



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

FOURTH SECTION

CASE OF BIMER S.A. v. MOLDOVA

(Application no. 15084/03)

JUDGMENT

STRASBOURG

10 July 2007

FINAL

10/10/2007

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 Bimer S.A. v. Moldova,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr G. BONELLO,

Mr K. TRAJA,

Mr S. PAVLOVSKI,

Ms L. MIJOVIĆ,

Mr J. ŠIKUTA, *judges*,

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

Having deliberated in private on 25 May and 19 June 2007,

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

PROCEDURE

1. The case originated in an application (no. 15084/03) 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 Bimer S.A. (“the applicant”), a company incorporated in the Republic of Moldova, on 7 March 2003.

2. The applicant was represented by Mr R. Zeglovs, a lawyer practising in Riga, Latvia. The Moldovan Government (“the Government”) were represented by their Agent, Mr V. Pârlog.

3. The applicant alleged, in particular, that the closure of its duty free shop and bar constituted a breach of its rights under Article 1 of Protocol No. 1 to the Convention.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 23 May 2006, the Court declared the application admissible.

6. The applicant and the Government each filed further written observations (Rule 59 § 1), the Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant, Bimer S.A., is a company incorporated in the Republic of Moldova. From the moment of incorporation its shares were owned by Moldovan, American and Bahamian investors, it therefore qualified as a company owned by foreign investors and thus benefited from special incentives and guarantees under the Law on Foreign Investments (see paragraph 24 below).

1. Background to the case

8. On 10 June 1994 Presidential Decree No. 195 (“the Decree”) was promulgated. It made possible the creation and operation of duty free shops at land, water and air-border crossings. According to the Decree, the duty free shops were entitled to sell imported goods without having to pay customs tax (see paragraph 23 below).

9. On 12 June 1997 the applicant company signed a contract with the Leușeni Customs Office, at the border between Moldova and Romania, providing for the opening of duty free shops on the territory of the customs zone. The contract did not contain any provisions as to its duration. It was approved by the Head of the Customs Department of the Government and by the Minister of National Security.

10. On 3 July 1998 and on 2 December 1998 the company obtained two licences to operate a duty free shop and a duty free bar, within the shop, at the Leușeni Customs Office. The licences were issued in accordance with the Decree and they did not contain any provisions as to their duration. Subsequently, the applicant company bought the necessary equipment, built the premises of the shop and bar and started operating them.

2. The change of legislation

11. On 24 April 2002 the Moldovan Parliament made an amendment to the Customs Code by which duty free sales outlets were thenceforward restricted to international airports and on board aircraft flying international routes (see paragraph 25 below).

12. On 18 May 2002 the Customs Department ordered the closure of all duty free outlets which were not located in international airports or on board aircraft flying international routes (“the order”).

2. *The applicant's court action against the order*

13. On 12 June 2002 the applicant company, together with other companies similarly affected, lodged a court action against the order with the Court of Appeal of the Republic of Moldova.

14. The applicant argued *inter alia* that the grounds relied on by the Customs Department in closing down its duty free shop and bar were not enumerated in the exhaustive list of grounds for closing down such shops provided for in section 56 of the Customs Code.

15. Moreover, in the light of section 46 of Law No. 780 (see paragraph 26 below), the new amendments to the Customs Code could not have retroactive effect and could be interpreted only as limiting the opening of duty free shops in the future, and not as closing down those already open.

16. According to the applicant, the order conflicted with section 40 of the Law on Foreign Investments (see paragraph 24 below), which stipulated that the activity of a company owned by foreign investors could be terminated only by a governmental decision or a court order, and only when the company had seriously breached Moldovan legislation and its articles of incorporation.

17. The applicant further argued that according to section 43 of the Law on Foreign Investments (see paragraph 24 below), in the event of the adoption of new, less favourable legislation, companies owned by foreign investors were entitled to rely on the old legislation for a period of ten years. The ten-year period began to run from the date of enactment of the new legislation. Moreover, the second paragraph of the same section specifically provided that foreign-owned companies which enjoyed customs incentives in accordance with the former legislation of the Republic of Moldova had the right to enjoy those incentives after new legislation came into effect.

3. *The judgment of the Court of Appeal of the Republic of Moldova*

18. On 26 June 2002 the Court of Appeal of the Republic of Moldova ruled in favour of the applicant company and quashed the order, relying *inter alia* on the following reasons:

“...The court considers that the order of the Customs Department No. 127 of 18 May 2002, issued for the purpose of applying Law No. 1022 of 25 April 2002 [concerning the modification of the Customs Code], by which the activity of duty free shops was terminated starting with 18 May 2002... is illegal because it is contrary to the legislation in force.

Law No. 1022 of 25 April 2002, by which Article 51 of the Customs Code was modified ... does not provide for the termination of the activity of the duty free shops already open in places other than airports and on board aeroplanes.

Moreover, the above mentioned Order [of the Customs Department] runs contrary to Article 56 of the Customs Code which does not provide among the reasons for

liquidating a duty free shop the reason provided for in the Order – a change in the legislation.

The Court considers that the modified text of Article 51 of the Customs Code cannot have a bearing on the duty free shops already open and in operation, because this would also run contrary to Article 46 (1) of the Law on the Normative Acts, which stipulates that a law cannot be retroactive or ultra active.

Since the applicants are enterprises with foreign investments, the Court considers that the Order runs contrary to Article 39 (1) of the Law on Foreign Investments, which provides that the foreign investments are guaranteed full security and protection in the Republic of Moldova.

