INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

FÁBRICA DE VIDRIOS LOS ANDES, C.A. AND OWENS-ILLINOIS DE VENEZUELA, C.A.

Applicants

and

BOLIVARIAN REPUBLIC OF VENEZUELA

Respondent

ICSID Case No. ARB/12/21
Annulment Proceeding

DECISION ON ANNULMENT

Members of the ad hoc Committee
Dr. Andrés Rigo Sureda, President
Prof. Diego P. Fernández Arroyo, Member
Dr. Inka Hanefeld, Member

Secretary of the ad hoc Committee
Ms. Sara Marzal Yetano

Date of dispatch to the Parties: November 22, 2019

REPRESENTATION OF THE PARTIES

REPRESENTING THE APPLICANTS:

Mr. Darrow Abrahams
and
Mr. Robert Volterra
Mr. Álvaro Nistal
Mr. Govert Coppens
Mr. Roberto Lupini
Mr. Ricardo Gerhard
Volterra Fietta
8 Mortimer Street
Fitzroy Place
London W1T 3JJ
United Kingdom

REPRESENTING THE RESPONDENT:

Dr. Reinaldo Enrique Muñoz Pedrosa
Procurador General de la República (E)

Dr. Henry Rodríguez Facchinetti
Gerente General de Litigio - Coordinación de
Juicios Internacionales
Procuraduría General de la República
Avenida Los Ilustres
cruce con Calle Francisco Lazo Martí,
Edif. Sede Procuraduría General de la República
Urbanización Santa Mónica
Caracas 1040
Venezuela

and

Mr. Osvaldo C. Guglielmino
Mr. Guillermo Moro
Mr. Alejandro Vulejser
Ms. Camila Guglielmino
Ms. Verónica Lavista[*]
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TABLE OF SELECTED ABBREVIATIONS / DEFINED TERMS

Application	Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A.'s Application for Annulment of the Award rendered on November 13, 2017, dated March 9, 2018
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Award	*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, November 13, 2017
Background Paper	Updated Background Paper on Annulment for the Administrative Council of ICSID, dated May 5, 2016
BIT or Treaty	Agreement on the Encouragement and Reciprocal Protection of Investments between the Bolivarian Republic of Venezuela and the Kingdom of the Netherlands, which entered into force on November 1, 1993
Counter-Memorial on Annulment	Venezuela's Counter-Memorial on Annulment, of December 19, 2018
Applicants or Claimants	Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A.
Hearing on Annulment	Hearing on Annulment held in Paris, France, from July 10-11, 2019
ICSID Convention or the Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated October 14, 1966
Memorial on Annulment	Applicants' Memorial on Annulment, dated September 20, 2018
Notice of Denunciation	Venezuela's denunciation of the ICSID Convention on January 24, 2012

OIEG Pleading	Counter-Memorial on Annulment, dated August 5, 2016 filed by OI European Group B.V. on August 6, 2016 in the annulment proceeding in *OI European Group B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25)
Post-Hearing Brief	Claimants' Post-Hearing Brief, dated June 6, 2016
Rejoinder on Annulment	Venezuela's Rejoinder on Annulment, of May 18, 2019
Reply on Annulment	Applicants' Reply on Annulment, dated February 18, 2019
Respondent or Venezuela	The Bolivarian Republic of Venezuela

I. INTRODUCTION AND OVERVIEW OF THE APPLICATION

1. This case concerns an application for annulment (the "**Application**") of the award rendered on November 13, 2017 in ICSID Case No. ARB/12/21 (the "**Award**") in the arbitration proceeding between Fábrica de Vidrios Los Andes, C.A. ("**Favianca**") and Owens-Illinois de Venezuela, C.A. ("**OIdV**", jointly with Favianca, the "**Applicants**" or "**Claimants**") and the Bolivarian Republic of Venezuela (the "**Respondent**" or "**Venezuela**") (the "**Arbitration**").

2. The Applicants and the Respondent are collectively referred to as the "**Parties**". The Parties' representatives and their addresses are listed above on page (i).

3. The Award decided on a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Venezuela and the Kingdom of the Netherlands, which entered into force on November 1, 1993 (the "**BIT**" or "**Treaty**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated October 14, 1966 (the "**ICSID Convention**" or the "**Convention**").

4. The dispute relates to the expropriation of the two largest glass container production plants in Venezuela, which the Applicants allege was carried out illegally and with no payment of compensation, in breach of several provisions of the BIT.

5. In the Award, the Tribunal reached the conclusion that it did not have jurisdiction over the dispute submitted to it on the basis that there was no mutual consent to submit the dispute to ICSID arbitration due to Venezuela's denunciation of the ICSID Convention on January 24, 2012 ("**Notice of Denunciation**").

6. The Applicants applied for annulment of the Award on the basis of Article 52(1) subparagraphs (b) and (e) of the ICSID Convention, identifying two grounds of annulment: (i) manifest excess of powers, and (ii) failure to state the reasons on which the Award is based.

II. PROCEDURAL HISTORY

A. THE REGISTRATION OF THE APPLICATION AND CONSTITUTION OF THE COMMITTEE

7. On March 9, 2018, the Applicants filed with the Secretary-General of ICSID the Application, including exhibits AA-1 to AA-8.

8. The Application was filed in accordance with Article 52 of the ICSID Convention and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings ("**Arbitration Rules**"), within 120 days after the date of the Award.

9. By letter of March 13, 2018, the Secretariat confirmed receipt of an original of the Application, together with five hard copies and six USB devices containing an electronic copy of the aforementioned document as well as legal authorities AALA-1 to AALA-18.

10. By letter of March 16, 2018, the Acting Secretary-General informed the Parties that the Application had been registered on that date and that the Chairman of the Administrative Council of ICSID would proceed to appoint an *ad hoc* committee pursuant to Article 52(3) of the ICSID Convention.

11. By letter of April 23, 2018, in accordance with Arbitration Rule 52(2), the Acting Secretary-General notified the Parties that the *ad hoc* committee (the "**Committee**") had been constituted and that the annulment proceeding was deemed to have begun on that date.

12. The Committee was composed of Dr. Andrés Rigo Sureda, a national of Spain, Prof. Diego P. Fernández Arroyo, a national of Argentina and Spain, and Dr. Inka Hanefeld, a national of Germany, designated to the ICSID Panel of Arbitrators by Spain, Argentina, and Germany, respectively. Ms. Marisa Planells-Valero, ICSID Legal Counsel, was designated to serve as the Secretary of the Committee.

13. In accordance with ICSID Arbitration Rules 53 and 13(1), the Committee held a first session with the Parties on June 12, 2018, at 10:30 a.m. (EDT), by telephone conference (the "**First Session**"). In addition to the Members of the Committee and the Secretary of the Committee, participating in the teleconference were:

On behalf of the Applicants:

Mr. Darrow Abrahams	Applicants' representative
Mr. Robert Volterra	Volterra Fietta
Mr. Giorgio Mandelli	Volterra Fietta
Mr. Álvaro Nistal	Volterra Fietta
Mr. Roberto Lupini	Volterra Fietta

On behalf of the Respondent:

Mr. Osvaldo Guglielmino	Guglielmino & Asociados
Mr. Diego Gosis	Guglielmino & Asociados
Ms. Verónica Lavista	Guglielmino & Asociados
Ms. Mariana Lozza	Guglielmino & Asociados
Mr. Guillermo Moro	Guglielmino & Asociados
Mr. Pablo Parrilla	Guglielmino & Asociados
Mr. Alejandro Vulejser	Guglielmino & Asociados

14. Following the First Session, on June 28, 2018, the Committee issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Committee on disputed issues. Procedural Order No. 1 provides, *inter alia*, that the procedural languages would be English and Spanish, and the place of proceeding would be Paris, France. Annex A to Procedural Order No. 1 set forth the procedural calendar.

B. THE PARTIES' WRITTEN SUBMISSIONS

15. Pursuant to the procedural calendar, on September 20, 2018, the Applicants filed their Memorial on Annulment (the "**Memorial on Annulment**") together with exhibits AA-9 to AA-40 and legal authorities AALA-19 to AALA-110.

16. On December 19, 2018, the Respondent filed its Counter-Memorial to the Applicants' Application for Annulment (the "**Counter-Memorial on Annulment**") together with exhibits RA-1 to RA-22 and legal authorities RALA-1 to RALA-73.

17. By letter of January 21, 2019, the Applicants submitted procedural objections to the Counter-Memorial on Annulment. The Applicants requested that the Committee strike from the record of this proceeding:

- Factual exhibits RA-7 and RA-21, both of which are copies of the Counter-Memorial on Annulment filed by OI European Group B.V. on August 6, 2016 in the annulment proceeding in *OI European Group B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25) (the "**OIEG Pleading**"), which the Applicants argued were filed in violation of Sections 15.2 and 15.3 of Procedural Order No. 1;

- Paragraph 79 of the Respondent's Counter-Memorial on Annulment in which the Respondent made references to the OIEG Pleading; and

- The Respondent's comments embedded in factual exhibit RA-11, which was the response to the Respondent's request for bifurcation that the Applicants filed in the Arbitration on August 30, 2013.

18. In the same letter, the Applicants requested that the Committee take into account the Respondent's procedural violations described in this letter as well as any future procedural violations when it renders its decision on the allocation of the costs of this annulment proceeding.

19. By letter of January 25, 2019, the Respondent presented its observations to the Applicants' letter of January 21, 2019. The Respondent requested that the Committee:

- Reject the Applicants' request to strike from the record factual exhibits RA-7 and RA-21 and paragraph 79 of the Respondent's Counter-Memorial on Annulment, because: (a) Sections 15.2 and 15.3 of Procedural Order No. 1 would not be applicable to the OIEG Pleading since this is a document prepared by the Applicants in a proceeding to which Venezuela was also a party, and (b) the Applicants would have the opportunity to argue on the documents and the merits of the Respondent's position in their reply memorial, and

- Grant authorization to replace factual exhibit R-11 with a clean version of such document.

20. In the same letter, the Respondent further requested that the Committee assign to the Applicants the costs arising from this submission at the time of distributing the costs of this annulment proceeding.

21. After considering the Parties' respective positions, on February 1, 2019, the Committee informed the Parties of its decision:

- To strike from the record of this proceeding: (i) factual exhibits RA-7 and RA-21, and (ii) paragraph 79 of the Respondent's Counter-Memorial.

- To authorize the Respondent to replace factual exhibit R-11 with a clean version of such document in the electronic file-sharing folder created for this case.

22. On February 18, 2019, the Applicants filed their Reply Memorial in support of their Application for Annulment (the "**Reply on Annulment**") together with exhibits AA-41 to AA-48 and legal authorities AALA-111 to AALA-138.

