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Is There Anything to Draw From "invested by investors"? Parallels Between Serafín García Armas v. Venezuela and Clorox v. Venezuela

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Serafín García Armas and Karina García Gruber v. Venezuela and *Clorox Spain v. Venezuela* are different in many aspects. *García Armas* relates to dual nationality, while *Clorox* relates to protected investment. However, they have a common feature: Article 1(2) of the Spain–Venezuela BIT was key to their developments.

That article defines investments as "any kind of assets, invested by investors […]." From a mundane provision, the Paris Court of Appeals (Paris CA) and the *Clorox* arbitral tribunal drew subtle distinctions of large implications.

García Armas and García Gruber v. Venezuela

In *García Armas*, the claimants – Mr. Serafín García Armas and his daughter, Ms. Karina García Gruber – were dual nationals of Spain and Venezuela.[1)] Mr. García Armas was born in Spain, but moved to Venezuela at a young age and became a national by naturalization in 1972. Ms. García Gruber, on the other hand, was born in Venezuela in 1980, being a Venezuelan national by birth, and acquired the Spanish nationality in 2003. In 2001, they became shareholders of *Alimentos Frisa* and Ms. García Gruber acquired shares in *Transporte Dole*, later becoming its sole shareholder.

In 2012, they started arbitration alleging that, in 2010, Venezuela had expropriated their investments in *Alimentos Frisa* and *Transporte Dole.* Venezuela objected to jurisdiction alleging that the claimants were not Spanish nationals when they made the investment in 2001. In regard to Mr. García Armas, Venezuela claimed that he had lost his Spanish nationality because of the Venezuelan 1955 naturalization law, according to which nationals by naturalization could neither use their original citizenship nor obtain another, and reacquired it by virtue of the 2004 Nationality and Citizenship law, which eliminated that restriction. Ms. García Gruber, on the other hand, had acquired the Spanish citizenship only later in 2003.

In the 2014 jurisdictional award, the arbitral tribunal majority held that the claimants' nationality when making the investment was not relevant. The relevant dates were those pertaining to (a) the alleged treaty breach and (b) the commencement of the arbitration. Venezuela applied for

annulment on multiple grounds under the French Code of Civil Procedure, including lack of jurisdiction of the arbitral tribunal (art. 1520, 1).

In 2017, the Paris CA partially set aside the jurisdictional award. Accepting a distinction between "held assets" and "invested assets" (*actif détenu* and *actif investi*), the Paris CA concluded that, under Article 1(2) of the BIT, nationality at the time of the investment was relevant for jurisdiction *ratione materiae*. In February 2019, the French Supreme Court overturned that decision at Venezuela's request. It held that since the BIT had two cumulative conditions for jurisdiction (nationality of the investor and protected investment) and one of them was lacking, a *partial* set aside was fraught with logical inconsistency. In April 2019, the arbitral tribunal rendered a final award, deciding that Venezuela had breached the BIT.

In despite of such final award, in line with French law, in June 2020 the Paris CA rendered a new decision in the annulment proceedings to fix the previous error. It reaffirmed its prior interpretation of Article 1(2) of the BIT and extended its reach, setting aside the jurisdictional award in its entirety. The writing style is different (and so is the composition of the three-judge panel), but the underlying reasoning is the same as in 2017. For the Paris CA, it follows from the ordinary meaning of words that protected investments under the BIT are assets invested by investors of the other Contracting Party; hence, jurisdiction *ratione materiae* requires investors to satisfy the nationality requirement when making the investment. (The interplay between the set-aside of the jurisdictional award and the enforcement of the final award, if any, seems uncharted territory. The decision may have just opened a new chapter in the long-running dispute between the Garcías and Venezuela.)

Clorox v. Venezuela

In *Clorox*, a case initiated in 2015, the claimant was Clorox Spain, a subsidiary of U.S.-based Clorox International. Clorox International had been the sole shareholder of Clorox Venezuela, the local investment vehicle, from the 1990s until April 2011, when Clorox Spain was constituted and immediately assigned all shares in Clorox Venezuela. In the merits, the dispute relates to legislative and administrative measures, adopted as of November 2011, that allegedly curbed Clorox's ability to establish product prices and conduct business operations, amounting to breach of fair and equitable treatment, full protection and security, and expropriation.

One of the jurisdictional objections presented by Venezuela was that Clorox Spain lacked a protected investment, for Article 1(2) of the BIT requires an active link between investor and investment, usually of cause (investor's activity) and consequence (investment). More than ownership of assets, an *action of investing* was needed. In turn, Clorox argued that it was an investor pursuant to the BIT, which only required incorporation in one of the Contracting Parties, and that Venezuela was trying to add non-written requirements – such as substantial business activities, effective control over investment, and denial of benefits – into the BIT.