Moreover, according to Article 40 of the Law on Foreign Investment, the applicants' activity ...can be terminated only by means of a Government Decision or a court judgment and only if they have seriously breached the legislation or their statute of incorporation. However, the Order in question does not contain any reference to any breaches committed by the applicant and is not based on a Government Decision or a court judgment.

It is necessary to indicate that in accordance with Article 43 (1) of the Law on Foreign Investment, in case of enactment of new laws which change the conditions of a company with foreign investment created before the enactment of such laws, the company in question has the right to guide itself by the old legislation for a period of 10 years calculated from the date of enactment of the new legislation.

According to the second paragraph of section 43 of the Law on Foreign Investments, foreign investors and enterprises with foreign capital which enjoyed customs, tax and other incentives in accordance with the legislation of the Republic of Moldova formerly in force, have the right to enjoy these incentives after the new legislation comes into effect.

...

The court considers that the Order violated the applicants' right to property guaranteed by Article 46 of the Constitution, Sections 1, 40 and 41 of the Law on Property and by Article 1 of Protocol No. 1 to the Convention.”

19. The Customs Department appealed against this judgment to the Supreme Court of Justice.

4. The judgment of the Supreme Court of Justice

20. On 11 September 2002 the Supreme Court of Justice allowed the Customs Department's appeal, quashed the judgment of the Court of Appeal and dismissed the applicant's action. The grounds relied on by the Supreme Court were as follows:

“The first instance court, in finding for the applicants, reached conclusions which are based on a wrong interpretation of the law because the Order in question does not provide for a total termination of the activity of duty free shops but only for the termination of their activity in certain places.

Therefore the first instance court's conclusion that the Order had as effect the termination of the entire activity of the foreign investors who had opened these shops and that thus their right to total security and protection provided for by Article 31 of the Law on Foreign Investment was violated is incorrect.

Article 51 of the Customs Code, as modified by Law No. 1022 of 25 April 2002, defines the duty free as a customs regime which consists of sale of goods under customs supervision in especially dedicated places in international airports and onboard aeroplanes.

Accordingly, through this provision the legislators regulate and limit the places in which such shops can be located but they do not create any interdiction in so far as their activity is concerned. Therefore the arguments of the first instance court that the right to activity of the foreign investors has been violated, is devoid of legal support. The applicants are not prohibited to place their shops in the places provided for by law, i.e. in airports and onboard aeroplanes.

...

According to the documents of incorporation of these companies, they practice different kinds of activities, including the sale of goods in the Duty Free regime.

The conclusion of the first instance court that the Order violated the right to property guaranteed by the Constitution and the international law is incorrect because the companies in question have the right to open duty free shops in other places, as provided by Article 51 of the Customs Code. The activity of the companies is not totally stopped and nothing is taken away from them.

...

The first instance court's reference to Article 40 of the Law on Foreign Investment which says that the activity of a company with foreign investment can only be terminated by a Government Decision or a court judgment is wrong because the Order did not totally terminate the applicants' activity but only the sale of goods in the Duty Free regime. They can do other activities which are provided in their documents of incorporation."

21. The Supreme Court of Justice did not express any view on the applicant's argument or the ruling of the Court of Appeal concerning the applicability of the second paragraph of section 43 (2) of the Law on Foreign Investment to the case. Its judgment was final.

II. RELEVANT DOMESTIC LAW AND PRACTICE

22. The relevant extracts from the Constitution of the Republic of Moldova read as follows:

"Article 46. The right to private property and its protection

(1) The right to possess private property ... [is] guaranteed.

(2) No one may have his property expropriated except for reasons dictated by public necessity, as established by law, and subject to the payment of just and appropriate compensation made in advance.

(3) No assets legally acquired may be confiscated. The effective presumption is that of legal acquirement.

...”

23. Presidential Decree No. 195 of 10 June 1994, in so far as relevant, reads:

“...

Section 3. Imported goods which are to be sold at “duty free” shops... shall be exempted from customs tax;

...

“Duty free” shops may be operated at the road, naval and air border crossing points....”

24. The Law on Foreign Investments of 1 April 1992, in so far as relevant, reads:

“Section 1. The applicable law

...

3.... Laws which contradict the present law in the part concerning foreign investments shall not be applicable.

...

Section 35. Customs incentives for goods brought into the country

1. The goods referred to in section 3 of the present law [cars, equipment, office equipment, raw material...], which are brought into the country as a contribution to the statutory capital shall be exempted from customs tax.

...

Section 36. Customs incentives for import and export

...

2. A company owned by foreign investors shall be exempt from customs tax for merchandise (raw materials...), imported for the purpose of producing goods to be exported.

Section 39. Guarantees concerning nationalisation or expropriation of foreign capital investments

1. Foreign investments in the Republic of Moldova are granted complete security and protection.

2. Foreign investments cannot be expropriated, nationalised or subjected to any other similar measures in any way other than according to the law, on the basis of a law serving the national interest and against the payment of appropriate compensation.

3. Compensation shall correspond to the value of investment assessed immediately before the moment of expropriation, nationalisation or other similar measure. It must be paid not later than three months from the moment the above measures are taken, with an appropriate bank interest rate calculated before the date of payment. The compensation has to be paid in the currency in which the investment was made and it may be transferred abroad without any restrictions.

