A no. 98, p. 46, para. 81).

It follows that in the present case Article 6 para. 1 (art. 6-1) is applicable in so far as the applicants may reasonably have considered that there was cause for alleging non-compliance with the statutory compensation provisions.

B. Compliance with Article 6 para. 1 (art. 6-1)

1. Access to a tribunal (Kincaid case)

193. Sir William Lithgow alleged that he had been the victim of a violation of Article 6 para. 1 (art. 6-1) - as interpreted by the Court in its Golder judgment of 21 February 1975 (Series A no. 18) -, in that he had had no access to an independent tribunal in the determination of his rights to compensation.

194. In this area, the following principles emerge from the Court's case-law, notably its above-mentioned Ashingdane judgment (Series A no. 93, pp. 24-25, para. 57).

(a) The right of access to the courts secured by Article 6 para. 1 (art. 6-1) is not absolute but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals".

(b) In laying down such regulation, the Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.

(c) Furthermore, a limitation will not be compatible with Article 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

195. The extent to which Sir William Lithgow did have access to the Arbitration Tribunal was a matter of dispute between him and the Government (see paragraph 30 above). The Court does not find it necessary

to resolve this difference of opinion. It will assume for the purposes of argument that this applicant at no time had an individual right of access to the Arbitration Tribunal or to any other tribunal as regards the determination of his right to compensation.

196. Notwithstanding this bar on individual access, the Court does not consider that in the particular circumstances the very essence of Sir William Lithgow's right to a court was impaired.

The 1977 Act established a collective system for the settlement of disputes concerning compensation, in that the parties to proceedings before the Arbitration Tribunal would be the Secretary of State for Industry on the one hand and the Stockholders' Representative on the other. The latter was appointed by and represented the interests of all the holders of securities of the company concerned (see paragraph 28 above) and thus the interests of each individual shareholder were safeguarded, albeit indirectly. This is borne out by the fact that the Act made provision for meetings of shareholders at which they could give instructions or express their views to the Representative (ibid.). Furthermore, in addition to the power of removal conferred by Schedule 6 to the 1977 Act, remedies were available to an individual who alleged that the Representative had failed or was failing to comply with his duties under the Act or with his common-law obligations as agent (ibid.).

197. Moreover, the Court shares the Commission's view that this limitation on a direct right of access for every individual shareholder to the Arbitration Tribunal pursued a legitimate aim, namely the desire to avoid, in the context of a large-scale nationalisation measure, a multiplicity of claims and proceedings brought by individual shareholders (ibid.). Neither does it appear, having regard to the powers and duties of the Stockholders' Representative and to the Government's margin of appreciation, that there was not a reasonable relationship of proportionality between the means employed and this aim.

2. Alleged breach of the "reasonable time" requirement (Vosper Thornycroft, BAC, Hall Russell, Yarrow Shipbuilders, Vickers Shipbuilding and Brooke Marine cases)

198. All the applicants, other than Sir William Lithgow, alleged that, in breach of Article 6 para. 1 (art. 6-1), the dispute as to compensation had not been determined within a "reasonable time". However, the former owners of Vosper Thornycroft, BAC, Vickers Shipbuilding and Brooke Marine stated that this claim was pursued only in the event that the Court should accept the view, expressed by the Commission in its report, that the nationalised undertakings passed to a certain extent into the public domain before Vesting Day.

199. The Court finds that in any event this claim cannot be sustained.

In the instances in question, no proceedings were instituted before the Arbitration Tribunal, save as regards Vickers Shipbuilding where proceedings were commenced but not pursued to a conclusion; in each case, the amount of compensation payable was settled in negotiations between the Department of Industry and the Stockholders' Representative (see paragraphs 52, 63, 68, 74, 81 and 90 above). In those negotiations, to which Article 6 para. 1 (art. 6-1) clearly did not apply, the parties were endeavouring solely to reach a mutually acceptable solution; neither of them was empowered to give a final decision, binding on the other, on the quantum of the compensation and at any time the discussions could have been discontinued and any unresolved questions referred to the Arbitration Tribunal (see paragraph 30 above). It was only after reference of the matter to the Arbitration Tribunal that any question of breach of the "reasonable time" requirement of Article 6 para. 1 (art. 6-1) could have arisen.

