DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENCINË KOSOVARE TË PRIVATIZIMIT	SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATIZATION AGENCY RELATED MATTERS	POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODNOSE NA KOSOVSKU AGENCIJU ZA PRIVATIZAJU

SCC-08-0227

Claimant

SOE Hotel Tourist Enterprise "Iliria", Deçan/Dečani
Represented by the Office of Legal Affairs of UNMIK

Respondents

1. **Deçan/Dečani Monastery**
2. **Municipality of Deçan/Dečani**
3. **Republic of Serbia**

The Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (the "Special Chamber"), Specialized Panel, composed of Esma Erterzi, Presiding Judge, Ilmi Bajrami and Diellza Hoxha, Judges, after deliberation held on 27/12/2012, hereby issues the following:

JUDGMENT

The claim is rejected as ungrounded.

Factual and Procedural Background:

On 16 October 2000, the Claimant filed a claim with the Municipal Court in Deçan/Dečani against the Respondents: (1) the Monastery of Deçan/Dečani; (2) Municipality of Deçan/Dečani and (3) Republic of Serbia regarding verification of ownership.

The Claimant before the conflict was a legal person within the organization HTD "Sloga" in Prishtinë/Pristina, while known as SOE Hotel Tourist Enterprise "Iliria" in Deçan/Dečani.

On 09.08.1993, HTD "Sloga" and the first Respondent concluded a donation contract no. 1235 of which the subject was the donation of the cadastral parcels and the objects built on them in parcels Nos 494, 495, 496, 502, 522, 523, 524, 1106, 1107, and 528, registered in the possession list 237 CM Deçan/Dečani in total surface of 11.40.51 ha. The third Respondent approved the donation contract, according to contract no.464-2914/97, in favor of the first Respondent.

The Claimant requested the annulment of the donation contract concluded between the SOE Sloga and the first Respondent, with number 1235 of 09.08.1993, and of the contract number 464-2914/97 concluded between the first Respondent and the third Respondent as ungrounded and unlawful. It asked from the Court to verify that the Claimant Hotel Tourist Enterprise "Iliria" in Deçan/Dečani is the owner of cadastral parcels and the objects built over the said parcels.

In the Municipal Court in Deçan/Dečani the case was registered under case number C.no 5/2000.

On 03.09.2011, the Court invited the Claimant to amend the claim (*petitum of request*) and to present evidence related to the contested objects.

On 11.09.2000, the Claimant submitted the amended claim according to the requirement of the court. On 16.10.2001, the Municipal Court held the hearing but neither the first nor third respondent did appear; the hearing was postponed for 27.11.2001. Even on this date the Respondents did not appear and the hearing was therefore postponed for an undetermined period of time. On 27.12.2001, the Respondents again did not appear although duly summoned; the hearing was postponed for 25.01.2002. On 25.01.2002 the Respondents were not present in the hearing, the first one refused the summons and the third one justifies the absence therefore the hearing is postponed for 21.02.2002. On 21.02.2002 the hearing was postponed for 19.03.2002.

On 28.02.2002, the second respondent the Municipality of Deçan/Dečani filed a submission wherein it did not contest the claim of the claimant Hotel Tourist Enterprise "Iliria" in Deçan/Dečani and it proposed the Court to approve the Claimant's claim in its entirety.

On 19.03.2002, the Municipal Court in Deçan/Dečani held the hearing to which neither the first nor the third Respondent did participate. The first Respondent was duly summoned with the Court Act of 05.03.2002 through the UNMIK Police but it did not reply to the summons; thus it was postponed to 18.04.2002. On 18.04.2002, the hearing was held and it was again postponed to 28.06.2002 because there was no response by the Department of Justice in Prishtinë/Pristina for the first and third Respondent.

On 28.06.2002, the Municipal Court in Deçan/Dečani held the main hearing in which the Claimant and the representative of second Respondent took part while the first Respondent refused the summons and the third respondent did not justify the absence although it received the summons on 29.04.2002.

The Court, pursuant to Article 295 of the Law on Contested Procedure then, decided to hold the hearing in absence of the respondents who were duly summoned. After reading the claim, administration of evidence, and closing arguments of the Claimant; the Municipal Court issued the Judgment annulling the donation contract no. 1235 of 09.08.1993 and contract 0464-2914/97, and verifying that the SOE Iliria Deçan/Dečani is the owner of the cadastral parcels and the objects built in the cadastral parcels no. 494, 495, 496, 502, 522, 523, 524, 528, 1104, 1105, and 1107, registered in the possession list 237 CM Deçan/Dečani and obliged the Monastery of Deçan/Dečani to return the immovable property into possession and free use of the Claimant.

The Municipal Court issued this default judgment based on Article 295 of Law on Contested Procedure (LCP) with the justification that the court continuously for almost one year duly summoned several times the first and third Respondents; whilst the first one refused the summonses, the third one, although it received the summonses institutionally, did not justify the absence.

According to the Municipal Court, the donation contract was concluded in 1997 while the Regulation No. 1999/24 of 12.12.1999, which entered into force on 10 June 1999, stipulated that the applicable law in Kosovo is the law in force as of 22 March 1989. The Court maintained the contested immovable properties donated in the contract were never a property of the Monastery of Deçan/Dečani. It concluded that this fact was verified with the historical details of the cadastral records and the possession list; thus the contract is not valid; and done in contradiction with to Articles 4 and 5 of the Law on Transfer of Immovable Property (Official Gazette 28/88) and that it was made during the time of violent measures. The Municipal Court decided that the contract concluded between the first and the third Respondent is void, not valid and unlawful because the third Respondent donated to the first Respondent the property which did not belong to it but to the SOE and its workers. On 03.09.2002, the lawyer of the third Respondent, republican lawyer, filed an appeal against this judgment with the District Court in Pejë/Peć challenging it due to essential violations of the provisions of Article 354 paragraph 2 point 7 of the LCP, regarding lack

of the opportunity of legal participation of parties in hearing and use of party's language in the proceeding pursuant to Article 354 paragraph 2 point 8 of the LCP. It also alleged, as to the ownership of the said parcels, that until 1964 the immovable properties were the property of the first Respondent Deçan/Dečani Monastery and that these properties are state owned properties of the third Respondent.

