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MONITORING DEPARTMENT/ RULE OF LAW DIVISION
Legal System Monitoring Section

Privatization in Kosovo:

Judicial Review of Kosovo Trust Agency Matters by the Special Chamber of the Supreme Court of Kosovo

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

This report analyses privatization and the judicial review of privatization decisions in Kosovo in light of international human rights standards.[1] It describes the rules governing the Kosovo Trust Agency (the "Trust Agency"), the institution charged with the privatization process, the privatization process and the Special Chamber of the Kosovo Supreme Court on Kosovo Trust Agency Related Matters (the "Special Chamber"), which is the judicial body with jurisdiction to review privatization matters. In addition, the report reveals concerns arising from direct monitoring by the OSCE Mission in Kosovo (the "OSCE") of cases before the Special Chamber.[2]

The Trust Agency transfers certain assets and liabilities of socially-owned enterprises to newly-formed subsidiaries, and then sells the shares of those subsidiaries in public auctions. It liquidates the remaining enterprises and assets and, as required by the relevant UNMIK Regulations, applies the proceeds to pay owners and creditors on liquidation, as well as to make certain statutory payments to eligible former and current employees of the enterprise in question.

The OSCE is concerned by the complexity of the Regulations and Administrative Directions related to the privatization process. Also, the rules sometimes lack detail and do not clarify important concepts, such as that of a trust. The report analyses legal protection of employees and suggests that the Trust Agency makes its operational policies and certain other information available to the public.

The legislative rules governing the privatization process stipulate that the Trust Agency may sell property owned by third parties and only must pay compensation to the owners from the sales proceeds. This may violate international human rights standards -- such as Article 1 of Protocol 1 to the European Convention on Human Rights (the "Convention") -- as privatization may result in expropriation without the necessary safeguards and adequate compensation. It may also have led to confusion among parties whose ownership claims are rejected. Recently, the Special Chamber ruled that certain of the legislative provisions concerning privatization violate, and are superseded by, Article 1 of Protocol 1, and Article 6 of the Convention.

The report also summarises the rules governing proceedings before the Special Chamber and identifies shortcomings.

[1] International human rights standards, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), are considered directly applicable in Kosovo pursuant to UNMIK Regulation No. 2001/9 On a Constitutional Framework for Provisional Self-Government in Kosovo, Section 3.2 (b) and 3.3, as amended, and UNMIK Regulation No. 1999/24, Section 1, as amended by UNMIK Regulation No. 2000/59.

[2] Pursuant to UN Security Council Resolution 1244, the OSCE has the mandate to monitor the Kosovo justice system for compliance with domestic law and international human rights standards. This is the first OSCE report based on monitoring of the Special Chamber of the Kosovo Supreme Court on Kosovo Trust Agency Related Matters. The OSCE began monitoring criminal cases in 1999, and extended its monitoring to civil cases in 2004.

Based on direct monitoring of the Special Chamber and review of sample decisions, the OSCE notes shortcomings such as the failure to publish decisions of the Special Chamber, the incorrect assumption of jurisdiction by regular courts of cases which should be heard by the Special Chamber, and poor performance by attorneys before the courts.

The report concludes with a number of recommendations to the legislature, Special Chamber, Trust Agency, and other relevant actors.

I. INTRODUCTION

Privatization in Kosovo is the redistribution of socially owned assets to private individuals or enterprises. It is a legally complex and politically charged process that will have long-term effects on the economy. It affects many former and current owners and employees. Some owners or employees may receive windfalls, while others nearly nothing. There is also an ethnic component, as individuals from different communities may argue that past or present discrimination has affected their ability to benefit from privatization. It will impact the potential "crown jewels" of Kosovo, such as the Trepca mining conglomerate and the ski resort in Brezovica/Brezovicë. It also affects many hotels, restaurants, land holdings and small businesses.

Privatization also raises emotional issues from the past: confiscations, nationalizations, the creation of socially owned property and later transformations of businesses. When socially owned property is privatized, there may be property claims from individuals or their descendants who owned private property prior to its seizure or following its transformation. The situation in Kosovo is further complicated because many property records have disappeared as a result of the 1999 conflict.

The importance of the privatization process is reflected in that the Special Representative of the Secretary General holds the exclusive power to administer enterprises and property. The privatization process has been delegated to the Trust Agency and disputes are generally submitted to the Special Chamber.

UNMIK Regulation No. 2008/4 amends UNMIK Regulation No. 2002/13 On the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters effective 31 May 2008. The most important implications of these amendments include increasing the number of judges on the Special Chamber and creating a right of appeal. It is expected that other legislation (such as the Administrative Direction on the Establishment of the Special Chamber) and the Regulation and Administrative Direction on the Establishment of the Kosovo Trust Agency will be amended as well.

II. HISTORICAL BACKGROUND, EXPROPRIATIONS, AND SOCIALLY OWNED ENTERPRISES

A. Expropriations, Social Ownership, Privatizations

Successive waves of expropriations, nationalizations, socializations and transformations which occurred during the Yugoslavia period after 1945 significantly complicate the privatization efforts in Kosovo.[3]

[3] See Kosovar Institute for Policy Research and Development, *The United Nations Mission in Kosovo and the Privatization of Socially Owned Property, a critical outline of the present privatization process in Kosovo*, Prishtinë/Priština, June 2005, pages 5-6, quoting V. Misajlovski: *On the Use of Objects belonging to Socially-Owned Property*, in: Zakonitost, Zagreb, 1958, page 438 and following. See also M. Tondini, *The privatization system in Kosovo, Rising towards an uncertain future*, Pristina, December 2003. Some of the relevant laws are: Kosovo Law on Land for Construction, Articles 38 and 39 (Official Gazette of Socialist Autonomous Province of Kosovo No. 14/80); Federal Law on Companies, Articles 75-79 (Official

After the Second World War, Yugoslav authorities confiscated private property of "enemies" and "collaborators". Later, the government nationalized agricultural land that exceeded the legally permissible size for private ownership.[4] Also, the Constitution of the People's Federal Republic of Yugoslavia of 1953 classified all natural resources as state property.

In the 1960s, workers councils replaced state control and social property replaced nationalized property. This reached its peak with the Constitution of the Socialist Federal Republic of Yugoslavia of 1974 which provided that all means of production and other means of collective labour, the output of collective labour and natural resources, and other assets designated for public use were social property. Social property was meant as a legal category of its own, different from private and state property. The main feature of social property was that private holders of social property did not acquire ownership, but rather a right of use of an asset qualified as social property. Enterprises were Socially Owned Enterprises (SOEs)[5] and the SOEs used socially owned assets. The supreme title-holder of social property was the society.[6]

Past confiscation, nationalization and socialization complicate the present privatization as there is uncertainty surrounding these properties. Arguably, some people are entitled to return of a property or financial compensation because they previously owned a property which had been illegally expropriated or became social property, and now belongs to an SOE which the Trust Agency privatizes or liquidates.[7] However, to date, there is no law regulating claims for restitution of previously expropriated property as has been the case in transition countries of Eastern Europe. The absence of a law on restitution has significantly increased the difficulties, complexities and problems for the privatization

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Gazette of the Socialist Federal Republic of Yugoslavia No. 77/88); Federal Law on Compulsory Settlement, Bankruptcy and Liquidation, Article 135 (Official Gazette of the Socialist Federal Republic of Yugoslavia No. 84/89).

[4] Official Gazette of the People's Federal Republic of Yugoslavia No. 64/45.

[5] UNMIK Regulation No. 2005/18, Section 3, defines a Socially Owned Enterprise as "(i) a legal entity (other than a Publicly-Owned Enterprise), which, at the time of its founding, fell within paragraphs 1 or 2 of Article 2 of the Law on Enterprises, or (ii) a legal entity (a) which at the time of its founding fell within paragraph 3 of Article 2 of the Law on Enterprises, and (b) where the majority of its assets are in social ownership or where the majority capital comprises social capital." Article 2 of the Yugoslav Law on Enterprises, published in Official Gazette of the Socialist Federal Republic of Yugoslavia No. 77/78, 40/89, 46/90, states: "1. The following shall be in social ownership: socially-owned enterprises, public enterprises, joint-stock companies and limited liability companies when they operate with assets in social ownership. 2. The following shall be in cooperative ownership: cooperative enterprises, joint-stock companies, limited partnerships, and companies with unlimited joint and several liability of their members, if assets in cooperative ownership are invested in them. 3. The following shall be in mixed ownership: joint-stock companies, limited liability companies, limited partnerships, companies with unlimited joint and several liability of their members, when assets in various forms of ownership are invested in them – social ownership, cooperative ownership, citizens' ownership, ownership of civil legal entities, and in ownership of foreign persons."

[6] Arguably, there are three entities that could be considered as organs representing the society: (1) the State (i.e., the Federation of Yugoslavia, the Republic of Serbia or the Province of Kosovo), (2) the municipalities or (3) the workers councils. For more information, see Kosovar Institute for Policy Research and Development, *The United Nations Mission in Kosovo and the Privatization of Socially Owned Property*, pages 5-6.

[7] The question whether previous ownership will be recognised depends on several factors, such as under which law the property was taken, whether it was taken in accordance with that law and whether that law provided for a time limitation to challenge the taking. See, e.g., minutes of the Special Chamber during hearing of 2 August 2007 in the case *Mehmet Shiroka et al. v. KTA*, SCC-07-0030.

programme in Kosovo. The Trust Agency has called for a restitution law in Kosovo for several years in order to seek to address certain of these difficulties**.**

Between 1989 and 1999 the Federal Republic of Yugoslavia - and later the Republic of Serbia - introduced "Interim Measures"[8] to change the management, workers councils and the workforce of SOEs. Moreover, a form of privatization occurred through transactions referred to as transformations.[9] Through transformations, some persons (often Serbs from outside Kosovo as well as Kosovo Serbs) acquired private ownership rights (under the law applicable at the time in Kosovo) in Kosovo SOEs. Privatization by the Trust Agency, as set out in the applicable UNMIK Regulations, could result in the expropriation of property of foreign nationals and Kosovo Serbs who were beneficiaries of such transformations conducted by Serbian authorities.[10] Furthermore, although the legislation specifies when the transformations should be recognized (i.e. when they were based on and carried out in full compliance with applicable law and were neither discriminatory nor in breach of the principles of the Convention),[11] it is unclear exactly when these requirements are met.

B. The Administration of Socially Owned Enterprises

Since 1999, UNMIK has focused on property rights issues, including those related to socially owned property, in Kosovo.[12] The Constitutional Framework for Provisional Self-Government in Kosovo[13] provides that certain powers will not be included in the powers of the Provisional Institutions of Kosovo but will remain exclusively in the hands of the Special Representative of the Secretary General. Among these powers are the authority to administer public, state and socially owned property, the regulation of public and socially owned enterprises, and the definition of the jurisdiction and competence for the resolution of commercial property disputes.[14]

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[8] Law on Actions of Republic Authorities in Special Circumstances, Official Gazette of the Socialist Republic of Serbia No. 30/90, and the Law on Working Relations in Special Circumstances, Official Gazette of the Socialist Republic of Serbia No. 40/90.

[9] Law on Conditions and Procedure for Transformation of Socially Owned Property in Other Forms of Property (as amended), Official Gazette of Socialist Republic of Serbia No. 48/91, 75/91 and 51/94.

[10] See Kosovar Institute for Policy Research and Development, *The United Nations Mission in Kosovo and the Privatization of Socially Owned Property*, 2005, page 11.

[11] UNMIK Regulation No. 2005/18, Section 5.3 (b).

[12] UNMIK Regulation No. 1999/01 of 25 July 1999, "On the Authority of the Interim Administration in Kosovo", as amended by UNMIK Regulation No. 2000/54, provides in Section 6:

'6.1. UNMIK shall administer movable or immovable property which is in the territory of Kosovo […], where UNMIK has reasonable and objective grounds to conclude that such property is:

i. property of, or registered in the name of, the Federal Republic of Yugoslavia or the Republic of Serbia or any of their organs; or
ii. socially owned property".

"6.2 Administration by UNMIK of any such property […] shall be without prejudice to the right of any person or entity to assert ownership or other rights in the property in a competent court in Kosovo, or in a judicial mechanism to be established by regulation."

UNMIK Regulation No. 1999/1 is deemed to have entered into force as of 10 June 1999, the date of adoption of UN Security Council Resolution 1244 (1999); see Section 7.

[13] UNMIK Regulation No. 2001/9 On a Constitutional Framework for Provisional Self-Government in Kosovo of 15 May 2001.

[14] UNMIK Regulation No. 2001/9 On a Constitutional Framework for Provisional Self-Government in Kosovo of 15 May 2001, Section 8.1(q), (r) and (u).

UNMIK has promulgated legislation and created two institutions - the Trust Agency and the Special Chamber - related to the administration and privatization of public, state and socially owned property.

III. THE LEGAL FRAMEWORK ON THE KOSOVO TRUST AGENCY

The basic document creating the Trust Agency and describing its functions is UNMIK Regulation No. 2005/18.[15]

A. The Trust Agency administers Socially Owned Enterprises

The Trust Agency has the authority to administer publicly owned enterprises and SOEs registered in Kosovo as of 31 December 1988 and socially owned property located in Kosovo as of 22 March 1989.[16] When doing so, the Trust Agency must act in the interest of the owners of the SOEs and the development of Kosovo as a whole and of the welfare of its inhabitants.[17]

Under its authority, the Trust Agency has wide management powers.[18] It may also establish one or more subsidiaries of SOEs[19] owned by those SOEs but administered by the Trust Agency, and transfer part or all of the assets and selected (usually current) liabilities of such SOEs to such subsidiaries.[20] Moreover, the Trust Agency may sell part or all of the shares in such subsidiary on behalf of the SOE[21] and administer the cash proceeds or shares resulting from those sales.[22] The Trust Agency shall hold these proceeds in trust for the benefit of creditors and owners of the SOE.[23]

Usually, most liabilities and employees remain with the SOE so that, after the sale of the subsidiary(ies) the new owner(s) are not responsible for them, and the Trust Agency will

[15] The Trust Agency was created by UNMIK Regulation No. 2002/12 On the Establishment of the Kosovo Trust Agency, which was amended by UNMIK Regulation No. 2005/18. To the knowledge of the OSCE, a new law regulating the Trust Agency, which would replace UNMIK Regulation No. 2002/12 (as amended by UNMIK Regulation No. 2005/18), has been drafted and forwarded to the Kosovo Assembly for consideration.

[16] In addition, the Trust Agency administers publicly owned enterprises and minority stakes in SOEs registered in Kosovo as of 31 December 1988 (see UNMIK Regulation No. 2005/18, Section 5.1).

[17] UNMIK Regulation No. 2005/18, Section 2.2 provides: "[…] the Trust Agency shall (a) administer Enterprises as trustee for their Owners […]" and "(c) carry out other activities to preserve or enhance the value or viability of the activities and take other steps and measures […] which encourage the economic reconstruction an development of Kosovo and the welfare of its inhabitants or those of any specific region." According to the Audit Report of the Office of the Auditor General (December 2006, page 6), this language (introduced by UNMIK Regulation No. 2005/18) has enabled the Trust Agency to include in the privatization conditions guarantees by an investor to employ members of ethnic groups from the local community.

[18] UNMIK Regulation No. 2005/18, Section 6.1.

[19] If the SOE has a wide variety of dissimilar businesses, the Trust Agency may create several subsidiaries.

[20] Under UNMIK Regulation No. 2005/18, Sections 6.1 (p) and (q), the Trust Agency may also transform Publicly Owned (i.e. state owned) Enterprises into Corporations or restructure a Publicly Owned Enterprise into several Enterprises or Corporations and transfer all of the assets of such Enterprise to such Corporation.

[21] The Trust Agency may not do so in the case of Publicly Owned Enterprises (see UNMIK Regulation No. 2005/18, Sections 6.2 and 8.4).

[22] UNMIK Regulation No. 2005/18, Sections 6.1(o), 6.2 and 8.

[23] UNMIK Regulation No. 2005/18, Section 8.6.

liquidate such SOE.[24] If the Trust Agency believes that the assets of an SOE do not form a valuable business, it will not form a subsidiary but simply liquidate the SOE.[25]

For additional information regarding the Trust Agency and SOEs, see Annex I.

