THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF LATVIA

JUDGMENT

ON BEHALF OF THE REPUBLIC OF LATVIA

Riga, 6 October 2010

Case No. 2009-113-0106

The Constitutional Court of the Republic of Latvia, composed of the Chairman of the Court hearing Gunārs Kūtris, Justices Kaspars Balodis, Aija Branta, Kristīne Krūma, Vineta Muižniece and Viktors Skudra,

having regard to constitutional complaint of Mr. Holger Haakon Kristensen,

according to Article 85 of the Satversme (Constitution) of the Republic of Latvia, Article 16 1st and 6th indent, Article 17 (1), 11th indent, Article 19.2 and Article 28.1 of the Constitutional Court Law,

on 7 September 2010 in writing examined the case

"On Compliance of Section 19 (5) of the Law on Procedures for Coming into Force of the Commercial Law with Article 105 of the Satversme of the Republic of Latvia and Article 5 of the Agreement between the Government of the Republic of Latvia and the Government of the Kingdom of Denmark concerning the Promotion and Reciprocal Protection of Investments"

The Facts

1. Before 2002, business activates in the Republic of Latvia were regulated by different normative acts. On 13 April 2000, the Commercial Law was adopted. The Court introduced new regulatory framework of business activities by summarizing all

issues of the field in one normative act. On 20 December 2001, the Law on Procedures for Coming into Force of the Commercial Law was adopted. Both above mentioned laws came into force on 1 January 2002.

The Law on Procedures for Coming into force of the Commercial Law (hereinafter – Law on Coming into Force of the Commercial Law) regulates, among the rest things, the procedure, according to which re-registration of enterprises (businesses), branch, departments and representations (hereinafter – companies), already registered in the Enterprise Register, in the Commercial Register. Section 9 of the Law on Coming into Force of the Commercial Law provides that limited liability companies and stock companies registered in the Enterprise Register shall until 31 December 2004 apply for recording in the Commercial Register or, in accordance with a decision of the meeting (general meeting) of the shareholders (stockholders), the liquidation of such companies shall be commenced, applying it for registration in the Enterprise Register. However, Section 19 of the above mentioned Law, as well as Sections $19.^{1}$–$19.^{9}$ thereof regulate procedure, according to which companies shall be liquidated if companies have not applied for re-registration in the Commercial Register within the above mentioned term and no decision has been adopted regarding their liquidation.

Section 19 (5) of the Law on Coming into Force of the Commercial Law provides: "Property left after the exclusion of the undertaking (company), branch, division or representation office from the Enterprise Register shall be as comparable to property without heirs in conformity with the provisions of Section 417 of The Civil Law".

2. The applicant – Mr. Holger Haakon Kristensen (hereinafter – the Applicant), founded a limited liability company "DAN LAT CAMPING" (hereinafter – SIA "DAN LAT CAMPING") in 1997. In the same year, SIA "DAN LAT CAMPING" purchased immovable property in Taurene Parish of Cēsis district.

On 10 October 2006, State Notary of the Enterprise Register adopted a decision to make an entry in the Enterprise Register journal regarding termination of action of SIA "DAN LAT CAMPING" because, before 3 January 2005, the company was not

applied for registering thereof in the Commercial Register or the Register of Associations and Foundations, and no decision has been taken regarding liquidation of the company. However, on 10 June 2007, the State Notary of the Enterprise Register adopted a decision to exclude SIA "DAN LAT CAMPING" from the Enterprise register because no notice on claims of creditors have been received within the established term and no commercial pledge has been registered in Commercial Pledge Register. The Applicant has not contested or appealed against the above mentioned decision. Consequently, since coming into force of the decision, property that remained after excluding of SIA "DAN LAT CAMPING" from the Enterprise Register, including the above mentioned purchased real estate, shall be regarded as property without heirs and transferrable to the State.

3. The Applicant holds that, Section 19 (5) of the Law On Coming into Force of the Commercial Law (hereinafter – the Contested Norm) does not comply with Article 105 of the Satversme of the Republic of Latvia (hereinafter – the Satversme), as well as Article 5 of the Agreement between the Government of the Republic of Latvia and the Government of the Kingdom of Denmark concerning the Promotion and Reciprocal Protection of Investments (hereinafter – Agreement of Protection of Investments).

The Applicant is of the view that, in the meaning of Article 105 of the Satversme, shares of SIA "DAN LAT CAMPING" owned by him and conferring him the right to dividends, quota of liquidation and indirect right to SIA "DAN LAT CAMPING" shall be regarded as "property". The first sentence of Article 105 of the Satversme protects persons from, among the rest, arbitrary depriving of property.

The Applicant admits that the simplified procedure of liquidation established by the Law on Coming into Force of the Commercial Law was aimed at liquidation of companies that have ceased functioning by thus improving business environment. The aim of the Contested Norm, however, was to prevent any situation when property exists without a manager. Nonetheless, it is difficult to perceive benefit gained by the society from the fact that, along with exclusion of a company from the Enterprise Register, shareholders of such company would be denied the right to property owned

by the company or receipt of compensation in the form of liquidation quote or in any other form. Consequently, restriction of fundamental rights is greater than benefit gained by the society.

Moreover, the Contested Norm reaches its aim only in relation to those companies that have ceased functioning and shareholders of which are not interested in their property right. As to shareholders who want to exercise their fundamental right to property, the aim of the Contested Norm can, in fact, be reached by less restrictive measures.

Likewise, the Applicant emphasizes that, pursuant to case-law of the European Court of Human Rights, alienation of property without disbursing any compensation reasonably proportional with the value thereof is usually recognized as non-proportional restriction of the property right.

The Applicant holds that he, as a citizen of the Kingdom of Denmark, has the right to protection of investments made in the Republic of Latvia also in accordance with the Agreement on Protection of Investments. Activities of the Applicant, namely, founding of a limited liability company and investing of twenty-three thousand USA dollars into it shall be regarded as investment in the meaning of Article 1 (1) of the above mentioned Agreement.

The regulatory framework included in the Contested Norm shall be regarded as a measure with consequences equal to expropriation because, pursuant to it, investments of twenty-three thousand USA dollars after exclusion of SIA "DAN LAT CAMPING" from the Enterprise Register are transferred to the State. Since the Applicant was not disbursed any compensation, the Contested Norm contradicts Article 5 of the Agreement on Protection of Investments that establishes compensations are obligatory requirement in such events.

