



School of International Arbitration

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International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law**

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Award Name and Date: Clorox España S.L. v. República Bolivariana de Venezuela (PCA Case No. 2015-30) – Award – 20 May 2019

Case Report by: Jorge Arturo González**, Editor: Diego Luis Alonso Massa***

Summary: Claimant brought an action for relief against Venezuela pursuant to the Venezuela-Spain bilateral investment treaty ('BIT'), claiming that Venezuela breached, among others, fair and equitable treatment, full protection and security, and expropriation protections set out in the BIT in relation with its investment in Clorox Venezuela, a company with operating headquarters and two factories in Venezuela. Respondent objected to the Tribunal's jurisdiction on several grounds. The Tribunal conceded to one of Venezuela's arguments, considering that Claimant, while being the owner of an investment in Venezuela, had not made the investment itself. Consequently, Claimant was not protected under the BIT and the Tribunal declined its own jurisdiction.

Main Issues: Requirement under the BIT that the investor made an investment; difference between holding an investment and having made an investment; indirect investments; treaty shopping; abuse of process.

Tribunal: Mr. Yves Derains (President), Professor Bernard Hanotiau (Arbitrator) and Professor Raúl Emilio Vinuesa (Arbitrator)

Claimant's Counsel: Mr. Guillermo Aguilar Alvarez, Ms. Caline Mouawad, Mr. Fernando Rodríguez Cortina, Ms. Jessica Beess und Chrostin, Mr. Aloysius Llamzon (King & Spalding LLP, New York)

Respondent's Counsel: Dr. Reinaldo Enrique Muñoz Pedroza, Dr. Felipe Andrés Daruiz Ferro, Dra. Delcy Eloína Rodríguez Gómez (República Bolivariana de Venezuela), Mr. Ricardo García Acevedo, Mr. Carlos Alberto Dugarte Obadía, Ms. María Alejandra García Morris (García & Morris Abogados, Bogotá), Mr. Ignacio Torterola, Mr. Diego Gosis, Ms. Verónica Lavista, Mr. Guillermo Moro, Mr. Alejandro Vulejser (GST LLP, Miami)

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Digest:

1. Relevant Facts

Clorox Spain S.L. ('Clorox Spain' or 'Claimant') is a company incorporated under the laws of the Kingdom of Spain. Respondent is the Republic of Venezuela ('Venezuela or 'Respondent') (¶ 2). Since 2011 Clorox Spain had ownership over Clorox Venezuela, a subsidiary operating in that country with a headquarters office and two factories. Up to 2011, Clorox Venezuela had been operating with a 40% average gross margin and a 20% average operating margin (¶ 438). However, in November 2011, Venezuela froze the prices of the products that accounted for 73% of Clorox Venezuela's sales. In 2014 Venezuela reaffirmed the price control regulation (¶ 438). Further, Venezuela restricted the management of Clorox Venezuela by forbidding the possibility of laying off employees, retaining tax credits owed to the company under the Value Added Tax regime, and restricting access to foreign currencies (¶ 440). In 2014 Clorox Venezuela sustained a loss of 14.1 million US dollars (¶ 438). The company ceased operations on September 22, 2014 (¶ 441). Venezuela took over the factories of Clorox Venezuela on 26 September 26, 2014, named a new Board of Directors, and sold its former products under a modified logo, which included the label "Made in Socialism" (¶ 442).

Claimant brought an action for relief against Venezuela pursuant to the BIT, alleging that Venezuela breached, *inter alia*, fair and equitable treatment, full protection and security, and expropriation protections in the BIT.

2. Procedural History

Claimant filed a Notice of Arbitration ('NoA') on May 18, 2015. Respondent received the NoA on the same date; pursuant to the UNCITRAL Arbitration Rules, the arbitration was deemed to have commenced on that date (¶¶ 4-6). Claimant appointed Professor Bernard Hanotiau as arbitrator in the NoA (¶ 8). Respondent appointed Professor Raúl Emilio Vinuesa on June 17, 2015 (¶ 9). The Secretary General of the Permanente Court of Arbitration ('PCA') appointed Mr. Yves Derains as presiding arbitrator (¶ 10). The parties agreed that the seat of the arbitration was Geneva, Switzerland (¶ 23) and that the language of the proceedings was Spanish (¶ 13).

On April 20, 2017, the pre-hearing conference call took place (¶ 89). The hearing was held from May 22 to May 26, 2017 (¶ 115). The Tribunal considered exhibit C-190 to be inadmissible after failing to verify its authenticity through the appointment of an expert (¶ 195).

