



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

SECOND SECTION

CASE OF ANHEUSER-BUSCH INC. v. PORTUGAL

(Application no. 73049/01)

JUDGMENT

STRASBOURG

11 October 2005

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON
11 January 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 Anheuser-Busch Inc. v. Portugal,

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

Mr J.-P. COSTA, *President*,

Mr A.B. BAKA,

Mr I. CABRAL BARRETO,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mrs A. MULARONI,

Mrs D. JOČIENĖ, *judges*,

and Mr S. NAISMITH, *Section Registrar*,

Having deliberated in private on 11 January and 20 September 2005,

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

PROCEDURE

1. The case originated in an application (no. 73049/01) against the Portuguese Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an American company, Anheuser-Busch Inc. (“the applicant company”), on 23 July 2001.

2. The applicant company was represented by Mr D. Ohlgart and Mr B. Goebel, of the Hamburg (Germany) Bar. The Portuguese Government (“the Government”) were represented by their Agent, Mr J. Miguel, Deputy Attorney-General.

3. The applicant company alleged a violation of its right to the peaceful enjoyment of its possessions as a result of being deprived of the right to use a trade mark.

4. The application was allocated to the Third 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. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

6. By a decision of 11 January 2005, following a hearing on admissibility and the merits (Rule 54 § 3), the Court declared the application admissible.

7. The applicant and the Government each filed further written observations (Rule 59 § 1). The parties replied in writing to each other’s observations.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 11 January 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr J. MIGUEL, Deputy Attorney-General,	<i>Agent,</i>
Mr A. CAMPINOS, Director of the National Institute of Industrial Property,	<i>Counsel;</i>

(b) *for the applicant*

Mr D. OHLGART, lawyer,	
Mr B. GOEBEL, lawyer,	<i>Counsel,</i>
Mr A. RIBEIRO-MENDES, lawyer and professor of law,	<i>Adviser.</i>

The Court heard addresses by them. A representative of the applicant company also attended the hearing.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is an American public company whose registered office is in Saint Louis, Missouri (United States of America). It produces and sells beer under the brand name “Budweiser” in a number of countries around the world.

10. On 19 May 1981 the applicant company applied to the National Institute for Industrial Property (NIIP) to register “Budweiser” as a trade mark on the industrial-property register. The NIIP did not grant the application immediately because it was opposed by a company incorporated in Czechoslovakia, Budejovický Budvar, which had already registered “Budweiser Bier” as an appellation of origin.

11. According to the applicant company, negotiations then took place between it and Budejovický Budvar concerning the use of the “Budweiser” trade mark. As the parties could not come to an agreement, the applicant company applied to the Lisbon Court of First Instance on 10 November 1989 for an order cancelling Budejovický Budvar’s registration. In a judgment of 8 March 1995, which became final, the Lisbon Court of First Instance granted that application on the ground that the product to which the registration referred, namely the beer known as “Budweiser Bier”, did not

have the requisite characteristics to be considered an appellation of origin or indication of source. The registration was therefore cancelled.

12. In a decision of 20 June 1995, which was published on 8 November 1995, the NIIP registered the “Budweiser” trade mark in the applicant company’s name, despite a prior objection by Budejovický Budvar. On 8 February 1996 Budejovický Budvar appealed to the Lisbon Court of First Instance against the NIIP’s decision on the strength of an agreement between the Governments of the Portuguese Republic and the Czechoslovak Socialist Republic for the protection of indications of source, appellations of origin and other geographical and similar designations (“the 1986 Agreement”), which was signed in Lisbon on 10 January 1986 and entered into force on 7 March 1987 after publication in the Official Gazette. In accordance with the law, the applicant company was invited by the court to take part in the proceedings as an interested party.

13. In a judgment of 18 July 1998, the Lisbon Court of First Instance dismissed the application. It found that the only intellectual property eligible for protection under Portuguese law was the appellation of origin “Ceskebudejovický Budvar”, not the trade mark “Budweiser”. In addition, it found that there was no risk of confusion between that appellation of origin and the applicant company’s trade mark, which the vast majority of consumers tended to identify as an American beer.

