



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, on 5 December 2022
Ref. no.: AGJ 2086/22

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JUDGMENT

in

Case No. KI159/20

Applicant

ADOL L.L.C.

**Constitutional review of Judgment Rev. no. 29/19 of the Supreme Court of
Kosovo, of 1 July 2020**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Gresa Caka-Nimani, President
Bajram Ljatifi, Deputy President
Selvete Gërzhaliu-Krasniqi, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by the limited liability company "ADOL L.L.C", having its headquarters in Tirana (hereinafter: the Applicant), which is represented by lawyers Arianit Koci and Granit Vokshi, from the law firm "Koci & Vokshi".

Challenged decision

2. The Applicant challenges constitutionality of Judgment [Rev. no. 19/19] of 1 July 2020 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with Judgment [Ac. no. 44/19] of 20 February 2019 of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) and Judgment [IV. EK. C. no. 593/2015] of 3 December 2018 of the Basic Court in Prishtina, Department for Commercial Matters (hereinafter: the Basic Court).

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 1 of Protocol no. 1 of the European Convention on Human Rights (hereinafter: the ECHR) and Article 54 [Judicial Protection of Rights] of the Constitution, in conjunction with Article 6 of the ECHR.

Legal basis

4. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 47 [Individual Requests] of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

5. On 12 October 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 2 November 2020, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërzhaliu-Krasniqi (Presiding), Bajram Ljatifi and Radomir Laban.
7. On 4 November 2020, the Applicant was notified about the registration of the referral and a copy of the referral was sent to the Supreme Court.
8. On 7 December 2020, the Court notified the company "Elkos" L.L.C. about the registration of the referral, and asked them to submit comments, if any, within 15 days.
9. The Court has not received any comments from the Elkos company, within the above-mentioned deadline
10. On 29 April 2021, the Court requested from the Basic Court in Prishtina the complete case file.
11. On 5 May 2021, the Basic Court in Prishtina submitted to the Court the complete case file.
12. On 17 May 2021, based on paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of the President and

Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph 4 of Rule 12 of the Rules of Procedure and Court Decision KK-SP 71-2/21, it was determined that Judge Gresa Caka-Nimani will assume the position of President of the Court after the end of the mandate of the current President of the Court, Arta Rama-Hajrizi, on 26 June 2021.

13. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge before the Constitutional Court.
14. On 26 June 2021, pursuant to paragraph 4 of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of the Court, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.
15. On 9 March 2022, the Review Panel considered the report of the Judge Rapporteur and unanimously requested the postponement of the case for additional supplementation.
16. On 13 October 2022, the Review Panel considered the report of the Judge Rapporteur and by majority recommended to the Court the admissibility of the Referral.
17. Pursuant to Rule 61 (Dissenting opinions) of the Court's Rules of Procedure, Judge Radomir Laban has prepared a dissenting opinion, which will be published together with this Judgment.

Summary of facts

18. The Applicant company "ADOL" l.l.c.. is a producer of alcoholic beverages "GJERGJ KASTRIOTI SKENDERBEU", based in Tirana. The Applicant, according to the case file, is the legal successor of the State Food Combine "Ali Kelmendi". The Applicant has registered the trademark at the Office for Industrial Property at the Ministry of Trade and Industry, now the Industrial Property Agency (hereinafter: IPA).
19. From the case file, it appears that another company (Canteen of beverages "GJERGJ KASTRIOTI SKENDERBEU" J.S.C., Durrës, Albania) also produces alcoholic beverages under the name "GJERGJ KASTRIOTI SKENDERBEU". The latter's trademark is not registered in the Republic of Kosovo, but it was imported into the Republic of Kosovo through the company "ELKOS" l.l.c.
20. On 23 November 2007, the Applicant registered the name "GJERGJ KASTRIOTI SKENDERBEU" as a protected trademark in the IPA with registration number 8232, class 33 Brandy.
21. On 24 December 2015, the Applicant submitted a lawsuit to the Basic Court, including the proposal for the appointment of an interim measure, claiming trademark infringement by the company "ELKOS" l.l.c., because the latter had imported products containing the name "Gjergj Kastrioti Skënderbeu", which are produced by another company, namely by Canteen "Gjergj Kastrioti" in Durrës. By this lawsuit, the Applicant emphasized that it has protected the trademark "GJERGJ KASTRIOTI SKENDERBEU", in Albania, internationally and in Kosovo. Further, the Applicant pointed out that the sale of products under the name "GJERGJ KASTRIOTI SKENDERBEU" by the "GJERGJ KASTRIOTI SKENDERBEU" J.S.C. Beverage Canteen, Durrës, Albania, constitutes a violation of the Applicant's trademarks because the latter does not have a valid registration of the trademark in Kosovo, and that the

company “ELKOS l.l.c.” is the importer of these drinks. In this regard, the Applicant emphasized that it has not given consent to any legal entity to import, store, put on the market, or sell the “GJERGJ KASTRIOTI SKENDERBEU” brand. In its lawsuit, the Applicant also emphasized the similarities of the trademark signs, noting that the Brandy Skenderbeu product labels, the label and carton for the Brandy Skenderbeu product and some other products, identically use the trademark registered in the Republic of Kosovo, and especially identical signs such as (i) identical colors: gold, black, red, white; (ii) the composition and relationships among themselves, and the identical placement positions of the main elements; (iii) the name “GJERGJ KASTRIOTI SKENDERBEU”, the size of the letters, the fonts used and the ratios between the constituent words of the brand name; (iv) identical stylized writing of the name. These identical trademark uses not only have the identical name, but are used for identical goods. Consequently, the Applicant also requested the appointment of an interim measure in order to prohibit the release into circulation and any other action such as the destruction or alienation of goods prohibited by the Ministry of Finance-Customs of Kosovo.

22. From the case file, it results that the responding party, in the answer to the lawsuit, argued, among other things, that it has imported the product since 2002, and the intervener’s product is a “*well-known product in the market of the Republic of Kosovo*”. The respondent also emphasized that the emblem of the Kastriots cannot be kept in exclusive ownership because this emblem “*is itself the Emblem of the Republic of Albania*”. The intervener (Durrës beverage canteen) also submitted its comments, emphasizing, among other things, that it has exported products with this trademark to Kosovo since 1999, and to Yugoslavia since 1987.
23. On 25 January 2016, the intervenor submitted a request for the cancellation of the trademark to IPA, emphasizing that: (i) they have produced Skenderbeu alcoholic drink since 1967, and this drink has been present in Kosovo since that time; (ii) by means of UCD (Unique Customs Documents) dating from 2000 onwards, it is proven that Skenderbeu drink was imported and sold in Kosovo; (iii) considers that the conditions provided for in Article 52 (Grounds for declaration of invalidity of a trade mark) of the Law on Trademarks have been met; (iv) refers to paragraph 1.3 of Article 53 (Request for declaration of the invalidity) in conjunction with paragraph 1 of Article 36 (Proof of use of the earlier trade mark) of the Law on Trademarks.
24. On 22 February 2016, the Basic Court by the Decision [IV. EK. C. no. 593/15], for the imposition of the interim security measure, prohibited the release into circulation and any other action, such as the destruction or alienation of goods prohibited by the Kosovo Customs, of the products imported by “Elkos LLC”, in the amount of 12040 liters „Skenderbeg“ brandy. The Basic Court was based on Article 297 paragraph 1, Article 306 paragraph 1 and Article 304 paragraph 3 of the Law on Contested Procedure, finding that there is a risk that without the imposition of the security measure, it will be significantly more difficult for the parties to fulfill their request.
25. On 26 November 2016, Canteen “Gjergj Kastrioti Skënderbeu” based in Durrës (intervener), asked the Basic Court to intervene in the contested procedure, and such a thing was allowed by the Basic Court, by the Decision of 3 July 2017
26. According to the case file, on 13 November 2017, the Basic Court, by Decision, decided on the determination and deposit of monetary funds on behalf of the guarantee for the imposition of the security measure, in the amount of 50,000 euro.
27. On 3 December 2018, the Basic Court by Judgment [IV. EK. C. no. 593/2015], (i) rejected as ungrounded the claim and statement of claim of the Applicant; (ii) repealed

the Decision of 22 February 2016 on the imposition of the interim security measure; (iii) repealed the Decision of 13 November 2017 on the determination and deposit of monetary funds in the name of the guarantee for the imposition of the security measure, in the amount of 50,000 euro; (iv) ordered that each party bear its own costs.

28. Regarding the issue of the recognized trademark, the Basic Court emphasized that (i) the products have acquired the treatment of the recognized trademark in Kosovo, due to the fact that the same products were imported in the former Yugoslavia, as well as in Kosovo since 1964, a fact certified according to archival documents that these products with the trademark Skënderbeu were imported into the territory of Yugoslavia, of which Kosovo has been a part since 1967 (ii) Elkos L.L.C., for years has imported this product from the intervener (iii) According to the UCD (Unique Customs Documents), the intervener exports to Kosovo since 2002, the products under Skënderbeu sign, without any obstacles; and (iv) based on the case law of the Court of Justice of the European Union, namely the case between Red Bull vs. Bulldog, [no. C. 65/12], decided that the use of similar signs should be tolerated when there are “*right reasons*” since the sign „Bulldog“ has been used since 1975, even before the formal registration of the trademark, and that according to the Basic Court, is a situation similar to that of the Applicant
29. The Basic Court, regarding the issue of national symbols, emphasized that “[...] according to Article 6 paragraph 1.8 [LT] trademarks which have not been authorized by the competent authorities, pursuant to Article 6 of the Paris Convention, cannot be registered, if they are registered, they must be declared invalid.”
30. On 14 December 2018, the Applicant submitted an appeal the Court of Appeals against the Judgment [IV. EK. C. no. 593/2015] of the Basic Court, claiming a violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law. Specifically, the Applicant did not agree with the Basic Court's reasoning regarding the term “*well-known trademarks*” emphasizing that the LMT requires a trademark to be registered, whether well-known or not, and emphasizes that “*The current LT does not provide that an earlier well-known unregistered trademark can serve as a sufficient basis for prohibiting the use of a later trademark*”.
31. On 20 February 2019, the Court of Appeals by the Judgment [Ac. No. 44/2019]: rejected as ungrounded the Applicant's appeal and upheld the Judgment of the Basic Court. The Court of Appeals reasoned that: (i) the allegations of erroneous application of substantive law are ungrounded because the court of first instance rightfully applied the provision of Article 6 of the LT, because the latter in paragraph 1.10 establishes that trademarks that cannot be registered or declared invalid are “*trademarks which contain symbols, emblems and state blazons which have not been determined in Article 6 of the Paris Convention and which are of general interest of the Republic of Kosovo, except cases when their registration have been permitted by competent body*”, and in the present case the Applicant alleges protection of signs “that constitute national symbols” but which cannot be appropriated; and (ii) Since in the present case the subject of consideration is the Applicant's statement of claim for the prohibition of the use of signs on products, the Court of Appeals did not consider whether the Applicant has the right to register these signs as trademarks ; (iii) Based on the provisions of Article 6, paragraph 1, sub-paragraphs 1.8 and 1.10 - these are trademarks protected by Article 6 bis of the Paris Convention and the TRIPS Agreement, and fall into the category of Trademarks with unauthorized content , which do not authorize the Applicant to prohibit their use to third parties. Furthermore, the Court of Appeals emphasized that the first instance court also applied the provisions that provide for the protection of well-known trademarks, specifically Article 7 in conjunction with Article

52 of the LT, as well as Article 6 bis of the Paris Convention, which is also inclusive, with significant expansions, in the TRIPS agreement, articles 16 (2) and (3); and this, because the respondent has argued that the respondent's products have been imported into the Kosovo market as a "reference market" since 1987, which in this case has acquired the status of a well-known brand in the Republic of Kosovo, before its registration by the claimant, therefore the respondent cannot be prohibited from using it."

