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

GRAND CHAMBER

CASE OF ANHEUSER-BUSCH INC. v. PORTUGAL

(Application no. 73049/01)

JUDGMENT

STRASBOURG

11 January 2007

In the case of Anheuser-Busch Inc. v. Portugal,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Luzius Wildhaber, *President*,
Christos Rozakis,
Nicolas Bratza,
Peer Lorenzen,
Giovanni Bonello,
Lucius Caflisch,
Loukis Loucaides,
Ireneu Cabral Barreto,
Corneliu Bîrsan,
Josep Casadevall,
Rait Maruste,
Elisabeth Steiner,
Stanislav Pavlovschi,
Lech Garlicki,
Khanlar Hajiyev,
Davíd Thór Björgvinsson,
Dragoljub Popović, *judges*,

and Erik Fribergh, *Registrar*,

Having deliberated in private on 28 June and 29 November 2006,

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 Lovells International Law Office, Madrid (Spain). The Portuguese Government ("the Government") were represented by their Agent, Mr J. Miguel, Deputy Attorney-General.

3. In its application, 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. On 11 January 2005, after a hearing dealing with both the question of admissibility and the merits (Rule 54 § 3), the application was declared admissible by a Chamber of that Section.

7. On 11 October 2005 a Chamber of that Section composed of Jean-Paul Costa, President, András Baka, Ireneu Cabral Barreto, Karel Jungwiert, Volodymyr Butkevych, Antonella Mularoni and Danutė Jočienė, judges, and Stanley Naismith, Deputy Section Registrar, delivered a judgment in which it held by five votes to two that there had been no violation of Article 1 of Protocol No. 1. A joint dissenting opinion by Judges Costa and Cabral Barreto was appended to the judgment.

8. On 11 January 2006 the applicant company requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention. A panel of the Grand Chamber granted that request on 15 February 2006.

9. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. At the final deliberations Giovanni Bonello and Dragoljub Popović, substitute judges, replaced Jean-Paul Costa and Boštjan M. Zupančič, who were unable to take part in the further consideration of the case (Rule 24 § 3). Lucius Caflisch continued to sit following the expiration of his term in office, in accordance with Article 23 § 7 of the Convention and Rule 24 § 4.

10. The applicant company and the Government each filed submissions on the merits.

11. A hearing took place in public in the Human Rights Building, Strasbourg, on 28 June 2006 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

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

(b) *for the applicant company*
Mr B. GOEBEL,
Mr D. OHLGART,
Ms C. SCHULTE, lawyers, *Counsel*,
Mr J. PIMENTA, lawyer,
Mr F.Z. HELLWIG, Senior in-house Counsel,
Anheuser-Busch Inc., *Advisers*.

The Court heard addresses by Mr Goebel and Mr Miguel and their replies to questions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. 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.

A. Background to the case

13. The applicant company has sold beer in the United States under the "Budweiser" mark since at least 1876. It broke into the European markets in the 1980s and says that it began to sell "Budweiser" beer in Portugal in July 1986.

14. The applicant company's decision to extend the sale of its beers to Europe led to a dispute with a Czechoslovak – now Czech – company called Budějovický Budvar. Budějovický Budvar produces a beer in the town of České Budějovice in Bohemia (Czech Republic) which is also called "Budweiser". The term comes from Budweis, the German name for the town. The applicant company alleges that Budějovický Budvar has only been marketing beer under the "Budweiser" name since 1895, whereas Budějovický Budvar says that it has been entitled to use that appellation since 1265, when King Ottakar II of Bohemia conferred the right to produce the beer on a number of independent brewers in České Budějovice (Budweis in German). The brewers used a special technique and beers produced by this method became known by the term "Budweiser", just as beers produced using the methods of another Czech town, Plzeň (Pilsen in German), became known as "Pilsner".

15. According to the information before the Court, the applicant company concluded two agreements in 1911 and 1939 with Budějovický Budvar concerning the distribution and sale of "Budweiser" beer in the United States. However, these agreements did not deal with the question of the right to use the "Budweiser" name in Europe. As a result, the two companies became embroiled in a series of legal proceedings over the right to use the term "Budweiser" in various European countries, including Portugal.

B. Application for registration of the trade mark in Portugal

16. 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 Budějovický Budvar, which alleged that "Budweiser Bier" had been registered in its name as an appellation of origin since 1968. Budějovický Budvar had effected the registration under the terms of the Lisbon Agreement of 31 October 1958 for the Protection of Appellations of Origin and their International Registration (see paragraph 33 below).

17. Negotiations took place throughout the 1980s with a view to resolving the dispute between the applicant company and Budějovický Budvar. According to the applicant company, in 1982 the negotiations even led to an agreement being drawn up concerning the use of the "Budweiser" trade mark in Portugal and other European countries. However, the talks eventually broke down and in June 1989 the applicant company instructed lawyers in Portugal to commence court proceedings.

18. The applicant company then applied to the Lisbon Court of First Instance on 10 November 1989 for an order cancelling Budějovický Budvar's registration. A summons was served on Budějovický Budvar, but it did not file a defence. In a judgment of 8 March 1995 (which, in the absence of an appeal, became final), the Lisbon Court of First Instance granted the applicant company's application on the ground that the product to which the registration referred, namely the beer known as "Budweiser Bier", was not an appellation of origin or indication of source. The Court of First Instance noted that under the terms of the Lisbon Agreement of 31 October 1958 such protection was reserved to the geographical name of a country, region, or locality, which served to designate a product originating therein, the quality and characteristics of which were due exclusively or essentially to the geographical environment, including natural and human factors. "Budweiser" did not come within this category. The registration was therefore cancelled.

19. Following the cancellation of the appellation of origin, and despite the fact that Budějovický Budvar had challenged the application for

registration under the opposition procedure, the NIIP registered the "Budweiser" trade mark in the applicant company's name on 20 June 1995 in a decision that was published on 8 November 1995.