On 26.09.2002, the Claimant responded on the Respondents' appeal.

On 25.10.2005, the District Court in Pejë/Peć issued the decision quashing the entire Judgment of the Municipal Court in Deçan/Decani C.no. 88/2001 of 28.06.2002, and remitted the case for retrial to the Municipal Court with the reasoning that the attacked decision essentially violated Article 354 paragraph 1 because Article 2 paragraph 1 of the LCP provided that in contested procedure the court are to decide within the limits of the requests. There were also violations of Article 354 paragraph 2 point 8 of the LCP on unduly service of court documents. District Court also noted that the first instance court, during the retrial, should consider the claim's irregularity with respect to legitimacy of the parties and the possibility of amending the claim to make it comprehensible.

After the judgment was quashed, the case took a new number C.no 325/05.

On 24.11.2006, the Municipal Court in Deçan/Dečani invited the Claimant to clarify the claim with respect to the legitimacy and the possibility of amending the relief sought in the claim.

On 7.12.2006, the Claimant submitted the clarification with regard to the legitimacy of parties. It stated that it has the legitimacy as a party in these proceedings since it is a registered entity based on the application for Provisional Business Registration made to UNMIK.

KTA, on 13.6.2008, applied for removal of the case pursuant to Section 4.5 of UNMIK Regulation No. 2002/13. With the Decision dated 20.6.2008, the Special Chamber, in case no RR-08-0002, removed the claim against all Respondents before the Municipal Court in case C.no. 5/2000-(325/05) where parties in the proceedings are the SOE Iliria, Deçan/Dečani against the Monastery of Deçan/Dečani, Municipality of Deçan/Dečani and the Republic of Serbia.

On 17 November 2008, the Special Chamber held the first session at this Court together with cases no SCC-08-0226 (the claim of Apiko represented by KTA/UNMIK Office of Legal Affairs) against Republic of Serbia and Monastery of Deçan/Dečani; case no SCC-08-0227 (the claim of SOE Iliria against Republic of Serbia, Municipality of Deçan/Dečani and Monastery of Deçan/Dečani), and case no SCC-06-0484 (the claim of Ali Demeukaj against Republic of Serbia and Monastery of Deçan/Dečani, Municipality of Deçan/Dečani, SOE Apiko, Zenun Mecaj and KTA) without merging the cases due to their close relation. That session was not about the merits of the claims but only on procedural matters and the registrations of the lands in the cadastral records then. The representation of the SOE by the KTA/UNMIK was challenged and the position of the SOE different than the KTA was heard. The representative of the Municipality was also present in that session.

As to the representation of the SOE; on 24 November 2008, the KTA/UNMIK Office of Legal Affairs filed a submission discussing its authority over the SOE and its legal standing in the proceedings as well as changes made in the cadastral records during the course of years. On 26.11.2008, the lawyer of the SOE Iliria filed a submission in Albanian some parts of Articles mentioned therein were also provided in English. On 1.12.2008, the lawyer of Municipality submitted a submission only in Albanian.

On 10 March 2009, the Trial Panel of the Special Chamber decided that the Office of the Legal Affairs of UNMIK has the legal standing in this case as representing the Kosovo Trust Agency and it has the sole right to represent the interests of the enterprises before the Special Chamber, in particular in this case. It is also mentioned, in the legal reasoning, that Chamber allows SOE to be represented by its own advisors unless and until KTA (in this case UNMIK) decides to exercise its administrative authority over the SOE. This Decision was appealed by the Privatization Agency of Kosovo (PAK).

On the other hand, the Trial Panel, with its decision of 18 May 2009, called into the suit the PAK for any interest that it may have on behalf of the Claimant SOE.

On 12.05.2009, KTA/UNMIK Office of Legal Affairs filed a submission for both cases SCC-08-0226 and SCC-08-0227 and made an application for a hearing. In the submission, it is stated that KTA would agree to a settlement proposal that would not challenge the ownership rights of Monastery of Deçan/Dečani with respect to cadastral parcels that are currently located within the Special Zoning Area that includes the Monastery and its hermitage as established with UNMIK Executive Decision No 2005/5 and would waive, on behalf of the Claimants in the matters in SCC-08-0226 and SCC-08-0227 and on behalf of any other SOE under statutory administration of and authority, any property right claim that they may have in relation to such plots.

The parties were summoned to the hearing held on 19 May 2009 to explore the possibility of settlement. A text of settlement in writing, without signatures, presented to the Court that was attached to the submission of Monastery dated 15.5.2009 by the Court; however, it cannot be specified by the Court which party it was submitted.

The hearings of case no SCC-08-0226 and SCC-08-0227 were held together on 19 May 2009.

