JUDGMENT OF THE COURT

18 November 2003 *

In Case C-216/01,

REFERENCE to the Court under Article 234 EC by the Handelsgericht Wien (Austria) for a preliminary ruling in the proceedings pending before that court between

Budějovický Budvar, národní podnik

and

Rudolf Ammersin GmbH,

on the interpretation of Articles 28 EC, 30 EC and 307 EC, and Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1), as amended by Council Regulation (EC) No 535/97 of 17 March 1997 (OJ 1997 L 83, p. 3),

* Language of the case: German.

THE COURT,

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans (Rapporteur), C. Gulmann and J.N. Cunha Rodrigues (Presidents of Chambers), D.A.O. Edward, A. La Pergola, J.-P. Puissochet, R. Schintgen, N. Colneric and S. von Bahr, Judges,

Advocate General: A. Tizzano,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Budějovický Budvar, národní podnik, by S. Kommar, Rechtsanwalt,

— Rudolf Ammersin GmbH, by C. Hauer, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the German Government, by W.-D. Plessing and A. Dittrich, acting as Agents,

— the French Government, by G. de Bergues and L. Bernheim, acting as Agents,

— the Commission of the European Communities, by A.-M. Rouchaud, acting as Agent, and B. Wägenbaur, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of Budějovický Budvar, národní podnik, represented by S. Kommar; Rudolf Ammersin GmbH, represented by C. Hauer, D. Ohlgart and B. Goebel, Rechtsanwälte; and the Commission, represented by A.-M. Rouchaud and B. Wägenbaur, at the hearing on 19 November 2002,

after hearing the Opinion of the Advocate General at the sitting on 22 May 2003,

gives the following

Judgment

1 By order of 26 February 2001, received at the Court on 25 May 2001, the Handelsgericht Wien (Commercial Court, Vienna) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Articles 28 EC, 30 EC and 307 EC, and Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1), as amended by Council Regulation (EC) No 535/97 of 17 March 1997 (OJ 1997 L 83, p. 3) ('Regulation No 2081/92').

2 Those questions were raised in proceedings between Budějovický Budvar, národní podnik ('Budvar'), a brewery established in the town of České Budjovice (Czech Republic), and Rudolf Ammersin GmbH ('Ammersin'), a company established in Vienna (Austria) which runs a drink distribution business, concerning Budvar's application for an injunction prohibiting Ammersin from marketing beer produced by the brewery Anheuser-Busch Inc. ('Anheuser-Busch'), established in Saint Louis (United States), under the name American Bud on the ground that, pursuant to various bilateral agreements between the Czech Republic and the Republic of Austria, in that Member State the name 'Bud' is reserved for beer produced in the Czech Republic.

Legal background

International law

3 Article 34(1) of the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978 provides:

'When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

(b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.'

Community law

4 The first and second paragraphs of Article 307 EC state:

'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.'

5 The seventh recital in the preamble to Regulation No 2081/92 states that 'there is diversity in the national practices for implementing registered designations o[f] origin and geographical indications;... a Community approach should be envisaged;... a framework of Community rules on protection will permit the development of geographical indications and designations of origin since, by providing a more uniform approach, such a framework will ensure fair competition between the producers of products bearing such indications and enhance the credibility of the products in the consumers' eyes'.

6 Article 1(1) and (2) of Regulation No 2081/92 provides:

'1. This Regulation lays down rules on the protection of designations of origin and geographical indications of agricultural products intended for human consumption referred to in Annex II to the Treaty and of the foodstuffs referred to in Annex I to this Regulation and agricultural products listed in Annex II to this Regulation.

...

2. This Regulation shall apply without prejudice to other specific Community provisions.'

7 Annex I to that regulation, headed 'Foodstuffs referred to in Article 1(1)', mentions 'Beer' in its first indent.

8 Article 2(1) and (2) of Regulation No 2081/92 provides:

'1. Community protection of designations of origin and of geographical indications of agricultural products and foodstuffs shall be obtained in accordance with this Regulation.

2. For the purposes of this Regulation:

(a) *designation of origin*: means the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff:

— originating in that region, specific place or country, and

— the quality or characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and the production, processing and preparation of which take place in the defined geographical area;

(b) *geographical indication*: means the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff:

— originating in that region, specific place or country, and

— which possesses a specific quality, reputation or other characteristics attributable to that geographical origin and the production and/or processing and/or preparation of which take place in the defined geographical area.'

9 Articles 5 to 7 of Regulation No 2081/92 lay down the procedure, known as the 'normal procedure', for the registration of geographical indications and designations of origin referred to in Article 2 of the regulation. According to Article 5(4) of that regulation, the application for registration is to be sent to the Member State in which the geographical area is located. In accordance with the first subparagraph of Article 5(5) of the regulation, the Member State is to check that the application is justified and forward it to the Commission of the European Communities.

10 Since examination of an application for registration by the Commission takes a certain amount of time and since, pending a decision on the registration of a name, a Member State must be allowed to confer transitional national protection, Regulation No 535/97 inserted the following text after the first subparagraph of Article 5(5) of Regulation No 2081/92:

'That Member State may, on a transitional basis only, grant on the national level a protection in the sense of the present Regulation to the name forwarded in the manner prescribed, and, where appropriate, an adjustment period, as from the date of such forwarding;...

Such transitional national protection shall cease on the date on which a decision on registration under this Regulation is taken....

The consequences of such national protection, where a name is not registered under this Regulation, shall be the sole responsibility of the Member State concerned.

The measures taken by Member States under the second subparagraph shall produce effects at national level only; they shall have no effect on intra-Community trade.'

11 Article 12 of Regulation No 2081/92 provides:

'1. Without prejudice to international agreements, this Regulation may apply to an agricultural product or foodstuff from a third country provided that:

— the third country is able to give guarantees identical or equivalent to those referred to in Article 4,

— the third country concerned has inspection arrangements equivalent to those laid down in Article 10,

— the third country concerned is prepared to provide protection equivalent to that available in the Community to corresponding agricultural products [or] foodstuffs coming from the Community.

2. If a protected name of a third country is identical to a Community protected name, registration shall be granted with due regard for local and traditional usage and the practical risks of confusion.

Use of such names shall be authorised only if the country of origin of the product is clearly and visibly indicated on the label.'

12 Article 17 of Regulation No 2081/92 sets up a registration procedure, known as the 'simplified procedure', applicable to the registration of names already in existence on the date of entry into force of that regulation. It provides, inter alia, that within six months of the entry into force of Regulation No 2081/92, Member States are to inform the Commission of the names they wish to register under that procedure.

13 In order to take account inter alia of the fact that the first proposal for registration of geographical indications and designations of origin which the Commission was to draw up pursuant to Article 17(2) of Regulation No 2081/92 was not submitted to the Council of the European Union until March 1996, when most of the transitional period of five years provided for by Article 13(2) of that regulation had already elapsed, Regulation No 535/97, which entered into force on 28 March 1997, replaced Article 13(2) with the following:

'By way of derogation from paragraph 1(a) and (b), Member States may maintain national systems that permit the use of names registered under Article 17 for a period of not more than five years after the date of publication of registration, provided that:

— the products have been marketed legally using such names for at least five years before the date of publication of this Regulation,

— the undertakings have legally marketed the products concerned using those names continuously during the period referred to in the first indent,

— the labelling clearly indicates the true origin of the product.

