

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

9 March 2005 \*

In Case T-33/03,

**Osotspa Co. Ltd**, established in Bangkok (Thailand), represented by C. Gassauer-Fleissner, lawyer, with an address for service in Luxembourg,

applicant,

v

**Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)**, represented by A. von Mühlendahl, T. Eichenberg and G. Schneider, acting as Agents,

defendant,

the other party to the proceedings before the Board of Appeal of OHIM, intervener before the Court of First Instance, being

\* Language of the case: German.

**Distribution & Marketing GmbH**, established in Salzburg (Austria), represented initially by C. Hauer and subsequently by V. von Bomhard, A. Renck and A. Pohlmann, lawyers,

ACTION brought against the decision of the Third Board of Appeal of OHIM of 27 November 2002 (Case R 296/2002-3) concerning opposition proceedings between Osotspa Co. Ltd and Distribution & Marketing GmbH,

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of H. Legal, President, V. Tiili and V. Vadapalas, Judges,  
Registrar: D. Christensen, Administrator,

having regard to the application lodged at the Registry of the Court on 4 February 2003,

having regard to the response lodged at the Registry of the Court on 28 May 2003,

having regard to the response of the intervener lodged at the Registry of the Court on 27 May 2003,

further to the hearing on 29 September 2004,

gives the following

## Judgment

### Background

- 1 On 10 September 1997 Distribution & Marketing GmbH ('the intervener') filed an application for a Community trade mark under Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended, at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM).
- 2 The mark for which registration was sought is the word sign Hai.
- 3 The goods and services for which registration of the mark was sought fall within Classes 5, 12, 14, 25, 28, 32, 33, 34, 35, 41 and 42 within the meaning of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as amended and modified.
- 4 That application was published in *Community Trade Marks Bulletin* No 58/98 of 3 August 1998.

5 On 30 October 1998 Osotspa Co. Ltd ('the applicant') gave notice of opposition under Article 42 of Regulation No 40/94 against the registration of the mark applied for in respect of the goods and services within Classes 5, 32, 33, 35 and 42 with the following description:

- Class 5: 'Strengthening and refreshing health care products, namely vitamin preparations, mineral preparations, tonics';
  
- Class 32: 'Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages';
  
- Class 33: 'Alcoholic beverages (except beers)';
  
- Class 35: 'Organisation of trade fairs and exhibitions for commercial and advertising purposes relating exclusively or non-exclusively to the following goods: strengthening and refreshing health care products, namely vitamin preparations, mineral preparations, tonics; beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages, alcoholic beverages; distribution for advertising purposes of strengthening and refreshing health care products, namely vitamin preparations, mineral preparations, tonics, beers, mineral and aerated waters and other non-alcoholic drinks, fruit drinks and fruit juices, syrups and other preparations for making beverages and alcoholic beverages';
  
- Class 42: 'Accommodation and catering for guests'.

6 The ground relied on in support of the opposition was that referred to in Article 8(1) (b) of Regulation No 40/94. The opposition was based on the existence, first, of national mark AM 537/96, registered in Austria on 10 May 1996, and, secondly, of Community trade mark No 168 427, registered on 12 May 1998, both of which designate 'non-alcoholic drinks; syrups and other preparations for making beverages' included in Class 32 of the Nice Agreement, cited above. Those two earlier figurative marks ('the earlier marks') are represented as follows:



7 By decision of 31 January 2002, the Opposition Division rejected the opposition, on the ground that there was no likelihood of confusion between the marks in question. Observing that it is necessary to take account of the average distinctiveness of the earlier marks, it considered that the conflicting signs are entirely different on the visual and aural level and that they have a completely different structure.

8 On 2 April 2002, the applicant lodged an appeal before OHIM pursuant to Articles 57 to 62 of Regulation No 40/94 against the decision of the Opposition Division.

9 By decision of 27 November 2002 ('the contested decision'), the Third Chamber of Appeal dismissed the appeal. Essentially, it considered that, in spite of the fact that the goods covered by the conflicting marks were partially identical and in view of the average distinctiveness of the earlier marks as well as the aural, visual and conceptual differences which can clearly be perceived between the conflicting signs, there was no significant likelihood of confusion on the part of the public of the Member States of the European Union, and in Austria in particular. That conclusion is all the more apparent because that assessment must take account of the average, reasonably well informed and reasonably observant and circumspect consumer who

perceives a mark as it is presented to him, without subjecting it to in-depth analysis or translating it into another language.

### **Forms of order sought**

10 The applicant claims that the Court should:

- vary the contested decision so as to allow the opposition to the registration of the mark Hai and refuse to register that mark;
- in the alternative, refer the case back to OHIM;
- order OHIM to pay the costs.