During that session;

The representative of Office of Legal Affairs of UNMIK declared that UNMIK waived the claims against Republic of Serbia and Municipality of Deçan/Dečani according to Article 193 of Law of Contested Procedure (4/1977 as amended). On behalf of the SOE, Mr. Teki Bokshi, as heard only in the capacity of the lawyer of SOE Iliria (not for SOE Apiko) stated, to quote from the minutes, that: "…as the representative of the Ilirjia SOE on 24 November 2008 we made a submission where we withdrew the claim against the Municipality of Decan since we have contradiction of interest with the Municipality of Decan and for this reason, the Municipality of Decan through written submission accepted the withdrawal and has joined us as intervenient of the SOE I represent". The representative of the Municipality of Deçan/Dečani stated that he accepted the withdrawal of the SOE but not the withdrawal of UNMIK but then confirmed the acceptance of the withdrawal. The lawyer of Municipality repeated his understanding of that the Municipality is now the intervener. The Presiding Judge announced that the Panel would decide on the waiver of the claims against the Municipality and Republic of Serbia and would consider the request made regarding the intervention request of the Municipality.

The representative of UNMIK Office of Legal Affairs-KTA and that of Monastery expressed their statements during the session on the settlement. They signed the minutes of the session on different dates. The lawyer of the SOE stated his challenge that UNMIK cannot represent the Claimant SOE Iliria and that PAK is the legal successor of KTA.

On 8 June 2009, the lawyer of the SOE Iliria filed a submission conveying the protests of the employees of the workers and management of Enterprise Iliria and reiterating the arguments of the

PAK is the only Agency that can represent the SOE as the successor of KTA, that UNMIK is taking the side of the Respondent Monastery and that the Court had not proven its objectiveness and impartiality and should be recused. He stated that they request from EULEX to assign another Trial Panel which had not involved so far *(it is worth to note that the composition of Trial Panel has changed several times from the beginning of the removal of the proceedings to the Special Chamber both under UNMIK mandate and under EULEX judges executive mandate as well).* He also stated that they request from the Constitutional Court to annul the Decision of the Trial Panel dated 10 March 2012 which stated that UNMIK Office of Legal Affairs has the sole right to represent the enterprises in the proceedings held in case no SCC-08-022; SCC-08-0227 and SCC-06-0484. *(The Specialized Panel notes that there is no document in the file indicating that such an application was made to the Constitutional Court against that Decision.)*

On 24 July 2010, the Appellate Panel rendered the Decision in the appeal of PAK against the Trial Panel Decision dated 10 March 2009 for all three cases (SCC-08-0226, SCC-08-0227 and SCC-08-0484) upholding the Trial Panel's Decision which stipulated that UNMIK Office of Legal Affairs has the sole legal standing on behalf of the SOEs in case no ASC-09-0025. *(The Specialized Panel also notes that there is no document in the file indicating that such an application was made by anyone to the Constitutional Court against the Decision of the Appellate Panel dated 24.7.2010, case no ASC-09-0025, either.)*

On the other hand, as to the settlement expressed during the hearing of 19 May 2009;

On 10 July 2009, UNMIK applied to the Special Chamber asking for issuance of certified minutes and a request for order to enforce the settlement concluded in the hearing held 19 May 2009.

On 26 October 2009, in its response to the Court's order, UNMIK repeated its request for issuance of certified copies of minutes of the session held on 19 May 2009 and an order for execution of the settlement.

On 9 February 2011, the Trial Panel rejected the requests of UNMIK dated 10 July 2009 and 26 October 2009. This time an appeal was filed against this Decision by UNMIK.

On 27 December 2011, the Appellate Panel rendered its Decision in case no ASC-11-0038 upholding the Trial Panel's Decision dated 9 February 2011 maintaining that the settlement was not completed yet and that the execution of the settlement is not in the jurisdiction of the Special Chamber in any case; while at the same time, stating that the Trial Panel should have set another hearing to enable the parties to complete their settlement expressed on 19 May 2009 with the procedural rules.

On 1 January 2012, the new Law No 04/L-033 on the Special Chamber of Supreme Court of Kosovo on Privatization Agency Related Matters entered into force.

With the Decision of Presidium of the Special Chamber No 1/2012, dated 2 February 2012, Specialized Panels were established. The case was initially assigned to Panel 4. As a result of the Presidium Decision No 19/2012 dated 20 June 2012, the case was allocated to the Panel 3 (Ownership Panel).

The Specialized Panel of Ownership Claims, as per the request of the UNMIK and opinion of the Appellate Panel, decided to have a hearing on 3.10.2012 which was asked to be postponed. The hearing was held on 16 October 2012.

On 29.10.2012, the lawyer of the SOE Iliria (not as the lawyer of the SOE Apiko) filed a submission only in Albanian challenging the hearing held in case no SCC-08-0227 without his presence.

On 30.10.2012, the lawyer of the Respondent Monastery submitted the following documents: (1) confirmation of the status on the monasteries and abbots both in Serbian and English (2) a copy of the Decision on the appointment of Father Sava Janic as Abbot of the Visoki Deçan/Dečani Monastery.

On 30.10.2012, UNMIK Office of Legal Affairs replied to the request of the Panel asking for clarification and check of the parties reaching the settlement whether it covers all parcels in dispute at hand. UNMIK asked for setting of another session.

On 6 November 2012, the lawyer of Municipality also filed a submission only in Albanian challenging the hearing held on 16.10.2012 for both cases SCC-08-0226 and SCC-08-0227.

On 19 November 2012, UNMIK Office of Legal Affairs filed another submission stating that KTA had waived all right in relation to the parcels mentioned in the settlement apart from the ones explicitly waived by the Monastery and this applies also where the settlement between the parties does not expressly enumerate all parcels that are in dispute. KTA stated that "the negotiated settlement reached by the parties and confirmed in writing shall become final and binding upon the parties" according to Section26.4 of UNMIK Administrative Direction of 2008/6 and therefore, it is not any longer in the purview of the Trial Panel to decide upon. On the other hand, UNMIK Office of Legal Affairs in the same submission asked for: (1) the joining of the cases procedurally with case no SCC-08-0226; (2) the issuance of certified copies of the minutes of 16.10.2012 as well as (3) to take necessary measures following the issuance of such certified copies for the enforcement of the settlement by ordering in the cadastral records of Municipality as reflected in the settlement.