However, this derogation may not lead to the marketing of products freely within the territory of a Member State where such names were prohibited.'

National law

14 On 11 June 1976, the Republic of Austria and the Czechoslovak Socialist Republic concluded an agreement on the protection of indications of source, designations of origin and other designations referring to the source of agricultural and industrial products ('the bilateral convention').

15 Following approval and ratification, the bilateral convention was published in the *Bundesgesetzblatt für die Republik Österreich* of 19 February 1981 (BGBl. No 1981/75). Pursuant to Article 16(2) thereof, the bilateral convention came into force on 26 February 1981 for an indefinite period.

16 Article 1 of the bilateral convention provides:

'Each of the contracting States undertakes to take all the necessary measures to ensure effective protection against unfair competition in the course of trade for indications of source, designations of origin and other designations referring to the source of the agricultural and industrial products in the categories referred to in Article 5 and listed in the agreement provided for in Article 6, and the names and illustrations referred to in Articles 3, 4 and 8(2)'.

17 Under Article 2 of the bilateral convention,

'Indications of source, designations of origin and other designations referring to the source within the meaning of this agreement mean all indications which relate directly or indirectly to the source of a product. Such an indication generally consists of a geographical designation. However, it may also consist of other information, if in the relevant consumer circles of the country of origin this is perceived, in connection with the product thus designated, as a reference to the country of production. In addition to the indication of source from a particular geographical area, the abovementioned designations may also contain information on the quality of the product concerned. These particular features of the product shall be determined solely or predominantly by geographical or human influences.'

18 Article 3(1) of the bilateral convention provides:

'... the Czechoslovak designations listed in the agreement provided for in Article 6 shall in the Republic of Austria be reserved exclusively for Czechoslovak products.'

19 Point 2 of Article 5(1)B of the bilateral convention refers to beers as one of the categories of Czech products concerned by the protection established by that convention.

20 Article 6 of the bilateral convention states:

'Designations of the individual products meeting the conditions laid down in Articles 2 and 5 which enjoy protection under the agreement and which are therefore not generic names will be listed in an agreement to be concluded between the Governments of the two contracting States.'

21 Article 7 of the bilateral convention is worded as follows:

'1. If the names and designations protected under Articles 3, 4, 6, and 8(2) of this agreement are used contrary to those provisions commercially for products, in particular for their presentation or packaging, or on invoices, waybills or other business documents or in advertisements, then all judicial and administrative measures for acting against unfair competition or otherwise suppressing prohibited designations which are available under the legislation of the contracting State in which protection is claimed shall be applied in accordance with the conditions laid down in that legislation and with Article 9.

2. Where a risk of confusion in commerce exists, paragraph 1 is also to be applied if the designations protected under the agreement are used in modified form or for products other than those to which they are allocated in the agreement referred to in Article 6.

3. Paragraph 1 is also to be applied if the designations protected under the agreement are used in translation or with a reference to the actual source or with additions such as "style", "type", "as produced in", "imitation" or the like.

4. Paragraph 1 does not apply to translations of designations from one of the contracting States where the translation is a colloquial word in the language of the other contracting State.'

22 Article 16(3) of the bilateral convention provides that the two contracting parties may denounce the convention by giving notice of at least one year, issued in writing and through diplomatic channels.

23 In accordance with Article 6 of the bilateral convention, an agreement on its application ('the bilateral agreement') was concluded on 7 June 1979. Pursuant to Article 2(1) thereof, that agreement came into force at the same time as the bilateral convention, namely 26 February 1981. It was published in the *Bundesgesetzblatt für die Republik Österreich* of 19 February 1981 (BGBl. No 1981/76).

24 Annex B to the bilateral agreement states:

'Czechoslovak designations for agricultural and industrial products

...

B. Food and agriculture (except wine)

...

2. Beer

Czech Socialist Republic

...

Bud

Budjovické pivo

Budjovické pivo Budvar

Budějovický Budvar

...'

25 On 17 December 1992, the Czech National Council declared that, in accordance with the prevailing principles of, and to the extent provided for by, international law, the Czech Republic considered itself bound, as of 1 January 1993, by the multilateral and bilateral agreements to which the Czech and Slovak Federative Republic was party on that date.

26 By Constitutional Law No 4/1993 of 15 December 1992, the Czech Republic confirmed that it assumed the rights and obligations of the Czech and Slovak Federative Republic which existed under international law on the date of its dissolution.

27 The communication of the Federal Chancellor concerning the bilateral agreements in force between the Republic of Austria and the Czech Republic (BGBl. III No 1997/123; 'the Federal Chancellor's communication') states:

'On the basis of a joint examination of the bilateral agreements between the Republic of Austria and the Czech Republic by the competent authorities of the two States it was established that, under the generally recognised rules of international law, the following bilateral agreements were in force between the Republic of Austria and the Czech Republic on 1 January 1993, the date on which the Czech Republic succeeded the former Czech and Slovak Federative Republic in the relevant territory, and have since been applied by the competent authorities within the framework of the legal systems of the two countries:

...

19. Agreement between the Republic of Austria and the Czechoslovak Socialist Republic on the protection of indications of source, designations of origin and other designations referring to the source of agricultural and industrial products, and the protocol of 30 November 1977

Vienna, 11 June 1976 (BGBl. No 75/1981)

...

26. Agreement implementing the Agreement between the Republic of Austria and the Czechoslovak Socialist Republic on the protection of indications of source, designations of origin and other designations referring to the source of agricultural and industrial products

Prague, 7 June 1979 (BGBl No 76/1981).

...'

The dispute in the main proceedings and the questions referred

28 Budvar markets beer, in particular under the names Budějovický Budvar and Budweiser Budvar, and exports a beer called 'Budweiser Budvar' in particular to Austria.

29 Ammersin markets inter alia a beer called American Bud, produced by the brewery Anheuser-Busch, which it buys from Josef Sigl KG ('Josef Sigl'), a company established in Obertrum (Austria) which is the sole Austrian importer of that beer.

30 By act of 22 July 1999, Budvar brought proceedings before the national court requesting that Ammersin be ordered to refrain from using on Austrian territory, in the course of its commercial activities, the name Bud, or similar designations likely to cause confusion, for beer or similar goods or in connection with such goods, save where Budvar products were concerned. In addition, Budvar also

sought the suppression of all designations conflicting with that prohibition, the rendering of accounts and publication of the judgment. The action was accompanied by an application for interim measures.

31 Budvar's action in the main proceedings is essentially based on two different pleas in law.

32 First of all, Budvar submits that the name American Bud, which is registered as a trade mark in favour of Anheuser-Busch, bears a similarity, likely to cause confusion within the meaning of the legislation on unfair competition, to its own priority trade marks protected in Austria, namely Budweiser, Budweiser Budvar and Bud.

33 Second, Budvar asserts that the use of the designation American Bud for a beer from a State other than the Czech Republic is contrary to the provisions of the bilateral convention because, pursuant to Article 6 of that convention, the designation Bud, referred to in Annex B to the bilateral agreement, is a protected designation and is therefore reserved exclusively for Czech products.

34 On 15 October 1999, the national court granted the interim measures sought by Budvar.

35 The appeal brought by Ammersin before the Oberlandesgericht Wien (Higher Regional Court, Vienna) (Austria) against those measures was not successful and leave to appeal to the Oberster Gerichtshof (Supreme Court) (Austria) was refused. Now that the interlocutory proceedings have ended, the Handelsgericht Wien is hearing the main application.