C. The proceedings in the Portuguese courts

20. On 8 February 1996 Budějovický 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 on the Protection of Indications of Source, Appellations of Origin and Other Geographical and Similar Designations ("the Bilateral Agreement"), which was signed in Lisbon on 10 January 1986 and which came into force on 7 March 1987, after publication in the Official Gazette. As required by law, the applicant company was invited by the court to take part in the proceedings as an interested party. In June 1996 it was served with the originating summons that had been lodged by Budějovický Budvar.

21. In a judgment of 18 July 1998, the Lisbon Court of First Instance dismissed the appeal. It found that the only intellectual property eligible for protection under Portuguese law and the Bilateral Agreement (which, according to the court was no longer in force, owing to the disappearance of one of the contracting parties, Czechoslovakia) was the "Českobudějovický Budvar" appellation of origin, not the "Budweiser" trade mark. In addition, it found that there was no risk of confusion between the appellation of origin and the applicant company's trade mark, which the vast majority of consumers tended to think of as an American beer.

22. Budějovický Budvar appealed against that decision to the Lisbon Court of Appeal, alleging, *inter alia*, a breach of Article 189 § 1, sub-paragraphs (l) and (j), of the Code of Industrial Property. 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. The Court of Appeal did not consider that there had been a breach of Article 189 § 1 (l) of the Code of Industrial Property, as the expression "Budweiser" was incapable of misleading the Portuguese public as to the origin of the beer concerned. However, it found that such a registration would infringe the Bilateral Agreement and, consequently, Article 189 § 1 (j) of the Code of Industrial Property. In that connection, it noted that the Bilateral Agreement had remained in force, following an exchange of notes between the Czech and Portuguese governments (see paragraph 25 below) and had been incorporated into domestic law by virtue of Article 8 of the Constitution, which contained a clause providing for international law to take effect in the Portuguese legal system.

23. 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 its Articles 2 and 24 § 5. The applicant company also alleged that, in any event, the protected appellation of origin "Českobudějovický Budvar" did not correspond to the German expression "Budweiser", so that the Bilateral Agreement could not be used to challenge its application for registration. The applicant company argued that, even supposing that the German expression "Budweiser" was an accurate translation of the Czech appellation of origin, the Bilateral Agreement applied only to translations between Portuguese and Czech, not to translations into other languages. It submitted, lastly, that the Bilateral Agreement was unconstitutional owing to a formal defect in that it had been adopted by the government, not Parliament, in breach of Articles 161 and 165 of the Constitution governing parliamentary sovereignty.

24. The Supreme Court dismissed the appeal on points of law in a judgment of 23 January 2001, which came to the applicant company's attention on 30 January 2001.

With regard to the TRIPs Agreement, the Supreme Court began by noting that the provision on which the applicant company relied required it to have acted in good faith before going on to say that the applicant company had not referred in its application for registration to any factual information that demonstrated its good faith. In any event, the effect of Article 65 of the TRIPs Agreement was that it had not become binding under Portuguese law until 1 January 1996, that is to say after the entry into force of the 1986 Bilateral Agreement. The Supreme Court therefore found that the TRIPs Agreement could not take precedence over the Bilateral Agreement.

As regards the interpretation of the Bilateral Agreement, the Supreme Court considered that the intention of the two contracting States in entering into it had incontestably been to protect through reciprocal arrangements their respective national products, including when translations of a name were used. The appellation of origin "Českobudějovický Budvar", which became "Budweis" or "Budweiss" in German, indicated a product from the České Budějovice region in Bohemia. It was therefore protected by the Bilateral 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 for which Parliament had exclusive competence.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. International law

1. Bilateral Agreement of 1986

25. The Agreement between the governments of the Portuguese Republic and the Czechoslovak Socialist Republic on the Protection of Indications of Source, Appellations of Origin and Other Geographical and Similar Designations was signed in Lisbon in 1986 and came into force on 7 March 1987. In a *note verbale* dated 21 March 1994, the Czech Minister for Foreign Affairs indicated that the Czech Republic would succeed Czechoslovakia as a contracting party to the Agreement. The Portuguese Minister for Foreign Affairs agreed thereto on behalf of the Portuguese Republic in a *note verbale* dated 23 May 1994.

26. 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 "Českobudějovické pivo" and "Českobudějovický Budvar" among the protected appellations of origin.

27. According to the applicant company, Czechoslovakia entered into similar agreements with two other member States of the Council of Europe, these being Austria and Switzerland. The agreement between Czechoslovakia and Switzerland was signed on 16 November 1973 and came into force on 14 January 1976. The agreement between Czechoslovakia and Austria was signed on 11 June 1976 and came into force on 26 February 1981.

2. The Paris Convention

28. The Paris Convention of 20 March 1883 for the Protection of Industrial Property, as subsequently revised on numerous occasions (the most recent being in Stockholm on 14 July 1967, United Nations Treaty Series 1972, vol. 828, pp. 305 et seq.), sets up a Union for the protection of industrial property, an expression that encompasses 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 rules of a very general nature dealing with the procedural and substantive aspects of industrial property law. It enables owners of marks to obtain protection in various member States of the Union through a single registration. It also establishes the priority rule, which grants, for a set period, a right of priority to an application for protection of an intellectual property right in one of the Contracting States over applications lodged subsequently in another Contracting State. The system introduced by this convention is administered by the World Intellectual Property Organisation (WIPO) based in Geneva (Switzerland).

29. The following provisions of the Paris Convention are of relevance to the present case:

Article 4

"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.

..."

Article 6 *bis*

"(1) The countries of the Union undertake, *ex officio* if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent

> authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.
>
> ..."

30. Portugal, Czechoslovakia (succeeded by the Czech Republic) and the United States of America were all Contracting Parties to the Paris Convention at the material time.

3. The Madrid Agreement and Protocol

31. 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 WIPO. 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 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 has not ratified the Agreement. It ratified the Protocol on 2 November 2003.

32. 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 a 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 fixed period, the mark enjoys the same protection as if it had been registered directly by that registry.