4. The payment of compensation is ensured by the State body entitled to carry out the expropriation, nationalisation or any other similar measures. The State body must determine the value of investment and pay the compensation not later than the day of the expropriation, nationalisation or other similar measure. If the State body does not have sufficient funds, the compensation shall be paid from the State budget.

5. The affected investor is entitled to request verification of the legality of the expropriation, nationalisation or other similar measure and of the amount of the compensation in the manner provided for by law.”

Section 40. Guarantees concerning forcible suspension and cessation of activity

1. The activity of an enterprise with foreign investors can be forcibly suspended only in accordance with a decision of the Government of the Republic of Moldova or a competent court, when the enterprise has seriously violated the terms of the legislation of the Republic of Moldova or the provisions of its articles of incorporation...

2. If the activity of an enterprise with foreign investors is suspended on the initiative of a body of State control, and no violations of legislation or of the constitutive documents are found, the above body shall compensate the enterprise for any damage including lost profit. If the State body does not have sufficient money, the payment is made from the State budget.

3. The assets of a foreign investor whose enterprise is liquidated or who withdraws from the enterprise may be taken abroad by him without any licence.”

...

“Section 43. Guarantees concerning changes of legislation

1. In the event of the adoption of new legislative acts changing the conditions of activity of an enterprise with foreign capital created before the adoption of such acts, that enterprise shall have the right to have applied to it the legislation of the Republic of Moldova operating on the day of its creation for a period of ten years calculated from the day of the entry into force of the new legislative act.

2. The provisions of paragraph 1 do not extend to legislation related to tax, customs, finance, monetary, credit, currency or anti-trust measures, or to legislation regulating State security, protection of the environment, social order, morals or the health of the population.

Foreign investors and enterprises with foreign investors which enjoyed customs, tax and other incentives in accordance with the former legislation of the Republic of Moldova shall enjoy those incentives after the new legislation comes into effect....”

25. The Customs Code of the Republic of Moldova as amended on 24 April 2002 reads:

“Section 51. *The duty free outlet* – a customs regime (*regim vamal*) which consists of the sale of goods under customs supervision in specially designed places situated in international airports and on board aircraft.

Section 56. A duty free outlet may be closed down if the licence expires or if it is annulled or withdrawn in accordance with the law.”

26. The relevant provisions of Law No. 780 of 27 December 2001 read as follows:

“Section 46 § 1. A law may have effect only during the period of its validity and may not have retroactive or prospective effect.”

27. The treaty between the United States of America and the Republic of Moldova concerning the encouragement and reciprocal protection of investment, signed at Washington on 21 April 1993, in so far as relevant, reads as follows:

“...

Article II. 3. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

(b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

(c) Each Party shall observe any obligation it may have entered into with regard to investments.

...

Article III. 1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except: for public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(3). Compensation shall be equivalent to the fair market value of the expropriated

investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable.”

28. On 31 July 2001 the Commission on the Economy, Industry, Budget and Finance of the Parliament of the Republic of Moldova replied to an enquiry made by the applicant concerning the interpretation of Section 43 of the Law on Foreign Investment. In a letter signed by the Chairman of the Commission, Mr. N. B., it stated the following:

“Subsection 1 of Section 43 provides that in the event of new legislation, changing the conditions of activity of a company with foreign investors which was created before the adoption of such new legislation, that company has the right to rely on the legislation in force on the day of its creation for a period of ten years calculated from the day of the entry into force of the new legislation.

The above is a general rule, which refers to any legislation changing the general conditions of activity of a company owned by foreign investors.

Paragraph 1 of Subsection 2 states the type of legislation not covered by the rule in Subsection 1, and which is applicable from the very moment of its entering into force.

Paragraph 2 of Subsection 2 states the exceptions to Paragraph 1 of Subsection 2. These exceptions refer only to privileges (*facilități*), incentives (*întesniri*), exemption of payments (*scutiri de plăți*), etc., which were provided for in law when the company was set up.

Accordingly, Paragraph 2 of Subsection 2 does not contradict the provisions of Paragraph 1 of Subsection 2, but makes clear that companies with foreign investors, which enjoyed customs, tax or other forms of privileges in accordance with the legislation of the Republic of Moldova formerly in force, have the right to enjoy those privileges for ten years after the entry into force of new legislation.”

29. In their observations of October 2005 the Government argued that the above letter had not been signed by the Chairman of the Commission on the Economy, Industry, Budget and Finance of the Parliament, but by an ordinary member of that Commission and that in any event, according to Moldovan legislation, it could not be considered an official interpretation of section 43 of the Law on Foreign Investment but merely an explanation. They requested the Court not to admit the letter as evidence.

30. The applicant company submitted for the Court's attention a judgment of the Court of Appeal of the Republic of Moldova in the case of *Bimer S.A. versus the Ungheni Customs Office* in which a similar matter had been decided. In that case the applicant had successfully challenged the closure of another duty free shop operated by it at the Ungheni customs point on the same grounds as in the present case. By its final judgment of 9 July 2002 the Court of Appeal found *inter alia* that the applicant company had been entitled to rely on the second paragraph of section 43 (2) of the

Law on Foreign Investments and that the amended section 51 of the Customs Code could not have any bearing on the applicant company since according to section 46 of Law No. 780 it could not have retroactive effect on the duty free shops opened prior to its enactment.

THE LAW

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

31. The applicant company argued that the closure of its duty free shop and bar 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.”