36 The national court observes that before bringing the action in the main proceedings, Budvar had already brought an action before the Landesgericht Salzburg (Regional Court, Salzburg) (Austria) which was identical with regard to both its purpose and its legal basis, but which was directed against Josef Sigl.

37 In that parallel case, the Landesgericht Salzburg ordered the interim measures sought by the claimant, and the Oberlandesgericht Linz (Higher Regional Court, Linz) (Austria) dismissed the appeal brought against that order. By order of 1 February 2000, the Oberster Gerichtshof dismissed the appeal brought on a point of law against the order made in the initial appeal proceedings, and upheld the interim measures.

38 The national court states that the order of the Oberster Gerichtshof is essentially based on the following considerations.

39 The Oberster Gerichtshof, which confined its examination to the plea related to the bilateral convention, held that the injunction sought against Josef Sigl, the defendant, could constitute an obstacle to the free movement of goods for the purposes of Article 28 EC.

40 However, it held that that obstacle is compatible with Article 28 EC because the protection of the designation Bud provided for in the bilateral convention constitutes protection of industrial and commercial property within the meaning of Article 30 EC.

41 According to the national court, the Oberster Gerichtshof held that the designation Bud is 'a simple geographical indication or... an indirect reference to source', in other words an indication for which it is not necessary to respect the guarantees associated with designations of origin — such as production in

compliance with the quality or manufacturing standards adopted and monitored by the authorities, or the specific product characteristics. Moreover, the designation Bud enjoys 'absolute protection', that is to say, irrespective of whether there is any risk of confusion or of consumers being misled.

42 In the light of the arguments submitted to it, the national court considers that there is reasonable doubt as to the correct answers to the questions of Community law raised in the main proceedings, in particular because it is not possible to ascertain from the Court's case-law whether 'simple' indications of geographical source, which do not carry any risk of consumers being misled, also come within the scope of the protection of industrial and commercial property within the meaning of Article 30 EC.

43 In those circumstances, the Handelsgericht Wien decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is the application of a provision of a bilateral agreement concluded between a Member State and a non-member country, under which a simple/indirect geographical indication which in the country of origin is the name neither of a region nor a place nor a country is accorded the absolute protection, regardless of any misleading, of a qualified geographical indication within the meaning of Regulation No 2081/92 compatible with Article 28 EC and/or Regulation No 2081/92, if on application of that provision the import of a product which is lawfully put on the market in another Member State may be prevented?

(2) Does this apply also where the geographical indication which in the country of origin is the name neither of a region nor a place nor a country is not understood in the country of origin as a geographical designation for a specific product, and also not as a simple or indirect geographical indication?

(3) Do the answers to Questions 1 and 2 apply also where the bilateral agreement is an agreement which the Member State concluded before its accession to the European Union and continued after its accession to the European Union with a successor State to the original other State party to the agreement by means of a declaration of the Federal Government?

(4) Does the second paragraph of Article 307 EC oblige the Member State to interpret such a bilateral agreement, concluded between that Member State and a non-member country before the Member State's accession to the EU, in conformity with Community law as stated in Article 28 EC and/or Regulation No 2081/92, so that the protection laid down therein for a simple/indirect geographical indication which in the country of origin is the name neither of a region nor a place nor a country comprises merely protection against misleading and not the absolute protection of a qualified geographical indication within the meaning of Regulation No 2081/92?'

The questions referred by the national court

Admissibility of the reference for a preliminary ruling

Observations submitted to the Court

44 Budvar claims that the case at issue in the main proceedings concerns provisions of a bilateral agreement concluded by a Member State and a non-member country to which, pursuant to the first paragraph of Article 307 EC, Community law does not apply. The interpretation of such provisions comes under the exclusive jurisdiction of the national court. In those circumstances, it is neither necessary nor permissible for the Court to give a ruling on the questions referred by the national court.

45 According to the Austrian Government, the part of the first question relating to the compatibility with Regulation No 2081/92 of the protection enjoyed under the bilateral convention is inadmissible. The issue is hypothetical inasmuch as the order for reference contains no evidence that any of the products concerned has been registered or is intended to be registered within the meaning of that regulation.

46 The Commission submits that the question arises whether the questions referred by the national court are hypothetical and, as such, inadmissible, given in particular that, first, the national court clearly does not concur with the interpretation of the bilateral convention given by the Oberster Gerichtshof in its interim order of 1 February 2000 as to the absolute nature of the protection enjoyed under that convention, second, the national court does not state what type of protection is, in its view, enjoyed by the name at issue in the main proceedings and, third, it also does not explain whether it is bound by the interpretation referred to above.

Findings of the Court

47 It is settled law that in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main

action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraphs 38 and 39).

48 According to Budvar, the national court's questions are not admissible because, given the applicability of the first paragraph of Article 307 EC, the case at issue in the main proceedings concerns only the interpretation of rules of national law, namely the bilateral convention and agreement ('the bilateral instruments at issue'), since Community law does not apply to that case.

49 In that regard, it need only be noted, first, that the third and fourth questions specifically concern the correct interpretation of Article 307 EC in the light of the circumstances of the case at issue in the main proceedings, while the first and second questions concern the interpretation of provisions of Community law, namely those of Articles 28 EC and 30 EC and of Regulation No 2081/92, in order to enable the national court to determine the compatibility of the national rules at issue with Community law. There can be no doubt as to the relevance of such an examination given the possible application of Article 307 EC to the case in question.

50 As regards, next, the Austrian Government's assertion that the part of the first question which relates to Regulation No 2081/92 is hypothetical, it must be observed that the case at issue in the main proceedings concerns Budvar's claim to a right which would result in Ammersin being prohibited from marketing certain goods under a protected designation and whose compatibility with the system established by Regulation No 2081/92 has been called into question, irrespective of whether there has been any registration under the system instituted by that regulation. That question is therefore in no way hypothetical.

51 Finally, as regards the Commission's arguments, suffice it to say that the various possibilities posited by the national court as to the nature of the name at issue in the main proceedings are merely the premisses on which the questions referred are based, the correctness of which it is not for the Court to examine.

52 It follows from all the foregoing that the reference for a preliminary ruling is admissible.

Substance

The first question

53 By its first question, the national court is asking essentially whether Regulation No 2081/92 or Article 28 EC precludes the application of a provision of a bilateral agreement between a Member State and a non-member country, under which a simple and indirect indication of geographical source from that non-member country is accorded protection in the importing Member State, irrespective of whether there is any risk of consumers being misled, and the import of a product lawfully marketed in another Member State may be prevented.

54 That question deals with the hypothesis that the name Bud constitutes a simple and indirect indication of geographical source, that is to say, a name in respect of which there is no direct link between a specific quality, reputation or other characteristic of the product and its specific geographical origin, so that it does not come within the scope of Article 2(2)(b) of Regulation No 2081/92 (see Case C-312/98 *Warsteiner Brauerei* [2000] ECR I-9187, paragraphs 43 and 44), and which, moreover, is not in itself a geographical name but is at least capable of

informing the consumer that the product bearing that indication comes from a particular place, region or country (see Case C-3/91 *Exportur* [1992] ECR I-5529, paragraph 11).

— Regulation No 2081/92

Observations submitted to the Court

55 Budvar submits that Bud is an abbreviation of the name of the town of Budweis — the Czech name for which is České Budjovice —, which is the place of origin of its beer, and thus includes a geographical reference which establishes a relationship with the brewing tradition of that town and reflects, in particular, the worldwide reputation of beer from Budweis, which is attributable to its excellent quality.