4. Lisbon Agreement of 31 October 1958

33. The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration was signed in Lisbon on 31 October 1958, revised in Stockholm on 14 July 1967 and amended on 28 September 1979. It enables Contracting States to request other Contracting States to protect appellations of origin of certain products, if they are recognised and protected as such in the country of origin and registered at the International Bureau of the WIPO. Both Portugal and the Czech Republic, as a successor to Czechoslovakia, are parties to this Agreement.

5. TRIPs

34. The Agreement on Trade-Related Aspects of Intellectual Property Rights was concluded in the Uruguay Round of the negotiations that resulted in the signature in April 1994 of the World Trade Organisation (WTO) Agreements in Marrakesh, which came into effect on 1 January 1995. The aim of this Agreement is to integrate the system of intellectual-property protection into the system of world-trade regulation administered by the WTO. The member States of the WTO undertake to comply with the substantive provisions of the Paris Agreement.

35. 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 16
(Rights Conferred)

"1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

..."

Article 17
(Exceptions)

"Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties."

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 § 1
(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."

B. Community law

36. European Union law contains various instruments designed to regulate and protect intellectual property, including trade marks. The instrument of most relevance to the present case is Council Regulation (EC) No. 40/941 of 20 December 1993 on the Community trade mark, which establishes a right to a Community trade mark and confers certain rights on applicants for registration. Its aim is to promote the development, expansion and proper functioning of the internal market by enabling Community undertakings to identify their products or services in a uniform manner throughout the Union. To that end, the Office of Harmonisation for the Internal Market (OHIM) has been established (for trade marks and designs – Article 2). It is based in Alicante (Spain). Applications for registration of a Community trade mark are sent to the OHIM, which decides whether to grant or reject them. An appeal lies against its decisions to the OHIM's Board of Appeal, and from there to the Court of First Instance of the European Communities (Articles 57-63).

37. Article 24 of the Regulation, which is entitled "The application for a Community trade mark as an object of property", lays down that the provisions relating to Community trade marks also apply to applications for registration. These provisions include Article 17 (Transfer), Article 19 (Rights *in rem*), Article 20 (Levy of execution) and Article 22 (Licensing).

By virtue of Article 9 § 3, an application for registration may also found a claim for compensation.

38. Finally, 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, provides: "Intellectual property shall be protected."

C. Comparative law

39. In accordance with the relevant international instruments, the legislation of most of the member States of the Council of Europe regards registration as a 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, once registered the mark is deemed to have been valid since the date the application for registration was filed (system of 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.

40. 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

41. 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 Code which the domestic courts applied in the instant case.

42. The 1995 Code provided a right of priority identical 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.

43. The other provisions of the Code of relevance to the present case read as follows.

Article 7

"1. The certificate of registration shall be issued to the interested party one month after the time-limit for appealing has expired or, if an appeal has been lodged, once the final judicial decision has been delivered.

2. The certificate shall be issued to the holder or to his or her representative upon presentation of a receipt."

Article 38

"An appeal against a decision of the National Institute of Industrial Property may be lodged by the applicant, a person who has filed an opposition or any other person who might be directly affected by the decision."

Article 39

"Appeals must be lodged within three months after the date of publication of the decision in the Industrial Property Bulletin or, if earlier, the date a certified conformed copy of the decision is obtained."

Article 189

"1. Registration shall also be refused of a mark ... containing one or all of the following:

...

(j) expressions or forms that are contrary to morals, domestic or Community legislation, or public order;

(l) signs liable to mislead the public, in particular as to the nature, quality, use or geographical source of the product or service to which the mark relates;

..."

44. Appeals against a decision by the NIIP to register a mark had to be lodged with the Lisbon Civil Court (Article 2 of Legislative-Decree no. 16/95). The Code did not indicate whether they had suspensive effect.

45. In a judgment of 10 May 2001 (*Colectânea de Jurisprudência* [Case-law collection], 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 justified 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 entitles the applicant to bring an action in damages on the basis thereof.

THE LAW

ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

46. The applicant company complained of an infringement of its right to the peaceful enjoyment of its possessions. Noting that a trade mark constituted a "possession" within the meaning of Article 1 of Protocol No. 1, it said that it had been deprived of that possession by the application of a bilateral treaty that had come into force after it had filed its application to register the mark. It argued that the Supreme Court's decision had to be regarded as an expropriation (as it had prevented the applicant company from enjoying the protection of its intellectual property right), but had not been effected in the general interest. 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 Chamber judgment

47. The Chamber held that there had been no violation of Article 1 of Protocol No. 1. It began by noting that, while intellectual property as such incontestably enjoyed the protection of that provision, an issue arose as to whether a mere application for registration of a trade mark was also covered by Article 1 of Protocol No. 1. In that connection, it acknowledged that the legal position of an applicant for the registration of a trade mark incontestably gave rise to financial interests, including a right of priority over subsequent applications. An application for registration constituted a pecuniary interest that benefited from a degree of legal protection (see paragraphs 43 and 45-48 of the Chamber judgment).

48. The Chamber reiterated, however, that Article 1 of Protocol No. 1 applied only to a person's existing possessions. Thus, for instance, the hope that a long-extinguished property right might be revived could not be

regarded as a "possession" and the same applied to a conditional claim which had lapsed as a result of a failure to fulfil the condition (see paragraph 49 of the Chamber judgment).

49. With regard to the instant case, the Chamber noted that 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 third party had raised an objection, as the applicable legislation permitted. In other words, the applicant company had a conditional right, which however was extinguished retrospectively for failure to satisfy the condition, namely that it did not infringe third-party rights. The Chamber therefore concluded that while it was clear that a trade mark constituted a "possession" within the meaning of Article 1 of Protocol No. 1, this was so only after final registration of the mark, in accordance with the rules in force in the State concerned. Prior to such registration, the applicant did, of course, have a hope of acquiring such a "possession", but not a legally protected legitimate expectation. Accordingly, when the Bilateral Agreement came into force on 7 March 1987 the applicant company did not have a "possession". The manner in which the Bilateral Agreement had been applied by the Portuguese courts could not, therefore, constitute interference with a right of the applicant company (see paragraphs 50-52 of the Chamber judgment).

