



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

FOURTH SECTION

CASE OF MOLDOVAHIDROMAŞ v. MOLDOVA

(Application no. 30475/03)

JUDGMENT

STRASBOURG

27 February 2007

FINAL

27/05/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Moldovahidromaş v. Moldova,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr K. TRAJA,

Mr S. PAVLOVSKI,

Mr L. GARLICKI,

Ms L. MIJOVIĆ,

Mr J. ŠIKUTA, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 6 February 2007,

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

PROCEDURE

1. The case originated in an application (no. 30475/03) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by S.A. “Moldovahidromaş”, a company registered in Chişinău, on 18 September 2003.

2. The applicant was represented by Mr N. Moşcin, a lawyer practising in Chişinău. The Moldovan Government (“the Government”) were represented by their Agent, Mr V. Pârlog.

3. The applicant alleged, in particular, that its right to a fair hearing and its right to the peaceful enjoyment of its possessions were breached as a result of the quashing of the final judgment of 23 October 1992.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court).

5. On 12 October 2004 a Chamber of that Section decided to communicate the application to the Government. On 4 April 2006 the application was declared partly admissible. The Court found that the applicant could claim to be a victim of a violation of Article 6 § 1 and Article 1 of Protocol No. 1 to the Convention as the current owner of the property concerned by the original judgment, despite the fact that the judgment as such did not concern the applicant.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

1. Events prior to the quashing of the 1992 judgment

7. By Government order of 19 June 1990 the Ministry of Heavy Industry of the USSR was given the right to manage the property of “Moldovahidromaş” (the State-owned legal predecessor of the applicant, hereinafter “M.”). On 28 November 1990 the Ministry of Heavy Industry concluded with the staff employed within M.’s scientific laboratory a contract for the creation of a separate association (*întreprindere de arendă*) to hold and manage the laboratory (“Hidrotehnica”, hereinafter “H.”).

8. The Ministry of Industry of Moldova (“the Ministry”) later considered that contract to be unlawful. On 1 September 1992 it ordered H.’s liquidation. H. challenged that order in court. The Ministry also initiated court proceedings for the annulment of the contract creating H.

9. On 23 September 1992 M. made a statement about its registration as a shared company, 58.2% of the shares of which were to be distributed to the staff and the rest remained State property. According to the statement, the final evaluation of the company’s assets was to be based on the accounting situation on 31 December 1992 and on the assets evaluation document to be drawn up. The period for the staff to subscribe for stock was set at between 25 September 1992 and 25 March 2003. M. also declared its right subsequently to be privatised in accordance with the law by becoming a public limited company.

10. On 22 October 1992 the Economic Court of Moldova annulled the Ministry’s order of 1 September 1992 since the Ministry had not been competent to order the liquidation of a company.

11. On 23 October 1992 the same court accepted the Ministry’s court action and declared the contract for the creation of H. null and void (“the 1992 judgment”). That judgment was not appealed against and became final. The court also ordered the liquidation of H., with the transfer of assets to the Ministry and the publication of an announcement in the press about its liquidation, setting a time-limit until 23 January 1993 for submitting any claims against H.

12. On 11 December 1992 the Ministry ordered H.’s liquidation pursuant to the court judgment of 23 October 1992 and the transfer of its assets to M., which was declared to be the legal successor of H. M.’s manager was ordered to create, on the basis of the property obtained from

H., a subsidiary without a separate legal personality, to manage H.'s scientific laboratory and plant.

13. On 29 December 1992 M. registered its statute with the State Registration Chamber. The applicant company was thereby created and it retained the name of its legal predecessor, "Moldovahidromaş". In respect of its assets, the statute referred to the statement of 23 September 1992.

14. On 30 December 1992 an "Act for the transfer and receipt of [H.]" was concluded. According to this Act, pursuant to the Economic Court's judgment of 23 October 1992, H. was transmitted to the applicant. M.'s assets evaluation document was drawn up on 1 January 1993.

15. In an evaluation of the value of the applicant's real estate dated 1 January 1994 referring to the accounting situation on 1 January 1993, subsidiary H.'s real estate was mentioned among the applicant's property. On 4 June 1994 the applicant's staff and the Government of Moldova signed the applicant's constitutive contract, which replaced certain parts of the constitutive statement of 23 September 1992. In respect of the property in the applicant company owned by the State, the constitutive contract referred to the assets evaluation document of 1 January 1993.

