

Blue Bank International & Trust (Barbados) Ltd. v the Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/20)

SEPARATE OPINION

By Christer Söderlund, 3 April 2017.

Denunciation of the ICSID Convention

1. I am in agreement with my colleagues in the Tribunal as to their conclusion that the Respondent's consent existed at the time of the Claimant's submission of its Request for Arbitration. However, I do believe that the role of Article 72 of the Convention – which forms the centrepiece of the Respondent's first-hand objection – as regards obligations based on unilateral consent could merit a more exhaustive analysis as to how it will play out in an investment treaty context.
2. I also believe that the matter of jurisdiction *ratione voluntatis* in a BIT context – like the present one – may well deserve a fuller discussion in view of the diversity of opinion that reigns in this area in the wake of the decision by Bolivia as the first Contracting State to withdraw from the ICSID Convention in 2007.

Background

3. As for the normative framework, I am in agreement with the presentation made in Section 6.3.1 of the Award but for the fact that also Article 72 of the ICSID Convention is necessarily a part of that framework.
4. As for the chronology of Section 6.3.2, I am also in agreement although, for reasons given below, I consider it of no relevance for my conclusion.

Points of departure

5. The ICSID Convention provides an arbitration regime for purposes of settling international investment disputes between Contracting States and investors of other Contracting States. Its application is limited to cross-border investments. These basic criteria are laid down in Article 25 which, in the 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.

6. In line with what has just been stated, a key element of the ICSID Convention is that adherence by itself does not oblige the Contracting State to submit to arbitration (under the ICSID regime or otherwise). This key element is emphasized already in the Preamble, seventh indentation:

Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration

7. From this it follows that consent to arbitration must be given in some other form. At the time the Convention was conceived, such other form was predominantly an investment contract between an investor and the State, national legislation or a submission agreement. It was not undertaken in an investment protection treaty. In contrast, today, in the absolute majority of cases consent will be found in a bi- or multilateral investment protection treaty.

8. Article 71 of the Convention deals with a Contracting State's right to withdraw from the Convention. It provides:

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.

9. Article 72 of the Convention reads as follows:

Article 72

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.

10. I am in agreement as regards my co-arbitrators' conclusion that the Respondent was bound by its consent to arbitrate at the time when the Claimant submitted its consent to arbitrate. However, I believe that the Respondent's invocation of Article 72 of the ICSID Convention requires analysis.

Implications of Article 72 of the ICSID Convention in the present context

11. The Respondent’s interpretation of Article 72 of the ICSID Convention is straightforward: The “consent” referred to in this provision concerns the unilateral consent given by the State (or its constituent subdivisions, agencies or any national) to submit to ICSID jurisdiction. Consequently, if there is unilateral consent, Article 72 implies that the period during which the State’s “rights or obligations under this Convention [---] arising out of consent” shall remain in effect ends at the point in time when the State’s notice of denunciation is received by the depositary if that consent has not been “perfected” by the investor’s consent at that time. The Respondent’s notice of denunciation was given on 24 January 2012. The Claimant’s consent (constituted by its submission of the Request for Arbitration) was given at a time when the Respondent’s consent to ICSID arbitration had ceased to apply.¹
12. In this relation, I make the following observations.
13. Article 72 covers the situation in which a denouncing State has unilaterally consented to ICSID jurisdiction prior to giving notice of its denunciation of the Convention.
14. According to the wording of this provision, 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 a constituency or a national) arising out of consent. This implies that unilateral consent may be withdrawn at any time.
15. Thus, the provision of Article 72 stands in harmony with the principle implied by Article 25, that withdrawal shall not be possible once there is *mutual* consent.
16. In view of the foregoing, the question that has to be examined in order to decide whether there is an obligation for the Respondent to submit to arbitration is whether Article 72 applies at all to the situation at hand.

