

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), and Article 59(1) and (2), Article 60 and Article 72(2) and (4) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Plenary and composed of the following judges:

Mr. Mato Tadić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Valerija Galić,

Ms. Seada Palavrić,

Mr. Zlatko M. Knežević,

Ms. Angelika Nußberger, and

Ms. Helen Keller

Having deliberated on the request filed by twenty-four members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, in the Case no. **U 16/20**, at its session held on 16 July 2021, adopted the following

PARTIAL DECISION ON ADMISSIBILITY AND MERITS

Deciding on the request filed by twenty-four members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina to resolve a dispute between Bosnia and Herzegovina and the Republika Srpska,

the Constitutional Court of Bosnia and Herzegovina hereby establishes that there is a dispute over decisions on concession with regard to the concession property and the competence to pass them, which were passed by the Republika Srpska, and orders the Concession Commission of Bosnia and Herzegovina, in the capacity as the Joint Concession Commission, to resolve, in terms of Article 4, paragraph 3 and Article 6, paragraph 2 of the Law on Concessions of Bosnia and Herzegovina and no later than three months as of the delivery of the present decision, the disputes between Bosnia and Herzegovina and the Republika Srpska, arising in connection with the concessions awarded

by the Decision on determining the conditions for awarding a concession through a negotiation process for the construction and use of Hydro Electric Power Plant „Buk Bijela“ on the Drina River, the Municipality of Foča, number: 04/1-012-2-472/16 of 4 March 2016 (*Official Gazette of the Republika Srpska*, 20/16), and by the Ruling awarding a concession for the construction and use of HPP „Buk Bijela“ on the Drina River, the Municipality of Foča, number: 04/1-012-2-1099/16 of 20 May 2016 (*Official Gazette of the Republika Srpska*, 42/16) and by the Concession contract number: 05.05/012-274-16/16 of 3 June 2016;

by the Decision on determining the conditions for awarding a concession through a negotiation process for the construction and use of HPP „Foča“ on the Drina River, number: 04/1-012-2-81/19 of 10 January 2019 (*Official Gazette of the Republika Srpska*, 4/19), and by the Ruling awarding a concession for the construction and use of HPP “Foča” on the Drina River, number: 04/1-0122-221/19 of 24 January 2019 (*Official Gazette of the Republika Srpska*, 9/19) and by the Concession contract no. 05.05/360-2-24/19 of 19 February 2019; and

by the Decision on determining the conditions for awarding a concession through a negotiation process for the construction and use of HPP “Paunci” on the Drina River, number: 04/1-012-2-80/19 of 10 January 2019 (*Official Gazette of the Republika Srpska*, 4/19), and by the Ruling awarding a concession for the construction and use of HPP “Paunci” on the Drina River, number: 04/1-012-2-214/19 of 24 January 2019 (*Official Gazette of the Republika Srpska*, 09/19) and by the Concession contract number: 05.05/360-2-22/19 of 19 February 2019.

The Concession Commission of Bosnia and Herzegovina is ordered, pursuant to Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to inform the Constitutional Court within a time limit of three months from the delivery of this Decision, of the measures taken to enforce this Decision, at the latest.

Until then, further proceedings upon the request of 24 members of the House of Representative of Bosna ad Herzegovina are postponed.

This Decision shall be published in *the Official Gazette of Bosnia and Herzegovina, the Official Gazette of the Federation of*

Bosnia and Herzegovina, the Official Gazette of the Republika Srpska and the Official Gazette of the Brčko District of Bosnia and Herzegovina.

REASONING

I. Introduction

1. On 28 December 2020, twenty-four members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina (“the applicants”) filed a request with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) for resolving the dispute between Bosnia and Herzegovina and the Republika Srpska, stemming from the adoption of the Decision on determining the conditions for awarding a concession through a negotiation process for the construction and use of Hydro Electric Power Plant „Buk Bijela“ on the Drina River, the Municipality of Foča, number: 04/1-012-2-472/16 of 4 March 2016 (*Official Gazette of the Republika Srpska*, 20/16), and the Ruling awarding a concession for the construction and use of HPP „Buk Bijela“ on the Drina River, the Municipality of Foča, number: 04/1-012-2-1099/16 of 20 May 2016 (*Official Gazette of the Republika Srpska*, 42/16) and the Concession contract number: 05.05/012-274-16/16 of 3 June 2016; the Decision on determining the conditions for awarding a concession through a negotiation process for the construction and use of HPP „Foča“ on the Drina River, number: 04/1-012-2-81/19 of 10 January 2019 (*Official Gazette of the Republika Srpska*, 4/19), and by the Ruling awarding a concession for the construction and use of HPP “Foča” on the Drina River, number: 04/1-0122-221/19 of 24 January 2019 (*Official Gazette of the Republika Srpska*, 9/19) and by the Concession contract no. 05.05/360-2-24/19 of 19 February 2019; and the Decision on determining the conditions for awarding a concession through a negotiation process for the construction and use of HPP “Paunci” on the Drina River, number: 04/1-012-2-80/19 of 10 January 2019 (*Official Gazette of the Republika Srpska*, 4/19), and by the Ruling awarding a concession for the construction and use of HPP “Paunci” on the Drina River, number: 04/1-012-2-214/19 of 24 January 2019 (*Official Gazette of the Republika Srpska*, 09/19) and by the Concession contract number: 05.05/360-2-22/19 of 19 February 2019 (“the impugned acts”). In addition, the applicants requested that the Constitutional Court issue an interim measure, which would prohibit the application of the impugned acts pending a final decision on the mentioned request.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, on 29 December 2020 the Government of Republika Srpska (“the RS Government”) was requested to submit its response to the request.