11 OHIM contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

12 The intervener contends that the Court should:

- dismiss the action in its entirety and uphold the contested decision;
  
- in the alternative, refer the case back to OHIM;
  
- order the applicant to pay the costs.

## Law

13 The applicant asks the Court, essentially, to refuse to register the Community trade mark applied for and to annul the contested decision.

*The request for refusal to register the Community trade mark applied for*

14 By the second part of its first head of claim, the applicant asks the Court, in substance, to order OHIM to refuse to register the mark applied for.

- 15 In that regard, it should be noted that, pursuant to Article 63(6) of Regulation No 40/94, OHIM is to be required to take the necessary measures to comply with the judgment of the Community judiciary. It is therefore not for the Court of First Instance to issue directions to OHIM. It is for the latter to draw the consequences of the operative part of judgments of the Court of First Instance and the grounds on which they are based (Case T-331/99 *Mitsubishi HiTec Paper Bielefeld v OHIM (Giroform)* [2001] ECR II-433, paragraph 33; Case T-34/00 *Eurocool Logistik v OHIM (EUROCOOL)* [2002] ECR II-683, paragraph 12, and Case T-129/01 *Alejandro v OHIM — Anheuser-Busch (BUDMEN)* [2003] ECR II-2251, paragraph 22. The second part of the applicant's first head of claim is therefore inadmissible.

*The request for annulment of the contested decision*

- 16 The applicant puts forward a single plea, alleging infringement of Article 8(1)(b) of Regulation No 40/94.

Arguments of the parties

- 17 The applicant contests the assessment of the Board of Appeal that there is no real likelihood of confusion between the signs in question.
- 18 In accordance with the formula that a low degree of similarity between the goods or services designated by the marks in question can be offset by a high degree of similarity between those marks, and vice versa, the applicant states that, at least as regards the goods in Class 32 which are identical, a low degree of similarity between the marks should suffice for there to be a likelihood of confusion. The applicant



maintains that there is a likelihood of confusion, even where the goods and services are not identical, because the marks at issue are in any event extremely similar.

19 Moreover, the applicant challenges the Board of Appeal's assessment that the earlier SHARK marks have average distinctiveness. The earlier marks consist of a reproduction of an animal which catches the imagination and is, quite evidently, purely fanciful in relation to the goods and services in question.

20 Moreover, the applicant claims that there is a likelihood of confusion where there is similarity from the point of view of one of the three aspects — visual, aural or conceptual. It notes that, in the contested decision, the conceptual similarity of the marks is established, but that that aspect is wrongly given less weight than the visual and aural aspects. As an example, the applicant draws attention to the fact that the Board of Appeal gave more importance to aural similarity than to the semantic content of the mark applied for by asserting that the customers concerned would think that 'Hai' was a distortion of the English word 'high'.

21 According to the applicant, the conflicting signs in this case are likely to be confused because they have just one meaning which is inherent, clear and immediately understandable. The average consumer immediately perceives the semantic content of the marks in question and at once establishes an association between that content and, as a result, between the two signs.

22 In addition, and contrary to the assertion of the Board of Appeal, that conceptual identity is not cancelled out by the use of two different languages. In that respect, referring to the decisions of the Austrian patent office, the applicant claims that the Board of Appeal failed to assess the state of the Austrian market, in which

knowledge of the English language is accepted. Therefore marks made up of words in a foreign language, particularly English, should not be assessed differently from those consisting of German words having the same meaning. Accordingly, the public at which the goods and services in question are directed understands the meaning of the word 'shark', a fact that is indeed accepted by the Board of Appeal.

- 23 The applicant adds that the semantic content of the earlier marks is supplemented by their graphic representation in the shape of a shark which makes the meaning even more accessible and clear. The word 'shark' written in the stylised shape of a shark promotes the closeness and the similarity between the marks in question. That has the effect of considerably reducing the difference stemming from the different languages.
- 24 As for the Board of Appeal's statement that translations of marks are relevant only if they are common and the relevant public assumes that the translated mark comes from the same undertaking or associated undertaking, the applicant submits that it suffices that consumers are likely to draw that parallel.
- 25 The applicant further states that 'absolute cross-confusion', that is to say the likelihood of confusion between a solely figurative representation of a word and a pure word mark, is accepted. It should particularly be concluded in this case that there is a likelihood of confusion since the earlier marks are not only made up of the figurative element representing a shark.
- 26 Finally, the applicant states that there is a likelihood of confusion in a significant part of the European Union. The word 'Hai' is known not only in German and Finnish,

but also in Swedish, Danish and Dutch, the last language also being spoken in Belgium. That word is also understood in some Italian and French border areas. In the northern parts of Europe, German and English are also understood.