14. Budejovický Budvar appealed against that decision to the Lisbon Court of Appeal. In a judgment of 21 October 1999, the Lisbon Court of Appeal overturned the impugned judgment and ordered the NIIP to refuse to register “Budweiser” as a trade mark, as it considered that such a registration would infringe the 1986 Agreement and, consequently, Article 189 § 1 (j) of the Industrial-Property Code.

15. The applicant company appealed on points of law to the Supreme Court, alleging *inter alia* that the impugned decision contravened the agreement of 15 April 1994 on the Trade-Related Aspects of Intellectual Property Rights (“the TRIPs Agreement”), which establishes the rule that registration confers priority, and in particular Articles 2 and 24 § 5 of that agreement. The applicant company also alleged that, in any event, the protected appellation of origin “Ceskebudejovický Budvar” did not correspond to the German expression “Budweiser”, so that the 1986 Agreement could not be used to challenge its application for registration. Even supposing, however, that the German expression “Budweiser” were an accurate translation of the Czech appellation of origin, the applicant argued that the 1986 Agreement applied only to translations between Portuguese and Czech, not into any other languages. It submitted, lastly, that a formal defect in the 1986 Agreement made it unconstitutional, as it had been adopted by the Government, not Parliament, in breach of Articles 161 and 165 of the Constitution governing parliamentary sovereignty.

16. In a judgment of 23 January 2001, which came to the applicant company's knowledge on 30 January 2001, the Supreme Court dismissed the appeal on points of law.

With regard to the TRIPs Agreement, the Supreme Court began by noting that the provision of that agreement relied on by the applicant company required it to have acted in good faith. However, the applicant company had not indicated in its application for registration any factual element that demonstrated its good faith. In any event, the Supreme Court noted that by virtue of Article 65 of the TRIPs Agreement, it had not become binding under Portuguese law until 1 January 1996, that is to say after the 1986 Agreement had entered into force. The TRIPs Agreement could not, therefore, take precedence over the 1986 Agreement.

As regards the interpretation of the 1986 Agreement, the Supreme Court considered it undeniable that the two contracting States had intended by that agreement to protect, through reciprocal arrangements, their respective national products, including in circumstances in which a translation of the names concerned was used. The appellation of origin "Ceskebudejovicky Budvar", which translated into German as "Budweis" or "Budweiss", indicated a product from the České Budějovice region in Bohemia. It was therefore protected by the 1986 Agreement.

Lastly, the procedure whereby the Agreement had been adopted did not contravene Articles 161 and 165 of the Constitution, since it did not concern a sphere that was within the exclusive competence of Parliament.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

C. The 1986 agreement

17. The agreement was signed in Lisbon in 1986 and came into force on 7 March 1987. In a note dated 21 March 1994, the Czech Minister of Foreign Affairs indicated that the Czech Republic would be succeeding Czechoslovakia as a contracting party to the Agreement. The Portuguese Minister of Foreign Affairs agreed thereto on behalf of the Portuguese Republic in a note dated 23 May 1994.

18. Article 5 of the 1986 Agreement provides, *inter alia*:

"1. If a name or designation protected under this Agreement is used in commercial or industrial activities in breach of the provisions of this Agreement for products ... all judicial or administrative remedies available under the legislation of the Contracting State in which protection is sought to prevent unfair competition or the use of unlawful designations shall, by virtue of the Agreement, be deployed to restrain such use.

2. The provisions of this Article shall apply even when translations of the said names or designations are used...”

Appendix A to the Agreement lists the designations “Ceskobudejovické pivo” and “Ceskebudejovicky Budvarà” among the protected appellations of origin.

1. International instruments

1. The Paris Convention

19. The Paris Convention of 20 March 1883 for the protection of industrial property, as subsequently revised on numerous occasions (most recently in Stockholm on 14 July 1967, [1972] 828 United Nations Treaty Series, pp. 305 et seq.), to which Portugal, the Czech Republic and the United States of America are parties, sets up a Union for the protection of industrial property, an expression understood to cover industrial designs, trade marks, appellations of origin and indications of source. The purpose of the Paris Convention is to prevent discrimination against non-nationals and it lays down a number of standards of a very general nature dealing with the procedural and substantive aspects of industrial-property law. The Convention enables owners of marks to obtain protection in various member States of the Union through a single registration.

