School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Decision Name and Date: Bolivarian Republic of Venezuela v. Mr. Serafín García Armas & Ms. Karina García Gruber, Ruling Nr. 15/01040, Court of Appeals of Paris (France), dated 25 April 2017 (*rendered in French*)

Case report by: Lisa M. Bohmer**, Editor Diego Luis Alonso Massa***

Summary: On 25 April 2017, the Paris Court of Appeals partially annulled a decision on jurisdiction rendered by the arbitral tribunal ("the Tribunal") in the *Serafín García Armas & Karina García Gruber v. The Bolivarian Republic of Venezuela*, UNCITRAL, PCA No. 2013-3 case. In a decision rendered in 2014[1] ("the Decision on Jurisdiction"), the Tribunal had decided that it had jurisdiction over a dispute concerning the alleged expropriation of Mr. Serafín García Armas' and Ms. Karina García Gruber's ("the Respondents") shares in two Venezuelan companies on the basis of the Spain-Venezuela BIT[2] ("the BIT"), despite the Spanish-Venezuelan dual nationality of the Respondents. The Paris Court of Appeals partially annulled the Decision on Jurisdiction for lack of jurisdiction *ratione materiae* since the Tribunal had concluded that the disputed assets were investments within the meaning of the BIT without giving any consideration to the nationality of the investors at the time when the investments were made. It rejected all other grounds for annulment. In particular, it held that the Tribunal had jurisdiction *ratione personae* over the dispute since neither the BIT nor the applicable UNCITRAL arbitration rules prevent Spanish-Venezuelan bi-nationals from bringing an action against one of their States of origin under the BIT. The Court also considered that an alleged fraud related to the evidence of the transfer of shares in the local companies to the two claimants in the arbitration proceedings did not warrant an annulment for violation of international public policy since such fraud would not have had a material impact on the outcome of the Decision on Jurisdiction. The Court further considered that the French conception of international public policy does not include a rule prohibiting a citizen from bringing an action against his/her State of origin before international dispute resolution bodies. The Court finally rejected the argument that the Tribunal violated the adversarial principle (and therefore Venezuela's due process) when quoting a number of bilateral investment treaties concluded by Venezuela and by Spain which had not been discussed by the parties. The Court considered that the review of these treaties merely allowed the arbitral tribunal to corroborate its findings and could therefore not be sanctioned.

Main issues: Annulment – Partial Annulment – UNCITRAL Arbitration Rules – Jurisdiction *ratione personae* – Dual Citizenship – Fraud – Customary International Law – Jurisdiction *ratione materiae* – Definition of Investment – Nationality of the Investor at the time when the

[1] Mr. Serafín García Armas & Ms. Karina García Gruber v. Bolivarian Republic of Venezuela, CPA case No. 2013-3, Decision on Jurisdiction, 15 December 2014.
[2] *Acuerdo entre el Reino de España y la Republica de Venezuela para la Promoción y la Protección Reciproca de Inversiones*, signed on 2 November 1995 and in force since 10 September 1997.

Investment was made – Non-compliance with the Mandate conferred upon the Tribunal – International Public Policy – Due Process – Adversarial Principle

Judges: Ms. Guihal (President), Ms. Salvary, Mr. Lecaroz

Arbitrators in the underlying arbitration: Professor Eduardo Grebler (President), Professor Guido Santiago Tawil (Appointed by Claimants), Mr. Rodrigo Oreamuno (Appointed by Respondent)

Applicant's Counsel: *French set-aside proceedings:* Luca de Maria (SELARL Pellerin – De Maria – Guerre), Alfredo De Jesus O. *Underlying arbitration:* Manuel Enrique Galindo (Procurador General de la República Bolivariana de Venezuela), Carmen Núñez-Lagos (Hogan Lovells Paris LLP), Luis Bottaro, Bruno Ciuffetelli, Gonzalo Rodríguez, Marianna Boza, Carlos Rodríguez (Hogan Lovells Venezuela)

Respondents' Counsel: *French set-aside proceedings:* Matthieu Boccon Gibod (SELARL Lexavoue Paris-Versailles), Elie Kleiman, Shaparak Saleh. *Underlying arbitration:* Nigel Blackaby, Lluís Paradell, Jean-Paul Dechamps (Freshfields Bruckhaus Deringer US LLP)

* Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Lisa M. Bohmer is qualified for the Paris bar (CAPA) and admitted to the Texas bar. She holds a Master triple-degree in Global Economic Governance from the University of Paris I Panthéon-Sorbonne, Sciences Po Paris and Columbia Law School, as well as an LL.M. in Energy, Environmental and Natural Resources Law from the University of Houston Law Center. She recently defended her Ph.D. thesis on "State functions in arbitration: a public law perspective" at the University of Paris I Panthéon-Sorbonne. She can be reached at https://www.linkedin.com/in/lisa-m-bohmer-113012a4/

