



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

Prishtina, on 31 October 2016
Ref. No.: RK992/16

RESOLUTION ON INADMISSIBILITY

in

Case No. KI12/16

Applicant

IMING D.O.O,

**Constitutional review of Judgment AC-I-15-0145-A0001, of the Appellate
Panel of the Special Chamber of the Supreme Court of Kosovo on
Privatization Agency of Kosovo Related Matters, of 1 October 2015**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërzhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Applicant is the company IMING D.O.O. (hereinafter: IMING) with headquarters in Strobeč, the Republic of Croatia (hereinafter: the Applicant). The Applicant is represented by lawyers Bejtush Isufi and Linn Slattengren, from Prishtina.

Challenged decision

2. The Applicant challenges Decision AC-I-15-0145-A0001, of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: Appellate Panel), of 1 October 2015, which was served on the Applicant on 27 October 2015.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment which allegedly violated the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial], and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as the rights guaranteed by Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR) and Article 1 [Protection of Property] of Protocol No. 1 of the ECHR.

Legal basis

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

Proceedings before the Constitutional Court

5. On 18 January 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 12 February 2016, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges: Robert Carolan (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.
7. On 29 February 2016, the Court informed the Applicant about the registration of the Referral and sent a copy of the Referral to the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the SCSC) and the Privatization Agency of Kosovo (hereinafter: PAK).
8. On 13 September 2016, the President of the Court appointed Judge Ivan Čukalović as Presiding Judge on the Review Panel to replace Judge Robert Carolan.
9. On 14 September 2016, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. On an unspecified date, the Kosovo Trust Agency (hereinafter: the KTA), initiated a special "*spin-off*" for the sale of shares of the company 'Mine MIM Golesh' (hereinafter: MIM).

11. After completion of the bidding process, the Applicant was selected by the KTA as a company that has met all the criteria that were required in the tender documentation.
12. On 11 December 2007, the KTA concluded a contract with the Applicant on the sale of the MIM shares.
13. The contract signed between the KTA and the Applicant, obliged the Applicant to meet certain requirements specified by the "Commitment Agreement". Among those requirements were the commitments to implement certain financial investments in MIM and to employ a certain number of employees within a certain time limit. Non-fulfillment of these commitments, pursuant to the contract signed, may result in withdrawal of the shares sold to the Applicant by the KTA.
14. On 21 December 2011, the Board of Directors of PAK - the legal successor to the KTA, concluded that the Applicant has not acted in full compliance with the employment and investment commitments that were defined in the "Commitment Agreement". For this reason, the Board of Directors of PAK unanimously decided to exercise their call-option and withdraw all shares purchased by the Applicant. The decision reads:

"The decision may not be executed after 15 March 2012, if during this time the Committee and the Buyer of the New Enterprise MIM Golesh reach a satisfactory agreement, which will result in the proposal of the Committee to the Board of Directors for extension of the contract, based on necessary guarantees, provided by the Buyer."
15. On 15 March 2012, the PAK Board of Directors rendered a decision by which they suspended the execution of their decision of 21 December 2011. In the reasoning is stated:

*"1) Suspended the execution of the Decision of the Board of the Agency of December 2011 on exercising a call option.
2) The Board approves the recommendation of the Committee for permitting the mortgage of the enterprise. The mortgage should and can be done under certain conditions, one of which is the inclusion of PAK, as a party in the agreement on mortgage. The rights and other limitations related to the mortgage of the assets will be made known by the Agency, separately from this notification, within a short period of time."*
16. On 31 October 2013, the PAK Board of Directors, based on the review of the report of the PAK management regarding the agreement of the enterprise MIM, rendered decision No. Ref. BD-58/11, by which *"the decision of the Board of Directors regarding the extension of the deadline of the Commitment Agreement of 11 December 2007, for 2 years, after signing the amended Commitment Agreement, that is modified. In case the buyer (the Applicant) refuses to sign the Commitment Agreement under the unchanged conditions, then the Decision of the Board of Directors, of December 2011 on the call option will be signed."*

17. On 31 August 2014, the Board of Directors of PAK, based on the report of the management for “spin-off” investments, concluded that the buyer (the Applicant) has not fulfilled the requirements of Article 6.2 of the “Commitment Agreement” which it signed with the PAK. For this reason, it rendered decision No. Ref. BD-69/35 which:

“a) Approved the execution of the decision of the PAK Board of December 2011 on exercising the call option of the New Enterprise MIM Golesh.

b) PAK Management is instructed to act upon the proceedings and based on the applicable law of the New Enterprise MIM Golesh.”

