

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 15 September 2015

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU
and NARCISSE ARIDO

Public

Decision on Defence Request to Postpone the Commencement of the Trial

To be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

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Others

Trial Chamber VII (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 64(2) and 67(1)(b) and (c) of the Rome Statute (the ‘Statute’) and Rule 132(1) of the Rules of Procedure and Evidence (the ‘Rules’) issues the following ‘Decision on Defence Request to Postpone the Commencement of the Trial’.

I. Procedural History

1. On 22 May 2015, the Chamber set the trial commencement date for Tuesday, 29 September 2015 and ordered the Office of the Prosecutor (the ‘Prosecution’) to submit its list of incriminating evidence and list of witnesses no later than 30 June 2015.¹
2. On 9 September 2015, the defence of Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala and Mr Narisse Arido (collectively, ‘Defence’) submitted the ‘Requête conjointe de la Défense de M. Kilolo, M. Mangenda, Mr. Babala and M. Arido demandant le report du début du procès afin d’assurer l’équité du procès et les droits des prévenus’ (the ‘Request’) requesting (i) the postponement of the commencement of the trial, and (ii) the holding of a status conference.²
3. On 14 September 2015,³ the Prosecutor responded to the Request.⁴

¹ Order setting the commencement date for trial, ICC-01/05-01/13-960, paras 12-13.

² Requête conjointe de la Défense de M. Kilolo, M. Mangenda, Mr. Babala and M. Arido demandant le report du début du procès et les droits des prévenus, ICC-01/05-01/13-1228-Conf with one confidential annex.

³ The Prosecution and the defence of Mr Jean-Pierre Bemba Gombo were instructed to submit their responses to the Request, if any, by Monday, 14 September 2015, see Email from Trial Chamber VII Communications to the parties on 10 September 2015 at 09h06.

⁴ Prosecution Reponse to “Requête conjointe de la Défense de M. Kilolo, M. Mangenda, Mr. Babala and M. Arido demandant le report du début du procès afin d’assurer l’équité du procès et les droits des prévenus”, 14 September 2015, ICC-01/05-01/13-1240-Conf.

II. Submissions

A. *The Defence*

4. The Defence seeks the postponement of the commencement of the trial on the grounds that it needs more time to adequately prepare for trial. In support of its Request, the Defence avers more specifically that:
 - (a) despite the disclosure deadline of 30 June 2015, the Prosecution disclosed a further 126 (out of a total of 6,200) pieces of evidence in five batches after said deadline, of which 74 items of evidence were disclosed in the last disclosure batch;⁵ also, an additional 12 pieces of evidence were disclosed belatedly due to an 'inadvertent error' as alleged on the part of the Prosecution;⁶ the disclosure of further evidence was announced for 9 September 2015, two months after the disclosure deadline set by the Chamber;⁷
 - (b) as the latest updated list of evidence was submitted on 31 August 2015, an analysis of said list of evidence could only start belatedly, thus delaying also any investigative measures on the part of the Defence;⁸
 - (c) certain statements of witnesses that the Prosecution intends to rely at trial have not been disclosed yet;⁹
 - (d) the Prosecution delayed the communication of the information on whether witnesses P-263, P-264, P-270 and P-20 were willing to meet the defence team of one of the accused; the Defence claims that this delay made it impossible for the Defence to exercise its right to examine witnesses testifying against the accused;¹⁰
 - (e) the Prosecution disclosed the report of the expert witness P-433 only on 30 June 2015 despite the fact that a meticulous analysis of said report is

⁵ Request, ICC-01/05-01/13-1228-Conf, paras 26-27.

⁶ Request, ICC-01/05-01/13-1228-Conf, paras 39-41.

⁷ Request, ICC-01/05-01/13-1228-Conf, paras 29 and 43.

⁸ Request, ICC-01/05-01/13-1228-Conf, paras 57-58.

⁹ Request, ICC-01/05-01/13-1228-Conf, paras 33 and 56.

