JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

12 June 2007 *

In Joined Cases T-57/04 and T-71/04,

Budějovický Budvar, národní podnik, established in České Budějovice (Czech Republic), represented by F. Fajgenbaum, lawyer,

applicant in Case T-57/04,

Anheuser-Busch, Inc., established in Saint Louis, Missouri (United States), represented initially by V. von Bomhard, A. Renck, A. Pohlmann, D. Ohlgart and B. Goebel, and subsequently by V. von Bomhard, A. Renck, D. Ohlgart and B. Goebel, lawyers,

applicant in Case T-71/04,

* Language of the case: English.

Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), represented by A. Folliard-Monguiral and I. de Medrano Caballero, acting as Agents,

defendant,

the other parties to the proceedings before the Board of Appeal of OHIM, interveners before the Court of First Instance, being

Anheuser-Busch, Inc. (in Case T-57/04),

Budějovický Budvar, národní podnik (in Case T-71/04),

ACTION for annulment of the decision of the Second Board of Appeal of OHIM of 3 December 2003 (Cases R 1024/2001-2 and R 1000/2001-2), concerning opposition proceedings between Budějovický Budvar, národní podnik and Anheuser-Busch, Inc.,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Fifth Chamber, Extended Composition),

composed of M. Vilaras, President, M.E. Martins Ribeiro, F. Dehousse, D. Šváby and K. Jürimäe, Judges,

Registrar: I. Natsinas, Administrator,

having regard to the applications lodged at the Registry of the Court of First Instance on 10 February (Case T-57/04) and 20 February 2004 (Case T-71/04),

having regard to the Order of the President of the Fifth Chamber of the Court of First Instance of 23 September 2004 joining the present cases for the purposes of the written procedure, the oral procedure and the judgment, pursuant to Article 50 of the Rules of Procedure of the Court of First Instance,

having regard to the response of OHIM lodged at the Court Registry on 27 September 2004,

having regard to the responses of the interveners lodged at the Court Registry on 28 (Case T-71/04) and 29 September 2004 (Case T-57/04),

having regard to the referral of the present cases to the Fifth Chamber, Extended Composition, of the Court of First Instance, and further to the hearing on 13 October 2005,

having regard to the order of 14 May 2007 to reopen the oral procedure and to the observations of the parties on the request from Anheuser-Busch. Inc. of 8 May 2007 for a ruling that there is no need to adjudicate in Case T-71/04,

further to the close of oral procedure on 24 May 2007,

gives the following

Judgment

Legal framework

I — *International law*

1 Articles 1 to 5 of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration ('the Lisbon Agreement'), adopted on 31 October 1958, revised at Stockholm on 14 July 1967 and amended on 28 September 1979, provide as follows:

'*Article 1*

(1) The countries to which this Agreement applies constitute a Special Union within the framework of the Union for the Protection of Industrial Property.

(2) They undertake to protect on their territories, in accordance with the terms of this Agreement, the appellations of origin of products of the other countries of the Special Union, recognised and protected as such in the country of origin and registered at the International Bureau of Intellectual Property ... referred to in the Convention establishing the World Intellectual Property Organisation ...

Article 2

(1) In this Agreement, "appellation of origin" means the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.

(2) The country of origin is the country whose name, or the country in which is situated the region or locality whose name, constitutes the appellation of origin which has given the product its reputation.

Article 3

Protection shall be ensured against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as "kind", "type", "make", "imitation", or the like.

Article 4

The provisions of this Agreement shall in no way exclude the protection already granted to appellations of origin in each of the countries of the Special Union by

virtue of other international instruments, such as the Paris Convention of March 20, 1883, for the Protection of Industrial Property and its subsequent revisions, and the Madrid Agreement of April 14, 1891, for the Repression of False or Deceptive Indications of Source on Goods and its subsequent revisions, or by virtue of national legislation or court decisions.

Article 5

(1) The registration of appellations of origin shall be effected at the International Bureau, at the request of the Offices of the countries of the Special Union, in the name of any natural persons or legal entities, public or private, having, according to their national legislation, a right to use such appellations.

(2) The International Bureau shall, without delay, notify the Offices of the various countries of the Special Union of such registrations, and shall publish them in a periodical.

(3) The Office of any country may declare that it cannot ensure the protection of an appellation of origin whose registration has been notified to it, but only in so far as its declaration is notified to the International Bureau, together with an indication of the grounds therefore, within a period of one year from the receipt of the notification of registration, and provided that such declaration is not detrimental, in the country concerned, to the other forms of protection of the appellation which the owner thereof may be entitled to claim under Article 4, above.

...'

2 Rules 9 and 16 of the Regulations under the Lisbon Agreement, as in force on 1 April 2002, provide as follows:

'Rule 9

Declaration of Refusal

(1) A declaration of refusal shall be notified to the International Bureau by the competent authority of the contracting country for which the refusal is issued and shall be signed by that authority.

...

Rule 16

Invalidation

(1) Where the effects of an international registration are invalidated in a contracting country and the invalidation is no longer subject to appeal, the invalidation shall be notified to the International Bureau by the competent authority of that contracting country. ...'

II — *Community law*

3 Articles 8 and 43 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended and as applicable at the material time, read as follows:

'*Article 8*

Relative grounds for refusal

1. Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered:

(a) if it is identical with the earlier trade mark and the goods or services for which registration is applied for are identical with the goods or services for which the earlier trade mark is protected;

(b) if because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; the likelihood of confusion includes the likelihood of association with the earlier trade mark.

2. For the purposes of paragraph 1, "earlier trade marks" means:

(a) trade marks of the following kinds with a date of application for registration which is earlier than the date of application for registration of the Community trade mark, taking account, where appropriate, of the priorities claimed in respect of those trade marks:

...

(iii) trade marks registered under international arrangements which have effect in a Member State;

...

4. Upon opposition by the proprietor of a non-registered trade mark or of another sign used in the course of trade of more than mere local significance, the trade mark applied for shall not be registered where and to the extent that, pursuant to the law of the Member State governing that sign:

(a) rights to that sign were acquired prior to the date of application for registration of the Community trade mark, or the date of the priority claimed for the application for registration of the Community trade mark;

(b) that sign confers on its proprietor the right to prohibit the use of a subsequent trade mark.

...

Article 43

Examination of opposition

...

2. If the applicant so requests, the proprietor of an earlier Community trade mark who has given notice of opposition shall furnish proof that, during the period of five years preceding the date of publication of the Community trade mark application, the earlier Community trade mark has been put to genuine use in the Community in connection with the goods or services in respect of which it is registered and which he cites as justification for his opposition, or that there are proper reasons for non-use, provided the earlier Community trade mark has at that date been registered for not less than five years. In the absence of proof to this effect, the opposition shall be rejected. If the earlier Community trade mark has been used in relation to part only of the goods or services for which it is registered it shall, for the purposes of the examination of the opposition, be deemed to be registered in respect only of that part of the goods or services.

3. Paragraph 2 shall apply to earlier national trade marks referred to in Article 8(2)(a), by substituting use in the Member State in which the earlier national trade mark is protected for use in the Community.

...'

4 Rule 22 of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1), as amended and as applicable at the material time, provides:

'Rule 22

Proof of use

1. Where, pursuant to Article 43(2) or (3) of the Regulation, the opposing party has to furnish proof of use or show that there are proper reasons for non-use, [OHIM] shall invite him to provide the proof required within such period as it shall specify. If

the opposing party does not provide such proof before the time limit expires, [OHIM] shall reject the opposition.

2. The indications and evidence for the furnishing of proof of use shall consist of indications concerning the place, time, extent and nature of use of the opposing trade mark for the goods and services in respect of which it is registered and on which the opposition is based, and evidence in support of these indications in accordance with paragraph 3.

3. The evidence shall, in principle, be confined to the submission of supporting documents and items such as packages, labels, price lists, catalogues, invoices, photographs, newspaper advertisements, and statements in writing as referred to in Article 76(1)(f) of the Regulation.

...'

III — *National law*

5 Article L. 641-2 of the French Code rural ('the Rural Code'), as applicable at the material time, provides:

'Agricultural or food products, raw or processed, may be given an exclusive, controlled appellation of origin. The provisions of Articles L. 115-2 to L. 115-4 and L. 115-8 to L. 115-15 of the Code de la consummation shall not apply to them.

Subject to the conditions set out below, those products may be given a controlled appellation of origin if they fulfil the requirements of Article L. 115-1 of the Code de la consommation, have a duly established reputation and are the subject of procedures for approval.

A controlled appellation of origin may never be considered as generic in nature and fall into the public domain.

The geographical name which constitutes an appellation of origin, or any other reference suggesting it, may not be used for any similar product, without prejudice to the legislative provisions or regulations in force on 6 July 1990, or for any other product or service if that use is likely to misappropriate or weaken the reputation of the appellation of origin.

The appellations of origin for higher-quality wines referred to in Article L. 641-24 and those which are in force on 1 July 1990 in the overseas departments retain their status.'

6 Article L. 115-5 of the French Code de la consommation ('the Consumer Code'), as applicable at the material time, provides:

'The procedure for allocating a controlled appellation of origin is laid down in Article L. 641-2 of the Rural Code, reproduced below ...'

7 Articles L. 711-3 and L. 711-4 of the French Code de la propriété intellectuelle ('the Intellectual Property Code'), as applicable at the material time, read as follows:

'Article L. 711-3

The following signs may not be adopted as a trade mark or element of a trade mark:

(a) those which are excluded by Article 6ter of the Paris Convention of March 20, 1883, as revised, for the Protection of Industrial Property or by Article 23(2) of Annex I C to the Agreement Establishing the World Trade Organisation;

(b) those which are contrary to public policy or to accepted principles of morality, or the use of which is prohibited by law;

(c) those which are likely to deceive the public, in particular as to the nature, quality or geographical origin of the goods or service.

Article L. 711-4

A sign may not be adopted as a trade mark if it interferes with prior rights, in particular:

(a) an earlier registered or well-known mark within the meaning of Article 6bis of the Paris Convention for the Protection of Industrial Property;

(b) a business name or corporate name, if there is a likelihood of confusion on the part of the public;

(c) a commercial name or sign known throughout the national territory, if there is a likelihood of confusion on the part of the public;

(d) a protected appellation of origin;

(e) copyright;

(f) rights resulting from a protected design or model;

(g) the rights attaching to the personality of a third party, in particular his surname, pseudonym or image;

(h) the name, image or reputation of a local authority.'

Background to the case

I — *The application for a Community trade mark lodged by Anheuser-Busch*

8 On 1 April 1996 Anheuser-Busch, Inc. lodged an application for registration of a Community trade mark with OHIM, pursuant to Regulation No 40/94.

9 That application concerned the following figurative trade mark:



10 The goods in respect of which registration of the figurative trade mark were sought are in Classes 16, 21, 25, 30 and 32 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond, for each of those classes, to the following description:

— Class 16: 'Paper, cardboard and goods made from these materials (included in class 16); printed matter; bookbinding material; stationery; adhesives for stationery or household purposes; instructional and teaching material (except apparatus); plastic materials for packaging (included in class 16); playing cards';

— Class 21: 'Household or kitchen utensils and containers (not of precious metal or coated therewith); combs and sponges; brushes (except paint brushes); brush-making materials; articles for cleaning purposes; unworked or semi-worked glass (except glass used in building); glassware, porcelain and earthenware (included in class 21)';

— Class 25: 'Clothing, footwear, headgear';

— Class 30: 'Flour and preparations made from cereals, bread, pastry and confectionery, ices; honey, treacle; yeast, baking powder; mustard; vinegar, sauces (condiments); spices; ice, snack foods included in class 30';

— Class 32: 'Beer, ale, porter, malted alcoholic and non-alcoholic beverages'.

11 On 1 December 1997, the application for registration of the Community figurative trade mark was published in *Community Trade Marks Bulletin* No 31/97.