3. On 29 January 2021, the RS Government submitted its response to the request. In addition, on 17 May 2021, the RS Government supplemented its response on its own initiative.

III. Request

a) Allegations stated in the request

4. The applicants allege that “Pursuant to Article VI(3)(a), paragraph 2 of the Constitution of Bosnia and Herzegovina, they fall within a group of legitimate applicants for referring disputes that arise under the Constitution between, *inter alia*, Bosnia and Herzegovina and one of the Entities in respect of issues, rights and responsibilities within the jurisdiction *ratione materiae* under the Constitution of Bosnia and Herzegovina.” They point out that they as persons with legal standing to sue referred to in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina have the constitutional right as well as the constitutional responsibility to protect the constitutional order of Bosnia and Herzegovina. The applicants emphasise that they addressed the relevant authorities of the Republika Srpska and requested that the aforementioned documents be rendered ineffective in order to avoid further violations of the Constitution of BiH. The Republika Srpska failed to take any action related to a friendly settlement of the dispute and it even continued to take further actions with a view to implementing the impugned decisions.

5. The applicants assert that the dispute concerns the issue of constitutional obligation of Entities’ authorities to comply with the Constitution of BiH and the division of competencies between the State and the Entities. They refer to the decisions of the Constitutional Court (decisions nos. U 15/18, U 10/16, U 1/11, and U 9/19), where the Constitutional Court of BiH took the position that the Entities did not have the right to manage and dispose of state property, as well as to establish a concession on state property. In addition, according to the appellants, “the impugned decisions, rulings and agreements show that the authorities of the RS Entity awarded a concession for the use of water potentials of the Drina River, regardless of the fact that these potentials, according to previous views of the Constitutional Court of BiH, constitute state property and represent the continuity of the State of BiH, as defined by Article I(1) of the Constitution of BiH. Furthermore, the Constitutional Court of BiH found that the State of BiH has an exclusive right to

dispose of state property, including here disputed water potentials of the Drina River, pending the adoption of the law on the status of state property at the level of BiH. Any other action, especially unilateral, is contrary to Article I(1) of the Constitution of Bosnia and Herzegovina and should be rescinded”.

6. The applicants indicated the following: “according to the Joint Statement of the President of the Government of the Republika Srpska and the President of the Government of the Republic of Serbia, which was signed in Banja Luka on 13 November 2020 ... the parties expressed their intention of joint and coordinated activities aimed at implementation of the project HPP Gornja Drina. The mentioned statement allows us to see what particular activities were undertaken aimed at continuing unconstitutional disposal of public goods, such as the water resources potential of the Drina River. It can be noted that after the issuance of impugned decisions, rulings and agreements on concession over three HPPs on the Drina River – *Buk Bijela*, *Paunci* and *Foča*, many concrete activities were undertaken to implement them.”

7. The applicants proposed that the Constitutional Court grant their request, establish that the impugned decisions are inconsistent with Article I(2) and Article VI(5) of the Constitution of BiH, and that they cease to have effect on the day following the day of publication of the decision of the Constitutional Court in the “Official Gazette of BiH”, as well as oblige the RS Government “to take all actions that will annul all subsidiary decisions and activities” that are based on the impugned decisions. In addition, “in order to prevent the harmful consequences that the impugned decisions, rulings and agreements could produce”, they proposed that the Constitutional Court issue an interim measure suspending the application of the impugned decisions. In the reasoning of this part of the request, the applicants stated “If a 'double hypothesis' test would be applied, which is customary for testing the justification of interim measures (the proportionality of consequences that would occur if the interim measure was adopted and the claim is rejected/dismissed with the consequences in the case where the interim measure is dismissed and the claim granted), it is evident that the reasons in favour of the adoption of the interim measure exist. Namely, if it were established that the request is well-founded and the implementation of the hydro power plants project of Gornja Drina, which is regulated by the impugned acts of the RS Government, is not stopped but rather it begins, the country would be exposed to severe political and international law crisis, and inter-entity and ethnic tension. On the other hand, if the implementation of the project in question were temporarily stopped, given that it is not about a crucial issue, the consequences would not be irreversible. It is also stated that the financial repercussions of the project in question should not be neglected. In fact, according to the feasibility study, the construction of these three facilities in the hydropower project

Gornja Drina would cost BAM 861,586,143.00. If it were established that the impugned decisions, rulings and agreements were unconstitutional and the funds had been spent, a serious financial damage would be inflicted on the Republic of Serbia, the Republika Srpska and its citizens as well as on Bosnia and Herzegovina.

b) Reply to the request

8. In response to the request, it is stated that the RS Government considers that the request is incomplete and unspecified, that it is inadmissible as the Constitutional Court has no jurisdiction to decide about the request, and even if it were admissible, it should be dismissed as unfounded.

9. The request is incomplete and unspecified as “facts and evidence are missing as to how the impugned acts, as individual administrative acts regarding concessions, may be in contravention of the Articles of the Constitution of BiH”, as referred to in the request.