20. The relevant parts of Article 4 of the Paris Convention provide:

“A. (1) Any person who has duly filed an application for ... the registration of ... an industrial design, or of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed.

(2) Any filing that is equivalent to a regular national filing under the domestic legislation of any country of the Union or under bilateral or multilateral treaties concluded between countries of the Union shall be recognized as giving rise to the right of priority.

(3) By a regular national filing is meant any filing that is adequate to establish the date on which the application was filed in the country concerned, whatever may be the subsequent fate of the application.

B. Consequently, any subsequent filing in any of the other countries of the Union before the expiration of the periods referred to above shall not be invalidated by reason of any acts accomplished in the interval, in particular, another filing, ... the use of the mark, and such acts cannot give rise to any third-party right or any right of personal possession. Rights acquired by third parties before the date of the first application that serves as the basis for the right of priority are reserved in accordance with the domestic legislation of each country of the Union

C. (1) The periods of priority referred to above shall be ... six months for industrial designs and trademarks.

...”

2. The Madrid Agreement and Protocol

21. The Madrid Agreement of 1891 Concerning the International Registration of Marks and the Madrid Protocol of 27 June 1989, establish and govern a system for the international registration of marks that is administered by the International Bureau of the World Intellectual Property Organization (WIPO) in Geneva (Switzerland). The Madrid Agreement was revised in Brussels (1900), Washington (1911), The Hague (1925), London (1934), Nice (1957) and Stockholm (1967). The 1989 Madrid Protocol established the “Madrid Union” composed of the States that were parties to the Madrid Agreement and the contracting parties to the Protocol. Portugal became a party to the Agreement on 31 October 1893. The United States of America have not ratified the Agreement. They ratified the Protocol on 2 November 2003.

22. The system set up by the Madrid Agreement is applicable to the members of the Madrid Union and affords owners of a mark a means of securing protection in various countries through a single application for registration in the national or regional registry. Under the system the registration of an international mark has the same effect in the countries concerned as an application to register the mark or registration of the mark by the owner directly in each individual country. If the trade-mark registry of a member State does not refuse protection within a set period, the mark enjoys the same protection as if it had been registered directly by that registry.

3. TRIPs

23. The Agreement on Trade-Related Aspects of Intellectual Property Rights (“the TRIPs Agreement”) was concluded in the Uruguay Round of the negotiations that resulted in the signature in April 1994 of the World Trade Organization Agreements in Marrakesh, which came into effect on 1 January 1995.

24. The provisions of the TRIPs Agreement of relevance to the present case are as follows:

Article 2 (Intellectual Property Conventions)

“1. In respect of Parts II [standards concerning the availability, scope and use of intellectual property rights], III [enforcement of intellectual property rights] and IV [acquisition and maintenance of intellectual property rights and related *inter-partes*

procedures] of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).

...”

Article 24 § 5
(International Negotiations; Exceptions)

“Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either:

(a) before the date of application of these provisions in that Member as defined in Part VI; or

(b) before the geographical indication is protected in its country of origin;

measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark ... on the basis that such a trademark is identical with, or similar to, a geographical indication.”

Article 65
(Transitional Arrangements)

“Subject to the provisions of paragraphs 2, 3 and 4[, which provide for longer periods], no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.”

C. Comparative law

25. In accordance with the relevant international instruments in this sphere, the legislation of most of the member States of the Council Europe regards registration as the corollary to the acquisition of the right to the mark. However, the vast majority of the States also regard the application for registration of the mark as conferring certain rights. In most cases, the date the application is filed is taken as the beginning of the period of validity of the mark once it has been registered (retrospective protection through registration). The date of filing also determines priority in the system of international marks. Lastly, in some countries, an application to register a mark may itself be the subject of provisional registration, while in others it may be the subject of an assignment, security assignment or licence and (provided the mark is subsequently registered) create an entitlement to compensation in the event of fraudulent use by a third party.