23. On April 24, 2019, the Committee and the Parties were advised that Ms. Sara Marzal Yetano, ICSID Legal Counsel, would be replacing Ms. Marisa Planells-Valero as Secretary of the Committee.

24. On May 18, 2019, the Respondent filed its Rejoinder to the Applicants' Application for Annulment (the "**Rejoinder on Annulment**") without any new exhibits or legal authorities.

C. THE REPRESENTATION OF VENEZUELA

25. On March 27, 2019, the Secretary-General received a communication (PER-26-2019) from Mr. José Ignacio Hernández G., professing to act as Special Attorney General of the Bolivarian Republic of Venezuela, concerning the representation of the Republic of Venezuela before ICSID. Mr. Hernández requested that any notice or communication from ICSID to the Bolivarian Republic of Venezuela should be addressed solely to Mr. Hernández in his capacity as Special Attorney General of the Republic of Venezuela,

and not to any other person claiming to act on behalf of the Bolivarian Republic of Venezuela.[2]

26. On March 28, 2019, the Secretary-General transmitted Mr. Hernández's communication of March 27, 2019 (PER-26-2019) to the Parties and the Members of the Committee.

27. On April 4, 2019, the Committee informed the Parties that it had decided to address the question of the representation of the Bolivarian Republic of Venezuela in this proceeding as a preliminary matter. Further, the Committee decided to (i) suspend the procedural calendar, and (ii) invite the individuals appearing on behalf of the Applicants, the individuals appearing on behalf of the Bolivarian Republic of Venezuela, and Mr. Hernández to file two rounds of simultaneous submissions on the questions raised by Mr. Hernández's communication on April 18 and May 2, 2019.

28. On April 4, 2019, Dr. Reinaldo Enrique Muñoz Pedroza, in his capacity as *Procurador General de la República (E), Procuraduría General de la República*, presented a communication addressing Mr. Hernández's communication of March 27, 2019 (PER-26-2019) and the Secretary-General's communication of March 28, 2019.[3]

29. Pursuant to the schedule set by the Committee, on April 18, 2019, Dr. Henry Rodríguez Facchinetti in his capacity of *Gerente General de Litigio, Procuraduría General de la República*, the Applicants and Mr. Hernández, professing to act as Special Attorney General of the Bolivarian Republic of Venezuela, submitted their observations.[4]

30. On April 24, 2019, the Committee informed the Parties that it considered the issue of the representation of the Respondent to have been sufficiently briefed and did not wish to receive further communications on this matter.

[2] Communication (PER-26-2019) from Mr. José Ignacio Hernández to ICSID, March 27, 2019.

[3] Communication from Dr. Reinaldo Enrique Muñoz Pedroza to ICSID, April 4, 2019.

[4] Communication from Mr. José Ignacio Hernández to ICSID, April 18, 2019.

31. On April 29, 2019, the Secretary-General received a communication (PER-55-2019) from Mr. Hernández following up on his letter of March 27, 2019.[5]

32. On April 30, 2019, the Secretariat transmitted Mr. Hernández's communication of April 29, 2019 (PER-55-2019) to the representatives of the parties on record and to the members of the tribunals and annulment committees constituted in each of the cases before ICSID involving the Bolivarian Republic of Venezuela, including the present annulment proceeding.

33. On May 3, 2019, after giving to all involved the opportunity to fully present their positions, the Committee ruled that "*the evidence on record does not justify a change in the status quo. For this reason, and taking into account considerations of fairness to both Parties and the efficiency of the proceedings, the Committee sees no basis to hold that, for purposes of this annulment proceeding, the representation of the Bolivarian Republic of Venezuela has changed*." Further, the Committee lifted the suspension of the procedural calendar.

D. THE HEARING ON ANNULMENT

34. By communication of May 17, 2019, the Secretary of the Committee circulated a draft pre-hearing organizational meeting agenda to the Parties in preparation for the upcoming hearing on annulment. The Parties were invited to confer on the agenda items and to submit, by May 28, 2019, a joint proposal advising the Committee of any agreements they were able to reach, or of their respective positions where they were unable to reach an agreement.

35. By communications of May 28 and 29, 2019, the Parties submitted their joint proposal on the procedural matters included in the draft pre-hearing organizational meeting agenda. The Parties reached an agreement on all items in the agenda and therefore requested that, unless the Committee wished to discuss any other procedural matter, the pre-hearing organizational conference meeting be cancelled.

[5] Communication (PER-55-2019) from Mr. José Ignacio Hernández to ICSID, April 29, 2019.

36. In light of the Parties' agreements, on May 31, 2019, the Committee cancelled the pre-hearing organizational meeting, and, on June 5, 2019, the Committee issued Procedural Order No. 2 recording such agreements.

37. By letter of June 18, 2019, the Applicants requested authorization from the Committee to introduce into the record the "*Decision on Italy's request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes*" issued in *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50) on May 7, 2019 ("***Eskosol v. Italy***").

38. By letter of June 24, 2019, the Respondent submitted to the Committee its observations on the Applicants' request of June 18, 2019.

39. On June 26, 2019, after considering the Parties' respective positions, the Committee decided to grant the Applicants' request and admit into the record the decision on jurisdictional objections issued in *Eskosol v. Italy*. Pursuant to the Committee's decision, on June 27, 2019, the Applicants submitted into the record such decision (as legal authority AALA-139).

40. The hearing on annulment was held in the Bosphorous Room of the Hearing Centre of the International Chamber of Commerce in Paris, France, from July 10-11, 2019 (the "**Hearing on Annulment**"). The following persons were present at the Hearing on Annulment:

Committee:

Dr. Andrés Rigo Sureda	President
Prof. Diego P. Fernández Arroyo	Member
Dr. Inka Hanefeld	Member

ICSID Secretariat:

Ms. Sara Marzal Yetano	Secretary of the Committee

For the Applicants:

Mr. Robert Volterra	Volterra Fietta
Mr. Álvaro Nistal	Volterra Fietta
Mr. Govert Coppens	Volterra Fietta

Mr. Roberto Lupini	Volterra Fietta
Mr. Ricardo Gerhard	Volterra Fietta

For the Respondent:

Dr. Reinaldo Muñoz Pedroza	Procuraduría General de la República Bolivariana de Venezuela
Mr. Osvaldo Guglielmino	Guglielmino Derecho Internacional
Mr. Guillermo Moro	Guglielmino Derecho Internacional
Mr. Alejandro Vulejser	Guglielmino Derecho Internacional
Ms. Camila Guglielmino	Guglielmino Derecho Internacional

Court Reporters:

Mr. Dante Rinaldi
Ms. Michelle Kirkpatrick

Interpreters:

Ms. Amalia Thaler - de Klemm
Mr. Jesus Getan Bornn
Ms. Ronzana Dazin

E. THE POST-HEARING PROCEDURE

41. The Parties filed their statements of costs on August 10 and 12, 2019.

42. On September 25, 2019, the Committee declared the proceeding closed in accordance with ICSID Arbitration Rules 53 and 38(1).

III. SUMMARY OF THE PARTIES' ARGUMENTS

43. As noted above, the Applicants seek the annulment of the Award on two of the five grounds for annulment set forth in Article 52(1) of the ICSID Convention: (i) the Tribunal manifestly exceeded its powers; and (ii) the Award fails to state the reasons on which it is based.

44. Below is a summary of the Parties' arguments on each of the grounds of annulment invoked by the Applicants.[6]

A. APPLICANTS' ARGUMENTS

(1) Manifest Excess of Powers

45. The Applicants refer first to the standard applicable for annulment under Article 52(1)(b) of the ICSID Convention. This provision requires that the Tribunal has exceeded its powers and that the excess is manifest. With regard to the first requirement, the Applicants affirm on the basis of previous decisions of ICSID annulment committees that a tribunal may exceed its powers if it does not exercise the jurisdiction it has or if it exercises jurisdiction when jurisdiction does not exist.[7] Similarly, a tribunal may exceed its powers if it wrongly establishes the relevant facts or fails to apply the proper law.[8] While an error of interpretation of the law does not meet the threshold for annulment, a misinterpretation or misapplication may be so gross as to amount to a failure to apply the law, "*particularly on questions of jurisdiction*."[9]

46. As regards the requirement that the excess be manifest, the Applicants refer to the various interpretations of this term by annulment committees: for some, "manifest" means that the excess is "*easily understood or recognized by the mind*;"[10] for others, it refers to the extent or consequences of the excess;[11] and finally, for a third group, the excess must be both clear and serious.[12] The Applicants submit that these nuances of interpretation are

[6] The summary of the Parties' positions that appears below is not intended to be a comprehensive survey of all points that they made, but rather to identify their principal positions. The Committee has taken into account the full range of arguments advanced by the Parties.

[7] Memorial on Annulment, ¶ 27.

[8] Memorial on Annulment, ¶¶ 28 and 31.

[9] Memorial on Annulment, ¶ 32.

[10] Memorial on Annulment, ¶ 35. The quotation is from *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, June 29, 2010, ¶ 211.

[11] Memorial on Annulment, ¶ 36.

[12] Memorial on Annulment, ¶ 38.

immaterial in the present case because the "manifest" requirement is met under all of them.[13]

47. In their Reply on Annulment, the Applicants reject the Respondent's "*unduly narrow*" view on the extent to which annulment committees may review the underlying award under Article 52(1)(b).[14] First, the Applicants point out that the *kompetenz-kompetenz* principle does not entail an unlimited degree of deference towards jurisdictional decisions.[15] On the contrary, Applicants insist that annulment committees must undertake a full and independent analysis of the applicable rules and facts of the case, particularly as regards jurisdiction.[16] Second, the Applicants maintain that the term "manifest" does not mean that annulment committees cannot conduct an elaborate analysis of the award.[17] Third, the Applicants reiterate that gross errors in the application of the laws may amount to manifest excess of powers.[18] In sum, the Applicants contend that "*in determining whether the Tribunal exceeded its powers, the Committee must review the Tribunal's factual and legal findings, including by assessing whether it 'properly* […] *appl*[ied] *the relevant rules of interpretation' codified in the VCLT to the BIT and the ICSID Convention*."[19]

48. The Applicants argue that, in failing to interpret the BIT and ICSID Convention in accordance with the rules codified in the Vienna Convention on the Law of Treaties ("**VCLT**"), the Tribunal failed to acknowledge its jurisdiction and thus manifestly exceeded its powers under Article 52(1)(b) of the ICSID Convention.

