EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 15375/89

Gasus Dosier- und Fördertechnik GmbH

against

the Netherlands

REPORT OF THE COMMISSION

(adopted on 21 October 1993)

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I. INTRODUCTION

1 The following is an outline of the case as submitted to the European Commission of Human Rights and of the procedure before the Commission.

A. The application

2 The applicant is a German private company with limited liability, having its registered office in Würzburg, Germany. Before the Commission the applicant company is represented by Mr. J.E. van der Wolf, a lawyer practising in Soest, the Netherlands.

3 The application is directed against the Netherlands, whose Government are represented by their Agent, Mr. K. de Vey Mestdagh of the Netherlands Ministry of Foreign Affairs.

4 The applicant complains under Article 1 of Protocol No. 1 that it was unjustly deprived of its possessions without any compensation in the following circumstances.

5 On 31 July 1980 the Dutch tax authorities seized a concrete mixing machine on the premises of a Dutch tax debtor for non-payment of taxes due and subsequently agreed to its sale. The tax debtor was a customer of the applicant company, who had sold and delivered the machine to this company under retention of title, whereas only a down payment of 17% had been made by the latter.

6 The tax authorities rejected the applicant company's objection against the seizure on 15 May 1981. The applicant company subsequently started civil proceedings challenging the lawfulness of the seizure. Its claims were rejected in a final decision of 13 January 1989 by the Supreme Court.

B. The proceedings

7 The application was introduced on 6 July 1989 and registered on 16 August 1989.

8 On 7 November 1990 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits of the application.

9 The Government's observations were submitted on 13 March 1991. The applicant submitted his observations in reply on 4 June 1991.

10 On 11 May 1992 the Commission decided to invite the parties to a hearing on the admissibility and merits of the application.

11 At the hearing on 21 October 1992, the Government were represented by their Agent, Mr. K. de Vey Mestdagh, and by Mr. H.D.O. Blauw as counsel and MM. A. van Eijsden and A. van Vliet, Ministry of Finance as advisers. The applicant company was represented by Mr. J.E. van der Wolf, and by the applicant company's shareholders Mr. H.-J. Leuschner and Mrs. C. Leuschner.

12 Following the hearing the Commission declared the application admissible in respect of the applicant company's complaint under Article 1 of Protocol No. 1.

13 On 4 November 1992 the Commission requested the parties to submit further information. On 10 February 1993 the applicant company submitted the information, followed by the Government on 12 February 1993.

14 After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

15 The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
E. BUSUTTIL
G. JÖRUNDSSON
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
MM. F. MARTINEZ
C. L. ROZAKIS
Mrs. J. LIDDY
J.-C. GEUS
M.P. PELLONPÄÄ

16 The text of the Report was adopted on 21 October 1993 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 1 of the Convention.

17 The purpose of the Report, pursuant to Article 31 para. 1 of the Convention, is

(1) to establish the facts, and

(2) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

18 A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application forms Appendix II.

19 The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. Particular circumstances of the case

20 In June 1980 the applicant company, Gasus Dosier- und Fördertechnik GmbH (hereinafter referred to as "Gasus"), sold a concrete mixing machine to Atlas Junior Beton B.V. (hereinafter referred to as "Atlas"), a Dutch company with limited liability in Leiderdorp, the Netherlands, for a sum of DM. 125.401,24. The transaction was concluded under the condition that the ownership of the machine would be transferred to Atlas after the purchase price had been fully paid by Atlas to Gasus (eigendomsvoorbehoud).

21 Following a down payment of DM. 21.672, the machine was delivered to Atlas on 28 July 1980. On 31 July 1980, whilst the machine was being installed, the movable property found on Atlas' premises, including the concrete mixing machine, was seized (bodembeslag) on the order of the Collector of Direct Taxes (Ontvanger der Directe Belastingen) in Leiden by virtue of Section 16 para. 3 of the Direct Taxes Collection Act of 22 May 1845 (Wet op de invordering van 's Rijks directe belastingen - hereinafter referred to as the "1845 Collection Act") for Atlas' failure to pay taxes. Gasus was not informed about this seizure and continued installing the concrete mixing machine, which was completed on 2 August 1980.

22 On 16 October 1980 Atlas was granted a provisional moratorium (voorlopige surséance van betaling) as it could no longer meet its financial obligations and a receiver (bewindvoerder) was appointed.