II — *Opposition brought against the Community trade mark application*

12 On 27 February 1998, Budějovický Budvar, národní podnik, a company established in the Czech Republic ('Budvar'), brought opposition proceedings pursuant to Article 42 of Regulation No 40/94 in respect of all of the goods specified in the application for registration.

13 In support of its opposition, Budvar relied, first, on a likelihood of confusion as referred to in Article 8(1)(b) of Regulation No 40/94 between the figurative trade mark applied for and the earlier national trade marks of which it is proprietor, namely:

— the international word mark BUDWEISER (R 238 203), initially registered on 5 December 1960 for 'beer of any kind', with effect in Germany, Austria, Benelux and Italy;

— the international figurative mark (R 342 157), initially registered on 26 January 1968 for 'beer of any kind', with effect in Germany, Austria, Benelux, France and Italy, reproduced below:



14 On 3 February 1999, Anheuser-Busch asked Budvar to furnish proof of use of its international trade marks, in accordance with Article 43(2) of Regulation No 40/94. On 7 April 1999, the Opposition Division of OHIM asked Budvar to furnish that proof within two months, that is, by 7 June 1999 at the latest. That time-limit was extended to 7 September 1999 at the request of Budvar.

15 On 7 September 1999, Budvar produced inter alia copies of advertisements which had appeared in eight magazines covering the years 1996 and 1997 and 10 invoices issued between 1993 and 1997, in order to prove the use of international word mark BUDWEISER No R 238 203 in Germany. Budvar also produced copies of advertisements which had appeared in six magazines covering the years 1996 and 1998 and also 10 invoices issued between 1993 and 1997, in order to prove the use of international word mark BUDWEISER No R 238 203 in Austria.

16 In support of its opposition, Budvar relied, second, on the basis of Article 8(4) of Regulation No 40/94, on four appellations of origin for beer, registered on 22 November 1967 with the World Intellectual Property Organisation (WIPO), under the Lisbon Agreement. Those appellations of origin are the following:

— appellation of origin No 49: ČESKOBUDĚJOVICKÉ PIVO (BUDWEISER BIER according to the German version of the registration);

— appellation of origin No 50: BUDĚJOVICKÉ PIVO — BUDVAR (BUDWEISER BIER — BUDVAR according to the German version of the registration);

— appellation of origin No 51: BUDĚJOVICKÝ BUDVAR (BUDWEISER BUDVAR according to the German version of the registration);

— appellation of origin No 52: BUDĚJOVICKÉ PIVO (BUDWEISER BIER according to the German version of the registration).

17 Relying on those registrations, Budvar claimed that the appellations of origin concerned were protected, in particular in France, and provided justification for the opposition based on Article 8(4) of Regulation No 40/94.

III — *Decision of the Opposition Division*

18 By Decision No 2412/2001 of 8 October 2001, the Opposition Division:

— rejected in part the opposition brought against registration of the figurative trade mark applied for, in respect of the opposition based on Article 8(4) of Regulation No 40/94 and on the basis of the four appellations of origin referred to in paragraph 16 above;

— accepted in part the opposition brought against registration of the figurative trade mark applied for, for the goods in Class 32 ('beer, ale, porter, malted alcoholic and non-alcoholic beverages'), in respect of the part of the opposition based on Article 8(1)(b) of Regulation No 40/94 and on the basis of international word mark BUDWEISER No R 238 203.

19 With respect to the rejection of the opposition based on Article 8(4) of Regulation No 40/94, the Opposition Division considered, essentially, that the use of the appellations of origin had not been demonstrated in respect of France and Portugal — the French and Portuguese rights having been relied on in support of the opposition — and that, accordingly, it had not been proven that the rights acquired by virtue of the appellations of origin were more than of mere local significance within the meaning of Article 8(4) of Regulation No 40/94. With respect to Italy — the use of the appellations of origin in Italy having been demonstrated — the Opposition Division found that proof of the protection conferred by Italian law on the appellations of origin concerned had not been made out in respect of dissimilar goods.

20 Regarding the partial acceptance of the opposition based on Article 8(1)(b) of Regulation No 40/94, the Opposition Division considered that evidence of genuine

use of international word mark BUDWEISER No R 238 203 and the international figurative mark R 342 157 had been furnished in respect of Germany, Austria, Benelux and Italy. Moreover, for reasons of procedural economy, the Opposition Division examined, first, international word mark BUDWEISER No R 238 203. Since that mark was clearly valid in Germany and in Austria, the Opposition Division restricted its examination to those two Member States. The Opposition Division held that the goods covered by the figurative trade mark applied for in Class 32 ('beer, ale, porter, malted alcoholic and non-alcoholic beverages') were identical to the goods covered by the international word mark BUDWEISER No R 238 203. It stated that, since the figurative trade mark applied for and the international word mark BUDWEISER No R 238 203 were identical phonetically and conceptually, and since the goods were identical, there was a likelihood of confusion on the part of the public in Germany and in Austria for goods in Class 32. However, it found that the goods covered by the figurative trade mark applied for in Classes 16, 21, 25, 30 and the goods covered by the earlier marks were not similar and that, accordingly, there was no likelihood of confusion for those goods.

IV — *Decisions of the Second Board of Appeal of OHIM*

21 On 27 November 2001 Anheuser-Busch appealed against the decision of the Opposition Division, in so far as that decision accepted the opposition based on Article 8(1)(b) of Regulation No 40/94 for the goods in Class 32.

22 On 10 December 2001 Budvar appealed against the decision of the Opposition Division, in so far as, in particular, the opposition had been rejected in the light of Article 8(4) of Regulation No 40/94 for the goods in Classes 16, 21, 25, 30 and 32.

23 In its appeal, Budvar did not challenge the partial rejection of the opposition based on Article 8(1)(b) of Regulation No 40/94 for the goods in Classes 16, 21, 25 and 30.

24 By a decision handed down on 3 December 2003 (Cases R 1000/2001-2 and R 1024/2001-2) ('the contested decision'), the Second Board of Appeal of OHIM dismissed the appeals brought by Budvar and Anheuser-Busch against the decision of the Opposition Division.

25 As regards the appeal brought by Anheuser-Busch, the Board of Appeal considered that the Opposition Division had not made an error in finding that proof of the use of international word mark BUDWEISER No R 238 203 had been furnished in respect of Germany and Austria. The Board of Appeal also found that there was a likelihood of confusion between the figurative trade mark applied for and the international word mark BUDWEISER No R 238 203, in Germany and in Austria, for the goods in Class 32, given that, first, the most dominant feature of the figurative trade mark applied for was identical to the earlier word mark and, second, that the goods in question were identical.

26 As regards the appeal brought by Budvar, the Board of Appeal found, first of all, that it was inadmissible as far as the goods in Class 32 were concerned, since Budvar had been successful on that point under Article 8(1)(b) of Regulation No 40/94.

27 Regarding the substance, with respect to the goods in Classes 16, 21, 25 and 30 of the trade mark application and the opposition based on Article 8(4) of Regulation No 40/94, on the basis of the appellations of origin, the Board of Appeal found, first,

that the evidence furnished by Budvar was insufficient to establish the protection of the appellations of origin in question under Italian and Portuguese law.

28 Next, contrary to what the Opposition Division had found, the Board of Appeal found that proof that the rights acquired by virtue of the appellations of origin were of more than mere local significance, within the meaning of Article 8(4) of Regulation No 40/94, had already been furnished in other proceedings in respect of France. Budvar was therefore not required, in the view of the Board of Appeal, to prove those facts again, contrary to what the Opposition Division had held.

29 Accordingly, in the Board of Appeal's view, the only remaining issue was whether the appellations of origin in question were protected under French law. It resolved that issue, for the goods in Classes 16, 21, 25 and 30, by finding that appellations of origin registered under the Lisbon Agreement enjoyed in France the protection conferred by Article L. 641-2 of the Rural Code, which provides that '[t]he geographical name which constitutes an appellation of origin, or any other reference suggesting it, may not be used for any similar products ..., or for any other product or service if that use is likely to misappropriate or weaken the reputation of the appellation of origin'. The Board of Appeal added that, since the goods covered by the Community trade mark application were different from the goods covered by the appellations of origin in question, the issue was whether the use in France of the figurative trade mark applied for was likely to misappropriate or weaken the reputation of those appellations of origin. The Board of Appeal stated in this regard that a reputation could not be misappropriated or weakened if it did not exist and that Budvar had not adduced any evidence to show that the appellations of origin in question possessed a reputation in France. The Board of Appeal considered that such a reputation could not, moreover, be presumed and that Budvar had failed to show how the reputation of the appellations of origin, assuming it existed, would be likely to be misappropriated or weakened if Anheuser-Busch were allowed to use a figurative mark containing the word 'Budweiser' in relation to the goods applied for in Classes 16, 21, 25 and 30.

Forms of order sought by the parties

I — *Case T-57/04*

30 Budvar claims that the Court should:

— annul the decision of the Second Board of Appeal of OHIM of 3 December 2003 in Case R 1024/2001-2;

— reject the application for registration lodged on 1 April 1996 on behalf of Anheuser-Busch for goods in Classes 16, 21, 25 and 31;

— notify the judgment of the Court to OHIM;

— order Anheuser-Busch to pay the costs.

31 OHIM and Anheuser-Busch contend that the Court should:

— dismiss the action;

— order Budvar to pay the costs.

II — *Case T-71/04*

32 Anheuser-Busch claims that the Court should:

— annul the decision of the Second Board of Appeal of OHIM of 3 December 2003 in Case R 1000/2001-2, in so far as it rejects the trade mark application for goods in Class 32;

— order OHIM to pay the costs.

33 OHIM contends that the Court should:

— dismiss the action in its entirety;

— order Anheuser-Busch to pay the costs.

34 Budvar contends that the Court should:

— declare the action brought by Anheuser-Busch to be inadmissible;

— in the alternative, uphold the decision contested by Anheuser-Busch;

— order the notification of the Court's judgment to OHIM;

— order Anheuser-Busch to pay the costs.

Law

I — *Case T-57/04*

35 The Court notes, as a preliminary point, that Budvar's action before the Court seeks to challenge the contested decision in so far as it rejected the opposition based on Article 8(4) of Regulation No 40/94 for the goods in Classes 16, 21, 25 and 30.

36 Budvar's action before the Court does not seek to challenge the contested decision in so far as it found that the appeal brought before the Board of Appeal was inadmissible for goods in Class 32.

37 The Court also notes that, in its application, Budvar incorrectly refers to Class 31, which is unrelated to the figurative trade mark application at issue here.

A — *Admissibility of Budvar's second head of claim*

38 By its second head of claim, seeking '[rejection of] the application for registration lodged on 1 April 1996 on behalf of Anheuser-Busch for goods in Classes 16, 21, 25 and 31', Budvar is essentially asking the Court to direct OHIM to refuse to register the figurative trade mark applied for (see, to that effect, Case T-388/00 *Institut für Lernsysteme* v *OHIM — Educational Services (ELS)* [2002] ECR II-4301, paragraph 18, and Case T-33/03 *Osotspa* v *OHIM — Distribution & Marketing (Hai)* [2005] ECR II-763, paragraph 14).

39 The Court notes, in this regard, that, under Article 63(6) of Regulation No 40/94, OHIM is to take the measures necessary to comply with judgments of the Community courts. Accordingly, the Court of First Instance is not entitled to issue directions to OHIM (Case T-331/99 *Mitsubishi HiTec Paper Bielefeld* v *OHIM (Giroform)* [2001] ECR II-433, paragraph 33; Case T-34/00 *Eurocool Logistik* v *OHIM (EUROCOOL)* [2002] ECR II-683, paragraph 12; and *ELS*, cited in paragraph 38 above, paragraph 19).

40 It follows that Budvar's second head of claim is inadmissible.

B — *Substance*

41 Budvar's action rests on a single plea in law, alleging infringement of Article 8(4) of Regulation No 40/94.

42 Budvar begins by describing the system which in its view governs the protection of appellations of origin under French law.