56 According to Budvar, the name Bud — which is protected in Austria under the bilateral convention — is therefore a qualified geographical indication or designation of origin, that is to say, an indication or a designation which is eligible for registration under Regulation No 2081/92.

57 Budvar submits that it is clear from the Court's case-law (*Warsteiner Brauerei*, paragraph 47) that Regulation No 2081/92 does not preclude a national system of protection, similar to that established by the bilateral convention, of a qualified geographical indication or designation of origin such as Bud.

58 In addition, Budvar submits that if the name Bud, as protected under the bilateral convention, is merely a simple indication of geographic source — that is, an indication of geographic source in respect of which there is no link between the characteristics of the product and its geographical source —, the judgment in *Warsteiner Brauerei*, in particular paragraph 54, *a fortiori* indicates that Regulation No 2081/92 does not preclude the application of that national protection, since such indications are clearly beyond the scope of that regulation.

59 According to Budvar, Regulation No 2081/92 governs only Community protection of the designations to which it refers. It follows that the national court's distinction between simple indications of geographic source and qualified indications is of no relevance when considering the purely national protection accorded by the bilateral convention. In the light of the judgment in *Warsteiner Brauerei*, in particular paragraphs 43 and 44, that conclusion holds true even where there is no risk of consumers being misled.

60 Ammersin claims that *Warsteiner Brauerei* does not provide any answer to the question underlying the dispute in the main proceedings, namely the question whether the absolute protection which Regulation No 2081/92 reserves to qualified geographic indications and designations of origin can be granted at the level of the Member States, in parallel to the system established by that regulation.

61 That question must be answered in the negative since it is clear from the object, intention and scheme of Regulation No 2081/92 that that regulation is exhaustive to the extent that it grants absolute protection. Ammersin submits, first, that the regulation subjects the protection of a name to strict conditions, according to which the name must be the name of a place and there must be a direct link between the quality of the product concerned and the place where it originates (Article 2(2) of Regulation No 2081/92), and, second, that that protection is granted only after a compulsory notification, verification and registration procedure involving, in particular, a detailed assessment of compliance with the product specifications (Article 4 et seq. of that regulation).

62 According to Ammersin, it follows that Regulation No 2081/92 precludes national systems of protection from granting absolute protection to geographical indications and designations of origin where it is not ensured that those indications and designations also meet the strict requirements laid down by that regulation.

63 That interpretation is lent support by Article 17 of Regulation No 2081/92, from which it follows that national systems of protection of qualified indications of geographical source, including those founded on bilateral conventions, may be maintained beyond the six-month period provided for in that provision only if they have been notified to the Commission within that period.

64 The indications of source protected under the bilateral convention, in particular the name Bud, were not however notified to the Commission within that period, which, for the Republic of Austria, expired on 30 June 1999. They can thus no longer enjoy protection.

65 The Austrian Government argues that if one starts from the assumption that the name at issue in the main proceedings is merely a simple indication of geographical source, it follows from the case-law of the Court that the protection accorded under the bilateral convention is compatible with Regulation No 2081/92.

66 That Government further submits that it is likewise clear from the case-law of the Court that Regulation No 2081/92 also does not preclude the application of national rules protecting names which are eligible for registration under that regulation.

67 The German Government submits that if the case concerns a simple indication of geographical source, then protection of the name Bud, as provided for in the bilateral convention, is compatible with Regulation No 2081/92 because that regulation applies only to qualified indications of geographical source, that is, indications which are intrinsically linked to the characteristics or the quality of the product in question.

68 On the other hand, if the case in the main proceedings concerns a qualified indication of source, that Government considers that it is necessary to bear in mind the fact that Regulation No 2081/92 provides only for the registration of indications of source from Member States (see Article 5(4) and (5) of that regulation). It is clear from the recitals in its preamble that the regulation is based on the premiss that the system it establishes will be supplemented by cooperation with non-member countries. However, at present there is no agreement between the European Union and the Czech Republic.

69 Therefore, no objections can be raised to the protection accorded under the bilateral convention, provided that, in terms of their content, the qualified indications of source referred to therein meet the requirements of Regulation No 2081/92.

70 The French Government submits that Article 12(1) of Regulation No 2081/92 authorises the maintenance of international agreements concluded prior to the entry into force of that regulation.

71 It is thus beyond doubt that the protection accorded by the bilateral convention to the name Bud cannot be incompatible with Regulation No 2081/92, particularly since that name has been classified as a protected designation of origin inter alia in the framework of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 31 October 1958, and was registered as such by the World Intellectual Property Organisation in 1975.

72 The Commission submits that it is clear from the case-law that Regulation No 2081/92 does not preclude a bilateral convention from according, possibly in conjunction with other national legal provisions, absolute protection, that is, irrespective of whether there is any use creating a risk of consumers being misled, to a geographical indication such as the one at issue in the main proceedings where there is no link between the characteristics of the product concerned and its geographical source.

The Court's reply

73 The Court has already held that there is nothing in Regulation No 2081/92 to imply that simple indications of geographical source cannot be protected under the national legislation of a Member State (see *Warsteiner Brauerei*, paragraph 45).

74 The aim of Regulation No 2081/92 is to ensure uniform protection within the Community of the geographical designations which it covers; it introduced a requirement of Community registration in respect of those designations so that they could enjoy protection in every Member State, whereas the national protection which a Member State accords to geographical designations that do not meet the conditions for registration under Regulation No 2081/92 is governed by the national law of that Member State and is confined to its territory (see *Warsteiner Brauerei*, paragraph 50).

75 No doubt is cast on that interpretation by the fact that the national system of protection of indications of geographical source at issue in the main proceedings provides for absolute protection, that is to say, irrespective of whether there is any risk of consumers being misled.

76 The scope of Regulation No 2081/92 is not determined by reference to such factors, but depends essentially on the nature of the designation, in that it covers only designations of products for which there is a specific link between their characteristics and their geographic origin, and by the fact that the protection conferred extends to the Community.

77 It is common ground that, for the purposes of the hypothesis to which the first question refers, the name at issue in the main proceedings is not a designation which comes within the scope of Regulation No 2081/92. Moreover, the protection which it enjoys under the bilateral instruments at issue is limited to Austrian territory.

78 In the light of the foregoing, the answer to the first question, in so far as it concerns Regulation No 2081/92, must be that that regulation does not preclude the application of a provision of a bilateral agreement between a Member State and a non-member country under which a simple and indirect indication of geographical origin from that non-member country is accorded protection in the importing Member State, whether or not there is any risk of consumers being misled, and the import of a product lawfully marketed in another Member State may be prevented.

— Articles 28 EC and 30 EC

Observations submitted to the Court

79 As a preliminary point, Budvar submits that the case at issue in the main proceedings concerns only direct imports to Austria from a non-member country,

namely the United States, and thus does not involve a barrier to intra-Community trade. Hence, it has no bearing on the internal market and does not come within the scope of Article 28 EC.

80 In addition, Budvar asserts that, according to the case-law of the Court, Articles 28 EC and 30 EC do not preclude the application of rules, laid down in an international agreement between Member States, on the protection of indications of source and designations of origin, provided that at, or after, the date on which that agreement comes into force the protected names have not become generic in the State of origin.