23 By registered letter of 21 October 1980, specifying the invoice numbers and amounts, the applicant company informed Atlas' receiver about the still outstanding debt of Atlas to Gasus and claimed full payment or a bank guarantee. Gasus further informed the receiver that in case of non-payment, it would exercise its property rights by taking back its delivered and unpaid goods on 30 October 1980.

24 On 23 October 1980 a meeting took place at the office of Atlas' receiver between Atlas, Van Baarsen Wandplaten B.V. (hereinafter referred to as "Van Baarsen"), the tax authorities and the National Investment Bank (Nationale Investerings Bank), the latter being one of the two Banks who were the fiduciary owners of Atlas' assets. During this meeting all parties agreed to the sale of all of Atlas' assets, part of which was seized by the tax authorities, to Van Baarsen for a total amount of 500.000 Dutch guilders. It was agreed that this transaction would not include goods on which third parties could still exercise any rights. It was furthermore agreed that one half of the proceeds of this transaction would be paid to the National Investment Bank and the other half to the tax authorities. The turnover tax Van Baarsen paid on this amount to Atlas was not divided nor paid to the tax authorities who had agreed that this amount would remain on Atlas' account. The sold assets, including the concrete mixing machine, were delivered to Van Baarsen at the end of October 1980.

25 On 30 October 1980 Atlas was declared bankrupt. During these proceedings Atlas' liquidator (curator) paid 4.021 Dutch guilders to the company Gebr. Rook B.V. out of what was still in Atlas' estate, since the sale to Van Baarsen had included masonry sand, which the Gebr. Rook B.V. had delivered under retention of title. There were no other secured commercial creditors. The bankruptcy proceedings were terminated on 20 June 1990 for lack of funds. Atlas' unsecured creditors remained fully unpaid.

26 The Government state it was agreed that the seizure by the tax authorities would be rescinded as soon as the tax authorities would have received their share of the proceeds of the sale, i.e. 250.000 Dutch guilders. This amount was received on 25 August 1981. The Government further state that on 23 October 1980 the tax authorities were unaware of Gasus' retention of title.

27 The applicant company states that it has never been informed that the seizure was rescinded on 25 August 1981. In this connection it refers to a specific statement made by its adversary parties in 1983 in the national proceedings on this issue to the effect that, since it had become clear that Atlas did not own the concrete mixing machine, the latter was not one of Atlas' assets and the tax authorities could continue to exercise their rights pursuant to Section 16 para. 3 of the 1845 Collection Act (bodemrecht). The tax authorities also stated that they did not object to the use of the concrete mixing machine by

Van Baarsen pending the outcome of the proceedings on the seizure.

28 After learning of the fate of the concrete mixing machine, Gasus filed on 4 March 1981 an objection (bezwaarschrift) against the seizure. The Director of Direct Taxes (Directeur der Directe Belastingen) rejected the objection on 15 May 1981, primarily for having been submitted out of time and subsidiarily as in any event he found no grounds for rescinding the seizure. Against this decision no appeal lay.

29 By summons of 22 May 1981 Gasus started civil proceedings before the Regional Court (Arrondissementsrechtbank) of Utrecht against Atlas' liquidator and Van Baarsen demanding that the concrete mixing machine be returned to Gasus.

30 Furthermore, by summons of 17 September 1981, Gasus started civil proceedings before the Regional Court of The Hague against the tax authorities, the liquidator of Atlas and Van Baarsen, complaining, inter alia, that the seizure was unlawful and that Gasus' rights under Article 6 para. 1 of the Convention had been violated as Section 16 para. 3 of the 1845 Collection Act excludes the possibility for a third party to have the seizure at issue examined by a court.

31 On 21 December 1983 the Regional Court of The Hague dismissed Gasus' complaints. Gasus' appeal was rejected by the Court of Appeal (Gerechtshof) of The Hague on 3 December 1986.

32 Gasus' subsequent appeal in cassation to the Supreme Court (Hoge Raad) was rejected on 13 January 1989. The Supreme Court held that Article 1 of Protocol No. 1 to the Convention was not violated as Section 16 para. 3 of the 1845 Collection Act was necessary to secure the payment of taxes in the sense that this payment should not be frustrated by a reservation of ownership (eigendomsvoorbehoud) of a third party-supplier.

33 In view of the Supreme Court's decision the applicant company withdrew its proceedings against the Liquidator and Van Baarsen before the Regional Court of Utrecht.

