

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

Blue Bank International & Trust (Barbados) Ltd.

The Claimant

v.

Bolivarian Republic of Venezuela

The Respondent

ICSID Case No. ARB/12/20

AWARD

Arbitral Tribunal:

Mr. Christer Söderlund, President

Prof. George Bermann

Ms. Loretta Malintoppi

Secretary of the Tribunal:

Ms. Sara Marzal Yetano

Date of dispatch to the Parties: 26 April 2017

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GLOSSARY OF TERMS

Ansbacher	Ansbacher (Bahamas) Limited, Bahamas
BIT or the Treaty	Agreement between the Government of Barbados and the Government of the Republic of Venezuela for the Promotion and Protection of Investments dated 15 July 1994, Exhibit C-135
Blue Bank or Claimant	Blue Bank International & Trust (Barbados) Ltd.
Brighton	Brighton Preferred Equity Investments Ltd.
BVI Companies	GIM Tour Ltd (BVI) and Western Hemisphere Hotels Ltd (BVI)
Centre or ICSID	The International Centre for Settlement of Investment Disputes
Claimant's Memorial	Claimant's Memorial on Jurisdiction and the Merits submitted on 7 September 2014
Commentary	Christopher H. Schreuer <i>et al</i> , <i>The ICSID Convention. A Commentary</i> , Cambridge University Press 2009
Convention or the ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
Counter-Memorial on Jurisdiction	Claimant's Counter-Memorial on Jurisdiction dated 8 June 2015
Eligible Person	Hampton Latin American Holdings, Ltd.
Escrow Agreement	Stock and Dividend Escrow Agreement, dated 1 April 2005, Exhibit R-112

Exhibit C- [No.]	Claimant's exhibits
Exhibit CLA- [No.]	Claimant's legal authorities
Exhibit R- [No.]	Respondent's exhibits
Exhibit RLA- [No.]	Respondent's legal authorities
Fourth Trust Deed	Amended and Restated Trust Deed of 16 March 2006, Exhibit R-115
GIM Tour	GIM Tour Ltd (BVI)
Hampton	Hampton Latin American Holdings, Ltd
Hemesa	Corporación Hotelera Hemesa S.A.
ICSID Arbitration Rule(s)	Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes in force since 2006
ICSID Institution Rule(s)	The Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings of ICSID
ITC	Inversora Turística Caracas S.A.
Memorial on Objections to Jurisdiction	Respondent's Memorial on Objections to Jurisdiction submitted on 23 March 2015
Original Trust Deed	Irrevocable Authorised Purpose Trust Deed, created by Jaime Castillo (the "Settlor") and Ansbacher (Bahamas) Limited (the "Trustee") on 21 April 2005, Exhibit R-116
Pledge Agreement	Collateral Pledge Agreement dated 1 April 2005, Exhibit R-113
Qatar Trust	The Qatar International Authorised Purpose Trust

Rejoinder on Jurisdiction	The Claimant's Rejoinder on Jurisdiction, dated 14 January 2016
Request for Arbitration or Request	The Request for Arbitration submitted by Claimant on 22 June 2012
Venezuela or Respondent	The Bolivarian Republic of Venezuela
Respondent's Reply	The Respondent's Reply on Objections to Jurisdiction of the Bolivarian Republic of Venezuela, dated 9 November 2015
Second Trust Deed	Deed of Retirement, Appointment and Indemnity, dated 1 July 2005, Exhibit R-161
Settlor, or Original Settlor	Jaime Castillo Ledesma, a Venezuelan citizen
Third Trust Deed	Deed of the Qatar Trust, dated 15 March 2006, Exhibit R-114
Trust Deed	Deed of Amended and Restated Trust, made on 8 June 2006, Exhibit C-99
VCLT	Vienna Convention on the Law of Treaties, signed at Vienna, 23 May 1969
Venezuelan Companies	The Venezuelan companies Inversora Turística Caracas S.A. and Corporación Hotelera Hemesa S.A., related to the Mezerhane Group
Waterstone	Waterstone Protector Services Corporation
Western Hemisphere	Western Hemisphere Hotels, Ltd (BVI)

1 THE PARTIES

1.1 The Claimant

1. The Claimant is Blue Bank International and Trust (Barbados) Ltd., a corporation incorporated under the laws of Barbados on 7 June 2002, having its head offices at Braemar Court, Deighton Road, St Michael BB14017, Barbados.¹

1.2 The Respondent

2. The Respondent is the Bolivarian Republic of Venezuela (jointly with the Claimant, the “Parties”).²

2 PROCEDURAL HISTORY

3. On 25 June 2012, the Centre received a Request for Arbitration filed by the Claimant against the Respondent dated 22 June 2012. The Request concerned the alleged expropriation and other violations of the obligations under the BIT³ in relation to Claimant’s tourism and hospitality business in Venezuela.
4. In the Request, the Claimant invoked Venezuela’s consent to dispute settlement through ICSID arbitration provided in Article 8 of the BIT. Also in the Request, the Claimant made a proposal as to the number of arbitrators and the method of their appointment.
5. The Request, as supplemented by the Claimant’s letter of 27 July 2012, was registered by the Secretary-General of ICSID on 7 August 2012 pursuant to Article 36(3) of the Convention. On the same day, the Secretary-General, in accordance with Rule 7(c) of the ICSID Institution Rules, notified the Parties of the registration and invited them to proceed to constitute the Tribunal.
6. By letter dated 8 October 2012, the Claimant invoked the procedure for the constitution of the Tribunal established in Article 37(2)(b) of the ICSID Convention. In the same letter, the Claimant appointed Mr. José María Alonso (a Spanish national) as an arbitrator and proposed Prof. George A. Bermann (a US national) as presiding arbitrator.

¹ Claimant’s Memorial, ¶ 66.

² Venezuela submitted its note of denunciation of the Convention on 24 January 2012.

³ Exhibit C-135.

7. On 22 October 2012, Mr. José María Alonso accepted his appointment as co-arbitrator.
8. By letter dated 5 November 2012, the Respondent appointed Dr. Santiago Torres Bernárdez (a Spanish national) as an arbitrator and proposed that the President of the Tribunal be appointed by agreement of the co-arbitrators. In a separate letter of the same date, the Respondent indicated its intention to propose the disqualification of Mr. José María Alonso pursuant to Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules. In a letter of 9 November 2012, the Centre informed the Parties that the Centre would transmit the disqualification proposal to the Tribunal as soon as it was constituted.
9. On 15 November 2012, Dr. Torres Bernárdez accepted his appointment as co-arbitrator.
10. On 4 May 2013, the Claimant filed a request for the Chairman of the Administrative Council to appoint the presiding arbitrator pursuant to Article 38 of the ICSID Convention. By letter of 23 May 2013, the Secretary-General proposed five candidates to the Parties to be considered as the presiding arbitrator. None of these proposals resulted in a mutually agreeable candidate.
11. By letter of 12 June 2013, the Claimant indicated its intention to propose the disqualification of Dr. Torres Bernárdez pursuant to Article 57 of the ICSID Convention and ICSID Arbitration Rule 9.
12. On 2 July 2013, the Centre communicated to the Parties its understanding that the intent of both Parties was to treat the Respondent's 5 November 2012 letter and the Claimant's 12 June 2013 letter as a proposal for disqualification of the majority of the members of the Tribunal, which would be decided by the Chairman of the Administrative Council in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9. Both Parties agreed with the Centre's understanding.
13. By letter of 31 July 2013, the Centre informed the Parties of its intention to propose to the Chairman of the Administrative Council the appointment of Mr. Christer Söderlund, a Swedish national, as the presiding arbitrator. By letter of 7 August 2013, the Respondent objected to the proposal of Mr. Söderlund as the presiding arbitrator. The Claimant did not submit observations. By letter of 13 August 2013, the Centre transmitted to the Parties Mr. Söderlund's reply to the Respondent's objections. Having carefully considered the correspondence exchanged on this matter, the Centre informed the Parties that it would proceed

with the appointment of Mr. Söderlund. Mr. Söderlund accepted his appointment on 15 August 2013.

14. By letter of 16 August 2013, the Centre informed the Parties that all the arbitrators had accepted their appointments and that, pursuant to ICSID Arbitration Rule 6(1), the Tribunal was deemed to have been constituted and the proceedings to have begun on that date. Ms. Alicia Martín Blanco, ICSID Legal Counsel, was designated by the Secretary-General of ICSID to serve as the Secretary of the Tribunal.
15. On the same date, the Centre transmitted copies of the proposals to disqualify Mr. Alonso and Dr. Torres Bernárdez to the three members of the Tribunal, declared the proceeding suspended in accordance with ICSID Arbitration Rule 9(6), and established a procedural calendar for the Parties' submissions on the disqualification proposals.
16. On 23 August 2013, the Respondent submitted additional observations to its disqualification proposal of Mr. José Maria Alonso.
17. On 2 September 2013, Dr. Torres Bernárdez submitted a letter to the Centre (i) furnishing explanations in accordance with ICSID Arbitration Rule 9(3) and (ii) submitting his resignation in accordance with ICSID Arbitration Rule 8(2). The Centre circulated this letter to the Parties, to Mr. Alonso, and to Mr. Söderlund on 6 September 2013.
18. On 9 September 2013, Mr. Alonso furnished explanations in accordance with ICSID Arbitration Rule 9(3). The Centre circulated Mr. Alonso's explanations to the Parties and to Mr. Söderlund on the same date.
19. On 9 September 2013, the Parties were invited to submit simultaneous observations on any of the documents filed regarding the proposals to disqualify Mr. Alonso and Dr. Torres Bernárdez by 19 September 2013. On 19 September 2013, the Respondent submitted its observations. On the same date, the Claimant submitted its observations in two separate documents: one document dealing with the resignation of Dr. Torres Bernárdez and another document relating to the proposed disqualification of Mr. Alonso.
20. On 4 October 2013, the Parties were invited to submit reply observations by 11 October 2013.

21. Following an extension of the deadline granted by the Centre to both Parties, the Respondent submitted its reply observations on 24 October 2013. No additional comments were received from the Claimant.
22. On 12 November 2013, the proposal for disqualification of arbitrator Mr. Alonso was upheld by the Chairman of ICSID's Administrative Council. Given Dr. Torres Bernárdez prior resignation, the Claimant's proposal for his disqualification was dismissed by the Chairman of ICSID's Administrative Council. The Secretary-General notified the Parties of a vacancy on the Tribunal following the disqualification of Mr. Alonso and that the proceeding would remain suspended pursuant to ICSID Arbitration Rule 10(2).
23. On 13 November 2013, the Claimant appointed Prof. George A. Bermann as arbitrator, in accordance with ICSID Arbitration Rule 11(1). Prof. Bermann accepted his appointment on 21 November 2013.
24. On 27 November 2013, the Tribunal consented to the resignation of arbitrator Dr. Torres Bernárdez pursuant to ICSID Arbitration Rule 8(2), and the Centre notified the Parties thereof.
25. On 29 November 2013, the Respondent appointed Ms. Loretta Malintoppi (an Italian national) as arbitrator, in accordance with ICSID Arbitration Rule 11(1). Ms. Malintoppi accepted her appointment on 6 December 2013.
26. By letter of 9 December 2013, the Centre informed the Parties that the Tribunal had been reconstituted and that, in accordance with ICSID Arbitration Rule 12, the proceeding was resumed.
27. The first session of the Tribunal was held by teleconference on 27 January 2014. The following persons participated in the conference call:

For the Tribunal:

Mr. Christer Söderlund (president)
Prof. George Bermann (arbitrator)
Ms. Loretta Malintoppi (arbitrator)

For the ICSID Secretariat:

Ms. Alicia Martín Blanco, Secretary of the Tribunal

For the Claimant:

Mr. Pedro J. Martinez-Fraga
Mr. C. Ryan Reetz
Mr. Juan C. Garcia
Mr. Kamal Sleiman

For the Respondent:

Mr. Osvaldo Guglielmino
Mr. Facundo Pérez Aznar
Mr. Guillermo Moro
Mr. Diego Brian Gosis
Ms. Yarubith Escobar

28. On 25 February 2014, the Tribunal issued Procedural Order No. 1 concerning procedural matters and including a schedule of the proceedings.
29. In accordance with the schedule fixed by the Tribunal, on 7 September 2014, the Claimant filed its Memorial.
30. On 28 October 2014, the Respondent requested the Tribunal to suspend the proceedings on the merits and to determine the Tribunal's jurisdiction as a preliminary matter.
31. On 22 December 2014, the Claimant filed observations on the Respondent's request for bifurcation.
32. On 13 January 2015, the Tribunal issued Procedural Order No. 2 granting the request for bifurcation and thus suspending the proceeding on the merits.
33. On 28 January 2015, the Tribunal issued Procedural Order No. 3 fixing a procedural calendar for the proceedings on jurisdiction.
34. Pursuant to the said calendar, the Respondent filed its Memorial on Jurisdiction on 23 March 2015, and the Claimant filed its Counter-Memorial on Jurisdiction on 8 June 2015.
35. On 18 August 2015, each party filed a request for the Tribunal to decide on production of documents.
36. By letter dated 21 August 2015, the Centre informed the Parties that Ms. Sara Marzal Yetano, ICSID Legal Counsel, would replace Ms. Alicia Martín Blanco as Secretary of the Tribunal.

