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

CASE OF BRONIOWSKI v. POLAND

(Application no. 31443/96)

JUDGMENT

STRASBOURG

22 June 2004

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

In the case of Broniowski v. Poland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mrs E. PALM,
Mr L. CAFLISCH,
Mrs V. STRÁŽNICKÁ,
Mr V. BUTKEVYCH,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN
Mr M. PELLONPÄÄ,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mr M. UGREKHELIDZE
Mr S. PAVLOVSCHI,
Mr L. GARLICKI, *judges*,
and Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 15 October 2003 and on 26 May 2004,

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

PROCEDURE

1. The case originated in an application (no. 31443/96) against the Republic of Poland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Jerzy Broniowski ("the applicant"), on 12 March 1996. Having been designated before the Commission by the initials J.B., the applicant subsequently agreed to the disclosure of his name.

2. The applicant, who had been granted legal aid, was represented by Mr Z. Cichoń, a lawyer practising in Cracow, and Mr W. Hermeliński, a lawyer practising in Warsaw. The Polish Government ("the Government") were represented by their Agents, Mr K. Drzewicki and, subsequently, Mr J. Wołąsiewicz, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, a breach of Article 1 of Protocol No. 1 to the Convention in that his entitlement to compensation for

property that his family had had to abandon in the so-called "territories beyond the Bug River" had not been satisfied.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section.

On 26 March 2002 a Chamber of that Section, composed of the following judges: Sir Nicolas Bratza, *President*, Mr M. Pellonpää, Mrs E. Palm, Mr J. Makarczyk, Mrs V. Strážnická, Mr R. Maruste and Mr S. Pavlovschi, *judges*, and also of Mr M. O'Boyle, *Section Registrar*, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72). On the same day the Chamber decided that all similar applications pending before the Court should be allocated to the Fourth Section of the Court and their examination adjourned until the Grand Chamber had delivered its judgment in the present case.

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court.

7. By a decision of 19 December 2002, following a hearing on admissibility and the merits (Rule 54 § 3), the Court declared the application admissible.

8. The applicant and the Government each filed written observations on the merits (Rule 59 § 1). Subsequently, the parties replied in writing to each other's observations. The applicant also submitted his claims for just satisfaction and the Government made their initial comments on that matter.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant, Mr Jerzy Broniowski, is a Polish national, who was born in 1944 and lives in Wieliczka, Małopolska Province, in Poland.

A. Historical background

10. The eastern provinces of pre-war Poland were (and in dated usage still are) called "Borderlands" (*"Kresy"*). They included large areas of present-day Belarus and Ukraine and territories around Vilnius in what is now Lithuania.

Later, when after the Second World War Poland's eastern border was fixed along the Bug River (whose central course formed part of the Curzon line), the "Borderlands" acquired the name of "territories beyond the Bug River" (*"ziemie zabużańskie"*).

Those regions had been invaded by the USSR in September 1939.

11. Following the Yalta and Potsdam Conferences, where the new border between the Soviet Union and Poland along the Curzon line had been agreed, and subsequent agreements concluded between the Polish Committee of National Liberation (*Polski Komitet Wyzwolenia Narodowego – "PKWN")* and the former Soviet Socialist Republics of Ukraine (on 9 September 1944), Belarus (on 9 September 1944) and Lithuania (on 22 September 1944) ("the Republican Agreements") (*umowy republikańskie*), the Polish State took upon itself the obligation to compensate persons who were "repatriated" from the "territories beyond the Bug River" and had to abandon their property there. Such property is commonly referred to as "property beyond the Bug River" ("*mienie zabużańskie"*).

12. The Polish Government estimated that from 1944 to 1953 some 1,240,000 persons were "repatriated" under the provisions of the Republican Agreements. At the oral hearing, the parties agreed that the vast majority of repatriated persons had been compensated for loss of property caused by their repatriation.

In that connection, the Government also stated that, on account of the delimitation of the Polish-Soviet State border – and despite the fact that Poland was "compensated" by the Allies with former German lands east of the Oder-Neisse line – Poland suffered a loss of territory amounting to 19.78%.

B. The circumstances of the case

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

1. Facts before 10 October 1994

14. After the Second World War, the applicant's grandmother was repatriated from Lwów (now Lviv in Ukraine).

On 19 August 1947 the State Repatriation Office (*Państwowy Urząd Repatriacyjny*) in Cracow issued a certificate attesting that she had owned a piece of real property in Lwów and that the property in question consisted of approximately 400 sq. m of land and a house with a surface area of 260 sq. m.

15. On 11 June 1968 the Cracow District Court (*Sąd Rejonowy*) gave a decision declaring that the applicant's mother had inherited the whole of her late mother's property.

16. On an unknown later date the applicant's mother asked the mayor of Wieliczka to enable her to purchase the so-called right of "perpetual use" (*prawo użytkowania wieczystego)* of land owned by the State Treasury **(**see also paragraph 66 below).

17. In September 1980 an expert from the Cracow Mayor's Office made a report assessing the value of the property abandoned by the applicant's grandmother in Lwów. The actual value was estimated at 1,949,560 old Polish zlotys (PLZ) but, for the purposes of compensation due from the State, the value was fixed at PLZ 532,260.

18. On 25 March 1981 the mayor of Wieliczka issued a decision enabling the applicant's mother to purchase the right of perpetual use of a plot of 467 sq. m situated in Wieliczka. The fee for the right of perpetual use was PLZ 392 per year and the duration was set at a minimum of forty and a maximum of ninety-nine years. The total fee for use, which amounted to PLZ 38,808 (PLZ 392 x 99 years) was offset against the compensation calculated by the expert in September 1980.

In June 2002 an expert commissioned by the Government established that the value of this transaction corresponded to 2% of the compensation to which the applicant's family was entitled (see also paragraph 35 below).

19. The applicant's mother died on 3 November 1989. On 29 December 1989 the Cracow District Court gave a decision declaring that the applicant had inherited the whole of his late mother's property.

20. In 1992, on a date that has not been specified, the applicant sold the property that his mother had received from the State in 1981.

21. On 15 September 1992 the applicant asked the Cracow District Office (*Urząd Rejonowy*) to grant him the remainder of the compensation for the property abandoned by his grandmother in Lwów. He stressed that the value of the compensatory property received by his late mother had been significantly lower than the value of the original property.

22. In a letter of 16 June 1993, the Town Planning Division of the Cracow District Office informed the applicant that his claim had been entered in the relevant register under no. R/74/92. That letter further read, in so far as relevant, as follows:

> "We would like to inform you that at present there is no possibility of satisfying your claim. ... Section 81 of the Land Administration and Expropriation Act of 29 April 1985 (*Ustawa o gospodarce gruntami i wywłaszczaniu nieruchomości*)[1] became, for all practical purposes, a dead letter with the enactment of the Local Self-Government Act of 10 May 1990. [The enactment of that Act] resulted in land being transferred from the [Cracow branch of the] State Treasury to the Cracow Municipality. Consequently, the Head of the Cracow District Office who, under the applicable rules, is responsible for granting compensation, has no possibility of satisfying the claims submitted. It is expected that new legislation will envisage another form of compensation. We should accordingly inform you that your claim will

1. See paragraph 46 below.

be dealt with after a new statute has determined how to proceed with claims submitted by repatriated persons."

23. On 14 June 1994 the Cracow Governor's Office (*Urząd Wojewódzki*) informed the applicant that the State Treasury had no land for the purposes of granting compensation for property abandoned in the territories beyond the Bug River.

24. On 12 August 1994 the applicant filed a complaint with the Supreme Administrative Court (*Naczelny Sąd Administracyjny*), alleging inactivity on the part of the Government in that they had failed to introduce in Parliament legislation dealing with claims submitted by repatriated persons. He also asked for compensation in the form of State Treasury bonds.

2. Facts after 10 October 1994

(a) Events that took place up to 19 December 2002, the date on which the Court declared the application admissible

25. On 12 October 1994 the Supreme Administrative Court rejected the applicant's complaint. It found no indication of inactivity on the part of the State authorities because "the contrary transpired from the fact that the applicant had received replies from the Cracow District Office and the Cracow Governor's Office".

26. On 31 August 1999, in connection with the entry into force of the Cabinet's Ordinance of 13 January 1998 (see also paragraphs 51-52 below), the Cracow District Office transmitted the applicant's request of 15 September 1992 for the remainder of the compensation, and the relevant case file, to the mayor of Wieliczka (*Starosta*). Meanwhile, following a reform of the local administrative authorities, the former Cracow Province (*Województwo Krakowskie*) – in which the Wieliczka district is situated – had been enlarged and renamed "Małopolska Province" (*Województwo Małopolskie*).

27. On 11 April 2002 the mayor of Wieliczka organised a competitive bid for property situated in Chorągwica being sold by the State Treasury. The bid was entered by 17 persons, all of whom were repatriated persons or their heirs. The applicant did not participate in the auction.

28. On 5 July 2002 the Ombudsman (*Rzecznik Praw Obywatelskich*), acting on behalf of repatriated persons, made an application under Article 191 of the Constitution, read in conjunction with Article 188, to the Constitutional Court (*Trybunał Konstytucyjny*), asking for legal provisions that restricted the possibility of satisfying their entitlements to be declared unconstitutional (see also paragraphs 50, 55, 60 and 70-71 below).

(b) Events that took place on and after 19 December 2002

29. On 19 December 2002 the Constitutional Court heard, and granted, the Ombudsman's application (see also paragraphs 79-87 below). The Constitutional Court's judgment took effect on 8 January 2003.

30. On 8 January 2003 the Military Property Agency issued a communiqué, which was put on its official website[2] and which read, in so far as relevant, as follows:

> "The Constitutional Court, in its judgment of 19 December 2002, declared that the provisions relating to the realisation of the Bug River claims by, *inter alia*, the Military Property Agency were unconstitutional.
>
> However, the implementation of the court's judgment requires that the Land Administration Act 1997, the Law of 30 May 1996 on the administration of certain portions of the State Treasury's property and the Military Property Agency, as well as the Law of 25 May 2001 on the reconstruction, technical modernisation and financing of the Polish Army in the years 2001-2006, be amended.
>
> It is also necessary to amend the Law of 15 February 1995 on the income tax from legal persons, in respect of the proceeds received by the Agency upon satisfying the Bug River claims.
>
> In the circumstances, the Military Property Agency will be able to organise auctions for the sale of immovable property after the amendments to the existing legislation have been made.
>
> Auctions will be advertised in the press ... and on the [Agency's] web site."

According to information made available on the agency's website, in 2002 it had in its possession two categories of property. The first was immovable property no longer used for any military purposes, which was normally sold at auctions. It comprised 13,800 hectares of land and 4,500 buildings with a total surface area of 1,770,000 sq. m. This property included military airports, testing grounds, rifle ranges, hospitals, barracks, offices, recreation and sports centres, buildings designated for social and cultural activities and various other buildings (fuelling stations, workshops, warehouses, etc.). The second category was property that was only temporarily not used by the army. It comprised 650 hectares of land and buildings with a total surface area of 100,000 sq. m.

31. On 8 January 2003 the State Treasury's Agricultural Property Agency (*Agencja Własności Rolnej Skarbu Państwa*), a body which at that time administered the State Treasury's Agricultural Property Resources (*Zasoby Własności Rolnej Skarbu Państwa*) (see also paragraph 91 below), issued a similar communiqué, which was put on its official website[3] and which read as follows:

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2. www.amw.com.pl.
3. www.anr.gov.pl.

"On 8 January 2003 the Constitutional Court's judgment of 19 December 2002 concerning the constitutionality of the provisions governing compensation for the Bug River property entered into force.

As a consequence of the court's judgment, it is necessary to amend the provisions relating to the land administration. The judgment does not by itself create a new legal regime and cannot constitute a basis for offsetting the value of the property abandoned outside the State's border against the price of the State Treasury's agricultural property. The principles, conditions and procedure in that respect should therefore be determined. Such actions have already been taken by the Office for Dwellings and Town Development and the Ministry for the Treasury.

In the circumstances, this Agency will desist from organising auctions for the sale of immovable property held among its resources, except for small plots of agricultural property.

The Agency's decision is inspired by the need to ensure that the Bug River claimants have their claims satisfied on conditions that are equal for all claimants."

32. By the end of 2003 neither of the above-mentioned agencies had resumed auctions. On the date of adoption of this judgment, the Military Property Agency website still contained the – unchanged – communiqué of 8 January 2003 on the suspension of auctions.

On 2 February 2004, two days after the entry into force of new legislation on the Bug River claims (see paragraphs 114-119 below), the Agricultural Property Agency (*Agencja Własności Rolnej*), a body which had in the meantime replaced the State Treasury's Agricultural Property Agency (see also paragraph 91 below) removed the communiqué of 8 January 2003 from its website and added an announcement entitled "Information for the Bug River people" (*"Informacja dla zabużan"*), providing a detailed explanation of the operation of the new statute.

33. Meanwhile, in the spring and summer of 2003, during the process of preparing a bill designed to settle the "Bug River claims" (*roszczenia zabużańskie*)*;* hereafter "the Government Bill" (see also paragraphs 111-113 below), the Government estimated the number of claimants and the value of the claims. According to the Government, there were 4,120 registered claims, of which 3,910 were verified and regarded as meeting the statutory conditions. The registered claims were valued at 3 billion new Polish zlotys (PLN). There were also 82,740 unverified claims pending registration, of which 74,470 were likely to be registered. The anticipated value of the unverified claims was PLN 10.45 billion. The anticipated total number of entitled persons was 78,380. As the parliamentary debate over the Government Bill – a debate which was widely discussed throughout the Polish media – progressed, the number of Bug River claims started to grow, since many new claims were being registered.

34. The statistical reports prepared by the Government, in particular the Ministry for the Treasury (*Ministerstwo Skarbu*) and the Ministry for Infrastructure (*Ministerstwo Infrastruktury*), have to date not addressed the question of how many of the Bug River claimants have ever obtained any compensation and, if so, whether it was full or partial, and how many of them have not yet received anything at all.

The idea of keeping a register of Bug River claims emerged in the course of the preparation of the Government Bill, and such a register is to be kept in the future. Nevertheless, the need to collect the relevant data had already been perceived by the Minister for Infrastructure in July 2002,[4] when he replied to a question by J.D., a Member of Parliament, concerning, in the deputy's words, "the final discharge of the Polish State's obligations towards persons who, after the Second World War, had abandoned their immovable property beyond the eastern border". In his reply, the Minister stated, *inter alia*:

> "In reply to the question relating to the number of unsatisfied claims, it has to be said that it was estimated by the Cabinet's Office (*Urząd Rady Ministrów*) at the beginning of the 1990s that there were about 90,000 [such claims]. At present it is very difficult to make such an estimation. ... In practice, every legal successor [of a Bug River claimant] could, and can, obtain a certificate – at present, a decision – [confirming the right to] a share in the abandoned property. What should be the criteria according to which the number of satisfied and unsatisfied claims is to be estimated? Should it be the number of applications made, including [several] applications by legal successors regarding one property abandoned by one owner (testator), or should it be the number of properties abandoned beyond the State's borders?
>
> It is also difficult to estimate the number of persons whose entitlement has been satisfied, especially as the entitlement can be enforced throughout the country and it often happens that it is satisfied partially in different provinces until it has been fully settled. This situation creates conditions in which the entitled persons may abuse their rights – a fact of which governors and mayors have notified us. They accordingly suggest that a register ... of the certificates issued confirming the entitlement to ... compensatory property be kept. At present, however, there is no single, comprehensive system for the registration of certificates and decisions entitling claimants to [compensatory property].
>
> Accordingly, the answer to the deputy's question as to the form in which the [Bug River claims] are to be satisfied and as to the possible legal solutions depends on reliable information on the number of unsatisfied claims. If it emerged that the number was significant and that not all claims could be satisfied under the applicable laws, other legislative solutions would have to be found – which, however, would be particularly difficult in view of the economic and financial problems of the State."

35. On 12 June 2003 the Government produced a valuation report prepared by an expert valuer commissioned by them. That report had been

4. Reply by the Minister for Infrastructure of 12 July 2002; available on the Polish Parliament's website: www.sejm.gov.pl.

drawn up on 14 June 2002. The value of the property that the applicant's grandmother had had to abandon was estimated at PLN 390,000. The expert stated that the applicant's family had so far received 2% of the compensation due.

36. On 28 October 2003 the mayor of Wieliczka organised a competitive bid for property situated in Chorągwica and Niepołomice, in the Małopolska Province, that was being sold by the State Treasury. The reserve prices were PLN 150,000 and PLN 48,000 respectively. The bid was entered by several Bug River claimants. The first property was sold for PLN 900,000, the second for PLN 425,000. The applicant did not participate in those auctions.

37. On 30 January 2004, by virtue of the Law of 12 December 2003 on offsetting the value of property abandoned beyond the present borders of the Polish State against the price of State property or the fee for the right of perpetual use (*Ustawa o zaliczaniu na poczet ceny sprzedaży albo opłat z tytułu użytkowania wieczystego nieruchomości Skarbu Państwa wartości nieruchomości pozostawionych poza obecnymi granicami Państwa Polskiego*) ("the December 2003 Act"), the State's obligations towards persons who, like the applicant, have obtained some compensatory property under the previous statutes are considered to have been discharged (see also paragraph 116 below).

38. On 30 January 2004 51 Members of Parliament from the opposition party, "Civic Platform" (*Platforma Obywatelska*), applied to the Constitutional Court, challenging a number of the provisions of the December 2003 Act (see also paragraph 120 below).

C. Relevant domestic law and practice

1. Honouring of the international treaty obligation to compensate repatriated persons

39. The Republican Agreements (see also paragraph 11 above) were each drafted in a similar way. Article 3 of each Agreement laid down rules concerning both the kind and the amount of property that repatriated persons could take with them upon evacuation, and obliged the Contracting Parties to return to them the value of the property which they had had to abandon.

40. Article 3 of the Agreement of 9 September 1944 between the Polish Committee of National Liberation and the Government of the Ukrainian Soviet Socialist Republic on the evacuation of Polish citizens from the territory of the Ukrainian Soviet Socialist Republic and of the Ukrainian population from the territory of Poland (*Układ pomiędzy Polskim Komitetem Wyzwolenia Narodowego a Rządem Ukraińskiej Socjalistycznej Republiki Rad dotyczący ewakuacji obywateli polskich z terytorium*

U.S.R.R. i ludności i ukraińskiej z terytorium Polski) ("the relevant Republican Agreement") provided, in so far as relevant, as follows:

> "2. Evacuated persons shall be allowed to take with them clothing, footwear, linen, bedding, foodstuffs, household goods, farming inventory stock, harnesses and other articles for household and agricultural use, up to a total weight of 2 metric tonnes per family, as well as any cattle and poultry belonging to the evacuated farm.
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> 3. Persons with specialised professions, such as workmen, craftsmen, doctors, artists and scholars, shall be accorded the right to take with them objects needed in the exercise of their professions.
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> 4. The following may not be taken upon evacuation:
>
> (a) cash, banknotes and gold and silver coins of any type, with the exception of Polish banknotes to a maximum amount of 1,000 zlotys per person, or Soviet currency to a maximum amount of 1,000 roubles per person;
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> (b) gold and platinum in alloy, powder or scrap form;
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> (c) precious stones in unworked form;
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> (d) works of art and antiques whenever they constitute a collection, or even as individual items, unless they are the evacuated person's family property;
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> (e) firearms (with the exception of hunting rifles) and military equipment;
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> (f) photographs (other than personal photographs), charts and maps;
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> (g) automobiles and motorcycles;
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> (h) furniture, whether by rail or by motor vehicle, because of the transport problems caused by the war.
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> ...
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> 6. The value of movable belongings left behind upon evacuation, and also of immovable property, shall be returned to the evacuated person on the basis of insurance valuations, in accordance with the applicable laws in the State of Poland and in the Ukrainian Soviet Socialist Republic, as the case may be. In the absence of an insurance valuation, the value of movable and immovable property shall be assessed by the Plenipotentiaries and Representatives of the Parties. The Contracting Parties shall undertake to ensure that town and village houses vacated as a result of resettlement are made available to resettled persons on a priority basis."

41. On 21 July 1952 the Government of the Republic of Poland and the Governments of the Union of Soviet Socialist Republics, the Ukrainian Soviet Socialist Republic, the Belarus Soviet Socialist Republic and the Lithuanian Soviet Socialist Republic concluded an agreement on the mutual settlement of accounts in connection with the evacuation of population groups and the delimitation of the Polish-Soviet State border (*Umowa między Rządem Rzeczypospolitej Polskiej, z jednej strony i Rządem Związku*

Socjalistycznych Republik Radzieckich, Rządem Ukraińskiej Socjalistycznej Republiki Radzieckiej, Rządem Białoruskiej Socjalistycznej Republiki Radzieckiej i Rządem Litewskiej Socjalistycznej Republiki Radzieckiej, z drugiej strony, o wzajemnych rozliczeniach, wynikłych w związku z ewakuacją ludności i delimitacją polsko-radzieckiej granicy państwowej) ("the 1952 Pact").

Article 2 of the 1952 Pact provided:

> "With a view to the complete and definitive mutual settlement of accounts for movable and immovable property, agricultural products and seed left on the territories of the Republic of Poland and of the USSR by persons evacuated and resettled in connection with the delimitation of the Polish-Soviet State border, the Government of the Republic of Poland undertake to pay the Government of the USSR the sum of 76 (seventy-six) million roubles."

42. From 1946 to the present day Polish law has provided that persons repatriated from the territories beyond the Bug River are entitled to have the value of the property abandoned as a result of the Second World War offset either against the fee for the right of perpetual use or against the price of immovable property purchased from the State Treasury.

43. That provision has been repeated in several statutes, starting with the Decree of 6 December 1946 on the transfer from the State of non-agricultural property in the Regained Territories and the former Free City of Gdańsk (*Dekret o przekazywaniu przez Państwo mienia nierolniczego na obszarze Ziem Odzyskanych i b. Wolnego Miasta Gdańska*).

The so-called "Regained Territories" (*"Ziemie Odzyskane*") were former German territories east of the Oder-Neisse Line, with which – upon Stalin's proposal – the victorious Allies compensated the Poles for the "territories beyond the Bug River" taken away from them by the former USSR.

Under the policy pursued at that time by the authorities, the "Regained Territories" and Gdańsk, after the expulsion of Germans residing there, were intended for the accommodation of Polish citizens "repatriated" from "beyond the Bug River", i.e. from the territories beyond the Curzon line. The repatriated persons had priority in purchasing land.

44. Further decrees and statutes were enforced between 1952 and 1991.

In the 1990s, however, the authorities started to consider the possibility of enacting a single statute dealing with all forms of restitution of property, including claims for compensation for property abandoned by repatriated persons (see also paragraphs 62-65 below).

45. Ultimately, a statute exclusively relating to the Bug River claims (the December 2003 Act) entered into force on 30 January 2004 (see also paragraph 37 above and paragraphs 114-119 below).

2. The Land Administration and Expropriation Act of 29 April 1985 and the related ordinance

(a) The 1985 Act

46. From 29 April 1985 to 1 January 1998 the rules governing the administration of land held by the State Treasury and municipalities were laid down in the Land Administration and Expropriation Act of 29 April 1985 ("the Land Administration Act 1985").

Section 81 of this Act dealt with entitlement to compensation for property abandoned in the "territories beyond the Bug River". In the version applicable from 10 October 1994 to 31 December 1997, it read as follows, in so far as relevant:

> "1. Persons who, in connection with the war that began in 1939 abandoned real property in territories which at present do not belong to the Polish State and who, by virtue of international treaties concluded by the State, are to obtain equivalent compensation for the property they abandoned abroad, shall have the value of the real property that has been abandoned offset either against the fee for the right of perpetual use of land or against the price of a building plot and any houses, buildings or premises situated thereon.
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> ...
>
> 4. In the event of the death of an owner of real property abandoned abroad, the entitlement referred to in subsection 1 shall be conferred jointly on all his heirs in law or on the one [heir] designated by the entitled persons.
>
> 5. The offsetting of the value of real property abandoned abroad, as defined in subsection 1, shall be effected upon an application from a person entitled to it."

(b) The 1985 Ordinance

47. Detailed rules were set out in the Cabinet's Ordinance of 16 September 1985 (as amended) on the offsetting of the value of real property abandoned abroad against the fees for perpetual use or against the price of a building plot and buildings situated thereon (*Rozporządzenie Rady Ministrów w sprawie zaliczania wartości mienia nieruchomego pozostawionego za granicą na poczet opłat za użytkowanie wieczyste lub na pokrycie ceny sprzedaży działki budowlanej i położonych na niej budynków*) ("the 1985 Ordinance").

Paragraph 3 of the 1985 Ordinance provided, in so far as relevant, as follows:

> "If the value of the property [abandoned abroad] exceeds the price of the real property that has been sold ..., the outstanding amount can be offset against the fee for the right of perpetual use, or against the price of an industrial or commercial plot of land and any commercial or small-business establishments, buildings designated for use as workshops or ateliers, holiday homes or garages situated thereon."

Paragraph 5 provided that a first-instance body of the local State administration that was competent to deal with town and country planning should issue the decisions on offsetting the value of property abandoned abroad. Paragraph 6 laid down detailed rules relating to the valuation of such property.

3. The Land Administration Act of 21 August 1997 and the related ordinance

(a) The Land Administration Act 1997

48. On 1 January 1998 the Land Administration Act 1985 was repealed and the Land Administration Act of 21 August 1997 (*Ustawa o gospodarce nieruchomościami*) ("the Land Administration Act 1997") entered into force.

The obligation to compensate repatriated persons was laid down in section 212,[5] which was phrased in similar terms to section 81 of the repealed 1985 Act. Section 212, in its relevant part, provided as follows:

> "1. Persons who, in connection with the war that began in 1939, abandoned real property in territories which at present do not belong to the Polish State and who, by virtue of international treaties concluded by the State, were to obtain equivalent compensation for the property abandoned abroad, shall have the value of the real property that has been abandoned offset against the fee for the right of perpetual use of land or against the price of a building plot and the State-owned buildings or premises situated thereon.
>
> 2. If the value of the real property that has been abandoned [abroad] exceeds the value of real property acquired by way of the equivalent compensation referred to in subsection 1, the outstanding amount may be offset against the fees for perpetual use, or against the price of a plot of land and a building designated for commercial purposes, or for use as an atelier, holiday home or garage, or of a plot of land designated for any of the above purposes.
>
> ...
>
> 4. The offsetting of the value of real property defined in subsection 1 shall be effected in favour of the owner of the property in question or a person designated by him who is his heir at law.
>
> 5. In the event of the death of the owner of real property abandoned abroad, the entitlements referred to in subsection 1 shall be conferred jointly on all his heirs or on the one [heir] designated by the entitled persons."

49. However, section 213 stated:

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5. That section was repealed on 30 January 2004, by virtue of section 14 of the December 2003 Act (see also paragraph 118 below).

> "Sections 204-212 of this Law shall not apply to property held by the State Treasury's Agricultural Property Resources, unless the provisions relating to the administration of those Resources state otherwise."

50. On 5 July 2002 the Ombudsman put the issue of the constitutionality of sections 212(1) and 213 of the Land Administration Act 1997 before the Constitutional Court (see also paragraph 28 above and paragraphs 55, 60 and 70-71 below).

(b) The 1998 Ordinance

51. The procedure for the implementation of section 212 of the Land Administration Act 1997 was laid down in the Cabinet's Ordinance of 13 January 1998 on the procedure for offsetting the value of real property abandoned abroad against the price of a title to real property or against the fees for perpetual use, and on the methods of assessing the value of such property (as amended) (*Rozporządzenie Rady Ministrów w sprawie sposobu zaliczania wartości nieruchomości pozostawionych za granicą na pokrycie ceny sprzedaży nieruchomości lub opłat za użytkowanie wieczyste oraz sposobu ustalania wartości tych nieruchomości)* ("the 1998 Ordinance").

52. Paragraph 4(1) of the 1998 Ordinance provided that the offsetting in question had to be effected on an application from the entitled person. The application had to be made to the mayor of the district in which the person resided. The mayor was to keep the register of claims submitted by repatriated persons.

Pursuant to paragraph 5(1), the mayor had, within 30 days, to issue a decision determining the value of the real property that had been abandoned abroad. Once such a decision was taken, the authorities responsible for handling claims submitted by repatriated persons could not refuse to effect the offsetting (paragraph 6).

In practice, the acquisition of title to compensatory property or of the right of perpetual use could be enforced only through participation in a competitive bid organised by the relevant public authority. Repatriated persons were not given priority in purchasing land from the State.

Transitional provisions, in particular paragraph 12 of the 1998 Ordinance, stated that proceedings that had been initiated under the previous rules and not terminated were to be governed by this new Ordinance.

4. The Local Self-Government Act of 10 May 1990

53. A very significant reduction in the State Treasury's land resources was brought about by legislative measures aimed at reforming the administrative structure of the State.

The Local Self-Government Act (introductory provisions) of 10 May 1990 (*Przepisy wprowadzające ustawę o samorządzie terytorialnym i ustawę o pracownikach samorządowych*) ("the 1990 Act"), which entered

into force on 27 May 1990, and other related statutes enacted at that time, re-established municipalities and transferred to them powers that had previously been exercised solely by the local State administration. That included the relinquishment of control over public land and the transfer of the ownership of most of the State Treasury's land to municipalities.

Pursuant to section 5(1) of the 1990 Act, ownership of land which had previously been held by the State Treasury and which was within the administrative territory of a municipality was transferred to the municipality.

As the Bug River claimants could only enforce their entitlement *vis-à-vis* the State property and not that of local self-government entities, this resulted in a shortage of land for satisfying those claims.

5. The Law of 19 October 1991 on the administration of the State Treasury's agricultural property (as amended)

54. Until 19 January 1994, repatriated persons could seek to obtain compensatory property from the State Treasury's Agricultural Property Resources (*Zasoby Własności Rolnej Skarbu Państwa*), under the provisions of the Law of 19 October 1991 on the administration of the State Treasury's agricultural property (*Ustawa o gospodarowaniu nieruchomościami rolnymi Skarbu Państwa*) ("the 1991 Act"). However, on that date, with the entry into force of the Law of 29 December 1993 on Amendments to the Law on the administration of the State Treasury's agricultural property and to other statutes (*Ustawa o zmianie ustawy o gospodarowaniu nieruchomościami rolnymi Skarbu Państwa oraz o zmianie niektórych ustaw*) ("the 1993 Amendment"), that possibility was excluded.

Following that reform, section 17 of the 1991 Act was phrased as follows:

> "As long as the forms of compensation for loss of property and the rules for the restitution of property to persons who, under section 81 of the Land Administration Act 1985, have applied for the offsetting of the value of real property abandoned abroad, in connection with the war that began in 1939, have not been determined in an autonomous statute, no such offsetting shall be effected against the price of property held by the State Treasury's Agricultural Property Resources."

55. On 5 July 2002 the Ombudsman put the issue of the constitutionality of section 17 of the 1991 Act before the Constitutional Court (see also paragraphs 28 and 50 above and paragraphs 60 and 70-71 below).

6. The Law of 10 June 1994 on the administration of real property taken over by the State Treasury from the Army of the Russian Federation

56. That law (*Ustawa o zagospodarowaniu nieruchomości Skarbu Państwa przejętych od wojsk Federacji Rosyjskiej)* ("the 1994 Act") entered into force on 23 July 1994. Pursuant to section 4 read in conjunction with

section 16, repatriated persons must be given priority in acquiring such property.

57. At the oral hearing, the Government admitted that, in reality, the property resources left by the Army of the Russian Federation had already been exhausted.

7. The Law of 30 May 1996 on the administration of certain portions of the State Treasury's property and of the Military Property Agency (as amended)

58. The Act (*Ustawa o gospodarowaniu niektórymi składnikami mienia Skarbu Państwa oraz o Agencji Mienia Wojskowego*) ("the 1996 Act"), which entered into force on 26 August 1996, deals with the administration of military property belonging to the State, including land, industrial property, hotels, dwellings and commercial premises. The Military Property Agency may organise competitive bids for the sale of real property.

59. Until 1 January 2002, under the general provisions of the 1996 Act, repatriated persons could seek to obtain compensatory property through participating in such bids. They did not have any priority over other bidders. However, with the entry into force of the Law of 21 December 2001 on Amendments to the Law on the organisation and work of the Cabinet and on the powers of ministers, and to the Law on the branches of the executive and to other statutes (*Ustawa o zmianie ustawy o organizacji i trybie pracy Rady Ministrów oraz o zakresie działania ministrów, ustawy o działach administracji rządowej oraz o zmianie niektórych ustaw*) ("the 2001 Amendment"), the situation changed. Since then, no property administered by the Agency could be designated for the purposes of providing compensation for property abandoned beyond the Bug River.

The amended section 31(4) of the 1996 Act read as follows:

> "Article 212 of the Land Administration Act of 21 August 1997 does not apply to property mentioned in section 1(1) of this law."

"Property" within the meaning of the latter provision is "the State Treasury's property that is administered or used by any entity subordinate to, or supervised by, the Minister for National Defence and which does not serve the purposes of the functioning of such an entity". That, for instance, includes land, commercial and industrial property, dwellings, sports facilities, etc.

60. On 5 July 2002 the Ombudsman put the issue of the constitutionality of section 31(4) before the Constitutional Court (see also paragraphs 28, 50 and 55 above and paragraphs 70-71 below).

61. However, before the entry into force of the 2001 Amendment, the authorities of the Military Property Agency issued an instruction on handling claims submitted by repatriated persons. The relevant part of that document read as follows:

"In connection with the entry into force on 15 September 2001 of the provisions of the Cabinet's Ordinance of 21 August 2001 amending the Ordinance on the procedure for the offsetting of the value of real property abandoned abroad against the price for a title to real property or against the fees for perpetual use, and on the methods of assessing the value of such property (Journal of Law No. 90, item 999), and with the questions submitted regarding the Agency's responsibility for the settlement of the claims of the Bug River repatriates, the following was agreed:

1. The Military Property Agency will not offset the value of property abandoned abroad against the price for a title to real property or against the fees for perpetual use.

2. Offers submitted by Bug River repatriates in competitive bids without the payment of a deposit should be disregarded. If, after the deposit has been paid, and the competitive bid has been successful, the bidder asks to offset the value of the land abandoned abroad against the price for the title or against the fees for perpetual use, it should be assumed that the bidder has withdrawn from the conclusion of the contract, and the deposit is forfeited in favour of the Agency.

3. In the event of the bidder in the above cases submitting a complaint concerning the competitive bid, the complaint should be immediately transmitted to the President of the Agency for settlement. Such complaints will not be taken into account.

4. In the event of the bidder bringing the case to court, the competitive bid process should continue, because the court summons will not delay the proceedings unless the court issues an interim order to protect the interests of the complainant.

5. In the event of sale without a competitive bid and in the event of sale by negotiation, offers by the Bug River repatriates should also be disregarded on account of the non-settlement of their claims by the Agency..."

8. The 1999 Bill

62. The drafting of the 1999 Bill on the restitution of immovable property and certain kinds of movable property taken from natural persons by the State or by the Warsaw Municipality, and on compensation (*Projekt ustawy o reprywatyzacji nieruchomości i niektórych ruchomości osób fizycznych przejętych przez Państwo lub gminę miasta stołecznego Warszawy oraz o rekompensatach*) ("the Restitution Bill 1999") was completed in March 1999.

63. The bill was introduced in Parliament by the Government in September 1999. However, it provoked a mounting conflict among all existing political factions before it was finally rejected, after a legislative process that lasted nearly one and a half years.

It provided that all persons whose property had been taken over by the State by virtue of certain statutes enacted under the totalitarian regime were to receive 50% of the actual value of their property, either in the form of *restitutio in integrum* or in the form of compensation in securities. Under section 2(3) read in conjunction with section 8, repatriated persons were to receive securities amounting to 50% of the value of their property,

calculated according to the detailed rules applying to all the persons concerned.

64. Following a heated debate involving all sections of society, the media and all the political parties and factions, the relevant Act of Parliament was transmitted for the President of Poland's signature in March 2001.

The President, exercising his right of veto, refused to sign it.

65. The President transmitted the vetoed Act to Parliament on 22 March 2001. The Special Parliamentary Commission for Adopting the Bill on Restitution 1999 moved for its re-adoption.

Ultimately, the government coalition failed to gather the three-fifths majority necessary to override the President's veto, and the Bill was rejected by Parliament on 25 May 2001.

9. The right of perpetual use of land

66. The right of perpetual use is defined in Articles 232 et seq. of the Civil Code (*Kodeks Cywilny*). It is an inheritable and transferable right *in rem* which, for 99 years, gives a person the full benefit and enjoyment of property rights attaching to land owned by the State Treasury or municipality. It has to be registered in the court land register in the same way as ownership. The transfer of that right, like the transfer of ownership, can be effected only in the form of a notarised deed, on pain of it being void *ab initio*. The "perpetual user" (*użytkownik wieczysty*) is obliged to pay the State Treasury (or the municipality, as the case may be) an annual fee which corresponds to a certain percentage of the value of the land in question.

10. Concept of entitlement to compensation for property abandoned in the territories beyond the Bug River, as defined by the Supreme Court

(a) Resolution of 30 May 1990

67. In its resolution of 30 May 1990 (no. III CZP 1/90), adopted by a bench of seven judges, the Supreme Court (*Sąd Najwyższy*) dealt with the question whether persons repatriated under the Pact of 25 March 1957 between the Government of the Polish People's Republic and the Government of the USSR, on the timing and procedure for the further repatriation from the USSR of persons of Polish nationality, were entitled to the deduction referred to in section 88(1) of the Land Administration Act 1985[6] (continued by section 212(1) of the Land Administration Act 1997). The answer was in the affirmative.

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6. In the consolidated text of the Land Administration Act 1985 (cited in paragraph 46 above), that provision became section 81 § 1.

In that context, the Supreme Court referred to the Republican Agreements of 1944 and held, *inter alia,* the following:

> "... by virtue of the Republican Agreements of 1944, the Polish State undertook to pay equivalent compensation for [the abandoned] property. Thus, in this way, the provisions of those agreements were incorporated into Polish law and, in respect of Polish citizens, may constitute a basis for general rights. ...
>
> Section 88(1) ..., on account of its specific wording, causes serious difficulties in construction. Instead of determining directly subjective and objective pre-conditions for the right to equivalent compensation, the legislature referred to the provisions of international treaties. That reference constitutes the incorporation of the provisions of those agreements into Polish law. Yet that section does not list the treaties to which it refers. Thus the possible instruments are:
>
> (a) the Republican Agreements of 9 and 22 September 1944;
>
> ...
>
> (c) the Pact of 25 March 1957 between the Government of the Polish People's Republic and the Government of the USSR on the timing and procedure for further repatriation from the USSR of persons of Polish nationality.
>
> ...
>
> Among the general principles laid down in the 1944 agreements only one, fundamental principle, enunciated in Article 3 § 6 of each of those Agreements – which provided that the Polish State should return the value of [abandoned property] to persons evacuated under those agreements – was incorporated into domestic law. Not from those other principles, but only from this one, does the general right to equivalent compensation derive."

(b) Resolution of 27 March 2001

68. In its resolution of 27 March 2001 (no. CZP 3/2001), the Supreme Court, sitting as a bench of three judges, dealt with the question whether an entitlement to compensation for property abandoned in the territories beyond the Bug River could be considered a debt chargeable to the State Treasury, and whether a person thus entitled could transfer his entitlement by way of a contribution in kind to pay for shares in a joint-stock company.

According to the Supreme Court, the entitlement in question is for all practical purposes a debt chargeable to the State Treasury, and undoubtedly has a pecuniary and inheritable and, to some extent, transferable character, as it can only be transferred between persons expressly mentioned in section 212(4) of the Land Administration Act 1997, namely the owners of property abandoned in the territories beyond the Bug River or their heirs.

Consequently, that entitlement cannot be transferred to a legal person who was not listed in section 212(4) and who, under Polish law, is not capable of inheriting. It has also been stressed that in the light of the

relevant practice and legal theory, a contribution in kind must be fully transferable, must have a precise accounting value and must be able to be entered as a capital asset on a balance sheet. Accordingly, the relevant entitlement does not satisfy the requirements for a contribution in kind.

11. Actions taken by the Ombudsman between January and July 2002

69. In a letter of 9 January 2002, the Ombudsman reminded the Prime Minister that he had already asked his predecessor in office whether any legislative process would be initiated in order to amend legislation and to increase the amount of land held by the State Treasury with a view to providing compensatory property for repatriated persons. He also referred to the practice of refusing to make deductions under section 212 of the Land Administration Act 1997. That letter, in its relevant part, read as follows:

> "On 30 May 2001 I wrote to the former Prime Minister, Prof. Jerzy Buzek, and raised my objections to the infringement by district mayors' offices (*starostwa powiatowe*) of certain rights of people repatriated from the 'territories beyond the Bug River'. Apart from bringing your attention to this problem, I also requested information on whether specific legislative work had been undertaken in order to increase the stock of real property designated for settling the claims of this quite considerable group of citizens. ...
>
> Paragraph 6 of the 1998 Ordinance makes very clear that, apart from the district mayors, other entities that administer State property on the basis of separate regulations are also to administer immovable property belonging to the State Treasury in order to ensure more effective realisation of compensation in kind for 'property beyond the Bug River'. However, it turns out that, following the amendments to the 1998 Ordinance, the necessary amendments to legislation, that would have increased the stock of property designated for settling the claims of people repatriated from the 'territories beyond the Bug River', have not been introduced.
>
> This state of affairs is confirmed by the letters I have received from entitled persons who claim, for instance, that the Military Property Agency still refuses to offset the value of their property abandoned abroad against the price of property being sold by the Agency or against the fee for the right of perpetual use. The situation is similar when people repatriated from the 'territories beyond the Bug River' wish to participate in bids organised by the State Agricultural Property Agency. In all the cases referred to above, each Agency, as grounds for denying entitled persons the right to participate in a bid, points to the absence of relevant legal regulations that would allow it to offset the value of property abandoned abroad against the price of property being sold by a given Agency. ...
>
> With regard to the above, I cordially ask you to inform me whether you are currently planning to amend the relevant legislation in order to increase the number of entities administering public property that are obliged to respect the right of people repatriated from the "territories beyond the Bug River" to compensation in kind. ..."

The Prime Minister replied that for the time being the authorities did not envisage any specific measures.

70. On 5 July 2002 the Ombudsman made an application to the Constitutional Court, asking that:

> "1. Section 212(1) of the Land Administration Act 1997, in so far as it excludes the possibility of offsetting the value of property abandoned in connection with the war that began in 1939 against the sale price of agricultural property owned by the State Treasury;
>
> 2. Section 213 of the Land Administration Act 1997, in so far as it excludes the application of Section 212 of that Act to property held by the State Treasury's Agricultural Property Resources;
>
> 3. Section 17 of the [1991 Act];
>
> 4. Section 31(4) of the [1996 Act];
>
> be declared incompatible with the principle of maintaining citizens' confidence in the State and the law made by it, emerging from Article 2 of the Constitution, as well as with Article 64 §§ 1 and 2, read in conjunction with Article 31 § 3 of the Constitution."

71. In the reasoning for his application, the Ombudsman invited the Constitutional Court to qualify the entitlement under section 212(1) of the Land Administration Act 1997 as, *inter alia*, an "opportunity or hope [of acquiring] ownership title to specific properties", a "right of a proprietorial nature secured by Article 64 of the Constitution" and a "right of a pecuniary nature, which also has the character of a debt".

12. Relevant constitutional provisions[7]

72. Article 2 of the Constitution reads as follows:

> "The Republic of Poland shall be a democratic State ruled by law and implementing the principles of social justice."

73. Article 31 § 3 of the Constitution, which lays down a general prohibition on disproportionate limitations on constitutional rights and freedoms (the principle of proportionality), provides:

> "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic State for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights."

74. Article 64 of the Constitution lays down the principle of protection of property rights. It states, in so far as relevant:

> "1. Everyone shall have the right to ownership, other property rights and the right of succession.

7. The Court's translation is based on the text of the official translation made for the research department of the *Sejm* (lower house of the Polish Parliament) Chancellery.

2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession. ...”

75. Article 77 § 1 refers to the State’s civil liability for a constitutional tort in the following way:

“Everyone shall have the right to compensation for any harm done to him by any act of a public authority in breach of the law.”

76. Article 87 lists the sources of law. That provision reads, in so far as relevant, as follows:

“1. The sources of the universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations. ...”

77. Article 91 of the Constitution, in its relevant part, states:

“1. After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.

2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.”

78. Article 188 of the Constitution determines the scope of the Constitutional Court’s jurisdiction. Article 191 lists the authorities and organisations entitled to apply to the Constitutional Court for a ruling on the conformity of a piece of legislation, or particular legislative provisions, to the Constitution.

Article 188 provides, in so far as relevant, as follows:

“The Constitutional Court shall adjudicate regarding the following matters:

(1) the conformity of statutes and international agreements to the Constitution;

...

(3) the conformity of legal provisions issued by central State authorities to the Constitution, ratified international agreements and statutes; ...”

Article 191, in its relevant part, reads as follows:

“1. The following may make an application to the Constitutional Court regarding matters specified in Article 188:

1) the President of the Republic, the Speaker of the *Sejm*, the Speaker of the Senate, the Prime Minister, 50 deputies, 30 senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the ... Prosecutor General, the President of the Supreme Chamber of Audit and the Ombudsman; ...”

13. Developments following the Court's decision of 19 December 2002 on the admissibility of the application

(a) The Constitutional Court's judgment of 19 December 2002

79. The Constitutional Court heard the Ombudsman's application on 19 December 2002 (see also paragraphs 70-71 above). The parties to the proceedings were the Prime Minister, representing the Government, the Prosecutor General (*Prokurator Generalny*) and the *Sejm*, represented by its Speaker (*Marszałek*). The All-Polish Association of Borderland Creditors of the State Treasury (*Ogólnopolskie Stowarzyszenie Kresowian Wierzycieli Skarbu Państwa*) submitted pleadings which addressed the manner in which the authorities had, or – rather – in their view, had not satisfied the entitlements under section 212 of the Land Administration Act 1997. The Constitutional Court admitted their pleading and considered it an opinion filed by a non-governmental organisation.

80. The Constitutional Court held that sections 212(2) and 213 of the Land Administration Act 1997, in so far as they excluded the possibility of offsetting the value of property abandoned abroad against the sale price of State agricultural property, were incompatible with the constitutional principles set out in Article 2 (principles of the rule of law and maintaining citizens' confidence in the State and the law made by it) and Article 64 §§ 1 and 2 (principle of protection of property rights), read in conjunction with Article 31 § 3 (prohibition of disproportionate limitations on constitutional rights and freedoms) of the Constitution. It went on to hold that section 17 of the 1993 Amendment and section 31(4) of the 1996 Act were, in their entirety, incompatible with the above-mentioned principles.

81. In Poland, the Constitutional Court's judgment was considered a landmark ruling on the Bug River claims, encompassing a detailed historical and legal analysis of that issue. Referring to the historical background of the case, the Constitutional Court stated, *inter alia*:

> "The first issue to be dealt with concerns the empowerment of the [communist authorities that concluded the Republican Agreements] to enter into international agreements. There is no doubt that the Polish Committee of National Liberation cannot be considered a constitutional entity of a sovereign State, with corresponding democratic legitimacy and capable of taking sovereign decisions in the name of the State.
>
> The scope of compensation set out for repatriated persons in the Republican Agreements was in no way equivalent or proportionate to the scope of compensation that the States with which these Agreements were concluded took upon themselves as an obligation. In most cases the repatriation was *de facto* in one direction, as most evacuees were former Polish citizens from the territories lost by the Polish Republic as a result of the Second World War. As a consequence, despite a considerably greater material burden of resettlement and repatriation, Poland, by virtue of the 1952 Pact, was obliged to pay the USSR the substantial sum of 76 million roubles (Article 2 of the 1952 Pact). As in the case of the change in Poland's borders, this type of

obligation can certainly not be treated as a sovereign decision by the Polish State authorities.

It should be mentioned at this point that similar burdens in connection with the consequences of the war were also borne by other States, but in no case, with the exception of Germany, was the weight of the burden comparable to the one the Polish State had to bear. It is worth recalling that meeting these obligations was further complicated by the considerable material losses suffered during the war and immediately afterwards. Under these conditions, it was evident that the process of affording satisfaction to the repatriated persons, as set forth in the agreements with the USSR and the Soviet Republics concerned, had to be moderate and spread over time. This also means that it is necessary to take into consideration the difficult financial situation of the State and, above all, the situation of groups of citizens other than the Bug River repatriates. Undoubtedly, the consequences of the war were felt by Polish society as a whole. In this connection, it cannot be argued that, for example, compensation that is incomplete, subject to time limits or taking a specific form is automatically in contradiction with the principle of justice. This view also applies to mechanisms providing only partial compensation for losses suffered as a result of acts of war and territorial changes."

82. The judgment, which contained extensive reasons, was based on the following main grounds:

"(1) The Republican Agreements gave rise to a specific type of State obligation to award compensation, through appropriate domestic law, to persons who had lost property in connection with the delimitation of Poland's borders after the Second World War. The Republican Agreements did not constitute a direct basis for repatriates to lodge compensation claims, as the legislature was left free to determine how the compensation machinery would be set up. The State's responsibilities in this regard, as undertaken in successive legal regulations, are matters left for an independent decision by the legislature.

(2) The right to credit, which provides for the possibility of offsetting the value of property lost by Polish citizens after being abandoned outside the present territory of the State, against the sale price of immovable property or against fees for the right of perpetual use, constitutes a specific surrogate for the lost property rights, which is not solely a legal expectation of compensation but rather a property right recognised in the Republic's legal order as part of its public law. As such, this right enjoys the constitutionally guaranteed protection of property rights (Article 64 §§ 1 and 2 of the Constitution).

(3) The creation of legal frameworks for given institutions cannot be entirely abstracted from the factual circumstances and the economic realities in which the legal institutions thus established are to function. As a matter of principle, therefore, the legislature may not narrow down the possibility of benefiting from a general right granted to an individual so severely that the ultimate result is essentially a *nudum ius*, so that the property becomes an immaterial right devoid of any pecuniary value in practice. In the case of the so-called right to credit, its nominal value does not, however, correspond to its actual value. The depreciation of the value of this right has occurred as a result of the legislature excluding specific categories of immovable property, which has fundamentally limited the possibility of enjoying this right.

(4) All property rights within the legal order are subject to constitutional protection. An interference with the sphere of an entity's legally protected property interests, when it occurs without the formal removal of the entity's legal title, amounts to *de facto* expropriation, within the meaning adopted in the case-law of the European Court of Human Rights. Consequently, the assessment of provisions that eliminate the possibility of benefiting from a right in practice leads to the conclusion that they are incompatible with Article 64 §§ 1 and 2 of the Constitution.

(5) Legal solutions limiting the possibility of benefiting from the right to credit, within the framework determined by the law, and resulting in those rights being stripped of their substance, cannot be considered necessary in a democratic State governed by the rule of law, and are not functionally related to any of the values set out in Article 31 § 3 [of the Constitution] (the principle of proportionality).

(6) The requirement of respect for the principle of maintaining citizens' confidence in the State and the law made by it, ensuing from the principle of the rule of law (Article 2 of the Constitution), entails a prohibition on enacting laws that would create illusory legal institutions. This principle therefore requires that the obstacles which prevent [persons] from benefiting from the right to credit be eliminated from the legal system. From the point of view of the confidence principle, in the case of the right to credit it is the means of protecting this right that is subject to assessment, rather than its substance. The lack of opportunity to benefit from this right, within the framework set out by the legislature, shows that an illusory legal institution has been created, and thereby constitutes a violation of Article 2 of the Constitution."

83. The Constitutional Court coined a new term for the entitlement under section 212 of the Land Administration Act 1997, calling it the "right to credit" (*"prawo zaliczania"*). That term has already entered legal usage and has frequently been referred to in many subsequent judicial decisions and various legal texts.

The court considered that even though that right originated in the provisions of the Republican Agreements, section 212 constituted the actual legal basis for it. In that regard, it held that those agreements did not constitute part of the domestic legal order since, even though they had been ratified, they had not been published in the Journal of Laws and could not be regarded as a source of law within the meaning of Article 91 of the Constitution.

The Constitutional Court defined the right to credit as follows:

"The right to credit has a special nature as an independent property right. In the opinion of the Constitutional Court, it constitutes a specific surrogate for property rights rather than a mere expectation of the right to compensation, and for this reason it should be recognised as enjoying the constitutionally guaranteed protection of property rights (Article 64 §§ 1 and 2). In the assessment of the Constitutional Court, it is justified to hold that the right to credit is a special property right of a public law nature. It is not a proper ownership right, but neither can it be reduced to the category of a potential right in the sense of a maximum formulated expectation [*ekspektatywa maksymalnie ukształtowana*]. Even though materialisation of the right depends on action by the entitled person, it would not be justified to conclude that this right does not exist until the time of its realisation resulting from winning a bid, in which the

entitled person may offset the value of abandoned property against the value of acquired property or against fees for perpetual use. ...

There can be no doubt that the right to credit belongs to the category of rights subject to protection under Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms."

84. The Constitutional Court further examined the case under Article 64 of the Constitution, laying down the principle of the protection of property rights. It described the State's conduct in the following way:

"In the opinion of the Constitutional Court, there is no doubt that, in these circumstances, all laws restricting the repatriates' access to acquisition by means of bids for certain categories of State Treasury property have a direct impact on the possibility of realising the right to credit.

In the present legal circumstances, one can identify a peculiar functional paradox in that a general right laid down in the legislation in force cannot be materialised in practice. Consequently the right to credit is becoming more and more of an 'empty obligation' and is turning into a *nudum ius*. Maintenance of the present trend, in which various types of State Treasury land are excluded from the application of the right to credit will mean that there is no hope of this right materialising in the future. This state of affairs is already resulting in an unfavourable and paradoxical situation: entitled persons who have been waiting for years to be able to participate in competitive bids and, subsequently, in the course of such bids, being aware of how difficult it is to realise their right to credit, "push up" the price of the property to a level considerably exceeding its market value.

In the present circumstances, in order to assess the possibility of taking advantage of the right to credit, one must take into consideration not only the limitation of the availability of certain types of property, with varying degrees of justification, but also the actual opportunities for enforcement of this right and its economic value.

The statutes restricting repatriates' access to State Treasury property essentially result in *de facto* expropriation, whereby it is impossible to enjoy the right to credit either at present or in the future, in the sense in which this concept is used in the European Court of Human Rights' case-law cited above. ...

The unconstitutionality of the limitations set out in section 212(1) and section 213 of the Land Administration Act 1997, in section 17 of the 1993 Amendment, and in section 31(4) of the 1996 Act, consists precisely in the fact that the general right (the right to credit) was formulated in such a way that it could not be materialised in the existing legal environment, so that it has become illusory and a mere sham. Moreover, it is not just a question of temporary impossibility, conditioned by certain factual and legal circumstances, but rather a question of the creation of legal constructions that exclude this possibility *ex thesi*. In the case at hand, assessment of the possibility of this right materialising is all the more essential in that the legislature, in accepting the principle of the State's obligations towards repatriates on the basis of the international agreements, failed at the same time to establish any alternative compensation mechanism. For several decades, the right to credit has been the only available *de lege lata* solution allowing for compensation of the material losses suffered by Polish citizens as a result of territorial changes in the 1940s. ..."

85. Assessing the situation from the point of view of Article 31 § 3 of the Constitution, namely the admissibility of the restrictions imposed by the authorities on the exercise of the right to credit, the Constitutional Court observed, *inter alia*:

> "[T]he protection of property rights does not mean that it is completely impossible to interfere with their substance, or that they are absolutely inviolable... What is necessary is to remain within the constitutional framework which sets out the boundaries for constitutional protection of a given property right [references to the relevant judgments of the Constitutional Court]. Such limitations are introduced by the Constitution in Article 31 § 3. In the Constitutional Court's case-law it has been indicated on many occasions that this provision provides tests for determining the conditions for the admissibility of limitations on the enjoyment of constitutional rights and freedoms. ...
>
> In this context, it is important to note the Constitutional Court's position expressed in the judgment of 12 January 2000, [references], according to which the scope of such limitations must not cause annihilation of the fundamental components of the general right, resulting in its being 'stripped' of its real substance and turned it into a legal fiction. Such a situation leads to a constitutionally unacceptable violation of the fundamental substance or the essence of that right. ...
>
> In the light of the foregoing considerations, it must be recognised that all the provisions referred to in the Ombudsman's application, which limit the actual scope of property in respect of which the procedure set out in section 212 of the Land Administration Act 1997 can be applied, are incompatible with Article 64 §§ 1 and 2 read in conjunction with Article 31 § 3 of the Constitution.
>
> Such limitations are not justified in a democratic State governed by the rule of law. The aims set out in section 17 of the 1993 Amendment, and the grounds provided for limiting the right to credit in the case of property entrusted to the Military Property Agency, namely the need for funds to modernise the armed forces, must not be pursued in a manner that deprives only a specific group of persons of the possibility of realising property rights vested in them.
>
> In the case of agricultural property administered by the State Treasury Agricultural Property Agency, such exclusion cannot be tolerated without the simultaneous establishment of universal solutions that would open up a way to solve property problems relating to the regulation of ownership relations.
>
> In the case of exclusions provided for in the 1996 Act, the aim of generating resources for the modernisation and maintenance of military institutions does not justify discrimination against persons entitled to credit for the value of property abandoned outside the present territory of Poland, purely because those persons may not be able to pay the purchase price in cash. This type of solution can never be recognised as necessary in a democratic State governed by the rule of law. Neither is there any functional connection between that limitation and the pursuance of the aims referred to in Article 31 § 3 of the Constitution. The need to introduce limitations could arise if the realisation of the right to credit were to make it impossible to satisfy the legally protected interests of other persons. In particular, the existence of the right to credit does not lead to a situation in which the rights of other persons might be

violated (for example, the rights of former owners who have been given priority or persons with a right of pre-emption).

At the same time, it should be stressed that the unconstitutionality of these provisions is not connected with a legislative omission consisting in the lack of certain regulations regarding compensation for the Bug River repatriates. Rather, it arises from the defective legal formulation of the provisions governing the question of compensation, which causes an inadmissible systemic dysfunction. It must be stressed that in creating a general property right, the State may not at the same time arbitrarily introduce, by taking advantage of the attributes of State power, such limitations which, by excluding substantial stocks of property from the compensation procedure, *de facto* paralyse the possibility for beneficiaries to derive any economic advantage from these rights."

86. Lastly, the Constitutional Court referred to the principle of the rule of law, set out in Article 2 of the Constitution. It held, *inter alia*, as follows:

"This principle means, first and foremost, the need to protect and respect properly acquired rights and to protect interests that have not yet been vested... but it also encompasses a prohibition against the legislature creating legal constructions that cannot be implemented and constitute an illusion of law, and hence a pretence of protecting those property interests that are functionally connected with the substance of the established general right.

As a matter of principle, the legislature may therefore not narrow the possibility of realising a general right formally vested in an individual to such an extent as to effectively create a *nudum ius*, i.e. a property right that consequently becomes devoid of substance and has no pecuniary value in practice. For it must be stressed yet again that in the case of the so-called 'right to credit,' its nominal value does not correspond to its real value. This depreciation occurs precisely because the possibility of realising this right has been limited to a significant extent through legislation excluding certain categories of property. ...

The imperative of adherence to the principle of maintaining confidence in the State, which encompasses, as indicated above, a prohibition against creating law that introduces fictional legal institutions, requires the elimination of legal obstacles that make it impossible to enjoy the right to credit. The Constitutional Court cannot assess to what extent a properly functioning right to credit could repair the damage caused by the loss of 'property beyond the Bug River'. The resolution of this problem, which is part of the general issue of redress for the losses sustained by particular groups of the population as a result of the country's historical territorial changes and changes in ownership introduced several decades ago, lies within the competence of the legislature. ...

Essentially, then, the important point here is the implementation of the postulate that legal regulations should be formulated in such a way as to secure to the individual not only legal certainty, but also complete foreseeability as to the extent to which their implementation will affect the individual's legal position in particular legal situations. The compensation mechanism introduced for persons who were deprived of their property as a result of territorial changes resulted in the development of legitimate expectations, on the part of those concerned, that this problem would be definitively solved in the future, with due consideration for the interests of all persons in whom this right to credit was vested. The opinion that there has been a violation of the

principle of maintaining confidence in the State and the law made by it, is further strengthened by the lack of alternative forms of compensation in the legal system. ...

Elimination from the legal system of the limitations introduced by sections 212 and 213 of the Land Administration Act 1997, and by the other individual provisions, would make it possible for the remainder of the credit mechanism to become a real, and not, as hitherto, a fictional instrument of compensation. This Court has not assessed the advisability of selection by the legislature of specific means of satisfying the repatriates' property interests, since the determination of concrete institutional solutions is within the legislature's independent sphere of competence. Therefore, it is the compensation machinery already set out in legislation that has been subjected to assessment from the point of view of constitutional guarantees.

It should be pointed out in passing that, in addition to the compensation procedure directly established by section 212 of the Land Administration Act, the legislature recently introduced a new possibility for the realisation of the right to credit in the Law of 5 December 2002 on Amendments to the Law on the exercise of the State Treasury's powers, the Law on commercialisation and privatisation of State enterprises and other statutes, which enters into force on 14 January 2003, and which adds a third subsection to section 53 of the Law of 30 August 1996 on the commercialisation and privatisation of State enterprises. On the basis of this provision, the persons referred to in section 212 of the Land Administration Act 1997 have been given the possibility of crediting the value of abandoned property against the sale price of a privatised enterprise, corresponding to the value of rights to certain items of immovable property included among the assets of the enterprise, or against the sale price of such rights not included among the assets. This is a new form of the right to credit and it is to be expected that it will broaden the possibility of obtaining actual compensation for lost property. However, the new regulation does not in principle change the assessment of the right to credit, as formed by the provisions contested in this case. For the existence of a new form of the right to credit... does not free the legislature from ensuring that the compensation machinery, as examined in the present case, is designed in such a way as to be a genuine instrument for the protection of the individual's property rights and not just a legal fiction.

The elimination of the limitations contained in the contested provisions will certainly provide new and more favourable conditions for enjoyment of the right to credit, and hence a chance for the genuine functioning of the compensation mechanism established by legislation."

87. On 8 January 2003 the Constitutional Court's judgment was published in the Journal of Laws. It took effect on that day.

(b) The December 2002 Amendment

88. On 14 January 2003 the Law of 5 December 2002 on amendments to the Law on the exercise of the State Treasury's powers, the Law on commercialisation and privatisation of State enterprises and other statutes ("the December 2002 Amendment") (*Ustawa o zmianie ustawy o zasadach wykonywania uprawnień przysługujacych Skarbowi Państwa, ustawy o komercjalizacji i prywatyzacji przedsiębiorstw państwowych oraz niektórych innych ustaw*) entered into force.

It contains two provisions that are relevant in the context of the Bug River claims.

89. Under the first of those provisions, section 2(16), the following amendment to section 53 of the Law on commercialisation and privatisation was made:

> "Persons referred to in section 212 of the [Land Administration Act 1997] shall have the value of property abandoned in the territories not belonging to the present Republic of Poland offset against the following charges:
>
> (1) part of the sale price of a [State enterprise], corresponding to the value of that enterprise's rights [*in rem*] to land and a building designated for commercial or service purposes, or for use as an atelier, or for artistic activities, or for use as a holiday home or garage or of a plot of land designated for any such purposes;
>
> (2) the sale price of the rights referred to in subsection 2 which have been sold as assets not belonging to the enterprise and have been taken over by the State after a contract for the lease of the enterprise expired or was discharged."

(c) The January 2003 Ordinance

90. On 7 February 2003 the Cabinet's Ordinance of 14 January 2003 on amendments to the ordinance on the detailed rules and procedure for conducting auctions for the sale of property owned by the State Treasury or municipality (*Rozporządzenie Rady Ministrów zmieniające rozporządzenie w sprawie określenia szczegółowych zasad i trybu przeprowadzania przetargów na zbycie nieruchomości stanowiących własność Skarbu Państwa lub własność gminy*) ("the January 2003 Ordinance") entered into force. Paragraph 5 of the amended ordinance reads as follows:

> "1. In auctions organised by a mayor exercising functions within the domain of public administration, persons having rights referred to in section 212 of the [Land Administration Act 1997] shall be exempted from payment of security if they make a written declaration to the effect that, in the event of their desisting from entering into a contract [of sale], they will pay a sum equal to the security required from other bidders.
>
> 2. Instead of a document confirming that they have paid security, persons referred to in subparagraph 1 shall submit to the mayor the original of the certificate or decision confirming that they have the right referred to in section 212 (1) and (2).
>
> 3. In determining the conditions for the sale of property at auctions referred to in subparagraph 1, payment of the [sale price] in the manner prescribed in section 212 may not be excluded."

(d) The April 2003 Act

91. On 16 July 2003 the Agricultural System Act (Law of 11 April 2003) (*Ustawa o kształtowaniu ustroju rolnego*) entered into force ("the April 2003 Act").

Under the provisions of this Act, the State Treasury's Agricultural Property Agency was transformed into the Agricultural Property Agency (see also paragraphs 31-32 above) which, pursuant to section 18, became its legal successor. The latter agency took over all property belonging to the former. The stock of property forming the State Treasury's Agricultural Property Resources was entrusted to the new agency. Consequently, that body is now responsible for the administration and distribution of State agricultural property and for holding auctions for the sale of that property under the provisions of the relevant ordinance (see paragraph 92 below).

(e) The August 2003 Ordinance

92. The Ordinance of the Minister for the Treasury of 1 August 2003 on detailed rules relating to the sale of property from the Resources of the State Treasury's Agricultural Property and its parts, conditions for payment of the price in instalments and land valuation rates (*Rozporządzenie Ministra Skarbu Państwa w sprawie szczegółowego trybu sprzedaży nieruchomości Zasobu Własności Rolnej Skarbu Państwa i ich częsci składowych, warunków rozkładania ceny sprzedaży na raty oraz stawek szacunkowych gruntów*) ("the August 2003 Ordinance") entered into force on 11 August 2003.

Under paragraph 8 of the August 2003 Ordinance, repatriated persons are exempted from the obligation to pay a security to guarantee payment of the sale price before an auction for the sale of State property.

This paragraph provides, in so far as relevant, as follows:

> "1. Natural persons who, under other statutes, are entitled to offset the value of property abandoned beyond the present borders of the Polish State, in connection with the war that began in 1939, against the price, or fee for perpetual use, of the State Treasury's property [which they wish to purchase] shall be exempted from payment of a security if they make a written declaration to the effect that, in the event that they desist from entering into a contract of sale, they will pay a sum equal to the security required from other bidders.
>
> 2. Instead of a document confirming that they have paid a security, the persons referred to in subsection 1 shall submit to the Auctions Board the original of the certificate or decision confirming their entitlement to offset the value of the abandoned property against the sale price.
>
> 3. In determining the conditions for the sale of property [–] in respect of which the right to credit referred to in subsection 1 applies [–] at an auction referred to in paragraph 6 [i.e. any auction organised under the provisions of the 1991 Act], payment of the sale price by means of such credit may not be excluded."

(f) The Cracow Regional Court's judgments of 2 and 7 April 2003

93. At the beginning of 2003 several repatriated persons (or their legal successors) sued the State Treasury before the courts, seeking damages under the law of tort and under the provisions of the relevant Republican

Agreements. Some of those claims were dealt with by the Cracow Regional Court (*Sąd Okręgowy*).

The claims were lodged despite the unfavourable outcome of similar cases in which claims for damages had been dismissed as having no legal basis in Polish law (see also paragraph 107 below).

94. The first group of plaintiffs alleged tortious conduct on the part of the State in that it had made it impossible for them to exercise the right to credit and in that it had created a defective, illusory and ineffectual mechanism for satisfying their entitlements under section 212 of the Land Administration Act 1997. They relied on the provisions of the Republican Agreements as a legal basis for pecuniary compensation and asserted that the authorities had committed a constitutional tort within the meaning of Article 77 of the Constitution.

95. The second group alleged that the State had committed a constitutional tort by, first, making it permanently impossible – through the enactment of successive laws and the adoption of defective practices – for them to satisfy their claims and, secondly, failing to publish the Republican Agreements in the Journal of Laws, thereby preventing the plaintiffs from relying on them in support of their civil claims before the courts.

All the plaintiffs sought damages in amounts equal to the value of the property which they, or their families, had had to abandon beyond the Bug River.

The first two landmark judgments were delivered on 2 and 7 April 2003.

(i) Judgment of 2 April 2003

96. On 2 April 2003 the Cracow Regional Court, after having heard an action brought by three individuals, B.G., J.K. and B.K., against the State Treasury for damages arising from the State's failure to satisfy their entitlement to compensatory property under section 212 of the Land Administration Act 1997, awarded the damages sought by them in their entirety.

97. The court established that from 1991 to 1998 the Cracow District Office[8] had organised 22 auctions for the sale of property in which Bug River repatriates could participate. In certain auctions only those persons who had made applications for compensation before 26 May 1990 had been able to make bids. In 2002 the mayor of the Cracow District had begun to hold auctions, but throughout that year there had been only 2 such auctions.

The Regional Court described the situation in relation to the implementation of the plaintiffs' right to credit in the following way:

> "... the organisation of these auctions either excluded persons from beyond the Bug River entirely, or limited participation in them to persons who were resident in the

8. The district in which the applicant's claim was registered at that time; see also paragraphs 22 and 26 above.

district where they were being held, or the property offered for sale could not satisfy the plaintiffs' claims, given the value of their entitlements. Also, there were situations where the State Treasury's Agricultural Property Agency organised auctions from which, under the relevant provisions, persons from beyond the Bug River were excluded.

Particular attention should, however, be given to situations where auctions did not exclude persons from beyond the Bug River. These occurred extremely rarely. In such situations a large group of persons who had entitlements to compensation would participate. These people, concerned that, owing to the small stock of property set aside to satisfy their claims, they would not be able to obtain any satisfaction, would increase their bids for the property in such a way that the price of the property for sale was several times higher than its market value. It was symptomatic that only persons from beyond the Bug River took part in these auctions, although the organisers also permitted the participation of persons who were able to buy the property in cash. In one of the auctions a property whose reserve price, assessed in line with market valuations, was 115,000 Polish zlotys, was sold for 700,000 zlotys. In another auction a plot with a building that had been used as a dissecting room, and which had a reserve price of just over 200,000 Polish zlotys, was sold for 1,500,000 Polish zlotys. In the context of the above situation, it suffices to say that, within the area of activity of the Cracow Branch of the All-Polish Association of Borderland Creditors of the State Treasury, i.e. within the territory of the former Cracow Province and part of the Nowy Sącz Province, only about 20 entitled persons out of a total of some 300 having certificates or administrative decisions, took advantage of their right to credit and, of these, nobody obtained full compensation for their entitlement. It should be added that, within the area of activity of the Cracow Branch of the All-Polish Association of Borderland Creditors of the State Treasury, 3,600 persons tried to obtain certificates confirming their right to obtain an equivalent to the abandoned property."

The court further found that the plaintiffs, or their predecessors, had earlier refused to accept two offers of compensatory property. It considered the refusal justified since the condition for obtaining the first property, a plot of land, had been to construct a house on it within 4 years, whereas the plaintiffs had not had the means for such an investment. The second offer had been to choose one of three tenement houses in another town, but those houses had been in a catastrophic state.

98. The Regional Court shared the Constitutional Court's opinion that the Republican Agreements did not constitute part of the domestic legal order. Consequently, they could not form a legal basis for raising a civil claim for damages before the court. It found, however, that the conduct of the State had amounted to a series of tortious acts and held, *inter alia*, that:

"As has been proved in detail in this case, a paradoxical situation arose, where entitled persons waited for years to participate in an auction, and then, if an auction actually took place, knowing how difficult it was to use their entitlement to credit and pressured by the situation they found themselves in, they bid up the price of the property to levels far exceeding its market value. In this way, finding themselves in a highly pressured situation, they lost a large part of their entitlement. The severe limitations placed on the possibility of satisfying their entitlements in effect brought about its elimination. This situation, where the State has created the circumstances described above, is in effect a totally unjustified expropriation [and amounts to] taking

from persons from beyond the Bug River property rights to which they are entitled. Even the creation of such a situation should be considered a state of lawlessness with regard to the rights of repatriated persons.

It should be emphasised most strongly that the legislature not only has the positive obligation to create regulations and procedures that protect property rights, but there is also a negative obligation to refrain from introducing regulations that might remove legal protection from such rights, or that might restrict them, not to mention [measures] eliminating them entirely. If the legislature does not fulfil the above conditions, it is in breach of Article 64 § 2 of the Constitution and enacts lawlessness. ...

In the opinion of this Court, the statutory restrictions resulting from the legislation described above - although the statutes may have been necessary – and relating to local government reform, agricultural restructuring, the modernisation of the army and other issues, do not justify discrimination against persons who have the right to credit the value of property abandoned outside the borders of the country, just because these people cannot pay the price of this property or [the fee for] the right [of perpetual use] in cash. ...

The statutory restrictions affecting the property rights acquired by persons from beyond the Bug River create a situation where they are deprived of the property value that was set by the legislature.

This is in effect a tortious act committed by the State, as a result of which, for reasons attributable to State, the plaintiffs sustained damage in that they were unable to realise their rights to obtain property at the value confirmed in the relevant administrative decision. While the legislature, in section 81 of the 1985 Act and in section 212 of the Land Administration Act 1997, gave persons from beyond the Bug River the right to credit the value of property abandoned abroad against the price of building plots or the price of buildings or premises situated on land belonging to the State Treasury, the subsequent acts rendered ineffective any possibility of this social group satisfying that entitlement.

In essence, the damage sustained by repatriated persons, and also by the plaintiff in the context of the present case, consists of the difference between what they should have been able to have within the value of their entitlement, pursuant to section 212 of the Land Administration Act 1997, and what they actually have in practice, as a result of the wrongful manner in which the State has implemented the law. ...

In accordance with Article 77 § 1 of the Constitution, everyone has the right to obtain compensation for unlawful acts carried out by a public authority. The liability of the State Treasury follows from Article 417 of the Civil Code, linked as it is with the functioning of a public authority as a whole, rather than with specific persons connected to that institution, bearing in mind that responsibility arises if there is an unlawful act. Furthermore, the functioning of the public authorities should be taken, in a wider sense, as an act or omission, as specific actions, or as orders, judgments, administrative decisions, quasi-normative statutes and, finally, legislative activity. ...

The fact that it was impossible for the [plaintiffs] to satisfy the entitlements they had obtained without a reduction in the greater part of their value, gives them the right to claim, on the basis of liability for a tort, compensation equal to the amounts stated in the relevant certificate.

> It is completely understandable that the plaintiffs, after obtaining the certificates that confirmed their entitlements as laid down in section 212 of the Land Administration Act 1997, did not participate in auctions organised by the [authorities], since the number of auctions of which they could have been aware was very small. However, in the context of the number of repatriated persons who were entitled to take part in auctions, any possible participation in an auction could result in their losing a significant proportion of their entitlement.
>
> Even though the Constitutional Court's judgment of 19 December 2002 took immediate effect after its publication in the Journal of Laws, i.e. on 8 January 2003 – a judgment that ... lifted the restrictions placed on repatriated persons in regard to the realisation of their entitlements – in practice, the Military Property Agency and the State Agricultural Property Agency, taking the view that the above-mentioned judgment of the Constitutional Court required the provisions of the Land Administration Act 1997 and other statutes to be updated, have created a situation where it continues to be impossible for repatriated persons to realise the entitlements that they have obtained.
>
> This fact, as described in the establishment of the facts of this case, is a matter of common knowledge from newspaper reports. Thus, the Government, incorrectly interpreting the consequences of the Constitutional Court's judgment, continue to block the rights of repatriated persons, thereby committing a tort to the extent and with the consequences described earlier by this Court."

99. In August 2003 the defendants filed appeals against that judgment with the Cracow Court of Appeal (*Sąd Apelacyjny*).

The appeals were heard on 24 September 2003. The Court of Appeal upheld the findings of fact made by the lower court but altered the ruling on the merits. It accordingly amended the first-instance judgment and dismissed the claim.

In its reasons, the Court of Appeal stressed that the enforcement of the right to credit depended, to a large extent, on the activity of the entitled person. It therefore constituted only a contingent right. Moreover, no pecuniary compensation was provided in section 212, which laid down another specific procedure for the discharge of the State's obligation. The plaintiffs could have obtained compensation only if they had proved that it had been impossible for them to obtain any compensatory property within the entire territory of Poland. In that context, the court stressed that the plaintiffs had not yet exhausted all means available under domestic legislation. They had not participated in auctions and had refused to buy the compensatory property offered to them by the authorities. Only through their active participation in the auctions could the plaintiffs have demonstrated that they had difficulty in satisfying their claim. The Court of Appeal also held that there was no basis for attributing tortious liability to the State, in particular liability for the alleged legislative inactivity. It rejected the idea that the legislature, by enacting erroneous legislation or by failing to guarantee properly the Bug River people's rights, had unlawfully expropriated the plaintiffs.

100. On 14 May 2004 the plaintiffs lodged a cassation appeal (*kasacja*) against the above judgment with the Supreme Court. The cassation proceedings are pending.

(ii) Judgment of 7 April 2003

101. On 7 April 2003 the Cracow Regional Court, composed differently, having heard an action brought by two individuals, T.Rz. and E.Rz., against the State Treasury (Governor of Małopolska), allowed the plaintiffs' claim for damages arising from the State's failure to discharge its obligation under section 212 of the Land Administration Act 1997.

102. The Regional Court considered that the provisions of the Republican Agreements could not constitute a basis for a civil claim since they had not been duly published in the Journal of Laws. It further considered, however, that not only the State's failure to secure the effective enjoyment of the right to credit but also its failure to discharge its legal duty to publish the Republican Agreements – a failure that had prevented the plaintiffs from relying on them as a legal basis – amounted to torts for which the State Treasury was liable. It held, *inter alia*:

"[As to the facts]

Unfortunately, it has to be said that, although the period since the Constitutional Court's judgment was given has not been very long, the agencies that hold the State Treasury's property have currently suspended the organisation of auctions for this property, on the ground that there are no new legislative provisions to replace those repealed. However, it is worth noting that the Constitutional Court's judgment ... concerned, as mentioned above, 'the elimination of restrictions from the system'; hence there are no grounds for adopting the position expressed in the communiqués made available to the public on the Internet. As a result, this possibility [of satisfying claims] remains illusory for the Bug River people.

[As to the law]

In the light of this court's findings of fact, there is no doubt that, while the Agreement of 9 September 1944 with the Ukrainian SSR was ratified, nevertheless it certainly has not been published since then in the Journal of Laws (which is also true of the agreement with the Belarus SSR). In the light of the constitutional provisions cited above, it therefore cannot constitute a source of law, since it did not come within the domestic legal order. Consequently, this agreement cannot be applied directly or relied on as a basis for the plaintiffs' claims. A similar opinion was expressed by the Constitutional Court in its judgment of 19 December 2002, which has already been mentioned in connection with the findings of fact made in the present case. ...

The plaintiffs applied[9] for publication of the Republican Agreement of 9 September 1944 with the Ukrainian SSR, but the Minister of Foreign Affairs refused to take action along those lines, as he was required to do under the law on international agreements, responding that the agreement was terminated as a result of its having

9. See paragraphs 103-104 below.

been executed. The basis expressed for this opinion was that, in the opinion of the Minister, the agreement had been executed *inter partes*, and therefore terminated, given the conclusion of the 1952 Pact with the Government of the USSR. ...

This opinion is erroneous for at least two reasons.

To begin with, in formal terms the Vienna Convention does not provide for the possibility of terminating an agreement as a result of its execution, but rather for termination as a result of the renunciation of the agreement. ...

Even if one were to accept the possibility that agreements could be terminated as a result of their execution, this is not an argument that is relevant where agreements have not yet been fully executed. ...

Apart from the above, which is, in a sense, of marginal relevance, it can be added that acceptance that the Republican Agreements had been terminated with effect from 1952 would have strange consequences, for it should be remembered that in this case the result would occur ... precisely from that date. But then one must ask the question why, for example, the Supreme Court in its case-law, quoted so extensively in the present case, has bothered over the last 50 years with the issue of agreements which were no longer in force? For instance, in the well-known resolution of 7 Supreme Court judges of 30 May 1990 (III CZP 1/90, ...), the Supreme Court ruled not only on section 88(1) of the Land Administration and Expropriation Act 1985, which set out the right to credit, but also on the Republican Agreements of 1944, and considered the substance of Article 3 § 6.[10] ...

It can be seen from the above arguments that the executive authority, despite an application from the plaintiff to this effect, did not proceed with the publication of the Agreement with the Ukrainian SSR (at least), despite the existence of a statutory obligation to publish ratified agreements immediately. ... To put it in precise terms, the public authority refrained from acting, despite a statutorily formulated duty to do so, and hence it acted in breach of the law (objective unlawfulness). Hence the first of the conditions of liability required by Article 417 of the Civil Code, read in conjunction with Article 77 § 1 of the Constitution, is fulfilled. ...

In its findings of fact, this Court found that the plaintiffs could not satisfy their claims under the Land Administration Act 1997, since the State Treasury, as represented by the mayor, had not made it possible for the right to credit to be enjoyed, given that it had not offered any immovable property for auction, and that this situation had lasted for years. In these circumstances, as rightly pointed out by the Constitutional Court, this right had become illusory. It was also indicated that the situation had not changed at all since the Constitutional Court's judgment. ...

As has been mentioned above, if the Agreement with the Ukrainian SSR of 9 September 1944 were published in the Journal of Laws, then, in accordance with Article 241 of the Constitution, this Agreement would be considered under Article 91 of the Constitution; there would then be a sort of presumption of its self-executing nature, and this Court would be obliged to apply it in the present case. ...

10. See paragraph 67 above.

> ... [had] the Republican Agreements been published, then at the present time there would have been no obstacles to pursuing claims on the basis of the agreement's provisions quoted above, ... In the opinion of this Court, the above remarks indicate that these provisions of the Agreement are self-executing in nature. ...
>
> This is an assertion of substantial significance. For, although the plaintiffs could invoke this instrument, its absence in the legal order makes that impossible in practice. But this absence is the result of an unlawful omission by the executive power, which neglected to publish the Agreement in the Journal of Laws.
>
> Given these circumstances, there is a clear and direct causal link between the unlawful omission by the public authorities, and the damage suffered by the plaintiffs. This pecuniary damage consists in the fact that it is impossible for the plaintiffs to satisfy their claims through a civil action based on Article 3 § 6 of the Agreement, given that the result of such a process is prejudged at the present time (rejection of the claim, or, as in the present proceedings, an indication that such a basis is unfounded). It is certain that such proceedings cannot have a positive outcome. ...
>
> It should be stressed that the damage described above would not have occurred if it had been possible for the plaintiffs to enjoy their so-called right to credit, which consists in offsetting the value of abandoned property. Hence the fact of causing damage by making it impossible to conduct proceedings is closely connected with that fact as well.
>
> In conclusion: the unlawful omission by the public authorities, consisting in not publishing the Agreement in the Journal of Laws despite the application by T.Rz. and E.Rz., made it impossible, as the plaintiffs could not enjoy their right to credit as a general right within the existing legal order, to obtain effective compensation in the maximum amount possible – namely, the value of the plaintiffs' property abandoned in Ukraine, which they claimed on the basis of Article 3 § 6 of the Agreement with the Ukrainian SSR."

(g) The Supreme Administrative Court's judgments of 26 May 2003 and 12 December 2003

103. On 26 May 2003 the Supreme Administrative Court heard cases brought by E.Rz. (the plaintiff in the proceedings described above) and a certain A.K. The applicants lodged the complaints under section 26 of the Supreme Administrative Court Act of 11 May 1995 (*Ustawa o Naczelnym Sądzie Administracyjnym*),[11] alleging inactivity on the part of the Prime Minister in that he had failed to publish the Republican Agreements of 9 September 1944, concluded by the Polish Committee of National Liberation and the Governments of the Soviet Socialist Republics of Ukraine and Belarus (see also paragraphs 11 and 39-40 above).

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11. That provision reads: "*When a complaint alleging inactivity on the part of an administrative authority is well-founded, the Supreme Administrative Court shall oblige that authority to issue a decision, or to perform a specific act, or to confirm, declare, or recognise a right or obligation provided for by law*."

104. The Supreme Administrative Court rejected the complaints, finding that they had been misdirected. In particular, there was no issue of inactivity on the part of the Prime Minister since he could not order publication of an international agreement without a prior recommendation from the Minister for Foreign Affairs. The latter had not, however, recommended the Republican Agreements for publication in the Journal of Laws.

In its decision the court made certain important findings of fact and law. It also challenged the opinion of the Constitutional Court as to the binding force of the Republican Agreements and expressed the view that Article 3 in each of the agreements related directly to the rights and obligations of repatriated persons and did not amount to a mere promise to act.

105. The court held, *inter alia*:

> "In the opinion of the Supreme Administrative Court, the substance of this Agreement, and in particular Article 3, indicates that it related directly to the rights and obligations of repatriated persons. It did not just contain a promise to act, which could not in and of itself constitute a basis for pursuing claims, since it only provided, as shown by the Constitutional Court judgment of 19 December 2002, and by the opinion of 27 January 2003 of the Legal Advisory Committee to the Minister of Foreign Affairs in the matter of Bug River property, for a special type of responsibility on the part of the State to regulate, in domestic law, the issue of settlement with persons who lost property as a result of the delimitation of the Polish borders. This is clear from Article 3 § 6, since the value of abandoned movable and immovable property was to be returned on the basis of an insurance valuation. ...
>
> In the opinion of the Supreme Administrative Court, the agreement in question, despite the position of the respondent and the reasoning of the Constitutional Court judgment of 19 December 2002, is still binding, as it has not been fully executed. In accordance with Article 59 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty is considered terminated if all the parties to it have concluded a later treaty relating to the same subject-matter and it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty, or if the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time. ..."

106. On 12 December 2003, in two subsequent judgments (nos. II SAB 219/03 and II SAB 221/03) concerning complaints about the inactivity of the Executive, in particular the Minister for Foreign Affairs' failure to proceed with the publication of the Republican Agreements in the Journal of Laws, the Supreme Administrative Court fully upheld the above view. It further ordered the Minister to deal with the claimants' applications for the Republican Agreements to be duly published.

(h) The Supreme Court's judgment of 21 November 2003

(i) Background

107. On 25 April 2001 the Warsaw Regional Court dismissed a claim for pecuniary compensation for property abandoned beyond the Bug River

(in the region which now belongs to the Ukraine) lodged by a certain Cz.S. against the State Treasury and the Minister for the Treasury. Cz.S. asked for an award corresponding to the value of the property in question and relied on, *inter alia*, Article 3 § 6 of the relevant Republican Agreement. The court considered that the provisions of the Agreement could not constitute an independent legal basis for establishing the liability of the defendant and that the plaintiff had failed to show a causal link between the damage claimed and any tortious act or omission on the part of the State authorities.

On 28 May 2002 the Warsaw Court of Appeal, on an appeal by the plaintiff, upheld the first-instance judgment and the reasons given for it.

(ii) The judgment

108. This judgment (no. I CK 323/02) was given by the Supreme Court sitting as a bench of three judges, following the examination of a cassation appeal lodged by Cz.S. against the Court of Appeal's judgment. The Supreme Court quashed the appellate judgment and remitted the case to the Warsaw Court of Appeal. In its judgment, considered as a landmark ruling on the Bug River claims and the State's civil liability for non-enforcement of the right to credit, the Supreme Court made a number of important findings of fact and law.

109. Considering the nature of the entitlement laid down in section 212 of the Land Administration Act 1997, the Supreme Court observed, *inter alia*:

> "While the nature of that right is disputable, there is nevertheless a prevailing view that it constitutes a particular proprietary right, [which is] inheritable and transferable in a specific manner and whose substance consists in the possibility of having a certain pecuniary obligation satisfied through the use of the so-called "Bug River money" (*pieniądz zabużański*). This so called right ... undoubtedly has a pecuniary value, [a value] which derives from the availability of goods which can be bought with it. The availability of those goods is determined by ... legislation and its application in practice."

110. It further stated as follows:

> "... [T]here can be no doubt that the legislative initiatives taken in the last few years have affected the value of the right to credit and that this reduction in value can be considered a material loss covered by the notion of damage. In this regard, it is necessary to compare the value of the right to credit in a hypothetical legal situation free from the laws found to have been defective, and the value of this right resulting from the enactment of the [defective] laws in question.
>
> In considerations relating to damage, one must not fail to mention the way in which the legal provisions relating to the Bug River people's rights are applied in practice. The case-file contains documents confirming that the State Treasury does not hold any auctions in which they could participate. Neither the Agricultural Property Agency nor the Military Property Agency have complied with the Constitutional Court's judgment. Such practices make it impossible, for all practical purposes, [for the claimants] to have their right to credit realised. Of course, [in such matters as] the

existence of damage and its value, the burden of proof lay on the plaintiff. Admittedly, this damage does not amount to deprivation of property rights and its value is not equal to the value of the property abandoned in the Ukraine. ...

In conclusion, [the Bug River claimants] may, under Article 77 § 1 of the Constitution, seek pecuniary compensation from the State Treasury for the reduction in the value of the [right to credit] resulting from the enactment of legislation restricting their access to auctions ...which either made it impossible for them to enforce their rights or reduced the possibility of enforcing those rights. ...

That does not mean, however, that it is possible [for the claimants] to obtain the full pecuniary value of the property abandoned in the Borderlands. It would be contrary to ... section 212 of the Land Administration Act 1997, by virtue of which the legislature – acting within its legislative autonomy – laid down specific compensatory machinery. The crucial point is, however, that previous legislative action rendered [this machinery] illusory – as the Constitutional Court has unequivocally held. This had an impact on the actual value of the [right to credit]. Indeed, the value of this right was reduced since the legislature, on the one hand, excluded from the scope of section 212 ... [certain] portions of State land and, on the other, through the application of this provision in practice (failing to hold auctions), made it unenforceable. [I]n consequence, the right to credit could not, and still cannot, be realised.

Such actions cannot be accepted in a democratic State governed by the rule of law and applying the principles of social justice (Article 2 of the Constitution), or in a State in which equal protection is guaranteed in respect of ownership, other property rights and the right of succession (Article 64 § 2 of the Constitution).

It must be noted that some 90% of persons entitled to compensatory property have obtained [full] compensation, in particular through the realisation of the right to credit. That being so, and given that the right to credit is still in force ..., the right to full compensation of those Bug River claimants, who have not yet realised the right to credit, must be considered justified. [To hold otherwise would amount to] unjustified discrimination between [various groups] of the Bug River people and would render unenforceable the provisions ... laying down the specific procedure for the realisation of the right to credit (in particular section 212)."

(i) The December 2003 Act

(i) Preparatory work and adoption by Parliament

111. Meanwhile, the Senate had prepared the Bill on amendments to the Land Administration Act, the Law on amendments to the Law on the administration of the State Treasury's Agricultural Property and other statutes (*Projekt ustawy o zmianie ustawy o gospodarce nieruchomościami i ustawy o zmianie ustawy o gospodarowaniu nieruchomościami rolnymi Skarbu Państwa oraz o zmianie niektórych innych ustaw*) ("the Senate Bill"). It was introduced in Parliament on 10 March 2003. In short, the Senate proposed a reformulation of the existing provisions in order to make all State land available to the Bug River claimants.

112. The first reading of the Senate Bill took place on 16 April 2003. On 26 May 2003 the Government, who at the beginning of 2003 had prepared their own bill (see also paragraph 33 above), submitted their opinion, in which they strongly criticised the proposals by the Senate.

The Government Bill was submitted to Parliament on 10 July 2003. The Government proposed that all State property be available for sale to the Bug River claimants but that the value of compensation be reduced to PLN 20,000.

113. Later, Parliament decided to work on both bills simultaneously.

The first reading took place on 29 July 2003. The second and the third readings took place on 28 October and 12 November 2003 respectively. In the course of the readings, the maximum value of compensatory property was increased to 50,000 Polish zlotys.

On 12 November 2003 the bills were adopted by the *Sejm* and the Act was referred to the Senate. The Senate proposed certain amendments which, in essence, were accepted by the *Sejm* on 12 December 2003. On the same day the December 2003 Act was transmitted for signature by the President of Poland. The President signed it on 5 January 2004.

(ii) The relevant provisions

114. The December 2003 Act entered into force on 30 January 2004. Section 1 provides as follows:

> "This law shall determine the principles of offsetting the value of property [which] was abandoned beyond the present borders of the Polish State, in connection with the war that began in 1939, against the price of State property or against the fee for the right of perpetual use and [in respect of which] redress was to be afforded under [the provisions of] the following [instruments]:
>
> (1) Agreement of 9 September 1944 between the Polish Committee of National Liberation and the Government of the Belarus Soviet Socialist Republic on the evacuation of Polish citizens from the territory of the Belarus SSR and of the Belorussian population from the territory of Poland;
>
> (2) Agreement of 9 September 1944 between the Polish Committee of National Liberation and the Government of the Ukrainian Soviet Socialist Republic on the evacuation of Polish citizens from the territory of the Ukrainian SSR and of the Ukrainian population from the territory of Poland;
>
> (3) Agreement of 22 September 1944 between the Polish Committee of National Liberation and the Government of the Lithuanian Soviet Socialist Republic on the evacuation of Polish citizens from the territory of the Lithuanian SSR and of the Lithuanian population from the territory of Poland;
>
> (4) Agreement of 6 July 1945 between the Republic of Poland's Provisional Government of National Unity and the Government of the Union of Soviet Socialist Republics on the right of persons of Polish and Jewish nationality living in the USSR to change the[ir] Soviet citizenship and on their evacuation to Poland, and on the right of persons of Russian, Ukrainian, Belorussian, Ruthenian and Lithuanian nationality

living within the territory of Poland to change the[ir] Polish citizenship and on their evacuation to the USSR."

115. Section 2 reads as follows:

"1. The right to credit the value of property abandoned abroad shall be conferred on the owners of such property, if they fulfil all the following conditions:

(1) they lived in the territories referred to in section 1 on 1 September 1939, held Polish citizenship on that day, and abandoned those territories in connection with the war that began in 1939;

(2) they are Polish citizens; and

(3) they have permanently resided in the Republic of Poland at least since the date of entry into force of this law.

2. In the event of the death of an owner of property abandoned beyond the present borders of the Polish State, the right to credit the value of [the abandoned] property shall be conferred either jointly on all his heirs, if they are Polish citizens and have permanently resided in the Republic of Poland since at least the date of entry into force of this law, or on the [one] heir designated by the remaining heirs. The designation of such an entitled person shall be effected through a declaration with the signature [or signatures] being confirmed by a notary.

3. The right to credit the value of property abandoned beyond the present borders of the Polish State, as confirmed pursuant to other legal provisions and to this law, shall not, without prejudice to subsection 2, be transferable.

4. The right to credit the value of property abandoned beyond the present borders of the Polish State shall not be conferred on a person who, pursuant to other legal provisions, including the provisions on land administration, on the agricultural reform or on the agricultural system and settlement, has acquired ownership or perpetual use of the State Treasury's property within the framework of the redress provided for in the agreements referred to in section 1."

116. Section 3 lays down the right to credit in the following way:

"1. Persons referred to in section 2 (1) and (2) shall, without prejudice to subsection 2 of this provision, have the value of property abandoned beyond the present borders of the Polish State offset against the price of State property or [against] the fee for perpetual use of such property and the price of buildings, other premises or dwellings situated therein.

2. Offsetting of the value of property abandoned beyond the present borders of the State, as referred to in the [preceding] subsection, shall be effected up to a value equal to 15% of the value of that property; the sum offset may not exceed 50,000 Polish zlotys."

117. Pursuant to sections 4 and 5, all Bug River claimants must apply to the governor of the relevant province to have their right to credit confirmed. The confirmation takes the form of an administrative decision, which may be appealed against to the President of the Office for Housing and Town

Development (*Prezes Urzędu Mieszkalnictwa i Rozwoju Miast*). The deadline for making such applications has been set for 31 December 2005.

Section 6 provides that governors are to keep registers of Bug River claims.

The entitlement to compensation under the December 2003 Act can only be enforced through the auction bidding procedure.

118. Section 14 reads, in so far as relevant, as follows:

> "The following amendments shall be made to the Land Administration Act of 21 August 1997:
>
> 1. Section 212 shall be repealed; ..."

119. Section 16 states:

> "Obligations following from the agreements referred to in section 1 shall be deemed to have been discharged towards the persons mentioned in section 2(4) and the persons who, under the provisions of this law, have realised the[ir] right to credit the value of property abandoned beyond the present borders of the Polish State."

120. On 30 January 2004, the date of entry into force of the December 2003 Act, a group of deputies from the party "Civic Platform" (see also paragraph 38 above) applied to the Constitutional Court under Article 191 of the Constitution read in conjunction with Article 188, challenging the constitutionality of a number of that Act's provisions, including sections 2(1)(2), 2(1)(3), 2(2), 2(4), 3(2) and 16. They invoked the constitutional principles of equality before the law, the protection of property and of lawfully acquired rights, and the rule of law. The proceedings are pending.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

121. The applicant alleged a breach of Article 1 of Protocol No. 1 to the Convention in that his entitlement to compensation for property abandoned in the territories beyond the Bug River, the so-called "right to credit", had not been satisfied.

Article 1 of Protocol No. 1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Scope of the case before the Court

122. Determining the scope of its jurisdiction *ratione temporis* in the decision on the admissibility of the application, the Court found that the applicant's grievance did not concern a single specific measure or decision taken before, or even after, 10 October 1994, the date of ratification of Protocol No. 1 by Poland. The crux of the applicant's Convention claim lay in the State's failure to satisfy his entitlement to compensatory property, which had been continuously vested in him under Polish law.