16. Also in 1994 the applicant registered with the State Registration Chamber a subsidiary under the name "Hidrotehnica" (hereinafter "subsidiary H."), to manage its laboratory and plant and to act on the basis of the applicant's statute and that of subsidiary H. The applicant issued a general power of attorney to subsidiary H.'s director, authorising him to sign contracts, act in court and take financial decisions regarding H. In accordance with subsidiary H.'s statute, should that subsidiary be liquidated, its property was to be transferred back to the applicant. In the applicant's request to a bank to open a sub-account for the use by its subsidiary H., the latter's stamp was applied, which referred to its status as the applicant's subsidiary.

17. In 1995 more of the State's shares in the applicant company were privatised, which raised the total percentage of private ownership in the company to 75.3%.

18. In 1997 the court file regarding the 1992 proceedings was destroyed pursuant to regulations establishing a five-year limit for keeping such files in court archives.

19. On 30 June 1998 the applicant made changes to its statute. The new statute declared that the company had been created through the re-organisation of M. and H. and was the legal successor of both.

20. By 2001, the company was 100% privately-owned. On 24 July 2001 the Department of Privatisation and Administration of State Property issued the applicant a privatisation certificate. It listed the real estate included in the company's constituting capital (*capitalul social*) in accordance with the evaluation act of 1 January 1993. Five buildings of subsidiary H. were included in that list. The certificate finally stated that the State had not

entrusted the management of any State property to the applicant. In a letter of 18 May 2002 the same Department informed the Government and the staff of subsidiary H. that the latter could not claim the right to separate from the applicant in order to become a State company unless the applicant's general assembly of stock holders decided so. It added that the entire property of H. had been transferred to M. following the 1992 judgment and the Ministry's order of 11 December 1992 and that thereafter M. was privatised by selling stocks to the staff and on the stock exchange.

2. The quashing of the 1992 judgment

21. On 23 July 2002, on the initiative of a group in the staff of the subsidiary H., the Prosecutor General filed a request with the Supreme Court of Justice for the annulment of the 1992 judgment.

22. On 25 September 2002 the applicant informed the Supreme Court of Justice about the failure of the Prosecutor General to send it a copy of his request for the annulment of the 1992 judgment, as he was obliged to do by law, and asked to be recognised as a party to the proceedings. It received no reply. The applicant submitted its arguments against the annulment of the 1992 judgment and asked the court to reject the Prosecutor General's request. On 29 October 2002 the applicant sent to the Supreme Court of Justice an *addendum* to its request, relying, *inter alia*, on Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

23. On 11 October 2002 the Supreme Court of Justice informed the applicant about the date of the hearing of the case. Similar letters were sent to the applicant for the hearings of 11 December 2002, 22 January 2003 and 21 April 2003. In none of them was the applicant mentioned as a party to the proceedings. According to the Government, the applicant was represented before the Supreme Court of Justice in all these hearings and was informed about the decision of 21 April 2003 by that court.

24. On an unknown date thereafter the Prosecutor General withdrew the request. On 11 December 2002 the court upheld the Prosecutor General's withdrawal of the request for annulment. On 22 January 2003 the court rejected the request for revision made by the "shareholders of H." because they had no standing, not having participated in the 1992 proceedings.

25. The Prosecutor General filed a further request with the Plenary Supreme Court of Justice for the annulment of its judgment of 11 December 2002.

26. On 9 April 2003 the Supreme Court of Justice upheld the request of the managing director of subsidiary H. to freeze all the company's assets pending the court's decision on the case.

27. On 21 April 2003 the applicant asked the Plenary Supreme Court of Justice to reject the Prosecutor General's request for the annulment of the 1992 judgment. It received no reply.

28. On the same day the Supreme Court of Justice upheld the Prosecutor General's request and quashed the judgment of 11 December 2002, ordering a re-hearing of the case by its own Economic Chamber.

29. On 23 April 2003 the applicant asked the Economic Chamber of the Supreme Court of Justice to recognise it as a party to the proceedings and to order the Prosecutor General to send it a copy of his request for the annulment of the 1992 judgment. The applicant received no reply. The Government have not commented on this in its observations.

30. On 24 April 2003 the Economic Chamber of the Supreme Court of Justice upheld the Prosecutor General's request and quashed the 1992 judgment. It adopted a new judgment whereby it rejected the Ministry's request to declare null and void the contract concluded in 1990 creating H. However, there was no annulment of the privatisation of the applicant's predecessor, M., nor was any compensation awarded to the applicant.