37. On 9 September 2015, the Tribunal issued Procedural Order No. 4 concerning the requests for production of documents.
38. On 20 October 2015, the Tribunal issued Procedural Order No. 5, likewise concerning the requests for production of documents and extending the deadline for the submission of the Respondent's Reply on Jurisdiction.
39. Pursuant to the Tribunal's instructions in Procedural Order No. 5, on 9 November 2015, the Respondent filed its Reply on Jurisdiction. In accordance with an extension granted by the Tribunal on 2 January 2016, the Claimant filed its Rejoinder on Jurisdiction on 14 January 2016.
40. Pursuant to the Tribunal's instructions, both Parties filed their documentary evidence for impeachment purposes on 3 February 2016. Neither party filed any documentary evidence for impeachment rebuttal purposes.
41. On 27 January 2016, both Parties identified the witnesses and experts they wished to examine during the hearing on jurisdiction. By email dated 29 January 2016, the Claimant objected to the examination at the hearing on jurisdiction of four of the witnesses requested by the Respondent. On 5 February 2016, the Tribunal issued its Procedural Order No. 6, in which it called upon the Claimant to produce two of the four witnesses requested by the Respondent.
42. From 15 through 18 February 2016, the Tribunal and the Parties held a hearing on jurisdiction at the seat of the Centre in Washington, D.C. The following persons attended the said hearing in whole or in part:

For the Tribunal:

Mr. Christer Söderlund (president)
Prof. George Bermann (arbitrator)
Ms. Loretta Malintoppi (arbitrator)

For the ICSID Secretariat:

Ms. Sara Marzal Yetano, Secretary of the Tribunal

For the Claimant:

Mr. Pedro J. Martinez-Fraga, Bryan Cave LLP
Mr. C. Ryan Reetz, Bryan Cave LLP
Ms. Emma Lindsay, Bryan Cave LLP
Mr. Giovanni Angles, Bryan Cave LLP
Ms. Catherine Driscoll, Bryan Cave LLP

Mr. Ian St. Clair Hutchinson, Blue Bank International & Trust (Barbados) Ltd.

Ms. Camille Rieber, Blue Bank International & Trust (Barbados) Ltd.

Ms. Gilda Pabon, Blue Bank International & Trust (Barbados) Ltd.

For the Respondent:

Mr. Osvaldo Guglielmino, Guglielmino & Asociados

Mr. Diego B. Gosis, Guglielmino & Asociados

Ms. Veronica Lavista, Guglielmino & Asociados

Mr. Quinn Smith, Special Counsel

Mr. Guillermo Moro, Guglielmino & Asociados

Mr. Nicolás J. Caffo, Guglielmino & Asociados

Mr. Alejandro Vulejser, Guglielmino & Asociados

Mr. Joaquín Coronel, Guglielmino & Asociados

Ms. Erika Fernández, Procuraduría General de la República Bolivariana de Venezuela

43. During the hearing, the following persons were examined:

On behalf of the Claimant:

Mr. Ian St. Clair Hutchinson, Blue Bank International & Trust (Barbados) Ltd.

Mr. Jaime Castillo Ledesma, Settlor of the Qatar International Authorised Purpose Trust

Mr. Andrew Ferreira, Chancery Chambers LLP

Ms. Leyda Martínez Quintana

Mr. Luis Alejandro López Carabaño

Mr. Peter David Hutson Williams QC, Retired Judge of the Supreme Court of Barbados

On behalf of the Respondent:

Mr. David John Brownbill QC, XXIV Old Buildings

44. Pursuant to the Tribunal's instructions, each party submitted its respective statements on costs on 18 April 2016, and its observations on the other party's statements on costs on 3 May 2016.
45. The Tribunal declared the proceeding closed on 26 April 2017 pursuant to ICSID Arbitration Rule 38(1).

3 BACKGROUND

46. The Claimant, Blue Bank, engages in international banking business including, of particular importance in this case, the administration and management of trust assets. Its primary business concerns the provision of fiduciary services to third parties. In this latter respect, the Claimant establishes and administers trusts and discharges functions as trustee. Based on the Trust Deed (as most recently amended)⁴, the Claimant was appointed trustee of the Qatar Trust – a trust under the laws of Barbados – for the purpose of administering and managing the assets of that trust. Among those assets figure shareholdings in two BVI Companies which, in their turn, are indirect shareholders in two Venezuelan companies, ITC and Hemesa.

47. According to the Claimant, Venezuela has, by frustrating the business of the Venezuelan companies and destroying valuable rights belonging to those companies, breached the protections afforded by the BIT, causing significant harm to the investments made by it as trustee of the Qatar Trust. On this basis the Claimant brings this claim for compensation under the BIT.

48. The Respondent, which has not enunciated a position on the merits of the Claimant's prayers for relief, has contested ICSID's jurisdiction and the Tribunal's competence to adjudicate the complaints brought by the Claimant.

49. As notified to the Parties in the Tribunal's Procedural Order No. 2 of 13 January 2015, the Tribunal decided to deal with the matter of jurisdiction as a preliminary issue. As a consequence, the proceedings were bifurcated for this purpose and the proceedings on the merits suspended pursuant to ICSID Arbitration Rule 41(3).⁵

4 POSITIONS OF THE PARTIES AND THEIR REQUESTS FOR RELIEF

50. The following paragraphs set forth the Parties' positions with respect to the matter of the jurisdiction of ICSID and the competence of this Tribunal.

4.1 The Respondent's position and requests for relief

51. In summary, the Respondent objects to the jurisdiction of ICSID and the competence of this Tribunal in the following terms:

⁴ The Trust Deed," Exhibit C-99.

⁵ Paragraph 32 *supra*.

- (a) The Respondent is not a party to the ICSID Convention and did not have that status at the time when this proceeding was filed. At the time, Venezuela had already voluntarily exercised its right to denounce the ICSID Convention and, thus, had withdrawn its consent to the submission of disputes to the jurisdiction of the Centre.⁶ In addition, the Respondent argues that, once its notice of denunciation of the Convention was given under Article 71 on 24 January 2012, its unilateral consent to submit to arbitration also lapsed pursuant to Article 72 of the Convention;⁷ Venezuela was not in any event a party to the Convention on the date of registration of the Request.⁸
- (b) The Tribunal has no jurisdiction *ratione personae* because Blue Bank is not the investor under the Treaty. It is the Qatar Trust, and not Blue Bank, that owns the investment. The Qatar Trust has no legal personality and cannot be regarded as a “national of another Contracting State” under Article 25(2)(b) of the ICSID Convention, nor as an “investor” according to the definition contained in Article 1(d) of the BIT.⁹
- (c) The real investors, if any, are Venezuelan nationals, and, as such, they are not protected under the Convention or the BIT.¹⁰
- (d) The Claimant underwent restructuring and established the Qatar Trust with the sole purpose of seeking protection under the ICSID Convention and the BIT after the dispute had arisen and thus the Claimant has engaged in conduct constituting an abuse of process.¹¹
- (e) Even if the Tribunal were to find that the Claimant indirectly controls an investment in Venezuela, indirect investments do not enjoy protection under the Treaty.¹²

52. On this basis, the Respondent has requested that the Tribunal:

- (a) Declare that the Centre has no jurisdiction and that the Tribunal has no competence over the case brought by the Claimant, and that the claim put forward by the Claimant is inadmissible;

⁶ Memorial on Objections to Jurisdiction, ¶ 14.

⁷ *Ibid.*, ¶ 19 & seq.

⁸ *Ibid.*, ¶¶ 26-30.

⁹ *Ibid.*, ¶¶ 32-41; Respondent’s Reply, ¶¶ 196-198.

¹⁰ Memorial on Objections to Jurisdiction, ¶¶ 58-86.

¹¹ *Ibid.*, ¶¶ 87-89; Respondent’s Reply, ¶¶ 324-365.

¹² Respondent’s Reply, ¶¶ 200-207.

- (b) Alternatively, to reject each and every claim made by the Claimant; and
- (c) To order the Claimant to bear all costs relating to these proceedings, including any expense incurred by the Respondent in relation to its legal representation, plus interest.

4.2 The Claimant's position and requests for relief

- 53. On the matters of the jurisdiction of ICSID and the competence of the Tribunal, the Claimant's position and requests for relief are the following.
- 54. The Claimant contends that Venezuela's denunciation of the ICSID Convention does not affect its consent to this arbitration. Accordingly, the Claimant maintains that ICSID has jurisdiction over this case and that the Tribunal is competent to adjudicate it.¹³
- 55. The Claimant further contends that the four criteria required in order to have ICSID jurisdiction over a case according to Article 25(1) of the ICSID Convention are present, *i.e.*: (1) a nationality criterion involving a dispute between a Contracting State and a foreign national of another Contracting State; (2) a dispute having a legal character; (3) a dispute arising out of an investment; and (4) an agreement to arbitrate supported by the written consent of the parties.¹⁴
- 56. The BIT contains similar jurisdictional requirements. The instant case meets all of the requirements necessary to establish ICSID's jurisdiction and the Tribunal's competence under both instruments.¹⁵
- 57. The Claimant rejects all the jurisdictional objections raised by the Respondent for reasons which will be dealt with in greater detail below.
- 58. The Claimant requests that the Tribunal:
 - (a) Declare that it has jurisdiction over the Claimant's claims and that such claims are admissible;
 - (b) Direct the arbitration to proceed to a hearing on the merits of the Claimant's claims; and

¹³ Counter-Memorial on Jurisdiction, ¶¶ 23-38.

¹⁴ Claimant's Memorial, ¶ 511.

¹⁵ *Ibid.*

- (c) Order Venezuela to bear the costs associated with the jurisdictional phase of the arbitration, including the Claimant's legal fees and expenses.¹⁶

5 THE BURDEN OF PROOF IN THE JURISDICTIONAL PHASE

5.1 The Claimant's position

59. The Claimant has submitted that in the jurisdictional phase it does not bear the burden of proving that the prerequisites for jurisdiction are met. It suffices, according to the Claimant, that the facts alleged by the Claimant as establishing jurisdiction be accepted *pro tem* so that the burden of proof of refuting jurisdiction lies with the Respondent.

60. Essentially, the Claimant submits as follows:

20. In the context of jurisdictional objections in an investor-State arbitration, then, the claimant is required to set forth a *prima facie* case of jurisdiction under the relevant treaty or treaties, including jurisdiction *ratione materiae*, *ratione personae*, *ratione temporis* and *ratione voluntatis*. Once the claimant has established this *prima facie* case, the burden shifts to the respondent to establish that that [*sic*] there is not jurisdiction *ratione materiae*, *ratione personae*, *ratione temporis* or *ratione voluntatis*. If the respondent carries that burden, the objections may be granted. If the respondent fails to carry that burden, the objections are denied. If the tribunal is unable to make the determination on the evidence before it, the issue should be joined to the merits. [...]¹⁷

61. In support of its position, the Claimant relies upon the separate opinion by Judge Higgins in the *Oil Platforms Case*,¹⁸ as well as a number of decisions on jurisdiction in investor-State arbitrations.¹⁹

5.2 The Respondent's position

62. The Respondent disagrees with the Claimant's position on the burden of proof. It takes the view that a person invoking the jurisdiction of an international tribunal must positively demonstrate that the requirements for establishing jurisdiction are met.²⁰

¹⁶ Counter-Memorial on Jurisdiction, ¶ 136; Rejoinder on Jurisdiction, ¶ 101.