32. On 4 April 2019, the Applicant submitted a revision to the Supreme Court on the grounds of erroneous application of substantive law and the violation of the provisions of the contested procedure. The Applicant in its revision claimed that the substantive law was erroneously applied due to the erroneous interpretation by the courts of Articles 5 (Signs which may be protected as trademarks), 6 (Refusal for absolute grounds) and 7 (Relative grounds for refusal) in conjunction with Article 52 (Grounds for declaration of invalidity of a trademark) of the LT.
33. Regarding the interpretation based Article 6 of the LT, the Applicant emphasized: (i) According to the LT, the main criterion for acquiring the protection from the substantive law is registration of the trademark, in which case the use of the trademark by others is prevented; (ii) in Article 12 [Exhaustion of the rights acquired by a trade mark] of the LT, the principle of national exhaustion is provided, in which case the parallel import or placing of products without the permission of the holder on the Kosovo market represents a violation of the trademark protected and the holder can ask the court to stop such an action; (iii) the Applicant has protected all figurative and verbal trademarks; (iv) based on Article 8 [Rights acquired by a trade mark] paragraph 1 of the LT, it is determined that the trademark is the exclusive right of its owner. In this regard, the Applicant pointed out that the company Elkos has placed on the market of Kosovo goods which have the identical sign with its trademarks. The Applicant also points out that the Court of Appeals has denied him the rights provided by the substantive law "*by applying it in an erroneous manner, although based on Article 95 of LT the claimant is entitled to the right to legal protection [...]*". From the systematic reading of the provisions of the LT, it is understood that Article 5, 6, and 7 and other articles of the LT, are related to examination procedures, refer to, obligate and apply only to the Industrial Property Agency and thus to no other law enforcement institution". In this regard, the Applicant emphasizes that the court is not the competent authority to assess the refusal for absolute reasons, but it is the IPA.
34. The Applicant further reiterates that the Court of Appeals made the decision "*as the subject of the claim was the contestation of the registration of trademarks for absolute reasons and not the confirmation that the respondent has infringed the trademark of the claimant*" [... *[Therefore , the court made the post-festum assessment of the trademarks already registered, without having such a request from any party to the dispute*".
35. Regarding the protection of signs, the Applicant states that he does not claim the protection of some heraldic signs, medieval symbols related to the figure of Gjergj Kastrioti, but he has proven to the court that "*owns, as the legal heir of the Ali Kelmendi State Food Combine, the emblem of the Kastriots and some other medieval symbols related to the figure of the National Hero*", and these symbols have also been registered as trademarks in Albania, starting from 11 June 1993, while internationally they have been registered from 2005 onwards. Regarding the fact that the trademark of the registered subject contains the flag or coat of arms of the Republic of Albania, the Applicant points out that they do not contain any emblem provided by Article 6 paragraph 1 point 10 of the Law on Trademarks, and in this case the Applicant makes

description and difference between the flag of the coat of arms, and the sign used as a trademark.

36. Regarding the interpretation of Article 7 of the LT, the Applicant points out that this article defines the cases when an objection can be filed against the registration of a trademark application published in the Trademark Bulletin. In this respect, the Applicant emphasized that the Court of Appeals incorrectly applied the substantive law, stating that the references in Article 7 and Article 52 of the LT were not used properly. The Applicant further states that *“References to the Paris Convention and the TRIPS Agreement are also incorrect. in LT, there is talk of trademarks registered according to international agreements that have effect in Kosovo (Article 7 par 2.5). In the Constitution of the Republic of Kosovo, Article 19 par 1 [Applicability of International Law] it is determined that: “1. International agreements ratified by the Republic of Kosovo become part of the internal legal system after their publication in the Official Gazette of the Republic of Kosovo.” While TRIPS is not part of the legal system of Kosovo at all. LT, Article 3, Definitions, point 1.5, gives this definition “Known trademark – trademark according to article 6 bis of the Paris Convention; Neither the Paris Convention itself nor the TRIPS Agreement contain any clear definition or guidance on what is meant by the term well-known brand.”* According to the Applicant, the LT does not provide protection to well-known trademarks, and the Court of Appeals, by allowing the use of an unregistered trademark, has unlawfully denied the Applicant’s legal rights arising from ownership of registered trademarks.
37. On 1 July 2020, the Supreme Court rendered the Judgment [E.Rev.29/19] which rejected as ungrounded the revision of the Applicant against the Judgment [Ac. No. 44/2019] of the Court of Appeals. The Supreme Court initially emphasized that in the present case, there is no exceeding of the claim, and it is inappropriate to claim that the courts of the lower instance have exceeded their powers by taking the powers of the IPA. Regarding this point, the Supreme Court emphasizes the factual situation that: (i) The Applicant in Albania has registered the trademark “Gjergj Kastrioti Skënderbeu” starting from 1993, and that the latter one contains the double-headed eagle on red color, the emblem of the Kastriots and some other medieval symbols related to the figure of Skanderbeg. Internationally, the claimant has registered this trademark since 2005, while in Kosovo - at the IPA, has registered it on 23 November 2007, with validity until 23 November 2027; (ii) The Applicant is a producer and distributor of alcoholic beverages, while the respondent circulates goods and is an importer of those products that contain the same sign, with the same graphic presentation, and are of origin from the Canteen of drinks in Durrës, which produces and exports these products since the 60s; and, (iii) The courts of lower instances have confirmed that the respondent has been selling the products of this trademark on the Kosovo market since 1987, importing them from the Durrës Canteen, and due to the many years of presence of the product, the brand has acquired the status of a 'well-known' brand in Kosovo.
38. The Supreme Court noted what is disputable in this case is whether Elkos L.L.C. can import alcoholic beverages-cognac “GJERGJ KASTRIOTI SKENDERBEU” from the “Durrës” liquor canteen without the Applicant's permission, and can this action be considered a violation of the trademark, for the reason that the Applicant at the IPA has acquired the exclusive right to use the sign “GJERGJ KASTRIOTI SKENDERBEU”. *The Supreme Court also emphasized that “The similarity of the signs is indisputable, since both parties (not completely) use the same name - „Gjergj Kastrioti Skenderbeu“, with the emblem of the Kastriots to identify the same product”.*
39. The Supreme Court, referring to Article 254 paragraph 1 of the LCP, emphasized that the Applicant has filed a lawsuit to find whether the trademark has been violated. Specifically, the Supreme Court states that the Applicant did not request that *“one of his*

rights be established - trademark infringement, but he requested that the respondent's "right" to use the same name, signs, emblems, etc. be established".

40. The Supreme Court, referring to Article 6 of the LT, emphasized that it is limited only to the assessment whether national and state symbols can be prohibited for use by third parties, and consequently concluded that trademarks enjoy legal protection, but *"even those that are not registered, enjoy legal protection"*.
41. The Supreme Court emphasized as follows: *"The first instance court from the administered evidence has established that the respondent has imported these products in the former Yugoslavia since 1964, therefore it has assessed that it has acquired the status of a recognized brand in Kosovo before the registration by the claimant, therefore its use cannot be prohibited. The product with the same name has been produced for many years in Durrës and that the intervener has a long tradition of exporting alcoholic beverages before the claimant started its own production. Legal theory does not clearly and precisely define the object of protection, or the term "known" trademark. However, there are some elements, requirements to acquire the status of the goods known for wide consumption, regardless of the age and culture of the wide consumer circle. It is an indisputable fact that the product of the intervener, which was imported by the respondent, possesses all the characteristics of a known product. For this reason, the allegation that the respondent failed to prove that he is a user of the 'known brand' is regarded as ungrounded, because obviously in the first instance procedure it was proven that (a long time ago) cognac brand alcoholic beverages „Gjergj Katrioti Skenderbeu“ from Durrës are a well-known product both in their home territory and in Kosovo"*.
42. The Supreme Court further reasoned that: *"As for the remarks related to the inclusion of the implementation of international provisions and rules (the Paris Convention and the TRIPS Agreement) of the second instance court, this Court considers them to be unfounded, due to the lack of of domestic laws and regulations which do not contain the provisions by which the dispute in question was dealt with. However, in this case it is necessary to give a fair decision which must be in harmony with international rules and norms as well as customary business norms, especially when such interpretations are in accordance with any constitutional system"*.

Applicant's allegations

43. The Applicant alleges that the challenged Judgment [Rev.nr.29/19] of the Supreme Court violates his fundamental rights and freedoms guaranteed by Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR and Article 54 [Judicial Protection of Rights] of the Constitution, in conjunction with Article 6 of the ECHR.

Regarding the alleged violations of Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 of Protocol No. 1 of the ECHR.

44. The Applicant points out that interpreting human rights in harmony with the court decisions of the European Court of Human Rights (hereinafter: ECtHR), which in the concept of ownership included *"property and the right to it- in the material and classical sense of the word, but it includes a wide range of monetary rights - rights derived from shares, patents, trademarks, court decisions and also rights derived from business management"*. In this case, the Applicant also cites the ECtHR cases *Melnychuk v. Ukraine; Anheuser-Buch inc. v. Portugal*, emphasizing that in these cases the ECtHR has considered intellectual property as "asset", specifically the trademark and copyright.

