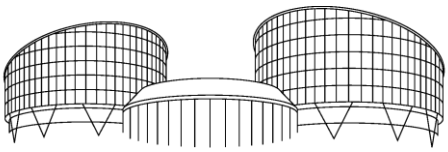

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF EAST/WEST ALLIANCE LIMITED v. UKRAINE

(Application no. 19336/04)

JUDGMENT

This version was rectified on 3 February 2014 under Rule 81 of the Rules of Court.

STRASBOURG

23 January 2014

FINAL

02/06/2014

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of East/West Alliance Limited v. Ukraine,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
André Potocki,
Paul Lemmens,
Aleš Pejchal, *judges,*
and Stephen Phillips, *Deputy Section Registrar,*

Having deliberated in private on 17 December 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 19336/04) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 27 May 2004 by East/West Alliance Ltd., an Irish company based in Dublin with a representative office in Ukraine ("the applicant company").

2. The applicant company was represented by the "International law firm "Consulting" based in Kyiv and, starting from 8 October 2013, also by Mr Grégory Thuan dit Dieudonné, a lawyer based in Strasbourg.[1] The Ukrainian Government ("the Government") were represented by their Agent, most recently Mr Nazar Kulchytskyy.

3. The applicant company alleged breaches of Article 1 of Protocol No. 1, as well as Article 6 § 1 and Article 13 of the Convention, on account of the authorities' numerous and multifaceted interferences with its property rights to fourteen aircraft, which allegedly resulted in its being deprived of those possessions.

4. On 31 March 2010 the application was communicated to the Government.

5. On 27 April 2012 the President of the Section decided, under Rule 54 § 2 (c) of the Rules of Court, that the parties should be invited to submit further written observations on the admissibility and merits of the application.

1. Rectified on 3 February 2014: the text "and, starting from 8 October 2013, also by Mr Grégory Thuan dit Dieudonné, a lawyer based in Strasbourg." was added.

6. The Irish Government, having been informed of their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44 of the Rules of Court), indicated that they did not wish to exercise that right.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. At the time of the events the applicant company, along with ATI (an air cargo traffic company), URARP (an aircraft repairs and maintenance company), and some other companies involved in the aviation business, belonged to the Titan Consortium.

8. At various times between August 1997 and March 2002, when he was elected to the national parliament, the president of the Ukrainian office of the applicant company, ATI and the Titan Consortium was a certain Mr L.

A. Facts concerning the An-28 aircraft

1. Purchase and business operations by the applicant company

9. Pursuant to a sale contract of 30 July 1999, as modified on 28 December 1999, the applicant company purchased eight Antonov-28 ("An-28") aircraft from the Russian airline company S. The aircraft had been manufactured in 1988-1990, and their flying records ranged from 1,455 to 2,821 hours.

10. On 9 and 19 January 2000 the applicant company leased those aircraft to ATI for ten years. It was stipulated in the contract that the aircraft would remain the property of the applicant company during that entire period. The ownership could then be transferred to ATI, on condition that it had settled all the leasing payments.

11. On 22 and 28 March 2000 the Ministry of Transport of Ukraine registered the aircraft. The applicant company was indicated as the owner in the registration certificates.

12. In November 2000 one of the aircraft was relocated to Moldova for commercial purposes.

13. On 7 March 2001 another aircraft was sold to company C.

14. The six remaining aircraft were parked at the Uzyn airbase in the Kyiv region (Bila Tserkva).

15. On 6 July 2001 the applicant company and ATI terminated the lease agreement because the lessee was unable to comply with its terms.

16. On 20 August 2001 the applicant company concluded an agreement on a ten-year lease of the six aircraft to another company, R.S.T., which was to take effect on 1 October 2001. That agreement, however, never entered into force.

2. Criminal proceedings against URARP and ATI officials

17. Between 23 and 25 January 2001 the tax police conducted a search on the premises of the Titan Consortium in Kyiv, including the applicant company's office, apparently in the context of criminal investigations against URARP on account of suspected tax evasion. As a result, it seized "a considerable number of documents" (quoted from a ruling of the Kyiv Prosecutor's Office of 20 September 2002 – see paragraph 27 below). The seized documentation included the original contract of sale for the six An-28s parked at the Uzyn airbase. The case file does not contain the search-and-seizure report.

18. On 23 March 2001 the tax police launched criminal proceedings against ATI officials on suspicion of tax evasion.

19. On 29 March 2001 the proceedings were discontinued as they had been instituted prematurely. However, by the same ruling the tax police instituted criminal proceedings against ATI officials on suspicion of document forgery.

20. On 30 March 2001 the tax police held an "inspection of the scene" at the Uzyn airbase, as a result of which they discovered and seized the six An-28 aircraft. The seizure was documented by a "report of the inspection of the scene" (the same procedure took place at Cherkasy airport in respect of eight L-410 planes also belonging to the applicant company – see paragraph 104 below). As the security guard was unable to produce the documentation for those aircraft, submitting that it was in the applicant company's office in Kyiv, the police concluded that "their owner could not be established".

21. The applicant company challenged the aforementioned seizure (as well as the seizure of the L-410 aircraft – see paragraph 105 below) before the prosecution authorities.

22. On 10 January 2002 the tax police opened again a criminal case against the ATI officials on suspicion of tax evasion.

23. On 21 March 2002 the Kyiv City Prosecutor's Office wrote to the applicant company, in reply to its complaint about the alleged unlawfulness of the seizure of the aircraft of 30 March 2001, that it could not decide on the seizure of the An-28 aircraft, as in the meantime, on 10 September 2001, the Kyiv City Commercial Court had also impounded them in the context of the commercial proceedings brought by the tax authorities (see paragraph 35 below). As regards the L-410s, their seizure was found to be unlawful as it had not been based on an adequate procedural document (see paragraph 106 below).

24. On an unspecified date a criminal case was opened against the vice-president of ATI, who was charged with abuse of office, forgery, tax evasion and money laundering. Apparently, this criminal case replaced those previously opened against the ATI officials (see paragraphs 18 and 22 above). The ATI vice-president was suspected, in particular, of having forged the contracts of 9 and 19 January 2000 (see paragraph 10 above) for the allegedly non-existent lease of the aircraft, with a view to tax evasion.

25. On 17 April 2002 the tax police investigator conducted another inspection of the planes at the Uzyn airbase.

26. On the same date the investigator classified the planes as material evidence in the criminal case against the ATI vice-president, with reference to Articles 78 and 79 of the Code of Criminal Procedure (see paragraph 138 below).

27. On 20 September 2002 the Kyiv City Prosecutor's Office refused to institute criminal proceedings against the tax police in respect of, *inter alia*, the search of the applicant company's office between 23 and 25 January 2001 and the seizure of documentation relating to the aircraft. It was the fourth decision of the prosecution authorities refusing to open a criminal case in that regard. The previous three had been quashed on grounds of insufficient evidence. The applicant company also unsuccessfully tried to bring a civil claim in that regard.

28. On 3 February 2003 the Pecherskyy District Court of Kyiv ("the Pecherskyy Court") found the vice-president of ATI guilty of professional negligence and acquitted him of the other charges (including the forgery of the lease contracts of 9 and 19 January 2001). By the same judgment the court ordered that the six AN-28s used as material evidence in the case be returned to "their owner". On 8 May 2003 the Kyiv City Court of Appeal upheld that judgment.

29. On 26 May 2003 the Pecherskyy Court wrote to the State company in charge of the management of the Uzyn airbase stating that, pursuant to the judgment of 3 February 2003, the planes in question were to be returned to their owner.

30. On 30 May 2003 the airbase manager forwarded that instruction to the State Tax Inspectorate in Bila Tserkva (further referred to as "the Bila Tserkva Tax Inspectorate" or "the tax inspectorate"), which had entrusted it with their storage. The airbase manager also indicated that the tax inspectorate owed the State company 46,295 Ukrainian hryvnias (UAH) for the storage.

31. On 2 June 2003 the tax inspectorate replied that meanwhile, on 16 September 2002, the aircraft had been declared ownerless (see paragraph 41 below) and that there were no lawful grounds for discontinuing their sale for State revenue (see also paragraphs 61-65 below). As to the supposed indebtedness, the tax inspectorate submitted that the planes, which were now State property, had been stored in a State-owned airbase and guarded

by the tax police (see paragraphs 73-74 below). Accordingly, it considered the claim for storage costs to be without basis.

32. On 7 February 2005 the Pecherskyy Court specified that, in accordance with the judgment of 3 February 2003, the six An-28s were to be returned to the applicant company, which was their owner.

33. On 28 February 2005 the court issued a writ of execution on the basis of its ruling of 7 February 2005.

3. Proceedings brought by the tax authorities for invalidation of the lease contracts of the aircraft

34. On 20 August 2001 the Pecherskyy District State Tax Administration in Kyiv lodged a claim with the Kyiv City Commercial Court against the applicant company and ATI, seeking to invalidate the lease contracts of 9 and 19 January 2000 (see paragraph 10 above). The claimant submitted that the applicant company had in fact supplied the planes to ATI free of charge, while the impugned lease contracts had subsequently been forged to conceal that fact, with a view to absolving ATI from any income tax payable. In addition to invalidation of the lease contracts, the tax administration sought confiscation of the eight aircraft, with the proceeds of their sale going to the State budget. It also requested that the planes be impounded as an interim measure to secure the claim.

35. On 10 September 2001 the court started the proceedings. It secured the claim by impounding the eight aircraft (including that sold to company C. and the one relocated to Moldova).

36. On 12 October 2001 company C. asked the court to lift the impoundment of the plane it had purchased. That request was apparently granted.

37. On 27 June 2003 the Kyiv City Commercial Court rejected the claim of the tax administration as unsubstantiated. It noted that it had been common ground that ATI had not complied with the lease contracts and therefore the applicant company remained the owner of the aircraft. The court also quashed the impoundment order of 10 September 2001 (see paragraph 35 above).

38. On 29 September 2003 the Kyiv Commercial Court of Appeal upheld that judgment. It stated that the applicant company's ownership of the aircraft had been confirmed by documents, while the allegation that some of the documents had been forged had been found to be unsubstantiated in the judgment of 3 February 2003 (see paragraph 28 above).