26. In most countries, registration is preceded by publication of notice of the application and a procedure whereby interested parties can oppose registration in adversarial proceedings. However, in some countries, registration is automatic if the competent authority is satisfied that the

application satisfies the formal and substantive requirements. In both cases, in accordance with the applicable international rules, an action to have a mark revoked or declared invalid may be brought within a set period. Such actions may be based on grounds such as valid prior title, prior application, right to international priority, or a failure to use the mark for a certain period.

D. Domestic law

27. The substantive and procedural law of industrial property at the material time was contained in two successive Codes of Industrial Property, the first introduced by legislative-decree no. 30679 of 24 August 1940 and the second by legislative-decree no. 16/95 of 24 January 1995. It was the latter (1995) code which was applied by the domestic courts in the instant case.

28. The Code recognised a like right of priority to that set out in the Paris Convention (Article 170). Priority was determined by reference to the date the application for registration was filed (Article 11). By virtue of Articles 29 and 30, the application for registration itself could be the subject of an assignment, with or without consideration, or a licence.

29. Article 189 § 1 (j) laid down that that registration was to be refused if the mark contained “expressions” that contravened domestic legislation. Subparagraph (l) also prohibited registration of a mark that contained elements that were liable to mislead the public.

30. Third parties who claimed that they were adversely affected by the registration of a mark had a right to appeal against the NIIP’s decision within three months from the date it was published (Article 39). The appeal had to be lodged with the Lisbon Civil Court (Article 2). The Code did not state whether such appeals had suspensive effect.

31. In a judgment of 10 May 2001 (*Colectânea de Jurisprudência*, 2001, vol. III, p. 85), the Lisbon Court of Appeal held that the mere filing of an application for registration conferred on the applicant a “legal expectation” (*expectativa jurídica*) that warranted the protection of the law. Article 5 of the New Code of Industrial Property, which was introduced by legislative-decree no. 36/2003 of 5 March 2003 and came into force on 1 July 2003, provides “provisional protection” of the mark even prior to registration and the applicant is entitled to bring an action in damages on the basis of that protection.

THE LAW

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

32. The applicant company complained of an infringement of its right to the peaceful enjoyment of its possessions. It noted that a trade mark constituted “possessions” within the meaning of Article 1 of Protocol No. 1. However, it had been deprived of that possession by the application of a bilateral treaty that had taken effect after it had applied to register the mark. In the applicant company’s submission, the Supreme Court’s decision had to be regarded as an expropriation – in that it had prevented it from securing the protection of its intellectual property right – when there was no public interest involved. Article 1 of Protocol No. 1 reads as follows:

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

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

A. The parties’ submissions

1. *The applicant company*

33. The applicant company submitted that the right to use a trade mark indisputably constituted “possessions” within the meaning of Article 1 of Protocol No. 1. It referred in that connection to the decision of the European Commission on Human Rights in the case of *Smith Kline and French Laboratories Ltd v. the Netherlands* (no. 12633/87, decision of 4 October 1990, Decisions and Reports (DR) 66, p. 70) and to Article 17 § 2 of the Charter of Fundamental Rights (Article II-77 of the draft Treaty establishing a Constitution for Europe – signed on 29 October 2004, but not yet in force – which guarantees the right to property). It pointed out that, in accordance with international law, this was a right that was protected from the date the application for registration was filed. From that point on, the owner of the mark possessed not only a right of priority but also the right to assign it, with or without consideration, and to seek compensation in the event of unlawful use by a third party. This was a feature common to the legislation of most of the member States of the Council Europe, including Portugal.

34. The applicant company maintained that from the moment it had filed the application it possessed a right not to be deprived of the use of the mark by a subsequent third-party right. However, that was precisely what had occurred as a result of the Portuguese courts' interpretation of the 1986 Agreement, the consequence of which had been that the Czech indication of source had been granted precedence over the applicant company's mark.