10. The Constitutional Court is not competent to decide on the dispute related to concessions, for “the award of concessions is initially and primarily regulated by laws, and secondarily and derivatively by bylaws. The legislative competence in regulating concessions is divided between Bosnia and Herzegovina and the Entities... In accordance with the aforementioned, concessions are legally regulated by the Law on Concessions of Bosnia and Herzegovina, the Law on Concessions of the Republika Srpska, the Law on Concessions of the Federation of BiH, laws on concessions of Cantons in the Federation of BiH.” In addition, “the Law on Concessions of Bosnia and Herzegovina regulates, *inter alia*, the manner of resolving disputes that may arise between public authorities when awarding a specific concession on concession property.”

11. As to the reasoning related to the assertion that the request is unfounded, the RS Government states that the alleged dispute between Bosnia and Herzegovina and Republika Srpska comes down to the question “whether Bosnia and Herzegovina has exclusive competence to award concessions on all public goods in Bosnia and Herzegovina.” Such a position has no basis in the Constitution of BiH, nor in the decisions of the Constitutional Court, nor in the laws that regulate the area of concessions. The RS Government is competent to adopt the impugned acts, which are fully consistent with the legal acts of Bosnia and Herzegovina and the Republika Srpska. The RS Government also points out the analysis of the application of all laws on concessions, which shows that “the competent authorities of the Federation of BiH, in accordance with the Law on Concessions of the Federation of BiH, awarded at least nine concessions, two of which are concessions for the construction of hydropower plants on the Bosna River (which extends over the two Entities)... six procedures relating to the construction and use of hydropower plants in the

Federation of BiH are underway, *inter alia*, on the Neretva and Bosna Rivers. The competent authorities of the Cantons within the Federation of BiH awarded at least 240 concessions, and the competent authorities of the Republika Srpska awarded at least 320 concessions. Therefore, the acceptance of the request could undermine the entire legal order in the area of concessions of Bosnia and Herzegovina, including all projects to which they have been awarded in that context.”

12. The response emphasizes that “the lack of a legal framework regulating state property cannot be transferred to the issue of awarding concessions, which is already regulated by the laws on concessions at the level of Bosnia and Herzegovina and at the level of Entities, in accordance with the division of competencies under the Constitution of BiH.” Therefore, the issue of competence to regulate the status of state property should and must be considered separately from the issue of competence to award a concession.”

13. With regard to the request for an interim measure, according to the response, it is unfounded and should be dismissed. The reasons given in support of the aforementioned are that the applicants failed to submit evidence that they had previously requested a postponement of the execution of the impugned decisions, which were made between 2016 and 2019. In addition, the reasons for the interim measure are general and arbitrary and are not corroborated by evidence of the existence of a danger should the interim measure not be granted. Contrary to the applicants’ allegations that the failure to adopt the interim measure would lead to financial repercussions detrimental to Bosnia and Herzegovina, it is exactly the adoption of an interim measure and the postponement of the construction of hydropower plants that would jeopardize the financing of the project, especially investments coming from abroad, and thus would create a direct risk of the occurrence of financial damage to Bosnia and Herzegovina.

14. At the request of the Ministry of Energy and Mining of the Republika Srpska regarding the work program of the Commission for 2020 and 2021, the response of the Concession Commission of Bosnia and Herzegovina number 01-50-1-7-16-1/21 of 25 January 2021 was also submitted along with the response to the request. The response concerned, which was signed by the deputy chair Dr. Milomir Amović, states, *inter alia*, “as for the concession projects on the upper part of the Drina River, which you mentioned in the letter, the Concession Commission does not have any official information about them, nor have they ever been included in any of our program activities. According to available information, these projects are not located in the border areas of BiH, nor on inter-entity lines, which would represent a shared competence of BiH and/or the Republika Srpska and/or the Federation of BiH and, as such, they are not subject to the Law on Concessions of BiH”.

15. The conclusion of the RS Government, of 13 May 2021, determining the supplement to the response, was submitted along with the supplement to the response to the request. The supplement to the response states that, after submitting the response to the request, it carried out a detailed analysis of the collected data relating to HPP “Buk Bijela”, such as physical and project planning documents. The analysis has focused on the position of the plant in relation to the border of Bosnia and Herzegovina with Serbia and Montenegro. The distance between the planned location of the future dam HPP “Buk Bijela” on the Drina River and Serbia and Montenegro has been determined. Attached to the supplement to the response is a graphic representation of the construction site, which includes the indicated distance to the territory of Serbia and Montenegro.

IV. Relevant Law

16. **The Constitution of Bosnia and Herzegovina**

Article I

Bosnia and Herzegovina

2. Democratic Principles

Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.

Article VI

5. Decisions of the Constitutional Court shall be final and binding.

16. **The Law on Concessions of Bosnia and Herzegovina** (*Official Gazette of BiH*, 32/02 and 56/04), in the relevant part, reads:

Article I

Contents and subject of the Law

1. This Law regulates the modalities and the conditions concerning the award of Concessions in Bosnia and Herzegovina, the competence for the award of concessions, institutional structure, competence and other issues pertaining to the work of Bosnia and Herzegovina Concession Commission, the tendering procedure, the contents and effects of concession contract, the rights and obligations of the Concessionaire and other issues pertain to the concessions of importance for Bosnia and Herzegovina.