Implications of denunciation of the ICSID Convention

17. The matter concerning the effect on the investor’s consent to arbitration of Article 72 has been subject to intense debate in the investment protection area. This debate was originally triggered by Bolivia’s denunciation of the Convention on 2 May 2007. Different interpretations have been advocated.² One such interpretation would coincide

¹ The Respondent’s Memorial on Jurisdiction, ¶¶ 218 & seq.; the Respondent’s Reply on Objections to Jurisdiction, ¶¶ 62 & seq.

² C. Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*. // Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung, and Claire Balchin, *The Backlash against Investment Arbitration: Perceptions and Reality*, pp. 353–368; C. Tietje, K. Nowrot and C. Wackernagel, *Once and Forever? The Legal Effects of a Denunciation of ICSID* // TDM, Vol 6, Issue 1, March 2009; M. Nolan, F. G. Sougens, *The Interplay between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The Possible Venezuela Case Study* // TDM, Vol. 4, Issue 5, September 2007; T. Voon, A D Mitchell, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law* // (February 21, 2016). ICSID Review, Forthcoming; A.A. Mezgravis and C.

with the view held by the Respondent, *i.e.* that in the absence of investor consent at the time when the depositary receives the State party's notice of denunciation, no basis for ICSID arbitration remains. A second reading of Article 72 (which is that of my co-arbitrators) may conceivably imply that investors may still accept the consent given in a BIT until the denunciation becomes effective in accordance to Article 71, *i.e.* six months after the depositary has received the denouncing State party's notice of denunciation. A third view is that ICSID arbitration will be available as long as the State's consent, if expressed in a BIT, remains effective for the duration of the BIT.

18. To this date, as far as is publicly known, only one tribunal has decided on interpretation and scope of Article 72 (Venoklim).³

Applying Article 72 in a BIT context

19. There is reason to believe that the great diversity of opinion that has been expressed in writings and commentary on the implications of Article 72 stems from the fact that the drafters of the ICSID Convention did not shape its provisions in contemplation of the subsequent State practice of offering investor-State dispute settlement (ISDS) by way of investment protection treaties.
20. At the time the ICSID Convention was drafted in the beginning of the sixties, no BIT with an investor-State mechanism was in existence. There existed a Germany – Pakistan BIT which had been concluded as early as in 1959, but that treaty did not include an ISDS mechanism.
21. Instead, consent to arbitration by States in relation to foreign investors was predominantly provided in the form of an arbitration clause entered into by the State itself, such as in a natural resource concession or a foreign investment agreement. At the time of the drafting of the Convention, it was also recognized that States could give consent to arbitrate future disputes by offering to submit to arbitration in a foreign investment law or by a treaty. However, up to 1968, *i.e.* after the Convention had entered into effect, BITs provided only for State-to-State dispute resolution through the

González. *Denunciation of the ICSID Convention: Two Problems, One Seen and One Overlooked* // TDM, Provisional Issue, November 2012; O M. Garibaldi. *On The Denunciation Of The ICSID Convention, Consent To ICSID Jurisdiction, And The Limits Of The Contract Analogy* // International Investment Law for the 21st Century: *Essays in Honour of Christoph Schreuer*. Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich. September 2009; E. Gaillard. *The Denunciation of the ICSID Convention* // TDM 5 (2007); Fernando Mantilla-Serrano. *La denuncia de la Convención de Washington, ¿impide el recurso al CIADI?* // Revista Peruana De Arbitraje N° 6 (2008), Pp. 205-216; Julien Fouret, *Denunciation of the Washington Convention and Non-Contractual Investment Arbitration: "Manufacturing Consent" to ICSID Arbitration?*, Journal of International Arbitration, // Volume 25 Issue 1 pp. 71 – 87; James O. Rodner and Jaime Martínez Estévez, *BITs in Pieces: The Effectiveness of ICSID Jurisdiction after the ICSID Convention Has Been Denounced* // Journal of International Arbitration, 2012, Volume 29 Issue 4. pp. 437 – 451; Antonios Tzanakopoulos, *Denunciation of the ICSID Convention under the General International Law of Treaties* // International Investment Law And General International Law: *From Clinical Isolation To Systemic Integration?*, pp. 75–93, Rainer Hofmann and Christian Tams, Nomos Verlagsgesellschaft, 2011.