3. Events after the quashing of the 1992 judgment

31. On 7 May 2003 the applicant made a request for the annulment of the judgment of 24 April 2003. On 26 June 2003 the court rejected that request, referring to the new Code of Civil Procedure and the introduction of a new form of court proceedings (revision, see paragraph 41 below).

32. On 6 June 2003 the newly created H. was registered in the State register of companies and the subsidiary H. was deleted from that register. According to a letter from the Chamber of Commerce of 28 May 2003, there was no company called "Hidrotechnica" in the State register on 1 May 2003 and no such company had been deleted from the register. Moreover, no such company had been registered in 1990-1992. The applicant challenged in court the changes made to the State register.

33. On 26 June 2003 the applicant made a request for the revision of the judgment of 24 April 2003 on the ground, *inter alia*, that it had not been allowed to intervene in proceedings which affected its pecuniary rights. On 10 July 2003 the Supreme Court of Justice rejected the request as unfounded but gave no reasons.

34. On 22 July 2003 the applicant was informed about the hearing by the Supreme Court of Justice of H.'s request for an additional ruling. By its judgment of 24 July 2003 the Supreme Court of Justice decided that H., created by the 1990 contract, could be registered in the State register under the same name and that the 1994 registration of the applicant's subsidiary H. should be deleted. At the same time, the court declared null and void all the decisions concerning the creation of the applicant's subsidiary H., including the applicant's decisions of 1992-1994.

35. On 18 February 2005 the Department of Privatisation of the Republic of Moldova issued the applicant a new privatisation certificate. According to this certificate, following the Supreme Court of Justice judgment of 24 July 2003 and the registration, on 6 June 2003, of H. in the

State register, the previously issued certificate of 24 July 2001 had been amended to exclude from the list of the applicant's property the five buildings belonging to its subsidiary H.

36. H. also requested amendments to the State real estate register to confirm its title to the buildings previously registered as belonging to the applicant. On 25 March 2005 the Chişinău Court of Appeal accepted that request. That judgment was upheld by the Supreme Court of Justice on 22 June 2005. Both courts found that the applicant had lost to H. the ownership over those buildings following the judgment of 24 April 2003.

37. H. initiated court proceedings against the bank in which the applicant's subsidiary H. had had its account, asking for the transfer of all the money in that account to its new account. The applicant was allowed to intervene as a third party, claiming that the money belonged to it, since its subsidiary had had to be closed following the annulment of the 1992 judgment and since the newly registered H. had not been declared to be the legal successor of subsidiary H. On 27 October 2005 the Regional Economic Court accepted the applicant's request. That judgment was quashed by the Chişinău Court of Appeal on 19 December 2005. On 16 February 2006 the Supreme Court of Justice upheld that judgment. The court relied on the judgments of 24 April and 24 July 2003 which annulled the 1992 judgment and found that the money on H.'s account had been earned after the annulment of the 1992 judgment and from H.'s own resources.

38. On 18 May 2006 the Agent of the respondent Government informed the Prosecutor General about the Court's decision of 4 April 2006 to declare partly admissible the present application. He annexed a copy of that decision and requested the Prosecutor General's Office to contribute its comments as part of the Government's observations to the Court regarding the present case. On an unknown date, the Prosecutor General's Office asked the Supreme Court of Justice to revise its judgments of 24 April and 24 July 2003, invoking Article 449 (c) and (j) of the Code of Civil Procedure ("CCP", see paragraph 41 below) and the decision declaring partly admissible the present application. He annexed the Government Agent's letter of 18 May 2006.

39. On 29 June 2006 the Supreme Court of Justice rejected that request. It found that the request had not been accompanied by sufficient evidence of new and relevant facts in the form of an application pending before the European Court of Human Rights regarding the case at issue. Moreover, the Court had declared the application partly admissible but had not adopted a judgment on the substance of the complaints, which prevented the Supreme Court of Justice from revising the judgments of 24 April and 24 July 2003 on the basis of Article 449 (c) CCP.

40. The court also found that the documents annexed to the request did not disclose the Government's position that a provision of the Convention

had been violated as a result of the quashing of the 1992 judgment. Accordingly, Article 449 (j) CCP did not apply either.

B. Relevant domestic law

41. The relevant domestic law is summarised in the case of *Roşca v. Moldova* (no. 6267/02, §§ 16 and 17, 22 March 2005).

