



REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, on 5 December 2022
Ref. no.:MK 2088/22

DISSENTING OPINION

of Judge

RADOMIR LABAN

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

Expressing from the beginning my respect to the opinion of the majority of judges that in this case there has been no violation of Article 46 [Protection of Property] in conjunction with Article 1 [Protection of property] of Protocol no. 1 of the European Convention for the Protection of Human Rights (hereinafter: ECHR).

As an individual judge of the Constitutional Court, I do not agree with the opinion of the majority and I consider that there has been a violation of human rights of the Applicant guaranteed by the Constitution and that refers to the violation of the rights guaranteed by Article 46 [Protection of Property] in conjunction with Article 1 [Protection of property] of Protocol no. 1 of the ECHR), which I will try to reason below.

As a judge, I agree with the factual situation as stated and presented in the judgment and accept the same factual situation as correct. However, I, as a judge, do not agree

with the way the Applicant's allegations were filed and presented in the judgment and I consider that not all of the Applicant's allegations have been mentioned, in particular those in which the Applicant reasons that the trademark represents the property and that failure to provide protection for a registered trademark constitutes a violation of the right to the peaceful enjoyment of property.

For the above, and pursuant to Rules 61 and 63 of the Rules of Procedure of the Constitutional Court, I will submit my dissenting opinion in writing. In order to follow as easily and clearly as possible the reasoning of my dissenting opinion **(I)** I will repeat the allegations of the Applicant regarding the alleged violations of the Applicant's rights guaranteed by Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 [Protection of property] of Protocol no. 1 of the ECHR, as presented by the Applicant himself in the referral to the Constitutional Court; **(II)** assess the application of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR; **(III)** to present the content of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR; **(IV)** reason the basic principles of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR; **(V)** apply the above basic principles in the present case; **(VI)** draw a conclusion regarding the alleged violations of the Applicant's rights guaranteed by Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 [Protection of property] of Protocol No. 1 of the ECHR.

(I) Applicant's allegations regarding alleged violations of the Applicant's rights guaranteed by Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 [Protection of property] of Protocol no. 1 of the ECHR

1. Everyone has the right to property, alone or in community with others. No one can be arbitrarily deprived of property. These provisions for the protection of property are contained in Article 17 of the Universal Declaration of Human Rights and this means not only the freedom to acquire and possess property, but also excludes the right of another to take property from someone arbitrarily. On the other hand, Article 1 of Protocol 1 of the European Convention for the Protection of Human Rights ("ECHR") provides that: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions". No one can be deprived of property, except for reasons of public interest and under the conditions provided by law and the general principles of international law. [Emphasis added].
2. Article 22, paragraph 1 of the Constitution establishes that the human rights guaranteed by the two aforementioned international acts are directly applied in the Republic of Kosovo and that they have precedence - in case of conflict - over all the legal provisions of the laws of Kosovo. Furthermore, Article 46 of the Constitution provides that the right to property is guaranteed and that no one can be arbitrarily deprived of personal property. Article 53 of the Constitution also provides that the fundamental rights and freedoms guaranteed by this Constitution shall be interpreted in accordance with the judicial decision of the European Court of Human Rights (hereinafter: the ECtHR).

3. Taking into account all the above-mentioned imperative/fundamental legal acts and the norms they contain regarding the right to property, and especially the definition of the Constitution regarding this right - it is clear that - the right to property is a basic and inviolable human right. This can be seen from the fact that in the Constitution the right to property is in the part that deals with fundamental human rights and freedoms.
4. Taking into account the case law of the ECtHR - through Article 53 of the Constitution - it should be borne in mind that the concept of ownership is broadly interpreted. According to the case law of the ECtHR, this concept does not only include property and the right to it - in the material and classical sense of the word, but also includes a wide range of monetary rights - deriving from shares, patents, trademarks, court decisions and also rights arising from running any business. [A. Grgić; Z. Mataga; M. Longar and A. Vilfan, *The Right of Property under the European Convention on Human Rights*, p. 7., paragraph 2] [Emphasis added].
5. In the case of non-physical assets, the ECtHR has specifically considered whether the stated legal position would create financial rights and interests and whether it has economic value for this reason. Thus, for example, the ECtHR held that intellectual property, and as such, trademarks as well as copyright (*Melnychuk v. Ukraine*, December; *Anheuser – Busch Inc. v. Portugal* [GC] paras. 72, 76 and 78), contain “property” within the meaning of Protocol 1, Article 1 of the ECHR.
6. The Constitution of the Republic of Kosovo, Article 46, is dedicated to the protection of property. Specifically, Article 46 provides that:
 1. *The right to own property is guaranteed;*
 2. *Use of property is regulated by law in accordance with the public interest;*
 3. *No one shall be arbitrarily deprived of property;*
 5. *Intellectual property is protected by law“.*
7. Therefore, it is not disputable that the protection of intellectual property, including trademarks, is guaranteed by the Constitution of the Republic of Kosovo and as such falls under the domain regulated by Protocol 1, Article 1 of the “ECHR”. The Constitution of the Republic of Kosovo stipulates that intellectual property is protected by law.
8. Law no. 04/L – 026 on trademarks, amended by Law no. 05/L - 040, (hereinafter: LT) is a law that defines the conditions and procedures for the registration of trademarks, the rights deriving from the registration and the implementation of these rights.
9. In Article 2, this law defines that “applies to trademarks in relation to goods and services wherein the entities are subject to the registration procedure with the Industrial Property Agency of the Republic of Kosovo established in the Ministry of Trade and Industry (hereinafter Agency) as well as community trademarks and international trademark registrations that apply to the Republic of Kosovo”. (Article 2 of the amended LT).

10. According to the LT, the trademark right is a property right. As such, the holder of the trademark right enjoys all the rights enjoyed by the holders of rights over immovable or movable property, rights which are considered absolute subjective rights. So, first of all, the owner of the trademark has the right to prevent others from using a similar trademark that may cause confusion about the origin of the goods/services.
11. The Law on Trademarks has as its mission the prevention of unfair competition from the misuse of trademarks. LT helps to ensure that the manufacturer/in the present case the claimant, and not the counterfeiter, the imitative competitor, will gain financial compensation and good reputation for the desired product. The purpose of trademark registration is to prevent others from using the same trademark in connection with the same goods or services. Registration is the only way to achieve this goal.
12. The principle of territoriality is one of the basic principles of industrial ownership. The Law on Trademarks defines that the protection of the trademark is territorial in nature and that with the LT, the Republic of Kosovo is among the countries that implement the "First to submit" system and not the "First to use" system. The LT very clearly states that the right to a trademark is acquired only by registering the trademark at the Industrial Property Office. Therefore, according to LT, national registration is a necessity.
13. The LT of the Republic of Kosovo, in Article 12, paragraph 1, applies the principle of national exhaustion. According to this article, 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, the holder may request the court to stop such activity since this procedure represents a violation of the protected trademark. This interpretation is known in the regular courts of Kosovo.
14. According to the applicable legislation, the claimant has protected all trademarks as figurative trademarks and verbal trademarks. Trademark protection is carried out according to the legal provisions of the LT.
15. The registration of trademarks by the claimant was done through the competent agency, through the Industrial Property Office of Kosovo ("IPOK"), today the Industrial Property Agency.
16. Procedures for trademark registration are carried out in accordance with the applicable legislation. The trademarks have been applied for registration by the claimant in accordance with the requirements of Articles 5 and 6 of the LT. Requests are considered for absolute reasons and published for objection in the then Bulletin. Since there were no aspirations or objections, both for relative and absolute reasons, provided for in Articles 5, 6 and 7 of the LT, invitations for registration payment were sent and payment was made. Since the decision to register the trademark has been taken, it has been published in the relevant Bulletin and no right of appeal has been filed against this decision. The

procedure for the registration of trademarks in the IPOK was carried out according to the provisions of Chapter V, namely Articles 23 to 44 of the LT, as well as the conditions and procedures for registration provided by Administrative Instruction no. 13/2012 for Trademark Registration Procedures issued by the Ministry of Trade and Industry (MTI).

17. In accordance with Article 8, paragraph 1, sub-paragraph 1. 1. LT, the trademark owner has the right to prevent third parties to use the trademark without his permission:

a) 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;

b) 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.

c) 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”.

18. The respondent has placed on the Kosovo market, through Customs, goods and packaging that have identical signs with the claimant's trademarks. In this case, the respondent violated the legal provisions provided for in Article 8, paragraph 2, sub-paragraphs 2.1, 2.2 and 2.3 of the LT. For this reason, the claimant requested the legal protection of its subjective rights.
19. The Basic Court, the Court of Appeals and the Supreme Court in Prishtina, in open opposition to the substantive law in force, namely to what is provided in Article 8 of the LT, ignore and dispute the protection provided by law for registered trademarks of the claimants in the Republic of Kosovo, even though it determines their registration from 23 November 2007, only four days after the establishment of the Industrial Property Office in Kosovo, and the extension of the term of protection of these trademarks for the following 10 years, until 23 November 2027.
20. The Basic Court, the Court of Appeals and the Supreme Court in Prishtina challenged the claimant's rights provided for by material law, applying the substantive law, even though based on article 95 of the LT, the claimant enjoys the right to judicial protection for the established violations, and who has requested the court to establish the violation, prohibition and termination of violation in the future (Article 96, paragraph 1, sub- paragraphs 1.1, 1.2 and 1.3 of the LT) , seizure and destruction of products, containing violations at the expense of the violator (Article 97 of the LT), and full or partial publication of the judgment in the media (Article 99 of the LT).