43 Budvar states, inter alia, that the purpose of an appellation of origin is to attach to a product a geographical name which is a guarantee of its origin and its characteristics, in order to protect both the consumer and the producer of the product against misappropriations of the name. That objective justifies the fact that the provisions referring to the protection of appellations of origin in France appear both in the Intellectual Property Code and in the Rural Code, both of which refer to the Consumer Code. Budvar adds that an appellation of origin is defined by a decree defining the geographical area of production and determining the conditions of that production and of approval of the product.

44 Budvar states that appellations of origin have a public policy status and absolute protection and that there is, in French law, a primacy of appellations of origin over trade marks. That primacy is expressed by an absolute prohibition on filing an application for a trade mark which would interfere with an appellation of origin, and also by a prohibition of the use of any sign which, by reproducing the geographical name constituting that appellation of origin, would interfere with it. Budvar observes in this regard, first, that Article L. 115-5 of the Consumer Code provides that '[a] controlled appellation of origin may never be considered as generic in nature and fall into the public domain', second, that an appellation of origin is in essence the designation of a product originating in a determined area and, third, that an appellation of origin cannot lapse, unlike a trade mark which is not used.

45 Budvar infers therefrom that a trade mark may never be registered if it is likely to interfere with an appellation of origin protected in France, irrespective of the goods or services in respect of which that application for registration is made. Consequently, an appellation of origin cannot be used for any other goods, irrespective of whether they are identical, similar or different.

46 In the light of the above factors, Budvar claims that the Board of Appeal made two errors.

47 In one line of argument, Budvar submits that Article L. 641-2 of the Rural Code was not applicable and that the Board of Appeal should have referred to Articles L. 711-3 and L. 711-4 of the Intellectual Property Code to assess whether a sign consisting of the geographical name of a protected appellation may be registered as a trade mark.

48 In a second, alternative, line of argument, Budvar submits that the Board of Appeal in any event applied Article L. 641-2 of the Rural Code incorrectly.

49 The Court notes that the parties' arguments concern, more specifically, the relevance to the present case of the fourth paragraph of Article L. 641-2 of the Rural Code.

1. First limb: inapplicability of the fourth paragraph of Article L. 641-2 of the Rural Code

(a) Arguments of the parties

Arguments of Budvar

50 Recalling the wording of Article 8(4) of Regulation No 40/94, Budvar states that it is not disputed that French law allows the holder of an appellation of origin to prohibit both the registration and the use of a subsequent trade mark, on the basis of the provisions of Article L. 711-4 of the Intellectual Property Code and Article L. 641-2 of the Rural Code.

51 In the present case, however, it is the registration of the 'Budweiser' name as a trade mark which is sought, the use of such a mark not being at issue.

52 Budvar accordingly refers to Articles L. 711-3 and L. 711-4 of the Intellectual Property Code, which lay down the bases justifying a refusal to register a trade mark.

53 On the basis of Article L. 711-4(d) of the Intellectual Property Code, which provides that '[a] sign may not be adopted as a trade mark if it interferes with prior rights, in particular ... a protected appellation of origin', Budvar submits that the holder of the right to use an appellation of origin may obtain a declaration of the nullity and prohibit the use of a mark reproducing or imitating it.

54 Budvar adds that appellations of origin constitute prior rights which preclude the validity of a trade mark, without its being necessary to demonstrate a risk of confusion or similarity of the goods, contrary to what is required for company or trading names, signs or trade names, or indeed earlier trade marks. On the latter point Budvar refers to Articles L. 716-1, L. 713-2 and L. 713-3 of the Intellectual Property Code. Accordingly, on the basis of Article L. 711-4 of the Intellectual Property Code, it must be considered that a sign which reproduces an appellation of origin may not be adopted as a trade mark, without its being necessary to take into account either the reputation of that appellation of origin, which exists by definition, or the goods covered by the trade mark applied for.

55 Budvar adds that registration may also be refused on the basis of being contrary to public policy, as permitted by Article L. 711-3(b) of the Intellectual Property Code, which provides that '[t]he following signs may not be adopted as a trade mark or element of a trade mark: ... those which are contrary to public policy or to accepted principles of morality, or the use of which is prohibited by law'. According to Budvar, since the public policy nature of appellations of origin has already been demonstrated, any application for registration of a trade mark which interferes with an appellation of origin must be refused on this basis. Budvar refers in particular to a judgment of the Cour d'appel de Paris (Paris Court of Appeal) of

15 February 1990, which held that public policy must be understood as including the mandatory rules of economic legislation, in particular those intended to protect consumers, and to a judgment of the French Cour de cassation of 26 October 1993 establishing public policy protection for the appellations 'Fourme d'Ambert' and 'Fourme de Montbrison'.

56 Budvar states lastly that Article L. 711-3(c) of the Intellectual Property Code also prohibits the registration of any misleading or deceptive sign, stating that '[t]he following signs may not be adopted as a trade mark or element of a trade mark: ... those which are likely to deceive the public, in particular as to the nature, quality or geographical origin of the goods or service'. Thus, according to Budvar, the making available of goods in Classes 16, 21, 25 and 30 under the name 'Budweiser', which possesses a reputation for a number of products, including beers, would mislead the public or might deceive it as regards the characteristics of that product, in particular those connected with its place of production.

57 By contrast, the fourth paragraph of Article L. 641-2 of the Rural Code, reproduced in Article L. 115-5 of the Consumer Code, is not intended to prohibit registration of a trade mark which conflicts with an appellation of origin but rather prohibits only the use of the geographical name which constitutes in whole or in part an appellation of origin. According to Budvar, the provisions of the Intellectual Property Code do not have the same purpose as those of the Consumer Code. The former relate to the appropriation of signs in the field of intellectual property, whereas the latter directly concern consumer protection.

58 Consequently, in order to determine whether a sign constituted by the geographical name of a protected appellation may be adopted as a trade mark, regard must be had to Articles L.711-3 and L.711-4 of the Intellectual Property Code and not to the fourth paragraph of Article L.641-2 of the Rural Code, as did the Board of Appeal.

59 Budvar adds, in a letter of 24 August 2005 lodged in response to a question put by the Court, that it referred before OHIM, and in particular before the Board of Appeal, to the fourth paragraph of Article L. 641-2 of the Rural Code as a basis for its opposition. Budvar nevertheless maintains that it may henceforth, before the Court, rely on the inapplicability of that provision to the present case. Budvar submits, first, that it is not changing the subject-matter of the proceedings, as they consist of the opposition brought against the registration of the figurative trade mark applied for. Budvar states, second, that its reliance on Articles L. 711-3 and L. 711-4 of the Intellectual Property Code does not amount to taking new facts into account, as those articles form the basis of the action before the Court. Regarding more specifically Article L. 711-4(d) of the Intellectual Property Code, Budvar states that it relied on that provision before OHIM. Lastly, referring to Case T-318/03 *Atomic Austria* v *OHIM — Fabricas Agrupadas de Muñecas de Onil (ATOMIC BLITZ)* [2005] ECR II-1319, Budvar considers, essentially, that OHIM should of its own motion have found out about the national law of the Member State concerned.

Arguments of OHIM

60 Before responding to the arguments put forward by Budvar in the first limb of its submissions, OHIM gives its interpretation of Article 8(4) of Regulation No 40/94, and in particular of the requirements it lays down.

61 First, OHIM points out that the earlier right must be based on use of more than mere local significance. In that regard, it states that registrations effected under the Lisbon Agreement constitute earlier rights falling within the scope of Article 8(4) of Regulation No 40/94. It also notes that proof of use of the earlier rights in France was furnished in this case by Budvar.

62 Second, OHIM submits that Article 8(4) of Regulation No 40/94 covers unregistered trade marks and similar earlier signs used in the course of trade for the designation of goods or services or of the business activity of the proprietor of the right. Geographical origin is a business-related factor because it is a key element which determines the choice and purchase of the goods in question. OHIM refers in this connection to the judgment of the Court of Justice in Case C-108/01 *Consorzio del Prosciutto di Parma and Salumificio S. Rita* [2003] ECR I-5121.

63 Third, OHIM notes that Article 8(4) of Regulation No 40/94 requires that the opponent be 'the proprietor of a non-registered trade mark or of another sign used in the course of trade'. OHIM points out in this connection that under some legal systems geographical indications are not business signs, because no individual rights are vested in those entitled to use them. Other legal systems, however, vest in natural persons or associations an exclusive right in a geographical indication, including the right to prohibit the use of a subsequent trade mark. In the latter case, which, in OHIM's view, covers the situation under the French legislation applicable to this case, the right based on the geographical indication falls within the scope of Article 8(4) of Regulation No 40/94.

64 Moreover, referring to Article 5(1) of the Lisbon Agreement, OHIM points out that appellations of origin are registered, albeit at the request of the competent offices, in the name of natural persons or legal entities, public or private. Furthermore, Article 8 of the Lisbon Agreement provides that legal action required for ensuring the protection of appellations of origin may be taken under the provisions of the national legislation, either at the instance of the competent office or at the request of the public prosecutor, or by any interested party. In OHIM's view, the exclusive right to use a protected designation and the right to bring an action against improper use are sufficient to qualify as a right, or at least a position, of proprietor as referred to in Article 8(4) of Regulation No 40/94. That conclusion is confirmed by a reading of Article 5(3) of the Lisbon Agreement.

65 Fourth, OHIM states that the right in question must be protected under the national legislation before the date of filing of the contested trade mark application. In this case, OHIM points out that the appellations of origin concerned were registered on 22 November 1967 and that their protection in France commenced with that registration. The rights in question thus pre-date the filing of the contested trade mark application.

66 Fifth, OHIM turns its attention to the requirement that the earlier right must confer on its proprietor, under the applicable national legislation, the right to prohibit the use of the opposed trade mark.

67 OHIM replies here inter alia to the arguments relating to the French legislation relevant in this case advanced by Budvar in the first limb of its submissions.

68 OHIM maintains that it is common ground that French law contains a number of provisions relating to conflicts between appellations of origin and later signs.

69 Referring to the wording of the fourth paragraph of Article L. 641-2 of the Rural Code, OHIM points out that that provision is mentioned and reproduced in Article L. 115-5 of the Consumer Code.

70 As regards Budvar's argument that the relevant provisions in this case were Articles L. 711-3(b) and (c) and L. 711-4(d) of the Intellectual Property Code and not Article L. 641-2 of the Rural Code, contrary to what the Board of Appeal decided, OHIM points out that, in a case where Article 8(4) of Regulation No 40/94 is involved, the national law must be applied in the same manner as a national court would do. In that respect, the national case-law is vested with a special authority binding on OHIM.

71 OHIM notes that the national judgments cited by Budvar during the opposition proceedings or before the Court, which deal with conflicts between appellations of origin and later trade marks, all applied the fourth paragraph of Article L. 641-2 of the Rural Code rather than Article L. 711-4(d) of Intellectual Property Code. This demonstrates that neither Article L. 711-4(d) of the Intellectual Property Code nor any other provision in that code is applicable.

72 Analysing more specifically Article L. 711-4(d) of the Intellectual Property Code, OHIM disputes Budvar's claim that the protection of appellations of origin against later trade marks is absolute and unconditional. OHIM points out in that regard that Article L. 711-4(d) of the Intellectual Property Code refers to the prohibition on registering a sign conflicting with an appellation of origin, rather than a prohibition on using such a sign. Given that Article 8(4) of Regulation No 40/94 expressly requires national law to confer 'the right to prohibit the use of a subsequent trade mark' rather than its registration, OHIM concludes that Article L. 711-4(d) of the Intellectual Property Code is not applicable.

73 Even assuming that the right to prohibit registration also confers the right to prohibit use of a later trade mark, regard should be had to the requirements for 'interference' with an appellation of origin to arise, as referred to in Article L. 711-4(d) of the Intellectual Property Code.

74 OHIM points out, as noted by Budvar, that the Intellectual Property Code is silent on this notion of 'interference' in regard to appellations of origin, whereas it is more explicit in regard to earlier trade marks, company names or trade names. In OHIM's view, this is not surprising since the scope of protection of appellations of origin is specifically defined by the fourth paragraph of Article L. 641-2 of the Rural Code. The notion of 'interference' should therefore be interpreted in the light of the latter provision.