B. The parties' submissions

1. The applicant company

50. The applicant company contested the Chamber's findings, though it agreed that Article 1 of Protocol No. 1 was applicable to intellectual property in general and to marks in particular. It submitted that the Chamber had, however, failed to draw the logical conclusions from its reasoning relating to the financial interests at stake in an application for registration. It argued that an application for registration had a pecuniary value and was therefore a "possession" within the meaning of Article 1 of Protocol No. 1, as, under the Court's case-law, the concept of "possessions", which had an autonomous meaning, was not limited to the ownership of physical goods but included certain other rights and interests that constituted assets.

51. The applicant company pointed out that the essential characteristics of the concept of property, such as assignability and transferability, were present in the instant case and in applications for the registration of a mark. In addition, the mark concerned was well-known to consumers, which in itself meant that it was an asset protected by Article 1 of Protocol No. 1. The applicant company referred in that connection to *Iatridis v. Greece*, in which the Court found that the clientele of an open-air cinema constituted an asset protected by Article 1 of Protocol No. 1 (see *Iatridis v. Greece* [GC], no. 31107/96, § 54, ECHR 1999-II).

52. An application for registration also conferred on the applicant, from the date the application was lodged, a vested right to exclusive protection. If, as in the applicant company's case, the application satisfied all the statutory conditions, in particular as regards the lack of conflicting pre-existing rights, the NIIP, as the competent national authority, was under a duty to register the mark and had no discretion in the matter. In accordance with the priority rule, one of the characteristic features of the property rights bound up in an application for registration of a trade mark was a legitimate expectation that the application would not be defeated by a third-party intellectual property right that arose after the application for registration was filed. The applicant company possessed such a legitimate expectation, as indeed the dissenting judges had acknowledged in their opinion appended to the Chamber judgment. The Chamber's findings were also incompatible with the Court's previous case-law on the concept of legitimate expectation, as had been expounded for instance in *Pine Valley Developments Ltd and Others v. Ireland* (29 November 1991, Series A no. 222) and *Beyeler v. Italy* ([GC], no. 33202/96, ECHR 2000-I).

53. In its written submissions to the Grand Chamber, the applicant company further noted that the Chamber had neglected an important issue, namely the fact that its "Budweiser" mark had already reached the registration stage when it was cancelled by the Supreme Court. The applicant company explained that it had been issued with a registration certificate by the NIIP on 20 June 1995, which proved that it was the owner of the mark under Portuguese law.

54. Since the applicant company had been entitled to the protection of Article 1 of Protocol No. 1 from the moment it lodged its application for registration of the mark, the effect of the Supreme Court's decision of 23 January 2001 had been to deprive it of its property. That interference with its rights was not provided for by law, since the Supreme Court's interpretation of the Bilateral Agreement was erroneous and contrary to the general principles of international law. The Portuguese courts had wrongly ruled that the Bilateral Agreement afforded protection of the appellations of origin referred to in Appendix A against translations of the names concerned into any other language, when in fact the Agreement only covered translations into Portuguese and Czech. The applicant company further pointed out that, under the principles of international law, assets belonging to non-nationals could be expropriated only in exchange for compensation.

55. It added that, even supposing that the interference had been provided for by law, it had not pursued a legitimate aim. 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 Article 189 § 1 (j) 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 payment. 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 Bilateral 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

56. The Government invited the Grand Chamber to endorse the Chamber's judgment and to hold that there had been no violation of Article 1 of Protocol No. 1. They reiterated that that provision did not apply to the applicant company's legal position as an applicant for the registration of a trade mark. In their submission, under the applicable law, a mark became a "possession" within the meaning of Article 1 of Protocol No. 1 only upon final registration. Prior thereto, an applicant for registration did not even possess a legitimate expectation. The Government referred in that connection to the Court's case-law holding that Article 1 of Protocol No. 1 only protected "existing" possessions.

57. The Government added that the applicant company's right to use of the mark had always been uncertain and a point of contention. When the application for registration was lodged on 19 May 1981 the right to use the term "Budweiser" had already been registered by Budějovický Budvar, which explained why the NIIP had not immediately processed the application. In that connection, the Government stressed that when the Bilateral Agreement between Portugal and the Czech Republic was signed in 1986, only Budějovický Budvar was entitled to use the term "Budweiser" (as an appellation of origin). Budějovický Budvar had, moreover, immediately contested the NIIP's decision in 1995 to register the mark and had gone on to win the proceedings. The Government therefore argued that the applicant company had at no stage during that period been able to claim any "legitimate expectation" that would have entitled it to the protection of Article 1 of Protocol No. 1.

58. With regard to the question of assignability and transferability, the Government said that even though it had been possible to assign and transfer applications for the registration of a trade mark since the entry into force of the Code of Industrial Property of 1995 – though not previously – the process was in practice of negligible, even symbolic, economic value. In point of fact, such dealings were generally the result of a dispute between two companies over an application to register a mark with the transfer of the application serving to settle the dispute. In the Government's submission,

that practice tended to support the view that Article 1 of Protocol No. 1 was not applicable to such applications.

59. With reference to the applicant company's assertion in its written submissions to the Grand Chamber that the NIIP had issued a registration certificate, the Government stated that, as a matter of law, the mere issue of a certificate did not assist the applicant company's position. They noted that the relevant provisions, in particular Article 7 § 1 of the Code of Industrial Property, made it clear that the competent authorities could only issue such a certificate when the judicial decision on the application for registration had become final. Although, despite this, the applicant company had inadvertently been issued with a certificate by the competent authorities, it was aware that it had no value in law and, furthermore, that its use in Portugal was an administrative offence which carried the same penalties as a minor offence under the provisions of domestic law.

60. The Government argued that the Supreme Court's decision could not have operated to deprive the applicant company of a "possession" within the meaning of Article 1 of Protocol No. 1. The domestic courts' interpretation of the Bilateral Agreement could not be overruled by the Court without it becoming a court of fourth instance, contrary to the aim and spirit of the Convention.