2. This Law sets forth the conditions under which local and foreign legal persons may be awarded concessions in the sectors that are under jurisdiction of Bosnia and Herzegovina, pursuant to the Constitution and laws of Bosnia and Herzegovina and in case it concerns the representation of international subjectivity of Bosnia and Herzegovina, as well as in the cases where concession property extends to the Federation of Bosnia and Herzegovina and the Republika Srpska for providing infrastructure and services, exploitation of natural resources and facilities used for their exploitation, financing, design, construction, rehabilitation, maintenance and/or operation of such infrastructure and all accompanying facilities thereto.

Article 2

Purpose of the Law

The purpose of this Law is to create a transparent, non-discriminatory and clear legal framework for setting the conditions under which local and foreign legal persons may be awarded concessions in Bosnia and Herzegovina and to encourage the investment of foreign capital in the sectors mentioned in Article 1, paragraph 2 of this Law.

Article 3

Definitions

For the purpose of this Law, the following terms shall have the following meanings:

“Conceding Party” - all relevant ministries or authorities of Bosnia and Herzegovina designated by the Council of Ministries of Bosnia and Herzegovina to award a concession as referred to under Article 4 (1).

“Concession” - the right awarded by a Conceding Party to provide the construction of infrastructure and/or services and to exploit natural resources under terms and conditions agreed on by Conceding Party and Concessionaire.

“Concessionaire” - legal person founded pursuant to the laws of Bosnia and Herzegovina, owned by a local and/or foreign legal person who is awarded a Concession and executing a concession contract pursuant to this Law.

Article 4

Authority to Award a Concession

- 1. The Council of Ministries of Bosnia and Herzegovina (hereinafter: Council of Ministries) makes the decisions on type and subject as well as volume of the concession to be awarded which is subject to ratification by the Bosnia and Herzegovina Parliamentary Assembly.*
- 2. In case of joint competence of Bosnia and Herzegovina and/or the Federation of Bosnia and Herzegovina and/or Republika Srpska and/or Brčko District of Bosnia and Herzegovina for concession awarding, the competent authorities harmonize the conditions and form of concession awarding.*
- 3. All disputes arisen from concession awarding between Bosnia and Herzegovina and/or Republika Srpska shall be solved by the joint Concession Commission referred to under Article 6 (2).*

Article 5(1)

- 1. This Law establishes the Concession Commission of Bosnia and Herzegovina as an independent regulatory legal entity set up to carry out its competences in the capacity as the Commission of Bosnia and Herzegovina for concessions awarding or in the capacity as the Joint Concession Commission (hereinafter: Commission).*

Article 6

Commission's Functional Distribution of Competence

- 1. Commission functions in the capacity as the Commission for Awarding Concessions of Bosnia and Herzegovina when it performs duties and gives authorizations pertain to concession awarding that fall under exclusive competence of Bosnia and Herzegovina.*
- 2. Commission functions in the capacity as the Joint Commission for Awarding Concessions when it performs duties and gives authorizations pertain to concession awarding that do not fall under exclusive competence of Bosnia and Herzegovina or in the cases set forth under Article 4 (3).*

Article 7

Composition of the Commission

1. When functions in the capacity of the Concession Commission awarding concessions of Bosnia and Herzegovina, the Commission consists of seven members, including the President and Vice-President, out of which three members have residence in the Federation of Bosnia and Herzegovina, three in the Republika Srpska and one member in the Brčko District of Bosnia and Herzegovina.

2. When it functions in the capacity as the Joint Concession Commission, the Commission consists of seven members. The President as referred to in paragraph 1 is also the President of the Joint Concession Commission. The President appoints three members of the Commission to the Joint Concession Commission out the members referred to in paragraph 1. Other three members of the Joint Commission are interchangeable, depending on the subjects and are appointed by the President of the Joint Concession Commission from among the members of the Federation of Bosnia and Herzegovina Concession Commission founded under the Concession Law of the Federation of Bosnia and Herzegovina and/or out of members of the Republika Srpska Concession Commission founded based on the Republika Srpska Law on Concession or the representatives of the Brčko District of Bosnia and Herzegovina.

Article 12

Operation of the Commission

1. The President of the Commission shall coordinate the work of the Commission and be responsible for work of the personnel.

2. Should the President of the Commission be absent or unable to act, the Vice-President shall act as the President of the Commission.

3. Applications filed with or requests for approval or reconsideration/review submitted to the Commission pursuant to this Law shall be examined and decided on by at least four Commissioners, out of whom one has residence set forth under Article 7 (1). If one Commissioner is unable to perform his/her duty or die in the course of deciding procedure, three remaining members of the Commission might unanimously make decision.

4. *The issues under the Joint Concession Commission competence referred to in Article 4 (3) and Article 6 (2) shall be considered and decided upon by seven Commissioners.*

Article 13

Decisions of the Commission

1. *Decisions of the Commission shall be made in writing and include the reasoning.*

2. *The Commission shall forward without delay a certified copy of its decision to the participants and the competent Minister (hereinafter: Minister) and upon request from the Minister, the copies of other documents as well*

3. *The Secretary of the Commission shall have custody of the records and execute other tasks assigned to him/her by the President of the Commission.*

4. *The decision referred to in Article 21 (3) and the approval referred to in Article 23 shall be published in the Official Gazette of Bosnia and Herzegovina.*

5. *All documents signed by the Commission President or the person authorized by the President shall be authentic. A copy of any document of the Commission signed by the President or authorized person shall be deemed authentic.*

Article 35

Jurisdiction of court

In the event of disputes arisen from violations of this Law the competent court shall be the Court of Bosnia and Herzegovina.