A. The submissions of the parties

32. The Government argued that the duty free shop and bar was not the only type of activity provided for by the applicant company's articles of association. Accordingly, it would be incorrect to state that by closing down the duty free shop and bar, the entire activity of the applicant company was stopped.

33. The applicant company was entitled to open a duty free shop and bar at the airport or on board aeroplanes. At the same time it was not deprived of its goods, since it could use the premises of the former duty free shop for other purposes and it could sell the merchandise under an ordinary, non-duty-free regime. Accordingly, the measure applied to the applicant could only be characterised as a control of the use of property.

34. The interference with the applicant's right to property had been carried out in accordance with the new section 51 of the Customs Code and accordingly it was prescribed by law and it pursued the public interest of preventing or reducing the number of offences of a financial or tax nature.

35. According to the Government, the duty free regime enjoyed by the applicant company under the terms of its licences did not constitute “customs, tax and other incentives” for the purposes of the second paragraph of section 43 (2) of the Law on Foreign Investments and therefore the applicant could not rely on that provision and hope to have the old legislation applied to it for a further ten years.

36. The Government argued that the “customs, tax and other incentives” mentioned in the second paragraph of section 43 (2) referred only to the incentives stipulated in sections 35 and 36 of the Law on Foreign Investments.

37. They also submitted that since both the Law on Foreign Investments and the Customs Code were organic laws, the newer law, the Customs Code, was applicable.

38. As a final argument in support of their position that the duty free regime did not constitute “customs, tax and other incentives” for the purposes of second paragraph of section 43 (2), the Government submitted a letter from the Customs Department, which, they argued, was the only body entitled to give explanations concerning customs legislation. In that letter, the Customs Department reiterated its position from the domestic proceedings that the duty free regime did not constitute “customs, tax and other incentives” for the purposes of the second paragraph of section 43 (2) of the Law on Foreign Investments.

39. The applicant company argued that the sale of goods in its duty free shop and bar had been its only activity. It submitted that the Law on Foreign Investments was clear in stating that foreign investments were guaranteed complete security and protection. Such was the wording of section 39 of the Law. In the applicant's view this law had been enacted in order to encourage foreign investors to invest their money in the Moldovan economy, in conditions of security while not being afraid of any change of legislation or of changes of the political course of Moldova. In such circumstances, any ambiguous part of the text concerning the guarantees afforded to it by this law should have been interpreted in its favour. If a State interpreted contradictions within its legislation for its own benefit, that constituted a breach of the principle of lawfulness, and accordingly a breach of the right to respect for one's possessions.

40. The applicant company argued that the effects of the legislation applied to it were not foreseeable and that accordingly the interference with its right to property was not in accordance with the law.

41. In particular, the applicant referred to the guarantees provided for in section 43 of the Law on Foreign Investments.

42. Moreover, the principle of non-retroactivity of laws stipulated in section 46 of Law No. 780 had been breached by the authorities when applying the new section 51 of the Customs Code to duty free shops opened in 1998.

43. The closure of the duty free shops had also been illegal because it was in breach of section 56 of the Customs Code which enumerated in an exhaustive manner the grounds on which a duty free shop could be closed down. That provision did not say anything about closing down a duty free shop on the ground of a change of legislation.

44. The applicant submitted that in a similar case decided by the Moldovan courts by a final judgment of 9 July 2002, the legislation referred to above had been interpreted and applied differently (see paragraph 30 above). That judgment, however, had not been complied with by the Moldovan authorities.

45. Since 60% of the shares of the company were held by a United States resident, the treatment applied to the company was contrary to the provisions of the Treaty between the United States of America and the Republic of Moldova concerning the encouragement and reciprocal protection of investment.

46. The applicant company also argued that the interference had constituted an excessive burden for it and that a fair balance had not been struck between the public interest and its individual rights.

47. The theoretical possibility for the applicant to relocate its duty free shop and bar in accordance with the new section 51 of the Customs Code was excluded because that would have required additional large investments, which was not consistent with the initial investment plan, and moreover the applicant would not have had any guarantees that after such relocation the law would not change again and that it would not lose its business again.

48. The applicant also argued that the interference amounted to a deprivation and that no compensation had been paid by the State.

B. The Court's assessment

49. It is undisputed between the parties that the applicant company's licence to operate the duty free shop and bar constituted a possession for the purposes of Article 1 of Protocol No. 1 to the Convention. The Court recalls that, according to its case-law, the termination of a valid licence to run a business amounts to an interference with the right to the peaceful enjoyment of possessions guaranteed by Article 1 of the Protocol (*Tre Traktörer Aktiebolag v. Sweden* judgment of 7 July 1989, Series A no. 159, § 55 and *Rosenzweig and Bonded Warehouses Ltd. v. Poland*, no. 51728/99, § 48, 28 July 2005).

50. In its judgment reversing the decision of the Court of Appeal in the present case, the Supreme Court of Moldova held that the Order of the Customs Department did not give rise to an interference with the activity of the applicant company in that the company retained the right to open duty free shops in other locations and to carry on other activities provided in its

documents of incorporation: the Order did not terminate the applicant's activities but only its sale of goods in a duty-free regime. Accordingly, the Supreme Court held that the Court of Appeal had erred in concluding that the Order had violated the applicant's right to property guaranteed by the Constitution and by international law.