In addition, the provisions of the Code of Civil Procedure concerning revision of final judgments, where relevant, read as follows:

“Article 446: Court decisions which may be subject to revision

Final decisions ... and judgments of all courts may be subject to revision, under the conditions of the present Chapter.

Article 447: Persons who may lodge a request for revision:

The following have the right to lodge a request for revision:

...

(b) persons who have not participated in the proceedings but whose rights were violated by the relevant judgment;

...

Article 449: Reasons for granting a request for revision:

A revision request shall be granted when:

... (c) certain essential circumstances or facts of the case become known which did not and could not have been known to the applicant;

... (g) The court adopted a decision in respect of the rights of persons not participating in the proceedings;

(j) The Government of the Republic of Moldova, represented by their Agent, or the European Court of Human Rights, have initiated a friendly settlement procedure in a case pending against the Republic of Moldova, which [the Government] consider that the court’s judgment has seriously violated a right provided by the Constitution of the Republic of Moldova or the European Convention for the Protection of Human Rights and Fundamental Freedoms;”

THE LAW

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

42. The applicant complained that the two judgments of the Supreme Court of Justice of 24 April and 24 July 2003, which set aside the final judgment of 23 October 1992, had violated its rights guaranteed under Article 6 § 1 of the Convention.

The relevant part of Article 6 § 1 reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law...”

43. The Government rejected the applicant’s claims and argued that in the proceedings before the Supreme Court of Justice the parties had enjoyed equal procedural rights and that the re-opening had been justified. The aim of the procedure for the annulment of final judgments was to offer additional protection to the weaker party in the proceedings and to avoid arbitrariness. Moreover, the domestic authorities had a certain margin of appreciation regarding the manner in which the last-instance court examined an appeal. It was also important that the Prosecutor General had not lodged his request on his own motion but at the request of H.’s staff.

44. The Government underlined various violations of the law allegedly committed by the court in its judgment of 23 October 1992, which were the reason for the quashing of the judgment in 2003. Moreover, the applicant’s claim that it had not been allowed to intervene in the proceedings was untrue since the Supreme Court of Justice had not adopted any preliminary decision either allowing or rejecting such a request.

45. Finally, the Government submitted that domestic law and practice allowed the courts to remedy violations resulting from the quashing of final judgments, under Article 449 (c) and (j) of the Code of Civil Procedure (see paragraph 41 above). They therefore considered that there was no reason for the Court to continue the examination of the complaints in this respect.

46. The applicant considered that the annulment of the 1992 judgment had been contrary to the principle of legal certainty and had violated its right to take part in the proceedings concerning its assets.

47. The Court notes that the Government have not referred to Article 449 CCP at the admissibility stage. They are therefore estopped from raising the issue of non-exhaustion of available domestic remedies at this stage of the proceedings. In such circumstances, the Court considers it appropriate to continue the examination of the complaints.

48. The Court recalls that it has found violations of Article 6 § 1 of the Convention in numerous cases raising issues similar to those in the present case (see, among other authorities, *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII and *Roşca v. Moldova*, no. 6267/02, 22 March 2005, § 29).

49. Having examined the material submitted to it, the Court notes that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. It is particularly disturbing that a judgment which has remained *res judicata* for over ten years could be annulled on grounds which were known at the time of adoption of that judgment.

50. Having regard to its case-law on the subject and to its decision of 4 April 2006 regarding the present application, the Court finds that the

annulment of the 1992 judgment breached the applicant's rights under Article 6 § 1 of the Convention.

51. There has accordingly been a violation of Article 6 § 1 of the Convention.

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

52. The applicant also claimed that the annulment of the 1992 judgment had violated its right guaranteed under Article 1 of Protocol No. 1 to the Convention, which provides:

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

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

53. The applicant relied on various documents in the case file proving its ownership over its subsidiary H., as well as on a report made by an expert contracted by it, confirming its submissions.

54. The Government disagreed. They submitted that the quashing had not affected the applicant's pecuniary rights since the 1992 judgment had not given any such rights to the applicant but concerned the Ministry. Moreover, H. *de facto* continued to be an independent company throughout the relevant period and it was never included in the privatisation of M. In support of that submission they relied on a report made by an expert working for the Ministry of Justice and who had been duly warned of his criminal responsibility for false statements. According to that report, when the applicant company was created on 29 December 1992 it had not yet included the property of H., which was only transferred the next day. After 1992 H. functioned independently of the applicant and had the right to sign contracts and use its own stamp and based its relations with the applicant on a contractual footing. The value of the applicant's constituent assets did not change since its creation, which showed that H. had not been taken into consideration during the privatisation.