3. Alleged breach of other requirements of Article 6 para. 1 (art. 6-1) (Hall Russell case)

200. The former owners of Hall Russell alleged that in certain respects the Arbitration Tribunal established by the 1977 Act did not meet the requirements of Article 6 para. 1 (art. 6-1).

201. In the first place, they alleged that the Arbitration Tribunal was not a "lawful tribunal", in that it was an extraordinary court, namely a tribunal set up for the purpose of adjudicating a limited number of special issues affecting a limited number of companies.

The Court cannot accept this argument. It notes that the Arbitration Tribunal was "established by law", a point which the applicants did not dispute. Again, it recalls that the word "tribunal" in Article 6 para. 1 (art. 6-1) is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country (see, inter alia, the Campbell and Fell judgment of 28 June 1984, Series A no. 80, p. 39, para. 76); thus, it may comprise a body set up to determine a limited number of specific issues, provided always that it offers the appropriate guarantees. The Court also notes that, under the statutory instruments governing the matter, the proceedings before the Arbitration Tribunal were similar to those before a court and that due provision was made for appeals (see paragraphs 31-32 above).

202. In the second place, it was contended that the close connection between the executive and the Arbitration Tribunal, especially the appointment of two of its members by the Minister who was a party to any proceedings (see paragraph 29 above), necessarily deprived the Tribunal of the character of an "independent and impartial tribunal".

As the Court has often observed, independence of the executive is one of the fundamental requirements that flow from the phrase in question (see, amongst many authorities, the Le Compte, Van Leuven and De Meyere

judgment of 23 June 1981, Series A no. 43, p. 24, para. 55). As regards the present case, although two members of the Arbitration Tribunal were nominated by the Secretary of State, the appointments could not be made without prior consultation of the Stockholders' Representatives (see paragraph 29 above). In fact, criteria for the selection of members of the Tribunal were worked out jointly (ibid.) and it does not appear that any dispute arose regarding the nominations. What is more, the Arbitration Tribunal was in no way bound by the amount of compensation offered by the Government in the negotiations (see paragraph 19 above), as is evidenced by the awards copies of which were supplied to the Court (Scott Lithgow Drydocks Ltd. case - 29 September 1981; Cammell Laird Shipbuilders Ltd. case - 23 October 1981). In these circumstances, there is no warrant for finding a lack of the requisite independence.

The applicants did not allege that the members in question were not subjectively impartial. Having regard to the manner in which the appointment procedure was actually carried out (see paragraph 29 above), the Court is of the opinion that their objective impartiality was not capable of appearing to be open to doubt (see, inter alia, the De Cubber judgment of 26 October 1984, Series A no. 86, pp. 13-16, paras. 24-30).

C. Conclusion on Article 6 para. 1 (art. 6-1) of the Convention

203. Having regard to the foregoing, the Court concludes that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention in the present case.

IV. ARTICLE 13 OF THE CONVENTION (art. 13)

204. Sir William Lithgow alleged that, as regards his complaints concerning compensation, there was available to him no "effective remedy", within the meaning of Article 13 (art. 13) of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

This allegation was contested by the Government and was rejected by the Commission.

205. "Article 13 (art. 13) requires that 'where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress' (see the Silver and Others judgment of 25 March 1983, Series A no. 61, p. 42, para. 113). However, 'neither Article 13 (art. 13) nor the Convention in general

lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention' (see the Swedish Engine Drivers' Union judgment of 6 February 1976, Series A no. 20, p. 18, para. 50). Although there is thus no obligation to incorporate the Convention into domestic law, by virtue of Article 1 (art. 1) of the Convention the substance of the rights and freedoms set forth must be secured under the domestic legal order, in some form or another, to everyone within the jurisdiction of the Contracting States (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 91, para. 239). Subject to the qualification explained in the following paragraph, Article 13 (art. 13) guarantees the availability within the national legal order of an effective remedy to enforce the Convention rights and freedoms in whatever form they may happen to be secured." (see the above-mentioned James and Others judgment, Series A no. 98, p. 47, para. 84)

206. The Convention is not part of the domestic law of the United Kingdom, nor does there exist any constitutional procedure permitting the validity of laws to be challenged for non-observance of fundamental rights. There thus was, and could be, no domestic remedy in respect of a complaint by Sir William Lithgow that the nationalisation legislation itself did not measure up to the standards of the Convention and Protocol No. 1 (P1). The Court, however, concurs with the Commission that Article 13 (art. 13) does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or to equivalent domestic legal norms (see the above-mentioned James and Others judgment, ibid., p. 47, para. 85). The Court is therefore unable to uphold the applicant's allegation in so far as it may relate to the 1977 Act as such.