49. In particular, the Applicants argue that, by the ordinary meaning of Article 9(1) and (4) of the BIT, the Respondent unconditionally consented to arbitration and that such consent subsists throughout the life of the BIT, but the Tribunal failed to analyze and give effect to the terms of that provision when it stated that the consent was "*conditional upon actions*

[13] Memorial on Annulment, ¶ 39.
[14] Reply on Annulment, ¶ 46.
[15] Reply on Annulment, ¶ 48.
[16] Reply on Annulment, ¶ 50.
[17] Reply on Annulment, ¶¶ 56 to 62.
[18] Reply on Annulment, ¶¶ 63 to 68.
[19] Reply on Annulment, ¶ 69.

taken by the Contracting Parties to the BIT in their capacities as Contracting States to the ICSID Convention."[20] The Tribunal thereby transformed the unconditional consent in the BIT into a consent entirely conditional on the Respondent's unilateral actions under a different treaty.[21]

50. The Applicants further argue that the interpretation of the Tribunal is contrary to the context of Article 9(1) and (4) of the BIT, that is, the remaining terms of Article 9 and to the other provisions of the BIT.[22] Article 14 is the last article of the BIT and provides that in case the BIT terminates, the previous articles continue to be effective for another 15 years. The interpretation of the Tribunal, which would enable the Respondent to terminate the BIT simply by filing a notice of denunciation for a different treaty, renders Article 14(3) pointless to the extent it applies to Article 9.[23]

51. The Applicants also refer to Article 9(2) of the BIT which applied before Venezuela became a party to the ICSID Convention and provides the consent to arbitration under the Additional Facility Rules. The Applicants argue that "*for at least as long as the Respondent is a party to the ICSID Convention, those disputes* [disputes under Article 9(1)] *shall be submitted to ICSID arbitration pursuant to Article 9(1).*"[24]

52. The Applicants question whether the Tribunal's interpretation of Article 9 meets the requirement of interpretation in good faith.[25] It fails as a reasonable interpretation and deprives Article 9 and Article 14(3) of any meaningful effect.[26]

53. According to the Applicants, the Tribunal's interpretation is contrary to the object and purpose of the BIT, which is to encourage and protect investments by providing access to a neutral dispute settlement mechanism (which is what distinguishes a BIT from "*mere*

[20] Memorial on Annulment, ¶ 49, quoting ¶ 260 of the Award.
[21] Memorial on Annulment, ¶ 61.
[22] Memorial on Annulment, ¶ 62.
[23] Memorial on Annulment, ¶ 64.
[24] Memorial on Annulment, ¶ 65.
[25] Memorial on Annulment, ¶ 66.
[26] Memorial on Annulment, ¶ 66.

political declarations").[27] For the Applicants, had the Contracting Parties intended to subordinate access to ICSID arbitration to a possible, future political decision to file a notice of denunciation of the ICSID Convention, they would have done so explicitly, as other investment treaties do.[28]

54. The Tribunal's interpretation is also contrary to the principle of *pacta sunt servanda* enshrined in Article 26 of the VCLT because it enables the Respondent to escape its obligation to the Kingdom of the Netherlands and the Dutch investors.[29] It is also contrary to Article 43 of the VCLT, which does not permit that treaty obligations be evaded by indirect means.[30]

55. The Applicants conclude:

> [i]*n sum, had the Tribunal fulfilled its obligation to interpret the BIT in accordance with the rules codified in the VCLT, the conclusion would have been clear: Venezuela's unconditional consent to ICSID arbitration enshrined in Article 9 subsisted on 20 July 2012, when the Applicants' filed the RFA. By straying from its obligation, the Tribunal failed to acknowledge its jurisdiction and manifestly exceeded its powers under Article 52(1)(b) of the ICSID Convention.*[31]

56. In their Reply on Annulment, the Applicants argue that the Respondent's Counter-Memorial on Annulment fails to rebut any of these points or to engage with the applicable treaty interpretation rules. Instead, its principal response is simply to note that the interpretative issues were already ventilated during the Arbitration. However, the Applicants contend that that does not undermine their arguments.[32]

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[27] Memorial on Annulment, ¶ 67.

[28] Memorial on Annulment, ¶ 70. The Applicants cite as an example, Article XII.4(a) of the Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, signed on July 1, 1996 (AALA-49).

[29] Memorial on Annulment, ¶¶ 71 and 72.

[30] Memorial on Annulment, ¶ 74. See also Memorial on Annulment ¶ 76.

[31] Memorial on Annulment, ¶ 78. See also Reply on Annulment, ¶¶ 74 to 76.

[32] Reply on Annulment, ¶¶ 77 and 79. See also ¶¶ 80 to 94.

57. The Applicants further argue that the Tribunal misinterpreted Article 71 of the Convention in a way that amounts to a disapplication of Article 71.[33] The Tribunal saw Article 71 as only regulating the effects from a notice of denunciation in respect of the State as a Contracting State to the Convention and the consequences of the denunciation in an ICSID arbitration as being governed by Article 72. According to the Applicants, this interpretation is contrary to the ordinary meaning of Article 71, in that "*nothing in Article 71 suggests a notice of denunciation immediately prevents the nationals of other Contracting States from accepting the consent to ICSID arbitration previously given by the denouncing State in other instruments*."[34] It is also contrary to the context of Article 71. The core jurisdictional provision –Article 25 of the Convention– does not distinguish between Contracting States that have filed a notice of dispute and those that have not.[35]

58. The Applicants contend that the Tribunal's interpretation of Article 71 is contrary to the object and purpose of the Convention because it limits "*the ability to settle investment disputes during the Six-Month Period*."[36] It is also contrary to the requirement of good faith because it leads to unreasonable situations, as "*it would allow an ICSID Convention Contracting State to embark on a wide-scale expropriation programme against foreign investors and then prevent those investors from exercising their right under any applicable investment treaties* […]."[37] It also deprives of full effect the sentence in Article 71 that reads, "[t]*he denunciation shall take effect six months after receipt of such notice*."[38]

59. Furthermore, the Tribunal's interpretation is inconsistent with the generally accepted rationale of waiting periods in treaty provisions.[39] The Applicants point out that the drafters

[33] Memorial on Annulment, ¶ 85.

[34] Memorial on Annulment, ¶ 86. See also Reply on Annulment, ¶¶ 100 to 107.

[35] Memorial on Annulment, ¶ 88. See also Reply on Annulment, ¶¶ 108 to 111.

[36] Memorial on Annulment, ¶ 91. See also Reply on Annulment, ¶¶ 112 to 118.

[37] Memorial on Annulment, ¶ 92. See also Reply on Annulment, ¶¶ 119 and 120.

[38] Memorial on Annulment, ¶ 93. See also Reply on Annulment, ¶¶ 121 and 122.

[39] Memorial on Annulment, ¶ 94. See also Reply on Annulment, ¶¶ 124 to 127, where the Applicants refer to a series of decisions of other international courts and tribunals regarding similar waiting periods, including: the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction of the Court and Admissibility of the Application, Judgement, November 26, 1984, I.C.J. Reports 1984, p. 392, para. 13 (AALA-83**)**; the *Case of Hilaire v. Trinidad and Tobago*, Inter-Am. Ct. H.R. (ser. C) No. 80, Judgment (Preliminary Objections), September 1, 2001 (AALA-113); and the *Second Greek Case* (Application No. 4448/70, Denmark, Norway and Sweden v. Greece), Partial Decision of the Commission as to the Admissibility of the

of the ICSID Convention could have included language that gave immediate effect to the notice of denunciation as in the case of the treaties establishing the Bretton Woods institutions. The Applicants contend that "[t]*hey deliberately chose not to adopt such language*."[40] They also contend that the Tribunal's interpretation contradicts the customary international law regulating the consequences of a State's denunciation of a treaty as codified in Article 70 of the VCLT.[41]

60. The Applicants also dispute the Tribunal's interpretation of Article 72 in the Award. According to the Applicants, the Tribunal concluded that Article 72 means the opposite of what its clear terms say.[42] First, the Tribunal read the words "*consent … by one of them*" to mean "mutual consent".[43] Second, "*the Tribunal was not allowed to apply, a contrario, its own misinterpretation of Article 72 to conclude, with no textual basis whatsoever, that the Notice of Denunciation produced effects from the very same day it was received by the depositary, depriving the Six-Month Period in Article 71 of any meaningful effect*."[44]

61. In this regard, the Applicants refer to the International Court of Justice ("**ICJ**") case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* ("***Nicaragua v. Colombia***").[45] For the Applicants, given the incontrovertible similarities between such case and the present proceeding, the ICJ's unanimous findings confirm that the Tribunal exceeded its powers by refusing to exercise its jurisdiction on an impermissible *a contrario* interpretation.[46]

Application, May 26, 1970 in Yearbook Of The European Convention On Human Rights (Martinus Nijhoff, 1972), p. 110 (AALA-117).

[40] Memorial on Annulment, ¶ 95.

[41] Memorial on Annulment, ¶ 96. See also Reply on Annulment, ¶¶ 128 to 134.

[42] Memorial on Annulment, ¶ 104.

[43] Memorial on Annulment, ¶ 105. See also ¶¶ 108 to 153. See also Reply on Annulment, ¶¶ 145 to 159.

[44] Memorial on Annulment, ¶ 106. See also ¶¶ 154 to 172.

[45] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* ("*Nicaragua v. Colombia*"), Preliminary Objections, Judgement of March 17, 2016, ICJ Reports 2016, p. 3 (AALA-81).

[46] Memorial on Annulment, ¶ 172. See also Reply on Annulment, ¶¶ 163 to 165. In their Reply on Annulment, the Applicants stress that they could not have made their arguments regarding the Nicaragua-Colombia ICJ case before since these are arguments that relate to the Tribunal's reasoning in the Award. See Reply on Annulment, ¶¶ 199 to 221.

62. In response to Respondent's Counter-Memorial on Annulment, the Applicants contend that the Tribunal's conclusion that Article 72 only protects mutual consent is also contrary to the drafting history of the ICSID Convention.[47] Further, they also stress that they have always maintained consistent interpretations of Articles 71 and 72,[48] and have never claimed that investors can accept open offers to arbitrate at any time. Instead, they have consistently argued that, "*pursuant to Article 14(3) of the BIT, the Respondent's consent to ICSID arbitration 'shall continue to be effective for a further period of fifteen years from* [the date of the termination of the BIT].'"[49]

63. The Applicants refer to the "*unitary jurisprudence of ICSID tribunals*,"[50] including those dealing with the Notice of Denunciation, in their understanding that notices filed by a Contracting State under the ICSID Convention may not modify unilaterally the consent given by that State in another treaty.[51] According to the Applicants, this unity in the jurisprudence "*underscores the manifest nature of the Favianca Tribunal's excess of powers.*"[52] Furthermore, all of these relevant decisions were part of the record of the Arbitration and "[t]*he Tribunal had a duty to either adopt a solution that was consistent with those decisions or explain the reasons that compelled it to diverge from them*."[53] The

[47] Reply on Annulment, ¶¶ 182 to 194.

