

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

Transban Investments Corp.
Claimant

and

Bolivarian Republic of Venezuela
Respondent

(ICSID Case No. ARB/12/24)

AWARD

ARBITRAL TRIBUNAL

H.E. Judge Peter Tomka, President of the Tribunal
Professor David D. Caron, Arbitrator
Dr. Santiago Torres Bernárdez, Arbitrator

Secretary of the Tribunal

Ms. Natali Sequeira (until August 7, 2017)
Ms. Marisa Planells-Valero

Date of Dispatch to the Parties: November 22, 2017

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Abbreviations

Barbadian Registrar	Barbadian Registrar of Corporate Affairs.
Barbados Companies Act	<i>Companies Act</i> , Chapter 308 of the Laws of Barbados.
BIT	Agreement between the Government of the Republic of Venezuela and the Government of Barbados for the Promotion and Protection of Investments, signed on 15 July 1994, entered into force on 31 October 1995, (1984 UNTS 169).
Carmichael Expert Report	Expert Report of Sir Trevor Carmichael, 17 December 2015.
CM	Claimant's Memorial dated 6 February 2015.
ICJ or Court	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes.
IBA Rules	International Bar Association, Arbitration Committee, Updated IBA Rules on the Taking of Evidence in International Arbitration (May 29, 2010).
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, signed on 18 March 1965, entered into force on 14 October 1966, 575 UNTS 159.
ICSID Institution Rules	ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, 2006.
MOBJ	Memorial on Objections to the Competence of the Tribunal and the Jurisdiction of the Centre and Counter-Memorial on the Merits, 4 August 2015.
Notice of Denunciation	Venezuela's notice of denunciation of the ICSID Convention, 24 January 2012.
RfA or Request	Request for the Institution of Arbitration Proceedings submitted by Transban on 24 July 2012.
RIAA	Reports of International Arbitral Awards
Schreuer – ICSID Commentary	Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, <i>The</i>

	<i>ICSID Convention: A Commentary</i> (2nd ed.), CUP (2009).
Claimant or Transban	Transban Investments Corp.
TCMJ	Claimant's Counter-Memorial on Jurisdiction, 17 December 2015.
Transban's Opposition to Bifurcation or TOB	Claimant's Memorandum in Opposition to Respondent's Request to Bifurcate Proceedings, 4 September 2015.
UNCITRAL	United Nations Commission on International Trade Law.
VCLT	<i>Vienna Convention on the Law of Treaties</i> , May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969).
Venezuela or Respondent	The Bolivarian Republic of Venezuela.

I. THE PARTIES

1. The Claimant is Transban Investment Corporation (“Transban” or “Claimant”), a company allegedly constituted under the laws of Barbados.
2. The Respondent is the Bolivarian Republic of Venezuela (“Venezuela” or “Respondent”).

II. PROCEDURAL HISTORY

3. On July 24 or 25, 2012 (the precise date is disputed by the Parties), the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received a Request for Arbitration (the “Request” or “RfA”), dated July 24, 2012, from the Claimant. The proceeding is initiated under the Agreement between the Government of Barbados and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (“BIT”), which was signed on July 15, 1994 and entered into force on October 31, 1995.¹
4. On August 27, 2012, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention.
5. On October 26, 2012, the Claimant informed the Centre of the appointment of Professor David D. Caron, a U.S. national, as arbitrator. On November 20, 2012, Professor Caron accepted his appointment.
6. On January 17, 2013, Venezuela appointed Dr. Santiago Torres Bernárdez, a national of the Kingdom of Spain, as arbitrator. Dr. Santiago Torres Bernárdez accepted his appointment on January 30, 2013.
7. On January 17, 2013, the Respondent submitted a proposal to disqualify Professor Caron. On June 18, 2013, the Claimant proposed the disqualification of Dr. Torres Bernárdez. Both proposals were filed before the constitution of the Tribunal.
8. On December 24, 2013, the Claimant requested, pursuant to Article 38 of the ICSID Convention, that the Chairman of the ICSID Administrative Council appoint the third arbitrator.
9. On February 14, 2014, the Chairman appointed Judge Peter Tomka, a national of the Slovak Republic, as President of the Tribunal. Judge Tomka accepted his appointment on February 23, 2014.
10. The Tribunal was constituted on February 24, 2014 in accordance with Article 37(2)(b) of the ICSID Convention. On the same date, in view of the proposals to disqualify the two co-arbitrators, the proceeding was suspended until the proposals were decided, pursuant to ICSID Arbitration Rule 9(6).

¹ UNTS, Vol. 1984, p. 169.

11. On May 13, 2014, the Chairman of the ICSID Administrative Council issued a Decision rejecting the proposals to disqualify Professor Caron and Dr. Torres Bernárdez. On the same date, the proceeding was resumed pursuant to ICSID Arbitration Rule 9(6).
12. The first session of the Arbitral Tribunal was held by telephone conference on July 8, 2014. Prior to that session, the Secretary of the Tribunal circulated to the Parties the Draft Agenda, on June 11, 2014, and the Draft Procedural Order on June 13, 2014. The Parties' comments on these two drafts were received on July 7, 2014.
13. On July 24, 2014, the revised Draft Procedural Order was circulated to the Parties by the Tribunal's Secretary. The Parties' final comments were received on July 30, 2014.
14. On September 30, 2014, the Tribunal issued Procedural Order No. 1 (in English and Spanish) which sets out the Procedural Rules governing the arbitration, including the procedural schedule.
15. On November 26, 2014, the Claimant requested a one month extension to file its Memorial, with all other deadlines to be extended accordingly. On December 1, 2014, the Respondent opposed the extension. On December 2, 2014, the Claimant submitted a revised proposal for amending the original procedural schedule. On December 4, 2014, the Respondent reiterated its opposition to the Claimant's request, adding that in case the Tribunal were to grant the request, the deadline for filing the Counter-Memorial be July 7, 2015.
16. On December 10, 2014, the Tribunal issued Procedural Order No. 2, modifying Section 14 (number and sequence of pleadings) of Procedural Order No. 1.
17. On February 6, 2015, within the time-limit as extended, the Claimant filed its Memorial.
18. On April 21, 2015, following exchanges between the Parties, the Tribunal issued Procedural Order No. 3 on the Respondent's Request for the Production of Documents.
19. On May 29, 2015, the Respondent requested the Tribunal to modify the procedural calendar. On June 5, 2015, the Claimant informed the Tribunal that it had no objection to the modification of the time-limit for filing the Respondent's Counter-Memorial.
20. On June 19, 2015, the Tribunal issued Procedural Order No. 4 modifying the procedural calendar.
21. On August 4, 2015, within the time-limit as extended, the Respondent filed its Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits ("MOBJ"). It requested, in accordance with the provisions of Section 14.3 of Procedural Order No. 1, as modified by Procedural Orders Nos. 2 and 4, that the Tribunal bifurcate the proceedings, dealing with its objections to jurisdiction as a preliminary matter.
22. On September 4, 2015, within the time-limit set in Section 14.5 as modified by Procedural Order No. 4, the Claimant filed its Memorandum in Opposition to Respondent's Request for Bifurcation ("TOB").

23. The filing of the Request for Bifurcation did not alter, pursuant to Section 14.5, the schedule for the Respondent's document production. On September 25, 2015, the Claimant submitted its Request for Production of Documents.
24. On October 8, 2015, the Tribunal issued Procedural Order No. 5 on the above Claimant's request.
25. On November 2, 2015, the Tribunal issued its Decision on Respondent's Request for Bifurcation and decided that the Respondent's first (*ratione temporis*) and second (*ratione personae*) objections on jurisdiction be dealt by the Tribunal as preliminary matters, while the third (*ratione materiae*) objection be joined to the merits. The Tribunal further ordered the Claimant to file its Counter-Memorial on Jurisdiction by December 17, 2015.
26. Pursuant to the deadline established by the Tribunal, the Claimant filed its Counter-Memorial on Jurisdiction ("TCMJ") on December 17, 2015.
27. On February 8, 2016, following exchanges between the Parties, the Tribunal issued Procedural Order No. 6 concerning the organization of the hearing on jurisdiction.
28. The hearing on jurisdiction was held at the Peace Palace in The Hague, on March 2 and 3, 2016.
29. Present at the hearing were:

Members of the Tribunal:

H.E. Judge Peter Tomka	President
Professor David D. Caron	Co-Arbitrator
Dr. Santiago Torres Bernárdez	Co-Arbitrator

ICSID Secretariat:

Ms. Natalí Sequeira	Secretary of the Tribunal
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Guglielmino & Asociados

Dr. Felipe Daruiz Ferro

Procuraduría General of the Bolivarian
Republic of Venezuela

30. During the hearing the Claimant was invited by the Tribunal to provide the full text of the following Barbadian legislation: (a) the Companies Act; (b) the Companies Regulations; (c) the International Business Companies Act; and (d) the International Business Companies Regulations. The full text of the requested legislation (with its Amendments) was transmitted by the Claimant after the hearing on March 11, 2016.
31. On May 10, 2016, the Parties filed their respective statements on costs.
32. The Tribunal held deliberations in The Hague on March 4 and June 16, 2016 and further exchanged views through other means of communication.

III. THE JURISDICTION OF THE TRIBUNAL

33. This Tribunal is constituted under the ICSID Convention. The Convention provides, at Article 25(1), as follows:

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.

34. It is for Claimant to establish the basis of jurisdiction of an ICSID Tribunal. Consent by the Parties may be found in a variety of written instruments. The offer to arbitrate may be in one written instrument and the acceptance in another.

35. Claimant seeks arbitration before ICSID on the basis of the BIT. In particular, Claimant points to Article 8(1) of the BIT which provides:

Disputes between one Contracting Party and a national or company of the other Contracting Party . . . shall, at the request of the national concerned, be submitted to [ICSID] for . . . arbitration . . . under the [ICSID Convention].

36. Claimant asserts that they are investors constituted under the laws of Barbados who have made an investment in Venezuela through their business activities in that State. Claimant therefore contends that arbitration before ICSID is available to it for the resolution of their dispute with Venezuela.
37. Rule 41(1) of the ICSID Arbitration Rules states that objections to a Tribunal's jurisdiction "shall be made as early as possible". As noted in paragraph 21, Respondent timely filed its MOJB on August 4, 2015.
38. As noted at paragraph 25, Respondent initially raised three preliminary objections to the Tribunal's jurisdiction and the admissibility of the claims. In its Decision of November 2, 2015, the Tribunal decided to deal with the Respondent's objections to jurisdiction *ratione temporis* and *ratione personae* as preliminary matters.
39. The Tribunal has had the benefit of extensive submissions and evidence from both Parties. Many issues and sub-issues have been raised in the course of the proceedings. The Tribunal has carefully considered all submissions, all evidence, and all issues but for the sake of procedural economy has only discussed in this Award those it considers necessary.

IV. THE APPLICABLE LAW

40. To rule, at the present stage of the proceedings, on the two preliminary objections the Tribunal will have to apply the ICSID Convention and the BIT. In interpreting these two treaty instruments, the Tribunal will be guided by customary international law as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. The Vienna Convention is, however, not directly applicable as a treaty for two reasons. Under its Article 4 "[w]ithout prejudice to the application of any rules set forth in the [Vienna] Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States." The ICSID Convention, adopted on March 18, 1965, entered into force on October 14, 1996 well before the Vienna Convention on the Law of Treaties was adopted on May 23, 1969 and entered into force almost eleven years later, on January 27, 1980. Moreover, Venezuela is not a Party to the Vienna Convention. For that reason, although Barbados is a Party to the Vienna Convention, having ratified it on June 24, 1971, the Vienna Convention is also not applicable as a treaty to the BIT which was signed on July 15, 1994 and entered into force on October 31, 1995. It is, however, well accepted

that Articles 31 and 32 of the Vienna Convention on interpretation of treaties reflect customary international law, as confirmed by the ICJ on a number of occasions.²

41. When dealing with the second preliminary objection in which the Respondent argues that the Claimant is not a protected investor pursuant to the BIT, since the BIT in its definition of companies in Article 1(d), refers to “corporations, firms and associations incorporated or constituted under the law in force in that Contracting Party”, the Tribunal will have to give careful consideration to the law of Barbados as Transban claims to be a protected investor of Barbados’ nationality. The Parties presented their arguments both on the law of Barbados and the law of Venezuela which they consider relevant for the purpose of reaching a decision on this objection.

V. OBJECTION TO JURISDICTION RATIONE TEMPORIS: ABSENCE OF CONSENT TO ARBITRATION BY VENEZUELA

42. Venezuela’s objection to jurisdiction *ratione temporis* has two aspects, each aspect alleged to be sufficient to deny the jurisdiction of the Tribunal. First, by the denunciation of the ICSID Convention, Venezuela withdrew its consent to ICSID jurisdiction, with immediate effect following receipt of the notice of denunciation by the World Bank. Second, in any case the Claimant filed its RfA with ICSID after more than six months had elapsed from the receipt by the World Bank of the notice of denunciation, when Venezuela was not any more a Contracting State to the ICSID Convention.

1. Venezuela’s Denunciation of the ICSID Convention

a. Position of the Respondent

43. Venezuela insists on the importance of State consent for establishing the jurisdiction of an international dispute settlement forum.³ The jurisdiction of an ICSID tribunal is predicated on a “‘double keyhole’ approach”⁴ or “double-barrelled test”⁵: First, the State party to the dispute and the State of whom the claimant investor possesses the requisite nationality must be Contracting States to the ICSID Convention, and, second, the disputing party State and the investor must have both consented to submit the dispute to an ICSID tribunal.⁶
44. Venezuela argues that its consent to arbitrate the dispute is lacking since it was not a party to the ICSID Convention upon registration of the RfA by ICSID or upon Transban expressing its consent to arbitration.⁷ It contends that Transban had to express its

² See *e.g.*, *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 466, para. 99; *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, p. 43, para. 160.

³ MOBJ, paras. 85-88.

⁴ MOBJ, paras. 90.

⁵ Hearing Transcript Day 1, p. 43:9-10, 14-25, p. 44 1-7; Hearing Transcript Day 2, p. 97:25, p. 98:1-3; Hearing Transcript Day 2, p. 100:10-16.

⁶ Hearing Transcript Day 1, p. 43:14-25; Hearing Transcript Day 2, p. 97:25, p. 98:1-3. Venezuela relies on International Bank for Reconstruction and Development, “Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States” (1965), 1 ICSID Reports, para. 25 (Exhibit RL-0140).

⁷ MOBJ, para. 89; Hearing Transcript Day 1, p. 29:20-25.

consent to arbitration prior to the receipt of the Notice of Denunciation by the World Bank, i.e., before January 24, 2012.⁸

45. Venezuela refers to Articles 71 and 72 of the ICSID Convention which read 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.

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.

46. Venezuela argues that it ceased to be a Contracting State to the ICSID Convention on the day when the World Bank received its Notice of Denunciation, i.e., on January 24, 2012.⁹ Respondent disputes therefore that Article 71 of the ICSID Convention means that Venezuela continued to be a Contracting State to the ICSID Convention during the six months following receipt of its notice of denunciation.¹⁰ Venezuela relies on ICSID Administrative and Financial Regulation 20 which lays out requirements for keeping a list of Contracting States that includes former Contracting States and the date on which the World Bank received their notices of denunciation; Venezuela argues that Regulation 20 deems the date of receipt of the notice to constitute the date on which a State ceases to be a Contracting State to the ICSID Convention.¹¹ It submits that pursuant to Article 71, investors have no rights under the ICSID Convention prior to consenting to the jurisdiction of an ICSID tribunal,¹² and such consent must be expressed prior to the receipt by the World Bank of a Contracting State's notice of denunciation.¹³
47. Regarding the *effet utile* to be given to the provision of Article 71 which states that the denunciation shall take effect six months after receipt of the notice of denunciation, Venezuela, relying on Professor Schreuer's commentary, suggests that this provision "refers [to] the other obligations incumbent upon a Contracting State under the Convention",¹⁴ namely the obligations in respect of the Centre's immunities and privileges (Arts. 18-24), recognition and enforcement of awards (Art. 54).¹⁵ In its oral argument, Venezuela also included diplomatic protection in this category (Art. 27).¹⁶
48. Venezuela thus construes the last sentence of Article 71 of the ICSID Convention, "[t]he denunciation shall take effect six months after receipt of such notice" as meaning that

⁸ MOBJ, paras. 101, 108; Hearing Transcript Day 1, p. 44:17-18; Hearing Transcript Day 2, p. 107:8-14.

⁹ Hearing Transcript Day 1, p. 44 8-11.

¹⁰ Hearing Transcript Day 1, p. 41:10-12.

¹¹ Hearing Transcript Day 1, p. 42:14-25, p. 43:1-3, p. 44:8-13.

¹² Hearing Transcript Day 2, p. 86:5-7.

¹³ Hearing Transcript Day 2, p. 93:14-18.

¹⁴ MOBJ, para. 104.

¹⁵ *Ibid.*, citing Christoph Schreuer, "The ICSID Convention: A Commentary" (Cambridge University Press, 2009), p. 1278 (Exhibit RL-0162).

¹⁶ Hearing Transcript Day 1, p. 52:10.

“existing rights and obligations under the treaty will continue for six months” after receipt of such notice; the denunciation concerns rights and obligations under the ICSID Convention that existed prior to a notice of denunciation.¹⁷

49. Venezuela views Article 72 as an exception to Article 71¹⁸, as a corollary to Articles 25 and 71 of the ICSID Convention,¹⁹ and as an exception to the double-barrelled test for establishing jurisdiction under the ICSID Convention.²⁰ The irrevocability of consent under Article 25(1), which provides that disputing parties cannot withdraw their consents unilaterally once they have given their written consents to submit a dispute to an ICSID tribunal, explains the existence of Article 72.²¹
50. In Venezuela’s view, the last words of Article 72 of the ICSID Convention, “consent to the jurisdiction of the Centre given . . . before such notice was received . . .”, mean that once the notice of denunciation is received by the World Bank, no new requests for arbitration can be validly formulated against the denouncing State.²² An ICSID tribunal has jurisdiction only once consent has been perfected; rights and obligations therefore arise only if an investor accepts a Contracting State’s offer to arbitrate, and these perfected and irrevocable consents must have been expressed before a notice of denunciation is received by the World Bank in order to benefit from Article 72.²³
51. Venezuela denies limiting Article 72 of the ICSID Convention to six months and instead argues that Article 72 applies so long as consent to the jurisdiction of an ICSID tribunal was given by both disputing parties prior to a notice of denunciation.²⁴ Contrary to the conclusions reached by the tribunal in *Venoklim*, this reading affords investors legal security from the moment when both disputing parties consent to arbitration, since such consent cannot be unilaterally withdrawn.²⁵
52. Venezuela invokes a statement by Aron Broches, General Counsel at the World Bank during the drafting of the ICSID Convention, with respect to a draft version of what later became Article 72 of the ICSID Convention, to the effect that “[i]f a 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”.²⁶ Venezuela further relies on Professor Schreuer’s views that, pursuant to Article 72 of the ICSID Convention, consent to submit an investment dispute to ICSID cannot be perfected by an investor once a State has sent a notice of denunciation under Article 71 of the ICSID Convention to the World Bank.²⁷

¹⁷ Hearing Transcript Day 1, p. 41:5-10, 13-16; Hearing Transcript Day 2, p. 86:1-4, p. 94:2-9.

¹⁸ Hearing Transcript Day 1, p. 41:20-23, p. 42:7-9.

¹⁹ Hearing Transcript Day 1, p. 41:18-19.

²⁰ Hearing Transcript Day 1, p. 44:15-17.

²¹ MOBJ, para. 105; Hearing Transcript Day 1, p. 47:17-20; Hearing Transcript Day 2, p. 94:9-12.

²² MOBJ, paras. 101, 108; Hearing Transcript Day 1, p. 44:17-18; Hearing Transcript Day 2, p. 107:8-14.

²³ MOBJ, paras. 105-106, 123; Hearing Transcript Day 1, p. 49:13-16, p. 51:4-8, p. 52:3-6.

²⁴ Hearing Transcript Day 2, p. 93:4-8.

²⁵ Hearing Transcript Day 1, p. 51:21-23; Hearing Transcript Day 2, p. 94:18-22, referring to *Venoklim Holding B.V. v. República Bolivariana de Venezuela*, ICSID Case No. ARB/12/22, Award (3 April 2015), (hereinafter *Venoklim v. Venezuela*) (Exhibit RL-0084),

²⁶ MOBJ, para. 102, citing *History of the ICSID Convention*, Vol. II, Part 2 (1968), p. 1010. (Exhibit RL-0139)

²⁷ MOBJ, para. 103, citing Schreuer, *The ICSID Convention: A Commentary*, pp. 1280-1281. (Exhibit RL-0162)

53. To Venezuela, the term “consent”, as used in Article 72 of the ICSID Convention, means “perfected consent.”²⁸ It points to what it considers to be “definitions of consent” in the Preamble to the ICSID Convention, in Article 25 of the ICSID Convention and in ICSID Institution Rule 2(3) as support for the proposition that “consent” as used in Article 72 means consent by both disputing parties.²⁹
54. Article 8(1) of the BIT states that “[d]isputes between one Contracting Party and a national or company of the other Contracting Party . . . shall, at the request of the national concerned, be submitted to [ICSID] for . . . arbitration . . . under the [ICSID Convention]”, while pursuant to Article 8(4) of the BIT, Venezuela “hereby gives its unconditional consent to the submission of disputes as referred to in paragraph 1 of this Article to international arbitration.” Venezuela acknowledges that Article 8 of the BIT remains valid and in force, but argues that it merely amounts to a general declaration of consent and that it is insufficient in and of itself to establish the jurisdiction of an ICSID tribunal.³⁰ No rights or obligations arise under the ICSID Convention from a mere offer of consent to arbitrate disputes given in a bilateral investment treaty if such offer had not been accepted prior to the receipt of a notice of denunciation by the World Bank, concludes Venezuela.³¹

b. Position of the Claimant

55. Transban argues that the denunciation takes effect six months after its receipt by the ICSID Secretariat, in accordance with Article 71 of the ICSID Convention,³² and that Article 72 of the ICSID Convention is not meant to restrict the application of that six-month delay: indeed, Article 72 does not mention the six-month delay or the taking into effect of a denunciation discussed in Article 71.³³
56. Transban construes Venezuela’s position as meaning that a State’s consent to arbitrate under the ICSID Convention “is immediately withdrawn at the moment of denunciation, thereby precluding any new claims under the [ICSID] Convention”³⁴, and that Transban was barred from filing the RfA since it had not perfected consent prior to the Notice of Denunciation.³⁵ Transban rejects Venezuela’s argument of immediate effect of its Notice of Denunciation based on ICSID Administrative and Financial Regulation 20³⁶ as contrary to the express wording of Article 71 of the ICSID Convention.³⁷ Transban

²⁸ *Ibid.*, para. 103, citing Schreuer, *The ICSID Convention: A Commentary*, p. 1280. (Exhibit RL-0162)

²⁹ Hearing Transcript Day 1, pp. 45-48; Hearing Transcript Day 2, p. 86:15-25, p. 87:1-6, 16-18, p. 88:6-8, p. 102:10-24.

³⁰ Hearing Transcript Day 2, p. 98:4-14, p. 99:16-25.

³¹ MOBJ, para. 105, citing Christoph Schreuer, “*Denunciation of the ICSID Convention and Consent to Arbitration*” in Michael Waibel et al. (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010), p. 361 (Exhibit RL-0163); Hearing Transcript Day 1, p. 44:20-22; Schreuer, *The ICSID Convention: A Commentary*, p. 1280 (Exhibit RL-0162). Venezuela interprets the terms “consent . . . given by one of them” as referring to the consent given by the Contracting State having denounced the ICSID Convention, its constituent subdivisions and agencies or any national of that State: *see* Hearing Transcript Day 2, p. 87:11-16, p. 88:3-6, 25, p. 89:1-2, p. 103:22-25, p. 141:8-24.

³² TCMJ, paras. 32, 39; Hearing Transcript Day 1, p. 138:12-15, 20-23.

³³ TCMJ, paras. 39, 40; Hearing Transcript Day 1, p. 140:13-17.

³⁴ TOB, para. 39; TCMJ, para. 30; Hearing Transcript Day 1, p. 139:22-25.

³⁵ TCMJ, paras. 37, 38, citing MOBJ, paras. 101, 108.

³⁶ Hearing Transcript Day 1, p. 42:14-25, p. 43:1-3, p. 44:8-13.

³⁷ Hearing Transcript Day 1, p. 143:16-20.

further argues that Administrative and Financial Regulation 20 in no way asserts that a State ceases to be a Contracting State on the day that the World Bank receives a notice of denunciation.³⁸

57. Transban emphasises that the tribunal in *Venoklim* rejected this same position of Venezuela.³⁹ The *Venoklim* tribunal stated that Venezuela's arguments contradict the ordinary meaning of Articles 71 and 72 of the ICSID Convention by giving immediate effect to a notice of denunciation.⁴⁰ According to the *Venoklim* Tribunal, Venezuela's position violated basic principles of legal security by preventing investors from knowing beforehand that a denunciation of the ICSID Convention was forthcoming: the impossibility of instituting arbitral proceedings following the receipt of the Notice of Denunciation by ICSID would vitiate the six-month delay that precedes the taking effect of a notice of denunciation under Article 71 of the ICSID Convention and would empty it of its ordinary meaning.⁴¹ The wording of Article 71 of the ICSID Convention provides no support for Venezuela's attempt at restricting the scope and effects of the six-month delay.⁴²
58. Transban rejects the idea that Article 72 of the ICSID Convention serves as a corollary or as an exception to Article 71 of the ICSID Convention: Article 72 is a rule entirely separate from Article 71.⁴³ Rather, Article 72 of the ICSID Convention limits the extinction of obligations by providing for the survival of obligations arising out of a denouncing State's consent to ICSID's jurisdiction beyond the six-month period mentioned in Article 71.⁴⁴ Transban quotes a preliminary draft of what has become Article 72 which stated that "obligations ... arising out of undertakings given prior to the date of such [denunciation] shall remain in full force and effect",⁴⁵ and argues that Article 72 was meant to prevent denunciations of the ICSID Convention from operating as withdrawals of previously given consents to arbitration.⁴⁶ For support, Transban turns to Article 70(1)(b) of the VCLT, which states that termination of a treaty "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."⁴⁷ The *Venoklim* tribunal further considered that Article 71 settles the future consequences of denunciations, while Article 72 ensures respect for

³⁸ Hearing Transcript Day 1, p. 144:12-14.

³⁹ TOB, para. 40; TCMJ, para. 43.

⁴⁰ *Venoklim v. Venezuela v.* para. 62.

⁴¹ TOB, para. 40; TCMJ, paras. 6, 43; Hearing Transcript Day 1, p. 138:16-23; see *Venoklim v. Venezuela*, paras. 62-63, 65.

⁴² TCMJ, para. 45; Hearing Transcript Day 1, p. 140:1-17. Transban asks that Prof. Schreuer's minority views in respect of Articles 71 and 72 of the ICSID Convention, on which Venezuela relies, "not be endorsed by this Tribunal": see TCMJ, para. 44, fn 54, citing a number of authors which take a view opposite to that of Prof. Schreuer and instead consider that an investor can file a request for arbitration during the six-month delay provided under Article 71 of the ICSID Convention.

⁴³ Hearing Transcript Day 1, p. 138:5-8, 24-25, p. 139:1, 7-9, 18-19.

⁴⁴ TCMJ, paras. 33, 39-40; Hearing Transcript Day 1, p. 139:10-14.

⁴⁵ TCMJ, para. 34, citing ICSID, *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States: Analysis of Documents Concerning the Origin and the Formulation of the Convention* 302, Vol. I (1970).

⁴⁶ TCMJ, para. 34, fn 38, citing ICSID, *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States: Documents Concerning the Origin and the Formulation of the Convention*, Vol. II, Part 2 (1968) (hereinafter *History of the ICSID Convention*) (Exhibit CL-0115).

⁴⁷ While acknowledging that Venezuela is not a Party to the VCLT, Transban insists on the guidance that the VCLT provides, as it is largely recognized to have codified customary international law: TCMJ, para. 35, fn 40.

rights and obligations acquired prior to the denunciation and establishes the non-retroactive character of denunciations.⁴⁸

59. Transban underlines that nowhere in Article 72 of the ICSID Convention is reference made to “perfected consent”; on the contrary, Article 72 refers only to consent given by a Contracting State and “does not require acceptance of the investor in order to become ‘consent’.”⁴⁹ The *Venoklim* tribunal considered that the consent referred to in Article 72 of the ICSID Convention is that of the respondent State: in the context of investor-State arbitration, Article 72 refers to a State’s unilateral offer to arbitrate, and not to the perfecting of such consent by an investor’s acceptance of the State’s unilateral offer to arbitrate.⁵⁰ Transban further contrasts Article 72 with the preamble to the ICSID Convention and Article 25, which specify consent by both disputing parties.⁵¹
60. Transban points out that Mr. Broches had hastened to confine his statement quoted by Venezuela: if a State’s unilateral offer to arbitrate a dispute had been accepted before the denunciation of the ICSID Convention, then “disputes arising between the State and the investor after the date of denunciation will still be within the jurisdiction of the Centre.”⁵² Transban further points out that Mr. Broches referred to the denunciation itself and not to a notice of denunciation. Transban argues that Mr. Broches’s comments likely applied in respect of denunciations that had already taken effect, and that a consent to arbitrate an investment dispute perfected during the six-month delay prior to a denunciation taking effect would therefore validly situate such a request for arbitration within the jurisdiction of an ICSID tribunal.⁵³
61. Articles 8(1) and 8(4) of the BIT take Venezuela’s treaty-based standing offer to consent to the arbitration of an investment dispute one step further by clearly giving its unconditional consent to submit BIT disputes to ICSID’s jurisdiction.⁵⁴ Transban argues that in *Tidewater*,⁵⁵ Venezuela acknowledged that the requirement of a separate written consent by a disputing Party State under Article 25(1) of the ICSID Convention is met when the relevant treaty stipulates an obligatory submission to arbitration, as does Article 8 of the BIT. The decision to refer a dispute to ICSID then rests solely with the protected investor.⁵⁶
62. In addition, Transban argues that Venezuela’s position contradicts the object and purpose of the ICSID Convention of encouraging private international investment through the legally guaranteed availability of international arbitration facilities by preventing a Contracting State of the ICSID Convention from terminating its obligation

⁴⁸ *Venoklim v. Venezuela*, para. 64.

⁴⁹ TCMJ, para. 53.

⁵⁰ *Venoklim v. Venezuela*, para. 65.

⁵¹ TCMJ, para. 53, fn 65.

⁵² TCMJ, para. 51, citing *History of the ICSID Convention*, p. 1010 (Exhibit CL-0115).

⁵³ TCMJ, para. 51.

⁵⁴ TCMJ, paras. 27-28, 54.

⁵⁵ TCMJ, para. 28, citing *Tidewater Inc., Tidewater Inv. SRL, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., Point Marine, L.L.C., Twenty Grand Marine Service, L.L.C., Jackson Marine, L.L.C. & Zapata Gulf Marine Operators, L.L.C. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction (8 February 2013), para. 33.

⁵⁶ TCMJ, para. 28.

of submitting investment disputes to the jurisdiction of ICSID without prior notice.⁵⁷ According to Transban, Venezuela's position would also "nullif[y] the broad consent and protection given by the BIT", since under Article 8 of the BIT, ICSID is "the only means to resolve the dispute between the investor and the State"; Article 72 of the ICSID Convention is precisely aimed at preventing such impasse.⁵⁸

2. The Critical Date for Establishing ICSID Jurisdiction

a. Position of the Respondent

63. Venezuela argues that even if the Tribunal decided that Transban could consent to arbitration during the six months following the receipt of the Notice of Denunciation by the World Bank, Transban's RfA is nevertheless time-barred.⁵⁹ Venezuela denounced the ICSID Convention on January 24, 2012, which means that the subsequent six-month delay under Article 71 of the ICSID Convention expired on July 24, 2012.⁶⁰
64. Firstly, Venezuela argues, "the critical date for determining the fulfilment of jurisdictional requirements is the date of commencement of the proceedings".⁶¹ Venezuela invokes ICSID Institution Rule 6(2), which deems the institution of an ICSID proceeding to occur "on the date of the registration of the request".⁶² ICSID registered the RfA on August 27, 2012, which should therefore serve as critical date.⁶³ Venezuela argues that Professor Schreuer expressed the view that the date of registration is the relevant date for ascertaining "all jurisdictional requirements".⁶⁴
65. Secondly, Venezuela argues that Transban filed its RfA on July 25, 2012.⁶⁵ Venezuela relies on a letter from ICSID, dated July 25, 2012, which states that the RfA had been received by ICSID on July 25, 2012.⁶⁶ In accordance with Institution Rules 2 and 4 and ICSID Administrative and Financial Regulation 29, the critical date should be the date of receipt, at the seat of ICSID, of an original signed hard copy of the RfA and five additional hard copies.⁶⁷ Since ICSID received the signed original hard copy of the RfA on July 25, 2012, Venezuela argues that the RfA was filed after the end of the six-month delay preceding the taking into effect of the Notice of Denunciation, i.e., at 00:00 on July 25, 2012.⁶⁸

⁵⁷ TCMJ, para. 41; Hearing Transcript Day 1, p. 138:15-23.

⁵⁸ TCMJ, para. 42.

⁵⁹ MOBJ, paras. 97-98, 107, 115, 123.

⁶⁰ MOBJ, paras. 107, 111.

⁶¹ MOBJ, para. 109.

⁶² *Ibid*, para. 109.

⁶³ MOBJ, paras. 107, 110-111. Venezuela did not reiterate that the date of registering the RfA should serve as critical date during the hearing on bifurcated objections to jurisdiction.

⁶⁴ MOBJ, paras. 112, citing Schreuer, *The ICSID Convention: A Commentary*, p. 144 (Exhibit RL-0162).

⁶⁵ Hearing Transcript Day 1, p. 54:19-23.

⁶⁶ MOBJ, paras. 107, 119, 120, and Exhibit R-0002; Hearing Transcript Day 2, p. 96:1-12.

⁶⁷ Hearing Transcript Day 1, p. 55:1-6, 14-22; Hearing Transcript Day 2, p. 94:23-25, p. 95:1-12.

⁶⁸ MOBJ, paras. 97, 115-117; Hearing Transcript Day 2, p. 107:15-19. Venezuela further alleges that Transban alleged that the Notice of Denunciation was dated 25 January 2012: *see* MOBJ, para. 121, but Transban appears to have changed its position and to acknowledge that the Notice of Denunciation was dated 24 January 2012: *see* TCMJ, para. 29, fn 33.

66. Venezuela rejects the notion that the procedural rules set by this Tribunal apply to the filing of the RfA: the ICSID Institution Rules and Administrative and Financial Regulations applied to the RfA at the time of its filing and these rules do not amount to “hyper-technicalities”.⁶⁹

b. Position of the Claimant

67. First, Transban insists on the clear distinction between the act of instituting proceedings and the institution of proceedings by an administrative body⁷⁰ and invokes common sense to argue that the date of registration of the RfA by ICSID should not serve as critical date, since it depends almost exclusively on the actions of the ICSID Secretariat, as opposed to the actions of disputing parties.⁷¹ In Transban’s view, the date of the filing of the request is the critical date for assessing the consent of the parties.⁷² Transban rejects Venezuela’s argument,⁷³ based on ICSID Institution Rule 6(2), that registration of the RfA by ICSID on August 27, 2012 should serve as critical date.⁷⁴ Transban illustrates this argument by turning to Article 36(3) of the ICSID Convention and ICSID Institution Rule 6(1)(b), which call on the ICSID Secretariat to register a request for arbitration unless it manifestly falls outside of ICSID’s jurisdiction: Transban argues that the ICSID Secretariat would be in an untenable position if a request for arbitration could fall outside of ICSID’s jurisdiction due to its own lateness in registering a request.⁷⁵

68. Transban relies on the finding of the tribunal in *Venoklim*, to the effect that the critical date for determining the existence of perfected consent is the date of filing the RfA,⁷⁶ as well as on a number of doctrinal sources and arbitral awards to the same effect.⁷⁷ Transban invokes the following elements as indications that the submission of a dispute to ICSID occurs at the moment when an investor files its request. First, the “settled jurisprudence” of the International Court of Justice supports the view that “jurisdiction must be determined at the time that the act instituting proceedings was filed”⁷⁸. Second, Article 8(1) of the BIT uses the terms “shall, at the request of the national concerned, be submitted [to ICSID]”.⁷⁹ Third, ICSID Institution Rule 2 stipulates that a request for arbitration must indicate the date of consent; “date of consent” is defined as “the date on which the second [disputing] party acted”⁸⁰, which Transban construes as the date of filing the RfA.⁸¹

⁶⁹ Hearing Transcript Day 1, p. 55:10-17; Hearing Transcript Day 2, p. 95:6-18.

⁷⁰ TCMJ, para. 63.

⁷¹ TCMJ, para. 62.

⁷² *Ibid.*

⁷³ MOBJ, paras. 107, 109-111.

⁷⁴ Hearing Transcript Day 1, p. 143:5-8.

⁷⁵ TCMJ, para. 62.

⁷⁶ TOB, para. 44, quoting *Venoklim v. Venezuela*, para. 63.

⁷⁷ TCMJ, para. 58, fn 72.

⁷⁸ TCMJ, para. 63, quoting *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3, para. 26.

⁷⁹ TCMJ, para. 64.

⁸⁰ TCMJ, para. 59.

⁸¹ TCMJ, fn 74; TCMJ, para. 60. Transban further quotes the *Report of Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Doc. ICSID/2 (8 March 1965), at para. 23 (Exhibit CL-0117), in support of its understanding that the date of filing the RfA proves the critical date for establishing perfected consent to the present arbitral proceedings.

69. Transban turns to paragraph 13.6 of Procedural Order No. 2, which deems the date of sending electronic versions of documents to constitute the official date of receipt of pleadings or communications,⁸² as further support for its view that filing the RfA was achieved upon the sender completing its final act needed for sending it.⁸³
70. Transban points out that, aside from its argument insisting on the date of registration of the RfA by ICSID as the critical date, Venezuela appears to imply an equivalence between the date of consent to arbitration, the date of the filing of the RfA and the date on which the RfA was sent,⁸⁴ and Venezuela appears instead to have focused on challenging the actual date on which Transban had filed the RfA.⁸⁵
71. Second, Transban argues that it filed the RfA – and therefore expressed its consent – on July 24, 2012 (i.e., within six months of the Notice of Denunciation), not on July 25, 2012 as Venezuela alleges, and that ICSID confirmed receipt of the RfA by letter the next day.⁸⁶ Transban points to a letter from Venezuela to ICSID, in which Venezuela recognizes that Transban filed the RfA on July 24, 2012.⁸⁷ Transban further relies on the following evidence, all dated July 24, 2012, as proof that the RfA was filed on that same day: the email to the ICSID Secretariat attaching the RfA, UPS electronic confirmations confirming receipt of relevant mailing information regarding the RfA, and a wire transfer order for payment of ICSID filing fees by DLA Piper on behalf of Transban.⁸⁸ Furthermore, the ICSID Secretariat acknowledged having already received payment of filing fees upon transmitting a copy of the RfA and related documentation to Venezuela on July 25, 2012.⁸⁹
72. Transban rejects, as a hyper-technicality, Venezuela’s argument predicated on Institution Rules 2 and 4 and ICSID Administrative and Financial Regulation 29 and according to which the delivery of an original signed hard copy and five hard copies to ICSID was necessary for Transban to express its consent to arbitration.⁹⁰ Transban recalls that delivery of the RfA by email on 24 July 2012 occurred instantly.⁹¹

3. Analysis by the Tribunal

73. The first issue the Tribunal has to resolve is the legal effect of Venezuela’s notification of denunciation of the ICSID Convention in accordance with its Article 71. That Article provides as follows:

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.

⁸² TCMJ, para. 67.

⁸³ TCMJ, para. 67, fn 86.

⁸⁴ MOBJ, paras. 107, 115.

⁸⁵ TCMJ, fn 73, citing MOBJ, para. 109; TCMJ, fn 86, citing MOBJ, para. 115.

⁸⁶ TOB, para. 43; TCMJ, paras. 6, 29, 66; MOBJ, paras. 107, 119, 120, and Exhibit R-0002.

⁸⁷ TCMJ, para. 68, fn 88 and Exhibit C-0103, p. 2; Hearing Transcript Day 1, p. 142:6-8.

⁸⁸ TCMJ, para. 67, fn 85 and Exhibits C-0099, C-0100 and C-0101; Hearing Transcript Day 1, p. 142:2-5.

⁸⁹ Exhibit R-0002.

⁹⁰ Hearing Transcript Day 1, p. 142:9-25, p. 143:1-3.

⁹¹ Hearing Transcript Day 1, p. 142:13-15.

74. It is established, and the Parties are in agreement, that the International Bank for Reconstruction and Development (the World Bank), which is the depositary of the Convention, received Venezuela's Notice of Denunciation on January 24, 2012.⁹² The six-month period, mentioned in Article 71 of the Convention, started to run on January 25, 2012 and expired on July 24, 2012. Until that day inclusive, Venezuela continued to be a Contracting State to the ICSID Convention. As from July 25, 2012, Venezuela has no longer been a Contracting State to the ICSID Convention.
75. The legal consequences of the termination of a treaty, of which denunciation is one of the forms, are determined by that treaty itself, or in case that it contains no specific provisions on this issue, by general international law. The Vienna Convention on the Law of Treaties is not applicable in this case as such because Venezuela is not a Party to it. However, Article 70 of the Vienna Convention has been regarded as reflecting customary international law by another arbitral tribunal⁹³ and no argument has been made to the Tribunal suggesting otherwise. Under the rule codified in that provision, "unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions . . . (a) releases the parties from any obligation further to perform the treaty; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination." In case of the denunciation of a multilateral treaty, the ICSID Convention being of such a nature, the above rule applies in the relations between the State which has denounced the treaty and each of the other parties to the treaty from the date when such denunciation takes effect.⁹⁴
76. In accordance with this rule -- unless the ICSID Convention provides otherwise -- Venezuela has been released, as of July 25, 2012, from any obligation further to perform the ICSID Convention while any rights, obligations or legal situations created through the execution of the Convention prior to the taking effect of its denunciation have not been affected.
77. The ICSID Convention contains only one specific Article referring to the Notice of Denunciation under Article 71, leaving aside Article 75 which deals with the functions of the depositary of the Convention among which is also his obligation to notify all signatory States of denunciation in accordance with Article 71. That specific Article is Article 72, which provides that

Notice by a Contracting State pursuant to Articles 70⁹⁵ 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

⁹² See ICSID News Release, dated January 26, 2012 informing that on January 24, 2012, the World Bank received a written Notice of Denunciation of the Convention from the Bolivarian Republic of Venezuela. The ICSID News Release further informs that "[i]n accordance with Article 71 of the ICSID Convention, the denunciation will take effect six months after the receipt of Venezuela's notice, i.e., on July 25, 2012." The ICSID News Release further confirms that, as required by Article 75 of the ICSID Convention, the World Bank, in its capacity as depositary of the Convention, has notified all ICSID signatory States of this denunciation. (Exhibit R-0003)

⁹³ The arbitral tribunal in *Rainbow Warrior* stated that "certain specific provisions of customary law in the Vienna Convention are relevant in this case, such as . . . Article 70, which deals with the legal consequences of the expiry of a treaty." *Case concerning Rainbow Warrior Affair (New Zealand/France)*, Decision of April 30, 1990, RIAA, vol. XX, p. 251, para. 75.

⁹⁴ See Article 70(2) of the VCLT.

⁹⁵ Article 70 deals with the territorial applicability of the Convention.

State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary. (footnote added)

Venezuela exercised its right to withdraw from the ICSID Convention under Article 71 thereof by its written Notice of Denunciation which the World Bank as depositary of the Convention received on January 24, 2012.

78. In the view of the Tribunal, Article 72 is a kind of saving clause. This view is supported by the fact that it also refers to notice under Article 70 which reads:

This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.

The purpose of Article 72 is thus to preserve rights, obligations and or legal situations which have arisen prior to the receipt of notices either under Article 70 or Article 71 of the Convention.

79. Article 72 speaks of rights and obligations under the Convention arising out of consent to the jurisdiction of the Centre given by the State (or its subdivisions or agencies or its nationals). The State's consent to the jurisdiction of the Centre does not derive from the participation of the State in the ICSID Convention. The Preamble to the Convention makes this clear beyond any doubt when it, in its last paragraph,

[d]eclar[es] 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 . . . arbitration. (emphasis added)

Thus, in addition to being a Party to the ICSID Convention, a State has to give "*its consent*" to the submission of a dispute to arbitration. Venezuela has given such consent to the submission of disputes with an investor of Barbados' nationality to international arbitration in the BIT which it concluded with Barbados on July 15, 1994.⁹⁶ Its Article 8, entitled "Settlement of Disputes between one Contracting Party and Nationals or Companies of the other Contracting Party", states in paragraph 4 that

[e]ach 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. (emphasis added)

Paragraph 1, to which reference is made in paragraph 4, provides for the disputes, defined therein as

⁹⁶ The BIT, having entered into force on October 31, 1995, remains in force.

[d]isputes 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,

to be submitted to the International Centre for Settlement of Investment Disputes.

80. Venezuela's consent to international arbitration of investment disputes with investors from Barbados is thus contained in the BIT and that consent remains valid. It alone, however, is not sufficient to establish the jurisdiction of ICSID. There are two further conditions to be met. First, Venezuela's consent has to meet with the consent of an investor from Barbados. The ICSID Convention stipulates this requirement clearly. The Contracting States, in the Preamble to the ICSID Convention, recognize that "mutual consent by the parties to submit such [i.e., investment] disputes . . . to arbitration . . . constitutes a binding agreement". Further, Article 25 of the ICSID Convention, in its paragraph (1), provides:

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. (emphasis added)

Transban expressed its consent in writing by the filing of the RfA. The question remains whether it has done so timely.

81. The second condition is that the State of the nationality of an investor and the State with which an investor has an investment dispute, are both Parties or, to use the language of the ICSID Convention, Contracting States to the Convention, as it appears from its Article 25 just quoted above.
82. Venezuela's consent to international arbitration, for the purposes of the present case, is expressed in the BIT (see para. 79 above), and not in the ICSID Convention. An action under the latter instrument, such as notice of its denunciation, cannot affect the BIT itself. It can only affect the rights and obligations under the Convention itself. The BIT being still in force, Venezuela's consent to international arbitration remains valid as well.
83. The question for the Tribunal to resolve is whether an investor can express its consent to ICSID arbitration in the period following the receipt by the depositary of the ICSID Convention of a notice of denunciation and prior to the taking effect of such notice. Nothing in Article 72 of the ICSID Convention suggests that this could not be the case. That Article addresses the issue of consent to the jurisdiction of the Centre given by a Contracting State, which has notified the depositary of its denunciation of the Convention under Article 71, as well as the consent given by constituent subdivisions or agencies or any national of such State. The purpose of this Article is to preserve rights and obligations under the Convention of that State or its subdivisions or agencies or its nationals arising out of *their* consent to the jurisdiction of the Centre given before the notice of denunciation by that State was received by the depositary. The temporal factor

in Article 72 relates to the consent given by the denouncing State or its subdivisions or agencies or nationals, not to the rights and obligations under the ICSID Convention. It is not to be expected that once a State has decided to denounce the ICSID Convention, it would nevertheless subsequently give its consent to the jurisdiction of the Centre.

84. It is true that the jurisdiction of the Centre is based on the mutual consent of both parties, an investor and a State, and that this mutual consent constitutes a binding arbitration agreement. The text of Article 72 does not create an obstacle for an investor to give its consent to ICSID arbitration subsequent to the receipt by the depositary of the notice of denunciation. If the denouncing State has given its consent to the jurisdiction of the Centre before notifying the depositary of its denunciation of the Convention, and if an investor has given its consent in writing when the Convention was still in force for the denouncing State, the mutual consent of both parties is in existence and constitutes a binding arbitration agreement.
85. The Tribunal is of the view that, as long as Venezuela was a Party to the ICSID Convention, it was open to the Claimant (Transban) to give its consent in writing to ICSID arbitration, Venezuela's consent having already been given in 1995 when its BIT with Barbados entered into force. The last day when Venezuela was a Contracting State to the ICSID Convention was July 24, 2012.
86. This brings the Tribunal to the issue whether Transban has given its consent in a timely manner.
87. Transban expressed its consent to the jurisdiction of the Centre in its RfA. That Request is dated July 24, 2012. That same day the Request was received in electronic form by the ICSID Secretariat. Article 25, paragraph 1, of the ICSID Convention requires that consent to submit an investment dispute to the Centre must be in "writing". Further, Article 36, paragraph 1 of the Convention provides that a request for arbitration shall be addressed in writing to the Secretary-General. The question is whether this requirement can be satisfied by a scanned copy of the Request, duly signed, having been sent as an attachment to an email addressed to the Secretary-General of the ICSID, if that scanned copy is subsequently "confirmed" by receipt of an original hard copy of the Request (with the required number of additional copies) by the ICSID Secretariat, as happened in this case.⁹⁷
88. When the Convention in its Article 25 requires consent to be given "in writing", it makes clear that it has to be expressed in a written form, i.e., expressed in a recorded paper form, not just orally. Having consent in written form makes it much easier to prove its existence.⁹⁸ In the present case, there is no doubt that the Claimant consented to the jurisdiction of the Centre, its consent having been expressed through written words in the RfA. There is also no doubt that this consent was given on July 24, 2012 when ICSID received a scanned copy of the RfA, annexed to an email from Counsel for the Claimant. ICSID thus became aware of this consent from the moment of the receipt of the scanned copy of the RfA.

⁹⁷ The original hard copy was received by the ICSID Secretariat on July 25, 2012 (Exhibit R-0002).

⁹⁸ One may recall the Latin maxim *Littera scripta manet*.

89. In the view of the Tribunal, it is necessary to distinguish between giving consent to arbitration, even when it is expressed in the RfA, and the filing of such a request. The date of giving consent and the date of filing a request may not coincide, the latter may follow the former.
90. The RfA has to be a written document, as specified in Article 36, paragraph 1, of the ICSID Convention which provides that a party “wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party”.⁹⁹
91. The Tribunal notes that, when the Convention was adopted in 1965, no such modern means of communication as sending documents by facsimile or scanning and emailing them were known or contemplated. All these technological developments came later.¹⁰⁰ In the view of the Tribunal, the term “in writing” should be interpreted in a reasonable way as encompassing developments in technology. In fact, as the International Court of Justice has observed “where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is ‘of continuing duration’, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning”.¹⁰¹ The Tribunal refers to a similar line of reasoning in the “Recommendation regarding the interpretation of article II, paragraph 2, and Article VII, paragraph 1, of the Convention on the Recognition and Enforcement Foreign Arbitral Awards, done in New York, 10 June 1958” adopted by UNCITRAL on July 7, 2006. It recommends that the requirements in Article II (2) of the 1958 Convention, which includes an “in writing” requirement, should “be applied recognizing that the circumstances described therein are not exhaustive.”¹⁰²
92. The Tribunal observes that not only was the RfA in its scanned copy, received on July 24, 2012, but also the original was mailed by a courier service in Florida the same day and delivered to the ICSID Secretariat the following day. Further, on July 24, 2012, the Claimant wired the required fee for lodging the Request, the fee having been received the same day by ICSID in its bank account.
93. The Tribunal concludes that the Claimant expressed its consent timely, at a time when Venezuela was still a Contracting State to the ICSID Convention. The Tribunal further finds that the Claimant filed its Request with the Secretary-General of ICSID when the Centre was still open for either arbitral or conciliation proceedings to be instituted

⁹⁹ Emphasis added.

¹⁰⁰ In the sixties and at least early seventies legal documents were typed on typewriters and copies produced using carbon paper.

¹⁰¹ *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009, p. 243, para. 66.*

¹⁰² *UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006*, United Nations, Vienna 2008, United Nations Publication Sales No. E.08.V.4, Part Three, p. 40. The text of Article II(2) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides: “The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”

against Venezuela. In view of the above, Venezuela's objection to the jurisdiction of the Centre *ratione temporis* is dismissed.¹⁰³

VI. OBJECTION TO JURISDICTION RATIONE PERSONAE: ABSENCE OF A PROTECTED INVESTOR

1. Companies as Protected Investors Pursuant to Article 1(d) of the BIT

94. In its second objection to the jurisdiction of the Centre, Venezuela argues that Transban does not qualify as a foreign investor protected under the ICSID Convention and the BIT.¹⁰⁴ Article 1(d) of the BIT defines companies for its purposes. It 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;

For the purposes of the Convention referred to in Article 8¹⁰⁵ 'Company' shall include any company incorporated or constituted under the law in force in one Contracting Party which is owned or effectively controlled by Nationals or companies of the other Contracting Party.

a. Position of the Respondent

95. Transban was initially incorporated under the laws of Venezuela in 1996.¹⁰⁶ Its original name was Inversiones Cibanca, C.A., until it opted for a second name, Inversiones Transbanca, C.A. in 1998, which was subsequently replaced by its current name, Transban Investments Corp., in 2000.¹⁰⁷ Venezuela argues that Transban is not a "company" of Barbados. Article 1(d) of the BIT requires that a company must have been "... incorporated or constituted under the law in force in that Contracting Party" to be a company of that Contracting Party.¹⁰⁸ Venezuela contends that Article 1(d) of the BIT applies to companies constituted or incorporated under the laws of Barbados, but not to companies "continued" under those same laws.¹⁰⁹ Venezuela submits that Transban does not meet this requirement since it was incorporated under the laws of Venezuela in 1996, not those of Barbados, and merely changed its domicile to Barbados on August 1, 2001, which "does not entail a change of nationality."¹¹⁰
96. Venezuela turns to Article 42 of the ICSID Convention and argues that, in the absence of an agreement in the BIT on the law applicable to the dispute, the Tribunal must apply the laws of Venezuela, including its rules on conflicts of laws, as well as relevant rules

¹⁰³ Arbitrator Dr. Santiago Torres Bernárdez does not share this conclusion. As explained in the opinion he has appended to the Award as Annex A, he would have upheld the *ratione temporis* preliminary objection.

¹⁰⁴ MOBJ, para. 184.

¹⁰⁵ Article 8 is entitled "Settlement of Disputes between one Contracting Party and Nationals or Companies of the other Contracting Party."

¹⁰⁶ MOBJ, paras. 54, 126; TCMJ, para. 11.

¹⁰⁷ MOBJ, paras. 55, 126; TCMJ, para. 11 and fn 4.

¹⁰⁸ MOBJ, paras. 125, 127.

¹⁰⁹ Hearing Transcript Day 2, p. 31:23-25, p. 32:1-3; Hearing Transcript Day 2, p. 133:5-16, p. 134:6-8.

¹¹⁰ MOBJ, para. 56. *See also*, MOBJ, paras. 54, 126-127.

of international law.¹¹¹ Venezuela argues that, pursuant to Article 20 of the Law of International Private Law of Venezuela, matters pertaining to the capacity, operation and dissolution of Transban are governed by the laws of Venezuela.¹¹² On the basis of Transban's alleged corporate continuance pursuant to the *Barbados Companies Act*, Venezuela considers Section 356.1(1) of the *Barbados Companies Act* applicable to corporate continuance, as an additional basis for deeming Venezuelan corporate law applicable to the present dispute: Section 356.1(1) of the *Barbados Companies Act* sets, as a prerequisite, the authorization of corporate continuance under the laws of the originating jurisdiction, in this case Venezuela.¹¹³ Venezuela acknowledges and admits that re-domiciling a corporate entity in a foreign jurisdiction is not prohibited under Venezuelan law,¹¹⁴ but argues that inasmuch as corporate continuance to another country is not provided for under Venezuelan law, no prescribed procedure for such a transfer exists.¹¹⁵ In the absence of a treaty allowing such re-domiciliation, Venezuela argues that a corporation would need to be dissolved in Venezuela before being re-incorporated abroad.¹¹⁶

97. Venezuela recalls that the disputing Parties and the Tribunal agreed, in section 15.1 of Procedural Order No. 1, to guidance from the IBA Rules on the Taking of Evidence in International Arbitration for purposes of document production.¹¹⁷ Venezuela turns to IBA Rule 9.5 as a basis to argue that the Tribunal should draw three negative inferences from the document production failures of Transban.¹¹⁸ First suggested negative inference: Transban has preserved its Venezuelan nationality,¹¹⁹ notably since Transban has presented no evidence to demonstrate that Transban actually succeeded Inversiones Transbanca, C.A.¹²⁰
98. Second negative inference: Inversiones Transbanca, C.A. was never validly terminated, notably through dissolution or liquidation, and never effectively changed its name to Transban.¹²¹ Transban provided no proof that it had cancelled its registration with the Commercial Registry of the State of Miranda, Venezuela.¹²² Article 280 of the Commercial Code of Venezuela imposes a quorum of 75% of the shareholders of a company to validly dissolve a corporation; since Transban did not validly change the required quorum¹²³ and since Transban's decision to re-domicile in Barbados was

¹¹¹ Hearing Transcript Day 1, p. 74:9-17.

¹¹² Hearing Transcript Day 1, p. 75:6-25, 76:1-11.

¹¹³ Hearing Transcript Day 1, p. 76:13-25, p. 77:5-8.

¹¹⁴ Hearing Transcript Day 2, p. 170:22-25, p. 171:1-11, 19-20, p. 172:1.

¹¹⁵ Hearing Transcript Day 1, p. 77:14-16; Hearing Transcript Day 2, p. 132:7-9.

¹¹⁶ Hearing Transcript Day 2, p. 172:1-7.

¹¹⁷ Hearing Transcript Day 1, p. 63:4-9.

¹¹⁸ Hearing Transcript Day 1, p. 35:15-17; Hearing Transcript Day 1, p. 63:10-22.

¹¹⁹ Hearing Transcript Day 1, p. 63:24-25, p. 64:1.

¹²⁰ MOBJ, paras. 54-57, 126. Venezuela refers to a contract filed by Transban, which refers to amendments to the bylaws of Inversiones Transbanca (as opposed to Transban Investments Corp.) at 31 May 2005, as proof that Inversiones Transbanca continues to exist: MOBJ, para. 57; Exhibit C-0033, pp. 10-11.

¹²¹ Hearing Transcript Day 1, p. 65:22-25, p. 66:1-2.

¹²² MOBJ, para. 138.

¹²³ Hearing Transcript Day 2, p. 116:18-25, pp. 117-119.

adopted with a quorum of 68% of shareholders, that decision was invalid and without effect.¹²⁴ Therefore, Transban never ceased to be a Venezuelan company.¹²⁵

99. Third negative inference: the actual seat of Transban's business has remained located in Venezuela.¹²⁶ Venezuela points to the absence of evidence that Transban ceased to do business in Venezuela and underlines that Transban modified nothing to its activities or corporate control upon changing its domicile to Barbados.¹²⁷ Venezuela argues that an absence of change to Transban's corporate purpose in its bylaws means no change of legal personality and therefore no change of nationality.¹²⁸

b. Position of the Claimant

100. Transban underlines that Article 1(d) of the BIT determines corporate nationality and defines a "company" only by reference to its place of incorporation or constitution¹²⁹ and specifies that the law in force in Barbados applies and is exclusively determinative for such purpose.¹³⁰ Transban rejects Venezuela's argument that one needs to turn to Venezuelan law pursuant to Article 42 of the ICSID Convention and denies the existence of any conflict of law; on the contrary, Article 1(d) of the BIT provides specifically that Barbados law will govern the issue of determining incorporation or constitution of a company.¹³¹
101. Transban shareholders voted in favour of changing Transban's domicile to Barbados on December 5, 2000.¹³² Transban dismisses the notion that the decision to re-domicile in Barbados is invalid due to a shareholder quorum set higher in Article 280 of the Commercial Code (75%) to that complied with by Transban (68%), since the quorum in Article 280 applies only where a company's bylaws do not mandate a different quorum; Transban's bylaws specified that the requisite quorum was set at 66%.¹³³ The quorum change was accepted and published by the Commercial Registry of Venezuela without any objection.¹³⁴

¹²⁴ Hearing Transcript Day 1, p. 78:23-25, p. 79:1-17 and Exhibit C-0004. As a side note, Venezuela could not have challenged the decision to re-domicile to Barbados even if it were invalid, since only shareholders of Transban would have had standing to do so: Hearing Transcript Day 2, p. 114:7-25, p. 115:1-6.

¹²⁵ Hearing Transcript Day 1, p. 73:16-19, p. 79:16-17.

¹²⁶ MOBJ, paras. 129, 138; Hearing Transcript Day 1, p. 63:24-25, p. 64:1.

¹²⁷ MOBJ, paras. 178, 179, citing Exhibit C-0004, p. 10; Hearing Transcript Day 2, p. 119:24-25, p. 120:1-3.

¹²⁸ MOBJ, para. 138, fn 138. Venezuela invokes United Nations International Law Commission, *Draft Articles on Diplomatic Protection*, 58th Sess. (A/61/10) (2006), commentary to Article 10, (Exhibit RL-0133).

¹²⁹ TOB, paras. 46, 49, 55; TCMJ, para. 73. Transban cites Prof. Schreuer and a number of ICSID and UNCITRAL arbitral awards as support for ascertaining nationality on the basis of incorporation: see TCMJ, fn 91.

¹³⁰ TCMJ, para. 76, fn 97; Hearing Transcript Day 1, p. 99:11-14, p. 109:9-11; Hearing Transcript Day 1, p. 114:22-24, p. 120:21-24; Hearing Transcript Day 2, p. 144:13-19.

¹³¹ Hearing Transcript Day 1, p. 114:22-24, p. 121:3-11; Hearing Transcript Day 2, p. 144:20-25.

¹³² TCMJ, para. 11 and fn 5, para. 75; Hearing Transcript Day 1, p. 100:18-25; Hearing Transcript Day 2, pp. 175-176; Exhibit C-0004.

¹³³ Hearing Transcript Day 1, p. 108:1-25, p. 109:1-4; Exhibit C-0002; Hearing Transcript Day 2, p. 154:15-25, p. 155:1-23.

¹³⁴ Hearing Transcript Day 2, p. 184:3-11.

102. Transban shareholders voted to amend its bylaws so as to reflect its change of domicile in accordance with Article 203 of the Commercial Code.¹³⁵ Transban registered the shareholder minutes with the Commercial Registry of Venezuela and published the minutes in Venezuela's *Repertorio Forense* so as to notify third parties in accordance with Article 221 of the Commercial Code, and then notified Venezuelan tax authorities that Transban would cease to be a Venezuelan company.¹³⁶ The Commercial Registry of Venezuela accepted and registered Transban's decision to re-domicile in Barbados without any objection.¹³⁷
103. The Commercial Registry of Venezuela had the duty to deny publication of a document that contravened applicable law.¹³⁸ The publication of Transban's quorum change¹³⁹ and of Transban's decision to re-domicile in Barbados have never been challenged, and Venezuela is now estopped from challenging them; nor can anyone else challenge such decisions fifteen years later due to the statute of limitations.¹⁴⁰
104. Transban did not produce a certificate of discontinuance or of termination of its incorporation in Venezuela because such a certificate does not exist under Venezuelan law and cannot be obtained: the Commercial Registry of Venezuela is not statutorily empowered to certify the termination of a Venezuelan corporation by issuing a certificate of termination or of discontinuance.¹⁴¹
105. To re-domicile in Barbados, Transban needed to achieve corporate continuance pursuant to Section 356.1 of the *Barbados Companies Act*¹⁴² by complying with the requirements set out in Part III, Division D of the *Barbados Companies Act*.¹⁴³ Transban's Board of Directors accordingly initiated the change of domicile by executing Articles of Continuance and filing the same with the Barbadian Registrar on December 29, 2000.¹⁴⁴ Transban was legally continued to Barbados as a result of the issuance of Transban's Certificate of Continuance by the Barbadian Registrar on August 17, 2001.¹⁴⁵
106. Transban argues that the issuance by Barbadian authorities of a Certificate of Continuance in 2001 has the same effect as incorporation under Barbadian law and deprives Transban's initial incorporation in Venezuela of any relevance.¹⁴⁶ In essence, Transban argues that "the change of domicile is [legally and effectively] equivalent to incorporating in Barbados,"¹⁴⁷ that Transban's Certificate of Continuance effectively

¹³⁵ Hearing Transcript Day 1, p. 101:10-19.

¹³⁶ TCMJ, para. 79 and Exhibits C-0004 and C-0089; Hearing Transcript Day 1, p. 101:20-25, p. 102:1-25, p. 103:1-2; Hearing Transcript Day 2, p. 180:15-25.

¹³⁷ Hearing Transcript Day 2, p. 181:11-18, p. 182:4-11.

¹³⁸ Hearing Transcript Day 2, p. 181:11-18, p. 182:4-11.

¹³⁹ Hearing Transcript Day 2, p. 184:3-11.

¹⁴⁰ Hearing Transcript Day 1, p. 102:1-5, p. 103:3-10, p. 107:4-20; p. 125:1-8; Hearing Transcript Day 2, p. 183.

¹⁴¹ Hearing Transcript Day 2, p. 146:6-14; p. 184:21-23, p. 185:6-10.

¹⁴² Carmichael Expert Report, para. 13.

¹⁴³ Carmichael Expert Report, paras. 14-15.

¹⁴⁴ TCMJ, para. 12 and fn 6; Carmichael Expert Report, paras. 15, 21.

¹⁴⁵ TCMJ, paras. 12-13 and fn 6; Carmichael Expert Report, paras. 16, 21. Transban's Certificate of Continuance was certified in October 2001, but executed in August 2001 (Exhibit C-0009).

¹⁴⁶ TOB, para. 51; TCMJ, paras. 7-8, 75; Carmichael Expert Report, para. 9; Hearing Transcript Day 1, p. 121:23-25, p. 122:1-2.

¹⁴⁷ Carmichael Expert Report, para. 24.

deems it an entity originally incorporated in Barbados,¹⁴⁸ and that Transban is a company incorporated under the laws of Barbados for purposes of Article 1(d) of the BIT.¹⁴⁹ Transban further argues that the Certificate of Continuance constitutes a fact and an “unchallenged and unassailable” decision nearly fifteen years after its issuance.¹⁵⁰

107. Transban explains that the *Barbados Companies Act* treats companies re-domiciled in Barbados as a result of continuance the same way as companies originally incorporated in the Barbados: Section 356.2(2) of the *Barbados Companies Act* states that articles of continuance become the company’s articles of incorporation, that a certificate of continuance amounts to a certificate of incorporation, and that the *Barbados Companies Act* applies to a continued company “as if the company had been incorporated under this Act.”¹⁵¹ Moreover, the definition of “company” set forth in Section 2(1)(b) of the *Barbados Companies Act* extends to entities “incorporated or continued” under the *Barbados Companies Act*.¹⁵² Following continuance, Transban remained the same entity in terms of assets and liabilities: it retained its “organic whole”¹⁵³, but became subject to a new legal regime and by the same token adopted Barbadian nationality.¹⁵⁴
108. Transban considers “difficult to follow” Venezuela’s argument that a lack of change in corporate purpose or activities reflects a lack of change in corporate existence, structure and nationality: these two aspects are not causally related and Venezuela cites no authority in support of its position.¹⁵⁵
109. Regarding the requirement under Section 356.1(1) of the *Barbados Companies Act* that corporate continuance be authorised by the laws of Venezuela, Transban and its expert on Barbadian law argue that this requirement must be construed as “not specifically prohibited” and that therefore authorization of corporate continuance under the laws of the originating jurisdiction is assumed.¹⁵⁶
110. Transban dismisses the existence of a conflict of law since Barbadian corporate law authorizes corporate continuance so long as no specific prohibition exists in the originating jurisdiction and since Venezuelan law does not prohibit continuance to another jurisdiction.¹⁵⁷ Transban further notes the admission by Venezuela that

¹⁴⁸ Carmichael Expert Report, para. 9.

¹⁴⁹ TCMJ, para. 76; Carmichael Expert Report, para. 11.

¹⁵⁰ Hearing Transcript Day 1, p. 122:1-2, 24-25, p. 123:1-7.

¹⁵¹ TCMJ, paras. 13, 78; Carmichael Expert Report, paras. 17, 22; Hearing Transcript Day 2, p. 28:2-7.

Transban’s expert, Mr. Carmichael, further distinguishes continued companies from “external companies,” whose formation under the laws of another country is acknowledged by Section 324(1)(a) of the *Barbados Companies Act*, and reincorporation which necessitates the liquidation and dissolution of the original corporate entity prior to the incorporation of a new entity: see TCMJ, para. 77; Carmichael Expert Report, paras. 19-20.

¹⁵² Carmichael Expert Report, para. 13; Hearing Transcript Day 2, p. 28:8-15.

¹⁵³ Hearing Transcript Day 2, p. 29:5-7, p. 64:23-24, p. 66:6.

¹⁵⁴ Hearing Transcript Day 1, p. 135:18-22; Hearing Transcript Day 2, p. 53:16-19, p. 63:12-16, p. 64:24-25, p. 66:4-10.

¹⁵⁵ TCMJ, para. 76, fn 96. Transban considers that the doctrine of continuing nationality, pertaining to diplomatic protection, has no application in investor-State dispute settlement proceedings: see TCMJ, para. 84, fn 113.

¹⁵⁶ Hearing Transcript Day 2, p. 34:13-14, 20-22, p. 36:2-4, p. 37:1-2, p. 41:19-22; 187:16-25.

¹⁵⁷ Hearing Transcript Day 2, p. 145:2-6, 18-20.

Venezuelan law does not prohibit continuance in a foreign jurisdiction.¹⁵⁸ Transban argues that Venezuelan law allows re-domiciling or corporate continuance in a foreign jurisdiction¹⁵⁹ and that the change of domicile is not a matter of public order under Venezuelan law: a juridical person's freedom and full capacity to act are enshrined in Article 112 of the Venezuelan Constitution and are limited only by specific prohibitions provided by law; Article 203 of the Commercial Code recognizes a juridical person's freedom to choose its domicile; and Article 335 of the Commercial Code acknowledges a juridical person's ability to transform its status, notably through continuance abroad, without dissolution or liquidation.¹⁶⁰

111. Moreover, the *Barbados Companies Act* does not require that dissolution or liquidation in the originating jurisdiction intervene as a prerequisite for achieving corporate continuance.¹⁶¹ Under Barbadian law, corporate continuance would entail, as a practical and assumed consequence, the cessation of the incorporation in the originating jurisdiction.¹⁶² However, there is no requirement under the *Barbados Companies Act* to file any proof of corporate discontinuance or termination from the originating jurisdiction in order to achieve corporate continuance in Barbados,¹⁶³ nor was Transban obligated under Venezuelan law to accomplish any additional steps following the issuance of its Certificate of Continuance by the Barbadian Registrar.¹⁶⁴
112. The issuance of the Certificate of Continuance means that the requirements that had to be met prior to its issuance had been satisfied: as the supreme administrative authority on corporate matters, the Barbadian Registrar had the duty to determine whether the corporation petitioning for continuance faced a prohibition of continuance in its jurisdiction of origin; the issuance of the Certificate of Continuance stands for the finding that there was no such prohibition under Venezuelan law.¹⁶⁵
113. The date of issuance of Transban's Certificate of Continuance, i.e., 17 August 2001, therefore stands as the moment when Transban became a Barbados company.¹⁶⁶ Since then, Transban has paid no taxes, has had no employees and has paid no social security in Venezuela; Transban has undertaken no action that suggests it is a Venezuelan company.¹⁶⁷

¹⁵⁸ Hearing Transcript Day 2, p. 187:10-12.

¹⁵⁹ Hearing Transcript Day 2, p. 187:23-25.

¹⁶⁰ Hearing Transcript Day 1, p. 105:25, p. 106:1-25, p. 107:1-3; Hearing Transcript Day 2, p. 176:12-15, 23-25, p. 177, p. 178:1-7, 20-21, p. 179, p. 180:1-14.

¹⁶¹ Hearing Transcript Day 2, p. 53:2-9.

¹⁶² Hearing Transcript Day 2, pp. 72-74.

¹⁶³ Hearing Transcript Day 2, p. 77:16-24.

¹⁶⁴ Hearing Transcript Day 2, p. 184:12-19.

¹⁶⁵ Hearing Transcript Day 2, p. 34:24-25, p. 35:1-5, p. 36:17-20, 24-25, p. 37:1-4, p. 38:8-11. Transban's expert mentioned that an affidavit by a Barbadian lawyer had accompanied Transban's request for corporate continuance to the Barbadian Registrar, and that such affidavit would have attested to the possibility of continuance: see Hearing Transcript Day 2, p. 42:1-23.

¹⁶⁶ TCMJ, paras. 75, 78; Carmichael Expert Report, paras. 18, 22; Hearing Transcript Day 1, p. 102:1-5, p. 103:21-23.

¹⁶⁷ Hearing Transcript Day 1, p. 104:18-24; p. 125:10-11; Hearing Transcript Day 2, p. 153:23-25, p. 154:1-3.

2. Companies of the Nationality of the Contracting State Party to the Dispute

a. *Position of the Respondent*

114. According to Article 25(2)(b) of the ICSID Convention, both of the following corporate entities are alternatively eligible to submit investment disputes to ICSID:

[i] any juridical person which had the nationality of a Contracting State other than the State party to the dispute ... and [ii] any juridical person which had the nationality of the Contracting State party to the dispute ... and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

115. Venezuela argues that Article 25 of the ICSID Convention establishes objective outer limits to the jurisdiction of tribunals: as a general rule, such jurisdiction can be exercised only in respect of disputes between a Contracting State and nationals of another Contracting State.¹⁶⁸ Article 25(2)(b) *in fine* of the ICSID Convention provides an exception to this general rule:¹⁶⁹ Venezuela and Barbados may characterise a company (in this case, Transban) incorporated in the Contracting State Party to a dispute (in this case, Venezuela) as an investor of another Contracting State's nationality (in this case, Barbados) provided that such company is subject to "foreign control" (i.e., non-Venezuelan control) (Article 25(2)(b) *in fine* of the ICSID Convention).¹⁷⁰ Article 1(d) *in fine* of the BIT echoes Article 25(2)(b) *in fine* of the ICSID Convention by stipulating that, for purposes of Article 8 of the BIT (settlement of disputes), the term "company" further includes a company (in this case, Transban) incorporated in the Contracting Party to the dispute (in this case, Venezuela), but which "is owned or effectively controlled by nationals or companies of" the other Contracting Party (in this case, Barbados).¹⁷¹

116. Venezuela argues that Transban has retained its Venezuelan nationality and that either Transban has dual Barbadian and Venezuelan nationalities or Transban never properly acquired Barbadian nationality and therefore only has Venezuelan nationality.¹⁷² Venezuela underlines that Transban did not produce any proof that its incorporation in Venezuela had been terminated.¹⁷³ As a result, Venezuela argues that Transban's RfA must be examined in light of Article 25(2)(b) *in fine* of the ICSID Convention.

117. Venezuela argues that Transban could not prove that nationals or companies of Barbados controlled it even if it tried.¹⁷⁴ Venezuela further alleges that Transban provided no evidence as to the ownership or effective control over Transban¹⁷⁵ and calls for a fourth

¹⁶⁸ MOBJ, paras. 161-162, 168-169.

¹⁶⁹ MOBJ, paras. 163-164.

¹⁷⁰ Venezuela draws the Tribunal's attention to *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award (3 April 2014) (Exhibit RL-0052) in respect of Article 25(2)(b) *in fine* of the ICSID Convention: see MOBJ, paras. 175-176.

¹⁷¹ MOBJ, paras. 140, 146, 173.

¹⁷² Hearing Transcript Day 1, p. 81:16-25, p. 82:1-8; Hearing Transcript Day 2, p. 122:25, p. 123:1-25, p. 124:1.

¹⁷³ Hearing Transcript Day 2, p. 76:7-25, p. 77:1-10.

¹⁷⁴ MOBJ, para. 143.

¹⁷⁵ MOBJ, para. 148.

negative inference under IBA Rule 9.5: that Transban shareholders, directors, controlling persons and ultimate beneficiaries are Venezuelan nationals and that Transban's management structure has remained unchanged since its incorporation in Venezuela.¹⁷⁶ Venezuela alleges that the true owners of the investments allegedly made by Transban are Venezuelan nationals;¹⁷⁷ that predecessor corporation Inversiones Cibanca, C.A. was incorporated by two Venezuelan nationals and had Venezuelan nationals as shareholders;¹⁷⁸ that individuals of Venezuelan nationality and/or domiciled in Venezuela owned a majority interest in Transban back in 2000;¹⁷⁹ that six Venezuelan individuals, all seemingly members of the Velutini family, appear to conduct business in Venezuela on behalf of Transban,¹⁸⁰ and that Transban's Directors are all domiciled in Venezuela.¹⁸¹ Venezuela further alleges that the cross-examination of Mr. Zambrano provided affirmative evidence leading to the same conclusions as the negative inferences put forward by Venezuela, rendering such negative inferences unnecessary.¹⁸²

118. Notwithstanding Article 1(d) of the BIT, Venezuela alleges that there exists under international law a requirement for "a real connection between a company and the State whose nationality is invoked" amounting to a "substantial and effective relation":¹⁸³ in other words, an "effective and actual nationality"¹⁸⁴ test. Venezuela constructs such a requirement by combining two cases: *Nottebohm*, in which the International Court of Justice decided that a State exercising diplomatic protection on behalf of natural persons had to substantiate a "genuine connection" with such individuals,¹⁸⁵ and *Barcelona Traction*, in which the Court suggested the possibility of lifting the corporate veil notably "to prevent the misuse of the privileges of legal personality".¹⁸⁶ Venezuela invokes a number of investor-State arbitral awards rendered by tribunals which have cited the Court's views expressed in *Nottebohm* and in *Barcelona Traction*.¹⁸⁷ Venezuela further submits that Transban is incapable of claiming Barbadian nationality on the basis of such a test.¹⁸⁸

¹⁷⁶ Hearing Transcript Day 1, p. 66:16-20.

¹⁷⁷ MOBJ, paras. 194-195.

¹⁷⁸ MOBJ, paras. 143, 154.

¹⁷⁹ MOBJ, para. 149.

¹⁸⁰ MOBJ, para. 58.

¹⁸¹ MOBJ, para. 150.

¹⁸² Hearing Transcript Day 2, p. 110:16-25, p. 111:1-18, p. 112:11-20, 25, p. 113:1-11, p. 114:3-6.

¹⁸³ MOBJ, para. 156.

¹⁸⁴ MOBJ, para. 160; Hearing Transcript Day 2, p. 136:7-9, 13-16.

¹⁸⁵ MOBJ, para. 157, citing *Nottebohm Case (second phase) (Liechtenstein v. Guatemala)*, Judgment (6 April 1955), I.C.J. Reports 1955, p. 4 (hereinafter *Nottebohm*), p. 23 (Exhibit RL-0109).

¹⁸⁶ MOBJ, para. 157, citing *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)*, I.C.J. Reports 1970, p. 3., Judgment (5 February 1970) (hereinafter *Barcelona Traction*) (Exhibit RL-0094), para. 56.

¹⁸⁷ MOBJ, para. 159 and fn 159, citing *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 April 2004) (hereinafter *Tokios Tokelès v. Ukraine*) (Exhibit RL-0074), paras. 54-56; *Cementownia "Nowa Huta" S.A. v. Turkey*, ICSID Case No. ARB (AF)/06/2, Award (17 September 2009) (Exhibit RL-0015), para. 155; *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility (18 April 2004) (Exhibit RL-0059), para. 90; *TSA Spectrum de Argentina S.A. v. Argentina*, ICSID Case No. ARB/05/5, Award (19 December 2008) (hereinafter *TSA Spectrum v. Argentina*) (Exhibit RL-0078), para. 139; Hearing Transcript Day 2, pp. 136-138, citing *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award (5 March 2011) (Slovak Republic-Switzerland BIT); *Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan, Ltd v. Macedonia*, ICSID Case No. ARB/12/31, Award (22 September 2015).

¹⁸⁸ Hearing Transcript Day 2, p. 137:13-14.

b. Position of the Claimant

119. Transban argues that neither Article 1(d) *in fine* of the BIT nor Article 25(2)(b) *in fine* of the ICSID Convention find application in the present case and need not be addressed:¹⁸⁹ Transban proved its incorporation under the laws of Barbados and therefore corresponds to a national of Barbados for purposes of the first part of Article 1(d) of the BIT and the first part of Article 25(2)(b) of the ICSID Convention.¹⁹⁰ Both Article 1(d) *in fine* of the BIT and Article 25(2)(b) *in fine* of the ICSID Convention thus become inapplicable, since Venezuela's line of reasoning hinges on finding that Transban has remained a company incorporated in Venezuela and does not constitute a company incorporated under the laws of Barbados.
120. Transban counters that neither *Nottebohm* nor *Barcelona Traction* can override the nationality criterion expressly set out in the first part of Article 1(d) of the BIT, and that ICSID jurisprudence has clearly endorsed prioritising and not overwriting clear and specific treaty-based criteria for determining corporate nationality.¹⁹¹ Transban underlines that none of Venezuela's authorities pertain to the first part of Article 25(2)(b) of the ICSID Convention¹⁹² and that the first part of Article 1(d) of the BIT clearly acknowledges incorporation under the laws of a State as sufficient for ascribing the nationality of the incorporating State to a company, a view supported by numerous arbitral awards.¹⁹³

3. Piercing the Corporate Veil and Abuse of Process

a. Position of the Respondent

121. Venezuela calls for the Tribunal to pierce Transban's corporate veil and relies on the tribunals' decisions to lift the corporate veil in *TSA Spectrum* and in *Loewen*.¹⁹⁴ Venezuela invokes Article 25(2)(b) *in fine* of the ICSID Convention,¹⁹⁵ the preamble to the BIT, the definition of "investment" pursuant to the BIT and Article 1(d) *in fine* of the BIT,¹⁹⁶ in addition to *Nottebohm* and *Barcelona Traction*,¹⁹⁷ as support for this

¹⁸⁹ TCMJ, para. 90.

¹⁹⁰ Hearing Transcript Day 1, p. 137:8-18.

¹⁹¹ TCMJ, paras. 82-83, 87-88, citing: *Saluka Investments B.V. (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, (17 March 2006), para. 241; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/08, Award (17 October 2013), para. 128; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, UNCITRAL, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility (30 November 2009), paras. 415-16; Hearing Transcript Day 1, p. 120:1-17.

¹⁹² TCMJ, paras. 92-93; Hearing Transcript Day 1, p. 126:18-25, p. 127:1-3, 20-25, p. 128:6-25, p. 129: 1-13.

¹⁹³ TCMJ, para. 73, fn 91, paras. 94-95; Hearing Transcript Day 1, p. 125:25, p. 126:1-9. The Majority of the tribunal in *Tokios Tokelès v. Ukraine* expressed the view that although Article 25(2)(b) of the ICSID Convention does not specify any particular rule for establishing the nationality of corporate entities, ICSID tribunals had consistently turned to the State under whose laws an entity was incorporated for ascribing nationality, and that "[a] systematic interpretation of Art. 25(2)(b) would militate against the use of the control test for a corporation's nationality": *Tokios Tokelès v. Ukraine*, para. 42, citing Schreuer, *The ICSID Convention: A Commentary*, pp. 279-281.

¹⁹⁴ MOBJ, para. 160.

¹⁹⁵ MOBJ, paras. 163-168.

¹⁹⁶ MOBJ, paras. 170-174. Venezuela further invokes Articles 2(2), 3(1), 3(2), 4(1), 5(1) and 5(2) of the BIT: see MOBJ, para. 172, fn 176.

¹⁹⁷ MOBJ, paras. 157-159.

request, as well as for the argument that neither the BIT, nor the ICSID Convention provides for protection of an investor of the host State against the host State¹⁹⁸ or of a “mere shell or ... ‘company of convenience’”.¹⁹⁹ Venezuela further urges the Tribunal to abstain from exercising its jurisdiction so as to avoid an abuse of the ICSID mechanism.²⁰⁰

122. Venezuela considers that fulfilling Barbadian corporate requirements cannot detract from the fact that Transban’s business is conducted by Venezuelan nationals from within Venezuela. Venezuela further accuses the Velutini family and other Venezuelan nationals of having used Transban and its change of domicile from Venezuela to Barbados in order to manufacture jurisdiction under the BIT and to benefit from tax advantages.²⁰¹

b. Position of the Claimant

123. Transban counters that the tribunal in *TSA Spectrum* proceeded to pierce the corporate veil in the context of applying Article 25(2)(b) *in fine* of the ICSID Convention and that the tribunal in *Loewen* refused to entertain the piercing of any corporate veil.²⁰² Transban underlines that neither *Nottebohm* nor *Barcelona Traction*, as construed by Venezuela, has found application within ICSID arbitral awards or decisions.²⁰³ Transban rejects the notion that the Venezuelan nationality of some of its management team or of some of its shareholders warrants concocting an unwritten denial of benefits clause to exclude Transban from protection under the BIT.²⁰⁴
124. Venezuela knew or should have known that Barbados law provided for the existence of holding companies or international business corporations with little actual operations in Barbados; Venezuela could have proposed a different definition of “company” in Article 1(d) of the BIT so as to exclude such corporations if it had wished to do so.²⁰⁵
125. Transban further responds by underlining the propriety of prospective nationality planning so as long as it occurs at a time when the dispute is not yet cognizable.²⁰⁶

¹⁹⁸ MOBJ, paras. 162, 169, 172; Hearing Transcript Day 1, p. 83:22-25.

¹⁹⁹ MOBJ, para 172.

²⁰⁰ MOBJ, paras. 147, 155, 183-184; Hearing Transcript Day 1, pp. 30-31.

²⁰¹ MOBJ, paras. 145, 155. Venezuela singles out, as additional “clear evidence” of Transban’s intent to change its domicile to Barbados “with a view to circumventing the limits to [ICSID’s] jurisdiction”, the fact that Transban’s domicile in Barbados is the domicile of its Barbadian law firm: see MOBJ, para. 183, citing Exhibit C-0014, p. 31, and Exhibit R-0009.

²⁰² TCMJ, para. 94; see also *TSA Spectrum*, para. 140; TCMJ, para. 91, citing *Loewen*, para. 237.

²⁰³ TCMJ, para. 83, citing *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010), para. 73 (Exhibit RL-0061).

²⁰⁴ TCMJ, para. 99, referring to MOBJ, para. 149; TCMJ, paras. 9, 104.

²⁰⁵ Hearing Transcript Day 1, p. 117:4-18; Hearing Transcript Day 2, p. 28:16-21.

²⁰⁶ TCMJ, paras. 102-103, 106-107, citing: *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits (3 September 2013) (hereinafter *ConocoPhillips v. Venezuela*), para. 273 (Exhibit RL-0019); *Aguas del Tunari, S.A. v. Bolivia*, ICSID Case No. ARB/02.3, Decision on Jurisdiction (21 October 2005), para. 332; *HICEE B.V. v. Slovak Republic*, UNCITRAL, PCA Case No. 2009-11, Partial Award (23 May 2011), para. 103; *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/10/17, Award (9 January 2015), para. 184 (hereinafter *Renée Rose Levy v. Peru*); Christoph H. Schreuer, “Nationality of Investors: Legitimate Restrictions vs. Business Interests” 24 *ICSID Review – Foreign Inv. Law J.* 521 (Fall 2009), 524.

Transban insists that the incorporation and domiciliation of Transban in Barbados (in 2001) occurred many years before the events “giving rise to the dispute” (in 2007-2009),²⁰⁷ at a time when the dispute was not foreseeable, and that “there is no evidence of abuse or misuse of legal personality.”²⁰⁸ Transban argues that formal definitions of nationality should be disregarded “only to prevent a ‘misuse of power conferred by the law’” and only to prevent “an abuse of the system of international investment protection.”²⁰⁹ Transban notes that the high threshold to be met before finding an abuse of process requires “very exceptional circumstances” absent from the present dispute.²¹⁰

126. Transban refutes Venezuela’s allegation that it “merely ‘pretended to relocate’” and turns to its expert of Barbadian corporate law who describes the practice of companies indicating the address of their law firms as their registered office as “entirely normal and, in fact, customary”.²¹¹ As a holding company, Transban has held numerous investments in various jurisdictions; as an international business corporation endowed with Barbadian nationality, Transban is not authorised to conduct business in Barbados.²¹² Transban has maintained its good standing and its ability to do business under Barbados law without interruption; Transban has filed annual tax returns with the Barbadian Department of Inland Revenue, has paid its taxes and annual fees, has an office in Barbados, and Transban’s shareholder and board of directors meetings have taken place in Barbados.²¹³
127. Transban disagrees that it produced no evidence as to its ownership²¹⁴ and rejects any negative inference under IBA Rule 9.5: Transban argues that it lived up to its document discovery obligations in good faith and to the best of its abilities; moreover, Transban produced numerous documents on the very issues in respect of which Venezuela asks the Tribunal to draw negative inferences for lack of documentary evidence produced.²¹⁵ Transban notably refers to a list of many hundreds of shareholders, which dispels any notion that ownership of Transban is closely or family held,²¹⁶ and to a number of shareholder meetings which took place in Barbados as attested by minutes made available to Venezuela through document production.²¹⁷

²⁰⁷ Hearing Transcript Day 1, p. 134:3-7.

²⁰⁸ TOB, paras. 47, 56, 62, 69, 71; TCMJ, para. 101; Hearing Transcript Day 1, p. 135:2-3.

²⁰⁹ TCMJ, para. 101, citing *ConocoPhillips v. Venezuela*, para. 273 (Exhibit RL-0019).

²¹⁰ TCMJ, para. 105, citing *Renée Rose Levy v. Peru*, para. 186.

²¹¹ TCMJ, para. 107, fn 152; Carmichael Expert Report, para. 28.

²¹² Hearing Transcript Day 1, p. 110:3-4, 13-18; Hearing Transcript Day 2, p. 67:19-25, p. 68:12-23, p. 69:1-4.

²¹³ TCMJ, paras. 14-15; Carmichael Expert Report, para. 26; Hearing Transcript Day 1, p. 104:11-17; Hearing Transcript Day 2, p. 153:12-22.

²¹⁴ TCMJ, para. 98.

²¹⁵ Hearing Transcript Day 1, p. 111:16-25, p. 112:13-24, p. 113:6-12.

²¹⁶ TCMJ, para. 98; Exhibit C-0110; Hearing Transcript Day 2, pp. 192-194. Transban further dismisses evidence pertaining to Inversiones Transbanca de Venezuela and of Facebank for lack of relevance since neither is the Claimant nor is either the vehicle through which Transban invested in Venezuela: see TCMJ, para. 99, referring to MOBJ, paras. 150-151; TCMJ, para. 98, referring to MOBJ, fn 145.

²¹⁷ Hearing Transcript Day 2, p. 147:6-24; Exhibits C-0092, C-0093.

4. Analysis by the Tribunal

128. In order to enjoy the rights and protection accorded by the BIT, including the right to institute international arbitral proceedings with ICSID under Article 8(1) of the BIT, the Claimant must satisfy the jurisdictional requirements set by the BIT. Article 8(1) of the BIT provides that:

[d]isputes 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, 1965.²¹⁸

129. The Tribunal observes that this quoted text in English uses two terms when describing the dispute, namely “a national” and “a company”. When describing who may submit the request to ICSID, however, the text refers only to “the national concerned”. It seems that the drafters of the English version of the BIT were influenced by the phrasing of the ICSID Convention.²¹⁹ However, the Spanish version of the BIT in Article 8(1) refers to “un *nacional* o *sociedad* de la otra Parte Contractante” not only when it qualifies the disputes which may be submitted to the ICSID either for arbitration or conciliation but also when it describes who may submit such a request (. . .se someterá, a solicitud del *nacional* o la *sociedad* interesada, al Centro . . .).²²⁰
130. The Respondent has not raised an objection (and rightly so) that a company has no right under the BIT to institute arbitral proceeding in ICSID. Rather, the Respondent’s objection to the Tribunal’s jurisdiction *ratione personae* is based on the argument that Claimant does not satisfy the requirements to be considered a company of Barbados for the purposes of the BIT as that term is defined in its Article 1(d). That provision reads as follows:

For the purposes of this Agreement:

....

(d) ‘companies’ means, in respect of each Contracting Party, *corporations*, firms and associations *incorporated* or *constituted under the law in force in that Contracting Party*;

For the purposes of the Convention referred to in Article 8 [i.e., the 1965 Washington Convention] ‘Company’ shall include any company incorporated or constituted under the law in force in one Contracting

²¹⁸ Emphasis added.

²¹⁹ See Article 25(1) and (2) of the ICSID Convention, paragraph 2 defining the term “national” used in paragraph 1 thereof.

²²⁰ See UNTS, vol. 1984, p. 169. The Parties signed the BIT in both languages, English and Spanish, and as the Spanish text indicates “siendo ambos textos igualmente auténticos” (both texts being equally authentic). This clause is missing in the English version of the BIT. The UNTS however indicates that the authentic texts are Spanish and English and that the BIT was registered by Venezuela on 28 July 1997.

Party which is owned or effectively controlled by nationals or companies of the other Contracting Party.

131. Claimant in asserting jurisdiction argues that it is a Barbadian company which has invested in Venezuela; it does not argue that it is a Venezuelan company effectively controlled by nationals of Barbados or companies of that Contracting Party. The second part of the Article 1(d) definition is thus of no relevance for the purposes of the case at hand.²²¹
132. The Tribunal will therefore focus its attention on the definition of a company for the purposes of the BIT. It is not disputed that Transban is a corporation; the Respondent has not contended that Transban is not organized as a corporation. What the Respondent argues is that Transban, although a corporation, is not “incorporated or constituted under the law in force in [Barbados]”.
133. The Claimant was originally incorporated in Venezuela under its laws in December 1996 with the name Inversiones Cibanca, C.A., with its address in Caracas. According to the Certificate of Registration and the Third Clause governing the company it has been established for “the duration . . . of fifty (50) years as of the date it is recorded in the Commerce Registry”.²²²
134. In 1998 the company changed its name, while remaining incorporated in Venezuela and maintaining its address in Caracas, to “Inversiones Transbanca, C.A.”.²²³
135. There is no dispute between the Parties that throughout that period, between 1996 and 2000 the Claimant was incorporated under the laws of Venezuela as a Venezuelan company.
136. On December 5, 2000 the shareholders of Inversiones Transbanca, C.A., voted for changing “the company’s address to the Island of Barbados”.²²⁴ The Chairman of the Board further “proposed authorizing the opening of branch offices both in Caracas, Republic of Venezuela, and in New York, United States of America”.²²⁵ It appears from the Minutes of the Shareholders’ meeting that it was decided, in connection with moving the address of the company to St. Michael in Barbados, to change the name of the company. It was thus resolved to amend the First and the Third Clauses in the company’s Charter By-laws, which refer to the name and the address of the company. The name of the company was changed to “Transban Investments Corp.”²²⁶
137. The Shareholders’ meeting further authorized three Venezuelan nationals, Messrs. Jose Antonio Muci Borjas, Hernando Díaz Candia and Alejandro Álvarez, “to execute and process all legal procedures for the *constitution* and *incorporation* of the company in the

²²¹ See TCMJ, para. 90. See also Hearing Transcript Day 1, p. 137: 3-18.

²²² Exhibit C-0001, Certificate of Registration, December 19, 1996, p. 5.

²²³ Exhibit C-0002, Minutes of Extraordinary Meeting of Shareholders of Inversiones Cibanca, C.A., August 10, 1998.

²²⁴ Exhibit C-0004, Minutes of Shareholders’ Meeting of Inversiones Transbanca, C.A.

²²⁵ *Ibid.*

²²⁶ *Ibid.*

Constitutional Monarchy of Barbados...[and]... to execute the necessary notification to the corresponding [i.e. Venezuelan] Commercial Registry”.²²⁷

138. The Minutes of the Shareholders’ Meeting reveal that the intention was that “the company w[ould] be sheltered by the laws of the Constitutional Monarchy of Barbados as a company of international business under the International Business Companies Act.”²²⁸
139. The above short history of the company in the period 1996-2000 shows that it was established as a Venezuelan company by Venezuelan nationals and incorporated under the laws of Venezuela. Further, it appears that this Venezuelan company was not liquidated or dissolved before the end of 2000 when it decided to change its address to Barbados and also to change its name. In fact, had it been dissolved before the end of 2000 it could not have “continued” in Barbados.²²⁹
140. It is now for the Tribunal to determine whether this Venezuelan company, with its name changed to Transban Investments Corp., has subsequently been incorporated or constituted under the law in force in Barbados and ceased to be incorporated in Venezuela as a Venezuelan company. Only if this has been the case it may qualify as a company for the purposes of the BIT. This requirement flows from the definition of “companies” in Article 1(d) of the BIT, as well as from its object and purpose which have to be taken into account when interpreting the BIT as provided for in customary international law on interpretation of treaties as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. The Preamble, where usually the object and purpose of a treaty is expressed²³⁰, states that the two governments have agreed on the BIT “desiring to strengthen the traditional ties of friendship between their countries, to extend and intensify the economic relations between them, particularly with respect to investments by nationals and companies of one Contracting Party in the territory of the other Contracting Party”. The purpose and object of the BIT is thus to encourage and protect the investments made by nationals and companies of Barbados in Venezuela and by nationals and companies of Venezuela in Barbados.
141. Following its application in Barbados, Transban received on August 17, 2001 a Certificate of Continuance issued by Barbadian Registrar of Companies, which certifies that Transban “was continued as set out in the attached Articles of Continuance, under section 356.2(1) of the Companies Act of Barbados.”²³¹ The Certificate of Continuance and the Articles of Continuance of December 29, 2000 indicate that Transban Investments Corp. possesses in Barbados the company no. 19481. The Articles of Continuance also provide restrictions on the business that the company may carry on: “The Company shall not engage in any business other than international business as defined in the International Business Companies Act, 1991-24.” “International business” is defined in Barbados’ International Business Companies Act as “the business

²²⁷ *Ibid.* (emphasis added).

²²⁸ *Ibid.*

²²⁹ See below, paras. 143-149.

²³⁰ See M. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties, Nijhoff, Leiden-Boston 2009, p. 428, para. 13 and O. Dörr, K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties, A Commentary, Springer, Heidelberg 2012, p. 546, para. 56

²³¹ Exhibit C-0009.

of international manufacturing or international trade and commerce.”²³² The Act itself provides that

[i]ts purposes are to revise the law governing international business companies carrying on the business of international manufacturing or international trade and commerce *from within* Barbados with a view to

- (a) encouraging the development of Barbados as a responsible international financial centre;
- (b) provision of incentives by way of tax reductions, exemptions and benefits for international manufacturing and international trade and commerce *from within* Barbados.²³³

Transban thus cannot engage in domestic economic activity in Barbados. The amended section 9(7) of the International Business Companies Act provides that “[a] licensee shall not engage in any business than international business.”²³⁴

- 142. The Articles of Continuance indicate in a section entitled “Details of incorporation”, that “[t]he company was originally incorporated under the name ‘Inversiones Cibanca, C.A’ in the second Commercial Registry of the Office of the Federal District and the State of Miranda on December 19, 1996 under Number 56, Volume 695-A Sgdo. The company’s name was changed to ‘Inversiones Transbanca, C.A’.”²³⁵
- 143. It appears from the above that Transban was not strictly speaking, in the language of the BIT, “incorporated or constituted under the law of Barbados”²³⁶, but rather had moved to and “continued” in Barbados in accordance with the relevant provisions of Barbados’ Companies Act²³⁷. The Tribunal must therefore consider whether “continuance” should be regarded as satisfying the requirement under the BIT of Claimant being “incorporated or constituted under the law of Barbados”.
- 144. The Companies Act consists of five Parts. Part I is entitled “*Formation and Operation of Companies*” and is divided into 12 Divisions. Division A bears the title “*Incorporation of Companies*”. Subsection 4(1) of the Companies Act provides that “subject to subsection (2), one or more persons may incorporate a company by signing and sending articles of incorporations to the Registrar of Companies”.²³⁸ There is no evidence, and it is not claimed, that Transban would have been established in Barbados in this way, under subsection 4 (1) of Part I, that is by signing and sending articles of incorporation to the Registrar of Companies. Nor is there any evidence that the Registrar of Companies would have issued to Transban a Certificate of Incorporation in

²³² Section 3 (1) of International Business Companies Act (Exhibit CL-0125).

²³³ Section 2 (1) of International Business Companies Act (Exhibit CL-0125) (emphasis added).

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ In the Request for Arbitration the Claimant stated that “Transban is a corporation created under the laws of Barbados” (para. 12) and that “Transban is incorporated in Barbados” (para. 72).

²³⁷ Exhibit CL-0108A.

²³⁸ Subsection (2) is not relevant to the present proceedings as it disqualifies three categories of persons, namely those (a) who are less than 18 years of age, (b) are of “unsound mind” and have been so found by a Tribunal in Barbados or elsewhere, or (c) have the status of a bankrupt, from a right to form or join in the formation of a company under the Companies Act.

accordance with Section 404. Such certificate is a conclusive proof of the incorporation of a company named in the certificate. A company comes into existence on the date shown in its certificate of incorporation.²³⁹

145. The relevant provisions of Barbados' Companies Act relating to Transban moving to Barbados are to be found in Part III²⁴⁰ entitled "*Other Registered Companies*". Part III consists of eight Divisions²⁴¹. Of particular relevance for the Tribunal's analysis are the provisions of Division D, entitled "*Corporate Mobility*", upon which the Parties focused their arguments.
146. It is useful to reproduce the text of this Division relevant for the analysis of Transban's situation. It reads as follows:

DIVISION D

CORPORATE MOBILITY

356.1. (1) A body corporate that is *then incorporated in a jurisdiction other than Barbados may, if so authorised under the laws of that other jurisdiction, apply to the Registrar for a certificate of continuance under this Act.*

(2) An application under subsection (1) must be made by *articles of continuance* in the prescribed form.

(3) Articles of continuance may, without so stating in the articles, effect any amendment to the corporate instruments of the body corporate that applies for continuance under this section, if the amendment

(a) is authorised in accordance with the law applicable to the body corporate before continuance under this Act; and

(b) is an amendment that a company incorporated under this Act is entitled to make to its articles.

356.2. (1) Upon receipt of articles of continuance, the Registrar may issue a certificate of continuance in accordance with section 404.

(2) On the date shown in the certificate of continuance

(a) the body corporate becomes a company to which this Act applies as if the company had been incorporated under this Act;

(b) the articles of continuance become the articles of incorporation of the continued company; and

²³⁹ See Sections 8 and 9 of the Companies Act of Barbados (Exhibit CL-0125).

²⁴⁰ Part II of the Companies Act is entitled "Protection of Creditors and Investors", Part IV "Winding-Up" and Part V "Administration and General". They are not relevant for the purpose of the analysis of the Respondent's objection to the Tribunal's jurisdiction *ratione personae*.

²⁴¹ The eight divisions of Part III are as follows: Division A: Companies without Share Capital, B: External Companies, C: Former-Act Companies, C.1: Statutory Companies, D: Corporate Mobility, E: Mutual Insurance Companies, F: Companies with a Separate Account Structure, G: Segregated Cell Companies.

(c) except for the purpose of section 62, the certificate of continuance is the certificate of incorporation of the continued company.

356.3. When a body corporate is continued as a company under this Act, sections 353 and 354 apply, with such modifications as the circumstances require, to the continued company as if it had been a former-Act company continued under this Act.

356.4. (1) Subject to section 356.5, a company may

(a) if it is authorised by its shareholders in accordance with this section; and

(b) if it is established to the satisfaction of the Registrar that its proposed continuance in another jurisdiction will not adversely affect its creditors or shareholders, apply to the appropriate official or public body of the other jurisdiction and request that the company be continued as a corporation in the other jurisdiction as if it had been incorporated under the laws of that other jurisdiction.

(2) A notice of a meeting of shareholders complying with section 109 must be sent in accordance with that section to each shareholder and must state that a dissenting shareholder is entitled to be paid the fair value of his shares in accordance with sections 213 to 222; but a failure to make that statement does not invalidate a continuance effected in another jurisdiction pursuant to an application made otherwise in accordance with this section.

(3) Each share of a company carries the right to vote in respect of a continuance in another jurisdiction whether or not it otherwise carries a right to vote.

(4) An application for continuance in another jurisdiction becomes authorised when the shareholders voting thereon have approved the continuance by special resolution.

(5) The directors of a company may, if authorised by the shareholders at the time of approving an application under this section for continuance of the company in another jurisdiction, abandon the application without further approval of the shareholders.

356.5. A company may not apply for continuance in another jurisdiction, nor may it be continued under the laws of another jurisdiction, as a body corporate incorporated in that other jurisdiction pursuant to section 356.4 unless the laws of that other jurisdiction provide in effect that

(a) the property of the company continues to be the property of the body corporate;

(b) the body corporate continues to be liable for the obligations of the company;

(c) any existing cause of action, claim or liability to prosecution is unaffected;

(d) a civil, criminal or administrative action or proceeding pending by or against the company can be continued to be prosecuted by or against the body corporate; and

(e) a conviction against or ruling order or judgment in favour of or against, the company can be enforced by or against the body corporate.

356.6. (1) Upon receipt of notice satisfactory to him that a company that has made an application under section 356.4 has been continued as a corporation under the laws of another jurisdiction, the Registrar must file the notice and issue a certificate of discontinuance in accordance with section 404.

- (2) After a certificate of discontinuance is issued under subsection (1) in respect of a company that is continued as a corporation under the laws of another jurisdiction, the corporation thereupon becomes an external company for all the purposes of this Act.
- (3) The notice described in subsection (1) is, for the purposes of section 404, articles that conform to law.
147. Transban submitted its application to the Registrar of Companies under Section 356.1. (1) of the Companies Act. It is not disputed that it fulfilled the condition set in that Section to be “then [i.e., at the moment of application] incorporated in a jurisdiction other than Barbados” since it was in 2000-2001 (at least until August 17, 2001) still incorporated in Venezuela.
148. The other condition in Section 356.1. (1) for the company applying for the Certificate of Continuance is that it is “so authorised under the laws of that other [i.e., non-Barbadian] jurisdiction” in which the applying company is incorporated. The Parties disagree as to whether the laws of Venezuela “authorise” companies incorporated in Venezuela to apply for continuance in other jurisdictions. It is this requirement of Barbadian law that leads the Tribunal’s analysis to Venezuelan law.
149. The Respondent argued that “Venezuelan law does not authorize a Venezuelan *sociedad anónima* to ‘continue’ in Barbados”; that “[w]hat you will find in Venezuela is the change of domicile within the territory [of Venezuela]”, but that “[t]he idea of an international transfer of the seat of the company, that idea of continuance is just simply completely ignored by the Venezuelan legal system”.²⁴²
150. The Respondent, however, in answering a question of the Tribunal at the hearing admitted that “there is no prohibition in statute” in Venezuelan law to re-domicile a corporate entity.²⁴³ Respondent further elaborated that “unless there is a specific treaty providing for a mechanism [of re-domiciling] – such as CIDIP II, which is an Inter-American Convention [on Conflicts of Laws Concerning Commercial Companies] which contains a mechanism for re-domiciliation outside of Venezuela – the way in which any re-domiciliation should occur would be to dissolve an entity and then move on”.²⁴⁴
151. The Claimant contended that Venezuelan law authorizes the re-domiciliation of a Venezuelan company since it does not prohibit it. In support of this contention it refers to the “full legal capacity” of both individuals and private corporations,²⁴⁵ which, according to it, derives from Article 112 of the Venezuelan Constitution “which recognizes economic freedom — that is free will - which entails, first freedom to enter into contracts - and the bylaws of a corporation are a contract — . . . ; and furthermore, freedom to determine the contents of that contract, unless there is a specific and express

²⁴² Hearing Transcript Day 1, p. 77: 14-25.

²⁴³ Hearing Transcript Day 2, p. 171: 19. Counsel of the Respondent was a little bit contradictory in his statement when he stated that “if a treaty exists, it wouldn’t be prohibited” to re-domicile. Hearing Transcript, Day 2, p. 171: 6-7.

²⁴⁴ Hearing Transcript Day 2, p. 172: 2-7. Venezuela stated that Barbados is not Party to the CIDIP II (Hearing Transcript Day 2, p. 171: 5-6). The statement was not challenged.

²⁴⁵ Hearing Transcript Day 2, p. 176: 23-24.

provision of a law . . . enacted by Congress that prohibits certain types of contracts or certain types of contents.”²⁴⁶ The Claimant submits that “there is no rule, no such rule that prohibits change of domicile to another jurisdiction. It does not exist. There is, in other words, no rule that prohibits the mobility of a company.”²⁴⁷ It may be that Venezuelan law does not prohibit the re-domiciliation of a Venezuelan company as Claimant argues. However, the question is not whether Venezuelan law prohibits but rather whether the Barbadian law requirement that such re-domiciliation is “so authorized” is satisfied by Venezuela simply not prohibiting such an action.

152. In the Tribunal’s view, the word “authorize” in Section 356.1. (1) in its ordinary meaning is rather equivalent “to give legal or formal warrant to a person or body to do”, “to empower” or “to permit”²⁴⁸, and not simply to a lack of a formal prohibition. Similarly, in legal English, in which Barbados’ laws are enacted, the word “authorize” has a meaning of “1. to give legal authority, to empower; 2. to formally approve, to sanction” and the word “authorization” means “1. official permission to do something, sanction or warrant; 2. the official document granting such permission.”²⁴⁹
153. In the Tribunal’s opinion, the word “authorize” has a similar meaning in the Barbados Companies Act. It is used in Division D “Corporate Mobility” not only in Section 356.1. (1) in relation to corporations moving to Barbados, but also in Section 356.4. (1) in relation to corporations leaving Barbados. Under that latter section, subject to conditions set out in Section 356.5., “a company may (a) if it is *authorized* by its shareholders in accordance with this section; . . . apply to the appropriate official or public body of other jurisdiction and request that the company be continued as a corporation in the other jurisdiction as if it had been incorporated under the laws of that other jurisdiction.”²⁵⁰ This section describes the procedure and conditions for authorizing by shareholders of moving a company out of Barbados and applying to the appropriate official of another jurisdiction to continue the company in that other jurisdiction. “Authorized” in this section therefore indicates authority given by the shareholders and would not exist simply because the shareholders do not prohibit such movement.
154. The Tribunal therefore concludes that the phrase “so authorized” requires an affirmative empowerment rather than merely a lack of prohibition. This conclusion is also supported by the limited record before the Tribunal.
155. First, the Tribunal observes that under section 356.6. (1) of Barbados’ Companies Act, upon receipt of notice that a company has been continued as a corporation under the laws of another jurisdiction, the Barbados’ Registrar of Companies “must file the notice and issue a *Certificate of Discontinuance*.”²⁵¹ The legal consequence of the issuance of such a certificate is that “[a]fter a Certificate of Discontinuance is issued . . . in respect of a company that is continued as a corporation under the laws of another jurisdiction, the corporation thereupon becomes an external company for all the purposes of this

²⁴⁶ Hearing Transcript Day 2, p. 177: 7-16.

²⁴⁷ Hearing Transcript Day 2, p. 178: 4-7.

²⁴⁸ Shorter Oxford English Dictionary, 5th ed., vol. 1, p. 154.

²⁴⁹ Black’s Law Dictionary, 10th ed., B.A. Garner (ed.), Thomson Reuters 2014, p. 159.

²⁵⁰ Emphasis added.

²⁵¹ Emphasis added.

[Barbados Companies] Act.”²⁵² In other words, the primary example of a corporate mobility regime in Barbados that the Tribunal has before it reveals a clear intent to have the migration of a company not only recognised by the receiving jurisdiction but also by the jurisdiction from which the corporation has departed.

156. Second, the Claimant, and its expert on Barbadian law, Sir Trevor Carmichael, argued that Barbados company law is influenced by Canada’s company law²⁵³ and referred to the book on Corporate Law in Canada by Bruce Welling.²⁵⁴ While it seems that Division D on Corporate Mobility in Barbados’ Companies Act (Section 356) is modelled on the Canada Business Corporation Act (Section 187), it is to be noted that Welling observes in his treatise that there “are potential difficulties whatever the two jurisdictions involved.”²⁵⁵ He elaborates:

The first problem involves the capacity of the corporation to change jurisdictions. In the B.C.C.A.²⁵⁶ example, this capacity was statutorily bestowed. However, one cannot anticipate that this will be the case in all jurisdictions. In the event that the jurisdiction of incorporation does not have such a section²⁵⁷, some interpretation of the ‘immigration’ section of the destination jurisdiction is required . . . the C.B.C.A. requires that a body corporate seeking to immigrate be ‘so authorized by the laws of the jurisdiction where it is incorporated.’ It is unclear whether this requires that the other jurisdiction statutorily permit emigration, or whether it is sufficient that the concept of emigration is within the scope of the corporate constitution and is, correspondingly, not prohibited by the Act.²⁵⁸

The primary authority relied upon by Claimant thus recognises that there are particular issues present when the State departed does not explicitly empower re-domiciliation. Welling concludes his discussion of “corporate emigration and immigration” with the following cautionary note:

[T]hose who plan or are faced with a proposed continuance would do well to analyse in detail the types of incorporation statutes in the two jurisdictions before committing themselves to simplistically designed and potentially inadequate articles of continuance.²⁵⁹

157. The potential confusion as to a corporation’s true status that may follow, unless an authorization to re-domicile is provided for, supports an interpretation of “so authorized” that calls for an explicit empowerment.

²⁵² Section 356.6(2) (Exhibit CL-108A).

²⁵³ Hearing Transcript, Day 2, p. 29:11-12 and p. 34: 8-9.

²⁵⁴ Bruce Welling, *Corporate Law in Canada, The Governing Principles*, (2nd ed., Toronto-Vancouver 1991) (Exhibit CL-0120).

²⁵⁵ *Ibid.*, p. 247.

²⁵⁶ Where “B.C.C.A.” refers to the British Columbia Companies Act.

²⁵⁷ The Tribunal understand that there is no such section in the Venezuelan law, under which Transban was originally incorporated as Inversiones Cibanca, C.A.

²⁵⁸ Bruce Welling, *Corporate Law in Canada*, p. 247. Footnotes omitted (Exhibit CL-0120).

²⁵⁹ *Ibid.*, p. 249.

158. Indeed, such potential confusion exists in the present proceeding. First, the Tribunal observes that even if it were to accept the Claimant's view that a Venezuelan company can re-domicile because Venezuelan law does not prohibit it from changing the company's seat to another country, there still would remain the question of the legal consequences of such a move under the law of Venezuela for the legal status of the company in that country. Barbados' laws, including the Companies Act, cannot have an impact on the legal situation in Venezuela of a company originally incorporated under the latter's laws unless Venezuelan law attaches such legal consequences to "corporate mobility", to the company's leaving Venezuela. The Tribunal notes that Claimant is unable to prove that Transban has ceased to be a company incorporated in Venezuela under Venezuelan law after it was issued a Certificate of Continuance in August 2001 in Barbados. The Tribunal acknowledges Claimant's argument that Transban was not formally discontinued in Venezuela since there is no procedure for such discontinuance under Venezuelan law and that Claimant could not have produced a Certificate of Discontinuance because such a certificate does not exist under Venezuelan law.²⁶⁰ Moreover, the Tribunal acknowledges, Claimant's argument that the Minutes of Shareholders' meeting of December 5, 2000, containing a decision to change the domicile of the company, were recorded by the Commercial Registrar in the Commercial Registry and the decision of the Registrar has never been challenged by the Government of Venezuela. The Tribunal on the basis of the evidence before finds that Claimant does not establish, however, that it no longer exists as a legal entity within Venezuela.
159. The record indicates that the Venezuelan company Inversiones Transbanca, C.A. on occasion and at least shortly after re-domiciliation continued to act in Venezuela under that name even after it changed its name to Transban Investment Corp. and received on August 17, 2001 from the Barbados' Registrar of Companies the Certificate of Continuance. At the Extraordinary meeting of Shareholders of Bavarian Motors, C.A., held on August 30, 2001, Inversiones Transbanca, C.A., represented by Dr. María Margarita Sosa, participated in the decision to increase the company's capital and Inversiones Transbanca, C.A. subscribed fifty percent of the capital increase.²⁶¹
160. Similarly and more recently, in a contract signed in August 2006 between Bavarian Motors and Banco Fondo Común, granting a line of credit, Mr. José Luis Velutini Octavio acted and signed the contract as "the Director of the corporation Inversiones Transbanca, C.A. (f/k/a Inversiones Cibanca, C.A.)".²⁶² The contract indicates that Inversiones Transbanca, C.A. is "domiciled in the city of St. Michael in the Constitutional Monarchy of Barbados" as was "recorded beforehand at the Second Mercantile Registry of the Judicial Jurisdiction of the Capital District and State of Miranda on December 19, 1996". The contract further states that the company "change[d] [its] corporate name to the current name [as] recorded [in] the above-cited Mercantile Registry on August 20, 1998." The contract also indicates that the company changed its "corporate domicile [which] was recorded [in] the above-cited Mercantile Registry on December 26, 2000. . . ." and "the company continues to [sic!] August 17, 2001 as an International Trade Corporation under Section 356-2 (1) of the Companies

²⁶⁰ Hearing Transcript Day 2, p. 146: 9-14 and p. 184: 21-23.

²⁶¹ Exhibit C-0010.

²⁶² Exhibit C-0033.

Law, Volume 308 of the Laws of Barbados, and is currently registered [sic!] in the registry of Companies”.²⁶³

161. The Tribunal therefore concludes on the basis of the evidence and argument presented to it, that Section 356.1. (1) in providing that a company, a corporate body which is incorporated in another jurisdiction may apply, if so authorized under the laws of that other jurisdiction, to the Registrar for a Certificate of Continuance in order to be continued in Barbados means something more than just a lack of express prohibition of corporate mobility in the laws of the jurisdiction of the original incorporation of a company.
162. There is another matter of concern to the Tribunal. The Claimant presents, as its investment in Venezuela, the establishment of a company called Bavarian Motors, C.A.²⁶⁴ However, Bavarian Motors was incorporated in Venezuela on July 13, 2000²⁶⁵, not by Transban but by Inversiones Transbanca, some 5 months before the shareholders of that company decided to change the company’s name and to move “the company’s address to the Island of Barbados”.²⁶⁶ As the Claimant admits, half of the Bavarian Motors’ initial capital was funded by Inversiones Transbanca and the remaining half by B.B.O. Servicios Financieros, C.A.²⁶⁷ It cannot thus be disputed that the original investment was a Venezuelan one, and not a foreign one. Subsequently, in November 2003, after Inversiones Transbanca moved its “company’s address” and changed its name to Transban Investment Corp., Transban acquired B.B.O.’s share of Bavarian Motors and thus became the exclusive and sole shareholder in Bavarian Motors.²⁶⁸
163. The Expert was asked by Counsel for the Claimant “to assess whether Transban is considered a ‘company’ under the laws of Barbados and within the meaning of Article 1(d) of the [BIT].²⁶⁹”
164. In the view of the Tribunal the key question rather is whether Transban is “a company incorporated or constituted under the law in force” in Barbados, because only then it may satisfy the requirements of the definition of companies in Article 1(d) of the BIT. The Expert’s conclusion is that “Transban is a ‘company’ constituted under the laws of Barbados, and has been a Barbados company since August 17, 2001 (the ‘Continuance Date’)”.²⁷⁰
165. The Expert bases his conclusion on the fact that “Transban followed the prescribed legal requirement for continuance and received a certificate of continuance in Barbados”.²⁷¹ In his view, “[u]nder the laws of Barbados, the legal effect of the issuance of that

²⁶³ *Ibid.*

²⁶⁴ CM, paras. 32-33.

²⁶⁵ Exhibit C-0003, Registro Mercantil.

²⁶⁶ Exhibit C-0004, Minutes of Shareholders’ Meeting of Inversiones Transbanca, C.A.

²⁶⁷ CM, para. 33.

²⁶⁸ *Ibid.*

²⁶⁹ Carmichael Expert Report, para. 3.

²⁷⁰ Carmichael Expert Report., para. 8.

²⁷¹ *Ibid*, para. 9.

certificate of continuance is that Transban is considered as an entity originally incorporated in Barbados”.²⁷²

166. The Tribunal notes that the Expert first takes the view that Transban is a company “constituted under the laws of Barbados” and then in the next paragraph of his report that “Transban is considered as an entity originally incorporated in Barbados”. It seems that he does not make a distinction between companies incorporated, and companies constituted, under the law in force in Barbados, although the text of the BIT contemplates the two alternatives when it 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”.²⁷³
167. The Tribunal further observes that Section 356.2 of the Barbados Companies Act is more nuanced than what the Expert suggests. It does not provide that “the legal effect of the issuance of that certificate [i.e., the Certificate of Continuance] is that a company is considered *as an entity originally incorporated* in Barbados”²⁷⁴, as asserted by the Expert, but rather states that “[o]n the date shown in the Certificate of Continuance the body corporate becomes a company to which this Act [i.e., the Companies Act] applies *as if* the company *had been incorporated* under this Act”.²⁷⁵ This language indicates that the Companies Act distinguishes between the incorporation and the continuation of companies. Transban is a continued company to which the Barbados’ Companies Act applies the same way as if it had been incorporated under that Act. But it is clear that Transban was not incorporated under the Barbados Companies Act because the “original” incorporation of companies in Barbados is done under Section 4 of Barbados’ Companies Act.
168. Further, it must be noted that the Barbados’ Companies Act, when defining the term “company”, distinguishes between incorporation and continuation. It defines a “company” as “a body corporate that is *incorporated or continued* under this Act”.²⁷⁶ In the view of the Tribunal, a company cannot be under the Barbados’ Companies Act continued and at the same time incorporated. No evidence to the contrary has been brought to the Tribunal’s attention.
169. There is one additional reason why, in the view of the Tribunal, Transban cannot be viewed as a company incorporated in Barbados, although the Claimant asserted that “Transban is a company that since August 17, 2001, has been incorporated in Barbados”.²⁷⁷
170. As mentioned above (see para. 142), the Transban’s Articles of Continuance contain a restriction on its business: “[T]he company shall not engage in any business other than international business as defined in the International Business Companies Act, 1991-24”.²⁷⁸ This corresponds with the intention of the Shareholders reflected in the

²⁷² *Ibid.*

²⁷³ Emphasis added.

²⁷⁴ Carmichael Expert Report, para. 9 (emphasis added).

²⁷⁵ Subsection 356.2. (2) (a) (emphasis added).

²⁷⁶ Section 2 (1) (b) (emphasis added).

²⁷⁷ Hearing Transcript Day 1, p. 98:18-20; p. 104:7-8.

²⁷⁸ Exhibit C-0009.

Minutes of their meeting on 5 December 2000, since the company was to be “sheltered by the laws . . . of Barbados as a company of international business under the International Business Companies Act”.²⁷⁹

171. Section 3 (2) of that Act provides, that “[f]or the purposes of this Act, an international business company shall be deemed to be resident in Barbados where that company is incorporated or registered under the laws of Barbados.”²⁸⁰ Clearly, the International Business Companies Act does make a distinction between companies incorporated under the laws of Barbados and those which are registered under the laws of Barbados. It is to be recalled that the division on corporate mobility (Division D) under which Inversiones Transbanca, C.A. applied for the issuance of the Certificate of Continuance, is contained in Part III of the Barbados’ Companies Act, entitled “Other Registered Companies”. In the view of the Tribunal, for the purposes of International Business Companies Act, Transban is “deemed to be a resident in Barbados” as a *company registered under the laws of Barbados*, and not as a company incorporated under the laws of Barbados.
172. In addition to incorporation, the BIT, in its definition of companies in Article 1 (d), uses also the term “constituted under the law in force in that Contracting Party”. To recall, the provision reads as follows: “(d) ‘companies’ means, in respect of each Contracting Party, corporations, firms and associations incorporated or *constituted* under the law in force in that Contracting Party”.
173. The Tribunal is of the view that Transban cannot be considered as “constituted under the law of Barbados” as that term is used in the definition of companies in the BIT. The ordinary meaning of the term “constitute” is “to establish” or “to form”.²⁸¹ This term has a similar meaning in legal English. It is understood as “to give legal or appropriate procedural form to (something), to establish by law, to make up or form”.²⁸²
174. The Barbados’ Companies Act does not use the term “constitute”, “constituted” or “constitution”. Rather, it uses the term “formation of companies” in the title of its Part I “Formation and Operation of Companies”. The way to form a company under that Part is to incorporate it pursuant to Section 4. From the above described history of Transban²⁸³ it is clear that it was not formed or established in Barbados, it had been in existence already for more than four years as a Venezuelan company when it decided to move to Barbados.
175. The Tribunal thus concludes that Transban does not satisfy the conditions set out in Article 1 (d) of the BIT because it has not been incorporated or constituted under the laws of Barbados. If Barbados, as “a responsible international financial centre”²⁸⁴, wished to provide coverage to a whole variety of different sorts of companies governed by its Companies Act, it could have proposed to and agreed with Venezuela on a different, broader definition of companies for the purposes of the BIT. It did not do so.

²⁷⁹ Exhibit C-0004, Minutes of Shareholders’ Meeting of Inversiones Transbanca, C.A.

²⁸⁰ Section 3 (2) of the Companies Act of Barbados (Exhibit CL-0125) (emphasis added).

²⁸¹ See Shorter Oxford English Dictionary, Fifth Edition, Vol. I, p. 496.

²⁸² Black’s Law Dictionary, Tenth Edition, B.A. Garner (ed.), Thomson Reuters, St. Paul 2014, p. 376.

²⁸³ See paras. 133-139 above.

²⁸⁴ Section 2 (1) (a) of the Barbados International Business Companies Act (Exhibit-CL-0125).

176. In view of the above, the Tribunal, by majority, upholds the Respondent’s objection *ratione personae* and declares that the International Centre for Settlement of Investment Disputes has no jurisdiction and that the Tribunal has no competence to entertain the case.²⁸⁵

VII. COSTS

177. On May 10, 2016, the Parties filed their respective Statements of Costs.

178. Each Party has requested the Tribunal to order that it be reimbursed for the costs of its legal representation, including the experts’ fees and disbursements.²⁸⁶ The Claimant further asked that it be reimbursed for its share of all arbitration costs paid to the ICSID and for the Respondent be ordered to pay its share.²⁸⁷

179. The Respondent has declined to pay any advance to the ICSID. Claimant made this payment *in lieu* of the Respondent.

180. The Claimant has submitted that it has incurred USD 1,712,511.52 of costs in total. This amount includes USD 700,766.90 for legal fees, USD 166,744.62 for disbursements (including travel, subsistence, the expert report, printing, courier fees) and USD 845,000.00 for advances paid to ICSID (including USD 410,000.00 that the Claimant was required to advance in view of Venezuela’s refusal to pay any advance), and the lodging fee.

181. The Respondent has submitted that it incurred the total costs for the proceedings, USD2,875,000,00, broken down as follows:

Item	Status	Amount
Legal fees	Disbursed	USD 92,000
Legal fees	Pending	USD 2,601,000
Expert fees	Pending	USD 75,000
Hearing expenses	Disbursed	USD 96,000
Other expenses	Disbursed	USD 11,000
Total		USD 2,875,000

182. Article 61 (2) of the ICSID Convention is applicable to the issue of costs. It provides:

(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.

²⁸⁵ Arbitrator Professor David Caron does not share this conclusion. As explained in his Dissenting and Concurring Opinion appended to the Award as Annex B, he would have rejected the *ratione personae* preliminary objection.

²⁸⁶ TCMJ, para. 110 (c); MOBJ, para. 500 (d).

²⁸⁷ TCMJ, para. 110 (c) and (d).

183. As Professor Schreuer observes “[n]either the Convention, nor the attendant Rules and Regulations offer substantive criteria for the tribunal’s decision on which party should bear the costs”.²⁸⁸ The Tribunal has a rather broad discretionary power over the allocation of costs incurred in the ICSID arbitration proceedings. Some tribunals applied the approach that “costs follow the event”, ordering the losing party to bear the costs of the proceedings, including the reasonable costs of the legal representation of the party which prevailed. They have occasionally taken into account the conduct of the parties in the proceedings.
184. The Tribunal sees no compelling reason not to follow this practice.
185. Consequently, it decides that the ICSID costs, including the fees and expenses of the Members of the Tribunal, shall be borne by the Claimant, Transban Investment Corp. Those costs total USD 738,188.97. The Claimant made all advances for the costs. Therefore, any balance left will be returned to the Claimant by the ICSID Secretariat.
186. Regarding the Respondent’s request that it be reimbursed by the Claimant for the costs of its legal representation, the Tribunal notes that the amount claimed USD 2,875,000.00 is neither fully justified nor reasonable. It is four times higher than the Claimant’s expenses for its legal representation. Even taking into account the fact that the Respondent’s costs for legal representation include the costs for the preparation of its Counter-Memorial on the Merits (79 pages), which was submitted together with its Memorial on Objections to Jurisdiction (57 pages), while the Claimant’s costs of legal representation cover only the jurisdictional phase, the difference is striking.
187. There is also a significant difference between the Respondent’s claimed expenses in these proceedings and its expenses in other ICSID arbitration proceedings: *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20). In the *Blue Bank* proceedings, which involved two rounds of written briefs and a four-day hearing on Jurisdiction, the Respondent, being represented by the same Counsel, claimed USD 1,709,295.00 and the Tribunal has ordered the Claimant to pay the Respondent this amount in full.²⁸⁹ It is to be recalled that in the present proceedings each party filed just a single written brief on Jurisdiction and the hearing was held during two days only. Moreover, the first objection to the jurisdiction of the Tribunal based on Venezuela’s denunciation of the ICSID Convention, was identical to the first objection in the *Blue Bank* proceedings. The same Counsel represented the Respondent in both proceedings.
188. Finally, certain expenses of the Respondent were incurred in relation to a challenge of one arbitrator, which challenge was dismissed by the Chairman of the ICSID Administrative Council.
189. Taking all these circumstances into account, the Tribunal — in the exercise of its discretion — determines that a reasonable amount for the Respondent’s costs of its legal representation for which it has to be reimbursed by the Claimant, is USD 600,000.00.

²⁸⁸ Schreuer, *The ICSID Convention: A Commentary*. p. 1228, para. 17 (Exhibit RL-0162).

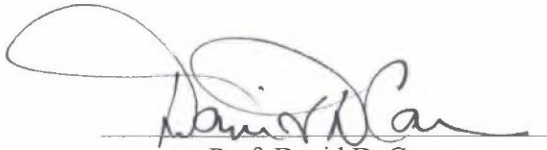
²⁸⁹ *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20), Award (26 April 2017), paras. 203 and 215 (3).

190. None of the Parties specified the period within which the reimbursement has to be paid. The Tribunal considers that a sixty-day period will be appropriate. Neither party requested that the interest shall be applied to the same award. Therefore, none is determined by the Tribunal.

VIII. DECISION

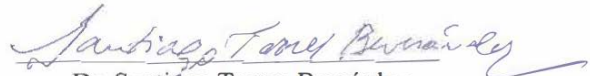
191. For the foregoing reasons, the Arbitral Tribunal:

- 1) Declares, by majority, that the Centre has no jurisdiction and the Tribunal lacks competence to adjudicate the present dispute;
- 2) Decides that the Claimant shall bear in full the ICSID costs of the proceedings (fees and expenses of the members of the Tribunal and the administrative fees of the Centre);
- 3) Orders the Claimant to pay the Respondent, within sixty days from the date of this Award, USD 600,000.00 (six hundred thousand United States Dollars) as the reimbursement of the Respondent's reasonable costs and expenses incurred in connection with these proceedings.



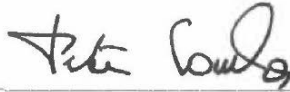
Prof. David D. Caron
Arbitrator
Date: November 6, 2017

(Dissenting and Concurring Opinion attached)



Dr. Santiago Torres Bernárdez
Arbitrator
Date: November 7, 2017

(Separate Opinion attached)



H.E. Judge Peter Tomka
President of Tribunal
Date: November 9, 2017

ANNEX A

Separate Opinion of Arbitrator Santiago Torres Bernárdez concerning the *ratione temporis* preliminary objection of the Respondent

1. In its paragraph 93 the Award dismisses the Venezuela's *ratione temporis* preliminary objection, while my own conclusion is that the objection should have been upheld by the Tribunal. The present opinion explains why, to my regret, I am unable to join my colleagues in the dismissal of such objection. Thus, this opinion is essentially focused on what seems to be the core of disagreement among us, beginning with the question of determination of the *critical date* to be taken into account in the interpretation and application of the saving clause of Article 72 of the ICSID Convention.

2. The Award finds that the critical date is 24 July 2012. This conclusion is reached by extrapolating the six-month period of Article 71 of the ICSID Convention with respect to the denunciation of the Convention into the interpretation of the provision set forth in Article 72 of the Convention as pleaded by *Transban*, while for me the relevant critical date is 24 January 2012, namely the date in which the World Bank, depositary of the ICSID Convention, received Venezuela's Notice of Denunciation, namely as provided for in Article 72.

3. My conclusion is based on the very text of Article 72, as well as on its context and the object and purpose of the provision enounced in that Article within the general economy of the ICSID Convention; a conclusion confirmed by the *travaux* relating to both Article 72 and Article 71. In my opinion, the issue that divides Parties, as set out in the Award, of whether or not *Transban* filed with ICSID its Request for Arbitration either on 24 or on 25 July 2012 is quite irrelevant for the determination to be made by the Arbitral Tribunal, without prejudice of recalling in that respect that the official communication of the Centre to the Bolivarian Republic of Venezuela concerning the institution of the Case states that it was on 25 July 2012 when the Centre *received* the Request for Arbitration on behalf of *Transban*.

4. There is, in my opinion, no legal justification to introduce the "six-month period" of Article 71 into the crucible of the interpretative operation of Article 72, as the Award does. Any such period is alien to the object and purpose of Article 72. The wording of Articles 71 and Article 72 of the ICSID Convention differ from each other for a good cause, namely because each of these provisions is called to serve a different function within the legal system established by the ICSID Convention. The scope of the temporal criteria in the text adopted for Article 71 and for Article 72 of the ICSID Convention respectively by the States reflects undoubtedly their clear intent to define the temporal scope of each of the provisions set forth in those Articles differently, in view of the different function each of these two *final provisions* of the Convention are called to serve.

5. Given the clearness of the text of Article 72 itself and that the text - as explained by the International Law Commission in its commentary to article 27 of its Draft Articles on the Law of Treaties - is presumed by the interpreter to be the authentic expression of the intentions of the parties in the treaty, this arbitrator does not see the need to alter that presumption in the course of any given particular application of Article 72. The conventional rule set out in Article 72 should be applied in accordance with the meaning of the terms thereof resulting from the application of the rules of international law on interpretation of treaties codified in Articles 31, 32 and 33 of the VCLT which, as

indicated above, are based upon the primacy of the text in the interpretation, without prejudice of course of having recourse to the relevant extrinsic interpretative elements forming part of such codified rules.

*

6. From its very Preamble, the multilateral ICSID Convention distinguishes, on the one hand, “consent to participate in the ICSID Convention” as a Centre for the settlement of investment disputes through the conciliation or arbitration procedures defined therein and, on the other hand, “consent of the parties to an investment dispute” to submit it for settlement to one or another of these proceedings of the Centre. Article 71 is concerned with the effects on the consent to participate in the ICSID Convention of a Contracting State’s notice of denunciation of the Convention, while Article 72 relates to the effects of any such notice on the eventual existing rights and obligations under the Convention arising from the parties to a given investment dispute consent to the jurisdiction of the Centre, namely in the relations between the denouncing Contracting State and a protected private investor national of another Contracting State of the ICSID Convention.

7. In other words, Article 72 does not regulate the effects of the notice of denunciation by a Contracting State of the multilateral ICSID Convention on its conventional relations with other Contracting States to such Convention as Article 71 does. What Article 72 regulates are the effects of that kind of notice with respect to the “binding agreements” between the denouncing Contracting State and a foreign private party or parties to submit a given investment dispute to the Centre for conciliation or arbitration as referred to in paragraph 6 of the Preamble of the ICSID Convention, namely of those “binding conciliation and/or arbitral agreements” which may be in existence before receipt by the depositary of the Convention of the notice of denunciation thereof by the Contracting State concerned.

8. The need of regulating the effects of the Contracting States’ notices of denunciation of the ICSID Convention with respect to any such “binding conciliation and/or arbitral agreements” is easy to understand if one bears in mind that such agreements are external to the ICSID Convention itself because, as declared in paragraph 7 of its Preamble: “... 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.”

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9. The present Award begins by making the distinction between the ICSID Convention and such “binding agreements” between the parties to an investment dispute. But, thereafter, the distinction became blurred in the reasoning of the Award as a consequence of the extrapolation of the temporal element of Article 71 (the six-month period) to Article 72, ignoring the fact that the latter has a temporal element of its own which is alien to the six-month period of Article 71. The first victim of that approach is the *effect utile* of the temporal element of Article 72, namely the terms “... consent given ... before such notice was received by the depositary”.

10. In my opinion, the extrapolation the Award makes detracts from the intended meaning and purpose of the saving clause of Article 72 which results from the ordinary meaning of its terms in their context and in the light of the object and purpose of the ICSID Convention and which is confirmed by the published *travaux* of the ICSID Convention as well as by the most respected doctrinal commentaries (*Schreuer, Fouret, Castro de Figueidero, etc.*).

11. Different constructions based, for example, on the reference made in Article 72 to consent “given by one of them” do not support the doctrinal argument of a few to the effect that the unilateral “general standing offers” of ICSID arbitration made by host States (for example, in an Agreement for the Promotion and Reciprocal Protection of Investments (BIT) (APPRI for its Spanish acronym) or in any other form) but which had not been accepted by the investor prior to the critical date established in Article 72 would remain unaffected by the notice of denunciation of the ICSID Convention. These doctrinal argument is based on the misreading that the words “given by one of them” refer to the legal relationship between the host State and the investor when the precedents thereof in the text are the denouncing State, its constituent subdivisions or agencies or its nationals. I am pleased to underscore that the present Award casts also aside the doctrinal argument based on the terms “given by one of them”, coinciding on that point with my own position thereon. But, the Award through a reasoning different from mine, reaches a conclusion similar *mutatis mutandis* to the conclusion of the supporters of the “given by one of them” argument on the meaning and scope of the saving clause of Article 72 of the ICSID Convention.

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12. Concerning the legal consequences of the termination of a treaty - of which *denunciation* is indeed one of its forms - the Award in its paragraph 75 quotes some provisions of Article 70 (Consequences of the termination of a treaty) of the Vienna Convention on the Law of Treaties (VCLT) and considers that the provisions of that Article codify customary international law in that matter. I think so concerning this last proposition, but I disagree with the role attributed by the Award to that provision of the Vienna Convention in the interpretation of Article 72 of the ICSID Convention.

13. First, it should be recalled that Article 70 of the VCLT enounces a residual rule (unless the treaty otherwise provides or the parties otherwise agree) as admitted by the Award itself and Article 72 of the ICSID Convention *does indeed* provide otherwise. For example, the scope of the saving clause articulated by Article 72 only applies to “rights or obligations under the Convention” in existence before the critical date defined in that Article, while the customary rules codified in Article 70 of the VCLT also protect “legal situations”. These “legal situations” are not listed in the saving clause of Article 72 of the ICSID Convention. However, the Award in its paragraph 78 concludes otherwise, namely that: “The purpose of Article 72 is thus to preserve rights, obligations or legal situations which have arisen prior to the receipt of notices under Article 70 or Article 71 of the (ICSID) Convention”

14. In support of the conclusion quoted above which adds “legal situations” to the text of the saving clause of Article 72 of the ICSID Convention, the Award would seem to invoke the textual fact that the clause applies to notices made pursuant to both Articles 70 (notices

concerning exclusions from territorial application) and Article 71 (notices concerning denunciations) of the ICSID Convention. But, I fail to see how the fact that the saving clause of Article 72 applies to those two kinds of notices implies that the clause also preserves mere “legal situations”. In other words, I do not see the relation between the premise and the conclusion of the Award on this issue because it is quite clear that the saving clause of Article 72 preserves only “rights or obligations” under the ICSID Convention “arising out of consent to the jurisdiction of the Centre” by the parties to an investment dispute.

15. That said, for such “rights and obligations” to be in existence at a given time, the other a party to an investment dispute - namely the private foreign investor - must have also given his own consent to submit the dispute to ICSID arbitration or conciliation (Article 25 (1) of the ICSID Convention). Otherwise, as explained in the Preamble of the Convention, there is not a “binding agreement” between the parties to the dispute to submit it to ICSID arbitration or conciliation. It follows necessarily that for the “rights or obligations” mentioned in Article 72 of the ICSID Convention to come into existence, it is necessary, as also articulated in the Preamble, the “mutual consent” of the parties to the dispute. The unilateral consent of one of the parties to the dispute is not a source of jurisdictional rights or obligations under the ICSID Convention.

16. The exclusion of “legal situations” from Article 72 of the ICSID Convention is in my opinion a textual fact explained by the particular kind of “rights or obligations” dealt with in such Article which relate, essentially, to the arbitral and conciliation ICSID procedures available to the parties to an investment dispute when these have concluded, by means external to the ICSID Convention, a binding agreement or undertaking to arbitrate or to conciliate the dispute in the Centre. And these international procedures for settlement of disputes, by their very nature, require the “mutual consent” of the parties to the dispute just as in customary international law, mutual consent that paragraph 23 of the Report of the Executive Directors qualifies as the cornerstone of the jurisdiction of the Centre.

17. It shall be also recalled that in the ICSID system the application of the Law of Treaties shall be conducted with discernment. There is no problem whatsoever with matters relating to Article 71 because only States are or may become Contracting States to the ICSID Convention. But when the reasoning is made in connection with the “arbitral agreements or undertakings” between the parties to an investment dispute to submit it to the Centre caution is advisable. Why? Because under the ICSID Convention, such “arbitral agreements or undertakings” are not “treaties”, since one of the parties, the investor, lacks *jus standing* to conclude treaties. There are however other general principles and rules of international law applicable to those agreements or undertakings, such as *pacta sunt servanda*, the mutual consent of the parties to the dispute as the basis of international arbitration, the requirement of the State’s consent to submit its disputes with third parties to international courts and tribunals, the principle of *res judicata*, etc.

18. Lastly, the above described meaning in Article 72 of the ICSID Convention of the expression that notices concerning territorial applications (Article 70) or denunciations (Article 71) of the Convention “... shall not affect the rights or obligations ...arising out of consent to the jurisdiction of the Centre” is not only supported as *context* by the aforementioned paragraph 6 of the Preamble and Article 25 (1) of the Convention but also by other Articles of the Convention. For instance, a similar expression is used in the first

lines of Article 66 (2) of Chapter IX (Amendment) of the ICSID Convention where it is obvious that the expression cannot encompass “legal situations”.

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19. Some of the rules codified by Article 70 of the VCLT are in line with the provisions articulated in articles 71 and 72 of the ICSID Convention. Article 71 reflects the rule codified in Article 70, paragraph 1(a), of the VCLT to the effect that denunciation releases the parties from any obligation to maintain compliance with the treaty. In the case of the ICSID Convention the denunciation takes effect, as stated in Article 71, six months after receipt by the World Bank of the notice of the denouncing Contracting State. This means that, in the instant case, Venezuela was released from further complying with its conventional obligations in its relations with other Contracting States of the ICSID Convention six months after 24 January 2012, *i.e.*, on 25 July 2012, but this is of course without prejudice of the saving clause enounced in Article 72 for rights or obligations under the ICSID Convention arising out of consent to the jurisdiction of the Centre by the parties to a dispute.

20. The provision of Article 72 corresponds in turn to Article 70, paragraph 1 (b), of the VCLT according to which the termination of a treaty, by denunciation or otherwise, does not affect any right, obligation or legal situation of the parties created through *the execution of the treaty prior to its termination*. But it is not identical. As already indicated, Article 72 of the ICSID Convention does not mention “legal situations”. Furthermore - and this is at the core of my disagreement with the conclusion of the Award - in Article 72 of the ICSID Convention the temporal scope of the saving clause enounced therein does not go on until the date of effective termination of the denouncing Contracting State’s participation in the Convention in its relations with other Contracting States, but as explicitly stated in the Article 72 until *receipt of the notice of denunciation by the depositary of the Convention*. In this case, until the notice of denunciation of the Bolivarian Republic of Venezuela was received by the World Bank on 24 January 2012.

21. It follows that, contrary to the conclusion of the Award , the six-month period of Article 71 of the ICSID Convention - *i.e.*, the period between 24 January 2012 and 24 July 2012 - is not covered by the saving clause of Article 72 the text of which only preserves from the effects of a notice of denunciation the “rights or obligation under the ICSID Convention ... arising out of consent to the jurisdiction of the Centre” *existing before the critical date of 24 January 2012*, which is the date on which the World Bank received the notice of denunciation of Venezuela. Continuity of the “binding agreements” mutually consented between the parties to an investment dispute to submit any such dispute to ICSID arbitration or conciliation preserved by the saving clause of Article 72 is, exclusively, that of those binding agreements executed before such critical date. In the instant case, the aforementioned saving clause does not operate at all beyond the 24 January 2012.

22. It should also be recalled that in the ILC commentary on the object of Article 70 of the VCLT (Article 66 of the ILC Draft Articles), the Commission made the caveat that the rule in paragraph 1 (b) of Article 70 of the VCLT relates only to the rights, obligations, or legal situations of the *States parties* to the treaties created through the execution thereof and it is not concerned with the eventual “vested interests” of *individuals*. Nevertheless,

this caveat as such has no incidence whatsoever in the present case because *Transban*, as indicated below, has not pleaded any vested interest, right or legal situation of its own prior to 24 January 2012. *Transban* has argued all along that its consent to the present arbitration was given on 24 July 2012 when the ICSID received a scanned copy of its Request for Arbitration annexed to an email from Counsel for Claimant.

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23. The objective legal question to be answered by the Arbitral Tribunal for the purpose of upholding or dismissing the Venezuela’ *ratione temporis* preliminary objection is, in my opinion, the following: Before the receipt by the World Bank of Venezuela’s Notice of Denunciation on 24 January 2012 were there in the relations between the Bolivarian Republic of Venezuela and *Transban* as parties to the present investment dispute rights or obligations under the ICSID Convention arising out of a consensual obligation binding both of them to submit the dispute to ICSID arbitration, thereby empowering the ICSID and the present Arbitral Tribunal with the jurisdiction and competence respectively necessary to settle the dispute?

24. In the light of the circumstances of the instant case, the answer to that question cannot be but negative. At no stage has *Transban* pleaded to have given any kind of consent to arbitrate the present investment dispute within the ICSID *before* the receipt by the World Bank of Venezuela’s Notice of Denunciation of the ICSID Convention on 24 January 2012. The plea of *Transban* has been that it had accepted the unconditional consent to international arbitration offer granted by Venezuela under the form of a standing “general arbitration offer” (in paragraph 4 of article 8 of the 1994 Barbados/Venezuela BIT) on 24 July 2012, namely, on a date following (not preceding) the receipt by the World Bank of Venezuela’s Notice of Denunciation on 24 January 2012. *Transban* is wrong with respect to the effects under the ICSID Convention of its late acceptance of Venezuela’s arbitration offer. But, *Transban* has correctly understood the mechanism according to which Venezuela’s offer in the applicable BIT shall be accepted by the investor in order to establish *the mutual consent of the parties to the investment dispute to submit it to ICSID arbitration* as provided for in the Preamble and Article 25 (1) of the ICSID Convention. Likewise, *Transban* admits the principle that a notice of denunciation filed pursuant to Article 72 of the Convention has, as from a given point in time, preclusive effects with respect to the possibility for the investor to invoke arbitral rights or obligations under the ICSID Convention, but it is wrong in the identification of the temporal scope of the saving clause of Article 72.

25. It follows from the above that propositions that standing “general arbitration offers” in BITs remain unaffected by a Contracting State’s notice of denunciation are erroneous as regards establishing the jurisdiction of the ICSID. Under Article 72 of the ICSID Convention private foreign investors’ eventual acceptance of those offers *after* the receipt of the notice by the depositary of the Convention are without effect with respect to establishing the jurisdiction of the Centre and, therefore, the competence of an ICSID arbitral tribunal.

26. In the system established by the ICSID Convention the standing “general arbitration offers” by themselves and without further ado - namely without the acceptance of the offer by the private foreign investor concerned – do not amount to a host State’s binding

consent to submit the investment dispute in question to ICSID arbitration. The contrary proposition cannot prevail. Why? Because it would not only ignore the text and context of Article 72 of the ICSID Convention, but also the legal principle under the Convention and customary international law that to be binding “arbitration agreements” require the consent of both parties to the dispute at issue as well as the condition that “arbitration agreements” are not entered into *erga omnes* but with regard to a particular person or persons. Arbitration offers are not arbitration agreements

27. The “jurisdictional obligations” derived from those binding arbitration agreements between the parties to the dispute, often bilateral, take place with regard to, and as between two different persons, the one that undertakes an obligation with the other and the one that has undertaken an obligation with the former as pointed out by the ICSID *ad hoc* Committee in *CMS v. Argentina (Annulment)* with respect to that kind of obligations in the context of application of the so-called umbrella clauses This implies, in my opinion, a major legal obstacle standing between *Transban’s* plea and Venezuela’s general arbitration offer. In any event, within the ICSID system an “offering State” cannot be equated with a “bound State”.

28. As already explained, the rights or obligations under the ICSID Convention arising out of the consent to the jurisdiction of the Centre mentioned in Article 72 do not come into being without the consent of both parties to the dispute, namely without a duly established mutual consent of those parties. Thus, a unilateral offer by any one of the parties is not a source of the aforementioned rights or obligations. The Preamble and Article 25 (1) of the Convention are crystal clear in that respect, as well as general international law. It is only when both parties to the investment dispute have given their respective consents to the ICSID arbitration that no party may withdraw it unilaterally. In this case, however, Claimant’s consent to arbitrate the present investment dispute was not given by *Transban* until 24 or 25 July 2012, *i.e.*, too late to perfect the requirement of the mutual consent of the parties, because as of 24 January 2012, the doors to ICSID arbitration were closed for Claimant pursuant to Article 72 of the ICSID Convention.

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29. The object and purpose of the rule in Article 72 of the ICSID Convention - as clearly expressed in its text - is indeed to operate as a saving clause in order to preserve the access to the ICSID arbitral or conciliation procedures and facilities in face of a given notice of denunciation of the Convention by a given Contracting State, but *providing* that both the Contracting State hosting the investment and the protected investor of another Contracting State have consented - *prior* to receipt of the notice by the depositary - to submit an actual or future *investment* dispute for settlement to ICSID arbitration or conciliation, as the case may be.

30. The saving clause enounced by Article 72 therefore preserves pending arbitral ICSID proceedings as well as “ICSID arbitration agreements” duly executed between the parties with respect to an actual or future investment dispute or disputes from the preclusive effects entailed by the exercise by the host Contracting State (or by the Contracting State of the investor’s nationality) of the unconditional right of denunciation of the ICSID Convention granted to all Contracting States in its Article 71. However, the scope of the saving clause of Article 72 is not, as already indicated, all embracing. The Article limits

the non-retroactive effects of a notice of denunciation exclusively to those ICSID proceedings and ICSID arbitration agreements in existence before the date on which the depositary received the notice.

31. The temporal delimitation of the saving clause made by Article 72 of the ICSID Convention actually narrows the temporal scope of the corresponding customary international law rule codified by the VCLT which extends the non-retroactive effect of a notice of denunciation until the very date on which the denunciation of the treaty takes effect (Article 70 (2) of the VCLT). Therefore, there is here a further discrepancy between the provision in Article 72 of the ICSID Convention and the customary rule codified in Article 70 of the VCLT, discrepancy that for me is determinative for the conclusion of the absence of “jurisdiction of the Centre” in the present case. As from the very date of its institution, the present case falls outside the temporal scope of the saving clause of Article 72. This factual circumstance prevents the Centre’s procedures and facilities for arbitration or conciliation of investment disputes from being deemed available for *Transban* when it filed its Request for Arbitration on 24 or 25 July 2012 (see Report of the Executive Directors, paragraph 22).

32. On the other hand, Article 72 of the ICSID Convention preserves without temporal limitations whatsoever all ongoing arbitral proceedings and agreements between the parties to the dispute providing for the jurisdiction of the ICSID *in existence between them before the critical date of receipt of the notice of denunciation of the Convention by the depositary*. Hence, the fact that Venezuela’s “general arbitration offer” in the applicable BIT has been accepted by *Transban* after the aforementioned critical date is what prevents the resulting undertaking from constituting an arbitral agreement susceptible to opening *Transban*’s access to ICSID arbitral or conciliation procedures and facilities.

33. Obviously, the BIT formulating the aforementioned “general arbitration offer” of Venezuela cannot modify the multilateral ICSID Convention which has its own amendment procedures (Articles 65 and 66 of the Convention), as it is equally truth that the ICSID Convention cannot modify a jota the bilateral Barbados/Venezuela BIT. Both the ICSID Convention and the applicable BIT are self-contained treaties and the final provisions of each of them must be interpreted and applied in good faith in accordance with the Law of Treaties. To do otherwise would result in misleading interpretations and applications of both the Convention and the BIT.

34. It follows that the fact that the Barbados/Venezuela BIT contains a standing “general arbitration offer” to private investors of Barbados is as such an element alien to the process of interpretation or application of Article 72 of the ICSID Convention. On the other hand, the fact that for the reasons developed in this Opinion the “jurisdiction of the Centre” does not exist in the instant case because of the *temporal* restriction of the saving clause of Article 72 and that, therefore, the present ICSID Arbitral Tribunal has no competence to adjudicate this ICSID case is a conclusion which I have reached evidently without prejudice of the eventual legal effects that the acceptance by *Transban* on 24 or 25 July 2012 of Venezuela’s general arbitration offer of the BIT may have with respect to non-ICSID arbitral mechanisms. As stated by the Institute of International Law in Article 3 of its Resolution on “Legal Aspects of Recourse to Arbitration by an Investor against the Authorities of the Host State under Inter-States Treaties”:

“The requirements and characteristics of investment arbitral mechanisms chosen by the parties shall be respected and their effects recognized. This applies, *inter alia*, to the existence of the parties’ consent (host States and investors) and the existence of an investment in conformity with the applicable international instruments, taking particularly into account the features of both ICSID and non-ICSID different arbitration mechanisms (*Annuaire de l’Institut de Droit International*, Session of Tokyo (2013), Vol. 75, at pages 425 (French) and 429/430 (English)).

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35. In the circumstances of the present ICSID case, for the Arbitral Tribunal to adjudicate Venezuela’s *ratione temporis* preliminary objection the first step to be taken is, in my opinion, to determine the meaning and scope of the saving clause set forth in Article 72 of the ICSID Convention through the application of the rules on the interpretation of treaties codified in Articles 31 to 33 of the VCLT. Only when that step is taken, shall it be possible to ascertain whether the legal fact of the acceptance by *Transban* on 24 or 25 July 2012 of Venezuela’s general arbitration offer in Article 8 (4) of the Barbados/Venezuela BIT has established or not from that date on a binding arbitral agreement between the Parties to the present investment dispute and if any such agreement falls within the scope of the saving clause of Article 72 of the ICSID Convention.

36. To accomplish the first step suggested above, the application of the “General rule of interpretation” of Article 31 of the VCLT suffices to ascertain with no difficulties whatsoever the meaning and scope of the saving clause of Article 72 of the ICSID Convention. Not having been established that Contracting States of the ICSID Convention have given a “special meaning” to some of the terms of Article 72, the object of the interpretative process of the Article is to determine in good faith the “ordinary meaning” of its terms in their context and in the light of the object and purpose of the ICSID Convention as enounced in its Preamble. In so doing, the interpreter must bear in mind that for the purpose of interpretation, the “context” comprises, following Article 31 of the VCLT, in addition to the text of Article 72 itself, the ICSID Convention as a whole, and particularly the two last paragraphs of the Preamble, Articles 25 and 26 on the jurisdiction of the Centre, Article 66 (2) on amendment of the Convention, Articles 70, 71 and 75 (d) of the Final Provisions and the instrument entitled “Report of the Executive Directors” to which the text of the ICSID Convention was attached.

37. As regards the three interpretative elements, extrinsic to both the “text” and the “context”, that according to paragraph 3 of Article 31 of the VCLT the interpreter shall also take into account together with the context, only paragraph (c) could be eventually relevant in the circumstances of the instant case, namely, “any relevant rules of international law applicable in the relations between the parties” to the ICSID Convention (the “Contracting States” in the terminology of the Convention). The taking into account of this element of the “General rule of interpretation” in the interpretative process of Article 72 of the ICSID Convention may pose in turn questions of “intertemporal law” the resolution of which is controlled within the “General rule” by the principle of interpretation in good faith (see paragraph (16) of the ILC’s commentary to article 27 of its Draft Articles on the Law of Treaties).

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38. However, these “intertemporal” questions of international law do not arise in the present case because, as it is generally admitted, its relevance in the interpretation process of a given treaty is dependent on the intentions of the parties to the treaty concerned and there is not any evidence indicating that the Contracting States of the ICSID Convention have intended to give an evolutionary meaning to any one of terms used on Article 72 either at the time of adoption of the Convention in 1965 or thereafter. Moreover, the consensual basic principle governing international arbitration has neither evolved nor been modified since 1965. It follows that interpretation of the terms of Article 72 must for this arbitrator be appreciated in the light of the law contemporary to the adoption of the ICSID Convention.

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39. Having applied the provisions in Article 31 of the VCLT bearing in mind that the general rule of interpretation of treaties articulated therein forms “a single, closely integrated rule” as was explained by the ILC (paragraph 8) of its Introduction to the Commentary to Articles 27 and 28 of its Draft Articles on the Law of Treaties), I have reached the following three main broad conclusions concerning the rule set forth in Article 72 of the ICSID Convention:

(a) As stated by the opening words of Article 72, a notice of denunciation filed pursuant to *Article 71 shall not affect* rights or obligations under the ICSID Convention arising out of consent to the jurisdiction of the Centre which may exist between the parties to a given actual or future investment dispute (between a host State and a protected private investor) and, consequently, any such rights or obligations are not altered or modified *as per the saving clause* when the notice of denunciation takes effect in the relations between the Contracting States to the ICSID Convention (functional *autonomy* of the saving clause);

(b) The *rights or obligations under the ICSID Convention* preserved by the saving clause are those arising out of consent to the jurisdiction of the Centre given by both parties to the investment dispute concerned because it is only by their mutual consent that the ensuing “binding agreement” may create rights or obligation for those parties, under the ICSID Convention, that open their access to the conciliation and arbitral proceedings set forth by the Convention (scope *ratione materiae* of the saving clause);

(c) The *rights or obligations under the ICSID Convention* referred to hereinabove are fully preserved by the saving clause, but only when the mutual consent of the parties to the investment dispute accepting the jurisdiction of the Centre has been given *before* receipt of the notice of denunciation of the Contracting State by the depositary of the Convention and , consequently, Article 72 leaves outside the jurisdiction of the Centre conciliation or arbitration agreements between the parties to the dispute perfected or executed between them during the period running from the date of the receipt of the notice by the depositary and the date on which the denunciation takes effect in the relations between Contracting States (scope *ratione temporis* of the saving clause)

40. It is on the basis of the above conclusions that I uphold the Respondent’s *ratione temporis* preliminary objection because *Transban’s* acceptance on 24 or 25 July 2012 of

Venezuela's general arbitration offer contained in Article 8(4) of the Barbados/Venezuela BIT does not fall within the temporal scope of application of the saving clause of Article 72 and, consequently, that acceptance is as such unable to establish a binding jurisdictional bond as regards settlement of the present investment dispute by recourse to ICSID arbitration. This conclusion is furthermore fully confirmed by the *travaux préparatoires* of Article 72 of the ICSID Convention.