21. We repeat that, according to the LT, the main criterion to obtain protection from the substantive law is the registration of the trademark. In these conditions, since the respondent has not proved that he has the rights protected according to the laws of the Republic of Kosovo, namely the registered trademarks, then the court had to accept the statement of claim and reject all the allegations of the respondent and the offender in the procedure.
22. On the contrary, by the annulled judgment, the Supreme Court has incorrectly applied and interpreted articles 5, 6 and 7, in conjunction with Article 52 of the LT. The erroneous interpretation and application of substantive law has also led to erroneous conclusions.
23. From a systematic reading of the provisions of the LT it is learned that articles 5, 6 and 7 and other articles of the LT refer to examination procedures and that they refer to, oblige and apply only to the Industrial Property Agency, and not to any other law enforcement institution. The use of these articles and their content to reject the request and appeal, as well as the revision, is a serious logical and legal nonsense.
24. Article 5 of the LT, Signs that can be protected as trademarks, determines that only signs that meet the positive and negative conditions provided for in the LT, namely Articles 5, 6 and 7, can serve as trademarks.
25. Article 6 of the LT applies only to trademark examination procedures and not to trademark infringement procedures. Its implementation is the absolute competence of the Industrial Property Agency (hereinafter: "IPA").
26. Since the Supreme Court reads and applies the substantive law incorrectly, it states that *„[...] as the protected symbols represent state symbols, the claimant has no right to prevent third parties from using them, despite the fact that they are registered”*. Further, the Supreme Court states that: *“the trademark offers greater legal protection to its owner, but even those that are not registered enjoy legal protection”*.
27. The court is not the competent authority to assess the rejection for absolute reasons under the LT, but the IPA is the one which makes the decision during the examination to reject the application for registration, and/or declare the registration invalid because:

6/ 1.8. trademarks which have not been authorized by the competent authorities, pursuant to Article 6 of the Paris Convention;

6/ 1.10 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.
28. The Supreme Court takes these provisions from Article 6 of the LT out of context and tries to use them as a legal basis to “assess whether these signs that constitute national and state symbols can be prohibited for use by third parties, regardless of whether the latter are registered as trademarks” and to reach the

illegal conclusion that the registered trademarks in dispute” do not authorize the claimant to prohibit the use of them by third parties”.

29. This competence was exercised by the Industrial Property Office, today IPA, for trademarks registered by the claimant in the Republic of Kosovo, thirteen (13) years ago. The trademarks with the name “GJERGJ KASTRIOTI SKENDERBEU”, with the sign the emblem of the Kastriots, with the two-head eagle and the helmet of the national hero, have been applied for registration as trademarks on 23 November 2007 and have been examined for absolute reasons. Trademarks are registered after the requests from the LT have been found to be in accordance with the substantive law. The protection of these trademarks is renewed three (years) ago and for the next ten (10) years.
30. Being with the status of a registered trademark, they enjoy all the rights foreseen in the LT, towards third parties, including the respondent and the intervener in the procedure.
31. For the sake of argument, we respectfully submit that the only way a Court could interpret, and therefore apply, Article 6 of the LT would be if the registration/non-registration of the trademark in the IPA was disputed either by the Applicant or by the objector. Therefore, the Court would be able to interpret Article 6 of the LT only if the administrative act of the governing body was challenged - which in the present case would be the decision of the IPA.
32. 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.
33. The claimant’s trademarks are registered. They have been examined to see if they meet the requirements to be registered as trademarks. The latter were examined by the examiner if they meet the absolute conditions for registration, in other words, if the emblem of the Kastriots and the helmet of Skënderbeu are state symbols of Albania and if they are related to the flag of the state of Albania, or the coat of arms of the Republic of Albania. There was no reservation, so it was passed to the second stage of the registration procedure.
34. They were also published in the Bulletin for objections from third parties, article 7 of LT, there was no objection to their registration as a trademark.
35. In the conditions where there was no doubt or reservation for any of the above articles, the decision for registration as a trademark was issued, within 15 days from the issuance of this decision, there was no complaint from any party.
36. They have been published in the Bulletin and are used as registered trademarks in the Republic of Kosovo, for the most part since 2007, respectively for about thirteen (13) years.

37. Therefore, all the five trademarks of the claimant are registered and as such are “*prima facie*” evidence, they are an undisputed issue in this dispute. Their registration and the fact that they enjoy legal protection, at least in the case under consideration, cannot be questioned. Whether they produce legal effects, having the status of registered trademarks, is the only thing that can never be called into question, as it is done by the Supreme Court. This is due to the fact that, during the time they were registered, there was and is no procedure that would question the legality of their registration, because their essential signs are the emblem of the Kastriots and the helmet of Skanderbeg, they enjoy the protection of the material right and the court is obliged to offer them protection as such.
38. Today, the procedures, time limits, legal conditions and circumstances when the registration of these marks could be challenged have been exceeded.
39. Therefore, the Court made the above-mentioned decision that the subject of the statement of claim was the contestation of the trademark registration for absolute reasons and not the confirmation that the respondent has infringed the claimant’s trademark. In this way, the Court has violated the principle of legal certainty, in such a way that by making the wrong application of material law, it has called into question the effect of trademark registration and the legal protection offered by LT for registered trademarks.
40. Therefore, repeatedly, the Court undermines the foundations of the LT and the doctrine of industrial and intellectual property as a whole, and trademarks in particular. The basic function of trademarks is precisely this, to have a distinctive character and to be registered only by one party because through it the latter benefits from the right of exclusivity and the right to prohibit use by third parties.
41. Therefore, the post-festum court made the assessment of the trademarks already registered, without having such a request from any party to the dispute, and in this way removed the provisions from Article 6 of the LT and interpreted them in an erroneous manner, contrary to any method of interpretation, be it teleological, systematic or even linguistic. Therefore, this interpretation defeats the purpose of LT existence.
42. The Law on Trademarks of Kosovo provides that a registered trademark is personal property, and as such an application for trademark registration will be treated as a **non**-transferable proprietary interest. (Chapter XV, Trademarks as an object of ownership, Articles 15 - 22)
43. As we emphasized above, the right to property, as an elementary human right, is provided for in Protocol no. 1, Article 1 of the European Convention on Human Rights (“ECHR”). Protocol 1 of Article 1 stipulates that:

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

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

44. The ECHR has determined that Article 1 of Protocol no. 1 of the ECHR contains three (3) separate rules [Lonnroth v. Sweden (1982) 5. EHRR 85] as follows: (i) The general principle of the unhindered exercise of property rights; (ii) the rule that any deprivation of the right to property must be carried out under certain conditions - the second sentence of the first paragraph of Article 1, as well as (iii) the principle that the state can control the use of property in accordance with the general interest, through the adoption/implementation of laws which are considered necessary to achieve the intended goals. In accordance with what was said above, the ECtHR has established three (3) basic principles, which apply to the intervention/restriction of property rights and they are as follows: (i) Principle of legality; (ii) The principle of the existence of a legitimate goal in the protection of the public interest and (iii) the principle of a fair balance between the protection of the public interest and the right to property of a certain person.
45. As noted above, the ECtHR considered intellectual property, such as trademarks and copyrights (Melnychuk v. Ukraine; Anheuser-Busch Inc. v. Portugal paras. 72, 76 and 78), to constitute “property” within the meaning of Protocol no. 1 of Article 1 of the ECHR. Therefore, trademarks enter the domain in which Protocol no. 1 of Article 1 provides protection. ECtHR affirms that Article 1 of Protocol no. 1. applies only to the person’s existing property. Further, specifically for trademarks, according to the ECtHR, in case Anheuser – Busch Inc. v. Portugal states that “while it is clear that the brand constituted property within the meaning of Article 1 of Protocol no. 1, this is so only after the final registration of the mark, in accordance with the applicable rules of the country in question.
46. Therefore, in accordance with the practice of the ECtHR, intellectual property, including trademarks, represent property only when they are registered by the competent bodies, while - as we elaborated, the claimant has registered the trademarks.
47. The Supreme Court, on the one hand, recognizes the indisputable fact that the claimant is the owner of the trademarks, however, in complete disregard and contrary to any legal provision, it refuses to offer protection, paradoxically emphasizing that *„trademarks generally offer greater legal protection to their owner, but even unregistered ones enjoy legal protection”*.
48. This scandalous finding is in complete contradiction with the very purpose of the existence of the LT and the legal protection that this law seeks to offer to the trademark owner. What kind of protection is offered to the trademark holder is articulated in Article 8 of the LT. This article, among other things, establishes that the owner of the trademark has the right to prohibit third parties from using the trademark without his permission, any sign that is identical to the trademark for goods or services that are identical to those for which it is registered as a trademark; (paragraph 1.1); any sign which is

identical or similar to the trade mark or if, by reason of the similarity or similarity of the goods or services for which the mark is used, to the goods and services covered by the registered trademark, it is likely to cause confusion among the public, including and the possibility of associating the sign with the trademark (paragraph 1. 2). Furthermore, this law has determined that the trademark owner has the right, among other things, to initiate proceedings in court to prove the violation of the trademark right (Article 96, paragraph 1. 1); preventing violations and/or prohibiting such other and similar violations in the future; (Article 96, paragraph 1.2); that products infringing a trademark be removed from the market, confiscated or destroyed at the infringer's expense. (Article 97.1.); compensation of damage (Article 98, paragraph 1); as well as publish the judgment (Article 99.1).