61. Even supposing that there had been interference with a right of the applicant company, such interference amounted, in the Government's submission, to control of the use of property, not deprivation of possessions. In any event, the interference was provided for by law, namely the Bilateral Agreement of 1986, which formed part of Portuguese domestic law. It also pursued a legitimate aim: the Portuguese courts' decision under the Bilateral Agreement was primarily 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 a 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. 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 had merely interpreted and applied 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.

C. The Court's assessment

1. The general principles

62. Article 1 of Protocol No. 1, which guarantees the right to the protection of property, contains three distinct rules: "the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest ... The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule" (see, among other authorities, *James and Others v. the United Kingdom*, 21 February 1986, § 37, Series A no. 98, in which the Court reaffirmed some of the principles it had established in its judgment in *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 61, Series A no. 52; see also *Beyeler*, cited above, § 98).

63. The concept of "possessions" referred to in the first part of Article 1 of Protocol No. 1 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 *Iatridis*, § 54, *Beyeler*, § 100, both cited above, and *Broniowski v. Poland* [GC], no. 31443/96, § 129, ECHR 2004-V).

64. Article 1 of Protocol No. 1 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"; nor can a conditional claim which has lapsed as a result of a failure to fulfil the condition (see *Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], no. 39794/98, § 69, ECHR 2002-VII).

65. However, in certain circumstances, a "legitimate expectation" of obtaining an "asset" may also enjoy the protection of Article 1 of Protocol No. 1. Thus, where a proprietary interest is in the nature of a claim, the person in whom it is vested may be regarded as having a "legitimate expectation" if there is a sufficient basis for the interest in national law, for example where there is settled case-law of the domestic courts confirming its existence (see *Kopecký v. Slovakia* [GC], no. 44912/98, § 52, ECHR 2004-IX). However, no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts (see *Kopecký*, cited above, § 50).

2. Application of these principles to the instant case

(a) Whether Article 1 of Protocol No. 1 was applicable

(i) Intellectual property in general

66. The first issue which arises with regard to the question of the applicability of Article 1 of Protocol No. 1 in the instant case is whether that provision applies to intellectual property as such. In deciding that it does (see paragraph 43 of the Chamber judgment), the Chamber referred to the case-law of the European Commission of Human Rights (see *Smith Kline and French Laboratories Ltd v. the Netherlands*, no. 12633/87, Commission decision of 4 October 1990, Decisions and Reports 66, p. 70).

67. The Court notes that the Convention institutions have been called upon to rule on questions of intellectual property only very rarely. In the above-mentioned case of *Smith Kline and French Laboratories Ltd*, the Commission stated as follows:

> "The Commission notes that under Dutch law the holder of a patent is referred to as the proprietor of a patent and that patents are deemed, subject to the provisions of the Patent Act, to be personal property which is transferable and assignable. The Commission finds that a patent accordingly falls within the scope of the term 'possessions' in Article 1 of Protocol No. 1."

68. The Commission followed this decision in *Lenzing AG v. the United Kingdom* (no. 38817/97, Commission decision of 9 September 1998, unreported), which also concerned a patent. However, it explained in that case that the "possession" was not the patent as such, but the applications made by the applicant company in civil proceedings in which it had sought to bring about changes to the British system for registering patents. The Commission noted in conclusion that there had been no interference with the applicant company's right to the peaceful enjoyment of its possessions, as it had been given an opportunity to set out its claims concerning the patent to a court with full jurisdiction.

69. In *British-American Tobacco Company Ltd v. the Netherlands*, the Commission expressed the opinion that Article 1 of Protocol No. 1 did not apply to an application for a patent that had been rejected by the competent national authority. It stated:

> "... 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." (see *British-American Tobacco Company Ltd v. the Netherlands*, 20 November 1995, opinion of the Commission, §§ 71-72, Series A no. 331)

As the Chamber noted in its judgment, the Court decided in *British-American Tobacco Company Ltd* not to examine separately the issue whether a patent application constituted a "possession" that came within the scope of the protection afforded by Article 1 of Protocol No. 1 (cited above, § 91), as it had already examined the position with respect to Article 6 § 1 of the Convention.

70. In *Hiro Balani v. Spain*, the question of the applicability of Article 1 of Protocol No. 1 to intellectual property was not examined. The Court did, however, find a violation of Article 6 § 1 of the Convention on account of the Spanish Supreme Court's failure to examine a ground of appeal by the applicant company alleging non-compliance with the priority rule (see *Hiro Balani v. Spain*, 9 December 1994, § 28, Series A no. 303-B).

71. More recently, in *Melnychuk v. Ukraine*, which concerned an alleged violation of the applicant's copyright, the Court reiterated that Article 1 of Protocol No. 1 was applicable to intellectual property. It observed, however, that the fact that the State, through its judicial system, had provided a forum for the determination of the applicant's rights and obligations did not automatically engage its responsibility under that provision, even if, in exceptional circumstances, the State might be held responsible for losses caused by arbitrary determinations. The Court noted that this was not the position in the case before it, as the national courts had acted in accordance with domestic law, giving full reasons for their decisions. Thus, their assessment was not flawed by arbitrariness or manifest unreasonableness contrary to Article 1 of Protocol No. 1 (see *Melnychuk v. Ukraine* (dec.), no. 28743/03, ECHR 2005-IX; see also, *Breierova and Others v. the Czech Republic* (dec.), no. 57321/00, 8 October 2002).

72. In the light of the above-mentioned decisions, the Grand Chamber agrees with the Chamber's conclusion that Article 1 of Protocol No. 1 is applicable to intellectual property as such. It must now examine whether this conclusion also applies to mere applications for the registration of a trade mark.

(ii) Applications for registration

73. Largely in line with the Government's submissions, the Chamber stated in its judgment:

> "... 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." (§ 52)

74. The Chamber accepted that the legal position of an applicant for the registration of a trade mark had certain financial implications, including those attendant on an assignment (possibly for consideration) or a licence and those arising out of the priority an application for registration afforded over subsequent applications. However, referring to the above-mentioned judgment in *Gratzinger and Gratzingerova*, the Chamber found as follows:

> "... 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, as the relevant legislation permitted. 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." (§ 50)

75. The Court considers it appropriate to examine 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. In that connection, it notes at the outset that the question whether the applicant company became the owner of the "Budweiser" mark on 20 June 1995 when it was issued with a registration certificate by the NIIP – a point that was argued in detail by the parties at the hearing before the Grand Chamber – is ultimately of secondary importance, the reason being that the issue of the certificate to the applicant company was in breach of the provisions of Article 7 of the Code of Industrial Property (see paragraph 43 above) and therefore cannot alter the nature of the "possession" to which the applicant company lays claim or the reality of its overall legal position for the purposes of Article 1 of Protocol No. 1.