18. **The Rules of Procedure of the Concession Commission of Bosnia and Herzegovina** (*Official Gazette of BiH, 75/06*), in the relevant part, reads:

Article 2

(1) The Concession Commission of Bosnia and Herzegovina shall perform its function and work in accordance with the Law and bylaws at its sessions in the capacity as:

a) the Commission of Bosnia and Herzegovina for Concessions Awarding;

b) Joint Commission on Concessions.

(2) The Commission for Awarding Concessions of Bosnia and Herzegovina and the Joint Commission on Concessions shall pass decisions, orders, rulings and conclusions.

19. The **Book of Rules on Request Submitting Procedure and Concession Awarding Procedure** (*Official Gazette of BiH*, 65/06), in the relevant part, reads:

Article 1

This Book of Rules shall establish the procedure for submitting requests, the procedure for awarding concessions either through a public invitation or in form of unsolicited proposal, the procedure for adopting a feasibility study, public tender, establishing and operation of a tender commission, selecting the most favorable bidder, making decision to award a concession, concluding a contract as well as control and supervision of the work of the concessionaire in the procedure of the implementation of the procedures for awarding concessions that are under the Constitution of Bosnia and Herzegovina and the laws in Bosnia and Herzegovina in the competence of Bosnia and Herzegovina, and in case when representing an international subjectivity of Bosnia and Herzegovina, as well as when the concession property extend onto the Federation of Bosnia and Herzegovina and/or Republika Srpska and/or Brčko District of Bosnia and Herzegovina, as provided for under the Law on Concessions of Bosnia and Herzegovina.

20. The **Law on Concessions of the Republika Srpska** (*Official Gazette of the RS*, 59/13, 16/18 and 70/20), in the relevant part, reads:

Article 1

This Law governs the subject-matter of and competence for awarding of concessions, policy of concession awarding, manner and procedure of concession awarding in the Republika Srpska, elements of concession contract and termination of concession contract, rights and obligations of the concessionaire and the concession grantor, appointment and competence of the Concession Commission of the Republika Srpska, and other issues relevant to the exploitation of concessions.

Article 6

(1) Within the context of this Law, the subject-matter of concession may be any of the following:

a) building, operation and maintenance of the following:

1) roads and associated infrastructure facilities,

2) railways, navigable channels and ports,

3) airports;

b) exploitation of the following public water assets:

1) water for technological process included in performance of economic activity,

(...)

(2) In addition to the concessions mentioned in paragraph 1 of this Article, a subject-matter of concession may also be the exploitation of other goods of general interest and provision of public services, in accordance with the regulations governing the concerned economic or other field.

(3) The concessions mentioned in paragraphs 1 and 2 of this Article may not be awarded in any manner or under any procedure other than in compliance with this Law.

Article 8

(1) Awarding of concessions mentioned in Article 6 of this Law shall be the competence of the Government, save for the concessions mentioned in point k) which shall be the competence of the assemblies of local self-government units.

(2) Notwithstanding paragraph 1 of this Article, the Government may authorize a local self-government unit to award also a concession mentioned in Article 6 paragraph 1, points j), lj), m) and n) of this Law.

Article 11

The procedure for concession awarding may be initiated based on the following:

a) initiative of the competent authority,

b) initiative of the interested person, or

c) bid in a negotiation process.

Article 26

(1) Exceptionally, a concession may be awarded in accordance with Article 12 of this Law, without conducting of the public invitation set forth by this Law, based on a bid in a negotiation process, in the following cases:

a) proposal by a public company performing an activity of general interest, the activity of which is a concession subject-matter or proposal by a public institution to which, in performing an activity of general interest for which it was established, a concession referred to in Article 6 of this Law may be awarded.

(...)

Article 27(2)

(2) The concession grantor shall set minimum technical, economic and financial, legal and other requirements by a decision, which shall be mandatory for the competent authority taking part in the negotiation process, as well as a deadline for conducting of the negotiation process.

(...)

Article 63

(1) Disputes that arise based on the concession contract shall be resolved before the competent court of the RS.

(2) For the resolution of the disputes mentioned in paragraph 1 of this Article, the contracting parties may also agree on arbitration.

(3) The law governing the procedure mentioned in paragraph 2 of this Article shall be the law of the RS.

21. **The Decision on determining the conditions for awarding a concession through a negotiation process for the construction and use of Hydro Electric Power Plant (“HPP”) „Buk Bijela“ on the Drina River, the Municipality of Foča, number: 04/1-012-2-472/16 of 4 March 2016 (Official Gazette of the Republika Srpska, 20/16) reads:**

Article I

This decision shall determine the conditions for awarding a concession for the construction and use of HPP “Buk Bijela” on the Drina River, the Foča Municipality.

Article II

The concession referred to in Article I of this Decision shall be awarded through a negotiation process, based on the offer of the Consortium founded by MH ERS - MP a.d. Trebinje and ZP "Hidroelektrane na Drini" a.d. Visegrad.

Article III

The subject-matter of the concession is the construction and use of the hydroelectric power plant "Buk Bijela" on the Drina River, estimated installed capacity of 93.52 MW and estimated total annual production of 332.3 GWh, which is located in the upper course of the Drina River and is about 11.6 km upstream of the new bridge in Foča. Hydro power plant "Buk Bijela" is a dam-toe powerhouse with a concrete gravity dam with a dam crest elevation of 436.10 m.n.m. The construction of the dam at chainage km 334 + 550 forms an accumulation with a normal deceleration angle of 434 m.n.m. and a total volume of 15.70 million m³.