3. Positions of the Parties on Jurisdiction

3.1 Respondent's Position

3.1.1 Claimant did not meet its burden of proof

Respondent submits that the burden of proof regarding the tribunal's jurisdiction when the facts are object of debate falls upon the claimant, as recognized by several investment arbitration tribunals. The jurisdiction must be clear, certain and proven. In this sense, Respondent alleges that the Claimant is not even remotely close to satisfactorily discharging this burden, and consequently, the Tribunal has to decline its jurisdiction (¶¶ 206-208).

3.1.2 Claimant is not an investor under the BIT

The applicable BIT only covers investments made by nationals or companies of a Contracting State in the territory of the other Contracting State (¶ 212). Further, under the BIT, the assets that constitute the investment must have been *invested* by the foreign investor (¶¶ 212, 225). This stems from article I of the BIT, which must be interpreted according to the Vienna Convention on the Law of the Treaties ('the Vienna Convention') (¶ 227). Under the Vienna Convention, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (¶ 227). According to article 1.2 of the BIT *any kind of assets invested by investors of a Contracting State in the territory of the other Contracting State* are considered an *investment* (¶ 230). Considering the purpose of the BIT, Respondent shows that, pursuant to the preambles of the BIT, it aims to protect real investors from one of the Contracting States that carry out real investments in the other Contracting State (¶ 234). According to the *Quiborax v. Bolivia* case, being the owner of an investment *i.e.*, shares, is not enough, but the action of *investing* is necessary (¶¶ 229, 231).

The action of *investing* never took place in this case, as Clorox Spain did not carry out an investment in Venezuela (¶¶ 212, 231). The true investment was that of The Clorox International Company ('Clorox International'), an American company that is not protected by the BIT (¶¶ 210, 212), as the US does not have a BIT with Venezuela (¶ 286). Claimant never purchased the shares of Clorox Venezuela, but they were rather fraudulently transferred as part of an abuse of process, as explained below (¶ 228).

Respondent submits that the true investor is Clorox International. With the sole purpose of protecting its investment under the BIT, Clorox International incorporated Clorox Spain, and on the same day of incorporation, transferred all of the shares of Clorox Venezuela to Clorox Spain through a supposed barter agreement (¶ 210). This constitutes a fraud, which was only planned with the purpose of seeking protection under the BIT (¶ 211). At this moment, the dispute was already foreseeable (¶ 214).

Clorox Spain is a shell company and its sole purpose is to hold the shares of Clorox Venezuela for Clorox International (¶ 213). According to Respondent, Clorox International admitted that the purpose of incorporating Clorox Spain was to carry out a corporate reorganization that would allow it to begin an international arbitration proceeding against Respondent (¶¶ 214, 292).

The only element linking Claimant to Spain is its registered address (¶¶ 215-216). The employees of Clorox Venezuela have no knowledge of Clorox Spain (¶ 217). Claimant has never been involved in the management of Clorox Venezuela, whereas the directors of Clorox International have (¶¶ 217, 221-222). When Clorox Venezuela stopped operations, Clorox International issued a press release (¶ 223).

Claimant has not provided evidence of wire transfers or any type of contribution, in cash or in kind, carried out in Venezuela (¶ 217). Clorox International remains the true shareholder in Clorox Venezuela's corporate structure, as Clorox Spain is nothing more than a paper company (¶¶ 218-219). From 2012 onwards, the employees of Clorox Venezuela used the distinctive logo of Clorox International (¶ 220).

3.1.3 Claimant engaged in an abuse of process

Respondent restates that the alleged investment is not protected by the BIT (¶ 237). Even though the BIT recognizes shares as an investment, the investor must have carried out the action of investing (¶ 237). Claimant did not purchase the shares, has not shown a sale and purchase agreement, or proven the payment of a price for the shares (¶ 239). All of the shares of Clorox Venezuela were transferred by Clorox International to Clorox Spain as a capital contribution in kind upon the latter's incorporation (¶ 239). Clorox Spain had a recorded capital stock of 3,000 euros, whereas Clorox Venezuela, its subsidiary, was worth 14 million US dollars (¶ 242). Even if Clorox Venezuela made a contribution of know-how or technology to Venezuela, this is irrelevant, as it is Clorox Spain that would have had to make this investment to qualify as an investor under the BIT (¶ 243). No evidence of such investment has been found (¶ 243).

An abuse of process takes place when a company that can *prima facie* invoke a right, behaves in such a way as to distort the rationale behind such right and consequently loses it (¶ 245). This definition refers to a procedural right, such as the alleged investor's right to access the dispute resolution mechanisms found in the BIT (¶ 245). The sole purpose behind the creation of Clorox Spain was for the present dispute to fall under the umbrella of the BIT (¶ 244).