4. The institution that adopted the contested act, the Saeima maintains in its reply that, first, the Applicant has not exhausted all general legal remedies; therefore proceedings in the case under review should be terminated. The Applicant has not contested the decision of 10 July 2007 adopted by the Enterprise Register regarding exclusion of the company from the Enterprise Register and has failed to observe the

procedure of mutual settlement of disputes between investor and a contractor as established in Article 9 of the Agreement on Protection of Investments.

When assessing the Contested Norm on its merits, the Saeima does not share the viewpoint of the Applicant and holds that it does comply with Article 105 of the Satversme and Article 5 of the Agreement on Protection of Investments.

The Contested Norm does not provide for mechanical denial of property right; it rather regulates the final stage of a long term procedure regulated in details. Moreover, setting in of consequences established in the Contested Norm depended on actions of the person. Consequently, the Contested Norm in itself does not deny the property right; instead, it regulates actions to be performed with property abandoned by a person.

The Commercial Law has been adopted with the purpose to improve business environment and increase security, as well as to ensure observance of rights and legal interests of persons involved in business relations. The procedure of re-registration established in the Law on Coming into Force of the Commercial Law has ensured further functioning of re-registered companies in accordance with provisions of the Commercial Law, as well as exclusion of those subjects from business environment that have ceased functioning and exist only formally. The established period of re-registration has been long enough, namely, three years (from 1 January 2002 to 31 December 2004); moreover, informative measures have also been taken during this timeframe.

Not only with the purpose to improve business environment but also to protect interests of third parties, i.e. creditors, Section 19 of the Law on Coming into Force of the Contested Norm establishes the procedure, according to which objects subject to re-registration are excluded from the Enterprise Register if they have not been re-registered or liquidated within the established term. The Contested Norm establishes actions to be performed in relation to property owned by an excluded company and left without owner due to discontinuation of existence of a company. Consequently, the aim of the Contested Norm is to prevent such situation when property is left without owner and is subject to risk of damage or destruction.

The Saeima indicates that the shareholders could take advantage of liquidation quota by executing voluntary liquidation of a company. However, the Applicant has not taken necessary actions to have the right to deal with shares of the company. The Law on Coming into Force of the Commercial Law has established sufficient terms and equal provisions for executing re-registration procedure.

As to compliance of the Contested Norm with Article 5 of the Agreement on Protection of Investments, the Saeima holds that, first, the Constitutional Court is not competent to decide on this issue because issues related with breaches of the Agreement on Protection of Investments shall be reviewed according to the procedure established in Article 9 of the Agreement.

When assessing compliance of the Contested Norm with Article 5 of the Agreement on Protection of Investments, the Saeima acknowledges the following: since foundation of a company is regarded as investment in the meaning of the Agreement, its exclusion from the Enterprise Register or cessation of legal form of investment must not contradict provisions of the above mentioned Agreement. According to the Saeima, however, the Contested Norm does not provide compulsory expropriation or nationalization. Consequences referred to in the Contested Norm directly depend on the will of a person. The Contested Norm shall be assessed as measure for solving the situation that sets in after actual abandoning of a company. Moreover, pursuant to the case-law established by the European Court of Human Rights, in the present case loss of property right shall be assessed as measure for control of use of property rather than alienation of property.

The Saeima emphasize that the Agreement on Protection of Investments does not establish a higher protection level to a citizen of Denmark if compared with citizens of Latvia or other Member States of the European Union.

5. The summoned person – **Ombudsman of the Republic of Latvia** (hereinafter – the Ombudsman) maintains the same opinion that it has provided in the reply of 18 February 2009 and holds that the Contested Norm does not comply with Article 105 of the Satversme.

Pursuant to the case-law of the European Court of Human Rights, shares of a limited liability company with the right to liquidation quota shall be regarded as property right or as property of a member of the society.

Procedure regulated in the Contested Norm, according to which a shareholder of a company loses his or her shares and rights related thereto, shall not be examined in the light of the fourth sentence of Article 105 of the Satversme because it does not establish expropriation in the meaning of the above mentioned article of the Satversme. The Contested Norm shall be assessed in relation to prohibition to arbitrary divestiture of property that follows from the first sentence of Article 105 of the Satversme in conjunction with the second sentence of Article 1 (1) of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Divestiture of property must be made based on legal grounds, in public interests, and it must be proportional.

The Ombudsman indicates that loss of property right by a shareholder of a company follows from the law. Likewise, the Ombudsman acknowledges that cessation of inexistent entrepreneurship was aimed at improving commercial environment and ensuring of the principle of legal certainty. However, the Ombudsman does not see any benefit from the fact that, along with exclusion of a company from the Enterprise Register, its shareholders lose their right to property possessed by the company or liquidation quota.

The Contested Norm is aimed at ensuring that no property is left without owner; however, this aim is reached only in respect to those companies that have indeed ceased existing and shareholders of which are not interested in exercising their property right. However, those shareholders of companies who want to exercise their property right cannot do it because the Contested Norm presumes non-existence of such shareholders.

According to the Ombudsman, the aim of the Contested Norm can be reached by other measures that would restrict rights of a person at a lesser extent. The Ombudsman holds that the restriction of the fundamental rights established in the Contested Norm, i.e. alienation of property of a shareholder of a company, is greater than benefit gained by the society. This conclusion is proved by the fact that normative

acts to not envisage any compensation, and this contradicts the case-law of the European Court of Human Rights, namely, alienation of property without disbursing any sum reasonably proportional with its value is usually regarded as non-proportional restriction of property right.

6. The summoned person – **the Ministry of Justice** indicates that the Contested Norm regulates activities with property once owned by a company that was excluded from the Enterprise register without executing liquidation procedure. The Law on Coming into Force of the Commercial Law commits companies to adopt a decision, within three years, regarding re-registering of a company in the Commercial Register or liquidation thereof.

The Applicant is the only shareholder of SIA "DAN LAT CAMPING" and the only member of the board, and he has failed to exercise his rights to ensure exercise of his right to own shares and property right, including the right to liquidation quota, that follow from them. Consequently, the Applicant, by failing to perform activities established in the Law on Coming into Force of the Commercial Law, has waived his right to shares of SIA "DAN LAT CAMPING" and the rights following thereof. In this respect, the Ministry of Justice refers to Section 1032 of the Civil Law that provides that ownership rights to a property are terminated by the intentional act of the owner, where the owner abandons a property.

The regulatory framework of Section 19 of the Law on Coming into Force of the Commercial Law regarding compulsory exclusion was aimed at excluding of economically passive subjects from the Enterprise Register by thus improving business environment. The Ministry of Justice draws attention to the fact that, pursuant to the data of the Enterprise Register, since the date of foundation, SIA "DAN LAT CAMPING" has failed to submit any annual report to the Enterprise Register, which allows concluding that the particular company was an economically passive subject.