76. With this in mind, the Court takes due note of the bundle of financial rights and interests that arise upon an application for the registration of a trade mark. It agrees with the Chamber that such applications may give rise to a variety of legal transactions, such as a sale or licence agreement for consideration, and possess – or are capable of possessing – a substantial financial value. With regard to the Government's submission that dealings in respect of applications for the registration of a mark are of negligible or symbolic value only, it is noted that in a market economy, value depends on a number of factors and it is impossible to assert at the outset that the assignment of an application for the registration of a trade mark will have no financial value. In the instant case, as the applicant company did not fail to point out, the mark in question possessed a definite financial value on account of its international renown.

77. The parties disagreed about whether, prior to the entry into force of the new Code of Industrial Property of 2003, it had been possible under

Portuguese law to obtain compensation for the illegal or fraudulent use by a third party of a mark in respect of which an application for registration was pending. For its part, the Court considers that, in the light of the Lisbon Court of Appeal's decision of 10 May 2001, such a possibility cannot be wholly ruled out.

78. These elements taken as a whole suggest that the applicant company's legal position as an applicant for the registration of a trade mark came within Article 1 of Protocol No. 1, as it gave rise to interests of a proprietary nature. It is true that the registration of the mark – and the greater protection it afforded – would only become final if the mark did not infringe legitimate third-party rights, so that, in that sense, the rights attached to an application for registration were conditional. Nevertheless, when it filed its application for registration, the applicant company was entitled to expect that it would be examined under the applicable legislation if it satisfied the other relevant substantive and procedural conditions. The applicant company therefore owned a set of proprietary rights – linked to its application for the registration of a trade mark – that were recognised under Portuguese law, even though they could be revoked under certain conditions. This suffices to make Article 1 of Protocol No. 1 applicable in the instant case and to make it unnecessary for the Court to examine whether the applicant company could claim to have had a "legitimate expectation".

(b) Whether there has been interference

79. The Court has found that Article 1 of Protocol No. 1 is applicable in this case. It must now examine whether there has been interference with the applicant company's rights to the peaceful enjoyment of its possessions.

80. The applicant company submitted that the interference stemmed from the Supreme Court's judgment of 23 January 2001, which had attached greater weight to the Bilateral Agreement of 1986 than to the chronologically earlier application for registration of the "Budweiser" mark. It was that judgment which had effectively deprived the applicant company of its right of property of the mark in circumstances which, in its submission, infringed the relevant international instruments and Article 1 of Protocol No. 1 for failure to comply with the priority rule. Had the Bilateral Agreement not been applied, the applicant company's application for registration would necessarily have been accepted, since it satisfied all the other applicable statutory conditions.

81. The question before the Court, therefore, is whether the decision to apply the provisions of the Bilateral Agreement of 1986 to an application for registration filed in 1981 could amount to interference with the applicant company's right to the peaceful enjoyment of its possessions.

82. In that connection it reiterates that, in certain circumstances, the retrospective application of legislation whose effect is to deprive someone

of a pre-existing "asset" that was part of his or her "possessions" may constitute interference that is liable to upset the fair balance that has to be maintained between the demands of the general interest on the one hand and the protection of the right to peaceful enjoyment of possessions on the other (see, among other authorities, *Maurice v. France* [GC], no. 11810/03, §§ 90 and 93, ECHR 2005-IX). This also applies to cases in which the dispute is between private individuals and the State is not itself a party to the proceedings (see *Lecarpentier v. France*, no. 67847/01, §§ 48, 51 and 52, 14 February 2006; see also, in connection with Article 6 of the Convention, *Cabourdin v. France*, no. 60796/00, §§ 28-30, 11 April 2006).

83. However, the Court notes that in the present case the applicant company complained mainly of the manner in which the national courts interpreted and applied domestic law in proceedings between two rival claimants to the same name, it being contended in particular that the courts wrongly gave retrospective effect to the Bilateral Agreement, rather than of the retrospective application of a law which deprived them of their pre-existing possessions. The Court observes that, even in cases involving litigation between individuals and companies, the obligations of the State under Article 1 of Protocol No. 1 entail the taking of measures necessary to protect the right of property. In particular, the State is under an obligation to afford the parties to the dispute judicial procedures which offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly in the light of the applicable law. However, the Court reiterates that its jurisdiction to verify that domestic law has been correctly interpreted and applied is limited and that it is not its function to take the place of the national courts, its role being rather to ensure that the decisions of those courts are not flawed by arbitrariness or otherwise manifestly unreasonable. This is particularly true when, as in this instance, the case turns upon difficult questions of interpretation of domestic law. The Court reiterates its settled case-law that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

84. The Court notes, firstly, that the instant case is distinguishable from the cases in which it found that there had been retrospective intervention by the legislature in relation to a party's proprietary right (see, as the most recent authorities, *Maurice* and *Lecarpentier*, cited above; see also *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, Series A no. 332). The reason for this is that in the present case the very question whether the legislation was retrospectively applied is in itself in issue whereas, in the above-mentioned cases, not only was the retrospective

effect of the legislation indisputable, it was also intentional. Indeed, it has not been established that the applicant company had a right of priority in respect of the "Budweiser" mark when the Bilateral Agreement, which is alleged to have been applied retrospectively, came into force. In this connection, the Court points out that the only effective registration in existence when the Bilateral Agreement took effect on 7 March 1987 was of the appellations of origin that had been registered in Budějovický Budvar's name under the Lisbon Agreement of 31 October 1958. While it is true that that registration was subsequently cancelled (see paragraph 18 above), the Court cannot examine what consequences the cancellation of the registration had on the right of priority attached to the mark.