[48] Reply on Annulment, ¶¶ 222 to 227.

[49] Reply on Annulment, ¶ 228. See also ¶¶ 229 to 235.

[50] Memorial on Annulment, p. 57. Reply on Annulment, p. 90.

[51] Memorial on Annulment, ¶ 173. See also ¶¶ 174 to 204. The Applicants refer to the following awards: *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, December 15, 2010 (AALA-57), in Memorial on Annulment, ¶¶ 174 to 178; *Transban Investments Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/24, Award, November 22, 2017 (AALA-11), in Memorial on Annulment, ¶¶ 179 and 180 and 200 to 203; *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, June 21, 2013 (AALA-7), in Memorial on Annulment, ¶¶ 182 to 184; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, April 26, 2017 (AALA-9), in Memorial on Annulment, ¶¶ 193 to 199; and *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award, April 3, 2015 (AALA-8), in Memorial on Annulment, ¶¶ 185 to 192. Reply on Annulment, ¶ 237. In their Reply on Annulment, the Applicants also refer to the award in *UP and C.D. Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, of October 9, 2018, as a further award that both confirms the Applicants' arguments regarding the effects of the Notice of Denunciation and contradicts the Award. See Reply on Annulment, ¶¶ 254 to 265.

[52] Memorial on Annulment, ¶ 204.

[53] Memorial on Annulment, ¶ 205.

Applicants argue that, because it did not do either, the Tribunal manifestly exceeded its powers.[54]

64. The Applicants further argue that the Tribunal manifestly erred in establishing the facts, disregarding evidence that confirmed that the Claimants had accepted Venezuela's offer to ICSID arbitration long before the Notice of Denunciation was even issued.[55] Indeed, according to the Applicants, they sent to the Respondent no fewer than 19 letters exercising their substantive rights and expressly reserving their procedural rights under the BIT in relation to this dispute; these letters were "*unequivocal manifestations of the Applicants' intention to submit the Dispute to ICSID arbitration in the event that the Respondent failed to comply with its obligation under BIT Article 6 to pay 'just compensation' for the expropriation of the Applicants' investments*."[56]

65. The Applicants add that, at that time, ICSID arbitration was the only arbitration forum available to the Claimants and that, therefore, the only procedural right that the Claimants could have been asserting and reserving at the time was the right to resort to ICSID arbitration.[57]

66. The Applicants stress that Venezuela's own witnesses admitted in their statements and at the Arbitration hearing that they knew about the Claimants' intention to submit the dispute to ICSID arbitration.[58]

67. The Applicants point out that this crucial question was disposed of by the Tribunal in a footnote in which it summarily dismissed the Claimants' argument because (i) it contradicted the earlier position of the Claimants, (ii) it was raised late in the proceedings, and (iii) the letters in question did not specifically refer to the ICSID Convention.[59] The Applicants contend that none of these reasons are valid. First, the Claimants only became aware of the evidence and the concessions of the Respondent's witnesses at the Arbitration

[54] Memorial on Annulment, ¶ 205. See also ¶¶ 206 to 226. Reply on Annulment, ¶¶ 266 to 291.
[55] Memorial on Annulment, ¶ 228. See also ¶¶ 229 to 236.
[56] Memorial on Annulment, ¶ 237. See also ¶¶ 238 to 245. Reply on Annulment, ¶ 293.
[57] Memorial on Annulment, ¶ 246. Reply on Annulment, ¶ 322.
[58] Memorial on Annulment, ¶ 247. See also ¶¶ 248 to 250. Reply on Annulment, ¶ 293.
[59] Memorial on Annulment, ¶ 251. Reply on Annulment, ¶ 300.

hearing, and the Claimants' Post-Hearing Brief of June 6, 2016 (the "**Post-Hearing Brief**")[60] was the first procedural opportunity they had to address it.[61] Second, the acceptance of Venezuela's offer cannot be negated by the Claimants' previous reliance on their July 20, 2012 letter and in their Request for Arbitration of the same date (the "**Request for Arbitration**").[62] Finally, there is no rule that requires investors to mention the ICSID Convention when they accept the offer of ICSID arbitration.[63]

68. The Applicants also contend that the Award must be annulled because the Tribunal manifestly exceeded its powers by failing to apply the proper law. In particular, the Tribunal acknowledged that Article 9 of the BIT was a core provision but failed to apply it.[64] The Tribunal also failed to apply Article 71 of the ICSID Convention because it concluded that it was irrelevant for purposes of determining the effects of the Notice of Denunciation.[65] Further, the Tribunal misinterpreted and misapplied Article 72 for the reasons already set forth above: it "*misinterpreted the express terms of Article 72 by concluding that the words 'consent* […] *by one of them' must refer to 'mutual consent'*", and "*based its Award on an impermissible, a contrario interpretation of its misreading of Article 72.*"[66]

(2) Failure to State the Reasons

69. The Applicants submit that the Award should be annulled because of a failure to state reasons. The Applicants understand that the legal standard for annulment under Article 52(1)(e) may be met in multiple ways. First, when the Tribunal fails to deal with an

[60] Post-Hearing Brief (Exhibit AA-40).

[61] Memorial on Annulment, ¶¶ 253 to 255. Reply on Annulment, ¶¶ 301 and 302. The Applicants stress that even though the letters were already in the record before the Arbitration hearing, the Claimants could not have made their argument without the confirmations given for the first time at the Arbitration hearing by Respondent's witnesses, because the oral evidence of such witnesses "*showed that there was—and had been—a 'meeting of the minds' as to the meaning and significance of the Applicant's letters*". Reply on Annulment, ¶ 315. Additionally, the Applicants argue that there is a difference between Mr Sarmiento's witness statement and his oral testimony, since at the hearing he "*expressly confirmed that Venezuela 'knew' about the Applicants' intention to submit the dispute to ICSID arbitration*." Reply on Annulment, ¶ 316.

[62] Memorial on Annulment, ¶ 253.

[63] Memorial on Annulment, ¶ 257. Reply on Annulment, ¶ 303.

[64] Memorial on Annulment, ¶ 263. Reply on Annulment, ¶ 333.

[65] Memorial on Annulment, ¶ 271. Reply on Annulment, ¶ 336.

[66] Memorial on Annulment, ¶ 272. Reply on Annulment, ¶ 337.

outcome-determinative point defined as "*a question that either has the potential of altering the tribunal's conclusions or is necessary to understand those conclusions*."[67] Second, annulment under this ground may also be warranted when the award provides reasons but they are insufficient or inadequate reasons (which are as bad as non-existent reasons).[68] Third, the award may also be annulled if it fails to address highly relevant evidence.[69] The relevance of the evidence may be determined from "*an objective standpoint—based on the impact it could have had on the outcome of the proceeding—or from a subjective one – based on the importance that the parties place on such evidence*."[70]

70. According to the Applicants, the Award should be annulled because its failure to state reasons meets the requirements for annulment set forth above. First, the Tribunal did not engage and deal with the outcome-determinative question of the consent of the Claimants before the date of the Notice of Denunciation evidenced in the oral testimony at the hearing. Despite the fact that in their Post-Hearing Brief the Claimants explained that the concessions by the Respondent's witnesses meant that there was no factual basis for the Respondent's jurisdictional objection regarding the effects of its Notice of Denunciation,[71] the Tribunal "*rejected the Applicants' argument without analyzing the critical legal significance of that oral testimony*."[72] Second, the evidence provided by the Respondent's witnesses was highly relevant, both under an objective or a subjective standard. Yet, the Tribunal did not even mention the crucial piece of oral evidence.[73] Third, the Tribunal did not provide adequate and sufficient reasons for its finding that the Applicants' letters did not constitute consent to ICSID arbitration.[74] The Tribunal should have "*(a) set out the rules governing consent under the BIT and the ICSID Convention; (b) analyse both the content of the Letters and the circumstances surrounding their submission to the*

[67] Memorial on Annulment, ¶ 282. Reply on Annulment, ¶ 350.
[68] Memorial on Annulment, ¶ 283. See also ¶¶ 284 to 287. Reply on Annulment, ¶ 362.
[69] Memorial on Annulment, ¶ 288. Reply on Annulment, ¶ 358.
[70] Memorial on Annulment, ¶ 290.
[71] Memorial on Annulment, ¶ 287. See also Reply on Annulment, ¶¶ 368 to 373.
[72] Memorial on Annulment, ¶ 294.
[73] Memorial on Annulment, ¶ 297.
[74] Memorial on Annulment, ¶ 298. Reply on Annulment, ¶¶ 382 to 385.

Respondent; and (c) explain why in its opinion, the Letters failed to meet the applicable legal standard. The Tribunal failed to do so."[75]

71. The Applicants conclude that "*the Tribunal's reasons cannot possibly constitute 'a reasonable basis for the solution arrived at.'*"[76]

B. RESPONDENT'S ARGUMENTS

(1) Nature and Scope of the Annulment Mechanism

72. The Respondent refers first to the nature and scope of annulment.[77] According to the Respondent, annulment is not an appeal or a mechanism to correct alleged errors of fact or law that a tribunal may have committed. Rather, it is a limited remedy to ensure the fairness of the proceeding: "*In sum, annulment is an extraordinary remedy established as an exception to the finality of awards. Therefore, the grounds for annulment are exhaustive and are aimed at guaranteeing the integrity of the tribunal, the proceedings, and the award.*"[78] Based on the decisions of previous ICSID committees, the Respondent asserts that annulment committees (a) accord a degree of deference to tribunals' reasonable decisions on jurisdiction,[79] (b) may not review a tribunal's analysis of the facts or the probative value assigned to the evidence on the record,[80] (c) may not consider new arguments or evidence not seen or heard by a tribunal,[81] and (d) may not review an award because it disagrees with the tribunal's decision which identified and applied the applicable law.[82]

73. The Respondent then addresses the grounds for annulment alleged by the Applicants.

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[75] Memorial on Annulment, ¶ 299.

[76] Memorial on Annulment, ¶ 301. The quote is from *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, June 5, 2007, ¶ 123 (hereinafter *Soufraki*).

[77] Counter-Memorial on Annulment, ¶¶ 38 to 74.

[78] Counter-Memorial on Annulment, ¶ 54. See also Rejoinder on Annulment, ¶ 22.

[79] Counter-Memorial on Annulment, ¶¶ 55 to 57.

[80] Counter-Memorial on Annulment, ¶¶ 58 to 62.

[81] Counter-Memorial on Annulment, ¶¶ 63 to 67.

[82] Counter-Memorial on Annulment, ¶¶ 68 to 74.