The Ministry of Justice concludes that the Contested Norm does comply with Article 105 of the Satversme because it has a legitimate aim (i.e. to ensure observance of rights and legal interests of other persons by improving business environment and establishing activities to be performed with abandoned property) and it complies with

the principle of proportionality because the Law on Coming into Force of the Commercial Law has established sufficient terms for meeting of shareholders to be able to adopt decision on further economic activates.

The Ministry of Justice holds that aims of Article 5 of the Agreement on Protection of Investments and Article 105 of the Satversme are similar; therefore the above mentioned arguments also refer to consideration of compliance of the Contested Norm with the Agreement on Protection of Investments.

The Ministry of Justice also emphasize that, when applying norms of the Law on Coming into Force of the Commercial Law, fair and equal attitude is ensured, which is of great importance in disputes regarding execution of the agreements on protection of investments. In this particular case, requirements of transparency of national legal regulatory framework and common requirements to be set forth in respect to all subjects are fulfilled.

7. The summoned person – **the State Chancellery** is of the viewpoint that the Contested Norm does not comply with Article 5 of the Agreement on Protection of Investments. In law on protection of international investments, expropriation and similar measures are regarded as such that directly mean confiscation of property or denial to the owner to use or gain benefit from it. Basically, the Contested Norm is aimed at recognizing property as State property; therefore, pursuant to this norm, measures performed shall be regarded as direct expropriation.

It has been established in international public law that expropriation shall not be measure executed in the frameworks of non-discriminating action of the State committed in good faith and regarded execution of police power of the State. General practice of other States shows that, in case of liquidation of enterprises, property remaining after satisfying claims of creditors is distributed among shareholders (owners) of a company. Moreover, normative acts of Latvia in respect to other cases of liquidation of companies exclude the possibility that an owner would receive the remaining property of the company after claims of creditors are satisfied. Consequently, the Contested Norm cannot be regarded as a general measure to implement police power of the State.

Consequently, the Contested Norm shall be regarded as measure of direct expropriation. Since Article 5 of the Agreement on Protection of Investments permits expropriation only in case if "immediate, adequate and effective compensation", whilst the Contested Norm does not envisage any compensation, Article 5 of the Agreement on protection of Investments is breached at least in this particular aspect.

8. The summoned person – **Dr.iur. Aivars Lošmanis, Associate Professor of the University of Latvia** is of the view that the Contested Norm cannot be regarded as the one that would establish, in direct and inevitable manner, loss of property right. The Law on Coming into Force of the Commercial Law has established the following rights to a person: 1) to re-register a company in the Commercial Register and thus continue business activities; 2) to adopt decision regarding termination of business activities and liquidation of the company, which gives right to receiving liquidation quota, or 3) take no decision.

The Contested Norm regulates consequences in case if a person has made a decision in favour of the second of the third possibility and the company is excluded from the Enterprise Register.

Considering the issue from the perspective of commercial law system, it is possible to agree that liquidation should be executed at any time whenever a company possesses any assets, namely, whenever settlement with its shareholders is possible. Such solution would be more appropriate also from the perspective of human rights. However, the State should ensure successful and fast re-registration of subjects. Such duty would not cause any non-proportional burden for the State taking into account the fact that a person had enough time to decide upon his or her further actions, including exercise of the right to liquidation quota.

Mr. A. Lošmanis also indicate that the right to liquidation quota as property right of a shareholder that follow from his or her participation in a company shall be regarded as property in the meaning of Article 105 of the Satversme. However, this right is valid only insofar as the company exists. As a company ceases existing, the subject for exercising this right also ceases existing. The Applicant has contested only logical consequences of Section 19 (4) of the Law on Coming into Force of the

Commercial Law rather that the above mentioned Section itself that provides for exclusion of a company from the Enterprise Register. The Contested Norm in itself does not have any influence on his property right or ownership right in the meaning of Article 105 of the Satversme.

9. The summoned person – **Mr. Aigars Strupišs, a lecturer at the University of Latvia and head of the work group for elaboration of the draft of the Commercial Law** indicates that one of the aims of commercial law reform was to eliminate companies once registered in the Enterprise Register and now ceased their business activities and failed to fulfil duties established in normative acts. All shareholders of limited companies are conferred equal right to re-register their companies or to liquidate them and receive liquidation quota. To perform these activities, they were given the period of three years.

When discussing the initial wording of the Contested Norm, the aim of the legislator was established, namely, to reduce estimated State expenses for liquidation of inactive companies and encourage shareholders either to liquidate or re-register their companies. According to the above mentioned aim, it was suggested the build the Contested Norm upon presumption that shareholders who have failed to fulfil the stipulated duty to re-register or liquidate their companies, have waived their property right to shares. Such waiver also includes refusal from liquidation quota.

Latvian legislation shall be applied to a company established in Latvia. Existence of the Agreement on Protection of Investments does not release a foreigner from duty to comply with requirements established in normative acts of Latvia that equally apply to all subjects in Latvia. After having inspected a data base of the Enterprise Register, it can be established that SIA "DAN LAT CAMPING" has failed to submit any annual report during its term of existence; neither has it re-elected its administrative body. This gives ground to consider that the company has not performed any economic activities during its term of existence. The assessment is neither influenced by the fact that the Applicant is a foreigner and he does not live in the territory of Latvia because Section 1502 of the Civil Law provides that The law shall protect an absentee only when he or she is absent (Section 1500) with good cause, and when, with good cause,

he or she has not designated a substitute, or when a substitute has been designated, but such substitute has withdrawn without the knowledge or participation of the absentee.

The fact that one of features of expropriation (nationalization, confiscation and other kinds of compulsory alienation) is the fact that the State applies its power to take property away from an owner, whilst the owner is not given the possibility to avoid such measure, or such possibility is formal and inappropriate, should also be taken into consideration. In the case under review, one cannot hold that the property was alienated by force because a transitional period and adequate mechanisms for retaining of property, i.e. re-registration of a company or liquidation thereof, was established in the frameworks of commercial law reform. The Applicant, however, has take advantage to apply these mechanisms.

10. The summoned person – **the Foreign Investors' Council in Latvia** indicates that legal regulation of commercial law, also in relation to registration, re-registration of businesses and declaration of data thereof shall be regarded isolated from legal regulation regarding non-commercial activities of natural persons. In the opposite event, the regulatory framework should protect rights and legal interest of persons. To decide the issue, it is necessary to assess the stipulated transitional period in comparison to duties to be fulfilled by a company in front of State institutions.