207. In so far as the allegation relates to the application of the legislation, the Court notes that it was open to the Stockholders' Representative in any case to refer the question of compensation to the Arbitration Tribunal or to test in the ordinary courts whether the Secretary of State had erred in law by misinterpreting or misapplying the 1977 Act (see paragraphs 30 and 32 above). Even if these remedies were not directly available to Sir William Lithgow himself (see paragraphs 30 and 195 above), he did have the benefit of the collective system established by the Act. The Court has found this system not to be in breach of the requirements of Article 6 para. 1 (art. 6-1) (see paragraphs 193-197 above), an Article whose requirements are stricter than those of Article 13 (art. 13) (see the above-mentioned Sporrong and Lönnroth judgment, Series A no. 52, p. 32, para. 88). In addition, the applicant would have had a remedy in the domestic courts against the Kincaid Stockholders' Representative for failure to comply with his obligations under the 1977 Act or with his common-law obligations as agent (see paragraph 28 above).

In these circumstances, the Court concludes that the aggregate of remedies available to Sir William Lithgow did constitute domestic machinery whereby he could, to a sufficient degree, secure compliance with the relevant legislation.

208. There has accordingly been no breach of Article 13 (art. 13).

FOR THESE REASONS, THE COURT

1. Holds by thirteen votes to five that there has been no violation of Article 1 of Protocol No. 1 (P1-1) on the ground that the 1977 Act contained no provisions making allowance for developments between 1974 and 1977 in the companies concerned;

2. Holds by seventeen votes to one that there has been no violation of the said Article 1 (P1-1) on any of the other grounds advanced by the applicants;

3. Holds unanimously that there has been no violation of Article 14 of the Convention, taken in conjunction with the said Article 1 (art. 14+P1-1);

4. Holds by fourteen votes to four that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention on the ground that Sir William Lithgow had no individual access to an independent tribunal in the determination of his rights to compensation;

5. Holds by sixteen votes to two that there has been no violation of the said Article 6 para. 1 (art. 6-1) on any of the other grounds advanced by the applicants;

6. Holds by fifteen votes to three that there has been no violation of Article 13 (art. 13) of the Convention.

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 8 July 1986.

Rolv RYSSDAL
President

For the Registrar
Jonathan L. SHARPE
Head of Division in the registry of the Court

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the following separate opinions are annexed to the present judgment:

- concurring opinion of Mr. Thór Vilhjálmsson;

- joint partly dissenting opinion of Mrs. Bindschedler-Robert, Mr. Gölcüklü, Mr. Pinheiro Farinha, Mr. Pettiti and Mr. Spielmann (Article 1 of Protocol No. 1) (P1-1);

- opinion of Mr. Lagergren joined by Mr. Macdonald (Article 6 para. 1 of the Convention) (art. 6-1);

- joint dissenting opinion of Mr. Pinheiro Farinha and Mr. Pettiti (Article 6 para. 1 of the Convention) (art. 6-1);

- joint dissenting opinion of Mr. Pinheiro Farinha, Mr. Pettiti and Mr. Spielmann (Article 13 of the Convention) (art. 13);

- dissenting opinion of Mr. Pettiti (Article 6 para. 1 and Article 13 of the Convention and Article 1 of Protocol No. 1) (art. 6-1, art. 13, P1-1);

- joint partly dissenting opinion of Mr. Russo and Mr. Spielmann (Article 6 para. 1 of the Convention) (art. 6-1).

R.R.
J.L.S.

CONCURRING OPINION OF JUDGE THÓR VILHJÁLMSSON

In this case I belong to the majority of the Court which has held that there has been no breach of the Convention or of Protocol No. 1 (P1).