35. The applicant company alleged that to all intents and purposes its mark had been expropriated. It noted, firstly, that the sole ground on which the Supreme Court had relied in cancelling the registration was the incompatibility of the mark with the 1986 Agreement and, therefore, with Portuguese legislation for the purposes of subparagraph (j) of Article 189 § 1 of the Code of Industrial Property. There had never been any question of a risk of confusion with the Czech company's products. Had there been, the Portuguese courts would have relied on subparagraph (l) of that provision, but they had not done so.

36. In the applicant company's submission, this constituted interference with its right of property. However, the interference was not provided for by law. The applicant company argued, in that connection, that the Portuguese courts' interpretation of the 1986 Agreement was erroneous and contrary to the general principles of international law, as they had wrongly ruled that the 1986 Agreement afforded protection of the appellations of origin referred to in Appendix A of the Agreement against translations into any language whereas the Agreement only covered translations into Portuguese and Czech. The applicant company further noted that under international law the property of a foreign national could be expropriated only in exchange for compensation.

37. It added that, even supposing that the interference had been provided for by law, it did not pursue any legitimate aim. It repeated that the domestic courts had not cited the risk of confusion alleged by the Portuguese Government between the "Budweiser" mark and the relevant appellations of origin, but had relied instead solely on subparagraph (j) of Article 189 § 1 of the Code of Industrial Property. Furthermore, the interference was disproportionate as it had failed to strike the requisite fair balance between the general interest and the right of individuals. It also pointed out in that connection that it had not received any compensation for the loss of the use of its mark, despite the fact that there were no exceptional circumstances to justify the lack of compensation. Furthermore, conflicts between trade marks and indications of source were now commonplace and the means were available under international law to resolve them satisfactorily. The Supreme Court's decision to give the 1986 Agreement precedence over the prior application to register the "Budweiser" mark was contrary to international law, in particular the TRIPs Agreement and the relevant Community directives.

2. *The Government*

38. In the Government's submission the applicant company did not have a "possession" within the meaning of Article 1 of Protocol No. 1. The Government pointed out, firstly, that under Portuguese law, as under the law of other member States of the Council Europe, it was only after final registration that a mark became a "possession" within the meaning of that provision. Prior to final registration, the person who filed the application did not even possess a legitimate expectation. That was the position in which the applicant company had found itself, especially as there was a pre-existing dispute over ownership of the mark between it and the Czech company Budejovický Budvar. Although it was true that the right of priority played a role in such situations, it did not guarantee registration of the mark. In the instant case, registration was refused as a result of objections raised by a third party under the applicable domestic legislation. The Government referred in that connection to the decisions in which the Court had held that Article 1 of Protocol No. 1 only protected "existing" possessions and concluded that that provision was inapplicable.

39. In the Government's submission, neither the decisions of the Portuguese courts nor the 1986 Agreement as such had interfered with the applicant company's right of property. However, even supposing that there had been interference with a right of the applicant company, such interference would amount to control of the use of property, not deprivation of possessions. In any event, the interference was provided for by law, namely the 1986 Agreement between Portugal and Czechoslovakia (and subsequently the Czech Republic) which formed part of Portuguese domestic law. It also pursued a legitimate aim: the Portuguese courts' decision under the 1986 Agreement was principally intended to ensure compliance with domestic law, particularly as it concerned the Portuguese State's international obligations, but also to avoid risks of confusion over the product's source. The Government observed in that connection that, although the Portuguese courts had not relied on Article 189 § 1 (l) of the Code of Industrial Property as a basis for refusing registration of the mark, it was apparent from the Supreme Court's judgment that it had also taken into account in its reasoning the risk of confusion with the Czech appellation of origin.

40. The Government added that any interference there may have been had been entirely proportionate. Noting that the State enjoyed a wide margin of appreciation when it came to defining the public interest, the Government observed that the State was entitled to determine the conditions under which a trade mark would be eligible for registration. In particular, it was at liberty to decide that third-party interests should be protected, under a procedure provided for by law. In the present case, the domestic courts' jurisdiction was restricted to interpreting and applying the relevant domestic legislation. The applicant company could not lay any claim to compensation by way of

reparation for losses which, the Government emphasised, it had at no stage alleged in the domestic proceedings.

