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."

*

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.

*

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".

*

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 theAward , 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.

*

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 o 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.

*

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 Contacting 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)).

*

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 Sates 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 the 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).

*

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.

*

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 *Article71 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).*

*

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 Contacting 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.

*

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 clearest: "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