4. Authorities' decision to declare the six aircraft ownerless

39. On 10 July 2002 an investigator of the Bila Tserkva Tax Inspectorate issued a report about "the temporary seizure of the taxpayer's assets" in

respect of the six An-28 planes parked at the Uzyn airbase, with a view to "settlement of the taxpayer's obligations *vis-à-vis* State budgets and target funds". The report listed the planes' registration numbers and referred to subsection 3.2 of section 9 of the Law of Ukraine "On the procedure for the settlement of taxpayers' obligations to State budgets and special-purpose funds" (see paragraph 140 below). It was signed by a tax police official, the Uzyn airbase manager and two attesting witnesses.

40. On 11 July 2002 the deputy head of the Bila Tserkva Tax Inspectorate issued a decision about "the administrative seizure of the taxpayer's assets" in respect of the aircraft in question. The decision reiterated that the measure had been undertaken with a view to "settlement of the taxpayer's obligations *vis-à-vis* budgets and State target funds". It was noted in the line "the taxpayer whose assets have been seized" that the owner of the aircraft had not been established.

41. On 16 September 2002 the Bila Tserkva City State Administration ("the Bila Tserkva Administration") issued an order by which it declared the six aircraft ownerless and empowered the tax police to sell them. As a result, between March and June 2003 the planes were sold to third parties (see paragraphs 61-65 below).

42. On 15 May 2003 the applicant company lodged a claim with the Kyiv Regional Commercial Court against the Bila Tserkva Administration, challenging the order of 16 September 2002. It submitted that it was the legitimate owner of the aircraft, that the defendant had duly been informed of that fact, and that the impugned order had amounted to unlawful expropriation of the applicant company's property.

43. On 3 June 2003, in order to secure the claim of the applicant company, the court banned any transactions involving the aircraft.

44. Consequently, on 4 June 2003 a bailiff sealed the six aircraft. The Ad Hoc Investigation Commission for the Investigation into Reasons for the Ukrainian Aviation Crisis Situation ("the Parliamentary Investigation Commission"), which in the meantime had been set up under the chairmanship of Mr L., MP (see paragraph 8 above), and to which the applicant company had complained, also sealed the aircraft.

45. The Bila Tserkva Administration appealed against the impoundment of the aircraft ordered on 3 June 2003 submitting, in particular, that the applicant company's claim was of a non-pecuniary nature, being limited to the invalidation of a document.

46. On 8 July 2003 the Kyiv City Commercial Court of Appeal rejected that appeal. It found the appellant's arguments groundless because the subject matter of the dispute was twofold: firstly, the impugned decision had declared the planes ownerless, and, secondly, it had authorised the tax authorities to sell the planes. Accordingly, a failure to secure the claim could jeopardise enforcement of any future judgment on the dispute.

47. On 11 November 2003 the Higher Commercial Court quashed the rulings of 3 June and 8 July 2003 on a cassation appeal lodged by the Bila Tserkva Administration. It noted that as of 3 June 2003 the planes had remained impounded in order to secure a claim in another set of proceedings under a ruling of 10 September 2001, which had not been quashed until 27 June 2003 (see paragraphs 35 and 37 above). As the legal procedure did not provide for "double" measures for securing claims, the ruling of the Kyiv Regional Commercial Court of 3 June 2003 had no legal basis.

48. On 25 December 2003 the Kyiv Regional Commercial Court found in favour of the applicant company and quashed the order of the Bila Tserkva Administration of 16 September 2002 (see paragraph 41 above). It stated that the property rights of the applicant company were confirmed by the aircraft registration certificates dated 28 March 2000 (see paragraph 11 above).

49. On 9 April 2004 the Kyiv Commercial Court of Appeal upheld that judgment. It also issued a separate ruling in which it referred, *inter alia*, to the documentary evidence in the case file proving that the Bila Tserkva Administration had proceeded with the sale of the planes on the grounds that they were ownerless (see paragraphs 41 and 61-65 below) after having received documents from the applicant company confirming the latter's ownership of those planes. The court thus concluded that, by declaring the planes ownerless, the defendant had infringed the applicant company's property rights. It further instructed the Kyiv Regional State Administration, the Kyiv City Tax Administration, and the Bila Tserkva Tax Inspectorate "to take appropriate measures in respect of the officials guilty of the violations of the procedure for identifying and declaring ownerless the property belonging to the [applicant company]."

50. On 20 July 2004 the Higher Commercial Court upheld the lower courts' decisions of 25 December 2003 and 9 April 2004.

51. On 9 December 2004 the General Prosecutor's Office ("the GPO") instituted criminal proceedings on the suspected abuse of power by officials of the tax and other state authorities, which had "had grave consequences". The prosecutor noted that, by declaring the applicant company's aircraft ownerless and selling them, as well as by unlawfully seizing its L-410s (see also paragraphs 104 and 106 below), the authorities had caused the applicant company "direct pecuniary damage of over one million Ukrainian hryvnias". On 15 December 2004 the supervision department of the GPO quashed the ruling of 9 December 2004 as premature. However, this later decision was subsequently also set aside (by the Deputy General Prosecutor's decision of 14 April 2005). There is no information on any further developments in the investigation.

52. On 21 December 2004 the Supreme Court quashed the judgment of the Kyiv Regional Commercial Court of 25 December 2003 and the related rulings of the higher-level courts (see paragraphs 48 and 50 above) and

remitted the case for fresh examination to the first-instance court. It considered that the courts had made a premature finding that the applicant company was the owner of the aircraft. The fresh examination of the case was supposed to clarify, including with the help of a forensic graphological examination, whether the contracts of sale of 30 July and 28 December 1999 (see paragraph 9 above) were authentic and in compliance with the Russian legislation as indicated therein.

53. On 25 September 2006 the Kyiv Regional Commercial Court, having examined the case afresh, allowed the applicant company's claim once again and quashed as unlawful the order of the Bila Tserkva Administration of 16 September 2002 (see paragraph 41 above). Pursuant to the instructions of the Supreme Court, it had undertaken a forensic graphological examination of the contract of sale of 30 July 1999 and the additional agreement of 28 December 1999, and had found the signatures on them to be authentic. The court further established that the transaction had taken place in compliance with Russian legislation as indicated in the contracts. It underlined that the aircraft had been declared ownerless despite the fact that the case file had contained copies of the certificates of their registration with the Ministry of Transport of Ukraine of 28 March 2000 (see paragraph 11 above). Furthermore, the Russian company S. had confirmed to the court in writing that it had sold the planes at issue to the applicant company. Accordingly, the court concluded that there were no reasons not to consider the contract of sale of 30 July 1999 as appropriate proof of the applicant company's title to the planes. The court also found that the Bila Tserkva Administration had breached the procedure for identifying and declaring the property ownerless.

54. The Bila Tserkva Administration, the Bila Tserkva Tax Inspectorate and the Kyiv Regional Prosecutor's Office appealed.

55. The Kyiv Tax Administration also enquired with Interpol whether the applicant company was registered and pursued its activities lawfully.

56. On 16 January 2007 the Kyiv Regional Commercial Court of Appeal stayed the examination of the case pending receipt of information from the Irish Interpol Department concerning that enquiry.

57. On 27 February 2007 the Ukrainian Interpol Department informed the applicant company of the reply of their Irish counterparts confirming that it (the applicant company) had no criminal record, nor any problems with the police in Ireland.

58. On 7 June 2007 and 14 October 2008 the Kyiv Regional Commercial Court of Appeal and the Higher Administrative Court, respectively, upheld the judgment of the Kyiv Regional Commercial Court of 25 September 2006 (see paragraph 53 above; apparently at some point the jurisdiction over the case had been changed from commercial to administrative).

59. On 10 November 2008 the applicant company asked the Bila Tserkva Tax Inspectorate to return the six aircraft to it, with reference to those judicial decisions.

60. On 10 December 2008 the tax inspectorate replied that it was impossible to return the planes to the applicant company, because they had been sold off at a public auction in the meantime (see paragraphs 63-65 below).

5. Sale of the aircraft to third parties

61. In July 2002, following the seizure of the aircraft (see paragraphs 39-40 above), the Bila Tserkva Tax Inspectorate commissioned the Ukrimpeks-2000 company to store and sell them.

62. The applicant company unsuccessfully sought to prevent the sale before the Bila Tserkva Administration.

63. On 17 March 2003 Ukrimpeks-2000 sold one plane to a private company.

64. On 24 April 2003 four other planes were sold to another private company.

65. On 4 June 2003 the sixth plane was sold to the Ukrainian State Air Traffic Service Enterprise.

66. On 12 December 2003 the Kyiv Regional Commercial Court started proceedings following a claim by the applicant company challenging all those sale contracts, and impounded the aircraft in order to secure the claim.

67. Meanwhile, the Ukrainian State Air Traffic Service Enterprise, from its side, also challenged the contract of 4 June 2003 before the Commodity Market Arbitration Office *("Біржовий арбітраж (на правах третейського суду)")*. The buyer could not get possession of the aircraft in question and found out that the sale had been carried out despite the judicial orders to impound the aircraft of 10 September 2001 and 3 June 2003.

68. On 19 February 2004 the Commodity Market Arbitration Office, in allowing the buyer's claim, declared the sale of 4 June 2003 (carried out in the form of a commodity market transaction) null and void.

69. On 19 May 2005 the Kyiv Regional Commercial Court discontinued the proceedings in which the applicant company was seeking annulment of the sale contract of 4 June 2003, with reference to that decision.

70. On 6 July 2005 the court also quashed the impoundment order of 12 December 2003 on the ground that it was impeding technical maintenance of the aircraft (the ruling did not refer to any requests to have the order quashed).

71. On 25 August 2009 the Kyiv Regional Commercial Court, in allowing the applicant company's claim, declared the sale contracts of 17 March and 24 April 2003 null and void.

72. On 17 December 2009 and 25 February 2010 the Kyiv Regional Commercial Court of Appeal and the Higher Commercial Court, respectively, upheld that judgment.

6. Security guard of the aircraft by the tax authorities

73. On 12 July 2002 the State Tax Administration instructed its Kyiv Regional Department to ensure security guard of the six An-28 aircraft.