41. The Government noted, lastly, that the sole remedy sought by the applicant company was an order setting aside the decisions of the domestic courts. However, that would be tantamount to turning the European Court into a court of fourth instance, contrary to the aim and spirit of the Convention. The Government submitted in conclusion that there had been no violation of Article 1 of Protocol No. 1.

B. The Court's assessment

42. The Court must first decide whether the right claimed by the applicant company can be considered a "possession" within the meaning of Article 1 of Protocol No. 1. In that connection it is the settled case-law of the Court that the concept of "possessions" has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision. The issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 (see, among many other authorities, *Beyeler v. Italy* [GC], no. 33202/96, § 100, ECHR 2000-I; and *Broniowski v. Poland* [GC], no. 31443/96, § 129, ECHR 2004-v).

43. The Court observes at the outset that intellectual property as such incontestably enjoys the protection of Article 1 of Protocol No. 1. That was the view taken by the European Commission of Human Rights with regard to patents in its aforementioned *Smith Kline* decision.

However, with regard to an application for a patent that had been rejected by the competent national authority, the Commission expressed the following opinion in the case of *British-American Tobacco Company Ltd*:

"... the applicant company did not succeed in obtaining an effective protection for their invention by means of a patent. Consequently, the company were denied a protected intellectual property right but were not deprived of their existing property" (*British-American Tobacco Company Ltd v. the Netherlands*, Series A no. 331, judgment of 20 November 1995, opinion of the Commission, p. 37, §§ 71-72)

In the same case, after finding that there had been no violation of Article 6 § 1 of the Convention, the Court decided not to examine separately the issue whether the patent application constituted a "possession" coming within the scope of the protection afforded by Article 1 of Protocol No 1 (*British-American Tobacco Company Ltd*, judgment cited above, p. 29, § 91).

44. The applicant company in the instant case considered that its position was different from that of the applicant company in the *British-*

American Tobacco Company Ltd case as its application for registration of the mark had been accepted, although it was subsequently cancelled. The Government took the view that registration of the application company's mark was conditional and could only become final if it was unopposed by a third party, which was not the case in this instance as it had been opposed by Budejovicky Budvar.

45. The Court notes that an issue arises as to when the right to protection of the mark becomes a "possession" within the meaning of Article 1 of Protocol No. 1. In other words, it must examine whether in the present case the legal position of the applicant company, as the applicant for registration of a mark, entitled it to the protection of that provision of the Convention.

46. The applicant company submitted that it did, not only under international law but also under Portuguese intellectual-property law. As it interpreted the law, the mere filing of an application for registration conferred certain rights (see paragraph 33 above), including a right of priority over other similar marks or indications of source filed later. The Government contested that analysis, noting that prior to final registration the applicant company's legal position was conditional, whereas Article 1 of Protocol No. 1 applied only to "existing" possessions.

47. The Court observes that the legal position of an applicant for the registration of a trade mark incontestably has financial repercussions. Thus, an application for registration can form the subject of an assignment, with or without consideration, or of a licence agreement. In that connection, contrary to what the Government have said, the possibility that such an assignment will have a substantial financial value cannot be ruled out. In the present case, the Court accepts that the international reputation of the mark in question was such that it possessed a definite financial value.

The Court further accepts the applicant company's assertion that, even under the 1995 Code of Industrial Property, which was the code applicable in the instant case, an unlawful or fraudulent use by a third party of the mark the applicant company had applied to register could in certain circumstances entitle it to compensation, even though that possibility was not expressly stated until the New Code of Industrial Property entered into force in 2003.

Lastly, filing the application conferred on the applicant company a right of priority over subsequent applications.

48. In the Court's view, these factors undeniably gave the applicant company a pecuniary interest that benefits from a degree of legal protection. However, the company's position in law was not sufficiently strong to amount to a "legitimate expectation" attracting the protection of Article 1 of Protocol No. 1.

49. The Court reiterates in that connection that this provision applies only to a person's existing possessions. Thus, future income cannot be considered to constitute "possessions" unless it has already been earned or is definitely payable. Further, the hope that a long-extinguished property

right may be revived cannot be regarded as a “possession” within the meaning of Article 1 of Protocol No. 1 either; nor can a conditional claim which has lapsed as a result of a failure to fulfil the condition (*Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], no. 39794/98, § 69, ECHR 2002-VII). A person who complains of a violation of his or her right to property must first show that such a right existed.

