



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

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Prishtina, 28 August 2015  
Ref. No.: RK 828/15

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI167/14**

Applicant

**NTP Unio Commerce,  
Zelqif Berisha, owner**

**Constitutional review of the Judgment AC-I-13-0045-A0001,  
of the Appellate Panel of the Special Chamber of the Supreme Court of  
Kosovo on Privatization Agency Related Matters, of 26 June 2014**

**THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

composed of:

Arta Rama-Hajrizi, President  
Ivan Čukalović, Deputy-President  
Robert Carolan, Judge  
Altay Suroy, Judge  
Almiro Rodrigues, Judge  
Snezhana Botusharova, Judge and  
Bekim Sejdiu, Judge

### **Applicant**

1. The Applicant is NTP Unio Commerce, with its seat in the Municipality of Hani i Elezit, Mr. Zelqif Berisha being the owner. The Applicant is represented by Mr. Alexander Borg Olivier, a lawyer practicing in Prishtina.

### **Challenged decision**

2. The Applicant challenges the Judgment AC-I-13-0045-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel of the SCSC), of 26 June 2014, which upheld the Judgment C-I-12-0042, of the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Specialized Panel of the SCSC), of 20 March 2013.
3. The challenged Judgment was served on the Applicant on 14 July 2014.

### **Subject matter**

4. The subject matter of the Referral is the constitutional review of the challenged decision which allegedly violated the rights of the Applicant, as guaranteed by Article 3 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property] in conjunction with Article 53 [Interpretation of Human Rights Provisions] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as his rights guaranteed by Article 6 [Right to a Fair Trial] of the European Convention on Human Rights (hereinafter: ECHR), and by Article 1 [Protection of Property] of Protocol No. 1 to the ECHR.

### **Legal basis**

5. The Referral is based on Articles 113.7 and 21.4 of the Constitution, Articles 29 and 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law).

### **Proceedings before the Constitutional Court**

6. On 14 November 2014, the Applicant submitted the Referral to the Court.
7. On 24 November 2014, the President of the Court appointed Judge Kadri Kryeziu as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (Presiding), Almiro Rodrigues and Ivan Čukalović.
8. On 26 November 2014, the Court notified the Applicant of the registration of Referral and sent a copy of the Referral to the SCSC and to the Privatization Agency of Kosovo (hereinafter: the PAK).
9. On 8 December 2014, the Court decided to reject the Request for Interim Measures (See Decision on Interim Measures KI167/14, published on 17 December 2014).
10. On 9 December 2014, the Court sent a copy of this Referral for information to the Applicants in case KI168/14, where Judgment of the Appellate Panel of the SCSC, AC-I-13-0045-A0001, of 26 June 2014 is challenged.



11. On 2 February 2015, the Applicant submitted a copy of the urgent request it had submitted to the SCSC requesting it "[...] to order immediately a suspension of all actions in the Liquidation procedure until the Constitutional Court of Kosovo issues its judgment in the case concerning "NewCo Grand Hotel Prishtina."
12. On 26 June 2015, by Decision of the President of the Court, Ivan Čukalović was appointed as Judge Rapporteur, replacing Kadri Kryeziu, whose mandate as Constitutional Court Judge ended on 26 June 2015.
13. On 26 June 2015, by Decision of the President of the Court, Arta Rama-Hajrizi was appointed as member to the Review Panel, replacing Enver Hasani, whose mandate as Constitutional Court Judge ended on 26 June 2015.
14. On 6 July 2015, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the full Court to declare the Referral as inadmissible.

