



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

FOURTH SECTION

CASE OF UNISTAR VENTURES GMBH v. MOLDOVA

(Application no. 19245/03)

JUDGMENT

STRASBOURG

9 December 2008

FINAL

09/03/2009

This judgment may be subject to editorial revision.

In the case of Unistar Ventures Gmbh v. Moldova,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Giovanni Bonello,

Ljiljana Mijović,

Ján Šikuta,

Päivi Hirvelä,

Mihai Poalelungi, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 18 November 2008,

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

PROCEDURE

1. The case originated in an application (no. 19245/03) 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 Unistar Ventures GmbH, a company incorporated in Germany (“the applicant”), on 7 March 2003.

2. The applicant company was represented by Mr V. Nagacevschi and Mr A. Năstase, lawyers practising in Chişinău. The Moldovan Government (“the Government”) were represented by their Agents, Mr V. Pârlog and subsequently, Mr V. Grosu.

3. The applicant complained that a final judgment in its favour was not enforced for several years.

4. The application was allocated to the Fourth Section of the Court. On 15 June 2004 a Chamber of that Section communicated the application to the Government. On 14 February 2006, it was decided under the provisions of Article 29 § 3 of the Convention to examine the merits of the application at the same time as its admissibility.

5. By a decision of 20 February 2007 the Court declared the application admissible in a separate decision and discontinued the application of Article 29 § 3 of the Convention to the case. On the same date the German Government were informed of their right to intervene in the proceedings in accordance with Article 36 § 1 of the Convention and Rule 44 § 1(b), but they did not communicate any wish to avail themselves of this right.

6. The applicant company and the Government each filed observations on the merits of the application (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, Unistar Ventures GmbH (hereafter “UV”), is a company incorporated in Germany.

1. The creation of the Moldovan-German company Air Moldova S.R.L.

8. On 3 March 2000 UV signed a contract with the Civil Aviation State Authority (hereafter “CASA”), under which the State-owned airline company Air Moldova was to be reorganised into a Moldovan-German limited liability airline company called Air Moldova S.R.L. (hereafter “the company”). The Moldovan Government, represented by the CASA, was to contribute 31,025,504 Moldovan lei (MDL) (2,548,086 euros (EUR) at the time) representing 51% of the registered capital, and UV was to contribute 2,384,705 United States dollars (USD), the equivalent of MDL 29,808,812 (EUR 2,448,161 at the time) representing 49% of the registered capital. The new company was declared to be the legal successor of the State airline company, Air Moldova.

9. On the same date the Articles of Association were adopted and the Chief Executive Officer (CEO) was elected. The Articles of Association provided that he could be dismissed only with three quarters of the votes.

10. On 7 April 2000 the Privatisation Department of the Ministry of Economy issued a permit to the newly created company. The permit stated, *inter alia*, that after having verified the incorporation documents the Department of Privatisation had decided to allow the creation of the new company.

11. On 25 July 2000 a specialised department of the Ministry of Justice examined the legality of the documents of incorporation of the company. It issued a decision according to which the company was legally incorporated and that all the documents of incorporation were in order and conformed to the legislation of the Republic of Moldova.

12. On 2 August 2000, following a letter from a member of Parliament, the Prosecutor General’s Office carried out a verification of the legality of the incorporation of the company. In its written conclusion it stated that all the documents of incorporation were in order and that the rules for creating a company with State participation had been fully complied with.

13. It appears from documents submitted by the parties that on 12 June 2000 and 13 June 2001 the company received from UV and/or its CEO via Dresdner Bank USD 2,384,705 in three instalments.

2. *The purchase of new aeroplanes by the company*

14. On an unspecified date the company concluded an agreement with the Brazilian aircraft manufacturer Embraer-Empresa Brasileira de Aeronáutica S.A. (hereafter “the Brazilian aircraft manufacturer”) for the purchase of two Embraer 145 aeroplanes. It appears from the documents submitted by the parties that the price of the aeroplanes was approximately USD 39 million, of which 15% was to be paid by the company and the rest was to be financed by Dresdner Bank and the European Bank for Reconstruction and Development (EBRD) by way of a ten-year loan.

15. On an unspecified date the company paid a non-refundable advance of approximately USD 3.7 million to the Brazilian aircraft manufacturer.

3. *The change of Government and the dispute between UV and the new Government*

16. The facts presented under this heading are based on the submissions and documents provided by the applicant that were not disputed by the Government.

17. In February 2001 the Communist Party of Moldova won the parliamentary elections. It declared in its manifesto, *inter alia*, that Western countries had a tendency to enter the Moldovan economy at any price, take over valuable assets and impose unequal contracts on the country in order to make it dependent on creditors. One of the goals of the Communist Party was to obtain control over the strategic branches of the national economy while at the same time keeping private the spheres of commerce and services, agriculture and small manufacturing industries.