11. The Enterprise Register indicates that information on commercial law reform was available in mass media, as well as in the premises and home page of the Enterprise Register. The Enterprise Register has also organized several meetings with the Foreign Investors' Council in Latvia.

The duty to submit an application for re-registration of a company or registration of a decision regarding its liquidation had to be fulfilled before 31 December 2004; however, in cases if a public notary of the Enterprise Register has established deficiencies in a re-registration application of documents attached thereto, the Register decides on postponing re-registration procedure and giving more time for elimination of the deficiencies. Consequently, decisions of a public notary of the Enterprise Register regarding re-registration were adopted also after the term established by the

law. Moreover, the Enterprise Register also examined re-registration applications submitted after the above mentioned terms if an applicant indicated any plausible reason for exceeding the procedural term.

The Enterprise register informs that 1620 subjects out of 3900 having foreign capital and that were not re-registered in the Commercial Register before 31 December 2004 or were not applied for liquidation were excluded from the Enterprise Register without executing liquidation procedure because no creditor claims were received in respect to them.

12. The State Revenue Service (hereinafter – the SRS) informs that SIA "DAN LAT CAMPING" has failed to make any tax payments to the SRS during its term of existence from 18 June 1997 to 10 July 2007. The company submitted annual reports for 1997 and 1998 only. Payments of immovable property tax for the immovable property "Dabari" in the Cēsis district, Taurene parish were made only up to 2009.

The above mentioned immovable property comprises a two-storied dwelling house that was uninhabited for a considerable time, agricultural lands that are not cultivated for a certain period of time, and forest where timber cutting was performed in 1997. The exploited part of the forest has got partially renewed.

The Constitutional Court has established:

I

13. The Saeima expressed a viewpoint that proceedings in the case under consideration should be terminated because the Applicant has not yet exhausted all general legal remedies. Notably, the Applicant has not contested the decision of 10 July 2007 by the Enterprise Register regarding exclusion of the company from the Enterprise Register; neither has he complied with the procedure of settling disputed established in Article 8 of the Agreement on Protection of Investments.

The above mentioned objections of the Saeima are ungrounded.

First, it follows from the constitutional complaint that the Applicant does not contest validity of the decision to exclude SIA "DAN LAT CAMPING" from the Enterprise register; neither complaints he on legal norms that were applied when

adopting the above mentioned decision. According to the Applicant, the infringement of the fundamental rights is caused by the Contested Norm in particular because it establishes actions to be performed in respect to property remaining after exclusion of a company from the Enterprise Register. As to consequences established in the Contested Norm, no decision is adopted because they occur automatically under certain conditions.

The Saeima has failed to provide substantiation for its opinion that contesting of the decision of 10 July 2007 of the Enterprise Register regarding exclusion of the company from the Enterprise Register could prevent possible infringement of the fundamental rights caused by the Contested Norm.

Second, it follows from Article19.^{2} (2) of the Constitutional Court Law, as well as from the essence of Constitutional Court as a national mechanism for protection of rights that the duty to exhaust all general legal remedies apply only to national measures for protection of rights. Therefore, observance of the procedure for settling disputes established in Article 9 of the Agreement of Protection of Investments cannot serve as precondition for lodging an application before the Constitutional Court.

Consequently, there are no general legal remedies for preventing of possible infringement of the fundamental rights of the Applicant, and proceedings in the present case shall be continued.

II

14. The Applicant holds that the Contested Norm is at variance with Article 105 of the Satversme.

Article 105 of the Satversme provides: "Everyone has the right to own property. Property shall not be used contrary to the interests of the public. Property rights may be restricted only in accordance with law. Expropriation of property for public purposes shall be allowed only in exceptional cases on the basis of a specific law and in return for fair compensation."

In the context of Article 105 of the Satversme, the term "property" can be interpreted in a broad manner. The Constitutional Court has concluded that property right" means all kinds of property right that a legitimate person can exercise in favour

of himself or herself and that he or she can exercise according to his or her will, including the rights that follow from shares (and securities) (*see: Judgment of 19 June 2010 by the Constitutional Court in the case No. 2010-02-01, Para 5.2*).

The Applicant is of the view that shares of SIA "DAN LAT CAMPING" owned by him shall be regarded as "property" in the meaning of Article 105 of the Satversme, provided that these shares gave him the right to dividends, liquidation quota, as well as conferred indirect right to property possessed by SIA "DAN LAT CAMPING". Likewise, the Saeima and the Ombudsman indicate that the content of the term "property" includes ownership right to shares giving the right to liquidation quota. The Saeima also rejects the statement that the above mentioned shares could have any direct or indirect right to property once owned by SIA "DAN LAT CAMPING".

There is no doubt that shares shall be regarded as "property" in the meaning of Article 105 of the Satversme of the Republic of Latvia. However, when the Contested Norm was effective, SIA "DAN LAT CAMPING" has already ceased existing along with its shares. The Applicant does not contest alienation of property of the Company and he considers it as lawful. The dispute of the present case is related with the ownership right to property remaining after a company has ceased to exist.

The summoned person Mr. A. Lošmanis indicates that, from the perspective of commercial law system, liquidation should be executed at any time whenever a company possesses any assets, namely, whenever settlement with its shareholders is possible (*see: case materials, pp. 149*). This general principle has been included in Section 106 of the Commercial Law that provides: Liquidation of a partnership occurs after the termination of the partnership, except in cases, when a different way of final accounting is specified in the partnership agreement, or also the partnership has been declared insolvent. However, the Section 112 (1) establishes that after the settlement of debts, the liquidator shall divide the remainder of the property of a partnership among the members of the partnership in conformity with the amount of their invested (capital) shares as specified in the closing balance sheet of the partnership. By referring to principles and guidelines elaborated by the World Bank, the State Chancellery also indicates that, in accordance with the general practice of other states, property remaining after satisfying claims of creditors in case of liquidation of a

company, is distributed among shareholders of a company (*see: Case materials, pp. 197*).

Section 19 of the Law on Coming into Force of the Commercial Law provides that if an company has not applied for recording in the Commercial Register in conformity with the provisions of this Chapter and a decision regarding liquidation of such company has not been taken, it shall be liquidated in accordance with the procedures determined in this Section. Consequently, it can be concluded that Section 19 of the Law on Coming into Force of the Contested Norm regulates an atypical case of liquidation of a company and therefore it shall be regarded as an exception from the general principle. This also means that the Applicant could reasonably count on the fact that his right that follow from shares would also comprise the right to property remaining after satisfying all claims.

Consequently, the right of the Applicant to property remaining after exclusion of such company from the Enterprise register, shares of which he owned, does pertain to the scope of protection guaranteed by Article 105 of the Satversme.