Article IV

The total value of the investment for the realization of the concession in question, according to the Economic Feasibility Study, is BAM 382,407,793.00.

Article V

The concession shall be awarded for a period of up to 50 years, starting from the day of concluding the concession contract.

Article VI

The amount of the concession fee shall be determined as follows:

- a one-time fee of BAM 764,816.00 and*
- the concession fee for the use of the subject-matter of the concession shall be 3.6% of the total annual income generated by performing the concession activity.*

Article VII

The concession contract shall specify the obligations of the concessionaire regarding the conditions of construction and use of the subject-matter of the concession, and it shall be entered into with the company to be established by the members of the Consortium.

Article VIII

The competent body for conducting the negotiation process for awarding the concession is the Ministry of Industry, Energy and Mining, which shall submit to the Government, within 60 days from the date of entry into force of this Decision, a report on the negotiation process and a proposal of a concession contract.

Article IX

This Decision shall enter into force on the eighth day after its publication in the "Official Gazette of RS".

22. The **Decision on determining the conditions for awarding a concession through a negotiation process for the construction and use of Hydro Electric Power Plant "Foča" on the Drina River** (*Official Gazette of the Republika Srpska*, 4/19) reads:

Article I

This decision shall determine the conditions for awarding a concession for the construction and use of HPP "Foča" on the Drina River.

Article II

The concession referred to in Article I. of this Decision shall be awarded through a negotiation process, based on the offer of the public company Mixed Holding "Elektroprivreda Republike Srpske" - Parent Company a.d. Trebinje.

Article III

The subject-matter of the concession is the construction and use of the hydroelectric power plant "Foča", estimated installed capacity of 44.15 MW and estimated total annual production of 175.8 GWh.

The planned location of the dam of HPP "Foča" is about 1.6 km upstream of Foča and about 10 km downstream of the location of the dam "Buk Bijela".

Article IV

The total value of the investment for the realization of the concession in question, according to the Economic Feasibility Study, is BAM 232,743,770.00.

Article V

The concession shall be awarded for a period of up to 50 years, starting from the day of concluding the concession contract.

Article VI

The amount of the concession fee shall be determined as follows:

- a one-time fee of BAM 1,163,718.85 and*
- fee for the use of the facility for the concession period of BAM 0.0055 per generated kilowatt-hour (kWh) of electricity at the official billing point for the delivery of electricity.*

Article VII

The concession contract shall specify the obligations of the concessionaire regarding the conditions of construction and use of the subject-matter of the concession.

Article VIII

The Ministry of Energy and Mining is hereby authorized to prepare documentation for the negotiating process and, in cooperation with the Concession Commission, to carry out the concession award procedure in accordance with the Law on Concessions and other substantive regulations related to the subject-matter of the concession.

Article IX

This Decision shall enter into force on the eighth day after its publication in the "Official Gazette of RS".

23. The **Decision on determining the conditions for awarding a concession through a negotiation process for the construction and use of Hydro Electric Power Plant "Paunci" on the Drina River** (*Official Gazette of the Republika Srpska*, 4/19) reads:

Article I

This decision shall determine the conditions for awarding a concession for the construction and use of HPP "Paunci" on the Drina River.

Article II

The concession referred to in Article I. of this Decision shall be awarded through a negotiation process, based on the offer of the public company Mixed Holding “Elektroprivreda Republike Srpske” - Parent Company a.d. Trebinje.

Article III

The subject-matter of the concession is the construction and use of the hydroelectric power plant “Paunci”, installed capacity of 43.20 MW and estimated total annual production of 166.9 GWh.

HPP “Paunci” is located circa 10 km downstream from the profile of the dam of HPP “Foča”, at chainage km 314 + 665 of the Drina River confluence with the Sava. The Foča-Goražde main road passes on the left side of the barrier site.

Article IV

The total value of the investment for the realization of the concession in question, according to the Economic Feasibility Study, is BAM 246,434,580.00.

Article V

The concession shall be awarded for a period of up to 50 years, starting from the day of concluding the concession contract.

Article VI

The amount of the concession fee shall be determined as follows:

- a one-time fee of BAM 1,232,172.90 and*
- fee for the use of the facility for the concession period of BAM 0.0055 per generated kilowatt-hour (kWh) of electricity at the official billing point for the delivery of electricity.*

Article VII

The concession contract shall specify the obligations of the concessionaire regarding the conditions of construction and use of the subject-matter of the concession.

Article VIII

The Ministry of Energy and Mining is hereby authorized to prepare documentation for the negotiating process and, in cooperation with the

Concession Commission, to conduct the concession award procedure in accordance with the Law on Concessions and other substantive regulations related to the subject-matter of the concession.

Article IX

This Decision shall enter into force on the eighth day after its publication in the "Official Gazette of RS".

V. Admissibility and merits

24. Given the specificity of the present case and the issues raised therein, the Constitutional Court decided to consider together the admissibility and merits of the request.

25. The Constitutional Court, first, invoked the provisions of Article IV(2) and Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, which read:

Article IV(2)

The House of Representatives shall comprise 42 Members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska.