18. In January 2002 the CASA made an attempt to change the company’s CEO by using its 51% of the votes. UV, however, opposed the attempt. UV’s position was supported by Dresdner Bank, who wrote to the President of Moldova informing him that in its view the change of management was contrary to the company’s Articles of Association and that it would consider withdrawing the lines of credit and that the EBRD would do likewise in case of a change of management. It appears that after this intervention, the CASA conceded temporarily. However, the company started to experience pressure from different State bodies.

19. Later, at the shareholders’ meeting of 19 June 2002, by making use of its 51% of the votes, the CASA unilaterally dismissed Air Moldova’s chief executive officer.

20. On the same date Dresdner Bank informed the President of Moldova, the Prime Minister, the German Embassy in Chişinău, the EBRD office in Chişinău, the World Bank office in Chişinău and the International Monetary Fund office in Chişinău *inter alia* that the CASA’s actions were contrary to the Articles of Association of the company, which provided that at least 75% of the votes were needed for a change of management. It also

declared its intention to withdraw from the company's project of purchasing new aeroplanes and stressed that the Government's actions were seriously damaging the image of the country and its attraction for foreign investors.

21. On 21 June 2002 the EBRD wrote to the Prime Minister of Moldova and expressed concern about the pressure put on the company and about the "arbitrary and commercially unnecessary change of the airline's management". It stressed that such actions by the Government could lead to the termination of any EBRD investment in Moldova and that the eventual withdrawal of the Dresdner Bank from the financing of the company would also lead to the EBRD's withdrawal.

22. On 3 July 2002 Dresdner Bank informed the company of its withdrawal of the credit line for the purchase of the Embraer aeroplanes.

23. On 18 July 2002 UV wrote to the CASA and proposed to find a solution to the problem by reorganising the company into a joint-stock company and including the EBRD as a shareholder. It stressed that otherwise the company risked losing the advance of USD 3.7 million paid to the Brazilian aircraft manufacturer and incurring penalties of up to USD 7 million. It appears that UV's proposal was not followed up.

4. The court proceedings between UV and the CASA

24. On 26 June 2002 UV brought a civil action against the CASA, challenging the change of CEO on the ground that it was contrary to the Articles of Association.

25. On 10 July 2002 the CASA brought its own action against UV, seeking the annulment of the contract of 3 March 2000 by which the company had been created (see paragraph 8 above). The grounds relied upon by the CASA were, *inter alia*, that the documents of incorporation were not in conformity with Government decisions and that the applicant did not have legal capacity to be a partner in the company.

26. UV contested the CASA's action, arguing, *inter alia*, that it had legal capacity and that, under the Law on Foreign Investment, companies with foreign investments were not bound by Government decisions but exclusively by laws enacted by Parliament. It also argued that in any event there was no prohibition under Moldovan law on stipulating in the Articles of Association of a company that a higher percentage of votes was needed for the election of the management.

27. The Economic Court of the Republic of Moldova joined the two actions and, on 6 August 2002, ruled in favour of the CASA. The court dismissed UV's action on the ground that, in accordance with the Governmental Decision on Enterprises No. 500 of 10 September 1991, a chief executive officer had to be elected by a simple majority of 51%.

28. At the same time the Economic Court upheld the CASA's action against UV, ordering the rescission of the contract by which the company had been created. The court upheld all the arguments relied upon by the

CASA and also added, on its own initiative, that it did not have in its possession any evidence that UV had paid its contribution of USD 2,384,705 into the company's statutory fund.

29. In the operative part of the judgment the Economic Court made the following order:

“The parties shall be put in the same position as they had been prior to the conclusion of the contract, following an audit and accounting control to be carried out by the Government, the Ministry of Finance and the Civil Aviation State Authority with the participation of UV (in Romanian: *Readucerea părților la situația inițială se va efectua după o verificare de audit contabilă și stabilirea cuantumului investițiilor efectuate. Alineatul dat al hotărârii judecătorești se va executa de către Guvernul RM, Ministerul Finanțelor, Administrația de Stat a Aviației Civile, cu participarea ÎCS „Unistar Ventures GmbH”*).”

30. The court also ordered UV to pay court fees in the amount of MDL 180,000 (approximately EUR 13,427).

31. UV appealed against the judgment, but its appeal was dismissed by the Supreme Court of Justice on 18 September 2002. No new reasons were given by the Supreme Court of Justice.

32. The decision of the Economic Court of 6 August 2002 became final and shortly thereafter the company was reorganised and reregistered as a State-owned airline company called Air Moldova. It appears that the reregistered company kept all the assets and debts of the company.

4. *The events which took place after the court proceedings*

33. On 25 October 2002 UV wrote a letter to the CASA and to the State-owned company Air Moldova, requesting the reimbursement of its investment by 29 October 2002. UV also stated that if the money was not paid, it would take all the necessary measures up to sequestration of Air Moldova's aircraft on German territory.

34. On 4 November 2002 UV requested from the Economic Court an enforcement warrant in respect of the decision of 6 August 2002.