¹⁷ Counter-Memorial on Jurisdiction, ¶ 20.

¹⁸ *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objection, Judgment, *I.C.J. Reports 1996*, p. 803, Separate Opinion of Judge Higgins, ¶¶ 32-34, Exhibits CLA-146, RLA-063.

¹⁹ Counter-Memorial on Jurisdiction, ¶¶ 12-14 and footnote 11.

²⁰ Memorial on Objections to Jurisdiction, ¶ 5.

63. The Respondent maintains that, in accordance with the principle “*actori incumbit probatio*”, and as confirmed by a number of international courts and tribunals, the person invoking the jurisdiction of an international court or tribunal must demonstrate that the requirements enabling such jurisdiction to be exercised are met. In other words, the Claimant must prove that all of the necessary jurisdictional prerequisites are satisfied.

64. A lack of evidence necessarily leads to a lack of jurisdiction on the part of the Tribunal. In effect:

[...] The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.²¹

5.3 The Tribunal’s analysis

65. The Claimant argues that, in order for the Tribunal to establish whether it has jurisdiction, it need consider whether the facts as alleged by the Claimant, if proven, could give rise to a Treaty breach. When setting forth this position, the Claimant has not distinguished between facts that have relevance specifically to the jurisdictional question only and facts that are also relevant for establishing the existence of claims that go to the substance of the dispute.²²

66. However, in the Tribunal’s view, it is necessary to distinguish between these different sets of facts with regard to the burden of proof. All facts that are dispositive for purposes of jurisdiction must be proven at the jurisdictional stage. In this regard, the Claimant bears the burden of proving the facts required to establish jurisdiction, insofar as they are contested by the Respondent. By contrast, facts that are relevant to the merits of the Claimant’s claims, such as whether there has been a Treaty breach, whether liability has been incurred, whether the Claimant has suffered indemnifiable damages and, if so, what is the amount of liability (*quantum*), are all matters on which the Claimant does not need to discharge a burden of proof at the jurisdictional stage.

67. At the present jurisdictional stage of the proceedings, the Tribunal has before it only the Parties’ submissions on jurisdiction and a limited evidentiary record, reflecting the arguments as to which the Parties sought to adduce factual support–

²¹ *ICS Inspection and Control Services Ltd (United Kingdom) v Argentina*, PCA Case No. 2010-9, 10 February 2012, ¶ 280, cited at ¶ 6 of the Memorial on Objections to Jurisdiction, Exhibit RLA-014.

²² See, for instance, Counter-Memorial on Jurisdiction, ¶ 20, and Rejoinder on Jurisdiction, ¶ 16.

insofar as they have considered that those factual matters relate to jurisdiction. In addition to the Claimant's statement of claim, which also includes a submission on the merits of the dispute, the Tribunal has been provided only with the Parties' views on the matters that in their respective opinion have a bearing on the matter of jurisdiction.

68. A number of tribunals have echoed the oft-quoted approach of Judge Rosalyn Higgins' separate opinion in the *Oil Platforms* Case to the effect that the only way that a claim may be accepted as "plausible" on jurisdiction is for a tribunal "to accept *pro tem* the facts as alleged by [a claimant] to be true and in that light to interpret [the treaty] for jurisdictional purposes – that is to say, to see if on the basis of [a claimant's] claims of fact there could occur a violation of one or more of them."²³

69. However, while it is true that matters that have a bearing on the merits of a dispute will not need to be conclusively established at the jurisdictional phase (something which may require a full-blown merits review of the case in its entirety), the matter of establishing a jurisdictional threshold is fundamentally different.

70. In this regard, the Tribunal shares the view of the *SGS v. Paraguay* tribunal which held as follows:

52. [...] A determination that a given set of alleged facts, even if proven, would not constitute a violation of a legal right is, in effect, a holding on the merits [...].

53. A fundamentally different approach is required, however, for issues that are directly determinative of the Tribunal's jurisdiction – such as, for example, issues of consent, nationality, covered investment, territoriality, or the temporal scope of treaty protection. If the Tribunal is to make jurisdictional determinations on such issues in a threshold jurisdictional stage (rather than joining them to the merits), the Tribunal must reach definitive findings of fact and conclusions of law. Without such determination, the Tribunal cannot satisfy itself that it has jurisdiction to hear the merits of the dispute.²⁴

²³ *Oil Platforms (Iran v US)*, Sep. Op. Higgins, paragraph 32.

²⁴ *Société Générale de Surveillance S.A. v Republic of Paraguay*, ICSID Case No. ARB/07/29, ¶¶ 52-53, Decision on Jurisdiction, 12 February 2010, Exhibits RLA-027, CLA-074.

71. The matter of the burden of proof in the jurisdictional stage was also clearly explained in the Decision on Jurisdiction in the *Philip Morris v Uruguay* case in the following terms:

Regarding burden of proof, it is commonly accepted that at the jurisdictional stage the facts as alleged by the claimant have to be accepted when, if proven, they would constitute a breach of the relevant treaty. However, if jurisdiction rests on the satisfaction of certain conditions, such as the existence of an “investment” and of the parties’ consent, the Tribunal must apply the standard rule of onus of proof *actori incumbit probatio*, except that any party asserting a fact shall have to prove it.²⁵

72. The Tribunal also concurs with the following statement by Sir Franklin Berman in the *Industria Nacional de Alimentos et al v. Peru* case:

[I]f particular facts are a critical element in the establishment of jurisdiction itself, so that the decision to accept or to deny jurisdiction disposes of them once and for all for this purpose, how can it be seriously claimed that those facts should be assumed rather than proved?²⁶

73. It follows that matters that are decisive for purposes of establishing jurisdiction, such as whether a particular claimant qualifies as an investor or whether an investment falls under the protection of the relevant treaty, must be proven and decided at the jurisdictional stage. In the present instance, the burden of proof that all the jurisdictional requirements of the case are met, insofar as they are contested by the Respondent, lies with the Claimant.

6 HAS THE RESPONDENT CONSENTED TO ARBITRATION (JURISDICTION *RATIONE VOLUNTATIS*)?

6.1 The Respondent’s position

74. The Respondent has objected to the jurisdiction of ICSID and to the competence of the Tribunal on the ground that the Request for Arbitration was submitted at a time when the Respondent had already denounced the ICSID Convention.²⁷ According to the Respondent, even assuming that the Respondent’s consent would have remained in effect six months after the date of denunciation under

²⁵ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, ¶ 29, 2 July 2013, Exhibit CLA-148. See, also, the case law cited at footnotes 3 and 4 therein.

²⁶ *Industria Nacional de Alimentos, S.A. and Indalsa Peru S.A. v Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, Dissenting Opinion of Sir Franklin Berman, at ¶ 17.

²⁷ Memorial on Objections to Jurisdiction, ¶¶ 14-25.

Article 71 of the Convention, that period of six months had elapsed by the time the Request was registered.²⁸

75. On these two points the Respondent has developed its position as follows.

6.1.1 Venezuela is not a party to the ICSID Convention

76. In accordance with Article 25 of the ICSID Convention, a State must be a Contracting State of that Convention in order for the Centre to have jurisdiction or for any tribunal established thereunder to have competence over a given dispute.²⁹ By the time this proceeding was filed, Venezuela had already voluntarily exercised its right to denounce the ICSID Convention and, by so doing, had withdrawn its consent to submit disputes to the jurisdiction of the Centre.³⁰

77. In sum, Venezuela is not a party to the ICSID Convention and did not have that status at the time when this proceeding was filed.

78. According to the Respondent, the absence of jurisdiction and competence became evident at two points in time: first, when the Claimant filed its Request for Arbitration to the Centre, as the Respondent had by that time already notified the depositary of its denunciation of the Convention; second, on the date when the Request was registered, since, even assuming that the six-month's notice requirement would apply during the period provided for in Article 71 of the Convention, that period had already elapsed, thus making the Respondent's consent moot. In view of those facts, the Respondent contends that there is no remaining basis for the jurisdiction of the Centre or the competence of the Tribunal.³¹

6.1.2 Venezuela's consent to arbitration terminated upon its denunciation of the Convention

79. By reference to Article 72 of the ICSID Convention, Venezuela further argues that, once a notice of denunciation is given under Article 71, consent can no longer be perfected through acceptance of an offer contained in a BIT or a law since the offer has become ineffective.³² Article 72 provides that:

²⁸ *Ibid.*, ¶¶ 26-31.

²⁹ *Ibid.*, ¶ 15; Respondent's Reply, ¶¶ 60, 61.

³⁰ Memorial on Objections to Jurisdiction, ¶ 14.

³¹ *Ibid.*, ¶ 16.

³² *Ibid.*, ¶ 21.

Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

80. The Respondent relies on, *inter alia*, publications by Prof. Schreuer who has opined that, once a denunciation of the Convention has been notified, consent to submit a dispute to the Centre cannot be perfected.³³ Prof. Schreuer explains that his position does not deprive the six-month period provided for in Article 71 of *effet utile*, because that period applies to other obligations incumbent upon a Contracting State under the Convention, such as respect for the Centre's immunities and privileges (Articles 18-24) and recognition and enforcement of awards (Article 54).³⁴

81. The Respondent further argues that Prof. Broches was unequivocal in stating that consent may not be perfected once the denunciation of the Convention has been notified,³⁵ and cites an exchange to that effect that was made in the course of the drafting of the Convention, where Prof. Broches explained that:

[i]f the State withdraws its unilateral statement by denouncing the Convention before it has been accepted by any investor, no investor could later bring a claim before the Centre.³⁶

82. Thus, according to the Respondent, once a notice of denunciation of the Convention has been given under Article 71 – in this case, on 24 January 2012 – consent can no longer be perfected by way of acceptance by an investor of an offer to arbitrate contained in an investment treaty or a law, since such offer to arbitrate will have ceased to be effective and thus capable of acceptance. In other words, there is no longer an offer to submit disputes to an ICSID tribunal on the part of the denouncing State.

³³ *Ibid.*, ¶¶ 20, 23.

³⁴ *Ibid.*, ¶ 24.

³⁵ *Ibid.*, ¶ 22; Respondent's Reply, ¶¶ 64, 65.

³⁶ History of the ICSID Convention, Vol. II, p. 1010, Exhibit RLA-085.

6.1.3 *Venezuela was no longer a party to the ICSID Convention on the date the Request was registered*

83. Venezuela denounced the Convention on 24 January 2012. Even assuming that the Claimant still enjoyed a six-month period within which to institute proceedings, that period ended on 24 July 2012.

84. The Claimant submitted its Request to ICSID on 25 June 2012. Although that submission took place within the six-month period following denunciation, the Request was not in fact registered until 7 August 2012. The delay was due to the fact that the request filed on 25 June 2012 did not meet the requirements for registration. As a result, the ICSID Secretariat asked the Claimant for documents and information, which were provided only on 27 July 2012, following which – on 7 August 2012 – the Request was finally registered. Thus, both the Claimant’s submission of the additional information and the Secretariat’s registration of the claim occurred after the six-month period had elapsed.

85. The Respondent alleges that, in order to establish the existence of international jurisdiction, the critical date for determining the fulfilment of jurisdictional requirements is the date of commencement of the proceedings and that proceedings cannot be considered as having been commenced until the Request is registered. It points to ICSID Institution Rule 6(2), which provides that “[a] proceeding under the Convention shall be deemed to have been instituted on the date of the registration of the request.”