55. The Court recalls its finding in the admissibility decision of 4 April 2006 regarding the present application that the applicant could claim to be a victim of an alleged violation of its rights guaranteed, *inter alia*, by Article 1 of Protocol No. 1 to the Convention.

56. It notes the Government's submission that the applicant had not in practice been deprived of any “possessions” within the meaning of Article 1

of Protocol No. 1 to the Convention despite the annulment of the 1992 judgment. The Court needs to verify that submission in order to determine whether the case requires a different approach to be taken from that adopted in other cases regarding the quashing of a final judgment.

57. The Court notes that M.'s statement of 23 September 1992 expressly mentioned the date of 31 December 1992 as the date of assessing the value of its assets for the purposes of creating the applicant company (see paragraph 9 above). Such an evaluation in fact took place on 1 January 1993, following the transfer of H. to the applicant on 30 December 1992 (see paragraph 14 above). In addition, on 11 December 1992 the Ministry, which was the owner of H. following the 1992 judgment, ordered its liquidation and the transfer of its assets to M., while expressly declaring M. to be the legal successor of H. (see paragraph 12 above). The date of 1 January 1993 also appears to be the reference date used in the applicant's constitutive contract of 4 June 1994 (see paragraph 15 above). Moreover, while H. was no longer an independent company following the Ministry's order of 11 December 1992, creditors could still lodge claims against its property until 23 January 1993 (see paragraph 11 above). It appears that any such claim lodged in 1993 would have been paid by M. as H.'s legal successor.

58. The Court also notes that H. was not registered as an independent company in the State register until after the annulment of the 1992 judgment (see paragraphs 16, 32 and 34 above). At the same time, that register contained the name of H. as the applicant's subsidiary, a fact reflected also on its official stamp. Moreover, subsidiary H.'s director acted on the basis of a general power of attorney issued by the applicant (see paragraph 16 above). That situation persisted for at least eight years after the 1994 registration of the applicant's subsidiary, without being challenged by anybody. In addition, subsidiary H.'s real estate was registered as belonging to the applicant until the courts adopted separate judgments to confirm H.'s ownership over that property, based on the annulment of the 1992 judgment (see paragraphs 35 and 36 above). Moreover, the account used by subsidiary H. prior to the annulment had been opened in the bank as a sub-account of the applicant. H. had to claim in court the money left on that account and the courts accepted that claim relying expressly on the annulment of the 1992 judgment (see paragraph 37 above).

59. It is clear from the privatisation certificate issued by the Department of Privatisation (see paragraph 35 above), that H.'s buildings had been included in the privatisation of M. and were thus part of the assets acquired by the applicant from the State. According to the same certificate, no State property was entrusted for the applicant's temporary management. The certificate had to be amended following the annulment of the 1992 judgment to exclude H.'s real estate from the list of assets included in the privatisation (see paragraphs 34 and 35 above). In its letter dated 18 May

2002 the same Department informed the Government that all H.'s assets had been transferred to M., which was subsequently privatised (see paragraph 20 above).

60. In the Court's opinion, if the Government's argument, that H. had not been part of the applicant's assets, were to be accepted, then H. would be left having had no legal status at all for over ten years: H. was not part of the applicant's property, neither was it State property since the applicant had not been given any such property for administration (see the preceding paragraph) and neither was it an independently registered company (see paragraph 58 above). However, a company cannot function in a legal vacuum. Indeed, the applicant, the staff of subsidiary H. and the State authorities acted, for over ten years, in a manner consonant with the applicant's claim of ownership over subsidiary H. Had H. been an independent company, as argued by the Government, there would have been no need, after the annulment of the 1992 judgment, for the various administrative decisions and court judgments ordering the deletion of the registration of the applicant's subsidiary, the change of ownership over the buildings of H. and the change of bank account owner (see paragraphs 32-37 above).

61. The above finding is not in contradiction with the materials in the file regarding a certain degree of independence which was granted by the applicant to its subsidiary and which, according to the Government, constituted evidence of H.'s independence from the applicant. Indeed, the internal organisation of a private company's sub-divisions is exclusively that company's concern.