Article VI(3)(a)

The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- *Whether an Entity's decision to establish a special parallel relationship with a neighbouring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.*
- *Whether any provision of an Entity's Constitution or law is consistent with this Constitution.*

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the

Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

26. Taking into account the provisions of Article IV(2) and Article VI(3)(a) of the Constitution of BiH, the Constitutional Court finds that the request has been filed by an authorized subject. In fact, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina consists of 42 members and 24 members, as many as have filed the request, make up at least one quarter of the total number of members. Having decided to consider the issue of admissibility together with the merits, the Constitutional Court declares the request admissible.

27. The Constitutional Court recalls that in its case law it has repeatedly decided on disputes under the Constitution of BiH between Bosnia and Herzegovina and one of the Entities. In this regard, for example, in case number U-10/16 the Constitutional Court stated: “According to the Constitutional Court’s case-law related to constitutional disputes, acts and activities of one of the Entities may raise the issue of the existence of a dispute between the given Entity and Bosnia and Herzegovina on some issue under the Constitution of Bosnia and Herzegovina on which only the Constitutional Court is competent to decide.” (see, the Constitutional Court, Decision on Admissibility and Merits no. *U 10/16* of 1 December 2016, paragraph 32, available at www.ccbh.ba).

28. In the present case, the applicants assert that there is a dispute between Bosnia and Herzegovina and the Entity of Republika Srpska, which arose from the impugned decisions passed by the Republika Srpska, in respect of which the mentioned Entity has no competence, since they concern the award of concessions on concession property owned by the State. According to the Constitution of BiH and the decisions of the Constitutional Court, referred to in the request, all issues related to the status of state property, including the award of concessions, fall within the competence of public authorities at the level of Bosnia and Herzegovina, and not at the Entity level.

29. On the other hand, the Republika Srpska asserts that there is no dispute regarding the impugned decisions, because that Entity is competent to make such decisions under the Constitution of BiH, relevant decisions of the Constitutional Court, as well as the Law on Concessions of Bosnia and Herzegovina and the Law on Concessions of Republika Srpska. In support of this position, the Republika Srpska argues that the concession property in this case is not state property within the meaning of the Constitution of BiH and the decisions of the Constitutional Court. The Republika Srpska also argues that even in the case of a concession dispute between Bosnia and Herzegovina

and the Republika Srpska, that dispute should be resolved by applying the Law on Concessions of Bosnia and Herzegovina and, consequently, the Constitutional Court is not competent to resolve it.

30. The Constitutional Court recalls its previous case law where it has dealt with issues of the constitutionality of challenged laws related to the status of state property. In this connection, in the case no. *U-1/11* the Constitutional Court reviewed the constitutionality of the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban (see, Constitutional Court, Decision on Admissibility and Merits no. *U-1/11* of 13 July 2012, available at www.ccbh.ba). The reasoning of the decision, paragraph 62, reads “State property, although similar in its structure to civil-legal private property, is a specific legal concept enjoying a special status for this reason. State property is characterized by the public law nature of the relationship between the subjects and the use of that property as well as its titleholder. It includes, first of all, movable and immovable objects in the hands of public authorities and can include furthermore a "public good" (sea water and seabed, river water and river beds, lakes, mountains and other natural resources, public transport networks, traffic infrastructure, *etc.*). It, by its nature, primarily serves all people in the country. As such, the “public good” may be exempted from legal transaction (*res extra commercium*) due to its importance, as it is the only way to preserve and protect it.” In its Decision no. *U-9/19*, the Constitutional Court reviewed the constitutionality of the challenged provisions of the Law on Inland Waterways Navigation of the Republika Srpska, regulating navigation on rivers in the RS (see, Constitutional Court, Decision on Admissibility and Merits no. *U-9/19* of 6 February 2020, available at www.ccbh.ba). The reasoning of the mentioned decision, paragraph 40, reads: “It follows from the cited case-law of the Constitutional Court that waters, as public goods, are considered state property. When the challenged Article 4 is read together with the provisions of Article 3 paragraph 1 of the Law, it follows that inland waters are ‘...water areas...where navigation is carried out on certain waterways...’. However, it is obvious that ‘inland waters’ or ‘water areas’, as referred to in the mentioned articles of the Law, are considered public goods, concerning which the Constitutional Court had taken a position earlier to be part of state property (river water and river beds, lakes, running water, as stated in the cited paragraphs 62 and 82 of the Decision no. *U-1/11*). The Constitutional Court held (also) in the present case that ‘inland waters’, referred to in the challenged Article 4, were included in the notion of state property. The Constitutional Court does not take it as a justification that the legislator indicated that these were ‘inland waters in the territory of the Republika Srpska’, for all of that is situated in the territory of the State of BiH. In terms of the title-holder of state property, there are no abstract ‘external waters’, in order for the legislator to make a difference in comparison to the ‘inland waters’ in the territory of the Republika Srpska that

are its property.” Paragraphs 45 and 48 state the following: “As indicated in the part of the reasoning above, the Constitutional Court holds that the Republika Srpska has responsibility to regulate the issue of inland navigation, exclusively on inland waters though. In terms of the constitutional division of responsibility, the Constitutional Court regards as ‘exclusively inland waters’ the waters of the Republika Srpska that are not at the same time the state borders and international navigable rivers. The National Assembly may not base its exclusive responsibility over the regulation of the issues of inland waters navigation on the rivers Sava and Drina, just because they flow partially through the Republika Srpska. The Constitutional Court reached a similar conclusion concerning the regulation of the issue of property (ownership) over the waterways in the Republika Srpska.”