49. All these were requested by the lawsuit submitted to the Basic Court in Prishtina. However, all judicial instances have rejected to grant judicial protection to the registered trademark. Acting in this way, all judicial instances, including the Supreme Court, have committed a serious violation of the right to property - which is an elementary right protected by the Constitution of the Republic of Kosovo and the ECHR.
50. Through its decision, the Supreme Court legalized trademark infringement. This is due to the fact that, according to its interpretation, the claimant's trademark registration is completely worthless. The Supreme Court, stressing that "*the trademark generally offers greater legal protection to its owner, but even those that are not registered enjoy legal protection*", contradicts the very purpose for which the LT exists. This is because, if no legal protection is offered to the economic rights arising from the registration of a trademark, what would be the purpose of its registration? It is well known that in addition to the moral rights of the trademark owner, he also carries rights that consist of the economic use of the trademark. Therefore, registering a trademark without ensuring legal protection is practically without any legal value.
51. Through this decision, the Supreme Court practically deprived the claimant of the peaceful enjoyment of his property. This is because the peaceful enjoyment of property in the context of trademarks does not only mean the right to be recognized as the owner of the trademark, but also the right to exclude others from their unauthorized use, as well as to demand compensation for trademark infringement - and in the last instance, this means the right of the owner to reap the economic fruits derived from the registered trademark. Without the element of its protection, the trademark as a legal institution is worthless. This is a violation of the fundamental rights of the trademark owner to enjoy its economic fruits.
52. According to the practice of the ECtHR, as emphasized above, any interference with property rights should be only if it is supported by law, is based on a legitimate purpose that is in the public or general interest and the limitation of this right should be based on the principle of proportionality, namely - that no one is deprived if it is possible to achieve the protection of the general interest by other (milder) means/measures. None of these elements have been fulfilled by the intervention of the Supreme Court in the ownership of the claimant. The intervention is not not based on the law, but also not based on a legitimate

purpose and does not take into account the principle of proportionality. Consequently, the claimant respectfully asserts that his property rights - namely intellectual property - have been violated.

53. The Applicant requests the Constitutional Court to establish that there has been a violation of Article 46 (Protection of Property) of the Constitution and Article 1 of Protocol 1 (Protection of property) of the European Convention on Human Rights;

(I) Assessment of the application of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR

(i) Intellectual property in general

54. The first question that arises regarding the applicability of Article 1 of Protocol no. 1 in this case is whether this provision applies to intellectual property as such. In deciding that they were applicable, the Grand Chamber referred to the case law of the European Commission on Human Rights (see *Smith Kline and French Laboratories Ltd v. the Netherlands*, no. 12633/87, Commission Decision of 4 October 1990, Decisions and Reports 66, p. 70).

55. The ECtHR notes that the institutions of the Convention have been called upon to decide on intellectual property issues very rarely. In the aforementioned case *Smith Kline and French Laboratories Ltd*, the Commission stated as follows:

“The Commission notes that under Dutch law the holder of a patent is referred to as the owner of the patent and that patents, under the provisions of the Patent Law, are considered personal property that is transferable and accessible”. The Commission assesses that the patent therefore falls within the scope of the term “possession” in Article 1 of Protocol no.

56. The Commission followed this decision in the case of *Lenzing AG v. United Kingdom* (no. 38817/97, Commission decision of 9 September 1998, unreported), which also concerned a patent. However, it explained in that case that the “property” was not the patent as such, but the reports filed by the applicant in civil proceedings seeking to make changes to the British patent registration system. The Commission found that there was no interference with the Applicant company’s right to the peaceful enjoyment of its property, as it was given the opportunity to present its claims regarding the patent in a court of competent jurisdiction.

57. In the case *British-American Tobacco Company Ltd v. Netherlands*, the Commission expressed the opinion that Article 1 of Protocol no. 1 shall not apply to a patent application rejected by the competent national authority. It was emphasized in it:

“...the applicant company failed to secure effective patent protection for its invention. Consequently, the company was deprived of the protected right of intellectual property, but the existing property is not deprived”. (see British-American Tobacco Company Ltd v. the Netherlands, 20 November 1995, Commission Opinion, paras. 71-72, Series A no. 331)

58. As the Chamber found in its judgment, the Court decided in *British-American Tobacco Company Ltd* not to consider separately the issue of whether the patent application constituted “property” that was within the scope of protection provided by Article 1 of Protocol no. (cited above, paragraph 91), having already considered the position in relation to Article 6, paragraph 1 of the Convention.
59. In the case of *Hiro Balani v. Spain*, the issue of the applicability of Article 1 of Protocol no. 1 for intellectual property was not examined. The Court, however, found a violation of Article 6 paragraph 1 of the Convention due to the failure of the Spanish Supreme Court to consider the appealing allegation of the applicant company which allegedly has not respected the priority rule (see *Hiro Balani v. Spain*, 9 December 1994, paragraph 28, series A no. 303-B).
60. Recently, in the case of *Melnichuk v. Ukraine*, which concerned the alleged violation of the applicant's right, the Court reiterated that Article 1 of Protocol no. 1 is applicable to intellectual property. However, it held that the fact that the state, through its judicial system, has provided a forum for the determination of the Applicant's rights and obligations does not automatically involve its responsibility under this provision, even if, in exceptional circumstances, the state may be held liable for losses caused by arbitrary decisions. The court assessed that this was not the position in the case before it, as the domestic courts had acted in accordance with the domestic legislation, giving full reasons for their decisions. Therefore, their assessment was not erroneous due to arbitrariness or apparent unreasonableness in violation of Article 1 of Protocol no. 1 (see *Melnichuk v. Ukraine* (judgment), no. 28743/03, ECtHR 2005-IKS; see also *Breierova and Others v. Czech Republic* (judgment), no. 57321/00, 8 October 2002).
61. In light of the aforementioned decisions, the Grand Chamber agrees with the conclusion of the Chamber that Article 1 of Protocol no. 1 is applicable to intellectual property as such. It must now consider whether this conclusion also applies to simple applications for the registration of a Trademark.

(ii) Registration Requirements

62. To a large extent in relation to trademarks, in its judgment the Chamber stated:

„... while it is clear that a trademark represents “property”, within the meaning of Article 1 of Protocol no. 1, this is only after the final registration of the trademark, in accordance with the rules in force in the country. Before such registration, the applicant, of course, has the hope of acquiring such “property”, but not a legally protected legitimate expectation. (paragraph 52)
63. The Chamber accepted that the Applicant's legal position for trademark registration has several financial implications, including those included in the concession (probably for consideration) or those arising from the priority given by the application for registration, through future applications. However, referring to the aforementioned judgment in the case of *Gratzinger and Gratzingerova*, the Chamber noted as follows:

„.... the applicant company could not be sure that it is the owner of the trademark in question until the final registration and only on the condition that a third party had not filed an objection, as allowed by the relevant legislation. In other words, the applicant company had a conditional right, which ceased to exist retrospectively due to the non-fulfillment of the conditions, namely that it had not violated the rights of third parties". (paragraph 50)

64. The ECtHR considers it appropriate to examine whether the circumstances of the case, viewed as a whole, have given the Applicant the right to a material interest protected by Article 1 of Protocol no. 1. In this regard, it notes at the outset that the issue of whether the applicant company became the owner of the sign “Budveiser” on 20 June 1995 when the NIIP issued it a certificate of registration - a point which the parties argued in detail at the hearing at Grand Chamber - is ultimately of secondary importance, the reason being that the issuance of the certificate to the applicant company was contrary to the provisions of Article 7 of the Law on Industrial Property (see paragraph 43 above) and therefore cannot change the nature of the “property” to which the applicant claims to be entitled or the reality of his general legal position within the meaning of Article 1 of Protocol no.
65. With this in mind, the Court takes into account the set of rights and financial interests arising from the application for trademark registration. It agrees that such applications may give rise to a number of legal transactions, such as a sales contract or license contract for consideration, and that they have - or may have - significant financial value.
66. The ECHR, through its practice, has established that Article 1 of Protocol no. 1 of the ECHR, applies to intellectual property (see ECtHR cases, *Anheuser-Buch 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).
67. 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.
68. Turning to the present case, these elements taken as a whole suggest that the legal position of the applicant company as a legal entity that registered the trademark in 2007, “*and the extension of the term of validity of the protection of these trademarks for another 10 years, until 23 November 2027*”, is covered by Article 1 of Protocol no. 1, since it has promoted interests of a proprietary nature.

69. I consider that when it registered the trademark in 2007, which is valid until 23 November 2027, the applicant company had the right to expect that it will be questioned in accordance with the current legislation if it meets other material and procedural relevant requirements. Therefore, the applicant company possessed a number of property rights – linked to its trademark registration – which were recognized under applicable law, although they could be revoked under certain conditions. This is sufficient for Article 1 of Protocol no. 1 to be applicable in this case, so I find it unnecessary to assess further whether the applicant company could claim that it had a “legitimate expectation”.
70. Referring to the above-mentioned practice, in the circumstances of this case, the Court concludes that the Applicant, since it has a registered trademark, enjoys “property” within the meaning of Article 46 of the Constitution in conjunction with Article 1 of the Protocol no. 1 of the ECHR, therefore, I conclude that the Applicant’s allegation falls under Article 1 of Protocol no. 1 of the ECHR, as well as Article 46 of the Constitution and that both of these articles are applicable in the present case.