B. Relevant domestic law and practice

34 Section 16 of the 1845 Collection Act deals with a specific form of seizure of assets of tax debtors by the tax authorities (hereinafter referred to as "bodemrecht") in case a tax-debtor fails to pay taxes, which are due to be paid. It gives the tax authorities the right to seize, without a prior judicial authorisation, and subsequently to sell certain goods (bodemzaken), which are situated on the premises of the tax-debtor at the time of the seizure of assets, regardless of who owns these goods.

35 Section 16 of the 1845 Collection Act provides:

<Dutch>

> "1. Derden die geheel of gedeeltelijk recht menen te hebben op roerende goederen welke ter zake van belastingschuld in beslag zijn genomen, kunnen een bezwaarschrift richten tot den directeur der directe belastingen, mits zulks doende vóór den verkoop en uiterlijk binnen zeven dagen, te rekenen van den dag der inbeslagneming. Het bezwaarschrift wordt ingediend bij den ontvanger, tegen een door dezen af te geven ontvangstbewijs. De directeur neemt zoo spoedig mogelijk een beslissing. De verkoop mag niet plaats hebben, dan na acht dagen na de beteekening van die beslissing aan den

reclamant en aan dengene tegen wien het beslag is gelegd. met nadere bepaling van den dag van verkoop.

2. Door het indienen van een bezwaarschrift volgens het vorig lid, verliest de belanghebbende niet het recht om zijn verzet voor den gewonen rechter te brengen.

3. Behoudens het recht van terugvordering, toegekend bij artikel 2014 van het burgerlijk wetboek en bij artikel 230 en volgende van het wetboek van koophandel, kunnen derden echter nimmer verzet in rechten doen tegen de inbeslagneming ter zake van belastingen, uitgezonderd de grondbelasting, indien de ingeoogste of nog niet ingeoogste vruchten, of roerende goederen tot stoffeering van een huis of landhoef, of tot bebouwing of gebruik van het land, zich tijdens de inbeslagneming op den bodem van den belastingschuldige bevinden."

<Translation>

"1. Third parties, who claim to have a full or partial right to movable goods which have been seized in view of a tax debt, can address an objection to the Director of Direct Taxes, on the condition that the objection is submitted before the sale and at the latest within seven days, to be calculated from the date of the seizure. The objection will be submitted to the Receiver, who will provide an acknowledgement of receipt. The Director will take a decision as soon as possible. The sale may not take place earlier than eight days after the notification of this decision to the objector and to the person against whom the seizure is directed, with a further determination of the day of the sale.

2. By submitting an objection within the meaning of the previous paragraph, the party concerned does not forfeit the right to submit his objection to the ordinary court.

3. Apart from the right of objection, granted by Section 2014 of the Civil Code and by Section 230ff. of the Commercial Code, third parties, however, may never legally object to the seizure of assets in connection with taxes, with the exception of land-tax, if the harvested or not yet harvested fruits, or movable goods used as furnishings of a house or farmstead, or for construction or use of the land, are situated on the premises of the tax-debtor concerned at the time of the seizure of assets."

36 "Premises" within the meaning of Section 16 para. 3 are a plot or part of a plot of land, which, for whatever purpose, is in use by the tax-debtor and which he has, independently of others, at his disposal (cf. Hoge Raad, judgment of 18 October 1991, N.J. 1992, no. 298). "Furnishings" within the meaning of Section 16 para. 3 are objects involved in the use of the plot in accordance with its purpose, such as, inter alia, all movable fixtures and fittings, including movable machinery (cf. Hoge Raad, judgment of 8 March 1920, N.J. 1920, p. 831, Hoge Raad, judgment of 11 March 1927, N.J. 1927, p. 494, Arrondissementsrechtbank Haarlem, judgment of 18 February 1964, N.J. 1965, no. 402 and Hoge Raad, judgment of 26 January 1981, N.J. 1981 no. 656). It does, however, not include stocks, raw and auxiliary materials and finished goods (cf. Hoge Raad, judgment of 11 March 1927, N.J. 1927, p. 494).

During the seizure, the owner may continue to use the seized goods.