On 20 December 2012, the lawyer of the Municipality filed another submission stating that he was informed by SOE Iliria that a hearing would be held on 5.12.2012 to which only representatives of UNMIK Office of Legal Affairs and SOE Iliria and Deçan/Dečani Monastery were invited. He emphasized that, although he asked to be on the side of the Claimant he was excluded as a party from the proceedings on 16.10.2012, the Court did not invite him to the session.

Actually, the session initially planned to be held on 13.12.2012 had to be postponed to 21.12.2012 based on the excuse of one of the party. The representatives of remaining parties were all present in that session as well as the lawyer of the Municipality among the audience. The oral submission of the lawyer of the SOE was also collected as to the settlement reached between the UNMIK Office of Legal Affairs and Deçan/Dečani Monastery.

Legal Reasoning

The Specialized Panel will discuss below the arguments of the parties in particular for this case.

1. The parties

(a) The Claimant

The Claimant in the case at hand is the Socially-owned Enterprise (SOE) "Iliria" of which name was changed from time to time. Its status as being a socially- owned enterprise is not contested by any party in the proceedings. There is no other Claimant or counter-claimant apart from this SOE despite there seems to be many stake holders expressing their relation in these proceedings in different capacities. Its representation by its own lawyer or legal standing of the UNMIK Office of Legal Affairs on behalf of the SOE as claimant will be discussed below in details.

(b) The administrative authority of the Agency over the Claimant SOE

As known, Kosovo Trust Agency (KTA) was established with Regulation No 2002/12 based on United Security Council Resolution 1244 (1999) and competence of the Special Representative of Secretary General (SRSG). As of 13 June 2012, the KTA started to have the administrative authority over the socially-owned enterprises. UNMIK REG No 2002/12, as amended with UNMIK Regulation 2005/18, foresees that the Agency shall have administrative authority with respect to all socially owned enterprise in Kosovo. Moreover, according to Article 6.2(d) of the same, the Agency has the right "to dispose of monies and other assets of Socially-owned Enterprises."

The Law No 03/L-067on Privatization Agency of Kosovo (PAK), as amended with Law No 04/L-034, also regulates the administrative authority of the Agency in the same way as provided to the KTA. Article 6.1 of the Law on PAK, grants the Agency broad and exclusive administrative authority over all Enterprises, Assets, interests, shares and property falling within the scope of Articles 5.1 and 5.2. Such authority shall include any action that the Agency considers reasonable and appropriate, within the limits of the Agency's administrative resources, to better enable the sale, liquidation, transfer or other disposition of an Enterprise, Asset or State Owned Interest. It has the right to appoint and replace the chairman, the directors and the managers of the SOE.

In this case, the matter which is highly contested is not the administrative authority of the Agency over the socially-owned enterprise. What is at hot debate is mainly "which Agency has the administrative authority over the SOE": Is it KTA or PAK?

The second highly contested matter in these proceedings is that "what if the administrator of the SOE has different position than the directors/managers of the SOE itself.
Now, the Panel is first to address the primary matter (whether it is KTA established by UNMIK or PAK established by Assembly of Kosovo as successor of the first that shall administer the SOE) as to the second one (what if when the SOE has different position than its administrator).

(c) KTA or PAK?

Whether it is KTA or PAK that administers the SOE has long been under discussion in these proceedings. It has already been responded not only once but twice by the Appellate Panel of the Special Chamber with the Decisions mentioned above in the procedural background(*Decision dated 24.7.2010, case no ASC-09-0025 and Decision dated 27 December 2011, in case no ASC-11-0038).*

All arguments deriving from Article 1.2 of Law on PAK as amended, stating that PAK is the legal successor of the KTA were repeatedly presented by the SOE itself, by its own lawyer, and by the lawyer of the Municipality during the hearings and in the written submissions. Representative of PAK as well argued the matter both in writing and orally during the session held on 19 May 2009 and in its appeal filed against the Decision of Trial Panel dated 10 March 2009. Furthermore, the Ministry of Justice had the opportunity to express its understanding on this representation with its letter of 14 October 2009 and maintained that according to Article 67.4 of Law on Management of

Public Finance and Accountability (Law No 03/L-048, dated 13 June 2008) allows and obliges the Ministry of Justice to be involved in the proceedings. All these arguments were available to the first instance and second instances judges of that time and assessed with their respective decisions on the matter.

On 10 March 2009, the Trial Panel of then concluded that the Office of the Legal Affairs of UNMIK, as representing the KTA, has legal standing in this case and that it has the sole right to represent the interests of the Enterprises in cases before the Special Chamber and in particular to the cases this decision applies. Upon the appeal filed by PAK against the Decision of the Trial Panel of 10 March 2009 the Appellate Panel upheld the conclusion of Trial Panel (Decision of 24 July 2010, case no ASC-09-0025).

In another decision of the Appellate Panel, dated 27 December 2011, case no ASC-11-0038, in the appeal against the Decision of the Trial Panel dated 9 February 2011 in cases SCC-08-0226 and SCC-08-0227, it is reiterated that the representation of the SOE by KTA and Office of the Legal Affairs of UNMIK is final and therefore binding and not be questionable anymore and even considered as to be *res judicata* by the Appellate Panel. At the time of issuance of that Decision, the new Law on PAK no 04/L-034 was already in force.