62. In view of its findings in paragraphs 57-63 above, the Court concludes that H. was part of the applicant's property at the moment of privatisation of M. and that the applicant lost its ownership over that property as a result of the annulment of the 1992 judgment and the subsequent decisions based on that annulment.

63. The Court recalls that it has found violations of Article 1 of Protocol No. 1 to the Convention in numerous cases raising issues similar to those in the present case (see, among other authorities, *Brumărescu*, cited above, § 80, ECHR 1999-VII and *Roşca*, cited above, § 32). Having examined the material submitted to it, and having regard to its finding in paragraph 65 above and in its admissibility decision of 4 April 2006 regarding the applicant's victim status (see paragraph 5 above), the Court notes that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case.

64. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. 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.”

66. The applicant claimed the restitution of H. or compensation for its market value and the difference in value of the applicant company before and after the annulment, as well as the sums of money left on H.’s bank account. The total sum claimed amounted to EUR 4,843,040. The applicant also claimed EUR 2,379,000 for non-pecuniary damage and EUR 11,000 for costs and expenses.

67. The Government submitted that H. had functioned independently of the applicant since 1991 and was not included in the privatisation of M. in 1992. Therefore, no damage had been caused to the applicant by the annulment of the 1992 judgment.

68. The Court considers that the question of the application of Article 41 of the Convention is not ready for decision. The question must accordingly be reserved and the further procedure fixed with due regard to the possibility of agreement being reached between the Moldovan Government and the applicant.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been a violation of Article 6 § 1 of the Convention on account of the annulment of the judgment of 23 October 1992;
2. *Holds* by six votes to one that there has been a violation of Article 1 of Protocol No. 1 to the Convention as a result of the same annulment;
3. *Holds* unanimously that the question of the application of Article 41 of the Convention is not ready for decision; accordingly,
 - (a) reserves the said question;
 - (b) invites the Moldovan Government and the applicant to submit, within the forthcoming three months, their written observations on the matter and, in particular, to notify the Court of any agreement they may reach;
 - (c) reserves the further procedure and delegates to the President of the Chamber power to fix the same if need be.

Done in English, and notified in writing on 27 February 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President

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

N.B.
T.L.E

DISSENTING OPINION OF JUDGE PAVLOVSKI

It would not be an exaggeration to say that the present case is one of the most difficult and complex cases I have ever been called upon to examine during my time at the European Court of Human Rights.

The complexity of this case derives from the economic character of legal disputes that arose during and were provoked by the period of transition from a state-regulated economy to a free market one that the Republic of Moldova had to go through during a certain phase of its history.

That period was one of radical political, social and economic transformation. It could be called a period of initial accumulation of capital.

That period was marked by a lack of clear legal provisions regulating the economic sphere of activity or responsibility of either the State or private persons.

The beginning of the 1990s in the last century in Moldova, like in many other post-Soviet countries, could also be called the period of struggle between old conservative and new progressive forces, and the case before us presents a very clear illustration of this struggle.

A group of persons tried to create a joint stock company: Hidrotehnica SA, and during the transition from a state-controlled economy to one based on the principles of a free market they were confronted with every kind of surmountable and insurmountable difficulty, including some of a legal and judicial nature.

All these circumstances should have been taken into consideration by the Court because they are really decisive for a proper understanding of the case before us.

Of no less importance is the substantial amount of money that is at stake in the present case. The financial repercussions and consequences of this case make it even more difficult to decide.

Unfortunately, the majority, when adopting its judgment, preferred not to look into the above-mentioned particularities of the substance of the case and limited itself exclusively to the examination of a legal certainty problem from the angle of the *Brumarescu v. Romania* case – that is, the *res judicata* nature of a final judicial decision.

The entire thinking behind the present judgment is concentrated in just one single paragraph, namely paragraph 48, which states: “...**The Court recalls that it has found violations of Article 6 § 1 of the Convention in numerous cases raising issues similar to those in the present case (see, among other authorities, *Brumarescu v. Romania* [GC], no. 28342/95, §§ 61, ECHR 1999-VII, and *Roşca v. Moldova*, no. 6267/02, 22 March 2005, §§ 29).**”

I respectfully disagree with my colleagues that the Court has already found violations of Article 6 § 1 “**...in numerous cases raising issues similar to those in the present case...**” In my view, this is simply not so.