¹⁰ Request, ICC-01/05-01/13-1228-Conf, paras 33 and 55-56.

indispensable for the preparation of the defence;¹¹ in addition, the Defence alleges that the analysis of said report was contingent upon the reading of the report of another expert witness whose report was disclosed only on 21 July 2015, three weeks after the disclosure deadline of 30 June 2015; moreover, the two reports refer to documents which have not yet been disclosed to the Defence;¹²

- (f) the Prosecution did not disclose any other declaration of expert witness P-0433 in contravention of Rule 76 of the Rules;¹³
- (g) expert witness P-433 is not on the Court's list of experts, as maintained by the Registry, and the CV of said witness has not been communicated to the Defence; this circumstance renders it impossible for the Defence to make submissions on the witness's qualifications and the propriety of his expertise;¹⁴
- (h) the Prosecution did not comply with its obligation to disclose Article 67(2) and Rule 77 material as soon as possible; as an example, reference is made to the belated disclosure of information of a meeting between the Prosecution and three of its witnesses;¹⁵
- (i) several disclosure requests of the Defence¹⁶ and a set of decisions of the Chamber are still pending;¹⁷
- (j) it has hitherto no access to the case record in the case of the *Prosecutor v Jean-Pierre Bemba Gombo* (the 'Main Case'); a related request to access the case record before Trial Chamber III and a request for leave to appeal a previous decision of the Chamber are pending;¹⁸ and

¹¹ Request, ICC-01/05-01/13-1228-Conf, para. 34.

¹² Request, ICC-01/05-01/13-1228-Conf, para. 35.

¹³ Request, ICC-01/05-01/13-1228-Conf, para. 36.

¹⁴ Request, ICC-01/05-01/13-1228-Conf, para. 37; see also para. 54.

¹⁵ Request, ICC-01/05-01/13-1228-Conf, para. 38.

¹⁶ Request, ICC-01/05-01/13-1228-Conf, para. 42 and confidential annex.

¹⁷ Request, ICC-01/05-01/13-1228-Conf, paras 44-45, 48-50 and 63, and confidential annex.

¹⁸ Request, ICC-01/05-01/13-1228-Conf, paras 46-47. It is highlighted that the defence of Mr Jean-Pierre Bemba Gombo and the Prosecution have access to the entire case record in the Main Case which, in the view of the Defence, affects the principle of equality of arms.

- (k) it was required to respond to three “bar table motions” which consumed a lot of the Defence’s preparation time prior to trial;¹⁹
 - (l) it encountered ‘problems’ concerning, *inter alia*, the timely disclosure of the identity of one witness, the lack of consent of two witnesses to be contacted by the Defence and the maintaining of redactions;²⁰
5. Finally, the Defence also maintains that due to the Registry’s tardy decision on legal aid, associate counsel joined three of the defence teams in this case only in July and August 2015. In this context, it asserts that associate counsel are indispensable to the work of the Defence in a case involving five accused and that more time is needed.²¹ The Defence also argues, with reference to a decision in the Main Case, that postponement is necessary due to the new composition of the Chamber.²²
 6. Making reference to other cases at the Court where the commencement of trial was postponed, the Defence requests that the commencement of the trial be postponed and commence in January 2016.²³
 7. In addition, the Defence requests that the Chamber convene a status conference which offers ‘*l’occasion d’échanges de civilités entre la Chambre dans sa composition actuelle et les équipes de défense dans leur configuration d’aujourd’hui*’²⁴ and the opportunity for the parties to raise any difficulties in relation to the points set forth in the Request.²⁵

¹⁹ Request, ICC-01/05-01/13-1228-Conf, para. 52.

²⁰ Request, ICC-01/05-01/13-1228-Conf, para. 56.

²¹ Request, ICC-01/05-01/13-1228-Conf, para. 60.

²² Request, ICC-01/05-01/13-1228-Conf, para. 61.

²³ Request, ICC-01/05-01/13-1228-Conf, paras 8-10, 51, 59 and 64. Reference was made to the cases of the *Prosecutor v. Bosco Ntaganda*, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, *Prosecutor v. Jean-Pierre Bemba Gombo* and the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.