37 The tax authorities have fixed certain criteria for the application of the "bodemrecht". These criteria are laid down in Section 30 para. 9 of the Collection Guidelines (Leidraad Invordering-Resolutie van 8 december 1961, nr. B 1/18516) of the Ministry of Finance, which, insofar as relevant, reads:

<Dutch>

> "De beslissing van de directeur behoort niet alleen afhankelijk te zijn van juridische overwegingen, doch daarbij dient, nadat nopens de juridische verhoudingen voldoende klaarheid is verkregen, ook aan overwegingen van billijkheid en eisen van goed beleid een grote plaats te worden ingeruimd. In dat beleid past dat het eigendomsrecht van een derde wordt ontzien voorzoveel een persoonlijke belasting- of premieschuld wordt ingevorderd en buitendien in de gevallen, waarin sprake is van reële eigendom van de derde, een en ander behoudens hetgeen hierna wordt opgemerkt.
> (...)
>
> Het voorenstaande laat onverlet dat in geen enkel geval aanleiding kan bestaan voor een terughoudend beleid indien duidelijk sprake is van samenspanning tussen de belastingschuldige en de derde, waarbij in een poging verhaal op goederen te bemoeilijken de juridische eigendomssituatie wordt gefingeerd.
>
> Uit een oogpunt van billijkheid en goed beleid is verhaal op goederen van een derde in het algemeen gerechtvaardig in de gevallen, waarin het verhaal dient tot invordering van zakelijke belasting- en premieaanslagen en de economische verhouding tussen de belastingschuldige en de goederen aanleiding geeft ze als zijn goederen aan te merken en de omstandigheid dat juridisch de goederen aan een ander toebehoren in hoofdzaak is geschapen om verhaal op de goederen ten laste van de belastingschuldige uit te sluiten of om te bereiken dat de derde zich bij voorrang op die goederen kan verhalen.
>
> Als voorbeelden hiervan kunnen gelden de gevallen, waarin goederen zijn geleverd in huurkoop of door middel van verschillende vormen van leasing of andere vormen, waarbij de leverancier van goederen de eigendom ervan voorbehoudt.
>
> Voorts kan worden gedacht aan de gevallen, waarin de goederen tot zekerheid in eigendom aan derden zijn overgedragen.
> (...)."

<Translation>

> "The decision of the director should not only depend on legal considerations. Once sufficient clarity has been obtained in respect of the legal relations at issue, considerations of fairness and demands of good policy should be given a large place in it. It suits such a policy that the property right of a third party is spared insofar as a personal tax or (social security) premium debt is collected and also where it concerns genuine property of a third party, all this with the exception of what is stated below.
> (...)

What is stated above leaves unaltered that in no case there can be reasons for a reticent policy where it clearly concerns machination between the tax debtor and the third party, whereby the legal property situation is being feigned in an attempt to hamper recovery on goods.

From a point of view of fairness and good policy recovery on goods of a third party is in general justified in cases, where the recovery serves the collection of commercial tax and premium assessments and the economic relation between the tax debtor and the goods gives cause to consider these goods as being his and the circumstance that the goods legally belong to another has been mainly created in order to exclude recovery at the expense of the tax debtor on these goods or to achieve that a third party obtains a preferential recovery right on these goods.

Examples of this can be the cases, where goods have been delivered under a hire-purchase agreement or under different forms of leasing or other forms, in which the supplier of the goods retains the ownership thereof.

Further those cases can be considered in which the ownership of the goods has been transferred to a third party as security.
(...)."

38 Under Dutch law the tax authorities may take execution measures with regard to goods belonging to a third party by way of retention of title after having seized these goods under Section 16 of the 1845 Collection Act (cf. Arrondissementsrechtbank Haarlem, judgment of 18 February 1964, N.J. 1965, no. 402) and the application of the "bodemrecht" is not limited to cases of machinations between the tax debtor and the third party owner (Hoge Raad, judgment of 9 January 1981, N.J. 1981 no. 656).

39 When a tax debtor is declared bankrupt all seizures of his assets, including a seizure pursuant to Section 16 of the 1845 Collection Act, become defunct with the exception of a seizure pursuant to Section 16 of the 1845 Collection Act of goods on the tax debtor's premises which belong to third parties (Hoge Raad, judgment of 20 December 1957, N.J. 1958 no. 81). However, in cases where such a third party waives his right, the seizure pursuant to Section 16 of the 1845 Collection Act becomes defunct, since in such cases the goods at issue become a part of the bankrupt's estate (cf. Hoge Raad, judgment of 10 April 1987, N.J. 1987 no. 829).