81 According to Budvar, that case-law applies *a fortiori* to a situation which, as in the main proceedings, concerns an agreement between a Member State and a non-member country according such protection, especially as it is indisputable — in particular since it is expressly stated in Article 6 of the bilateral convention — that the designation Bud is not, and has never been, a generic term.

82 Ammersin submits that it does not follow from the Court's case-law that absolute protection of a name such as Bud is justified under Article 30 EC. Only simple indications of geographical source — essentially, place-names — with a strong reputation, which constitute for producers established in the places to which they refer an essential means of attracting custom, are justified. The designation Bud is not the name of a place, nor does it have a reputation among consumers.

83 Ammersin also submits that protection of the name Bud likewise cannot be justified under Article 28 EC, that is to say, by an overriding reason in the general interest, such as consumer protection or fairness in commercial transactions. Those objectives can be adequately attained by granting protection against the

risk of consumers being misled. In those circumstances, absolute protection is clearly disproportionate.

84 The Austrian Government submits that according to the settled case-law of the Court, Article 28 EC does not preclude restrictions on imports and exports where those restrictions are justified on the grounds of protection of industrial and commercial property within the meaning of Article 30 EC, to the extent that such restrictions are necessary to safeguard the rights which constitute the specific subject-matter of that property.

85 That justification applies equally both to simple indications of geographical source and to indirect indications of geographical source.

86 That Government submits that the names protected by the bilateral convention — even though they are not qualified geographical indications or designations of origin capable of coming within the scope of Regulation No 2081/92 — enjoy a special reputation capable of justifying restrictions on the free movement of goods.

87 Those names were listed in the annexes to the bilateral agreement at the suggestion of interested national circles, on the basis of consumer expectations and in close concertation with the competent interest groups and administrations.

88 The aim of the bilateral convention was to prevent the protected designations from being improperly used and from becoming generic.

89 The German Government submits that the protection which the bilateral convention accords to simple indications of geographical source is a measure having equivalent effect to a quantitative restriction within the meaning of Article 28 EC, but is justified under Article 30 EC on the grounds of protection of industrial and commercial property or, alternatively, under Article 28 EC as an overriding reason in the public interest, relating in particular to fairness in commercial transactions or consumer protection.

90 As regards Article 30 EC, the German Government submits that it is clear from the case-law of the Court that the prohibition on the use of the name Bud under the bilateral convention protects the commercial property in the indications of source within the meaning of that article and can, therefore, justify a barrier to trade which is prohibited by Article 28 EC.

91 If it were found that the name at issue in the main proceedings is a simple indication of source, that indication would be protected against the risk of its reputation being exploited. It would, moreover, be irrelevant whether that indication does in fact have a reputation or whether a person not entitled to do so had in fact exploited the reputation of that indication of source in the marketing of his products.

92 The German Government submits, in the alternative, that where there are overriding reasons in the general interest, in particular relating to fairness in commercial transactions and consumer protection, Member States are permitted to adopt national provisions concerning the use of misleading indications which do not require consumers actually to have been misled. That principle is confirmed by various directives.

93 The Commission submits that the prohibition on marketing beer in Austria under the name of American Bud which follows from the bilateral convention constitutes a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 28 EC, which is justified because it relates to the protection of industrial and commercial property within the meaning of Article 30 EC.

94 In that regard, the Commission asserts that according to the case-law of the Court, geographical names such as Bud which are accorded absolute protection by an international agreement even though there is no link between the characteristics of the products concerned and their geographical source are covered by the justification relating to industrial and commercial property set out in Article 30 EC.

The Court's reply

95 Articles 28 EC and 30 EC apply without distinction to products originating in the Community and to those admitted into free circulation in any of the Member States, whatever the real origin of such products. It is therefore subject to those reservations that those articles apply to the American Bud beer at issue in the main proceedings (see, to that effect, Case 125/88 *Nijman* [1989] ECR 3533, paragraph 11).

96 In the case at issue in the main proceedings, the prohibition on marketing beer from countries other than the Czech Republic under the name of Bud in Austria, which follows from the bilateral convention, is capable of affecting imports of that product under that name from other Member States and thus of constituting a barrier to intra-Community trade. Such a rule is therefore a measure having an effect equivalent to a quantitative restriction within the meaning of Article 28 EC (see, to that effect, *Nijman*, paragraph 12, and *Exportur*, paragraphs 19 and 20).

97 National legislation prohibiting the use of a geographical name for goods originating in a non-member country which are admitted into free circulation in other Member States where they are lawfully marketed does not, it is true, absolutely preclude the importation of those products into the Member State concerned. It is, however, likely to make their marketing more difficult and thus to impede trade between Member States (see, to that effect, Case C-448/98 *Guimont* [2000] ECR I-10663, paragraph 26).

98 It is therefore necessary to examine whether that restriction on the free movement of goods can be justified under Community law.

99 The Court has already held, in relation to the absolute protection of an indication of source granted under a bilateral agreement of essentially the same kind as the one at issue in the main proceedings, that the aim of such an agreement, which is to prevent the producers of a contracting State from using the geographical names of another State and thereby taking advantage of the reputation of the products of undertakings established in the regions or places indicated by those names, is to ensure fair competition. Such an objective may be regarded as falling within the sphere of the protection of industrial and commercial property within the meaning of Article 30 EC, provided that the names in question have not, either at the time of the entry into force of that agreement or subsequently, become generic in the country of origin (see *Exportur*, paragraph 37, and Case C-87/97 *Consorzio per la tutela del formaggio Gorgonzola* [1999] ECR I-1301, paragraph 20).

100 As is clear from, in particular, Articles 1, 2 and 6 of the bilateral convention, that objective forms the basis of the system of protection established by the bilateral instruments at issue.

101 Therefore, if the findings of the national court show that according to factual circumstances and perceptions in the Czech Republic the name Bud designates a region or a place located on the territory of that State and its protection is justified there on the basis of the criteria laid down in Article 30 EC, that does not preclude such protection from being extended to the territory of a Member State such as, in this case, the Republic of Austria (see, to that effect, *Exportur*, paragraph 38).

102 In the light of the foregoing, the answer to the first question, in so far as it concerns Articles 28 EC and 30 EC, must be that those articles do not preclude the application of a provision of a bilateral agreement between a Member State and a non-member country, under which a simple and indirect indication of geographical origin from that non-member country is accorded protection in the Member State concerned, whether or not there is any risk of consumers being misled, and the import of a product lawfully marketed in another Member State may be prevented, provided that the protected name has not, either at the date of the entry into force of that agreement or subsequently, become generic in the State of origin (see *Exportur*, paragraph 39).

103 The answer to the first question must therefore be that Article 28 EC and Regulation No 2081/92 do not preclude the application of a provision of a bilateral agreement between a Member State and a non-member country under which a simple and indirect indication of geographical origin from that non-member country is accorded protection in the importing Member State, whether or not there is any risk of consumers being misled, and the import of a product lawfully marketed in another Member State may be prevented.

The second question

104 By its second question, the national court is asking essentially whether Regulation No 2081/92 or Article 28 EC precludes the application of a provision of a bilateral agreement between a Member State and a non-member country under

which a name which in that country does not directly or indirectly refer to the geographical source of the product is accorded protection in the Member State concerned, whether or not there is any risk of consumers being misled, and the import of a product lawfully marketed in another Member State may be prevented.