- 27 OHIM contends that, in the contested decision, the Board of Appeal applied the principles governing assessment of the likelihood of confusion, as they emerge from the case-law, without error and that, while taking into account the parties' pleas, it correctly concluded that there was no likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94.
- 28 Given that the earlier marks have only average distinctiveness and taking account of the very marked differences between the signs on the visual and aural level, OHIM agrees with the Board of Appeal's conclusion that, in spite of the partial identity of the goods covered by the conflicting signs, the conceptual similarity of the signs is not sufficient in this case to conclude that there is a significant likelihood of confusion under trade mark law.
- 29 The intervener agrees with the statement of reasons of the contested decision.
- 30 In the intervener's submission, the aural differences which exist between the words 'Hai' and 'shark' and the graphic form of the figurative mark SHARK mean that the signs in question create a different impression and exclude any similarity between them.

31 The applicant's argument that the average consumer immediately perceives the meaning of the marks at issue and establishes a link between them is not realistic. The applicant's contention asks too much of the consumer and does not correspond to real life. Although it is accepted that consumers put more emphasis on similarities than on differences between signs, consumers would not identify any shared feature in this case, either in the image or the verbal element. The word 'Hai' does not appear in the earlier marks and, conversely, the stylised shark image and the word 'shark' are not included in the sign filed by the intervener. As there are no similar elements, there cannot therefore be a likelihood of confusion.

32 As regards the use of two languages, the intervener submits that, even if the case-law accepts that the basic vocabulary of the English language is understood by Austrian consumers and is translated by its equivalent into German, the word 'shark' cannot be classified among words taken from basic English vocabulary. Moreover, the applicant's argument that the word 'shark' became well known through the famous film 'Der weiße Hai' is fallacious. The film is known in Austria only by its German name, and indeed the original English title of the film does not even contain the word 'shark'. Furthermore, the word 'shark' belongs to the American, not the English language.

33 In addition, the intervener takes the view that, contrary to the applicant's claim, the consumers concerned will not perceive the word 'Hai' as a German or Dutch name for a carnivorous fish, but also as a distortion of the English word 'high' meaning top, of quality, good, noble etc. Aurally, the word 'Hai' thus gives the sign a double meaning as it plays on the distortion, which is, indeed, the purpose of the incorrect spelling of the expression 'high'. Besides, even if the main meaning of the Hai mark were to correspond only to the original meaning of the word 'Hai', there would manifestly be no similarity between the SHARK and Hai marks because consumers

would not easily see the same semantic content in those two words. It is not realistic to believe that consumers translate the German or Dutch word 'Hai' by the American word 'shark' without any other association of ideas. Therefore nor is there a likelihood of confusion from that point of view.

- 34 Finally, the intervener states that acceptance of 'absolute cross confusion' has no bearing in this case, since in the presence of a mark which is both verbal and figurative consumers remember mainly the verbal element 'shark' and not the graphic element.

### Findings of the Court

- 35 Under Article 8(1)(b) of Regulation No 40/94, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to be registered if because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected. The likelihood of confusion includes the likelihood of association with the earlier trade mark. In addition, under Article 8(2)(a)(i) and (ii) of Regulation No 40/94, earlier trade marks are to mean Community trade marks and trade marks registered in a Member State with a date of application for registration which is earlier than the date of application for registration of the Community trade mark.

- 36 According to settled case-law, the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings constitutes a likelihood of confusion.

37 According to the same line of case-law, the likelihood of confusion must be assessed globally, depending on the perception on the part of the relevant public of the signs and of the goods or services in question, taking into account all factors relevant to the case, in particular the interdependence between the similarity of the signs and the similarity of the goods or services covered (see Case T-162/01 *Laboratorios RTB v OHIM — Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)* [2003] ECR II-2821, paragraphs 31 to 33, and the case-law cited).

38 In this case, the earlier marks were the subject of a national registration, in Austria, and a Community registration. Therefore, the relevant territory for the analysis of likelihood of confusion is the whole of the European Union and Austria in particular. Given that the goods in question are everyday goods, the public targeted is the average consumer, who is deemed to be reasonably well informed and reasonably observant and circumspect. It is common ground that the goods in question, that is, energy drinks, are directed above all at a young public.

39 Further, even though Article 8 of Regulation No 40/94 does not contain a provision similar to Article 7(2) to the effect that an application to register a trade mark may be refused where the absolute ground for refusal obtains in only part of the Community, the same solution should be applied in the present case. It follows that registration must also be refused even where the relative ground for refusal obtains in only part of the Community (Case T-355/02 *Milhens v OHIM — Zirh International (ZIRH)* [2004] ECR II-791, paragraph 36).