B. Sale of Subsidiaries of Socially Owned Enterprises

The procedure governing the sale of the shares in a subsidiary to which all or some of the assets of an SOE have been transferred, is not described in a Regulation but in the Trust Agency's "Rules of Tender for the Spin-Off Privatization".[26] The current standard form of these Rules provides that the shares in the subsidiary will be sold in a public auction based on an "information memorandum" which describes the assets and liabilities of the subsidiary.[27] It is the responsibility of the bidders to perform a "due diligence" investigation of the subsidiary and its assets.[28] The ranking of the bids and bid selection is as follows: the highest bidder may purchase the subsidiary at its bid price. However, if the highest bidder does not proceed, the second highest bidder may purchase the subsidiary at the highest bid price. If the second highest bidder also does not proceed, the third highest bidder may purchase the subsidiary at the highest bid price.[29] Bidders may not change their bids and negotiations regarding the share purchase agreement shall be kept at a minimum.[30] However, according to the Rules of Tender, the Board of the Trust Agency may postpone or cancel the tender at any time and for any reason in its sole discretion.[31]

Since its establishment, the Special Chamber has altered its view of the nature of the Trust Agency and its authority to cancel a tender. Initially, the Special Chamber provided the Trust Agency with wide discretion to cancel a tender. Then, it limited this discretion and noted that the Trust Agency must act fairly. Most recently, the Chamber has classified the Trust Agency as an administrative body and the cancellation of a tender as an administrative decision that must meet the requirements of the Law on Administrative Procedure.[32]

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[24] See http://www.kta-kosovo.org/ (SOEs); see also UNMIK Regulation No. 2005/18, Section 9.
[25] See UNMIK Regulation No. 2005/18, Sections 6.2(c) and 9.
[26] For the text of the Rules of Tender, see http://www.kta-kosovo.org.
[27] Audit Report of the Office of the Auditor General, page 11.
[28] Rules of Tender, Section 4.
[29] Rules of Tender, Section 11. In practice, a distinction is made between ordinary spin-offs and special spin-offs. Special spin-offs take place in the case of large, strategic and significant SOEs with a large number of employees. According to the Audit Report of the Office of the Auditor General, December 2007, pages 9-10 and 12-13, the Trust Agency has a policy of considering any company with at least 150 workers and a potential turnover of € 10 million as being of strategic importance for Kosovo and therefore worthy of special spin off treatment. In the case of ordinary spin-offs, there is normally one round of bidding during the tender and the winning bid is chosen solely on the basis of the highest bid price. In the case of special spin-offs, two rounds of bidding are held and three standard criteria may be applied: (i) bid price (50% of total bid value), (ii) employment guarantees (25% of total bid), and (iii) investment guarantees (25% of total bid). Further criteria are applied in individual cases.
[30] Rules of Tender, Sections 12 and 13.
[31] Rules of Tender, Section 15.1.
[32] Kosovo Assembly Law No. 02/L-28 On the Administrative Procedure, promulgated by UNMIK Regulation No. 2006/33 of 13 May 2006 and entered into force on 13 November 2006.
The following cases show this evolution of legal interpretation:

- In a judgment dated 10 August 2004 (*Osman Mecinaj et al. v. KTA,* SCC-03-0002) the Special Chamber noted without comment that the Rules of Tender leave the Trust Agency discretion to cancel or proceed with the tender, if the requirements of the relevant section of the Rules are met.

C. Ownership

Under UNMIK Regulation No. 2005/18, the Trust Agency need not determine the ownership status of assets of SOEs before privatization. Rather, it is obliged to clarify this issue after the assets are sold, provided, of course, that it has first established that the entity falls within its authority under UNMIK Regulation No. 2005/18 .[33] Consequently, the legislative scheme allows for the Trust Agency disposing of assets owned by a third party. This is discussed in Chapter V.

D. Reorganization of Socially Owned Enterprises through Moratorium Proceedings

If an SOE cannot meet its obligations for more than six months or its liabilities exceed its assets, and if the Trust Agency believes that the SOE can continue its business as a result of a reorganization, the Trust Agency may apply for the reorganization of the SOE. The Special Chamber shall order reorganization proceedings if several conditions are satisfied (the "Moratorium Decision").[34]

The aim of the reorganization is to protect the SOE and its assets from creditors. During the moratorium, all actions to satisfy any claim against the SOE or its assets are suspended and shall only continue with the permission of the Special Chamber.[35]

The Special Chamber appoints one or more Administrators of the SOE.[36] The Administrator shall be independent.[37] He or she has wide powers. However, the approval of the Trust Agency and/or the Special Chamber is required for some actions.[38]

- In a judgment dated 10 October 2006 (*Grand Group Partnership, JSC v. KTA*, SCC-06-0176), the Special Chamber held that the Trust Agency must follow the normal principles of law which include the obligation to abide by its own Rules of Tender and treat parties equally. The tender process does not create a contractual relationship, but rather an obligation on the Tenderer to act fairly. The Rules of Tender bind the bidders, but also impose a requirement on the Trust Agency to implement them equally on all bidders.
- In a judgment dated 16 May 2007 (*Doni private company v. KTA*, SCC-06-0436), the Chamber quoted several articles of the Law on Administrative Procedure (1986) and stated that this law applies to the Trust Agency under UNMIK Regulation No. 1999/24:
  "the Chamber has no doubt that the [Trust Agency] falls within the definition of an administrative organ. […] The [Trust Agency] took the decision to disqualify the claimant from the tender-bid without any verification. This action goes against the provisions of Section 135(1) of the [Law on Administrative Procedure]." Regarding the Trust Agency's alleged sole discretion to disregard any tender: "the Chamber notes that the concept of absolute discretion of administrative authorities has suffered various inroads in law over the last years in the interest of legality, public interest and transparency as well as on the basis of fundamental human rights. The [Trust Agency] cannot disregard all rules […] Indeed any administrative decision is to be fair and reasonable as well as based on the correct argumentation. Absolute administrative discretion is now a myth and the administrative authority needs to prove that its decisions are taken on the basis of what makes legal sense."
  Thus, in its May 2007 decision, the Chamber classified the Trust Agency as an administrative organ.

[33] UNMIK Regulation No. 2005/18, Section 5.3.
[34] UNMIK Regulation No. 2005/48, Sections 3 and 4.
[35] UNMIK Regulation No. 2005/48, Section 5.1.
[36] UNMIK Regulation No. 2005/48, Section 8.
[37] According to UNMIK Regulation No. 2005/48, Section 10, "[t]he Administrator shall be independent of the Agency, the Enterprise, the creditors and the PISG […]".
[38] UNMIK Regulation No. 2005/48, Sections 10-15.

A creditors meeting shall discuss and vote upon one or more proposed reorganization plans.[39] The Administrator shall submit the plans voted on to the Special Chamber which shall schedule a hearing and decide on those plans.[40]

Approval of a plan by the Special Chamber means that all claims against and obligations of the SOE are reformulated and governed by the terms of the confirmed reorganization plan. However, the Administrator may later dismiss a claim or make a final evaluation of the claims.[41]

Following further proofs of claims[42] the Administrator shall submit a final list of all claims, classified in classes of priority, to the Special Chamber. Claims shall be paid according to priority by class.[43]

The Special Chamber may order closure of the reorganization proceedings and the confirmed reorganization plan.[44] Thereafter, all debts due from the SOE arising prior to the date of the Moratorium Decision are extinguished by operation of law and any action to collect such extinguished debts shall be prohibited except as the Special Chamber may order. Moreover, the SOE shall be considered financially recovered and may continue business activities without further restriction or supervision.[45]

To date, on application by the Trust Agency, the Special Chamber has agreed to the commencement of reorganization of only one company: Trepca (and SOEs related to it).[46] However, an Administrator still has not been appointed.

E. Liquidation of Socially Owned Enterprises

If the Trust Agency believes that the (remaining) assets of an SOE cannot be revitalized into a viable business, it will initiate a voluntary liquidation of a SOE or any part thereof.[47]

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[39] UNMIK Regulation No. 2005/48, Sections 24.3 and 25.
[40] UNMIK Regulation No. 2005/48, Sections 27.1 and 27.3.
[41] UNMIK Regulation No. 2005/48, Section 28.
[42] UNMIK Regulation No. 2005/48, Sections 30 and 31.
[43] UNMIK Regulation No. 2005/48, Section 37.
[44] This may be done upon receipt of the final report and an application from the Administrator seeking closure of the reorganization. See UNMIK Regulation No. 2005/48, Sections 39-41.
[45] UNMIK Regulation No. 2005/48, Section 42.
[46] On 2 June 2005, the Special Representative of the Secretary General issued Administrative Direction 2005/7 for the stay of all enforcement actions against assets or Enterprises that are part of Trepca, based on judgments of the Special Chamber or other courts, during a period of three months. This stay has been extended. On 9 March 2006, the Special Chamber issued a moratorium decision which states, *inter alia*: "As of the date of this Moratorium Decision all actions, proceedings or acts of any kind aimed at enforcing or satisfying any claim against Trepca. Under KTA Administration as defined above, or its assets shall be suspended and shall only continue with the permission of this Court in accordance with section 5.2 of UNMIK Regulation No. 2005/48."
[47] The Trust Agency may do so if it believes that liquidation is "in the interest of the creditors and/or owners" of such SOE, see UNMIK Regulation No. 2005/18, Section 9.1. The Trust Agency shall conduct the liquidation in accordance with the Regulation on Business Organizations (UNMIK Regulation No. 2005/18, Section 9.1 referring to UNMIK Regulation No. 2001/6), and the Regulation on reorganization and liquidation of Enterprises (UNMIK Regulation No. 2005/48, Section 43.4). Moreover, UNMIK Regulation No. 2005/48, Section 43.1 provides for liquidation proceedings ordered by the Special Chamber in certain events related to reorganization proceedings. In such court ordered liquidation proceedings the

1) Possible suspension of legal action and rescission of transactions

Unlike the moratorium (which is ordered by the Special Chamber), liquidation (which is initiated by the Trust Agency) does not by law suspend legal action of creditors against the SOE. Until recently, to suspend legal action against an SOE, the Trust Agency was required to file an application with the court where the legal action had been initiated against the SOE.[48] A recent legal change has made the suspension of claims against SOEs in liquidation easier. Now, a notification by the relevant Liquidation Committee to the Special Chamber that a particular SOE is in liquidation has the effect of a moratorium[49] and suspends all actions to satisfy any claim against that SOE in all courts in Kosovo. Pursuant to the same amendment, creditors who do not submit evidence of their claims to the Liquidation Committee within two months of the notification of the liquidation will not benefit from distributions in the liquidations.[50] However, if a creditor provides sufficient justification for late filing, the Liquidation Committee is required to admit the claim submitted after the deadline.[51]

During liquidation of an SOE the Trust Agency can request that the Special Chamber rescind any transaction of the SOE if the transaction occurred less than 90 days before the date of the second publication of the notice of the liquidation.[52]

2) Liquidation Committees

In any liquidation, the Trust Agency appoints a Liquidation Committee.[53] Liquidation Committees are responsible only to the Board of the Trust Agency and shall not be liable to any other party.[54] None of the Liquidation Committee, the Trust Agency and their employees shall be liable for losses incurred by a creditor, the SOE, any employee or any other party for consequences of their decisions provided that the Liquidation Committee has exercised reasonable care and diligence.[55]

Liquidation Committees have all powers of the management and control bodies of the SOE,[56] including the power to give instructions to the management of the SOE, to take possession of or collect property, to sell or lease assets and to employ or dismiss

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functions of the Administrator are exercised by a Liquidation Committee, appointed by and responsible exclusively to the Board of the Trust Agency. See UNMIK Regulation No. 2005/48, Section 43.3 and Administrative Direction No. 2007/1, Sections 3 and 4. To the knowledge of the OSCE, there have not been any court ordered liquidations.

[48] UNMIK Regulation No. 2005/18, Section 9.3. This Section also describes the documents that, must be submitted as part of the application.

[49] Administrative Direction No. 2007/1, Section 13.1.

[50] Administrative Direction No. 2007/1, Section 14, refers to UNMIK Regulation No. 2005/48, Section 43.1(d)(ii). This reference should probably be to Section 43.3(d)(ii) which provides that creditors who do not file their claims within 2 months of the second notice of the liquidation shall not benefit from the distribution of the proceeds of the liquidation.

[51] Administrative Direction No. 2007/1, Section 14.2. This provision (creating an obligation) apparently overrides UNMIK Regulation No. 2005/48, Section 43.1, according to which the Liquidation Committee "may to its sole discretion" admit a claim submitted after two months, even if the creditor provides sufficient justification for late filing.

[52] UNMIK Regulation No. 2005/18, Section 9.4.

[53] UNMIK Regulation No. 2005/18, Section 9.2, and Administrative Direction No. 2007/1, Section 3.

[54] Administrative Direction No. 2007/1, Section 4.

[55] UNMIK Regulation No. 2005/48, Sections 10.3 and 10.4, referred to by Sections 43.3 and 43.4.

[56] UNMIK Regulation No. 2005/18, Sections 9.1 and 9.2.

employees of the SOE.[57] However, the Liquidation Committee must obtain the approval of the Trust Agency or of the Special Chamber for certain categories of actions.[58]

All potential creditors must submit their claims and creditor information to the Liquidation Committee.[59] The Liquidation Committee shall treat registration or delivery of claims to the Trust Agency as suspending the running of the limitation period from the date on which the claim was registered or delivered to the Trust Agency.[60]

The Liquidation Committee may convene a creditors meeting and appoint a creditors committee to assist the Liquidation Committee. Notwithstanding motions passed during a creditors meeting, the Liquidation Committee shall not be compelled to take any specific course of action.[61]

The Liquidation Committee shall notify any affected creditor in writing if it rejects a claim, giving a reasoned explanation for the rejection or reduction of the claim. The affected creditor can apply to the Trust Agency for a review of the decision.[62]

3) Review of decisions of Liquidation Committees by Review Committee and Special Chamber

Following a 2007 amendment, the Trust Agency has established an internal Review Committee, independent of the Liquidation Committees, to review the decisions and actions of the Liquidation Committees that are challenged by an aggrieved party. The decisions of the Trust Agency shall be based on the recommendations of the Review Committee and are subject to review by the Special Chamber.[63]

The Liquidation Committee shall submit a final list of claims to the Board of the Trust Agency for approval before payment.[64] Claims of creditors shall be satisfied according to their classes and in the order specified in UNMIK Regulation No. 2005/48.[65]

After completion of the liquidation proceedings and upon application of the Liquidation Committee, the Special Chamber closes the liquidation if it is satisfied that all assets of the SOE have been liquidated and all funds realized have been substantially paid out.[66] The SOE is then considered legally dissolved and non-existent and no further creditor or ownership claims may be enforced against the Trust Agency or the assets of the former SOE.

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[57] UNMIK Regulation No. 2005/48, Section 11.
[58] See, e.g., UNMIK Regulation No. 2005/48, Section 15 (referred to by Sections 43.3 and 43.4), Administrative Direction No. 2007/1, Section 11, and UNMIK Regulation No. 2005/48, Section 13.2 (referred to by Administrative Direction No. 2007/1, Section 13.4).
[59] Administrative Direction No. 2007/1, Section 13.2.
[60] Administrative Direction No. 2007/1, Section 7.
[61] Administrative Direction No. 2007/1, Section 6.
[62] Administrative Direction No. 2007/1, Section 8.
[63] Administrative Direction No. 2007/1, Section 9.
[64] Administrative Direction No. 2007/1, Section 12 and UNMIK Regulation No. 2005/48, Section 35.
[65] After certain priority claims (including expenses of the Special Chamber, the Liquidation Committee and for the operation of the business after the start of the liquidation) follow (i) entitlements of employees to 20% of the proceeds (see below); (ii) secured claims realised from assets; (iii) claims of ownership of specific assets including real assets; (iv) wage claims up to the start of the liquidation; (v) unsecured claims and (vi) claims of owners of the SOE; UNMIK Regulation No. 2005/48, Section 44.
[66] Administrative Direction No. 2007/1, Section 17 and UNMIK Regulation No. 2005/48, Section 45.

The Trust Agency has not yet finalized any of the liquidations it initiated.

F. Transformation of Right of Use of Property into Leasehold

UNMIK legislation[67] provides that any right of use to property (i.e. land and buildings thereon classified as "immovable socially owned property") registered in the name of an SOE which is transferred to a subsidiary of the SOE as part of a reorganization or which is included in the liquidation of an SOE, shall be transformed into a leasehold upon transfer or liquidation. Such statutory leasehold shall include the right to possess, use, transfer and encumber the property to third parties (always subject to the leasehold).[68]

The 99-year leasehold is created in privatizations and liquidations.[69] Transfers and encumbrances must be done in writing and must, like the transformation of a right into a leasehold, be registered.[70] A leasehold shall not be affected by any change to the underlying ownership of the property and can only be expropriated under the same conditions and procedures provided for expropriation of ownership of real property.[71]

G. Rights of Eligible Employees of Socially Owned Enterprises

1) Eligible employees entitled to 20% of proceeds

Privatization and liquidation affect the special status of employees of the SOEs concerned. For this reason, employees of SOEs that are privatized are entitled on a priority basis to a 20% share of the proceeds from the sale of shares of a subsidiary of an SOE that is privatized and of land assets that are subject to a voluntary liquidation.[72]

The Trust Agency shall place the reserved amount in a special escrow account[73] for distribution by the Federation of Independent Trade Unions to eligible employees.[74]

2) Lists of eligible employees ("employee lists") and review

Employees can only participate in the 20% share if they are registered as an employee with the SOE at the time of privatization[75] or initiation of the liquidation[76] and have been

[67] UNMIK Regulation No. 2003/13, Sections 2–9, as amended by UNMIK Regulation No. 2004/45, Section 2, and implemented by Administrative Direction No. 2005/12, Sections 2 and 3.
[68] UNMIK Regulation No.2003/13, Section 2.1, as amended by UNMIK Regulation No.2004/45, Section 1.
[69] UNMIK Regulation No.2003/13, Sections 1 and 3.1.
[70] UNMIK Regulation No.2003/13, Sections 3.2 and 6.
[71] UNMIK Regulation No. 2003/13, Sections 8 and 9. The Trust Agency has developed a practice whereby it provides the buyer in a privatization or liquidation with the documentation with which the buyer can register the leasehold with the cadastre.
[72] UNMIK Regulation No. 2003/13, Section 10, as amended by UNMIK Regulation No.2004/45, Section 10, and implemented by Administrative Direction No. 2005/12, Section 4.
[73] UNMIK Regulation No. 2003/13, Section 10.5 and Administrative Direction No. 2007/1, Section 15.
[74] According to UNMIK Regulation No. 2003/13, Section 10.5, 75% shall be distributed in equal amounts to each eligible employee and 25% shall be distributed in amounts proportionate to the number of months the eligible employee served within the SOE.
[75] According to Administrative Direction No. 2005/12, Section 4.2, if the Trust Agency disposes of the assets of an SOE through both the sale of shares in a subsidiary and a sale of assets in liquidation, it shall issue a single list of eligible employees. The eligibility requirements shall be determined on the basis of the earlier of the time of privatization and the initiation of the liquidation of the SOE. According to

on the payroll of the SOE for not less than three years (at any time). To determine who is entitled to these benefits, the representative body of employees in the SOE, in co-operation with the Federation of Independent Trade Unions of Kosovo, shall establish on a non-discriminatory basis and submit to the Trust Agency a list of eligible employees (the "employee list").