15. The Constitutional Court has established in its case-law that Article 105 of the Satversme shall be interpreted in conjunction with Article 1 of the Protocol No. 1 of the Convention (*see, e.g.: Judgment of 20 May 2002 of the Constitutional Court in the case No. 2002-01-03, Concluding Part, Judgment of 26 April 2007 in the case No. 2006-38-03, Para 10, and Judgment of 28 May 2009 in the case No. 2008-47-01, Para 7.1*).

The European Court of Human Rights has indicated in its case-law that Article 1 of Protocol No. 1 the Convention comprises three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, is concerned, amongst other things, with the right of a State to control the use of property (*see: Lithgow and Others v. the United Kingdom, judgment of 8 July 1986, Series A, no.*

102, p. 50, Para. 120, 106; James and Others v. the United Kingdom, judgment of 21 February 1986, Series A, no. 98, Para. 41).

The Constitutional Court has concluded that Just like the First Protocol, Article 1 of the EHRC, Article 105 of the Satversme not only envisages the right to enjoy the property rights in serenity and the right of controlling use of the property in accordance with general interests. The fourth sentence of Article 105 of the Satversme establishes cases when the State has the right to expropriate property *de iure* (*see, e.g.: Judgment of 20 May 2002 by the Constitutional Court in the case No. 2002-01-03, the Concluding Part, Judgment of 14 December 2005 in the case No. 2005-10-03, Para 8, and Judgment of 16 December 2005 in the case No. 2005-12-0103, Para 21.3 and 21.4*).

The above mentioned norms establish different criteria for lawful assessment of restriction; therefore it is necessary to establish which of the criteria shall be applied to the Contested Norm in particular.

According to participants of the present case and the summoned persons, the Contested Norm shall not be assessed in conjunction with the fourth sentence of Article 105 of the Satversme. This opinion shall be recognized as valid.

The Contested Norm as restriction of property right shall be examined in the context of the first and the third sentence of Article 105 of the Satversme.

Opinions of the participants of the present case differ in respect to the fact, which norm of Article 1 of the Protocol shall be applied to the Contested Norm. The Applicant and the Ombudsman also are of the view that the Contested Norm shall be regarded as deprivation of property right but, pursuant to the case-law of the European Court of Human Rights, alienation of property without disbursing compensation could be regarded as lawful only in exceptional cases. Moreover, the Saeima holds that the Contested Norm shall be regarded as a measure to control exercise of property right in the meaning of Article 1 (2) of Protocol No. 1 of the Convention rather than alienation of property.

The Saeima reasonably indicates that, pursuant to the case-law of the European Court of Human Rights, the norm of Article 1 of Protocol No. 1 that regulates alienation of property is not observed in all events whenever a person is denied

property right [*see: J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom, judgment of 30 August 2007, application No. 44302/02, Para. 64; AGOSI v. the United Kingdom, judgment of 24 October 1986, application No. 9118/90, Para. 51]*. The Contested Norm shall be comparable with normative regulatory framework that was assessed in the judgment in the case *J.A. Pye (Oxford) Ltd v. the United Kingdom*, according to which property right is lost at all times when another person gains property for a lasting term. Like in the above mentioned case, the aim of the Contested Norm of the present case is to regulate ownership to property without owner or manager rather than to alienate any property from owners.

Consequently, also in the context of Article 1 of Protocol No. 1 of the Convention, the Contested Norm shall be assessed as a measure to control use of property rather than alienation of property.

16. When assessing lawfulness of restriction of the ownership right to property, the Court shall investigate whether it has been established by law, whether it has a legitimate objective, and whether it is proportional.

In the present, case, there is no dispute whether the restriction of the right to property has been established by law.

As to legitimate aim of the restriction, the Saeima indicates that the aim of the regulatory framework included in Section 19 of the Law on Coming into Force of the Commercial Law envisaging exclusion of companies that have not been re-registered from the Enterprise Register was to improve business environment and protect interests of creditors. However, the aim of the Contested Norm is to establish actions to be performed in respect to remainder of property and to prevent such situations when such property is left without owner and subject to threat of damage and destruction.

The Ministry of Justice also indicates that the aim of the Contested Norm was to ensure rights and legal interests of other persons by improving business environment and establishing actions to be performed in respect to abandoned property.

Such aim shall be regarded as legitimate because it is aimed at improvement of legal environment and ensuring of rights of other persons.

17. In order to establish whether a legal norm adopted by the legislator complies with the principle of proportionality, it is necessary to investigate whether: 1) measures selected by the legislator are appropriate for reaching the legitimate aim, namely, whether the Contested Norm reaches the aim set; 2) whether such measures are necessary, namely, whether the aim can be reached by other measures that would restrict rights of persons at a lesser extent; 3) whether benefit gained by the society is greater than detriment caused to rights of a person (*see: Judgment of 19 June 2010 by the Constitutional Court in the case No. 2010-02-01, Para 9*).

18. The Contested Norm establishes actions to be performed in respect to property remaining after exclusion of a company from the Enterprise Register, namely, it provides that such property shall be regarded as property without heirs and is transferred to the State.

The Ministry of Justice indicates that the law does not give the State the right to refuse accepting property without heirs; therefore no manifestation of will of the State is necessary in case of transfer of property right. Consequently, property of a company that has not been re-registered shall be regarded as State property irrespective of the fact whether the State has executed the procedure for registering property right.

Moreover, Section 8 of the Law "On the State Revenue Service" provides that the State Revenue Service shall record property transferred to the ownership of the State; however, the procedure for fulfilling this duty is regulated in 25 April 2006 Cabinet of Ministers Regulations No. 315 "Regulations regarding Procedure for Registration, Assessment, Sale, Transfer free of Charge, and Destruction of Property Transferred to the Ownership of the State and Transfer of Sales incomes into the State Budget".

Consequently, the Contested Norm ensures that property remaining after exclusion of a company of the Enterprise Register is not left without an owner.

Consequently, the Contested Norm ensures reaching of the legitimate aim.

19. The Applicant and the summoned persons have drawn attention to different other measures that restrict rights of persons at a lesser extent. Therefore the Constitutional Court must assess whether the Contested Norm is necessary to reach the aim.

19.1. The Applicant indicates that the rights of shareholders of a company as restricted at a lesser extent by the regulatory framework adopted at the first reading of the draft law that established that property remaining after exclusion of a company from the Enterprise Register shall be distributed between the shareholders proportionally to their share. Another possibility was to establish a term, within which shareholders of a company could apply "for receipt of public property, liquidation quota or any other kind of compensation" after a company was excluded from the Enterprise Register. In such cases, activities related to distribution of property should not be performed in respect to all excluded companies but only to those, shareholders of which are interested in property.