(2) Manifest Excess of Powers

74. The Respondent first argues that annulment committees, when dealing with manifest excesses of power in matters of jurisdiction, have to pay due heed to the *Kompetenz-Kompetenz* principle enshrined in Article 41 of the ICSID Convention.[83] The Respondent recognizes that this principle does not shield the Award from annulment under Article 52(1)(b), rather it favors a presumption of deference to the Tribunal.[84] As stated by the *Azurix* annulment committee, "*If* […] *reasonable minds might differ as to whether or not the tribunal has jurisdiction, that issue falls to be resolved definitively by the tribunal in exercise of its power under Article 41 before the award is given, rather than by an ad hoc committee under Article 52(1)(b) after the award has been given*."[85]

75. The Respondent disputes the existence of a duty to adopt the same interpretation as previous tribunals or to explain the reasons which compelled the tribunal to diverge from them. The principle of *stare decisis* does not apply in international law.[86] It does not apply to the ICJ either and, in "*the context of the ICSID Convention, the situation is even more extreme since each arbitral tribunal constituted within the framework of the Convention is an ad hoc tribunal which is constituted solely for the purpose of the relevant dispute, only has competence over that particular dispute, and is not bound by the conclusions reached by other tribunals constituted under the Convention*."[87]

76. As regards excess of powers due to a failure to apply the applicable law, the Respondent affirms that "*a committee only has jurisdiction to analyze whether the tribunal acted within its competence and is not competent to evaluate which is the most preferable interpretation out of all possible interpretations of the applicable law*."[88] The Respondent argues that the Applicants simply disagree with the interpretation of the applicable law by the Tribunal, but an annulment committee does not have the power to reinterpret the facts and legal

[83] Counter-Memorial on Annulment, ¶ 85.

[84] Counter-Memorial on Annulment, ¶ 89. See also Rejoinder on Annulment, ¶¶ 45 to 52.

[85] Counter-Memorial on Annulment, ¶ 87, quoting *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment, September 1, 2009, ¶¶ 67-68 (hereinafter *Azurix*).

[86] Counter-Memorial on Annulment, ¶¶ 100 to 105.

[87] Counter-Memorial on Annulment, ¶ 101.

[88] Counter-Memorial on Annulment, ¶ 107.

positions already discussed by the Tribunal.[89] While the Respondent does not deny that some committees have held that, in exceptional cases, a sufficiently egregious or flagrant error of law could be equivalent to the non-application of the applicable law, these are extreme cases that differ greatly from the mere disagreement regarding the criteria chosen by the Tribunal that the Applicants claim in this case.[90]

77. The Respondent then turns to the requirement that the excess of powers must be "manifest." The Respondent understands manifest as requiring an excess of power to be obvious, extremely serious, and plain enough to not require an elaborate analysis of the text of the award.[91]

78. In applying the legal standard to the facts of the case, the Respondent claims that the Tribunal applied the proper law in interpreting the BIT and the ICSID Convention. As expressed by the Tribunal, the question to be answered is the effect of Venezuela's denunciation of the ICSID Convention on the consent to ICSID arbitration contained in the BIT. The Respondent argues that it is undisputable that the jurisdiction of an ICSID tribunal requires compliance not only with the BIT in question, but also with the ICSID Convention, as stated by the Tribunal in the Award and recognized by the Applicants.[92]

79. The Respondent defends the distinction made by the Tribunal between Article 71 and 72 of the ICSID Convention. According to the Respondent, the Applicants are "*unable to understand the difference between the rights and obligations of Contracting States as Contracting States under the Convention and the rights and obligations of a party to an arbitration under the Convention*."[93] Further, the Tribunal's analysis of Articles 71, 72 and 25 of the Convention was carried out by the Tribunal in accordance with Article 31 of VCLT; it does not contradict the customary international law on the consequences of

[89] Counter-Memorial on Annulment, ¶¶ 109 to 113. See also Rejoinder on Annulment, ¶¶ 53 and 58.
[90] Rejoinder on Annulment, ¶ 53.
[91] Counter-Memorial on Annulment, ¶¶ 114 to 123. See also Rejoinder on Annulment, ¶¶ 32 to 44.
[92] Counter-Memorial on Annulment, ¶¶ 135 to 139. See also Rejoinder on Annulment, ¶¶ 85 to 87.
[93] Counter-Memorial on Annulment, ¶ 155.

denunciation of multilateral treaties, and is consistent with the drafting history of the ICSID Convention.[94]

80. The Respondent argues that the Applicants' interpretation of Article 71 and Article 72 is mutually inconsistent:

> [Applicants] *suggest, on the one hand, that the text of Article 72 of the Convention should be ignored and that the six-month period contained in Article 71 be deemed as a period in which consent may be perfected. On the other hand, they propose an interpretation whereby the consent referred to in Article 72 means unilateral consent, which would allow any investor to accept an open offer to arbitrate at any time. Both interpretations cannot be advanced simultaneously as they are mutually inconsistent.*[95]

81. The Respondent claims that the argument *a contrario* developed in the Memorial on Annulment on the basis of the *Nicaragua v. Colombia* case is inadmissible because it is a new argument and, in any case, it is mistaken.[96] Among other things, the Respondent stresses that the present case does not feature key elements that were present in the *Nicaragua v. Colombia* case, which "*prevents the consideration that the ICJ's decision supports in any sense the* [Applicants]*' appellatory claim.*"[97]

82. The Respondent reiterates that disregard of a precedent of a tribunal under the ICSID Convention could never be a ground for annulment[98]. The Respondent also disputes that there is a consistent line of precedents or that the "*Tribunal failed to state the reasons that led it to depart from the alleged precedents on the matter*."[99]

83. The Respondent argues that the Applicant's claim regarding the alleged lack of application of Article 9 of the BIT and Articles 71 and 72 of the Convention masks a mere disagreement with the Tribunal's interpretation relative to the applicable law. Further, the

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[94] Rejoinder on Annulment, ¶¶ 144 to 147.

[95] Counter-Memorial on Annulment, ¶ 211. Rejoinder on Annulment, ¶¶ 150 to 168.

[96] Counter-Memorial on Annulment, ¶¶ 213 to 221. Rejoinder on Annulment, ¶¶ 169 to 197.

[97] Rejoinder on Annulment, ¶ 197.

[98] Counter-Memorial on Annulment, ¶ 223. Rejoinder on Annulment, ¶¶ 198 to 206.

[99] Counter-Memorial on Annulment, ¶ 227.

Respondent stresses that the Applicants have failed to show that the Tribunal's interpretation is untenable or unreasonable and therefore have failed to meet the high standard required for this annulment ground to succeed.[100]

84. The Respondent also contests the assertion that the Tribunal did not accurately establish the facts as regards the alleged acceptance of the offer to arbitrate the dispute before the filing of the Request for Arbitration on July 20, 2012. The Respondent contends that "*Claimants' mere disagreement with the way in which the Tribunal weighed the arguments and the evidence on the record does not constitute valid grounds for seeking annulment of the Award*."[101] The Respondent points out that what is now characterized as a fundamental issue was given short shrift throughout the proceeding, and was only briefly raised in the Post-Hearing Brief.[102] In contrast, from the time of the Request for Arbitration the Applicants asserted that they gave their consent when they filed the said Request. The Respondent affirms that the "*Claimants are asking the Committee to annul the Award because the Tribunal established that the facts relating to their acceptance of the offer to arbitrate took place just as Claimants stated during the original proceeding*."[103]

85. The Respondent points out that by raising this issue in the Post-Hearing Brief (which was filed simultaneously with Respondent's) the "*Claimants deprived the Republic of the possibility of presenting its own arguments in this respect and exercising its right of defence before the Tribunal*."[104] The Respondent denies that the argument could not have been made before the Arbitration hearing because the oral testimony of Mr. Sarmiento was known only at such hearing. The Respondent points out that "*Mr. Sarmiento's written witness statement is virtually identical to the statement given during his examination at the hearing in this regard*."[105] The Respondent observes that the written testimony of Mr. Sarmiento had been available since the Rejoinder on the Merits and the letters were on the

[100] Rejoinder on Annulment, ¶¶ 88, 92, 93, 96, 97 and 148.

[101] Counter-Memorial on Annulment, ¶ 233.

[102] Rejoinder on Annulment, ¶¶ 224 and 225.

[103] Counter-Memorial on Annulment, ¶ 245. See also Rejoinder on Annulment, ¶¶ 215 to 220.

[104] Counter-Memorial on Annulment, ¶ 249.

[105] Counter-Memorial on Annulment, ¶ 255.

record long before the Arbitration hearing.[106] The Respondent also points out that the Applicants take a position on the admissibility of tardy jurisdictional arguments which contradicts their position in the original phase of the proceeding.[107] Furthermore, the letters and the testimony of Messrs. Sarmiento and Pimentel at the hearing fail to refer specifically to ICSID. The Respondent finds this omission significant since Article 9 of the BIT refers to various *fora* and not only to ICSID.[108]

(3) Failure to State Reasons

86. The Respondent then turns to the argument of a failure by the Tribunal to state reasons. The Respondent states, based on the decisions of prior ICSID annulment committees, that this is a minimum requirement which is met "*when the award allows the reader to follow the tribunal's reasoning from its legal and factual premises to the conclusion thereof.*"[109] The Respondent cautions against using the criterion of insufficiency or inadequacy of the reasons since it may lead a committee to review the merits of the tribunal's statement of reasons.[110] The Respondent contends that a tribunal does not need to comment on all the parties' arguments nor "*to give reasons for its reasons*."[111]

87. In applying the applicable standard to the facts of the case, the Respondent affirms that the Applicants seek to recycle the argument of excess powers into the argument of a failure to state reasons for not having adequately addressed an outcome-determinative issue: the issue of the Claimants' earlier acceptance of the Respondent's offer in the BIT.[112] The Respondent contends that the Tribunal dealt with this issue, as it has already been explained by the Respondent to rebut the Applicants' arguments of manifest excess of powers in

[106] Counter-Memorial on Annulment, ¶ 255. In its Rejoinder on Annulment, the Respondent also argues that if it were true that the Claimants had expressed their consent to ICSID arbitration when sending the letters prior to the arbitration, then they should have said so, rather than insisting that they had consented on July 20, 2012 with the filing of the Request for Arbitration. Rejoinder on Annulment, ¶¶ 231 to 234.

[107] Counter-Memorial on Annulment, ¶ 257.

[108] Counter-Memorial on Annulment, ¶ 267. See also Rejoinder on Annulment, ¶ 235.

[109] Counter-Memorial on Annulment, ¶ 278. Rejoinder on Annulment, ¶ 244.

[110] Counter-Memorial on Annulment, ¶ 285.