However, for the reasons already given in my concurring opinion annexed to the James and Others judgment of 21 February 1986, I consider that Article 1 of Protocol No. (P1-1) 1 does not embody a right to compensation and I therefore do not share the view expressed on this point in paragraph 120 of the present judgment. Accordingly, I have not found it necessary to take a stand on what is stated in paragraphs 121-175 of the judgment regarding the issues related to the standard of compensation.

JOINT PARTLY DISSENTING OPINION OF JUDGES BINDSCHEDLER-ROBERT, GÖLCÜKLÜ, PINHEIRO FARINHA, PETTITI AND SPIELMANN (ARTICLE 1 OF PROTOCOL NO. 1) (P1-1)

(Translation)

We voted in favour of a finding of violation of Protocol No. 1 (P1), although we share the opinion of the majority of the Court on several of the principles and issues dealt with in the judgment.

Thus, we agree with the majority that the United Kingdom nationalisation Act was designed to promote the general interest and a legitimate aim in respect of which Parliament was in a position to arrive at a fair assessment.

In addition, the method chosen was acceptable. The same applies to the basic criterion adopted for calculating compensation, which is, moreover, a criterion found in other domestic legislation.

On the other hand, we cannot follow the reasoning of the majority on the issue that is important for us, namely the reference period; this is because the Act in question made no provision for any adjustment.

The selection of a reference period antedating the promulgation of the legislation is clearly conceivable provided - as was, in fact, the case with the first Bill - that the interval between that period and vesting day is reasonable. Unfortunately, the Parliamentary proceedings and the political debates delayed by some eighteen months the moment at which the reference period was put to use (vesting day). This necessarily had adverse effects as regards subsequent developments in the fortunes of the companies concerned.

No one can deny that it was possible to introduce some mechanism whereby a financial adjustment would have been made to take account of the increased remoteness of the reference period. In this connection, precedents could have been found in the techniques laid down by different nationalisation statutes for several methods and equalisation formulae, based on a comparison between current book-values, cash in hand and cash-flow and the basic data on which compensation was calculated.

Such a course was all the more necessary because it had been argued in Parliament that certain of the Act's provisions were unfair, a fact which the Government did not contest at the hearings.

In our view, this absence of any adjustment mechanism in abstracto is of itself contrary to the interpretation of the provisions of Protocol No. 1 (P1).

In the concrete cases submitted to the Court, the distortions that were the direct result of this absence of any adjustment mechanism could have been

calculated accurately by examining the facts of each case or, if need be, by calling for an expert's report.

In this connection, the applicants demonstrated at the hearings, by means of various calculations, the effects of the legislation.

The Government did not consider that any purpose would be served by discussing these figures; their main submission was that if the compensation method chosen by Parliament was a correct one, it was not necessary to examine the concrete results in detail.

We cannot share this view.

Even if it is accepted that as regards a nationalisation of property belonging to its own nationals the State enjoys a wide margin of appreciation, the scope of that margin still has to be defined or identifiable.

The choice of a method cannot, in fact, be neutral. Above all, it cannot be divorced from its direct financial consequences. Furthermore, even if the analytical method adopted is satisfactory as regards isolated aspects, it can lead to distortions by reason of the combination and cumulation of all the economic and financial provisions which were included in the Act and were superimposed on each other.

Whilst taking account of the social effects, the domestic economic situation, the importance of the industries in question and the State's financial contribution, parameters of the margin of appreciation could have been ascertained.

However, between a nationalisation which amounts to "spoliation" on the one hand and reasonable compensation consonant with the principle of proportionality on the other, the quantitative margin is vast and its scope cannot be left completely undefined.

Since the figures supplied by the applicants were not contested at the hearings, it can be seen, prima facie and to the extent that those figures are correct, that at least in the Kincaid, the Vosper Thornycroft and the Brooke Marine cases subsequent developments in these companies occasioned, by virtue of the prolongation of the interval initially envisaged, unreasonable and disproportionate distortion; this is so even if account is taken of the margin of appreciation allowed to and recognised to be enjoyed by the State in the field of nationalisation.

In this respect, our Court's case-law contains sufficient criteria for the components of the Act in question to be analysed in terms of the Convention or Protocol No. 1 (P1) and for the conclusion to be drawn, from the absence of any mechanism to adjust for the remoteness of the reference period, that there was an actual violation.