Observations submitted to the Court

105 Budvar claims that the protection accorded to the name Bud under the bilateral convention would be incompatible with Article 28 EC only if there were absolutely no association in either the Member State concerned or the non-member country between the protected indication, which is a modified form of the full name of the place where the protected product is produced, on the one hand, and the product protected by that indication and bearing that particular name and its place of production, on the other. Such protection would be compatible with Regulation No 2081/92 even if such an association were completely ruled out.

106 Ammersin and the German Government submit that if the name Bud is not regarded in the country of origin as the geographical name of a specific product or as a simple or indirect geographical indication, protection of that name cannot be justified on the grounds of protection of industrial or commercial property within the meaning of Article 30 EC.

The Court's reply

107 If the findings of the national court show that according to factual circumstances and perceptions prevailing in the Czech Republic, the name Bud does not directly or indirectly identify any region or place in the territory of that State, the question

then arises whether the absolute protection of that name, as provided for by the bilateral convention, which constitutes an obstacle to the free movement of goods (see paragraphs 96 and 97 above) can be justified under Community law by reference to Article 30 EC or on some other ground.

108 In that case, and without prejudice to any protection under specific rights such as trade mark rights, the protection of that name cannot be justified on the grounds of protection of industrial and commercial property within the meaning of Article 30 EC (see, to that effect, *Exportur*, paragraph 37, and Joined Cases C-321/94 to C-324/94 *Pistre and Others* [1997] ECR I-2343, paragraph 53).

109 In those circumstances, the Court must examine whether such an obstacle can be justified by an imperative requirement in the general interest such as fairness in commercial transactions or consumer protection.

110 If it were established that the name Bud does not contain any reference to the geographical source of the products that it designates, the Court would have to hold that none of the information supplied to it by the national court shows that protection of that name is susceptible of preventing economic operators from obtaining an unfair advantage or consumers from being misled as to any of the characteristics of those products.

111 The answer to the second question must therefore be that Article 28 EC precludes the application of a provision of a bilateral agreement between a Member State and a non-member country under which a name which in that country does not directly or indirectly refer to the geographical source of the product that it

designates is accorded protection in the importing Member State, whether or not there is any risk of consumers being misled, and the import of a product lawfully marketed in another Member State may be prevented.

The third and fourth questions

112 By its third and fourth questions, which should be examined together, the national court is asking essentially whether the first paragraph of Article 307 EC is to be interpreted as permitting a court of a Member State to apply the provisions of bilateral agreements such as those at issue in the main proceedings, concluded between that State and a non-member country and according protection to a name from the non-member country, even where those provisions prove to be contrary to the Treaty rules, on the ground that they concern an obligation resulting from agreements concluded before the date of the accession of the Member State concerned to the European Union, and whether the second paragraph of that article requires that national court to interpret those provisions in such a way that they are consistent with Community law.

Observations submitted to the Court

113 Budvar observes that the bilateral agreement was concluded by the Republic of Austria before its accession to the European Union, which took place on 1 January 1995, and that the Federal Chancellor's communication, issued in 1997, in other words after that accession, is, according to its very wording, of purely declaratory value. According to Budvar, the bilateral convention was not maintained in force by that declaration, but remained in force after the break-up of the Czech and Slovak Federative Republic on 1 January 1993 by virtue of the rules of public international law on the succession of States.

114 In those circumstances, Budvar claims that the Republic of Austria was entitled under the first paragraph of Article 307 EC, as interpreted by the Court, or even required under public international law, to take all the measures necessary to ensure the protection of the name Bud provided for in the bilateral convention, notwithstanding any provision of Community law.

115 Budvar submits that even assuming that in relation to the protection provided for by the bilateral convention there is a conflict between that convention and Community law, the Community institutions are prevented, under the first paragraph of Article 307 EC, from applying all primary and secondary Community law until that conflict is resolved, possibly by denunciation of the bilateral convention.

116 According to Budvar, the only appropriate methods of eliminating any incompatibilities between an agreement which predates the accession of a Member State to the European Union and the Treaty are the methods permitted under public international law, such as renegotiation of the agreement, or its interpretation in such a way that it is consistent with Community law.

117 There are no plans to renegotiate the bilateral convention. Moreover, it follows from the wording of Article 7(1) of that convention — a provision which is utterly unambiguous in that regard — that the protection accorded by the convention to the name concerned is independent of any risk of confusion or of consumers being misled.

118 Ammersin claims that the first paragraph of Article 307 EC is not applicable to the case at issue in the main proceedings because, on the date of its accession to the European Union, the Republic of Austria did not have any obligations under the bilateral convention.

119 The Republic of Austria did not have any obligation under international law in the period prior to the Federal Chancellor's communication, which includes the date of its accession to the European Union. Furthermore, there is no custom of international law relating to the succession of States on the basis of which the bilateral agreements would have remained in force following the break-up of the Czech and Slovak Federative Republic.

120 Therefore, it was only by way of the Federal Chancellor's communication that the Republic of Austria assumed the obligations to the Czech Republic under the bilateral convention. Contrary to its wording, that communication is therefore constitutive in nature.

121 The bilateral convention can be interpreted in such a way that it is consistent with Community law if it is taken to mean that, under that convention, the name Bud is protected only where consumers are in fact misled. Article 7(1) of the convention does not lay down a requirement of absolute protection but instead provides for the application of 'judicial and administrative measures for acting against unfair competition or otherwise suppressing prohibited designations'.

122 Under Austrian law and, more specifically, its provisions on unfair competition, all applications for orders prohibiting the use of names are subject to the condition that those names are used in a misleading manner.

123 Moreover, according to Ammersin, it is Article 7(2) of the bilateral convention which is applicable to the case in the main proceedings, since the name American Bud, used as a registered trade mark, constitutes a modified form of the protected designation for the purposes of that provision. There are significant differences between that mark and the protected designation Bud — specifically in the form used as a bottle label — and it is perceived by consumers as an independent mark.

124 In that regard, Ammersin submits that the second paragraph of Article 307 EC clarifies Article 10 EC, which imposes on Member States the general obligation to act in a way favourable to the Community. In particular, it follows from the case-law relating to Article 10 EC that when applying domestic law the national court called upon to interpret that law must do so as far as possible in the light of the wording and the purpose of higher-ranking provisions of Community law, in order to attain the results intended by the Treaty and thus to comply with Regulation No 2081/92 and Article 28 EC.

125 The Austrian Government submits that the Republic of Austria and the Czech Republic both share the dominant opinion that States are bound by treaties concluded by their predecessor States. The principle of continuity in situations such as the one at issue in the main proceedings is expressed in Article 34(1) of the Vienna Convention on Succession of States in respect of Treaties. Moreover, that principle is consistent with customary international law. After the dissolution of the State which was succeeded by the Czech Republic, the validity of the bilateral instruments at issue was in no way affected by their application to bilateral relations between the Republic of Austria and the Czech Republic.

126 According to that Government, the Federal Chancellor's communication therefore has purely declaratory value.

127 In addition, the Austrian Government points out that in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties of 23 May 1969 '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

128 According to that Government, having regard to the meaning to be given to the relevant terms of the bilateral convention in their context, and in the light of the object and the purpose of that convention, those terms cannot be interpreted as meaning that, as a simple or indirect indication of geographical source, the name Bud only has protection against the risk of consumers being misled and not absolute protection. Such an interpretation is thus a priori excluded.