86. According to the Respondent, this means that the critical date on which all jurisdictional requirements for a given dispute must be deemed to have been met is the date of registration which, in this case, was 7 August 2012, well after expiry of the six-month period.³⁷ The Secretary-General may not register a request for arbitration where, on the date of registration, the State against which the proceeding is instituted is not a Contracting State to the Convention.³⁸ Even if institution of the proceedings could be deemed to have occurred on 27 July 2012, which is when the Claimant met the necessary requirements in order for the request to be registered, that date is also more than six months later than the date of denunciation of the Convention by the Respondent.

87. In conclusion, the Tribunal must decline its competence and deny the jurisdiction of the Centre over this dispute, since Venezuela did not give its consent to submit

³⁷ Memorial on Objections to Jurisdiction, ¶ 27.

³⁸ *Ibid.*, ¶ 30.

this dispute to the Tribunal. It was not a party to the Convention because its consent had expired on the date of denunciation. Even if Article 71 could be interpreted as giving the Claimant an additional six months following denunciation in which to institute proceedings, the Claimant failed to do so within that period.

6.2 The Claimant's position

88. The Claimant agrees with the Respondent that consent to arbitration by the Contracting State which is a party to the dispute is required. The Claimant disagrees, however, with Venezuela's contention that it did not consent to arbitrate this dispute.³⁹ In the Claimant's view, Venezuela's assertion that it was no longer a Contracting State to the ICSID Convention following the notice of denunciation is irrelevant to whether Venezuela's offer of ICSID arbitration contained in the BIT remained in existence and capable of acceptance at the time of the Claimant's consent.
89. Significantly, Venezuela did not (and cannot) unilaterally withdraw its consent to arbitration under the BIT; what it did was to denounce the ICSID Convention. Pursuant to Article 71, that denunciation did not take effect for a period of six months. During that time period, the Claimant accepted Venezuela's offer to arbitrate, which was provided in the Treaty, not in the ICSID Convention. Even if the Claimant had not accepted Venezuela's offer within the six-month period, nothing in the Treaty or the Convention provides that the denunciation affects the Respondent's obligation to arbitrate according to the Treaty's terms. Article 72 affirmatively provides that Venezuela's denunciation does not affect its obligation arising out of consent given by Venezuela before the notice of denunciation.⁴⁰
90. The Claimant consented to arbitrate its dispute with Venezuela upon submitting its Request on 22 June 2012. At that time, Venezuela's consent to arbitrate was still in effect. The Request was transmitted to Venezuela by email and international courier by the ICSID Secretariat on 6 July 2012. These dates pre-date 24 July 2012, which, under Article 71's six-month period, is the date when Venezuela's denunciation would have taken effect.⁴¹

³⁹ Counter-Memorial on Jurisdiction, ¶ 23.

⁴⁰ *Ibid.*, ¶ 26.

⁴¹ *Ibid.*, ¶¶ 25, 46. Rejoinder on Jurisdiction, ¶ 55.

6.2.1 *Venezuela's consent to ICSID arbitration in Article 8 of the Treaty remains in effect*

91. The Claimant relies on the fact that Venezuela expressly consented to arbitration under the auspices of ICSID in Article 8 of the Treaty, which provides as follows, in relevant part:

(1) Disputes between one Contracting Party and a national or company of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter shall, at the request of the national concerned, be submitted to the International Centre for Settlement of Investment Disputes for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and national of other States, opened for signature at Washington on March 18, 1965.

[...]

(4) Each Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article.

92. The Treaty, including Venezuela's unconditional consent to ICSID arbitration, entered into force on 31 October 1995 and remains in effect.

93. Venezuela's notice of denunciation of the ICSID Convention on 24 January 2012 does not nullify its consent to this arbitration. As noted above, Venezuela's consent to arbitrate is contained in the Treaty, which remains in force. Its denunciation of the Convention only affected its status as a Contracting State under the Convention, pursuant to the Convention's terms, not whether it has consented to ICSID arbitration.⁴²

6.2.2 *Under Article 71 Venezuela remained a Contracting State at the time of the Claimant's filing*

94. Even, were the Tribunal to find Venezuela's consent to ICSID arbitration in Article 8 of the Treaty insufficient to establish Venezuela's consent to this arbitration, the Claimant contends that Venezuela's consent to this arbitration follows from the application of Article 71 of the ICSID Convention. Article 71 provides that a Contracting State may denounce the Convention by providing

⁴² Counter-Memorial on Jurisdiction, ¶ 30.

written notice and that “[t]he denunciation shall take effect six months after receipt of such notice.” Under Article 71, Venezuela’s denunciation of the Convention did not take effect until 25 July 2012, six months after notice of denunciation was provided on 24 January 2012.⁴³

95. Venezuela remained a Contracting State to the ICSID Convention during this period because it is only “[a]fter the denunciation becomes effective [that] a signatory will cease to be a Contracting State, which is one of the conditions required under Article 25(1) of the ICSID Convention.”⁴⁴ Therefore, as Professor Gaillard has explained, “[w]hen the investor has accepted the state’s general consent... within the six-month period set forth in Article [71], the effectiveness of the existing rights and obligations should raise little difficulty as the host state is still a contracting party at th[at] time.”⁴⁵

6.2.3 *Article 72 of the ICSID Convention permits an investor to accept a host State’s unilateral offer of ICSID arbitration after denunciation of the Convention*

96. Although, in the Claimant’s view, the application of Article 71, combined with the terms of the BIT, disposes of Venezuela’s objection to jurisdiction *ratione voluntatis* in this case, Claimant notes that Venezuela also relies on Article 72 to assert that mutual consent to arbitration by both parties is required to have been given before Venezuela’s notice of denunciation was submitted to ICSID. However, this “perfected consent” theory ignores the plain language of the Convention.⁴⁶

97. Article 72 of the ICSID Convention covers the situation in which a denouncing State has unilaterally consented to ICSID jurisdiction prior to giving notice of its denunciation of the Convention.⁴⁷

98. The reference to “consent to the jurisdiction of the Centre given by one of them” in Article 72 plainly refers to consent given by only one of the entities listed, namely a denouncing State, one of its constituent subdivisions or agencies, or one of its nationals – i.e. unilateral consent. The provision does not require consent given by more than one party and thus by its terms does not require mutual consent.⁴⁸

⁴³ *Ibid.*, ¶ 31.

⁴⁴ *Ibid.*, ¶ 32, citing J. Rodner and J.M. Estevez, *BITS in Pieces: The Effectiveness of ICSID Jurisdiction after the ICSID Convention Has Been Denounced*, J. OF INT’L ARB., Vol. 29, Issue 4, 437-51, Exhibit CLA-109.

⁴⁵ E. Gaillard, *The Denunciation of the ICSID Convention*, NYLJ, Vol. 237, No. 122 (26 June 2007), Exhibit CLA-096.

⁴⁶ Counter-Memorial on Jurisdiction, ¶ 35.

⁴⁷ *Ibid.*, ¶ 36.

⁴⁸ *Ibid.*, ¶ 36.

99. Accordingly, pursuant to Article 72, a State’s notice of withdrawal from the ICSID Convention does not affect its obligations under the Convention in a case in which it has given consent to the jurisdiction of the Centre before its notice of denunciation is received by ICSID. It is the unilateral consent of the State to ICSID jurisdiction – in this case by means of the BIT – that is relevant under Article 72.⁴⁹
100. Thus, the continued validity of Venezuela’s consent to arbitration in this case is not dependent upon the application of Article 72. Nevertheless, Article 72 provides additional support for the proper assumption of jurisdiction by the Tribunal, as Venezuela’s unilateral offer of ICSID arbitration in the Treaty – with a promise of continued validity for ten years after any denunciation of the Treaty – was made well before it denounced the Convention.⁵⁰

6.3 The Tribunal’s analysis

101. In order to establish whether it has jurisdiction *ratione voluntatis*, *i.e.* whether Venezuela’s consent to jurisdiction was still valid and effective when the Claimant’s Request for Arbitration was filed, notwithstanding Venezuela’s written notice of denunciation of the ICSID Convention, the Tribunal’s analysis must both identify the appropriate normative framework and take account of the basic facts, more specifically, the chronology of this case. While the three members of the Tribunal have reached the same result regarding the Tribunal’s jurisdiction *ratione voluntatis*, and agree on this conclusion unanimously, the President of the Tribunal has adopted a different approach to this issue and appends a separate opinion to this Award in this regard.

6.3.1 The normative framework

102. Pursuant to Article 41(1) of the ICSID Convention, the Tribunal “shall be the judge of its own competence”. This provision codifies the universally accepted principle of *kompetenz-kompetenz*, whereby, if a respondent challenges the jurisdiction of the Centre or the competence of a tribunal, the tribunal must be satisfied that the Centre has jurisdiction and the tribunal is competent to hear and decide a dispute.
103. The jurisdiction of the Centre extends only to Contracting States and nationals of other Contracting States of the Convention and its substantive scope of application

⁴⁹ *Ibid.*, ¶ 37.

⁵⁰ *Ibid.*, ¶ 32, Rejoinder on Jurisdiction, ¶ 59.

is limited to “investments”. These basic criteria are laid down in Article 25 of the Convention which, in relevant part, provides:

Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

104. Pursuant to this provision, one of the requirements for ICSID jurisdiction is that both parties to a legal dispute consent in writing to submit that dispute to the Centre. Moreover, the last sentence of the first paragraph of Article 25 of the Convention expressly states that, once consent is given by the parties, it cannot be withdrawn unilaterally.

105. A Contracting State can nevertheless denounce the Convention under Article 71, which provides as follows:

Article 71

Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

6.3.2 *The chronology*

106. The relevant chronology of the present case is as follows: the Respondent filed a written notice of denunciation of the ICSID Convention to the World Bank (as Convention depositary) on 24 January 2012. On 25 June 2012, the Claimant filed the Request for Arbitration dated 22 June 2012. ICSID forwarded a copy by courier and email under cover letter of 6 July 2012 to the Respondent, informing it that ICSID had received the Request on 25 June 2012.⁵¹ The Request was received by the Respondent on 7 July 2012.

107. On 18 July 2012, ICSID wrote to counsel on record for the Claimant requesting additional clarification of the Request.⁵² The Respondent’s denunciation of the ICSID Convention became effective on 25 July 2012 pursuant to Article 71 of the

⁵¹ Exhibit C-150.

⁵² Exhibit C-151.

Convention. On 27 July 2012, counsel of record for the Claimant replied to ICSID providing the clarifications sought.⁵³ The Request was registered by the Centre on 7 August 2012.

6.3.3 *The Tribunal's conclusion*

108. The Parties devote attention in this regard to both Articles 71 and 72 of the ICSID Convention. The majority of the Tribunal considers that the starting point of the analysis is Article 71, the provision that contemplates denunciation and designates its date of effectiveness, rather than Article 72, whose purpose is to preserve from the consequences of denunciation the rights and obligations under the Convention arising out of consent to the jurisdiction of the Centre given by the denouncing State before the notice of denunciation is communicated to the depositary.⁵⁴ If, as the majority finds, an agreement to arbitrate was formed between the Claimant and the Respondent before denunciation under Article 71 took effect, there is no reason to inquire further into Article 72, inasmuch as Article 72 deals only with the post-termination survival of certain of a State's rights or obligations.
109. The majority finds, and the Parties so assumed in their pleadings, that the first inquiry in connection with the Tribunal's jurisdiction *ratione voluntatis* concerns whether, at the time the agreement to arbitrate was formed, Venezuela's denunciation of the ICSID Convention had, or had not, taken effect.
110. The existence of an agreement between the Parties to arbitrate the present dispute depends on whether the Respondent had made an offer to arbitrate such a dispute and whether the Claimant accepted that offer while the offer was still in effect.
111. The offer relied upon by the Claimant for purposes of this arbitration is contained in Article 8 of the BIT, dealing with the "Settlement of disputes Between one Contracting Party and Nationals or companies of the other Contracting Party" which states:

(1) Disputes between one Contracting Party and a national or company of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter shall, at the request of the national concerned, be submitted to the International Centre for Settlement of Investment Disputes for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between

⁵³ Exhibit C-152.