35. On 21 November 2002 the Economic Court replied that no enforcement warrant could be issued because enforcement was to be carried out solely on the basis of the judgment of 6 August 2002.

36. On 6 December 2002 UV wrote a letter to the Government of Moldova and the Ministry of Finance asking them to comply with the court decision of 6 August 2002, so as to put the parties in the same position as they had been prior to the conclusion of the joint venture contract.

37. On 26 December 2002 the Court of Accounts of the Republic of Moldova, the body which controls the formation, administration and use of public finances in Moldova, issued a decision concerning the administration of public money with regard to the company. It found, *inter alia*, that UV had invested USD 2.384 million in the statutory fund of the company, representing 49% of the capital, which, at the date of the examination by the

Court of Accounts, was entirely paid up by UV. The decision of the Court of Accounts was published in the Official Gazette.

38. On 20 February 2003 the Ministry of Finance replied to UV's letter of 6 December 2002 indicating that since it was not the beneficiary of the investment, it could not pay.

39. Since the State Registry of immovable property was refusing to reregister some of the assets of the former Moldovan-German company in the name of the reorganised State-owned company on the ground of lack of clarity of the judgment of 6 August 2002, the CASA made a request to the Economic Court, on 12 February 2004, asking it to clarify the judgment in that respect.

40. On 6 May 2004 UV addressed a similar request to the Economic Court asking, *inter alia*, for clarification of the reason for ordering an audit and accounting control once the size of the investment was known to the parties. It also asked who was to carry out the control and whether it should be a national, international, governmental or non-governmental organisation. It finally asked about the time-limit for carrying out the control and explanation of the phrase in the judgment "with the participation of UV".

41. On 18 May 2004 the Economic Court upheld the CASA's request and ordered that the assets be reregistered in its name. At the same time, referring to UV's request, the court argued that the operative part of the judgment was clear enough as concerned the restitution of UV's investment and that since the court had not been presented [during the proceedings] with evidence establishing the exact amount, an audit control was ordered so that its amount could be established and repaid to UV.

42. After the communication of this case to the Government, on 20 May 2005, the CASA wrote to UV proposing to hold a meeting within the next fifteen days in order to agree upon the method of enforcement of the judgment of 6 August 2002. In particular, it stressed that it was necessary to agree upon the audit company to be employed, the costs of the audit and the questions to be put to the auditor.

43. On 26 May 2005 UV's representative replied that he was ready to meet the CASA's representatives and that he was available on any date except 30 and 31 May and 1, 2, 6 and 14 June 2006.

44. On 23 August 2005 a meeting between the representatives of the CASA, the Ministry of Finance and UV took place and it was agreed that the first two would formulate questions to be put to the auditor and send them to UV for comments. UV's representative expressed his disagreement with the proposal of the other parties that the company should contribute to the costs of the audit control. He argued that, according to the judgment, the audit control was to be carried out by the Government, the Ministry of Finance and the CASA, while UV was only to "participate".

45. On 30 May 2005 the CASA wrote to the Economic Court asking it to clarify the judgment of 6 August 2002, namely to clarify who was to organise the audit and accounting control and what was the required extent of involvement of the Government, the Ministry of Finance, the CASA and UV. The CASA also asked for clarification as to which company was to carry out the control, what the questions to be put to it were and who was to pay for the audit control. It appears that the Economic Court never examined this request.

46. On 5 October 2005 UV's representative received from the CASA a set of questions to be put to the auditor. The questions raised such issues as Air Moldova's financial state at the time of its reorganisation into a Moldovan-German company, its financial evolution, the impact on the company of the contract for the purchase of Embraer aeroplanes, the manner in which UV's investment was used, the company's financial state at the date when the contract of association was declared null and void and the amount which should be restituted to UV. The CASA also proposed that the audit control be carried out by Deloitte & Touche and that the costs of the control should be divided between all the parties.

47. On 19 October 2005 UV's representative wrote back to the CASA and argued that the questions proposed were not consistent with the operative part of the judgment of 6 August 2002 and with the decision of 18 May 2004, since—according to them—the audit control was intended to establish the amount of money invested by UV in order to refund it, but not such issues as the impact of the contracts concluded by the company during its existence. He also argued that the financial evolution of the company was irrelevant for the purpose of putting the parties “in the same position as they had been prior to the conclusion of the contract”. UV proposed two questions which, in its view, were consistent with the operative part of the judgment of 6 August 2002 and which raised such issues as finding out the exact amount of UV's investment and of the default interest due to UV for the inability to use it.

48. On 8 November 2005 the CASA invited the representative of UV to another meeting to be held on 10 November. The representative declined the invitation, however, on the ground that he was busy on that date. He asked the CASA to notify him of meetings at least one week in advance.

49. On 28 December 2005 the CASA lodged an application with the Economic Court asking it to amend the wording of its judgment of 6 August 2002 and arguing that the operative part differed from that pronounced orally on 6 August 2002.