The Saeima does not share the opinion of the Applicant and indicates that not each solution dealing with the situation in a different manner can be regarded as a more lenient one. Solutions suggested by the Applicant would mean that the State must ensure another possibility to perform distribution of property between shareholders after they have failed to take advantage of it during previous three years. The present regulatory framework is based on assumption that a shareholder is no more interested in property since he or she has not exercised the right to liquidate the company and receive liquidation quota.

Moreover, the summoned person A. Strupišs indicated that the aim of the Contested Norm was to create economic mechanisms stimulating shareholders of companies to perform liquidation of the company. Consequently, this ensures saving of State resources that would otherwise be spent to liquidate companies that have ceased their economic activities.

However, the summoned person Mr. A. Lošmanis holds that the wording of the draft law approved at the first reading was incorrect from the legal point of view. The meaning of the term "property shall be distributed between the shareholders proportionally to their share" was unclear because it is necessary to ensure transition

of property to a certain party. Moreover, Mr. A. Lošmanis indicates that the legislator could settle upon applying the liquidation procedure also to companies having no creditor claims, namely, without differentiating between categories of companies. Another possibility was not to execute liquidation. Instead, a certain State institution could be commissioned to sell and distribute property after a company was excluded from the Enterprise Register, which would thus allow them to settle accounts with shareholders of a nonexistent company. However, establishing of such duty for a State institution would cause non-proportional workload (*see: Case materials, pp. 147-149*).

19.2. The above mentioned opinions show that the aim of the Contested Norm, namely, to ensure that no property is left without owner after a company is excluded from the Enterprise Register, could be reached by other measures that are more favourable for a person.

The Constitutional Court has indicated that in cases when more lenient measures exist, it is necessary to investigate whether they could reach the legitimate aim with the same effectiveness. A more lenient means are not any means, but only such by which the aim may be reached in the same quality (*see: Judgment of 13 May 2005 by the Constitutional Court in the case No. 2004-18-0106, Para 19*). The duty of the Constitutional Court is to assess the compliance of the impugned norm with the fundamental rights, determined in the Satversme but not to substitute the freedom of action of the legislator with its viewpoint on a more rational solution (*see: Judgment of 30 March 2009 by the Constitutional Court in the case No. 2009-85-01, Para 19*).

The Constitutional Court, however, has the authority to verify whether the legislator, when restricting the rights of a person, has selected such alternative measures that restrict the rights of person at a lesser extent (*see: Judgment of 30 March 2009 by the Constitutional Court in the case No. 2009-85-01, Para 19*).

If the legitimate aim can be reached by measures that restrict the rights of persons at a lesser extent but requires non-proportional contribution by the State and the society, then the State is not committed to selecting such measure.

19.3. The procedure for adoption of the Contested Norm makes the Court concluding that the Saeima has assessed alternatives in a proper way. The Contested Norm has been adopted in the frameworks of commercial law reform. To elaborate

this regulatory framework, a work group and a special sub-commission of the Saeima Legal Committee were formed. At the first reading of the draft law, another wording of the Contested Norm was assessed; however, it has been concluded during discussions of the Saeima Legal Committee and the above mentioned sub-commission that it cannot be regarded as the most lenient measure possible to reach the legitimate aim of the norm.

The Constitutional Court acknowledges that the Contested Regulation not only ensures that property remaining after exclusion of the company from the Enterprise Register is not left without owner, but it also guarantees that shareholders of companies are interested to liquidate the company and receive liquidation quota. Thus, the legislator has tried to reduce number of those companies, exclusion from the Enterprise Register of which should be decided by the State.

Other measures referred to as less restrictive ones motivate shareholders of companies to wait until the State executes liquidation of a company and division of property rather than to decide on the further destiny of the company themselves.

Liquidation of a company would at any case be an additional function, fulfilment of which would require considerable resources. Since liquidation would apply mainly to fictive companies and those who have ceased their economic activities, it would be possible to cover liquidation costs by means of property of the company only in rare cases. Moreover, the Saeima reasonably indicates that it would not be reasonable and proportional to commit the State to liquidate 23 486 subjects, owners of which are not interested in.

Similar considerations are also applicable to the suggestion to transfer property left after exclusion of a company from the Enterprise Register to shareholders proportionally to their share. In such a case, it would be necessary to distribute such property of companies, owners of which are not interested in; therefore such distribution is regarded as non-effective. The Saeima reasonably indicates that application of such mechanism would be related with management of remainder of property for a certain time and search of the owners. Consequently, it would not be reasonable for the State to select such mechanism.

It is not possible to agree with the opinion of the Applicant that the State had the duty to establish term within which former shareholders of a company could apply for remainder of property after the company is excluded from the Enterprise Register. The Law on Coming into Force of the Commercial Law already provided for the term of three years necessary for shareholders of companies to receive compensation in the form of liquidation quota for property once possessed by the company. Establishment of additional period after expiry of the above mentioned term would prolong the commercial law reform and delay improvement of the legal system.

The Applicant maintains that companies having debts enjoyed a more beneficial situation. Namely, they were liquidated and, in certain cases, shareholders had the right to receive property remaining after satisfying claims of creditors. However, such regulation is aimed at protection of creditors rather than shareholders of companies. Moreover, even in such cases, if a company has not appointed a liquidator, property remaining after satisfying claims of creditors is recognized as property without heirs. Consequently, it can be concluded that the Law on Coming into Force of the Commercial Law systematically regulates procedure, according to which property once possessed by a company is recognized as property without heirs in case if shareholders are not interested into it. No debt commitments influence the above described approach.

Consequently, the legitimate aim could not be reached at the same quality by less restrictive measures, and therefore the Contested Norm shall be recognized as indispensible for reaching of the aim.

20. When comparing benefit gained by the society to restriction of the rights of persons, it is necessary to take into account the fact that shareholders of companies act in the field of commercial law. The Saeima reasonably indicates that, in this domain, the principle of dispositivity is of importance. It requires that a shareholder to act and fulfil obligations commissioned, as well as to take advantage of possibilities provide. Therefore, although the normative regulatory framework that already established re-registration procedure and consequences for failure to comply with the procedure was adopted after foundation of SIA "DAN LAT CAMPING", shareholders of the

administrative body of this company did have the duty to follow amendments to normative acts and execute duties established therein.