²⁴ Request, ICC-01/05-01/13-1228-Conf, para. 65.

²⁵ Request, ICC-01/05-01/13-1228-Conf, para. 66.

B. The Prosecution

8. The Prosecution opposes the Request which it considers to be ‘unsubstantiated, fraught with inaccuracies and misrepresentations, and untimely’.²⁶ At the outset, it contends, amongst other things, that the Defence was furnished with the ‘overwhelming majority’ of the evidentiary material on which the Prosecution seeks to rely on at trial already before the confirmation of charges and was able to analyse and refute it at the time.²⁷ The Prosecution also recalls that the Defence received a detailed and footnoted Pre-Trial Brief.²⁸
9. As regards any disclosure violation alleged by the Defence, the Prosecution avers that it has complied with its disclosure obligations, including those related to exculpatory evidence, throughout the process.²⁹ In particular, the Prosecution argues that disclosure past the 30 June 2015 deadline was owed to the (i) express Defence requests for additional disclosure; (ii) Chamber’s orders making the reports of the Independent Counsel available to the parties; (iii) corrections to metadata fields; and (iv) Chamber’s authorisation to delay the disclosure of the identity of one witness which resulted in some of the material related to said witness to be re-disclosed with lesser redactions.³⁰ The Prosecution also submits that the transcripts of Prosecution interviews with three witnesses were disclosed three weeks before the 30 June 2015 deadline.³¹
10. With respect to the late communication of the lack of consent of four Prosecution witnesses to be contacted by one of the defence teams, the Prosecution, while accepting the allegation of belated communication, avers that this did not negatively affect the rights of the Defence. It argues that in fact three out of the four witnesses had declined to be contacted by the Defence, while the fourth

²⁶ ICC-01/05-01/13-1240-Conf, para. 1.

²⁷ ICC-01/05-01/13-1240-Conf, para. 4.

²⁸ ICC-01/05-01/13-1240-Conf, para. 4.

²⁹ ICC-01/05-01/13-1240-Conf, para. 5.

³⁰ ICC-01/05-01/13-1240-Conf, para. 6.

³¹ ICC-01/05-01/13-1240-Conf, para. 7.

witness, who accepted to be contacted, will testify later in the trial, thus rendering minimal any prejudice arising out of the late communication of his consent.³²

11. Concerning any purported disclosure violations in relation to witness P-433, the Prosecution recalls that the report of witness P-433 was disclosed in time. It also submits that the witness is not an expert witness; nevertheless, the Prosecution announced that it would disclose the witness's CV and short summary of expected testimony 'in the coming days'.³³ In this context, the Prosecution also disagrees with the Defence claim that the analysis of P-433's report is contingent upon receiving the expert report of P-0361, as both reports cover two distinct aspects of the telecommunication evidence.³⁴ In addition, the Prosecution clarifies that no further statement of P-433 was collected and, consequently, would have to be disclosed.³⁵

12. In relation to the amendments of the list of evidence, the Prosecution refers to the Chamber's prior authorisations to add specific pieces of evidence. It also avers that the additions to the list of evidence have been 'extremely limited'.³⁶ Lastly, the Prosecution contends that the Defence makes generic claims of errors in translations and technical problems with recordings which it could have raised in due time.³⁷

13. As concerns the granting of access to the record of the Main Case, the Prosecution argues that it does not have control over said case record. It also

³² ICC-01/05-01/13-1240-Conf, paras 10-11.

³³ ICC-01/05-01/13-1240-Conf, para. 11. The Chamber notes that the Prosecution provided the Defence with the CV of the witness and clarified the scope of his testimony on 11 September 2015 by Email, see ICC-01/05-01/13-1242-Conf, para. 2.

³⁴ ICC-01/05-01/13-1240-Conf, para. 12.

³⁵ ICC-01/05-01/13-1240-Conf, para. 14.

³⁶ ICC-01/05-01/13-1240-Conf, para. 17.

³⁷ ICC-01/05-01/13-1240-Conf, para. 18.

submits that it has diligently reviewed all the material in its possession and effectuated disclosure accordingly.³⁸

14. With respect to the Defence claim that considerable time was required to respond to the bar table motions, the Prosecution purports that the Defence did not have to start 'from scratch' as the material was in the Defence's possession since before and had been analysed for the purpose of the confirmation of charges stage.³⁹ It also argues that it had announced in the first status conference that bar table motions would be submitted in this case.⁴⁰ Finally, the Prosecution alleges that the early submission of such motions did not disturb or delay the Defence preparation for trial.⁴¹

III. Analysis

15. At the outset, the Chamber deems it important to underline that the fact that various Trial Chambers postponed the commencement of other trials does not obligate this Chamber to accede to the Request in this case. Rather, a postponement request must be assessed on the basis of the reasons advanced and in light of the circumstances of each case. Crucially, in its assessment of a request under Rule 132(1), second sentence, of the Rules, the Chamber must ensure the overall fairness and expeditiousness of proceedings, bearing in mind the various competing interests at stake.

16. In principle, setting a date for the commencement of trial is not a tentative recommendation but is instead a binding decision which has to be maintained in the normal course of events. In other words, postponing the commencement of trial is an exceptional measure and not the norm; most importantly, it cannot be the expectation of the parties that a postponement request *will* be granted. A

³⁸ ICC-01/05-01/13-1240-Conf, paras 19-20.

³⁹ ICC-01/05-01/13-1240-Conf, paras 21-22.

⁴⁰ ICC-01/05-01/13-1240-Conf, para. 21.

⁴¹ ICC-01/05-01/13-1240-Conf, para. 23.

stringent approach on this issue ensures predictability and reliability with regard to the Chamber's case management and conforms with the principle of expeditiousness.

17. The Chamber recognizes that the Prosecution disclosed further limited evidentiary material past the 30 June 2015 deadline⁴² and added, upon the Chamber's authorisation, a small number of pieces of evidence to its list of evidence. Indeed, judicial proceedings are organic in nature and disclosure of evidence is an ongoing process, depending on the nature of each piece of evidence. Also, security concerns may at times warrant the imposition of protective measures that entail, for example, delayed disclosure of the identity of witnesses or the lifting of redactions closer to the commencement of trial.

18. The Chamber notes that the disclosure of evidence past the deadline of 30 June 2015 concerns 210 pieces of evidence in total⁴³ – a number that reflects only a

⁴² The Chamber was notified of the disclosure of additional evidence after the deadline of 30 June 2015 in filings ICC-01/05-01/13-1061 (6 July 2015); ICC-01/05-01/13-1097 (21 July 2015); ICC-01/05-01/13-1106 (27 July 2015); ICC-01/05-01/13-1117 (31 July 2015); ICC-01/05-01/13-1195 (28 August 2015); and ICC-01/05-01/13-1229 (9 September 2015).

⁴³ The Chamber recalls the following: on **6 July 2015**, the Prosecution notified disclosure of two documents as incriminating evidence following the Chamber's decision (Decision on Independent Counsel Report on Material transmitted by the Dutch Authorities, 30 June 2015, ICC-01/05-01/13-1046-Red); on **21 July 2015**, the Prosecution notified disclosure of one expert report as incriminating evidence following the Chamber's decision (Decision on 'Prosecution's Request pursuant to Regulation 35 to vary the Time Limit for Disclosure of an Expert Report', 24 June 2015, ICC-01/05-01/13-1027); on **27 July 2015**, the Prosecution notified disclosure of one document as incriminating evidence that was also added to the list of evidence pursuant to the Chamber's decision (Decision on Independent Counsel Report of 25 June 2015, 20 July 2015, ICC-01/05-01/13-1092); moreover, the Prosecution notified disclosure of one document pursuant to Rule 77 of the Rules; on **31 July 2015**, the Prosecution notified disclosure of in total 31 documents as incriminating evidence following the delayed disclosure of material in relation to one protected witness (Decision on Prosecution's Application for Delayed Disclosure, 22 June 2015, ICC-01/05-01/13-1025-Conf-Red2) or in relation to which redactions were lifted; moreover, the Prosecution notified disclosure of 13 Rule 77 documents which had already been disclosed but in relation to which redactions were lifted; on **28 August 2015**, the Prosecution notified disclosure of 10 documents as incriminating evidence of which nine items of evidence were simply re-disclosed as the metadata to said evidence was corrected. One further document was added to the list of evidence following the Chamber's decision (Decision on Prosecution Request to add 12 items to its List of Evidence, 27 August 2015, ICC-01/05-01/13-1191); moreover, the Prosecution notified disclosure of 74 Rule 77 documents following, in part, the Chamber's decisions (Decision on 'Requête de la défense de monsieur Aimé Kilolo Musamba aux fins de divulgation d'informations relatives au témoin de l'Accusation 169' and Related Additional Requests, 17 August 2015, ICC-01/05-01/13-1154; and Decision on Mangenda Defence Request

very limited portion of the overall amount of evidence already disclosed to the Defence (approximately 6,200). The Chamber notes that the evidence concerned was disclosed either following a Chamber's decision, upon a Defence request or was re-disclosed due to the lifting of redactions. The Defence argument must also be read against the backdrop that the vast majority of evidence was already disclosed to the Defence during the case's pre-trial phase, thus allowing the Defence to analyse the evidence from an early stage of the proceedings and on a continuous basis.⁴⁴ In this context, the Defence does not substantiate that any of the pieces of evidence disclosed after the 30 June 2015 deadline was so essential to its preparation so as to warrant the postponement of the trial. Therefore, the Defence claim of belated disclosure cannot justify the postponement of the commencement of the trial.

19. Moreover, the list of evidence was first submitted on 30 June 2015, as ordered by the Chamber, thus allowing the Defence to prepare itself at least three months prior to the commencement of the trial. Since then, the list was updated twice.⁴⁵ The addition of certain items to the list of evidence did not impede the Defence from commencing to analyse the evidentiary material set out in the list of evidence as submitted on 30 June 2015. Indeed, the Defence should have started to analyse the evidence contained in the list of evidence at an early stage.
20. In this context, the Defence argument that associate counsel joined three defence teams only recently can only have a limited bearing on the subject-matter of the Request. Counsel have been appointed since the beginning of the proceedings in

for Cooperation, 14 August 2015, ICC-01/05-01/13-1148-Conf); on **9 September 2015**, the Prosecution notified disclosure of 84 Rule 77 documents following, in part, the Chamber's decision (Decision on Defence Request for Disclosure of Information concerning the Fourteen Witnesses, 24 August 2015, ICC-01/05-01/13-1172).

⁴⁴ Transcript of Hearing, 24 April 2015, ICC-01/05-01/13-T-8-Red, p. 9, lines 8-11; see also ICC-01/05-01/13-1240-Conf, para. 4.

⁴⁵ Prosecution's Third Updated List of Evidence, 31 August 2015, ICC-01/05-01/13-1196 with confidential annex A.

this case and are expected to have performed their functions prior to the appointment of associate counsel.

21. Also, the argument that the Defence could not adequately prepare itself with regard to two witnesses on the grounds that the report of one of them was disclosed only three weeks after the 30 June 2015 deadline also does not convince the Chamber that a postponement is warranted to remedy this situation. It was entirely foreseeable when the Defence would be able to incorporate this report into its preparation, as the late disclosure was explicitly authorised by the Chamber. Indeed, the reports were disclosed sufficiently in advance of the commencement of the trial.
22. Further, the Defence claim that most of its time was consumed for the preparation of responses to the Prosecution's bar table motions is also not tenable. The record shows that the Defence was not impeded on this basis – its responses to these motions actually show command over half the documentary evidence in the Prosecution's case before the start of trial,
23. Other arguments of the Defence appear to be speculative or too generic in nature. More specifically, the Defence's allegation that the Prosecution has not disclosed statements of witnesses is speculative and gratuitous as no concrete information is furnished that statements have indeed been withheld from the Defence. As regards P-433, the Chamber notes that reports underlying the witness's anticipated testimony have been duly disclosed and, upon a Defence request on 8 September 2015, the Prosecution furnished a CV and additional information about this witness on 11 September 2015. In relation to the argument that the Prosecution did not comply with its disclosure obligations under Article 67(2) of the Statute or Rule 77 of the Rules, the Chamber finds that this statement is generic and unsubstantiated – particularly in view of the number of defence disclosure requests which have been rejected in recent weeks.