⁵⁴ Schreuer *et al.*, *op. cit.*, p. 1280, ¶ 5.

States and national of other States, opened for signature at Washington on March 18, 1965.

[...]

(4) Each Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article.

112. According to its Article 13, the BIT was to remain in force for an initial period of ten years and thereafter continue in force until the expiration of twelve months after either Party's notice of termination. For investments made during the term of the BIT, a sunset period of ten years applies starting with the date of termination. The BIT had not been terminated at the time when the Claimant submitted its Request for Arbitration on 25 June 2012, and it remains in force today.
113. In order for the Claimant to accept the Respondent's offer to arbitrate, it must signify its consent to arbitrate. It is upon the Claimant's doing so that an agreement to arbitrate is formed between the Claimant and the Respondent. ICSID Institution Rule 2(3) specifically defines the "date of consent" as follows:

'Date of consent' means the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted.
114. ICSID Institution Rule 2(3) thus suggests that the date when the Claimant's consent was given is the date on which the Claimant first filed its Request, *i.e.* "the date on which the second party acted." This is the date when the investor's consent to the offer by the host State was expressed and the consent to arbitration was perfected.
115. Under the ICSID Convention, it is necessary to distinguish the date of institution of an arbitration from the "date of consent". The former event is governed by ICSID Institution Rule 6(2), according to which "[a] proceeding [...] shall be deemed to have been instituted on the date of the registration of the request." As the tribunal in *Venoklim v. Venezuela* found, the date of registration depends only on the ICSID Secretariat and not on a claimant's procedural conduct, and a claimant should not be prejudiced in its filing of a request of arbitration for any delays that may accrue in connection with the registration. This is so, even in

circumstances where the Secretariat requests additional information in order to register a request. The *Venoklim* tribunal remarked:

[...] la fecha del registro de la Solicitud depende exclusivamente del Secretariado del CIADI y no de una actuación jurídico-procesal de la Demandante. Sería ilógico concluir que aunque la Demandante presentara su solicitud de arbitraje antes de que hubiera transcurrido el período de seis meses establecido en el Artículo 71, podría resultar perjudicado por el transcurso del lapso indefinido que podría existir entre la presentación de la solicitud y el registro de esta.⁵⁵

116. It is also worth noting that, at the time the Claimant originally filed the Request, it reasonably appeared that it had the authority to do so. When the ICSID Secretariat asked for further details as to the Claimant’s internal corporate documents authorizing the filing, the Claimant filed a resolution of the Claimant’s Board of Directors that authorized the granting of the power of attorney. It would make little sense to hold that the Claimant’s consent did not take effect until such formalities were observed.

117. As for the date of effectiveness of a denunciation, Article 71 of the ICSID Convention, as noted, provides:

Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

118. Article 71 must be interpreted in conformity with the terms of Article 31 of the VCLT,⁵⁶ in accordance with its ordinary meaning, in light of its object and purpose, and in order to ensure its *effet utile*. Under Article 32 of the VCLT, recourse to the *travaux préparatoires* of a treaty may be made in order to avoid a result which is “manifestly absurd or unreasonable”.⁵⁷

119. On a plain reading of Article 71, there exists a six-month period of time following receipt of a written notice of denunciation by the depositary before the

⁵⁵ “[T]he date of registration of the Request depends solely on the ICSID Secretariat and not on a juridical-procedural action by the Claimant. It would be illogical to conclude that although the Claimant submitted its request for arbitration before the six-month period established in Article 71 has elapsed, it could be prejudiced by the lapse of an indefinite period that could exist between the filing of the request and the registration of the same.” [Tribunal translation] *Venoklim Holding B.V. v Bolivarian Republic of Venezuela*, Award, 3 April 2015, Exhibits CLA-157, RLA-084, ¶ 78.

⁵⁶ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 *I.L.M.* 679 (entered into force Jan. 27, 1980). It is undisputed that Articles 31 and 32 of the VCLT reflect customary international law and thus apply in this case even though the ICSID Convention predates the VCLT and Venezuela is not a party to the VCLT.

denunciation becomes effective. The relevant language is mandatory: “The denunciation *shall* take effect six months after receipt of such notice” (emphasis added). It follows that a denunciation of the ICSID Convention takes effect only after the expiry of six months from the date of receipt of the notice of denunciation by the depositary. Any other interpretation of this provision would render the reference to a six-month time period devoid of any meaning, and would run directly contrary to the principle of *effet utile* (*ut res magis valeat quam pereat*), which is one of the fundamental tenets of treaty interpretation.⁵⁸ If the intention was for the denunciation to take immediate effect, it would have made no sense to specify, in the second sentence of Article 71, that there should be a further waiting period of six months after receipt of the notice before the denunciation becomes effective.⁵⁹

120. If the Claimant filed its Request for Arbitration on 25 June 2012, and if Venezuela’s denunciation did not take effect until six months following its 24 January 2012 notice of denunciation (*i.e.* until 24 July 2012), then the agreement to arbitrate was formed before the expiry of the six-month period during which Venezuela, despite its denunciation, was still party to the ICSID Convention. Accordingly, the majority of the Tribunal finds that the question whether, under Article 72 of the ICSID Convention, consent given by the Respondent prior to denunciation remained valid even after the denunciation took effect and the Respondent was no longer a State party to the ICSID Convention, does not need to be addressed.⁶⁰

7 DOES THE TRIBUNAL HAVE JURISDICTION *RATIONE PERSONAE* UNDER THE TREATY?

7.1 The Respondent’s position

121. The Respondent disputes that the Claimant qualifies as an investor under the Treaty.

⁵⁸ *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13; *Corfu Channel, Judgment of 9 April 1949, I.C.J. Reports 1949*, p. 4, at p. 24; *Territorial Dispute (Libyan Arab Jamahiriya/Chad) Judgment, I.C.J. Reports 1994*, p. 6, at p. 25; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, at p. 125.

⁵⁹ For a similar analysis and conclusion, see the Judgment of the International Court of Justice in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)*, *Preliminary Objections, Judgment of 17 March 2016*, ¶¶ 34-40 and 48.

⁶⁰ *See also* Counter-Memorial on Jurisdiction, ¶ 26, where the Claimant acknowledges that “the Tribunal need not decide the issue under Article 72”.

122. The Respondent notes that Blue Bank claims to be “the sole legal registered holder of the property and assets that constitute the Trust Fund of the Qatar Trust”.⁶¹ Nonetheless, available records indicate that the shares in the BVI Companies belong to the Qatar Trust and not to Blue Bank. For the Respondent, Blue Bank is the trustee of a trust created for the sole purpose of affording protection illegitimately to persons who would not otherwise be protected under the ICSID Convention and the BIT.⁶²
123. The BIT only deals with investments made by nationals or companies of a Contracting Party within the territory of the other Contracting Party. Article 1 of the Treaty states that investment means “every kind of asset invested by nationals or companies of one Contracting Party in the territory of the other Contracting Party”. Thus, Article 1 of the Treaty provides that the assets making up the investment must be “invested” by the investor. This is not the case here because the assets invested by Blue Bank belong to the trust, not to the Claimant. In any event, given that the Qatar Trust does not have legal personality, is not a national of the other State and is not a company, it cannot be afforded protection under the BIT.⁶³
124. Both the ICSID Convention and the Treaty provide that a foreign investor may submit a dispute to the jurisdiction of the Centre under certain circumstances. However, in the instant case, there is no foreign investor, given that a trustee is not the owner of the shares that are the subject-matter of the trust. Therefore, Blue Bank cannot be deemed to be the owner of the alleged investment to which this dispute refers. In the absence of this decisive element for the purpose of jurisdiction, this Tribunal has no competence over this case.⁶⁴
125. Moreover, even if the description provided by Claimant of the corporate structure including GIM, Humboldt, Hemesa, and ITC were correct, the decisive issue is who really controls the Qatar Trust. That will determine whether the Centre may exercise its jurisdiction and the Tribunal its competence. For the Respondent, even if, *quod non*, the Tribunal were to conclude that Blue Bank is the investor because it is the trustee of the Qatar Trust, the Tribunal would still lack jurisdiction over this dispute because Venezuelan nationals or a Qatari sovereign fund appear to be hiding behind the Qatar Trust and in any case dominating the Claimant.⁶⁵

⁶¹ Memorial on Objections to Jurisdiction, ¶ 37, referring to the Claimant’s Memorial, ¶ 70 and the witness statement of Mr Ian StClair Hutchinson, ¶ 24.

⁶² Memorial on Objections to Jurisdiction, ¶ 33.

⁶³ *Ibid.*, ¶ 38.

⁶⁴ *Ibid.*, ¶ 41.

⁶⁵ *Ibid.*, ¶ 48.

7.2 The Claimant's position

126. Blue Bank contends that it is a protected investor under the Treaty and the ICSID Convention.⁶⁶
127. Blue Bank meets the requirements of Article 25(1) of the ICSID Convention in respect of disputes submitted to arbitration between a Contracting State and a national of another Contracting State.⁶⁷ As a “juridical person”, Blue Bank also satisfies the nationality requirement provided in Article 25(2)(b) of the Convention.⁶⁸
128. Blue Bank, not the Qatar Trust, is the claimant in this arbitration and it is Blue Bank’s status as an investor under the Treaty and the Convention that is determinative for the claimant’s *jus standi*.
129. Blue Bank is a “company” under Article 1 of the Treaty. Article 1(d) additionally provides that “‘companies’ means, in respect of each Contracting Party, ‘corporations’, firms and associations incorporated or constituted under the law in force in that Contracting Party [...]” In the Barbados-Venezuela BIT there is no restriction on the nationality of a protected investor’s shareholders for the purposes of determining that company’s nationality. As tribunals have recognised, such an omission indicates that the parties intended *not* to impose additional restrictions on a company’s nationality.⁶⁹
130. Blue Bank is incorporated under the laws of Barbados and was a national of Barbados on all dates relevant to this dispute, including the dates on which the Treaty breaches occurred and the date on which Blue Bank consented to arbitration. Blue Bank is physically located in Barbados, and Barbados is its sole place of business.⁷⁰
131. Consequently, Blue Bank is a “National of another Contracting State” under the first clause of Article 25(2)(b) of the ICSID Convention, which defines a “National of another Contracting State” as “any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit the dispute to conciliation or arbitration.” Blue Bank fits within this definition because, as noted above, it was

⁶⁶ Counter-Memorial on Jurisdiction, ¶ 48, *in fine*.

⁶⁷ Claimant’s Memorial, ¶ 512.

⁶⁸ *Ibid.*, ¶ 513.

⁶⁹ *Ibid.*, ¶¶ 156-157.

⁷⁰ Counter-Memorial on Jurisdiction, ¶ 60.

a company incorporated under the laws of Barbados on the date that the Request for Arbitration was filed (and indeed remains so).⁷¹

132. There is no basis under the Treaty or the Convention to look to anything other than Blue Bank's place of incorporation to determine its nationality as an investor. It is not, therefore, possible to impugn Blue Bank's status as the legal owner of the trust property, including the investments at issue in this case. The Treaty does not require that an investor hold a beneficial interest in the investment. Investor-State tribunals have recognised that ownership of the investment is not limited to beneficial ownership, and they have accepted that claims may be brought by the trustees on behalf of a trust.⁷²
133. Any attempt to suggest that Blue Bank is not the owner of the investment is unavailing. It does not matter if the Escrow Agreement and the Pledge Agreement or the share purchase agreements list the Qatar Trust as the owner of the investment or the purchaser of the shares in GIM Tour and Western Hemisphere in view of the fact that the Trust Deed and Barbados law establish Blue Bank, as trustee, as the legal owner of the trust property.⁷³

7.3 The Tribunal's analysis

134. A few fundamental facts and documents relating to the Qatar Trust and to Blue Bank need to be recalled at the outset to place the discussion in the proper context.
135. Blue Bank brings the action as trustee for the Qatar Trust. It does not invoke an investment made for its own account or on its own behalf, the alleged investment being the acquisition of the two BVI Companies. This is stated, for instance, in the Request for Arbitration, under "I. Introduction", as follows:

Blue Bank International & Trust (Barbados) Ltd. ("Blue Bank"), a Barbados corporation, as trustee of the Qatar International Authorised Purpose Trust ("Qatar Trust"), submits to arbitration at the International Centre for the Settlement of Investment Disputes ("ICSID") certain claims against the Bolivarian Republic of Venezuela ("Venezuela").⁷⁴

136. In its Memorial, the Claimant explains its role in the following terms:

⁷¹ *Ibid.*, ¶ 58; Rejoinder on Jurisdiction, ¶ 63.