*** Lawyer, University of Buenos Aires, admitted to practice law in the City of Buenos Aires; Sworn Translator, University of Buenos Aires, Argentina. LLM holder in International Relations – with a specialization in Private International Law – Institut de Hautes Études Internationales, University of Geneva, Switzerland. Mr. Alonso Massa can be contacted at: alonso@arbitrage-transnational.com or https://ar.linkedin.com/in/diegoluisalonsomassa

Digest:

1. Relevant Facts and Procedural Details

The dispute arose out of several measures taken by Venezuelan government officials against the assets of two Venezuelan food distribution companies, Alimentos Frisa and Transporte Dole. The claimants in the underlying arbitration and Respondents in the court proceedings are Mr. Serafín García Armas and his daughter Ms. Karina García Gruber, both shareholders in the two companies. Mr. García Armas moved to Venezuela in 1961, where he started what would become a successful family business in the food distribution sector. In this context, several members of Mr. García Armas' family were involved in the successive incorporation and dissolution of various companies. In 2001 and in 2006, the two claimants in the underlying arbitration acquired all the shares in Transporte Dole and in Alimentos Frisa from two other daughters of Mr. García Armas, Raquel and Fanny García. In 2010, Venezuelan government officials allegedly seized all products and the transportation fleet of the two companies at their storage facility. Mr. García Armas was born in Spain and acquired the Venezuelan citizenship in 1972. His daughter Karina was born Venezuelan and acquired the

Spanish citizenship in 2003. But Venezuela recognized dual citizenships only as of 2004.

On 9 October 2012, the claimants in the underlying arbitration initiated arbitration proceedings on the basis of the BIT to obtain reparation for the alleged expropriation of their assets. Venezuela ("the Applicant") eventually agreed to UNCITRAL arbitration instead of ICSID arbitration, which is the default mechanism for Investor-State arbitration under the BIT. The seat of the Arbitral Tribunal was Paris, France. On 15 December 2014, the Tribunal rendered the Decision on Jurisdiction, deciding that it had jurisdiction over the case. In particular, the Tribunal held that it had jurisdiction *ratione personae* over the dispute since neither the UNCITRAL arbitration rules nor the BIT prohibit dual citizens from bringing an action against one of their States of origin. It further concluded that it had jurisdiction *ratione materiae* over the dispute since the citizenship of the investor at the time when the investment was made was irrelevant for the definition of an investment. In a dissenting opinion, Mr. Rodrigo Oreamuno considered that the citizenship of the investor at the time when the investment was made was relevant, but that in the present case, it could not be contested that the two claimants had the Spanish citizenship when at least some of the investments were made, which was sufficient to establish jurisdiction *ratione materiae*. On 14 January 2017, Venezuela filed an application for annulment of the Decision on Jurisdiction, raising four of the five grounds for annulment outlined in article 1520 of the French Code of Civil Procedure ("CCP"). It claimed that the Tribunal wrongly upheld jurisdiction (art. 1520(1)), that the arbitral tribunal ruled without complying with the mandate conferred upon it (art. 1520(3)), that due process was violated (art. 1520(4)) and that recognition or enforcement of the award would be contrary to international public policy (art. 1520(5)).

2. The Court's Analysis

2.1 Violation of public policy due to fraud committed by the Respondents

Venezuela first alleged that the Respondents never acquired the relevant shares in the two companies. According to Venezuela, the Respondents submitted falsified documents and rendered false testimony during the arbitration proceedings in order to prove transfers of shares to the Respondents that never took place. According to the Applicant, the Respondents therefore committed fraud, which falls under Article 1520(5) of the CCP on international public policy.

The Court of Appeals rejected this argument. It considered that an arbitral award can only be annulled for fraud under Article 1520(5) if one party submitted false evidence or fraudulently omitted relevant evidence, and if this action had a material impact on the decision of the tribunal. Without further inquiring whether false evidence had been submitted, the Court considered that Venezuela did not submit any evidence that the Decision on Jurisdiction would have been different if the original shareholders in the two companies, the Respondents' relatives Raquel and Fanny García, had initiated the arbitration proceedings instead of the Respondents.

2.2 Lack of jurisdiction ratione personae due to the dual citizenship of the Respondents, and non-compliance with the mandate conferred upon the Tribunal

Venezuela argued that the Tribunal lacked jurisdiction *ratione personae* over the dispute. It considered that the reference made by the BIT to ICSID arbitration, the treaty on friendship and commerce replaced by the BIT and public international law on diplomatic protection

confirmed that the parties to the BIT meant to exclude any action by a bi-national against one of his States of origin and to require any nationality to be effective. Venezuela further argues that the Tribunal ruled without complying with the mandate conferred upon it when it failed to address the domestic and international rules of law raised by the Applicant. In any case, Venezuela submits that Venezuelan law should apply to the dispute concerning the Respondents' citizenships.