45. The Applicant states that the LT establishes the conditions and procedures for the registration of trademarks, the rights from the registration and the implementation of these rights and that this law determines that the right to the trademark is a property right.
46. Further, the Applicant states that the LT aims to prevent unfair competition from the misuse of trademarks, and that the principle of territoriality according to the LT determines that the protection of the trademark has a territorial nature and with the LT the Republic of Kosovo ranks among the countries that apply the “First to submit” system and not the “first to use” system. According to the Applicant, paragraph 1 of Article 12 of the LT, applies the principle of national exhaustion according to which *“the rights of the holder of the registered trademark to control the circulation of goods or services will end only when these goods or services have been introduced into the Kosovo market by the owner or with his consent. As a consequence, in cases of parallel importation or placement of certain (authentic) products on the Kosovo market without the holder's permission, who may request the court to stop such activity since this procedure represents a violation of the protected trademark [...]”*.
47. Regarding the above, the Applicant emphasizes that he has protected all trademarks as figurative marks and verbal marks, in accordance with the LT, to the IPA, by applying for registration according to articles 5 and 6 of the LT, and the entire registration process, according to the Applicant, was done in compliance with articles 23 and 44 of the LT and Administrative Instruction no. 13/2012 for Trademark Registration Procedures issued by the Ministry of Trade and Industry.
48. The Applicant referring to Article 8 of the LT states that *“The respondent [ELKOS] has placed on the Kosovo market, through Customs, goods and packaging that have identical signs with the [Applicant's] trademarks”*.
49. Therefore, the Applicant alleges that *“the Basic Court, the Court of Appeals and the Supreme Court “in open opposition to the substantive law in force, [Article 8 of the LT] , ignore and deny the protection provided by law for trademarks of the [Applicant], even though it determines their registration from 23 November 2007 [...] and the extension of the term of protection of these trademarks for the following 10 years, until 23 November 2027”*.
50. The Applicant further emphasizes that the regular courts have denied him the rights foreseen by the substantive law, applying the law in an erroneous way. Regarding this point, the Applicant refers to articles 95, 96, 97 and 99 of the LT.
51. Further, as regards the allegation of erroneous application of substantive law, the Applicant alleges that the Supreme Court incorrectly applies and interprets Articles 5, 6 and 7 in conjunction with Article 52 of the LT emphasizing that only the IPA, and not the court, is competent to take the decision to reject the application for registration and/or declare it invalid.
52. Specifically, regarding the erroneous application of the substantive law, the Applicant also states: *“[...] the only possibility when a court would be able to interpret, and therefore apply Article 6 of the LT, would be in case that the registration /non-registration of the trademark in the IPA would be challenged either by the applicant or by the objector. Thus, the Court would be able to interpret Article 6 of the LT only if the administrative act of the administrative body [IPA decision] would be challenged. Therefore, by making erroneous application of Article 6 of the LT, the Court goes beyond its powers and jurisdiction, takes over the role and administrative*

competences of the IPA and seeks to examine, for absolute reasons, whether the conditions to be registered as trademarks, citing, without any legal basis, that in accordance with Article 6 of the LT, they cannot be registered as trademarks, therefore, it concludes that they do not enjoy legal protection”.

53. The Applicant therefore notes that the Court of Appeals rendered the decision in question *“as the subject of the claim was the contestation of the registration of trademarks for absolute reasons and not the confirmation that the respondent has infringed the trademark of the claimant” [...] therefore , the court made the post-festum assessment of the trademarks already registered, without having such a request from any party to the dispute, and in this way clarifies the provisions from Article 6 of the LT by interpreting them in a completely inappropriate way [...]”.*
54. The Applicant, referring to the citation of the Supreme Court, in which it is emphasized that *“trademarks in general offer great legal protection to their owner, but even unregistered ones enjoy legal protection”*, claims that this conclusion is completely contrary to the purpose of the existence of the LT and the protection it offers to the owner in accordance with Article 8, which, inter alia, states that *“The owner of the registered trademark has the right to prohibit third parties from using without his permission any sign, which is identical to the trademark, for goods or services which are identical to those for which the trademark is registered”.*
55. In sum, the Applicant states that the Supreme Court deprived him of the peaceful enjoyment of his property, without protecting his property right, and that this interference *“is not based on law, but it is also not based on a legitimate purpose nor does it take into account the principle of proportionality”*, as provided by the ECtHR.

Regarding the allegations of violation of Article 54 of the Constitution in conjunction with Article 6 of the ECHR

56. The Applicant initially states that the Supreme Court has given superficial reasoning and does not refer to any of the Applicant's claims filed in the revision. The Supreme Court *“is focused on issues that a priori protect the position of the lower instances, treating it as if the subject of the dispute of the claimant is the right to import the goods and not the certification and prohibition of infringement of the registered trademark, as well as whether the registered trademark right enjoys protection in the Republic of Kosovo, right?”*
57. The Applicant further states: *“In order to justify unproven decision conclusions, the Court confuses the legal institute of “well-known trademark” with authentically eclectic theorizations on the status of “well-known goods” “product” or “well-known goods”, and, absurdly, finds and accepts for granted the fact that the respondent or the intervener imports that product in Kosovo from 1964 or 1987, when there is no evidence in the documents to prove it. On the contrary, with the evidence filed by the Intervenor and the respondent, it is proven that the Intervenor was established as an anonymous trading company and was registered as a legal entity in court on 16 August 1995, two years after the registration of the claimant's iconic trademark with national registration number 45 “GEORGJ KASTRIOTI/SKENDERBEU” and emblem.*
58. Regarding the above, the Applicant continues: *“This statement of the Court is not grounded because, by the Paris Convention, Article 6 bis, the field of protection granted to well-known brands is established. The holder of a well-known trademark has the right to initially object to the registration of a subsequent trademark that is in conflict with his trademark. The holder of a well-known trademark can also request the cancellation of the registration of a subsequent trademark that conflicts with the*

*well-known trademark. These are provisions that are also included in the LT, namely Article 7, paragraph 1 in conjunction with Article 7, paragraph 2, sub-paragraph 2.3 and Article 52, paragraph 1, sub-paragraph 1.3 in conjunction with Article 7, paragraph 2, - sub-paragraph 2.3. **But, according to LT, no legal protection is offered to a trademark, even if it is well-known in the territory of the Republic of Kosovo, if the trademark is not first registered in Kosovo, by the Industrial Property Agency.** In other words, in terms of the LT, there is no question that, for trademarks, whether they are well-known, (emphasis added) formal trademark registration is required to enjoy legal protection.”*

59. The Applicant also points out that “*Under the LT, apart from opposing the registration and cancellation of the latter, the holder of a well-known unregistered trademark does not have the right to use the provisions of the trademark law to request the prohibition of the use of a similar trademark. **In other words, the LT does not provide that a well-known and earlier unregistered trademark can serve as a sufficient basis for prohibiting the use of a later registered trademark.** From such reasoning of the Court, it can be concluded that the Court acted with unprecedented haste - not analyzing and not mentioning any of the evidence presented and not giving its opinion on all the evidence and claims of [the Applicant] separately.”*
60. In conclusion, the Applicant states that “*his fundamental rights guaranteed by Article 6 of the European Convention on Human Rights have been violated. In other words, the reasoning of the decision shows that in fact the case of [the Applicant] was not really addressed (this obligation derives from the Decision of the ECtHR Affaire H. v. Belgium) by not giving answers to the main arguments of [the Applicant].*
61. Finally, the Applicant requests the Court to declare the referral admissible and to find that there has been a violation of (i) Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 of the ECHR; (ii) Article 54 of the Constitution in conjunction with Article 6 of the ECHR; (iii) to declare invalid Judgment E. Rev. No. 29/19 of the Supreme Court and remand it for reconsideration.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 46 [Protection of Property]

*The right to own property is guaranteed.
Use of property is regulated by law in accordance with the public interest.
No one shall be arbitrarily deprived of property.
[...]
Intellectual property is protected by law.*

Article 54 [Judicial Protection of Rights]

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

European Convention on Human Rights

Article 6
(Right to a fair trial)

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

[...]

Protocol no. 1 of the European Convention on Human Rights

Article 1
(Protection of property)

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

[...]

Relevant legal provisions for trademarks

LAW No. 05/L -040 AMENDING AND SUPPLEMENTING THE LAW No. 04/L-026 ON TRADEMARKS

Article 3
Definitions

1. The terms used in this Law shall have the following meaning:

[...]

Paris Convention - the Convention for the Protection of Industrial Property of March 20, 1883, reviewed and amended.

[...]

1.5. *Known trademark – trademark according to article 6 bis of the Paris Convention.*

[...]

Article 4
Acquisition of trademark right

1. *A trademark right shall be acquired through registration of trademark in the trademark register, maintained by Industrial Property Office.*

2. *Local and foreign person may be trademark holders in the Republic of Kosovo.*

3. *Person who is not national of Republic of Kosovo or does not have of registered business representative office shall represent to the Office through authorized representatives only.*

Article 5

Signs which may be protected as trademarks

A trademark may be every sign which could be represented graphically, particularly words, including personal names, designs, letters, numbers, the shape of goods or their packaging, colors as well as combination of all above under a condition that goods or services of one enterprise can be distinguished from the other enterprises.

*Article 6
Refusal for absolute grounds*

- 1. As trademark cannot be registered or if registered must be declared invalid:
 - 1.1. signs which are not in accordance with Article 5 of this Law;*
 - 1.2. trademarks which do not contain any distinctive feature;*
 - 1.3. trademarks which do consist exclusively of signs or indications that may be used in trading for determining type, quality, quantity, intention, value, geographical origin, time of production of goods or conducting services or showing other features of goods and services;*
 - 1.4. trademarks which consist exclusively of signs or indications that have become common in everyday language or are used confidently and have become common trading practices.*
 - 1.5. signs which consist exclusively of:
 - 1.5.1. the shape which results from goods nature;*
 - 1.5.2. the shape of goods which is necessary to obtain a technical result,*
 - 1.5.3. the shape which gives substantial value to the goods;**
 - 1.6. trademarks which are contrary to moral principles and public order;*
 - 1.7. trademarks which may cheat public, for instance regarding the nature, quality or geographical origin of goods or services;*
 - 1.8. trademarks which have not been authorized by the competent authorities, pursuant to Article 6 of the Paris Convention.;*
 - 1.9. trademarks the use of which may be prohibited by provisions of any other Law;*
 - 1.10. trademarks which contain symbols, emblems and state blazons which have not been determined in Article 6 of the Paris Convention and which are of general interest of the Republic of Kosovo, except cases when their registration have been permitted by competent body;*
 - 1.11. trademarks for wines or alcohol drinks containing or consisted of a geographical indication which identifies such wines or alcohol drinks not having that origin;*
 - 1.12. trademarks containing or consisted of a denomination of origin or a geographical indication with effect in the territory of the Republic of Kosovo, if application for registration of the trademark has been submitted after application for registration of a denomination of origin or a geographical indication and it is in application request for registration of geographical indication, determined by respective legislation, basis of such denominations are registered for types of similar goods.**
- 2. Paragraphs 1.2, 1.3 and 1.4 of this Article shall not applicable if in the process of registration, prior to application date for registration, the trademark acq*

*Article 7
Relative grounds for refusal*

- 1. Upon opposition submitted by the holder of an earlier trademark, the trademark submitted shall not be registered if:
 - 1.1. it is identical with an earlier trademark and goods or services for which the trademark has been submitted are identical with the goods or services protected by the earlier trademark;**

1.2 it is identity or similar to earlier trademark and goods or services which have been submitted are similar to goods and services protected by earlier trademark and when due to similarity there is possibility causing confusion to public, including the possibility of association to earlier trademark.

- 2. "Earlier trade mark" in the meaning of paragraph 1 of this Article, means:*
- 2.1. registered trademark with the application date or earlier priority date;*
 - 2.2. application for registration of trademark, with application date or earlier priority date, in registration process;*
 - 2.3 trademark that is well known in the territory of the Republic of Kosovo, on the date of application for trademark registration, or when appropriate, the right of priority requested in relation with the application for trademark registration.*
 - 2.4 community trademark or application for registration of community trademark, as determined by paragraph 1 of Article 83 of this Law.*
 - 2.5 registered trademarks according to international agreements which have effect in the Republic of Kosovo;*
- 3. In case of an objection by the owner of the earlier trademark, under Article 7.2 of the basic Law, there should not be registered the identical trademark or similar to the earlier trade mark, which is protected for goods or services that are not similar to those for which the earlier trade mark is registered, if the earlier trademark has a reputation in the Republic of Kosovo and by the use of the trademark in question, reasonably, an unfair advantage is realized by distinguishing characteristics or reputation of the earlier trade mark or distinctive feature or reputation of the earlier trade mark are damaged.*
- 4. In case of an objection by the owner of the earlier trademark, trademarks should not be registered if the representative or agent of the owner of the trademark without the authorization of the owner applies for trademark registration in its own name, except when the representative or agent justifies his actions.*

CHAPTER II EFFECTS OF A TRADE MARK

Article 8

Rights acquired by a trademark

- 1. The registered trademark shall be exclusive right of its holder. The holder of trademark shall be entitled to prevent third parties to use without his permission:*
- 1.1. any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered;*
 - 1.2. any sign where, because of its identity with, or similarity to the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark;*
 - 1.3. any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the Republic of Kosovo and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.*
- 2. According to paragraph 1 of this Article the holder of the trademark may prohibit the following actions also:*
- 2.1. affixing the sign to the goods or to the packaging thereof;*

- 2.2. offering the goods, or putting them on the market or stocking them for these purposes under that sign, or offering or supplying services thereunder;
- 2.3. importing or exporting the goods under the sign;
- 2.4. using the sign on business papers and in advertising.

3. The rights conferred by a registered trade mark shall prevail against third parties from the date of publication of registration of the trade mark. Reasonable compensation may, however, be claimed in respect of acts occurring after the date of publication of a trade mark application, which

acts would, after publication of the registration of the trade mark, be prohibited by virtue of that publication. The court judging the case may not decide upon the merits of the case until the registration has been published.

[...]

Article 12

Exhaustion of the rights acquired by a trade mark

1. Exhaustion of the right for prohibition of the use of trade mark for the goods and services shall begin when the trade mark have been put in the market of the Republic of Kosovo by the holder or after the membership of the Republic of Kosovo into the European Union, in the territory of any of the States of the European Union, or States Parties to the Agreement Creating the European Economic Area, under that trade mark.

2. Paragraph 1 of this Article shall not apply where there exist legitimate reasons for the holder to oppose further commercialization of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market

[...]

Article 52

Grounds for declaration of invalidity of a trade mark

1. A trade mark shall be declared invalid upon a request to the Office:

1.1. when the trade mark has been registered in conflict of the provisions of Article 5 or Article 6 of this Law;

1.2. when applicant was acting in bad faith when he filed the application for the trade mark;

1.3. When there is an earlier trade mark as referred to in Article 7 paragraph 2 of this Law and the conditions set out in paragraph 1 or paragraph 3 of Article 7 of this Law are fulfilled;

1.4. when there is a trade mark as referred to in Article 7 paragraph 4 of this Law and the conditions set out in that paragraph are fulfilled;

1.5. when the use of such trade mark may be prohibited by virtue of an earlier right in particular:

1.5.1. right on a name

1.5.2. right of personal portrait;

1.5.3. Copyright;

1.5.4. industrial property right.

1.6. when the use of the trade mark would infringe rights to a sign used in the course of trade in the Republic of Kosovo were it was earlier acquired and that sign confers on its holder the right to prohibit the use of a subsequent trade mark.

2. When the trade mark has been registered in breach of the provisions of Article 6 subparagraphs 1.2., 1.3. and 1.4. of this Law, it may nevertheless not be declared

invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.

3. A trade mark may not be declared invalid on the grounds of an earlier trade mark with reputation or an earlier well-known trade mark if the earlier trade mark has not become wellknown within the meaning of sub-paragraph 2.3 of paragraph 2 of Article 7 of this Law or has not acquired the reputation within the meaning of Article 7 paragraph 3 of this Law up to the date of priority of the later trade mark.

4. Where the holder of one of the rights referred to in sub-paragraphs 1.3., 1.4. 1.5. and 1.6 of paragraph 1 of this Article has previously requested a declaration that a trade mark is invalid, he may not submit a new request for a declaration of invalidity on the basis of another of the said rights which he could have invoked in support of his first request.

5 Where the ground for invalidity exists in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

6. When a trade mark is declared invalid for all or some of the goods or services it shall be deemed that with the declaration of invalidity of the trade mark all the effects that it had had from its registration shall cease.

CHAPTER XIII CIVIL –LEGAL PROTECTION

Article 95

Persons entitled to claim the protection of rights

The protection of the rights under this Law may be claimed by a right holder, or a person authorized by her/him pursuant to the general provisions on representation, and, by the holder of the exclusive license to use a trade mark on the basis of the licensing contract.

Article 96

Claim procedures for the establishment and termination of infringement

1. The trademark owner may file a claim against any person who has violated the trademark by performing, without authorization, any of the acts referred to in Article 8, paragraph 1 and 2 of the basic Law requiring:

1.1. finding of a violation of the rights of the mark;

1.2. prohibition of violation of rights and prohibition of the continuation of such and similar violations of the rights in the future.

2. Actions specified in paragraph 1, sub-paragraphs 1.1 and 1.2 and in paragraph 2 of Article 96 of the basic Law may also be made against persons, who in their economic activity conducted services while violating trademark or threat for violation of trademark rights.

3. The trademark owner may file a claim against any person who by performing any actions without authorization has caused serious threat of violation of his trade mark, demanding distancing from the act in question and prohibition of trademark rights violation.

Article 97

Claim procedures for the establishment and termination of infringement

- 1. The trademark owner may initiate judicial proceedings against any person who has violated the rights of a trademark committing without authorization one of the acts listed in Article 8, paragraphs 1 and 2 of the basic Law requiring that the products that violate trademark rights and in appropriate cases, the materials and tools used primarily in the creation or manufacture of those products should be removed from the market, confiscated or destroyed.*
- 2. The court shall impose the measures referred to in paragraph 1 of this Article and that on the defendant's expense, unless there are special reasons for not deciding so.*
- 3. The imposition of measures by the Court under paragraph 1 of this Article should be in proportion with the nature and seriousness of the offense and taking into account the interests of third parties.*

*Article 98
Claim for compensation for damages*

- 1. The holder of a trade mark may take a court procedure against any person who has caused him damage by performing without authorization any of the acts referred to in Article 8, paragraphs 1 and 2 of this Law, claiming damages and claiming payment of remuneration.*
- 2. The trademark owner may initiate judicial proceedings against any person who has the rights of a trademark, committing without authorization one of the acts listed in Article 8, paragraphs 1 and 2 of the basic Law, claiming payment of compensation in the amount that he would have required, taking into consideration the circumstances in the license agreement, if it ever existed.*
- 3. The trademark owner may initiate judicial proceedings against any person who has violated the rights of a trademark, committing without authorization one of the acts listed in Article 8, paragraphs 1 and 2 of the basic Law without having any legal basis for this action, a court decision or law, and has benefited from it, claiming restitution or compensation for such benefits under the general rules for unfounded enrichment.*
- 4. When determining damages, the court should take into account all relevant aspects, such as the negative economic consequences, including lost profits, which the damaged party has suffered, any unfair profits made by the violator and, in appropriate cases, elements other than economic factors, such as the moral damage caused to the owner of rights as a result of violation of the right.*

*Article 99
Claim for publication of the judgment*

- 1. The holder of a trade mark may claim that the final judgment even partially upholding the claim to publish in the means of public communication at the expense of the defendant*
- 2. The court shall decide, within the limits of the claim, on the means of public communication in which the judgment shall be published, and whether it shall be published entirely or partially.*

**PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL
PROPERTY**

*Article 6 bis
Well-Known Marks*

The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.

(2) A period of at least five years from the date of registration shall be allowed for requesting the cancellation of such a mark. The countries of the Union may provide for a period within which the prohibition of use must be requested.

(3) No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith.

Article 6 ter

1)

(a) The countries of the Union agree to refuse or to invalidate the registration, and to prohibit by appropriate measures the use, without authorization by the competent authorities, either as trademarks or as elements of trademarks, of armorial bearings, flags, and other State emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view.

(b) The provisions of subparagraph (a), above, shall apply equally to armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations of which one or more countries of the Union are members, with the exception of armorial bearings, flags, other emblems,

abbreviations, and names, that are already the subject of international agreements in force, intended to ensure their protection.

(c) No country of the Union shall be required to apply the provisions of subparagraph (b), above, to the prejudice of the owners of rights acquired in good faith before the entry into force, in that country, of this Convention. The countries of the Union shall not be required to apply the said provisions when the use or registration referred to in subparagraph (a), above, is not of such a nature as to suggest to the public that a connection exists between the organization concerned and the armorial bearings, flags, emblems, abbreviations, and names, or if such use or registration is probably not of such a nature as to mislead the public as to the existence of a connection between the user and the organization.

(2) Prohibition of the use of official signs and hallmarks indicating control and warranty shall apply solely in cases where the marks in which they are incorporated are intended to be used on goods of the same or a similar kind.

3)

(a) For the application of these provisions, the countries of the Union agree to communicate reciprocally, through the intermediary of the International Bureau, the list of State emblems, and official signs and hallmarks indicating control and

warranty, which they desire, or may hereafter desire, to place

wholly or within certain limits under the protection of this Article, and all subsequent modifications of such list. Each country of the Union shall in due course make available to the public the lists so communicated. Nevertheless such communication is not obligatory in respect of flags of States.

10b The provisions of subparagraph (b) of paragraph (1) of this Article shall apply only to such armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations as the latter have communicated to the countries of the Union through the intermediary of the International Bureau.

(4) Any country of the Union may, within a period of twelve months from the receipt of the notification, transmit its objections, if any, through the intermediary of the International Bureau, to the country or international intergovernmental organization concerned.

(5) In the case of State flags, the measures prescribed by paragraph (1), above, shall apply solely to marks registered after November 6, 1925.

(6) In the case of State emblems other than flags, and of official signs and hallmarks of the countries of the Union, and in the case of armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations, these provisions shall apply only to marks registered more than two months after receipt of the communication provided for in paragraph (3), above.

(7) In cases of bad faith, the countries shall have the right to cancel even those marks incorporating State emblems, signs, and hallmarks, which were registered before November 6, 1925.

(8) Nationals of any country who are authorized to make use of the State emblems, signs, and hallmarks, of their country may use them even if they are similar to those of another country.

(9) The countries of the Union undertake to prohibit the unauthorized use in trade of the State armorial bearings of the other countries of the Union, when the use is of such a nature as to be misleading as to the origin of the goods.

(10) The above provisions shall not prevent the countries from exercising the right given in paragraph (3) of Article 6quinquies, Section B, to refuse or to invalidate the registration of marks incorporating, without authorization, armorial bearings, flags, other State emblems, or official signs and hallmarks adopted by a country of the Union, as well as the distinctive signs of international intergovernmental organizations referred to in paragraph (1), above.

THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

Article 16 Rights Conferred

1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade

identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

2. Article 6bis of the Paris Convention (1967) shall apply, mutatis mutandis, to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.

3. Article 6bis of the Paris Convention (1967) shall apply, mutatis mutandis, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.”

Admissibility of the Referral

62. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, foreseen in the Law and further specified in the Rules of Procedure.

63. In this regard, the Court refers to paragraph 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establish:

“(1) The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

[...]

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.”

64. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which stipulates:

“4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.

65. In this regard, the Court notes that the Applicant is entitled to file a constitutional complaint, invoking alleged violations of fundamental rights and freedoms, which are valid for individuals as well as for legal persons (See case of the Court no. KI41/09, Applicant AAB-RIINVEST University L.L.C., Resolution on Inadmissibility of 3 February 2010, paragraph 14).

66. In addition, the Court also examines whether the Applicant has fulfilled the admissibility requirements as further specified in the Law. In this respect, the Court first refers to Article 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
(Individual Requests)

“1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.”

Article 48
(Accuracy of the Referral)

“In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge.”

Article 49
(Deadlines)

The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a Court decision. [...]”.

67. As to the fulfillment of these criteria, the Court finds that the Applicant is an authorized party, which is challenging an act of a public authority, namely Judgment [Rev. no. 29/19] of 1 July 2020 of the Supreme Court, after having exhausted all legal remedies provided by law. The Applicant has also specified the rights and freedoms for which it claims to have been violated, pursuant to the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadline set out in Article 49 of the Law.
68. The Court finds that the Referral of the Applicant meets the admissibility criteria established in Rule 39 (1) of the Rules of Procedure. The Referral also cannot be declared inadmissible on the basis of the requirements established in Rule 39 (3) of the Rules of Procedure. Therefore, the latter is to be declared admissible for consideration on merits.

Merits

69. The Court first recalls the circumstances of the present case, which originate as a result of the registration of the trademark “GJERGJ KASTRIOTI SKENDERBEU” by the Applicant at the IPA. Due to the similarities with some products imported by the ELKOS company, the Applicant requested the imposition of the security measure, by which the import of such products was prohibited. In the court proceedings, the Applicant's allegation was rejected as ungrounded because the Basic Court, the Court of Appeals, and the Supreme Court assessed that the products imported by the Elkos company are well-known brands and that trademarks containing symbols, emblems and state blazons cannot to be appropriated by one party and that their use be prohibited to other parties.
70. Regarding the above, the Applicant claims that the regular courts violated his rights guaranteed by Article 46 [Protection of Property] of the Constitution in conjunction

- with Article 1 of Protocol no. 1 of the ECHR, and Article 54 [Judicial Protection of Rights] of the Constitution, in conjunction with Article 6 of the ECHR.
71. Regarding the violation of Article 46 of the Constitution, in conjunction with Article 1 of Protocol no. 1 of the ECHR, the Court recalls that the Applicant essentially claims that: (i) since he has registered the trademark, he is entitled to all legal rights related to it, including judicial protection; (ii) the regular courts, contrary to the substantive law [Article 8 of LT], ignore and deny the protection offered by the law, namely Articles 95, 96, 97 and 99 of the LT to the trademarks of [the Applicant]; (iii) The Supreme Court erroneously applies and interprets Articles 5, 6 and 7 in conjunction with Article 52 of the LT; (iv) only the IPA, and not the court, is competent to take the decision to reject the application for registration and/or declare it invalid;
72. Specifically, regarding the erroneous application of the substantive law, the Applicant is based on the arguments that: (i) the only possibility when a court would be able to interpret, and therefore apply Article 6 of the LT, would be case that the registration /non-registration of the trademark in the IPA would be challenged either by the applicant or by the objector. Therefore, according to the Applicant, the regular courts would be able to interpret Article 6 of the LT only if the administrative act of the administrative body [IPA decision] would be challenged; and (ii) by making erroneous application of Article 6 of the LT, the Supreme Court goes beyond its powers and jurisdiction, takes over the role and administrative competences of the IPA and seeks to examine, for absolute reasons, whether the conditions to be registered as trademarks, citing, without any legal basis, that in accordance with Article 6 of the LT, they cannot be registered as trademarks, therefore, it concludes that they do not enjoy legal protection.
73. The Applicant further reiterates that the Court of Appeals made the decision as the subject of the claim was the contestation of the registration of trademarks for absolute reasons and not the confirmation that the respondent has infringed the trademark of the applicant, therefore the Supreme Court made the post-festum assessment of the trademarks already registered, without having such a request from any party to the dispute.
74. The Applicant, referring to the decision of the Supreme Court, in which it is emphasized that *“trademarks in general offer great legal protection to their owner, but even unregistered ones enjoy legal protection”*, claims that this conclusion is completely contrary to the purpose of the existence of the LT and the protection it offers to the owner in accordance with Article 8, which, inter alia, states that *“The owner of the registered trademark has the right to prohibit third parties from using without his permission any sign, which is identical to the trademark, for goods or services which are identical to those for which the trademark is registered”*.
75. In sum, the Applicant states that the Supreme Court deprived him of the peaceful enjoyment of his property, without protecting its property right, and that this interference *“is not based on law, but the latter is neither based on a legitimate purpose nor does not take into account the principle of proportionality”*, as provided by the ECtHR.
76. Regarding the violations of Article 54 in conjunction with Article 6 of the ECHR, the applicant emphasizes that: (i) the Supreme Court has given superficial reasoning, oriented to issues which a priori protect the position of the lower instance courts, treating as if the subject of the claimant's 's dispute is the right to import the goods and not the certification and prohibition of infringement of the registered trademark and whether the registered trademark right enjoys protection in the Republic of Kosovo, and that the reasoning of the decision shows that in in fact, the [Applicant's] case was not

really dealt with; (ii) The Supreme Court confuses the legal institute of “well-known trademark”, “with authentically eclectic theorizations on the status of “well-known goods”, “product” or “well-known goods”, and that this assertion of the Supreme Court is not grounded because with the Paris Convention, Article 6 bis, the field of protection granted to well-known brands is determined; and, (iii) according to LT, in the territory of the Republic of Kosovo, no legal protection is offered to a trademark, even a well-known one, if the trademark is not first registered in Kosovo, by the Industrial Property Agency . This is because formal trademark registration is always required.

77. The Court considers that the Applicant’s allegations are essentially related to the manifestly erroneous or arbitrary application of the law, therefore the Court will deal with them below under the allegations of violation of Article 46 in conjunction with Article 1 of Protocol no. 1 of the ECHR.

I. Regarding the allegations of violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR

78. The Court recalls that the present case is about trademarks, namely trademarks registered with the IPA by the Applicant, and for which the Applicant had initiated a lawsuit with the subject of dispute of “infringement of trademark rights”. The Applicant claims that he enjoys legal protection, because goods similar to those of the Applicant, but not registered in the IPA, were imported into the territory of the Republic of Kosovo by the company Elkos. In the context of the Applicant’s allegations of violation of Article 46 of the Constitution, namely the right to protection of property, the Court also refers to the case law of the ECtHR in the interpretation of Article 1 (Protection of property) of Protocol no. 1 of the ECHR.
79. In this regard, the Court first recalls that the Constitution, by Article 46, guarantees the right to the protection of property, where paragraph 5 of this Article expressly states that “*Intellectual property is protected by law*”. The right to property is also guaranteed by Article 1 of Protocol no. 1 of the ECHR, which, based on the case law of the ECtHR, guarantees the right to the enjoyment of “*property*”, including guarantees that no one can be deprived of property, except in the public interest.
80. Consequently, the Court will first deal with whether the Applicant had “property” according to Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR.;

A. Did the Applicant have property

81. The ECHR, through its case law, has established that Article 1 of Protocol no. 1 of the ECHR, applies to intellectual property (see ECtHR cases, *Anheuser-Busch inc v. Portugal*, Judgment of 11 January 2007, paragraph 72; *Melnychuk v. Ukraine*, Judgment of 5 July 2005; *SIA AKKA/LAA v. Latvia* , Judgment of 12 July 2016, paragraph 41; *Tokel v. Turkey*, Judgment of 9 February 2021, paragraph 56), and moreover, it applies to cases of trademarks, in cases where they are registered (see ECtHR case, *Kamoy Radyo Televizyon Yayincilik ve Organizasyon A.Ş. v. Turkey*, Judgment of 16 April 2019, paragraph 37).
82. Therefore, the ECtHR, in the case of *Kamoy Radyo Televizyon Yayincilik ve Organizasyon A.Ş. v. Turkey*, first, assessed whether the applicant company had “property”, and concluded that the applicant company in this case is entitled to recognition of its right to property, because it had a registered trademark. The ECtHR, after finding that the applicant company had a “property” according to Article 1 of

Protocol no. 1 of the ECHR, emphasized that in that case it should be examined whether there has been interference with the company's right to the peaceful enjoyment of its property (see the ECtHR case, *Kamoy Radyo Televizyon Yayincilik ve Organizasyon A.Ş. v. Turkey*, cited above, paragraph 38).