(II) Content of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR

71. In this regard, I first recall the content of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR.
1. *“The right to own property is guaranteed.*
 2. *Use of property is regulated by law in accordance with the public interest.*
 3. *No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated”.*
- [...]
5. *Intellectual property is protected by law.*

Article 1 [Protection of property] of Protocol no. 1 of the ECHR:

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

(III) The basic principles of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR

72. The content of Article 1 of Protocol no. 1 of the ECHR and its application, have been interpreted by the ECtHR through its case law, as noted above, the Court will refer to the interpretation of the Applicant's allegations of violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR.
73. As for the rights guaranteed and protected by Article 46 of the Constitution, the Court first assesses that the right to property according to paragraph 1 of Article 46 of the Constitution guarantees the right to possess property; paragraph 2 of Article 46 of the Constitution defines the way of using the property, clearly specifying that its use is regulated by law and in accordance with the public interest; and, in paragraph 3, guarantees that no one can be deprived of property arbitrarily, also defining the conditions under which property can be expropriated (see case of the Court, KI50/16, Applicant Veli Berisha and others, Resolution on Inadmissibility of 10 March 2017, KI 67/16, Applicant Lumturije Voca, Resolution on Inadmissibility, of 6 December 2016).
74. I recall that based on paragraph 2 of Article 46 of the Constitution, the right to property can be limited by law. In this case, I consider that the Assembly, as a legislative body, has the right to regulate by law the use of property, in accordance with the public interest. I also recall that paragraph 5 provides that *"Intellectual property is protected by law"*.
75. As for the rights guaranteed and protected by Article 1 of Protocol no. 1 of the ECHR, I note that the ECtHR has established that the property right consists of three different rules. The first rule, which is defined in the first sentence of the first paragraph and which has a general nature, reflects the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, includes deprivation of property and subjects it to certain conditions; The third rule, which is included in the second paragraph of this article, recognizes the states, among others, the right to control the use of property in accordance with the general interest, with the implementation of those laws that they consider necessary for this purpose; (see ECtHR case, Sporrong and Lönnrot v. Sweden, nos. 7151/75, 7152/75, Judgment of 23 September 1982, paragraph 61; and Court case, KI86/18, applicant Slavica Đorđević, Judgment of 3 February 2021, paragraph 140).
76. However, all the above rules are not "different" in the sense that they are unrelated. The second and third rules refer to special cases of interference with the right to the peaceful enjoyment of property and must be interpreted in the light of the general principle expressed in the first rule (see ECtHR cases Bruncrona v. Finland, of 16 February 2005, Application No. 41673/98, paragraph 65; Anheuser-Busch Inc v. Portugal, of 11 January 2007, Application No. 73049/01, paragraph 62; James and Others v. the United Kingdom, No. 8793/79, Judgment of 21 February 1986, paragraph 37, Beyeler v. Italy, No. 33202/96, Judgment of 5 January 2020, paragraph 98, and see Court case KI129/16, applicant "KOSBAU GmbH", Resolution on Inadmissibility of 13 November, 2017, paragraph 35).

77. The above provisions, however, shall not in any way diminish the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. (see ECtHR cases *The former King of Greece and others v. Greece*, no. 25701/94, Judgment of 23 November 2000, paragraph 50).
78. However, the intervention must meet certain requirements: it must comply with the principle of legality and pursue a legitimate aim in a way that is reasonably proportionate to the aim sought to be achieved (see Judgment *Beyeler v. Italy*, cited above, paragraphs 108 - 114).
79. This approach represents the structure of the method that the Court uses to examine cases where it is convinced that Article 46 of the Constitution and Article 1 of Protocol no. 1 are applicable. It consists of a series of successive steps in which the following questions are resolved: Has there been any interference with the Applicant's right to the peaceful enjoyment of his "property"? If so, does that interference constitute a deprivation of property? If not, is it about controlling the use of the property? If the measures that affected the rights of the applicant cannot be considered either deprivation or control of the use of property, the Court interprets the factual situation of the case in the light of the general rule respecting the peaceful enjoyment of "property".

(IV) Application of the above-mentioned basic principles in the present case

80. To examine the Applicant's allegations regarding the violation of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR, the Court must first apply a test that consists of 4 (four) steps, namely it must determine; **(1)** if there have been obstacles or interference in the peaceful enjoyment of property and what type of interference exists in the present case; **(2)** if the obstacle or interference in the peaceful enjoyment of property is defined by law; **(3)** whether the obstruction or interference with the peaceful enjoyment of the property had a legitimate aim; and **(4)** whether the obstacle or interference with the peaceful enjoyment of the property was proportionate.
- (1) whether there have been obstacles or interference with the peaceful enjoyment of the property and what kind of interference exists in the present case**
81. The Applicant, the company „ADOL“ L.L.C., is a producer of alcoholic beverages „GJERGJ KASTRIOTI SKENDERBEU“ with headquarters in Tirana. The Applicant has registered the trademark at the Industrial Property Office in the Ministry of Industry and Trade, now the Industrial Property Agency (hereinafter: IPA).
82. On 23 November 2007, the Applicant registered the sign „GJERGJ KASTRIOTI SKENDERBEU“ as a protected trademark in the IPA with registration number 8232, class 33 Brandy.

83. I recall that this case is about trademarks, namely the trademarks that the Applicant has registered in IPA, and for which the Applicant filed a lawsuit for a contested case of “trademark infringement”. The Applicant alleges that he enjoys legal protection, because goods similar to the Applicant’s goods, but not registered in the IPA, were imported into the territory of the Republic of Kosovo by the company Elkos. Within the Applicant’s allegations of violation of Article 46 of the Constitution, namely the right to the protection of property, the Court also refers to the case law of the ECHR in the interpretation of Article 1 (Protection of property) of Protocol no. 1 of the ECHR.
84. In this regard, I first recall that the Constitution, by Article 46, guarantees the right to the protection of property, where paragraph 5 of this Article expressly states: “*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 unhindered enjoyment of “property”, including guarantees that no one can be deprived of property, except in the public interest.
85. I recall that due to the similarity with some products imported by the ELKOS company, the Applicant requested the imposition of a security measure, by which the import of such products is prohibited. In the court proceedings, the lawsuit of the Applicant was rejected as ungrounded, because the Basic Court, the Court of Appeals and the Supreme Court assessed that the products imported by Elkos are recognized trademark and that trademarks containing state symbols, emblems and national coat of arms cannot be appropriated by one party while their use is prohibited to other parties.
86. Regarding the violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR, I recall that the Applicant essentially declares that: (i) having registered the trademark, it enjoys all legal rights related to it, including judicial protection; (ii) the regular courts, contrary to the substantive law [Article 8 of the LT], ignore and deny the protection provided by law, namely Articles 95, 96, 97 and 99 of the LT on trademarks [of the Applicant]; (iii) The Supreme Court incorrectly 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 decide on the rejection of the application for registration and/or to declare it invalid.
87. The Applicant points out that in accordance with Article 8, paragraph 1, subparagraph 1.1 of the LT, the trademark owner has the right to prohibit third parties from using the trademark without his approval:
- a) *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;*
 - b) *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.*

c) 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.

88. The Applicant considers that *"the respondent has placed on the Kosovo market, through Customs, goods and packaging that have identical trademarks with the claimant's trademarks. In this case, the respondent violated the legal provisions provided for in Article 8, paragraph 2, subparagraphs 2.1, 2.2 and 2.3 of the LT. For this reason, the claimant requested the legal protection of his subjective rights"*.
89. The Applicant alleges that *"The Basic Court, the Court of Appeals and the Supreme Court in Prishtina, in open opposition to the applicable substantive law, namely to what is provided by Article 8 of the LT, ignore and deny the protection offered by the law to registered trademarks of claimant in the Republic of Kosovo, even though it proves their registration from 23 November 2007, just four days after the Industrial Property Office in Kosovo was established, and the extension of the term of validity of the protection of these trademarks for another 10 years, until 23 November 2027"*.
90. 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"*, argues that this conclusion is completely contrary to the purpose of the existence of the LT and the protection it offers to the trademark 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"*.
91. 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 not also based on a legitimate purpose nor does not take into account the principle of proportionality"*, as provided by the ECtHR.
92. 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, 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.
93. On 26 November 2016, Cantina „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.

94. 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.
95. 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.
96. 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.
97. He further notes that the Court of Appeals by Judgment [Ac. no. 44/2019] and the Supreme Court by Judgment [E. Rev. 29/19], by which the Judgment [IV. EK. C. no. 593/2015] of the Basic Court was upheld, through which the statement of claim of the Applicant for the imposition of the interim security measure, the prohibition and release into circulation and any other action, of the products imported by “Elkos L.L.C.”, was rejected, namely „Skenderbeg“ cognac, which the Applicant has registered as a protected trademark in the IPA with registration number 8232, class 33 Brandy, justifying the result identically as the basic court.
98. Therefore, I conclude that the Applicant was not offered the protection that the Applicant enjoys in accordance with Article 8, paragraph 1, sub-paragraph 1. 1. of the LT, which gives the owner of the trademark the right to prohibit third parties from using the trademark without his approval:

a) 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;

b) 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.

c) 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”.

99. I consider that when it registered the trademark in 2007, which is valid until 23 November 2027, the Applicant company had the right to expect to be examined in accordance with the applicable legislation if it meets the other relevant material and procedural conditions. Therefore, the Applicant company had a number of property rights – linked to its trademark registration – which were recognized under applicable law, although they could be revoked under certain conditions.
100. In the present case, I consider that the Applicant company could have claimed that it had a “legitimate expectation” that it would have the appropriate judicial protection before the domestic courts in the country where it registered the trademark and that it would be provided with the protection that the Applicant acquires in accordance with Article 8, paragraph 1, sub-paragraph 1. 1 of the LT, which gives the trademark owner the right to prohibit third parties from using the trademark without his approval.
101. Therefore, I consider that the allegation of the Applicant that “...By this decision, the Supreme Court practically deprived the claimant of the peaceful enjoyment of his property. This is because the peaceful enjoyment of property in the context of trademarks does not only mean the right to be recognized as the owner of the trademark, but also the right to exclude others from their unauthorized use, as well as to demand compensation for trademark infringement. - and in the last instance, this means the right of the owner to reap the economic fruits derived from the registered trademark. Without the element of its protection, the trademark as a legal institute is worthless. This is a violation of the fundamental rights of the trademark owner to enjoy its economic fruits”.
102. I note that the measures that the ECHR, according to the third rule, qualified as control of the use of property cover a variety of situations, including, for example, the following: revocation of licenses or changes to the conditions of licenses affecting the conduct of business (see ECtHR cases *Tre Traktörer Aktiebolag v. Sweden*, cited above, paragraph 55; *Rosenzweig and Bonded Warehouses Ltd. v. Poland*, cited above, paragraph 49; *Megadat.com SRL v. Moldova*, cited above, paragraph 65; *Bimmer S.A. v. Moldova*, cited above, paragraph 49);
103. Therefore, I conclude that the Court of Appeals by Judgment [Ac. no. 44/2019] and the Supreme Court by Judgment [E. Rev. 29/19], through which Judgment

[IV. EK. C. no. 593/2015], of the Basic Court was upheld, through which the request of the Applicant for the imposition of an interim security measure, the prohibition and release into circulation and any other action, of the products imported by „Elkos L.L.C.“ was rejected, namely „Skenderbeg“ cognac, which the Applicant has registered as a protected trademark in the IPA with registration number 8232, class 33 Brandy, which has led to the change of conditions for permission that affect the conduct of the business, which had the consequence of interfering with the right to the peaceful enjoyment of the Applicant's property, namely controlling the use of the Applicant's property, and as a result, the Applicant was unable to protect his registered trademark, even though the Applicant had legitimate expectations that with the act of registration of the trademark, he would gain the right to protect it through court proceedings.

104. However, I recall that despite the fact that the courts determine that the decisions of public authorities have violated the right to peaceful enjoyment of the Applicant's property, in order to prove the violation, other criteria must be met, which were declared in the case *Megadat. com SRL v. Moldova*, the ECtHR stated that, in order for the measure of control of the use of property to be justified and not to constitute a violation of the right to property, it must be prescribed by law, in accordance with the general interest and that there is a relationship of proportionality between the measure granted and the aim sought to be achieved (see ECtHR case *Megadat.com SRL v. Moldova*, cited above, paragraph 66).

(2) was the obstacle or interference with the peaceful enjoyment of property prescribed by law

105. In order to carry out this step of the test, namely to determine whether the obstruction or interference with the peaceful enjoyment of property was foreseen by law, I will first describe **(a)** the general principles of the ECtHR indicated in the case law regarding the expression “prescribed by law” and then carried out **(b)** Application of the general principles “prescribed by law”.

(a) General principles of the ECtHR presented in the case law regarding the expression „prescribed by law“

106. Any interference with the rights protected by Article 1 of Protocol no. 1 must be in accordance with the presumption of legality (see ECtHR cases *Vistiņš and Perepjolkins v. Latvia*, of 25 October 2012, application no. 71243/01, judgment of 25 October 2012, paragraph 95; *Béláné Nagy v. Hungary*, of 13 December 2012, application no. 53080/13, judgment of 13 December 2016, paragraph 112). The expression “*under the conditions provided by law*” which refers to any interference with the right to the peaceful enjoyment of “property” should be interpreted in the same way as the expression “*in accordance with the law*” under Article 8 of the ECHR in relation to the interference with the rights protected by that provision or the term “prescribed by law” which refers to the interference with the rights protected under Articles 9, 10 and 11 of the ECHR.
107. The principle of legality is the first and most important requirement from Article 1 of Protocol no. 1. The second sentence of the first paragraph allows

interference with “property” only “under the conditions provided by law”, and the second paragraph recognizes the right of states to control the use of property by applying “laws”. In addition, the rule of law, one of the fundamental principles of a democratic society, is part of all articles of the ECHR (*Iatridis v. Greece*, judgment of 25 March 1999, application no. 31107/96, paragraph 58; *Former King of Greece and others v. Greece*, cited above, paragraph 79. *Broniowski v. Poland* No. 31443/96, Judgment of 22 June 2004, paragraph 147).

108. The existence of a legal basis in domestic law is not sufficient in itself to satisfy the principle of legality. In addition, the legal basis must have a certain quality, that is, to be in accordance with the rule of law and provide guarantees against arbitrariness. In this regard, it should be noted that when speaking about the “aw”, Article 1 of Protocol no. 1 alludes to the same concept that the ECHR refers to in other articles when it uses that expression, a concept that includes laws and case law (see ECtHR cases, *Špaček, s.r.o., v. Czech Republic*, no. 26449/95, Judgment of 9 November 1999, paragraph 54; *Vistiņš and Perepjolkins v. Latvia*, cited above, paragraph 96).
109. The principle of legality also implies that the applicable provisions of domestic law are sufficiently accessible, precise and predictable in their application (see ECtHR cases, *Beyeler v. Italy*, cited above, paragraph 109; *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia*, no. 60642/08, judgment of 16 July 2016, paragraph 103; *Centro Europa 7 S.R.L. and DI Stefano v. Italy*, cited above, paragraph 187).
110. With regard to availability, the term “law” should be interpreted in its material sense, not in its formal sense. Therefore, the fact that certain rules related to the exercise of rights protected by Article 1 of Protocol no. 1 have not been published in official gazettes in the form provided by the law for the adoption of legislative or regulatory instruments that bind citizens and legal entities in general, does not prevent these regulations from being considered law, if the Court is convinced that the public is aware of them in another way (see ECtHR cases, *Špaček, s.r.o., v. Czech Republic*, cited above paragraphs 57 - 60).
111. Furthermore, the Court recalls that when examined based on Article 1 of Protocol no. 1, the laws with retrospective application which were found to represent legislative interference were nevertheless in accordance with the requirement of legality from Article 1 of Protocol no. 1 (see ECHR cases, *Maggio and others v. Italy*, no. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, judgment of 31 August 2011, paragraph 60, *Arras and others v. Italy*, no. 17972/07, judgment of 14 May 2012, paragraph 81).
112. The use of control measures implemented on the basis of laws issued after the occurrence of the facts leading to the interference, as such, are not unlawful (see ECtHR case, *Saliba v. Malta*, no. 4251/02, judgment of 8 February 2006, paragraphs 39 - 40) unless those laws were enacted specifically to influence the outcome of an individual case. Neither the Convention nor its protocols prevent legislative intervention in existing contracts with retroactive effect (*Mellacher and others v. Austria*, nos. 10522/83, 11011/84; 11070/84,

judgment of 19 December 1989; paragraph 50; *Bäck v. Finland*, no. 37598/97, judgment of 20 October 2004, paragraph 68).

113. However, in certain circumstances, the retrospective application of legislation which has the effect of depriving a person of existing “property” which was part of his “ownership” may constitute an interference which may infringe the fair balance between the requirements in the general interest on the one hand and the protection of the peaceful enjoyment of the right to “property” on the other (see ECtHR cases, *Maurice v. France*, no. 11810/03, judgment of 6 October 2005, paragraphs 90 and 93).
114. The principle of legality also includes the duty of the state or other public authority to comply with court orders or decisions taken against it (see ECtHR case, *Belvedere Alberghiera S.r.l. v. Italy*, no. 31524/ 96, judgment of 30 October 2000, paragraph 56).
115. Finally, in the case of *Aliyeva and others v. Azerbaijan*, the ECtHR also concluded that when manifestly contradictory decisions, and in particular decisions of the Supreme Court, where judgments that contained contradictory assessments of the same situation in the applicants' cases were rendered and in cases initiated by other persons, represent interference with the right to the peaceful enjoyment of property, unless a reasonable explanation is given for the differences, such interference cannot be considered lawful for the purposes of Article 1 of Protocol no. 1 of the Convention because they lead to inconsistency of their procedures (see ECtHR case, *Aliyeva and others v. Azerbaijan*, no. 66249/16 66271/16 75978/16 77309/16 77691/16 1038/17 52821/17, judgment of 21 December 2021, paragraphs 130-135).

(b) Application of general principles “prescribed by law”

116. In relation to this criterion, first of all I note that the interference with the right to the peaceful enjoyment of the property was a result of judgment [IV.EK.C. no. 593/2015] of the Basic Court which (i) rejected, as ungrounded, the claim and the statement of claim of the applicant; (ii) revoked the decision of 22 February 2016 for the imposition of the interim security measure; (iii) revoked the decision of 13 November, 2017 for the determination and deposit of financial funds in the name of the guarantee for the imposition of the security measure in the amount of 50,000 euro; and (iv) ordered each party to bear its own costs.
117. The Basic Court regarding the issue of the recognized trademark emphasized that (i) the 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 (ii) *Elkos L.L.C.* for years has imported this product from the intervener (iii) The intervener according to the UCD, has been exporting to Kosovo since 2002, the products under the *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], has decided that the use of similar

signs should be tolerated when there are legitimate reasons, since the "Bulldog" sign has been used since 1975, even before the formal registration of the trademark, and that according to the Basic Court, it is situation similar to that of the Applicant.