50. On 30 December 2005 the Economic Court upheld the CASA's application and amended the operative part (see paragraph 29 above), as suggested by the CASA, by deleting the words “audit” and “with the participation of”.

51. On 3 January 2006 the Vice-President of the Economic Court wrote to the Government Agent informing him, *inter alia*, that if UV possessed evidence to establish the amount of its investment then, in order to recover the money, it should have given the evidence to the Ministry of Finance.

52. On 2 March 2006 a meeting was held between the representatives of the CASA, the Government, UV, the Ministry of Finance and the State-owned company Air Moldova at which the representatives of the State insisted on the same questions as proposed to UV on 5 October 2005. Moreover, this time they proposed that the audit control be carried out by the National Centre for Expert Analysis under the control of the Ministry of Justice. UV's representative agreed with the questions but expressed concerns about the independence of the auditor proposed by the representatives of the State. Finally, UV's representative agreed with the proposed auditor, subject to the request to have sight of all the documents which were to be given to it.

53. It appears that UV was not sent the documents submitted to the National Centre for Expert Analysis.

54. On 6 April 2006 the latter drew up a "technical-scientific" report. Initially the report was to be signed by the Minister of Justice, as ordered by the Prime Minister of Moldova. However, the Minister of Justice wrote to the Prime Minister expressing her view that the applicant company could contest the independence and the impartiality of the National Centre for Expert Analysis on the ground that it was subordinated to the Ministry of Justice. She expressed the view that the report would be more credible if signed by the experts who had drafted it but not by her. Her proposal was accepted and the report was signed by the experts.

55. The conclusion of the report was, *inter alia*, that UV had invested USD 2,384,705 in Air Moldova, but since that money had been paid as an advance to the Brazilian aircraft manufacturer, it could be repaid to UV only after Air Moldova had recovered it or when the Embraer aeroplanes were delivered to Air Moldova. Moreover, the report stated that the money invested by UV had not been used by Air Moldova in its business activity, so UV could not lay claim to any part of the profit gained during the years 2000-2002 and could not be held liable for any part of the losses.

56. On 11 September 2006 the Court of Accounts of the Republic of Moldova issued a decision concerning the creation of the statutory fund of the Moldovan-German Airline Company Air Moldova. It found, *inter alia*, that some documents had been destroyed in accordance with the law, while others were contradictory, and decided to remit the materials to the Centre for Fighting Economic Crime and Corruption for investigation.

57. On 13 December 2006 the CASA wrote to the Economic Court and asked again for clarification of the manner of enforcement of the judgment of 6 August 2002.

58. On 23 March 2007 the Economic Court issued again an explanatory judgment in which it explained that the parties should recover all the assets and moneys with which they had participated in the company and that any profit obtained by the company during its existence should be divided among them in accordance with the percentage of their participation.

59. In April 2007, after the case was declared admissible by the Court, the parties agreed to contract a foreign audit company for the purpose of determining the amount due to the applicant company.

60. On 21 September 2007 the Government and the applicant company signed an agreement with Deloitte & Touche. The parties agreed to accept without any reserves the results of the report which was due by 1 May 2008. According to its mandate, Deloitte & Touche was to determine the amounts to be refunded to the founders in proportion to their shareholdings as at 25 September 2002 and in accordance with the National Accounting Standards and the pertinent court decisions. The mandate did not provide for the conversion of the amounts to a particular currency and for the calculation of any interest on the amounts due.

61. On 23 April 2008 Deloitte & Touche issued a report in which it determined that the applicant company had invested USD 2,384,705 in the share capital of the company and that the part of the profit to which it was entitled amounted to MDL 13,055,376 (EUR 984,108) as at 25 September 2002. It appears from the parties' submissions that they both accepted the report without any reservations. Nonetheless, in view of the diverging opinions concerning the interest due, the applicant company has not been refunded to date.

II. RELEVANT NON-CONVENTION MATERIALS

62. The relevant provisions of the Civil Code in force at the material time read as follows:

“Article 50. Nullity of contracts that are not in conformity with the law

...

When a contract is declared null and void, each party must return the other party everything received from it on the basis of the contract...

Article 198. Judgment by which a legal person is ordered to pay money

When the court orders a legal person... to pay an amount of money, it must indicate in the operative part of the judgment the nature of the amounts to be paid and the account from which the amounts will be deducted.

Article 207. Enforcement of the judgment

A court judgment must be enforced after it becomes final, except for cases of immediate enforcement.

Article 337. Enforcement documents

Enforcement documents are:

1) Enforcement warrants issued on the basis of court judgments and decisions, friendly settlements accepted by the court...

Article 338. Issuing of an enforcement warrant

An enforcement warrant must be issued to the plaintiff by a court, after the judgment has become final...

The enforcement warrant must be handed personally to the plaintiff, or if he or she so requests, it must be sent directly to the Department of Enforcement of court judgments by the Ministry of Justice.

Article 343. Request for enforcement

The bailiff shall start the enforcement of a judgment upon the request of [one of the parties to the proceedings]...