50. In the instant case, the applicant company could not be sure of being the owner of the trade mark in question until after final registration and then only on condition that no objection was raised by a third party. In other words, the applicant company had a conditional right, which was extinguished retrospectively for failure to satisfy the condition, namely that it did not infringe third-party rights. The Court notes in that connection that the relevant Portuguese legislation was clear, precise and reasonable, in that it provided a clear time-limit of three months in which third parties could object to the registration of a trade mark (contrast *Beyeler v. Italy*, judgment cited above, § 109).

51. In this connection, it should be borne in mind that the applicant company’s right to use the “Budweiser” mark was already contested by Budejovicky Budvar when it filed its application. The applicant company acknowledged this, even referring to the negotiations on the subject between the two companies. Indeed, it was only after the negotiations had broken down that the applicant company decided to apply to the Lisbon Court of First Instance for an order cancelling the registrations in the name of Budejovicky Budvar, eight years after it filed its own application with the NIIP (see paragraphs 10 and 11 above). As a company engaged in a commercial enterprise, which by its very nature carried an element of risk, the applicant company was or should have been aware that there was a possibility that its request would be turned down by the competent authorities, especially as by the time it lodged its application challenging Budejovicky Budvar’s own registration on 10 November 1989, the 1986 Agreement had already been in force for two and a half years.

52. The Court thus considers that, while it is clear that a trade mark constitutes a “possession” within the meaning of Article 1 of Protocol No. 1, this is only so after final registration of the mark, in accordance with the rules in force in the State concerned. Prior to such registration, the applicant does, of course, have a hope of acquiring such a “possession”, but not a legally-protected legitimate expectation. In that connection, the applicant company’s allegation that the 1986 Agreement, which the domestic courts relied on to refuse registration, was subsequent to the date the application was filed is irrelevant, since, when that Agreement entered into force on 7 March 1987, the applicant did not have a “possession”. The manner in which the Portuguese courts applied the 1986 Agreement could not, therefore, have constituted interference with a right of the applicant company.

53. In sum, Article 1 of Protocol No. 1 is not applicable in the present case and has not, therefore, been violated.

FOR THESE REASONS, THE COURT

1. *Holds* by five votes to two that there has been no violation of Article 1 of Protocol No. 1;

Done in French, and notified in writing on 11 October 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. NAISMITH
Deputy Registrar

J.-P. COSTA
President

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

J.-P.C.
S.H.N.

JOINT DISSENTING OPINION OF JUDGES COSTA AND CABRAL BARRETO

(Translation)

To our great regret, we are unable to agree with the reasoning of the majority in this important new case for the reasons set out below.

1. The filing of the application for registration with the National Institute of Industrial Property (NIIP) in 1981 conferred on the applicant company a right of priority over subsequent applications. In the present case, the applicant company was entitled to expect that its application would be examined in accordance with that rule and the other rules governing intellectual property in force at that time, particularly as its application had already been considered by the NIIP, and indeed an objection by Budejovický Budvar had been dismissed. In these circumstances, and even though planning and trade-mark law are of course quite different, Anheuser-Busch Inc. was in a very similar position to that of the applicant company in the *Pine Valley* case, in which the Court found that the fact that outline planning permission had been granted amounted to a favourable decision as to the principle of the proposed development (*Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, Series A no. 222, p. 23, § 51).

2. Further, the illegal or fraudulent use by a third party of a mark in respect of which an application for registration has been made may, in certain circumstances, entitle the applicant to compensation. Such a right is currently contained in the Portuguese New Code of Industrial Property and, although it was not set out in either the 1940 Code or the 1995 Code, which was applicable in the present case, it was recognised in general terms by at least one judgment of the Lisbon Court of Appeal (see paragraph 31 of the judgment). This is an additional reason why the legal position of an applicant for the registration of a trade mark has pecuniary implications.