³ *Venoklim Holding B.V. v Venezuela*, ICSID Case No. ARB/12/22, Award of 3 April 2015 (Spanish). A previous case, *E T I Euro Telecom International N.V. v Bolivia*, ICSID Case No. ARB/07/28, would also have had to address this issue but was discontinued by the claimant.

establishment of “mixed” commissions or by submission of a dispute to the ICJ. According to Newcombe and Paradell “[i]t appears that the first BIT that expressly incorporates provisions for investor-State arbitration, though with qualifications, is Indonesia-Netherlands (1968)”. By the same source, it appears that the Tchad-Italy BIT was the first BIT – in 1969 – that provided for investor-State arbitration with unqualified State consent.⁴

22. Although a few more BITs were entered into in the beginning of the seventies, it would take a long time before the ISDS mechanism of such instruments was put into actual operation; the effectiveness of a unilateral arbitration offer contained in a treaty was first upheld in 1985 in *SPP v. Egypt*.⁵
23. According to Newcombe and Paradell, in the period 1970-1974, no more than 39 BITs were concluded; between 1975 and 1979, 60 BITs were concluded. The 1990’s witnessed a proliferation in the number of BITs. At the end of the decade, there were almost 2,000 BITs concluded.
24. The above overview demonstrates that the investor-State arbitration option that represents the absolutely predominant basis for investor-State arbitration in the last few decades did not exist at all at the time when the ICSID Convention was opened for ratification. This circumstance gives reason to assume that the provisions of the Convention were drafted without regard to the existence of “arbitration without privity” grounded in investment protection treaties. As a consequence, the provisions of the Convention will nowadays have to be regularly applied in a contextual framework that did not exist at the time of the Convention’s creation.
25. The task in front of which the Tribunal is placed is, therefore, to determine the relevance of Article 72 of the ICSID Convention in a context which did not exist at the time when the Convention came into existence, and which its drafters did not have occasion to consider.
26. In order to arrive at the appropriate application of Article 72 in the relevant context in this arbitration, it is necessary to depart from a number of fundamental premises.
27. The consent of Venezuela that the Claimant relies on for purposes of this arbitration is premised on Article 8(1) of the BIT. Article 8 deals with the “Settlement of Disputes Between one Contracting Party and Nationals or Companies of the other Contracting Party”.

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

⁴ Newcombe, Paradell, *Law and Practice of Investment Treaties*, Kluwer 2009.

⁵ *Southern Pacific Properties (Middle East) Limited v. Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 27 November 1985.

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.

28. This declaration of consent of the Respondent and Barbados entered into effect on 31 October 1995. According to its terms – Article 13 – it was to remain in effect for an initial period of ten years and thereafter be subject to termination 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.
29. The BIT had not been terminated at the time when the Claimant submitted its Request for Arbitration.
30. The inquiry which has to be undertaken is the following: Does the presence of the BIT constitute a circumstance that will deprive the State of its right to immediately withdraw its consent to arbitration?
31. The following observations may provide an appropriate point of departure.
32. Normally, doctrinal writings will assume that an analogy with the “offer-acceptance” principle found in municipal law offers a workable model for explaining how the investor’s entitlement to submit disputes to international arbitration is fashioned in a BIT context. Applying this model, some scholars have concluded that the arbitration agreement is not “perfected” until the investor submits its consent, at which time the State’s unilateral consent may no longer apply according to Article 72 of the Convention.
33. However, this explanation model, on closer scrutiny, represents an approximation which does not lead to the appropriate inferences in all instances.⁶ It may elicit, erroneously, a perception of the existence of an offer-acceptance relationship between the contracting State and investors of the other contracting State, to the exclusion of the basic State-to-State relationship grounded in the treaty. This, in its turn, may lead to a misapplication in the specific instance of Article 72, as it assumes that there is a unilateral consent given, which will not be perfected until such time as when a particular “investor” declares its consent, *i.e.* accepts the offer.