118. The Basic Court, regarding the issue of national symbols, emphasized the following “[...] 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”.
119. Further notes that the Court of Appeals by judgment [Ac. no. 44/2019] and the Supreme Court by judgment [E. Rev. 29/19], by which the judgment [IV. EK. C. no. 593/2015] of the Basic Court was upheld, which rejected the statement of claim of the Applicant for the imposition of the interim security measure, the prohibition and release into circulation and any other action, of the products imported by “Elkos L.L.C”, namely cognac „Skenderbeg“, which the Applicant has registered as a trademark in the IPA with registration number 8232, class 33 Brandy, justifying the result identically to the basic court.
120. Based on the above, I find that the interference with the peaceful enjoyment of the Applicant’s property was a result of the decisions of the regular courts, namely the decisions of the Basic Court, the Court of Appeals and the Supreme Court based on the applicable law, namely Law No. 04/L-026 on Trademarks as well as Law No. 05/L - 040 on amending and supplementing the Law on Trademarks that were approved by the Assembly of the Republic of Kosovo and that were in force at the time of the decision. Courts also used Article 6 of the Paris Convention for the Protection of Industrial Property in their reasoning.
121. The principle of legality also means that provisions of the domestic law are sufficiently accessible, precise and predictable in their implementation are applicable, in the present case we are dealing with laws voted in a public session of the Assembly, which are published in the official gazette, which is available online on the web. Therefore, the Court concludes that the laws were available to the Applicant and that the norms were precise and predictable.
122. The use of control measures implemented on the basis of laws issued after the appearance of the facts leading to the intervention, as such, are not unlawful (see ECtHR case, Saliba v. Malta, no. 4251/02 , judgment of 8 February 2006, paragraphs 39 - 40) unless those laws were enacted specifically to influence the outcome of an individual case. In the present case, I note that the challenged law has a general effect and does not intend to affect the individual case of the Applicant, but had *erga omnes* effect and aimed to regulate the rules of trademarks as a whole in the entire territory of the Republic of Kosovo.
123. I find that the measures for controlling the use of property, namely the decisions of the Basic Court, the Court of Appeals and the Supreme Court were taken on the basis of the valid law, namely Law no. 04/L-026 on Trademarks as well as Law no. 05/L - 040 on amending and supplementing the Law on Trademarks. Also, it is clear that the provisions of Law No. 04/L-026 on

Trademarks as well as Law No. 05/L – 040 on amending and supplementing the Law on Trademarks, are generally applicable, that they were valid and effective, that the latter were available and predictable for the applicant.

124. Due to all that was said above, I find that the provisions of the Law were predictable because they were formulated with the necessary clarity and precision. Therefore, the Court comes to the conclusion that the interference with the Applicant's right to the peaceful enjoyment of the property, which was as a result the challenged decisions of the regular courts in this case, was done on the basis of the law.

(3) have the obstacles or interference with the peaceful enjoyment of property had a legitimate aim (general interest)

125. According to the ECtHR, any interference with the rights and freedoms guaranteed by the Convention must have a legitimate aim. Likewise, in cases involving a positive duty, there must be a legitimate justification for the state's inaction. The very principle of "fair balance" inherent in Article 1 of Protocol no. 1 presupposes the existence of a general interest of the community. Moreover, it must be reiterated that the various rules contained in Article 1 are not distinct, in the sense of incoherence, and that the second and third rules refer only to special cases of interference with the right to the peaceful enjoyment of property. One of the effects of this is that the existence of the "public interest" required in the second sentence, or the "general interest" in the second paragraph, are in fact a consequence of the principle defined in the first sentence, so that interference with the exercise of the right to the peaceful enjoyment of property within the meaning of the first sentence of Article 1 must also have an aim in the public interest (see, ECtHR cases, *Broniowski v. Poland*, cited above, paragraph 148; *Könyv-Tár Kft and others v. Hungary*, no. 21623/13, judgment of 16 March 2018, paragraph 45, *Beyeler v. Italy*, cited above, paragraph 111).
126. The list of purposes for which interference would fall within the scope of the concept of public interest is extensive and may include various new purposes that are subject to public policy considerations in different factual contexts. Specifically, the decision to enact a law confiscating property or social security compensation usually involves consideration of political, societal and social issues (see ECtHR cases, *Former King of Greece and Others v. Greece*, cited above, paragraph 87; *Vistiņš and Perepjolkins v. Latvia*, cited above, paragraph 106).
127. According to the system of protection established by the Convention, the national authorities should carry out an initial assessment of the existence of a problem of public interest that requires measures of deprivation of property or interference with the peaceful enjoyment of "property". And in this, as in other areas covered by the safeguards of the Convention, national bodies enjoy a wide margin of appreciation. For example, the margin of appreciation enjoyed by the legislature in the application of social and economic rules is wide and the Court will respect the legislature's assessment of what is "in the public interest" unless that assessment is manifestly without a reasonable basis. (see ECtHR case, *Bélané Nagy v. Hungary*, cited above, paragraph 113).

128. Furthermore, the concept of “public interest” is necessarily broad (see ECtHR cases *Vistiņš and Perepjolkins v. Latvia*, cited above, paragraph 106; *R.Sz. v. Hungary*, no. 41838/11, judgment of 4 November 2013, paragraph 44; *Grudić v. Serbia*, no. 31925/08, judgment of 24 September 2012, paragraph 75.). The Court usually respects states’ claims that the intervention it examines was in the public interest, and its review in this regard is of the lowest intensity. Therefore, the Applicant’s claim that a particular measure in reality served a different purpose than that invoked by the respondent state in the context of a particular case before the Court rarely has a serious prospect of success. In any case, it is sufficient for the Court that the intervention is in the public interest, even if this interest is different from the interest expressed expressly by the State in the proceedings before the Court. In some cases, the Court even found the aim *ex officio* (see ECtHR cases, *Ambruosi v. Italy*, no. 31227/96, judgment of 19 January 2001, paragraph 28; *Marija Božić v. Croatia*, 50636/09, judgment of 24 April 2014, paragraph 58).
129. As a result of this respect for the assessment of domestic authorities, there are rare examples of situations in which the Court has not found that there is a public interest that would justify interference (see ECtHR cases, *S.A. Dangeville v. France*, no. 36677/97, judgment of 16 July 2022, paragraphs 47 and 53 - 58 – non-refund of prepaid tax; *Rosenzweig and Bonded Warehouses Ltd. v. Poland*, cited above, paragraph 56 - cancellation of the applicant’s business permit without referring to any reasons of public interest by the authorities in authoritative decisions).
130. Returning to the present case, I first note that the interference with the right to the peaceful enjoyment of the property came as a result of judgment [IV. EK. C. no. 593/2015], of the Basic Court, which was upheld by the Court of Appeals by judgment [Ac. no. 44/2019] and the judgment [E. Rev. 29/19] of the Supreme Court, which rejected the request of the applicant for the imposition of an interim security measure, the prohibition and release into circulation and any other action of the products imported by “Elkos L.L.C.”, i.e. cognac „Skenderbeg“, which the Applicant has registered as a protected trademark in the IPA with registration number 8232, class 33 Brandy, reasoning the points identically as the basic court.
131. I note that the Supreme Court reasoned further: “....*However, in this case it is necessary to give a fair decision which must be in accordance with international rules and norms as well as customary business norms, especially when such interpretations are in accordance with any constitutional system*”.
132. I recall that the state authorities enjoy a wide margin of appreciation both in terms of the choice of enforcement means and in terms of ascertaining whether the consequences of enforcement are justified by the general interest to achieve the purpose of the given law (see, the case of the ECtHR , *Beyeler v. Italy*, cited above, paragraph 112).
133. In the end, I conclude that based on the reasoning of the Supreme Court, it can be concluded that the regular courts followed a legitimate aim and tried to

justify the protection of the public interest. Therefore, I conclude that the regular courts followed a legitimate aim when rendering the challenged decisions.

(4) was the obstacle or interference with the peaceful enjoyment of the property proportional, namely in fair balance

134. In order to be in accordance with the general rule defined in the first sentence of the first paragraph of Article 1 of Protocol no. 1, the interference with the right to the peaceful enjoyment of “property”, in addition to being foreseen by law and in the public interest, must result in a “fair balance” between the requirements of the public interest of the community and the requirements to protect fundamental rights of the individual (see ECtHR cases, *Beyeler v. Italy*, cited above, paragraph 107; *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia and the former Yugoslav Republic of Macedonia*, cited above, paragraph 108) .
135. In other words, in cases involving alleged violations of Article 1 of Protocol no. 1, the Court must assess whether due to the action or inaction of the state, the person in question had to bear a disproportionate and excessive burden. During the assessment of compliance with this requirement, the Court must make a comprehensive examination of the various interests in this matter, bearing in mind that the Convention aims to protect rights which are “practical and effective”. In this context, it should be emphasized that uncertainty - whether legislative, administrative or arising from the practices applied by the authorities, is a factor that is taken into account when evaluating the actions of a state (see the ECtHR case, *Broniowski v. Poland*, cited above , paragraph 151)
136. The search for this balance is embodied in the entire Convention and is also reflected in the structure of Article 1 of Protocol no. 1 (see ECtHR cases, *Sporrong and Lönnroth v. Sweden*, cited above, paragraph 69; *Brumărescu v. Romania*, no. 28342/95, judgment of 28 October 1999, paragraph 78; *Saliba v. Malta*, cited above, paragraph 36).
137. The issue of whether the right balance has been found becomes relevant only after it has been established that the interference in question served the public interest, met the requirement of legality and was not arbitrary (see the cases of the ECHR, *Iatridis v. Greece*, cited above, paragraph 58; *Beyeler v. Italy*, cited above, paragraph 107).
138. This issue is most often decisive for determining whether or not there has been a violation of Article 1 of Protocol No. 1. The Court usually conducts a detailed analysis of the proportionality requirement, as opposed to the much more limited examination of whether the interference occurred in the public interest.
139. The purpose of the proportionality test is to prove first how and to what extent the Applicant was limited in exercising the rights affected by the complained interference and what were the harmful consequences of the restriction imposed on the exercise of the right of the applicant in his situation. After that, this impact is compared with the importance of the public interest, due to which the interference has come.