In the May 2019 award, the tribunal made a two-step analysis of jurisdiction and ultimately sided with Venezuela's interpretation of Article 1(2) of the BIT. It held that Clorox Spain *prima facie* had an investment, being the sole shareholder of the locally incorporated company, but that treaty protection was limited to assets "invested by investors", so an *action of investing* was also required. For the tribunal, Clorox Spain had not made an action of investing because no real

exchange took place in April 2011. Clorox Spain received the shares from Clorox International for the purpose of its own constitution, as contribution in kind for its share capital and premium. No transfer of value occurred between them, as Clorox Spain itself would not exist had it not been for what it received from Clorox International. In addition, there was no evidence that Clorox Spain had made further investments in the local company. In short, the tribunal understood that to make is not the same as to hold an investment and that treaty protection required the former.

In March 2020, Switzerland's highest court set aside the *Clorox* award. For the Swiss Federal Tribunal, Article 1(2) is an ordinary asset-based definition of investment – a general clause followed by a non-exhaustive list of examples – known for its openness. Unpersuaded by what it called the "particular importance" given to "invested by investors" (para. 3.4.2.4), the court considered that the arbitral tribunal addressed as *investment definition* what is actually an issue of *treaty shopping*. Known problem, but wrong remedy, especially considering that the BIT has neither a denial of benefits clause nor nationality requirements in addition to place of incorporation. On the other hand, the court held that whether there had been abuse of rights in the corporate restructuring is a pending issue that should be decided by the arbitral tribunal, which inevitably reminds of *Philip Morris v. Australia* and the foreseeable dispute test (previous Kluwer blog posts that have discussed abuse of rights related-issues can be found here, here, here, here and here).

Analysis & Conclusion

To say that the Paris CA and the Clorox tribunal's interpretations are unusual is an understatement. They depart from the view that "invested by investors" is meaningless, little else than just redundant treaty writing, and give the wording important consequences for jurisdictional outcomes. Yet, and perhaps because of that, they raise at least two issues that would welcome further discussion.

First, the Paris CA blurred the lines between jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis* with the understanding that "the jurisdictional criteria established in the BIT are cumulative and indivisible" (para. 56, June 2020 decision). Under that view, these categories are less of separate boxes, which can be checked one at a time, and more of intertwined aspects of jurisdiction. Hence, nationality, at the time the investment is made, is relevant to determine if there is a protected investment. Nationality would be relevant from the beginning, as only investments *made by* investors are protected.[2)] That view contrasts with Article 25(2) of the ICSID Convention and overall practice, in which nationality's relevant date appears to be on a later stage – date of the alleged treaty breach, date of consent (usually when the request for arbitration is filed by the investor), and date of registration.

Second, the decisions assume that *to invest* (or *to make* an investment) cannot be conflated with *to hold* an investment. That is implied from the Paris CA's 2017 distinction between "held assets" and "invested assets", which the 2020 decision does not elaborate further but seems to accept as starting point (para. 51), and more directly affirmed by the Clorox tribunal (paras. 815-816).

The Swiss Federal Tribunal ruling, apart from describing Article 1(2) of the BIT as a broad asset-based definition of investment, did not address that distinction upfront. It seems to have circumvented it, by reasoning that "leaving aside the disputed formula 'invested by investors', it

must be noted that this definition does not contain any particular restriction or requirement concerning the nature of the protected investments" (para. 3.4.2.5), and by approaching the issue from other angles. Namely, (a) that the true issue being decided was different (origin of funds and, ultimately, treaty shopping), (b) that the BIT had not limitation clauses, such as denial of benefits, and (c) that the tribunal had added non-written conditions to the definition of investment. In the end, it seems that regardless of how novel the Clorox interpretation of "invested by investors" may be, from the standpoint of legal reasoning it still needs a more direct answer as to why it is incorrect – or not.

Despite their differences, the key takeaway from the Paris CA (in the 2017 and 2020 García Armas's set-aside decisions) and the Clorox tribunal (in the 2019 award), when viewed altogether, is that there may be some meaning to draw from "invested by investors". Whether, ten years from now, these decisions will be seen as outliers or as precursors of a new trend of interpretation is the ultimate question.

All texts in French and Spanish mentioned in this post have been translated into English by the author.

References

?1 Previous posts have discussed the dispute between the Garcías and Venezuela, which spans across at least three treaty-based arbitrations and issues such as dominant and effective nationality and challenge of arbitrators).

?2 The reasoning is different, but the outcome resembles Mr. Orrego Vicuña's dissenting opinion in *Siag v. Egypt* (2007). He considered that since Mr. Siag was Egyptian when the investment was made, that situation was not consistent with the ICSID Convention meaning and purpose. Mr. Rodrigo Oreamuno, co-arbitrator in *García Armas v. Venezuela*, also leans towards that view in his dissenting opinion.

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