75 It follows from all those considerations that Article L. 711-4(d) of the Intellectual Property Code cannot augment, or diminish, the legal content of the fourth paragraph of Article L. 641-2 of the Rural Code. The latter provision is the only relevant one for determining the scope of the protection afforded to appellations of origin against the use of later signs, including trade marks.

76 As regards the reliance by Budvar on Article L. 711-3(b) and (c) of the Intellectual Property Code, OHIM submits that those provisions are not relevant because they deal with absolute grounds of refusal, namely the prohibition of signs which are contrary to public policy or which are liable to deceive the public, in particular as to the nature, quality or geographical origin of the goods or services. These provisions mirror Article 7(1)(f) and (g) of Regulation No 40/94. Referring to Case T-224/01 *Durferrit* v *OHIM — Kolene* (*NU-TRIDE*) [2003] ECR II-1589, OHIM points out that, in any case, national or Community provisions relating to absolute grounds for refusal may not be relied on in opposition proceedings before OHIM.

77 Moreover, OHIM states, in a letter of 9 August 2005 lodged in response to a question put by the Court, that Budvar may not rely on the inapplicability of the fourth paragraph of Article L. 641-2 of the Rural Code to the present case, after having stated before OHIM that that provision formed the basis of the opposition proceedings in question.

Arguments of Anheuser-Busch

78 Anheuser-Busch points out first of all that, under Article 8(4) of Regulation No 40/94 and so far as the applicable national legislation is concerned, the relevant

provisions of law, case-law and doctrine constitute part of the factual background. Those facts must be submitted and proved by the opponent, in accordance with Article 74(1) of Regulation No 40/94. In the case at hand, Budvar has not provided a coherent explanation of the relevant law, let alone evidence for the positions that it has taken.

79 As regards the French legislation applicable here, Anheuser-Busch considers that Budvar's submissions throughout the various proceedings have been contradictory and unclear. Before OHIM, the opposition was based predominantly on the fourth paragraph of Article L. 641-2 of the Rural Code. When the Board of Appeal rejected the opposition on that basis, Budvar changed its view and stated, for the first time, that the fourth paragraph of Article L. 641-2 of the Rural Code did not apply (maintaining instead that Articles L.711-3 and L.711-4 of the Intellectual Property Code should be applied). Anheuser-Busch argues that that change of view and the contradictory presentation of the legal situation in France in themselves justify the dismissal of the present action. In particular, Anheuser-Busch maintains that Budvar is prevented from changing the legal basis of the claim at this stage of the proceedings and that the arguments submitted in that regard before the Court should be disregarded. That would be in line with the relevant practice of the Court (Case T-129/01 *Alejandro* v *OHIM — Anheuser-Busch* (*BUDMEN*) [2003] ECR II-2251, paragraph 67, and Case T-10/03 *Koubi* v *OHIM — Flabesa* (*CONFORFLEX*) [2004] ECR II-719, paragraph 52).

80 Anheuser-Busch maintains, moreover, that the fourth paragraph of Article L. 641-2 of the Rural Code is relevant in this case. It points out that Budvar itself stated that Article L. 711-4 of the Intellectual Property Code 'prohibits the registration as a trade mark of a sign which would interfere with an appellation of origin' whereas, on the other hand, the fourth paragraph of Article L. 641-2 of the Rural Code 'prohibits only the use of the geographical name which constitutes wholly or in part an appellation of origin'. In other words, Article L. 711-4 of the Intellectual Property Code relates to the registration of French marks whereas the fourth paragraph of Article L. 641-2 of the Rural Code relates to the use of a subsequent mark. Consequently, bearing in mind the fact that Article 8(4) of Regulation No 40/94

concerns the 'right to prohibit the use of a subsequent trade mark', Anheuser-Busch concludes that only the fourth paragraph of Article L. 641-2 of the Rural Code is applicable.

81 Moreover, even if Budvar's arguments concerning Article L. 711-4 of the Intellectual Property Code are admissible and must be examined, Anheuser-Busch submits that those arguments are unfounded.

82 In particular, Anheuser-Busch points out that Article L. 711-4 of the Intellectual Property Code does not determine the scope of protection of all the earlier rights it mentions. By stating that such earlier rights prevent the registration of a trade mark if the mark infringes them, Article L. 711-4 of the Intellectual Property Code presupposes rather that the scope of protection is defined and regulated elsewhere. If Budvar's interpretation were correct, other earlier rights (such as well-known earlier trade marks, copyrights, industrial design rights or personality rights) would enjoy 'absolute protection' against subsequent trade marks, irrespective of other requirements such as, for example, similarity of the rights in question.

83 The real question to be posed under Article L. 711-4 of the Intellectual Property Code is whether or not there has been interference with earlier rights. This can only be answered by taking into account the special rules applying to the earlier rights. In this respect, Anheuser-Busch notes that the Intellectual Property Code itself explicitly refers to the Rural Code. In particular, Title II of Book VII of the Intellectual Property Code, which concerns 'Appellations of Origin', contains only one article (L.721-1), which states that '[t]he rules relating to the determination of appellations of origin are laid down by Article L. 115-1 of the Consumer Code'. The relevant provisions for the protection of appellations of origin are therefore to be found in the Consumer Code, which in turn refers to the Rural Code. Anheuser-Busch thus disputes the position taken by Budvar that a sign which reproduces an appellation of origin may not be registered as a trade mark in any circumstances. In Anheuser-Busch's view, an appellation of origin is protected for a particular product. Since the products covered by the present cases are dissimilar, the use of the same

term for those products cannot interfere with the appellations of origin, unless there are specific circumstances. Such circumstances are provided for only in the fourth paragraph of Article L. 641-2 of the Rural Code and not in Article L. 711-4 of the Intellectual Property Code. The latter provision is therefore irrelevant when determining whether or not French law gives Budvar a right under Article 8(4) of Regulation No 40/94.

84 Anheuser-Busch observes moreover that for the first time in six years of proceedings Budvar alleges infringement of Article L. 711-3(b) and (c) of the Intellectual Property Code. Anheuser-Busch sees no need to reply to those arguments, which are inadmissible and inapplicable. Those allegations are belated and, moreover, not supported by any facts or evidence. Anheuser-Busch also points out that the present cases result from oppositions concerning relative grounds for refusal. Article L. 711-3 of the Intellectual Property Code, however, relates to absolute grounds for refusing trade mark applications, and moreover applies only to trade mark applications filed in France.

(b) Findings of the Court

85 The Court notes that Article 8(4) of Regulation No 40/94 allows for opposition proceedings to be brought against an application for a Community trade mark on the basis of a sign other than an earlier trade mark, the latter situation being covered by Article 8(1) to (3) and (5).

86 According to the wording of Article 8(4) of Regulation No 40/94, that sign must be used in the course of trade and be of more than mere local significance. Pursuant to the law of the Member State governing that sign, the ensuing rights must have been

acquired prior to the date of application for registration of the Community trade mark, or the date of the priority claimed for the application for registration of the Community trade mark. Also pursuant to the law of the Member State governing that sign, the sign must confer on its proprietor the right to prohibit the use of a subsequent trade mark.

87 The question raised by Budvar before the Court relates to the last condition laid down by Article 8(4) of Regulation No 40/94, that is, whether, in the present case, it has been sufficiently established that the appellations of origin relied on confer the right, on the basis of the applicable French legislation, to prohibit the use of a subsequent trade mark.

88 Given that Article 8(4) of Regulation No 40/94 is in the part relating to relative grounds of refusal, and taking into account Article 74 of that regulation, the onus of proving that the sign in question confers the right to prohibit the use of a subsequent trade mark is on the opposing party before OHIM.

89 In that context, account must be taken, inter alia, of the national rules relied on and judicial decisions delivered in the Member State concerned. On that basis, the opposing party must demonstrate that the sign in question falls within the scope of application of the law of the Member State relied on and that it confers the right to prohibit the use of a subsequent trade mark. It must be emphasised that, in the context of Article 8(4) of Regulation No 40/94, the proof put forward by the opposing party must address the matter from the perspective of the Community trade mark for which registration is sought.

90 The Board of Appeal, after recalling the wording of Article 1(1) and (2), Article 2(1), Article 3, Article 5(1) and Article 8 of the Lisbon Agreement (paragraphs 41 to 45 of the contested decision), held that '[a]ppellations of origin that are registered under the Lisbon Agreement enjoy in France the protection conferred by Article L. 641-2 of the [Rural Code]' (paragraph 46 of the contested decision).

91 The Court notes that the fourth paragraph of Article L. 641-2 of the Rural Code is reproduced in the fourth paragraph of Article L. 115-5 of the Consumer Code.

92 The Court also notes that the fourth paragraph of Article L. 641-2 of the Rural Code, reproduced in the fourth paragraph of Article L. 115-5 of the Consumer Code, was relied on by Budvar before OHIM, in particular in the appeal brought before the Board of Appeal.

93 It is only before this Court that Budvar has argued, for the first time, that Article L. 641-2 of the Rural Code was inapplicable to the present case and that the Board of Appeal should have referred to Article L. 711-3(b) and (c) and Article L. 711-4(d) of the Intellectual Property Code.

94 The Court notes as a preliminary point that, apart from Article L. 641-2 of the Rural Code, certain articles of the Intellectual Property Code were relied on by Budvar before OHIM. Regarding more specifically Article L. 711-4(d) of the Intellectual Property Code, the Court notes that that provision covers 'protected' appellations of origin. The applicant was therefore entitled to raise the issue of the role of Article L. 711-4(d) of the Intellectual Property Code in French law and of the possible link between that provision and Article L. 641-2 of the Rural Code. For those reasons, the Court finds that Budvar is entitled to challenge the application made by the Board of Appeal of Article L. 641-2 of the Rural Code to the present case and the failure to take into account, inter alia, Article L. 711-4(d) of the Intellectual Property Code.

95 Turning to the substance, first, the Court notes that Budvar proceeds from the assumption that the fourth paragraph of Article L. 641-2 of the Rural Code is not applicable, since that provision contains a prohibition of the use of a geographical

name which constitutes an appellation of origin, not a prohibition of registering a trade mark. Budvar's arguments must be understood as meaning that the fourth paragraph of Article L. 641-2 of the Rural Code is not applicable in proceedings concerning the registration of a Community trade mark. On this point, suffice it to note that Article 8(4) of Regulation No 40/94 provides that, pursuant to the applicable national law, the sign in question must confer on its proprietor the right to prohibit the 'use' of a subsequent trade mark. Article 8(4) of Regulation No 40/94 does not require that, pursuant to the applicable national law, the sign in question must confer on its proprietor the right to prohibit the 'registration of a trade mark'. Budvar's assumption is therefore unfounded. Accordingly, the possibility of taking account of the fourth paragraph of Article L. 641-2 of the Rural Code cannot be excluded on that ground.

96 Second, the Court notes that the fourth paragraph of Article L. 641-2 of the Rural Code covers situations in which a subsequent sign uses, directly or indirectly, the geographical name which constitutes an appellation of origin.

97 Article 2 of the Lisbon Agreement, pursuant to which the names in question were registered as appellations of origin, provides that an appellation of origin, for the purposes of that agreement, means the 'geographical name' of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.

98 In the present case, it is common ground that the figurative trade mark for which registration is sought uses directly a geographical name which constitutes an appellation of origin within the meaning of Article 2 of the Lisbon Agreement.

99 Third, the fourth paragraph of Article L. 641-2 of the Rural Code forms part of Title IV relating to the development of agricultural and food products, in which it appears

in Chapter 1, 'Appellations of origin'. Articles L. 641-1-1 to L. 641-4 of the Rural Code set out the framework for the procedures for recognition of appellations of origin, with the fourth paragraph of Article L. 641-2 specifying the extent of the protection conferred on appellations of origin where the geographical name which constitutes them or any other reference suggesting them is used. The protection conferred on appellations of origin, geographical indications and certificates of specific character registered at Community level, is reproduced in Articles L. 642-1 to L. 642-4 of the Rural Code.