Of course, in principle, the majority's approach would have been correct had certain legal conditions been met. However, I regret to say that this was not the case.

I consider that before taking a position in the present case the majority should have looked into the question of what the principle of *res judicata* means in terms of Convention jurisprudence.

The answer to this question can be found in the judgment in the case of *Ryabykh v. Russia* (application no. 52854/99, §52, ECHR 2003-IX), which states the following: **"... Legal certainty presupposes respect for the principle of *res judicata* ... that is the principle of the finality of judgments. This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case..."**

In the case of *Popov v. Moldova*, the Court, referring to the annulment procedure, stated precisely the following: **"...this procedure, although possible under domestic law, was incompatible with the Convention because it resulted in a litigant's "losing" a favourable judgment. ..."** (see *Popov v. Moldova* (no.2), application no. 19960/04, §46).

It is clear from the above-mentioned provisions that when the Court speaks of a breach of the principle of *res judicata* - in the light of its case-law – it is referring to "parties" in the sense used in the *Ryabykh* judgment or of "litigants" "losing a favourable judgment" in the sense used in the *Popov* (no.2) judgment.

So, in order to allege any violation of its rights resulting from a breach of the principle of *res judicata*, the applicant should have shown that in the 1992 proceedings it had the procedural status of a litigant or a party. The applicant failed to do so, however, because it is impossible to prove a fact that simply did not exist.

According to paragraphs 7 and 8 of the present judgment, the 1992 proceedings took place between the Ministry of Industry of Moldova and the joint stock company Hidrotehnica SA. At that time our applicant was a state-owned entity which had no standing in the 1992 proceedings, and, moreover, which, in its current capacity as a privately owned entity simply did not exist.

As is clear from paragraph 1 of the present judgment, Moldovahidromaş SA was registered in Chişinău on 18 September 2003, that is, practically 11 years after the 1992 proceedings had come to an end.

So the fact that the applicant was not a party or a litigant in the 1992 proceedings makes this case different not only from *Brumarescu* and *Rosca*, to which reference is made in paragraph 48 of the present judgment, but also from many other *Brumarescu*-type cases previously examined by the Court.

The legal situation before us presents a novelty which deserves the attention of the Grand Chamber.

The second question which I would like to raise is the following. In this case we are dealing with a very interesting and unusual situation. In the 1992 proceedings, as I have mentioned above, there were two parties: the State in the person of the Ministry of Industry and a newly created joint stock company, Hidrotehnica SA.

All the steps taken by the Moldovan authorities from 1992 to 2003 were directed against the owners of the joint stock company, Hidrotehnica SA, which, in practical terms, cannot be seen as anything other than a manifestation of attempts to protect so-called state interests against the interests of the owners of the joint stock company Hidrotehnica SA. The one and only judicial decision that put an end to the violations of the rights of these persons was the Supreme Court's decision of 24 April 2003 – a decision taken, in the majority's view, in violation of the principle of legal certainty.

I am very sorry to say so, but I cannot share the majority's view on this issue. In my opinion, if a prosecutor belatedly intervenes in a set of proceedings between the State and a joint stock company and tries to protect that joint stock company's lawful interests against the interests of the State, this situation has nothing in common with the *Brumarescu* situation, where the prosecutor acted in the diametrically opposite way, to the detriment of the applicant, who, by the way – unlike in our case – did have the procedural status of a "party".

I find it very difficult to agree that the protection of private owners' legal interests against breaches committed by State authorities can be regarded as a violation of the principle of legal certainty.

Of course, it would have been better had the Prosecutor General intervened earlier, but it should never be too late to protect legitimate interests of private owners against abusive acts by the State. And in this sense – and for our situation – I find the saying "better late than never" to be very apt.

In theory, I would agree that the belated restoration of the Hidrotehnica SA owners' rights might, to some extent, have affected the rights of the current owners of Moldovahidromaş SA. This is particularly true if one takes into consideration that in the meantime a state-owned entity, Moldovahidromaş, has also become a joint stock company. But I would not like to speculate on this issue and prefer to stop here.

We are now dealing with the competing interests of two joint stock companies: Hidrotehnica SA and Moldovahidromaş SA. But this is a slightly different issue, which, again, has nothing to do with the *Brumarescu* case-law on which the present judgment is based.

The above reasons explain why I am not able to share the majority's findings in the present case. In my view, in the present case there has been no violation of the applicant's rights in the manner alleged by it and upheld by the majority.