140. During this examination, the ECtHR takes into account many factors. There is no fixed list of factors in question. They vary from case to case, depending on the factual situation of the case and the nature of the interference in question. The factors and facts that the court takes into account during the test can be as follows; **a)** Procedural factors, **b)** Selection of measures **c)** Substantive issues relevant to the fair balance test, **d)** Aspects related to the Applicant **e)** Compensation for interference with ownership as an element of fair balance, and **f)** Conclusion about the fair balance.

a) Procedural factors

141. Although Article 1 of Protocol no. 1 does not contain express procedural assumptions, the latter has been interpreted as implying that the persons affected by the measure which interferes with their “property” should be offered a reasonable opportunity to present their arguments to the responsible authorities in order to effectively challenge the measures in question, claiming, depending on the case, that they are illegal or that they constitute arbitrary and unreasonable behavior (see ECtHR cases, *G.I.E.M. S.R.L. and others v. Italy*, no. 1828/06, judgment of 28 June 2018, paragraph 302; *AGOSI v. the United Kingdom*, no. 9118/80, judgment of 24 October 1986, paragraphs 55 and 58-60).
142. It is also relevant that the main arguments presented by the applicants were carefully examined by the authorities (see ECHR cases, *Megadat.com SRL v. Moldova*, paragraph 74; *Bistrović v. Croatia*, no 2577/05, judgment of 31 August 2007, paragraph 37).
143. As for the procedural factors, the Court notes that the Applicant had the opportunity to challenge the decision of the Basic Court first before the Court of Appeals and later also before the Supreme Court so that the Applicant had a reasonable opportunity to present his arguments to the competent authorities in order to effectively challenge these measures, claiming, depending on the case, that they are unlawful or that they constitute arbitrary and unreasonable treatment (see the case of the ECHR, *G.I.E.M. S.R.L. and Others v. Italy*, cited above, paragraph 302).
144. I recall that the essence of the entire contested procedure initiated by the Applicant is the prohibition of the import and sale of products containing signs and symbols such as those of the Applicant, and not the cancellation of the trademark registration, because I recall that the intervener has not a trademark registered in the Republic of Kosovo, unlike the Applicant, who has registered the trademark in the Republic of Kosovo.
145. Therefore, for this procedure, the Applicant has initiated the protection of his rights established in articles 95 and 96 of the LT, because the latter had a trademark registered in the IPA. As it has been repeated several times by the Applicant, but also by the regular courts, the dispute in question does not refer to the trademark dispute procedure.

146. I recall that the Applicant throughout the procedure referred to the legal protection that this law on trademarks aims to provide to the trademark owner. What kind of protection is offered to the trademark holder is articulated in Article 8 of the LT. This article, among other things, establishes that the owner of the trademark has the right to prohibit third parties from using the trademark without his permission, any sign that is identical to the trademark for goods or services that are identical to those for which it is registered as a trademark; (paragraph 1.1); any sign which is identical or similar to the trade mark or if, by reason of the uniformity or similarity of the goods or services for which the sign is used, to the goods and services covered by the registered trademark, it is likely to cause confusion among the public, including also the possibility of associating the sign with the trademark. (paragraph 1. 2). Furthermore, this law has determined that the trademark owner has the right, among other things, to initiate proceedings before the court to prove the violation of the trademark right (Article 96, paragraph 1. 1); preventing violations and/or stopping other such and similar violations in the future; (Article 96, paragraph 1.2); that products infringing a trademark be removed from the market, confiscated or destroyed at the infringer's expense. (Article 97.1.); compensation of damage (Article 98, paragraph 1); as well as to publish the judgment (Article 99.1).
147. I recall that on 4 April 2019, the Applicant submitted a revision to the Supreme Court on the grounds of incorrect application of substantive law and the violation of the provisions of the contested procedure. The Applicant in his 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 trade mark) of the LT.
148. In its revision, the Applicant stated that regarding the interpretation in relation to 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 of 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.

149. The Supreme Court in the challenged judgment emphasized that 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"*.
150. 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"*.
151. 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"*.
152. 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 "recognized" 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 Kastrioti Skenderbeu“ from Durrës are a well-known product both in their home territory and in Kosovo"*.
153. I recall that the Applicant had alleged violation of trademark rights, namely the rights to protect the trademark based on the article 8 , 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."*

154. The Applicant also raised the issue of rights from Article 96, which stipulates that:

1. The holder of a trade mark may lodge a claim against any person who has infringed a trademark by performing without authorization any of the acts referred to in Article 8, paragraphs 1 and 2 of this Law, claiming:

1.1. establishment of the Mark infringement;

1.2. termination of the infringement and prohibition of such and similar future infringements”.

155. I consider that the Applicant has not received a specific answer to the specific and essential allegations and that the judgment of the Supreme Court does not provide the guarantees of Article 31 of the Constitution and Article 6 of the ECHR, which include the obligation of the courts to give sufficient reasons for their decisions. I also consider that, taken as a whole, the Supreme Court has not achieved a fair balance between the litigants in this procedure, because it did not respond to any of the essential allegations and arguments of the Applicant that could affect the final outcome of its case and the proper administration of justice.

156. Regarding the allegation of violation of the right to the protection of property, I consider that the Supreme Court has not given any answer or reasoning to the issues raised by the Applicant that were related to the right to judicial protection of a registered trademark, which is stipulated by Article 8 of the Law on Trademarks.

157. From all of the above, I conclude that throughout the entire procedure before the regular courts, the Applicant did not receive adequate and reasoned answers to the main issues that the Applicant stated throughout the procedure, the regular courts did not examine with due diligence the Applicant's main allegations which have been set out in detail above (see ECtHR case *Megadat.com SRL v. Moldova*, cited above, paragraph 74; *Bistrović v. Croatia*, cited above, paragraph 37).

158. Therefore, I conclude that in terms of procedural factors, the Applicant had a reasonable opportunity to present its arguments before the competent authorities in order to effectively challenge these measures, claiming, depending on the case, that they are unlawful or constitute arbitrary and unreasonable treatment. However, during the procedure, the regular courts, and especially the Supreme Court, did not examine with sufficient care the Applicant's main allegations related to the right to judicial protection of a registered trademark.

b) Choice of measures

159. One of the elements of the fair balance test is the question of whether there were other, less intrusive measures that the public authorities could reasonably have implemented in pursuit of the public interest. However, the possible existence of such measures does not by itself render the challenged legislation

unjustifiable. Provided that the legislature remains within its own margin of appreciation, it is not for the Court to assess whether the legislation represented the best solution to deal with the problem or whether the legislature's discretion should have been exercised in a different way (see ECtHR case, *James and others v. United Kingdom*, cited above, paragraph 51; *Koufaki and Adedy v. Greece*, no. 57657, decision of 7 May 2013, paragraph 48).

160. It may also be relevant the issue of whether it was possible to achieve the same goal through less intrusive measures on the Applicant's rights and whether the authorities have considered the possibility of applying these less intrusive solutions (see ECHR cases , *OAD Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/12, judgment of 8 March 2012, paras 651-654; *Vaskrsić v. Slovenia*, no. 31371/12, judgment of 25 July 2017, para. 83).
161. In the case before me, I consider that the interference with the peaceful enjoyment of property, namely the measure of controlling the use of the property was a permanent situation that lasted from the moment of filing the lawsuit until the end of the procedure, even after the end of the procedure until today, which has made the Applicant's business activity difficult and that there were no other alternative measures, because the Applicant was forced to suffer the consequences throughout the duration of the procedure as a result of the decisions of regular courts that did not have offered it the protection it deserves according to Article 8 of the Law on Trademarks, the Applicant has been forced to endure measures of control the use of the property, a control that had consequences in the economic activity with permanent effect, facing a heavy and disproportionate burden.
162. Therefore, I conclude that there were no other alternative measures, such measures that are less intrusive, which the public authorities could reasonably implement in pursuit of the public interest. I consider that the same goal could have been achieved by a less invasive interference with the Applicant's rights, and that the authorities did not consider the possibility of implementing those less intrusive solutions.

c) Substantive matters relevant to the test of fair balance

163. In certain cases, the test of fair balance involves the question of whether the special circumstances of the case have been sufficiently taken into account by the state, including the question of whether the measures controlling the "property" or part of the property affected the value or benefit of the part that is not covered by the measures pertaining to the Applicant (see ECHR cases, *Azas v. Greece*, no. 50824, judgment of 21 May 2002, paragraphs 51-53; *Interoliva ABEE v. Greece*, no. 58642/00, judgment of 10 October 2003, paragraphs 31 - 33).
164. I note that in the present case, we are dealing with the control measure of "property", taking into account that the Applicant was not offered judicial protection of the right to the registered trademark, but there was no confiscation of the property, as well that the Applicant was able to continue

with the management of other parts of the property, but without the possibility of protection of the trademark.