31. Unlike the aforementioned examples of the case-law regarding the status of state property, in respect of which no law that would regulate the issue of the status of state property was passed at the level of Bosnia and Herzegovina, in the present case the issue of concessions is regulated by the Law on Concessions of Bosnia and Herzegovina, the Law on Concessions of Republika Srpska, the Law on Concessions of the Federation of BiH and the laws on concessions of Cantons in the Federation of BiH. In this regard, Article 1 of the Law on Concessions of Bosnia and Herzegovina stipulates the following: “This Law regulates the modalities and the conditions concerning the award of concessions in Bosnia and Herzegovina, the competence for the award of concessions, institutional structure, competence and other issues pertaining to the work of Bosnia and Herzegovina Concession Commission, the tendering procedure, the contents and effects of concession contract, the rights and obligations of the Concessionaire and other issues pertain to the concessions of importance for Bosnia and Herzegovina.” In addition, “the Law sets forth the conditions under which local and foreign legal persons may be awarded concessions in the sectors that are under jurisdiction of Bosnia and Herzegovina, pursuant to the Constitution and laws of Bosnia and Herzegovina and in case it concerns the representation of international subjectivity of Bosnia and Herzegovina, as well as in the cases where concession property extends to the Federation of Bosnia and Herzegovina and the Republika Srpska for providing infrastructure and services, exploitation of natural resources and facilities used for their exploitation, financing, design, construction, rehabilitation, maintenance and/or operation of such infrastructure and all accompanying facilities thereto.” By the same Law, in terms of Article 5, paragraph 1, “the Law establishes the Concession Commission of Bosnia and Herzegovina as an independent regulatory legal entity set up to carry out its competences in the capacity as the Commission of Bosnia and Herzegovina for concessions awarding or in the capacity as the Joint Concession Commission.”.

The law provides for the manner and body responsible for resolving concession disputes. Consequently, according to Article 4, paragraph 3, “all disputes arisen from concession awarding between Bosnia and Herzegovina and/or Republika Srpska shall be solved by the joint Concession Commission.”

32. The Constitutional Court notes that the Law on Concessions of Bosnia and Herzegovina does not contain special provisions that would determine the manner and authorized body for initiating a dispute within the competence of the Concession Commission of Bosnia and Herzegovina in the capacity as the Joint Concession Commission. Thus, there is a legislative gap. The Constitutional Court must fill the legislative gap accordingly.

33. In connection with the response of the Concession Commission of Bosnia and Herzegovina, which was given on the request of the Ministry of Energy and Mining of the Republika Srpska and which was attached to the response to the request, the Constitutional Court notes that it was given by the Deputy Chairman of the Concession Commission of Bosnia and Herzegovina. In addition it cannot be considered a decision or position of the Commission in terms of Articles 12 and 13 of the Law on Concessions of Bosnia and Herzegovina. Therefore, the Constitutional Court cannot consider that answer in terms of the existence and resolution of a specific dispute.

34. In view of the aforementioned, the Constitutional Court concludes that there is a dispute between Bosnia and Herzegovina and the Republika Srpska relating to the impugned decisions with regard to the status of concession property and the competence to pass them. The Constitutional Court concludes so as the Republika Srpska made the impugned decisions in the belief that it is competent to do so under the Constitution of BiH, the decisions of the Constitutional Court and relevant concession laws. On the other hand, the applicant, authorized under the Constitution of BiH, considers that the Republika Srpska does not have the competence to make the impugned decisions for they concern the status of state property, which can be decided only at the level of Bosnia and Herzegovina. Considering the fact that the Law on Concessions of Bosnia and Herzegovina, which contains provisions on the manner and body responsible for resolving concession disputes between Bosnia and Herzegovina and the Entities, was adopted by the Institution of Bosnia and Herzegovina-Parliamentary Assembly, the Constitutional Court concludes that it is necessary to oblige the Concession Commission of Bosnia and Herzegovina to make a decision in the capacity as the Joint Concession Commission.

35. The Constitutional Court, taking into account all the allegations of the applicants, as well as the allegations in the response of the Republika Srpska, and the fact that the present decision did not

finally resolve the dispute in question, has set an appropriate time-limit for deciding the dispute of up to three months from the date of submission of this decision to the Concession Commission of BiH in its capacity as the Joint Concession Commission. For this reason, the Constitutional Court postponed further proceedings on this part of the request *sine die* pending the adoption of the decision by the aforementioned Commission. Considering the above, the Constitutional Court concluded that it would not examine separately the request for interim measure.

VI. Conclusion

36. Deciding on the request, filed by the applicants authorized under the Constitution of BiH, for resolving the dispute under the Constitution of BiH between Bosnia and Herzegovina and the Entity of Republika Srpska, the Constitutional Court concluded that there was a dispute relating to the decisions on concessions, which were passed by the Republika Srpska, with regard to the concession property and the competence to pass these decisions. According to the Law on Concessions of Bosnia and Herzegovina, the Concession Commission of Bosnia and Herzegovina should resolve the present dispute, in the capacity as the Joint Concession Commission.

37. Pursuant to Article 57(2)(b), Article 59(1) and (2), Article 60 and Article 72(2) and (4) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of the present decision.

38. Pursuant to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina