

EXHIBIT 1

FÁBRICA DE VIDRIOS LOS ANDES, C.A.

and

OWENS-ILLINOIS DE VENEZUELA, C.A.

Applicants

v.

BOLIVARIAN REPUBLIC OF VENEZUELA

Respondent

(ICSID Case No. ARB/12/21)

APPLICATION FOR ANNULMENT

9 MARCH 2018



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I. INTRODUCTION

1. Pursuant to Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**ICSID Convention**”) and Rule 50 of the Rules of Procedure for Arbitration Proceedings (the “**ICSID Arbitration Rules**”), Fábrica de Vidrios Los Andes, C.A. (“**Favianca**”) and Owens-Illinois de Venezuela, C.A. (“**OIdV**”) (together, the “**Applicants**”) submit this application for annulment (the “**Application**”) of the award rendered on 13 November 2017 (the “**Favianca Award**”) by the arbitral tribunal (the “**Favianca Tribunal**”) in *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/21) (the “**Favianca Arbitration**”).¹
2. The dispute underlying this Application concerns a straightforward case of uncompensated, direct expropriation. On 25 October 2010, without warning and live on national television, the then-President of the Bolivarian Republic of Venezuela (“**Venezuela**” or the “**Respondent**”), Hugo Chávez Frías, announced the expropriation of OIdV’s and Favianca’s investments in the two largest and most profitable glass-container-manufacturing operations in the country. Virtually from that moment, the Respondent has controlled and benefitted greatly from the Applicants’ lucrative investments. Yet, to this day, more than seven years later, Venezuela has not paid one cent of compensation for that unlawful expropriation (the “**Dispute**”).
3. Another ICSID tribunal already has determined that the same facts constitute a clear violation of the 1991 Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela (the “**BIT**”).² That tribunal awarded compensation to the investor in that case for its 72.983 percent equity interest in OIdV and Favianca. In contrast, the *Favianca* Tribunal allowed the Respondent to continue to enjoy the fruits of its expropriation without paying any compensation to the Applicants. The *Favianca* Tribunal’s

¹ *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Award, 13 November 2017, **Exhibit A-1**.

² See Section IV below.

purported basis for denying full reparation to the Applicants was that they initiated the *Favianca* Arbitration after Venezuela filed its 24 January 2012 notice of denunciation of the ICSID Convention (the “**Notice of Denunciation**”), even though they had done so before the expiry of the six-month period established in Article 71 of the Convention for the Notice of Denunciation to take effect (the “**Six-Month Period**”).

4. The *Favianca* Award is flawed in many ways that require annulment under the ICSID Convention. The *Favianca* Tribunal reached its decision through a gross misapplication and misinterpretation of the law applicable to the Dispute and it failed to have proper regard of the evidence on the record and of the jurisdictional significance of that evidence. Further, it failed to deal with key arguments submitted by the Applicants during the *Favianca* Arbitration. The *Favianca* Award makes a mockery of the Applicants’ rights under the BIT. It fundamentally challenges the ICSID Convention and, more generally, international law. But its consequences go well beyond even this. The *Favianca* Award is potentially the single-most egregious assault to date on the integrity of the ICSID system and the legitimacy of ICSID as an organisation under international law.
5. Were the *Favianca* Tribunal’s interpretation of the ICSID Convention allowed to stand, it would systemically undermine the ICSID system. It would enable any Contracting State to avoid its responsibility under international law by purporting to withdraw consent to ICSID arbitration with immediate effect and without notice, merely in order to avoid an inconvenient and anticipated exercise of rights under the ICSID Convention. The further consequential corollary more broadly under public international law of the *Favianca* Tribunal’s interpretation of the ICSID Convention is that, if left standing, it would enable a State party to an investment treaty which called for ICSID arbitration effectively to terminate that investment treaty with immediate effect without actually denouncing it. Such an absurd outcome violates the public international law principle of *pacta sunt servanda* and entirely undermines the intentions of the framers of the ICSID Convention.
6. It is of no surprise, therefore, that the *Favianca* Tribunal’s conclusions on the facts and the law are in stark contradiction to all of the other decisions rendered by ICSID tribunals on the effects of Venezuela’s Notice of Denunciation on the consent to ICSID arbitration given by foreign investors during the Six-Month Period. Every

other ICSID award on this point, both before and after the issuance of the *Favianca* Award, has properly identified, interpreted and applied the relevant international legal standards. The *Favianca* Award is an outlier that shocks the conscience. It is a stranger to basic principles of public international law. It impedes the harmonious development of investment law. It undermines the legitimate expectations of the ICSID Convention Contracting States. It unjustly deprives investors of certainty and protection. It causes uncertainty for all ICSID Convention Contracting States that aim to use the Convention (and investment treaties) as a means of developing balanced and predictable economic relations.

7. The Applicants initiated the *Favianca* Arbitration on 20 July 2012, based on Venezuela's "unconditional" consent to ICSID arbitration contained in Article 9 of the BIT. On that date, Venezuela's Notice of Denunciation had not yet taken effect, the consent to ICSID arbitration that Venezuela had previously given in the BIT remained intact and Venezuela remained an ICSID Convention Contracting State.
8. Article 71 of the ICSID Convention establishes expressly and unambiguously that a notice denouncing that treaty "shall take effect six months after receipt of such notice". The *Favianca* Tribunal ignored this and rewrote the ICSID Convention by giving effect to the Respondent's denunciation before the end of the Six-Month Period. Further, Article 72 of the ICSID Convention makes clear that a State's notice of denunciation pursuant to Article 71 "shall not affect the rights or obligations under this Convention of that State [...] arising out of consent to the jurisdiction of the Centre given by [it] before such notice was received by the depositary". The *Favianca* Tribunal stood Article 72 on its head, making it, instead, affect the rights and obligations of the Venezuela under the Convention. Every other ICSID tribunal dealing with this issue has confirmed the opposite of the *Favianca* Tribunal. They have confirmed that Articles 71 and 72 mean that the BIT and the ICSID Convention provide tribunals with jurisdiction—indeed require them to exercise that jurisdiction—over claims submitted during the Six-Month Period.
9. The *Favianca* Tribunal not only misidentified and misapplied the law in a determinative manner, but also it ignored the evidence on the record of the case on this point. That evidence confirms that, long before Venezuela filed its Notice of Denunciation, OIdV and *Favianca* repeatedly accepted Venezuela's unconditional

offer of ICSID arbitration contained in the BIT. In the months that followed the expropriation, they sent numerous letters to Venezuela exercising their substantive rights and expressly reserving their procedural rights under the BIT in relation to the Dispute. And, critically, during the hearing in the *Favianca* Arbitration (the “**Hearing**”), Venezuela’s witnesses confirmed that they understood OIdV and Favianca’s letters for what they were: an unequivocal manifestation of their intention to confirm their right to submit the Dispute to ICSID arbitration. This evidence was given under oath, against interest by the Respondent’s own witnesses and was determinative of the issue on its own. It was, however, inexplicably ignored by the *Favianca* Tribunal.