It is not relevant whether the current composition of the Specialized Panel agrees with that conclusion or not. The final Decisions are binding not only on parties but also on all Courts unless a new law regulates the field differently after the adoption of such final Decision on a procedural matter. The predictability and legal certainty principles require that the final decisions/judgments cannot be challenged further, no matter they are correct or not, unless an extraordinary remedy is available (which is still subject to specific time limit). There is no evidence or notification in the file indicating that any party or third person claiming to have an interest in this case has challenged the constitutionality of the Decisions of the Appellate Panel or applied for extraordinary remedies in this particular case at hand.

In the case at hand, the Appellate Panel, in its Decision dated 24 July 2010, made its determination on that it is the Office of the Legal Affairs of UNMIK that has the sole right to represent the SOE when the Law on PAK and the Constitution of Republic of Kosovo were already in force. The Constitution of then, in Article 143, was referring to the role and effect of Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007. According to Article 143.2 of the Constitution, the provisions of the Comprehensive Proposal shall take precedence over all other legal provisions in Kosovo. Furthermore, the Constitution, laws and other legal acts of the Republic of Kosovo shall be interpreted in compliance with the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007. If there are inconsistencies between the provisions of this Constitution, laws or other legal acts of the Republic of Kosovo and the provisions of the said Settlement, the latter shall prevail (Article 143.3 of the Constitution).

It is a very well-known fact that the Comprehensive Proposal (Ahtisaari Plan) gives the administrative authority over the socially-owned enterprises to Kosovo Trust Agency (Annex VII of the Comprehensive Settlement, Article 2). The fact that as of today the Constitution does not make any reference to the Comprehensive Proposal or does not give prevalence over the Constitution is not relevant. All the submissions of the parties and their statements on their settlement and signing of the minutes of the hearing in which the settlement was expressed, apart from the last one supplementing the previous ones, were made at a time when such reference to Comprehensive Proposal was still existing in the Constitution as the higher one in the hierarchy of the norms.

The Specialized Panel will not take a new stance on the matter but only refer to the previous determination of the Appellate Panel on the representation of the Claimant SOE by the Office of the Legal Affairs of UNMIK which is only declaratory now but not constitutive.

(d) The remaining Respondent(s)

The original claim filed with the Municipal Court was directed against Republic of Serbia as the first Respondent and Municipality of Deçan/Dečani as the second Respondent and Deçan/Dečani Monastery as the third one. The Municipal Court already concluded before removal of the claim that Municipality accepted the claim before removal of the proceedings to the Special Chamber in case no RR-08-0002 dated 20.6.2008.

The SOE withdrew the claim and the UNMIK waived the claim against Municipality. The Municipality accepted the withdrawal of the claim by the SOE against it. The lawyer of the SOE Iliria and the lawyer of the Municipality of Deçan/Dečani both admitted that the withdrawal of the SOE was accepted by the Municipality in the session held on 19 May 2009. Furthermore, UNMIK waived the rights against the Municipality as well as against the Republic of Serbia based on Article 193 of Law on Contested Procedure (4/1977)

The Specialized Panel considers that the declaration of the representative of the Office of Legal Affairs of UNMIK did not require the consent of the Trial Panel. The withdrawal of the claim was explicitly regulated in UNMIK AD 2008/6 (now in Article 26 of Annex of the Special Chamber Law) which requires the consent of the Specialized Panel. However, there is no explicit provision on waiving of rights and claims in neither of them. Thus, the provision of the Law on Contested Procedure (Article 193 of old LCP, Article 261 of the new LCP) is applicable, pursuant to Article 70 of UNMIK AD 2008/6 (and Article 14 of Special Chamber Law) in waiving of claims which neither needs the consent of the Court nor that of Respondent(s). The declaration made by the representative of the Claimant on 19 May 2009, therefore, produced its legal effect as of that date.

Now, the Panel draws attention to the fact that Republic of Serbia and Municipality of Deçan/Dečani are not parties anymore in these proceedings. The only remaining Respondent is the Deçan/Dečani Monastery.

2. The intervention request of the Municipality of Deçan/Dečani

Despite the Municipality accepted the withdrawal of the claim of the SOE directed against it as the second Respondent, it wished to stand beside the SOE as Claimant. The request as intervention in the proceedings was made long before; however the Panel stating that the request would be examined did not take a decision on accepting or rejecting it explicitly and informing the Municipality on the outcome. This is why perhaps the Municipality considered itself as if it is one of the Claimants in the proceedings.

On 16.10.2012, during the hearing the Specialized Panel deliberated on the intervention request of the Municipality to stand beside the Claimant and rejected it. The parties and Municipality were informed on that the Decision as to the settlement presented will also include the reasoning for such rejection in writing but the requester may even before challenge this conclusion.

The SOE has a lawyer on its own. It is already concluded that UNMIK Office of Legal Affairs has the legal standing as the Claimant on behalf of the SOE. PAK also alleged to have administrative authority over the SOE which was rejected by the Appellate Panel. Thus the SOE does not need any further representative or administrator or intervener to defend its position. More importantly,

the intervener based its argument on the fact that the SOE and the lands in dispute are in its territory. This fact does not give the Municipality any legal grounds to intervene any contested procedure related to a land within its territory. The intervention can only be allowed by the court if the enacting clause of a judgment in a proceeding would ever produce any legal effect on the person asking intervention. Even if the claim of the Claimant is approved than it would be the Agency which would administer those lands. Then, the Agency may even privatize the assets of the socially owned enterprise. Whatever link exists between the SOEs and the Municipalities as to allocating the lands to the SOEs under the ex-Yugoslavian laws was cut as of 13 June 2002 with the establishment of KTA by UNMIK. Thus, the Municipality has no legal interest to intervene in the proceedings beside the SOE.

3. The registration in cadastre actual situation as of the date of settlement

In this regard it is worth to mention the Executive Decisions of SRSG as to the changes in the Cadastral records. The SRSG, first, with the Executive Decision No 2008/16 of 22 April 2008, decided that in the absence of substantiating documentation provided by the Municipality of Deçan/Dečani, the entries of land parcels Nos. 494, 495, 502, 503, 522, 523, 524, 528, 1104, 1105 and 1106 (possession list No 237) currently registered in the cadastral books of Deçan/Dečani Municipality in the name of Socially-owned Enterprise "Tourist Hotel Enterprise Deçan/Dečani and land parcel No. 943 (possession list No.119) currently registered in the cadastral books of Deçan/Dečani Municipality in the name of Socially-owned Enterprise "Public Housing Enterprise" shall temporarily be set aside with immediate effect and the *status quo ante* shall be restored. The Executive Decision shall be reviewed if satisfactory substantiating documentation is provided to UNMIK by the Municipality of Deçan/Dečani. It is also stated in this Executive Decision that it shall be without prejudice to a final authoritative determination of the property rights regarding the land parcels concerned following the outcome of the ongoing judicial proceedings before the competent courts in Kosovo and ongoing proceedings before the Kosovo Property Agency.

With a subsequent Executive Decision No 2008/21, dated 17 May 2008, the SRSG decided that the entries in the Cadastre set aside by Executive Decision No 2008/16, shall be substituted by entries into cadastre records that restore and consistent with possession list No 138 (N95-01-1/97) issued by the Peje/Pec Office of Land Cadastre on 10 March 1998. It further stated that consistent with the above the Visoki Decani Serbian Orthodox Monastery shall continue to enjoy undisturbed possession of land parcels No 301 through 312 (current possession list No 131), land parcels Nos 494, 495, 502, 503, 522, 523, 524, 528, 1104, 1105 and 1106 (current Possession List No 237) and land parcel No 943(current Possession List No 119). In the event of an authoritative adjudication of the proprietary rights regarding the lands concerned by a court of competent jurisdiction in Kosovo, following the outcome of the ongoing proceedings before the Kosovo Property Agency, the cadastre records shall accurately reflects such adjudication.

It is not known by the Panel why the UNMIK Executive Decision No 2008/21 has not been reflected in the Cadastral records. What is known is that the cadastral records are still in the name of the SOE and the parties are aware of this fact as can easily be understood from their oral submissions during the sessions held in 2008 and 2009. It is unknown to the Specialized Panel whether the parties has ever attempted to change the cadastral records in accordance with UNMIK Executive Decision of 2008/21 and if yes, why it cannot be executed. However, what is important is that the lands in dispute are still registered under the name of the Claimant.

As to the handover of possession of the cadastral parcels, the possession of the lands by the Respondent Monastery has already been protected with the above mentioned Executive Decision

of the SRSG. As of today, since the case pending before the Special Chamber is at its early stage as to the conduct of proceedings, the Panel does not hold any information whether Kosovo Property Agency made such a determination referred in the Executive Decision No 2008/21 of the SRSG. It is not relevant either, since the claim of the Claimant SOE asking for handover of the possession as such would not fall today under the jurisdiction of the Special Chamber which operates under the Special Chamber Law No 04/L-033. Special Chamber has jurisdiction over the claims against the Respondent SOEs or the Agency not those of SOE in the capacity of a Claimant against the private natural or legal persons. (Article 4 read in conjunction with Article 5.2.2 of the Special Chamber Law).

4. The settlement

Taking into account the determination of the Appellate Panel that it is the Legal Office of UNMIK, as representing the KTA, which has the sole legal standing in the proceedings; and bearing in mind that the same concluded that SOE can only represents itself unless the KTA takes over the proceedings, as discussed above in details, the mere contention of the SOE that it does not agree with the settlement allegedly reached between the KTA and Respondent Monastery or that it should have been represented by PAK not by KTA, cannot bring any new feature to the discussions. All those arguments were already responded by the first and second instances.

After this point, what the Specialized Panel should look for is whether the settlement reached between the UNMIK Legal Office and the sole remaining Respondent Deçan/Dečani Monastery fulfills the requirements of procedural rules and what kind of legal effect may derive therefrom.

The following can be pointed out as important submissions related to the will to reach a settlement;

(a) The will on reaching a settlement expressed in the submission of KTA/UNMIK dated 12 May 2009 and application for a hearing to present this settlement
(b) The settlement expressed during the session held on 19 May 2009 and
(c) The application made on 10 July 2009 by KTA/UNMIK asking for certified minutes of the hearing of 19 May 2009 and execution of settlement
(d) The settlement presented in writing and expressed in the session held on 16 October 2012 and supplemented in accordance with the Appellate Panel opinion stated in its decision of ASC-11-0038 dated 27 December 2011
(e) The clarification provided in the submission dated 29 October 2012
(f) The text signed outside the Court and attached to the submission dated 3 December 2012
(g) Confirmation of the text of settlement during the hearing held on 21 December 2012

The first three of them were not considered as a proper settlement complying with procedural rules by the Trial Panel and the Appellate Panel previously. Detailed analysis of the reasoning of those Panels for such rejection can be found in the legal reasoning of the judgment in case no SCC-08-0226.

What it worth to remind here is the understanding of the Appellate Panel on how a settlement can be reached incompliance with the procedural rules. The Appellate Panel emphasized the explanation of the Trial Panel on that the minutes of the hearing of 19 May 2009, during which that they made their declarations constitute their settlement but the minutes were signed on different dates by the parties. The Claimant's representative signature bears the dates of 22 June 2009 whereas the Respondent's is dated 8 July 2009. The Appellate Panel attached importance to such different dates of signing of the minutes. In the interpretation of the Appellate Panel, as "the

UNMIK AD No 2008/6 in Section 26.4 requires that such an agreement be in the written form, the wording of this Section implies that an agreement has to be put in writing by the parties outside of the hearing". To quote from that Decision "…*following the written agreement, submitted to the Trial Panel , the Court can close the case, and the parties are free to give execution to their agreement by the legal instruments provided by the law to this extent".*

According to the Appellate Panel, another form of settlement is within the Court is provided for by Article 322 of Law on Contested Procedure (the former LCP), applicable to the proceedings before the SCSC pursuant to Section 70.3 of UNMIK AD No 2008/6. The said Article reads "*the settlement of the parties shall be entered in court records. The settlement is considered made when the parties, upon reading of records to them, sign the records. The parties shall be issued certified copies of the records into which the settlement was entered, should they request so."*

After giving these explanations, the Appellate Panel concluded that in the case at hand the procedure prescribed by above mentioned provision was not followed since the parties signed the minutes on different dates. According to the Appellate Panel, Article 322 of Law on Contested Procedure, as it can be understood by a thorough reading of the law, implies that the agreement shall be made at the same time by the same parties, during the same hearing, who shall sign the agreement before the judge in charge in the public hearing, "upon reading of the records to them".

In any case, the Appellate Panel noted that the parties had expressed their will to settle the dispute and therefore, the Trial Panel should set a hearing in order to investigate the possibility of such settlement to reach pursuant to applicable provisions.

The Appellate Panel remained silent as to non-issuance of the minutes to the parties as requested by the UNMIK Office of the Legal Affairs.

Another point raised by the Appellate Panel was that in any case execution of such settlement does not fall under the jurisdiction of the Special Chamber.

On 20 June 2012, the case was transferred to the jurisdiction and competence of the Ownership Panel as a result of the Presidium Decision No 19/2012. The Ownership Panel, based on the request of the UNMIK Office of the Legal Affairs and taking into account the Appellate Panel Decision held another hearing on 16 October 2012.

In the session held on 16 October 2012; the text of the settlement made in writing and signed outside of the Court was read. The representative of UNMIK and The Respondent Monastery confirmed the text of the settlement read to them. The parties were ordered to provide the Court with the lacking documents showing the legal personality of the Monastery of Deçan/Dečani and confirmation of the right of Monastery to settle and waive any right in respect to any cadastral parcel that was subject matter of the claims without need to be represented by any other institution is Kosovo or Serbia and its representation by the Abbot, Father Sava Janic, as the authorizer giving the power of attorney to lawyer Mr. Aleksander Radovanovic. This owes to the fact that, according to the text of the settlement, the Monastery is not only accepting the waiving of the claims by UNMIK for some parcels but also waiving the rights over some other parcels in favor of the SOEs or private person(s) which are outside of the Special Zone.

With the order of the Presiding Judge of 23.10.2012, the minutes of the session held on 16.10.2012 were served on the parties that presented the settlement. They were invited to check and sign the minutes in the presence of the Presiding Judge on the same date for the confirmation of the settlement. On 15.11.2012, the representative of UNMIK Office of Legal Affairs and Father Sava

Janic, the Abbot of the Monastery of Deçan/Dečani, and the lawyer of the Monastery signed the minutes at the same time.

The missing documents as well as the translation into Serbian of the settlement were presented by the parties within the time limit provided by the Presiding Judge during the session of 16 October 2012. Furthermore, the Panel asked clarification whether the settlement left behind some parcels beyond the limit of the settlement since some parcel numbers that are the subject matter of the claim was not mentioned in the settlement. The parties provided clarification and confirmed their settlement once again in the hearing held on 21 December 2012.

In the session held on 21 December 2012, the lawyer of the SOE objected to the settlement reached by UNMIK and Deçan/Dečani Monastery. It argued that PAK should have been invited to the hearing and representing the SOE. He further argued that a representative should work in favor of interest of his clients not against.

As to the procedural rules, in the interpretation of the Specialized Ownership Panel, the presentation of the settlement right now, even the one expressed in the hearing of 19 May 2009 was complete. The Presiding Judge of then stated that the Court would prefer a text in writing and gave them time limit to be clear on the content of the settlement. However, the representative of the Monastery clearly stated that they did not need time for this and accepted the offer made by the representative of the UNMIK Office of the Legal Affairs. The offer and the acceptance of the offer are sufficient to decide that an agreement is concluded. This is the basic principle of laws regulating contracts or obligations in many legal systems on how to reach an agreement/contract. In any case, the free will of the parties were put in the minutes on 19 May 2009 and those minutes were signed by them despite the signing of the minutes by parties took place at different times. Nonetheless, the Panel as mentioned above considers itself bound with the interpretation of the Appellate Panel on how to reach a settlement.

Article 416 of the current Law on Contested Procedure (Law No 03/L-006) regulates the form of settlement and defines the way to reach it. According to this Article; the settlement is included in the minutes of the meeting. The court settlement is concluded at the moment when the parties read minutes of the meeting on settlement and sign it. Certified copy of the minutes of the meeting, including settlement, is given to the parties. Such settlement presented in the session held on 16 October 2012 and the supplementing text attached to the submission of 3 December 2012 signed outside of the Court and confirmed during the hearing held on 21 December 2012 is considered as in line with the Decision of the Appellate Panel and made in compliance with Article 26 of UNMIK AD No 2008/6 and that of Annex of SCL and that such settlement has been completed and is in compliance with Article 416 of LCP as well.

5. Lack of counter claim

The UNMIK Office of the Legal Affairs asked for issuance of an order for a change in the books of Cadastre to reflect the settlement in the cadastral records. However, there is no counter claim or a separate claim filed by the Respondent Deçan/Dečani Monastery for the verification of the ownership right over the lands in question and/or registration of them in the records of Cadastre under its name up to now.

The settlement and binding effect of such settlement on parties reached in a pending proceeding is a different legal concept than an acceptance of a claim or a counter claim. Without having a counterclaim, the Court can only decide on the effect of the settlement over the relief asked in pending proceedings in relation to a claim.

What the Specialized Panel can decide is limited to the claim of the SOE. It can either grant the reliefs sought therein or reject it. Considering that there is no separate claim or counter claim filed by the Respondent Monastery which would be subject to certain limit of time that already expired, the Panel can take a stance only on the request of the Claimant in the current proceedings. The Court settlement can be reached only if charges are raised (Article 418.1 of LCP).

6. The reliefs that can be granted based on the settlement

The only relief that can be granted based on this settlement in the case at hand is to reject the claim for some parcels Article 26 of UNMIK AD No 2008/6 or of Annex of the Special Chamber Law does not explicitly state what kind of actions should be taken by the Panel upon a settlement. This provision only stipulates that such a settlement is binding on the parties but nothing else. The matter is covered with in Law on Contested Procedure.

According to Article 417 of LCP, during the entire court procedure, "the court considers if it is going along side with the charges if it came to a settlement, and if it considers the charges are addressed, rejects the charges". The cadastral parcels over which the Monastery waived its rights are already registered under the name of the SOE accordingly no change is needed in the Cadastre. Based on the settlement, now the Panel verifies the ownership right of the Claimant over these parcels cannot be challenged by the Monastery in future. Thus, only determination that can be made now by the Court as to this settlement is to reject the claim as ungrounded.

The rest is not in the competence of the Specialized Panel. Nor there is a counter claim or a separate claim filed by the Respondent to be joined with this one at hand to acquire the ownership right over the lands in question or asking the verification of the ownership or registration of them under its name.

7. The execution of the settlement

The representative of UNMIK Office of Legal Affairs filed a submission on 19 November 2012 asking for certified copy of the minutes of the session held on 16 October 2012 as well as issuance of an order to the Cadastre instructing it to register the cadastral parcels in dispute under the name of the Respondent Monastery. The minutes of the said hearing already provided and the certified ones will also be provided to the parties and served on them as attached with this judgment.

As for the request for issuance of order for the change in Cadastre to enable the execution of their settlement reached between UNMIK and Monastery:

According to Article 414 of Law on Contested Procedure (Law No 03/L-006);

In court settlement the entire charge or just a part of it can be included in it. The court brings an order regarding legal settlement. However, the parties cannot reach the settlement through court if the charge has to do with the rights they do not freely possess (Article 3, paragraph 3 of LCP). In case that case, the parties come to an agreement on the rights they do not freely possess, the court will include in the minutes of the hearing the agreement between parties which can later be evaluated by the appeal court for its validity Article 414.4 of LCP). Thus, the settlement reached by parties can be made subject to an appeal and third parties may still claim that the rights are not the ones the parties freely possess.

Otherwise, such settlement is binding on the parties in accordance with Article 26 of Annex of the Special Chamber Law, the explicit provision which does not require the application of LCP, either in this sense read in conjunction with Article 14 of Special Chamber Law and/or Section 70.3 of UNMIK AD No 2008/6.

Nonetheless, execution of such settlement does not fall under the jurisdiction of the Special Chamber. The Special Chamber does not have jurisdiction over the execution of even its own decisions or judgments. The regular courts have jurisdiction over execution requests. The binding nature of settlement between the parties does not change this fact.

If the parties wish to execute their settlement, they are free to take necessary actions before the administrative authorities by means of presenting the certified minutes signed by them as to their settlement reached before the Special Chamber in this case and verified and delivered on them by the Court together with this Judgment. In case of non-compliance of the administrative authorities to their settlement, they may present their challenges within the administrative procedure.

Or else, they may ask for execution of this judgment before the competent regular court if and when it becomes final. It is worth to state that such execution request still would fall outside of the jurisdiction of the Special Chamber.

The Costs

The parties did not take a stance as to the costs. Thus, no party asks to be reimbursed. As to the court fees, the Panel decides that no imposition on the cost needed as there is no written court schedule yet approved by the Kosovo Judicial Council in accordance with Article 57.2 of Annex of the SCL and the matter is solved with settlement.

Legal Advice

The settlement reached by the parties is binding on them in accordance with Article 26 of Annex of SCL. Such settlement can only be challenged by them under the conditions stipulated in Article 418.2 of LCP.

In case any person claiming that his/her/its procedural rights had been infringed or that he/she/it has substantial rights over the subject matter of this case or intending to challenge the settlement reached; the Panel reminds that the appeal procedure is as follows:

Pursuant to Article 10.6 of the Special Chamber Law, may file an appeal against this judgment is to be in writing to the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters within twenty-one (21) days from the receipt of this decision or being aware of it. According to the same Article the appeal has to be served on the other parties within the same time limit by the appellant and proof of service is to be attached to the appeal. The Specialized Panel, in this regard, reminds also the provision of Article 59 of the Annex. The Appellate Panel may reject the appeal, thus this Judgment will become final, if the parties fails to comply with the provision of Article 10.6 of the Special Chamber Law and Article 59 of the Annex within the prescribed time period.

Whether the appeal of those who claim such interest is admissible or not is to be assessed by the Appellate Panel.

Esma Erterzi,

Presiding Judge, EULEX