40 In a judgment of 26 May 1989 concerning a case, where during bankruptcy proceedings a Liquidator with the consent of the tax authorities had sold a machine, which had been delivered under retention of title, which had not been fully paid and in respect of which the "bodemrecht" had been applied, the Supreme Court held that a Liquidator, with the tax authorities' consent, is at liberty to sell such goods as if they belonged to the tax debtor, having regard to the fact that the proceeds of that sale were higher than the expected proceeds of a sale by the tax authorities at a public auction pursuant to Section 462 of the Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering) this being in the interest of the tax authorities as a secured creditor (Hoge Raad, N.J. 1990, no. 331).

41 On 1 June 1990 the 1990 Collection Act and new Collection Guidelines came into force, slightly altering the legal situation with respect to the "bodemrecht". The position of owners by way of retention of title under the new Act and Collection Guidelines has

remained unchanged.

42 It is not possible for suppliers of goods to obtain information from the Netherlands tax authorities on their debtors' outstanding tax debts. According to Section 67 para. 1 of the General Act on State Taxes (Algemene Wet inzake Rijksbelastingen) tax officials in the Netherlands are bound by professional secrecy.

43 Under both German and Dutch law the ownership of goods sold and delivered under retention of title is formally transferred upon full payment of the purchase price.

III. OPINION OF THE COMMISSION

A. Complaint declared admissible

44 The Commission has declared admissible the applicant company's complaint that it was unjustly deprived of its possessions without any compensation.

B. Point at issue

45 Accordingly, the issue to be determined is whether there has been a violation of Article 1 of Protocol No. 1 (P1-1) to the Convention.

C. Article 1 of Protocol No. 1 (P1-1)

46 Article 1 of Protocol No. 1 (P1-1) to the Convention 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."

47 The applicant company argues that under German law, which in view of a clause to this effect in Gasus' general terms of sale and delivery it considers applicable to its transaction with Atlas, Gasus is the legal owner of the concrete mixing machine. Ownership through retention of title is recognised under Dutch law as a form of ownership. Ownership entails the right to voluntarily restrict the enjoyment of possessions, including selling property under retention of title and reclaiming it when called for. Ownership through retention of title cannot be considered as a mere security right under Dutch law, since it lacks the specific characteristics of a security right under Dutch law. Therefore the concrete mixing machine must be considered as forming a part of Gasus' possessions within the meaning of Article 1 of Protocol No. 1 (P1-1).

48 The applicant submits that the application of the "bodemrecht" does not fall within the scope of the second paragraph of Article 1 of Protocol No. 1 (P1-1), since this provision concerns control of the use of property, not deprivation of property. The application of the "bodemrecht" implies that a third party owner is in fact deprived of his possessions. Having regard to the fact that there is no connection between the tax debt collected and Gasus, the applicant company finds no objective or reasonable justification for the deprivation of its property right in respect of the concrete mixing machine.

49   The applicant company finally submits that, even if the application of the "bodemrecht" fell within the scope of the second paragraph of Article 1 of Protocol No. 1 (P1-1), given that in practice the possibility of the exercise of its ownership right became nil following the application of the "bodemrecht" and given that it received no compensation for the loss of its machine, there was no fair balance struck between the public and private rights in the application of the "bodemrecht" and the measure complained of was grossly disproportionate to its aim.

50   The Government primarily submit that Article 1 of Protocol No.1 (P1-1) does not apply to security rights, such as ownership through retention of title and that, therefore, the concrete mixing machine at issue cannot be regarded as forming a part of Gasus' "possessions" within the meaning of Article 1 of Protocol No. 1 (P1-1).

51   The Government, alternatively, submit that, if the concrete mixing machine should be considered as a "possession" within the meaning of Article 1 of Protocol No. 1 (P1-1), this complaint falls under the second paragraph of Article 1 (P1-1-2), which entitles Contracting States to enforce such laws as they deem 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.

52   According to the Government the margin of appreciation Contracting States enjoy under Article 1 of Protocol No. 1 (P1-1) implies that where a Contracting State recognises ownership through retention of title, it is at liberty to restrict it in the sense that another statutory right, such as the tax authorities' "bodemrecht", can overrule it. This restriction is in the public interest. If it would not exist it would in many cases be impossible for the Netherlands authorities to recover tax debts, since in such a situation a tax debtor's assets could be protected by commercial creditors from the collection of taxes due.