SEPARATE OPINION OF JUDGE LAGERGREN JOINED BY JUDGE MACDONALD (ARTICLE 6 PARA. 1 OF THE CONVENTION) (art. 6-1)

There is no doubt that the applicants' ownership of shares in the companies concerned constituted "civil rights", which they could defend before the ordinary courts in the United Kingdom. These proprietary rights were extinguished, against compensation, through the operation of the 1977 Act. The applicants were left with no remedy against the basic provisions contained in the Act; in particular, they had no possibility of obtaining a review by a national court of many of the arguments now presented to the Court at Strasbourg. It was merely the application of the 1977 Act that was left to be determined - in the last resort - by the Arbitration Tribunal and other national courts.

Thus, up to 17 March 1977, when the third Aircraft and Shipbuilding Industries Bill received the Royal Assent, the applicants could defend their proprietary rights against all kinds of interference. However, when the ultimate interference occurred, namely when the proposal to deprive them of their shares passed into law, the United Kingdom took away, in those respects that are relevant in this case, the jurisdiction of its courts with regard to the very existence of the applicants' proprietary rights and did not even confer on those courts any jurisdiction over the content of the statutory compensation provisions.

In my opinion, this abrupt and serious limitation of the right of access to courts was premature and unacceptable and was not consistent with a fair interpretation of Article 6 (art. 6) of the Convention (see the Golder judgment of 21 February 1975, Series A no. 18, pp. 17-18, paras. 35-36, the Oztürk judgment of 21 February 1984, Series A no. 73, pp. 17-18, para. 49, and my own concurring opinion annexed to the Ashingdane judgment of 28 May 1985, Series A no. 93, p. 27). The normal right of access to the courts, which existed throughout the lifetime of the proprietary rights, should also have covered the very moment when these rights were extinguished on 17 March 1977. This is all the more so since, up to the respective Vesting Days (29 April and 1 July 1977), the ownership of the shares was recognised to remain in the hands of the applicants, albeit as a somewhat naked right without the full court protection required by Article 6 para. 1 (art. 6-1) of the Convention.

It follows from the foregoing that in my opinion there has been a violation of Article 6 para. 1 (art. 6-1) of the Convention in so far as the applicants were deprived of any access to the courts in order to challenge, under the Convention and Protocol No. 1 (P1) or equivalent domestic legal norms, the taking of their shares on the conditions laid down in the 1977 Act. However, in view of the Court's recent judgment in the case of James

and Others (21 February 1986; Series A no. 98, paras. 79-82), I join the majority with regard to the present question also.

JOINT DISSENTING OPINION OF JUDGES PINHEIRO FARINHA AND PETTITI (ARTICLE 6 PARA. 1 OF THE CONVENTION) (art. 6-1)

(Translation)

We conclude that there has been a violation of Article 6 para. 1 (art. 6-1) for the following reasons.

With effect from 17 March 1977, the date of adoption of the third Bill, the applicants were no longer entitled to take proceedings to defend their proprietary rights against unjustified interferences by the State with those rights. As a result of the Act, the ordinary courts no longer had jurisdiction to determine compensation claims or whether the nationalisation provisions were compatible with domestic law.

The former owners should have had access to the courts, at least until the moment when all their rights were extinguished, in order to institute proceedings to contest the matter and seek redress. Access to the Arbitration Tribunal through the intermediary of representatives cannot be regarded as equivalent to access to the courts.

JOINT DISSENTING OPINION OF JUDGES PINHEIRO FARINHA, PETTITI AND SPIELMANN (ARTICLE 13 OF THE CONVENTION) (art. 13)

(Translation)

Under the system and terms established by the United Kingdom legislation, the former owners had no effective remedy before a national authority to test the compatibility of the Act with the rights guaranteed by the Convention and Protocol No. 1 (P1), whereas above all there was, in our view, a violation of the Convention as regards Article 6 (art. 6) and of Protocol No. 1 (P1).

DISSENTING OPINION OF JUDGE PETTITI (ARTICLE 6 PARA. 1 AND ARTICLE 13 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1) (art. 6-1, art. 13, P1-1)

(Translation)

I voted in favour of a finding of violation of Protocol No. 1 (P1) and of Articles 6 and 13 (art. 6, art. 13) of the Convention on the following grounds.