[111] Counter-Memorial on Annulment, ¶ 292, citing *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, April 5, 2016, ¶ 257 (hereinafter *TECO*) (AALA-17). Rejoinder on Annulment, ¶ 246.

[112] Counter-Memorial on Annulment, ¶ 295.

respect of similar facts. The Respondent affirms that the Applicants in effect request the Committee to conduct the kind of analysis that blurs the distinction between an annulment and an appeal.[113]

88. According to the Respondent, the Tribunal did not fail to consider highly relevant evidence. In fact, it considered the evidence, namely, the testimony of Messrs. Sarmiento and Pimentel at the hearing, but the Committee may not re-evaluate the evidence before the Tribunal.[114]

IV. RELIEF REQUESTED

89. The Applicants have requested that the Award be annulled in its entirety, and that they "*be reimbursed the entirety of the costs and the legal fees incurred by them in connection with this annulment proceeding*."[115]

90. The Respondent has requested that (i) the Applicants' request be rejected in its entirety, and (ii) the Applicants be ordered "*to pay all costs and attorneys' fees arising from this proceeding, including charges for the use of the Centre's facilities, the ad hoc Committee's costs and fees, as well as all legal expenses and fees incurred by the Bolivarian Republic of Venezuela in connection with this annulment, with the corresponding application of interest*."[116]

V. ANALYSIS OF THE COMMITTEE

91. Before engaging in this analysis, it will be useful to recall a few key dates for the proper understanding of the reasoning of the Committee. Venezuela denounced the ICSID Convention on January 24, 2012 by written notice addressed to its depositary. On July 23, 2012, ICSID received the Applicant's Request for Arbitration dated July 20, 2012. In

[113] Counter-Memorial on Annulment, ¶ 296.

[114] Counter-Memorial on Annulment, ¶¶ 209 and 315. Rejoinder on Annulment, ¶¶ 248, 249 and 278 to 288.

[115] Reply on Annulment, ¶ 390.

[116] Rejoinder on Annulment, ¶ 298(b).

accordance with Article 71 of the Convention, the denunciation took effect on July 25, 2012.

A. NATURE AND SCOPE OF THE ANNULMENT MECHANISM

92. As noted in the ICSID Background Paper on Annulment of 2016 ("**Background Paper**"), "*assuring the finality of ICSID arbitration awards was a fundamental goal for the ICSID system*."[117] Thus, annulment is an exceptional remedy limited to the five instances set forth in Article 52 of the ICSID Convention. The exceptional character of the remedy has been consistently recognized by annulment committees and it is not disputed by the Parties. Similarly, annulment committees coincide in differentiating the annulment remedy from an appeal. Annulment is a remedy "*to uphold and strengthen the integrity of the ICSID process*."[118] It does not entail a substantive review of the award. The Committee will return to these general themes as needed in considering the grounds on which the Applicants have based their request for annulment, namely, that the Tribunal manifestly exceeded its powers and the award failed to state the reasons on which it is based.

B. THE TRIBUNAL HAS MANIFESTLY EXCEEDED ITS POWERS

(1) Legal Standard

93. Article 52(1)(b) of the Convention provides as ground for annulment that "*the Tribunal has manifestly exceeded its powers*." On its plain meaning this sentence means that there has to be an "excess" in how the Tribunal has exercised its powers and that this excess must be "manifest." By its ordinary meaning, "excess" means "*more than the proper or specified amount*," while "manifest" means obvious, readily perceived by the senses, and easily understood or recognized by the mind.[119] This is the interpretation given to "manifest" by most annulment committees. As noted in the Background Paper, while some committees have interpreted "manifest" as requiring that "*the excess be serious or material*

[117] Background Paper, ¶ 71.

[118] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award rendered on August 20, 2007, August 10, 2010, ¶ 247(i) (RALA-10).

[119] Definitions taken from the on-line Merriam-Webster Dictionary.

to the outcome of the case,"[120] others have found a link between the two. Thus, the *Libananco* annulment committee held: "*While the term 'manifest' would in itself seem to correspond to 'obvious' or 'evident,' it follows from the very nature of annulment as an exceptional measure that it should not be resorted to unless the tribunal's act or its failure to act has had, or at least may have had, serious consequences for a party*."[121] The Committee finds merit in this understanding of "manifest" in the context of the exceptional nature of the annulment remedy.

94. The Parties disagree on whether the Committee should defer to the Tribunal in its decision on jurisdiction on the grounds that the Tribunal has the power to determine its own jurisdiction. The Respondent has relied on the *Azurix* annulment committee that held: "[i]*f* […] *reasonable minds might differ as to whether or not the tribunal has jurisdiction, that issue falls to be resolved definitively by the tribunal in exercise of its power under Article 41 before the award is given, rather than by an ad hoc committee under Article 52(1)(b) after the award has been given*."[122] Article 52(1)(b) does not distinguish between a manifest excess of power in cases of decisions pertaining to the jurisdiction of the Tribunal and other instances in which this may occur. The Committee would expect that faced with that situation the requirement that the excess be manifest would assist a committee in deciding whether the tribunal acted within the scope of its jurisdiction.

95. The Parties agree that a tribunal may exceed its powers by not applying the proper law, but disagree on whether the erroneous application of the law may amount to a non-application of the law and constitute an excess of powers. As the Respondent itself acknowledges, some committees have held that a gross or egregious misapplication or misinterpretation of the law may lead to annulment while others consider that this approach comes too close to an appeal. The Committee recognizes that sometimes there exists a fine line between a failure to apply the proper law and an erroneous application of the law.[123] With this in mind, the Committee remains concerned not to step beyond its mandate and act as an appeal

[120] Background Paper, ¶ 83.

[121] *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Excerpts of Decision on Annulment, May 22, 2013, ¶ 102 (AALA-103). See also *Soufraki*, ¶ 40.

[122] Counter-Memorial on Annulment, ¶ 87, quoting the *Azurix*, ¶¶ 67-68.

[123] Background Paper, ¶ 93.

judge when faced with a question of an egregious or gross misapplication of the law. Such would, in the Committee's view, risk it exceeding its own powers. Thus, in border line situations, the Committee finds it appropriate to recall the limited and extraordinary nature of the annulment remedy.

(2) Application of the Legal Standard to the Present Case

96. The Applicants argue that the Tribunal exceeded its powers because it manifestly failed to exercise its jurisdiction. This contention is based on the treatment by the Tribunal of the Applicants' supposed notification of their consent to arbitrate prior to the Respondent's denunciation of the ICSID Convention, and on a gross misinterpretation and misapplication of the BIT and the ICSID Convention.

97. The first leg of the Applicants' argument questions the appreciation of the evidence before the Tribunal on the timing of the Applicants' consent. The Committee cannot substitute its own appreciation of the facts for those of the Tribunal. The Applicants have argued that an annulment committee must perform "*an independent analysis*" of the ICSID Convention, the Arbitration Rules and the particular facts of the case. The Applicants have also argued that a jurisdictional excess of powers may require a finding that the Tribunal wrongly established the relevant facts. There is no support in the case law for such approach. On the contrary, annulment committees have been consistent in holding that the nature of the annulment remedy "*forbids an inquiry … on mistakes in analyzing the facts*."[124] Similarly, annulment committees cannot review the correctness of an award's findings on facts.[125] The role of an annulment committee is limited and should not second guess the evaluation of evidence by the Tribunal.

98. The factual question argued by the Applicants is the date on which the Applicants consented to arbitrate the dispute. In the Request for Arbitration, the Applicants have stated that the date of their consent is July 20, 2012. Only in the Post-Hearing Brief did they argue for an earlier date on the basis of 19 letters in which they reserved their rights under the

[124] *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Ukraine's Application for Annulment of the Award, July 8, 2013, ¶ 233 (RALA-68).

[125] *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, ¶ 122 (AALA-22).

BIT and of alleged concessions of the Respondent's witnesses. The Tribunal dealt with this matter in footnote 155 of the Award. The Applicants take exception to the Tribunal disposing of this "critical question" in a footnote.[126] The Tribunal notes that the Applicants themselves dealt with this matter in a single paragraph in their Post-Hearing Brief.[127] It is not disputed that the argument of the Applicants had not been made before. The Tribunal further notes that the argument was late. The Applicants argue that jurisdictional arguments can be made at any time. Jurisdictional arguments should be made as early in the proceedings as possible[128] and certainly not in the Post-Hearing Brief when the other party has no chance to rebut them, and particularly when the argument contradicts the position taken by the Applicants from the start of the proceeding. In any case, the appreciation of the terms of the correspondence and the witnesses' evidence was a matter for the Tribunal and it is beyond the remit of the Committee to revise it now. As stated by the *Caratube* annulment committee, "[t]*he respect for tribunals' factual findings is normally justified because it is the tribunal who controlled the marshalling of evidence, and had the opportunity of directly examining witnesses and experts*."[129]

99. The second ground adduced by the Applicants is that the Tribunal misinterpreted and misapplied the law. There is no dispute as regards the applicable law but only on its interpretation and application. The Tribunal determined that the core provisions relevant to the jurisdictional proceedings are Article 9 of the BIT and Articles 71 and 72 of the ICSID Convention, which the Committee reproduces here for convenience.

100. Article 9 of the BIT:

> *1. Disputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter, shall at the request of the national concerned be submitted to the*

[126] See heading of slide 42 of Applicant's Opening Slides. In fact, as discussed below in paras. 121-122, the footnote refers back to ¶ 220 of the Award in which the Tribunal sets out in the "*Claimants' Position"* section the Claimants' arguments concerning the Respondent's witnesses' concessions. Further, footnote 111 in ¶ 220 of the Award refers to the transcript from Day 3 of the Arbitration hearing in which the concessions apparently arose.

[127] Post Hearing Brief, ¶ 3 (Exhibit AA-40).

[128] Arbitration Rule 41(1).

[129] *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, ¶ 158 (AALA-105).

International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965.

2. As long as the Republic of Venezuela has not become a Contracting State of the Convention as mentioned in Paragraph 1 of this Article, disputes as referred to in that paragraph shall be submitted to the International Centre for Settlement of Investment Disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules).

3. The arbitral award shall be limited to determining whether there is a breach by the Contracting Party concerned of its obligations under this Agreement, whether such breach of obligations has caused damages to the national concerned, and, if such is the case, the amount of compensation.

4. Each Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in Paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article.

5. The arbitral award shall be based on:

- the law of the Contracting Party concerned;

- the provisions of this Agreement and other relevant Agreements between the Contracting Parties;

- the provisions of special agreements relating to the investments;

- the general principles of international law; and

- such rules of law as may be agreed by the parties to the dispute.

101. Article 71 of the ICSID Convention:

Any Contracting State may denounce this Convention by written notice to the depository of this Convention. The Denunciation shall take effect six months after receipt of such notice.