53   The Government find nothing in the genesis of Article 1 of Protocol No. 1 (P1-1) suggesting that the second paragraph of this provision is only applicable to the tax debtor's own possessions. The Government add that in the application of the "bodemrecht" genuine property of third parties is respected. The "bodemrecht" is only exercised in respect of third parties who have stipulated certain rights as security.

54   The Government conclude that the application of the "bodemrecht" did not violate the applicant company's rights under Article 1 of Protocol No. 1 (P1-1).

55   The Commission recalls that Article 1 of Protocol No. 1 (P1-1) guarantees in substance the right of property. It comprises "three distinct rules". The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose. However, the rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property. They must therefore be construed in the light of the general principle laid down in the first rule (cf. Eur. Court H.R., Mellacher and others judgment of 19 December 1989, Series A no. 169, p. 24, para. 42).

56 The Commission considers that where, as in the present case, property is sold and delivered on the condition that the seller should remain owner until the purchase price has been fully paid, a special legal situation arises where the respective rights of the seller and the owner will depend on the domestic legal rules which are applicable to the transaction. Normally, both the seller and the buyer will in such cases be holders of a limited property right which is protected under Article 1 of Protocol No. 1 (P1-1), but the exact scope of the right of each of the parties may be different in different legal systems. In particular, it will depend on the domestic rules of private law to what extent the seller's retention of title entails a protection against claims by the buyer's creditors. If these creditors are entitled, in some circumstances, to have the property seized and sold in payment of their claims, the result will be that the seller is deprived of his property right.

57 In the present case, the applicant company was deprived of its property right in accordance with specific rules of Dutch law, which allowed the property to be seized and sold in payment of the buyer's debts to the tax authorities. This measure falls under the second sentence of the first paragraph of Article 1 of Protocol No. 1 (P1-1), and the Commission must therefore determine whether the conditions laid down in that provision were satisfied or, in other words, whether the deprivation of property was effected in the public interest and subject to the conditions provided for by law and by the general principles of international law.

58 The Commission notes that, where a person has not paid his debts, it is normal that the creditor can obtain enforcement measures against him. Such measures may include the deprivation of property, the purpose being to sell the property and to give the creditor satisfaction out of the proceeds. Such deprivation of property must in general be considered to be effected in the public interest, since it contributes to the good functioning of the economic system and of those legal rules which are aimed at ensuring that creditors will obtain satisfaction for their claims.

59 The deprivation of the applicant company's property, which took place in the present case, must be seen in the context of those general rules which allow property to be seized and sold in payment of debts. Although in this case the various specific rights inherent in property were shared between the seller and the buyer, the seizure and sale of the property for the purpose of giving satisfaction to one of the buyer's creditors must still be considered a measure taken within the general legal framework aimed at upholding a well-functioning system of economic relations.

60 Moreover, when considering the proportionality of the measure in relation to the loss suffered by the applicant company, the Commission notes that it was taken in accordance with specific rules of Dutch law. Consequently, the applicant company could, at least with appropriate legal advice, have taken these rules into account as well as the risks resulting therefrom in regard to the machine which it sold. If these risks were found to be considerable, the applicant company could have chosen not to sell the machine to Atlas, or it could, as an alternative, have wished to protect its interests in a suitable manner, for instance by claiming specific security in addition to the retention of title or by taking out an insurance.

61 In these circumstances, the Commission cannot find that the application of the "bodemrecht" rules to the present case were disproportionate to the applicant company's interests, and the deprivation of property must therefore be considered to have been effected in the public interest.

62 The Commission has already noted that the seizure and sale of the machine were effected on the basis of specific rules of Dutch law. The deprivation of property therefore occurred "subject to the conditions provided for by law" within the meaning of Article 1 of Protocol No.1 (P1-1).

63 As regards the requirement of Article 1 of Protocol no. 1 (P1-1) that deprivation of property must respect "the general rules of international law", the Commission recalls that this provision refers to those principles of international law which protect foreign property against confiscation or against nationalisation or expropriation without adequate compensation being paid (cf. Eur. Court H.R., Lithgow and Others judgment of 8 July 1986, Series A no. 102, p. 49, paras. 117-119). It is true that in the present case the property right at issue was that of a foreign company. Nevertheless, the deprivation of property which occurred cannot be compared to those measures of confiscation, nationalisation of expropriation in regard to which international law provides special protection to foreign citizens and companies.