⁷² Counter-Memorial on Jurisdiction, ¶ 55; Rejoinder on Jurisdiction, ¶ 65.

⁷³ Rejoinder on Jurisdiction, ¶ 66.

⁷⁴ Request for Arbitration, ¶ 1.

Blue Bank serves as Trustee of the Purpose Trust titled Qatar International Authorised Purpose Trust (“the Qatar Trust”). On June 8, 2006, the Qatar Trust was established as an international trust under the *International Trusts Act* of the Laws of Barbados.⁷⁵

137. Further, the Claimant states that the Qatar Trust is the “substantial investor”⁷⁶ and describes its role in submitting the claim in this arbitration in the following terms:

Blue Bank brings this action as Trustee for the Qatar Trust because as a matter of law, this purpose trust under the laws of Barbados has no beneficiary and no other natural person or juridical entity as a matter of law who can bring this claim arising from damage to the Qatar Trust assets.⁷⁷

138. This fundamental premise, *i.e.* that Blue Bank brings this claim as trustee of the Qatar Trust, is undisputed between the Parties, and has, consequently, formed the point of departure for their respective positions in this arbitration.

Formation and Modification of the Qatar Trust

139. The documents and facts regarding the formation and amendments affecting the Qatar Trust which are constitutive of the Claimant’s trusteeship are outlined below.

The Original Trust Deed of 21 April 2005

140. According to the Original Trust Deed of 21 April 2005,⁷⁸ the Settlor, *i.e.* an individual identified as “Jaime Castillo of Caracas, Venezuela”, has settled property on the trust “set out in Schedule A” in an amount of USD 5,000.
141. The Qatar Trust was set up in Bahamas. The trustee at the time was Ansbacher, a provider of trust services in Bahamas under the Banks and Trust Companies Act.
142. The “Authorized Purposes of the Trust,” according to Article 3(1) of the Original Trust Deed, was “to acquire and procure certain shareholdings and act as shareholders in various Venezuelan enterprises.”⁷⁹

⁷⁵ Claimant’s Memorial, ¶ 69.

⁷⁶ *Ibid.*, ¶ 1.

⁷⁷ *Ibid.*, ¶ 79.

⁷⁸ Exhibit R-116.

⁷⁹ The paperwork that brought about this situation is indicated by the Claimant in a footnote in the Claimant’s Memorial of the following tenor: “42 See Exhibit C-100, a true and correct copy of the Share Purchase Agreement executed on April 27, 2005, and pursuant to which

The Second Trust Deed of 1 July 2005

143. In the Second Trust Deed,⁸⁰ the purpose of the Trust is described in Article 3(1) somewhat more generically as the acquisition of “certain negotiable instruments, shareholdings and act as the shareholder in various enterprises”. As in the Original Trust Deed, the shares were to be pledged for purposes of satisfying “obligations under [t]he Agreements” (sub-littera c) (despite capitalization, not a defined term). To the Second Trust Deed was appended a “Schedule A,” listing the amount of “US\$ 5,000”.

The Third Trust Deed of 15 March 2006

144. The Third Trust Deed⁸¹ concerns the appointment of the Claimant as the new trustee in replacement of Ansbacher under its previous company name, Oceanic Bank and Trust (Barbados) Limited.

The Fourth Trust Deed of 16 March 2006

145. In the preambular language (Article 4) of (the Fourth Trust Deed,⁸² it is provided that the governing law be changed to that of Barbados, that the Original Trust Deed be made consistent with the International Trusts Act of Barbados as well as generally “vary the terms of the Trust for the better protection of the purposes therein stated”.

The Trust Deed of 8 June 2006

146. The Trust Deed,⁸³ described by the Claimant as the current version at the time of the arbitral proceedings, is in essential respects a restatement of its prior versions.
147. It is also important to recall the facts regarding the purchase by the Qatar Trust of the BVI companies

The Purchase of the BVI Companies

148. A few days after the formation of the Qatar Trust, on 27 April 2005, the BVI Companies were purchased by the Qatar Trust for an aggregate amount of USD

Blue Bank (Qatar Trustee) agreed to purchase all of the issued and outstanding shares of: (i) GIM TOUR LTD and (ii) WESTERN HEMISPHERE HOTEL LTD”.

⁸⁰ Exhibit R-161, pp 18-36, which includes a compilation of the existing trust deeds in the case.

⁸¹ Exhibit R-114.

⁸² Exhibit R-115.

⁸³ Exhibit C-99.

156 million (of which USD 60 million was contingent on a certain future event). Through the BVI companies, the Qatar Trust had ownership interests in the Venezuelan companies ITC and Hemesa, which are said by the Claimant to be part of the investment it made in this case.⁸⁴ It was agreed that payment of the entire purchase sum was to be on deferred terms.⁸⁵

149. The funds required to meet these payment obligations appear to have been borrowed – or intended to be borrowed at a future date – from Brighton, which, according to the Escrow Agreement⁸⁶ and a Collateral Pledge Agreement⁸⁷ of 1 April 2005 between Brighton and the Qatar Trust, was to be given the shares of the BVI Companies as collateral.
150. By the Escrow Agreement, Brighton undertook to deposit into an escrow an amount of USD 250 million in favor of the Qatar Trust in return for the pledge of the shares in the BVI Companies.
151. All of these transactions took place before the Claimant was appointed trustee of the Qatar Trust and were performed by the trustee at the time, Ansbacher, Bahamas⁸⁸. Thus, Ansbacher had the Qatar Trust purchase the BVI Companies pursuant to the two share purchase agreements dated 27 April 2005.⁸⁹
152. With this background in mind, the Tribunal will now move to consider whether it has jurisdiction *ratione personae* under the ICSID Convention and under the BIT.
153. The ICSID Convention does not contain a definition of “investor.” Article 25(1) of the ICSID Convention provides that “jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.” This provision defines the outer demarcation lines for subjective and substantive access to ICSID

⁸⁴ To be clear, the Counter-Memorial on Jurisdiction, at ¶ 92, states as follows: “Blue Bank’s investment includes its ownership interests in Venezuelan companies ITC and Hemesa, which were purchased for US\$156,000,000; its interest in the sums—totalling over US\$100,000,000—that ITC and Hemesa invested in the Teleférico, Hotel Humboldt and Hotel Puerto La Cruz; and its interests in the Concession Contracts.” Those may constitute investments of ITC and Hemesa, but not of any foreign investor, let alone Blue Bank.

⁸⁵ Exhibit C-100.

⁸⁶ Exhibit R-112.

⁸⁷ Exhibit R-113.

⁸⁸ The Tribunal attaches no significance to the fact that it was Blue Bank’s predecessor, Ansbacher, that acted on behalf of the Qatar Trust when making the investment.

⁸⁹ The paperwork that brought about this situation is indicated by the Claimant in a footnote in the Claimant’s Memorial of the following tenor: “42 See Exhibit C-100, a true and correct copy of the Share Purchase Agreement executed on April 27, 2005, and pursuant to which Blue Bank (Qatar Trustee) agreed to purchase all of the issued and outstanding shares of: (i) GIM TOUR LTD and (ii) WESTERN HEMISPHERE HOTEL LTD.”

arbitration. The Claimant in this case is a “national of another Contracting State.” This is in principle sufficient from the point of view of nationality under the ICSID Convention.

154. Nevertheless, when it comes to the specific delimitation of competence conferred upon an arbitral tribunal in any given instance, recourse must additionally be had to the instrument on which jurisdiction is ultimately based, in this case an investment protection treaty.

155. Article 8(1) of the BIT provides as follows:

Disputes between one Contracting Party and a national or company of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter shall, *at the request of the national concerned*, be submitted to the International Centre for Settlement of Investment Disputes for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on March 18, 1965. (Emphasis added).

156. There is no definition of “investor” in the underlying BIT in this case either. Instead, the term “companies” is defined as follows under Article 1(d) of the BIT:

“companies” means, in respect of each Contracting Party, corporations, firms and associations incorporated or constituted under the law in force in that Contracting Party;

157. Pursuant to the above provisions of the BIT, and given that Blue Bank is a company incorporated under the laws of Barbados, *i.e.* of one of the Contracting States to the BIT, the nationality requirement under the BIT is satisfied. However, the BIT defines the ambit of persons and investments protected under the treaty in the following terms (Article 1(a)):

ARTICLE I

Definitions

For the purposes of this Agreement, “investment” means every kind of asset invested by nationals or companies of one Contracting Party in the territory of the other Contracting Party and in particular, though not exclusively, includes: [non-exhaustive list of asset classes]

158. In light of the relevant provisions of the BIT, including Articles 8(1) and 1(a), the central question to be determined for purposes of jurisdiction is whether the Claimant, found to have the requisite nationality, has made an “investment” pursuant to Article 1(a).

8 HAS BLUE BANK MADE AN “INVESTMENT” PURSUANT TO ARTICLE 1(A) OF THE TREATY?

159. The Claimant contends that the Tribunal has competence because Blue Bank, as trustee of the Qatar Trust, is the legal owner of the assets of the Qatar Trust. The Tribunal will therefore address this question first.

8.1 Does Blue Bank as trustee have legal ownership of the assets of the Qatar Trust?

160. By way of introduction, it is worth noting that, in the case of the Qatar Trust, the sole asset that has been settled on the trust consists of the USD 5,000 allegedly contributed by the “Original Settlor,” a Venezuelan national by the name of James Castillo Ledesma.

161. The fundamental feature of a trusteeship under the Barbados International Trusts Act is that the trustee may not have any interest in the fortunes of the entrusted assets. The trustee does not manage the trust assets on its own behalf and does not have an interest of any nature whatsoever in those assets. The trust assets are separate from the equity of the trustee and do not form part of the trustee’s estate.

162. The characteristics of a trust and the nature of a trusteeship under Barbados law are set forth in the following terms in the Barbados International Trusts Act:

(1) In this Act, the expression “trust” means the legal relationship created when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specific purpose.

(2) A trust has the following characteristics

(a) the assets of the trust constitute a separate fund and are not a part of the trustee’s own estate;

(b) title to the assets of the trust is held in the name of the trustee or in the name of another person on behalf of the trustee;

(c) the trustee has the power and the duty to manage, employ or dispose of the assets of the trust in accordance with the terms thereof and the special duties imposed upon him by law; and

(d) the trustee is accountable for the management and administration of the assets of the trust.⁹⁰

163. Applying these provisions to the case at hand, in relation to the trust assets, Blue Bank exercises the function of a trustee – a *sui generis* legal construct – and as such it acts in its own name but on behalf of the trust in furtherance of certain third party interests (whether for a person or a purpose). As trustee, Blue Bank does not own the assets, but simply manages and administers them for a particular purpose (in the case of a so-called “purpose trust”) or to the benefit of a third party (in the case of a customary beneficiary trust). It follows that, by acting in its capacity as trustee, the Claimant cannot be considered as having committed any assets in its own right, as having incurred any risk, or as sharing the loss or profit resulting from the investment. As appears from the Trust Deed, the emolument flowing to the Claimant for its discharge of services as the Trustee of the Qatar Trust is an annual fixed fee and nothing else:

The Trustee shall be entitled to be paid out of the Trust Fund, an annual fee of One Hundred Thousand United States Dollars (US\$100,000.00), (the “Annual Trustee Fee”) in respect of the Trustee acting in the capacity as Trustee of this Trust, and for all services provided hereunder.⁹¹

164. The plain and ordinary meaning of Article 8(1) of the BIT makes it clear that the Tribunal’s *ratione personae* jurisdiction is predicated on the Claimant having made an “investment.” An “investment” is defined in Article 1(a) of the BIT as “every kind of asset invested by [...] companies of one Contracting Party.” Determinative for Blue Bank’s standing is therefore the question whether it has made an investment.
165. Blue Bank brings a claim in its capacity of trustee on behalf of the Qatar Trust and not on its own behalf, does not own the alleged investment and is not bringing a claim in relation to an investment that it has made itself. As for the Qatar Trust, it lacks personality (as acknowledged by both Parties) and it is not a company. Moreover, the ordinary meaning of the words “nationals” or “companies” provided in the BIT does not extend to a “trust”, whether this absence exists by chance or by design.