### **Summary of facts**

15. In 2005, the Kosovo Trust Agency (hereinafter: KTA) initiated a "Special Spin Off" for the sale, through privatization, of the facilities of the Grand Hotel in Prishtina.
16. Following the completion of the bidding process, background checks and litigation at the Special Chamber, the KTA announced the Applicant as the winning bidder.
17. On 10 August 2006, the KTA concluded a contract with the Applicant to sell him the entire share capital of the New Co Grand Hotel LLC (hereinafter: the Grand Hotel). Consequently, the shares were registered in the Ministry of Trade and Industry in the name of the enterprise NTP Unio Commerce.
18. The contract signed between the KTA and the Applicant obligated the Applicant to meet certain requirements as specified in the Commitment Agreement. These requirements included the obligation to make certain financial investments in the building of the Grand Hotel and to maintain and engage a certain number of employees within a certain time frame. A failure to meet these obligations could result in the withdrawal of the shares from the Applicant.
19. On 31 May 2012, the Board of Directors of PAK, the legal successor of the KTA, found that the Applicant did not act in full compliance with the employment and investment commitments that were defined in the Commitment Agreement. Thus, PAK unanimously decided to exercise the Share Call Option and, as such, withdrew all the shares in NewCo Grand Hotel LLC that were purchased by the Applicant.
20. As a result of this Decision of the PAK Board of Directors, the shares and the facilities of the Grand Hotel Prishtina passed to the administration of PAK.

21. On 8 June 2012, the Applicant filed a claim with the Specialized Panel of the SCSC. The Applicant also filed a request for interim measures, asking the Specialized Panel of the SCSC to restrain the PAK from alienating the shares of the Grand Hotel to any third parties until the final decision on the merits of his claim.
22. In his claim, the Applicant challenged the validity of the Decision of the PAK Board of Directors dated 31 May 2012 to exercise a Share Call Option on the shares of the Grand Hotel. In this regard, the Applicant held that *"pursuant to Article 6.2 of the Commitment Agreement the Share Call option shall only be exercised upon written instruction of the Exercising Authority and that pursuant to Article 1 of the Commitment Agreement, concerning the definition "Exercising Authority", in the event that the Special Representative of the Secretary General [of the United Nations] (SRSG) no longer exists, he shall be replaced by an arbitral tribunal formed in accordance with procedures set out at 9.3.2 (b) of the Agreement."*
23. On 29 June 2012 the Specialized Panel of the SCSC (Decision C-I-12-0042) rejected the request for interim measures, reasoning that for the case in question there was no indication that any immediate and irreparable damage would be caused and which could not be reasonably compensated by means of financial compensation.
24. As a result of the Applicant's appeal against the rejection of interim measures, on 27 September 2012, the Appellate Panel of the SCSC (Decision, AC-I-12-0042), approved the Applicant's appeal as partly grounded and decided *"to restrain the KPA from alienating the shares of the NewCo Grand Hotel to any third parties until the final decision regarding the merits of the claim."*
25. On 20 March 2013, the Specialized Panel of the SCSC (Judgment, C-I-12-0042 of 20 March 2013) rejected the Applicant's claim as ungrounded, reasoning that the Applicant's violations of the Commitment Agreement were egregious and that the PAK Decision to exercise the withdrawal of the shares of the Grand Hotel was valid.
26. The Specialized Panel of the SCSC further held that PAK by virtue of Law No. 04/L-034 on the Privatization Agency of Kosovo (hereinafter: the PAK Law) rightfully reversed the sale by exercising the Share Call Option and that the PAK Law replacing the Kosovo Trust Agency by PAK is valid Kosovo Law.
27. The Applicant filed an appeal with the Appellate Panel of the SCSC, due to substantial violations of procedure, incorrect determination of the facts and erroneous interpretation of the substantive law.
28. Specifically, the Applicant stated that *"[...] pursuant to 6.2 of the Commitment Agreement the share call option shall only be exercised upon written instructions of the Exercising Authority and that pursuant to article 1 of the Commitment Agreement, concerning the definition "Exercising Authority" in the event that the SRSG no longer exists, he shall be replaced by an arbitral tribunal formed in accordance with procedures set out at 9.3.2 (b) of the Agreement. The Claimant stated that the contract clearly refers to the*



*independent and unbiased tribunal, which would decide whether the parties fulfilled their contracting obligations. The Claimant further stated that the PAK as the legal successor of the KTA is only entitled to request of the "Exercising Authority" the permit to exercise the share call option and not to withdraw from the sale by a unilateral decision. The same will be foreseen also in the "letter on authorization of transfer of shares ownership", signed by the Claimant."*