18. On the same date, the Board of Directors of PAK rendered Decision No. Ref. BD-69/36, by which the enterprise “MIM Golesh” is placed under direct Administration of PAK, pursuant to Article 15.2, item 2.5, in conjunction with Article 6, paragraph 1.5, of Law No. 04/L-034 on PAK.
19. On 30 October 2014, the Applicant submitted the request and the claim to the Specialized Panel of the SCSC. The Applicant requested temporary suspension of PAK Decision No. BD-69/35, of 31 August 2014, on the call option and Decision No. BD-69/36, of 31 August 2014, on placement of “MIM Golesh” under PAK administration, until the final judgment on the merits of the claim is rendered.
20. In its claim with the Specialized Panel of the SCSC, the Applicant stated that “*the claimant challenges the validity of the decision, which was taken on a Sunday, on the last day of the mandate of some of the board members. It also finds the decision as unfair because five members have taken part in the decision, only four approved the withdrawal of shares.*” The Applicant also stated “*that it fulfilled all the contractual obligations provided by the agreement on investment commitment.*”
21. On 25 May 2015, the Specialized Panel of SCSC rendered Judgment C-I-14-0022, which rejected as ungrounded the request for suspension of the execution of the decisions and the Applicant’s claim. In the reasoning on the Applicant’s claims, the Specialized Panel of the SCSC, *inter alia*, stated:

“The challenged decisions taken by PAK are based on the law and do not infringe the rights of the claimant.

The decisions of PAK to withdraw the shares and to reassume control over the company were issued in accordance with the procedural applicable rules.

The fact that the board took the decision on a Sunday is irrelevant. The board may not be obliged to work on Sunday, but no legal provision stops the board of PAK to do that.

Likewise, it is not essential to the case that some board members were working on the last day of their mandate. There is no provision limiting the

powers of a board member nearing the end of his or her mandate. Therefore, even on the last day of the mandate, any board member has full capacity to exercise this function.

The board was acting by respecting the quorum of at least five members of the board present (Article 14.4 of the Law on PAK)."

22. As to the Applicant's allegations related to the fulfillment of the contractual commitments regarding the investment, the Specialized Panel of the SCSC stated:

"The claimant was in serious breach of his obligation to employ full-time staff [...] All major obligations of a contract need to be respected, and if one is not fulfilled, the failure cannot be compensated with another obligation. For that reason, the failure to comply with the contractual obligation to employ staff stands alone to sufficiently base the decision to withdraw the shares. Therefore, the question whether or not the claimant has invested enough money to respect the contractual obligation is irrelevant for the decision in the case in hand. Therefore, the court had no reason to call upon an expert to assess the value of the investment incurred.

As a consequence of the withdrawal of the shares, the decision to assume control over the company was necessary to safeguard the status quo and to preserve the investment made."

23. On 1 July 2015, the Applicant filed an appeal with the Appellate Panel against the Judgment of the Specialized Panel of SCSC of 25 May 2015, alleging procedural violations, erroneous determination of the factual situation and erroneous application of the substantive law to the detriment of the claimant.
24. In addition, the Applicant added in the appeal that "the challenged decision of the Board had to be necessarily rendered by a qualified majority of at least 5 votes in favor, and not as it was acted in the present case, when, in the Board meeting have participated 5 Board present members, and only 4 of the members have voted for and one has abstained... On this ground, the challenged decisions of the respondent directly violate the law and violate all the rights of the claimant."
25. As regards the fulfillment of the contractual investment commitments, the Applicant stated: "the Board has not verified the evidence offered by the claimant that it has invested millions of euro, and this assessment is neither assessed by the Chamber according to the challenged judgment, with a justification that the claimant has not fulfilled the requirement of the employment of employees, although the employment was one of the conditions, as the main requirements of the contract, as it is the payment of the price, and the investment commitment were partially met, although the employment period, which was partly fulfilled [...]. Based on this, the Applicant requested, "that a new assessment of the real amount of investments is made through a new expertise."