⁶Or, in the language of one Tribunal: “[...] While it is common and often harmless to somewhat loosely refer to dispute resolution clauses such as Article VII of the BIT as provisions containing the State parties’ ‘standing offer’ to arbitrate, this is in fact conceptually inaccurate and legally incorrect; Article VII rather contains the State parties’ ‘consent’ to arbitrate, which is binding on the State as such, without any further ‘perfecting’, as a unilateral undertaking *vis-à-vis* a class of foreign investors.” *İçkale İnşaat Limited Şirketi v Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016, ¶ 244.

Interpreting Article 25(1) of the ICSID Convention in a BIT context

34. Contributing to this interpretation (that there is only unilateral consent until such time as the investor has “accepted” the offer) is, no doubt, the wording of Article 25(1) of the ICSID Convention in that it provides that “[w]hen the parties have given their consent, no party may withdraw its consent unilaterally” where the identity of “the parties” refers to the parties to the dispute which, in a BIT context, are the host State and the investor.
35. A literal application of this language leads to the conclusion that there is unilateral consent only as long as the investor has not given its reciprocal consent to arbitrate.
36. However, such literal interpretation fails to take into account the situation which existed at the time when the text of the Convention was conceived. The mutual consent (which cannot be withdrawn under this Article) was invariably given in an investment contract or an *ad hoc* submission agreement,⁷ *i.e.* the contracting parties and the potential disputants were the same. The notion of an inter-State investment treaty was not contemplated in a way so as to accommodate the exigencies of consent given by way of an inter-State undertaking.⁸
37. In view of this changing landscape as concerns the modalities of consent, it is necessary to interpret the Convention text in appreciation of the form of States’ consent to submit to international arbitration at the behest of third party investors that now has come to prevail.
38. From the foregoing it follows that the Convention’s reference to a dispute between a Contracting State and a national of another Contracting State cannot allow the conclusion that as long as that “national of another Contracting State” has not “accepted” the unilateral consent, a situation of unilateral consent as foreseen in Article 72 is present. The undertaking of obligations in relation to another contracting State (in

⁷ It is notable that the Report of Executive Directors as examples of giving consent mentioned “an investment agreement”, a “*compromis*” or – as an example of a unilateral offer of consent – “investment promotion legislation” (Article 24 of the Report).

⁸ One tribunal – in an early award of 1999 – was prescient in the way that it observed “En ce qui concerne la compétence du CIRDI – et, par voie de conséquence, celle du Tribunal arbitral – elle trouve sa source non pas dans un accord conclu entre l’Etat d’accueil et l’investisseur étranger mais directement dans le traité international conclu entre l’Etat d’accueil et l’Etat national de l’investisseur. L’exigence fondamentale du consentement des parties, formulée à l’article 25 de la Convention du CIRDI, se trouve ainsi revêtir une expression originale, à laquelle on ne pensait guère au moment de l’élaboration de la Convention du CIRDI, à une époque où la pratique des traités bilatéraux d’investissement était encore embryonnaire. La présente affaire est la seconde seulement dans la jurisprudence du CIRDI à se situer dans un tel cadre. Nul doute, cependant, qu’une situation de ce genre se présentera de plus en plus fréquemment dans l’avenir.” [As far as ICSID’s competence – and, as a consequence, that of the Arbitral Tribunal – is concerned, it derives not from an agreement between the host State and the foreign investor but directly from the international treaty between the host State and the national State of the investor. The basic requirement of consent of the parties, as set out in Article 25 of the ICSID Convention, thus finds its expression in a novel fashion, which was hardly thought of at the time of the ICSID Convention, at one time where the practice of bilateral investment treaties was still embryonic. The present case is the second only in ICSID jurisprudence to fall within such a framework. There is no doubt, however, that a situation of this kind will occur more and more frequently in the future] [President’s translation], *Antoine Goetz et al v République du Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, ¶ 67.

a BIT) is of an enduring nature and constitutes a binding commitment under international law for the term of the applicable treaty.