83. Referring to the case law above, in the circumstances of the present case, the Court concludes that the Applicant, since it has registered the trademark in the IPA, enjoys “property” within the meaning of Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR.
84. The Court will further examine whether there has been interference with the Applicant's right to property.

B. Whether there has been interference?

85. The Applicant claims that since it has registered the trademark with IPA, it enjoys all the rights arising from the trademark, including the ban on the export of products bearing symbols similar to the Applicant’s trademark.
86. The Court recalls that in cases involving judicial issues between individuals, the State’s obligations under Article 1 of Protocol No. 1 of the ECHR include **taking the necessary measures to protect the right to property**. In particular, the State is under the obligation to provide the parties to the dispute with judicial proceeding that provide the necessary procedural guarantees and thus enable the courts to adjudicate in a fair and effective manner, in the light of the law in force. In such cases, the question of whether there has been State interference with property rights is often inseparable from the question of whether or not the decisions of the domestic courts were arbitrarily or manifestly unreasonable (see ECtHR cases, *Anheuser- Buch inc v. Portugal*, cited above, paragraphs 83-87 and *Kushoglu v. Bulgaria*, Judgment of 10 May 2007, paragraph 47).
87. In the light of the latter, and taking into account the Applicant’s allegations of a manifestly erroneous interpretation of the law, the Court will examine whether there has been interference with the property rights of the Applicant as a result of arbitrary decisions by regular courts (see as reference *Kushoglu v. Bulgaria*, cited above, paragraph 48).

C. Has there been arbitrariness in the decisions of the regular courts

88. The Court recalls that the Applicant’s main allegation consists in the manifestly erroneous application/interpretation of the law regarding the issue of trademarks, thus resulting in arbitrary decisions of the regular courts.
89. Regarding this point, the Court recalls that the main issue consists in the protection of the Applicant’s trademark which is registered in the IPA, and the prohibition of the use of the name, signs and symbols which are similar to those registered by the Applicant. The Court recalls that in this case, the regular courts have not prohibited the intervener the right to use the name, signs and symbols, essentially relying on two elements. First, that the Applicant regarding the national symbols cannot register the latter as a trademark, therefore it does not enjoy legal protection; and the second, that the trademark from the other manufacturer has acquired the status of a well-known trademark in the Republic of Kosovo, before its registration by the Applicant
90. In this regard, taking into account that the Applicant has registered the trademark, which according to the ECHR, is protected by Article 1 of Protocol no. 1., the Court

recalls as above that in cases involving judicial issues between individuals, the State is under the obligation to provide the parties to the dispute with court proceedings that provide the necessary procedural guarantees and thus enable the courts to adjudicate fairly and effectively in light of applicable law. Therefore, the question of whether there has been State interference with property rights is often inseparable from the question of whether or not the decisions of the domestic courts were arbitrarily or manifestly unreasonable (see *mutatis mutandis* paragraph 84 above).

91. Consequently, in the following, the Court will examine whether there has been arbitrariness in the decisions of the regular courts, and whether these decisions deprived the Applicant of the peaceful use of his property.
92. The Court notes from the case file that the Applicant and the intervener are entities that produce the same products with the same name and similar appearance. Both companies, according to the case file, have the same products because the previous factory was privatized, and the latter had two canteens, in Durrës and in Tirana. Thus, this resulted in these two canteens producing products with the same name.
93. The Court recalls that the essence of the entire contested procedure initiated by the Applicant concerned the prohibition of the import and sale of products containing signs and symbols, the same as those of the Applicant, and not the cancellation of the trademark registration, because the intervener does not have the trademark registered in the Republic of Kosovo, unlike the Applicant, who has it registered. Therefore, for this procedure, the Applicant had also initiated the protection of his rights as provided by Articles 95 and 96 of the LT, because the latter had a trademark registered with the IPA. As it has been repeated several times by the Applicant, but also by the regular courts, the relevant dispute has nothing to do with the procedure trademark challenging.
94. In the following, the Court recalls that the decisions of the regular courts had reasoned in a similar line, regarding whether the fact that Elkos llc imported alcoholic beverages without the Applicant's permission - cognac with the sign "GJERGJ KASTRIOTI SKENDERBEU" from the "Durrës" canteen (intervenor) is considered a violation of the Applicant's registered trademark. In this regard, the Regular courts relied on two categories of reasoning, namely referring to (a) well-known brands; and (b) the use of national symbols.

(a) As for well-known trademarks

95. Initially, the Basic Court, by Judgment [IV.EK.C.nr.593/2015], rejected as ungrounded the claim and the statement of claim of the Applicant and regarding the "well-known trademark" reasoned that the intervener's products:

"[...] have acquired the treatment of recognized trademark in Kosovo, because the same products have been imported in the former Yugoslavia, but also in Kosovo since 1964, a proven fact according to archival documents, these products with the trademark Skënderbeu were imported into the territory of Yugoslavia, of which Kosovo has been a part since 1967.

The responding company "Elkos" l.l.c., for years has imported this product from the Intervenor "Gjegj Kastrioti Skënderbeu" canteen until 2015. The claimant has registered the trademark with no. 17665 of 05.11.2015, and that based on this decision, the Customs of Kosovo, by decision 215/2015, of 02/12/2015, have temporarily stopped the products of the responding party imported by the Intervenor.[...]

The intervenor, according to the UCD (Unique Customs Documents), exports to Kosovo since 2002, the products under the Skënderbeu sign, without any obstacles, and without being disturbed by anyone.

[...] From the case law of the European Court, with the case between Redbull vs. Bulldog, with no. C.65/12, where the holder of the right Red Bull, has banned the holder of the "Bulldog" the sign on energy drinks with the "Bulldog" sign.

Red Bull's request has been approved by the Court in the Netherlands, which has banned the use of the Bulldog sign. However, the Court of Justice of the European Union has decided that the use of similar signs should be tolerated when there are "right reasons" since the sign "Bulldog" has been used since 1975, even before the formal registration of the trademark. The similar situation is even in this case, when the intervenor was present on the Kosovo market much earlier, before the claimant registered the trademark, some 30 years ago, therefore this brand in Kosovo is a well-known brand, which according to Article 7 of the LT, a well-known brand cannot be registered in Kosovo. The court has found that the respondent has not violated the trademark, in the case of importing products from the producer "Gjergj Kastrioti Skënderbeu canteen" because such a brand of this manufacturer is a well-known brand in the Republic of Kosovo, due to the fact that the latter has been used by the Kosovar consumer for more than 30 years, as well as at the time of registration of this brand by the claimant, the latter has been distributed throughout the commercial network of Kosovo.

96. The Court of Appeals by the Judgment [Ac. no. 44/2019] emphasized:

"Also, the Court of Appeals assesses that the first instance court has correctly applied the provisions of Article 7 in conjunction with Article 52 of the LT, as well as Article 6bis of the Paris Convention, which is also inclusive, with significant expansions, also in the TRIPS agreement, articles 16 (2) and (3), which provisions provide for the protection of well-known trademarks. In the present case, the respondent has argued that the respondent's products have been imported into the Kosovo market as a "referent market" since 1987, and thus acquired the status of a well-known brand in the Republic of Kosovo, before its registration by the claimant therefore, the respondent cannot be prohibited from using it."

97. The Supreme Court in its Judgment [E. Rev. 29/19] of 1 July 2020, referred to the factual situation according to which it emphasized:

"The first instance court from the administered evidence has established that the respondent has imported these products in the former Yugoslavia since 1964, therefore it has assessed that it has acquired the status of a well-known brand in Kosovo before the registration by the claimant, therefore its use cannot be prohibited. The product with the same name has been produced for many years in Durrës and that the intervenor has a long tradition of exporting alcoholic beverages, before the claimant started its own production.

Legal theory does not clearly and precisely define the object of protection or the term "well-known" trademark. However, there are some elements, requirements to acquire the status of the goods known for wide consumption, regardless of the age and culture of the wide consumer circle. It is an indisputable fact that the product of the intervenor which was imported by the respondent, possesses all the characteristics of a known product. For this reason, the allegation that the respondent failed to prove that he is a user of the 'known brand' is regarded as ungrounded, because obviously in the first instance procedure it was proven that (a long time ago) cognac brand alcoholic beverages „Gjergj Kastrioti Skenderbeu“ from Durrës are a well-known product both in their home territory and in Kosovo”.