74. The planes were apparently still parked at the Uzyn airbase after their sale to third parties (see paragraphs 14, 39 and 63-65 above).

75. According to the applicant company, on 4 June 2003 it concluded a contract with a State security agency on the guarding of the planes. That contract remained in force until August 2007 and the applicant company paid a total of UAH 351,522 (which, according to its calculations, was equivalent at the time to USD 67,865) for the services provided. According to the Government, that contract was of no effect in practice, given that the planes remained in the authorities' custody (see also paragraph 243 below).

76. In 2004 the applicant company found out that some of the planes had been damaged or had had some equipment removed, so it complained to the police.

77. As a result, on 23 July 2004 the Bila Tserkva police investigator, in the presence of a representative of the applicant company, inspected the six planes. The inspection revealed that some of them had been damaged and/or had had certain equipment removed. A door handle had been broken and the door damaged on one plane, and the wheel housing, navigation equipment, engines, emergency radio installations, pilots' seats and flashlight were missing on some of the planes. At the same time, some of the bailiffs' seals and those of the Parliamentary Investigation Commission (see paragraph 44 above) were broken or missing, whereas there were fresh and intact Kyiv Regional Tax Administration seals on the planes.

78. On 26 July 2004 the applicant company complained to the GPO about the theft and damage of the aircraft, emphasising that it had happened while they were being guarded by the Bila Tserkva Tax Inspectorate. The applicant company sought to institute criminal proceedings against the latter. It further argued that the planes had arrived at the airbase in good condition, referring to the fact that they had all been independently flown there, rather than taken inside the hold of another aircraft.

79. On 5 August 2004 the prosecutor's office refused to institute criminal proceedings against the officials of the Bila Tserkva Tax Inspectorate on account of the theft, having found no *corpus delicti* in their actions.

80. On 14 September 2004 the prosecutor's office initiated criminal investigations into the theft without targeting them against any specific persons.

81. On 28 March 2005 the investigator terminated the investigations, having found it impossible to identify the perpetrator(s).

82. On 2 October 2007 the applicant company brought an administrative claim against the tax authorities on account of the allegedly unlawful armed guard of the aircraft, and sought its lifting.

83. On 19 November 2007 the Kyiv Regional Administrative Court refused to open the proceedings. It noted that the dispute in question had already been resolved by the judgment of the Kyiv Regional Commercial Court of 25 September 2006, upheld by the Kyiv Regional Commercial Court of Appeal on 7 June 2007 (see paragraphs 53 and 58 above).

84. On 17 February 2009 the applicant company brought another administrative claim against the Bila Tserkva Administration and Tax Inspectorate seeking the return of its six AN-28s. It submitted that those authorities had committed an unlawful omission by their failure to return the planes to the applicant company as their legitimate owner. It further noted that the decision of 16 September 2002 had been quashed by the Kyiv Regional Commercial Court on 25 September 2006, whose decision had been upheld by the higher-level courts. Nonetheless, the property had never been returned to the applicant company.

85. On 14 April 2009 the Kyiv Regional Administrative Court terminated the proceedings on the grounds that they fell under criminal rather than administrative jurisdiction. The court noted that it had been discovered that the applicant company's claim concerned the alleged non-enforcement of a final criminal verdict (apparently meaning the verdict of the Pecherskyy Court of 3 February 2003, further clarified on 7 February 2005 – see paragraphs 28 and 32 above).

86. On 9 October 2009 the applicant company wrote to the tax authorities that it was the only legitimate owner of the six aircraft, as the decision to declare them ownerless had been quashed by the courts. It therefore insisted that the guard of the planes be lifted and that they be returned to it.

87. On 23 October 2009 the Bila Tserkva Tax Inspectorate replied that no decision had been taken about the lifting of the guard.

88. On 6 November 2009 the Kyiv Regional Tax Administration also replied to the applicant company that there was no reason to stop guarding the planes given that the court proceedings on the matter were ongoing (without specifying which proceedings it was referring to).

89. On 16 February 2010 the applicant company requested, once again, that the State Tax Administration set aside its instruction of 12 July 2002 regarding the guarding of the aircraft.

90. On 3 March 2010 the Deputy Head of the State Tax Administration forwarded that request to the Kyiv Regional Tax Administration.

91. On 15 March 2010 the latter dismissed the applicant company's request. It noted that, indeed, the courts had invalidated both the decision to

declare the planes ownerless and the contracts for their subsequent sale. Nonetheless, no decision had been delivered on the lifting of the security guard.

7. Criminal investigations in respect of Ukrimpeks-2000 (the company in charge of the sale of the aircraft)

92. On 6 October 2010 an investigator of the Bila Tserkva police department declared the six AN-28 planes as material evidence in the criminal investigation into suspected embezzlement by Ukrimpeks-2000, which had been initiated in February 2006 (the company officials were suspected of having failed to transfer all the proceeds of the aircraft sales to the State budget – see paragraphs 61 and 63-65 above). The investigator noted that the planes were under constant security guard by the Bila Tserkva Tax Inspectorate (see paragraphs 73 and 87-91 above).

93. On 26 November 2010 the applicant company complained about that decision to the Kyiv Regional Department of the Ministry of the Interior. It stated that there were no grounds for attaching the aircraft as material evidence in the criminal case in question, which had been opened about four years earlier. The applicant company pointed out that, while the planes had been guarded by the tax authorities, their technical condition had considerably deteriorated and they had become unusable. Therefore, the applicant company suggested that the tax authorities might have been seeking ways to shift the responsibility for that deterioration onto the law-enforcement authorities.

94. On 25 December 2010 the Bila Tserkva Prosecutor's Office, to which the applicant company's complaint had apparently been referred, replied that there were no reasons for it to intervene.

8. Inspection of the aircraft by Antonov specialists

95. On 17 June 2011 the investigator of the Bila Tserkva police department (apparently, the one in charge of the criminal investigation into suspected embezzlement by Ukrimpeks-2000 in which the planes had been declared as material evidence – see paragraph 92 above) decided that the planes should be returned to the applicant company.

96. On 9 August 2011 the applicant company contracted Antonov, the exclusive designer and manufacturer of An-28 aircraft, to carry out an expert evaluation of the planes.

97. From 3 to 8 October 2011 an expert commission of Antonov inspected the planes in the presence of the applicant company's representative. It concluded that what had been presented to it for inspection had consisted of separate items and components, which could not be classified as aircraft. Nor could they be identified as constituent parts of

exactly the planes belonging to the applicant company. Furthermore, no documentation for the planes was available.

B. Facts concerning the L-410 aircraft

1. Purchase and business operations by the applicant company

98. On 25 July 2000 the applicant company purchased six L-410 aircraft at a public auction.

99. On 15 August 2000 it received notarised certificates that those planes were its property.

100. On 19 September 2000 it purchased two more planes of the same type at a commodity market.

101. Pursuant to lease contracts between the applicant company and ATI of 18 August and 1 October 2000, the eight L-410s were to be leased to the latter after repairs and technical upgrading had been carried out by the applicant company. This was envisaged to be completed by 1 May 2001.

102. The planes were parked at Cherkasy airport.

2. Seizure of the aircraft by the tax authorities and related events

103. During the search conducted at the applicant company's office in Kyiv between 23 and 25 January 2001 (see paragraph 17 above), the tax police seized original documentation for the L-410 planes. The case file does not contain the search-and-seizure report.

104. On 30 March 2001 the tax police seized the aircraft "for the purpose of using them as material evidence in the criminal case [against the ATI officials] and for redemption of tax arrears". The seizure was documented by a "report of the inspection of the scene" (similar to the inspection conducted on the same date at the Uzyn airbase – see paragraph 20 above).

105. On 21 February 2002 the applicant company challenged the seizure of the planes before the Kyiv City Prosecutor's Office.

106. On 21 March 2002 the prosecutor replied that, indeed, the seizure of the L-410 planes had not been based on any procedural document and that he had therefore instructed the tax police to "take an appropriate decision concerning those aircraft".

107. On 22 April 2002 the Kyiv State Tax Administration instructed the applicant company to submit financial documentation in respect of the planes in order for a decision to be taken.

108. On 26 April 2002 the investigator of the police department of the State Tax Administration declared the eight L-410 planes as material evidence in the criminal investigations against the ATI officials (see also paragraph 26 above).

109. In August 2002 the criminal case was transferred to the GPO.

110. On 2 January 2003 a criminal case was opened in respect of Mr L. as the former president of ATI (see paragraph 8 above). Apparently, the planes were then classified as material evidence in those criminal proceedings. On 26 May 2003 the GPO discontinued the criminal investigations against Mr L. as there was insufficient evidence of any guilt. It was noted in the resolution that the eight L-410 planes, which had been classified as material evidence in the case, were to be returned to ATI. On 4 August 2004 the prosecutor amended his resolution to read that the planes had to be returned to the applicant company.

111. The applicant company unsuccessfully tried to bring proceedings before the commercial and civil courts on account of the seizure of the planes and their classification as evidence in the criminal case. On 18 October and 1 November 2004 the Kyiv City Commercial Court and the Shevchenkivskyy Court respectively refused to accept its claims for examination as being beyond their competence.

112. On 15 November 2004 the GPO's supervisory department quashed the decision of 26 April 2002 (see paragraph 108 above).

113. On 19 November 2004 it informed the Kyiv Tax Administration of that decision and instructed it to return the aircraft to the applicant company as their rightful owner. A similar letter was sent to the management of Cherkasy Airport.

114. On 3 December 2004 the director of Cherkasy Airport informed the applicant company that the aircraft could be transferred to it only in the presence of the Kyiv Tax Administration which had seized them.

3. Proceedings brought by the applicant company against the tax authorities

115. On 8 February 2006 the applicant company lodged a claim with the Kyiv City Commercial Court against the Kyiv Tax Administration seeking the return of the eight L-410 aircraft.

116. On 24 May 2006 the court allowed the claim and obliged the defendant to return the planes to the applicant company. It noted that the tax police had ignored the prosecutor's unambiguous instructions to return the planes to the applicant company. The judgment stated as follows:

> "As confirmed by the case materials and not refuted by the defendant, the [applicant company] is the owner of the eight L-410 aircraft .... The failure of the Kyiv State Tax Administration to comply with the instructions of the General Prosecutor's Office as regards the return of the planes to the claimant [unlawfully] deprives the latter of its right to possess and use its property".