International legal opinion and case-law in respect of nationalisations are inconclusive and subject to continuing changes.

Admittedly, there is general recognition of the principle of compensation for nationals, contrasting with the 19th century tendency to dispute it, but the amounts decided have varied widely in different States and at different periods. This judgment is the first in which the European Court has applied Protocol No. 1 (P1) in this area.

The principle of compensation for subjects of States other than the one which decided to nationalise has been the subject of numerous judgments and of a considerable amount of legal literature.

The State’s sovereign power over its nationals has, since the 19th century, been a major topic of international legal controversy.

The modern State has accepted its duty to protect its subjects against unfair laws which would dispossess them on the pretext of nationalisation and also to protect them if they are victims of nationalisation abroad (see the Coolidge declaration).

Nationalisations are lawful under international law, but precedents for the amount of compensation to be awarded are inconclusive, the word "equitable" occurring most frequently.

United Nations General Assembly Resolution 1803 of 14 December 1962 and UNCTAD Resolution 46 III did not lay down definite rules. When the French courts had to reach decisions about Algerian and Chilean nationalisations, they used the term "adequate" and associated the word "fair" with "equitable" (see Cass. Civ., 23.4.69, TGI Paris, 29.11.72, Corporación del Cobre, XCV Cr14 drtt. int. priv. 1974 - pp. 729 and 732).

For a nationalisation to comply with international law and to be capable of taking effect internationally, it must be appropriate to its legitimate objective, and the area in which it is effective must be so defined as to allow that objective to be attained, but not exceeded.

Recent international arbitration awards, while establishing the right of States to nationalise on condition that this is exercised in accordance with international law and is subject to a general obligation to provide compensation, have refined the concepts of compensation (Texaco Calasiatic award, 19.1.77; LIAMCO v. the Libyan Government award;

separate opinion of Judge Lagergren, Iran US Claims Trib., judgment 184.161.1; Ind. Corp. v. the Islamic Republic of Iran 161, American Journal of International Law, vol. 8, no. 1; see also Judge Lachs, in Recueil des cours de l'Académie de droit international, 1984, vol. 169).

The words "fair", "adequate" and "equitable" could be the subjects of lengthy explanations, but, whatever the semantics, the ultimate aim is to arrive at an objective assessment of the actual loss suffered. The Paris Regional Court (on 29 November 1972) also mentioned the situation resulting from the effective profits and from the taking of these into account by the law.

The French Conseil constitutionnel insisted on correcting the provisions of the French 1981 Nationalisation Act, as it considered that the Act's supplementary criteria for rectifying shortcomings in the reference data were inadequate and gave rise to under-estimates. Notes and comments on the content of these decisions have been written by Professor B. Goldman.

Ensuring that the action taken is not confiscatory is always a prime concern during the deliberations of arbitration courts and tribunals, leading them to check individual aspects of the amount.

In the United Kingdom, confiscatory legislation would have no effect on property situated in England (Russian Commercial Industrial Bank v. Cie. Esc. Mulhouse and Lazard Bros. v. Midland Bank, 1933). The reaction of the Paris Regional Court dealing with the Chilean nationalisations was the same.

The famous differences of legal opinion on the nationalisation of foreigners' property (W. Lewald, G.J. Ross, Friedman), although the arguments started from opposite poles, most frequently led to very similar conclusions about the adequacy of the compensation (JDI No. 1, 1956).

In order to identify the general rules of public international law on the protection of nationals' and foreigners' property, account must be taken of developments since 1948 at the United Nations and UNCTAD. F. Munch also cites Protocol No. 1 (P1) to the European Convention as a source, saying that this clearly showed that expropriation was allowed only on the conditions provided for by law and by the general principles of international law, and that it was regrettable that details of these principles were not defined (Recueil des cours de l'Académie de droit international, 1959, vol. 98).

In the present judgment, the Court has endeavoured to clarify the text of Article 1 (P1-1).