29. On 26 June 2014, the Appellate Panel of the SCSC rejected as ungrounded the Applicant's appeal and upheld the Judgment of the Specialized Panel of the SCSC (C-I-12-0042 of 20 March 2013).
30. In its Judgment, the Appellate Panel of the SCSC held that all arguments presented in the appeal were well considered by the Specialized Panel, and it correctly rejected the Applicant's claim.
31. Regarding the Applicant's claim "*in the event that the SRSG no longer exists, he shall be replaced by an arbitral tribunal formed in accordance with procedures set out at 9.3.2 (b) of the Agreement*", the Appellate Panel held as following:

*"The Board of Directors of the Respondent could validly issue the Share Call. It needed no prior written instruction by the SRSG as prescribed in Article 6.2 Commitment Agreement and it needed no prior Arbitration. Both requirements have been abolished by Art. 31 .4 of the PAK Law. The power of the SRSG was transferred by law on the Board of Directors of the Respondent. It is true that by Art.31.4 PAK law the contractual duties and rights of the parties of the Commitment Agreement are changed. The Claimant loses the chance that the SRSG refrains from instructing a Share Call and he also loses the right to enter arbitration in case the SRSG does not exist anymore or -as it rather turned out -the executive capacities he had at the time this agreement was signed do not exist any longer. "*

32. Consequently, the Appellate Panel of the SCSC concluded as following:

*"[...] the Appellate Panel considers that the Claimant has not substantially fulfilled the requirements determined by the Commitment Agreement and the lack of their fulfilment clearly presents an egregious breach of contractual obligations of the Agreement (which is precondition to the rejecting decision), and there was no substantiated objection to this, either by the Claimant himself. From the case file, the Appellate Panel found that there were some submissions by the Respondent sent to the Claimant warning him about exceeding of timeliness for fulfilling the obligations, there were even penalties for such omissions, nevertheless, the Claimant was not able to fulfil the commitments given by the Agreement."*

### **Applicant's allegations**

33. The Applicant alleges that the Judgment of the Appellate Panel of the SCSC (AC-I-13-0045-A0001 of 26 June 2014), upholding the Judgment of the Specialized Panel of the SCSC (C-I-12- 0042 of 20 March 2013), violated the

rights guaranteed by Article 3 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property] in conjunction with Article 53 [Interpretation of Human Rights Provisions] and Article 54 [Judicial Protection of Rights] of the Constitution, as well as his rights guaranteed by Article Article 6 [Right to a Fair Trial] of the ECHR, and Article 1 [Protection of Property] of Protocol No. 1 to the ECHR.

34. In this regard, the Applicant's allegations are to be divided as follows:
- Allegations regarding violation of the principle of equality;
  - Allegations regarding violation of the protection of property; and
  - Allegations regarding violation of the right to a fair trial.

***Allegations regarding violation of the principle of equality***

35. The Applicant alleges a violation of Article 3 [Equality before the Law] of the Constitution.
36. In this respect, the Applicant argues that the principle of equality was violated because of unequal treatment of the Applicant in the proceedings before the SCSC, adjudication by the SCSC beyond the scope of the Applicant's claim, and the application of the PAK Law by the SCSC.
37. Firstly, the Applicant claims that the SCSC allowed PAK as a respondent in the proceedings to present evidence and arguments in order to justify its Decision to withdraw the Applicant's ownership over Grand Hotel. The Applicant considers that, in so doing, the SCSC harmed the position of the Applicant and as such it was allegedly put in a disadvantageous position. Thus, the Applicant concludes that the SCSC violated the Applicant's rights guaranteed by Article 3 of the Constitution.
38. Secondly, the Applicant claims that the SCSC exceeded the scope of the Applicant's claim and responded on the allegations of PAK as respondent by concluding that the Applicant committed an egregious violation of the commitments. The Applicant further claims that the SCSC adjudicated the case without giving the Applicant an equal opportunity to address the facts and the allegations made by PAK. Thus, the Applicant concludes that the SCSC violated the equality principle.
39. Thirdly, the Applicant claims that through the medium of Law PAK transformed itself from a party to the contract to and Exercising Authority which authorized the withdrawal of ownership over the Grand Hotel. The Applicant admits that the substitution of the Special Representative of the Secretary General (hereinafter: the SRSG) with the Board of Directors of PAK is in line with the principles of Rule of Law enshrined in the Constitution. However, the Applicant claims that if this *"[...] substitution is applied to the PAK contracts, and is applied retroactively in a way that grants one contracting party unilateral power to void an essential element of the contract, then it would violate the Constitution."*