117. On 24 October 2006 the Kyiv Commercial Court of Appeal quashed that judgment on an appeal by the Kyiv Tax Administration and terminated the proceedings. It found that the defendant had no longer been in charge of the planes after the criminal case in which they had been

declared as material evidence had been transferred to the GPO in August 2002 (see paragraph 109 above). Moreover, the court considered that the destiny of the planes had already been resolved in the context of the criminal proceedings by the prosecutors' resolutions of 26 May 2003, 4 August and 19 November 2004, pursuant to which the planes had to be returned to the applicant company (see paragraphs 110 and 113 above). The court therefore concluded that, as from 4 August 2004, there had been no impediments, including from the defendant's side, to the applicant company's accessing the L-410 planes.

118. On 1 April 2008 the Higher Administrative Court issued a final decision quashing the ruling of the Kyiv Commercial Court of Appeal of 24 October 2006 and upholding the judgment of the Kyiv City Commercial Court of 24 May 2006 on the applicant company's cassation appeal.

4. Proceedings for enforcement of the judgment of the Kyiv City Commercial Court of 24 May 2006

119. On 11 June 2008 the Kyiv City Commercial Court issued a writ of execution, according to which the eight L-410 aircraft were to be returned to the applicant company.

120. On 18 June 2008 the bailiff opened enforcement proceedings and instructed the Kyiv Tax Administration to send its representative to Cherkasy airport to inspect the planes, verify their completeness and implement the transfer.

121. From July to December 2008 the bailiff reported several times his failure to enforce the judgment because the tax authorities' representative had been absent or because the airport administration had refused to allow the bailiff to enter the airport.

122. From 5 December 2008 to 6 May 2010 the enforcement proceedings were stayed pending the outcome of applications lodged by both the bailiff's service and the tax authorities with the Kyiv City Commercial Court for clarification of its judgment of 24 May 2006 (those applications were eventually rejected).

123. From May to December 2010 the bailiff issued at least three more reports about his inability, for the same reasons as before (see paragraph 121 above), to enforce the judgment in question.

124. Meanwhile, in September 2010, the applicant company incidentally found out about a decision of the Cherkasy City Council of 24 July 2008 authorising the municipal enterprise "Cherkasy Airport" to sell the eight L-410 planes (with the same serial numbers as those of the planes belonging to the applicant company) at a public auction. The proceeds of the auction were to be used for the needs of Cherkasy Airport. Five of the planes had been sold to third parties.

125. On 10 December 2010 the administration of Cherkasy airport finally allowed the bailiff to enter the airport. Instead of the eight L-410

planes to be returned to the applicant company, the bailiff discovered there only three (or, more precisely, their components).

126. On 23 December 2010 the bailiff reported that he could not transfer the planes to the applicant company because: firstly, only three of them were left; secondly, the planes were locked and there were no keys to open them, which made it difficult to evaluate their technical condition; and, thirdly, the documentation for the planes was missing.

127. On the same date an expert commission of T., an aircraft maintenance company, which had been contracted by the applicant company, examined the planes discovered at Cherkasy airport and reported the following: instead of the eight complete L-410 planes as indicated in the writ of enforcement, there were separate components and items of three planes; no documentation for those items was available; the planes had corrosion on their metal surfaces and cracks in their windows; and their engines and propellers were missing. The conclusion was reached that the planes had not been stored in compliance with storage rules and that, in fact, the items discovered could no longer be considered as aircraft. Lastly, the absence of any documentation made it impossible to identify the discovered items as those belonging, and supposed to be returned, to the applicant company.

128. On 24 December 2010 the bailiff enquired with the Kyiv City Commercial Court, with reference to the expert commission's report, as to how to proceed with the enforcement.

129. On 3 March 2011 T. informed the applicant company that in 2008 and 2009 it had performed major repairs to six aircraft propellers, the serial numbers of which were the same as those of the L-410s belonging to the applicant company. The customer company had presented itself as the owner of the planes in question.

130. On 15 June 2011 the bailiff declared a "search for the debtor's property" in respect of the eight L-410s to be returned to the applicant company.

131. On 20 June 2011 the above decision was sent to the State Aviation Security Service.

132. On 16 and 18 August 2011 the bailiff repeated his request to the tax authorities to appear at Cherkasy airport at a specific time.

133. On 19 August 2011 the Kyiv City Tax Administration replied to the bailiff that after an audit in 2007 the eight L-410s had been declared as assets of the Cherkasy Airport municipal company and their ownership had been transferred to the city. It was a known fact that the bailiff had discovered only three planes at the airport and had therefore declared a search for the remaining five planes. Accordingly, the bailiff was aware that the debtor did not have the property defined in the writ of enforcement.

134. On 26 August 2011 the bailiff asked the applicant company to make it clear whether it was ready to accept the three aircraft in the

condition in which they had been discovered at Cherkasy airport (which had not improved since 23 December 2010 – see paragraphs 126-127 above). As to the remaining five planes, it turned out that they had been sold to third parties in 2008 pursuant to a decision of the Cherkasy City Council. Furthermore, the State Aviation Security Service informed the bailiff that on 13 August 2008 the eight L-410s had been excluded from the state register of civilian aircraft and that their location was unknown.

135. On 30 August 2011 the group of technical experts again examined the components of the three planes at Cherkasy airport and confirmed its conclusion of 23 December 2010 that those items could not be regarded as aircraft.

136. On the same date the bailiff issued a report about the impossibility of returning to the applicant company even the three planes.

137. On 30 August 2011 the bailiff terminated the enforcement proceedings with the conclusion that it was impossible to enforce the judgment because the debtor did not have the property in question and the search for that property had been unsuccessful.

II. RELEVANT DOMESTIC LAW AND PRACTICE AT THE MATERIAL TIME

138. The relevant provisions of the Code of Criminal Procedure (1960) read as follows:

"Article 78. Material evidence

Material evidence consists of items that are instruments or objects related to a criminal offence or bearing its traces, money, valuables and other proceeds of crime, as well as any items which could serve to uncover a criminal offence, to identify a perpetrator or to refute the accusation or mitigate a penalty.

Article 79. Preservation of material evidence

Material evidence shall be carefully examined, if possible photographed, described in detail in the examination report and attached to the case file by the inquiry officer, investigator or prosecutor in charge or by a judicial ruling. The material evidence shall be kept in the case file, except for cumbersome items which shall be stored by the enquiry or investigation authority or in the court or shall be transferred for storage to a respective enterprise, institution or organisation. ...

In some cases the material evidence may be returned to its owner if this is not detrimental to the proceedings. ...

Article 178. Grounds for conducting a seizure

A seizure shall be carried out in cases where the investigator has accurate information that the items or documents of relevance are with a certain person or at a certain place.

A seizure shall be based on the investigator's ruling. ...

Article 181. Persons in whose presence search and seizure are conducted

A search and seizure shall be conducted in the presence of two attesting witnesses and the person occupying the premises in question ....

A search and seizure in premises occupied by an enterprise, company or organisation shall be conducted in the presence of their representatives. ...

The persons searched, the attesting witnesses and the respective representatives shall have explained to them their right to be present during all the actions of the investigator and to make statements on those actions; their statements shall be reflected in the report. ...

Article 186. Seizure of items and documents

During a search and seizure only items and documents relevant to the case may be seized, as well as the valuables and property of the accused or the suspect with a view to securing a civil claim or possible confiscation of property. ...

The investigator shall present to the attesting witnesses and the other persons present all the documents and items subject to seizure. They shall be listed in the seizure report with an indication of their name, number, measurements, weight, material and individual features. Where necessary, the seized items and documents shall be packed and sealed on the spot. ...

Article 188. Search and seizure report

The investigator shall produce a report on a search and seizure in two copies .... The report shall indicate the grounds for the search and seizure, the premises on which it was conducted ... the investigator's actions and the search and seizure results.

The report of the search or seizure shall reflect all the statements and remarks of those present concerning the investigator's actions. All those present shall sign both copies of the report. ...

Article 190. Inspection [of the scene or items]

In order to uncover traces of a crime and other material evidence, to clarify the circumstances of the crime, as well as other circumstances of relevance to the investigation, the investigator shall conduct an inspection of the scene, premises, items or documents.

In urgent cases, an inspection of the scene may be carried out before the institution of criminal proceedings. In this case, and where there are grounds for it, criminal proceedings shall be instituted immediately after the inspection of the scene."

139. The Code of Commercial Procedure 1991 provided as follows:

"Article 66. Grounds for securing a claim

The commercial court shall be entitled to take measures for securing a claim, upon the request of the claimant ... or of its own motion. Securing a claim is allowed at any stage of the proceedings where a failure to take measures might complicate or render impossible the enforcement of the commercial court's judgment.

Article 67. Measures for securing a claim

A claim may be secured by the following measures:

impoundment of the property or money belonging to the defendant;

prohibition on the defendant taking certain actions;

prohibition on other persons taking certain actions related to the subject matter of the dispute; ....

... A ruling on securing a claim may be appealed against."

140. The relevant provisions of the Law of Ukraine "On the procedure for the settlement of taxpayers' obligations to the State budgets and special-purpose funds" *("Про порядок погашення зобов'язань платників податків перед бюджетами та державними цільовими фондами")* (enacted in 2000 and repealed following the entry into force of the Tax Code on 2 December 2010), read as follows:

"Section 9. Administrative seizure of assets

9.3.1. Following an application by a tax police unit, the head of the tax authority (or his deputy) may decide to seize a taxpayer's assets. This decision shall be sent:

... (b) to the taxpayer, with the assets' alienation ban;

(c) to other persons in possession of or using the taxpayer's assets, with the ban on their alienation."