The Court of Appeals rejected these arguments. It reminded the parties that it has the power to address all relevant factual and legal arguments when reviewing whether or not the Tribunal had jurisdiction over the dispute, regardless of whether the arbitration is based on a contract or on a treaty. The Court explicitly referred to Articles 31 and 32 of the VCLT[3] as customary international law. It concluded that neither the terms nor the context of the BIT, nor its object and purpose warranted a distinction between bi-nationals and other claimants. It further considered that ICSID arbitration was only one of several means of Investor-State dispute resolution contemplated by the BIT. Since Venezuela agreed to UNCITRAL arbitration, the reference to ICSID arbitration could not establish the parties' intention to exclude bi-nationals. The Court concluded that since the terms of the treaties were clear, it was not necessary to have recourse to general international law to construe its meaning. In any case, it noted that the Applicant did not submit sufficient evidence to establish either a rule of customary international law according to which citizens can never bring an action against their State of origin before international dispute resolution bodies, or a rule of customary international law according to which a claimant can only prevail himself of an effective nationality in such instances. Finally, the Court considered that, according to the provisions of the BIT, the law of the State of origin applies to determine whether or not an investor has the nationality of that State, so that Spanish law and not Venezuelan law determines whether or not the Respondents were Spanish citizens at one given moment in time.

2.3 Lack of jurisdiction ratione materiae due to the dual citizenship of the Respondents, and non-compliance with the mandate conferred upon the Tribunal

Contrary to the majority of the Tribunal, Venezuela considered that the Respondents had to have the Spanish nationality when the investment was made, otherwise there was no investment within the meaning of the BIT. It further argued that the investments were made in 2001, before Venezuela recognized the validity of dual citizenships. The Applicant also considered that the Tribunal failed to comply with the mandate conferred upon it when it did not take into account other relevant instruments of public international law as well as Venezuelan law providing for the registration of foreign investments.

With regard to the last argument, the Court of Appeals considered that Venezuela cannot avail itself of its domestic law in order to avoid its international obligations. As long as there is no requirement to register a foreign investment under the BIT, any domestic law in this sense is therefore irrelevant. The Court then analyzed the definitions provided for in the BIT, stating that an investment is "…any type of asset invested by investors of one Contracting Party in the territory of the other Contracting Party…".[4] The Court concluded that, according to the ordinary meaning of these terms, an investment should not only be the property of an investor as defined by the BIT at the time when the arbitration proceeding was initiated, but

[3] Vienna Convention on the Law of Treaties, concluded on 23 May 1969.
[4] BIT, art. I.2. The original Spanish version states: *"…todo tipo de activos, invertidos por inversores de una Parte Contratante en el territorio de la otra Parte Contratante…"*

that it should also have been the property of an investor within the meaning of the BIT when the investment was made. As a result, the Court pronounced the annulment of the Decision on Jurisdiction, but only "…to the extent that it excluded any element of temporality in the identification of the protected investments".[5]

2.4 Violation of international public policy due to the dual citizenship of the Respondents

Venezuela argued that the Tribunal violated international public policy, which prohibits a person from bringing an action against his own State of origin before international dispute resolution bodies.

The Court of Appeals rejected this argument expediently, considering that "…the French conception of international public policy does not recognize the alleged principle".[6]

2.5 Violation of due process due to a disregard of the adversarial principle

Finally, Venezuela alleged that the Tribunal violated the adversarial principle and therefore its due process when reviewing sixty-nine bilateral investment treaties signed by Venezuela and by Spain that had not been discussed between the parties, in order to conclude, *a contrario*, that the two States had no intention to exclude bi-nationals from bringing an action against one of their States of origin.

The Court rejected this argument, considering that the Tribunal gave sufficient reasons for its decision when considering that the terms of the BIT did not exclude bi-nationals from bringing an action under the BIT against one of their States of origin. As a consequence, the review of other bilateral investment treaties signed by Venezuela and by Spain only corroborated the Tribunal's findings and did not amount to a violation of the adversarial principle or warrant the annulment of the award.

3. The Court's Decision

The Court of Appeals decided to annul the Decision on Jurisdiction, but only to the extent that the Tribunal concluded that the disputed assets were investments in the sense of the BIT without consideration of the nationality of the investors at the time when the investments were made. It pronounced the *exequatur* of the Decision on Jurisdiction on all other aspects and ordered each party to bear her own legal costs and expenses.

[5] The original French version states: "*…en ce qu'elle exclut tout élément de temporalité dans la détermination des investissements protégés*".
[6] The original French version states: "*…le principe allégué ne correspond pas à la conception française de l'ordre public international*".