10. In sum, the *Favianca* Tribunal manifestly exceeded its powers in a number of ways. First, contrary to the customary international law rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties (the “**VCLT**”), the *Favianca* Tribunal impermissibly concluded that ICSID tribunals lack jurisdiction over claims submitted against Venezuela during the Six-Month Period. Second, it failed to exercise jurisdiction that arose from the evidence on the record confirming that OIdV and Favianca actually had consented to ICSID arbitration well before the Notice of Denunciation was received by the depositary of the ICSID Convention.
11. Furthermore, the *Favianca* Tribunal failed to comply with its obligations under Article 48(3) of the ICISD Convention to “deal with every question submitted to [it]” and to “state the reasons upon which the [*Favianca* Award] is based”. On these bases, the *Favianca* Award must be annulled pursuant to Articles 52(1)(b) and 52(1)(e) of that Convention.
12. This Application is structured as follows: **Section II** sets out the relevant details of the Applicants and of the Applicants’ Counsel. **Section III** confirms that this Application fulfils the requirements set out in the ICSID Convention. **Section IV** provides a brief summary of the Dispute underlying the Application. **Sections V** and **VI** detail the annulment grounds on which this Application is based.³ And **Section VII** contains the Applicants’ Request for Relief.

³ The Applicants reserve their rights to amend and supplement the arguments regarding the grounds on which this Application is based at the appropriate stage of this annulment proceeding.

II. THE APPLICANTS AND THE APPLICANTS' COUNSEL

13. The Applicants are legal persons constituted under the laws of Venezuela. OIdV and Favianca were incorporated on 13 April 1956 and 8 August 1968, respectively.⁴ The Applicants also are “nationals” of the Kingdom of the Netherlands (“**The Netherlands**”) for the purposes of Article 1(b)(iii) of the BIT and Article 25(2)(b) of the ICSID Convention because they are controlled by OI European Group B.V. (“**OIEG**”), a legal person constituted under the law of The Netherlands.⁵ OIEG is the owner of a 72.983 percent interest in the OIdV and Favianca business enterprise.⁶ In turn, OIEG is part of the O-I group of companies, one of the world’s leading producers of glass bottles and other glass containers.
14. Volterra Fietta acts as the Applicants’ counsel, with full powers of representation in connection with the Application and the ensuing annulment proceeding.⁷ The address and contact details of Volterra Fietta and of the Volterra Fietta lawyers representing the Applicants in this annulment proceeding are as follows:

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15. The Applicants request that all communications and correspondence be addressed to the Volterra Fietta lawyers listed above.

⁴ See *Favianca* Award, para. 124, **Exhibit A-1**.

⁵ See *Favianca* Award, para. 3, **Exhibit A-1**.

⁶ As established in the *Favianca* Award, “OIEG owns, through its combined direct and indirect shareholdings, 71.996% of the shares in Favianca. OIEG also directly owns 73.97% of the shares in OIdV”: *Favianca* Award, para. 3, **Exhibit A-1**.

⁷ See *Favianca*’s Power of Attorney, **Exhibit A-2**; OIdV’s Power of Attorney, **Exhibit A-3**.

III. THIS APPLICATION MEETS THE REQUIREMENTS SET OUT IN THE ICSID CONVENTION AND IN THE ICSID ARBITRATION RULES

16. Pursuant to ICSID Arbitration Rule 50(1):

An application for [...] annulment of an award shall be addressed in writing to the Secretary-General and shall:

- (a) identify the award to which it relates;
- (b) indicate the date of the application;
- (c) state in detail [...] the grounds on which it is based [...]; [and]
- (d) be accompanied by the payment of a fee for lodging the application. [...]

17. In addition, ICSID Arbitration Rule 50(3) provides that ICSID's Secretary-General shall refuse to register an application for annulment if that application is not made within 120 days of the date on which the award was rendered.

18. This Application meets all of the above requirements; namely:

- (a) as identified in paragraph 1 above, this Application relates to the *Favianca* Award, attached as Exhibit A-1;
- (b) this Application is dated, and submitted on, 9 March 2018, which falls 116 days after the 13 November 2017 date on which the *Favianca* Award was rendered;
- (c) Sections V and VI below detail the grounds on which this Application is based; and
- (d) as confirmed by ICSID, in the Secretary of the *Favianca* Tribunal's 5 March 2018 communication to the Applicants' counsel, the Applicants have paid the requisite lodging fee of USD 25,000 out of the balance of the *Favianca* Arbitration funds that are due to *Favianca* and OIdV and that are still held by ICSID.

IV. THE DISPUTE UNDERLYING THIS APPLICATION RELATES TO VENEZUELA’S UNLAWFUL, UNCOMPENSATED EXPROPRIATION OF OI DV AND FAVIANCA’S INVESTMENTS

19. The Dispute concerns a straightforward case of unlawful, uncompensated, direct expropriation. For more than five decades, Favianca and OIdV built, maintained, owned and operated the two largest glass-manufacturing plants in Venezuela.⁸ The plants were highly lucrative investments. For example, they generated almost to USD 300 million in profits in a period of less than three years leading up to the expropriation.
20. President Chávez made a televised address to the nation on 25 October 2010 and, without warning, announced the expropriation of the Applicants’ investments.⁹ The following day, the Respondent issued Presidential Decree No. 7.751, formalising the expropriation of the Applicants’ investments.¹⁰ The reasons alleged by President Chávez for the expropriation were that OIdV and Favianca had: (a) exploited workers; (b) destroyed the environment; and (c) taken away the money of Venezuelans.¹¹
21. President Chávez invented those rationalisations. They were entirely untrue and the Respondent has never provided any evidence to support its false accusations. In fact, during the *Favianca* Arbitration, the Respondent denied that it had expropriated the companies for the reasons given by President Chávez. Instead, as part of a retrospective litigation strategy, the Respondent invented new, equally untenable,

⁸ See *Favianca* Award, para. 124, **Exhibit A-1**.

⁹ See *Favianca* Award, para. 137, **Exhibit A-1** (“On the evening of October 25, 2010, President Hugo Chávez, made a television broadcast announcing the expropriation of Favianca and OIdV in which he stated: ‘The expropriation of this glass company is ready, how is it called? Owens-Illinois! Be it expropriated. [Vice-President] Elías [Jaua] proceed. Owens-Illinois, a company of North American capital that has been here for years, years exploiting its workers, destroying the environment there, in... there, in ... in Trujillo. Go see the hills that they have destroyed. And they have taken the money of Venezuelans. Carry out an environment study, [Environmental Minister] Hatcher; all environmental damages. So, proceed, Vice-President. And there is another list there, right? Leave it there for today, for today leave it there. Owens-Illinois, be it expropriated. In the meantime, the bourgeois can keep laughing; keep laughing.’”)

¹⁰ See *Favianca* Award, para. 138, **Exhibit A-1**.

¹¹ See *Favianca* Award, para. 137, **Exhibit A-1**.

reasons to try to convince the *Favianca* Tribunal not to find that it had violated the BIT.

22. Immediately after President Chávez's televised announcement, Venezuela mobilised its heavily armed National Guard to occupy the Applicants' plants.¹² The Respondent's own expert on Venezuelan law later confirmed that Venezuela had falsely accused OIdV and Favianca of having violated consumer protection norms in order to provide it with an excuse to occupy the plants and without having to respect these companies' due process rights.¹³ During the following months, the Respondent forced the Applicants' employees to help it operate the plants through intimidation and threats of imprisonment.
23. Over the course of 2010, 2011 and early 2012, the Applicants sent no less than 19 letters to the Respondent, objecting to the expropriation and to numerous other unlawful actions and expressly reserving both their substantive and procedural rights.¹⁴
24. Shortly after the expropriation, the Applicants also engaged in negotiations with the Respondent to obtain compensation for the expropriation of their investments.¹⁵ Despite months of negotiations, Venezuela steadfastly refused to comply with its obligation under Article 6 of the BIT to pay "just compensation" for the expropriation.¹⁶ In fact, more than seven years after the expropriation, it still has failed to comply with this obligation.
25. On 2 September 2011, OIEG initiated ICSID arbitration proceedings against Venezuela, claiming compensation for its 72.983 percent equity interest in OIdV and Favianca (the "**OIEG Arbitration**").¹⁷ On 10 March 2015, the tribunal in the *OIEG Arbitration* (the "**OIEG Tribunal**") issued an award in OIEG's favour, finding that

¹² See *Favianca Award*, para. 140, **Exhibit A-1**.

¹³ See *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015 ("**OIEG v. Venezuela**"), paras 512-519, **Exhibit A-4**.

¹⁴ See, e.g., Communication from the Applicants to Venezuela, 1 February 2011, **Exhibit A-5**; Communication from the Applicants to Venezuela, 8 November 2010, p. 5, **Exhibit A-6**.

¹⁵ See *Favianca Award*, paras 165-167, **Exhibit A-1**.

¹⁶ See *Favianca Award*, para. 167, **Exhibit A-1**.

¹⁷ See *OIEG v. Venezuela*, paras 1, 924 and 931, **Exhibit A-4**.

Venezuela had breached its obligations under the BIT in multiple ways (the “**OIEG Award**”). Venezuela was ordered to pay compensation for 72.983 percent of what it expropriated.

26. On 20 July 2012, the Applicants sent a letter to Venezuela expressly confirming that they accepted Venezuela’s offer of ICSID arbitration in the BIT and initiated the *Favianca* Arbitration.¹⁸ As a result of both the Respondent’s failure to pay compensation and the *Favianca* Award, the Respondent continues to enjoy 27.017 percent of what it took, consequence-free.¹⁹
27. A number of findings in the *OIEG* Award are directly applicable to this proceeding. These include the conclusions that the Respondent breached: (a) its obligations under Article 6 of the BIT to pay “just compensation” for its expropriation “without undue delay”²⁰ and to carry out the expropriation in accordance with “due process of law”;²¹ (b) the “fair and equitable treatment” standard contained in Article 3(1) of the BIT by occupying OldV’s and *Favianca*’s plants on the basis of unfounded accusations;²² and (c) the Umbrella Clause in Article 3(4) of the BIT because Venezuela’s actions were contrary to its obligations towards *OIEG*, OldV and *Favianca* under its own legal system.²³
28. Despite repeatedly acknowledging that it must pay for the assets it took, and despite the *OIEG* Award, Venezuela still has not paid a single penny in compensation to either *OIEG* or the Applicants.

¹⁸ See *Favianca* Award, para. 12, **Exhibit A-1**.

¹⁹ Based on these and other findings, the *OIEG* Tribunal ordered Venezuela to pay compensation for the unlawful expropriation of *OIEG*’s 72.983 percent equity interest in OldV and *Favianca*. Specifically, it ordered Venezuela to pay the principal sum of USD 372,461,982, plus interest, and USD 5,750,000 in legal costs and expenses: See *OIEG v. Venezuela*, paras 984.5-984.7, **Exhibit A-4**. To date, no tribunal has ordered Venezuela to pay compensation for the remaining 27.017 percent of the value of the expropriated investments.

²⁰ See *OIEG v. Venezuela*, para. 425, **Exhibit A-4**.

²¹ See *OIEG v. Venezuela*, para. 403, **Exhibit A-4**.

²² See *OIEG v. Venezuela*, para. 560, **Exhibit A-4**.

²³ See *OIEG v. Venezuela*, para. 595, **Exhibit A-4**.

V. THE FAVIANCA TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS UNDER ARTICLE 52(1)(B) OF THE ICSID CONVENTION

29. As explained in this Section, the *Favianca* Tribunal “manifestly exceeded its powers” by failing to: (a) exercise jurisdiction over the Dispute; and (b) apply the proper law. Section V.A below outlines the legal standard for annulment under Article 52(1)(b). Sections V.B and V.C explain why the *Favianca* Award meets the requirements for annulment under that legal standard.

A. The legal standard for annulment under Article 52(1)(b) of the ICSID Convention

30. Pursuant to Article 52(1)(b) of the ICSID Convention, “[e]ither party may request annulment of the award” on the basis “that the Tribunal has manifestly exceeded its powers”. Article 52(1)(b) establishes a dual requirement. First, the tribunal must have exceeded its powers. Second, the excess of powers must be manifest.

31. The first requirement covers a number of situations. For instance, an ICSID tribunal may exceed its powers by failing to exercise the jurisdiction it has. Indeed, it is not within a tribunal’s power to refuse to decide a dispute (or part of a dispute) that meets all jurisdictional requirements under Article 25 of the ICSID Convention. As the committee in *Soufraki v. UAE* explained:

[...] there is also an excess of power if the tribunal does “too little,” as far as its jurisdiction *ratione personae*, or *ratione materiae* or *ratione voluntatis* is concerned. There is an excess of power if the tribunal:

- does not exercise its jurisdiction over a person or a State in respect of whom it does have jurisdiction;
- does not exercise its jurisdiction over a matter that does fall within the ambit of the jurisdiction of the Centre;
- does not exercise its jurisdiction over a question that is encompassed in the consent of the Parties.

This means, for example, that a tribunal would manifestly exceed its powers if it did not exercise its jurisdiction over a company which has

to be considered as a foreign investor under Article 25(2)(b) to which the BIT offers a recourse to ICSID arbitration.²⁴

32. In that same vein, the *Occidental v. Ecuador* committee stated:

Jurisdictional excess of powers requires a finding that the tribunal has misconstrued the applicable law (e.g. the law regulating ownership of a protected investment) or has wrongly established the relevant facts (e.g. whether an investor actually controls an investment). Article 52(1)(b) of the Convention requires that the excess of jurisdiction resulting from such misconstruction or from such wrongful determination be “manifest”; if that requirement is fulfilled, the tribunal’s award deserves annulment.²⁵

33. The Decision on Annulment of the committee in *Indalsa v. Peru* expressed the generally held view that “it is widely accepted that a failure to apply the proper law may amount to an excess of powers”.²⁶ While annulment committees have explained that a “simple error” in the interpretation of the applicable law does not constitute a basis for annulment, they also have made clear that misinterpretation or misapplication of the proper law may be so gross or egregious as to amount to a failure to apply the proper law.²⁷

34. The second requirement—that is, that the tribunal must have exceeded its powers “manifestly”—has been interpreted in multiple ways. A number of committees have concluded that the term “manifestly” must be read as “easily understood or recognized by the mind”.²⁸

²⁴ *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007 (“*Soufraki v. UAE*”), para. 44, **ALA-1**.

²⁵ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015, paras 50-51, **ALA-2**.

²⁶ *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, para. 98, **ALA-3**.

²⁷ *Soufraki v. UAE*, para. 86, **ALA-1**. See also *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, 19 October 2009, paras 42-44 and 51, **ALA-4**; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Application for Annulment of the Award, 29 June 2010 (“*Sempra v. Argentina*”), para. 164, **ALA-5**.

²⁸ See, e.g., *Sempra v. Argentina*, para. 211, **ALA-5**.

35. By contrast, other committees have concluded that the word “manifestly” is a qualitative matter concerned not with the clarity of any excess but with its extent. For these committees, the manifest nature of an excess of powers relates to the seriousness or consequences of the excess. For instance, specifically in relation to a tribunal’s failure to exercise its jurisdiction, the *Vivendi v. Argentina (I)* committee stated that:
- [...] it is only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power. Subject to that qualification, however, the failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result, amounts in the Committee’s view to a manifest excess of powers within the meaning of Article 52(1)(b).²⁹
36. Finally, a third group of committees has concluded that, for an excess of powers to result in annulment of an award, the excess must be both clear and serious.³⁰ These nuances of interpretation are immaterial in the present case. As explained in Sections V.B and V.C below, the *Favianca* Tribunal “manifestly exceeded its powers” under any and all of the above interpretations of Article 52(1)(b).
37. First, the *Favianca* Tribunal exceeded its powers because it did not “exercise its jurisdiction over a question that is encompassed in the consent of the Parties”. Differently put, to paraphrase the committee in *Soufraki v. UAE*, it did “‘too little,’ as far as its jurisdiction [...] *ratione voluntatis* is concerned”.³¹ Further, its “[m]isinterpretation” and “misapplication” of the BIT and of the ICSID Convention fit the test as expressed by the same committee: “so gross [and] egregious as substantially to amount to failure to apply the proper law”.³²
38. Second, the *Favianca* Tribunal’s excess of powers was “manifest” both because of the serious consequences it had on the outcome of the *Favianca* Arbitration and because

²⁹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 (“*Vivendi v. Argentina (I)*”), para. 86, **ALA-6**.

³⁰ The committee in *Soufraki v. United Arab Emirates* considered that “a strict opposition between two different meanings of ‘manifest’—either ‘obvious’ or ‘serious’—[was] an unnecessary debate”. Having said so, it then held that “a manifest excess of power implies that the excess of power should at once be textually obvious and substantively serious”: *Soufraki v. UAE*, para. 40, **ALA-1**.

³¹ *Soufraki v. UAE*, para. 44, **ALA-1**.

³² *Soufraki v. UAE*, para. 86, **ALA-1**.

it is, fitting the test set out in the *Sempra v. Argentina* annulment decision, “easily understood or recognized by the mind”.³³

39. Self-evidently, the excess of powers had serious consequences because it resulted in the *Favianca* Tribunal not deciding any of OIdV and Favianca’s claims on the merits. Notably, by failing to apply the proper law and by refusing to exercise its jurisdiction, the *Favianca* Tribunal failed to provide the Applicants with any remedy in relation to the unlawful expropriation of their investments. These investments include the 27.017 percent of the expropriated assets in relation to which no tribunal has ordered Venezuela to pay compensation.
40. The *Favianca* Tribunal’s excess of powers also is easily recognised by the mind because it is textually obvious. Its misinterpretation of the ICSID Convention is contrary to the VCLT and renders the most fundamental provisions of the BIT a dead letter. The manifest nature of the *Favianca* Tribunal’s excess of powers is confirmed further by the fact that its findings are contrary to every single one of the decisions that have analysed the effects of Venezuela’s Notice of Denunciation on the consent to ICSID arbitration given by foreign investors during the Six-Month Period. Additionally, the *Favianca* Tribunal disregarded crucial arguments and evidence regarding the Applicants’ pre-Notice of Denunciation acceptance of Venezuela’s offer of ICSID arbitration.

B. The *Favianca* Tribunal “manifestly exceeded its powers” by failing to exercise its jurisdiction over the Dispute

41. Contrary to OIdV and Favianca’s arguments, the *Favianca* Tribunal concluded that:
 - (a) despite the fact that the Notice of Denunciation did not enter into force until 25 July 2012, it had the immediate effect of preventing foreign investors from accepting Venezuela’s consent to ICSID arbitration contained in other international treaties;³⁴
 - (b) as a result, neither the 20 July 2012 letter that OIdV and Favianca sent to Venezuela nor the Request for Arbitration (the “**RFA**”) they filed that same day were

³³ See, e.g., *Sempra v. Argentina*, para. 211, **ALA-5**.

³⁴ See, e.g., *Favianca* Award, para. 282, **Exhibit A-1**.

capable of perfecting consent to arbitration under the ICSID Convention;³⁵ and (c) the numerous letters that Favianca and OIdV sent to Venezuela before it filed its Notice of Denunciation did not constitute valid acceptance of Venezuela's offer of ICSID arbitration in the BIT.³⁶

42. As explained in this Section, the *Favianca* Tribunal's conclusions are based on: (a) an impermissible interpretation of both the BIT and the ICSID Convention; and (b) a total disregard of evidence confirming that OIdV and Favianca had validly accepted Venezuela's consent to ICSID arbitration long before its Notice of Denunciation.
- (i) The *Favianca* Tribunal failed to interpret the relevant treaty provisions in accordance with the customary international law rules codified in the VCLT
43. The *Favianca* Tribunal had an obligation to interpret the BIT and the ICSID Convention in accordance with the customary international law rules codified in the VCLT. Properly applied, these rules lead to the conclusion that the Notice of Denunciation did not render immediately ineffective Venezuela's "unconditional" consent to ICSID arbitration contained in Article 9 of the BIT.
44. In the *Favianca* Tribunal's own words, "[i]t is manifest from the express terms of Article 9 that the Respondent's consent to ICSID arbitration is 'unconditional' and there is no ambiguity attaching to that consent".³⁷ Venezuela denounced the BIT on 1 November 2008 but, by virtue of Article 14(3), all of the BIT's Articles "shall continue to be effective" until 1 November 2023. This means that Venezuela's "unconditional" consent to ICSID arbitration certainly subsisted on 20 July 2012, the date of the RFA. Yet, the *Favianca* Tribunal concluded that the "unconditional" consent given in Article 9 of the BIT was "obviously conditional upon actions taken by the Contracting Parties to the BIT in their capacities as Contracting States to the ICSID Convention".³⁸

³⁵ See *Favianca* Award, Section V.B.(3), **Exhibit A-1**.

³⁶ See *Favianca* Award, footnote 155, **Exhibit A-1**.

³⁷ See *Favianca* Award, para. 257, **Exhibit A-1**.

³⁸ *Favianca* Award, para. 260, **Exhibit A-1**.

45. This conclusion is contrary to the customary international law rules contained in the VCLT. For example, VCLT Article 31 required the *Favianca* Tribunal to interpret Article 9 of the BIT “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The *Favianca* Tribunal manifestly failed to do so. With no textual basis in the BIT, its interpretation: (a) turns an expressly “unconditional” consent into a “conditional” one; and (b) clearly goes against the object and purpose of the BIT by depriving the Applicants of their right to obtain full reparation through ICISD Convention arbitration.
46. The *Favianca* Tribunal’s interpretation is just as contrary to VCLT Article 43, which specifically mandates that the denunciation of a treaty cannot subvert a provision in another treaty. In other words, the Notice of Denunciation could not render ineffective the consent given in Article 9 of the BIT.
47. Even assuming that the expressly “unconditional” consent to ICSID arbitration given by Venezuela in the BIT was in fact conditional on the effects under the ICSID Convention of Venezuela’s Notice of Denunciation, *quod non*, that would still lead to the conclusion that the *Favianca* Tribunal had jurisdiction over the Dispute.
48. Article 71 of the ICSID Convention categorically establishes that a notice of denunciation of that Convention “shall take effect six months after receipt of such notice”. That means that Venezuela’s 24 January 2012 Notice of Denunciation took effect only on 25 July 2012. That Notice, therefore, could not prevent the RFA submitted during the Six-Month Period from perfecting the Parties’ consent under the BIT. Plainly, on 20 July 2012, the Notice of Denunciation simply had not taken effect.
49. Article 72 of the ICSID Convention further confirms that the *Favianca* Tribunal had jurisdiction over the Dispute. Article 72 states expressly that a notice of denunciation of the ICSID Convention “shall not affect” the obligations of the denouncing State arising out of the consent to arbitration given by that State before the denunciation.
50. The *Favianca* Tribunal nevertheless concluded that the Notice of Denunciation produced the immediate effect of releasing Venezuela from the obligations that

stemmed from the consent to ICSID arbitration that it had previously given in numerous investment treaties.

51. At the appropriate stage of this annulment proceeding, the Applicants will detail the manifestly erroneous premises on which the *Favianca* Award is based. In the meantime, it suffices to note that the *Favianca* Tribunal based its decision on the cumulative effect of: (a) impermissibly restricting, with no textual basis or support, Article 71's scope of application by deciding that this provision does not cover the effects of the denunciation of the ICSID Convention on arbitration proceedings; (b) concluding, absent any language to that effect in both Articles 71 and 72, that Article 72 acts as an exception to the general rule regarding the Six-Month Period established in Article 71; (c) misinterpreting Article 72 by deciding that it refers to the consent of both parties to an arbitration, despite the fact that there is no reference therein to "mutual consent" and that the provision expressly refers to consent "given by one" of those parties; and (d) reaching a conclusion that deprives the Applicants of their fundamental right to resort to ICSID arbitration (and that may well affect drastically the rights of numerous other investors), not on the basis of what Article 72 actually says but, rather, on an erroneous, *a contrario* interpretation of its terms.
52. In other words, the *Favianca* Tribunal's interpretation is contrary to the ordinary meaning and to the context of Articles 71 and 72, as well as to the object and purpose of the ICSID Convention. Among other rules, the *Favianca* Tribunal's interpretation of these Articles is therefore contrary to the customary international law rule codified in VCLT Article 31. It also is contrary to the customary rule in VCLT Article 70, which makes clear that explicit language is required in order for a treaty's denunciation to 'release' the denouncing State from obligations that accrued during the life of the treaty. On this basis alone, the *Favianca* Award should be annulled pursuant to Article 52(1)(b) of the ICSID Convention.
53. That being said, the decisions of ICSID tribunals that have analysed the specific question at issue in this case provide yet more evidence of the manifest nature of the *Favianca* Tribunal's excess of powers. For example, on 21 June 2013, sole arbitrator Rodrigo Oreamuno issued a Decision on Jurisdiction in *Inversión y Gestión v. Spain* analysing the effects of Venezuela's Notice of Denunciation on proceedings initiated during the Six-Month Period. Based on the wording of Articles 71 and 72 of the

ICSID Convention, Arbitrator Oreamuno concluded that “[t]he rights and obligations of Venezuela and of the Claimants (specifically the right to accede to the jurisdiction of ICSID) were in force when the Claimants filed their Request [for Arbitration] on 14 June 2012”.³⁹ Arbitrator Oreamuno added that:

Instead of creating an exception to the six-month period established in Article 71, Article 72 reiterates the same criteria that the notice of denunciation does not affect ‘... the rights or obligations’ of any ‘national of that State arising out of consent to the jurisdiction of the Centre’ ‘before such notice was received by the depositary’.⁴⁰

54. Similarly, in its 3 April 2015 award, the tribunal in *Venoklim v. Venezuela* unambiguously concluded that:

Once a State has made a valid offer of international arbitration, one of its main obligations is complying with such offer, including during the six-month period foreseen by [Article 71 of] the ICSID Convention for the denunciation to take effect.

The foregoing means that, when the Claimant filed its Request [for Arbitration (i.e., during the Six-Month Period)], Venezuela still was a Contracting State to the ICSID Convention and, therefore, it was obliged to respect its obligation to resort to arbitration before such forum.⁴¹

55. Among other findings, the *Venoklim v. Venezuela* tribunal explained that: (a) accepting Venezuela’s argument that the Notice of Denunciation should produce immediate effects would be contrary to the ordinary meaning of the terms of Article 71; (b) Article 72 refers to unilateral consent, not to mutual consent; and (c) Venezuela’s interpretation of Articles 71 and 72 would run directly counter to the principle of legal certainty—that is, it would allow States unilaterally to deprive foreign investors from access to ICSID arbitration overnight, which is precisely what the Six-Month Period in Article 71 is designed to avoid.⁴²

³⁹ *Inversión y Gestión de Bienes, IGB, S.L. and IGB18 Las Rozas, S.L. v. Kingdom of Spain*, ICSID Case No. ARB/12/17, Decision on Jurisdiction, 21 June 2013 (“*Inversión y Gestión v. Spain*”), para. 62, **ALA-7** (free translation).

⁴⁰ *Inversión y Gestión v. Spain*, para. 66, **ALA-7** (free translation).

⁴¹ *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award, 3 April 2015 (“*Venoklim v. Venezuela*”), paras 66-67, **ALA-8** (free translation).

⁴² *See Venoklim v. Venezuela*, para. 65, **ALA-8**.

56. Equally, in its 26 April 2017 award, the tribunal in *Blue Bank v. Venezuela* conclusively stated:

On a plain reading of Article 71, there exists a six-month period of time following receipt of a written notice of denunciation by the depositary before the denunciation becomes effective. The relevant language is mandatory: “The denunciation *shall* take effect six months after receipt of such notice” (emphasis added). It follows that a denunciation of the ICSID Convention takes effect only after the expiry of six months from the date of receipt of the notice of denunciation by the depositary. Any other interpretation of this provision would render the reference to a six-month time period devoid of any meaning, and would run directly contrary to the principle of *effet utile* (*ut res magis valeat quam pereat*), which is one of the fundamental tenets of treaty interpretation. If the intention was for the denunciation to take immediate effect, it would have made no sense to specify, in the second sentence of Article 71, that there should be a further waiting period of six months after receipt of the notice before the denunciation becomes effective.

If the Claimant filed its Request for Arbitration on 25 June 2012, and if Venezuela’s denunciation did not take effect until six months following its 24 January 2012 notice of denunciation (*i.e.* until 24 July 2012), then the agreement to arbitrate was formed before the expiry of the six-month period during which Venezuela, despite its denunciation, was still party to the ICSID Convention.⁴³

57. The president of the *Blue Bank v. Venezuela* tribunal, Mr Söderlund, agreed with the tribunal’s conclusion but issued a separate opinion because he considered that the role of Article 72 merited a more exhaustive analysis.⁴⁴ Having conducted that in-depth analysis, he concluded that Article 72 simply “does not apply in the presence of a BIT” and, therefore, that “Venezuela’s consent [under the applicable BIT] did not expire immediately upon its notice of denunciation as provided in Article 72”.⁴⁵
58. In yet another decision that starkly contradicts the *Favianca* Tribunal’s findings, the 22 November 2017 award in *Transban v. Venezuela* stated that:

⁴³ *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017 (“*Blue Bank v. Venezuela*”), paras 119-120, **ALA-9** (emphasis in original) (internal citations omitted).

⁴⁴ *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Separate Opinion of Christer Söderlund, 3 April 2017 (“*Blue Bank v. Venezuela, Separate Opinion of Christer Söderlund*”), paras 1 and 56, **ALA-10**.

⁴⁵ *Blue Bank v. Venezuela*, Separate Opinion of Christer Söderlund, 3 April 2017, para. 56, **ALA-10**.

The text of Article 72 does not create an obstacle preventing the investor from giving its consent to ICSID arbitration after receipt by the depositary of the notice of denunciation. If the denouncing State gave its consent to the jurisdiction of the Centre before notifying the depositary of the denunciation of the Convention, and if the investor gave its consent in writing when the Convention was still in force for the denouncing State, mutual consent by both parties exists and constitutes a mandatory arbitration agreement.⁴⁶

59. The *Transban v. Venezuela* decision was issued nine days after the *Favianca* Award. Each of the other three decisions referred to above, however, as well as numerous decisions of international courts and tribunals supporting the same conclusion, were on the record of the *Favianca* Arbitration. And the Applicants specifically drew the *Favianca* Tribunal's attention to each of these authorities in timely fashion.
60. While there is no rule of binding precedent in ICSID arbitration, it is well-established that ICSID tribunals must give due consideration to earlier-in-time decisions to avoid contradictory findings, to promote the "harmonious development of investment law", to "meet the legitimate expectations of the community of States and investors towards certainty of the rule of law" and to protect the legitimacy of the ICSID system.⁴⁷
61. The *Favianca* Tribunal did none of those things. The *Favianca* Award does not even mention the *Inversión y Gestión v. Spain* decision. The *Favianca* Award failed to engage with the findings of the tribunals in *Venoklim v. Venezuela* and *Blue Bank v. Venezuela*. The *Favianca* Tribunal limited itself to addressing only part of the various issues discussed in President Söderlund's separate opinion.
62. At the same time, the *Favianca* Tribunal did not refer to any ICSID decision supporting its interpretation of Articles 71 and 72. The reason for this is simple: there is no such decision. Surely, it is not a coincidence that every single decision on the effects of the Notice of Denunciation on the consent to ICSID arbitration given by foreign investors during the Six-Month Period, whether rendered before or after the *Favianca* Award, has reached the opposite conclusion. And each of those other

⁴⁶ *Transban Investments Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/24, Award, 22 November 2017, para. 84, **ALA-11** (free translation).

⁴⁷ *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 3 (Confidentiality Order), 27 January 2010, para. 58, **ALA-12**. See also *Saipem S.p.A. v. the People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 67, **ALA-13**.

tribunals reached that conclusion not on the basis of a tortured reading of the applicable instruments but on the basis of a straightforward interpretation wholly compatible with the ordinary meaning of the relevant ICSID Convention provisions.

63. In sum, the *Favianca* Tribunal should have asserted its jurisdiction *ratione voluntatis* over the Dispute by concluding that OIdV and Favianca’s 20 July 2012 letter and RFA validly perfected the Parties’ consent to ICSID arbitration under the BIT. That much is clear from the wording of the relevant treaty provisions and from the unanimous jurisprudence on the issue. As explained in the following sub-Section, the *Favianca* Tribunal also manifestly exceeded its powers by ignoring compelling evidence proving that OIdV and Favianca actually had accepted the offer of ICSID arbitration in the BIT long before Venezuela filed its Notice of Denunciation.

(ii) The *Favianca* Tribunal disregarded evidence confirming that OIdV and Favianca had accepted the offer of ICSID arbitration in the BIT long before Venezuela filed its Notice of Denunciation

64. The ICSID Convention’s only formal requirement regarding the parties’ mutual consent to ICSID arbitration is that it must be “in writing”.⁴⁸ Thus, in order for mutual consent to exist, OIdV and Favianca merely needed to accept, in writing, Venezuela’s offer of ICSID arbitration contained in Article 9 of the BIT. In truth, the Applicants met that requirement long before Venezuela filed its Notice of Denunciation. As a result, even with its erroneous interpretation of the ICSID Convention, the *Favianca* Tribunal should have concluded that it had jurisdiction *ratione voluntatis* over the Dispute.

65. Long before Venezuela filed its Notice of Denunciation, OIdV and Favianca sent numerous letters to Venezuela unequivocally asserting the existence of the Dispute, exercising their substantive rights under the BIT and repeatedly reserving their procedural rights under that BIT. To quote only one of these letters, on 1 February 2011, OIdV and Favianca wrote to Venezuela on the following terms:

[T]he Companies confirm that they do not waive any of their rights (procedural or substantive) under domestic and international law,

⁴⁸ ICSID Convention, Article 25.

including any rights under the Bilateral Investment Treaty between Venezuela and the Kingdom of the Netherlands, as they are entitled to the benefit of legal protections both under Venezuelan law and international law. The Companies will continue to comply with their obligations under Venezuelan law as they are compelled to do so; however, they insist in their objection to Venezuela's expropriation, occupation and takeover of their plants and assets and reserve all of their rights in relation to Venezuela's actions.⁴⁹

66. The "procedural" rights under the BIT expressly referenced in the Applicants' letter necessarily and obviously included their right under Article 9 to submit the Dispute to ICSID arbitration.
67. In the final written and oral phases of the *Favianca* Arbitration, Venezuela repeatedly confirmed that, when it received the letters, it understood that the Applicants were asserting their right to submit the Dispute to international arbitration. For example, in a witness statement submitted with its Rejoinder on the Merits, one of Venezuela's witnesses, Mr Sarmiento, stated:

Mr. Enríquez [one of *Favianca* and OIdV's fact witnesses] is also mistaken when he states that the Minister said that the Claimants should abstain from submitting new claims, and that he got "upset" when Mr. Enríquez reported *that the companies reserved the right to be compensated in arbitration. That reservation was something the Minister knew by heart because it was a phrase that the Claimants routinely inserted into their correspondence with the Ministry.* Even I read the reservation phrase in the correspondence I reviewed in preparation for the meeting. The Minister was not surprised to hear it, nor did he request for the Claimants to abstain from submitting any claim. On the contrary, he calmly stated to Mr. Enríquez that his clients had every right to take their matter to international tribunals. The Minister did indicate that the Ministry expected that would not be the case.⁵⁰ (Emphasis added.)

68. When questioned about this statement at the Hearing, Venezuela's witness stated:

MR VOLTERRA: So it is your testimony, is it, that the minister knew by heart that the Claimants were reserving their right to go to arbitration; is that what you are saying?

⁴⁹ Communication from the Applicants to Venezuela, 1 February 2011, **Exhibit A-5** (free translation). See also Communication from the Applicants to Venezuela, 8 November 2010, p. 5, **Exhibit A-6**.

⁵⁰ Second Witness Statement of Mr Alexander Sarmiento in the *Favianca* Arbitration, 18 June 2014, para. 45, **Exhibit A-7**.

MR SARMIENTO: Yes, yes. In fact, in every single communication they actually said so in writing.

[...]

MR VOLTERRA: One of the reasons I am exploring this with you is that this is new testimony that did not come out before. So I am happy to go through this with you. In the next sentence there, you say that the minister told the companies that they had every right to take this to international Tribunals. Again, that is your testimony, is it?

MR SARMIENTO: Yes, that is correct.

[...]

MR SARMIENTO: I must repeat that *all of the communications by O-I to the minister had a final note attached to them saying that they were reserving the right to submit this to a Tribunal*. I cannot remember exactly the exact wording but there was a reference to that. We knew that was coming and we knew about it. We actually did know about it, yes.⁵¹ (Emphasis added)

69. These statements make clear that Venezuela was fully aware that OIdV and Favianca had confirmed in writing their right to resort to international arbitration under the BIT long before Venezuela filed the Notice of Denunciation. And, critically, at the time Favianca and OIdV sent the letters, ICSID arbitration was the only international arbitration forum available to them under the BIT. OIdV and Favianca explained in their Post-Hearing Brief that the concessions of Venezuela’s witness at the Hearing crystallised the evidence on this point—that is, that the Applicants’ pre-Notice of Denunciation letters constituted valid acceptance of Venezuela’s offer of ICISD arbitration under the BIT.
70. Shockingly, the *Favianca* Tribunal ignored this. It disposed of this critical question, and this critical evidence, in a short statement in a footnote of the *Favianca* Award. That statement did not even mention the crucial concessions made by Venezuela’s witness at the Hearing. The *Favianca* Tribunal dismissed the Applicants’ argument because: (a) it was “raised very late”; (b) “it contradict[ed] [OIdV and Favianca’s] earlier position that they consented [to ICSID arbitration] on July 20, 2012”; and (c)

⁵¹ Day 3, English transcript of the Hearing in the *Favianca* Arbitration, 19 September 2013, p. 104, lines 4-10; p. 106, lines 3-11; p. 106, line 19 to p. 107, line 1, **Exhibit A-8**.

“the correspondence referred to by [OIdV and Favianca] ma[de] no reference to the ICSID Convention”.⁵²

71. None of these reasons constitutes a legitimate basis for rejecting the Applicants’ argument. OIdV and Favianca timely raised the argument in their Post-Hearing Brief because that was the first procedural opportunity they had to address the testimony provided by Venezuela’s witness at the Hearing. Self-evidently, the Applicants could not have relied on that testimony before it was given. For that same reason, prior to the Hearing, the Applicants had relied on their 20 July 2012 letter and RFA to prove the Parties’ mutual consent to ICSID arbitration. Ultimately, however, the date on which OIdV and Favianca can be said to have accepted Venezuela’s offer of ICSID arbitration is a fact that cannot possibly depend on the timing of the argument. Equally, the existence of that fact cannot be negated by the Applicants’ previous reliance on their 20 July 2012 letter and RFA.
72. Likewise, the fact that OIdV and Favianca’s pre-Notice of Denunciation letters did not mention explicitly the ICISD Convention cannot constitute a decisive factor. What actually matters is that: (a) the BIT contained Venezuela’s express and unconditional consent to arbitration under the ICSID Convention; (b) OIdV and Favianca intended to accept Venezuela’s offer of ICSID arbitration under the BIT; (c) their intention was manifested in repeated written communications to Venezuela; (d) the State clearly understood that intention; and (e) in fact, it confirmed that the Applicants had “every right” to submit the Dispute to international arbitration.
73. For the *Favianca* Tribunal to ignore these decisive facts and to refuse to exercise its jurisdiction over the Dispute based on supposed requirements that are nowhere to be found in the relevant treaty provisions constitutes a manifest excess of powers under Article 52(1)(b) of the ICSID Convention.

⁵² *Favianca* Award, footnote 155, **Exhibit A-1**.

C. The *Favianca* Tribunal also “manifestly exceeded its powers” by failing to apply the proper law

74. As explained in Section V.A, it is well-established that a tribunal may manifestly exceed its powers under Article 52(1)(b) of the ICSID Convention by failing to apply the proper law. Indeed, Article 42 of the Convention establishes that “[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties”. That provision is based on the principle that an arbitral tribunal’s competence and authority derive from the parties’ agreement to arbitrate, which constitutes both the basis and the outer limit of the tribunal’s power.
75. As the *MINE v. Guinea* annulment committee explained, “the parties’ agreement on applicable law forms part of their arbitration agreement. Thus, a tribunal’s disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function”.⁵³ That committee further explained that, “[i]f the derogation is manifest, it entails a manifest excess of power”.⁵⁴ In that same vein, ICSID jurisprudence clearly confirms that, when deciding issues relating to its jurisdiction, in particular, a gross misapplication of the applicable law by a tribunal can amount to a manifest excess of powers. Thus, for example, the Decision in *Adem Dogan v. Turkmenistan* provides that “[t]his would be the case when such misapplication leads a tribunal to [...] [reject] jurisdiction where jurisdiction exists”.⁵⁵
76. That is precisely the situation in the present case. The Parties’ agreement to arbitrate is contained in Article 9 of the BIT. That provision establishes that “[t]he arbitral award shall be based”, *inter alia*, “on the provisions of [the BIT]”, “other relevant Agreements between the Contracting Parties” and “the general principles of international law”. Like in any other ICSID Convention arbitration, the law applicable in the *Favianca* Arbitration also included the ICSID Convention. As a result, the *Favianca* Tribunal was under an obligation to decide Venezuela’s

⁵³ *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988, 14 December 1989 (“*MINE v. Guinea*”), para. 5.03, **ALA-14**.

⁵⁴ *MINE v. Guinea*, para. 5.03, **ALA-14**.

⁵⁵ *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, 15 January 2016, para. 105, **ALA-15**.

preliminary objections on jurisdiction by interpreting and applying both the BIT and the ICSID Convention in accordance with the customary international law rules codified in the VCLT.

77. As explained in Section V.B.(i) above, the *Favianca* Tribunal manifestly failed to do so. Among its many other breaches of these mandatory treaty interpretation rules, the *Favianca* Tribunal concluded that Venezuela's expressly "unconditional" consent to ICSID arbitration in Article 9 of the BIT was, in fact, "obviously conditional" on Venezuela's unilateral decision not to submit a notice of denunciation of the ICSID Convention. Further, it imposed additional requirements on the Applicants' acceptance of Venezuela's consent to ICSID arbitration that are nowhere to be found in the text of either the BIT or the ICISD Convention.
78. Similarly, the *Favianca* Tribunal concluded that Venezuela's Notice of Denunciation had the immediate effect of relieving Venezuela of the obligations naturally flowing from the consent to ICSID arbitration that it had given previously in the BIT. Yet, Articles 71 and 72 of the ICSID Convention establish precisely the opposite in explicit and mandatory terms. *Expressis verbis*, they provide that a notice of denunciation of the ICSID Convention: (a) "shall take effect six-months after receipt of such notice"; and (b) "shall not affect" the obligations of the denouncing State arising out of the consent to ICSID's jurisdiction previously given by that State.
79. The egregious nature of the *Favianca* Tribunal's error of law is obvious on a plain reading of the BIT and of the ICISD Convention. But, as explained in Section V.B.(i) above, the decisions of all the other ICSID tribunals that have analysed the specific point at issue in this case provide yet further evidence of the manifest nature of the *Favianca* Tribunal's excess of powers.

VI. THE FAVIANCA AWARD ALSO MUST BE ANNULLED UNDER ARTICLE 52(1)(E) OF THE ICSID CONVENTION BECAUSE IT FAILED TO STATE THE REASONS ON WHICH IT IS BASED

80. Pursuant to Article 52(1)(e) of the ICSID Convention, "either party may request annulment of the award" if "the award has failed to state the reasons on which it is based". This provision is the corollary of the rule in Article 48(3) of the ICSID

Convention, which states that “[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based”.

81. A tribunal may fail to state reasons in a number of ways. For example, as the *Rumeli v. Kazakhstan* committee explained, “a failure to deal with a question which would have altered an important finding of the tribunal”⁵⁶ is, of itself, a failure to state reasons. Similarly, the *TECO v. Guatemala* committee explained that “[a] tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion.”⁵⁷
82. A failure to state reasons may also arise when an award does not provide “sufficient” and “adequate” reasons. As explained in the *Soufraki v. UAE* annulment decision, committees have a mandate to verify that reasons in an award “are adequate and sufficient reasonably to bring about the result reached by the Tribunal”.⁵⁸ In that same vein, the *Pey Casado v. Chile* committee explained that:
- as long as there is no express rationale for the conclusions with respect to a pivotal or outcome-determinative point, an annulment must follow, whether the lack of rationale is due to a complete absence of reasons or the result of frivolous or contradictory explanations.⁵⁹
83. Annulment committees also have explained that the requirement to state reasons is intended to ensure that parties can understand the reasoning of the tribunal, meaning the reader can understand the facts and law applied by the tribunal in coming to its conclusion.⁶⁰
84. The *Favianca* Tribunal failed to deal with a number of outcome-determinative points, and the reasons underlying several of its findings manifestly fail to meet the required

⁵⁶ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *Ad Hoc* Committee, 25 March 2010, para. 81, **ALA-16**.

⁵⁷ *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para. 137, **ALA-17**.

⁵⁸ *Soufraki v. UAE*, para. 131, **ALA-1**.

⁵⁹ *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, para. 86, **ALA-18**.

⁶⁰ *MINE v. Guinea*, para. 5.09, **ALA-14**.

standards. For example, as explained in Section V.B(ii) above, Venezuela’s witnesses repeatedly confirmed that, when it received the Applicants’ pre-Notice of Denunciation letters, Venezuela understood that the Applicants were asserting their right to submit the Dispute to international arbitration. On that basis, OIdV and Favianca explained that the concessions of Venezuela’s witness at the Hearing crystallised the evidence confirming that the Applicants accepted Venezuela’s offer of ICSID arbitration under the BIT long before it filed the Notice of Denunciation. As a result, even with its erroneous interpretation of the ICSID Convention, the *Favianca* Tribunal should have concluded that it had jurisdiction *ratione voluntatis* over the Dispute.

85. Yet, the *Favianca* Tribunal disposed of this “outcome-determinative point” in a short statement buried in a footnote that: (a) did not even deal with the crucial concessions of Venezuela’s witness; and (b) is based on “insufficient”, “inadequate” and, in fact, “frivolous reasons”. The *Favianca* Tribunal provided no implied or “express rationale” for disregarding the concessions of Venezuela’s witnesses. Nor did it allow the Applicants to follow how the *Favianca* Tribunal reached its conclusions. Equally, it failed to provide coherent reasons for its findings that: (a) OIdV and Favianca raised their pre-Notice of Denunciation consent argument late; (b) the argument contradicted their prior position; or (c) the relevant correspondence did not constitute an acceptance of Venezuela’s offer of ICSID arbitration in the BIT.

* * *

86. In sum, the *Favianca* Award should be annulled under Article 52(1)(b) of the ICSID Convention because the *Favianca* Tribunal “manifestly exceeded its powers” by impermissibly refusing to exercise its jurisdiction over the Dispute and by failing to apply the proper law. It also should be annulled under Article 52(1)(e) because the *Favianca* Tribunal failed to state the reasons underlying its decision to reject some of the Applicants’ outcome-determinative arguments.
87. The *Favianca* Award breaches the Applicants’ fundamental right to obtain full reparation through ICSID Convention arbitration for the unlawful expropriation of their investments. But its harmful effects extend well beyond this Dispute. The *Favianca* Tribunal’s findings are fundamentally at odds with the unanimous

jurisprudence of ICSID tribunals on the issue, the object and purpose of the ICSID Convention and the role of ICSID as an institution.

88. If it is allowed to stand, the *Favianca* Award will provide an incentive for rogue States to violate their obligations under investment treaties, safe in the knowledge that they can prevent affected foreign investors from holding them accountable for their actions through ICSID arbitration simply by submitting a notice of denunciation of the ICSID Convention. By contrast, annulment of the *Favianca* Award would promote the harmonious development of investment law, safeguard the legitimate expectations of the community of States and investors towards certainty of the rule of law and prevent further erosion of the legitimacy of the ICSID system.

VII. REQUEST FOR RELIEF

89. For the foregoing reasons, which will be developed in subsequent submissions, the Applicants respectfully request that:
- a. the *Favianca* Award be annulled in its entirety; and
 - b. the Applicants be reimbursed the entirety of the costs and the legal fees incurred by them in connection with this annulment proceeding.

9 March 2018



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