85. These are questions whose rightful place was before the domestic courts. The Supreme Court decided in its judgment of 23 January 2001 to reject the applicant company's argument based on an alleged violation of the priority rule. In the absence of any arbitrariness or manifest unreasonableness, the Court cannot call into question the findings of the Supreme Court on this point.

86. Nor is it for the Court to review the Supreme Court's interpretation of the Bilateral Agreement, which was contested by the applicant company. It would merely note here that the applicant company was afforded the opportunity, throughout the proceedings in the Portuguese courts, to indicate how it interpreted both that Agreement and the other legislation it considered applicable to its case and to inform the Portuguese courts of the solution it considered best adapted to the legal issue raised by the case. Confronted with the conflicting arguments of two private parties concerning the right to use the name "Budweiser" as a trade mark or appellation of origin, the Supreme Court reached its decision on the basis of the material it considered relevant and sufficient for the resolution of the dispute, after hearing representations from the interested parties. The Court finds no basis on which to conclude that the decision of the Supreme Court was affected by any element of arbitrariness or that it was otherwise manifestly unreasonable.

87. In the light of the foregoing, the Court therefore concludes that the Supreme Court's judgment in the instant case did not constitute interference with the applicant company's right to the peaceful enjoyment of its possessions. There has, therefore, been no violation of Article 1 of Protocol No. 1.

FOR THESE REASONS, THE COURT

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 11 January 2007.

Erik Fribergh Registrar	Luzius Wildhaber President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Judges Steiner and Hajiyev;

(b) joint dissenting opinion of Judges Caflisch and Cabral Barreto.

L.W.
E.F.

JOINT CONCURRING OPINION OF JUDGES STEINER AND HAJIYEV

1. We agreed with the majority that there has been no violation of Article 1 of Protocol No. 1, but on other grounds. In our view, Article 1 of Protocol No. 1 does apply, in general, to intellectual property. This was accepted by both the parties but there has never been any clear statement of this principle by the Court in the past.

2. We therefore agree that Article 1 of Protocol No. 1 is applicable to intellectual property in general and to a duly registered trade mark.

3. But does this also hold true for a simple trade mark application? The next step for us was to decide if the applicant for the registration of a trade mark had a "possession" within the meaning of Article 1 of Protocol No. 1. To benefit from the protection of Article 1 of Protocol No. 1, the applicant should have a claim in respect of which he can argue that he had at least a "legitimate expectation" that it would be realised. This expectation should be more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision.

4. In the present case, as the Chamber judgment correctly pointed out, there were strong economic interests attached to the trade mark application. To give an example from Community law, Regulation No. 40/941 on the Community trade mark states that a trade mark application has to be considered as "object property". Such an object can, under the domestic legislation of most States (including Portugal), be transferred, given as security, licensed and so on. This means that a trade mark application has some commercial value despite the fact that the application for registration may not be successful. In such a transaction the application will be bought and sold with the attendant commercial risk. The purchaser buys in the knowledge that the mark may not be registered. He or she assumes the commercial risk of such a transaction. The application's commercial value will depend on the commercial risk in the individual case, and more specifically on the chances of the mark being registered.

5. Are these elements sufficient to give a trade mark application the status of a "legitimate expectation"?

6. In our view, they are not, for four main reasons. Firstly, the right claimed by the applicant company was a conditional one. As the Chamber emphasised in its judgment:

> "... [T]he 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 (paragraph 50 of the Chamber

judgment). Our settled case-law denies the quality of "possession" to a conditional claim which has lapsed as a result of a failure to fulfil the condition. It should be pointed out that not every application for a trade mark results in registration and many applications are never likely to be registered. In other words, an application for the registration of a trade mark is quite clearly a conditional right: the condition being that it meets the conditions for registration.

7. Secondly, Anheuser-Busch knew, when filing its trade mark application, that the application was likely to be opposed by Budějovický Budvar, even without the intervention of a later event such as the 1986 Agreement between Portugal and Czechoslovakia. At the time the application to register the trade mark was made in 1981, the right to use the Budweiser trade mark was already being discussed globally between the applicant company and Budějovický Budvar. As stated above, litigation was already pending in courts throughout Europe. As the applicant company itself recognised, negotiations were under way between Anheuser-Busch and Budějovický Budvar with a view to reaching an agreement concerning the use of the Budweiser trade mark. In such circumstances, one could reasonably argue that the applicant company's claim was far from constituting an asset in respect of which it could claim to have a "legitimate expectation" that it would be realised. And that situation, we would point out, already existed before the entry into force of the 1986 Bilateral Agreement.

8. Thirdly, there may have been a problem if, as in *Beyeler v. Italy* ([GC], no. 33202/96, ECHR 2000-I), the applicable provision of domestic law was not sufficiently accessible, precise and foreseeable. In that case the Court examined whether the fact that the domestic law left open the time-limit for the exercise of a right of pre-emption by the State in the event of an incomplete declaration without, however, indicating how such an omission could subsequently be rectified could amount to a violation of Article 1 of Protocol No. 1. Such a situation could indeed lead to the conclusion that an interference with the right to the peaceful enjoyment of one's possession would be unforeseeable or arbitrary and therefore incompatible with the principle of lawfulness. In the instant case we have in mind a situation in which the trade mark application filed by Anheuser-Busch could be challenged for an indefinite period of time. However, this was not the case. As the Chamber judgment pointed out, 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. Therefore there has been no violation of Article 1 of Protocol No. 1 on account of a possible procedural problem.

9. Fourthly, it may also be said that, conversely, the registration criteria relied on by Anheuser-Busch were not clear. The doubts as to the proper interpretation of the registration criteria and the complexities of having to

analyse the various international instruments in question meant that it was never a foregone conclusion that Anheuser-Busch's trade mark application would be registered, in other words, there was no justified reliance on a legal act which had a sound legal basis (see, in this respect, *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, Series A no. 222).