The dispute resolution chapter of a BIT constitutes mutual consent for purposes of Article 25(1) of the ICSID Convention

39. The BIT is an international instrument which creates rights and obligations for the contracting States. Although intended to bring substantive and procedural benefits to third parties – “investors” – such third-party rights must also be regarded as being owed by the contracting States to each other. By the same token it also imposes on the contracting States the obligation to provide a forum at the request of “investors” of the other contracting State.
40. As concerns the effectiveness of obligations undertaken by one State in relation to another State as compared with any undertaking ultimately intended to benefit a third party, there is no difference from the point of view of its obligatory character. The binding nature of each category of undertakings (whether procedural or substantive) is the same, and both are owed by each contracting State to the other on a reciprocal basis.
41. Seen from this perspective, it is clear that the States that are parties to investment protection treaties have undertaken to maintain their respective undertakings to observe substantive standards laid down in the relevant treaty, as well as the obligation to submit to international arbitration, on a mutual basis and for the duration of the treaty. This leads to the important consequence that Article 72 does not come into play.
42. However, even if one does not accept the mutuality basis of an investment protection treaty, but consider the “offer-acceptance” model as a proper explanatory model for the investor-State relationship, such “offer” would then – until the moment of acceptance by an investor – represent a unilateral undertaking. Such undertaking would have been undertaken for the duration of the treaty, and Article 72 would not apply. To quote the words of Prof Schreuer, “[a] mere offer of consent to ICSID’s jurisdiction may be withdrawn at any time, unless, of course, it is irrevocable by its own terms.”⁹

Relevance of the *travaux* for the BIT context

43. In this relation, there is reason to comment on Mr Broches’ statement that only the unilateral consent by the State which has not been accepted by the investor at the time of withdrawal from the Convention by the State implies that “no investor could later bring a claim before the Centre.” This statement has been understood by some scholars to imply that the absence of investor consent at the time of the State’s denunciation precludes access to arbitration. However, it is clear to see that the situation addressed by Mr Broches is not one where the State is bound by a BIT with an investor-State dispute

⁹ Schreuer *et al*, *The ICSID Convention, A Commentary*, second edition, Article 25, ¶ 599.

settlement mechanism in relation to another State as such instruments simply were not on offer at that time. The question (paragraph 61) relates to “a general declaration” and Mr Broches also responds on the premise of a “general statement of the kind mentioned by [the proponent].”

44. It is clear that Mr Broches did not and could not provide an answer based on the assumption of a – at the time non-existing – mutual agreement between States to, *inter alia*, offer the nationals of their counterparties international arbitration for an agreed period of time. The situation was different. It concerned a general declaration that could only be conceived as directing itself towards an investor to submit to arbitration; such declaration would not involve any other State and did not concern an offer of arbitration which was undertaken for any specific period of time.
45. The conclusion that the above observations compel is that a notice of denunciation of the ICSID Convention is of no consequence for consent given by a State party in a BIT in relation to another State. Such consent (whether regarded as unilateral or mutual) will remain in effect for the duration of the BIT. In other words, the availability of ICSID arbitration will remain open not only for the six-month period, which according to Article 71 of the Convention follows on the notice of denunciation, but also until such time as the relevant BIT is terminated.

Access to ICSID arbitration post-termination?