9.3.2. An assets seizure may be ... applied to goods which are produced, stored, transported or sold in breach of customs legislation or legislation on excise tax, as well as goods ... sold in breach of legal procedures, without prior determination of their owner. In this case, officials of the tax or other law-enforcement authorities, acting within their competence, shall have the right to undertake a temporary seizure of such assets. This should be reflected in a report giving the reasons for the seizure, with references to breaches of concrete legal provisions, the description of the assets, their specific features and quantity, information about the person or persons from

whom the goods have been seized (if applicable), and a list of the rights and duties of those persons in respect of the seizure. ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

141. The applicant company complained under Article 1 of Protocol No. 1 of the alleged infringement by the State authorities of its property rights to six An-28 and eight L-410 aircraft. The provision relied on reads as follows:

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

A. Admissibility

1. Non-exhaustion of domestic remedies

142. The Government submitted that the applicant company had not exhausted the domestic remedies insofar as its complaint concerned the seizure by the authorities of the aircraft and their documentation. They noted that after the applicant company’s unsuccessful attempt to bring civil proceedings in respect of the documentation seizure, it could have brought an administrative claim in that regard. The Government further argued that it had been open for the applicant company to bring a separate civil claim for damages in respect of its inability to recover the planes once they were designated as material evidence in criminal proceedings.

143. As regards the documentation seizure, the applicant company noted that only a party to the criminal proceedings could challenge actions taken by an enquiry authority in the course of preliminary investigation. As the applicant company had had no status in the respective criminal investigation, there had been no legally envisaged possibility for it to challenge the impugned seizure.

144. The applicant company further contended that, given the multiple judicial proceedings it had already initiated seeking to have its rights restored, and noting the authorities' non-compliance with the final judicial decisions delivered in its favour, it could not have been reasonably expected to initiate any additional proceedings in order to comply with the requirement of the exhaustion of domestic remedies. In its view, it had done everything possible at the domestic level before bringing its complaints to the Court.

145. The Court points out that the purpose of the rule of exhaustion of domestic remedies under Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions (see, for example, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). At the same time, this rule must be applied with some degree of flexibility and without excessive formalism. The Court has already held on a number of occasions that this rule is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case (see *Akdivar and Others v. Turkey* [GC], 16 September 1996, § 69, *Reports of Judgments and Decisions* 1996-IV, and *Aksoy v. Turkey*, 18 December 1996, §§ 53-54, *Reports* 1996-VI). The Court looks, in particular, whether the applicant did everything that could reasonably be expected in order to exhaust available domestic remedies (see *Merit v. Ukraine*, no. 66561/01, § 58, 30 March 2004).

146. Turning to the present case, the Court notes the multifaceted nature of the alleged breach of the applicant company's rights under Article 1 of Protocol No. 1, where the seizure of the documentation and the aircraft are only a few of the issues complained of (see paragraph 155 below).

147. Furthermore, the Court does not lose sight of the extensive efforts undertaken by the applicant company at the national level. It notes that the applicant company sought to restore its rights under the criminal, civil, administrative and commercial jurisdictions for more than ten years. Accordingly, the Court does not consider that the Ukrainian authorities were in principle not provided with sufficient opportunity to prevent or put right the alleged violation of Article 1 of Protocol No. 1.

148. The Court will not go on with its assessment of the admissibility of this part of the application here, as the question of exhaustion of domestic remedies relates to the merits of the applicant company's complaint, under Article 13 of the Convention, that it lacked effective remedies in respect of the alleged interference with its property rights. Hence, to avoid prejudging those issues, the Court considers that these questions should be examined together. Accordingly, it holds that the question of exhaustion of domestic remedies should be joined to the merits of the applicant company's complaint under Article 13 (see paragraphs 223-229 below).

2. Compatibility ratione personae

149. The Government, referring to the decision of the tax police of 17 June 2011 on the return of the An-28s to the applicant company (see paragraph 95 above), submitted that the applicant company had lost its victim status in respect of its complaint under Article 1 of Protocol No. 1 concerning those aircraft.

150. The applicant company, in turn, referred to the report of the Antonov expert commission of 8 October 2011, according to which the property to be returned to the applicant company – the six An-28s, which had been taken from it in good operational condition – had in fact consisted of separate items and components which could no longer be classified as aircraft. Nor were those items identifiable as constituent parts of the aircraft belonging to the applicant company (see paragraph 97 above). In the applicant company's view, there were therefore no grounds for considering that it had lost its victim status.

151. The Court notes that an applicant is deprived of his or her status as a victim if the national authorities have acknowledged, either expressly or in substance, and then afforded appropriate and sufficient redress for, a breach of the Convention (see, for example, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 178-193, ECHR 2006-V).

152. It considers that none of the aforementioned conditions have been met in the present case.

153. Accordingly, this objection by the Government should be rejected.

3. Otherwise as to admissibility

154. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

155. The applicant company alleged that the State had committed a series of unlawful acts and omissions, violating its property rights, including the following:

(a) the seizure of the aircraft documentation in January 2001;
(b) the seizure of the An-28 and L-410 aircraft on 30 March 2001;
(c) the decision of the Bila Tserkva Administration of 16 September 2002 to declare the six An-28s ownerless and to authorise their sale on that ground;

(d) the sale of the An-28s to third parties before completion of the judicial proceedings brought by the applicant company challenging the authorities' decision to declare those planes ownerless property and while the planes were under court impoundments;
(e) the continued security guard of the An-28s by the tax police from July 2002 onwards, including after several judicial decisions ordering the return of the planes to the applicant company;
(f) the damage to the six An-28s and three L-410s and the vandalising of their equipment, as well as the disappearance of the five L-410s while they were in the authorities' custody;
(g) the decision of the Cherkasy City Council of 24 July 2008 authorising the Cherkasy Airport municipal enterprise to sell the eight L-410s belonging to the applicant company at a public auction (apparently, five of them were eventually sold); and
(h) the non-enforcement of the final judicial decisions ordering the return of the aircraft to the applicant company.

156. The applicant company emphasised that there had been no criminal proceedings against it and that it had no tax arrears.

157. Having regard to all the above issues and its inability in principle to retrieve its property, the applicant company submitted that the interference by the respondent State had resulted in *de facto* unlawful and arbitrary deprivation of its possessions.

158. The Government admitted that the seizure of the aircraft on 30 March 2001 and the non-enforcement of the final decisions ordering their return to the applicant company had constituted interference with its right to peaceful enjoyment of its possessions.

159. They noted, however, that the aircraft had been seized as material evidence in the criminal proceedings on the basis of the public interest of crime combating, and that that public interest prevailed over the private interest of the applicant company to possess the planes.

160. The Government disagreed with the applicant company's argument that the seizure of its property had been unlawful, because it had taken place in the context of criminal proceedings not against the applicant company, but against third persons. They referred in that connection to the Code of Criminal Procedure, under which the seizure of property of third persons in criminal proceedings was possible. Furthermore, the issue had been examined by the domestic courts, which had rejected the applicant company's complaints in that regard.

161. The Government noted that it had been possible in principle to return the material evidence to its owner before completion of the criminal proceedings. However, given that the applicant company was an Irish entity, there had been the risk that the aircraft might be moved to Ireland before the proceedings were completed.

162. The Government admitted that by the judgment of 3 February 2003 the Pecherskyy Court had ordered that the An-28s, which had previously been classified as material evidence in the criminal proceedings against the ATI officials, be returned to the applicant company. However, given that between 2003 and 2010 there had been a number of judicial proceedings regarding those aircraft, they had in fact been disputed property and could not be returned to the applicant company. The Government further observed that on 6 October 2010 the planes had been declared as material evidence in criminal proceedings against Ukrimpeks-2000 officials. They emphasised that from that point onwards the applicant company could not be regarded as having any entitlement to them.

163. As to the authorities' handling of the aircraft while they were material evidence in criminal proceedings, the Government submitted that the responsibility for the destiny of material evidence had rested on the State and that the applicant company had had no entitlement to the aircraft until the decision had been made to return them to it. Accordingly, the Government considered that there had been no interference with the applicant company's property rights as regards the preservation of the aircraft, the authorities' decision to declare them ownerless property, their sale to third parties and the damage to them, as at the time when all those events took place no such property rights could be said to have existed for the applicant company.

164. The Government further contended that the continued security guard of the aircraft by the tax police had not amounted to interference with the applicant company's property rights. In their opinion, the guarding did not hinder the right of the applicant company to possess, use and dispose of the aircraft as its property.

165. In sum, the Government maintained that even if some of the issues raised by the applicant company had amounted to interference with its property rights, that interference had had an adequate legal basis, had pursued a legitimate aim and had been proportionate to that aim.

2. The Court's assessment

(a) General principles established in the Court's case-law

166. According to the well-established case-law of the Court, Article 1 of Protocol No. 1 to the Convention comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. The second and third rules, which are

concerned with particular instances of interference with the right to peaceful enjoyment of property, must be construed in the light of the general principle laid down in the first rule (see, among many authorities, *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 44, ECHR 1999-V, and *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 93, 25 October 2012).

167. The Court emphasises that 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 (see *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II). The requirement of lawfulness, within the meaning of the Convention, demands compliance with the relevant provisions of domestic law and compatibility with the rule of law, which includes freedom from arbitrariness (see *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296-A, § 42, and *Kushoglu v. Bulgaria*, no. 48191/99, §§ 49-62, 10 May 2007).

168. The Court further reiterates that any interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole. The requisite balance will not be found if the person concerned has had to bear an individual and excessive burden (see, among other authorities, *Sporrong and Lönnroth v. Sweden*, 23 September 1982, §§ 69 and 73, Series A no. 52). In other words, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, for instance, *James and Others v. the United Kingdom*, 21 February 1986, § 50, Series A no. 98).

(b) Application of the above principles to the present case

169. The Court notes that the applicant company's ownership of the six An-28 and eight L-410 aircraft is confirmed by the aircraft registration certificates issued by the Ministry of Transport of Ukraine on 22 and 28 March 2000 and by the notarised property certificates of 15 August 2000 (see paragraphs 11 and 99 above).

170. Although between 19 January 2000 and 6 July 2001 the An-28s were leased to ATI, they remained the applicant company's property factually and legally (see and compare with *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, § 57, Series A no. 306-B). Their subsequent lease to R.S.T. on 20 August 2001 in fact never took effect. The same concerns the lease by the applicant company of the L-410s to ATI on 18 August and 1 October 2000, which did not take effect either, because the precondition was that the aircraft should be repaired by the applicant company by 1 May 2001 (by which time the

planes had already been seized by the authorities – see paragraphs 10, 15-16 and 101 above).