Therefore, those arguments cannot be taken into account when entertaining the present Request.

24. The Defence argument relating to the Prosecution's delayed communication of the information whether or not four witnesses consented to be contacted by one of the defence teams, also does not convince the Chamber that a postponement is warranted at this stage. As the Prosecution confirmed, three of the four witnesses in any case declined to be contacted by the defence team in question. As a result, the belated communication of this information has not prevented the Defence from exercising its rights under Article 67(1)(e) of the Statute, as alleged. In relation to the fourth witness, who expressed consent to be contacted, the Chamber is of the view that the prejudice suffered by the Defence does not reach such a level so as to justify the postponement of the trial.

25. Insofar as the Defence contends that a set of decisions has yet to be issued, which it believes to be quintessential in advance of the trial, the Chamber recalls that some of those decisions referred to by the Defence have been issued in the meantime.⁴⁶ Other issues raised by the Defence do not actually require a decision in these proceedings at all, such as a protocol regulating dual status witnesses – there are no such witnesses in this case. The Chamber also informs the parties that other relevant decisions will be issued in due course. As regards *inter partes* requests for disclosure,⁴⁷ the Chamber urges the Prosecution and the Defence to resolve those issues as soon as possible.

26. A further element the Chamber must take into account when considering the Request is the fact that a postponement request was not put forth by the fifth

⁴⁶ See, for example, Decision on Request for Disclosure or Securing of Prior Statements Given by Prosecution Witnesses to Domestic Judicial Authorities and International Organisations, 9 September 2015, ICC-01/05-01/13-1227; Decision on Requests Related to Timing of Defence Opening Statement, 10 September 2015, ICC-01/05-01/13-1231; Decision on Defence Requests for Prosecution Requests for Assistance, Domestic Records and Audio Recordings of Interviews, 10 September 2015, ICC-01/05-01/13-1234-Conf.

⁴⁷ According to the Defence submission in annex to the Request, p. 2, there are four *inter partes* requests pending.

accused in this case, namely Mr Jean-Pierre Bemba Gombo ('Mr Bemba'). More importantly, unlike the four accused presenting the Request, Mr Bemba is in detention. When deciding on the Request, the Chamber is duty-bound to safeguard the rights of *all* accused in this case, including the rights of Mr Bemba. In the present instance, the Chamber is particularly attentive to Mr Bemba's right to be tried without undue delay pursuant to Article 67(1)(c) of the Statute. Any postponement of the commencement of trial would entail a longer detention period for the accused. Accordingly, the Chamber will take this factor also into account when deciding upon the Request.

27. In this context, the fact that the bench in this Chamber was recently re-composed is, contrary to the Defence allegation, not a reason to postpone the commencement of the trial. Indeed, the Judges of this Chamber are prepared to conduct the trial as scheduled.

28. For the reasons set out above, the Chamber is of the view that the postponement of the commencement of the trial in the present circumstances of the case is not warranted.

29. In relation to the request of the Defence to hold a status conference, the Chamber does not find that such status conference for the purpose of '*échanges de civilités*' or raising the points as summarised in the Request is necessary.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

ORDERS the parties to prepare and submit a public redacted version of their respective filings (ICC-01/05-01/13-1228-Conf; ICC-01/05-01/13-1240-Conf) within ten days after notification of this decision.

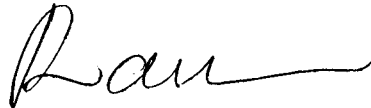
Done in both English and French, the English version being authoritative.



**Judge Bertram Schmitt,
Presiding Judge**



Judge Marc Perrin de Brichambaut



Judge Raul Pangalangan

Dated 15 September 2015

At The Hague, The Netherlands