64 The Commission is therefore of the opinion that the deprivation of the applicant company's property right was not contrary to Article 1 of Protocol No. 1 (P1-1).

D. Conclusion

65 The Commission concludes, by six votes to six with the casting vote of the President, that there has been no violation of Article 1 of Protocol No. 1 (P1-1) to the Convention.

Secretary to the Commission	President of the Commission
(H.C. Krüger)	(C.A. Nørgaard)

(ORG. E)

CONCURRING OPINION OF MRS. JANE LIDDY

The interference complained of originates in Section 16 of the 1845 Collection Act, which aims at the collection of outstanding tax debts. The collection of taxes is an interference with the right guaranteed in the first paragraph of Article 1 of Protocol No. 1, but is justified under the second paragraph of this provision. The application of the "bodemrecht" in the present case was a measure taken for the enforcement of the collection of outstanding taxes. Although it did involve a deprivation of a right in rem of a third party, I consider that, in the circumstances of the present case, the deprivation formed a constituent element of the procedure for the collection of tax debts, which constitutes a control of the use of property. It is therefore the second paragraph of Article 1 of Protocol No. 1, which is applicable in the present case (see Eur. Court H.R., Agosi judgment 24 October 1986, Series A no. 108, p. 17, para. 51).

The second paragraph of Article 1 of Protocol No. 1 recognises the right of a State to enforce such laws as it deems necessary, in distinction to the second paragraphs of the Articles 8 up to and including 11 of the Convention which only permit exceptions which are necessary. By making this distinction the founders of the Convention underlined that it is for the national authorities to make the initial assessment, in the field of taxation, of the aims to be pursued and the means by which they are pursued; accordingly a margin of appreciation is left to them. The margin of appreciation must be wider in this area than it is in many others (cf. No. 12560/86, Dec. 16.3.89, D.R. 60

p. 194).

However, the finding that the application of the "bodemrecht" is a measure which as such comes under the scope of the second paragraph of Article 1 of Protocol No. 1 does not bring it wholly outside the control of the Convention organs. The correct application of Article 1 of Protocol No. 1, like that of any other provisions of the Convention, is in principle subject to their supervision. This supervision includes, apart from the examination whether a certain measure is of such a kind that it can be reasonably considered as necessary for one of the purposes enumerated in the Article, an examination whether its application in the concrete case is not disproportionate to its aim (cf. No. 13013/87, Dec. 14.12.88, D.R. 58 p. 163).

Having regard to the State's margin of appreciation in taxation matters, the fact that the "bodemrecht" can only be applied in respect of goods found on a tax debtor's premises, the fact that Gasus only lost its right to reclaim the concrete mixing machine and not its right to receive payment from Atlas and taking into consideration that parties to a commercial transaction in general take certain financial risk and can inform themselves as to any relevant laws having an effect on their contractual commitments, I do not consider that in the circumstances of the present case the application of the "bodemrecht" complained of was disproportionate.

It is for these reasons that I consider that there has been no violation of Article 1 of Protocol No. 1 to the Convention.

(ORG. E)

DISSENTING OPINION OF MR. S. TRECHSEL
JOINED BY MM. C.L. ROZAKIS AND J.-C. GEUS

To my regret I cannot follow the opinion expressed by my colleagues according to which the interference with the property of the applicant company was in conformity with Article 1 of the Protocol.

I first come to the conclusion that the exercise of the "bodemrecht" in the present case falls to be considered as a deprivation of property to the detriment of the applicant. In fact, the very purpose of selling an object under a retention title consists in securing the claim of the vendor to the full price in case the buyer were to become unable to fulfil his obligations. Under civil law there is no doubt that, in the present case the applicant remained the owner of the concrete mixing machine. Economically, with the payment of instalments by Atlas the right of Gasus would gradually lose substance, but this aspect is not relevant to the present case as the machine was seized while it was still being installed.

The exercise of the "bodemrecht" by the tax authorities thus deprived Gasus not only of a "nuda proprietas" but of their possessions in the sense of Article 1 para. 1, second sentence, of Protocol No. 1.