171. Accordingly, the Court is satisfied that the six An-28s and eight L-410s constituted the applicant company's "possessions" attracting protection under Article 1 of Protocol No. 1.

172. The Court has already noted the considerable number and multifaceted nature of the alleged interferences with the applicant company's property rights (see paragraphs 146 and 155 above). It will analyse each of the incidents complained of separately and in their totality.

i. Documentation seizure by the tax police in January 2001

173. The impugned interferences with the applicant company's property rights allegedly started in January 2001, with the seizure by the tax police of the original documentation proving its ownership title to the aircraft (see paragraphs 17 and 103 above).

174. The Court accepts that withholding of title documentation amounted to a measure of control of the use of property.

175. It notes the lack in the case file of comprehensive information and documents on the legal grounds for and necessity of the seizure in question. At the same time, the Court observes that, while the authorities did not deny having withheld the documentation proving the applicant company's title to the aircraft, they never used it as evidence in any of the criminal proceedings regarding the applicant company's business partners (there were no criminal proceedings against the applicant company itself). Moreover, it was the absence of that documentation that later prompted the authorities to conclude that the owner of the aircraft could not be established (see, in particular, paragraph 20 above). In the Court's view, such behaviour of the tax authorities can be interpreted as disclosing indications of bad faith and arbitrariness.

176. The Court therefore concludes that the seizure by the tax police of the applicant company's documentation in January 2001 was contrary to the requirements of Article 1 of Protocol No. 1.

ii. Seizure of the aircraft on 30 March 2001

177. The Court further notes that on 30 March 2001 the tax police conducted an "inspection of the scene" at the Uzyn airbase and Cherkasy airport, where the six An-28s and the eight L-410s belonging to the applicant company were parked. As a result, all those aircraft were seized (see paragraphs 20 and 104 above).

178. In so far as the seizure of the L-410 aircraft is concerned, the Court observes that, as acknowledged by the domestic authorities themselves, it was not based on an adequate procedural document and was thus in breach of the domestic legislation (see paragraph 106 above).

179. Although there was no such acknowledgement by the domestic authorities in respect of the An-28s because of the impoundment imposed within different proceedings (see paragraph 23 above), it follows from the case-file materials that their seizure on 30 March 2001 had not been based on a proper procedural document either (see paragraphs 20, 106 and 138 above). Accordingly, it appears that the above conclusion about the violation of the domestic legislation holds true in respect of the seizure of the An-28s too.

180. The Court also observes that the domestic legislation required the presence of a representative of the applicant company during the seizure and giving him the possibility to make statements concerning the investigative measure (see paragraph 138 above). In the present case, however, the tax authorities, which had earlier seized the documentation proving the applicant company's title to the aircraft, considered that the owner of those planes could not be established (see paragraphs 17 and 20 above).

181. This leads the Court to conclude that the seizure of the applicant company's An-28 and L-410 planes on 30 March 2001 did not comply with the requirement of lawfulness inherent in Article 1 of Protocol No. 1.

iii. Retention by the authorities of the An-28 aircraft and related developments

182. As regards the subsequent developments, the Court notes that on 20 August 2001 the applicant company signed an agreement to lease the aircraft to a third company, which however never took effect (see paragraph 16 above). However, as submitted by the Government in their comments on the applicant company's claims for just satisfaction (see paragraph 240 below), at the time the aircraft remained under the seizure of 30 March 2001. Accordingly, the Court considers it established that the authorities continued to retain the aircraft. Its considerations on the unlawfulness of the seizure (see paragraph 181 above) hold true for the subsequent retention of the aircraft.

183. The Court further observes that from 10 September 2001 to 27 June 2003 the six An-28s were impounded by the Kyiv City Commercial Court in securing the claim of the tax administration, which had been brought against the applicant company on 20 August 2001 with a view to invalidating the lease contracts (see paragraphs 35 and 37 above).

184. The same An-28s were also classified as material evidence in the criminal case against the ATI vice-president during the period from 17 April 2002 to 3 February 2003 (see paragraphs 26 and 28 above).

185. The Court reiterates that the seizure of property for legal proceedings, which does not deprive the owner of his possessions, but only provisionally prevents him from using them and from disposing of them, normally relates to the control of the use of property, which falls within the ambit of the second paragraph of Article 1 of Protocol No. 1 to the Convention (see, among others, *Raimondo v. Italy*, 22 February 1994, § 27,

Series A no. 281-A; *Adamczyk v. Poland* (dec.), no. 28551/04, 7 November 2006; *Karamitrov and Others v. Bulgaria*, no. 53321/99, § 72, 10 January 2008; and *Borzhonov v. Russia*, no. 18274/04, § 51, 22 January 2009).

186. In the Court's opinion, nothing indicates that either of the two aforementioned seizures (from 10 September 2001 to 27 June 2003 and from 17 April 2002 to 3 February 2003) was in breach of the domestic legislation (see paragraphs 138-139 above).

187. Concerning the impoundment applied on 10 September 2001, the Court accepts that the interference was in the "general interest" of the community, being aimed at securing the claims under examination in commercial proceedings and given the possibility of an eventual confiscation of property (see, *mutatis mutandis*, *Földes and Földesné Hajlik v. Hungary*, no. 41463/02, § 26, ECHR 2006-XII, and *Borzhonov*, cited above, § 58).

188. The same can be said about the retention of the aircraft within the criminal proceedings, as retention of physical evidence may be necessary in the interests of proper administration of justice, which is a legitimate aim in the "general interest" of the community (see *Smirnov v. Russia*, no. 71362/01, § 57, 7 June 2007).

189. Furthermore, given the substance of the tax administration's commercial claim, as well as the criminal charge against the ATI vice-president, according to which the lease had allegedly been used as a tool to conceal taxable income and thus to enable tax evasion by ATI, the company to which those aircraft had been leased (see paragraphs 24 and 34 above), the Court does not exclude that both the impoundment within the commercial proceedings and the seizure within the criminal proceedings were also of relevance to eventually secure the payment of taxes.

190. The Court cannot, however, limit its examination of the situation to the impoundment of 10 September 2001 and the seizure of 17 April 2002, because during the time of their validity a number of other events took place having had serious, if not irreversible, impact on the applicant company's property rights.

191. The Court notes that on 10 and 11 July 2002 the Bila Tserkva Tax Inspectorate seized the six An-28 aircraft with a view to "settlement of the taxpayer's obligations *vis-à-vis* budgets and State target funds" (see paragraphs 39-40 above).

192. The second paragraph of Article 1 of Protocol No. 1 explicitly reserves the right of Contracting States to pass such laws as they may deem necessary to secure the payment of taxes. The importance which the drafters of the Convention attached to this aspect of this provision may be gauged from the fact that at a stage when the proposed text did not contain such explicit reference to taxes, it was already understood to reserve the States' power to pass whatever fiscal laws they considered desirable, provided always that measures in this field did not amount to arbitrary confiscation

(see *Gasus Dosier- und Fördertechnik GmbH*, cited above, § 59, with further reference to the *travaux préparatoires*).

193. The Court observes that the seizure of the aircraft by the tax authorities on 10 and 11 July 2002 was based on subsections 3.1 and 3.2 of section 9 of the Law "On the procedure for the settlement of taxpayers' obligations to the State budgets and special-purpose funds" (see paragraphs 39 and 140 above). The provisions relied on provided for such a seizure in the event of a breach of the customs or excise tax legislation, or where an unlawful sales transaction had taken place. Furthermore, tax officials had to specify in the seizure report exactly which legal provision had been breached warranting the seizure in question.

194. In the present case, however, the seizure report did not contain any explanations as to what had warranted the seizure, contrary to the aforementioned legal requirement. Nor did it refer to any alleged breach of customs or excise tax legislation, or any unlawful sale transaction.

195. It therefore appears that the tax authorities acted in breach of the applicable domestic fiscal legislation. Accordingly, their actions were unlawful under paragraph 1 of Article 1 of Protocol No. 1. With that said, there is no need for the Court to assess the respective legislation itself in the light of the principles enshrined in paragraph 2 of the mentioned provision (see paragraph 192 above).

196. The Court further observes that the tax authorities, having obtained the seizure of the six An-28s first as material evidence in the criminal proceedings initiated by them against the ATI officials and later by way of impoundment within the commercial proceedings against the applicant company, also initiated by them (see paragraphs 26 and 35 above), decided to seize those aircraft yet again on 10 and 11 July 2002. Being well aware of the applicant company's title to the aircraft (see paragraphs 11 and 53 above), they proceeded with the seizure under the pretext that the owner of those aircraft was unknown.

197. The Court next observes that on 16 September 2002 the Bila Tserkva City Administration declared the six aircraft ownerless property and empowered the tax police to sell them. As a result, between March and June 2003 the aircraft were sold to third parties (see paragraphs 61-65 below).

198. Those measures amounted to the applicant company's deprivation of its property (see and compare with *Patrikova v. Bulgaria*, no. 71835/01, § 101, 4 March 2010).

199. As found by the domestic courts, the authorities' decision to declare the six An-28s ownerless property, as well as their subsequent sale to third parties, was in breach of the domestic legislation (see paragraphs 53, 58, 68 and 71-72 above). The Court has no reason to question those findings. It further observes that, by the time the last aircraft was sold (on 4 June 2003), the planes had been impounded for the third time (in addition

to the seizures from 10 September 2001 to 27 June 2003 and from 17 April 2002 to 3 February 2003), for the period from 3 June to 11 November 2003 in the context of the commercial proceedings brought by the applicant company in the meantime seeking invalidation of the authorities' decision to declare its aircraft ownerless (see paragraphs 25, 28, 35, 37, 43, 47 and 65 above).

200. Although several judicial decisions unambiguously reaffirmed the applicant company's title to the aircraft (see paragraphs 28, 32, 38, 53 and 58-59 above), it still remained impossible for it to recover them.

201. The Court observes, in particular, that, although the tax administration admitted in its letter to the applicant company of 15 March 2010 that there had been final judgments invalidating as unlawful the declaration of the aircraft as ownerless property and their subsequent sale to third parties, it continued to guard them on the grounds that there had been no separate decision lifting that guard (see paragraph 91 above). The Court concludes that the retention of the aircraft continued without any legal basis or logical rationale.

202. The Court further notes that subsequently, on 6 October 2010, an investigator of the Bila Tserkva police department declared the aircraft material evidence in criminal proceedings instituted in February 2006 regarding embezzlement by Ukrimpeks-2000 (company officials were suspected of having failed to transfer all the proceeds from the sale of the aircraft to the State – see paragraphs 61 and 92 above). The aircraft were retained as material evidence until 17 June 2011, when the investigator decided that they should be returned to the applicant company.

203. However, while remaining in the authorities' custody, the aircraft got damaged and vandalised.

204. The Court reiterates that any seizure or confiscation entails damage. But, in order to be compatible with Article 1 of Protocol No. 1, the actual damage sustained should not be more extensive than that which is inevitable (see *Raimondo*, cited above, § 33, and *Jucys v. Lithuania*, no. 5457/03, § 36, 8 January 2008).

205. The Court notes that in the present case the applicant company alerted the authorities to the damage to its aircraft as early as in 2004 and that its concerns proved accurate (see paragraph 77 above). Nonetheless, by the time the applicant company was finally allowed to recover those aircraft in June 2011, they were in such poor condition that they could no longer even be considered as aircraft and were no more than their separate items and components (see paragraph 97 above).

206. Even though the applicant company itself contracted a security company to guard the aircraft, in addition to their guard by the tax police (see paragraph 75 above and paragraph 242 below), the Court is satisfied that the responsibility for the physical damage of the planes rests with the

State. It further notes that there is nothing to show that this damage, which in fact amounted to the complete destruction of the property, was inevitable.

207. Accordingly, in so far as the retention by the authorities of the An-28 aircraft is concerned, the Court cannot but conclude that, once again, the requirements of Article 1 of Protocol No. 1 were not respected.

iv. Retention by the authorities of the L-410 aircraft and related developments

208. The Court notes that, following the seizure of the L-410s on 30 March 2001, the tax authorities retained them even after the Kyiv City Prosecutor's Office concluded on 21 March 2002 that the aforementioned seizure had been unlawful (see paragraphs 104-106 above).

209. The Court further observes that the eight L-410s were declared as material evidence in the criminal investigation against the ATI officials for the periods from 26 April 2002 to 15 November 2004 and from 2 January to 26 May 2003 (see paragraphs 108, 110 and 112 above). In the absence of comprehensive information regarding the aforementioned investigation, it appears difficult to judge on the lawfulness and necessity of those seizures.

210. At the same time, the Court notes that the tax authorities continued to retain the aircraft after the prosecutor, who had earlier declared them as material evidence, had ordered that they be returned to the applicant company on 25 May 2003 and later on 15 November 2004. The retention of the aircraft was therefore devoid of any legal basis.

211. Following its futile attempts to recover its property, in February 2006 the applicant company had to initiate separate judicial proceedings in that regard. Although eventually, on 1 April 2008, those proceedings were completed with a final judicial decision in its favour, this turned out to be of no effect in practice, as the decision remained unenforced.

212. The Court emphasises that the interference with the applicant company's property rights in the present case should not be viewed as confined to the lengthy non-enforcement of the final domestic judgment in its favour. The necessity for the applicant company to bring those proceedings in the first place to recover property which legitimately belonged to it is in itself an indication of a breach of its rights under Article 1 of Protocol No. 1.

213. The Court notes that before the aforementioned proceedings were completed, in 2007 the eight L-410s had been declared as assets of the "Cherkasy Airport municipal company and transferred to the ownership of the city. Subsequently, while the bailiff service was trying to enforce the ruling of 1 April 2008 and was confronted with a complete lack of cooperation from the tax authorities and the airport administration, on 24 July 2008 Cherkasy City Council authorised the airport administration to sell the aircraft at a public auction. As a result, five of the planes were sold to third parties (see paragraphs 121, 123, 124 and 133 above). As regards the three remaining planes, they had been damaged to such an extent that, as

established by technical experts in December 2010 and August 2011, they could no longer be considered as aircraft (see paragraphs 125 and 127 above).

214. The Court therefore considers that the authorities' behaviour was arbitrary and abusive and that it resulted in the applicant company being deprived of its possessions in breach of all the safeguards of Article 1 of Protocol No. 1.

v. Conclusions

215. In the light of the foregoing, the Court cannot but conclude that the applicant company has been deprived of its six An-28 and eight L-410 aircraft in an utterly arbitrary manner, contrary to the rule of law principle.

216. Furthermore, the Court notes that this interference was not of an instantaneous nature, but that the applicant company was denied access to its property for more than ten years. While it was taking strenuous efforts before various administrative, tax, prosecution and judicial authorities to recover its property, which remained fruitless regardless of their legal outcome, the aircraft were getting damaged and vandalised, or sold to third parties, or simply disappeared without anybody held accountable.

217. Even though for brief periods the retention of the aircraft by the authorities complied with some of the principles inherent in Article 1 of Protocol No. 1, the concomitant abusive and arbitrary actions of the authorities negated in practice the effectiveness of those safeguards.

218. For the reasons set out in paragraph 229 below the Court rejects the Government's exception of non-exhaustion as regards Article 1 of Protocol no. 1 and finds that there has been a violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

219. The applicant company also complained under Article 6 § 1 of the Convention about the length of the domestic proceedings, including the lengthy non-enforcement of the judgment of the Kyiv City Commercial Court of 24 May 2006 given in its favour. The provision relied on reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

220. The Court notes that this complaint is closely linked to those under Article 1 of Protocol No. 1 and must therefore likewise be declared admissible.

221. However, having regard to the reasons which led the Court to find a violation of Article 1 of Protocol No. 1 to the Convention, the Court considers that the present complaint does not give rise to any separate issue.

222. Consequently, the Court holds that it is not necessary to examine the complaint under Article 6 § 1 of the Convention separately.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

223. The applicant company further complained that it did not have an effective domestic remedy in respect of the above complaints. It relied on Article 13 of the Convention, which reads as follows:

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

A. Admissibility

224. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

225. The applicant company maintained its complaint.

226. The Government contended that no arguable claim had been raised. Therefore, they considered that there was no issue under Article 13 of the Convention.

227. The Court reiterates that Article 13 of the Convention guarantees the availability, at the national level, of a remedy to enforce the substance of Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law; in particular, its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see, among other authorities, *Aksoy v. Turkey*, cited above, § 95, and *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI).

228. The Court has already noted in the present case that the applicant company's strenuous efforts before various authorities to recover its property brought no results for over twelve years (see, in particular,

paragraph 216 above). There is nothing to show that it had in practice an opportunity to obtain effective remedies for its complaints, that is to say, remedies which could have prevented the violations from occurring or continuing, or could have afforded the applicant appropriate redress.

229. The Court concludes, therefore, that there has been a violation of Article 13 of the Convention. It also dismisses the Government's objection regarding the admissibility of the applicant company's complaint under Article 1 of Protocol No. 1 based on the non-exhaustion of domestic remedies, which was previously joined to the merits of its complaint under Article 13 of the Convention (see paragraph 148 above).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

230. 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."

A. Damage

1. The parties' submissions

(a) Pecuniary damage

231. The applicant company claimed 165,915,960 US dollars (USD) in respect of the pecuniary damage on the basis of the following calculations.

232. First, it claimed compensation equivalent to the current market value of fourteen aircraft similar to those of which it had been deprived.

233. As An-28s were no longer in production, the applicant company referred to the current market value of the M28 Skytruck, produced by a Polish company, "PZL Mielec" as a development of licence-built Antonov An-28. Six new M28 Skytrucks could currently be purchased for USD 48,000,000.

234. L-410s continued to be produced by the Czech manufacturer, LET Airplane Industries. The current market value of eight such new aircraft was USD 44,000,000.

235. Secondly, the applicant company claimed compensation for lost profit. It referred in this connection to the profit it could have made by virtue of the lease agreements of 18 August 2000 and 20 August 2001 (see paragraphs 16 and 101 above). According to its calculation, the amount of that profit taking account of inflation was USD 60,464,552.

236. Thirdly, the applicant company submitted that it could have placed the aforementioned profits from the lease of the aircraft on a bank deposit at an average annual interest rate of 3.8%. As a result, it would have earned USD 13,383,543.

237. Lastly, the applicant company claimed under this head compensation for the costs borne under the security contract of 4 June 2003 to guard the six An-28s, which amounted to USD 67,865 (see paragraph 75 above).

238. The Government contested the above claims. They submitted that the applicant company's property rights to the respective aircraft had been reaffirmed by the domestic courts and that the authorities had been making all possible efforts to enforce those judgments and to return the planes to the applicant company. Accordingly, if the Court were to grant compensation for their value, the applicant company would receive double payment.

239. The Government also pointed out that the aircraft in question were not new when the State authorities had allegedly interfered with the applicant company's property rights. They therefore considered the applicant company's claim for compensation of the value of new aircraft unjustified.

240. The Government also contended that the applicant company's claim regarding the loss of profit was unsubstantiated. As regards the lease agreement of 18 August 2000 with ATI in respect of the L-410s, the Government noted that ATI had proved unable to comply with a similar lease agreement concerning the An-28s (see paragraph 15 above). Accordingly, there were no grounds for considering that it would have properly complied with the agreement of 18 August 2000. In so far as the applicant company referred to the lease agreement of 20 August 2001 in respect of the six An-28s, the Government noted that it had had no right to conclude that agreement at all, as at that time the aircraft had been retained by the authorities pursuant to the seizure of 30 March 2001 (see paragraph 20 above).

241. The Government also contested as groundless and speculative the applicant company's argument concerning potential bank deposits.

242. As regards the compensation for the security contract costs, the Government noted that the aircraft had been at the time in the custody of the authorities. Therefore, it was unnecessary and pointless for the applicant company to conclude a separate contract for their security guard.

(b) Non-pecuniary damage

243. The applicant company also claimed USD 10,000 in respect of non-pecuniary damage.

244. The Government contested this claim as unsubstantiated and exorbitant.

2. The Court's assessment

(a) General principles

245. The Court reiterates that a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see, for example, *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 19, ECHR 2001-I, and *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 32, ECHR 2000-XI).