26. On 22 July 2015, the respondent (PAK) filed a response to the appeal with the Appellate Panel in which it stated that it fully challenges the allegations of the Applicant filed in the appeal. It also noted that the Specialized Panel of the SCSC carefully considered all the evidence presented by the parties to the proceedings and their allegations in the hearing, and thus the litigants were provided the equality of arms; therefore, the claimant's allegation that the Specialized Panel of the SCSC did not consider the evidence presented is not based on the law.
27. On 1 October 2015, the Appellate Panel rendered Judgment AC-I-15-0145-A0001, which rejected the Applicant's appeal as ungrounded, while it upheld in its entirety the Judgment of the Specialized Panel of the SCSC. As to the allegations on which the Applicant's appeal was based, the Appellate Panel stated that:

"The Appellate Panel also agrees with the conclusion of the Specialized Panel that it is not necessary to perform a new assessment of the real amount of investments through a new expertise, as requested by the [Applicant], because as the Specialized Panel correctly concluded that all of the obligations undertaken by the Agreement on purchase of shares have to be respected by the [Applicant], and if happens that one of the obligations cannot be fulfilled then the failure to fulfil it may not be compensated by another contractual obligation.

More specifically, the Appellate Panel assesses that failure to fulfil the contractual obligation in relation to employment of number of workers envisaged by the Sales Agreement, is sufficient ground to come up to the conclusion that the challenged Decisions of PAK Board were lawful and in compliance with the procedures provided by law."

28. As regards the Applicant's allegations related to the quorum of the PAK Board of Directors when rendering the decision of 31 August 2014, the Appellate Panel stated, *inter alia*, that:

"In regards to this allegation of the [Applicant], the Specialized Panel provided correct conclusions and in compliance with the law. As per these allegations the [Applicant] does not have a right because based on Article 14.4 of the Law on PAK, it is considered that the Board has a quorum if at least 5 of directors are present at the meeting and at least one of them should be an international member. Whereas, based on Article 14.6 of the Law on PAK, Decisions may be made by a simple majority of the members present, and that actually happened. At the Board meeting there were 5 members present, 4 votes were pro and 1 member abstained when the Decision was made on execution of the decision on withdrawal of shares, whilst 5 votes were pro when the decision was taken for taking the shares of the company under control of the PAK. The [Applicant] unjustly alleges that these decisions do not fall under Article 15.2 of the Law on PAK which requires the qualified majority for taking the decision including also 3 international members of the PAK Board.

The Specialized Panel correctly concluded that the PAK challenged Decisions do not fall under Article 15.2 of the Law on PAK whereof the qualified majority is required.

On the grounds of these reasons, the Appellate Panel rejects the appeal of the [Applicant] as ungrounded and upholds the appealed Judgment of the Specialized Panel as correct and based on law."

Applicant's allegations

29. The Applicant alleges that the decision of PAK on taking ownership over 100% of the Applicant's shares is contrary to Article 46 of the Constitution of the Republic of Kosovo and Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR). This procedure represents an arbitrary and unconstitutional expropriation.
30. The Applicant also states that the failure of all state mechanisms, including the Special Chamber of the Supreme Court, to protect its property rights, constitutes violation of Article 31 of the Constitution of Kosovo and Article 6 of the ECHR. The Applicant did not have an effective and proper protection of its property rights by a court which did not comply with the principle of the equality of arms.
31. Accordingly, the Applicant addresses the Court with a request to hold that there has been a violation of Articles 31 and 46 of the Constitution of Kosovo in conjunction with Article 6 and Article 1 of Protocol 1 of the ECHR, and to declare invalid the decisions of the Board of Directors of PAKnos. BD-69/35 and BD-69/36 on forced alienation of ownership over all shares.
32. In this regard, the Applicant's allegations are to be divided as it follows:
 - the allegations regarding the violation of the right to fair trial, and
 - the allegations regarding the violation of the protection of property