51. Insofar as the judgment of the Supreme Court is to be interpreted as meaning that, because of its limited impact, the Order did not interfere with the possessions of the applicant company for the purposes of Article 1 of Protocol No. 1, the Court is unable to accept this view. While it is true that the Order did not prevent the applicant company from carrying on other activities authorised under its articles of association, as for instance the conducting of an ordinary retail business, and while the company could in principle have applied for a new licence to open a duty-free shop at an airport location, it is beyond dispute that the Order had the immediate and intended effect of preventing the applicant from continuing to operate its duty-free business at the Leuşeni Customs Office and of terminating the applicant's existing licence to carry on business at that location. In these circumstances, the Court finds that there was a clear interference with the applicant's right to the peaceful enjoyment of its possessions for the purposes of Article 1 of Protocol No. 1. Consistently with the Court's case-law referred to in paragraph 49 above, such interference constitutes a measure of control of use of property which falls to be examined under the second paragraph of that Article.

52. For a measure constituting control of use to be justified, it must be lawful (see, *Katsaros v. Greece*, no. 51473/99, § 43, 6 June 2002) and “for the general interest” or for the “securing of the payment of taxes or other contributions or penalties”. The measure must also be proportionate to the aim pursued; however, it is only necessary to examine the proportionality of an interference that is lawful (see *Katsaros*, cited above, § 43).

53. In so far as the lawfulness of the interference is concerned, the Court notes that the main dispute between the parties both before the domestic courts and before the Court is whether the duty free regime enjoyed by the applicant company in accordance with the Decree was “customs, tax and other incentives” for the purpose of the second paragraph of subsection 2 of section 43 and whether it could therefore be entitled to enjoy the former more favourable legislation for at least ten years as provided for in subsection 1 of section 43.

54. The Government argued that the duty-free regime enjoyed by the applicant company under the terms of its licences did not constitute “customs, tax or other incentives” within the meaning of section 43 of the Law on Foreign Investments, such “incentives” referring only to those stipulated in section 35 and 36 of that Law. As noted above (paragraph 38), the Government submitted a letter from the Customs Department supporting this interpretation of the section. It was further contended by the

Government that the Law on Foreign Investments and the Customs Code were organic laws and that the Code, being the more recent in time, was applicable in the case.

55. The Court observes that similar arguments were advanced by the Customs Department before the Court of Appeal in the present case and were rejected by that court, which concluded that section 43 of the Law was applicable to the applicant's business and that the effect of the 2002 legislation was to change the conditions of activity of the applicant company, which had been created with foreign investment before the enactment of such legislation. The Court of Appeal further held that, pursuant to the second paragraph of section 43 of the Law, enterprises such as the applicant company with foreign capital, which had enjoyed customs, tax and other incentives in accordance with the legislation of the Republic of Moldova formerly in force, had the right to enjoy those incentives for ten years after the new legislation came into effect. Accordingly, the Order which resulted in the immediate termination of those customs incentives was illegal as it was contrary to the legislation in force.

56. This view was confirmed by the Court of Appeal in its judgment of 9 July 2002 (see paragraph 30 above), in which it was held that the applicant company had been entitled to rely on the second paragraph of section 43 (2) of the Law and that the amended section 51 of the Customs Code could not have any bearing on the applicant company since, according to section 56 of Law No. 780, it could not have retroactive effect in respect of duty-free shops opened prior to its enactment.

57. The former judgment of the Court of Appeal, unlike the latter, never became final, since it was quashed on appeal by the Supreme Court. However, as noted above, the judgment was set aside on the ground that there had been no relevant interference with the applicant's activities or with its right to property in international law. The Supreme Court did not dispute the Court of Appeal's interpretation of section 43 of the Law or its view that the second paragraph of that section would govern in the case of any interference with the right of a company with foreign capital to carry on a duty-free business. The Court has found above that there was such interference in the present case.

58. The Court reiterates that it is in the first place for the domestic authorities, notably the courts, to interpret and apply domestic law (*Jahn and Others v. Germany* [GC] nos. 46720/99, 72203/01 and 72552/01, § 86, ECHR 2005-). It finds no grounds in the present case to call into question the view of the Court of Appeal, expressed on two occasions, that section 43 was applicable to the case of the present applicant and that the Order which required the immediate closure of the applicant's duty-free business at the Leuşeni Customs Office was not lawful under domestic law.

59. Accordingly, the interference with the applicant's property in the present case was not lawful and was therefore incompatible with the

applicant's right to the peaceful enjoyment of its possessions within the meaning of Article 1 of Protocol No. 1. This conclusion makes it unnecessary to examine whether the other requirements of the second paragraph of Article 1 have been complied with (see *Iatridis v. Greece* [GC], no. 31107/96, § 62, ECHR 1999-II).

60. There has therefore been a violation of Article 1 of Protocol No. 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. Article 41 of the Convention provides:

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

A. Damage

62. The applicant company claimed 798,956.51 United States dollars (“USD”) for the pecuniary damage suffered as a result of the breach of its right guaranteed by Article 1 of Protocol No.1 to the Convention. The amount included the lost profit calculated for a period of ten years in the amount of USD 256,134.80, the cost of the immovable property located in the Leușeni customs zone which the applicant company was unable to use after the closure of the duty free shop and bar in the amount of USD 234,329.18, the related bank interest of USD 176,444.63 and compensation for inflation estimated at USD 132,047.90.

63. In a letter dated 14 March 2007, referring to the Government's observations in reply to its observations, the applicant company requested the Court to reserve the question of the application of Article 41 for a separate decision.