41. In fact, during the elaboration of the ICSID Convention it became crystal clear that rights and obligations arising out from *existing consents* to ICSID arbitration between the parties to an investment dispute should be preserved as per the saving clause of Article 72, but not beyond or otherwise. In the three drafts (preliminary, first, and revised drafts) of this present Article 72, the saving clause only preserved the undertakings or consents to the jurisdiction of the Centre "given prior to the notice of denunciation" or "prior to the date of any such notice". The statements made by *Broches* during the consideration of Article 72 (then Article 73) cannot be clearer, and they correlate point by point with meaning and scope of Article 72 which results from my interpretation of the saving clause made pursuant to Article 31 of the VCLT.

42. After beginning by explaining that Article 72 (then Article 73) was intended to be about the effects of notices of denunciation of the Convention (Article 71) or the exclusion of a territory from the scope of application of the Convention (article 70) with respect to *already given consents* to conciliation or arbitration *under the Convention* (emphasis added), *Broches* stated *inter alia*, the following:

"... the intention of Article 73 (72) in the text submitted to the Directors, was to make it clear that if a State had 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" (*Documents Concerning the Origin and the formulation of the Convention*, Volume II, Part 2, page 1009);

"... 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" (*Ibid.*, p. 1010);

"(Mr. Gutierrez Cano raised the question of cases where there was not an agreement between the State and the investor but only a general declaration on the part of the State in favour of the submission of claims to the Centre and a subsequent withdrawal from the Convention by that State before any such claim had been in fact submitted to the Centre. In that hypothesis, would the Convention still compel the State to accept the jurisdiction of the Centre?) *Broches*' response to the question:

"... a general statement of the kind mentioned by Mr. Gutierrez Cano would not be binding on the State that had made it until it had been accepted by the investor. If the State withdraws its unilateral statement through the denunciation of the Convention before it has been accepted by any investor, no investor could later bring a claim before the Centre. If, however, the unilateral offer of the State has been accepted before the

denunciation of the Convention, then disputes arising between the State and the investor after the date of denunciation will still be within the jurisdiction of the Centre” (*Ibid.*)

“... the provision under discussion had not been questioned at any of the regional meetings or in the Legal Committee. It was a basic essential provision. The Convention establishes the principle that agreements to arbitration cannot be broken by one of the parties. The provision under discussion only drew the necessary conclusions in the event of denunciation of the Convention: the denouncing State could not incur in any new obligations, but existing obligations would remain in force” (*Ibid.*, p. 1011).

(After this last statement by *Broches* the consensus was for Article 72 of the Convention to remain unchanged)

43. It follows from the above that the outcome of an interpretation of Article 72 of the ICSID Convention in accordance with Article 31 of the VCLT and the *travaux préparatoires* of the Convention are essentially in harmony, the latter confirming the meaning and scope of the aforementioned result. This means undoubtedly that in the present case for the Respondent to be considered a State which has “given its consent” to submit the present investment dispute to ICSID arbitration, the “general arbitration offer” made by Venezuela in the BIT should have been duly accepted by *Transban* before Venezuela’s notice of denunciation was received by the depositary. However, Claimant’s consent was granted too late for an ICSID arbitration because by 24 or 25 July 2012 the saving clause of Article 72 of the Convention had not been operative for a long time, namely since 24 January 2012 on.

44. In his remarkable commentary on Article 72 of the ICSID Convention, *Schreuer*, following *Broches*, describes with further precision the effects of denunciation of the ICSID Convention on standing general offers that host States articulate in their legislation or a treaty as follows:

“Consent to jurisdiction is perfected only after its acceptance by both parties. A unilateral offer of consent by the host State through legislation or a treaty before a notice under ... Art. 71 would not suffice for purposes of Art. 72. An investor’s attempt to accept a standing offer of consent by the host State that may exist under legislation or a treaty after the receipt of the notice of denunciation under ... Art. 71 would not succeed. In order to be preserved by Art. 72 consent would have to be perfected prior to the receipt of the notice of ... denunciation. *In order to benefit from the continued validity under Art. 72 consent must have been given before the denunciation of the Convention... Under the explicit wording of Art. 72 the relevant date is the date of receipt of the notice by the depositary. Therefore, the provision in Art.71 that the denunciation of the Convention by a State party takes effect only six months after notice has been given does not afford an opportunity to perfect consent during this period*” (*Schreuer, The ICSID Convention. A Commentary, Second Edition, 6th printing 2014*), pp. 1280/1281) (*italics supplied*).

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45. I share the *Schreuer’s* conclusions. They generally correlate with my own findings on the meaning and scope of the saving clause of Article 72 of the ICSID Convention construed pursuant to the codified rules on interpretation of treaties of the VCLT. It

should also be recalled that during elaboration of the Convention attempts to further limit the scope of the saving clause of Article 72 were defeated and that no amendments were made at any moment to make the operation of the saving clause subject to, or conditioning it in any respect by the six-month period of Article 71 which, as already stated, concerns the different question of the effects of notices of denunciations (or of territorial applications) in the relations between Contracting States to the ICSID Convention (not in the relations between a host Contracting States and a protected private investor).

46. It would seem that the Award tries to sustain in some way the extrapolation of the six-month period of Article 71 of the ICSID Convention into its reading of Article 72 on the fact that during that period the Convention was still in effect for the denouncing Contracting State, in the instant case for the Bolivarian Republic of Venezuela. If so, the argument is not substantiated because, first, the critical date for the application of Article 72 is 24 January 2012 and, second, the ICSID Convention does not establish terminal limits to the continuation of the rights or obligations under the Convention preserved from the effects of the denunciation by the saving clause of its Article 72.

47. Consent to the jurisdiction of the Centre remains in effect or is preserved by the saving clause when it has been given by both parties to the investment dispute before the notice of denunciation is received by the depositary. And this is quite independent from the fact that the ICSID Convention continues to be in force in the relations between the Contracting States until the expiration date of the six-month period of article 71. In addition, mutual consents to the jurisdiction of the Centre actually preserved by the saving clause of Article 72 of course remain operative beyond the expiration date of any such six-month period. Undoubtedly, *Transban* admits this conclusion because, according to its own plea, it filed its Request for Arbitration on 24 July 2012 knowing full well that the ICSID Convention would no longer take effect in the relations between the Bolivarian Republic of Venezuela and Barbados as Contracting States the following day, namely on 25 July 2012. It just so happens that in the present case the whole unfolding of the proceedings takes place after Venezuela is no longer a Contracting State. *Transban* has not challenged either the unitary character of the regime established by Article 72, namely, that any such regime applies to all forms or mechanisms whereby consent to the jurisdiction of the Centre of the parties to the dispute is perfected (contract, legislation, BIT or any other written form). Nevertheless, *Transban* denies the *effect utile* of Article 72 of the ICSID Convention.

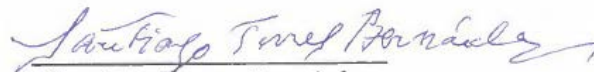
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48. Finally, a further consideration which explains why, to my regret, I cannot support the Award is precisely that its conclusion, following *Transban*, also denies the *effect utile* of Article 72 of the ICSID Convention, principle qualified by the ICJ as one of the “fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence” (*Territorial Dispute (Libya/Chad), Judgment, I.C.J. Reports 1994*, p. 25, paragraph 51). In fact, the Award deprives the saving clause of Article 72 of the meaning or effect that was to be attributed within the system established by the ICSID Convention and without a satisfactory accompanying explanation, because in the instant case, a conclusion taking due account of the *effect utile* principle would not be contrary in any respect to the letter and spirit of such saving clause (see *I.C.J. Reports 1950*, page 229).

49. As explained by the ILC in its commentary to the corresponding Draft Articles on the Law of Treaties, the principle of *effect utile* (rule of effectiveness; maxim *ut res magis valeat quam pereat*) is embedded in the general rule of interpretation of Article 31 (1) of the VCLT under the control of “good faith” and the “object and purpose of the treaty” (Commentary to Articles 27 and 28, Introduction, paragraph (6)). Moreover, it should also be recalled that an interpretation the result of which would render futile or make an inanity the clear terms of Article 72 of the ICSID Convention or of any other Article of the Convention could be considered an “unreasonable result” and, consequently, in case of doubts, the interpreter is allowed to have recourse to the supplementary means of interpretation of Article 32 of the VCLT, including the published *travaux préparatoires*, in order to determine the meaning and scope of the saving clause of Article 72 the operation of which, as explained in this Opinion, is not subject in any respect to Article 71 of the Convention. The opening words of Article 72 cannot be clearer: “Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect” the rights or obligations under the ICSID Convention preserved by the saving clause of Article 72.

*

50. In sum, in the light of the considerations made all along in this opinion, I uphold, the Respondent’s *ratione temporis* preliminary objection. It follows therefore that for me the Claimant’s case failed not only upon *ratione personae* grounds but as well as for *ratione temporis* considerations.



Santiago Torres Bernárdez

Date: October 26, 2017

ANNEX B

Transban Investments Corp.

v.

Bolivarian Republic of Venezuela

ICSID Case No. ARB/12/24

**Dissenting and Concurring Opinion of
Professor David D Caron**

I. Introduction

1. I concur in much of the Tribunal’s holdings. I agree with the Tribunal’s reasoning and conclusions regarding the effect of Venezuela’s denunciation of the ICSID Convention on jurisdiction in this proceeding.¹ Likewise, I agree with the Tribunal’s reasoning and conclusions regarding the timeliness of Claimant’s consent to jurisdiction.²
2. I respectfully dissent, however, from the Tribunal’s holding that the Tribunal lacks jurisdiction over this claim because Transban Investments Corporation (“Transban” or the “Claimant”) is not a protected investor within the meaning of Article 1(d) of the 1994 Agreement between the Government of the Republic of Venezuela and the Government of Barbados for the Promotion and Protection of Investments (the “BIT”). In particular, I dissent from the Tribunal’s holding that the issuance to Transban in 2001 of a Certificate of Continuance by the Barbados Registrar of Companies did not “constitute” Transban Investments Corporation, an acknowledged Barbadian continued corporation under the laws of Barbados.

II. Understanding Corporate Migration

3. Critically, the reasons justifying the Majority’s holding that the Claimant is not a protected investor rest solely on the fact that Transban was “continued” in Barbados rather than “incorporated.” If Transban had gained its legal status through “incorporation” rather than “continuance” in Barbados, then Transban would meet the definition of a protected

¹ Paragraphs 73 through 85 of the Tribunal’s Award.

² Paragraphs 86 through 93 of the Tribunal’s Award.

investor under the BIT.³ As indicated by the Tribunal, Respondent raises other objections to Claimant's status as a protected investor under the BIT.⁴ Given, however, the reliance of the Majority's holding on Transban's status as a "continued Company" under Barbados law the Majority expresses no view on these other objections.⁵

4. Given that "continuation" is the basis of the Majority's decision, it is appropriate to introduce the practice of continuation. "Continuation" is the term utilized by Barbados for what is known more generally in Barbados law as "corporate mobility," and even more widely known as "corporate migration." Corporate migration is a process used by some States whereby a corporation in one State may migrate to another State. The alternative to such migration is for the corporation in the home State to dissolve and, as it does so, to transfer all of its assets to a newly established corporation in the receiving State. The fundamental motivation for the practice of corporate migration is to avoid some of the unnecessary costs of closing, transferring and reestablishing what is, in many respects, a very similar corporation. Given that corporate law may be different from State to State, migration can have peripheral effects upon the company. If one thinks of the corporate laws of two States as two bottles of slightly different shapes, then corporate migration is the process of pouring a business enterprise from one bottle to another. The content of the enterprise remains essentially the same, although its precise shape may be different. Although there exists substantial literature on the practice of corporate migration, almost no material was made a part of the record in this proceeding, perhaps a reflection of the

³ Professor Schreuer, reviewing the practice of ICSID tribunals, observes that:

An analysis of practice indicates that tribunals have given effect to the definitions of corporate nationality contained in BITs. If the requirements for corporate nationality under the respective BIT were met, the tribunals typically refused to second guess it."

C. Schreuer, *Nationality of Investors: Legitimate Restrictions vs. Business Interests*, 24 ICSID FOREIGN INVESTMENT LAW JOURNAL 521, 525 (2009) (Exhibit CL-0119). As an example, Schreuer refers to *Tokio Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr 29, 2004), where the Claimant was incorporated in Lithuania but controlled by Ukrainian nationals. The majority held that Claimant's incorporation in Lithuania met the BIT's definition of protected investor.

⁴ See paragraphs 114-120 and paragraphs 121-127.

⁵ I note for the sake of completeness, that I would deny Respondent's other objections. Respondent's other two objections both seek to rebut the presumptive conclusion that meeting the definition of company in the BIT would suffice to establish Claimant as a protected investor. Both of Respondent's objections do so by asserting a form of abuse of process by Claimant.

The second objection argues that there is an abuse of process because in fact the Claimant continued to operate as a Venezuelan company at its convenience. Aside from the evidentiary questions present, the key points are (1) although the global extent of its activities is contested, the record indicates that Transban Investments Corporation made investments and conducted business not only in Venezuela, but elsewhere in the world and, most importantly, (2) there is no question that the investments at issue in the proceeding are held by Transban Investments Corporation, the Barbadian continued company. Respondent does not challenge Claimant's ownership of the investment itself. If Claimant had not acquired its investment itself, but rather the investment had been acquired by Inversiones Transbanca, C.A. (the pre-2001 Venezuelan corporate vessel), then there would not be a protected investment. As stated, however, no evidence is offered or objection is made in this respect.

The third objection argues that the migration of the corporation to Barbados is an abuse of process in that it is an effort to manufacture jurisdiction and thus an abuse of the ICSID mechanism. The corporate migration, however, occurred in 2001 long before the events in 2007-2009 that gave rise to the present proceedings. It is not contested that Transban's status under Barbados law was acquired long before the claims in this proceeding arose.

assumed basic nature of corporate migration. The primary item included in the record is the relevant portion of Professor Bruce Welling's study of corporate law in Canada.⁶ As to the motivation for corporate migration, Welling writes: "Becoming a corporate immigrant can be looked upon as a shorter and simplified form of dissolving the corporation in its home jurisdiction and reincorporating in a new jurisdiction."⁷

5. Simultaneously, it is important to emphasize what "continuation" is not. As Welling observes "continuance . . . is not to be confused with the mere carrying on of business in a jurisdiction other than that which created the corporation. . . . Continuance implies the more substantial step of abandoning the jurisdiction of incorporation and seeking a new permanent home . . ."⁸ There is no dispute in this proceeding that "continuance" under Barbadian law is an example of corporate migration.

III. What the Majority Holds and Why I Dissent

6. To be a protected investor under the BIT, Transban must meet the definition of "companies" in Article 1(d) of the BIT:

"[C]ompanies" means, in respect of each Contracting Party, corporations, firms and associations incorporated or constituted under the law in force in that Contracting Party.

The Tribunal concludes at paragraph 175 that Transban does not satisfy the conditions set out in the definition because it has not been incorporated or constituted under the laws of Barbados.

7. The Tribunal acknowledges, as it must, at paragraph 132 that:

It is not disputed that Transban is a corporation; the Respondent has not contended that Transban is not organized as a corporation. What the Respondent argues is that Transban, although a corporation, is not "incorporated or constituted under the law in force in [Barbados]".

The Tribunal also acknowledges, as it must, that there is no dispute that Transban possesses legal personality under the laws of Barbados. The Tribunal writes at paragraph 141:

Transban received on August 17, 2001 a Certificate of Continuance issued by Barbadian Registrar of Companies, which certifies that Transban "was continued as set out in the attached Articles of Continuance, under section 356.2(1) of the Companies Act of Barbados."

⁶ B. Welling, *Corporate Law in Canada: The Governing Principles* (Butterworth, 2nd ed., 1991)(Exhibit CL-0120).

⁷ Welling at 246.

⁸ Welling at 245.

In other words, Transban is a corporation and possesses legal personality under the laws of Barbados. Again, it bears emphasis that the nub of the Majority's holding is that Transban is a Barbadian corporation by way of continuance rather than by way of incorporation.

8. The Tribunal's reasoning identifies at paragraph 164 the "key question" as "whether Transban is 'a company incorporated or constituted under the law in force' in Barbados, because only then it may satisfy the requirements of the definition of companies in Article 1(d) of the BIT." The Tribunal appropriately divides this question into two parts: (1) whether Transban was *incorporated* under the laws of Barbados and (2) whether Transban was *constituted* under the laws of Barbados.

9. On the question of whether it is "incorporated" under the laws of Barbados, the Tribunal focuses its analysis on those laws. Given that the BIT defines companies with reference to the laws of Barbados, the Tribunal appropriately seeks to determine the meaning of "incorporated" by reference to those laws. The Tribunal points out at paragraph 168 that:

[. . .] the Barbados' Companies Act, when defining the term "company", distinguishes between incorporation and continuation. It defines a "company" as "a body corporate that is *incorporated or continued* under this Act". In the view of the Tribunal, a company cannot be under the Barbados' Companies Act continued and at the same time incorporated.

In addition, Section 356.2 of the Barbados Companies Act provides that "[o]n the date shown in the certificate of continuance the body corporate becomes a company to which this Act [*i.e.*, the Companies Act] applies *as if* the company *had been incorporated* under this Act" (emphasis added). In other words, although a continued company will be regarded as equivalent to an incorporated company, it simultaneously is not a company that was "incorporated." I agree with the reasoning of the Majority on this point.

10. On the question of whether Transban was "constituted" under the laws of Barbados, the Tribunal in paragraphs 173-174 argues that it could not have been "constituted" because "it is clear that it was not formed or established in Barbados, it had been in existence already for more than four years as Venezuelan company when it decided to move to Barbados."

11. It is with regards to this reasoning and the conclusion concerning "constituted" that I strongly dissent. The reasoning misperceives the legal act of continuance and both the law and realities of corporate existence

12. The Tribunal, looking to the ordinary meaning of the word "constitutes," finds that the word means to establish or to form. I agree that the BIT points to the adoption of a shared autonomous meaning for the term "constitutes." Although the word "incorporate" will have an analog in all legal systems and thus reference should be made to the analog itself, the word "constitutes" is a more general term allowing for other ways in which legal systems "establish" or "form" companies.

13. The Tribunal fails to recognize, however, that the granting of the Certificate of Continuance “established” or “formed” Transban Investments Corporation, a legal entity that did not previously exist. That the predecessor Venezuelan company, Inversiones Transbanca, C.A., had existed for four years as a legal entity within the Venezuelan legal system is irrelevant. Consider, for example, if the predecessor Venezuelan company had dissolved and transferred all of its assets to a newly incorporated company in Barbados. It would make no difference that essentially the same business enterprise previously existed for four years as a different legal entity in the Venezuelan legal system. Although the business enterprises were very similar, the legal act of incorporation would have created a new entity under the Barbados legal system. Likewise, before the issuance of its Certificate of Continuation, a continued corporation in Barbados operating under the name of Transban Investments Corporation did not exist. Transban Investments Corporation was formed, established and constituted by the issuance of the Certificate of Continuance.
14. The realities of corporate migration highlight that the formation and establishment of Transban Investments Corporation was a particularly significant legal act. Property, debts, rights and liabilities of Transban Investments Corporation are held or appertain to Transban Investments Corporation, and not to its pre 2001 Venezuelan legal form, Inversiones Transbanca, C.A. Recalling the imagery in paragraph 4, if one thinks of the corporate laws of Venezuela and Barbados as providing two bottles of slightly different shapes, then corporate migration is the process of pouring a business enterprise from a Venezuelan bottle labeled Inversiones Transbanca, C.A. to a Barbadian bottle labeled Transban Investments Corporation. Importantly, the word “constitutes” relates to the bottle and not to the content that migrated. Thus, in this instance, Barbadian law established, formed and constituted a bottle that had not previously existed, a bottle that would now hold rights and bear obligations exclusively, a bottle labeled Transban Investments Corporation. For these reasons, I am unable to agree with the view of the Majority.

IV. The Distinction between this Proceeding and the Official Acts and Policy of Barbados

15. In the longest section of its reasoning (paragraphs 148 to 161) as to whether Transban is an investor protected by the BIT, the Tribunal addresses an argument of Respondent as to whether Transban was entitled at all to the 2001 Certificate of Continuance issued by the Barbados Registrar of Companies. In addressing this argument, the Tribunal analyses not the specific application of the laws of Venezuela to Transban, but the application of these laws generally to Venezuelan companies seeking continuance. It must be emphasized, however, that this extended section of reasoning is not a basis for the Majority’s holding that Transban is not an investor protected by the BIT. I offer these comments to mitigate any uncertainty that this dangling thread of reasoning potentially creates for other continued companies within Barbados as well as the corporate migration process of Barbados generally.
16. A condition in Section 356.1. (1) for a company applying for a Certificate of Continuance is that it is “so authorised under the laws of that other [i.e., non-Barbadian] jurisdiction”

in which the applying company is incorporated. The Parties disagree as to whether the laws of Venezuela “authorise” companies incorporated in Venezuela to apply for continuance in other jurisdictions. The Tribunal accepts that Venezuela does not prohibit corporate migration but concludes in paragraph 161 that the word authorise “means something more than just a lack of express prohibition of corporate mobility in the laws of the jurisdiction of the original incorporation of a company.”

17. I agree with the Majority that, on the basis of the evidence and argument presented to the Tribunal (limitations recognized likewise by the Tribunal itself), and placing myself in the position of the Barbadian Registrar of Companies, I would interpret the term “authorise” in Section 356.1 to mean something more than just a lack of express prohibition of corporate mobility in the laws of the home jurisdiction. However, such a conclusion on the part of the Tribunal does not itself yield a conclusion bearing on the case before it. The Tribunal correctly does not use its reasoning as a basis for its holding because such reasoning does not alter or address the fact that the Registrar issued a Certificate of Continuance to Transban in 2001. ICSID jurisprudence consistently regards the award of citizenship by a State as presumptive proof of the nationality of an individual. The award of a certificate of continuance should be no different. As with the proof of nationality of individuals, such a presumption may be overcome. But there is no evidence, or indeed argument, in this proceeding that Transban in any way misled the Barbadian Registrar of Companies. Accordingly, the reasoning of the Award is not a questioning of the specific application of the law of Barbados to Transban, but rather a questioning of the approach of Barbados generally to the application of its law on corporate mobility. Moreover, it would apply not only to all other Venezuelan companies who, having gained Certificates of Continuance, migrated to Barbados, but it would also apply to corporate migrants from all countries where there is not a prohibition on corporate mobility but also not an authorisation.
18. For this reason, the Tribunal’s inclusion of the phrase “on the basis of the evidence and argument presented” is an important limitation and a recognition by the Tribunal that its reasoning should not be seen as a questioning of the approach of Barbados to the general application of its laws. In my opinion, the preferable response to Respondent’s argument would have been to state that the 2001 Certificate of Continuance presumptively establishes the corporate continuance of Transban under the laws of Barbados and that Respondent does not establish a basis whereby that presumption may be rebutted.

V. Conclusion

19. I respectfully dissent from the Majority’s holding that the Claimant, acknowledged as a continued corporation under the laws of Barbados, was not “constituted” under the laws of Barbados and thus is not a protected investor within the meaning of the BIT.



Professor David D Caron

Arbitrator

Date: November 6, 2017