46. The above conclusion prompts the following inquiry. The enduring nature of consent given in a BIT may lead to a situation where an investor will wish to submit to ICSID arbitration at a time when the host State (or even both Contracting States) is no longer a party to the ICSID Convention. The fact that such membership is a prerequisite according to Article 25(1) of the Convention for arbitral jurisdiction, coupled with the principle – also enunciated in Article 25(1) – that mutual consent cannot be withdrawn –necessitates an inquiry into whether recourse to ICSID arbitration (which requires that the concerned State parties are signatories of the Convention) is still possible.
47. A look into the drafting history of the ICSID Convention reveals that the implications of denunciation on consent in a comparable situation were raised only shortly before the Convention was opened for signature.
48. The question that was raised was whether a “perfected” agreement between a State and an investor (an “investment contract”) would survive denunciation of the Convention. This might imply that a State Party might have to arbitrate before the ICSID even decades after its adherence to the ICSID Convention had come to an end. Mr Broches confirmed that the State would be so obliged.

54. Mr. Broches replied that the intention of Article 73 [now Article 72 of the ICSID Convention] in the text submitted to the Directors was to make it clear that if a State has consented to arbitration, for instance by entering into an

arbitration clause with an investor, the subsequent denunciation of the Convention by that State would not relieve it from its obligation to go to arbitration if a dispute arose.

[...]

57. Mr. Mejia-Palacio asked what would happen if a State which was a party to the Convention signed an agreement with a company and later withdrew from the Centre while no disputes were pending. If, say ten years later a dispute arose – would that dispute still be under the jurisdiction of the Centre?

58. Mr. Broches replied that if the agreement with the company included an arbitration clause and that agreement lasted for say 20 years, that State would still be bound to submit its disputes with that company under that agreement to the Centre.

[...]

49. This statement provides support for the assumption that the ICSID would register a request for arbitration also where a State party had left the Convention but where the investor could invoke a former Contracting State's consent to ICSID arbitration by a valid BIT.
50. However, this unequivocal declaration still raises the following quandary.
51. ICSID is created as an administrative facility for purposes of serving dispute settlement by way of (conciliation and) arbitration. It is central that ICSID is not a "free for all" institution that will serve all disputants in all matters, but exclusively, Article 1(2), "between Contracting States and nationals of other Contracting States" in respect of cross-border investment.
52. This circumstance is not without importance (but with no relevance for any conclusion to be made), as an investor deprived of recourse to ICSID arbitration under this particular BIT would have no recourse in international arbitration at all.¹⁰
53. Already in its Preamble, second indentation, the Convention notes that "...disputes [...] between Contracting States and nationals of other Contracting States", and, of course, in Article 25 of the Convention, it is made clear that it is open for "Contracting State[s] [...] and [...] national[s] of [other] Contracting State[s]".
54. Participation in the Convention of the State parties is an absolute requirement; it is not subject to waiver by agreement between the parties.¹¹ The relevant time of membership in the Convention is the point in time when proceedings in a particular case are

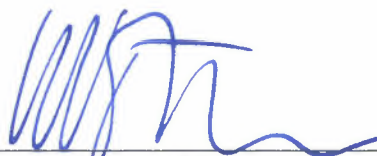
¹⁰ This *impasse* is illustrated by *Venezuela US, srl v Venezuela*, PCA No. 2013-34, on my assumption that other recourse cannot be had on the basis of the MFN clause.

¹¹ Schreuer *et al*, *The ICSID Convention: A Commentary*, Article 25, ¶ 213.

initiated. After expiry of the six-month notice period, it is clear that the denouncing State party is not any longer a “Contracting State.”

55. One may envisage that principles in international law such as the one of good faith may preserve an investor’s right to access to ICSID arbitration where the State has undertaken to maintain that promise for the duration of a particular BIT.
56. The fact that a post-termination request under a BIT would be registered at the ICSID does not answer the question whether a tribunal would consider itself competent to deal with the dispute. It would not be appropriate to delve into that issue for purposes of the present case where I share my co-arbitrators’ conclusion that the Request was filed within the six-month notice period stipulated in Article 71 of the Convention. The purpose of this opinion is to provide an explanation why Article 72 does not apply in the presence of a BIT and why Venezuela’s consent did not expire immediately upon its notice of denunciation as provided in Article 72.

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Christer Söderlund
President of the Tribunal

Date: 3 April 2017