***Allegations regarding violation of the protection of property, as guaranteed by Article 46 of the Constitution and Article 1 of Protocol No. 1 to the ECHR***

40. The Applicant extensively quotes the case law of the European Court of Human Rights (hereinafter: the ECtHR) and argues that the challenged Judgment constitutes a violation of the “[...] *the protection afforded to the applicant by Article 1 Protocol 1 and Article 46 of the Constitution [...]*”.
41. In this regard, the Applicant argues that the PAK acting as an agency of the Government “ [...] *unlawfully and without due process took ownership and possession of this property from the private owner with only a nominal compensation and without any judicial proceeding.*”

***Allegations regarding violation of Article 31 of the Constitution and Article 6 of the ECHR***

42. The Applicant claims that the unequal treatment by SCSC, the adjudication beyond the scope of the Applicant’s claim, the application and interpretation of the PAK Law and the unlawful interference with the possessions of the Applicant “[...] *have also breached, in different specific ways, his fundamental rights as provided under the provisions of Article 6 of the ECHR and Article 31 of the Kosovo Constitution.*”
43. The Applicant claims that unequal treatment relates to the unfair treatment during the proceedings before the SCSC, and as such “*inequality of arms in itself creates a breach of Article 6 of the ECHR as it creates a prejudice against one of the parties, in this case, the applicant.*”
44. The Applicant argues that the SCSC had a legal obligation to allow the parties in the proceedings equal opportunities to produce evidence and to plead their case. Therefore, according to the Applicant, he was not given a fair and impartial hearing and an opportunity to plead his case.
45. The Applicant explains that his specific claim on adjudication by the SCSC beyond the Applicant’s claim was the following: “*Zelqif Berisha trading as NTP “Unio Commerce” (Buyer) Challenges the Decision of Privatization Agency of Kosovo (PAK) Board of Directors dated 31 May 2012 to “exercise a Share Call Option” on the stock shares of NewCo Grand Hotel LL.C. Claimant seeks a judgment from the Special Chamber adjudicating that the Decision of the Board is unlawful as ultra vires.*”
46. The Applicant considers that the scope of his claim was limited and that the SCSC was requested to answer a procedural question of fundamental importance. Consequently, the Applicant argues that there was a violation of its right guaranteed under Article 6 of the ECHR, because the SCSC “[...] *addressed the presented question only casually, and went beyond the question before it to approve the action of PAK as though PAK were the Exercising Authority.*”

47. The Applicant further argues that the Board of Directors of PAK, while assuming the role of the Exercising Authority based on the new PAK Law, unilaterally changed the parameters of the agreement by withdrawing his ownership over the Grand Hotel.
48. In this regard, the Applicant alleges that principles of fairness and impartiality guaranteed by Article 31 of the Constitution and Article 6 of the ECHR were violated, because the *“action of the Trial Panel has deprived the Claimant of the contractual right to have an independent agent to assess the facts objectively and impartially and then decide on the expropriation (Share Call Option) before the government agency (PAK) acts.”*
49. In addition, the Applicant argues that the violation of Article 1 of Protocol No. 1 to the ECHR implicitly causes a violation of Article 31 of the Constitution and Article 6 of the ECHR, because he *“[...] had never had the facts complained of, fact relative to his property, being forcibly, unilaterally and illegally investigated judicially.”*
50. Finally, the Applicant concludes by requesting the Court to annul the Judgments of the Specialized Chamber of the SCSC (C-I-12-0042 dated 20 March 2013) and that of the Appellate Panel of the SCSC (AC-I-13-0045-A0001 dated 26 June 2014).