165. Therefore, I conclude that despite the fact that there was no confiscation of the property, but only a control measure of the “property”, by the decision of the regular courts, the Applicant was not offered the judicial protection of the trademark right, which has led to the reduction in the value of the parts of the property that were not included in the measures, because they would have a much higher value and a greater sales turnover if the protection of the trademark right had been ensured.

d) Issues concerning the applicant

166. One of the most important factors for the balance test according to Article 1 of Protocol no. 1 is to see whether the Applicant attempted to take advantage of a weakness or a loophole in the legal system (see the cases of *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v United Kingdom*, no. 117/1996/736/ 933-935, judgment of 23 October 1997, paragraph 109). Similarly, in the case of *G.I.E.M. S.R.L. and others v. Italy*, cited above, paragraph 301, the Court has emphasized that the degree of culpability or negligence of the Applicant or, at the very least, the relationship between their conduct and the violation in question, may be taken into account for the purpose of assessing whether the revocation was reasonable.
167. Regarding this factor, the Court has no information either from the competent state authorities, nor from the regular courts that the Applicant has violated any norm, has been punished or has tried to take advantage of any weakness or a loophole in the legal order. On the contrary, the Applicant has a valid and registered trademark until 23 November 2027. (see ECtHR case *OGIS-Institut Stanislas, OGEC Saint-Pie X and Blanche de Castille and others v. France*, application no. 42219/98 et 54563/00, judgment of 27 October 2004, paragraphs 69 and 71).
168. Therefore, I find that the Applicant did not attempt to take advantage of any weakness or a loophole in the legal order, that the Applicant was not found guilty or negligent in using the registered trademark illegally, so that the Court can assess that it was necessary to control the use of the property.

e) Compensation for interference with ownership as an element of fair balance

169. The terms of compensation are essential for assessing the fair balance, and in particular the question of whether the contested measure imposes an unreasonable burden on the applicants (see ECtHR cases, *Holy Monasteries v. Greece*, nos. 13092/87 and 13984/88, judgment of 9 December 1994, paragraph 71; *Platakou v. Greece*, No. 38460/97, judgment of 5 December 2001, paragraph 55). Taking property without payment of an amount reasonable in relation to its value usually constitutes disproportionate interference and a complete lack of compensation may be considered justifiable under Article 1 of Protocol no. 1, only in exceptional circumstances.

170. What is reasonable depends on the circumstances of each case, but a wide margin of appreciation is applied when assessing the amount of compensation. The Court's power of review is limited to assessing whether the selection of compensation terms falls outside the state's margin of appreciation in this domain (see ECtHR case, *James and others v. the United Kingdom*, cited above, paragraph 54). The Court will respect the legislature's assessment of compensation for interference with the right to the peaceful enjoyment of "property" unless it is manifestly without a reasonable basis (see ECtHR case, *Lithgow and others v. the United Kingdom*, no 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, judgment of 8 July 1986, paragraph 122).
171. In the present case, I note that the property control measures took place without any compensation for the Applicant. Measures of control of property without payment of a reasonable amount in relation to its value will usually constitute unreasonable interference and a complete lack of compensation may be considered justified under Article 1 of Protocol no. 1 only in exceptional circumstances.
172. I note that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justified only in exceptional circumstances that are not relevant to the present purposes. As regards Article 1 (P1-1), the protection of property rights it provides would be largely illusory and ineffective in the absence of any equivalent principle (see ECtHR case, *Lithgow and others v Kingdom of the United States*, cited above, paragraph 122).
173. Therefore, I find that the interference with the peaceful enjoyment of the Applicant's property occurred without the payment of any compensation to the Applicant, therefore a "fair balance" was not reached between the requirements of the general interest of the community and the requirements of the protection of fundamental rights of the individual.

f) Conclusion about fair balance

174. Therefore, I as an individual judge regarding the factors that are taken into account to determine whether there has been a proportionality in the interference with the right to the peaceful enjoyment of the Applicant's property, reach the conclusion:
- a) that in terms of procedural factors the Applicant had a reasonable opportunity to present its arguments before the competent authorities in order to effectively challenge these measures, claiming, depending on the case, that they are illegal or that constitute arbitrary and unreasonable treatment. However, during the procedure, the regular courts, especially the Supreme Court, did not consider with due diligence the main allegations of the Applicant that were related to the right of judicial protection of the registered trademark.

- b) that there were no other alternative measures, less intrusive measures that the public authorities could have reasonably implemented for the realization of the public interest. I consider that the same goal could have been achieved by a less invasive interference with the Applicant's rights, and that the authorities did not consider the possibility of implementing those less intrusive solutions.
 - c) that despite the fact that there was no confiscation of property, but only a control measure of "property", by the decisions of the regular courts, the Applicant was not offered protection of trademark rights, which has led to the reduction in the value of the parts of the property that were not included in the measures, because they would have a much higher value and a greater turnover if the trademark rights were protected.
 - d) that the Applicant has not tried to take advantage of any weakness or a loophole in the legal order, that the Applicant has not been found guilty or negligent in the use of the illegally registered trademark, so that the court can assess that the measure control of the use of the property was necessary
 - e) that the interference with the peaceful enjoyment of the Applicant's property occurred without paying any compensation to the Applicant, therefore a "fair balance" was not reached between the requirements of the general interest of the community and the requirements for the protection of fundamental rights of the individual.
175. I recall the ECtHR case, *Megadat.Com SRL v. Moldova*, where the ECtHR assessed that the measure taken by the state authorities against the company that provided Internet services was so severe that the company in question was forced to close its business and to sell all its assets within a very short time (see ECtHR case, *Megadat.com SRL v. Moldova*, cited above, paragraph 69).
176. I recall that this case is about trademarks, namely the trademarks that the Applicant has registered in IPA and for which the Applicant had initiated a lawsuit in a contested case of "trademark infringement". The Applicant claims that he enjoys legal protection, because goods similar to the goods of the Applicant, but which are 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 allegation of violation of Article 46 of the Constitution, namely the right to the 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.
177. In this regard, I first recall that the Constitution, by Article 46, guarantees the right to the protection of property, and paragraph 5 of this Article expressly states: "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 peaceful enjoyment of "property", including guarantees that no one can be deprived of property, except in the public interest.

178. The Applicant points out that in accordance with Article 8, paragraph 1, subparagraph 1.1 of the LT, the trademark owner has the right to prohibit third parties from using the trademark without his approval:

a) 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;

b) 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.

c) 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”.

179. Therefore, I consider that the allegations that the Basic Court, the Court of Appeals and the Supreme Court in Prishtina, in open contradiction with applicable substantive law are grounded, to what is provided by Article 8 of the LT, ignore and dispute the protection provided by the law for the claimant's registered trademarks in the Republic of Kosovo, even though they prove their registration from 23 November 2007.

180. I also consider that the allegations that the Basic Court, the Court of Appeals and the Supreme Court in Prishtina challenged the claimant's rights provided for by the substantive law, applying it incorrectly, are grounded, even though based on Article 95 of the LT, the claimant enjoys the right to judicial protection for the found violations and who asked the court to find the violation, prohibit and stop the violation in the future (Article 96, paragraph 1, subparagraphs 1. 1, 1. 2 and 1. 3 of the LT), the confiscation and destruction of products containing violations at the expense of the violator (Article 97 of the LT), and the full or partial publication of the judgment in the public information means (Article 99 of LT).

181. Therefore, I conclude that the challenged decisions of the regular courts do not pass the ECtHR test of proportionality and that a) in terms of procedural factors, the Supreme Court did not assess with sufficient care the Applicant's main allegations regarding the right to judicial protection of the registered trademark, b) the same goal could be achieved with less invasive interference with the rights of the Applicant, c) judicial protection of the trademark rights was not offered, which led in the reduction of the value of the parts of the property that are not covered by the measures d) the Applicant's guilt or negligence for the illegal use of the registered trademark has not been proven and e) that the interference with the peaceful enjoyment of the Applicant's property has occurred without paying any compensation to the Applicant, therefore a “fair balance” has not been struck. Therefore, there has been the interference with the peaceful enjoyment of the Applicant's property in a disproportionate manner.

182. From all the above, I conclude that in the light of the prevailing circumstances of the case and the assessments described previously, the interference with the peaceful enjoyment of the property in the case of the Applicant was not proportionate because the latter had legitimate expectations that during the period in which it has a valid registered trademark, it will be able to exercise its economic activity, protect the trademark in court proceedings and peacefully enjoy its property.
183. Therefore, I conclude that by the challenged judgment [Rev. no. 19/19] of 1 July 2020 of the Supreme Court in conjunction with the judgment [Ac. no. 44/19] of 20 February 2019 of the Court of Appeals and the judgment [IV. EK. C. no. 593/2015] of 3 December 2018 of the Basic Court, which rejected as ungrounded the Applicant's claim and statement of claim by which he sought judicial protection of the registered trademark, the Applicant's right to peaceful enjoyment of property has been violated, guaranteed by Article 46 of the Constitution and Article 1 of Protocol no. 1 of the ECHR.

(V) Conclusion regarding the alleged violations of the Applicant's rights

184. Based on the above, and taking into account the consideration of the Applicant's allegations in its referral:
- I. I CONSIDER that the Applicant's allegations that by the challenged judgment [Rev. no. 19/19] of 1 July 2020 of the Supreme Court in conjunction with the judgment [Ac. no. 44/19] of 20 February, 2019 of the Court of Appeals and the judgment [IV. EK. C. no. 593/2015] of 3 December 2018 of the Basic Court, which rejected as ungrounded the Applicant's claim and statement of claim by which he sought judicial protection of the registered trademark, the Applicant's right to peaceful enjoyment of property has been violated, guaranteed by Article 46 of the Constitution and Article 1 of Protocol no. 1 of the ECHR, are grounded.
- II. I CONSIDER THAT the judgments [Rev. no. 19/19] of 1 July 2020 of the Supreme Court in conjunction with the judgment [Ac. no. 44/19] of 20 February, 2019 of the Court of Appeals and the judgment [IV. EK. C. no. 593/2015] of 3 December 2018 of the Basic Court should have been declared unconstitutional.

Dissenting Opinion is submitted by Judge:

Radomir Laban, Judge

On 24 October 2022 in Prishtina