129 According to the German Government, the bilateral convention contains rights and obligations assumed by the Republic of Austria prior to its accession to the European Union. Pursuant to the first paragraph of Article 307 EC, such a convention is not affected by Community law and its application therefore has priority over Community law.

130 The fact that the non-member country which entered into the bilateral convention, namely the Czechoslovak Socialist Republic, no longer exists does not call that interpretation into question. The Republic of Austria — like the Federal Republic of Germany and, to the best of the German Government's knowledge, a number of other Member States — has recognised the continuity of most international treaties and has therefore acted in accordance with customary practice between States.

131 According to the German Government, an interpretation favourable to Community law would have to take the form of an amendment to the bilateral convention following bilateral negotiations to that end, and, where such negotiations fail, denunciation or suspension of that convention. However, in the meantime, the national courts are entitled to protect the rights concerned even where they are contrary to Community law. That Government submits that the national court has not indicated whether the convention in question can be denounced.

132 The French Government submits that it follows from the Federal Chancellor's communication that the bilateral instruments at issue have remained in force between the Republic of Austria and the Czech Republic, without interruption, since 1 January 1993 — a date prior to the Republic of Austria's accession to the European Union. That communication did not decide the continued validity of the bilateral convention from 1997 onwards, but merely noted that fact and informed individuals thereof. Therefore, those agreements are clearly international acts concluded prior to the accession of the Republic of Austria and to which Article 307 EC applies.

133 Moreover, it follows from the case-law of the Court that, in accordance with the principles of international law, Community rules — in this case Article 28 EC and the relevant provisions of Regulation No 2081/92 — can be deprived of effect by an earlier international agreement — in this case the bilateral convention — where that agreement imposes on the Member State concerned obligations whose performance can still be required by the non-member country which is party to that agreement.

134 According to that Government, it is clear from that case-law that the applicability of such a convention must be verified by the national court, which is also responsible for identifying the obligations in question in order to determine the extent to which they preclude application of Article 28 EC or Regulation No 2081/92.

135 The French Government submits that the interpretation proposed by the national court would result, in the case at issue in the main proceedings, in an infringement of the bilateral convention and thus does not constitute a permissible method under international law for resolving an incompatibility between that convention and Community law within the meaning of the second paragraph of Article 307 EC, as interpreted by the Court of Justice.

136 According to that Government, it follows from the wording of Article 7(1) of the bilateral convention, which is utterly unambiguous, that it excludes a priori an interpretation of that provision as meaning that the name Bud is protected as a simple and indirect geographical indication only against the risk of consumers being misled and consequently does not enjoy absolute protection. Therefore, that interpretation cannot be entertained as an interpretation which meets the requirement of compatibility with Community law.

137 The Commission submits that Article 307 EC applies to the bilateral convention since that convention has an effect on the application of the Treaty and, moreover, was concluded between the Republic of Austria and a non-member country well before that Member State's accession to the European Union.

138 However, the question arises whether the first paragraph of Article 307 EC also applies to an agreement which, as in the case at issue in the main proceedings, has been maintained in force to the benefit of the State which succeeded the original non-member country by virtue of a declaration made by the authorities of a Member State after its accession to the European Union.

139 That question also prompts the question whether the declaration concerned is constitutive in nature.

140 The Commission submits that under international law the Federal Chancellor's communication has only a declaratory effect, since a treaty remains in force if the parties' consent to its continuation can be inferred from their actions.

141 That is a question of fact, whose appraisal comes within the jurisdiction of the national court. The Commission submits that there is no information in the case-file to indicate that the parties did not wish to maintain the bilateral instruments at issue.

142 The Commission concludes that the first paragraph of Article 307 EC applies to the case at issue in the main proceedings and, accordingly, that the Treaty does not affect either the rights or the obligations under the bilateral convention.

The Court's reply

143 The Court must answer this question because it is clear from the answer to the second question that, in the event that the name Bud cannot be regarded as directly or indirectly referring to the geographical source of the products that it designates, Article 28 EC precludes the protection accorded to that name by the bilateral instruments at issue.

144 It follows from the first paragraph of Article 307 EC that rights and obligations under an agreement concluded between a Member State and a non-member country before the date of accession of that Member State are not affected by the Treaty provisions.

145 The purpose of that provision is to make clear, in accordance with the principles of international law, that application of the EC Treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under an earlier agreement and to perform its obligations thereunder (see, inter alia, Case C-84/98 *Commission* v *Portugal* [2000] ECR I-5215, paragraph 53).

146 Consequently, in order to determine whether a Community rule may be deprived of effect by an earlier international agreement, it is necessary to examine whether that agreement imposes on the Member State concerned obligations whose performance may still be required by the non-member country which is party to it (see, to that effect, inter alia, Joined Cases C-364/95 and C-365/95 *T. Port* [1998] ECR I-1023, paragraph 60).

147 In the present case, it is common ground that protection of the name Bud is provided for by the bilateral instruments at issue, which were concluded between the Czechoslovak Socialist Republic and the Republic of Austria well before the latter's accession to the European Union.

148 It also appears from the bilateral instruments at issue, in particular Article 7(1) of the bilateral convention, that they impose on the Republic of Austria obligations whose performance could have been required by the Czechoslovak Socialist Republic.

149 However, the question arises whether under those instruments the Czech Republic has acquired rights which it can still require the Republic of Austria to respect.

150 It should be recalled that following its break-up on 1 January 1993, the Czech and Slovak Federative Republic, which had itself replaced the Czechoslovak Socialist Republic, ceased to exist and that two new independent States, namely the Czech Republic and the Slovak Republic, succeeded it on the respective parts of its territory.

151 The question therefore arises whether, in the context of such a succession of States, the bilateral instruments at issue concluded by the Czechoslovak Socialist Republic remained in force following the break-up of the Czech and Slovak

Federative Republic, in particular with respect to rights inuring to the benefit of the Czech Republic, such as the ones at issue in the main proceedings, with the effect that those rights and the corresponding obligations on the Republic of Austria remained in force after that break-up and were consequently still in force at the date of the Republic of Austria's accession to the European Union.

152 It is common ground that at the date of the break-up, there was a widely accepted international practice based on the principle of the continuity of treaties. According to that practice, unless one of the State parties to a bilateral agreement indicates its intention to renegotiate or denounce the agreement, the agreement is considered in principle to remain in force in relation to the States succeeding the State which has broken up.

153 At least as far as concerns the specific case of the complete break-up of States, and notwithstanding the possibility of denouncing or renegotiating agreements, it is apparent that the principle of the continuity of treaties, thus understood, constitutes a reference principle which was widely accepted at the time of the break-up in question.

154 In any event, and without there being any need for the Court to decide the question whether at the time of the break-up of the Czech and Slovak Federative Republic that principle of the continuity of treaties was a customary rule of international law, it cannot be denied that application of that principle in the international practice of the law of treaties was, at that time, fully consistent with international law.

155 In those circumstances, it must be ascertained whether both the Republic of Austria and the Czech Republic actually intended to apply the principle of the continuity of treaties to the bilateral instruments at issue and whether there is any evidence of their intentions in that regard during the period between the date of the break-up and that of the Republic of Austria's accession to the European Union.

156 As is clear from, in particular, the resolution of the Czech National Council of 17 December 1992 and from Article 5 of Constitutional Law No 4/1993 (see paragraphs 25 and 26 above), the Czech Republic expressly accepted the principle of the automatic continuity of treaties.