100 The fourth paragraph of Article L. 115-5 of the Consumer Code, which reproduces the fourth paragraph of Article L. 641-2 of the Rural Code, forms part of a section entitled 'Appellations of origin', itself part of a chapter relating to the development of products and services in a title relating to consumer information. The fourth paragraph of Article L. 115-5 of the Consumer Code refers to the procedure for attributing a controlled appellation of origin, as defined by Article L. 641-2 of the Rural Code, as well as the extent of the protection conferred on appellations of origin, pursuant to the fourth paragraph of that provision, where the geographical name which constitutes them or any other reference suggesting them is used.

101 It follows that the fourth paragraph of Article L. 641-2 of the Rural Code, as well as the fourth paragraph of Article L. 115-5 of the Consumer Code which reproduces it, are specific provisions which define the extent of the protection conferred on appellations of origin under French law, where the geographical name which constitutes them or any other reference suggesting them is used.

102 Article L. 711-4(d) of the Intellectual Property Code, as well as the other provisions of that code relied on by Budvar, are included in Title 1 relating to manufacturing, commercial and service trade marks and in Chapter 1, 'Elements constituting the trade mark'.

103 The Court notes on this point, first, that the provisions of the Intellectual Property Code relied on by Budvar, in contrast to the abovementioned provisions of the Rural Code and of the Consumer Code, do not appear in a part of the code specifically relating to appellations of origin.

104 The Court notes, next, that the provisions of the Intellectual Property Code relied on by Budvar concern the conditions for registration of trade marks under French law and not the conditions of their use for the purposes of Article 8(4)(b) of Regulation No 40/94.

105 Moreover, regarding specifically Article L. 711-4(d) of the Intellectual Property Code, it states that '[a] sign may not be adopted as a trade mark if it interferes with ... a protected appellation of origin'. In order to determine to what extent an appellation of origin is 'protected' and, where applicable, whether a sign 'interferes with' it, regard must be had, inter alia, to the fourth paragraph of Article L. 641-2 of the Rural Code, reproduced in the fourth paragraph of Article L. 115-5 of the Consumer Code, where, as in the present case, the geographical name which constitutes that appellation of origin is used by the trade mark for which registration is sought.

106 Fourth, the Court notes that, when the contested decision was adopted, the only French judicial decision which, like the present case, concerned the use, for a dissimilar product, of a geographical name constituting an appellation of origin registered in a third country and protected pursuant to the Lisbon Agreement, and was delivered after the introduction in 1990 of the fourth paragraph of Article L. 641-2 of the Rural Code in French law, is a judgment of the Cour d'appel de Paris of 17 May 2000 giving effect to the Cuban appellations of origin Habana and Habanos to designate cigars and tobacco, either in leaf form or manufactured, and products made with that tobacco ('the *Havana* judgment'). That judgment was relied on by Budvar before OHIM.

107 That case concerned the trade mark Havana, registered and used in France, inter alia for perfume.

108 That judgment, the Cour d'appel de Paris first examined the conditions laid down by the fourth paragraph of Article L. 115-5 of the Consumer Code, which reproduces the fourth paragraph of Article L. 641-2 of the Rural Code, and concluded that 'the risk of misappropriation of the reputation of the appellation of origin Habana [was] genuine and [was] thus sufficiently serious'.

109 Second, in a part entitled 'Measures to be taken', the Cour d'appel de Paris considered that, by application, inter alia, of Article L. 711-4(d) of the Intellectual Property Code, the claimant was 'entitled to seek annulment of the trade mark Havana filed in France'.

110 Moreover, without using as a basis the provisions of the Intellectual Property Code, the Cour d'appel de Paris stated that the claimant was 'also entitled to ask for an order prohibiting the companies [in question] from using the name Havana to designate all of the cosmetic products in their ranges'. Given the terms employed by the Cour d'appel de Paris, the prohibition on using the name 'havana' was based on the fourth paragraph of Article L. 115-5 of the Consumer Code, which reproduces the fourth paragraph of Article L. 641-2 of the Rural Code.

111 It follows that the Cour d'appel de Paris, in that case, examined the conditions laid down by the fourth paragraph of Article L. 115-5 of the Consumer Code, which reproduces the fourth paragraph of Article L. 641-2 of the Rural Code, in order to determine the protection which could be conferred on the appellations of origin in question, registered pursuant to the Lisbon Agreement, under French law.

112 It also follows that, by application of the abovementioned provisions of the Consumer Code, which reproduce those of the Rural Code, the Cour d'appel de Paris was able to prohibit the use of the geographical name which constituted the appellations of origin in question for the products concerned, and hence the use of the disputed trade mark. The application of the fourth paragraph of Article L. 641-2 of the Rural Code, reproduced in the fourth paragraph of Article L. 115-5 of the Consumer Code, can therefore confer entitlement to prohibit the 'use' of a subsequent trade mark, for the purposes of Article 8(4) of Regulation No 40/94.

113 The Court notes that the approach adopted in the *Havana* judgment had already been used by the Cour d'appel de Paris, in the context of the protection of appellations of origin registered under French law, in a judgment of 15 December 1993 relating to the protection of the controlled appellation of origin Champagne. That judgment, also relied on by Budvar before OHIM, concerned a trade mark registered in France for perfume which consisted of the geographical name constituting that appellation of origin. In that case, the Cour d'appel de Paris first applied the fourth paragraph of Article L. 115-5 of the Consumer Code, which reproduces the fourth paragraph of Article L. 641-2 of the Rural Code, before ruling on the application of the provisions of the Intellectual Property Code.

114 In the light of all of the foregoing, the Court finds that the Board of Appeal did not make an error in taking into consideration the fourth paragraph of Article L. 641-2 of the Rural Code, which is reproduced in the fourth paragraph of Article L. 115-5 of the Consumer Code.

115 Accordingly, the first limb of the single plea relied on by Budvar must be rejected as unfounded.

2. Second limb, in the alternative: the incorrect application by the Board of Appeal of the fourth paragraph of Article L. 641-2 of the Rural Code

(a) Arguments of the parties

Arguments of Budvar

116 The Court were to consider that an application for registration as a trade mark of a geographical name constituting an appellation of origin represents use of a geographical name within the meaning of the fourth paragraph of Article L. 641-2 of the Rural Code, Budvar, in any event, asks the Court to find that in the contested decision the Board of Appeal misapplied that article and the provisions of the Lisbon Agreement.

117 Budvar states, first of all, that the Board of Appeal was right to hold that:

'It is undoubtedly true that French appellations of origin are protected in France only if their reputation has been duly established. Article L. 641-2 of the [Rural Code] states that agricultural, forestry and food products may benefit from an appellation of origin if, among other conditions, they "possèdent une notoriété dûment établie" [have a duly established reputation]' (paragraph 50 of the contested decision).

118 Budvar adds that the Board of Appeal nevertheless felt able to state:

'That condition does not, however, apply to foreign appellations of origin protected in France as a result of the Lisbon Agreement. It is clear from Article 5(1) of the

Agreement ... that appellations of origin which are protected in the country of origin obtain protection in the other countries belonging to the Special Union as a result of a simple request made by the competent authorities of the country of origin' (paragraph 50 of the contested decision).

119 In Budvar's view, that statement is not correct.

120 Budvar states, in the first place, that all the countries signatory to the Lisbon Agreement have similar rules concerning the granting of appellations of origin. Article 2 of the Lisbon Agreement gives, in that regard, a valid definition of 'appellation of origin' for all signatory countries.

121 Consequently, all the countries signatory to the Lisbon Agreement require proof of an established reputation in order to grant an appellation of origin. This point is not disputed in the contested decision.

122 Budvar adds that the reputation of the geographical names 'Budweiser' to designate beers had to be proved in the Czech Republic in order to obtain the appellations of origin concerned, and points out in that regard that the appellations of origin concerned were registered with the WIPO on 22 November 1967.

123 Moreover, pursuant to Article 1(2) of the Lisbon Agreement, the French State recognised and declared eligible for protection on French territory the appellations of origin including the geographical name 'Budweiser' by Decree 70-65 of 9 January 1970, published in the *Journal officiel de la République française* on 23 January 1970. Budvar points out that no appeal to the Conseil d'État (Council of State) was lodged against that decree.

124 Budvar's view, the appellations of origin concerned are therefore protected in France by the effect of the Lisbon Agreement alone, in particular Article 1(2) of the agreement.

125 Thus, an appellation of origin which has originated in a country signatory to the Lisbon Agreement is protected on French territory in the same way as national appellations, without there being any need to prove that it does in fact enjoy a reputation. The contested decision was therefore incorrect in holding that '[i]t cannot be presumed that ... appellations of origin which are protected in France under the Lisbon Agreement possess a reputation in France' (paragraph 50 of the contested decision).

126 Budvar adds that the Board of Appeal also misapplied the fourth paragraph of Article L. 641-2 of the Rural Code when it held that:

'[W]here a[n] ... appellation of origin is protected in France under the Lisbon Agreement, it enjoys protection against dissimilar goods only if proof is adduced that it possesses a reputation in France and that its use in relation to dissimilar goods would misappropriate or weaken that reputation.

...

In the present case, by contrast, [Budvar] has not only failed to adduce any evidence that the appellations of origin possess a reputation in France but has also failed to show how the reputation of the appellations of origin, even if it is assumed to exist,

would be likely to be misappropriated or weakened if [Anheuser-Busch] were allowed to use a figurative mark containing the word BUDWEISER in relation to the goods applied for in Classes 16, 21, 25 and 30' (paragraphs 51 and 53 of the contested decision).

127 Budvar draws the attention of the Court to the fact that the fourth paragraph of Article L. 641-2 of the Rural Code, as reproduced in the Consumer Code, concerns the use of the geographical name constituting the whole or part of an appellation of origin. It does not concern the appellation of origin but the geographical name which is mentioned in it. It must therefore be inferred from this that the reproduction of the geographical name constituting the appellation of origin is prohibited for identical, similar and different goods. That interpretation is logical since the geographical name is the essential and determinative element of any appellation of origin. The use of the geographical name alone is such as necessarily to evoke the product covered by the appellation of origin.

128 In the present case, Anheuser-Busch applied for registration of a trade mark which amounts to the reproduction of the geographical name 'Budweiser' alone, without merging it into a whole such as to cause it to lose its status as an appellation of origin. There is therefore no need to apply the exception provided for in the fourth paragraph of Article L. 641-2 of the Rural Code and to determine whether or not the figurative trade mark for which registration is sought, which amounts to the geographical name 'Budweiser', is likely to give rise to the weakening or misappropriation of the reputation necessarily attaching to any appellation of origin.

129 In any event, and very much as a subsidiary consideration, Budvar submits that the reputation which is inherent in the appellations of origin concerned is likely to be misappropriated or weakened by registration of the trade mark at issue. It points out in that regard that no French legislation requires the degree of that inherent reputation to be particularly high for its protection to be extended to different

products. At the very most, the proof required is that that inherent reputation is likely to be weakened and rendered commonplace by the registration of a trade mark reproducing its geographical name.

130 Budvar states that the application for registration of the trade mark concerned was filed in this case by a beer-brewing company, that is to say, by a direct competitor. Indeed, one of the applications for registration filed by Anheuser-Busch was filed in order to designate beers (which is the subject-matter of the joined Case T-71/04). Budvar adds that one of the elements of the figurative trade mark applied for is the slogan 'king of beers'. The trade mark applied for thus makes direct reference to beers. In any event, on the date of the applications for registration Anheuser-Busch must therefore have been aware, as a professional in the field of brewing beer, of the reputation of the appellations of origin claimed, at the very least on Czech territory.