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

33. The Applicant alleges that due to unequal treatment by the SCSC, the adjudication beyond the scope of the Applicant's claim, the application and interpretation of the Law on PAK and unlawful interference with the Applicant's possessions "[...] violated also in various specific way its fundamental rights provided by the provisions of Article 6 of the ECHR and Article 31 of the Constitution of Kosovo."
34. The Applicant alleges that this unequal treatment is related to unfair treatment during the proceedings before the SCSC, and by this: *"inequality of arms in itself created violation of Article 6 of ECHR, as it creates prejudice towards one of the parties, in this case, in the present case, towards the Applicant."*
35. The Applicant alleges that the SCSC had a legal obligation to allow the parties to the proceedings an equal opportunity to submit evidence and to plead their case. The Applicant alleges that it was not allowed to present supplementary evidence

regarding its financial investments. Therefore, according to the Applicant, it was not given a fair and impartial trial and an opportunity to plead its case.

36. The Applicant alleges that the decisions of the Board of Directors of PAK were rendered contrary to the law, which he alleged during the entire proceedings, and as a result there has been a violation of Article 31 of the Constitution.
37. The Applicant further alleges that being unable to present evidence in order to prove decisive facts (the amount of investments and number of employees) constitutes the effective violation of the right to fair hearing.

Allegations regarding the violation of protection of property, guaranteed by Article 46 of the Constitution and Article 1 of Protocol no. 1 of the ECHR

38. The Applicant further cites the case law of the European Court of Human Rights (hereinafter: the ECtHR) regarding the issue of expropriation and alleges that the challenged judgment constitutes a violation of *"[...] the protection provided to the Applicant in accordance with Article 1 of Protocol 1 of ECHR, and Article 46 of the Constitution of Kosovo [...]"*.
39. In this regard, the Applicant claims that PAK, acting as an agency of the Government *"[...] in an unlawful manner and without proper proceedings carried out the expropriation of its property in spite of all guarantees provided to PAK. In the present case, the expropriation procedure was carried out without any procedure provided by the applicable legislation and contrary to the provisions contracted between the parties."*
40. Therefore, the Applicant alleges that *"the expropriation act performed in violation to all the above-mentioned guarantees is arbitrary, unconstitutional, it does not serve the public interest and is clearly not proportionate. In short, the behavior of the public authorities involved in this arbitrary expropriation and without any compensation is a major fraud. This is a clear violation of Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR. In addition, even in case that for some reason the expropriation is considered to be legal, the lack of proper compensation makes it unlawful and unconstitutional."*

Relevant provisions of Law no. 04/L-034 on 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 fulfill 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

41. The Court first examines whether the Applicant has met the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.
42. The Court also states that in accordance with Article 21.4 of the Constitution which establishes that "*Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable*", the Applicant is entitled to file a constitutional complaint, referring to fundamental rights which are applicable for individuals and legal persons (see *mutatis mutandis*, Resolution of 27 January 2010, case KI41/09, AAB-RIINVEST University L.L.C. Prishtina v. the Government of the Republic of Kosovo).
43. 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.”

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

“(1) The Court may consider a referral if:

(d) the referral is prima facie justified or 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.”

Allegations regarding violation of Article 31 of the Constitution and Article 6.1 of ECHR

45. The Court recalls that the Applicant alleges that Judgment AC-I-15-0145-A0001 of the Appellate Panel violates its rights and freedoms provided by Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR.

46. The Court recalls Article 31 of the Constitution, which provides:

“1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

*2. Everyone is entitled to a fair and impartial public hearing as to the determination of one’s rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
[...]”*

47. The Court also recalls Article 6.1 of the ECHR which provides:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public

order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. [...]"