In the past, the Trust Agency did not review these lists and employees could file complaints directly with the Special Chamber.[77] Review of these complaints required most of the time of the Special Chamber. Since an amendment of the rules in 2006,[78] the Trust Agency must first publish a provisional list of eligible employees and within 20 days any person may file a request or challenge with respect to the list. The Trust Agency shall require submission of evidence and may conduct evidentiary hearings. Thereafter, it shall adjust the list and publish it. Only then may employees file complaints with the Special Chamber, with the Trust Agency as respondent.[79]

3) Proof of discrimination

Employees who claim that they would have been registered as an employee at the time of privatization or the initiation of liquidation of the SOE and employed for no less than three years, had they not been subjected to discrimination, may submit a complaint to the Special Chamber.[80]

4) Ranking of employee claims in liquidation

20% of the liquidation or sales proceeds are, by operation of law, automatically allocated for the benefit of the "eligible employees".[81] The entitlements rank high: below certain administrative and court expenses but above secured claims and above claims of the owner(s) of the assets involved.[82]

H. Safeguarding of Claims regarding Socially Owned Enterprises

Several measures aim to ensure that the proceeds of the sale of the shares in a subsidiary

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Administrative Direction No. 2005/12, Section 4.3, the "time of privatization" is the date and time of the conclusion of an agreement for the sale of shares in a subsidiary.

[76] UNMIK Regulation 2003/13, Section 10.4, as amended by Regulation 2004/45, Section 1.B and Administrative Direction 2005/12, Section 4.4.

[77] See UNMIK Regulation No. 2003/13, Section 10. In a case under this Regulation before its amendment (*Thermosystem v. KTA*, SCEL 04-0001), the Trust Agency informed the Special Chamber that it had not reviewed the complaints. Before taking an active role in the process, the Trust Agency awaited the Chamber's decision regarding how it should exercise its discretion when preparing the list of eligible employees. The Special Chamber found this submission "utterly unacceptable".

[78] Administrative Direction No. 2006/17, Section 64.

[79] In the view of the Special Chamber, complaints about eligibility for 20% of the sales proceeds of an SOE cannot be combined with claims for compensation of personal income for the years that the employees have not worked because of discrimination. Such claims should be submitted to the Chamber separately. Judgment of 16 May 2007 (*Bexhet Shabani et al. v. KTA*, SCEL-06-001).

[80] UNMIK Regulation No. 2003/13, Section 10.4, as amended by UNMIK Regulation 2004/45, Section 1.B and 10.6. For comments, see Chapter IV of this Report.

[81] UNMIK Regulation No. 2003/13, Section 10.1.

[82] However, claims for wages that have remained unpaid until the decision of the Special Chamber or the Trust Agency to commence liquidation proceedings (limited to three months gross salary per person) rank lower, i.e. above unsecured claims and other wage claims. UNMIK Regulation No. 2005/48, Section 44.1(c) and (f).

of an SOE accrue to the creditors or owners of that same SOE and not to other parties. The Trust Agency must hold the proceeds of a sale of shares in trust for the creditors and owners of the SOE.[83] The Trust Agency must also hold accounts and other assets of SOEs administered by it in trust separately from each other and from the accounts and other assets of the Trust Agency. In addition, trust assets and SOEs shall not be liable for any debt of the Trust Agency.[84]

I. The Position of the Trust Agency and its Directors

1) Limited liability of the Trust Agency and exclusive jurisdiction of the Special Chamber

The liability of the Trust Agency is strictly limited to the assets of the Trust Agency plus the unpaid portion of its subscribed capital. The Trust Agency is not liable for any debt related to trust assets and for any debt attributable to SOEs and their directors.[85] Moreover, the Trust Agency is only liable for action or inaction that is outside its authority, represents a gross misuse of its powers, or represents a breach of contractual obligations incurred by the Trust Agency.[86] Furthermore, any such liability of the Trust Agency is limited to persons suffering a financial loss as a direct result of the action or inaction of the Trust Agency. The Trust Agency is not liable for any indirect, consequential or punitive damage.[87]

Parties who assert a claim against the Trust Agency can do so only in the Special Chamber. The Special Chamber has exclusive jurisdiction for all suits against the Trust Agency and 60 day prior notice to the Trust Agency is required.[88]

2) Liability of the Board and staff of the Trust Agency

The Board, management and staff of the Trust Agency are not liable to any party other than the Trust Agency for any action on behalf of the Trust Agency within the scope of their authority.[89]

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[83] UNMIK Regulation No. 2005/18, Section 8.6.
[84] UNMIK Regulation No. 2005/18, Sections 18.1, 18.2 and 18.3.
[85] UNMIK Regulation No. 2005/18, Sections 18.1 and 18.2.
[86] UNMIK Regulation No. 2005/18, Section 18.4. In a judgment of 10 October 2006 (*Grand Group Partnership, JSC v. KTA*, SCC-06-0176), the Special Chamber held, referring to Section 10.4 of UNMIK Regulation No. 2002/13, that these provisions are only applicable to requests for damages or similar remedies from the Trust Agency and not to "ordinary judicial decisions".
[87] UNMIK Regulation No. 2005/18, Section 18.5.
[88] UNMIK Regulation No. 2005/18, Section 30.
[89] UNMIK Regulation No. 2005/18, Section 16.9. Under UNMIK Regulation No. 2005/18, Section 13.5, a director may be liable to the Trust Agency if the director: (1) has done any act which justifies his/her removal from office under Section 13.4, (2) if the director knew or should have known that his/her decision was in violation of the UNMIK Regulation No. 2005/18, any other applicable law or a decision of the Special Representative of the Secretary General, or (3) if the director grossly neglected generally accepted due diligence standards. There have been cases where a claimant sued members of the Board of Directors of the Trust Agency, before the Special Chamber. For instance, in one matter (*Grand Hotel Group Partnership, JSC v. KTA*, SCC-06-0176) the claimant argued that the Managing Director of the Trust Agency had caused the claimant damages, was responsible for, and should pay, such damages under Article 154.1 of the Law on Obligations of Kosovo. The Special Chamber dismissed the claim.

IV. LEGISLATIVE PROBLEMS WITH THE LEGAL FRAMEWORK ON THE KOSOVO TRUST AGENCY

A. The Legislation is Complex

The legislation governing the Trust Agency and the privatization process is complex and contained in several different instruments. Examples are:

- The voluntary liquidation of SOEs is based on UNMIK Regulation No. 2005/18 amending UNMIK Regulation No. 2002/12, On the Establishment of the Kosovo Trust Agency, Section 9. This Section refers to "the procedures established under the Regulation on Business Organizations."[90] Moreover, Section 43.4 of UNMIK Regulation No. 2005/48, On the Reorganization and Liquidation of Enterprises and Their Assets, provides that voluntary liquidations shall be conducted in accordance with the provisions for court-ordered liquidations of that Regulation. Administrative Direction No. 2007/1 specifies several matters that are important in liquidations and has created the Review Committee. Administrative Direction No. 2006/17 describes the procedures for reorganization and liquidation proceedings and for review of liquidation committee decisions before the Special Chamber.
- The creation of leasehold of land is based on UNMIK Regulation No. 2003/13 which has been amended by UNMIK Regulation No. 2004/45 and implemented by Administrative Direction No. 2005/12.
- The eligibility of employees for 20% of the sales proceeds has been written into UNMIK Regulation No. 2003/13 and its amendments. Administrative Direction No. 2006/17 describes the procedure for complaints regarding these lists before the Special Chamber. The Anti-Discrimination Law is relevant for complaints of employees based on discrimination.

B. The Legislation Sometimes Lacks Detail

The Regulations and Administrative Directions sometimes lack clarity and sufficient detail. This has caused both the Trust Agency and the Special Chamber to seek guidance.

For example, under the previous rules regarding the entitlement of employees to 20% of the sales proceeds, the Trust Agency in one case informed the Chamber that it had not undertaken any consideration of the complaints. It awaited the Chamber's decision regarding how it should exercise discretion when preparing the list of eligible employees before playing any active role in the process.[91] The rules have since been clarified by the legislator (UNMIK) and provide more detail for the benefit of both the Trust Agency and the Chamber.[92]

With respect to the same rules, the Special Chamber has asked the Special Representative of the Secretary General to clarify whether the Anti-Discrimination Law of Kosovo supersedes the provisions for the type of evidence of discrimination.[93]

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[90] UNMIK Regulation No. 2001/6.
[91] See judgment of 9 June 2004 in *Vahdet Kollari in re Thermosystem v. KTA*, SCEL-04-0001.
[92] Administrative Direction No. 2006/17, Section 64.
[93] See judgment of 17 January 2006 in *Qemajl Peja et al. in re Progres SOE v. KTA*, SCEL-05-0002.

In determining ownership of assets that the Trust Agency privatizes, the Trust Agency has requested the Special Chamber to issue a ruling on the privatization rules, particularly on the question of ownership. [94] The Special Chamber has rejected this request and has submitted questions relating to compliance of Sections 5.3 and 5.4 of UNMIK Regulation No. 2005/18 and of Section 10.5 of UNMIK Regulation No. 2002/13 with certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (the "Convention") to the Special Representative of the Secretary General.

The Special Chamber does not have the competence to issue advisory opinions, and can only render judgments related to a specific case. On the other hand, under Section 2 of UNMIK Regulation No. 2000/59[95] courts may request clarification from the Special Representative of the Secretary General in connection with the implementation of this Regulation; this includes the application of international human rights standards.

C. Trust Not Defined, Other Concepts Not Clear

The legal concept of trust plays a central role in the function of the Regulation and Administrative Direction regarding the Trust Agency. For instance, Section 2.2(a) of UNMIK Regulation No. 2005/18 states that the Trust Agency shall administer enterprises as trustee for their owners and Section 8.6 states that proceeds from a sale of shares shall be held in trust by the Trust Agency for the benefit of creditors and owners of the enterprise concerned. According to Section 18.3 of the same UNMIK Regulation, accounts and other assets of enterprises administered by the Trust Agency shall be held in trust separately from each other and separately from the accounts and other assets of the Trust Agency. However, the concept of trust is not defined or described in any law applicable in Kosovo.[96]

Other legal concepts have not been defined clearly. For example, UNMIK Regulation No. 2005/18, Section 3, defines "Owner" as "a person or entity with a claim to ownership." Also, the legal effect of a "disclaimer" of assets in the reorganization of an enterprise pursuant to Section 11.2 of UNMIK Regulation No. 2005/48 is unclear.

D. Suspension of Proceedings involving Ownership Claims in Liquidations and the European Convention on Human Rights

Article 6 of the Convention provides that "everyone is entitled to a fair and public hearing within a reasonable time […]." Article 13 of the Convention requires that

[94] By request of 16 June 2005, the Trust Agency requested the Special Chamber to join five cases (in which it was respondent), stating that each of these cases raised the following common issues: (i) the legality of the acts of the Trust Agency in selling the assets of the entities by way of spin-off privatization; and (ii) whether certain types of transformations between March 1989 and June 1999 were carried out in accordance with Applicable Law or were implemented in a non-discriminatory manner. They also raised the question whether the "Interim Measures" and the "Transformation Law" were "Applicable Law". The Trust Agency added: "a ruling on the above laws could greatly clarify the legal situation in approximately 70% of the Trust Agency's portfolio". The Special Chamber rejected this request by decision of 29 September 2005 (*Balkanbelt v. KTA*, SCC-04-0188).

[95] Amending UNMIK Regulation No. 1999/24 On the Applicable Law in Kosovo.

[96] While the concept of trust might be sufficiently defined in other legal systems, it is not defined under Kosovo law.

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority […]." However, the right to access to court is not absolute. In most of the states that are parties to the Convention, the right of access to the court is restricted when the debtor is bankrupt. Such restrictions do not necessarily violate Article 6 of the Convention where the aim pursued is legitimate and the means employed to achieve the aim are proportionate.[97]

Nevertheless, there is concern whether the suspension of proceedings involving ownership claims against SOEs by a simple notification of the Liquidation Committee of the Trust Agency to, instead of a decision by, the Special Chamber,[98] meets the requirements of Articles 6 and 13 of the Convention. After the suspension, the creditors and potential owners must file their claim with the Liquidation Committee within two months after notification.[99] Suspended court proceedings can only continue with the permission of the Special Chamber.[100]

The Trust Agency considers that a suspension of the proceedings does not violate international standards because (i) an aggrieved litigant can apply to the court for the stay of proceedings to be lifted; (ii) the liquidation committees are bound to notify all known creditors and owners (which will include litigants whose proceedings are suspended) that the liquidation has commenced and to call for their claims; (iii) the Trust Agency may admit a claimant who shows sufficient justification for late submission of his claim; and (iv) a person aggrieved by a decision of the Trust Agency in relation to a liquidation can challenge it in the Special Chamber.

However, as a further consequence, under the relevant legislation, creditors and potential owners only have a right to a share of the proceeds of liquidation.[101] Even if the Special Chamber eventually lifts the suspension of the court proceedings, and it is established that there are private owners of the enterprise in liquidation, the owners only have a right to a share of the proceeds. However, they cannot obtain the return of their property. Therefore, the OSCE believes that the notification of the Liquidation Committee to the Special Chamber according to Section 13.1 UNMIK Administrative Direction No. 2007/1, which has the same effect as a Moratorium -- suspending all court proceedings and denying potential owners their right to the return of their property – may violate international human rights standards.[102]

> In one case (*Meti Impex, Private Company v. KHT Kosova in liquidation and KTA*, SCC-06-0449) the Trust Agency repeatedly sent a notification of the liquidation of the SOE and a request for a suspension based on the old legislation[103] to the Special Chamber. During a hearing of 5 September 2007 the Presiding Judge stated:

[97] See European Court of Human Rights, *M. v. United Kingdom*, application no. 12040/86; 52 D.R. 269.
[98] Administrative Direction No. 2007/1, Section 13.1.
[99] UNMIK Administrative Direction No. 2007/1, Section 14.1; UNMIK Regulation No. 2005/48, Section 43.3(d).
[100] UNMIK Regulation No. 2005/48, Section 5.1.
[101] UNMIK Regulation No. 2005/48, Section 44.1(e).
[102] See also Chapter V. C of this Report, "*No Rescission, No Restitution*".
[103] Submissions of 4 June, 30 August and 27 September 2007 based on UNMIK Regulation No. 2002/12, Section 9 and UNMIK Regulation No. 2001/6, Section 39.3.

> "The Chamber […] has agreed that such suspensions run counter to the principles of Article 6 of the European Convention on Human Rights and that such suspensions may only apply to execution of judgments."[104]

The OSCE believes that the restriction can only be justified if the aim is legitimate and the means are proportionate. Arguably, proportionality may only be achieved if a suspension is not triggered by a mere notification of the Liquidation Committee -- appointed by and responsible to the Trust Agency, which is one of the parties in the proceedings which are subject to the suspension. Rather, the suspension should be decided by a court (the Special Chamber).

E. Evidence of Discrimination in Employee List Cases

Section 10.6(b) of UNMIK Regulation No. 2003/13 requires that a complaint filed with the Special Chamber alleging that the complainant is excluded from the list of eligible employees because of discrimination be accompanied by documentary evidence. However, the Special Chamber has determined that this requirement does not comply with Article 14 (prohibition of discrimination) of the Convention,[105] Article 221.4 of the Law on Contested Procedure[106] and Article 8 of the Anti-Discrimination Law of Kosovo.[107]

Following several judgments and a clarification of Article 8 of the Anti-Discrimination Law by the Special Representative of the Secretary General,[108] the Special Chamber now

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[104] The Special Chamber has not yet decided with respect to a notification under the new rules.

[105] Article 14 of the Convention provides: "The enjoyment of the rights and freedoms as set forth in this Convention shall be secured without discrimination on any ground […]."

[106] Article 221.4 of the Law on Contested Procedure (Official Gazette of Socialist Federal Republic of Yugoslavia No. 4/77-1478, 36/80-1182, and 69/82-1596) provides: "The facts that are a matter of common knowledge need not be proved."