131 The circumstances in which the application for registration of the trade marks was filed therefore indicate not only a clear intention to harm the reputation of the appellations of origin in question by weakening them and destroying their uniqueness by rendering the 'Budweiser' name commonplace, but also an attempt to appropriate those appellations of origin. The fact that Anheuser-Busch is a major beer brewer is evidence of the parasitic and underhand nature of its intention as well as of its aim of weakening the appellations of origin and rendering them commonplace. Budvar observes that the cases which gave rise to the judgments of the Cour d'appel de Paris of 15 December 1993 (*Champagne*) and 17 May 2000 (*Havana*, cited in paragraph 106 above) involved undertakings which did not compete with each other. In those cases, there was found to be a misappropriation of the reputation of the appellations of origin concerned.

132 Moreover, it is necessary to take into consideration the past legal relations between Budvar and Anheuser-Busch. The dispute between those parties arose more than a century ago. Budvar states that in 1894 Adolphus Busch declared that he had been inspired by the excellence of the beer produced in Budweis, Czechoslovakia, to perfect Budweiser beer, brewed according to the Bohemian method, in Saint Louis, Missouri, the headquarters of the Anheuser-Busch company.

133 Budvar therefore concludes that the risk of harming the reputation of the appellations of origin is sufficiently established and must lead the Court to refuse to register the marks concerned.

Arguments of OHIM

134 OHIM replies to Budvar's arguments in its analysis of the requirement laid down by Article 8(4) of Regulation No 40/94 that the earlier right must confer on its proprietor, under the applicable national legislation, the right to prohibit the use of the opposed mark.

135 Having submitted that the fourth paragraph of Article L. 641-2 of the Rural Code was applicable in this case, OHIM examines the extent of the protection of appellations of origin under that provision.

136 OHIM draws a distinction here between the need to prove the reputation of the appellation of origin and the risk of that reputation being misappropriated or weakened.

— The need to prove the reputation of the appellation of origin

137 OHIM points out that the Lisbon Agreement requires each contracting party to grant protection to registered appellations. That protection, according to OHIM, must be at least at the level of the protection provided for in the Lisbon Agreement.

138 In that regard, OHIM recalls that Article 3 of the Lisbon Agreement provides that '[p]rotection shall be ensured against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as "kind", "type", "make", "imitation", or the like'.

139 In OHIM's view, the minimum protection required extends only to the goods for which the registration was made, and to goods which would fall within the same class of products (in this case beer). The Lisbon Agreement does not require protection to be granted beyond that category of products.

140 However, that does not mean that an appellation of origin may not benefit from more extensive protection under the national law of the country in which the acquired right is enforced.

141 Recalling the wording of the fourth paragraph of Article L. 641-2 of the Rural Code, OHIM submits that the protection granted by that provision is twofold.

142 First, the minimum protection provided by the fourth paragraph of Article L. 641-2 of the Rural Code extends to the use of an identical designation or a designation capable of suggesting the appellation of origin in relation to similar goods. That protection is unconditional and may be invoked for all appellations of origin, whether national or foreign, the only elements to be established being the likelihood of suggestion between the signs and the similarity between the goods.

143 Second, the fourth paragraph of Article L. 641-2 of the Rural Code provides an enlarged scope of protection for all appellations of origin, whether national or foreign, which extends to the use of an identical designation or a designation capable of suggesting the appellation of origin in relation to dissimilar goods. That protection is conditional on proof that the appellation of origin possesses a reputation and that the reputation is likely to be misappropriated or weakened.

144 That likelihood must be evaluated in relation to the French public. Likewise, it must be proved that the reputation of the appellation of origin is known to the French public. There cannot be any likelihood of misappropriation or weakening of a non-existent reputation.

145 The Board of Appeal therefore did not err in concluding that '[i]t cannot ... be presumed that foreign appellations of origin which are protected in France under the Lisbon Agreement possess a reputation in France' (paragraph 50 of the contested decision).

146 In those circumstances, Budvar is wrong to claim that an appellation of origin by definition possesses a reputation or is well known. Budvar's confusion stems from the fact that the notion of the 'reputation of the product' which is required under Article 2(2) of the Lisbon Agreement for registration in the country of origin does not automatically extend to the other member countries in which protection is sought. Therefore, an indication such as 'Budweiser' which possesses a reputation in the Czech Republic but is not known or used widely on the French market cannot possess a reputation in France.

147 In this respect, OHIM submits that the fourth paragraph of Article L. 641-2 of the Rural Code and all other provisions prohibiting the misappropriation, exploitation, weakening or tarnishing of the reputation of an appellation of origin (OHIM refers in particular to Article 13(1) of Council Regulation (EEC) No 2081/92 of 14 July

1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1)) aim at protecting the 'image' of the appellation of origin, that is to say, its economic value. Such damage can arise only if the appellation of origin possesses a reputation in the country where protection is claimed.

148 OHIM points out that the concept of 'reputation' of appellations of origin was identified by the Court of Justice in its judgment in *Consorzio del Prosciutto di Parma and Salumificio S. Rita*, cited in paragraph 62 above (paragraph 64), which concerned Regulation No 2081/92, in the following terms:

'The reputation of designations of origin depends on their image in the minds of consumers. That image in turn depends essentially on particular characteristics and more generally on the quality of the product. It is on the latter, ultimately, that the product's reputation is based.'

149 The image or reputation of appellations of origin depends on the public's subjective perception and may vary according to the territory considered. It is true, in OHIM's view, that the image or reputation of the appellation of origin proceeds from the quality of the product. However, the image or reputation of the appellation of origin will depend significantly on factors which are extraneous to the product itself. OHIM cites inter alia the amount of investment in promoting the appellation of origin, how intensive use of the appellation of origin has been and the market share held by the product.

150 Because the reputation of appellations of origin depends mostly on those factors and their impact on the public, such a reputation cannot be inferred from the registration under the Lisbon Agreement and needs always to be proved in each

country where that reputation is claimed to have been harmed. Any other solution would amount to granting the same scope of protection to widely renowned appellations of origin and to obscure appellations of origin, and probably to granting the latter protection in a country where they do not have any reputation.

151 OHIM concludes from the foregoing that the Board of Appeal did not err in making the application of the fourth paragraph of Article L. 641-2 of the Rural Code conditional on proof that the appellations of origin had a reputation in France.

152 That conclusion is borne out by the French case-law. According to OHIM, in certain cases involving Article 8(4) of Regulation No 40/94, national law must be applied as a national court would do. National case-law is therefore of particular importance.

153 In that respect, the Board of Appeal was right to rely on the *Havana* judgment, cited in paragraph 106 above, which ruled on a conflict between the appellation of origin Habana, protected under the Lisbon Agreement for cigars, and the later French trade mark Havana for perfumes. It is clear from that judgment that failure to establish the reputation in France of the international appellation of origin Habana would have resulted in dismissal of the action.

154 OHIM adds that where protection is claimed against use of a later designation in relation to dissimilar goods, the French courts require proof of reputation with respect to all appellations of origin, regardless of their national or international origin. OHIM refers here to the judgments of the Cour d'appel de Paris of 15 December 1993 and 12 September 2001, relating to the appellation of origin Champagne, annexed to the application. Contrary to Budvar's assertion, there is therefore no difference in treatment.

— Misappropriation or weakening of the reputation of the appellation of origin

155 OHIM submits that the Board of Appeal was also right to dismiss the appeal on the ground that Budvar had failed 'to show how the reputation of the appellations of origin, even if it is assumed to exist, would be likely to be misappropriated or weakened if [Anheuser-Busch] were allowed to use a figurative trade mark containing the word BUDWEISER in relation to the goods applied for in Classes 16, 21, 25 and 30' (paragraph 53 of the contested decision).

156 Budvar never submitted any fact or argument at any stage of the procedure to substantiate the claim that use of the trade marks at issue would be likely to misappropriate or weaken the reputation of the appellations of origin. Being bound by the terms of Article 74(1) of Regulation No 40/94, the Board of Appeal therefore did not err in dismissing the possibility of such a misappropriation or weakening.

157 The arguments contained in the application in that regard are thus inadmissible, since they were put forward for the first time before the Court.

158 If those arguments are nevertheless held to be admissible, OHIM states that the reputation of appellations of origin is likely to be misappropriated where operators purposely choose identical or similar signs for use in a different field, in order to divert to their own benefit part of the investments made by the holder of the earlier right. That situation is very similar to taking unfair advantage of the repute of an earlier trade mark in the context of Article 5(2) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1) or Article 8(5) of Regulation No 40/94.

159 OHIM admits that the use of a figurative mark which contains the words 'king of beers' in relation to goods of any kind could theoretically create an association in the public's mind with beers, because it contains the words 'king of beers' and because such use could be perceived by the public as indirectly promoting Anheuser-Busch's main brewing activity. This is particularly true as regards the use of the figurative mark at issue in relation to the snack foods included in Class 30, since those goods may be sold on the counters of bars and cafes. If, therefore, the Court were to consider that the reputation of the appellations of origin can be presumed, OHIM requests that the case be referred back to the Board of Appeal for further consideration on this point.

160 As regards the weakening of the reputation of appellations of origin, OHIM submits that such weakening is likely to exist where the goods for which the conflicting sign is used appeal to the public's senses in such a way that the image and power of attraction of the appellation of origin are affected. That situation is very similar to use detrimental to the repute of an earlier trade mark in the context of Article 5(2) of First Directive 89/104/EEC or Article 8(5) of Regulation No 40/94.

161 In this case, however, there is no antagonism between beer, on the one hand, and most of the goods covered by the application for registration, on the other, such as to harm the image of the earlier appellations of origin. It is, moreover, unlikely that the use of the marks concerned in relation to most of the goods covered by the application for registration could evoke negative or unpleasant mental associations which would conflict with the prestige of the earlier appellations of origin.

162 In addition, OHIM submits observations regarding the Act of Accession of the Czech Republic, which entered into force on 1 May 2004, and regarding the amendment of Article 8(4) of Regulation No 40/94.

163 As regards the Act of Accession of the Czech Republic, OHIM notes that since 1 May 2004 (that is, after the adoption of the contested decision) the names 'Českobudějovické pivo' and 'Budějovické pivo' ('Budweiser Bier') have been protected under Regulation No 2081/92 as geographical indications, the Act of Accession providing, moreover, that that protection 'is without prejudice to any beer trade mark or other rights existing in the European Union on the date of accession'.

164 As regards Article 8(4) of Regulation No 40/94, OHIM observes that it was amended by Council Regulation (EC) No 422/2004 of 19 February 2004 (OJ 1994 L 70, p. 1), that is, after the contested decision was adopted, to include earlier rights protected pursuant to the Community legislation.

165 In OHIM's view, those amendments should not affect the present case, as they occurred after the contested decision was adopted. OHIM states that in any case Article 13(1)(a) of Council Regulation No 2081/92 is drafted in terms very similar to Article L. 641-2 of the Rural Code.

Arguments of Anheuser-Busch

166 Anheuser-Busch, taking the view that a reputation is required under Article L. 641-2 of the Rural Code in order to obtain protection against a product different from that for which the appellation of origin is protected, examines whether such a reputation exists in this case.

167 Anheuser-Busch maintains that Budvar has never argued that there was any actual reputation among the French public, let alone proffered any evidence of such reputation. Anheuser-Busch adds that there is not even a hint of use of the appellations of origin in France and points out, in that regard, that Budvar did not submit any invoices, advertisements, brochures, or figures relating to sales or advertisement expenditure, market shares or brand awareness.

168 Budvar has instead argued that the appellations of origin have an 'inherent reputation' that must be assumed, that being entirely independent of any use of the geographical name in France and of the consumer's perception of it. The argument supporting that view, advanced by Budvar, is that the reputation of a French appellation of origin has to be demonstrated when the application is made to the Institut national des appellations d'origine (National Institute for Appellations of Origin) for its protection in France.

169 However, in Anheuser-Busch's view, such proof of reputation is only required for protection of French appellations of origin. For recognition of foreign appellations of origin, no reputation in France is required. There are hundreds of appellations of origin, registered with effect in France under the Lisbon Agreement, which are completely unknown to the vast majority of the French public. Anheuser-Busch refers here to its pleading submitted on 18 February 2002 to the Board of Appeal, which it attaches as an annex to its responses before the Court, and in particular to the opinion given by a lawyer in France who is an intellectual property specialist.