Noting that that entitlement had been conferred on him on the date of ratification and subsisted both on 12 March 1996, the date on which he had lodged his application with the Commission, and on 19 December 2002, the date of its decision on admissibility, the Court held that it had temporal jurisdiction to entertain the application. It also held that it could have regard to the facts prior to ratification inasmuch as they could be considered to have created a situation extending beyond that date or might be relevant for the understanding of facts occurring after that date (see *Broniowski v. Poland* (dec.) [GC], no. 31443/96, ECHR 2002-X, §§ 74-77).

123. However, the date from which the Court has jurisdiction *ratione temporis* not only marks the beginning the period throughout which, up to the present day, acts or omissions of the Polish State will be assessed by the Court from the point of view of their compliance with the Convention, but is also relevant for the determination of the actual content and scope of the applicant's legal interest guaranteed by Polish law to be considered under Article 1 of Protocol No. 1.

124. While the historical background of the case, including the post-war delimitations of State borders, the resultant migration of persons affected by those events and the Republican Agreements, in which the applicant's entitlement to compensation originated (see paragraphs 10-12, 39-41, 67 and 81 above), is certainly important for the understanding of the complex legal and factual situation obtaining today, the Court will not consider any legal, moral, social, financial or other obligations of the Polish State arising from the fact that owners of property beyond the Bug River were dispossessed and forced to migrate by the Soviet Union after the Second World War. In particular, it will not deal with the issue whether Poland's obligation under the Republican Agreements to return to those persons the value of the property abandoned in the former Soviet republics might have any bearing on the scope of the applicant's right under domestic legislation

and under the Convention and whether Poland honoured the obligations it had taken upon itself by virtue of those Agreements.

125. The sole issue before the Court is whether Article 1 of Protocol No. 1 was violated by reason of the Polish State's acts and omissions in relation to the implementation of the applicant's entitlement to compensatory property, which was vested in him by Polish legislation on the date of the Protocol's entry into force and which subsisted on 12 March 1996, the date on which he lodged his application with the Commission.

B. Applicability of Article 1 of Protocol No. 1

1. The parties' submissions

(a) The applicant

126. The applicant, as he had already done in the proceedings concerning the admissibility of the application, maintained that his entitlement constituted a property right which Poland had originally recognised in taking upon itself the obligation to compensate repatriated persons under Article 3 § 6 of the relevant Republican Agreement. That obligation had later been incorporated into domestic law, which vested in him, as the heir of his repatriated grandmother, a specific right to offset the value of the property abandoned by his family beyond the Bug River against the price, or the fee for perpetual use, of immovable property purchased from the State. That right, he added, was explicitly recognised by the Polish courts as a property right and had recently been defined by the Constitutional Court as the "right to credit". It indisputably fell within the concept of "possessions" for the purposes of Article 1 of Protocol No. 1.

(b) The Government

127. Referring to the Court's decision on the admissibility of the application and to its finding that Article 1 of Protocol No. 1 was applicable, the Government maintained that under domestic legislation the applicant was "merely a claimant" with the possibility of asking for compensatory property. He had made an application to that effect but, as he had not submitted an expert report determining the present market value of the abandoned property, the authorities could not issue the necessary additional documents enabling him to participate in auctions for the sale of State property.

128. In that respect, the Government compared Mr Broniowski's situation to that of the applicant in the case of *Jantner v. Slovakia* (no. 39050/97, §§ 27 et seq., 4 March 2003) and submitted that his entitlement constituted – like that of Mr Jantner – a conditional claim

which, by reason of the applicant's non-compliance with the procedural requirements for his application, had lapsed as a result of the failure to fulfil a condition.

2. The Court's assessment

129. The concept of "possessions" in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to the ownership of material goods and is independent from the formal classification in domestic law. In the same way as material goods, certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision. In each case the issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 (see *Iatridis v. Greece* [GC], no. 31107/96, § 54, ECHR 1999-II, and *Beyeler v. Italy* [GC], no. 33202/96, § 100, ECHR 2000-I).

130. When declaring the application admissible, the Court rejected the Government's arguments as to the inapplicability of Article 1 of Protocol No. 1. It found that the applicant had a proprietary interest eligible for protection under that Article. It further noted that the applicant's entitlement had continuously had a legal basis in domestic legislation which had subsisted after 10 October 1994 and that it was defined by the Polish Supreme Court as, *inter alia*, a "debt chargeable to the State Treasury" which had "a pecuniary and inheritable character" (see *Broniowski v. Poland* (dec.), cited above, §§ 97-101).

131. Subsequently, when ruling in December 2002 on the application brought by the Ombudsman (see paragraph 28 above), the Constitutional Court described the applicant's entitlement as the "right to credit", having a "special nature as an independent property right", which "should be recognised as enjoying the constitutionally guaranteed protection of property rights" and which was a "special property right of a public-law nature". While the Constitutional Court accepted that the materialisation of that right depended on action by an entitled person, it rejected the idea that the right did not exist until its realisation through a successful bid at an auction for the sale of State property. In sum, the Constitutional Court had no doubts that the right to credit was subject to protection under Article 1 of Protocol No. 1 (see paragraphs 80-87, especially at paragraph 83, above).

In the judgment of 21 November 2003 that followed the above ruling, the Polish Supreme Court considered that the right to credit was a "particular proprietary right" of a "pecuniary value", which was "inheritable and transferable in a specific manner" and whose substance consisted in "the possibility of having a certain pecuniary obligation satisfied through the use of the so-called 'Bug River money' " (see paragraph 109 above).

The Court subscribes to the analysis, in Convention terms, made by the highest Polish judicial authorities of the entitlement which was conferred on the applicant by Polish legislation. It finds nothing in the Government's present arguments to change the conclusion that, as has already been established in the decision on admissibility, the applicant's right to credit constitutes a "possession" within the meaning of Article 1 of Protocol No. 1.

132. As regards the content and scope of the right in question, the Court has already observed that that issue must be seen from the perspective of what "possessions" the applicant had on the date of the Protocol's entry into force and, critically, on the date on which he submitted his complaint to the Convention institutions (see paragraph 125 above).

In fact, on both those dates (10 October 1994 and 12 March 1996) the applicant's situation was essentially the same. At the relevant time the right to credit was laid down in section 81 of the Land Administration Act 1985, which provided that persons repatriated from beyond the Bug River, or their heirs, could, on an application lodged with the relevant authority, offset the value of their abandoned property against the price, or against the fee for perpetual use, of a building plot and any houses or buildings situated on it which were being sold by the State (see paragraph 46 above).

The procedure for enforcing the right was set out in the 1985 Ordinance, which provided, in paragraph 3, that if the value of the Bug River property exceeded the price of the compensatory property that had been sold by the State – which was the case as far as the applicant was concerned – the outstanding amount could be offset against the price of an industrial or commercial plot of State land and specific categories of buildings or establishments situated thereon (see paragraphs 18-21 and 47 above).

133. Accordingly, for the purposes of Article 1 of Protocol No. 1, the applicant's "possessions" comprised the entitlement to obtain, further to the application he had made already on 15 September 1992, compensatory property of the kind listed in paragraph 3 of the 1985 Ordinance (see paragraphs 18 *in fine* and 21 above). While that right was created in a kind of an inchoate form, as its materialisation was to be effected by an administrative decision allocating State property to him, section 81 clearly constituted a legal basis for the State's obligation to implement it.

C. Compliance with Article 1 of Protocol No. 1

1. Applicable rule of Article 1 of Protocol No. 1

134. Article 1 of Protocol No. 1 comprises 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, recognises that the Contracting States are entitled, *inter alia*, to control the use of property in accordance with the general interest. The three rules are not, however, distinct in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, among other authorities, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, pp. 29-30, § 37, which reiterates in part the principles laid down by the Court in the case of *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 24, § 61; see also *Iatridis v Greece*, § 55, and *Beyeler v. Italy* § 98*,* judgments cited above).

135. The parties did not take clear positions on the question under which rule of Article 1 of Protocol No. 1 the case should be examined. While neither of them argued that the situation complained of had resulted from measures designed to "control the use of property" within the meaning of the second paragraph, the applicant alleged that there had been a general failure by the State to satisfy his right, and the Government maintained that neither any failure to respect that right nor any interference with it could be attributed to the authorities (see also paragraphs 137-142 below).

136. Having regard to the complexity of the legal and factual issues involved in the present case, the Court considers that the alleged violation of the right of property cannot be classified in a precise category. In any event, the situation mentioned in the second sentence of the first paragraph is only a particular instance of interference with the right to peaceful enjoyment of property as guaranteed by the general rule laid down in the first sentence (see *Beyeler v. Italy,* cited above, § 106). The case should therefore more appropriately be examined in the light of that general rule.

2. Nature of the alleged violation

(a) The parties' submissions

(i) The applicant

137. The applicant considered that the State's continuous failure to satisfy his entitlement – a failure that, in his view, by itself amounted to an interference with his property rights – had been caused by a series of acts and omissions on the part of the authorities.

According to the applicant, the situation complained of originated in the State's failure to fulfil its legislative duty to regulate in a proper and timely manner the question of the Bug River claims and to create conditions for the full implementation of the claimants' rights. Throughout the period falling within the Court's temporal jurisdiction, the State had not only constantly failed to react to, and to resolve through legislative measures, the problem of the insufficient amount of State property designated for the purposes of satisfying those claims – a shortage which resulted from the 1990 "communalisation" of State land – but had also enacted laws that had successively all but removed the possibility of obtaining property from among its land resources.

138. What was more, the applicant added, the State authorities had made the realisation of his entitlement impossible in practice. It had been their common and widespread policy not to put State land up for sale and to prevent the entitled persons from bidding for State property at auctions.

139. The final act had taken place on 30 January 2004, the date of entry into force of the December 2003 Act, by virtue of which all the State's obligations towards the applicant, and all other Bug River claimants who had ever obtained any compensatory property under the previous legislation, had been deemed to have been discharged.

(ii) The Government

140. The Government did not accept that there had been an interference with the applicant's right to the peaceful enjoyment of possessions because, as they had stated at the oral hearing and maintained in their further written pleadings, he had no "possessions" for the purposes of Article 1 of Protocol No. 1.

141. As regards the State's alleged failure to fulfil its positive obligations under Article 1 of Protocol No.1 by reason of its legislative omissions, the Government stressed that, since the years 1944-47, the time of the first and main wave of repatriation of Polish citizens from beyond the Bug River, the State had continued to legislate on the matter. Owing to those earlier laws, the vast majority of repatriated persons had obtained compensatory property, in particular in the western part of Poland, which before the war had belonged to Germany.

142. Subsequent laws governing land administration, especially those applicable throughout the period falling within the Court's temporal jurisdiction, had set out extensive rules governing the realisation of the remaining Bug River claims. Furthermore, the State had made constant efforts to enact specific legislation dealing with various restitution claims, including the applicant's entitlement. It was true that the first such attempt had been futile, as the Restitution Bill 1999 had been rejected by Parliament. However, the work on the Bug River legislation had continued and, recently, Parliament had passed the December 2003 Act, which

comprehensively regulated the whole set of issues concerning the Bug River claims.

In sum, the Government considered that it could not be said that the issue before the Court involved the Polish State's failure to fulfil its positive obligation to secure to the applicant the peaceful enjoyment of his possessions.

(b) The Court's assessment

143. The essential object of Article 1 of Protocol No. 1 is to protect a person against unjustified interference by the State with the peaceful enjoyment of his or her possessions.

However, by virtue of Article 1 of the Convention, each Contracting Party "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention". The discharge of this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention. In the context of Article 1 of Protocol No. 1, those positive obligations may require the State to take the measures necessary to protect the right of property (see *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 96, ECHR 2002-VII, with further references, and, *mutatis mutandis*, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49, and *Kroon and Others v. the Netherlands*, judgment of 27 October 1994, Series A no. 297-C, p. 56, § 31).

144. However, the boundaries between the State's positive and negative obligations under Article 1 of Protocol No. 1 do not lend themselves to precise definition. The applicable principles are nonetheless similar. Whether the case is analysed in terms of a positive duty on the State or in terms of an interference by a public authority which requires to be justified, the criteria to be applied do not differ in substance. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole. It also holds true that the aims mentioned in that provision may be of some relevance in assessing whether a balance between the demands of the public interest involved and the applicant's fundamental right of property has been struck. In both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (see, *mutatis mutandis*, *Keegan v. Ireland,* cited above, § 49, and *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, §§ 98 et seq., ECHR 2003-VIII).

145. In the present case, the applicant's submission under Article 1 of Protocol No. 1 is that the Polish State, having conferred on him an entitlement to compensatory property, subsequently made it impossible for him – by obstruction and inaction, both legislative and administrative, and by extralegal practices – to benefit from that entitlement and that,

ultimately, by virtue of the recent legislation, it extinguished his legal interest (see paragraphs 137-139 above).

The mutual interrelation of the alleged omissions on the part of the State and of accompanying acts that might be regarded as an "interference" with the applicant's property right makes it difficult to classify them in a single precise category. As shown by the course of the events described above, culminating in the enactment of the December 2003 legislation, the facts of "commission" and "omission" were closely intertwined (see paragraphs 30-31; 48-49; 56-57; 59-61; 63-65; 69-70; 84-86; 96-98; 102; 110 and 114-119 above).

Also, the legal and practical consequences of those facts and the State's conduct were variously assessed by the national courts; for instance, the Constitutional Court considered that the laws restricting the Bug River claimants' access to State property had resulted in *de facto* expropriation (see paragraph 84 above). Some civil courts considered that the State was liable for damage sustained by the Bug River claimants on account of both the fact that it had imposed unjustified restrictions on the exercise of the right to credit and the fact that it had failed to fulfil its positive obligations to protect property rights and duly to publish the Republican Agreements (see paragraphs 98 and 102 above). The Supreme Court held that the State's practices did not amount to a deprivation of property, but had nevertheless unduly restricted the right in question (see paragraph 110 above).

146. The facts of the case may well be examined in terms of a hindrance to the effective exercise of the right protected by Article 1 of Protocol No. 1 or in terms of a failure to secure the implementation of that right. Having regard to the particular circumstances of the present case, the Court considers it unnecessary to categorise strictly its examination of the case as being under the head of the State's positive obligations or under the head of the State's negative duty to refrain from an unjustified interference with the peaceful enjoyment of property.

The Court will determine whether the conduct of the Polish State – regardless of whether that conduct may be characterised as an interference or as a failure to act, or a combination of both – was justifiable in the light of the applicable principles set out below.

3. General principles

(a) Principle of lawfulness

147. The first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions only "subject to the conditions provided for by law" and the second paragraph recognises that States have the right to control the use of property by enforcing "laws".

Moreover, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see *Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 79, ECHR 2000-XII, with further references, and *Iatridis v. Greece*, cited above § 58).

The principle of lawfulness also presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application (see the Beyeler judgment cited above, §§ 109-110).

(b) Principle of a legitimate aim in the public interest

148. Any interference with the enjoyment of a right or freedom recognised by the Convention must pursue a legitimate aim. By the same token, in cases involving a positive duty, there must be a legitimate justification for the State's inaction. The principle of a "fair balance" inherent in Article 1 of Protocol No. 1 itself presupposes the existence of a general interest of the community. Moreover, it should be reiterated that the various rules incorporated in Article 1 are not distinct, in the sense of being unconnected, and that the second and third rules are concerned only with particular instances of interference with the right to the peaceful enjoyment of property. One of the effects of this is that the existence of a "public interest" required under the second sentence, or the "general interest" referred to in the second paragraph, are in fact corollaries of the principle set forth in the first sentence, so that an interference with the exercise of the right to the peaceful enjoyment of possessions within the meaning of the first sentence of Article 1 must also pursue an aim in the public interest (see the Beyeler judgment, cited above, § 111).

149. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures to be applied in the sphere of the exercise of the right of property, including deprivation and restitution of property. Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.

Furthermore, the notion of "public interest" is necessarily extensive. In particular, the decision to enact laws expropriating property or affording publicly-funded compensation for expropriated property will commonly involve consideration of political, economic and social issues. The Court has declared that, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, it will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation (see the above-cited judgments *James and Others*, p. 32, § 46,

and *Former King of Greece and Others*, § 87). This logic applies to such fundamental changes of a country's system as the transition from a totalitarian regime to a democratic form of government and the reform of the State's political, legal and economic structure, phenomena which inevitably involve the enactment of large-scale economic and social legislation.

(c) Principle of a "fair balance"

150. Both an interference with the peaceful enjoyment of possessions and an abstention from action must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, among other authorities, the Sporrong and Lönnroth judgment, cited above, p. 26, § 69).

The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measures applied by the State, including measures depriving a person of his of her possessions. In each case involving the alleged violation of that Article the Court must, therefore, ascertain whether by reason of the State's action or inaction the person concerned had to bear a disproportionate and excessive burden (see the above-cited judgments *Sporrong and Lönnroth*, § 73, and *Former King of Greece and Others*, §§ 89-90, with further references).

151. In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of. That assessment may involve not only the relevant compensation terms – if the situation is akin to the taking of property – but also the conduct of the parties, including the means employed by the State and their implementation. In that context, it should be stressed that uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner (see *Vasilescu v. Romania*, judgment of 22 May 1998, *Reports of Judgments and Decisions* 1998-III, p. 1078, § 51; *Beyeler*, cited above, §§ 110 *in fine*, 114 and 120 *in fine*; *Sovtransavto Holding*, cited above, §§ 97-98).

4. Application of the above principles to the present case

(a) Whether the Polish authorities respected the principle of lawfulness

(i) The applicant

152. The applicant maintained that the State's failure to satisfy his property entitlement was inherently incompatible with its general legal duty to enforce rights recognised by law and, in particular, to create conditions for their implementation.

As regards the successive restrictions on the exercise of his right, he admitted that they had been introduced through a number of statutes, in particular the Land Administration Act 1997 and the 2001 Amendment. He stressed, however, that those laws had been incompatible with the Constitution and, in consequence, with the legal order as a whole. Despite that fact and the clear message emerging from the Constitutional Court's judgment that obstacles to the realisation of the Bug River claims should be removed in law and in practice, the State had continued to enact unconstitutional laws and to tolerate practices contrary to that judgment, such as the suspension of auctions for the sale of State property by the Military Property Agency and the State Treasury's Agricultural Property Agency. As the applicant expressed it, the final, crowning achievement of the Government had been to enact the December 2003 Act, legislation running counter to the Constitutional Court's judgment and extinguishing his right to compensation.

It could not, therefore, be said that the authorities had observed the principle of lawfulness.

(ii) The Government

153. The Government saw no issue of "unlawfulness" as regards the State's conduct since, as they had already submitted (see paragraph 140 above), there had, in their view, been no interference with the applicant's right to the peaceful enjoyment of possessions.

(iii) The Court's assessment

154. The Court notes that, as the applicant conceded, the restrictions on his right were indeed introduced through several statutes (see paragraphs 49, 59 and 114-119 above). It is true that the legal provisions, which up to the entry into force of the Constitutional Court's judgment had prevented him from materialising his entitlement, were found to be incompatible with the rule of law and the principle of protection of property rights (see paragraphs 84-86 above). It is also true that some Polish civil courts and, most notably, the Supreme Court, regarded the situation obtaining after the entry into force of the Constitutional Court's judgment, in particular the

authorities' practices, to be unacceptable and contrary to the rule of law. The Cracow Regional Court called it, *inter alia*, a "state of lawlessness" (see paragraphs 98 and 110 above).