98. From the above, the Court initially notes that the Basic Court reasoned that the intervenor's mark is a well-known trade mark because (i) according to archival documents, the same products were imported into the territory of Yugoslavia, of which Kosovo has been a part since 1967 (ii) According to the UCD (Unique Customs Documents), the intervener exports to Kosovo since 2002, and the company Elkos as a respondent for years has imported this product from the Intervenor; (iii) the Court of Justice of the European Union, decided that the use of similar signs should be tolerated when there are "right reasons" thus referring to the case „*Bulldog*“. Further, the Court of Appeals, referring to well-known trademarks, referred to the provisions of Article 7 of the LT in conjunction with Article 52, Article 6bis of the Paris Convention, and in the TRIPS Agreement, Articles 16 (2) and (3), emphasizing that in the present case the intervener's products were imported into the Kosovo market as a "referent market" a long time ago, and with this they have acquired the status of a well-known brand. In the end, the Supreme Court emphasized that: (i) from the evidence administered by the first instance court, it was assessed that the intervener's products acquired the status of a well-known brand in Kosovo before its registration by the Applicant; (ii) Legal theory does not clearly and precisely define the object of protection or the term "recognized" trademark, but, there are some elements, requirements to acquire the status of the goods known for wide consumption, and considered as an indisputable fact that the product of the intervener which was imported by the respondent, possesses all the characteristics of a known product, based on the fact long time ago cognac brand alcoholic beverages „Gjergj Katrioti Skenderbeu“ from Durrës are a well-known product both in their home territory and in Kosovo.
99. The Court recalls that in his arguments the Applicant states that (i) the subject of the statement of claim was the confirmation of trademark infringement and not the contestation of trademark registration for absolute reasons; and (ii) based on Article 8 of the LT the trademark owner has the right to prevent third parties from using without his permission any sign, which is identical to the trademark, for goods or services which are identical to those for which trademark is registered.
100. The Court notes that the LT, in its Article 8, determines that the rights acquired by trademarks are the exclusive rights of its owner, and the latter has the right to prevent third parties from using them without his permission: (i) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered; (ii) any sign where, because of its identity with, or similarity to the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark; (iii) any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the Republic of Kosovo and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark (paragraph 1, sub-paragraphs 1.1; 1.2; 1.3). The trademark owner is also entitled to prohibit actions such as: (i) affixing the sign to the goods or to the packaging thereof; (ii) offering the goods, or putting them on the market or stocking them for these purposes under that sign, or offering or supplying services thereunder; (iii) importing or exporting the goods under the sign; (iv) using the sign on business papers and in advertising (paragraph 2 sub-paragraphs 2.1; 2.2; 2.3). Whereas, the rights conferred by a registered trade mark shall prevail against third parties from the date of publication of registration of the trade mark (paragraph 3).

101. Based on Article 8 of the LT, the Applicant enjoys legal protection against trademark infringement. In the following, the Court will analyze whether the decisions of the regular courts were arbitrary in their reasoning, considering the circumstances of the present case.
102. The Court again recalls that it is not disputable that the Applicant enjoys “property” based on the trademark registration (see paragraphs 79-82 above). LT, on the other hand, allows the Applicant, based on articles 95 and 96, judicial protection against entities that violate the trademark, which in the present case, the Applicant had initiated with the request to ban the import of canteen products in Durrës (interveners), on behalf of the “Elkos” company. The entire dispute, and the main issue in this case, derives from the interpretation of the legislation, by the regular courts, for allowing the import of products similar to those of the Applicant, but not registered as trademarks, and which, according to regular courts, enjoy protection because they are well-known products in the market of the Republic of Kosovo.
103. The Court in this case notes that the LT in particular, Article 96, determines that the owner of the trademark (the Applicant in the present case) can file a lawsuit against any person who has violated the right of the trademark by carrying out without authorization any of the actions referred to in Article 8, paragraphs 1 and 2 of the LT, requesting (i) finding the violation of trademark rights; and (ii) prohibiting infringement of trademark rights.
104. In this context, bearing in mind the legal provisions referred by the regular courts, the Court notes that the LT, in Article 7, defines the refusal for relative reasons. This article also provides that in the event of an objection being filed by the owner of the earlier trademark, the trademark applied for shall not be registered if certain conditions are met, and among others, (i) when that trademark is identical with an earlier trademark and goods or services for which the trademark has been submitted are identical with the goods or services protected by the earlier trademark (paragraph 1 sub-paragraph 1.1) and (ii) it is identical or similar to earlier trademark and goods or services which have been submitted are similar to goods and services protected by earlier trademark and when due to similarity there is possibility causing confusion to public, including the possibility of association to earlier trademark (paragraph 1 sub-paragraph 1.2). Earlier trademark means that the trademark that is well known in the territory of the Republic of Kosovo, on the date of application for trademark registration, or when appropriate, the right of priority requested in relation with the application for trademark registration (paragraph 2 sub-paragraph 2.3). The Court further notes that the LT provides that in case of an objection by the owner of the earlier trademark, there should not be registered the identical trademark or like the earlier trademark, which is protected for goods or services that are not similar to those for which the earlier trademark is registered, if the earlier trademark has a reputation in the Republic of Kosovo and by the use of the trademark in question, reasonably, an unfair advantage is realized by distinguishing characteristics or reputation of the earlier trade mark or distinctive feature or reputation of the earlier trade mark are damaged (paragraph 3). Consequently, In case of an objection by the owner of the earlier trade mark, trademarks should not be registered if the representative or agent of the owner of the trademark without the authorization of the owner applies for trademark registration in its own name (paragraph 4).
105. Finally, regarding the applicability of the legal provisions, the Court notes that the Court of Appeals has also referred to Article 52 of the LT, which defines the reasons for the cancellation of the trademark, and in which, among other things, it is determined that the trademark is revoked by the IPA, when (i) it has been registered in violation of the provisions of Articles 5 and 6 of the LT (paragraph 1 sub-paragraph 1.1) (ii) when there

is an earlier trademark as mentioned in Article 7 paragraph 2 of this law and when the conditions mentioned in paragraph 1 or paragraph 3. of Article 7 of this law, paragraph 1 sub-paragraph 1.3 have been met); (iii) when there is a trademark as mentioned in Article 7 paragraph 4 of this law and when the conditions defined by that paragraph are met (paragraph 1 sub-paragraph 1.4); Further, there is the possibility that the trademark may not be revoked on the basis of an earlier trademark with reputation or an earlier well-known trademark if the earlier trademark has not become well-known under Article 7 paragraph 2, sub-paragraph 2.3. of this law or has not acquired a reputation according to Article 7 paragraph 3 of this law until the date of the priority right of the later trademark (paragraph 3). In the end, when the trademark is canceled for all or some of the goods or services, it is considered that with the cancellation of the trademark, all the effects that it has had since its registration are extinguished (paragraph 6).

106. The Court, considering the circumstances of the present case, initially considers that the registration of trademarks is important for the development of businesses based on product distinction and the trust given by consumers, and emphasizes that their protection is equally important because from this also derives their property right.
107. The Court notes that the LT does not explicitly foresee the situation of what happens when a well-known but unregistered trademark operates in a market together with a trademark that is similar or identical to the latter. While the LT foresees the absolute and relative reasons for the registration or not of trademarks, the Court notes that the absolute grounds include the issue of national symbols, namely the fact that they cannot be registered, while regarding the relative grounds, it is emphasized that in the case of the submission of the objection by the owner of the previous trademark, the trademark for which the application has been submitted is not registered if certain conditions are met, such as the case when that trademark is identical to the earlier trademark and the goods or services for which the application is submitted are identical to the goods or services protected by the earlier trademark (in the present case, a well-known trademark).
108. Consequently, the Court notes that the LT provides the procedures when the rejection is made for relative reasons, which must be followed in the event of the submission of the objection, and in this case, it is provided that well-known trademarks constitute a basis for the relative rejection of a trademark in the registration procedure. Second, the LT provides in Article 52 the conditions for the cancellation of a trademark, and among other things it states that such trademarks are canceled by the IPA, when they are registered in violation of the provisions of Articles 5 and 6 of the LT, and when there is an earlier trademark.
109. The conditions to consider a well-known trademark are provided in the LT in Article 3, according to which a trademark will be considered as such according to article 6bis of the Paris Convention. The LT reference to the Paris Convention regarding the definition of the meaning of the notion of a well-known trademark has also resulted in such a reference being specified by regular courts in the reasoning given in their decisions.
110. The Court notes that the legal framework determines that trademarks that are registered enjoy protection, however the Paris Convention for the Protection of Industrial Property namely Article 6bis, defines the protection of trademarks even though they are not registered provided that they are “well known”.
111. In this case, the Court notes that “*well-known trademarks*” are given special protection by the provisions of international instruments, namely Article 6bis of the Paris Convention and paragraphs 2 and 3 of the TRIPS Agreement. Regarding what was

reasoned by the Supreme Court, the Court recalls that the latter, in its Judgment Rev. no. 29/19, emphasized:

“As for the remarks related to the inclusion of the implementation of international provisions and rules (the Paris Convention and the TRIPS Agreement) of the second instance court, this Court considers them to be ungrounded, due to the lack of of domestic laws and regulations which do not contain the provisions by which the dispute in question would be dealt with. However, in this case it is necessary to give a fair decision which must be in harmony with international rules and norms as well as customary business norms, especially when such interpretations are in accordance with any constitutional system”.

112. From the above, the Court recalls that the Applicant, pursuant to Article 96 of the LT, requested (i) the finding of trademark infringement and (ii) the prohibition and cessation of future trademark infringement.
113. The Court notes that the Court of Appeals and the Supreme Court, referring to Article 7 of the LT, considered that the Applicant cannot stop the importation of the intervener’s products by the company Elkos, for the reason that it considered them as “*well-known trademarks*” as defined by Article 6bis of the Paris Convention, due to the fact that they have been imported since 1967, and moreover, they have been imported by the Elkos company, where according to the relevant documentation (UCD), it has been proven that they were imported from 2002. Regular courts to resolve the dispute in question referred to international instruments, namely the Paris Convention and the TRIPS Agreement.
114. On the other hand, the Court recalls that the Applicant claims that the position of the Supreme Court regarding Article 6bis of the Paris Convention is not correct because according to it: (i) *The holder of a well-known trademark has the right to first object the registration of a subsequent trademark that is in conflict with his trademark, and (ii) may request the cancellation of the registration of the later trademark that is in conflict with the well-known trademark. However, the Applicant claims that “according to the LT, no legal protection is offered to a trademark, even if it is well-known in the territory of the Republic of Kosovo, if the trademark is not first registered in Kosovo, by the Industrial Property Agency.”*
115. The Court takes into account that the LT refers to the Paris Convention and also to the fact that the LT was drafted in compliance with the directives of the European Union, namely (i) Directive no. 2008/95/EC of the European Parliament and of the Council of 22 October 2008 for the approximation of the laws of the Member States related to Trademarks (Codified version), (OJ L 299, 8.11.2008 p. 25-33), (ii) Directive 2004/48/EC of the European Parliament and of the Council, April 2004 on the Implementation of Intellectual Property Rights (OJ L 157, p.45, 30.4.2004; OJ L 195, p.16, 2.6.2004). Both of these directives were drafted with the Paris Convention and the TRIPS Agreement of the World Trade Organization in mind. In the circumstances of this case, the Court notes that the regular courts have considered that the intervener’s trademark constitutes a well-known product.
116. The Court also notes that the regular courts have referred to the TRIPS agreement namely Article 16 (2) which provides that when determining whether a trademark is well-known, consideration must be given to the knowledge of that trademark in the relevant part of the public, including also knowledge of the presence in the country in question acquired as a result of the promotion of the trademark.