Article 361. Adjournment of enforcement

The bailiff can adjourn the enforcement only at the request of the plaintiff or on the basis of a court order."

63. According to Article 143 (8) of the Code of Civil Procedure in force at the material time expert reports were to be ordered by the judge, at the stage of preparation of the case for debates, after having consulted the parties.

64. On 12 June 2003 a new Civil Code was enacted, the relevant provisions of which read as follows:

Article 619. Default interest

"(1) Default interest is payable for delayed execution of pecuniary obligations. Default interest shall be 5% above the interest rate provided for in Article 585 [NBM refinancing interest rate] unless the law or the contract provides otherwise. Proof that less damage has been incurred shall be admissible.

(2) In non consumer-related situations default interest shall be 9% above the interest rate provided for in Article 585 unless the law or the contract provides otherwise. Proof that less damage has been incurred shall be inadmissible."

65. The explanatory judgment of the Plenary of the Supreme Court of Justice, No. 12 of 25 April 2000 states:

“...A court judgment must be certain, complete, clear, coherent and convincing...

It is forbidden to use superfluous and unclear ... language...

No judgment shall be pronounced whose enforcement depends on the fulfilment of a precondition.”

THE LAW

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

66. The applicant company complained that the non-enforcement of the final judgment of 6 August 2002 had violated its right to the peaceful enjoyment of its possessions under Article 1 of Protocol No. 1 which, in so far as relevant, 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....”

A. The submissions of the parties

1. The applicant company's submissions

67. The applicant company submitted in the first place that the pressure put on it, starting in January 2002, and the subsequent proceedings which ended with the final judgment of 6 August 2002 were a result of the implementation by the Government of the programme of the Communist Party (see paragraph 17 above).

68. According to the applicant company, making the enforcement of the judgment of 6 August 2002 conditional on an audit control pursued the aim of delaying or even hindering the refunding of the money invested by it. Imposing that condition was illegal because it was contrary to the explanatory judgment of the Plenary Supreme Court of Justice, No. 12 of 25 April 2000. The applicant company admitted that, under the domestic law, the explanatory judgments of the Supreme Court were in theory not binding on the lower courts; however, there was no explanation as to why the Supreme Court had disregarded its own case-law. Moreover, the applicant company pointed to the fact that the Government had not

presented any domestic case-law in which the Supreme Court had departed from its explanatory judgments.

69. The fact that the judgment of 6 August 2002 had ordered an audit control after the judgment became final was also contrary to Article 143(8) of the Code of Civil Procedure, which stipulated clearly that an expert control should be ordered during the proceedings but not afterwards. The applicant company alleged that the courts which considered its case were not independent from the Government. In its view the problem of *restitutio in integrum* was not so complex as to require an audit control. It was sufficient to refund the applicant company the invested money and 49% of the profit obtained by the company during its existence.

70. The applicant company further submitted that the Government had not undertaken any steps in order to enforce the judgment of 6 August 2002, a judgment which was in any event illegal in its view. The Government had started to act only after the communication of this case by the Court and all their acts pursued the goal of avoiding paying any compensation to UV. The applicant company sent the Court a copy of a newspaper article containing a statement of the United States Ambassador to Moldova, in which it was mentioned, *inter alia*, that several foreign companies including UV had been deprived of their investments in Moldova without any compensation.

71. Referring to the Government's statement that it (UV) should have presented evidence concerning its investment in the statutory fund of the company, the applicant company argued that the Court of Accounts of the Republic of Moldova in its decision of 26 December 2002 had established clearly the amount of the investment in the statutory fund (see paragraph 37 above). The applicant company also argued that it was undisputed that it had transferred USD 2,384,705 to the company and that the accounting documents of the company showed that amount as UV's contribution to the statutory fund. In any event the money could not have been transferred for other purposes as there was no consideration other than the subscription of shares. Moreover, the fact that the money had been transferred into the statutory fund had also been established by two independent companies, KPMG and Ernst & Young, in their yearly audit reports for 2000-2003 which proved that UV had invested USD 2,384,705 in the statutory fund of the company.

72. The applicant company argued that while the judgment of 6 August 2002 was illegal under the domestic law in that it did not specify the exact amount of money to be paid to it, it still established clearly that the applicant had a monetary claim against the Government in the amount of its investment in the company. That claim could be considered a possession for the purposes of Article 1 of Protocol No. 1. The failure to pay the applicant company the invested money constituted an interference with the right to property which was not provided for by law, was not in the public interest and was disproportionate.

73. In its observations of 15 July 2006 the applicant company informed the Court that the Government were not happy with the decision of the Court of Accounts of the Republic of Moldova of 26 December 2002 (see paragraph 37 above) because it was not consistent with their position in this case. It drew the Court's attention to the fact that the Government were undertaking measures directed at amending that decision. The applicant company expressed the view that the decision would be modified by the time the Government's final observations were due.