⁹⁰ Exhibit CLA-129.

⁹¹ Article 17.1 of the Trust Deed, Exhibit C-99.

166. By way of example, in the *Renta et al. v. Russia* case,⁹² two of the claimants were pension funds without legal personality, the assets of which were managed by management companies. These funds display, in relevant respects, great similarities with a trust. The *Renta* tribunal in particular held as follows:

122. Russia argues that Emergentes and Eurofondo are not corporate bodies. Spanish law (specifically: Article 3 of Law 35/2003 of 4 November 2003) treats them as collective investment funds without legal personality. It follows in Russia's submission that they are not investors as defined in the Spanish BIT.

[...]

127. [...] It requires a juridical leap to allow the funds to qualify as investors by absorbing a corporate identity which is not their own.

167. Moreover, under the Trust Deed, the trustee's powers over the trust assets are extremely limited, as can be clearly seen from clauses 9.1.2, 9.2.1, 9.3, 18 and 20. At bottom, the trustee (Blue Bank) simply performs a service to third party interests – ultimately the beneficiary or the purpose of the Qatar Trust, as the case may be – in exchange for a fee.⁹³

168. The Tribunal notes that the Parties' arguments have occasionally centered around such concepts as "legal owner," "beneficial or nominal ownership," "legal title," "nominee ownership" and the like.⁹⁴ However, this is a mere matter of semantics. In actual fact and law, Blue Bank is not an owner in any relevant sense of the word.

169. It follows that the Claimant's repeated references to Blue Bank as the "legal owner" of the trust assets is inapposite. It may be noted that the Barbados International Trusts Act is carefully drafted so as not to describe the legal relationship created between the trustee and the trust assets in terms of "ownership," "legal title" or the like. Instead, the Act takes care to refer to the trust assets as a "separate fund," not part of the trustee's "own estate" and provides

⁹² *Renta 4 S.V.S.A et al. v Russian Federation*, SCC Case No. Arbitration V (024/2007), Award on Preliminary Objections, dated 20 March 2009.

⁹³ As observed at ¶ 199 below, the President of the Tribunal does not attach importance on the matter of limited control.

⁹⁴ Claimant's Memorial, ¶ 1: "Blue Bank as Trustee is the absolute legal owner of the trust fund"; Respondent's Counter-Memorial on Jurisdiction, ¶ 49: "Blue Bank is the legal owner of the assets that comprise the trust fund"; *Ibid.*, ¶ 51: "... the trustee is the legal owner of the trust fund under applicable Barbadian law"; Rejoinder on Jurisdiction, ¶ 49: "... the placing of property into trust results in the legal ownership of that property being transferred to the trustee".

that title to the trust assets is held “in the name of the trustee,” not that the assets are “owned” by the trustee.

170. The party that would come closest to satisfying the requirements of “ownership” with regard to the assets of the Qatar Trust is what the trust deeds refer to as the “Eligible Person” (which is not a term of art but one that the Tribunal – for reasons given in paragraphs 190 to 194 below – considers to be a beneficiary). It is the “Eligible Person”, in this case Hampton, that enjoys ultimate control over the trust assets and that will ultimately enjoy or suffer, as the case may be, the fortunes of the trust assets.
171. Under Schedule I of the Trust Deed, Hampton is also the “Protector”, jointly with another company, Waterstone. Section 16 of the Trust Deed lists the powers and duties of the Protector, who is “responsible for ensuring that the terms of [the] Trust Deed are complied with and are given effect to” and has, *inter alia*, the power to remove the trustee.⁹⁵ For its part, the trustee has no power and no discretion over the trust assets. As noted by the Respondent’s expert, David Brownbill QC:

[Under the terms of the trust] [t]he trust property belongs, in equity, exclusively to Hampton. This situation can change only if Hampton itself effects that change in its capacity as Protector. The trustee has no material power or discretion which could be exercised so as to diminish or prejudice Hampton’s position. [...] As the entire beneficial interest vests, indefeasibly, in a single beneficiary the Trustee is a nominee or bare trustee for Hampton.⁹⁶

172. In conclusion, Blue Bank, as a trustee holding the assets of the Qatar Trust for the ultimate benefit of third party interests, does not own the assets of the Qatar Trust, did not invest these assets for its own account and cannot, therefore, ground jurisdiction on any investment made by it as required by Articles 1(a) and 8(1) of the BIT.
173. The Tribunal has thus reached the conclusion that Blue Bank has no ownership rights in respect of the assets of the Qatar Trust, that it has not brought a claim on its own behalf – whether as a nominal or beneficial owner – and that, accordingly, Blue Bank has not invested the relevant assets under the terms of the BIT.

⁹⁵ Clauses 16.1.1 and 16.2.1 respectively.

⁹⁶ David Brownbill QC Expert Report, ¶ 28.

8.2 The legal nature of the Qatar Trust

174. Although for purposes of determining whether the Claimant has made an “investment” in Venezuela, as required under Article 1(a) of the BIT, it is not necessary to determine the nature of the Qatar Trust, given the significance attached by the Parties to this question for purposes of jurisdiction, the Tribunal addresses the question here.

175. The Claimant contends in this regard that – as trustee of the Qatar Trust – it is the legal owner of its assets. It specifically characterizes the Qatar Trust as a “purpose trust.” The Claimant further asserts that – as legal owner of the property of the Qatar Trust and the only entity that may advance claims with regard to that property – it is the proper claimant in this case.⁹⁷ For its part, the Respondent argues that the Qatar Trust is a conventional beneficiary trust which does not belong to the trustee (whose capacity is very limited) but to the Eligible Person.⁹⁸

176. The Parties’ arguments may be summarized as follows:

8.2.1 *The Respondent’s position*

177. The Respondent contests the assertion that the Claimant’s actions as trustee for the Qatar Trust confer investor status on the Claimant. For the Respondent, the Qatar Trust is not a purpose trust. The International Trusts Act 1995 of Barbados, which would apply to the Qatar Trust, includes in Part III the definition of “purpose trusts”:

In this Part, "purpose trust" means

(a) a trust, other than a trust that is for the benefit of particular persons, whether or not immediately ascertainable, or

(b) a trust that is [not] for the benefit of some aggregate of persons ascertained by reference to some personal relationship⁹⁹

178. In order to determine whether a trust is a *purpose trust* or a customary, *beneficiary trust*, its object has to be analyzed in order to establish whether it has been created for the benefit of a particular person or an aggregate of persons. When no person or aggregate of persons can be identified as the beneficiary, this is constitutive of a *purpose trust*.

⁹⁷ Rejoinder on Jurisdiction, ¶ 510.

⁹⁸ Respondent’s Reply, ¶¶ 103-113.

⁹⁹ Memorial on Objections to Jurisdiction, ¶ 95; Exhibit R-13. The Respondent argues that this provision of the Trusts Act should be read to include the word “not” between “is” and “for” in letter (b). See, for instance, Transcript, Day 3, page 532, line 3.

179. The Qatar Trust was created for the benefit of a person, Hampton, which is both the Eligible person and Protector of the Qatar Trust. The very purpose of the Qatar Trust is to provide benefits to Hampton, independently of the obligation of the Qatar Trust to repay the loans obtained in exchange for the issue of Qatar Notes.
180. In addition to distributing earnings to the Eligible Person, the only other purpose of the assets described in the trust deeds is the satisfaction of merely administrative needs. Therefore, the Qatar Trust is not a *purpose trust*, but an ordinary trust created for the benefit of a particular person. No part of the assets or income is distributed or allocated to a specific purpose other than acquiring companies in order to repay the loans obtained and distribute the remainder to Hampton. All operating companies of the Qatar Trust are Venezuelan.
181. In this respect, the Original Trust Deed explains that the purpose of the trust was the following:

[...] acquire or procure certain shareholdings and act as the shareholder in various Venezuelan enterprises (hereinafter the “Enterprises”) in order to irrevocably pledge such assets and income from such assets to Brighton Preferred Equity Investments Ltd. (hereinafter “Brighton”) in form of a Promissory Note (the “Note”) in order raise sufficient funds [...] ¹⁰⁰

8.2.2 *The Claimant’s position*

182. The Claimant explains its role as trustee of the Qatar Trust in the statement of claim as follows:

Blue Bank serves as Trustee of the Purpose Trust titled Qatar International Authorised Purpose Trust (“the QatarTrust”). On June 8, 2006, the Qatar Trust was established as an international trust under the International Trusts Act of the Law of Barbados. ¹⁰¹

183. The Claimant describes the Qatar Trust as follows.

[a]s a purpose trust, the Qatar Trust is a special genus of trust that under the laws of Barbados is a statutory product of the International Trusts Act. As a principle of law, a person who derives a direct or consequential benefit (whether’ financial or non-financial), through the proper exercise by the Trustee of the stated purpose of the trusts has no beneficial interest in the trust

¹⁰⁰Exhibit R-116.

¹⁰¹ Claimant’s Memorial, ¶ 69.

property or trust fund. Such an individual has no property or proprietary interest in the trust in the technical sense that, for example, would allow the person to take legal action on the trust's behalf. [Emphasis omitted].¹⁰²

184. The Claimant has made the following remarks with respect to its role as investor under the BIT.

The non-charitable purpose trust is a statutory creation in Barbados, a product of the International Trusts Act. The Qatar Trust satisfies the essential requirements for validity of an international purpose trust under section 10 of the Act.¹⁰³

185. The Qatar Trust satisfies the four requirements for a purpose trust under the Barbados International Trusts Act:

The stated purposes are properly construed specific, reasonable and capable of fulfillment, and are not immoral, unlawful or contrary to public policy. There is a First Protector to enforce the Trust and provision for the appointment of a successor-protector. The Qatar Trust specifies the event upon the happening of which the Qatar Trust terminates (defined as the "Termination Date") and provides for the disposition of surplus assets of the Qatar Trust upon its termination [...]¹⁰⁴

186. The distributive elements of the Qatar Trust for the benefit of the Eligible Persons are intended to give effect to the stated purposes and do not create a separate beneficial interest in the Eligible Persons. Rather, the residual distributive element of the Qatar Trust, stated in Section 7.1(k), is required for a purpose trust under section 10(d) of the International Trusts Act and is in the nature of a contingent contractual obligation owed by the trustee to the Eligible Persons. It does not reflect the creation of a trust for the benefit of Eligible Persons or any one Eligible Person.

187. The creation of the Qatar Trust was for purposes of facilitating access to capital by enabling the securitization of the Trust's assets.

188. Blue Bank became trustee and reorganized the Qatar Trust under Barbados Law for commercial reasons. The Qatar Trust was restructured under Barbados law in 2006 primarily to get the benefit of a bilateral tax treaty between Barbados and

¹⁰² *Ibid.*, ¶ 71.

¹⁰³ Rejoinder on Jurisdiction, ¶ 32.

¹⁰⁴ Quoted from the Claimant's expert's written statement, Second Witness Statement of Peter David Hutson Williams, ¶ 27.

Venezuela that provided benefits that were unavailable in the Bahamas in respect of any income from the trust property.

189. Blue Bank is the legal owner of the property of the Qatar Trust and the only entity that may claim in respect of the trust property. It is a basic legal principle in common-law jurisdictions that the placing of property into trust results in the legal ownership of that property being transferred to the trustee. All legal interest in the trust assets is held by the trustee.

8.2.3 *The Tribunal's conclusion*

190. Although, as noted (paragraph 179 *supra*), the characterization of the Qatar Trust as a beneficiary or a purpose trust is not dispositive of this case, the Tribunal, in consideration of the attention paid to the matter by counsel, has considered the matter and concludes that the Qatar Trust is not a purpose trust.