3. Further, and decisively, by the time the Portuguese State entered into the 1986 Agreement with Czechoslovakia, the applicant company had already filed, some five years earlier, an application to register its trade mark. It was entitled not only to a right of priority but also to the hope of seeing its application examined in accordance with the rules and principles in force when it was filed and, consequently, to have the mark definitively registered. However, registration was ultimately refused, not because there was any risk of confusion over the source of the product concerned, but solely as a result of legislation that was introduced after 19 May 1981, when the application for registration was filed. That legislation was the exclusive cause of the refusal to register the mark. In their decisions, the domestic courts did not rely on Article 189 § 1 (j), which laid down that registration of a mark was to be refused if it contained “expressions” that contravened

the national legislation. The registration was refused because it fell foul of the 1986 Agreement.

4. All these factors lead us to consider that the applicant company was the owner of a pecuniary interest that was recognised under Portuguese law. It was entitled to expect that its application would be examined and approved, as the objections that had been raised by the Czech company had been dismissed by the competent authorities and there were no other grounds for refusing its application at that time. In short, the applicant company had a legitimate expectation that was sufficiently strong to attract the protection of Article 1 of Protocol No. 1. That provision is therefore applicable in the present case. In that connection, we agree with the majority's comments in the section of the judgment which unambiguously states that Article 1 of Protocol No. 1 was applicable, an issue which had never been clearly settled by a decision of the Court (in the *British American Tobacco Company Ltd v. the Netherlands*, judgment of 20 November 1995, Series A no. 331, after the Commission had expressed the opinion that Article 1 of Protocol No 1 had not been violated, the Court held (§ 91) that it was unnecessary to decide whether the patent application filed by the applicant company in that case constituted a "possession" that came within the scope of the protection afforded by Article 1 of Protocol No. 1).

5. The refusal to register the mark indisputably amounts to interference with the applicant company's right of property. Although in the present case the applicant company cannot really be said to have been deprived of ownership of the "Budweiser" mark, as there was no formal or constructive expropriation, it is nevertheless undeniable that the effect of the decisions of the domestic courts has been to prevent the applicant company from using the mark in Portugal. Its total inability to exploit the mark commercially constitutes interference. Such interference must comply with the rule of law, pursue a legitimate aim and strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (*Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II). It must be remembered that in the business world, the right to use a mark in a market such as the Portuguese market may have considerable value.

6. While we are able to agree that the interference with the applicant company's rights was provided for by law (the 1986 Agreement) and had a legitimate aim (namely to secure compliance with the international obligations of the Portuguese State, which, by signing the 1986 Agreement had certain obligations towards Czechoslovakia and subsequently the Czech Republic), it remains to be determined whether a "fair balance" was struck between the demands of the general interest of the community and the

requirements of the protection of the individual's fundamental rights. Ascertaining whether such a balance existed requires an overall examination of the various interests in issue, which may call for an analysis of the compensation terms – if the situation is akin to the taking of property (see, among other authorities, *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102, pp. 50-51, §§ 120 and 121).

7. The State's right to enter into international agreements that are necessary for the protection of certain products cannot be disputed, but in this context the State must also take into account any rights of private parties, especially if, like the applicant company, they are non-nationals. Although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals (*Lithgow and Others*, § 116).

8. As we have already noted, the State intervened under the 1986 Agreement in a way that objectively harmed the applicant company's pecuniary interests. Although it may not have intended to intervene in the statutory procedure leading to the registration of the mark in the applicant company's name, the effect of its intervention was indisputably to make such registration legally impossible. Its intervention thus produced, albeit inadvertently, the same result. It was undoubtedly legitimate for the State to intervene in this way in order to protect its own products under terms of reciprocity vis-a-vis the other State Party to the 1986 Agreement. However, it did so without taking into account the applicant company's pre-existing rights, when it would have been possible for it to do so by providing, for example, adequate compensation. That being so, the Portuguese authorities caused the applicant company to bear an individual and excessive burden which upset the "fair balance" which should have been struck between the requirements of the general interest and the protection of the right to the peaceful enjoyment of one's possessions.

In our view, there has therefore been a violation of Article 1 of Protocol No. 1.