157 As to the Republic of Austria's position, it appears traditionally to have advocated what is known as the '*tabula rasa*' principle, whereby, with the exception of treaties relating to territory or cases where there is an express agreement to the contrary, the succession of a new State to a contracting State automatically results in the expiry of the treaties concluded by the latter.

158 However, the question arises whether in a situation of succession of States such as that resulting from the complete break-up of the former State and, in particular, in relation to the bilateral instruments at issue, the Republic of Austria intended to apply the principle referred to in the preceding paragraph of this judgment.

159 As the Advocate General points out in points 141 and 142 of his Opinion, it seems clear from both the case-law of the Austrian courts and the fact that, in particular in relation to the Czech Republic, the Republic of Austria denounced certain agreements concluded with the Czechoslovak Socialist Republic, but solely with regard to the future, that there are indications in the approach of that Member State, also during the period between the break-up of the Czech and Slovak Federative Republic and the Republic of Austria's accession to the European Union, to show that it had moved away from applying the '*tabula rasa*' principle.

160 The Austrian practice as regards the States succeeding the Czech and Slovak Federative Republic seems to be based on a pragmatic approach, according to which bilateral agreements remain in force unless they have been denounced by one or other of the parties. Such an approach leads to results which are very similar to those resulting from application of the principle of the continuity of treaties.

161 In that regard, it is for the national court to ascertain whether, at any time between the break-up of the Czech and Slovak Federative Republic, which took place on 1 January 1993, and the Federal Chancellor's communication in 1997, the Republic of Austria indicated its intention to renegotiate or denounce the bilateral instruments at issue.

162 If confirmed by the national court, that would be particularly significant because, as has been pointed out in paragraph 156 above, at the time of the break-up of its predecessor State, the Czech Republic clearly expressed the point of view that agreements concluded with that predecessor State remained in force. The Czech Republic thus expressly reserved the right to enforce against the Republic of Austria the rights accorded to it under the bilateral instruments at issue in its capacity as the successor State.

163 The importance of such a circumstance is, moreover, corroborated by the purpose of the first paragraph of Article 307 EC, the aim of which is to allow a Member State to respect the rights which can be asserted against it by non-member countries on the basis of an agreement which predates that State's accession to the European Union in cases such as the one at issue in the main proceedings (see paragraph 145 above).

164 It is for the national court to ascertain whether, in the case at issue in the main proceedings, both the Republic of Austria and the Czech Republic actually intended to apply the principle of the continuity of treaties to the bilateral instruments at issue.

165 As regards the Republic of Austria, it should again be made clear that it cannot be ruled out a priori that a declaration of intention in that regard, even where made after a certain delay (that is, not until 1997), can nevertheless be taken into account for the purpose of definitively establishing the intention of that Member State to accept the Czech Republic as contracting party to the bilateral instruments at issue and to find that, in the present case, application of those instruments comes within the scope of the first paragraph of Article 307 EC.

166 It would be otherwise if, at any time prior to the Federal Chancellor's communication, the Republic of Austria had already clearly expressed the contrary intention.

167 If, having carried out the checks that are necessary having regard, in particular, to the criteria set out in this judgment, the national court were to reach the conclusion that at the date of the Republic of Austria's accession to the European Union that Member State was bound to the Czech Republic by the bilateral instruments at issue, it would follow that those instruments can be regarded as acts concluded before the date of the Republic of Austria's accession to the European Union for the purposes of the first paragraph of Article 307 EC.

168 It should be added that, in accordance with the second paragraph of that provision, the Member States are required to take all appropriate steps to eliminate the incompatibilities between an agreement concluded before a Member State's accession and the Treaty.

169 It follows that the national court must ascertain whether a possible incompatibility between the Treaty and the bilateral convention can be avoided by interpreting that convention, to the extent possible and in compliance with international law, in such a way that it is consistent with Community law.

170 If it proves impracticable to interpret an agreement concluded prior to a Member State's accession to the European Union in such a way that it is consistent with Community law then, within the framework of Article 307 EC, it is open to that State to take the appropriate steps, while, however, remaining obliged to eliminate any incompatibilities existing between the earlier agreement and the Treaty. If that Member State encounters difficulties which make adjustment of an agreement impossible, an obligation to denounce that agreement cannot therefore be excluded (see *Commission* v *Portugal*, paragraph 58).

171 In that regard, its should be noted that Article 16(3) of the bilateral convention provides that the two contracting parties may denounce the convention by giving notice of at least one year, issued in writing and through diplomatic channels.

172 Pending the success of one of the methods referred to in the second paragraph of Article 307 EC in eliminating any incompatibilities between an agreement predating the accession of the Member State concerned to the European Union and the Treaty, the first paragraph of that article permits that State to continue to apply such an agreement in so far as it contains obligations which remain binding on that State under international law.

173 In the light of the foregoing, the answer to the third and fourth questions must be that the first paragraph of Article 307 EC is to be interpreted as permitting a court of a Member State, subject to the findings to be made by that court having regard inter alia to the criteria set out in this judgment, to apply the provisions of bilateral agreements such as those at issue in the main proceedings, concluded between that State and a non-member country and according protection to a name from the non-member country, even where those provisions prove to be contrary to the Treaty rules, on the ground that they concern an obligation resulting from agreements concluded before the date of the accession of the Member State concerned to the European Union. Pending the success of one of the methods referred to in the second paragraph of Article 307 EC in eliminating any incompatibilities between an agreement predating that accession and the Treaty, the first paragraph of that article permits that State to continue to apply such an agreement in so far as it contains obligations which remain binding on that State under international law.

Costs

174 The costs incurred by the Austrian, German and French Governments and by the Commission, which have submitted observations to the Court, are not recover-

able. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Handelsgericht Wien by order of 26 February 2001, hereby rules:

1. **Article 28 EC and Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, as amended by Council Regulation (EC) No 535/97 of 17 March 1997, do not preclude the application of a provision of a bilateral agreement between a Member State and a non-member country under which a simple and indirect indication of geographical origin from that non-member country is accorded protection in the importing Member State, whether or not there is any risk of consumers being misled, and the import of a product lawfully marketed in another Member State may be prevented.**

2. **Article 28 EC precludes the application of a provision of a bilateral agreement between a Member State and a non-member country under which a name which in that country does not directly or indirectly refer to the geographical source of the product that it designates is accorded protection in the importing Member State, whether or not there is any risk of consumers**

being misled, and the import of a product lawfully marketed in another Member State may be prevented.

3. The first paragraph of Article 307 EC is to be interpreted as permitting a court of a Member State, subject to the findings to be made by that court having regard inter alia to the criteria set out in this judgment, to apply the provisions of bilateral agreements such as those at issue in the main proceedings, concluded between that State and a non-member country and according protection to a name from the non-member country, even where those provisions prove to be contrary to the EC Treaty rules, on the ground that they concern an obligation resulting from agreements concluded before the date of the accession of the Member State concerned to the European Union. Pending the success of one of the methods referred to in the second paragraph of Article 307 EC in eliminating any incompatibilities between an agreement predating that accession and the Treaty, the first paragraph of that article permits that State to continue to apply such an agreement in so far as it contains obligations which remain binding on that State under international law.

Skouris	Jann	Timmermans
Gulmann	Cunha Rodrigues	Edward
La Pergola	Puissochet	Schintgen
Colneric		von Bahr

Delivered in open court in Luxembourg on 18 November 2003.

R. Grass	V. Skouris
Registrar	President