117. The Court takes into consideration the fact that the Supreme Court also referred to the Paris Agreement, which specifically in its article 6 *bis* regulates the issue of well-known trademarks, emphasizing among other things in paragraph 1 of Article 6 *bis* that the authorities must cancel the registration, and prohibit the use of a trade mark which constitutes a reproduction, an imitation or a translation, likely to create confusion, of a mark which is considered by the competent authority of the country of registration or use “*well known in that country*” to be a person’s trademark which is entitled to the benefits of this Convention and is used for identical or similar goods, and this also applies where the essential part of the trademark constitutes a reproduction of any such well-known sign or an imitation likely to create confusion with it. Furthermore, paragraph 2 of Article 6 *bis* requires a period of at least five years from the date of registration to request the cancellation of such a mark, while paragraph 3 of Article 6 *bis* requires that no deadline shall be set to request the cancellation or prohibition of the use of trademarks registered or used in bad faith.
118. Within the meaning of the above reasoning, the Supreme Court, based on the files before it, concluded that the trademark from the intervener has been present in the Kosovo market for about 30 years, namely “*before the formal registration of the trademark by the applicant*”. The Supreme Court, moreover, emphasized that the product with the same name has been produced for many years in Durrës and that the intervener has a long tradition of exporting alcoholic beverages, before the Applicant started its own production. While the Applicant argues that only it enjoys protection because it has registered the trademark, the Court, in analyzing the reasoning of the regular courts, does not see arbitrariness because the latter, in essence, have implemented the provisions of international instruments that specifically regulate the issue of “*well-known trademarks*”, and in this case they concluded that the Applicant cannot stop the import of the intervener's goods because they constituted “*well-known trademarks*” even before the formal registration of the trademark by the Applicant.
119. Consequently, based on the fact that in the concrete case the Applicant complained mainly about the way how the regular courts interpreted and applied the provisions of the Law on Trademarks and the provisions of international instruments related to the treatment of the question of “*well-known trademarks*”, the Court recalls that even in cases involving litigation between individuals and companies, the obligations of the State under Article 1 of Protocol No. 1 entail the taking of measures necessary to protect the right of property. In particular, the State is under an obligation to afford the parties to the dispute judicial procedures which offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly in the light of the applicable law. However, the Court reiterates that its jurisdiction to verify that domestic law has been correctly interpreted and applied is limited and that it is not its function to take the place of the national courts, its role being rather to ensure that the decisions of those courts are not flawed by arbitrariness or otherwise manifestly unreasonable. This is particularly true when it is analyzed in the light of the circumstances of the concrete case which turns upon difficult questions of interpretation of domestic law (See in connection with this aspect also the decision of the ECtHR: *Anheuser-Busch inc v. Portugal*, cited above, paragraph 83).
120. Finally, the Court finds that the decisions of the regular courts are not arbitrary or manifestly unreasonable, as far as the reasoning given in relation to the issue of the “*well-known trademark*”, and therefore do not constitute an interference with the constitutional right of the Applicant for protection of property, and the same have not resulted in violation of Article 46 of the Constitution in conjunction with Article 1 of the Protocol no. 1 of the ECHR ((See in connection with this aspect the conclusion given in the decision of the ECtHR: *Anheuser-Busch inc v. Portugal*, cited above, paragraph 87).

(b) As for the issue of symbols

121. The Court also has in its attention the issue of national symbols, which was considered by the regular courts. While the latter have declared they had not dealt with issues of whether the Applicant has the right to register the relevant trademark, due to its similarity to the flag and coat of arms of the Republic of Albania, they have dealt with the fact that such symbols cannot be appropriated by the Applicant.
122. The specificity of this case, according to the case file, derives from the history of the companies (the applicant and the intervener) which, as a consequence of privatization, have continued as separate businesses.
123. The Court notes that issues related to national symbols were dealt with by the regular courts. In this regard, the Basic Court emphasized that: *“in accordance with Article 6 paragraph 1.8 [LT], trademarks that are not authorized by competent bodies in accordance with Article 6 of the Paris Convention cannot be registered, if registered they are to be declared invalid”*.
124. The Court recalls that in the present case, the Court of Appeals also stated as follows: *“the allegations of erroneous application of substantive law are ungrounded because the first instance court applied the provision of Article 6 of the LT, which in paragraph 1.10 establishes that “trademarks which contain symbols, emblems and state blazon which have not been determined in Article 6 of the Paris Convention and which are of general interest of the Republic of Kosovo, except cases when their registration have been permitted by competent body. In the present case, the claimant claims the protection of signs that constitute national symbols, therefore, this court assesses that these signs, based on Article 6, paragraph 1, sub-paragraphs 1.8 and 1.10 of the LT, cannot be appropriated by a party to prohibit their use to other parties. And moreover, “the subject of consideration is the statement of claim of the claimant for the prohibition of the use of the above-mentioned signs on the products of the claimant””*.
125. The Supreme Court had emphasized that *“The similarity of the signs is indisputable, since both parties (not completely) use the same name - “Gjergj Kastrioti Skënderbeu”, with the emblem of the Kastriots for the identification of the same product”, also referred to Article 6 of the LT and emphasized that: “Regarding the allegation of incorrect implementation of the provision of Article 6 of the LT, namely the incorrect reference to this provision by the courts of lower instances, their interpretation and interference in the competence of the registration authority, are ungrounded. The second instance court did not examine the issue of whether the claimant has the right to register these signs as trademarks, but limited itself to assessing whether these signs, which constitute national and state symbols, can be prohibited for use by the third parties, regardless of whether the latter are registered as trademarks. The Supreme Court completely accepts such a reasoning of the second instance court, despite the fact that the registered trademark generally offers greater legal protection to its owner, but even those that are not registered enjoy legal protection.*
126. The Supreme Court, referring to Article 254 paragraph 1 of the LCP, emphasized that the Applicant had filed lawsuit to prove that the trademark has been violated by the respondent who had imported a quantity of alcoholic beverages cognac “Gjergj Kastrioti Skënderbeu” from Durrës Canteen. Specifically, the Supreme Court states that the Applicant did not request that *“one of his rights be established - trademark infringement, but he requested that the respondent’s “right” to use the same name, signs, emblems, etc. be established”*.

127. LT also in its Article 6, defines the refusal for absolute reasons, and defines how trademarks cannot be registered or if they are registered, must be declared invalid *inter alia*, (i) trademarks that have not been authorized by the competent authorities in compliance with Article 6 of the Paris Convention (paragraph 1 sub-paragraph 1.8.); (ii) trademarks that contain state symbols, emblems and blazons that are not established in Article 6 of the Paris Convention and that are in the general interest of the Republic of Kosovo, except in cases where their registration is permitted by the competent body (paragraph 1 sub-paragraph 1.10).
128. The Court notes that the Basic Court, the Court of Appeals and the Supreme Court, determined that Article 6 of the LT provides that trademarks that cannot be registered or, if registered, must be declared invalid are trademarks that are not authorized under Article 6 of the Paris Convention and trademarks containing state symbols, emblems and blazons. However, the Court notes that the Court of Appeals and the Supreme Court did not examine the issue of whether the claimant has the right to register these signs as trademarks, but was limited to assessing whether these signs, which constitute national and state symbols, can be prohibited for use to third parties, regardless of whether the latter are registered as trademarks.
129. The Court finds that the Court of Appeals and the Supreme Court found that these signs, which constitute national and state symbols, cannot be prohibited for use to third parties. In the present case, even if the trademark used by the intervener was not a “*well-known trademark*”, the very fact that the two companies use elements of the flag and the national emblem of the Republic of Albania in their products constitutes a characteristic through which it is impossible the acquisition of this symbol as a trademark by the Applicant but also by the intervener. In the circumstances of the present case, it means that the intervener cannot be prohibited from using this sign. Therefore, the Court finds that the decisions of the regular courts were not arbitrary in the assessment that these signs can be prohibited for use to third parties.
130. The Court reiterating that the present case concerns the prohibition of products that have the same signs, and not the trademark’s right, because the latter, according to the case file, has not been revoked or canceled to the Applicant, concludes that the Basic Court, the Court of Appeals and Supreme Court, have assessed that such a ban cannot be made because: (i) the product of the intervener has acquired the status of a well-known trademark in the Republic of Kosovo and (ii) the signs that constitute national symbols cannot be appropriated by one party to prevent their use by other parties.
131. In this case, the Court emphasizes that it is not up to it to review the interpretations of the regular courts regarding the request to prohibit the use of the same symbols, but the Court points out that the Applicant was given the opportunity throughout the proceedings before the regular courts to present his arguments regarding the interpretation of the LT, and in the face of contradictory comments from the Applicant and the opposing party, regarding the prohibition or not of the use of similar signs, the regular courts rendered their decisions based on the materials that they considered important or sufficient for the resolution of this dispute. Consequently, the Court cannot conclude that the Judgment of the Supreme Court contained any element of arbitrariness or was manifestly unreasonable (See in connection with this aspect the conclusion given in the decision of the ECtHR: *Anheuser-Busch inc v. Portugal*, cited above, paragraph 86).
132. Consequently, the Court assesses that the Judgment of the Supreme Court in the present case has not interfered with the constitutional right of the Applicant to protection of property, therefore, the same has not resulted in violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR.

II. Regarding the allegations of violation of Article 54 of the Constitution in conjunction with Article 6 of the ECHR

133. The Court recalls that the Applicant also raises allegations of violation of Article 54 of the Constitution in conjunction with Article 6 of the ECHR. The Court, referring to the above assessments, considers that the allegations of violation of Article 54 of the Constitution in conjunction with Article 6 of the ECHR, have been dealt with within the frame of allegations of violation of Article 46 of the Constitution. Therefore, the Court assesses that the challenged Judgment of the Supreme Court has not been rendered in violation of Article 54 of the Constitution.

FOR THESE REASONS

In accordance with Articles 21.4 and 113.7 of the Constitution, Article 20 of the Law, and Rule 59 (1) of the Rules of Procedure, in the session held on 13 October 2022:

DECIDES

- I. TO DECLARE unanimously the Referral admissible;
- II. TO HOLD by majority that the Judgment [Rev. no. 29/19] of 1 July 2020 of the Supreme Court of Kosovo is in compliance with Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo in conjunction with Article 1 of Protocol no. 1 of the European Convention on Human Rights.
- III. TO NOTIFY this Judgment to the parties;
- IV. TO PUBLISH this Judgment in the Official Gazette, in accordance with Article 20.4 of the Law;
- V. This Judgment is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Nexhmi Rexhepi

Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.