170 Referring to the judgments of the Cour d'appel de Paris in the *Havana* and *Champagne* cases, Anheuser-Busch adds that the appellations of origin at issue in the present cases have never been shown to have been used in France, let alone to have acquired any reputation among the French public.

171 Accordingly, the conclusions of the Board of Appeal in the contested decision, and in particular those set out in paragraphs 49 to 53 of that decision, are correct.

172 Anheuser-Busch points out, moreover, that under Article L. 641-2 of the Rural Code protection of an appellation of origin against the use of a protected term for dissimilar goods is conditional on the reputation of that appellation being likely to be misappropriated or weakened.

173 In Anheuser-Busch's submission, a reputation that does not exist cannot be misappropriated or weakened within the meaning of Article L. 641-2 of the Rural Code. Budvar has failed to prove any misappropriation or weakening of the appellations of origin.

174 As regards Budvar's allegations concerning the allegedly malicious attitude of Anheuser-Busch, they are entirely beside the point. They are clearly belated. They are also unsupported by any relevant facts or evidence and are in fact simply untrue. Anheuser-Busch also considers that a party's attitude plays no role in the determination of whether the use of a sign leads to potential damage to or misappropriation of the reputation of another sign.

175 In any event, relying on the additional arguments put forward, Anheuser-Busch submits that Budvar's opposition should have been rejected on the basis of Article 8(4) of Regulation No 40/94.

176 First, Anheuser-Busch submits that one reason for rejecting the opposition was the lack of an adequate explanation provided by Budvar of the applicable national law.

Second, Anheuser-Busch points to the lack of proof of use in the course of trade, in France, of the appellations of origin, before the filing of the trade mark application. Third, according to Anheuser-Busch, Budvar did not adduce any evidence demonstrating that the use of the signs in question was of more than mere local significance. Fourth, Anheuser-Busch maintains that the appellations of origin at issue are invalid because they do not meet the requirements of recognition under the Lisbon Agreement.

(b) Findings of the Court

177 First, considering that the fourth paragraph of Article L. 642-1 of the Rural Code was applicable to the present case and that the goods covered by the figurative trade mark applied for and those covered by the appellations of origin in question were different, the Board of Appeal stated that:

'It is undoubtedly true that French appellations of origin are protected in France only if their reputation has been duly established ... [and] it cannot be presumed that foreign appellations of origin which are protected in France under the Lisbon Agreement possess a reputation in France' (paragraph 50 of the contested decision).

178 Second, the Board of Appeal stated that:

'[W]here a foreign appellation of origin is protected in France under the Lisbon Agreement, it enjoys protection against dissimilar goods only if proof is adduced that it possesses a reputation in France and that its use in relation to dissimilar goods would misappropriate or weaken that reputation' (paragraph 51 of the contested decision).

179 Third, the Board of Appeal found that:

'[Budvar] has not only failed to adduce any evidence that the appellations of origin possess a reputation in France but has also failed to show how the reputation of the appellations of origin, even if it is assumed to exist, would be likely to be misappropriated or weakened if [Anheuser-Busch] were allowed to use a figurative mark containing the word BUDWEISER in relation to the goods applied for in Classes 16, 21, 25 and 30' (paragraph 53 of the contested decision).

180 Budvar's arguments in the second limb of the single plea in law point, in reality, to two errors allegedly made by the Board of Appeal.

181 First of all, Budvar considers, essentially, that the conditions laid down by the fourth paragraph of Article L. 641-2 of the Rural Code for conferring, in the case of dissimilar products, protection in France on appellations of origin registered by another country under the Lisbon Agreement, in particular the requirement of demonstrating a likelihood of misappropriation or weakening of the reputation of those appellations, are more restrictive than the conditions laid down by the Lisbon Agreement. Accordingly, the geographical name constituting an appellation of origin registered under the Lisbon Agreement is protected, irrespective of the products covered by the subsequent trade mark, without its being necessary to prove the existence of any reputation or misappropriation or weakening of the reputation.

182 In that context, Budvar stated at the hearing that, under Article 55 of the French Constitution, duly ratified or approved treaties and agreements, as of their publication, prevail over laws, subject to the application of the treaty or agreement by the other party. Consequently, the French legislative provisions adopted before or even after the entry into force of that provision must be interpreted in accordance

with the terms of the Lisbon Agreement. Budvar added that it did not agree with the manner in which the French courts have applied the Lisbon Agreement.

183 Next, and in any event, Budvar submits that the reputation of the appellations of origin in question could be assumed and that the likelihood of misappropriation or weakening of the reputation is established.

Consistency, in respect of dissimilar products, of the conditions laid down by the fourth paragraph of Article L. 641-2 of the Rural Code with the provisions of the Lisbon Agreement

184 Of the current Member States of the European Union, the French Republic, the Republic of Hungary, the Italian Republic, the Portuguese Republic, the Czech Republic and the Slovak Republic were contracting parties to the Lisbon Agreement at the time the contested decision was adopted.

185 First, according to the terms of the Lisbon Agreement, the Court notes that there is a close link between the appellation of origin and the product concerned by that appellation, as well as the protection deriving from it. More specifically, the contracting parties to the Lisbon Agreement undertook, in accordance with Article 1(2) of that agreement, to protect the appellations of origin of 'products' of the other countries. Under Rule 5(2)(iv) of the Regulations under the Lisbon Agreement, an international application for registration of an appellation of origin under that agreement must specify 'the product to which the appellation applies'.

186 Second, Article 2(1) of the Lisbon Agreement provides that the product to which the appellation of origin attaches must draw its quality and characteristics exclusively or essentially from the geographical environment, including natural and human factors. Moreover, the protection provided for in Article 3 of the Lisbon Agreement covers cases where the registered appellation of origin is usurped or imitated. In that framework, the protection of an appellation of origin against any usurpation or imitation is to apply when the products in question are identical or similar. That protection is intended to ensure that the quality or the characteristics of the product concerned, which result from the geographical environment, including natural and human factors, are not appropriated or reproduced by a party not entitled to do so.

187 Third, Article 3 of the Lisbon Agreement provides that protection is to be ensured 'even if the true origin of the product is indicated' or if the appellation is used in translated form or accompanied by terms such as 'kind', 'type', 'make', 'imitation', or the like. Given the terms employed, those specific terms make sense only when the products in question are identical or, at the very least, similar.

188 Accordingly, the Court finds that the protection conferred under the Lisbon Agreement applies, without prejudice to a possible extension of that protection by a contracting party on its territory, when the products covered by the appellation of origin in question and those covered by the sign which is liable to interfere with it are identical or, at the very least, similar.

189 Furthermore, without its being necessary to conduct an analysis by analogy, the Court notes that, at Community level, Regulation No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, as applicable at the material time, contains, in Article 13(1)(b), provisions close to those in Article 3 of the Lisbon Agreement and also expressly, in Article

13(1)(a), provisions which provide, subject to certain conditions, for protection of names registered at Community level when the products in question are not comparable to those which are registered under those names.

190 It does not follow from the case-law, in particular Case C-87/97 *Consorzio per la tutela del formaggio Gorgonzola* [1999] ECR I-1301, and also the Opinion of Advocate General Jacobs in that case ([1999] ECR I-1304), that Article 13(1)(b) of Regulation No 2081/92 has been interpreted as meaning that the protection conferred under Article 13 applies when the products in question are different, as that situation is governed by Article 13(1)(a) of that regulation.

191 The Court notes in this context that, if the reading suggested by Budvar of the terms of the Lisbon Agreement, extending the appellations' protection to all products, be they identical, similar or different, corresponded to the intention of the drafters of that agreement, it would have placed certain Member States which are also contracting parties to that agreement in a conflicting position at the time of adoption of Regulation No 2081/92. Although Article 13(1)(b) of Regulation No 2081/92 and Article 3 of the Lisbon Agreement are drafted in almost identical terms, the protection of appellations of origin registered at Community level or under the Lisbon Agreement would differ quite significantly within the single market, for different products, depending on the application of one or other of those provisions.

192 Nevertheless, the fact that the protection granted under the Lisbon Agreement applies only when the products covered by the appellation of origin in question and those covered by the sign which is liable to interfere with it are identical or, at the very least, similar, does not prevent the contracting parties to the Lisbon Agreement from being able to provide for more extensive protection in their national legal order.

193 Article 4 of the Lisbon Agreement states, moreover, that the provisions of the agreement in no way exclude the protection already granted to appellations of origin in each of the contracting parties by virtue of other international instruments or by virtue of national legislation or court decisions.

194 The fourth paragraph of Article L. 641-2 of the Rural Code, reproduced in the fourth paragraph of Article L. 115-5 of the Consumer Code, as applied by the French courts to the protection of appellations of origin registered under the Lisbon Agreement, follows that logic.

195 By providing that the geographical name constituting an appellation of origin or any other reference suggesting it may not be employed for any similar product, those provisions allow appellations of origin registered under the Lisbon Agreement to benefit from the protection provided for in Article 3 of that agreement against any imitation or usurpation. In that context, if the products in question were identical or similar, the appellations of origin relied on by Budvar, set out in paragraph 16 above, could be protected under French law, without its being necessary to demonstrate that those appellations possess a reputation in France, nor a fortiori that that reputation is liable to be misappropriated or weakened.

196 In also providing that the geographical name constituting the appellation of origin or any other reference suggesting it may not be used for any other product or service when that use is liable to misappropriate or weaken the reputation of the appellation of origin, the fourth paragraph of Article L. 641-2 of the Rural Code, reproduced in the fourth paragraph of Article L. 115-5 of the Consumer Code, allows appellations of origin registered under the Lisbon Agreement to benefit from more extensive protection than that provided for under that agreement. That more extensive protection is, however, subject to certain conditions.

197 It follows from the foregoing that, contrary to the essence of Budvar's submissions, in the case of dissimilar products, the conditions laid down in the fourth paragraph of Article L. 641-2 of the Rural Code are not more restrictive than the conditions laid down in the Lisbon Agreement.

198 For the sake of completeness, the Court notes that the International Bureau of WIPO, which administers the Lisbon Agreement, itself stated the following in a public document of 8 June 2000, entitled 'Possible solutions for conflicts between trade marks and geographical indications and for conflicts between homonymous geographical indications', available on the WIPO website under reference SCT/5/3 and distributed at the Fifth Session of the Standing Committee on the law of trade marks, industrial designs and geographical indications:

'The rightful users of geographical indications are entitled to prevent anybody from using that geographical indication if the goods on which the geographical indication is used do not have the indicated geographical origin. Like trade marks, geographical indications are subject to the principles of "specialty", i.e., they are only protected for the kind of products on which they are actually used, and "territoriality", i.e., they are protected for a given territory only and are subject to the laws and regulations applicable in that territory. An exception to the principle of specialty exists for geographical indications having a reputation. At present, treaties administered by WIPO or the [Agreement on Trade-Related Aspects of Intellectual Property Rights] do not provide for this extended scope of protection for that particular category of geographical indications' (paragraph 20 of document SCT/5/3).

Proof of the reputation of the appellations of origin in question in France, in the case of dissimilar products

199 First, the Court notes, as stated in paragraph 188 above, that the protection conferred under the Lisbon Agreement applies where the products in question are identical or similar.

200 Second, the Court finds that the products in question in Case T-57/04, namely those covered by the figurative trade mark applied for — in Classes 16, 21, 25, 30, the products in Class 32 being the subject-matter of Case T-71/04 — and those covered by the appellations of origin relied on by Budvar in the light of Article 8(4) of Regulation No 40/94 — in Class 32 — are different. None of the parties to the dispute challenges this fact which was, moreover, pointed out by the Board of Appeal.

201 Third, under the fourth paragraph of Article L. 641-2 of the Rural Code, reproduced in the fourth paragraph of Article L. 115-5 of the Consumer Code, as applied by the French courts to the protection of appellations of origin registered under the Lisbon Agreement, the geographical name constituting the appellation of origin or any other reference suggesting it may not be employed for any other product or service where that use is liable to misappropriate or weaken the reputation of the appellation of origin. As noted in paragraph 196 above, that provision allows appellations of origin registered under the Lisbon Agreement to benefit from a more extensive protection than that provided for by that agreement.