246. The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the breach allows for *restitutio in integrum*, it is for the respondent State to effect it. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (see *Brumărescu*, cited above, § 20).

247. The Court enjoys certain discretion in the exercise of the power conferred by Article 41, as is borne out by the adjective "just" and the phrase "if necessary" in its text (see *Guzzardi v. Italy*, 6 November 1980, § 114, Series A no. 39). In order to determine just satisfaction, it has regard to the particular features of each case, which may call for an award of less than the value of the actual damage sustained or the costs and expenses actually incurred, or even for no award at all.

248. In this context, the Court reiterates that in cases involving the taking of property by the State, the distinction between "lawful" and "unlawful" deprivation of property is particularly relevant to the assessment of a pecuniary claim (see *Ukraine-Tyumen v. Ukraine* (just satisfaction), no. 22603/02, § 22, 20 May 2010, with further references).

249. The nature and the extent of the just satisfaction to be afforded by the Court under Article 41 of the Convention directly depend on the nature of the breach (see *Shesti Mai Engineering OOD and Others v. Bulgaria*, no. 17854/04, § 101, 20 September 2011, with further references). Moreover, the Court's case-law establishes that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention (see, amongst others, *Stretch v. the United Kingdom*, no. 44277/98, § 47, 24 June 2003). Thus, for an award to be made in respect of pecuniary damage, the applicant must demonstrate that there is a causal link between the violation and any financial loss alleged (see, for example,

Družstevní záložna Pria and Others v. the Czech Republic (just satisfaction), no. 72034/01, § 9, 21 January 2010).

250. Sometimes a precise calculation of the sums necessary to make complete reparation in respect of the pecuniary losses suffered by the applicant may be prevented by the inherently uncertain character of the damage flowing from the violation (see *Smith and Grady v. the United Kingdom* (just satisfaction), nos. 33985/96 and 33986/96, § 18, ECHR 2000-IX). There might be other impediments. For example, it is impossible to calculate precisely the value of property which no longer exists (see *Hovhannisyan and Shiroyan v. Armenia* (just satisfaction), no. 5065/06, § 13, 15 November 2011).

251. The Court is also aware of the difficulties in calculating lost profits in circumstances where such profits could fluctuate owing to a variety of unpredictable factors (see *Dacia S.R.L. v. Moldova* (just satisfaction), no. 3052/04, § 47, 24 February 2009). This is particularly true in cases concerning the commercial activities of a company, which implies the taking of risks and a degree of uncertainty as to the use and the profitability of the possessions in question (see *Basarba OOD v. Bulgaria* (just satisfaction), no. 77660/01, § 26, 20 January 2011).

252. As regards pecuniary compensation for non-pecuniary damage, the Court may award it to commercial companies ruling on an equitable basis, as its exact calculation is in principle impossible. Non-pecuniary damage suffered by such companies may include aspects that are to a greater or lesser extent "objective" or "subjective". Aspects that may be taken into account include the company's reputation, uncertainty in decision-planning, disruption in the management of the company (for which there is no precise method of calculating the consequences) and lastly, albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team (see *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 35, ECHR 2000-IV).

253. If one or more heads of damage cannot be calculated precisely, the Court may decide to make a global assessment ruling on an equitable basis (see, for a recent reference, *Agrokompleks v. Ukraine* (just satisfaction), no. 23465/03, §§ 80 and 93, 25 July 2013).

(b) Application of the above general principles to the present case

254. The Court has found that the applicant company has been deprived by the State of its fourteen aircraft in an unlawful and arbitrary manner (see paragraphs 215-218 above).

255. Accordingly, only the return of those aircraft to the applicant company would put it, as far as possible, in a situation equivalent to the one in which it would have found itself had there not been a breach of Article 1 of Protocol No. 1 (see and compare with *Iatridis* (just satisfaction), cited above, § 35).

256. However, *restitutio in integrum* is not possible because the aircraft in question have either been seriously damaged, or have been sold to third parties, or have gone missing.

257. It follows that the respondent Government must compensate the applicant company for their value as of the time of the interference.

258. The Court does not agree, however, with the applicant company's approach to its calculation, according to which it should be compensated the current market value of new aircraft (see paragraphs 233-234 above).

259. The Court notes that the aircraft of which the applicant company was dispossessed were not new. Thus, the An-28s which it purchased in 1999 had been manufactured in 1988-1990 and had a flying record of between 1,455 and 2,821 hours (see paragraph 9 above). Although equivalent information on the L-410s is unavailable, it appears that they required some repairs and technical upgrading following their purchase by the applicant company (see paragraph 101 above).

260. The Court has not been provided with information on the market value of the aircraft at the time of the events or the current market value of aircraft of comparable technical characteristics and wear. Neither is it in a position to establish with precision the inherent amortisation and repair costs.

261. With regard to the business operations involving the aircraft which the applicant company pursued after their purchase (see paragraphs 10, 16 and 101 above), the Court accepts that in the present case the planes were intended to be used in gainful activity. It therefore has no doubt that the applicant company has lost profits which it could have derived from its planes during the period from their taking up to the present time.

262. At the same time, the Court finds it impossible to define the amount of the lost profits with precision, given all the imponderables involved.

263. The Court also considers that the violations it has found in the instant case must have caused the applicant company disruption and prolonged uncertainty in the conduct of its business. It must also have caused its managers feelings of helplessness and frustration (see and compare *Centro Europa 7 S.R.L. and di Stefano v. Italy* [GC], no. 38433/09, § 221, ECHR 2012).

264. In the light of the foregoing considerations and having regard to all the materials in its possession, the Court finds it appropriate to rule in equity and make a global assessment in the present case (see *Agrokompleks*, cited above, §§ 80 and 93).

265. It considers it reasonable to award the applicant company an aggregate sum of 5,000,000 euros (EUR), covering all heads of damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

266. The applicant company further claimed an award equal to 10% of the above just satisfaction claims in respect of its legal representation in the proceedings before the Court. In substantiation, it submitted copies of the legal services agreements which it had concluded with the "International law firm "Consulting" on 1 November 2006 and 8 January 2009, according to which the applicant company undertook to pay the law firm 10% of the just satisfaction to be awarded to it by the Court on this case. In the event that its application should be found inadmissible or raising no issues under the Convention or its Protocols, the applicant company would pay the law firm UAH 50,000 under the agreement of 1 November 2006 and UAH 5,000 under that of 8 January 2009.

267. The Government contested that claim. In their view, "the realistic amount" of the legal fees was set by the applicant company itself at UAH 50,000 in the legal services agreement of 1 November 2006.

268. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see, for example, *Bottazzi v. Italy* [GC], no. 34884/97, § 30, ECHR 1999-V).

269. The Court notes that the applicant company concluded an agreement with a law company concerning its fees which is comparable to a contingency fee agreement. Such an agreement whereby a lawyer's client agrees to pay the lawyer, in fees, a certain percentage of the sum, if any, awarded to the litigant by the court – giving rise to obligations solely between lawyer and client – cannot bind the Court, which must assess the level of costs and expenses to be awarded with reference not only to whether the costs are actually incurred but also to whether they have been reasonably incurred (see *Iatridis* (just satisfaction), cited above, § 55, with further references).

270. In the light of the foregoing principles and having regard to the case-file materials, the Court considers it reasonable to award EUR 8,000 under this head, plus any tax that may be chargeable to the applicant company on that amount.

C. Default interest

271. The Court considers it appropriate that the default interest rate 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

1. *Decides* unanimously to join the Government's objection as to the exhaustion of domestic remedies in respect of the applicant company's complaint under Article 1 of Protocol No. 1 to the merits of its complaint under Article 13 of the Convention, and dismisses it after having examined the merits of that complaint;

2. *Declares* unanimously the application admissible;

3. *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 1;

4. *Holds* unanimously that there is no need to examine the complaint under Article 6 § 1 of the Convention;

5. *Holds* unanimously that there has been a violation of Article 13 of the Convention;

6. *Holds* by six votes to one
that the respondent State is to pay the applicant company, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000,000 (five million euros) in respect of pecuniary and non-pecuniary damage, plus any tax that may be chargeable to the applicant company;

7. *Holds* unanimously that the respondent State is to pay the applicant company, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant company;

8. *Holds* unanimously that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses* unanimously the remainder of the applicant company's claim for just satisfaction.

Done in English, and notified in writing on 23 January 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips	Mark Villiger
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge P. Lemmens is annexed to this judgment.

M.V.
J.S.P.

PARTLY DISSENTING OPINION OF JUDGE LEMMENS

I voted with my colleagues in finding violations of Article 1 of Protocol No. 1 and Article 13. I would like to underline that this is a quite extraordinary case, in which the tax administration used all sorts of tricks to avoid doing what it had been ordered to do, namely to return the aircraft to the applicant company. This resulted in the applicant company being deprived of its aircraft "in an utterly arbitrary manner, contrary to the rule of law principle" (paragraph 215 of the judgment).

To my regret, however, I cannot join my colleagues in the decision relating to the just satisfaction awarded to the applicant company. The majority awards an aggregate sum of EUR 5,000,000. In my opinion, the question of the application of Article 41 is not yet ready for decision.

The applicant company provided the Court with calculations based on the current market value of new aircraft. I agree with the majority that this is not the correct approach (see paragraph 258), and that the calculation of the award should be based on the current market value of aircraft of comparable technical characteristics and wear, that is, of used aircraft (see paragraph 260).

In my opinion we have not been provided with sufficient elements to make an assessment of the current market value of An-28s and L-410s, regard being had to their state at the time they were placed under the supervision of the authorities and the applicant company was denied access to them. I do not feel reassured that, within the total amount of EUR 5,000,000, there is a part that reasonably relates to the actual market value of used aircraft. There are elements in the file which suggest that the amount of EUR 5,000,000 may be much higher than the total price paid by the applicant company for the aircraft in 1999 and 2000 (see paragraph 259, referring to paragraphs 9 and 101). In order to avoid the risk of our award being too high, I would have preferred to reserve the question of just satisfaction and to invite the parties to submit calculations on the basis of a set of criteria specified by the Court in its judgment.