40 In the light of the foregoing considerations, it is appropriate to compare first the goods concerned and second the conflicting signs.

## — Comparison of the goods

- 41 According to case-law, in assessing the similarity of the goods or services concerned, all the relevant factors relating to them should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary (Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 23).
- 42 The conflicting marks relate to certain goods within the same class, that is, Class 32, the description of which, moreover, is broadly identical.
- 43 The goods included in Class 5 referred to in the trade mark application can also be goods used in the preparation of drinks, especially energy drinks. As for the goods in Class 33, which include alcoholic drinks, it should be noted that energy drinks are currently often marketed and consumed with alcoholic drinks.
- 44 Furthermore, all the goods in question in Classes 5, 32 and 33 are usually subject to widespread distribution, from the food section of a department store to bars and cafes.
- 45 As regards services within Classes 35 and 42 referred to in the trade mark application, it should be noted that they are less similar to the goods covered by the earlier marks. The fact that alcoholic and non-alcoholic drinks are promoted at trade fairs and are often consumed in restaurants does not suffice to create a link between those goods and the services in Classes 35 and 42.

- 46 It must therefore be concluded that the goods within Class 32 are identical. The goods in Classes 5 and 33 referred to in the trade mark application are linked to the goods in Class 32, covered by the earlier marks, to the extent that they must be regarded as similar. On the other hand, the services included in Classes 35 and 42, named in the trade mark application, and the goods covered by the earlier marks cannot be regarded as being similar.

— Comparison of the signs

- 47 It is clear from settled case-law that the global assessment of the likelihood of confusion, as far as concerns the visual, aural or conceptual similarity of the conflicting marks, must be based on the overall impression given by them, bearing in mind, inter alia, their distinctive and dominant components (see Case T-292/01 *Phillips-Van Heusen v OHIM — Pash Textilvertrieb und Einzelhandel (BASS)* [2003] ECR II-4335, paragraph 47, and the case-law cited).
- 48 The question whether the degree of similarity between the marks at issue on the visual, aural and conceptual levels is sufficiently great for there to be a likelihood of confusion between them must be examined in the light of those considerations.
- 49 In this case, on the visual level, the two signs Hai and SHARK are clearly distinguished by their graphic representation since only the SHARK mark appears in figurative form. In that respect, it should be noted that the graphics of the letters of the word SHARK reproduce the form of a shark, while the Hai sign is made up exclusively of the word 'Hai'. Even in their verbal aspects, the conflicting signs ('Hai' and 'shark') must be regarded as dissimilar, although they both contain the combination of letters 'h' and 'a'. The two signs are therefore not similar on the visual level.



- 50 Aurally, it is clear that the signs in question do not have any similarity.
- 51 On the conceptual level, it is not disputed that the English word 'shark' is translated as 'Hai' in German and Finnish, as 'haai' in Dutch and as 'haj' in Danish and Swedish. It is therefore probable that people who speak those languages understand both 'shark' and 'Hai' as meaning 'shark'. That is above all the case for the targeted public, given that they are young people who generally have sufficient knowledge of English to understand the meaning of the word 'shark'. That is also the case for people who do not immediately recognise the English word 'shark', but who understand its meaning when they see the shark image. The semantic content of the earlier marks is supplemented by their graphics in the form of a shark which make their meaning even more accessible and clear. It should therefore be found that there is a conceptual similarity between the signs in question which, however, depends on prior translation.
- 52 It also appears that the mark applied for can translate a play on words, a distortion of the English word 'high'. However, that meaning is not obvious and is not sufficient to cancel out the conceptual similarity between the conflicting signs.
- 53 Consequently, there is no visual or aural similarity between the signs in question, but some conceptual similarity which depends on prior translation.
- 54 The question whether that conceptual similarity is sufficient to create a likelihood of confusion in this case must therefore be assessed globally.

## — Global assessment of the signs in question

- 55 According to case-law, where the earlier mark is not especially well known to the public and consists of an image with little imaginative content, the mere fact that the two marks are conceptually similar is not sufficient to give rise to a likelihood of confusion (Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 25).
- 56 The more distinctive the earlier mark, the greater will be the likelihood of confusion. It is therefore not impossible that the conceptual similarity resulting from the fact that two marks use images with analogous semantic content may give rise to a likelihood of confusion where the earlier mark has a particularly distinctive character, either per se or because they are well known on the market (see, to that effect, *SABEL*, cited above, paragraph 24). Such marks therefore enjoy broader protection than marks with a less distinctive character (*Canon*, cited above, paragraph 18, and Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 20).
- 57 In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, an overall assessment must be made of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 49, and *Lloyd Schuhfabrik Meyer*, cited above, paragraph 22).
- 58 In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-

standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (*Windsurfing Chiemsee*, cited above, paragraph 51, and *Lloyd Schuhfabrik Meyer*, cited above, paragraph 23).