Leaving aside the sheer economical interest of filling the treasury, which cannot be meant by that provision, I can think of no "public interest" which could justify such an expropriation as there exists no link whatsoever between the claims of the Dutch tax authorities and the applicant company's possessions. I am not aware of any other legislation which would allow the tax authorities to confiscate the property of a third party which happens to be on the premises of a tax debtor.

I also fail to find any justification for this "bodemrecht" when taking into account the economic background of the

"eigendomsvoorbehoud". It is a relatively simple instrument of credit which may have great practical importance. This instrument is deprived of its value when the seller must fear that the tax authorities will interfere as, in particular, he has no possibility of finding out whether his partner, the buyer, has paid his taxes due.

Even assuming that the State could claim a legitimate interest in applying the "bodemrecht", quod non, I would still find that, as the applicant company was left without even the commencement of any compensation, no fair balance was struck between the interests of the fiscal authorities and those of the applicant company. Only in passing do I wish to express some astonishment at the way in which Dutch legislation accords a privileged position to the fiscal authorities in comparison to other creditors.

For the reasons set out above I conclude that there has been a violation of Article 1 of the Protocol in the present question.

(ORG. E)

DISSENTING OPINION OF MR. H.G. SCHERMERS

I agree with the majority of the Commission that the Netherlands's legal rules on the "bodemrecht" do not infringe the Convention. In fact I support the majority's reasoning up to para. 60 of the Report.

However, deprivation of property, even if legal, should be executed in a fair and non-discriminatory manner. The wide margin of appreciation which the Governments have under Article 1 of Protocol No. 1 remains under the supervision of the Convention organs.

In the present case the possessions of Atlas were sold for 500,000 Dutch guilders. This amount was arbitrarily divided between the two largest creditors, the tax authorities and the fiduciary owners of Atlas' assets. Gasus, as the third largest creditor and holding a security right which is, in my opinion, equivalent to that of the fiduciary owners, did not receive any part of these proceeds. This fundamentally different way of compensating one creditor holding ownership from another creditor also holding ownership infringes in my opinion the general principles underlying the European Convention of Human Rights which are by their nature general principles of international law.

I therefore conclude that there has been a violation of Article 1 of Protocol No. 1.

(ORG. E)

DISSENTING OPINION OF MR. M. PELLONPÄÄ

I agree with the majority of the Commission that the exercise of the "bodemrecht" in the present case constituted a deprivation of possessions within the meaning of the second sentence of Article 1, para. 1 of the First Protocol to the Convention. I further agree that this deprivation took place "in the public interest and subject to the conditions provided for by law", as required by that provision.

I nevertheless conclude that Article 1 was violated in that the application of the relevant legal rules in this case failed to strike a fair balance between the various interests at stake, thus imposing a disproportionate burden on the applicant company.

The sale and delivery contract between the applicant and Atlas was governed by German law. In addition, also under Dutch private law

the ownership of goods sold and delivered under retention of title is not formally transferred until payment in full of the purchase price. In these circumstances the applicant could legitimately consider its ownership interest to be sufficiently protected against interference of a confiscatory nature by Dutch authorities. Although the governing law clause in the contract between the two private parties cannot be interpreted as preventing the application of Dutch public law rules on "bodemrecht", I nevertheless consider that the applicant could not reasonably be expected to take specific precautionary measures with a view to protecting itself against the application of those rules.

I refer to and agree with the considerations put forward in the dissenting opinion of Mr. Trechsel concerning the practical importance and the economic background of the concept of retention of title. I also agree with what he says about the lack of any compensation. In the last-mentioned respect I further agree with the views expressed by Mr. Schermers in his dissenting opinion and conclude that there has been a violation of Article 1 of the First Protocol.

APPENDIX I

HISTORY OF PROCEEDINGS

Date	Item
6 July 1989	Introduction of application
16 August 1989	Registration of application
Examination of admissibility	
7 November 1990	Commission's decision to invite the Government to submit their observations on the admissibility and merits of the application
13 March 1991	Government's observations
4 June 1991	Applicant's observations in reply
11 May 1992	Commission's decision to hold a hearing on the admissibility and the merits of the application
21 October 1992	Hearing on the admissibility and the merits of the application, Commission's decision to declare the application admissible and to invite the parties to submit additional information and, if they so wish, further observations
Examination of the merits	
10 February 1993	Applicant's additional information and further observations
12 February 1993	Government's additional information and further observations

12 October 1993	Commission's deliberations on the merits and final vote
21 October 1993	Commission's adoption of the Report