10. The four above-mentioned reasons lead us to the conclusion that there was no sufficient basis in the national legislation, or in the settled case-law of the domestic courts, to allow the applicant company to claim that it had a "legitimate expectation" that was protected under Article 1 of Protocol No. 1. As the Court stated in *Kopecký v. Slovakia* ([GC], no. 44912/98, § 52, ECHR 2004-IX): "... where the proprietary interest is in the nature of the claim it may be regarded as an 'asset' only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it."

JOINT DISSENTING OPINION OF JUDGES CAFLISCH AND CABRAL BARRETO

1. We concur with the finding of the judges of the majority that Article 1 of Protocol No. 1 applies in this case. But we would have preferred an approach based on the premise that the applicants, at the relevant time, enjoyed a "legitimate expectation" as defined by the Court (see *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, Series A no. 222).

2. Indeed various treaties and domestic laws grant provisional protection to trade marks from the date of their filing with the competent authority, the National Institute for Industrial Property (NIIP) in the present case. The filing affords some degree of priority and protection for the trade mark until its definitive registration, which may take some time. In the present case, registration was finally refused on the basis of the relevant legislation, namely, the Portuguese Code of Industrial Property in its version of 24 January 1995. Article 189 of that Code provides that "[r]egistration shall also be refused of a mark ... containing ... expressions ... that are contrary to ... domestic ... legislation", and that legislation included the 1986 Bilateral Agreement between Czechoslovakia and Portugal, which had become Portuguese law.

3. Items such as clientele, reputation and urbanisation certificates are intangible in character; they are nevertheless "rights", that is to say, "interests protected by law", as has been recognised by the Court. In the present judgment the Court extends its recognition to applications for the registration of a trade mark, which therefore enjoy the status of "possessions" within the meaning of Article 1 of Protocol No. 1. We agree with the Court but would prefer to hold that the filing of an application for registration of a trade mark creates a "legitimate expectation" in the sense of the case-law on Article 1.

4. Our view is essentially based on the following elements:

(i) The Portuguese courts themselves have held that the filing of an application for the registration of a trade mark creates an "*expectativa jurídica*", a concept practically coterminous with that of "legitimate expectation".

(ii) Requests for registration can be transferred or form the object of licensing agreements.

(iii) On account of the application for registration, the trade mark acquires an economic value at both the national and international levels. It is protected from interference by third parties, any interference entailing a duty of reparation, and enjoys priority over subsequent requests by third parties, that is, an expectation that the applicant will not be deprived of the trade mark by subsequent applications for registration.

(iv) The NIIP has no discretion to grant or refuse registration when the legal conditions existing at the time of the filing are met, as they were until the 1986 Bilateral Agreement intervened. Indeed, the priority attaching to the filed (but not yet registered) trade mark would become an empty shell if it could be nullified at any time by the introduction of new legislation.

5. The above elements prompt the conclusion that the filing of an application for the registration of a trade mark, as distinguished from registration itself, creates rights in favour of the applicant, in particular a right to have the trade mark registered. That right is of a *conditional* nature; it depends on the fulfilment of the statutory conditions for registration existing at the time of the filing. We are, in other words, in the presence of a "legitimate expectation" rather than a "possession" ("*bien*") in the sense of Article 1 of Protocol No. 1. Under the Court's case-law that expectation cannot, however, be cancelled by subsequent national legislation, even if the latter is based on treaty law.

6. Having established (i) that the applicant company was the beneficiary of a "legitimate expectation" and (ii) was protected by Article 1 of Protocol No. 1, it remains to be seen whether it was deprived of that expectation by conduct of Portuguese State organs that was contrary to Article 1.

7. For the majority of the Court (see paragraph 83 of the judgment), the present case was "mainly [about] the manner in which the national courts interpreted and applied domestic law in proceedings between two rival claimants", and had therefore to be distinguished (paragraph 82) from cases such as *Maurice v. France* ([GC], no. 11810/03, ECHR 2005-IX), and *Lecarpentier v. France* (no. 67847/01, 14 February 2006). For the majority, the present dispute is basically one between private parties, rather than between an individual and a State, in other words a situation which – although the majority does not expressly say so – comes close to one that should be viewed under Article 6: the only point that matters (see paragraph 85 of the judgment) is whether there has been "any arbitrariness or manifest unreasonableness" on the part of the organs of the Portuguese State. The majority reaches the conclusion that there has not.

8. In our view, the Court's reasoning is both debatable and contradictory. The case opposes an individual applicant against a State; the applicant company's grievance is that it has been deprived of a "possession" or "legitimate expectation" by the Portuguese courts. Accordingly, the case does *not* pertain to a "private" conflict between private companies. The majority is wrong in thinking the contrary and, in fact, in viewing the issue as something akin to Article 6. And, even if it were right – herein lies the contradiction – why did it bother at all with a lengthy analysis (see paragraphs 66-78 of the judgment) of the applicability of Article 1 of Protocol No. 1?

9. In examining whether there was an unlawful interference with the applicant company's "legitimate expectation", the following points should be borne in mind:

– It appears doubtful that the act of dispossession brought about by the Portuguese Code of Industrial Property, as a consequence of the Bilateral Agreement of 1986, was really performed in the public interest.

– If, like us, one assumes, that the applicant for the registration of a trade mark enjoys a "legitimate expectation", protected by Article 1of Protocol No. 1, that expectation, and in particular the priority inherent therein, was destroyed through the retroactive application of the 1986 Agreement.

– As a company of foreign nationality, the applicant is protected by the "general principles of international law" mentioned in the first paragraph of Protocol No. 1, such as the principle of non-discrimination and the rule requiring prompt, adequate and effective compensation, which has been disregarded in the present case.

The above considerations lead us to the conclusion that there has been an unlawful interference with the applicant company's "legitimate expectation" and, accordingly, a violation of Article 1 of Protocol No. 1.

10. By concluding the Bilateral Agreement of 1986 and applying it retroactively, the Portuguese authorities have objectively caused damage to the applicant company. Whether they did so deliberately or not might have affected the quantum of damages to be awarded, had the Court found in the applicant company's favour. As it did not, the issue can remain undecided.