[107] Article 8.1 of Law No. 2004/3, promulgated by UNMIK Regulation No. 2004/32 (Anti-Discrimination Law), provides that when persons establish facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

[108] In a proceeding regarding complaints of a number of people alleging that they were excluded from the employee list because of discrimination, the Special Chamber has held (decision of 9 June 2004, *Vahdet Kollari in re Thermosystem v. KTA*, SCEL-04-0001):
"[the Chamber] will take into account not only the documentary evidence as required by Section 10.6(b) of UNMIK Regulation No. 2003/13, because this provision in limiting the type of evidence required is discriminatory in light of jurisprudence of the European Court of Human Rights regarding article 14 of the [Convention]." Moreover, the Special Chamber referred to Article 221.4 of the Law on Contested Procedure, stating that facts that are a matter of common knowledge need not be proved. In a judgment of 17 January 2006 (*Qemajl Peja et al. in re Progres, SOE v. KTA*, SCEL-05-0002), the Special Chamber referred to European Court of Human Rights case law. It also quoted the clarification that it had requested from the Special Representative of the Secretary General that the provisions of Article 8 of the Anti-Discrimination Law supersede the provisions of the Section of UNMIK Regulation No. 2003/13 that requires documentary evidence of discrimination (*Clarification of the Special Representative of the Secretary General of UNMIK Regulation No. 2003 of 12 May 2003*, dated 11 January 2006). Following this clarification, the Special Chamber also noted that UNMIK promulgated the Anti-Discrimination Law after UNMIK Regulation No. 2003/13 and that the Anti-Discrimination Law states explicitly that it supersedes all previous applicable laws of this scope. The Special Chamber ruled that the Anti-Discrimination Law of Kosovo "nullifies those provisions of Section 10 of UNMIK Regulation No. 2003/13 that are in conflict with it […]. [T]he Chamber must consider facts from which it may be presumed that there has been direct or indirect discrimination. It cannot confine itself to documentary evidence, but must also consider other types of evidence, including statistical evidence and matters of common knowledge. In addition, once the

rules in general[109] that a person can submit a standard statement on discrimination, facts from which it can be presumed that there was direct or indirect discrimination and a certified copy of a workbook showing commencement with the SOE at a date more than three years before and that is still open. Under such circumstances, the individual will in general be considered an eligible employee.[110]

F. Publication by the Trust Agency of its Operational Policies, Annual Reports and Audit Reports

1) Operational policies

Section 10 of UNMIK Regulation No. 2005/18 requires that the Board of the Trust Agency "issue operational policies guiding the Trust Agency in the exercise of its powers […]". These policies must contain rules and procedures governing the public sale of subsidiaries of SOEs.

The OSCE believes that the legislation should provide that the operational policies should not only have rules for the sale of subsidiaries, but also for the administration and for the reorganization and liquidation of SOEs. Although the OSCE has not reviewed the operational policies, the Trust Agency has advised that some of these areas – such as SOE administration matters - are already covered by the operational policies.[111] The reorganization rules, until now only applied to Trepca, are not widely known. Administration and liquidation of SOEs tend to take place at the local level and thus are less transparent for the public.

When the OSCE requested a copy of the operational policies in November 2007, the Trust Agency declined, arguing that the operational policies are an "internal, commercially sensitive document" in that they contained sections dealing with, for example, collusion of bidders. The Trust Agency claims it has significant experience of attempts being made by bidders to buy enterprises through collusion, intimidation and fraud and has sought to develop rules to counter them the best they can.[112]

The OSCE believes that the operational policies of the Trust Agency are an important document since they specify privatization procedures. This is not only important for the Trust Agency itself, but also for third parties who enter into a contractual relationship with the Trust Agency and may wish to verify compliance by the Trust Agency with its

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complainant has established a prima facie case of direct or indirect discrimination, it shall be for the respondent [the Trust Agency] to prove that there has been no breach of the principle of equal treatment."

[109] See, e.g., the following decisions: *Dragoljub Grujic et al. in re Ringov, Peja, SOE v. KTA*, SCEL-05-0016, 20 July 2006; *Jovan Stankovic et al. in re Bosko Cakic/Mustafa Rexhepi, SOE v. KTA*, 31 January 2007, SCEL-06-020 and *Asija Niksic et al. in re SOE "1 Maji" in Mitrovicë/Mitrovica v. KTA*, 31 January 2007, SCEL-06-026.

[110] Complaints in employee list cases are rejected when these criteria are not satisfied, when complaints are filed late, or when the lawyer representing employees does not submit a power of attorney from his clients. See, e.g., the decisions *Dragoljub Grujic et al. in re Ringov, Peja, SOE v. KTA*, 20 July 2006, and *Qemajl Peja et al. in re Progres, SOE v. KTA*, 17 January 2006.

[111] According to information given by the Trust Agency to the OSCE in April 2008.

[112] The Rules of Tender (for privatization) are of course publicly available documents.

own rules. For these reasons, the OSCE suggests that the operational policies should be made public.[113]

2) Quarterly and annual reports

UNMIK Regulation No. 2005/18 provides that the Board of the Trust Agency must submit quarterly reports to the Special Representative of the Secretary-General[114] and must publish the annual reports of the Trust Agency.[115]

The Board must also adopt by-laws of the Trust Agency and issue financial policies.[116] Moreover, the Regulation requires annual audits of the Trust Agency. These audits must extend to any Enterprise and trust accounts administered by the Trust Agency.[117]

The OSCE believes that the Trust Agency would increase its transparency by publishing on its website its quarterly and annual reports and the audit reports. In addition, to promote transparency of its operations, the annual report of the Trust Agency should include the by-laws and the financial policies of the Board.

G. Choice of Law and the Rules of Tender

The Rules of Tender do not specify the applicable law or contain choice of law provisions. This may result in disputes if a foreign party is among the bidders or wins the auction.

In the matter of *Wood Industries LLC v. KTA*, SCC-04-0130, the claimant argued that a dispute regarding a bid under the tender rules was subject to the law of the state of New York because a draft of a related contract contained a provision to that effect. By judgment of 26 October 2005, the Special Chamber rejected this argument.[118]

The Rules of Tender are also ambiguous about the jurisdiction of any court over possible disputes related to the tender process.[119] However, the Special Chamber has rejected the

[113] Section 10 of UNMIK Regulation No. 2005/18 provides that the Board of the Trust Agency shall issue operational policies and mentions 13 items that must specifically be covered by these policies. The OSCE suggests that these operational policies be made public because the nature of most of these issues and the words used in several subsections ("transparent", "processes of due process", "giving notice") imply that this would be reasonable.

[114] UNMIK Regulation No. 2005/18, Section 20.1, provides that the quarterly reports must summarize the activities and reflect the financial results of the Trust Agency.

[115] According to UNMIK Regulation No. 2005/18, Section 20.2, the annual report must include statements of accounts of the Trust Agency, statements of the accounts and assets held by the Trust Agency in trust, a record of Enterprises placed under the direct administration of the Trust Agency, a record of the creation and sale of subsidiaries of SOEs accomplished during the reported year and pending, a record of Enterprises liquidated, and a record of Enterprises declared bankrupt.

[116] Required by UNMIK Regulation No. 2005/18, Sections 14 and 19.

[117] UNMIK Regulation No. 2005/18, Section 25.2.

[118] The Chamber held: "it is an established principle in conflict of laws issues that while the parties are free, within limits, to choose any law to regulate their contractual relations, in the absence of a binding contract other factors are to be taken into account. The place where the contract will eventually be concluded, the place where the property forming the subject-matter of the contract is located and the place where the activity covered by the contract will be carried out are all significant factors. The only link with New York in this case would seem to be the registered office of the Claimant."

[119] Section 17 of the Rules of Tender provides: "1. Subject to section 17.2 below, the decisions of the Agency […] shall be final and shall not be appealed to any court or other organ. Bidders shall not be

contention of the Trust Agency that the Rules of Tender state that decisions of the Trust Agency are final, and it has assumed jurisdiction.[120]

The OSCE believes that the Rules of Tender should contain clear clauses regarding the choice of law.

V. PRIVATIZATION CAN LEAD TO ILLEGAL EXPROPRIATION

In the OSCE's opinion, if assets in an SOE derive from an illegal expropriation (for example, an illegal confiscation by Yugoslav authorities after World War II),[121] the privatization of such SOE by the Trust Agency would also be an illegal expropriation. This is because the privatization laws (such as UNMIK Regulations No. 2005/18 and 2002/13) may not meet the requirements for expropriations under international human rights standards applicable in Kosovo, particularly Article 1 of Protocol 1 to the Convention.[122]

A. Expropriation under Protocol 1 to the Convention

In summary, following the interpretation of Article 1 of Protocol 1 to the Convention[123] by the European Court of Human Rights, expropriations must meet the following requirements:

1. Before expropriation occurs, the authority must determine that the taking of the property is "in the public interest". For this determination, the European Court of Human Rights provides the national legislature with broad discretion and will reject the

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entitled to file any claim in any court, within or outside Kosovo [….]" "2. Notwithstanding the preceding clause, the parties acknowledge and agree that the Special Chamber […] shall have exclusive and final jurisdiction over the Agency."

[120] See, e.g., the decision *Grand Group Partnership JSC v. KTA*, SCC-06-0176, 18 May 2006. Representatives of the Trust Agency have confirmed that in practice the Trust Agency accepts jurisdiction of the Special Chamber in disputes regarding the Rules of Tender.

[121] See Chapter II of this Report.

[122] See regarding the direct applicability Section 3.2 (b) and 3.3 of UNMIK Regulation No. 2001/9, On a Constitutional Framework for Provisional Self-Government in Kosovo; see also UNMIK Regulation No. 1999/24 On the Law Applicable in Kosovo, as amended by UNMIK Regulation No. 2000/59, Section 1.3: "In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards, as reflected in particular in: … the [Convention]." It follows that the Trust Agency must observe the provisions of the Convention, including Article 1 of Protocol 1. In the OSCE Report, *First Review on the Criminal Justice System,* 10 August 2000, pages 16 and following (http://www.osce.org/documents/mik/2000/08/970_en.pdf), the OSCE recognized the importance of implementing the supremacy of human rights standards. Although UNMIK Regulation No. 1999/24 did not explicitly state the supremacy of international human rights standards, the Special Representative of the Secretary General confirmed, in a letter to the President of the Belgrade Bar Association dated 14 June 2000, that Section 3 of Regulation 1999/24 applies to judges and that this means they must not apply any provisions of the domestic law that are inconsistent with international human rights standards. Furthermore, Section 3.3 of UNMIK Regulation No. 2001/9 On a Constitutional Framework for Provisional Self-Government in Kosovo confirms the direct applicability of international human rights standards.

[123] Article 1 of Protocol 1 to the Convention 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 […]."

legislature's judgment only if the determination is "manifestly without reasonable foundation."[124] This may be the case, for instance, if the deprivation of property only takes place to transfer a property from one private individual to another. However, depending on the circumstances, even in such cases there may be a public interest.[125]

2. There must be a balance (proportionality) between the interest of the community and the protection of the individual's rights.[126] Factors that are important for determining whether a balance is achieved include:

a) Whether the deprived individual receives adequate compensation. This is often - although not always - considered to be the market value of the asset. The European Court of Human Rights has recognized exceptions to this rule. In some cases, the European Court of Human Rights has deemed a smaller amount as sufficient.[127] It has held that in exceptional cases, the absence of compensation was justifiable.[128] At times (for instance in the event of "an individual and excessive burden" for the owner), a larger amount is required.[129]

b) The attitude and personal circumstances of the parties involved, such as:

- whether the national authority has acted in reasonable time and an appropriate and consistent manner;[130]
- whether the individual expected the taking;[131] and
- whether judicial review has been possible.[132]

c) However, the European Court of Human Rights has on occasion indicated that when there are large numbers of similar claims, broad and general categories and standards are acceptable.[133]

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[124] Judgments of the European Court of Human Rights, *James and Others v. United Kingdom*, 21 February 1986, application no. 8793/79, paragraph 46; *Lithgow and Others v. United Kingdom*, 8 July 1986, application no. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, paragraph 122; *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, application no. 17849/91, paragraph 37; *The Former King of Greece and Others v. Greece*, 23 November 2000, application no. 25701/94, paragraph 87; *Browniowski v. Poland*, 22 June 2004, application no. 31443/96, paragraph 149.

[125] Judgment of the European Court of Human Rights, *James and Others v. United Kingdom*, 21 February 1986, application no. 8793/79, paragraph 40.

[126] P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the ECHR*, page 881. See also the judgments of the European Court of Human Rights, *Sporrong and Lonnroth v. Sweden,* 23 September 1982, application no. 7151/75, 7152/75, paragraph 69; *Jahn and Others v. Germany*, 30 June 2005, application no. 46720, 72203 and 72552, paragraph 93.

[127] Judgments of the European Court of Human Rights, *Lithgow and Others v. United Kingdom*, 8 July 1986, application no. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, paragraph 121; *Holy Monasteries v. Greece*, 9 December 1994, application no. 13092/87, 13984/88, paragraphs 70 and 71: "legitimate objectives of public interest may call for less than reimbursement of the full market value."

[128] Judgment of the European Court of Human Rights, *Jahn and others v. Germany*, 30 June 2005, application no. 46720, 72203 and 72552, paragraphs 94, 111, 116 and 117, on the grounds of, *inter alia*, social justice (regarding a party who had received a windfall gain).

[129] Judgment of the European Court of Human Rights, *Hentrich v. France*, 22 September 1994, application no. 13616/88, paragraphs 43 and 49.

[130] Judgment of the European Court of Human Rights, *Broniowski v. Poland*, 22 June 2004, application no. 31443/96, paragraph 151.

[131] Judgment of the European Court of Human Rights, *Allan Jacobsson v. Sweden*, 25 October 1989, application no. 10842/84, paragraph 61.

[132] Judgment of the European Court of Human Rights, *Hentrich v. France*, 22 September 1994, application no. 13616/88, paragraph 49.

3. The deprivation of property must be subject to the conditions provided for by national law and by general principles of international law.

- Regarding national law, the European Court of Human Rights does not examine whether the national law has been applied correctly, but requires the existence of and compliance with adequately accessible and sufficiently precise domestic legal provisions.[134] Moreover, there must be protection, in the form of procedural safeguards, from arbitrariness.

- The reference to principles of international law implies the obligation to pay damages. However, this principle relates only to the nationalization of foreign property and cannot be invoked against the national state of the owner.

B. Sections 5.3 and 5.4 of the UNMIK Regulation No. 2005/18

Following an amendment of the previous UNMIK Regulation No. 2002/12,[135] under Sections 5.3 and 5.4 of UNMIK Regulation No. 2005/18, the Trust Agency is required to determine after it has privatized or liquidated an SOE whether such entity had been validly transformed and whether such transformation had been implemented in a non-discriminatory fashion, such that a third party could be recognized as being the owner of the entity. Thus, following privatization, the Trust Agency (or the person to whom the asset has been sold) does not return the assets to the owners.[136] Rather, the owners share in the sales proceeds thereof, but only after deductions for administrative expenses and of 20% of the proceeds for employees on the "employees list". This new regulation granted explicit jurisdiction to the Trust Agency over any enterprise that was socially-owned in

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[133] The European Court of Human Rights considered: "the uncertainty, litigation, expense and delay that would inevitably be caused […] under a scheme of individual examination of each of many thousands of cases" may mean that "the system cannot in itself be dismissed as irrational and inappropriate. " Judgment of the European Court of Human Rights, *James and Others v. United Kingdom*, 21 February 1986, application no. 8793/79, paragraph 68. See also judgment of the European Court of Human Rights, *Lithgow v. United Kingdom*, 8 July 1986, application no. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, paragraphs 121 and 122.

[134] Judgments of the European Court of Human Rights, *Lithgow v. United Kingdom* 8 July 1986, application no. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, paragraph 110; *Hentrich v. France*, 22 September 1994, application no. 13616/88, paragraph 42.

[135] The need to amend UNMIK Regulation No. 2002/12 became apparent when in October 2003 the then-chairman of the Trust Agency Board temporarily suspended the privatization process due to concerns that UNMIK Regulation No. 2002/12 contained weaknesses which would make further privatization transactions vulnerable to legal challenge (see Ahmet Shala, *Privatization in Kosovo: the best in the Balkans?*). UNMIK Regulation No. 2002/12 imposed the burden of proof on the Trust Agency regarding its jurisdiction to privatize an SOE. The scope of the Trust Agency's authority was unclear which did not serve either the Trust Agency or Kosovo. It was not clear whether any given entity fell within the scope of the Trust Agency's authority (and therefore subject to privatization). The Trust Agency only had jurisdiction over such SOEs if they underwent transformation (for example, under the Yugoslav privatization program or through mergers or acquisitions) before 22 March 1989 or, if it occurred after, was based on applicable law and implemented in a non-discriminatory manner (Section 5, UNMIK Regulation No. 2002/12). On 17 August 2004, Kai Eide, the Special Envoy of the UN Secretary General, concluded in his *Report to the Secretary-General of the United Nations, The situation in Kosovo,* that privatization has become a sign of unfulfilled promises, and therefore recommended that the privatization process should move forward effectively without delay. With the new UNMIK Regulation No. 2005/18, the privatization process was re-launched and greatly accelerated.

[136] In this connection, the definition of "owner" in Section 3 of UNMIK Regulation No. 2005/18 as "a person or entity *with a claim* to ownership with respect to an Enterprise" is strange.

the manner described in Section 5, regardless of transformation. Thus, the Trust Agency could, under the applicable law, sell property which is potentially private.

This also applies to third parties who have become owners of assets pursuant to a transformation (any type of corporate restructuring that may have resulted in a privatization, see Chapter II), provided that:

- they paid for shares issued to them, and
- the transformation
  - took place between 22 March 1989 and 13 June 2002,[137]
  - complied with applicable law, and
  - was neither discriminatory nor in breach of the principles of the Convention.