However, in the Court's opinion, those findings and the consequences they entail from the point of view of compliance with Article 1 of Protocol No. 1 are material considerations to be taken into account in determining whether the Polish authorities, in applying various impugned measures or in refraining from action, struck a fair balance between the interests involved. The Court will therefore proceed on the assumption that, in so far as the acts and omissions of the Polish State constituted interferences or restrictions on the exercise of the applicant's right to the peaceful enjoyment of his possessions, they were "provided for by law" within the meaning of Article 1 of Protocol No. 1.

(b) Whether the Polish authorities pursued a "legitimate aim"

(i) The applicant

155. The applicant considered that no public interest could possibly justify the State's persistent failure to resolve the problem of the Bug River claims, which had been recognised by Polish law for nearly 60 years. He stressed that under the Republican Agreements the State had taken upon itself the obligation to return to the Bug River owners, without any conditions or financial or other limitations, the value of the property they had had to abandon. While it might be acceptable that the implementation of that obligation should, on account of the general interest of the community, be achieved over a period of time, nothing could explain the adoption of legislative policy that for several decades had completely disregarded the obligations towards the Bug River claimants.

(ii) The Government

156. The Government replied that the State had done everything possible to satisfy the Bug River claimants and stressed, once again, that most of them had obtained compensatory property. However, in the 1990s the demands of the country's political and economic transformation had made it necessary to reintroduce local self-government and to change the ownership relations between the State and municipalities. That, in turn, had resulted in most of the State's land being transferred to the latter, within whose powers the administration of land within their administrative territories had been placed. The crucial importance of that reform had been indisputable, although it had very considerably reduced the possibility of satisfying the Bug River claims.

157. In the Government's view, the State had not, as the applicant alleged, disregarded the rights of the Bug River claimants. The authorities had made many efforts to resolve their problem and it should not be

overlooked that, in that context, they had been faced with very difficult legal and moral issues. Thus, they had been required to deal with a variety of restitution and compensation claims that had originated in past events occurring under the totalitarian regime, and they had had to act in a manner ensuring that the rights of all those wronged by that regime were given equal consideration.

(iii) The Court's assessment

158. The aims pursued by the State in relation to the enactment of the statutes that impeded the realisation of the applicant's entitlement were, as evidenced by the relevant court judgments, to reintroduce local self-government, to restructure the agricultural system and to generate financial means for the modernisation of military institutions (see paragraphs 85 and 98 above). The Court does not doubt that during the political, economic and social transition undergone by Poland in recent years, it was necessary for the authorities to resolve such issues. It accordingly accepts that it was legitimate for the respondent State to take measures designed to achieve those aims, in the general interest of the community.

(c) Whether the Polish authorities struck a fair balance between the general interest of the community and the applicant's right to the peaceful enjoyment of his possessions

(i) Background to the Bug River claims

(α) The parties' submissions

159. The applicant accepted that the loss of property by his family had been caused by historical and political events and that, in reality, it had not been the Polish State that had expropriated his family or had forced them to migrate from their homeland. However, it had been the Polish State's undertaking under the relevant international agreements to compensate his family. That obligation had been incorporated into domestic legislation since 1946 and, as far as he was concerned, had never been discharged in its entirety.

160. The Government stressed that the migration of the Polish population from the territories beyond the Bug River had resulted from territorial changes following the Second World War. They had been decided by the "Big Three" at the Tehran, Yalta and Potsdam conferences, initially without the consent of the legitimate, exiled Polish Government in London, on whom they had later been imposed. As a result of those changes Poland, which before the war had comprised 388,600 sq. km, had lost 19.78% of its original territory.

Furthermore, under the Republican Agreements concluded by the Polish communist authorities, in the years 1944-1945 Poland had had to accommodate some 1,240,000 Polish nationals repatriated from beyond the new border and to provide them with the necessary housing and financial assistance. Despite that fact, under the terms of the 1952 Pact, Poland had had to pay the Soviet Union 76 million roubles (calculated under the gold standard) for the evacuation. Thus, it had been forced to pay heavily for the so-called "repatriation" of its own nationals and, often, for their lives, since most of those who had remained in the Soviet Union had been either resettled in Kazakhstan or other parts of that country or had lost their lives in the course of the widespread Stalinist persecutions.

161. The "fair balance" in the present case should, in the Government's view, be seen from this perspective and in the light of the fact that, apart from the difficult financial situation of the State, which had been impoverished by years of totalitarian rule, the authorities had consistently tried to satisfy the Bug River claims.

(β) The Court's assessment

162. The Court recognises that, given the particular historical and political background of the case, as well as the importance of the various social, legal and economic considerations that the authorities had to take into account in resolving the problem of the Bug River claims, the Polish State had to deal with an exceptionally difficult situation, involving complex, large-scale policy decisions. The vast number of persons involved – nearly 80,000 – and the very substantial value of their claims (see paragraph 33 above) are certainly factors that must be taken into account in ascertaining whether the requisite "fair balance" was struck.

Also in that context, it should be noted that the Polish State chose, by adopting both the 1985 and 1997 Land Administration Acts, to reaffirm its obligation to compensate the Bug River claimants and to maintain and to incorporate into domestic law obligations it had taken upon itself by virtue of international treaties entered into prior to its ratification of the Convention and the Protocol (see paragraphs 46, 48 and 81 above). It did so irrespective of the fact that it faced various important social and economic constraints resulting from the transformation of the country's entire system, and was undoubtedly confronted with a difficult choice as to which pecuniary and moral obligations could be fulfilled towards persons who had suffered injustice under the totalitarian regime.

163. The Court accepts that these factors should be taken into account in determining the scope of the margin of appreciation to be allowed to the respondent State.

(ii) Conduct of the authorities

(α) The parties' submissions

164. The applicant once again repeated that the State's conduct constituted a mixture of acts and omissions which had ultimately led to the destruction of his right of property as a result of the enactment of the December 2003 Act, whereby the State had – unilaterally and arbitrarily – written off its obligation to satisfy his entitlement. That final act had for all practical purposes been tantamount to an expropriation without the payment of compensation.

Turning to the earlier events, the applicant maintained that the State, while having been fully aware that the so-called "communalisation" under the 1990 Act had made the implementation of the Bug River claims nearly impossible, had decided, instead of resolving the problem of the shortage of State land, to introduce laws that had limited even more severely the pool of land set aside for settling those claims.

165. In that connection, he stressed that the Constitutional Court had explicitly held that both the applicable legislation and the practices applied by the authorities in respect to the Bug River claimants had been in flagrant violation of fundamental constitutional principles, including the principle of proportionality.

Following the entry into force of the Constitutional Court's judgment, the applicant added, the State, instead of creating conditions for the execution of that judgment, had only made efforts to hinder the satisfaction of his entitlement. Precisely on the date on which the judgment had entered into force, the authorities, under the pretext that its implementation had required the adoption of a number of statutes, had suspended virtually all auctions for the sale of State property, in order to avoid settling the Bug River claims.

166. The Government disagreed. They maintained that all the alleged restrictions on the applicant's right had been strictly necessary and had been prompted by important considerations of general State policy, with the implementation of a programme of social and economic reform. They stressed that in cases like the present one, involving the assessment of complicated political, economic and social questions, on which opinions within a democratic society might legitimately vary, the Contracting States should be allowed a broad margin of appreciation in the choice of the measures designed to achieve the aims pursued by reforms.

167. The Government further submitted that the Constitutional Court's judgment had removed a number of obstacles to the realisation of the applicant's entitlement since the cluster of legal provisions that had previously hindered the proper operation of the compensation machinery had been repealed.

The Government did not address the applicant's argument that the authorities, by suspending the auctions, had not implemented that judgment

in practice. Instead, they referred to the new legislation, emphasising that it had been specifically designed to deal with the Bug River claims, and that it would comprehensively resolve all the complex matters concerning the rights of the Bug River repatriates.

(β) The Court's assessment

The period up to 19 December 2002

168. At the beginning of the period under consideration, the applicant had, as already noted above, the entitlement to obtain, further to the application he had made to that effect, compensatory property corresponding to the remainder of the property lost by his family. Even though that right was created in an inchoate form, as its materialisation was to be effected by an administrative decision allocating State property to him, section 81 of the Land Administration Act 1985 clearly constituted a legal basis for the State's obligation to implement it (see paragraphs 46-47 and 133 above).

Yet the situation obtaining both before and at the relevant time made the implementation very difficult if not impossible because, in the aftermath of the re-establishment of self-government in Poland, the State Treasury scarcely had any land at its disposal. The shortage of land was officially acknowledged. In that context, as well as in connection with the suspension of the possibility of obtaining State agricultural property under the 1993 Amendment, the authorities made public promises – confirmed by statutes, for instance section 17 of the 1991 Act – to enact specific legislation dealing with forms of compensation for loss of property and the rules for the restitution of property to the Bug River claimants. They further envisaged legislation designed specifically for a variety of restitution and compensation claims, including the applicant's entitlement (see paragraphs 22-23, 44, 53-54, 56 and 62-65 above).

169. In the years 1994-1998 certain portions of State property could still have been set aside for the settlement of Bug River claims since, pursuant to the 1994 and the 1996 Acts, property taken over by the State Treasury from the Army of the Russian Federation and property administered by the Military Property Agency were – at least in law – available for those purposes (see paragraphs 56-59 above).

Be that as it may, that fact does not seem to have had any discernible positive impact on the realisation of the applicant's entitlement since, as established by the Cracow Regional Court, between 1991 and 1998 the authorities of the district in which his claim was registered at that time organised only 22 auctions for the sale of State property (see paragraph 97 above).

170. Further events, starting on 1 January 1998, the date of entry into force of the Land Administration Act 1997, had a decisive impact on the

applicant's situation. By that date the authorities had not yet enacted the promised restitutive legislation; in fact, the relevant bill was later ultimately rejected by Parliament (see paragraph 62-65 above).

Nevertheless, in section 212 of the Land Administration Act 1997, the State explicitly confirmed the applicant's right and its obligation to implement it in a manner similar to that specified in the previous laws. That section reiterated, in practically identical terms, the provision for compensation laid down in the Land Administration Act 1985. Admittedly, the renewed validation of the State's obligation was not accompanied by the creation of conditions for its implementation. On the contrary, it imposed a further restriction on the applicant's entitlement. By virtue of section 213, the possibility of obtaining compensatory property from among the State's agricultural land, a possibility which up to that time had only been suspended pending the introduction of new restitution laws, was eliminated. Furthermore, under the 1998 Ordinance, the acquisition of compensatory property could be enforced solely through participation in a competitive bid organised by the relevant public authority (see paragraphs 48-52 and 54 above).

171. As emerges from the material before the Court, it was a matter of common knowledge that the authorities desisted from organising auctions for the Bug River claimants, subjected their participation in auctions to various conditions or, as shown by the practices of the Military Property Agency, openly denied them the opportunity to seek to enforce their entitlement through the bidding procedure (see paragraphs 61, 84, 97 and 110 above). The practices of that agency, which were described in detail in its own official instruction and which, in the Court's opinion, constituted a purposeful attempt to circumvent the rules governing the procedure for the implementation of the applicant's entitlement, in reality prepared the ground for the next restrictive statute. The 2001 Amendment, which entered into force on 1 January 2002, eliminated the possibility for the applicant to seek compensation from among the State's military property resources (see paragraphs 58-59 above).

172. Bearing in mind that, by that time, the only State property resources available to the Bug River claimants were those previously administered by the Army of the Russian Federation and that, as the Government admitted, those resources were practically exhausted (see paragraphs 49, 56-57 and 59 above), the Court considers that the authorities gradually all but wiped out the applicant's right from the domestic legal order and that his right, even though still theoretically existing, was rendered illusory.

173. That finding is in accordance with the assessment of the State's conduct by the Polish courts, including the highest judicial authorities (see paragraphs 84-86 and 110 above).

The Constitutional Court, referring to the State's conduct, had no doubt whatsoever that the combination of the restrictions imposed on the right to

credit had resulted in a paradoxical situation in which that right could not be realised in practice, and that those restrictions were not justified in a democratic State governed by the rule of law. In that context, it also found that that conduct of the authorities was incompatible with the constitutional principle of maintaining citizens' confidence in the State and the law made by it, ensuing from the rule of law.

That court considered that the right to credit was becoming an "empty obligation" and that the limitations excluding substantial portions of property from the compensation procedure in fact "paralys[ed] the possibility for beneficiaries to derive any economic advantage" from their rights. It also held that the right to credit was formulated in such a way that it "could not be materialised in the existing legal environment, so that it ha[d] become illusory and a mere sham" (see paragraphs 80-86 above).

The Court sees no cause to depart from the Constitutional Court's findings, which were based on its direct knowledge of the national circumstances.

The period after 19 December 2002

174. The Government contended that the Constitutional Court's ruling of 19 December 2002 on the constitutional application brought by the Ombudsman had removed a number of obstacles to the realisation of the applicant's entitlement (see paragraph 167 above). In the Court's view, that might have been the case had the authorities complied with that judgment.

It is true that, on 14 January 2003, the legislation was amended so as to enable the Bug River claimants to bid at auctions for the sale of privatised State enterprises (see paragraph 88 above). It is also true that, pursuant to the January 2003 and the August 2003 Ordinances, the Bug River claimants were exempted from the payment of a security before an auction for the sale of State Treasury and municipal property, and that the offsetting of the value of their entitlement against the price of property sold at such auctions could no longer be excluded (see paragraphs 90 and 92 above).

However, having regard to the other events that followed the Constitutional Court's judgment, the Court does not consider that those changes to legislation, although they were generally in the applicant's favour, materially improved his situation.

175. To begin with, on the date of entry into force of that judgment, the State Treasury's Agricultural Property Agency and the Military Property Agency issued official communiqués, disseminated via the Internet. Both communiqués were worded similarly and announced that the agencies had suspended all auctions for the sale of State property because, allegedly, they could not be held before numerous amendments to the legislation had been introduced (see paragraphs 30-32). This policy resulted in the effective suspension of the execution of the judgment because the provisions restoring State agricultural and military property to the pool of property

available to the Bug River people could not be implemented in practice. It was strongly condemned by the judicial authorities, most notably the Supreme Court, which deemed such acts to amount to constitutional torts. However, neither the executive nor the legislative power reacted to the agencies' conduct (see paragraphs 30-32, 98, 102 and 110 above).

In the Court's opinion, such conduct by State agencies, which involves a deliberate attempt to prevent the implementation of a final and enforceable judgment and which is, in addition, tolerated, if not tacitly approved, by the executive and legislative branch of the State, cannot be explained in terms of any legitimate public interest or the interests of the community as a whole. On the contrary, it is capable of undermining the credibility and authority of the judiciary and of jeopardising its effectiveness, factors which are of the utmost importance from the point of view of the fundamental principles underlying the Convention and which, in the context of the present case, must prevail over any conceivable considerations of economic or social policy that might have been behind the Polish State's failure to rectify the policy of the agencies concerned.

That assessment appears to have been shared by the Polish Supreme Court which, in its judgment of 21 November 2003, found that the authorities had made the right to credit unenforceable in practice and held, *inter alia*, that "such actions cannot be accepted in a democratic State governed by the rule of law and applying the principles of social justice ..." (see paragraph 110 above).

176. The culminating event, however, took place on 30 January 2004, the date of entry into force of the December 2003 Act, a law whose constitutionality was challenged before the Constitutional Court by a group of Members of Parliament on that very date (see paragraphs 37-38 and 120 above).

By virtue of that Act, the Polish State deemed discharged all obligations which might have arisen in relation to the implementation of the applicant's right to credit, because his family had already obtained partial compensation under the previous legislation (see paragraphs 35, 37 and 114-119 above).

The Court would reiterate that compensation terms under the relevant legislation may be material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on applicants. The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference, and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances (see the Former King of Greece and Others judgment, cited above, § 89, with further references).

The Court considers, however, that the terms under which the State's obligation towards the applicant was written off are one more material factor to be taken into account in assessing as a whole the State's

compliance with Article 1 of Protocol No.1. For that reason, it finds it more appropriate to draw its conclusion as to the effects of the recent legislation on the applicant's previously existing entitlement after having determined whether his conduct, in the particular circumstances of the present case, had a bearing on the effective implementation of his right to credit.

(iii) Conduct of the applicant

(α) The parties' submissions

177. The Government, as they had done at the admissibility stage, pleaded that the applicant had failed to exhaust the domestic remedies available to him, as required by Article 35 § 1 of the Convention, and that his conduct had not been consistent with the diligence required of a claimant.

They stressed that domestic law implied that a person seeking to satisfy a claim for compensation for Bug River property should display an active attitude. Yet the applicant, throughout the entire period under consideration, had not made a single attempt to participate in auctions for the sale of State property. The Government admitted that the bidding procedure could not by itself be regarded as an effective remedy under Article 35 § 1 of the Convention, but they nevertheless considered that it had constituted a condition *sine qua non* for the implementation of the applicant's entitlement.

178. In the Government's submission, the applicant, by his own inaction, namely his failure to comply with the statutory requirements for his application for compensatory property, had deliberately excluded any possibility for him to participate in auctions. They contended that the fact that he had not submitted to the authorities an updated expert report determining the current market value of the abandoned property had prevented them from issuing a decision confirming his entitlement, as required by the 1998 Ordinance.

Lastly, the Government pointed out that even recently, between April 2002 and October 2003, the mayor of Wieliczka, his place of residence, had organised three auctions and that, had the applicant observed the procedural requirements for his application, nothing would have prevented him from bidding for, and possibly acquiring, the property concerned, situated in Chorągwica and Niepołomice, close to his home.

179. The applicant submitted that the allegation that his conduct had not been diligent should be assessed in the light of all the relevant circumstances. First of all, the authorities had not given any real effect to the previous legislation, however defective and restrictive. The minimal number of auctions organised in the Cracow District in the 1990s and the large number of claimants, with similar yet unsatisfied claims, demonstrated that, as established by the Cracow Regional Court, it had been near to

impossible for him to enforce his right to credit. The same conclusion, in respect of the situation subsisting within the entire country, had been reached by the Constitutional Court.

He further referred to the findings of the Constitutional Court and the Cracow Regional Court that it had been a common phenomenon for the Bug River claimants, given the chronic shortage of land, to have lost a significant proportion of their claim by "pushing up" the prices of property sold at auctions to a level considerably exceeding its market value. The same applied to the auctions mentioned by the Government, at which the land in question had been sold for sums several times in excess of the reserve prices and, also, significantly exceeding the value of his entitlement, as stated in the valuation report supplied to the Court by the Government.

(β) The Court's assessment

180. The question of the effectiveness of the procedure for the implementation of the applicant's entitlement was examined in depth by the national courts which, as the Court has noted, had the advantage of possessing direct knowledge of the situation (see paragraphs 172-173 above).

Assessing the general situation up to 19 December 2002, the Constitutional Court observed that "all laws restricting the Bug River claimants' access to acquisition by means of bids for certain categories of State Treasury's property [had] a direct impact on the possibility of realising the right to credit". It went on to find that "the lack of opportunity to benefit from this right, within the framework set out by the legislature, show[ed] that an illusory legal institution [had] been created". It held that, in consequence, the existing compensation machinery had become a "fictional instrument of compensation" (see paragraphs 82-86 above).

As regards the situation in the district in which the applicant's claim was registered at the relevant time, the Cracow Regional Court, on the basis of evidence before it, established – and that finding has not been contested by the Government – that during the eight years up to 1998 the authorities had organised only 22 auctions and that, on the whole, only 20 persons out of the 300 who had an entitlement, had had their right to credit satisfied (see paragraphs 97 and 169 above).

Furthermore, it has already been established that on 8 January 2003, after the entry into force of the Constitutional Court's judgment, the authorities, in an attempt to hinder the implementation of that judgment, suspended nearly all auctions for the sale of State property (see paragraphs 174-175 above). The Cracow Regional Court and, subsequently, the Supreme Court held that the State's conduct amounted to a constitutional tort and the possibility of realising the right to credit was considered to have been illusory (see paragraphs 98, 102 and 110).