102. Article 72 of the ICSID Convention:

Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of the constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the

> *Centre given by one of them before such notice was received by the depository.*

103. The Tribunal dealt first with the issue of whether actions taken by the Respondent with respect to the ICSID Convention affect the Respondent's consent to arbitrate under Article 9 of the BIT. According to the Tribunal, this issue "*concerns the legal relationship between two international treaties rather than a question of treaty interpretation in respect of the terms used in Article 9 of the BIT*."[130] The Tribunal then notes that consent to ICSID arbitration has a different juridical character than consent to other forms of arbitration because ICSID arbitration is regulated by a multilateral treaty. The Tribunal explains:

> *The ICSID Convention has its own provisions for determining how and when it is to come into force, … how and when a Contracting State may withdraw from the treaty and no longer be bound by the obligations thereunder. The state parties to a bilateral investment treaty cannot, in that treaty, purport to amend their rights and obligations under the ICSID Convention, a multilateral treaty.*[131]

104. The Tribunal finds that the distinctions between the consent to ICSID arbitration and to other forms of arbitration are reflected in the text of Article 9 itself, which in paragraph 2:

> *recognizes that such consent* [to ICSID arbitration] *cannot be operational until Venezuela takes the necessary steps to become a Contracting State under the ICSID Convention. The basic point is that consent to ICSID arbitration in the BIT is obviously conditional upon actions taken by the Contracting Parties to the BIT in their capacities as Contracting States to the ICSID Convention. And given that reality, the Contracting Parties to the BIT included an alternative route … arbitration under the ICSID Additional Facility Rules*.[132]

105. Based on this analysis, the Tribunal rejects the contention that the Respondent's consent to ICSID arbitration under Article 9(1) of the BIT is "*impervious to Venezuela's actions taken in respect of its obligations under the ICSID Convention. ICSID arbitration is only available if the conditions for access to ICSID arbitration in the investment treaty and the*

[130] Award, ¶ 257.

[131] Award, ¶ 258.

[132] Id., ¶ 260.

ICSID Convention have been satisfied. That is a proposition that is universally accepted in the jurisprudence and is accepted by the parties in the present case."[133]

106. The Committee recalls the standard discussed in paragraph 95 above. Leaving aside the Committee's views on whether the Tribunal's interpretation is correct or not, the Committee finds that the Tribunal's interpretation of Article 9 of the BIT is reasonable and tenable and, therefore, cannot amount to manifest excess of powers.

107. Then the Tribunal turns to Articles 71 and 72 of the ICSID Convention. According to the Tribunal, Article 71 addresses Venezuela as a Contracting State and Article 72 as a potential party in ICSID arbitrations. Hence, "[t]*o adjudge whether Venezuela's denunciation of the ICSID Convention has any effect on its position as a party (or as a potential party) to ICSID arbitrations, the Tribunal must, therefore, interpret and apply Article 72 of the ICSID Convention*."[134] The Tribunal proceeds to interpret the ordinary meaning of the terms of Article 72 and refers to the principal interpretative disagreement between the Parties that concerns the phrase "*arising out of consent to the jurisdiction of the Centre given by one of them*." The Tribunal reasons that "*the ordinary meaning of 'consent to the jurisdiction' could encompass either interpretation proffered by the parties because it is perfectly possible to use those words to mean the unilateral act of consenting …or the multilateral result of consenting …*"[135] To decide between the two alternatives, the Tribunal analyzes the phrase in question in the context of Article 72 and of other provisions of the ICSID Convention. The Tribunal favors the interpretation of perfected consent and explains the reasons why: first, it does not make sense to talk about unilateral consent given by nationals of the Contracting State that could generate rights and obligations under the ICSID Convention; second, even a Contracting State's "*rights and obligations under the ICSID Convention as a party or potential party to ICSID arbitration only arise at the point of perfected consent*;"[136] and third, in terms of the overall context of the ICSID Convention, the jurisdiction of the Centre under Article 25(1) is founded upon

[133] Id., ¶ 261, emphasis added.
[134] Id., ¶ 270.
[135] Id., ¶ 273.
[136] Id., ¶ 275.

perfected consent. The Tribunal also analyzes the phrase "*given by one of them*" because of the emphasis placed on this phrase by the Applicants. It also considers Article 72 in the context of Article 66(2). After it reaches its conclusion based on the ordinary meaning and the context of Article 72, the Tribunal turns to the Applicants' argument that the proffered interpretation would be inconsistent with the object and purpose of the ICSID Convention.

108. The Tribunal finds that the Applicants' argument does not support the Applicants' interpretation of Article 72. The Tribunal explains why: First, "*it would be very unusual for an appeal to the object and purpose of a treaty to lead to an interpretation that is fundamentally at odds with the ordinary meaning of terms in the context*."[137] Second, "*the Contracting States to the ICSID Convention have specifically agreed that a Contracting State should have the right to denounce the treaty and they have sought to regulate that right*."[138] The Tribunal also considers the argument that the Applicants' interpretation should be preferred because, under such interpretation, the investors would not be surprised by the Convention's denunciation. The Tribunal explains that it is not its function to eliminate any negative consequences that might flow from the denunciation of the ICSID Convention. Withdrawal of consent is an eventuality in any adjudicating system founded on consent.

109. At this point in its reasoning the Tribunal notes that it has "*reached a firm conclusion on the proper interpretation of Articles 71 and 72 of the ICSID Convention by resorting to the general rule of interpretation in Article 31 of the VCLT*."[139] Although it considered it unnecessary, the Tribunal also resorted to the *travaux préparatoires* for the ICSID Convention because the Parties had made extensive references to them. In this respect, the Tribunal observed that "*whilst resort to the travaux préparatoires is not justified in accordance with the threshold established by Article 32 of the VCLT, the insights that can nevertheless be drawn from an examination of the travaux provide direct support for the Tribunal's interpretation of Articles 71 and 72 of the ICSID Convention*."[140]

[137] Id., ¶ 284.
[138] Id., ¶ 285.
[139] Id., ¶ 291.
[140] Id., ¶ 296.

110. As in the case of Article 9 of the BIT, the Committee concludes that the Tribunal's interpretation of Articles 71 and 72 is well reasoned and grounded in the text of the ICSID Convention by applying the general rule of interpretation in Article 31 of the VCLT. Consequently, it does not constitute a manifest excess of powers on the part of the Tribunal.

111. The Applicants have argued that the Tribunal disregarded the decisions of other tribunals which decided the same issue. It is well known that there is no *stare decisis* in international law. Tribunals are independent from each other and not bound by other tribunals' decisions. The Committee concurs in that it is desirable to develop a *jurisprudence constante* by consideration of precedents and explanation in what aspects they are similar or need to be distinguished from the instant case. However, the standing of precedents is not at the level of the applicable law. To ignore them just by itself would not be tantamount to an egregious misapplication of the law. In any event, the Tribunal took into account and analyzed previous decisions on the same issue, as explained in the next paragraph.

112. In fact, the Tribunal considered three of the awards of other tribunals brought to its attention by the Parties.[141] Generally, the Tribunal commented that it was "*less concerned about recording instances where other tribunals have come to the same or different results and more interested in confronting the reasons that have led tribunals to a different conclusion*."[142] The Tribunal noted that the *Tenaris* tribunal decided that consent was perfected before the Convention was denounced and therefore it was not relevant to the issue discussed. As regards the other two cases (*Blue Bank* and *Venoklim*), they reached opposite conclusions to that of the Tribunal. In analyzing those cases, the Tribunal found that "[t]*he only sustained judicial engagement with the interpretation of Articles 71 and 72 to date is to be found in the Separate Opinion of Mr Söderlund in Blue Bank*."[143] The Tribunal observed that the majority concluded in a single sentence that Article 72 was irrelevant, while Mr. Söderlund thought that "*the Respondent's invocation of Article 72 of*

[141] Id., ¶ 297, referring to *Venoklim Holding B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award, April 3, 2015, (*Venoklim v. Venezuela*); *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Award, December 12, 2016, (*Tenaris v. Venezuela*); and *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award and Separate Opinion, April 26, 2017 (*Blue Bank v. Venezuela*).

[142] Id., ¶ 298.

[143] Id., ¶ 298.

the ICSID Convention requires analysis."[144] The Tribunal goes on to consider arbitrator Söderlund's analysis and explains why it does not agree with him. The Committee finds significant that the Tribunal in particular addressed the analysis that it found to reflect "*sustained judicial engagement*" even when it was only a Separate Opinion.

113. To conclude, the Committee finds that the Tribunal did not exceed its powers by determining that it had no jurisdiction whether on the basis of the facts or on the interpretation of the applicable law.

C. THE AWARD FAILED TO STATE THE REASONS ON WHICH IT IS BASED

(1) Legal Standard

114. The Applicants agree with the Respondent's statement in the Counter-Memorial on Annulment that "*the statement of reasons is an essential element of the awards issued by tribunals constituted under the ICSID Convention*"; it "*ensures that the parties to arbitration can understand the decisions entered by the tribunals and the reasons why those decisions have been adopted, in order to ensure respect for the right to due process and the right to defence*."[145]

115. The Applicants argue that the Respondent unduly raises the threshold for annulment under Article 52(1)(e), an argument disputed by the Respondent. The differences between the Parties concern the extent to which a tribunal needs to address every argument advanced by the Parties, to address highly relevant evidence, and to provide sufficient or adequate reasons.

116. On the first point, the Parties seem to agree that tribunals are not required to deal with every argument but they should address outcome-determinative arguments.[146] The Committee recalls the explanation of the *Libananco* annulment committee: "[L]*ack of consideration of a question submitted to a tribunal could amount to a failure to state reasons if no reasons*

[144] Id., quoted in the Award at ¶ 298.

[145] Reply on Annulment, ¶ 348 quoting the Counter-Memorial on Annulment, ¶ 275.

[146] Reply on Annulment, ¶ 352.

are given by the tribunal for not addressing the question and such question would be determinant for understanding the reasoning of the award."[147]

117. As regards the arguments on the need for a tribunal to address "*highly relevant evidence*," the Applicants explain that a tribunal does not need to address all pieces of evidence, but "*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*."[148] The Respondent seems to agree, "[t]*he* [Applicants] *have also conceded in their last presentation that tribunals don't have the obligation to analyze each piece of evidence included in the proceedings*."[149]

118. While the Tribunal should address highly relevant pieces of evidence, the question for the Committee is the extent of its role in reviewing the Award and its factual underpinnings. The Applicants have quoted with approval the *Suez* annulment decision statement that there may be a failure to state reasons "*only if there was a total failure to address evidence that would have been 'highly relevant' to the Tribunal's decision, i.e., evidence whose consideration could have had a significant impact on the Award*."[150] The Committee's concern on this matter is that it is not in the remit of the Committee to judge "*the admissibility of any evidence adduced and of its probative value*," a task reserved to the Tribunal in the Arbitration Rules.[151] While the "total failure" to address evidence may be so obvious that it may fit within the Committee's purview, how the Tribunal appreciates the probative value of the evidence would be beyond the Committee's competence.