**Relevant provision of Law No.04/L-034 on the Privatization Agency of Kosovo**

**Article 31 [Applicable Law]**

*1. The present Law shall prevail over any provisions of the Law of Kosovo that are inconsistent herewith. Without prejudice to the general application of the foregoing sentence, it is specifically provided that the Law on Administrative Procedures shall not be applicable:*

*1.1. to any action taken by the Agency under the authority of the present Law with respect to the privatization, liquidation, sale, transfer, restructuring, reorganization or other disposition of any Enterprise, Corporation or Asset, and*

*1.2. the handling and determination by the Agency or a Liquidation Authority of any claim or interest made or asserted by any person as a purported Creditor or Owner.*

*2. This Law repeals Law No. 03/L-067, “on the Privatization Agency of Kosovo”*

*3. The Agency takes over all assets and liabilities that its predecessor may have held, acquired or incurred under UNMIK Regulation 2002/12. The Board and management of the Agency shall fulfil all responsibilities of any predecessor Board or management appointed under UNMIK Regulation 2002/12.*

*4. Without prejudice to the generality of the foregoing paragraph or paragraph 2 of Article 3 of the present Law, it is specifically provided that the Agency is the Lawful and exclusive successor to any and all rights and obligations of the KTA specified in or arising in connection with a contract previously executed by the KTA and one or more third parties having as its*



principal subject matter the management, operation, sale, transfer, liquidation or other disposition of an Enterprise, a Corporation, an Asset, or any interest in any of these. Any references in such a contract to the KTA shall be conclusively interpreted to mean the Agency. Any reference in such a contract to the Special Representative of the Secretary General shall be conclusively interpreted to mean the Board of the Agency. If the contract contains one or more provisions specifying that the contract is to be governed by the Law of a foreign jurisdiction:

4.1. neither that provision nor the Law of the specified jurisdiction shall be used, interpreted or applied in any manner that avoids or diminishes the foregoing requirements of this paragraph, and

4.2. this paragraph shall not be interpreted as validating or invalidating, in whole or in part, in any manner, the choice of Law specified in such provision; such validity or invalidity shall be determined in accordance with the applicable rules of international private Law.

5. The Directors of the Board appointed by the ICR pursuant to Article 12, paragraph 3, shall remain in their positions after the conclusion of the ICR's mandate and shall be compensated from PAK dedicated revenue unless otherwise decided by the ICR prior to the completion of his mandate.

#### **Admissibility of the Referral**

51. First of all, the Court examines whether the Applicant has met the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.

52. The Court takes into account Article 48 of the Law, which provides:

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

53. The Court also refers to Rule 36 (1) and (2) of the Rules of Procedure, which provides:

*"(1) The Court may consider a referral if:*

*(d) the referral is prima facie justified not manifestly ill-founded.*

*(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*

*(a) the referral is not prima facie justified, or*

*(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or*

*(c) the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution, or*

*(d) the Applicant does not sufficiently substantiate his claim".*

54. The Court recalls that the Applicant alleges that the Judgment of the Appellate Panel of the SCSC (AC-I-13-0045-A0001 of 26 June 2014), upholding the Judgment of the Specialized Panel of the SCSC (C-I-12-0042 of 20 March 2013) violated the principle of equality, right to property and his right to fair and impartial trial.

***Allegations regarding violation of the principle of equality***

55. The Applicant claims that the challenged Judgments of the SCSC violated the principle of equality, as guaranteed by Article 3 of the Constitution.
56. In this regard, the Applicant alleges that it was treated unequally, the SCSC adjudicated beyond the scope of the Applicant's claim and the SCSC unduly applied the PAK Law..
57. Firstly, the Applicant alleges that it was treated unequally by SCSC in the proceedings, because the SCSC allowed PAK, as a respondent in the proceedings, to present evidence and arguments in order to justify its own Decision on withdrawing the Applicant's ownership over Grand Hotel. Thus, according to the Applicant PAK harmed its position and, as such, it was put in a disadvantageous position.
58. The Court notes that the Appellate Panel of the SCSC in its Judgment held that:

*"The change of law does not mean that the Respondent being a party in the Commitment Agreement and being foreseen as a party in a possible arbitration changes into the position of a judge in its own case. The Respondent remains a party also in exerting its right to a new Share Call. It remains exposed to the Special Chambers independent judicial appraisal whether it has acted legally or not in doing so."*

59. Secondly, the Applicant alleges that the SCSC exceeded the scope of the Applicant's claim, because, while considering the allegations of PAK as respondent, the SCSC concluded that the Applicant committed an egregious violation of the commitments.
60. In this regard, the Court notes that the Appellate Panel of the SCSC reasoned its Judgment as it follows:

*"Based on what was stated in the appeal, the Appellate Panel does not find any argument that the court exceeded the limitations given by the claim, because it only decided in one point of the enacting clause -"The claim is rejected as ungrounded", and nothing more. The Appellant had a claim in the Special Chamber, therefore it was decided in compliance with that claim. With regard to the assessment of the Specialized Panel "the court evaluates the Claimant's violations are egregious", the Appellate Panel assesses that the Trial Panel did not exceed its limits and did not exacerbate the Claimant because it had to evaluate whether the Claimant has given reason to PAK to issue the share call to be able to adjudicate the full request of the Claimant to declare the share call as invalid. After the Trial Panel*



*came to the correct conclusion that it was within the power of PAK to issue a share call without consulting the SRSG or an arbiter tribunal it had to decide whether the performance of the Claimant necessitated the share call. Otherwise it would not have been able to decide whether the share call was issued rightfully and therefore the claim ungrounded or whether it had to be declared invalid with the result that the claim would have been successful.*

61. Regarding the Applicant's allegation of a violation of the principle of equality, the Court considers that the Applicant had the possibility to confront the charges in both instances of the SCSC and, in fact, he did exercise its right presenting before the SCSC its claim and appeal. In addition, the Court considers that the justification provided by the Appellate Panel of the SCSC, in answering the aforementioned allegations concerning the principle of equality, is reasoned and fair.
62. The Constitutional Court cannot substitute the role of the regular courts. The role of the regular courts is to interpret and apply the pertinent rules of both procedural and substantive law. (See Case *Garcia Ruiz vs. Spain*, No. 30544/96, ECtHR, Judgment of 21 January 1999; see also Case KI70/11 of the Applicants *Faik Hima, Magbule Hima and Bestar Hima*, Constitutional Court, Resolution on Inadmissibility of 16 December 2011).
63. Thirdly, the Applicant claims that the Board of Directors of PAK, based on the new PAK Law, assumed the role of the Exercising Authority authorizing the withdrawal of ownership over the Grand Hotel.
64. In this respect, the Court considers that the Applicant raises questions of legality and therefore it emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).
65. In addition, the Court notes that the Applicant also raises the issue of the compatibility of the PAK Law with the Constitution.
66. In this respect, the Applicant would not be an authorized party to refer to the Constitutional Court matters related to the compatibility of laws with the Constitution or questions of constitutional compatibility of a law when it is raised in a judicial proceeding. Compatibility of laws with the Constitution, or constitutional questions raised in judicial proceedings, are matters which are in the jurisdiction of the Constitutional Court, but only if they are referred by authorized parties, which in that case are, respectively, only the Assembly of Kosovo, the President of the Republic of Kosovo, the Government, the Ombudsperson (Article 113, 2. 1), and the Courts (Article 113. 8). (See Cases KI 118/14, Applicant: *Raiffeisen Bank Kosovo J.S.C*, Resolution on Inadmissibility of 9 March 2015, KO04/11, Applicant: *Supreme Court of the Republic of Kosovo* requesting Constitutional Review of Articles 35, 36, 37 and 38 of the Law on Expropriation of Immovable Property, No. 03/L-139, Judgment of 1 March 2012; KO43/10, Applicant *LDK-AAK-LDD, Prizren MA*, Resolution on Inadmissibility of 25 October 2011, paragraphs 19-21; and KI230/13, Applicant

*Tefik Ibrahimi*, Resolution on Inadmissibility of 19 May 2014, paragraphs 25-27).

67. For the foregoing reasons, the Court considers that the facts presented by the Applicant do not in any way justify the allegation of a violation of his right to equality before the law, as guaranteed by Article 3 of the Constitution.