181. In the circumstances and bearing in mind the risk inherent in the auction bidding procedure, the Court considers that, by reason of the State's own obstructive action and inaction, that procedure could not be regarded as an "effective" or "adequate" means for realising the applicant's entitlement to compensation vested in him under Polish legislation. It cannot be said that the applicant was responsible for, or culpably contributed to, the state of affairs of which he is complaining. Rather, as the Court finds on the evidence before it, the hindrance to the peaceful enjoyment of his possessions is solely attributable to the respondent State (see also paragraphs 168-176 above).

That being so, the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies, which was reserved in the decision on admissibility (see *Broniowski* (dec.) cited above, §§ 86-87), should be rejected.

(iv) Conclusion as to "fair balance"

182. The Court accepts that in situations such as the one in the present case, involving a wide-reaching but controversial legislative scheme with significant economic impact for the country as a whole, the national authorities must have considerable discretion in selecting not only the measures to secure respect for property rights or to regulate ownership relations within the country, but also the appropriate time for their implementation. The choice of measures may necessarily involve decisions restricting compensation for the taking or restitution of property to a level below its market value. Thus, Article 1 of Protocol No. 1 does not guarantee a right to full compensation in all circumstances (see *James and Others* cited above, § 54).

Balancing the rights at stake, as well as the gains and losses of the different persons affected by the process of transforming the State's economy and legal system, is an exceptionally difficult exercise. In such circumstances, in the nature of things, a wide margin of appreciation should be accorded to the respondent State.

Nevertheless, the Court would reiterate that that margin, however considerable, is not unlimited and that the exercise of the State's discretion, even in the context of the most complex reform of the State, cannot entail consequences at variance with Convention standards (see paragraphs 149-151 above).

183. Whilst the Court accepts that the radical reform of the country's political and economic system, as well as the state of the country's finances, may justify stringent limitations on compensation for the Bug River claimants, the Polish State has not been able to adduce satisfactory grounds justifying, in terms of Article 1 of Protocol No. 1, the extent to which it has continuously failed over many years to implement an entitlement conferred

on the applicant, as on thousands of other Bug River claimants, by Polish legislation.

184. The rule of law underlying the Convention, and the principle of lawfulness in Article 1 of Protocol No. 1, require States not only to respect and apply, in a foreseeable and consistent manner, the laws they have enacted, but also, as a corollary of this duty, to ensure the legal and practical conditions for their implementation (see also paragraph 147 above). In the context of the present case, it was incumbent on the Polish authorities to remove the existing incompatibility between the letter of the law and the State-operated practice which hindered the effective exercise of the applicant's right of property. Those principles also required the Polish State to fulfil in good time, in an appropriate and consistent manner, the legislative promises it had made in respect of the settlement of the Bug River claims. This was a matter of important public and general interest (see paragraph 150 above). As rightly pointed out by the Polish Constitutional Court (see paragraph 82 above), the imperative of maintaining citizens' legitimate confidence in the State and the law made by it, inherent in the rule of law, required the authorities to eliminate the dysfunctional provisions from the legal system and to rectify the extra-legal practices.

185. In the present case, as ascertained by the Polish courts and confirmed by the Court's analysis of the respondent State's conduct, the authorities, by imposing successive limitations on the exercise of the applicant's right to credit, and by applying the practices that made it unenforceable and unusable in practice, rendered that right illusory and destroyed its very essence.

The state of uncertainty in which the applicant found himself as a result of the repeated delays and obstruction continuing over a period of many years, for which the national authorities were responsible, was in itself incompatible with the obligation arising under Article 1 of Protocol No. 1 to secure the peaceful enjoyment of possessions, notably with the duty to act in good time, in an appropriate and consistent manner where an issue of general interest is at stake (see paragraph 152 above).

186. Furthermore, the applicant's situation was compounded by the fact that what had become a practically unenforceable entitlement was legally extinguished by the December 2003 legislation, pursuant to which the applicant lost his hitherto existing entitlement to compensation. Moreover, this legislation operated a difference of treatment as between Bug River claimants in so far as those who had never received any compensation were awarded an amount which, although subject to a ceiling of 50,000 PLN, was a specified proportion (15%) of their entitlement, whereas claimants in the applicant's position, who had already been awarded a much lower percentage, received no additional amount (see paragraphs 115 and 118-119 above).

As stated above (see paragraphs 134 and 182), under Article 1 of Protocol No. 1 the State is entitled to expropriate property – including any compensatory entitlement granted by legislation – and to reduce, even substantially, levels of compensation under legislative schemes. This applies, particularly, to situations in which the compensatory entitlement does not arise from any previous taking of individual property by the respondent State, but is designed to mitigate the effects of a taking or loss of property not attributable to that State. What Article 1 of Protocol No. 1 requires is that the amount of compensation granted for property taken by the State be "reasonably related" to its value (see paragraph 176 above). It is not for the Court to say in the abstract what would be a "reasonable" level of compensation in the present case. However, given that – as acknowledged by the Government (see paragraph 35 above) – the applicant's family had received merely 2 % of the compensation due under the legislation as applicable before the entry into force of the Protocol in respect of Poland, the Court finds no cogent reason why such an insignificant amount should *per se* deprive him of the possibility of obtaining at least a proportion of his entitlement on an equal basis with other Bug River claimants.

(d) General conclusion

187. Having regard to all the foregoing factors and in particular to the impact on the applicant over many years of the Bug River legislative scheme as operated in practice, the Court concludes that, as an individual, he had to bear a disproportionate and excessive burden which cannot be justified in terms of the legitimate general community interest pursued by the authorities.

There has therefore been a violation of Article 1 of Protocol No. 1 in the applicant's case.

II. ARTICLES 46 AND 41 OF THE CONVENTION

A. Article 46 of the Convention

188. Article 46 of the Convention provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

189. It is inherent in the Court's findings that the violation of the applicant's right guaranteed by Article 1 of Protocol No. 1 originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons. The unjustified hindrance on the applicant's "peaceful enjoyment of his possessions" was neither prompted by an isolated incident nor attributable to the particular turn of events in his case, but was rather the consequence of administrative and regulatory conduct on the part of the authorities towards an identifiable class of citizens, namely the Bug River claimants.

The existence and the systemic nature of that problem have already been recognised by the Polish judicial authorities, as has been confirmed by a number of rulings, referred to in detail in the present judgment. Thus, in its judgment of 19 December 2002 the Constitutional Court described the Bug River legislative scheme as "caus[ing] an inadmissible systemic dysfunction" (see paragraph 85 *in fine* above). Endorsing that assessment, the Court concludes that the facts of the case disclose the existence, within the Polish legal order, of a shortcoming as a consequence of which a whole class of individuals have been or are still denied the peaceful enjoyment of their possessions. It also finds that the deficiencies in national law and practice identified in the applicant's individual case may give rise to numerous subsequent well-founded applications.

190. As part of a package of measures to guarantee the effectiveness of the Convention machinery, the Committee of Ministers of the Council of Europe has adopted a Resolution of 12 May 2004 (DH Res. (2004)3) on judgments revealing an underlying systemic problem, in which, after emphasising the interest in helping the State concerned to identify the underlying problems and the necessary execution measures (paragraph 7 of the preamble), it invited the Court "to identify in its judgments finding a violation of the Convention what it considers to be an underlying systemic problem and the source of that problem, in particular when it is likely to give rise to numerous applications, so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments" (paragraph I of the Resolution). That resolution has to be seen in the context of the growth in the Court's caseload, particularly as a result of series of cases deriving from the same structural or systemic cause.

191. In the same context, the Court would draw attention to the Committee of Ministers' Recommendation of 12 May 2004 (Rec. (2004)6) on the improvement of domestic remedies, in which it is emphasised that, in addition to the obligation under Article 13 of the Convention to provide an individual who has an arguable claim with an effective remedy before a national authority, States have a general obligation to solve the problems underlying the violations found. Mindful that the improvement of remedies

at the national level, particularly in respect of repetitive cases, should also contribute to reducing the workload of the Court, the Committee of Ministers recommended that the Contracting States, following Court judgments which point to structural or general deficiencies in national law or practice, review and, "where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court".

192. Before examining the applicant's individual claims for just satisfaction under Article 41 of the Convention, in view of the circumstances of the instant case and having regard also to the evolution of its caseload, the Court wishes to consider what consequences may be drawn for the respondent State from Article 46 of the Convention. It reiterates that by virtue of Article 46 the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII).

193. The Court has already noted that the violation which it has found in the present case has as its cause a situation concerning large numbers of people. The failure to implement in a manner compatible with Article 1 of Protocol no. 1 the chosen mechanism for settling the Bug River claims has affected nearly 80,000 people (see paragraphs 33-34 above). There are moreover already 167 applications pending before the Court brought by Bug River claimants. This is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery.

Although it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the many people affected. Above all, the measures adopted must be such as to remedy the systemic defect underlying the Court's finding of a violation so as not to overburden the

Convention system with large numbers of applications deriving from the same cause. Such measures should therefore include a scheme which offers to those affected redress for the Convention violation identified in the instant judgment in relation to the present applicant. In this context the Court's concern is to facilitate the most speedy and effective resolution of a dysfunction established in national human rights protection. Once such a defect has been identified, it falls to the national authorities, under the supervision of the Committee of Ministers, to take, retroactively if appropriate (see *Bottazzi v. Italy* [GC], no. 34884/97, § 22, ECHR 1999-V, *Di Mauro v. Italy* [GC], no. 34256/96, § 23, ECHR 1999-V and the Committee of Ministers' Interim Resolution DH(2000)135 of 25 October 2000 (Excessive length of judicial proceedings in Italy: general measures); see also *Brusco v Italy* (dec.), no. 69789/01, ECHR 2001-IX and *Giacometti and Others v. Italy* (dec.), no. 34939/97, ECHR 2001-XII), the necessary remedial measures in accordance with the subsidiary character of the Convention, so that the Court does not have to repeat its finding in a lengthy series of comparable cases.

194. With a view to assisting the respondent State in fulfilling its obligations under Article 46, the Court has sought to indicate the type of measure that might be taken by the Polish State in order to put an end to the systemic situation identified in the present case. The Court is not in a position to assess whether the December 2003 Act (see paragraphs 114-120 above) can be treated as an adequate measure in this connection since no practice of its implementation has been established as yet. In any event, this Act does not cover persons who – like Mr Broniowski – had already received partial compensation, irrespective of the amount of such compensation. Thus, it is clear that for this group of Bug River claimants the Act cannot be regarded as a measure capable of putting an end to the systemic situation identified in the present judgment as adversely affecting them.

Nevertheless, as regards general measures to be taken, the Court considers that the respondent State must, primarily, either remove any hindrance to the implementation of the right of the numerous persons affected by the situation found, in respect of the applicant, to have been in breach of the Convention, or provide equivalent redress in lieu. As to the former option, the respondent State should, therefore, through appropriate legal and administrative measures, secure the effective and expeditious realisation of the entitlement in question in respect of the remaining Bug River claimants, in accordance with the principles for the protection of property rights laid down in Article 1 of Protocol No. 1, having particular regard to the principles relating to compensation (see paragraphs 147-151, 176 and 186 above).

B. Article 41 of the Convention

195. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

1. Damage claimed in the present case

196. Under the head of pecuniary damage, the applicant claimed 990,000 Polish zlotys (PLN) in compensation for loss of his right of property. In his estimation, that amount corresponded to the value of the property abandoned in Lwów, for which he had not received redress. He further claimed PLN 1,548,000 for loss of profit for the period of over 50 years throughout which neither he nor his predecessors had been able to derive any benefit from their possessions.

The applicant further asked the Court to award him 12,000 euros (EUR) for the non-pecuniary damage he had suffered on account of the uncertainty, stress and frustration caused by his continuing inability to enjoy his property right.

By way of costs the applicant, who was represented before the Court under its legal aid scheme by two lawyers, claimed the sum of PLN 125,000.

197. The Government, who had been asked to address the question of just satisfaction in a general manner, considered that the claims were excessive. Referring to the applicant's claim for costs, they stressed that the applicant's lawyers demanded excessive amounts for their work on the case. For instance, one of the applicant's representatives charged an exceptionally high fee for 1 hour, amounting to PLN 1,000, i.e. some EUR 250 which, given the situation in Poland, was unacceptable.

2. The Court's conclusion

(a) Pecuniary and non-pecuniary damage

198. In the circumstances of the case, the Court considers that the question of compensation for pecuniary and/or non-pecuniary damage is not ready for decision. That question must accordingly be reserved and the subsequent procedure fixed, having due regard to any agreement which might be reached between the respondent Government and the applicant (Rule 75 § 1of the Rules of Court) and in the light of such individual or general measures as may be taken by the respondent Government in execution of the present judgment. Pending the implementation of the relevant general measures, which should be adopted within a reasonable

time, the Court will adjourn its consideration of applications deriving from the same general cause.

(b) Costs and expenses

199. As regards the costs and expenses already incurred by the applicant in the proceedings before the Court, the Court, making its assessment on an equitable basis, awards him the sum of EUR 12,000, less EUR 2,409 received under the Court's legal aid scheme, to be converted into Polish zlotys at the rate applicable at the date of settlement, together with any tax that may be chargeable on this amount.

(c) Default interest

200. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds* that the above violation has originated in a systemic problem connected with the malfunctioning of domestic legislation and practice caused by the failure to set up an effective mechanism to implement the "right to credit" of Bug River claimants;

4. *Holds* that the respondent State must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Article 1 of Protocol No. 1;

5. *Holds* that, as far as the financial award to the applicant for any pecuniary or non-pecuniary damage resulting from the violation found in the present case is concerned, the question of the application of Article 41 is not ready for decision and accordingly,
   (a) *reserves* the said question as a whole;

(b) *invites* the Government and the applicant to submit, within six months from the date of notification of this judgment, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
(c) *reserves* the further procedure and *delegates* to the President of the Court the power to fix the same if need be;

6. *Holds*
(a) that the respondent State is to pay the applicant, within three months, EUR 12,000 (twelve thousand euros) in respect of costs and expenses incurred up to the present stage of the proceedings before the Court, less EUR 2,409 (two thousand four hundred and nine euros) received by way of legal aid from the Council of Europe, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable on the above amount;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 June 2004.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr Zupančič is annexed to this judgment.

L.W.
P.J.M.

CONCURRING OPINION OF JUDGE ZUPANČIČ

My concurring opinion relates to paragraphs 190 to 194 and to points 3 and 4 of the operative part of the judgment.

In paragraph 190 we refer to the resolution of the Committee of Ministers of the Council of Europe dated 12 May 2004 (DH Res. 2004)3); the Committee *"after emphasising the interest in helping the State concerned to identify the underlying problems and the necessary execution measures, ..., invited the Court 'to identify in its judgments finding the violation of the Convention, what it considers to be an underlying systemic problem and the source of that problem, in particular when it is likely to give rise to numerous applications, so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.'"*

The Court uses this portion of the resolution of the Committee of Ministers to rationalize what it then says in paragraph 192 as if it were continuing the incremental process that had been commenced in *Scozzari and Giunta v. Italy* (39221/98 and 41963/98, § 249, ECHR, 2000-VIII).

In *Scozzari and Giunta*, the Court, for the first time, applied the language of Article 41 in conjunction with Article 46, to the effect that, taken together, they require the State to do away with the situation which had caused the violation (*"restitutio in integrum"*) in the first place and which in fact was the violation found in the case.

Article 46 requires the High Contracting Parties to undertake to abide by the final judgment of the Court; Article 41 refers to situations where the internal law of the High Contracting Party concerned allows only partial reparation to be made. The way Article 41 is phrased, which was the basis of our position taken in *Scozzari and Giunta*, implies that the just satisfaction afforded to the party injured by the contracting State is granted derivatively and secondarily, i.e. in situations where the internal law of the High Contracting Party concerned does not itself provide for and deliver a full reparation – meaning: *restitutio in integrum* – to be made. The *Travaux préparatoires* of the Convention reveal the origin of this rather enigmatic and confusing phrase. It derived from a pre-war Swiss-German Arbitration Agreement. It was used as a means of mere political compromise concerning the binding nature of the judgments of the Court; hence its unsuitable language.

However, in *Scozzari and Giunta* we finally decided to interpret the above language consistently with its logical import, i.e. to the effect that pecuniary just satisfaction cannot be the sole remedy. We shall see below that there are situations where mere just satisfaction has rather absurd results. This follows the crucial legal logic according to which the right and the remedy must be interdependent. The consubstantiality of the language of Articles 41 and 46 logically implies that the internal law of the High

Contracting Party must offer a remedy to the applicant in whose case the violation was found and, moreover, that that remedy should be decided upon by the Court in its final judgment, by which the High Contracting Party undertakes to abide.

In other words, in *Scozzari and Giunta* we came to the logically inescapable conclusion that a *restitutio in integrum* should be required by the Court in situations in which the non-compliance with the Convention – *Scozzari and Giunta* was a family law case –, is a continuing situation extending into the future. Partial or complete compensation for the injury incurred prior to the Court's final judgment, even assuming that money can make good such injuries, would only cover the period up to the point of the Court's own final finding of a violation. The situation in the recently decided case of *Assanidze v. Georgia*, 08/04/2004, where the applicant continued to be illegally detained, and where the Court for the first time in the operative part of the judgment required the applicant's immediate release, is precisely the case in point. It also grows out of the *Scozzari* doctrine. This doctrine is principled and has nothing whatsoever to do with the pragmatic aspect of offsetting the Court's rapidly augmenting case-load.

To reiterate. It would be absurd if the Court were to afford "just satisfaction to the injured party" and then sub rosa *acquiesce* to the continuation of the status quo which the offending State would not be obliged, under the previous interpretation of the language of Article 41, to remedy in its essential aspects.

However, in *Broniowski* we have a situation that is analogous but not identical to the one in *Scozzari and Giunta* and *Assanidze*. In these two cases, without the Court's express order, the applicant would continue to suffer the violation of her or his human rights. In *Broniowski* on the other hand the applicant himself will indeed have been vindicated and compensated, but thousands of others will not. It is true, in other words, that to offer just satisfaction to Mr Broniowski will do absolutely nothing to resolve the predicament in which thousands of other citizens of Poland have found themselves in the whole post-War period. And in which they would continue to find themselves despite the Court's finding the violation. At issue, therefore, is not the continuing violation of the human rights of a single applicant, but of thousands of other subjects. *A fortiori*, therefore, the Court does have reason to require the State to remedy this "systemic situation". I wholeheartedly and unequivocally support this principled essence of the Court's decision.

What I do not agree with is the ambivalent and hesitant rationale of the judgment. I do not think this Court needs, apart from the Convention itself, any additional legal rationalisation to legitimise its principled logic, and especially if it is to seek that legal basis in a resolution of the Committee of Ministers which, in fact, has quite a different pragmatic goal in mind. The Committee of Ministers refers to the underlying "systemic problem" which,

typically, is the situation in which Italy found itself with its massive unreasonable delay problem, where the cases were not decided in good time and where justice had systemically been denied because it had again and again been delayed. I simply do not agree with the last sentence of paragraph 190 where the majority says *"that resolution has to be seen in the context of the growth of the Court's case-load, particularly as a result of series of cases deriving from the same structural or systemic cause"*. The reference in the first sub-paragraph of paragraph 193 to the *"threat to the future effectiveness of the Convention machinery"* has absolutely nothing to do with the principled position taken by the Court. Again, in the middle of the second sub-paragraph of paragraph 193 we say that *"the measures adopted must be such as to remedy the systemic defect underlying the Court's finding of a violation so as to not to overburden the Convention system with large numbers of applications deriving from the same cause."* The true reason for the logic started in *Scozzari and Giunta* and continued in *Assanidze v. Georgia* has nothing to do with the Court's case-load.

It has, however, everything to do with justice.