

**Transban Investments Corp.**

v.

**Bolivarian Republic of Venezuela**

**ICSID Case No. ARB/12/24**

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

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**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.<sup>1</sup> Likewise, I agree with the Tribunal’s reasoning and conclusions regarding the timeliness of Claimant’s consent to jurisdiction.<sup>2</sup>
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

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<sup>1</sup> Paragraphs 73 through 85 of the Tribunal’s Award.

<sup>2</sup> Paragraphs 86 through 93 of the Tribunal’s Award.

investor under the BIT.<sup>3</sup> As indicated by the Tribunal, Respondent raises other objections to Claimant's status as a protected investor under the BIT.<sup>4</sup> 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.<sup>5</sup>

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

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<sup>3</sup> 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.

<sup>4</sup> See paragraphs 114-120 and paragraphs 121-127.

<sup>5</sup> 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.<sup>6</sup> 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."<sup>7</sup>

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 . . ."<sup>8</sup> 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."

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

<sup>7</sup> Welling at 246.

<sup>8</sup> 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**

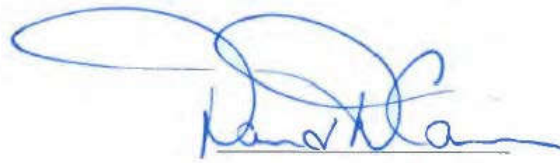
15. In the longest section of its reasoning (paragraphs 148 to 161) as to whether Transban is an investor protected by the BIT, the Tribunal addresses an argument of Respondent as to whether Transban was entitled at all to the 2001 Certificate of Continuance issued by the Barbados Registrar of Companies. 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