59 In this case, the applicant did not plead that its marks were recognised in the market, only that they have a high distinctive character per se. In assessing their distinctive character account must therefore be taken, with their other inherent qualities, of whether the earlier marks contain descriptive elements or not.

60 It is not disputed in this case that the earlier SHARK marks do not contain any descriptive element. They are marks with special graphics the letters of which have stylised characters so that the whole of the sign calls to mind the form of a shark, the 's' being the head, the 'a' the dorsal fin and the 'k' the tail of the animal. It should be noted that the animal chosen and the product covered by the earlier marks are not incidental: a shark is used to designate energy drinks. Those marks, taken as a whole, may be regarded as striking and attention-grabbing. Such marks are also more easily committed to memory by the relevant public.

61 Consequently, the inherent qualities of the earlier marks give them a relatively high distinctive character, contrary to what OHIM and the intervener claim.

62 Therefore, having established that this is a question of goods which are partly identical and earlier marks with a distinctive character per se, it must be examined whether, in this case, conceptual similarity alone, which depends on prior translation, is sufficient to conclude that there is a likelihood of confusion.

- 63 In that respect, it should be stated that the goods in question are energy drinks intended for a young public which is generally acquainted with branded goods. As the Board of Appeal correctly stated, those goods are usually subject to widespread distribution, for example, in supermarkets, where the public buys them above all 'on sight'. Nor should the importance of verbal orders in restaurants, cafés and bars be overlooked.
- 64 In the light of all the foregoing, it must be held that the significant visual and aural differences between the marks in question are such as to cancel out, to a large extent, their conceptual similarity which depends on prior translation. The degree of conceptual similarity between two marks is of less importance where the relevant public, at the time of purchase, is called on to see and pronounce the name of the mark.
- 65 It must therefore be held that the degree of similarity between the marks at issue is not sufficiently great for the Court to make a finding that the public might believe that the goods in question come from the same undertaking or, as the case may be, from undertakings which are economically linked.
- 66 Having regard to the differences between the conflicting signs, that assessment is not invalidated by the fact that the goods and services covered by the mark applied for are partly identical to the goods covered by the earlier marks.
- 67 In those circumstances, the Board of Appeal was right to conclude that there was no likelihood of confusion between the mark applied for and the earlier marks.

- 68 As regards the national decisions cited by the parties, it is settled case-law that registrations already made in the Member States are a factor which may only be taken into consideration, without being given decisive weight, for the purposes of registering a Community trade mark (Case T-122/99 *Procter & Gamble v OHIM (Soap bar shape)* [2000] ECR II-265, paragraph 61; Case T-24/00 *Sunrider v OHIM (VITALITE)* [2001] ECR II-449, paragraph 33, and Case T-337/99 *Henkel v OHIM (Round red and white tablet)* [2001] ECR II-2597, paragraph 58).
- 69 So far as concerns OHIM's practice, it is apparent from the case-law that decisions concerning registration of a sign as a Community trade mark which the Boards of Appeal are called on to take under Regulation No 40/94 are adopted in the exercise of circumscribed powers and are not a matter of discretion. Accordingly, the registrability of a sign as a Community trade mark must be assessed solely on the basis of that regulation, as interpreted by the Community judiciary, and not on the basis of a previous practice of the Boards of Appeal (Case T-106/00 *Streamserve v OHIM (STREAMSERVE)* [2002] ECR II-723, paragraph 66; Joined Cases T-79/01 and T-86/01 *Bosch v OHIM (Kit Pro and Kit Super Pro)* [2002] ECR II-4881, paragraph 32, and Joined Cases T-324/01 and T-110/02 *Axions and Belce v OHIM (Brown cigar shape and gold ingot shape)* [2003] ECR II-1897, paragraph 51).
- 70 In those circumstances, the applicant's sole plea must be rejected and the action in its entirety dismissed.

## Costs

- 71 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since OHIM and the intervener have applied for costs and the applicant has been unsuccessful, the applicant must be ordered to pay their costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders the applicant to pay the costs.**

Legal

Tiili

Vadapalas

Delivered in open court in Luxembourg on 9 March 2005.

H. Jung

Registrar

H. Legal

President