202 Fourth, in that framework, in accordance with the principle of territoriality, the protection of appellations of origin is governed by the law of the country where the protection is sought (Case C-3/91 *Exportur* [1992] ECR I-5529, paragraph 12). That protection is thus determined by the law of that country, in the light of the prevailing facts.

203 Fifth, the Court notes that the reputation of appellations of origin depends on the image they have in the perception of consumers. That image in turn depends, essentially, on the specific characteristics and, more generally, the quality of the product. It is the latter which ultimately forms the basis of the product's reputation, which may be greater or lesser.

204 It follows from those elements that the Board of Appeal did not make an error in finding that Budvar should have furnished proof that the appellations of origin in question possessed a reputation in France. That proof should have, inter alia, made it possible to determine the image the appellations of origin in question had amongst French consumers.

205 The Board of Appeal found that Budvar had not furnished proof of such a reputation in France. Before the Court Budvar has not called into question, in particular in its application, the Board of Appeal's finding of fact on this point. Budvar maintains, in fact, that the reputation of the appellations of origin in question may be presumed under the French legal provisions or the registration under the Lisbon Agreement.

206 The Court notes that the presumptions of reputation put forward by Budvar may not be regarded as objective elements making it possible to establish the reputation of the appellations of origin in question in France or, where applicable, to measure its extent.

207 The Cour d'appel de Paris, in the *Havana* judgment, cited in paragraph 106 above, stated that it was 'undeniable and abundantly established by the documents submitted in the case (including an extract from the book *La grande histoire du cigare* and a number of extracts from the press) that Havana cigars from Cuba possess an outstanding reputation and are commonly regarded as among the finest in the world'. It follows that, in order to ascertain, in that case, whether the conditions laid down by the fourth paragraph of Article L. 115-5 of the Consumer Code, reproducing the fourth paragraph of Article L. 641-2 of the Rural Code, were met, the Cour d'appel de Paris relied on objective elements and did not assume the existence of the reputation of the appellations of origin in question in that case. It was those objective elements which enabled it to find that the reputation of the

appellation of origin in question was 'outstanding' and to find also that the misappropriation of the reputation of such an evocative and 'prestigious' appellation was liable to weaken it, inter alia, in France.

208 Turning specifically to the French legal provisions referred to by Budvar, the Court finds that the second paragraph of Article L. 641-2 of the Rural Code does not allow for presuming any reputation of the appellations of origin in question in France. That provision states: '[s]ubject to the conditions set out below, [agricultural or food products, raw or processed] may be given a controlled appellation of origin if they fulfil the requirements of Article L. 115-1 of the Consumer Code, have a duly established reputation and are the subject of procedures for approval'. As rightly noted by the Board of Appeal, that provision essentially does not apply to appellations of origin registered under the Lisbon Agreement but concerns the procedure for obtaining an 'appellation d'origine contrôlée' in France. Accordingly, there can be no presumption under that provision that appellations of origin registered under the Lisbon Agreement possess a reputation in France.

209 This finding is not affected by the fact that French courts apply the fourth paragraph of Article L. 115-5 of the Consumer Code, which reproduces the fourth paragraph of Article L. 641-2 of the Rural Code, in order to grant extended protection to appellations of origin registered under the Lisbon Agreement where the products in question are different. A distinction should be drawn between the conditions for the recognition of appellations of origin and the conditions for the protection of appellations of origin under French law. Accordingly, even though French courts grant appellations of origin registered under the Lisbon Agreement more extensive protection than that provided for under that agreement, pursuant inter alia to the fourth paragraph of Article L. 641-2 of the Rural Code, reproduced in the fourth paragraph of Article L. 115-5 of the Consumer Code, that does not in itself mean that those appellations of origin have a presumed reputation on the basis of a recognition procedure applicable to controlled appellations of origin registered in

France. Moreover, such a presumption of reputation, on the basis of the second paragraph of Article L. 641-2 of the Rural Code, does not follow from the documents in the case, in particular the judgment of the Cour d'appel de Paris in *Havana*, cited in paragraph 106 above.

210 Nor do the provisions of the Lisbon Agreement allow for a presumption of reputation, in France, for the appellations of origin relied on by Budvar. First of all, as noted in paragraph 188 above, the protection conferred by that agreement does not cover situations where, as in the present case, the products in question are different. Accordingly, the Lisbon Agreement cannot affect the proof of the reputation of the appellations of origin in question in France, where the products are different. From a factual standpoint, moreover, the Court notes that, although Article 2 of the Lisbon Agreement provides that '[t]he country of origin is the country whose name, or the country in which is situated the region or locality whose name, constitutes the appellation of origin which has given the product its reputation', it cannot be inferred from that provision that the appellations of origin registered under the Lisbon Agreement possess a reputation in the territory of each of the contracting parties to the agreement.

211 It follows from all of the foregoing that the Board of Appeal did not err in finding that Budvar had not furnished proof that the appellations of origin possess a reputation in France and that, accordingly, one of the elements for the application of the protection conferred by the fourth paragraph of Article L. 641-2 of the Rural Code, reproduced in the fourth paragraph of Article L. 115-5 of the Consumer Code, was absent in the present case.

212 For the sake of completeness, the Court notes that the Board of Appeal not only found that Budvar had not furnished proof that the appellations of origin in question possessed a reputation in France, but added that Budvar had failed 'to show how the reputation of the appellations of origin, even if it is assumed to exist, would be likely to be misappropriated or weakened if [Anheuser-Busch] were allowed to use a

figurative mark containing the word BUDWEISER in relation to the goods applied for in Classes 16, 21, 25 and 30' (paragraph 53 of the contested decision).

213 The Court notes that the fourth paragraph of Article L. 642-1 of the Rural Code, reproduced in the fourth paragraph of Article L. 115-5 of the Consumer Code, states that the geographical name which constitutes the appellation of origin or any other reference suggesting it may not be used for any similar products nor 'for any other product or service' when 'that use' is likely to misappropriate or weaken the reputation of the appellation of origin. It is therefore the use of the geographical name which constitutes the appellation of origin for a specific 'product' or 'service' which must be likely to misappropriate or weaken the reputation of the appellation of origin. That product or service thus necessarily forms part of the assessment of the likelihood of misappropriation or weakening of the reputation of the appellation of origin.

214 This interpretation is supported by the French case-law, including the judgment of the Cour d'appel de Paris in *Havana* (cited in paragraph 106 above).

215 The Cour d'appel de Paris found the following in that judgment:

'The company Aramis has launched on the market and distributes a men's cologne under the name "havana" ...; the shape of the bottle ... because of its oblong shape crowned by a grey metal cap, suggests the shape of a cigar which is burning down ...

It is undisputed that the launching of a new cologne carries with it major financial risk and that, in order to reduce that risk, it is necessary to entice the public which is unaware of the fragrance by fostering an image for them which is particularly attractive through the power of suggestion it is capable of conveying ...

The choice ... of the term "havana" to promote a luxury cologne intended for men is in no way a coincidence but reflects the deliberate will of the company to convey, through the particularly strong suggestive power it has, the prestigious and sensual image of good taste which attaches to Havana cigars evidenced by the curls of smoke ...'

216 Thus the Cour d'appel de Paris relied largely on the product concerned by the use of the geographical name constituting the appellation of origin in question to find that the reputation of that appellation was likely to be misappropriated or weakened.

217 That approach has, moreover, been followed by the French courts in relation to the protection of French controlled appellations of origin. Thus the Cour d'appel de Paris, in its judgment of 15 December 1993 relating to the protection of the controlled appellation of origin Champagne, a judgment also produced by Budvar before OHIM, said that 'in using the name Champagne to launch a new luxury perfume, in choosing a presentation calling to mind the characteristic champagne cork and in using the image and taste and feelings of joy and celebration suggested by champagne in promotional material, the appellants wished to create an attractive effect borrowed from the prestige of the disputed appellation'.

218 In the present case, the Court finds that Budvar did not produce before OHIM and, in particular, before the Board of Appeal any evidence to show that the use of the

geographical name in question, specifically for the products covered by the figurative trade mark applied for, in Classes 16, 21, 25 and 30, was likely to misappropriate or weaken the reputation — assuming it had been established in France — of the appellations of origin concerned. Moreover, as a purely conjectural matter, it was for Budvar to formulate its application with sufficient precision to enable OHIM to give a comprehensive ruling on Budvar's assertions.

219 For all of the foregoing reasons, the second limb of the single plea in law put forward by Budvar must be rejected.

220 Therefore, without its being necessary to rule on the supplementary arguments put forward by Anheuser-Busch, Budvar's action must be rejected in its entirety. Moreover, as to the additional arguments put forward by Anheuser-Busch, and in so far as they must be understood as an independent plea based on Article 134(2) of the Rules of Procedure, the Court notes that this plea is incompatible with the intervener's own claims and must accordingly be rejected (see, to that effect, Case T-278/04 *Jabones Pardo* v *OHIM — Quimi Romar (YUKI)*, not published in the ECR, paragraphs 44 and 45). The additional arguments put forward by Anheuser-Busch are intended, essentially, to challenge certain points of fact and law accepted by the Board of Appeal. Anheuser-Busch has not, however, sought annulment or alteration of the contested decision under Article 134(3) of the Rules of Procedure.

II — *Case T-71/04*

221 By letter of 8 May 2007 addressed to the Registry of the Court, Anheuser-Busch informed the Court that it had withdrawn its application for registration of a Community trade mark in respect of the goods in Class 32. Anheuser-Busch produced a copy of the notification of withdrawal of the registration application, sent to OHIM on 8 May 2007.

222 Since the subject-matter of the action in Case T-71/04 concerns specifically registration of the trade mark sought for the goods in Class 32, Anheuser-Busch takes the view that there is no longer any need to continue the proceedings before the Court.

223 Anheuser-Busch leaves it to the Court to make an appropriate ruling on costs.

224 After the reopening of the oral procedure by order of 14 May 2007, the Court asked OHIM and Budvar to submit their views on Anheuser-Busch's request for a ruling that there is no need to adjudicate in the case, which they did within the prescribed period.

225 By letter of 16 May 2007 addressed to the Registry of the Court, OHIM confirmed that the application for registration of a Community trade mark in respect of the goods in Class 32 had been withdrawn and stated that there was no longer any need to adjudicate in Case T-71/04. OHIM asked for costs not to be awarded against it.

226 By letter of 22 May 2007 addressed to the Registry of the Court, Budvar noted the withdrawal of the application for registration of a Community trade mark in respect of the goods in Class 32 and asked the Court to make a ruling as to costs.

227 The oral procedure was closed once again on 24 May 2007.

228 Pursuant to Article 113 of the Rules of Procedure of the Court of First Instance, the Court finds that, in the light of the withdrawal of the application for registration in so far as the goods in Class 32 are concerned, the action in Case 71/04 has become devoid of purpose. There is therefore no longer any need to adjudicate in that case.

Costs

I — *Case T-57/04*

229 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings.

230 Since Budvar has been unsuccessful in Case T-57/04, it must be ordered to pay the costs, in accordance with the forms of order sought by OHIM and Anheuser-Busch.

II — *Case T-71/04*

231 Under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment, the costs are to be in the discretion of the Court.

232 In the present case, the Court finds that it is justified in the circumstances to order Anheuser-Busch to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

hereby:

1. In Case T-57/04:

— dismisses the application;

— orders Budějovický Budvar, národní podnik to pay the costs.

2. In Case T-71/04:

— holds that there is no longer any need to adjudicate in the case;

— orders Anheuser-Busch, Inc. to pay the costs.

Vilaras Martins Ribeiro Dehousse

Šváby Jürimäe

Delivered in open court in Luxembourg on 12 June 2007.

E. Coulon M. Vilaras

Registrar President

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