Was the system established by the United Kingdom Act sufficiently structured or sophisticated to meet all the requirements of international law? I agreed with the majority that this was the case for all the statutory provisions except those concerning the Reference Period and the subsequent developments, seen in the light of Protocol No. 1 (P1), and those concerning

the procedure, seen in the light of Article 6 (art. 6). F. Munch says that, for the court having jurisdiction in a given matter, the relationship between States under international law is also part of the lex rei sitae. He went on to say that the said court in the nationalising State remains bound by the law common to itself and the State at the time of the nationalisation unless this is repealed or suspended for a reason of international public law (ibid.). In my opinion, the British principle of "equity" and of a "fair trial" necessitated access to a genuine court, as the latter would have been better able to take account of national law and of the general principles of international law when assessing compensation.

The general principles of international law, according to which it used to be considered that compensation for non-nationals ought to be full, adequate, equitable, prompt and appropriate, have changed somewhat in the face of pressure from the Third World. The term "adequate" has given way to "equitable", which is much vaguer (see the Nice session of the Institute of International Law).

The requirement for compensation which fully covers the loss (International Law Association, Hamburg, Professor Gihl’s report) has given way to one for what is called equitable compensation.

This is far removed from the definition in the Chorzow judgment: the value of the property as it previously existed plus additional damages for the loss suffered. There is even acceptance of a certain discrimination between nationals and aliens, provided that any measure taken does not affect only aliens (see F. Boulanger, Nationalisation en droit international public, Paris, Economica).

The Third World countries claim a certain amount of discretionary power in this field where the general principles of international law are concerned (see the Conference of Third World countries, Algiers, 1971).

It follows from this development that international arbitration courts will henceforth tend to be less demanding in the case of nationalisations carried out by Third World States. At the same time, such arbitration courts retain the principle of compensation for non-nationals of industrialised countries which more nearly meets the criteria of adequacy, fairness and appropriateness than would be the case for nationals of the same countries.

Furthermore, under the system and terms established by the United Kingdom nationalisation legislation the former owners had no effective remedy before a national authority to test the compatibility of the Act with the general principles of international law and with the rights guaranteed by the Convention and Protocol No. 1 (P1), despite the fact that the Convention, as regards Article 6 (art. 6), and Protocol No. 1 (P1) had been violated, in my view.

The conclusion I have drawn from this brief rehearsal of the legal rules applicable to this case and with which I shall end this separate opinion is

that, even if a national may be awarded less compensation than a non-national, the amount laid down by the United Kingdom legislation ought to have taken into consideration every parameter and all reasonable weightings, in order to arrive at an equitable result, the consequences of which would not be too far removed from the legitimate aim pursued, even allowing for the State's margin of appreciation. This does not seem to me to have been done, for the reasons cited above.

JOINT PARTLY DISSENTING OPINION OF JUDGES RUSSO AND SPIELMANN (ARTICLE 6 PARA. 1 OF THE CONVENTION) (art. 6-1)

(Translation)

In general, we share the opinion of the majority that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention, but we cannot agree with it as regards Sir William Lithgow (see paragraphs 193-197 of the judgment). This is because we consider that, as the largest Kincaid shareholder, he did not enjoy the right of access to a court, which is guaranteed by the said Article 6 para. 1 (art. 6-1).

In holding that there was no violation of this provision, the Court relied on two arguments which we do not find convincing.

Firstly, the Court considered that the limitation on the direct right of access to the Arbitration Tribunal - access being available only to the Stockholders' Representative but not to a shareholder - pursued a legitimate aim, namely the desire to avoid a multiplicity of individual claims. But even supposing that an aim of this kind can be regarded as reasonable, it cannot be taken as sufficient to justify the suppression - and, in our view, it was not a matter of a mere restriction, especially as Sir William Lithgow held a relative majority (that is, a "blocking minority") of the shares - of a fundamental entitlement and, hence, the impairment of the very essence of the right in question.

Secondly, the Court noted that it was open to the shareholders to institute proceedings against the Representative for failure to comply with his statutory duties or with his common-law obligations as agent. This reasoning also does not appear to us persuasive since, unless he established that the Representative had acted fraudulently or negligently, a shareholder could derive no advantage from this remedy. In any event, even if he had exercised it, Sir William Lithgow would at the most have obtained a finding of responsibility on the part of the Representative, something that was clearly not his objective.