Pursuant to the normative regulatory framework, a person had a possibility to re-register a company for it to continue functioning or to liquidate the company and receive liquidation quota. Section 19 of the Law on Coming into Force of the Commercial Law establishes actions only in respect to those companies what have failed to fulfil the duty of re-registration or liquidation. Consequently, the regulatory framework ensures that persons, to whom the Contested Norm could cause considerable detriment, would prevent all consequences by themselves.

The Constitutional Court acknowledges that the stipulated term of three years for re-registration or liquidation of a company was reasonable, especially taking into account the burden of duties imposed on a person for avoiding application of the Contested Norm on him or her. A person only had to announce decision of the Enterprise Register either regarding launching of liquidation procedure of a company or entering thereof into the Enterprise Register. Moreover, information regarding actions to be performed were publicly available.

In case if the Contested Norm was not adopted, the State would have to invest non-proportional resources into liquidation of companies, owners of which are not interested into their property. Moreover, it is reasonable to suggest that, by failing to adopt the Contested Norm or establishing another regulatory framework that would be more advantageous for entrepreneurs, the State would have to undertake the duty to liquidate more than 23 thousand subjects, founders of which would have failed to execute liquidation of a company.

Consequently, it can be concluded that benefit gained from the Contested Norm by the society is greater than detriment caused to a person.

III

21. The Saeima holds that the Constitutional Court does not have the jurisdiction to decide on compliance of the Contested Norm with Article 5 of the Agreement on

Protection of Investments because issues regarding infringements of this Agreement shall be reviewed according to the procedure referred to in Article 9 thereof.

Moreover, the State Chancellery expressed a viewpoint that the Constitutional Court does have the jurisdiction to assess compliance of the Contested Norm with the Agreement on Protection of Investments because the aim of Article 9 thereof is to entitle a private person to litigate against the State; it neither prohibits nation institutions, including the Constitutional Court, to assess compliance of the freedom of action with international liabilities undertaken.

Article 9 of the Agreement on Protection of Investments provides "Disputes between a Contracting Party and an Investor" provides:

"(1) Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment on the territory of that other Contracting Party shall be subject to negotiations between the parties in dispute.

(2) If any dispute between an investor of one Contracting Party and the other Contracting Party continues to exist after a period of three months, investor shall be entitled to submit the case either to:

(a) the International Centre for Settlement of Investment Disputes having regard to the applicable provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C. on 18 March 1965, or in case both Contracting Parties have not become parties to this Convention,

(b) an arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law. The parties to the dispute may agree in writing to modify these Rules. The arbitral awards shall be final and binding on both Parties to the dispute."

Jurisdiction of the Constitutional Court has been generally established in Article 85 of the Satversme and Article 1 of the Constitutional Court Law; however, an all-embracing list of cases to be examined by the Constitutional Court is included in Article 16 of the Constitutional Court Law.

Article 16 (6) of the Constitutional Court Law provides that the Constitutional Court shall adjudicate matters regarding compliance of Latvian national legal norms with those international agreements entered into by Latvia that is not in conflict with the Constitution. Based on this norm, the Constitutional Court has already examined cases on compliance of laws with international agreements ratified by the legislator (*see, e.g.: Judgment of 21 October 2002 by the Constitutional Court in the case No. 2002-05-010306, Judgment of 7 July 2004 in the case No. 2004-01-06, Judgment of 1 October 2004 in the case No. 2004-02-0106, Judgment of 13 May 2005 in the case No. 2004-18-0106, Judgment of 15 June 2006 in the case No. 2005-13-0106, and Judgment of 30 October 2009 in the case No. 2009-04-06).*

Latvia ratified the Agreement on Protection of Agreements by Decision of the Supreme Council of 28 October 1992 "On Ratification of the Agreement between the Government of the Republic of Latvia and the Government of the Kingdom of Denmark concerning the Promotion and Reciprocal Protection of Investments". Consequently, jurisdiction of the Constitutional Court to verify whether national legal norms of Latvia comply with this Agreement follows from Article 16 (6) of the Constitutional Court Law. The fact that an international agreement establishes institution that can assess whether the State has fulfilled duties undertakes by the agreement in the meaning of international law does not affect the duty of the Constitutional Court to assess compliance of national legal norms of Latvia with the above mentioned Agreement in the frameworks of its jurisdiction.

However, it should be indicated that competence of the institution referred to by the Constitutional Court and mentioned in Article 9 of the Agreement on Protection of Investments, namely, the International Centre for Settlement of Investment Disputes (hereinafter – the ICSID) considerably differs. The Constitutional Court can only assess whether a legal norm of Latvia complies with the Agreement on Protection of Investments; moreover, it should only be a norm contested in a particular case. The Constitutional Court cannot review a dispute on protection of investments on its merits, namely, it cannot assess whether the State has infringed the Agreement on Protection of Investments by means of its activities in general. Likewise, the Constitutional Court cannot assess the Contested Norm based only on actual situation

of the Applicant. Compliance of the Contested Norm with the Agreement on Protection of Investments shall be assessed *in abstracto*.

Assessment of compliance of the Contested Norm with Article 5 of the Agreement on Protection of Investments shall be performed observing the above mentioned limits of competence.

22. Article 5 of the Agreement on Protection of Investments "Expropriation and Compensation" provides:

„Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of the expropriating Party, on a basis of non-discrimination and against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or impending expropriation become public knowledge, shall be made without delay and shall include interest at LIBOR until the date of payment, be effectively realisable in convertible currency and be freely transferable. There shall be legal provision giving an investor concerned a right to prompt review of the legality of the measure taken against the investment and of their valuation in accordance with the principles set out in this paragraph by due process of law in the territory of the Contracting Party making the expropriation."

The Contested Norm establishes actions with the property remaining after exclusion of companies from the Enterprise Register. In fact, it establishes actions with shares of a company remaining after cessation of economic activities. Moreover, the Contested Norm applies to all companies registered in the Republic of Latvia irrespective of the fact whether a shareholder is Latvian or foreign investor. Consequently, the Contested Norm can also apply to investors from Denmark. Consequently, the Contested Norm does pertain to the regulatory framework of the Agreement on Protection of Investments.

ICSID has indicated in its case-law that "investments" are characterised by four criteria: financial investment or investment made by means of labour; project duration, economical risk, and investment into economic development of the State (*see: ICSID, Mitchell v. Congo, decision on annulment, 1 November 2006, case No. ARB/99/7, Para 27).* These criteria are mutually related, and their existence can be established only after a thorough analysis of facts.