2. The Government's submissions

74. The Government argued that the National Centre for Expert Analysis had found in its report of 6 April 2006 (see paragraph 54 above) that USD 2,384,705 had not in fact been invested by UV in the statutory fund of the company but had been used by the company for the purchase of Embraer aeroplanes and that reimbursement would be possible only after the aeroplanes were delivered or the money was refunded by the Brazilian aircraft manufacturer.

75. According to the Government, the decision of the Court of Accounts of the Republic of Moldova of 26 December 2002 (see paragraph 37 above) should be disregarded because it did not focus on the investments made by the parties in the company, but rather on the activity of both the Stateowned Company "Air Moldova" and the company during the period 1998-2002. The Government referred to a new decision of the Court of Accounts of 11 September 2006 (see paragraph 56 above), which in their view was more relevant because it focused on the creation of the statutory fund of the company. The Government disputed the applicant's submissions made in paragraph 73 above and argued that the Court of Accounts had acted on its own initiative without any pressure from the Government.

76. According to the Government, making the enforcement of the judgment of 6 August 2002 subject to a precondition amounted to a temporary suspension of enforcement which was possible under the Code of Civil Procedure. Accordingly, it did not contradict the explanatory judgment of the Plenary Supreme Court of Justice. In any event, they argued that the explanatory judgments of the Supreme Court of Justice were not binding on the lower courts.

77. Making the enforcement of the judgment subject to a precondition had been dictated by the need to have a clear image of the investments effectively made by UV in the company. Had the applicant company submitted to the courts evidence concerning the amount of its investment, the courts would not have subjected the enforcement of the judgment to a precondition.

78. The Government further argued that the applicant company had not submitted any evidence that the authorities had interfered with the process of enforcement in order to hinder, invalidate or delay it. On the contrary,

both the domestic courts and the Government had done everything possible to ensure that an audit control was carried out irreproachably and expeditiously.

79. In their pre-admissibility observations on the merits, the Government argued that the applicant company did not have a possession in the sense of that Article because the judgment debt had not been clearly established. In their final observations on the merits, the Government submitted that the applicant company did not have a possession until after the amount was determined in an accounting report. Making the enforcement of the judgment conditional on the carrying out of an audit control must be considered as a temporary control of use of property, which was not contrary to Article 1 of Protocol No. 1 since it had been done by a court in accordance with the law. According to the Government, making the payment of the money to the applicant conditional in the judgment of 6 August 2002 on the carrying out of a preliminary audit control, pursued the legitimate aim of “attempting to exclude arbitrariness in the areas of protection of the interests of foreign investors and the administration of public funds in a society which was in a process of transition”. The Government also argued that the applicant company did not bear an excessive burden because its investment would be reimbursed as soon as the exact amount had been established.

80. According to the Government the non-enforcement was due to the behaviour of the applicant company. They relied on the letter of 3 January 2006 of the Economic Court (see paragraph 51 above) and argued that the applicant company should have provided the Ministry of Finance with documents confirming its investment in order to be refunded, but had not done so.

81. From 30 December 2005 the applicant company had been under an obligation to participate in the audit control (see paragraph 50 above); however, it had not done anything in that respect.

82. Referring to the applicant company’s representative’s letter of 26 May 2005 (see paragraph 43 above), the Government argued that it was proof of the lack of interest on the part of the company in solving the problem quickly. Moreover, the fact that UV did not want to bear the cost of the audit control (see paragraph 44 above) was further proof of its lack of interest in a speedy execution of the judgment.

83. In their observations of 14 April 2006 the Government referred to the letter from the Economic Court of 3 January 2006 addressed to the Government (see paragraph 51 above) and argued that it was sufficient for the applicant to present the Ministry of Finance with evidence concerning its investment in order to be refunded.

84. In their observations of 18 September 2006 the Government argued that the audit control had been ordered with a view to verifying how much of the investment was left after the creation and liquidation of the company.

According to the Government, the creation and the liquidation involved costs which had to be divided between the parties on the basis of their contribution to the statutory fund: 51% to 49%. They also argued that after the control of 6 April 2006 (see paragraphs 54 and 55 above) the parties had to sign the report and give it to a court for approval.

85. According to the Government, the CASA had signed the report of 6 April 2006 whereas the applicant company had refused to sign it. That was another indication that its intention was to protract the execution of the judgment of 6 August 2002 at all costs.

86. The Government further stated that if UV was sure of having invested money in the statutory fund of the company, it should have simply submitted the evidence rather than bear the supplementary expenses of an audit control. They expressed their astonishment at the fact that UV had presented such documents for the first time in the proceedings before the Court. However, at the same time, they argued that the documents presented by the applicant did not prove that the investment had been made in the statutory fund of the company. The Government concluded that UV's real intention was to obtain a judgment from the Court in its favour at any price.

B. The Court's assessment

87. The Government argued that the applicant company did not have a possession within the meaning of Article 1 of Protocol No. 1 until after the amount had been determined in an accounting report. It follows that according to the Government, the applicant company only started to have a possession on 23 April 2008 when Deloitte & Touche issued its report (see paragraph 61 above).