119. The third point discussed by the Parties relates to whether insufficiency or inadequacy of reasons warrants the annulment of an award. The Respondent finds support in *Vivendi I* for the proposition that, as a general rule and absent exceptional circumstances, insufficient

[147] Quoted in Reply on Annulment, ¶ 351.

[148] Reply on Annulment, ¶ 358, quoting *TECO*.

[149] Rejoinder on Annulment, ¶ 247.

[150] Reply on Annulment, ¶ 360.

[151] According to Arbitration Rule 34(1): "*The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value*."

reasons do not constitute a ground for annulment.[152] In turn, the Applicants recall that the *Vivendi I* annulment committee explained that exceptional circumstances are present if the "*decision on a particular point essentially lacking in any expressed rationale*" and "*the point* [is] *itself* […] *necessary to the tribunal's decision*."[153] However, the Committee recalls that the extent of insufficiency and inadequacy required to justify annulment on this basis is a matter of debate.[154] In this respect, the *MINE* annulment committee held that the "*adequacy of the reasoning is not an appropriate standard of review*."[155]

120. The Respondent has relied on the *MINE* annulment committee to argue that the requirement to state reasons is a minimum requirement that allows the reader to follow the reasoning of the Tribunal as it progresses from point A to point B.[156] The Applicants have explained that subsequent annulment committees have clarified the scope of the minimum requirement and adduce as an example the decision of the *Soufraki* annulment committee.[157] While that committee may have clarified the meaning of minimum requirement, it has not changed it in substance. Indeed, it refers to a total absence of reasons, frivolous reasons, a failure to state reasons for a particular material point or insufficient reasons to explain the result arrived at by the tribunal.[158]

121. The Applicants take exception to the argument of the Respondent based on the decision in *TECO* that a more nuanced approach is necessary when dealing with allegations of insufficient and inadequate reasons. The Applicants point out that the *TECO* annulment committee concluded that "*insufficiency of reasons can lead to annulment* […] *when a tribunal did provide some explanations for its decision, but these are insufficient from a logical point of view to justify the tribunal's conclusion*."[159] Again, this is not substantially

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[152] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, ¶ 65 (AALA-6).

[153] Quoted in the Reply on Annulment, ¶ 362.

[154] Background Paper, ¶ 106.

[155] *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, December 14, 1989, ¶ 5.08 (hereinafter *MINE*) (AALA-14).

[156] Counter-Memorial on Annulment, ¶ 282.

[157] Reply on Annulment, ¶ 364.

[158] *Soufraki*, ¶ 126, cited in the Reply on Annulment, ¶ 364.

[159] Quoted in the Reply on Annulment, ¶ 366.

different from the holding of the *MINE* annulment committee. Indeed, if reasons are "*insufficient from a logical point of view*," they will not enable the reader "*to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion*."[160] In the Committee's view, the understanding of the standard developed by the *MINE* committee is difficult to improve on.

(2) Application of the Legal Standard to the Present Case

122. The Applicants allege that the Tribunal failed to engage with the Applicants' argument regarding the oral testimony of two witnesses that confirmed, according to the Applicants, that the Applicants had consented to ICSID arbitration before the Notice of Denunciation. The Applicants clarified that they do not challenge the probative value given by the Tribunal to the oral testimony of the two witnesses; rather, the Applicants' "*argument is that the Tribunal completely disregarded that oral testimony without any analysis and without explaining why it found it insufficient, unpersuasive or otherwise unsatisfactory*."[161]

123. The Respondent argues that "[i]*t becomes evident that the Tribunal pondered the argument and expressed its conclusions on the matter, referring explicitly to the position of the Claimants and the evidence that it considered relevant to make that decision*."[162] The Respondent affirms that the correctness or persuasiveness of the reasoning of the Tribunal is not relevant. The Respondent contests the Applicants' argument that the Committee has authority to assess the sufficiency or adequacy of the reasons. The Respondent adds that the letters written to the Respondent and attached to the Claimants' Memorial on the Merits of July 15, 2016 (as Exhibits C-55 and C-58) are barely mentioned in subsequent memorials of the Claimants and not one is characterized in those memorials as a letter of acceptance of an offer of arbitration under the ICSID Convention.[163]

[160] *MINE*, ¶ 5.09.
[161] Reply on Annulment, ¶ 377.
[162] Rejoinder on Annulment, ¶ 262.
[163] Rejoinder on Annulment, ¶ 270.

124. The Committee notes that, on this point, the Award describes the Claimants' position by reference to the Claimants' Rejoinder on Jurisdiction of August 21, 2014: "[t]*he Tribunal has jurisdiction to hear the dispute in this case on the basis that at the time the Claimants consented to ICSID jurisdiction on July 20, 2017* [*sic*], *the Respondent was still an ICSID Contracting State and its consent to arbitration in the BIT was extant*." [164]

125. Then the Tribunal quotes in full the paragraph in the Post-Hearing Brief setting forth the position of the Claimants in the arbitration proceeding:

> *Furthermore, in their Post Hearing Brief, the Claimants stated the following: 'at the Hearing, [...] the Respondent's witnesses accepted that, in 2011, long before the Respondent's denunciation of the ICSID Convention, the Claimants had notified the Respondent of their intention to refer the dispute to arbitration under the BIT.' The Claimants submit that 'that reference can be understood only as consent to the jurisdiction of ICSID and of this Tribunal, with the result that the Claimants and the Respondent consented to ICSID arbitration prior to the Respondent's denunciation,' and that 'the contemporaneous record bears out the fact that the Claimants had expressed their consent to ICSID arbitration repeatedly over the course of late 2010 and early 2011.'*[165]

126. As part of the Tribunal's analysis, the Tribunal dismissed the new argument raised by the Applicant's in the Post-Hearing Brief in footnote 155 of the Award. According to the Tribunal, (i) this point was raised very late, (ii) it contradicted the Claimants' earlier position that they consented on July 20, 2012, and (iii) the correspondence referred to by the Claimants made no reference to the ICSID Convention. In dismissing the new argument, the Tribunal cross-referred to the paragraph where the Tribunal copied the new argument (para. 220), to the paragraphs of the Claimants' Memorial on the Merits of July 15, 2016 where the Claimants had held their previous position (paras. 154 and 180), and to

[164] Award, ¶ 219, citing the Claimants' Rejoinder on Jurisdiction of August 21, 2014, ¶ 117. The date in this paragraph of the Award is incorrect. The correct date is July 20, 2012.
[165] Award, ¶ 220 The quotations within the text can be found in footnote 111 in Claimants' Post-Hearing Brief, ¶ 3 citing the Arbitration hearing transcript (Tr. Day 3, 103:10-106:11, and Tr. Day 3, 292:1-5), and in footnote 112 in the Claimants' Post-Hearing Brief, ¶ 3, citing letter from OIdV to the Respondent dated November 8, 2010, p. 5, exhibit C-55, and letter from OIdV to the Respondent dated November 12, 2010, p. 4, exhibit C-58.

the exhibits where the letters of the Claimants to the Respondent may be found (C-55 and C-58).[166]

127. The new argument was founded on the acceptance by the Respondent's witnesses that "*the Claimants had notified the Respondent of their intention to refer the dispute to arbitration under the BIT*."[167] It is notable that the letters and the written witness statements were part of the arbitration file since submission of the Respondent's Rejoinder on the Merits of June 20, 2014, which means that the Claimants could have developed their position in their Rejoinder on Jurisdiction of August 21, 2014. It is difficult for the Committee to discern the significance given by the Applicants in this proceeding to the testimony of the witnesses as compared to their written statements. It is evident that, even by the Claimants' own words, the Claimants had only notified the Respondent of their intention to refer the dispute to arbitration.

128. As part of their contention that the Tribunal gave no reasons, the Applicants also emphasize that the Tribunal did not even mention the oral testimony. The Committee observes that paragraph 220 of the Award is based on the oral testimony. The quotations within that paragraph are precisely from the transcripts of the hearing and the letters of the Claimants to the Respondent. Thus, the Tribunal considered the new argument and justified its rejection. In the view of the Committee, the reasoning in the Award allows the reader to follow how the Tribunal reached its conclusion.

129. To conclude, the Committee finds that there is no merit in the Applicants' claim that the Award should be annulled for failure to state reasons.

D. COSTS

130. Article 61(2) of the ICSID Convention provides:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members*

[166] Award, footnote 155 to ¶ 251.

[167] See ¶ 122 above.

of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

131. This provision, together with Arbitration Rule 47(1)(j) (applicable to this proceeding under Arbitration Rule 53), grants discretion to the Committee to determine the allocation of costs it deems appropriate in the present proceeding.

132. The Committee has decided to reject the Application for Annulment and, accordingly, the Applicant shall bear all fees and expenses of the Committee Members, and ICSID's administrative fees and expenses. On the other hand, while the alleged grounds for annulment have been rejected by the Committee, they raised fundamental questions related to the denunciation of the ICSID Convention by Venezuela which justify that each Party shall bear all expenses incurred in connection with its own defense.

133. The costs of the arbitration, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, amount to (in USD): [168]

Committee's fees and expenses	
Andrés Rigo Sureda	75,242.50
Diego P. Fernández Arroyo	44,250.00
Inka Hanefeld	37,621.05
ICSID's administrative fees	84,000.00
Direct expenses (estimated)[169]	74,911.95
Total	**316,025.50**

134. The above costs have been paid out of the advances made by the Applicants. The remaining balance shall be reimbursed to the Applicants.

[168] The ICSID Secretariat will provide the parties with a detailed Financial Statement of the case account once all invoices are received and the account is final.

[169] This amount includes estimated charges relating to the dispatch of this Decision on Annulment (courier, printing and copying).

VI. DECISION

135. For the reasons set forth above, the Committee decides as follows:

(1) To reject the Application for Annulment.

(2) Each Party shall bear its own costs and fees.

(3) The Applicants shall bear the costs of the annulment proceeding, including the fees and expenses of the Committee and the costs of the Centre.

Prof. Diego P. Fernández Arroyo
Member of the *ad hoc* Committee

Date: 8 NOV. 2019

Dr. Inka Hanefeld
Member of the *ad hoc* Committee

Date: 12 Nov 2019

Dr. Andrés Rigo Sureda
President of the *ad hoc* Committee

Date: 16 NOV. 2019