***Allegations regarding violation of the protection of property, as guaranteed by Article 46 of the Constitution and Article 1 of Protocol No. 1 to the ECHR***

68. The Applicant also alleges that the challenged Judgments constitute a violation of the protection of property as guaranteed under Article 46 of the Constitution and Article 1 Protocol 1 to the ECHR.
69. In this regard, the Applicant claims that *“this is a clear violation, inter alia, of Article 1 of Protocol No. 1 of the ECHR, as well as of Articles 22, 32, and 46 of the Constitution of the Republic of Kosovo, besides constituting a violation of fundamental principles of the Rule of Law [...] PAK, acting as an agency of the Government of Kosovo unlawfully and without due process took ownership and possession of this property from the private owner with only a nominal compensation and without any judicial proceeding.”*
70. In respect of the issue of compensation, the Appellate Panel of the SCSC in its Judgment held that the *“[...] the issue of the problems while implementing the commitments according to the Agreement and the issue of compensation – return of the invested means – should be subject to another court procedure.”*
71. In this relation, the Court acknowledges that the applicant had a right to property, but the loss of that property was legitimate, namely (a) in accordance with law; (b) served a legitimate purpose (in the public interest); and (c) was reasonable and proportionate to the objective sought. Furthermore, the Court notes that the withdrawal of ownership over the shares of Grand Hotel by Decision of the PAK Board of Directors was reviewed and decided by the SCSC. Thus, the Court considers that the the reasoning given in both decisions of the SCSC is clear, and after having reviewed the proceedings, the Court has also found that the proceedings before the SCSC have not been unfair or arbitrary (See Case *Shub vs. Lithuania*, No. 17064/06, ECtHR, Decision of 30 June 2009).
72. In conclusion, the Court finds that, the Applicant has not presented any convincing argument to establish that the alleged violations represent constitutional violations.

***Allegations regarding violation of Article 31 of the Constitution and Article 6 of the ECHR***

73. As stated above, the Applicant argues that the unequal treatment by the SCSC, its adjudication beyond the scope of the Applicant's claim, the application and interpretation of the PAK Law, and the unlawful interference with its



possessions have violated in a variety of ways its right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

74. Firstly, the Applicant argues that the SCSC had a legal obligation to allow the parties in the proceedings equal opportunities to produce evidence and to plead their case. However, according to the Applicant, it was not given a fair and impartial hearing and an opportunity to present its case.
75. In this regard, the Court notes that the Applicant has not presented any evidence or arguments as to how and why it was treated in an unequal manner and why it was not given a reasonable opportunity to produce evidence and plead its case before the SCSC.
76. In this respect, the court reiterates that dissatisfaction with the decision does not suffice for the Applicant to raise a credible allegation of a constitutional violation of the right to a fair trial. When alleging constitutional violations, the Applicant must present convincing and indisputable arguments to support the allegations, for the referral to be grounded. (See Case No. KI198/13 Applicant *Privatization Agency of Kosovo*, Resolution on Inadmissibility of 13 March 2014).
77. The Court considers that both the Specialized Panel and the Appellate Panel of the SCSC conducted the proceedings in a fair way and justified their decisions on the grounds of the Applicant's claim and the appeal.
78. In this respect, the Court also notes that the Specialized Panel and the Appellate Panel of the SCSC justified their decisions based on the evidence and reasoning provided by the Applicant, in its capacity as a claimant, and also based on the evidence and responses to the claim submitted by PAK, in its capacity of the respondent. Based on the foregoing, the fact that the Applicant and PAK, both parties in the proceeding before the SCSC, "*were given the opportunity to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision*" shows that the Specialized Panel and the Appellate Panel of the SCSC justified and rendered their decisions in accordance with the principles guaranteed under the right to an adversarial trial. (See Case *Vermeulen v. Belgium*, ECtHR, No. 19075/91, Judgment of 20 February 1996).
79. Secondly, the Applicant argues that the SCSC adjudicated beyond the scope of the Applicant's claim. In this regard, the Applicant alleges that the scope of its claim was limited and that the SCSC was requested to answer a procedural question of fundamental importance, namely to determine that the Decision of the PAK Board of Directors was unlawful as *ultra vires*. In this respect, the Applicant alleges a violation of its rights guaranteed under Article 31 of the Constitution and Article 6 of the ECHR, because the SCSC "[...] *addressed the presented question only casually, and went beyond the question before it to approve the action of PAK as though PAK were the Exercising Authority.*"
80. In this respect, the Court notes that the Appellate Panel of the SCSC held the following:

*“Based on what was stated in the appeal, the Appellate Panel does not find any argument that the court exceeded the limitations given by the claim, because it only decided in one point of the enacting clause - “The claim is rejected as ungrounded”, and nothing more.*

*[...]*

*The Appellate Panel assesses that the Trial Panel did not exceed its limits and did not exacerbate the Claimant because it had to evaluate whether the Claimant has given reason to PAK to issue the share call to be able to adjudicate the full request of the Claimant to declare the share call as invalid. After the Trial Panel came to the correct conclusion that it was within the power of PAK to issue a share call without consulting the SRSG or an arbitral tribunal it had to decide whether the performance of the Claimant necessitated the share call. Otherwise it would not have been able to decide whether the share call was issued rightfully and therefore the claim ungrounded or whether it had to be declared invalid with the result that the claim would have been successful.”*

81. Thirdly, the Applicant further argues that by virtue of the new PAK Law, the Board of Directors of PAK assumed the role of the Exercising Authority and as a result unilaterally changed the parameters of the agreement by withdrawing its ownership over the Grand Hotel. Thus, the Applicant alleges that its right to a fair and impartial trial as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR were violated, because *“the interference of the legislature brought about a position that changed the status of the applicant as subject of law in his contractual relationships.”*
82. In this regard, the Court notes that the Appellate Panel of the SCSC in its Judgment responded as following:

*“Both requirements have been abolished by Art. 31. 4 of the PAK Law. The power of the SRSG was transferred by law to the Board of Directors of the Respondent.*

*It is true that by Art.31.4 PAK Law the contractual duties and rights of the parties of the Commitment Agreement are changed. The Claimant loses the chance that the SRSG refrains from instructing a Share Call and he also loses the right to enter arbitration in case the SRSG does not exist anymore or - as it rather turned out - the executive capacities he had at the time this agreement was signed do not exist any longer.*

*However these losses are not unconstitutional. The legislator may modify contractual relations and does it often [...].”*

83. Regarding the application of PAK Law by both instances of the SCSC, the Court refers to its own case law, whereby it concluded that as part of the Rule of Law principle and based on Article 102 [General Principles of the Judicial System] of the Constitution, *“ [...] the Special Chamber of the Supreme Court, as part of the Kosovo judiciary, is under the constitutional obligation to apply laws adopted by the Kosovo Assembly.”* (See Case KI25/10, Applicant: Kosovo Privatization Agency, Judgment of 30 March 2011, paragraph 56).



84. Moreover, once again the Applicant raises the issue of legality and the question of the compatibility of the PAK Law with the Constitution.
85. Regarding the issue of legality, the Court re-emphasizes that it is not its task to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).
86. In respect to the question of the compatibility of the PAK Law with the Constitution, the Applicant would not be an authorized party to refer to the Court such matters related to the compatibility of laws when it is raised in a proceedings before a court.
87. In addition, the Applicant argues that a violation of Article 46 of the Constitution and Article 1 of Protocol No. 1 to the ECHR implicitly causes violation of Article 31 of the Constitution and Article 6 of the ECHR, because it *"[...] had never had the facts complained of, fact relative to his property, being forcibly, unilaterally and illegally investigated judicially."*
88. In this respect, the Court notes that the Applicant has not presented any facts or convincing arguments as to how and why *"[...] the facts relative to his property were forcibly, unilaterally and illegally investigated judicially."*
89. In conclusion, based on the aforementioned, the Court concludes that the Applicant has not substantiated its allegations of violations of its rights to equality before the law, to protection of property and to a fair and impartial trial and thus the Referral is inadmissible as manifestly ill-founded.

### **FOR THESE REASONS**

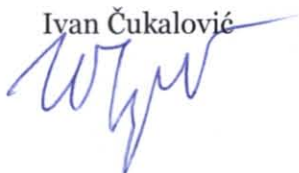
The Constitutional Court, pursuant to Article 48 of the Law and Rule 36 (1) and (2), b) and d), of the Rules of Procedure on 28 August 2015, unanimously:

### **DECIDES**

- I. TO DECLARE the Referral as Inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law; and
- IV. TO DECLARE this Decision effective immediately.

**Judge Rapporteur**

Ivan Čukalović



**President of the Constitutional Court**

Arta Rama-Hajrizi