88. The Court reiterates that Article 1 of Protocol No. 1 protects pecuniary assets, such as debts (see *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, § 31, Series A no. 332).

89. In order to determine when the applicant company started to have a "possession" for the purposes of Article 1 of Protocol No. 1, the Court must ascertain whether the judgment of 6 August 2002 gave rise to a debt in its favour that was sufficiently established to be enforceable (see *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 59, Series A no. 301-B).

90. It notes that the relevant domestic legislation, in particular Article 50 of the Civil Code, afforded the applicant company a right to "*restitutio in integrum*" as a result of the rescission of the contract of 3 March 2000 between it and the CASA (see paragraph 62 above). The domestic courts also recognised in their judgments of 6 August 2002 and 18 September 2002 the applicant company's right to "*restitutio in integrum*" (see paragraphs 29 and 31 above). For the reasons set out below, the Court considers that those judgments gave rise to a debt in the applicant

company's favour that was sufficiently established to be enforceable. The debt consisted of the recoupment of the initial investment and the return of the profit earned by the company during its existence.

91. As to the recoupment of the initial investment the Court notes that it is undisputed that UV invested USD 2,384,705 in the company. This amount appeared in the company's yearly audit reports of 2000-2002 (see paragraph 71 above) and in the decision of the Court of Accounts of 26 December 2002 (see paragraph 37 above). Moreover, while the Government insisted that the audit control made by the National Centre for Expert Analysis was necessary to establish the exact amount of UV's investment, the Court notes that even the questions put to the National Centre for Expert Analysis by the Government suggest that the amount of the investment was well known to them. In particular, the National Centre for Expert Analysis was not asked how much UV had invested in the company, but how its investment had been used (see paragraph 46 above).

What was disputed between the parties before April 2008, when Deloitte & Touche issued its report, was whether the money was invested in the statutory fund or used for other purposes. However, the Court does not consider this issue of any relevance, since it appears clear from the decision of 6 August 2002, as later clarified on 18 May 2004, that the intention of the Economic Court was that the applicant company be refunded the amount of its investment in the company irrespective of whether the money was invested in the statutory fund or invested elsewhere (see paragraphs 29 and 41 above). This conclusion is also supported by the letter dated 3 January 2006 sent to the Government Agent by the Vice-President of the Economic Court (see paragraph 51 above), a copy of which was submitted to the Court by the Government.

92. As to the return of the profit earned by the company during its existence, the Court notes that this part of the debt was confirmed by Deloitte & Touche, which ran an audit control in accordance with the terms of the Economic Court's judgment of 6 August 2002. It is to be noted that the Economic Court confirmed that this was the case in its explanatory judgment of 23 March 2007 (see paragraph 58 above). Moreover, this was also the common understanding of the parties when commissioning the audit from Deloitte & Touche. The profit earned by the company during its existence must also have been easily ascertainable from the financial statements made by the company with the Tax Authorities.

93. The Court recalls that failure by the authorities to enforce a final judgment can be considered a disproportionate interference with the right to peaceful enjoyment of "possessions". That has been found to be the case on many occasions by the Court (see, for example, *Prodan v. Moldova*, no. 49806/99, ECHR 2004-III (extracts); *Popov v. Moldova (no. 1)*, no. 74153/01, 18 January 2005). In the present case, the Court does not find any reason to depart from its findings in the above cases.

94. The Court observes in this connection that the non-enforcement of the final judgment of 6 August 2002 was due, to a large extent, to the fact that the Economic Court did not indicate in its judgment the amount to be paid to the applicant company, despite the provisions of Article 198 of the Civil Code (see paragraph 62 above). It is to be observed that the amount of the initial investment and the amount of the profits earned by the Company were readily and easily ascertainable. The Court refers to its findings in paragraphs 91 and 92 above in this connection. The justification for ordaining a procedure for this purpose is thus open to question.

95. Moreover, the judgment of the Economic Court was drafted in such a way as to make execution entirely dependent on the will of one of the parties to the proceedings, namely the Government. Indeed, the judgment ordered the restoration of the parties to their original position only after the Government, the Ministry of Finance and the CASA had carried out an audit and accounting control with the participation of UV (see paragraph 29 above). The situation did not change substantially after the changes made to the judgment on 30 December 2005 since the Government could still decide when and whether to proceed with the accounting control (see paragraph 50 above). The Government could not be coerced in any way by the applicant to comply with the judgment of 6 August 2002 for the simple reason that the Economic Court had refused to issue an enforcement warrant without specifying the legal grounds for its refusal (see paragraphs 34 and 35 above). Accordingly, the only way for the judgment to be executed was for the Government to comply with it voluntarily.

96. The Government decided to comply with the judgment of 6 August 2002 and to carry out an audit control only after the Court had communicated this case. However, it appears from the questions put to the auditor (see paragraph 46 above) that even at that point their intention was not to establish the amount of the investment as ordered by the courts. It was only after the case had been declared admissible, in February 2008, that the Government took more serious steps with a view to complying with the judgment of 6 August 2002 and agreed together with the applicant to employ Deloitte & Touche.

97. The Court does not accept the Government's submissions to the effect that it was the applicant company's behaviour which prevented them from complying with the judgment of 6 August 2002. The circumstances of the case plainly indicate that the initiative lay with the Government to complete the procedure set in motion by the judgment of 6 August 2002. They have failed to do so to date.

98. In such circumstances, the Court concludes that the interference with the applicant company's right to peaceful enjoyment of "possessions" was disproportionate and that there has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

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

99. Since the issues complained of under this Article are similar to those examined under Article 1 of Protocol No. 1 to the Convention (see paragraphs 94-97 above), the Court does not consider it necessary to examine separately this complaint (see, *mutatis mutandis*, *Megadat.com S.r.l. v. Moldova*, no. 21151/04, § 80, 8 April 2008; *Davidescu v. Romania*, no. 2252/02, § 57, 16 November 2006; *Laino v. Italy* [GC], no. 33158/96, § 25, ECHR 1999-I; and *Zanghì v. Italy*, 19 February 1991, § 23, Series A no. 194-C).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

100. 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. Pecuniary damage

101. The applicant company claimed EUR 7,533,878 for pecuniary damage suffered as a result of the failure of the authorities to enforce the judgment of 6 August 2002. This amount, calculated as of the date on which the applicant company submitted its claims under Article 41 of the Convention, included the equivalent of the investment from the date when the company was constituted, 49% of the income earned by the company during its existence and the default interest calculated in accordance with the Moldovan legislation. The applicant company also claimed EUR 2,303 per day to be calculated after the date on which they submitted their claims for just satisfaction until such date when the Court would determine the issue of just satisfaction in the case.

102. The Government agreed to pay the money invested by the applicant company in the joint venture company and 49% of its profit as determined by Deloitte & Touche. According to them this amount was EUR 3,431,313. As to the interest on the above amount, the Government disagreed with the amount claimed by the applicant company and reiterated their claim that the non-enforcement was due to the applicant company's behaviour. They contested the method of calculation used by the applicant company and submitted that they were ready to accept an amount of EUR 1,514,287.

103. The Court accepts that the applicant company suffered pecuniary damage as a result of the breach of Article 1 of Protocol No. 1 found above. The Court considers that the applicant is entitled to recover its lost investment and a part of the profit of the joint venture company in

proportion to its shareholding. Taking into account the circumstances of the case under consideration and making its own assessment, the Court awards the applicant company a total amount of EUR 6,700,000 for pecuniary damage.

B. Non-pecuniary damage

104. The applicant claimed EUR 200,000 for the non-pecuniary damage suffered as a result of the non-enforcement of the judgment of 6 August 2002.

105. The Government contested the amount claimed and asked the Court to dismiss it.

106. The Court considers that the applicant company must have been caused considerable inconvenience, if only in the conduct of the company's everyday affairs. Deciding on an equitable basis, it awards the applicant company EUR 3,000 for non-pecuniary damage.

C. Costs and expenses

107. The applicant company claimed EUR 9,855 to cover the representation fees and EUR 28,420 to cover its expenses related to the accounting control carried out by Deloitte & Touche.

108. The Government contested the amount claimed for legal fees, calling it excessive and unreal in the light of the economic situation of the country and of the average monthly salary. They disputed the number of hours spent by the applicant company's lawyers and the hourly fees charged by them and argued that the lawyers could claim a maximum sum of EUR 350. They also contested the amount of EUR 28,420 and argued that according to the judgment of 6 August 2002 as amended by the Economic Court on 30 December 2005, the applicant company was to contribute for the purpose of running the accounting verification.

109. The Court reiterates that in order for costs and expenses to be included in an award under Article 41 of the Convention, it must be established that they were actually and necessarily incurred and were reasonable as to quantum (see, for example, *Amihalachioaie v. Moldova*, no. 60115/00, § 47, ECHR 2004-III).

110. The applicant had not shown any basis for claiming the costs of the audit carried out by Deloitte & Touche with the agreement of the parties. Accordingly, this claim is disallowed. On the other hand, the Court awards the applicant company the full sum claimed for costs and expenses (EUR 9,855).

D. Default interest

111. 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

1. *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
2. *Holds* unanimously that there is no need to examine separately the complaint under Article 6 § 1 of the Convention;
3. *Holds* by six votes to one:
 - (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, the following amounts to be converted into the currency of the respondent State at the rate applicable on the date of settlement:
 - (i) EUR 6,700,000 (six million seven hundred thousand euros) in respect of pecuniary damage;
 - (ii) EUR 3,000 (three thousand euros) in respect of non-pecuniary damage;
 - (iii) EUR 9,855 (nine thousand eight hundred and fifty-five euros) in respect of costs and expenses;
 - (iv) any tax that may be chargeable on the above amounts;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 December 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President