In order to assess the Contested Norm, the Constitutional Court does not have to decide whether the Applicant can be regarded as an investor in the meaning of the Agreement on Protection of Investments. From the perspective of jurisdiction of the Constitutional Court, facts of the present case do not change the regulatory framework of the Contested Norm. The fact that the Applicant owned shares of SIA "DAN LAT CAMPING" permits regarding him *prima facie* as investor and serves as sufficient ground for the Constitutional Court to review his constitutional complaint regarding compliance of the Contested Norm with the Agreement on Protection of Investments.

23. The Applicant holds that the Contested norm should be recognized as measure with consequences equal to expropriation because, after exclusion of SIA "DAN LAT CAMPING" from the Enterprise Register, it has resulted into transfer of investments of twenty-three thousand USA dollars to the State.

The Saeima denies that the Contested Norm would have had initiated compulsory alienation of nationalization of property. Loss of property right in this particular case should be regarded as a measure for control of use of property rather than alienation of property.

Moreover, the State Chancellery is of the view that the aim of the Contested Norm was to recognize property as State property; therefore it leads to direct expropriation.

24. When analysing similar norms of other agreements on protection of investments, the ICSID, has recognized a broad range of measures as expropriation. For instance, expropriation could be caused by normative regulation that in itself does not deny the property right; instead, it prohibits gaining profit from investments [*see:*

ICSID, Metalclad Corp. v. Mexico, award, 30 August 2000, case No. ARB(AF)/91/1]. It is indicated in legal literature that cases when a person, to whom a particular measure is applied, is denied the property right shall be regarded as direct expropriation; however measures that do not affect the status of the property right of persons but still prohibit obtaining profit from investments shall be regarded as indirect expropriation (*see: R. Dolzer, C., Schreuer, Principles of International Investment Law, OUP, 2008, p.92).*

The ICSID also dedicated that use of regulatory power of the State by causing obstacles for entrepreneurship or obligating persons to pay taxes or other payments shall not be regarded as expropriation in itself (*see: ICSID, Telenor v. Hungary, award, 13 September 2006, case No. ARB/04/15, Para 64)*. Governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation (*see: ICSID, Feldman v. Mexico, award, 15 December 2002, case No. ARB(AF)/99/1, Para. 103]*.

Likewise, the ICSID has acknowledged: in order to establish whether actions performed by the State can be regarded as expropriation, it is necessary to balance two controversial interests, namely, the extent to which a selected measure would restrict the fundamental rights of a person should be assessed in comparison with the authority of the State to regulate its policy. The State has the right to adopt such regulatory framework that is aimed at social aim or that of general benefit. In such a case, measure selected by the State would impose no obligation on the State unless actions of the State are obviously non-proportional with what is necessary for reaching of the aim (*see: ICSID, LG&E v. Argentina, decision on liability, 3 October 2006, case No. ARB/02/1, Paras 189 and 195).*

25. Section 19 (4) of the Law on Coming into Force of the Commercial Law envisage exclusion of a company from the Enterprise Register, after which the company ceases existing. However, when establishing that the remainder of property

shall be regarded as property without heirs, the Contested Norm regulates situation when a company has ceased existing and shares once owned by a person are already lost.

Alienation of property or restriction of possibilities to obtain profit from one's investment is neither the aim of the procedure of exclusion of a company from the Enterprise Register, nor that of the Contested Norm. Section 19 of the Law on Coming into Force of the Contested Norm regulates actions to be performed in respect to companies that have failed to perform re-registration within the stipulated term or have failed to adopt a decision regarding liquidation thereof. The aim of this regulatory framework is to improve business system, terminate existence of fictive companies, protect interests of creditors and prevent situation when property is left without owner. Consequently, the particular normative regulatory framework has been introduced to ensure interests of the society, and the State has exercised its right to regulate issues relevant to the society.

Moreover, Section 19 of the Law on Coming into Force of the Commercial Law applies only to those companies that have failed to fulfil the stipulated duty within the established term, namely, to make decision regarding re-registration or liquidation of a company. Consequently, persons could take measures not to lose shares owned by them and ensure that property of the company would not become property without heirs. Entrepreneurs who were interested in their shares prevented the respective consequences.

Using its regulatory power, the State elaborated a non-discriminating regulatory framework applying to all entrepreneurs. This is action of a person that determines whether the particular regulatory framework would apply to a company owned by him or her. Consequently, it can be regarded that in case if the Contested Norm applies to a company owned by a person, this is a person who has agreed to it by performing concludent actions.

Consequently, when adopting the Contested Norm, the State has exercised its right to regulate the particular issue with the purpose to ensure interests of the society. To assess the Contested Norm, the Constitutional Court does not have to decide whether, in the present case, adoption of the particular regulatory framework would

cause direct or indirect expropriation of investment, especially when taking into consideration the diverse case-law of tribunals for protection of investments in this respect (*see: Azurix Corp. v. Argentina, award, 14 July 2006, case No. ARB/01/12, Para 309)*. Moreover, Article 5 of the Agreement on Protection of Investments does not prohibit expropriation; it only defines conditions for execution thereof. If the Contested Norm indeed causes expropriation, it does not automatically mean that the Norm is at variance with Article 5 of the Agreement on Protection of Investments.

26. Article 5 of the Agreement on Protection of Investments provide that investments shall not be expropriated, except for cases when expropriation shall be executed for :

1) a public purpose related to the internal needs of the expropriating Party;

2) on a basis of non-discrimination and

3) against prompt, adequate and effective compensation.

Further text of Article 5 of the Agreement on Protection of Investments applies to procedural and material aspects of the procedure for disbursing compensation.

The fact that the Contested Norm has been adopted in the interests of the society and is not discriminating has already been established in previous sections of this Judgment.

It cannot be denied that the Contested Norm in itself does not provide for any compensation; it only establishes that property once possessed by a company and remaining after exclusion of the company from the Enterprise Register shall be regarded as property without heirs.

However, nothing in the Contested Norm can be interpreted in a way that the Norm would restrict the right of a person to compensation that follows from the Agreement on Protection of Investments. The Contested Norm does not regulate the procedure for disbursement of compensation; neither excludes it cases when a person would be entitled to receive one.

Consequently, the Contested Norm does not contradict Article 5 of the Agreement on Protection of Investments.

The Constitutional Court

Based on Article 30 – 32 of the Satversme of the Republic of Latvia

h o l d s :

Section 19 (5) of the Law on Procedures for Coming into Force of the Commercial Law does comply with Article 105 of the Satversme of the Republic of Latvia and Article 5 of the Agreement between the Government of the Republic of Latvia and the Government of the Kingdom of Denmark concerning the Promotion and Reciprocal Protection of Investments.

The Judgment is final and not subject to appeal.

The Judgment shall come into force on the date of publishing it.

Presiding Judge G. Kūtris