64. The Government disagreed with the applicant and argued that the methods of calculation employed by it in respect of each of the above amounts were wrong. They submitted a detailed explanation in support of this view. They informed the Court that in order to determine the amount of the alleged damage suffered by the applicant company they had ordered an economic and accounting evaluation to be carried out by the National Centre for Expert Analysis under the control of the Ministry of Justice (“National Centre”). In that connection two experts from the National Centre had been requested to determine the cost of the immovable property located inside the Leușeni customs zone, the applicant company's lost profit calculated for a period of ten years, the related bank interest and the loss arising from inflation.

65. In a report dated 14 November 2006 the experts had determined that the value of the immovable property located on the premises of the Leușeni Customs Office was USD 197,089.68; the lost profit for a period of ten years amounted to USD 256,134.80; the related bank interest amounted to USD 92,208.53; and that the loss arising from inflation amounted to USD 68,971.98.

66. The Government argued on the basis of the report of the National Centre that the damage suffered by the applicant company amounted to USD 614,404.99 and asked the Court to dismiss the applicant company's claims as ill-founded.

67. The Court notes the applicant's request to reserve the question of the application of Article 41; however, in view of the materials in its possession, it considers that the question is ready for decision. In particular while the parties' calculations differ, the discrepancy between them is not so fundamental as to require an adjournment of the question.

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

69. In the present case the Court has found a violation of Article 1 of Protocol No. 1 to the Convention on the ground that the closure of the applicant company's duty free shop and bar were not lawful within the meaning of that provision. In view of the materials in its possession and of the submissions of the parties it considers that the applicant company suffered a pecuniary loss which would have been avoided had the duty free shop and bar not been closed by the respondent State.

70. The parties agreed in principle that the calculation of the damage should be determined on the basis of such elements as the cost of the immovable property located inside the Leușeni customs zone, the applicant company's lost profit calculated for a period of ten years, the related bank interest and the loss arising from inflation. Only the methods of calculation and the resulting amounts linked to each of the above elements remained disputed between them.

71. Having analysed the submissions and the methods of calculation employed by the parties, bearing in mind the specific circumstances of the case, the materials in the Court's possession and deciding on an equitable basis the Court decides to award the applicant company EUR 520,000 for pecuniary damage.

72. Since the applicant did not make any claims for non-pecuniary damage or for costs and expenses, the Court does not consider it necessary to make any awards in respect of these heads.

B. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
2. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 520,000 (five hundred and twenty thousand euros) in respect of pecuniary damage, plus any tax that may be chargeable, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 July 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 following separate opinions are annexed to this judgment:

- concurring opinion of Sir Nicolas Bratza;
- concurring opinion of Mr Pavlovschi.

N.B.

T.L.E.

CONCURRING OPINION OF SIR NICOLAS BRATZA

1. I am in full agreement with the other members of the Chamber that the applicant's rights under Article 1 of Protocol No. 1 to the Convention were violated in the present case. However, in arriving at this conclusion, I would have preferred a reasoning different from that in the judgment.

2. As noted in the judgment (§ 58), it is not a dispute between the parties that the applicant company's licences to operate the duty-free shop and bar constitutes a possession for the purposes of Article 1 of the Protocol. As is further noted in the judgment (§ 60), the Order of the Customs Department of 18 May 2002 had the immediate and intended effect of preventing the applicant from continuing to operate its duty-free business at the Leuşeni Customs Office and of terminating the applicant's existing licences to carry on business at that location. Even if, as the Supreme Court of Moldova held, the Order did not give rise to an interference with the “activity” of the applicant company for the purposes of section 40 of the Law of Foreign Investments, or with the rights guaranteed by the Constitution of Moldova, on the basis that the applicant retained the right to carry on other business activities, it clearly amounted to an interference with the applicant's right to the peaceful enjoyment of its possession for the purposes of Article 1 of the Protocol (see, for example, *Tre Traktörer Aktiebolag v. Sweden*, judgment of 7 July 1989, Series A no. 159, § 55).

3. Although the applicant company could not carry on a duty-free business, it maintained some economic rights represented by its premises at the border and its property assets, including unsold stock. In these circumstances, as in the *Tre Traktörer* case, the withdrawal or suspension of the licences is to be seen not as a deprivation of possessions for the purposes of the second sentence of Article 1 of Protocol No. 1 but as a measure of control of use of property which falls to be examined under the second paragraph of that Article.

4. In order to comply with the requirements of the second paragraph, it must be shown that the measure constituting the control of use was lawful, that it was “in accordance with the general interest”, and that there existed a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Chamber's conclusion in the judgment that the applicant's rights under Article 1 were violated is based on the fact that the Order was not “lawful” in that, as found by the Court of Appeal of Moldova, it did not comply with the requirements of section 43 of the Law on Foreign Investments, which entitled the applicant company to enjoy customs incentives for ten years after the coming into effect of the amendment to the Customs Code restricting duty-free sales outlets to

international airports and on board aircraft flying international routes. I would have preferred that the question of the lawfulness of the measure had been left open and that the Court's focus had been rather on its proportionality to any legitimate aim served by it.

5. According to the Court's constant case-law, the second paragraph of Article 1 is to be construed in the light of the general principles enunciated in the first sentence, and requires that a fair balance is struck between the demands of the general interests of the community which is served by the measure in question and the fundamental rights of the individual which are affected by the measure. In determining whether a fair balance exists, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question (see, for example, *AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, § 52). The requisite balance will not be found if the individual concerned has had to bear “an individual and excessive burden”. The existence or lack of compensation terms under the relevant legislation may be a material factor in the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on an applicant (see, for example, *Holy Monasteries (The) v. Greece* judgment of 9 December 1994, Series A no. 301-A, § 71 and, in the specific context of the second paragraph of Article 1, *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 57, ECHR 1999-V).

6. The Government argued that, by subjecting the sale of duty-free goods to a system of licences, the Moldovan legislation took measures to implement the national policy in this field. This was in line with Moldovan economic policy generally, the objective of which was to control the use of merchandise in the general interest. It is further argued that the amendment to the Customs Code in April 2002 was designed in the general interest to contribute to the reduction and elimination of violations of the law of a financial and fiscal character.

7. It is not disputed by the applicant company that the control of use of duty-free goods through a licensing system served the general interest of the community and this I can readily accept. I can also accept that legislative provisions which are designed to prevent fraud or fiscal offences on the part of those carrying on duty-free businesses serve a legitimate aim in the general interest. The central question, however, remains whether the

application of those measures in the particular case of the applicant company struck a fair balance between the competing public and private interests.

8. In determining this question several features of the case seem to me to be of importance:

(i) There was and is no suggestion that the applicant company had in any way contravened the law or that it was suspected of fiscal or other offences in carrying on its duty-free business. As pointed out in the judgment of the Court of Appeal, section 40 of the Law on Foreign Investments permitted the suspension of the activities of an enterprise with foreign investors only in accordance with a decision of the Government of Moldova or a competent court but the Order in question contained no reference to any such breaches on the part of the applicant and was not based on any such decision or judgment. In this respect, the position of the present applicant is in sharp contrast to that of the applicant in the *Tre Traktörer* case, where the revocation of the applicant's alcohol licence was based on discrepancies in the book-keeping of the licence-holder concerning the sale of alcoholic beverages, which were found to be very significant in relation to the total turnover of the company and on which the Court placed considerable emphasis in concluding that a fair balance had not been upset.

(ii) The financial repercussions of the termination of the applicant's business were very serious. The applicant company had obtained the licences to operate the duty-free shop and bar in 1998; it had bought the necessary equipment, built the shop premises and had been carrying on the business for some 2-3 years before the Order was issued in May 2002. The scale of the loss suffered by the applicant company as a result of the immediate closure of the business may be judged from the Government's own estimate of the damage sustained by the applicant, which totalled in excess of USD 614,000, including loss of profits over a ten year period of some USD 256,000.

(iii) In further contrast to the situation in the *Tre Traktörer* case, there is nothing to suggest that the measure in question could have been foreseen or that provision could have been made by the applicant company to mitigate its loss. As noted in the Court's judgment, the licences contained no provisions limiting their duration and there was nothing in the relevant legislation at the time of issue of the licences to suggest that they could be terminated, except on grounds provided for in section 56 of the Customs Code.

(iv) Despite the serious impact which the new legislation would be likely to have on existing duty-free businesses, no exception was made in the legislation for such businesses and no transitional period was afforded during which duty-free business could be wound down and alternative sources of revenue found. Nor was any compensation whatever provided to mitigate the effect of the substantial losses which would inevitably be suffered by companies or individuals affected by the Order.

9. These factors, taken together, lead me to conclude that, notwithstanding the margin of appreciation afforded to the State, a fair balance was not preserved in the present case and that the applicant company was required to bear an individual and excessive burden, in violation of Article 1 of the Protocol No. 1.

10. As to the question of just satisfaction under Article 41 of the Convention, while it is true that the calculation of the applicant's pecuniary loss might in principle vary depending on whether the violation of Article 1 was based on the unlawfulness of the interference or on its lack of proportionality, I note that the Government have not suggested that any different approach should be taken in the present case. Accordingly, I see no reason to adopt any different approach and have voted with the other members of the Chamber in awarding the sum set out in paragraph 80 of the judgment.

CONCURRING OPINION OF JUDGE PAVLOVSKI

In my opinion, the present application is inadmissible on account of the applicant company's failure to exhaust all available domestic remedies, as required by the Convention, in its attempts to obtain full compensation for the damage sustained.

The problem of compensation for damage is not only closely linked to the problem of exhaustion or non-exhaustion of domestic remedies. In my opinion, it is also closely linked to the problem of proportionality, which forms part of the examination of the merits of the case.

Despite my firm conviction that the present application is inadmissible, I have decided to go along with my fellow judges in finding a violation in the case of *Bimer S.A. v. Moldova*.

Let me explain the line of reasoning which led me to this decision and which - to some extent - is similar to that expressed in my partly concurring opinion in the case of *Cooperativa Agricola Slobozia-Hanesei v. Moldova* (application no. 39745/02), namely that international judges in their decision-making activity are to a certain extent bound by the positions expressed by the parties and the evidence submitted by them.

Returning to the present case, I consider that it may be treated as another in a series of economic cases which have already been examined or are still pending before this Court.

Economic cases always pose extremely complex questions, the answers to which require deep professional knowledge. Their examination is even more difficult when such cases involve taxation issues taken together with various legislative changes. Dealing with taxation matters creates problems even for persons who are specialised in this field, not to mention international judges. That is why the parties' submissions are crucial and decisive in the correct adjudication of these cases. Where a party fails to comply with its procedural obligations, the Court's task is rendered even more difficult.

The case of *Bimer S.A.* presents a clear illustration of the above statement. In my opinion this case has two basic aspects.