191. The International Trusts Act 1995 of Barbados, which would apply to the Qatar Trust, includes in Part III, Section 9, the following definition of “purpose trusts”:

9. In this Part, “purpose trust” means

(a) a trust, other than a trust that is for the benefit of particular persons, whether or not immediately ascertainable, or

(b) a trust that is [not] for the benefit of some aggregate of persons ascertained by reference to some personal relationship.¹⁰⁵

192. In order to determine whether a trust is a purpose trust or a beneficiary trust, its object has to be analyzed. When no particular person or aggregate of persons can be identified as the beneficiary, the trust may be characterized as a purpose trust. The concept of purpose trust must, consequently, be negatively defined.

193. As discussed at paragraphs 179 - 180 above, the Qatar Trust was created for the benefit of a person, *i.e.* Hampton, which is both the Eligible Person and the Protector of the Qatar Trust. The very purpose of the Qatar Trust is to provide benefits to Hampton, independent of the obligation of the Qatar Trust to repay the loans obtained in exchange for the issue of Qatar Notes which of course is not a beneficial but an onerous obligation.

¹⁰⁵ As noted above, the negation within hard brackets is added by reason of Mr Brownbill's remark that its omission is a drafting mistake (Transcript, Day 3, page 532, lines 2 and 3). The Tribunal finds this remark logically compelling, although this is ultimately of no consequence for the Tribunal's conclusion.

194. The only other purpose of the assets described in the Qatar Trust Deed is the satisfaction of merely administrative needs. Therefore, the Qatar Trust is not a purpose trust, but a customary beneficiary trust created for the benefit of a particular person.

8.3 Did Blue Bank act with the independence associated with a beneficiary trust?

195. Although the preceding discussion establishes that the Claimant cannot assert jurisdiction in the absence of an investment of assets that it has made, the analysis would not be complete (according to the majority) if consideration were not at all given to the terms of the Trust Deed according to which Blue Bank was to perform its functions as trustee. This question is addressed below.

196. Although a trustee in a beneficiary trust must without doubt act for the benefit of the beneficiary, a trustee must be in a position to act with some independence in pursuing that purpose. An examination of the Trust terms reveals that in performance of its tasks, Blue Bank cannot perform many essential trustee functions independently, but, with respect to them, is under the control of Hampton, as both the Eligible Person and the Protector of the Qatar Trust. It is true that the Trust Deed purports generally, in Clauses 9 and 10.1-10.3, to guarantee the Trustee's independence, but it also conditions a great many meaningful exercises of authority by Blue Bank to the consent of the Hampton as both Protector and "Eligible Person." Illustrative are the following:

- Clause 8.1: "The Trustee shall not be held liable for any breach of duty or loss or damage to any third party caused by virtue of or as a result of any distribution made pursuant to the direction of the Protector. The Trustee shall not have the responsibility or any duty to investigate or ascertain whether any discretion directed to be made by the Protector is properly in furtherance of the purposes hereof."
- Clause 8.2: "The Trustee [...] may pay or apply the whole or any part or parts of the capital or income of the Trust Fund to or for the benefit of the Eligible Persons, in such manner as the Protector shall in its direction think fit."
- Clause 8.3: "With the consent of the Protector, the Trustee may pay or transfer the whole or any part of the capital or income of the Trust Fund to the trustees for the time being of any other trust wheresoever established or existing [...]"

- Clause 8.4: “[...] [A]ny settlement made by the Trustee under this present power upon or for the benefit of the Eligible Persons [...] may contain such trusts, powers and provisions whatsoever [...] as the Protector in its absolute discretion shall determine.”
- Clause 9.4.2: “The Trustee shall not without the consent of the Protector [...] take or execute any of the following actions [among which] (d) the sale, exchange, assignment, pledge or hypothecation of any Enterprise or all or substantially all of the assets forming part of the Trust Fund.”
- Clause 13.1: “The Protector, shall have power at any time or times during the Trust Period to add to the class of Eligible Persons such one or more persons [...] as the Protector shall in its absolute discretion determine.”
- Clause 13.2: “The Protector, may in a declaration by Deed, made at any time or times during the Trust period declare that any persons or member of a class named or specified [...] in such declaration who is would or might but for this clause be or become entitled to any distribution [...] or be otherwise able to benefit hereunder as the case may be, shall: (a) be wholly or partially excluded from future benefits hereunder [...]”
- Clause 13.4: “The Protector in exercising any of the powers conferred in favour of any particular person is hereby expressly authorised to ignore entirely the interests of any other person interested or who may become interested under this Trust.”
- Clause 16.1.1: “In the manner provided for in this Trust Deed, the Protector shall be responsible for ensuring that the terms of this Trust Deed are complied with and are given effect to. The Protector shall not except as expressly provided for by law, be responsible to the Trustee [or] the Eligible Persons [...] for the manner in which he exercises his duties and discretions hereunder, or for any omission or failure to act, except to the extent that in any circumstance there has been willful negligence, willful default or dishonesty on the part of the Protector.”
- Clause 16.2.1: “The Protector shall have the following powers vested in him: [...] (b) to remove the Trustee or any Trustee at any time from time to time; and (c) to do all such other acts and things incidental to the foregoing and to exercise all powers necessary or useful to carry on the business of the Trust,

to promote any of the purposes for which the Trust is formed, and to carry out the provisions contained herein.”

- Clause 16.3.1: “Notwithstanding the provisions of the Applicable Law, the Protector shall have an absolute and uncontrolled discretion in exercising and in deciding whether or not to exercise any power here conferred, and in deciding whether to give or to withhold any consent to any act or thing requiring hereunder the consent of the Protector. The Protector may exercise such discretion upon consideration of such facts or information and in such manner for the benefit of the Eligible Persons or any one or more of them exclusively of the others or other of them as the Protector may think fit and the Protector shall not be liable or accountable in any manner for any exercise of or non-exercise of such discretion.”¹⁰⁶

197. In other words, Hampton essentially has full control over Blue Bank’s management of the Qatar Trust. It decides the way in which earnings are distributed after Qatar Notes are paid, it has the power to remove the trustee and, in its capacity as Eligible Person (not a term of art), it is the beneficiary of the earnings distributed at its own discretion, without being accountable to anyone. It is, for all intents and purposes, the “real” owner of the purported investment in the BVI Companies.

The President of the Tribunal differs as to the relevance of control:

198. The President agrees with the majority as concerns the factual situation that Blue Bank’s discretion to act as trustee under the terms of the Trust Deed was totally circumscribed, giving it no control over the management of the trust assets. However, whether this was so or not is without relevance for the question whether Blue Bank may assert jurisdiction under the BIT. Determinative for this question is whether it made the investment on which it relies in its own behalf or not. However, the unanimous conclusion of the Tribunal is that Blue Bank did not make the investment in its own behalf.

9 OTHER JURISDICTIONAL ARGUMENTS

199. The Tribunal’s holding that the Claimant lacks standing for failure to have invested assets in the host State compels dismissal of the Claimant’s claims for lack of jurisdiction. It also implies that the other arguments adduced by the Respondent, including that jurisdiction was fabricated by the Claimant in the face

¹⁰⁶ Exhibit C-99.

of an existing or imminent dispute for the sole purpose of obtaining protection under the BIT (abuse of process),¹⁰⁷ do not need to be addressed separately.

10 ALLOCATION OF COSTS

200. On 18 April 2016, the Parties filed their respective Statements of Costs. Comments were exchanged on 3 May 2016.
201. Each of the Parties has requested to be reimbursed for the legal costs incurred in these proceedings including, in the case of the Respondent, interest.
202. The Claimant has submitted that it incurred a total of USD 1,924,345.06 in legal fees and expenses. It has effected an advance on costs to ICSID in the amount of USD 850,000.00.
203. The Respondent has submitted that it incurred a total of USD 1,709,295.00 in legal fees and expenses. It did not contribute by way of advance on costs to ICSID.
204. As regards costs, Article 61(2) of the ICSID Convention provides as follows:

Article 61

(1) [...]

(2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

205. An arbitral tribunal has the discretionary power to allocate the arbitration costs and the legal fees and expenses between the parties, including by ordering the losing party to bear in full the costs of the arbitration and the legal fees and expenses incurred by both parties.
206. Both Parties to this arbitration have submitted requests for reimbursement in respect of their respective legal costs.
207. The Tribunal is well aware of the practices of certain arbitration tribunals not to make any order for legal costs. However, there is an increasing trend to

¹⁰⁷ Memorial on Objections to Jurisdiction, ¶¶ 87-135.

acknowledge that a successful party should not normally be left out of pocket in respect of the legal costs reasonably incurred in defending its legal rights.

208. The Tribunal favors the approach taken by the Parties – which is implicit in their requests for cost orders – that as a general principle the successful party should be paid its reasonable legal costs by the unsuccessful party.
209. In light of the Tribunal’s finding that the Claimant does not prevail on the preliminary question of jurisdiction, the Tribunal considers it appropriate for the Claimant to bear in full its legal fees and expenses, as well as the arbitration costs.
210. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID’s administrative fees and direct expenses, amount to (in USD):¹⁰⁸

Arbitrators’ fees and expenses	
Christer Söderlund	USD 314,441.12
George Bermann	USD 115,595.99
Loretta Malintoppi	USD 144,820.86
ICSID’s administrative fees	USD 128,000.00
Direct expenses (estimated) ¹⁰⁹	USD 90,044.27
Total	<u>USD 792,902.24</u>

211. For the same reason as explained above, the Tribunal considers it appropriate that the Claimant also be ordered to reimburse the Respondent’s legal fees and expenses in the amounts requested. The Tribunal finds the Respondent’s request for such costs reasonable.
212. Consequently, the Claimant is ordered to pay to the Respondent the amount of USD 1,709,295.00, representing the Respondent’s legal fees and expenses.

¹⁰⁸ The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account once all invoices are received and the account is final.

¹⁰⁹ This amount includes estimated charges relating to the dispatch of this Award (courier, printing and copying).

213. As for interest on the Respondent's legal costs, the Tribunal considers that any delay in respect of the Claimant's reimbursement of costs shall attract interest. The Respondent has not specified from which date it considers that interest shall accrue or at what rate. The Tribunal will therefore base these parameters on reasonableness and fix the commencement date at 30 days from the date of this Award applying an annual simple interest rate of 5 per cent.
214. As for the fees and expenses of the members of the Tribunal and the charges for the use of ICSID facilities, these costs will be defrayed out of the advances made by the Claimant. Having regard to the Tribunal's decision that the Claimant shall be ultimately liable for arbitration costs, there will be no order for those costs.

11 DECISION

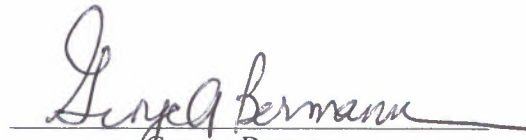
215. For the foregoing reasons, the Arbitral Tribunal unanimously:

- 1) Declares that the Centre does not have jurisdiction and the Arbitral Tribunal does not have competence to adjudicate the present dispute;
- 2) Declares that the Claimant shall bear in full its legal costs and expenses, the costs of this arbitration, as well as the Respondent's legal costs and expenses;
- 3) Orders the Claimant to pay to the Respondent the amount of USD 1,709,295.00, representing the Respondent's legal costs and expenses, within 30 days from the date of this Award, together with interest thereon calculated from the 30th day following the date of this Award at the rate of 5% per annum.

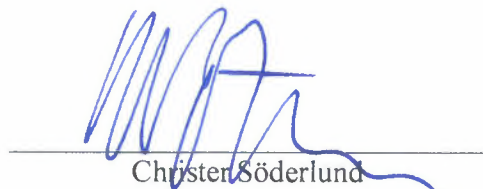
* * * * *


Loretta Malintoppi
Arbitrator

Date: 30/3/2017


George Bermann
Arbitrator

Date: 6 April 2017


Christer Söderlund
President of the Tribunal

Date: 3 April 2017