If these conditions are not satisfied, third parties who benefited from the transformation are not protected and do not share in the proceeds.

Since UNMIK Regulation No. 2005/18 allows the Trust Agency to sell assets without prior determination of the ownership of those assets,[138] and protects parties who have bought property from the Trust Agency, privatization could result in an expropriation - the sale of assets owned by third parties. However, risking a violation of Article 1 of Protocol 1 to the Convention, UNMIK Regulation No. 2005/18, Section 5.3 does not include the necessary procedural safeguards.

First, the question arises if these expropriations are in the public interest. The European Court of Human Rights held that the national authorities are in the best position to determine the public interest. In the view of the Trust Agency, the legislator considered that the public interest of the privatization programme in Kosovo is to facilitate the transition of Kosovo's inefficient and unproductive economy to one that is efficient, competitive and employs the many hundreds of thousands of unemployed people in Kosovo. This indeed, could be considered as a public interest.

However, the interference must comply with the law. The law needs to be sufficiently certain and accessible to the public.[139] Of concern to the OSCE, UNMIK Regulation No. 2005/18 is not precise under which conditions the deprivation of property can occur.[140] In

[137] By letter of 24 August 2004, The Legal Adviser of UNMIK stated that under UNMIK Regulation No. 1999/1, UNMIK has authority to administer socially owned property including SOEs as per 10 June 1999, the date of UN Security Council Resolution 1244. Transformations of SOEs after 10 June 1999, based on legislation which was not promulgated by UNMIK, are not legally valid.

[138] The actions and investigations that the Trust Agency currently undertakes before it actually sells assets may be described in its operational policies referred to in Section 10 of UNMIK Regulation No. 2005/18. However, as discussed above, the Trust Agency has not made its operational policies available to the OSCE.

[139] Judgment of the European Court of Human Rights, *Lithgow v. United Kingdom*, 8 July 1986, application no. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, paragraph 110.

[140] In the view of the Trust Agency, the public interest as stated above is encapsulated in Section 2.2(c) of UNMIK Regulation No. 2005/18. This section provides that the Trust Agency has the power "to carry out other activities to preserve or enhance the value or viability of the activities concerned and take such other steps or measures as it in its discretion deems appropriate … which encourage the economic reconstruction and development of Kosovo and the welfare of its inhabitants or those of any specific region." However, arguably the Trust Agency's legal mandate is firstly, according to Section 2.2 (b) of UNMIK Regulation No. 2005/18, to "carry out activities to preserve or enhance the value, viability and governance of

particular, Sections 5.3 and 5.4 of UNMIK Regulation No. 2005/18 contrast with the comprehensive procedural safeguards contained in the Law on Expropriation of Kosovo, which regulates the procedures for the public authorities to deprive individuals of their possessions in the public interest.[141] The Expropriation Law contains four articles for "determination of common interest", five articles for "preparatory activities for the expropriation", ten articles for the "decision on expropriation" and, notably, 30 articles for "compensation for expropriated property."

Second, the deprivation must be proportionate. Arguably, the aim of reviving the economy can indeed be achieved without expropriations, if ownership claims are examined prior to the decision to privatize the enterprise. Under UNMIK Regulation No. 2005/18, the Trust Agency must issue operational policies for the purpose of ensuring compliance by the Trust Agency with the principles of Article 1, Protocol 1 of the Convention, including processes with respect to matters of prompt due process. The consideration of property claims by the Trust Agency does not jeopardize the entire privatization process. Only those claimants who can prove either they hold valid ownership title or that a transformation under Yugoslav Law did not comply with was the then applicable law, have a right to the return of their property.[142] Thus, the OSCE considers that the expropriation of private property without prior examination of the claims is arguably disproportionate and unreasonable.

Of note, in the absence of restitution legislation, no court in Kosovo, including the Special Chamber, has jurisdiction to examine claims against dispossessions which were socialized in accordance with the then applicable Yugoslav Law.[143]

Moreover, arguably Section 5.3 does not strike the required balance between the interest of the community and the protection of the individual owner. The issue is whether the sales proceeds (in public auction or in liquidation) minus administrative expenses and 20% for employees, amount to the compensation required by case law of the European Court of Human Rights. The Special Chamber has ruled that it does not:

> "a privatization sale of [a property] is likely to fetch less than the true market value. Thus, if claimants succeed in proving their ownership, there will likely be insufficient funds to fairly compensate them for the confiscation."[144]

UNMIK Regulation No. 2005/18 need not include the detailed provisions in the Law on Expropriation. Rather, it should be amended to require that the Trust Agency determine, prior to any privatization, the ownership of those assets it intends to sell and return those assets to the rightful owner. Such procedure would lead to privatization and restitution

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Enterprises", which lacks any reference to the public interest. Therefore, the notion of public interest might not be sufficiently precise in the regulation.

[141] Official Gazette of Socialist Autonomous Province of Kosovo, No. 21/78.

[142] According to the caseload of the Special Chamber, almost 100% of the dispossessions which occurred during the Yugoslav times were done in accordance with the applicable law at the time and therefore are legally valid. Reference - Special Chamber Memo to the Special Representative of the Secretary General dated 8 February 2008, *Observations in relation to the Memorandum dated 24 January 2008.*,

[143] Reference - Special Chamber Memo to the Special Representative of the Secretary General dated 8 February 2008, *Observations in relation to the Memorandum dated 24 January 2008*.

[144] Decision of 12 October 2005, *Fatmi Loxha v. KTA and Hotel Korzo, SOE*, SCC-05-0453.

rather than expropriation.[145] UNMIK Regulation No. 2005/18 should also detail which ownership claims and from what time periods are valid.

In summary, there are owners (or descendants of owners) whose land and other assets were illegally expropriated or transferred to socially owned property, and are now privatised. Under these circumstances, the OSCE believes that the current privatization by the Trust Agency arguably could result in illegal deprivation of property rights. These owners have a right to the guarantees under international human rights standards, particularly Article 1 of Protocol 1 to the Convention.[146]

C. No Rescission, No Restitution

By Section 10.5 of UNMIK Regulation No. 2002/13, the legislator intended to create a system where privatization by the Trust Agency would lead to monetary compensation rather than in-kind restitution (returning a property to its rightful owner), irreversible:

> "No party shall be entitled to a remedy that would require the rescission of a transaction or the nullification of a contract entered into by the [Trust Agency] pursuant to its authority under […] UNMIK Regulation No. 2002/12."[147]

Therefore, an owner who loses his or her assets during privatization cannot obtain rescission of the transaction and obtain restitution. He or she is limited to a claim for compensation.

The OSCE considers that excluding claims for nullification or rescission of contracts entered into by the Trust Agency may violate Article 6 of the Convention, which details the right to a fair trial. More specifically, under European Court of Human Rights case law, Article 6 includes a right of access to the court to determine legal rights.[148]

In the view of the Trust Agency, Section 10.5 of UNMIK Regulation No. 2002/13, as amended, does comply with the Convention. The Trust Agency refers to the above

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[145] The alternative would be to explicitly incorporate expropriation rules such as prior determination of ownership, public interest and payment of adequate compensation.

[146] The Special Chamber has noted that most of the dispossessions that occurred during Yugoslav times were done according the applicable law at the time and therefore are legally valid. Since there currently is no "restitution" legislation, no court in Kosovo, including the Special Chamber, has jurisdiction to examine claims against such dispossessions.

[147] Effective 31 May 2008, Section 10.5 of UNMIK Regulation No. 2008/4 amends this language as follows: "No party shall be entitled to a remedy that would require the rescission of a completed transaction or the nullification of a contract validly entered into with a third party that acted in good faith and fully performed by the Agency, pursuant to its authority under UNMIK Regulation No. 2002/12."

[148] See judgment of the European Court of Human Rights, *Golder v. United Kingdom*, 21 February 1975, application no. 4451/70, paragraphs 35 and 36: "It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings. […] Article 6 para. 1 (art. 6-1)secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal." The Special Chamber has sent a request for clarification of its concern regarding Sections 5.3 and 5.4 of UNMIK Regulation No. 2005/18 and Section 10.5 of UNMIK Regulation No. 2002/13 to the Special Representative of the Secretary General.

mentioned judgment of the European Court of Human Rights *James and others v. United Kingdom.* In this judgment, the Court held that Parliament could enact a law expropriating property rights in the public interest without an individual right to challenge. However, the factual situation underlying that case differs from the situation in Kosovo. In the *James and others v. United Kingdom* case, the expropriation was estimated to be likely to affect 98 to 99 per cent of the one and a quarter million houses to which the legislation referred. The denial of an individual right to challenge therefore seemed appropriate.[149] However, in Kosovo, only a small percentage of the enterprises which are subject to privatization actually belong to private owners.[150] Therefore, the expropriation of these few holders of a property right could rather amount to an individual and excessive burden on the individual owners. In this context, the European Court on Human Rights held that such a burden could only be legitimate if procedural guarantees are provided.[151]

However, the competent legislative authorities in Kosovo could enact a law allowing for the expropriation of property which is sufficiently precise and foreseeable and which provides for the necessary safeguards in accordance with Article 1 of Protocol 1 to the Convention.[152] UNMIK Regulation No. 2005/18 arguably does not meet these standards.

D. Injunctions

Sections 5.3 and 5.4 of Regulation No. 2005/18, in conjunction with Section 10.5 of Regulation 2002/13, lead to the following conclusions for claimants who own assets in SOEs:

- Prior to a sale in a public auction or liquidation, restitution can occur.[153] A person who claims ownership in an SOE or of an asset held by an SOE can obtain his property by filing an ownership claim. If the Trust Agency does not return the asset to the owner, the person should file a claim for ownership with the Special Chamber. If a sale is imminent, the claimant should request an injunction, that will temporarily block the sale.
- If the sale has taken place, restitution cannot take place. The owner can only file a claim for ownership and obtain compensation, not restitution.

[149] See judgment of the European Court of Human Rights, *James and Others v. United Kingdom,* 21 February 1986, application no. 8793/79, paragraph 68.
[150] According to information from the Special Chamber, to date, only in one case the claimant succeeded to prove that he has an ownership title regarding the contested property (in matter of *Alexander Hadzijevic and Vera Frtunic v. KTA and SOE Trepca Hotels restaurant Parajsa (Hotelier Company Ibar)*, SCC-06-0010.
[151] See judgment of the European Court of Human Rights, *Hentrich v. France*, 22 September 1994, application no. 13616/88, paragraph 49.
[152] In a different context, the OSCE has already emphasized that a new Law on Expropriation must contain adequate and effective safeguards for the right to property and related human rights, such as effective remedies, adequate notice, transparent procedures and adequate compensation, see OSCE Report, Expropriations in Kosovo, December 2006, http://www.osce.org/documents/mik/2006/12/22676_en.pdf, page 6 (Recommendation addressed to the Kosovo Assembly Committee on Economy, Trade and Industry).
[153] Representatives of the Trust Agency have stated in interviews conducted by the OSCE in fall 2007 that if prior to privatization or liquidation it is established that an enterprise or its assets are privately owned, the Trust Agency will return the property to the rightful owner.

In order to obtain an injunction and delay the sale of a property:[154]

- the claimant must provide credible evidence that immediate and irreparable damage will result to the claimant if no preliminary injunction is granted, and
- the request for the injunction must be submitted together with an "underlying" claim or subsequent to a claim (in these cases usually for restitution of the property) that has been filed earlier.

Of note, the Special Chamber has awarded requests for injunctions (thus enabling the claimants to pursue their claims for the restitution of their property) with the argument that the sale of the property to a third party would leave the claimant without possibility to recover the property and that financial compensation as provided for in Regulation 2005/18 would likely be unsatisfactory.[155]

The system whereby owners can only file ownership claims before the Trust Agency has sold their property and must request an injunction if the sale is imminent is not always clear to parties or their lawyers. In several cases, claimants demanded the annulment of a tender and sale, and restitution of their properties. The Special Chamber explained that this was not possible under the law and that, since the claimant had not applied for an injunction before the tender and sale, the claimant could only claim compensation.[156]

E. The Special Chamber Rules that the Convention Prevails over Domestic Law

UNMIK Regulation No. 2005/18 does not provide which claims of ownership must or may be honoured. The Special Chamber has rejected a request of the Trust Agency to give a general ruling regarding this issue. Instead the Special Chamber has rendered judgments that relate exclusively to the specific facts of the individual cases. It does not have the authority to issue advisory opinions or general rulings (see Chapter IV.B).

In the matter *Balkanbelt v. KTA* (SCC-04-0188), the Special Chamber held that in that particular case the application of the transformation laws resulted in discrimination

[154] Administrative Direction No. 2006/17, Section 52. The other party must usually be informed of the request and be given the opportunity to file opposing arguments. This is not the case with requests for injunctions in other courts. See Law on Contested Procedure, Article 277.

[155] Examples of case law of the Special Chamber regarding injunctions are: decision of 14 February 2007 (*Muharrem Zenel Shabanaj et al. v. Rugova, Agricultural Cooperative and KTA*), SCC-07-0012; decision of 20 September 2005 (*Ismajli v. KTA and Hotel Tourist Company Kosova*), SCC-05-177; decision of 12 October 2005 (*Fatmi Loxha et al. v. KTA and Hotel Korzo, SOE*), SCC-05-0453; decision of 18 May 2006 (*Grand Group Partnership JSC v. KTA*), SCC-06-0176; decision of 21 November 2006 (*Shaban Morina v. KTA*), SCC-06-0415; decision of 20 January 2006 (*Kosova Hotel Kristal v. KTA*), SCC-05-0473.

[156] In one case (judgment of 30 November 2006, *Balkanbelt v. KTA*, SCC-04-0188), the failure to obtain restitution for his client caused a lawyer to challenge the mandate of the United Nations. The Chamber responded that this argument was political in nature and thus could not be addressed by the court. During a hearing of 2 August 2007 (in the matter of *Mehmet Shiroka et al. v. KTA*, SCC-07-0030) the presiding judge explained that the claimant had not requested an injunction and that the Regulation prohibited the Chamber from annulling the sale. See also the matter of *Yumco JSC v. KTA* (SCC-05-0482). During a hearing of 8 May 2007 in the matter of *Doni private company v. KTA* (SCC-06-0436), the Special Chamber strongly advised the claimant to amend his claim and demand compensation instead of restitution. In the latter case, the Special Chamber accepted the oral amendment suggested by the Special Chamber to the claimant and awarded compensation (judgment of 16 May 2007). These examples demonstrate that claimants and their lawyers are often unaware that owners can only file ownership claims before the Trust Agency has sold their property and must request an injunction if the sale is imminent.

against Albanian workers. This made the transformation invalid so that Balkanbelt had not legally acquired the property in question and was not entitled to protection under Article 1 of Protocol 1 to the Convention.

In the matter *Yumco JSC v. KTA* (SCC-05-0482), the court reasoned, again after an analysis of the relevant facts of the case, that no valid transformation of Yumco-Kosovo had taken place. Consequently, Yumco JSC failed to prove its ownership and the Trust Agency had the exclusive authority to administer and privatize Yumco-Kosovo.

In the above cases, the Special Chamber applied Sections 5.3 and 5.4 of UNMIK Regulation No. 2005/18. However, in its judgment of 20 November 2007 in the matter of *Alexander Hadzijevic and Vera Frtunic v. KTA and SOE Trepca Hotels restaurant Parajsa (Hotelier Company Ibar)*, SCC-06-0010, the Special Chamber ruled, again based on the concrete facts of the specific case, that international human rights standards prevail over the privatization rules. The Special Chamber concluded that the claimants instead of the respondent-SOE were the rightful owners of the property. The Special Chamber held that Sections 5.3 and 5.4 of UNMIK Regulation No. 2005/18 do not comply with Article 1 of Protocol 1 to the Convention because they do not establish bodies authorized to carry out privatization and to establish the existence of public interest. In addition, the law does not define public interest and excludes equitable compensation. Moreover, the Special Chamber held that the prohibition of rescission of transactions entered into by the Trust Agency is not consistent with Article 6.1 of the Convention. In the words of the Special Chamber: "The [Trust Agency] does not provide the guarantees required by Article 6 of the European Convention. Therefore, its decisions should be subject to full judicial review." The Trust Agency filed a request for review regarding this case on 18 December 2007. The case is still pending.

VI. THE LEGAL FRAMEWORK ON THE SPECIAL CHAMBER

The main pieces of legislation governing the Special Chamber are UNMIK Regulation No. 2002/13[157] and Administrative Direction No. 2006/17.[158] Under these rules, the Special Chamber has five judges; three are international judges and two are residents of Kosovo.[159] The Special Representative of the Secretary General appoints all judges after consultation with the President of the Supreme Court of Kosovo[160] and assigns one of the international judges as Presiding Judge of the Special Chamber.[161]

[157] UNMIK Regulation No. 2002/13 On the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, 13 June 2002. On 5 February 2008, the Special Representative of the Secretary General promulgated a new UNMIK Regulation on the Special Chamber (UNMIK Regulation No. 2008/4) which will enter into force on 31 May 2008 and will amend UNMIK Regulation No. 2002/13.

[158] Administrative Direction No. 2006/17 of 6 December 2006, "Amending and replacing UNMIK Administrative Direction No. 2003/13, implementing UNMIK Regulation No. 2002/13 On the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters".

[159] Under the recently enacted UNMIK Regulation No. 2008/4 (which enters into force on 31 May 2008), the Special Chamber shall be composed of up to 20 judges, 13 of whom shall be international judges and seven shall be habitual residents of Kosovo (Section 3).

[160] UNMIK Regulation No. 2002/13, Section 3.1.

[161] UNMIK Regulation No. 2002/13, Section 3.2.

For additional information on the Special Chamber, see Annex I.

A. The Jurisdiction of the Special Chamber

The Special Chamber has exclusive jurisdiction for all suits against the Trust Agency.[162] Therefore, any party who desires to sue the Trust Agency must do so in the Special Chamber. Other courts must declare such claims inadmissible.[163]

The Special Chamber has primary jurisdiction for:[164]

- challenges to decisions or other actions of the Trust Agency[165]
- claims against the Trust Agency for financial losses resulting from decisions of the Trust Agency acting as administrator of an SOE
- claims against SOEs under the administration of the Trust Agency if such claims arose during or before the administration by the Trust Agency, and
- other claims mentioned in Section 4.1 of UNMIK Regulation No. 2002/13.[166]

Therefore, creditors' and owners' claims in a liquidation of an SOE must be filed with the Special Chamber. Upon application of the Trust Agency, the Special Chamber may remove any action pending in any other court to which an SOE administered by the Trust Agency is a party.[167]

The Special Chamber also has authority to render:

- decisions to refer or remove claims that are within the primary jurisdiction of the Special Chamber to or from the regular courts[168]
- decisions regarding complaints concerning lists of eligible employees[169]
- judgments, decisions and orders in reorganization and liquidation proceedings
- judgments in appeal from judgments of regular courts in matters that are within the jurisdiction of the Special Chamber.[170]

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[162] UNMIK Regulation No. 2005/18, Section 30.1.
[163] The Special Chamber admits a claim against the Trust Agency only if 60 days before the claim is filed, prior notice is given to the Chairman of the Board of the Trust Agency. UNMIK Regulation No. 2005/18, Section 30.2.
[164] UNMIK Regulation No. 2002/13, Section 4.1.
[165] However, nobody shall be entitled to a remedy that would require the rescission of a transaction or the nullification of a contract entered into by the Trust Agency pursuant to its authority under UNMIK Regulation No. 2002/12 (2005/18). Therefore, if the Trust Agency has sold a third party's assets in connection with a privatization or liquidation, restitution cannot take place. See UNMIK Regulation No. 2002/13, Section 10.5.
[166] Section 4.1 of UNMIK Regulation No. 2008/4 enhances the jurisdiction of the Special Chamber, though most competences remain unchanged.
[167] UNMIK Regulation No. 2002/13, Section 4.5.
[168] UNMIK Regulation No. 2002/13, Sections 4.2 and 4.5. The Special Chamber shall remove the case from the other court if a party to the case so requests. Administrative Direction No. 2006/17, Section 18.3. See also UNMIK Regulation No. 2008/4, Section 4.6.
[169] Administrative Direction No. 2006/17, Section 64.4. See also UNMIK Regulation No. 2008/4, Section 4.1(e).
[170] Administrative Direction No. 2006/17, Section 55. Also, UNMIK Regulation No. 2008/4, Section 4.1(i).

Under UNMIK Regulation No. 2008/4, Section 3, the Special Chamber will have five trial panels, each consisting of two international judges and one judge resident in Kosovo, specialized in a specific area of law.[171]

B. Judge Rapporteur and Normal Proceedings

When a claim is filed with the Special Chamber, the Presiding Judge appoints a Judge Rapporteur[172] to examine whether the claim meets all requirements[173] (e.g. that the claim and documentation are provided in Albanian or Serbian and always with an English version[174]) and is admissible, and whether relief can be awarded in respect of the claim.[175] If the claim does not meet all requirements, the Judge Rapporteur (depending on the type of requirements not met) may refer the claim to the Special Chamber with a recommendation that the claim be declared inadmissible[176] or be rejected, or issue an order to the claimant with specific instructions to complete or correct the claim within a given period of time.[177] If the Judge Rapporteur determines that the claim satisfies all requirements, he shall serve the claim on the respondent.[178]

The respondent may file a defence within one month after service of the claim. Thereafter the Judge Rapporteur determines the periods within which the claimant can file a reply and the respondent a rejoinder. The Judge Rapporteur then reports to the full Chamber which facts are contested and which party bears the burden of proof.[179] Based hereon, evidentiary hearings with one or two judges and full panel hearings are held. Administrative Direction No. 2006/17 has elaborate rules for the hearings.[180]

The procedural rules applicable to proceedings regarding employee lists and liquidation matters differ from the procedural rules described above. In employee list cases, the Trust Agency (which acts as respondent in these matters) can file observations on the complaints. No further written statements will be submitted but the Special Chamber may

[171] These areas are privatization-related matters; matters related to entitlements of employees; general ownership and creditor claims; matters related to the liquidation of enterprises; and reorganization or restructuring of enterprises.
[172] Administrative Direction No. 2006/17, Section 14.
[173] Administrative Direction No. 2006/17, Sections 25.1(a) and 25.2. See also Law on Contested Procedure, Articles 109 and 281 and Article 109. Administrative Direction No. 2006/17, Section 25.2(f) refers to Sections 22 and 24.
[174] The requirement of Administrative Direction No. 2006/17, Section 22.7 that if documents are submitted in Albanian or Serbian, an English translation must be provided while the opposite is not required, favours those parties whose working language is English.
[175] Administrative Direction No. 2006/17, Section 25.1(b).
[176] The Special Chamber has ruled (judgment of 26 October 2005, *Wood Industries LLC v. KTA*, SCC-04-0130) that although the Judge Rapporteur has declared a claim admissible, the claim may be declared inadmissible at a later stage of the proceedings. The decision of the Judge Rapporteur is not a definite decision of the issue because it is only based on information submitted by the claimant.
[177] The Special Chamber strictly applied the time period given by the Judge Rapporteur to correct a claim when it declared (order of 17 November 2004, *Aqif Laqi v. NPMK "Kosova Plastika" and KTA*, SCC-04-0154) the claim inadmissible because the claimant had not corrected his claim before the deadline.
[178] Administrative Direction No. 2006/17, Sections 25.3 - 25.6.
[179] Administrative Direction No. 2006/17, Section 31.
[180] Administrative Direction No. 2006/17, Sections 32 - 44. Case files that were examined in preparation of this report in general showed compliance with these procedures.

order a hearing.[181] In liquidation cases, the Liquidation Review Committee can file observations on the challenge of the creditor.[182]

In proceedings before the Special Chamber, claimants and respondents must be "represented by a member of a bar association in Kosovo or in Serbia"[183] but natural persons may represent themselves.[184] The Presiding Judge may permit that a party be represented by a member of a "foreign" bar association.[185] A lawyer acting for a party must submit a power of attorney. If the claimant fails to do so, the claim shall be dismissed as inadmissible.[186]

C. Referral of Claims to Regular Courts

The Special Chamber may refer claims over which it has primary jurisdiction to the regular courts if all parties consent thereto or the Special Chamber is satisfied that the court to which it refers the claim will make an impartial decision.[187] The criteria that the Special Chamber must use for its decision are (i) the nature of the parties, (ii) the amount in dispute, and (iii) other circumstances.[188] However, the Special Chamber cannot refer cases that do not belong to the category of "claims" over which the Special Chamber has "primary jurisdiction", such as employee list cases and liquidation cases.[189] The referral

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[181] Administrative Direction No. 2006/17, Section 64.
[182] Administrative Direction No. 2006/17, Sections 65 and 66.
[183] Administrative Direction No. 2006/17, Section 21.1.
[184] The Presiding Judge may order that a party must be represented by a member of a bar association in Kosovo or Serbia if required for the protection of that person's rights and interests. The Presiding Judge shall do so only if he is satisfied that the party is able to afford legal representation or legal aid will be made available.
[185] Administrative Direction No. 2006/17, Section 21.3.
In several cases reviewed for this report, the Special Chamber did allow foreign lawyers. For instance, in a decision of 9 September 2004 (*Wood Industries LLC v. KTA*, SCC-04-0130) the Presiding Judge allowed representation of the claimant by a member of a bar in the United States. The same issue arose in the case *Shaban Morina v. KTA* (SCC-06-0415) with respect to a member of the Law Society of England and Wales.
[186] Administrative Direction No. 2006/17, Section 21.4-6.
[187] UNMIK Regulations No. 2002/13 and No. 2008/4, Section 4.2.
[188] UNMIK Regulation No. 2002/13, Section 4.2 and Administrative Direction No. 2006/17, Section 17.
[189] The Special Chamber may refer claims while in employee list cases the employees file complaints and in liquidation cases the aggrieved party usually files a challenge. One judge on the Special Chamber has confirmed that the Special Chamber often refers creditors' claims, labour claims (for unpaid salaries etc., but not employee list complaints) and ordinary property claims (other than expropriation related matters). However, the Special Chamber does not refer sensitive claims which involve a large amount of money or many employees, and ownership claims where problems of international law and political sensitivities arise (these cases usually relate to expropriations in the 1940s-60s). This seems in accordance with the aforementioned criteria.
According to a written statement of the Special Chamber to the OSCE, the original purpose of referring cases was to fight a permanent lack of human and material resources. However, over time the following additional purposes have been identified:

- by referring cases the Special Chamber enables regular courts to deal with cases which they would not be dealing with otherwise,
- by reserving the right to appeal, the Special Chamber can monitor and correct of the regular courts, and assure a uniform jurisprudence in matters falling under its jurisdiction,
- regular courts have better access to the evidence relevant to cases referred (e.g. cadastral records, employment documents, site inspections etc.), reducing the duration of proceedings and improving justice efficiency, and
- costs are reduced (court fees, attorneys fees, costs of translation) for the parties.

order must state the reasons for the decision and whether an appeal is to be filed with the Special Chamber or with another court.[190]

D. Three-judge Panels

The Presiding Judge has the authority to assign claims to panels of three judges. Such panels are composed of an international judge, a national judge and the presiding judge or his designee. The full Special Chamber will review decisions of such panels (i) if the panel cannot reach consensus, (ii) at the request of a judge not sitting in the panel, or (iii) at the application of a party to the proceedings.[191]

E. One Instance, Limited Appeal

According to UNMIK Regulation No. 2002/13, judgments of the Special Chamber are final and binding.[192] This means that no appeal from judgments of the Special Chamber is possible and that claims that are within the jurisdiction of the Special Chamber (e.g. all claims against the Trust Agency) will only be heard in one instance.[193] However, the Special Chamber has jurisdiction in appeals from decisions of other courts to which the Special Chamber has referred matters or which have decided on claims that are within the primary jurisdiction of the Special Chamber.[194]

Of note, the new UNMIK Regulation No. 2008/4, which will enter into force on 31 May 2008, creates the possibility to appeal judgments or decisions of a trial panel of the

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[190] Administrative Direction No. 2006/17, Section 17.2. According to the judges interviewed, appeal to the Special Chamber or another court is always preserved. UNMIK Regulation No. 2008/4, Section 4.3, provides that a judgment or decision of a court to which a matter has been referred may be appealed only to the trial panel of the Special Chamber, unless the trial panel decides otherwise.

[191] Administrative Direction No. 2006/17, Sections 13.3 and 13.4. Of note, amending UNMIK Regulation No. 2008/4, Section 8.2, provides that a trial panel may delegate the conduct of proceedings to a single international judge or a sub-panel consisting of two of its members, one of whom shall be an international judge. Judgments and decisions of such judge or sub-panel shall be deemed to be issued by the trial panel, unless the order delegating the case requires the trial panel to take the decision or make the judgment.

[192] UNMIK Regulation No. 2002/13, Section 9.7; see also Administrative Direction No. 2006/17, Section 45.6.

[193] According to a person involved in drafting the early regulations establishing the Special Chamber, the initial drafts provided for a two-instance Special Chamber, but financial constraints resulted in the removal of the appeals chamber.

[194] UNMIK Regulation No. 2002/13, Section 4.3 and Administrative Direction No. 2006/17, Section 55. An appeal must be filed with the Special Chamber within two months of service of the decision on the parties while the term for appeal in other proceedings in the courts of Kosovo is 15 days after receipt of a copy of the judgment by the parties. The term for review by the Supreme Court is 30 days. See Law on Contested Procedure, Articles 348 and 382. From cases reviewed it appears that the Special Chamber strictly applies the rule that its judgments are final. For instance, in a judgment of 7 November 2007 (*Grand Group Partnership JSC v. KTA*, SCC-06-0176), the claimant requested the Special Chamber to review its decision regarding the costs of the proceedings. The Special Chamber considered that the claimant tried to draw a distinction between an appeal on the merits and an appeal on the costs, but that the law makes no such distinction. Moreover, the claimant had not asked for a rectification of the judgment or a review of an omission. (Administrative Direction No. 2006/17, Section 46 provides for rectification of clerical calculation errors. Section 47 provides that a party may apply for a supplement of a judgment if the Chamber omits to give a decision on a specific part of a claim or on costs). The Special Chamber declared the request inadmissible.

Special Chamber. Parties may appeal to the appellate panel for review of such decisions within 30 days of receipt.[195]

F. Reviews and Appeal

The Special Chamber itself has acknowledged the limited appeal possibility (and understaffing and delays) as a problem and following several measures the Special Chamber performs more appellate-like procedures:

- **Employee List Cases**
  Until 2006, the Trust Agency did not review the employee lists and employees could file their complaints directly with the Special Chamber. However, since an amendment of the law[196], the Trust Agency must publish and correct these lists, subject to review in second instance by the Special Chamber.

- **Liquidation Review Committee**
  The recently created[197] Liquidation Review Committee serves as a first instance review body of decisions of the Liquidation Committees. Decisions of the Review Committee are subject to review in second instance by the Special Chamber.

- **More cases assigned to three-judge panels**
  At present, the Presiding Judge assigns three-judge panels[198] to most cases which it does not refer to regular courts. Although UNMIK Regulation No. 2002/13 does not foresee the possibility of a appeal, upon request of a judge or a party, the full Special Chamber will review a decision of a three-judge panel.[199] This may be considered as an informal appeal.[200]

- **More cases referred to Regular Courts**
  Currently, the Special Chamber refers most claims to regular courts.[201] In its referral decisions, the Chamber preserves the right of appeal, either to another regular court or to the Chamber itself.

G. Other Procedural Rules

To answer questions that are not sufficiently covered by the mainly procedural rules of Administrative Direction No. 2006/17, the Special Chamber may apply any provisions of the Law on Contested Procedure applicable in Kosovo and of applicable law on the

[195] The appellate panel consists of two international judges, two judges resident of Kosovo and the president of the Special Chamber. UNMIK Regulation No. 2008/4, Sections 3.3, 4.4 and 9.5.
[196] Administrative Direction No. 2006/17, Section 64.
[197] Administrative Direction No. 2007/1, Section 9.
[198] Administrative Direction No. 2006/17, Section 13.3.
[199] According to a judge interviewed, review is requested in approximately ten to twenty percent of the decisions of three-judge panels.
[200] This request for review will be unnecessary with the entry into force of UNMIK Regulation No. 2008/4, which create a formal appeal, UNMIK Regulation No. 2008/4, Section 9.5.
[201] According to a judge interviewed, the Special Chamber now refers about 80% of the claims submitted to regular courts.

powers of the Supreme Court of Kosovo relating to civil matters.[202] The Special Chamber may also issue additional procedural rulings,[203] although it has not done so thus far.

VII. LEGISLATIVE PROBLEMS WITH THE LEGAL FRAMEWORK ON THE SPECIAL CHAMBER

A. Limited Appeal and Compliance with Human Rights Standards

As discussed above, in many Special Chamber cases, there is no right of appeal under UNMIK Regulation No. 2002/13. Article 6.1 of the Convention[204] does not expressly create a right to an appeal in civil matters.[205] Article 2 of the Seventh Protocol to the Convention and Article 14.5 of the International Covenant on Civil and Political Rights provide for a right of appeal only in criminal matters.[206] However, in most countries that are parties to the Convention it is possible to appeal civil court decisions to provide the parties with additional judicial safeguards. Thus, the OSCE welcomes the establishment of a right to appeal against decisions and judgments of the Special Chamber by the new UNMIK Regulation No. 2008/4 which will enter into force on 31 May 2008.[207]

B. Appointment of Judges and the Independence of the Special Chamber

There is concern whether the procedure for the appointment of Special Chamber judges is consistent with the required independence of the court. With regard to the right to a hearing by an independent tribunal, as guaranteed by Article 6.1 of the Convention, the European Court of Human Rights has stated:

> "In order to establish whether a body can be considered 'independent', regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence."[208]

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[202] Administrative Direction No. 2006/17, Section 67.3.
[203] Administrative Direction No. 2006/17, Section 67.1.
[204] Article 6 (Right to a fair trial), paragraph 1, of the Convention provides: "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. The 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."
[205] Judgments of the European Court of Human Rights, *Delcourt v. Belgium*, application no. 2689/65, 17 January 1970, paragraph 25; *Hoffmann v. Germany,* 11 October 2001, application no. 34045/96, paragraph 65.
[206] The Seventh Protocol (1984) to the Convention provides in Article 2: "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law". See the similar text of Article 14.5 of the International Covenant of Civil and Political Rights.
[207] UNMIK Regulation No. 2008/4, Sections 3.3, 4.4 and 9.5.
[208] Judgment of the European Court of Human Rights, *Langborger v. Sweden*, 22 June 1989, application no. 11179/84, paragraph 32. See also *Campbell and Fell v. United Kingdom*, 28 June 1984, application no. 7819/77 and 7878/77, paragraph 79 (criminal case).

Judges on the Special Chamber are appointed by the Special Representative of the Secretary General of the United Nations, who is also responsible for executive and legislative matters. This procedure is not limited to the Special Chamber, but the same procedure applies to the appointment of other international judges and prosecutors in the Kosovo courts.[209] Moreover, in accordance with United Nations-practice, the judges of the Special Chamber are appointed for periods of six months each time. Although the Special Chamber does present an appearance of independence, the appointment of the judges for periods of six months by the institution that is co-responsible for the legislative and executive powers in Kosovo raises concerns under Article 6.1 of the Convention.

Furthermore, pursuant to UNMIK Regulation No. 2005/18, the Chairman of the Board of the Trust Agency is also the Deputy Special Representative of the Secretary General within UNMIK. Therefore, both the judiciary and the Trust Agency report to the same individual – the Special Representative of the Secretary General (who is also the legislator). This could provide the context for the possible appearance of impropriety should the Trust Agency inform UNMIK of concerns regarding decisions and judgements taken by the Special Chamber.

C. Multiple Functions and Impartiality of Judges

Another concern with UNMIK Regulation No. 2002/13 is whether the same judges performing pretrial and trial functions, or acting as a trial and appellate judge, comply with fair trial standards.

Judges of the Special Chamber often perform several functions with respect to the same case: first as Judge Rapporteur (who examines the claim when it is initially filed), later as member of the Special Chamber (which discusses the claim when it refers the matter to a regular court). Moreover, the same judge who refers a case to a regular court or who sits on a three-judge panel may hear the appeal or review in the same case.

Article 6.1 of the Convention demands a hearing by an impartial tribunal. According to the European Court of Human Rights, when the impartiality of a tribunal for the purposes of Article 6.1 is evaluated, not only the personal conviction and behaviour of a particular judge in a given case are relevant. In addition, the question whether there are sufficient guarantees to exclude any legitimate doubt in this respect is important. In this connection, the mere fact that a judge has already taken decisions before the trial cannot in itself be regarded as justifying anxieties as to his impartiality. What matters is the scope and nature of the decisions.[210]

Participation in a trial by a judge (who before the trial has made a record of the statements of a party without examining the merits of the case, and has undertaken certain pre-trial measures which consist of collecting simple information), were, in the European Court's view, of a preparatory character to complete the case-file before the

[209] The OSCE has previously noted concerns that the procedure for appointment of judges and prosecutors, particularly international ones, does not comply with the principle of judicial independence. See OSCE Report, *Review of the Criminal Justice System September 2001 - February 2002*, pages 27-29.

[210] Judgments of the European Court of Human Rights, *Hauschildt v. Denmark*, 24 May 1989, application no. 10486/83, paragraphs 49-53; *Nortier v. the Netherlands*, 24 August 1993, application no. 13924/88, paragraph 33; *Saraiva de Carvalho v. Portugal*, 22 April 1994, application no. 15651/89, paragraph 35; *Castillo Algar v. Spain*, 28 October 1998, application no. 28194/95, paragraphs 46-51.

hearing. The European Court of Human Rights held that fear as to the impartiality of the judge was not objectively justified and that there was no violation of Article 6.1 of the Convention.[211]

The European Court of Human Rights has also held that prior involvement of a judge in a case before the trial did not violate Article 6 of the Convention when the decision of the judge was subject to control by a judicial body that had full jurisdiction and provided the guarantees of Article 6 of the Convention.[212] However, when trial judges are called upon to determine whether their own application of the law has been adequate, there is concern regarding the impartiality of the judges.[213]

Thus, assuming that a Special Chamber judge does not consider the merits of the case when acting as a Judge Rapporteur or when he refers a matter to the regular court, this combination of functions likely does not violate Article 6.1 of the Convention, as interpreted by the European Court of Human Rights. However, a review of a judgment of a three-judge panel cannot be considered as a valid appeal because the same judges who participated in the three-judge panel also are part of the full Chamber.[214]

In light of the above, the OSCE welcomes the creation of separate first instance and appellate panels where judges involved at the first instance stage do not hear the appellate proceeding related to that case. The OSCE recommends that a new Administrative Direction be issued to implement UNMIK Regulation No. 2008/4 that provides adequate safeguards against creating multiple functions of judges within the Special Chamber that may raise conflict of interest concerns.

VIII. CONCERNS IDENTIFIED IN THE JUDICIAL REVIEW OF JUDGMENTS OF THE SPECIAL CHAMBER

The OSCE has monitored approximately 56 cases at the Special Chamber since August 2006. As part of its monitoring, the OSCE has attended court sessions and reviewed court files and judgments. This section summarizes concerns that the OSCE observed in its monitoring activities.

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[211] Judgment of the European Court of Human Rights, *Fey v. Austria*, 24 February 1993, application no. 14396/88, paragraphs 30-36.

[212] Judgment of the European Court of Human Rights, *De Haan v. the Netherlands*, 26 August 1997, application no. 22839/93, paragraphs 47-51.

[213] Judgment of the European Court of Human Rights, *San Leonard Band Club v. Malta*, 29 July 2004, application no. 77562/01, paragraphs 61-66.

[214] While most of the judgments of the European Court of Human Rights cited in this paragraph involved criminal cases, the same logic is persuasive in civil cases. In the case *Aleksander Hadzijevic and Vera Frtunic v. KTA and SOE Trepca Hotels restaurant Parajsa*, SCA-07-0083, the Trust Agency filed a request for review, on 15 January 2008, against the judgment rendered by a three judge panel on 18 December 2007. As there are only five judges working at the Special Chamber in total, three of the judges, who had adjudicated the case will therefore sit on the full judge panel composed of five judges – despite the Trust Agency's request for disqualification of the three judges. According to the Special Chamber, the review -- which is not an appeal -- does not raise impartiality or fair trial concerns where a fact is discovered which might by its nature have a decisive influence on the outcome of the dispute concerned and which when the decision was taken was not known to the court and could not reasonably be known by the parties. See Rule 80 of the Rules of Procedure of the European Court of Human Rights ("Rules of Court"); see also Rule 46 of the Rules of Procedure of the Human Rights Advisory Panel of Kosovo, February 2008.

A. Publication of Decisions

The OSCE is concerned that the Special Chamber does not publish or distribute decisions. However, according to the Special Chamber, that is because the court lacks the necessary financial and material resources, which is outside its control.

In case law under Article 6.1 of the Convention, the European Court of Human Rights recognizes the relevance of publication of judgments.[215] Of note, the hearings of the Special Chamber are open to the public and its judgments are pronounced publicly, thus meeting the formal requirements of the right to a public hearing of Article 6 of the Convention.[216] However, copies of the judgments are available only at the reception of the Chamber. At present, the decisions are not readily available to the public -- they are neither published in a gazette nor posted on the internet.

Public decisions can serve many valuable functions, such as to increase transparency in the judiciary and to educate lawyers about how to interpret relevant law. Moreover, parties who consider submitting a claim to the Special Chamber may encounter problems when trying to review judgments of the Special Chamber.[217] Consequently, the OSCE believes that, because of the importance of the judgments of the Special Chamber to the economic and political development of Kosovo, it should regularly publish its decisions in an official gazette (and preferably distribute them in hard copy and on the internet).

B. Regular Courts Assume Jurisdiction

The OSCE is concerned that civil courts in Kosovo have on occasion failed to examine their jurisdiction *ex officio* in cases where the Special Chamber has primary or exclusive jurisdiction. This not only violates domestic procedural law, but also may violate the right to be heard by a tribunal established by law.[218]

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[215] According to case law of the European Court of Human Rights: "the principles governing the holding of hearings in public […] also apply to the public delivery of judgments […] and have the same purpose, namely a fair trial […]. [I]n each case the form of publicity to be given to the 'judgment' under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 § 1" See judgment of the European Court of Human Rights, *Werner v. Austria*, 24 November 1997, application no. 21835/93, paragraphs 54 and 55. See also judgments of the European Court of Human Rights, *Pretto and Others v. Italy*, 8 December 1983, application no. 7984/77, paragraph 26; *Axen v. Germany*, 8 December 1983, application no. 8273/78, paragraph 31; *Sutter v. Switzerland*, 22 February 1984, application no. 8209/78, paragraph 33; *Diennet v. France*, 26 September 1995, application no. 18160/91, paragraph 33; *Malhous v. the Czech Republic*, 12 July 2001, application no. 33071/96, paragraph 55).

[216] In a case (where the judgment of the Court of Cassation of Italy had not been pronounced publicly), the European Court of Human Rights held, having regard to the Court of Cassation's limited jurisdiction, that depositing the judgment in the court registry, which made the full text of the judgment available to everyone, was sufficient to satisfy the requirement (judgment of the European Court of Human Rights, *Pretto and Others v. Italy*, 8 December 1983, application no. 7984/77, paragraph 27). However, the European Court of Human Rights found a violation of Article 6(1) of the Convention where decisions were served on the applicant and not delivered at public sittings. The Court considered that no judgment was pronounced publicly and that publicity was not sufficiently ensured by other means (judgment of the European Court of Human Rights, *Werner v. Austria*, 24 November 1997, application no. 21835/93, paragraphs 56-60).

[217] The lack of publicity of judgments is a more general problem in Kosovo. In the past, two volumes with judgments of the Supreme Court have been published, but this seems the sole exception.

[218] See Article 14(1) of the International Covenant on Civil and Political Rights and Article 6(1) of the Convention.

The Convention guarantees the right to a fair trial before an "independent and impartial tribunal established by law."[219] In interpreting this right, the European Court on Human Rights held that a court should be properly composed "in accordance with law" and noted that a violation occurs when a tribunal does not function according to applicable procedural law.[220]

Under applicable civil procedure, "[i]mmediately upon receipt of the pleadings, the court shall *ex officio* assess whether it is competent to judge that particular case […]."[221] "When during the proceedings, the court determines that the case falls neither within the jurisdiction of a court of record […], but that it falls within the jurisdiction of some other domestic or foreign body, it shall declare itself as not competent, cancel already conducted actions in the proceedings, and dismiss the claims."[222] Once the court pronounces itself non-competent, it shall assign the case to the competent court or body.[223] As described above, the Special Chamber has primary jurisdiction in suits against an SOE administered by the Trust Agency.[224]

Despite these legal requirements, the OSCE has observed cases where regular courts incorrectly assumed jurisdiction in cases within the primary or exclusive jurisdiction of the Special Chamber:

> The Prishtinë/Priština Municipal Court incorrectly assumed jurisdiction of a suit against an SOE administered by the Trust Agency in a claim for unfair dismissal from work and for unpaid salaries. On 23 November 2005, the Municipal Court awarded claimants three million euros in a decision against the SOE. At the request of the public prosecutor, the Supreme Court of Kosovo cancelled the judgment and sent the case to the Special Chamber on 14 July 2006. The main reason for that decision was that the Municipal Court had no jurisdiction over the SOE.

With respect to the question whether the Chamber should refer the matter again to the Municipal Court or should hear the case itself, the Special Chamber noted:

> "the Municipal Court decided on the basis of an unbalanced knowledge of the facts. Moreover the Municipal Court misled the [Trust Agency] by informing it, in response to a specific query, that no cases were pending against the SOE […] when in fact the claim had already been filed. […] In

[219] Article 6(1) of the Convention.
[220] *Zand v. Austria*, European Court of Human Rights, 7360/76, Commission Report, 12 October 1978.
[221] "The assessment of jurisdiction is done on the grounds of the counts of the charges, and on the grounds of the facts known to the court." See Article 15 (1) and (2) of the Law on Contested Procedure (Official Gazette of Socialist Republic of Yugoslavia, No. 4/77 and its subsequent amendments). Moreover, throughout the proceedings, the court *ex officio* shall pay attention to whether the resolution of the dispute lays within the court's jurisdiction. See Article 16(1) of the Law on Contested Procedure. According to Article 354(2)(3) of the Law on Contested Procedure, the fact that a decision has been made on a case that was nor within the jurisdiction of that court is a substantial breach of the procedure and ground for appeal against a decision.
[222] Article 16(2) of the Law on Contested Procedure. According to Article 354(2)(3) of the Law on Contested Procedure, the fact that a decision has been made on a case that was nor within the jurisdiction of that court is a substantial breach of the procedure and ground for appeal against a decision.
[223] Article 21(1) of the Law on Contested Procedure.
[224] UNMIK Regulation No. 2005/18, Section 30.1; UNMIK Regulation No. 2002/13, Section 4.

> these circumstances the Chamber concludes that the whole issue is to be retried before this Chamber."[225]

In addition, the following cases demonstrate more examples of the failure of regular courts to appropriately assess their jurisdiction and refer the case to the Special Chamber:

> In a property dispute before the Municipal Court Prizren against an SOE under the administrative authority of the Trust Agency, the court decided in the preliminary hearing on 21 February 2006 to proceed with this case without assessing its jurisdiction.[226] The court scheduled the first main session on 7 March 2006 and issued a judgment on 3 May 2006 in which the court approved the claim, declaring a property contract between the parties as null and void, and ordering the respondent to return the property to the claimants.
>
> In a labour dispute before the Municipal Court Mitrovicë/Mitrovica against a Publicly Owned Enterprise under the administrative authority of the Trust Agency, the court held four trial sessions[227] and subsequently issued a judgment which was appealed to the District Court Mitrovicë/Mitrovica on 22 September 2005.

In the above mentioned examples, the courts did not correctly assess their competence to hear the dispute. Since both suits involved claims against a enterprises under the administrative authority of the Trust Agency, the courts should have dismissed the claims and referred them to the Special Chamber, which had primary or exclusive jurisdiction. By hearing a case outside their jurisdiction, the municipal courts violated domestic law and possibly international human rights standards.

C. Quality of Legal Representation

Lawyers should zealously represent clients and pursue their interests to the best of their abilities. The Code of Professional Ethics ("Ethics Code"), which also regulates the relations between the lawyer and client, states "[t]he lawyer advises and defends his client with diligence and zeal,"[228] and requires that "[t]he lawyer should take care to provide his party with necessary defence as soon as possible and with as few expenses as possible, as well as to fight any delay."[229] At a minimum, the lawyer should diligently follow the established procedural rules under applicable law and advocate for his client.

Despite these requirements of effective, diligent and zealous legal representation, the OSCE has observed poor performance by some lawyers before the Special Chamber. The main concerns include the lack of knowledge of applicable law, poor preparation, and failure of lawyers to attend court sessions proceedings without notifying the court in

[225] According to the OSCE research, the lawyer of the claimant seemed not able or willing to answer questions of the Presiding Judge. This case seems an example of collusion between the parties and judges at the level of the regular courts. Judges of the Special Chamber have mentioned that they noticed more incidents of apparent collusion.
[226] On the same date, the court ordered that the Trust Agency should be notified about the case.
[227] Dated 17 January, 10 February, 10 March, and 4 May 2005.
[228] Article 32, Ethics Code.
[229] Article 50, Ethics Code.

advance. In addition, lawyers failed to provide powers of attorneys to the court as required by law.

The following cases, based on direct monitoring by the OSCE, serve as examples:

1) Lack of knowledge of the applicable law

> In two combined cases before the Special Chamber, the claimants claimed annulment of a tender and privatization by the Trust Agency, and re-publication of a new tender, of immovable property located in the village of the claimants. During the hearing dated 2 August 2007, the lawyer stated that he did not know under which law the property that his client claimed had been socialized in the past. The lawyer added that he did not know of the formal procedure applicable to the sale of the property. Therefore, the lawyer in this case had insufficient knowledge of the law.

2) Poor preparation or Failure to Appear During Court Sessions

> In a case before the Special Chamber, the Presiding Judge asked the lawyer of the employees, in a hearing dated 11 September 2007, what the legal basis of the claim was, who had caused the damage and when this had happened. The lawyer stated several times only that everything was stated in the claim.
>
> During an evidentiary hearing of 18 August 2007 in the Special Chamber, the claimant's lawyer could not explain any legal issues of the case (which dealt with a question of validity of a property exchange contract) to the panel. As the presiding judge could not continue the hearing without receiving a clear statement of the claimant's lawyer, such as regarding the legal basis of the claim, the judge asked the lawyer to provide his submissions in writing and postponed the proceedings.
>
> In another evidentiary hearing in the Special Chamber dated 22 October 2007, two lawyers for the claimant could not answer questions of the Chamber. More specifically, the lawyers could not explain the status of proceedings before municipal courts involving the claimant which were relevant to the case. Therefore, the presiding judge suspended the case.

Clearly, the lawyers in these cases had prepared themselves poorly for the court hearings.

The quality of the lawyers of the Trust Agency seemed in most of the cases better than those representing private parties. However, Trust Agency attorneys also on occasion were not prepared, or requested extensions for simple procedural tasks or to familiarize themselves with the file:

> For instance, during a hearing in the Special Chamber dated 17 April 2007, the lawyer of the Trust Agency came unprepared because the file had been given to that lawyer at a late moment. In another case, a lawyer of the Trust Agency was present but could not answer any questions (hearing of 30 October 2007).

In addition, the occasional failure of lawyers of the Trust Agency to appear for SOEs as respondents in regular courts creates the risk of default judgments against those SOEs, sometimes for large amounts.[230] This happens not only if the regular court and local management of the SOE do not inform the Trust Agency, but even if the Special Chamber refers a claim against an SOE to a regular court (and informs the Trust Agency thereof):

> Lawyers for an SOE and the Trust Agency did not appear in a preliminary session of the Municipal Court of Kaçanik/Kačanik held on 27 September 2007. The Special Chamber had referred this matter to the Municipal Court and informed the Trust Agency (party to the proceedings) thereof.
>
> The Trust Agency also did not appear for the respondent-SOE in a matter which the Special Chamber referred to the District Economic Court of Prishtinë/Priština on 28 February 2007. On 4 October 2007, the Special Chamber rejected the appeal of the Trust Agency against the judgment of the Prishtinë/Priština Court.

The Trust Agency advises that, with limited resources, it must focus its attention on specific cases. Furthermore, in some cases SOEs provide their own lawyers. According to the Trust Agency, it is not required to, nor can it, represent all SOEs in respect of all claims that may affect them. However, the risk that the Trust Agency assumes by not presenting a defence in regular court proceedings is clear from the decision (dated 1 November 2007) of the Special Chamber in the matter *Vehbi Thaqi and others v. SOE Paper Factory*, SCA-07-0059.

In this matter, the claimants had filed a claim against the SOE before the Special Chamber in 2005. The Special Chamber referred the matter to the Municipal Court of Lipjan/Lipljane and served copy of that decision upon the Trust Agency. The Municipal Court heard the case and issued a final decision (dated 27 September 2005) against the SOE. The Trust Agency did not present any defence for the SOE and did not appeal the decision. The claimants then obtained an execution order and attempted to collect the amount of the court decision from the trust account of the Trust Agency with the Central Banking Authority of Kosovo. The Banking Authority refused to co-operate. Thereafter, the Trust Agency placed the SOE in liquidation and asked the Special Chamber to suspend all cases against the SOE. However, a three-judge panel of the Special Chamber gave the claimants permission to proceed against the trust account of the Trust Agency. The full Chamber rejected the request of the Trust Agency to review this decision and added that the ground for seeking this appears to be that the Trust Agency did not present a defence in the Municipal Court proceedings. The fact that Trust Agency chooses not to provide representation cannot be a basis to overturn an otherwise final and legally binding court decision.[231]

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[230] See *Idriz Hergaja et al. v. Kosovoatex/Kosovka SOE*, SCA-06-0001 and *Abaz Lushi and 911 others v. Pipe Factory, SOE and KTA*, SCA-06-008.

[231] See decision of the Special Chamber dated 1 November 2007 in the matter of *Vehbi Thaqi and others v. SOE Paper Factory*, SCA-07-0059.

3) No power of attorney

The OSCE is also concerned that lawyers often do not file powers of attorney with the Special Chamber, as required by domestic law.[232]

Administrative Direction No. 2006/17, Section 21.4, requires that a lawyer acting for a party must submit to the Registry of the Special Chamber a copy of the power of attorney granting him the authority to represent that client. If the lawyer fails to submit the power of attorney, the Special Chamber shall dismiss the claim as inadmissible (Section 21.6).

Despite this legal requirement, the OSCE observed in several cases that lawyers of claimants could not produce a power of attorney:

> In a case regarding a challenge of a decision of a liquidation committee of an SOE in the Special Chamber, only five out of 61 employees had granted the required power of attorney to the lawyer at the time of the hearing dated 7 August 2007.
>
> A similar situation arose in a matter where the Special Chamber had granted an injunction against the intention of the Trust Agency to privatize contested land. Thereafter, the claimants changed their lawyer and the new lawyer never submitted a power of attorney and never responded to any communication from the Special Chamber. Consequently, the Special Chamber subsequently withdrew the injunction.

In accordance with applicable rules, the Special Chamber has declared complaints inadmissible when a lawyer did not submit a power of attorney. See, for instance, a decision of 20 July 2006 (*Dragoljub Grujic et al. in re Ringov Peja, SOE v. KTA*, SCEL-05-0016).

Thus, in these cases the lawyers failed to diligently follow the established procedural rules under applicable law which did not serve the best interest of their clients, violating the Ethics Code.

D. Delays

The OSCE is concerned that delays in Special Chamber trial proceedings (or proceedings initially filed in another court and referred to the Special Chamber) hinder the proper administration of justice and possibly violate the rights of parties to a trial within a reasonable time.

The right to be tried within a reasonable time is implied in the guarantee of the right to a fair trial (Article 6 of the Convention), which also applies to civil proceedings.[233] In determining what constitutes "a reasonable time" for the purposes of Article 6 of the Convention, regard must be paid to the circumstances of each case. This includes the complexity of the factual or legal issues raised by the case, the conduct of the plaintiff

[232] Administrative Direction No. 2006/17, Section 21.4-6, discussed in Chapter VI.B.

[233] See judgment of the European Court of Human Rights, *Moreira v. Portugal*, 26 October 1988, application no. 11371/85, paragraph 46.

and of the state.[234] In this context, the European Court of Human Rights ruled that states must organize their legal systems so as to allow the courts to comply with the requirements of Article 6 of the Convention.[235] The purpose of this requirement is to guarantee that within a reasonable period, and by means of a judicial decision, an end is put to the insecurity in which a person finds himself as to his civil-law position.[236]

However, the public authorities are not responsible for delays attributable to the parties or their lawyers, and therefore such delays are not considered when determining whether a case meets the "reasonable time-period" standard.[237] However, lawyers must improve their performance and comply with their obligations under the Ethics Code to avoid delays.[238]

While most of the court files reviewed showed active case management by the Special Chamber and timely action by the parties, there have been substantial delays in some cases:

> A long delay occurred in a matter that a commercial court referred to the Special Chamber on 12 June 2003 because of lack of jurisdiction. The claimant submitted the claim to the Special Chamber on 23 March 2004. After four months passed for translation and clarification of the claim, the respondent submitted its response on 6 August 2004. Further delays occurred in the period October 2004 – February 2005 and from April 2005 until 9 August 2007 when a hearing was held. During this hearing, the lawyer for the claimants stated that he had been appointed recently and requested postponement to familiarise himself with the case. The presiding judge expressed concern and said that he could not accept this request because the appointment was known for six months. During a later hearing in the same case (31 October 2007) the lawyer of the respondent declared that he had been assigned two hours before and requested postponement.

In this case the file management by the Special Chamber may not have been optimal, but the lawyers or their clients appeared to abuse their procedural rights and violate the Code of Ethics to cause delay.

The OSCE also observed substantial delay in a few other cases:

> In one case, the party filed its claim with the Special Chamber on 5 July 2006 and the respondent (the Trust Agency) received the claim on 20 December 2006. The Special Chamber registered the response on 19 January 2007 but did not schedule the hearing until 6 September 2007.

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[234] Judgment of the European Court of Human Rights, *Pailot v. France*, application no. 32217/96, 22 April 1998, paragraph 61.
[235] Judgments of the European Court of Human Rights, *Muti v. Italy*, 23 March 1994, application no. 14146/88, paragraph 15; *Sussmann v. Germany*, 16 September 1996, application no. 20024/92, paragraphs 55 and 56.
[236] P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, page 602.
[237] Judgment of the European Court of Human Rights, *Konig v. Federal Republic of Germany*, 28 June 1978, application no. 6232/73, paragraphs 97-114.
[238] Article 50, Ethics Code.

> In a second case in the Special Chamber, a request for an injunction (to enjoin a tender scheduled for 6 September 2006) was filed with the Special Chamber on 4 September 2006, but was only served on the respondent (the Trust Agency) on 16 May 2007. Subsequently (on 23 July 2007), the Trust Agency has sold the property that the claimant had wanted to enjoin with the injunction.

Different factors may cause delays. These include the high number of cases, understaffing and administrative errors by the Special Chamber, procrastination and abuse of procedural rights by the parties or their lawyers, and changes of lawyers. However, an important cause is likely the poor quality of (especially claimants') lawyers. Most of the claims submitted to the Special Chamber are deficient and need to be corrected and completed before the proceedings can start.

However, to protect the rights of parties to a trial within a reasonable time, as required under international law, the Special Chamber and the Trust Agency should minimize delays in these cases.

E. Administrative Errors

The OSCE also has observed a few administrative errors in its monitoring of the Special Chamber:

> In some cases, a submission by one of the parties was not in the file of the other party or in the file of the Special Chamber. The amendment of the claim had been sent by the Special Chamber to the respondent. During the hearing, it was not in the court's file. In three related cases, two claimants had not received the statement of the defendant. In the third case during the hearing, one of the submissions of the claimant was not in the court's file. Something similar happened in another case monitored by the OSCE.[239]
>
> In an employee list matter, the registration form in the administration of the Special Chamber (and the judgment of 10 October 206) states that "the deadline for the complaints was 12.06.2006". Nevertheless, the Chamber accepted a complaint which according to the same registration form was dated 6 July 2006 (after the deadline).

IX. CONCLUSION

This report summarizes the laws applicable to the Trust Agency and Special Chamber, and notes the OSCE's concerns regarding compliance with international human rights standards. Of note, the Trust Agency rules are complex and, in the opinion of the OSCE, do not meet requirements of the Convention if it privatizes assets that were previously subject to illegal expropriation. A major problem with the Special Chamber laws, which

[239] This does not necessarily mean that there are many administrative errors. The OSCE has observed that sometimes documents are temporarily taken from the main case file of the court by one of the sitting judges to review the file, or to make photocopies, and later placed back.

has recently been remedied, is that they did not provide the parties with a right of appeal.[240]

In direct monitoring of Special Chamber cases, the OSCE noted problems such as the lack of publication of decisions, the incorrect assumption of jurisdiction by the regular courts of matters within the primary or exclusive jurisdiction of the Special Chamber, poor performance by Trust Agency and other attorneys, and delays in the proceedings.

Privatization in Kosovo has been underway for approximately four years and the Trust Agency has sold many of the bigger and more promising SOEs. Other important SOEs - such as that related to the Brezovica/Brezovicë ski area - have yet to be privatized. Many more companies will undergo liquidation. Moreover, the Trust Agency must finalize the liquidations and reorganizations - such as the Trepca mine - that it initiated, but has yet to complete.

As privatization will be crucial for the future economic and political development of Kosovo, it is important that the process by the Trust Agency and judicial review by the Special Chamber are fair, transparent, and comply with international human rights standards.

[240] However, the new UNMIK Regulation No. 2008/4 which will enter into force on 31 May 2008, provides for a right to appeal.

RECOMMENDATIONS

Suggested Changes to Applicable Legislation:

- UNMIK Regulation No. 2005/18 regarding the Trust Agency should be amended to ensure that the rules governing privatization comply with the requirements of Article 1 of Protocol 1 to the Convention regarding the protection of property. The law should provide for determination of ownership and for return of assets to their rightful owners before privatization. The law should be sufficiently detailed. Furthermore, a law should also make clear which claims of ownership will be recognized (a law on restitution should be drafted and promulgated).
- The term "trust" should be defined.
- Section 13.1 of UNMIK Regulation No. 2007/1, which introduced the suspension of all proceedings against an SOE in liquidation by simple notification to the Special Chamber, should be amended to allow for judicial determination of the suspension or judicial review of such determination.
- UNMIK Regulations No. 2002/13 and 2008/4 and Administrative Direction No. 2006/17 should be amended to ensure that judicial appointments are free from political influence.
- Reduce the number of and simplify the Regulations and Administrative Directions governing the Special Chamber, the Trust Agency and the privatization process. Conflicts with other Kosovo laws must be eliminated, such as the type of evidence required in discrimination matters and the term to lodge appeals from judgments.

To the Special Chamber:

- Publish and make available to the public in hard and electronic copy (e.g. on the internet) court decisions.

To the Kosovo Trust Agency:

- Clarify applicable law and dispute settlement in the Rules of Tender.
- Promulgate additional rules regarding the administration and liquidation of SOEs, and make public its operational policies, and quarterly, annual, and audit reports.
- Ensure that there is effective legal representation for claims against SOEs in the local courts or in cases before the Special Chamber in which it is a party.

To the Kosovo Chamber of Advocates:

- Conduct trainings for lawyers on the laws governing the Special Chamber, Trust Agency, and the privatization process.
- Discipline attorneys who violate the Code of Professional Ethics.

ANNEX I: FACTS AND FIGURES OF THE TRUST AGENCY AND SPECIAL CHAMBER

The Special Chamber

The Special Chamber commenced work in June 2003. As of October 2007, the Special Chamber has a total staff of 32 persons, including five judges (three international and two national), five legal officers (three international and two national), one registrar, five interpreters, and one court recorder. In total, there are 12 international and 20 national staff members.

Of the incumbent judges, the three international judges began work with the Special Chamber in early 2005, one of the national judges arrived before 2005, and the other national judge started early 2007.

The Special Chamber distinguishes the following categories of cases: appellate proceedings; applications under the reorganization regulation; creditor's claims against decisions of liquidation committees; and employees list complaints.[241] Below follows a survey of cases filed, decided and pending in these categories.

Cases in Appeal

Year	Total Appeals Filed	Total Appeals Decided	Total Active Appeals
2005	4	3	1
2006	27	15	12
2007	59	5	54
Total	90	23	67

Applications under Reorganization Regulation

Year	Total Applications Filed	Total Applications Decided	Total Active Applications
2005	6	4	2
2006	1	1	0
Total	7	5	2

Claims against Decisions of Liquidation Committees

Year	Total Claims Filed	Total Claims Decided	Total Active Claims
2006	7	3	4
2007	6	2	4
Total	13	5	8

[241] There is one more category, Protection of legality cases. This category has not been included here because the OSCE is aware of only one case.

Employee List Complaints[242]

Year	Total Complaints Filed	Total Complaints Decided	Total Active Complaints
2003	17	Postponed to 2004	0
2004	2101	2101	0
2005	2030	1978	3
2006	1251	1247	6
2007	1		1
Total	5385	5326	10

The Trust Agency

The Trust Agency is an independent body with full legal personality.[243] It has its headquarters in Prishtinë/Priština and five regional offices, in Prishtinë/Priština, Prizren, Mitrovicë/Mitrovica, Pejë/Peć and Gjilan/Gnjilane. The Trust Agency has a total share (or charter) capital of € 10,000,000 of which € 1,000,000 has been paid up[244] from the Kosovo Consolidated Fund.[245] The Trust Agency has a Board of Directors consisting of eight members - four international directors and four residents of Kosovo.[246] The Board appoints the managing director (who is a member of the Board) and the deputy managing directors on nomination by the Chairman.[247] The Trust Agency has a total staff of approximately 245, including 44 internationals, 201 Kosovans, and six international consultants. The staff dedicated to SOEs numbers approximately 30 at headquarters, including about 12 international and five Kosovan lawyers.

The Trust Agency has a large claims unit, for the registration and processing of tens of thousands of claims, sometimes against the Trust Agency but mainly against SOEs. In privatizations, usually ownership claims arise. In liquidations of SOEs, creditors' claims arise and they are subject to decisions by the relevant Liquidation Committee and possibly to review by the Review Committee and further review by the Special Chamber[248].

[242] The Special Chamber noted that as of October 2007, it has decided 5326 employee list complaints but an individual judgment has not been issued for each complainant. Where possible, the Chamber included all complainants of each privatised enterprise in one judgment. However, these cases are time consuming, as the court must check significant evidence for each complainant.
[243] UNMIK Regulation No. 2005/18, Section 1.
[244] UNMIK Regulation No. 2005/18, Section 17.
[245] Information from the Trust Agency.
[246] The Special Representative of the Secretary General appoints the Kosovo directors, one of whom shall be vice-chairman of the Board. Three of the Kosovo directors are ministers of the Government of Kosovo, including a minister from the Kosovo Serb Community. The fourth Kosovo minister is the president of the Federation of Independent Trade Unions of Kosovo. The international directors are the Deputy Special Representative of the Secretary General for Economic Reconstruction, who is Chairman of the Board; the Deputy to the Deputy Special Representative of the Secretary General for Economic Reconstruction; the Deputy Special Representative of the Secretary General for Civil Administration, and the Managing Director of the Trust Agency. The directors other than the chairman and the vice-chairman serve for renewable two-year terms.
[247] The Board of Directors may dismiss the managing director and the deputy managing directors at any time, UNMIK Regulation No. 2005/18, Section 15.5.
[248] Administrative Direction No. 2007/1, Section 9.

As of November 2007, the total number of SOEs that the Trust Agency administered was approximately 650. Depending on the value, size and significance of the particular SOE, the Trust Agency administers some SOEs closely, others at a distance. The more "meaningful" SOEs where the benefits of economic development seemed most likely or technical (e.g. cadastral) complications appeared minimal, have been privatized, with liquidation either taking place or pending. As of November 2007, the Trust Agency had been involved in the privatization of approximately 320 SOEs (for which approximately 550 subsidiaries had been created) and had placed 110 SOEs in liquidation. Of the remaining SOEs, a number will yet undergo privatization and liquidation. Other SOEs, whose assets are insignificant or where technical complications (no cadastral registration, etc) are high, will only be liquidated. None of the liquidations has been finalized so that (or because) creditors have not yet received payment. [249]

[249] According to information received in an interview with an official of the Trust Agency, November 2007.