The first of these aspects is an administrative dispute between Bimer S.A. and the Customs Department. This part of the case commenced on 11 June 2002, when Bimer S.A. brought administrative proceedings before the Administrative Court seeking annulment of the Customs

Department's order no. 127-0 of 18 May 2002, an order which had the immediate and intended effect of preventing the applicant from continuing to operate its duty-free business at the Leuşeni Customs Office and of terminating the applicant's existing licence to conduct business at that location. Those proceedings were terminated by the final decision of the Supreme Court of Justice of 11 September 2002, which dismissed the applicant's action.

Thus, in respect of its request for annulment of the Customs Department's order, the applicant did indeed exhaust all domestic remedies.

The second aspect of the case is whether the applicant exhausted domestic remedies with regard to its claim for compensation for the damage allegedly caused by the closure of its duty-free shop and bar. Here I really do have some very serious doubts.

No one may question the sovereign power of member States' national Parliaments to enact any laws they see fit in the field of taxation, in order to reflect national realities, international obligations and the economic situation existing in those states. In enacting such measures, however, member States must take into consideration different competing interests.

According to the Court's well-established case-law, an interference, including one resulting from measures to secure payment of taxes, must strike a "fair balance" between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights.

Furthermore, in determining whether this requirement has been met, it is recognised that a Contracting State, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation and the Court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation (see *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, judgment of 23 October 1997, Reports of Judgments and Decisions 1997-VII, §§ 80-82).

The Customs Department's order had the effect of terminating a valid licence to run a business, which amounts to an interference with the right to the peaceful enjoyment of possessions guaranteed by Article 1 of the Protocol. Such an interference represents a measure to control the use of property as set out in the second paragraph of that Article.

In the light of the above, it is important to study how national legislation strikes a “fair balance” between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights. Or, to put it more bluntly, what forms of compensation for the damage caused to foreign investors by various forms of interference with their property rights existed, were available and, accordingly, ought to have been exhausted by the applicant?

In this connection the Foreign Investments Act is particularly relevant. Here I refer to Moldovan legislation that was in force at the material time. Section 39 of this Act directly stipulates that foreign investments in Moldova are granted complete security and protection. They cannot be expropriated, nationalised or subject to any other similar measure in any way other than according to the law ... and against the “payment of appropriate compensation”. Compensation is to correspond to the value of the investment assessed immediately before the moment of expropriation, nationalisation or similar measure. It must be paid not later than three months from the moment the above measures are taken, with an appropriate bank interest rate calculated before the date of payment (see paragraph 24 of the judgment).

According to section 45 of the same Act, all litigation between foreign investors and state bodies concerning the methods of application of the Act and the provisions of other legal acts of Moldova is to be adjudicated by the Economic Court of Moldova.

In my opinion, the decision to withdraw the licence was clearly a measure to control the taxation sector in the country. Such a decision involved a deprivation of property, in so far as the licence itself could be considered a possession, but in the circumstances of the present case the deprivation formed a constituent element of control of the use of property in the interests of taxation.

Given that the applicant company incurred pecuniary damage as a result of the State authorities' actions, it should have initiated compensation proceedings before the Economic Court of Moldova, in accordance with the above-mentioned provisions of sections 39 and 45 of the Foreign Investment Act. This was not done. In practical terms, this means that the applicant has failed to exhaust all available domestic remedies.

At the stage of communication the Government were asked a direct question: “Did the applicant exhaust all the domestic remedies available to it under domestic law?”

Despite the fact that – in the particular circumstances of the present case – the answer to this question was self-evident and did not present any particular difficulty, the Government's representatives failed to respond or preferred not to deal with this question in their observations.

Where a case has been communicated to the respondent Government, it is the normal practice of this Court not to declare the application inadmissible for failure to exhaust domestic remedies unless this matter is raised by the Government in their observations (see *Rehbock v. Slovenia*, no. 29462/95, (dec), 20 May 1998).

This failure by the Government representatives to answer a direct question put by the Court resulted in the following unanimous finding, reflected in the admissibility decision of 23 May 2006: “...The Court notes that the respondent Government have not pleaded that the applicant has failed to make use of domestic remedies, and it need not therefore examine this matter...” (see the admissibility decision in the case of *Bimer S.A. v. Moldova* of 23 May 2006, application no. 15084/03).

The Court decided to declare the present application admissible.

Thus, it is my opinion that the Government's failure to raise the question of non-exhaustion of domestic remedies from the very outset pre-determined the fate of the present case and made its outcome quite foreseeable.

Such shortcomings create a false impression as to the non-existence in the Republic of Moldova of any remedies for the protection of foreign investment or any possibility for foreign investors to obtain compensation for damage caused by the state authorities, something that, in my view, is completely wrong.

The damages awarded by the Court in the present case are quite impressive, but they are based on the applicant's calculations as well as those submitted by the Government. The latter calculations were made by the National Centre for Expert Analysis and, in general terms, are in line with the calculations submitted by the applicant. For instance, if the applicant claimed USD 798,956.51 (see paragraph 71), then the Government, in turn, stated that the damage suffered by Bimer S.A. amounted to USD 614,404.99 (see paragraph 75). Awarding EUR 520,000

in such a situation can be considered as a perfectly equitable sum, because it presents a fair balance between the sum requested by the applicant and the figure submitted by the Government.

In my opinion, in such circumstances the Court simply had no option but to accept a “fair balance” approach.