48. As stated above, the Applicant alleges that the unequal treatment by the SCSC, the adjudication beyond the scope of the Applicant's claim, the application and interpretation of the Law on PAK and the unlawful interference with the Applicant's property violated in a variety of ways its rights guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.
49. Firstly, the Applicant alleges that the SCSC had a legal obligation to allow the parties to the proceedings equal opportunities to produce evidence and to plead their case. The Applicant alleges that it was not allowed to present supplementary evidence regarding its financial investments. According to the Applicant, it was not given a fair and impartial hearing and an opportunity to present its case.
50. In this regard, the Court notes that the Applicant has not submitted any evidence or argument as to how and why he was treated in an unequal manner and in what way he was not provided a reasonable opportunity to produce evidence and plead his case before the SCSC.
51. The Court reiterates that the Applicant's 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 and impartial trial. When alleging constitutional violations, the Applicant must present convincing and indisputable arguments to support the allegations, for the referral to be grounded (see, Resolution on Inadmissibility of 30 June 2014, no. KI198/13, *Privatization Agency of Kosovo*).
52. 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 appeal, which can be precisely seen in the reasoned judgments.
53. In this respect, the Court also notes that both the Specialized Panel and the Appellate Panel of the SCSC justified their decisions based on the evidence and arguments provided by the Applicant, in a capacity of 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).
54. Secondly, the Applicant alleges that the selective application and interpretation of certain legal provisions of the Law on PAK by the PAK Board of Directors

related to quorum, affected the legitimacy of the Board itself, and therefore the legitimacy of the decisions rendered. Accordingly, the decisions of the PAK Board of Directors, according to the Applicant, were unlawful as *ultra vires*.

55. In this respect, the Court notes that the Specialized Panel and the Appellate Panel of the SCSC dealt with the Applicant's allegations regarding the legitimacy of the composition of the Board of Directors of PAK, and also the legitimacy of decisions rendered, which according to the Applicant, were unlawful as *ultra vires*, on which it concluded:

"The decision to withdraw the shares was rendered by a majority of four out of five votes in total, which is in compliance with requirement of the simple majority (Article 14.6 of the Law on PAK). The [Applicant] invokes that this did not manage to meet the standard of the qualified majority. In fact, Article 14.7 of the Law on the PAK requires five positive votes for the decisions that require a qualified majority. Article 15.2 of the Law on PAK is applicable also in cases of resuming the control (different from initial control of an enterprise)."

56. In this regard, the Court adds that the violation of Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR, does not depend on the certainty of a favorable outcome of the proceedings for the applicant. The Applicant's arguments regarding what law should have been applied by the regular courts, and how that law should have been interpreted, are outside the scope of the Court's jurisdiction, unless in its selection of what law to apply and how to interpret it the regular courts have been manifestly arbitrary.
57. This means that when building a case before the Constitutional Court it is not sufficient that the Applicant merely claims a violation of Article 31 of the Constitution or Article 6.1 of the ECHR, on the basis of the fact that the regular courts did not accept as grounded the Applicant's claims of erroneous application and interpretation of the relevant legal provisions, and mainly when the appeals were not favorable to the Applicant.
58. In this respect, it should be borne in mind, since this is a very common source of misunderstandings on the part of applicants, that the "fairness" required by Article 31 is not a "substantive" fairness (a concept which is part-legal, part-ethical and can only be applied by the trial judge), but rather a "procedural" fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court (See ECtHR, Decision of 6 July 2010, *Star Cate – Epilekta Gevmata and Others v. Greece*, no. 54111/07.).
59. As to the application of the Law on PAK by the two instances of SCSC, the Court refers to its case law, where it concluded that as a 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: *Privatization Agency of Kosovo*, Judgment of 30 March 2011, paragraph 56).

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

60. 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 of Protocol 1 to the ECHR.
61. The Court notes that the Applicant alleges that its right to a peaceful enjoyment of possessions is violated by PAK and by the decisions of the Special Chamber and that this proceeding of PAK and of Special Chamber violates the rights as protected by Article 46 of the Constitution and Article 1 of the First Protocol of the ECHR.
62. The Court recalls Article 46 of the Constitution, which provides:
- “1. The right to own property is guaranteed.
2. Use of property is regulated by law in accordance with the public interest.
3. No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.
4. Disputes arising from an act of the Republic of Kosovo or a public authority of the Republic of Kosovo that is alleged to constitute an expropriation shall be settled by a competent court.
5. Intellectual property is protected by law.”*
63. In addition, the Court recalls Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution, which provides:
- “1. Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.
2. Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfillment of the purpose of the limitation in an open and democratic society.
3. Fundamental rights and freedoms guaranteed by this Constitution may not be limited for purposes other than those for which they were provided.
4. In cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation.
5. The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right.”*
64. The Court also recalls Article 1 of Protocol no. 1 of the ECHR, which provides:

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

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

65. In the present case, the Court notes that the loss of property of the Applicant, namely the shares in the mining company and the current assets involved, was based on the authority prescribed by the Law on PAK and under the conditions of the special *spin-off* contract.
66. The Court notes that the Special Chamber suggests that the Applicant could have initiated judicial proceedings in order to request the right to compensation for the damage related to the lost investments that have been made. The Court notes that the Specialized Panel of the SCSC made this clear in its decision of 27 May 2015 (Judgment C-I-14-0022),

“[...] the withdrawal of shares does not mean that the claimant will lose all his investment as he most likely will be entitled to an indemnification, although he is likely to lose some money...”

67. The Court notes that the Applicant was deprived of its shares and current assets in the mining company and that this loss is due to the actions of PAK to reclaim the shares and assets of the company. The reclaiming of the property was to ensure an adequate return and protection of the assets of the social-owned enterprise, which were public assets. As such, the return of shares and assets of the mining company serves to protect the public interest. In this case, the Applicant was fully aware of the terms and conditions attached to the purchase of shares, as stated in the special *spin-off* agreement, which the Applicant had signed.
68. In addition, the Applicant was given several opportunities to respect its commitments to invest and hire a certain number of employees as specified by the *spin-off* agreement. According to the decisions of the Special Chamber, both in the first and in the second instance, the Applicant failed to fully comply with these contractual obligations. The Court recalls that, in its decision of 27 May 2015 (Judgment C-I-14-0022) the Specialized Panel of the SCSC stated:

“The PAK decision to withdraw the shares was not disproportional. The obligation to employ was a core obligation and the breach of it was severe, leaving at least, a great number of families without an income [...].”

69. In these circumstances, the Court finds that the PAK procedure to take measures and return the shares and property of the mining company was justifiable and proportionate to achieve the legitimate aim of protecting the public interest, in accordance with Article 55 of the Constitution and Article 1 of the First Protocol of the ECHR.

70. The Court also found that the proceedings before the SCSC have not been unfair or arbitrary (See case *Shub v. Lithuania*, no. 17064/06, ECHR, Decision of 30 June 2009).
71. In conclusion, the Court finds that the Applicant has not presented any convincing argument to prove that the alleged violations constitute constitutional violations.
72. In sum, the Court considers that the Applicant has not substantiated all its allegations nor it has submitted any *prima facie* evidence indicating a violation of its rights guaranteed by the Constitution and ECHR (See, case No. KI19/14 and KI21/14 Applicants *Tafil Qorri and Mehdi Sylja*, Constitutional Court of the Republic of Kosovo, Constitutional Review of Decision CA. no. 2129/2013, of the Court of Appeal of Kosovo, of 5 December 2013, and Decision CA. no. 1947/2013, of the Court of Appeal of Kosovo, of 5 December 2013).
73. The Court considers that the Applicant's Referral does not meet the requirements established by the Constitution, as further provided by the Law and foreseen by the Rules of Procedure.
74. Therefore, the Applicant's Referral is manifestly ill-founded on constitutional basis, and is to be declared inadmissible in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and (2) (a) (b) (c) and (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Article 48 of the Law, and Rule 36 (1) (d), (2) (a) (b) (c) and (d) of the Rules of Procedure, in the session held on 15 September 2016, unanimously

DECIDES

- I. TO DECLARE the Referral 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;
- IV. TO DECLARE this Decision effective immediately.

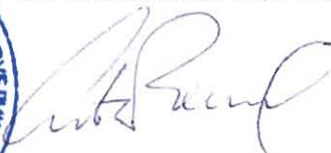
Judge Rapporteur



Snezhana Botusharova



President of the Constitutional Court



Artur Rama-Hajrizi