A corporate reorganization that aims to obtain the protection of a BIT is not necessarily illegitimate or abusive (¶ 247), but if such reorganization takes place after the dispute becomes reasonably foreseeable, then it ranks as abusive and illegitimate (¶¶ 248-250). According to Respondent, the Tribunal should consider whether the corporate reorganization stands on its own, independently of granting access to the BIT (¶ 291).

Foreseeability is not a mere possibility (¶ 251), but rather, a reasonable prospect that a measure which may give rise to a treaty claim will materialize, according to *Philip Morris v. Australia* (¶ 252).

Claimant states that the moment when the dispute originated was when the price control regulation was enacted on July 18, 2011 ('Price Regulation Law') (¶ 254). Clorox Spain was incorporated before this date, on April 15, 2011 and received the shares of Clorox Venezuela on the same day (¶ 254). According to this timeline, presented by Claimant, the corporate reorganization was not abusive and was unrelated to the dispute (¶ 254). However, according to Respondent, Clorox Spain did not become a shareholder of Clorox Venezuela until August 3, 2011 when the Shareholders' Meeting of Clorox Venezuela approved the acquisition of its

stock by Clorox Spain (¶¶ 258, 259). As a result, Claimant's status as an alleged investor under the BIT did not take place before the origin of the dispute (¶ 260).

However, even if Claimant in fact became an investor on the date of its incorporation, the dispute was already reasonably foreseeable at this moment, as the President of Venezuela had announced the creation of the Superintendence of Prices and Costs ('Superintendence') and the forthcoming Price Regulation Law (¶ 263). This shows that the corporate reorganization was abusive. By comparison, these facts are much clearer than those of *Philip Morris v. Australia*, where there was great political instability and debate regarding the regulation of tobacco (¶¶ 265, 266). Claimant omitted these crucial facts, but also, the existence of a price control regime affecting the exact same products manufactured by Claimant, since 1994 (¶¶ 269-274). Further, Clorox International had objected to these regulations in the past (¶ 283).

All the other grievances allegedly faced by Claimant were also foreseeable, or even foreseen by the time of Claimant's incorporation, and are intertwined with the matter of price regulation (¶¶ 277-279, 284). For instance, Clorox Venezuela had complained about the difficulty to obtain foreign currencies (¶¶ 280-281). Another element to take into consideration in this foreseeability test is that, since 1997, labor legislation and practice ordered to reinstate the business operation of a company when massive layoffs took place (¶ 282).

Bad faith does not have to be proven to show that an abuse of process was committed (¶ 285). Nonetheless, the deceptive conduct of Claimant must weigh in on the Tribunal's decision (¶ 285).

3.1.4 Claimant engaged in treaty shopping and its corporate veil should be lifted

Respondent submits that corporate planning must be justified by economic or commercial motives, while treaty shopping is not adequate in this sense (¶ 299). Whether Claimant has employees or a real business operation has not been proven (¶ 300). As this is a case of treaty shopping, Claimant's corporate veil should be lifted, in order to ascertain that the ultimate beneficiary of the investment is Clorox International (¶ 302). Clorox Spain is a facade and the true nationality of the investor should prevail (¶¶ 303-304)

Respondent is certain that Claimant's incorporation was a response to the arbitral award of June 10, 2010, concerning *Mobil v. Venezuela*, where it was established that an ICSID tribunal lacked jurisdiction to hear a claim raised by an American Company (¶ 305). ICSID case law supports the argument that a corporate reorganization is abusive if it takes place after the dispute becomes reasonably foreseeable (¶ 306).

3.2 Claimant's Position

3.2.1 Respondent did not prove its affirmative defense

The burden of proof regarding fraud and abuse of process falls upon Respondent; there is a high threshold which is not met on the facts of this case (¶¶ 320, 323, 325). Claimant has proven that it is a Spanish investor and that the dispute refers to its investment in Venezuela (¶ 321), qualifying as an investor under article I(1)(b) of the BIT (¶ 313). Claimant's affirmative defenses regarding fraud and abuse of process must be clearly proven to succeed, but there is no evidence supporting them (¶¶ 326, 329).

3.2.2 Claimant is an investor under the BIT

Claimant is a Spanish company and owns 100% of the stock of Clorox Venezuela, a Venezuelan company (¶ 333). Under the BIT, companies can be considered investors (¶ 334). The BIT does not require that the investor is involved in the management of the investment or that it carries out business operations in its home country (¶ 335). These additional requirements alleged by Respondent do not stem from the BIT (¶¶ 335, 336). Other BITs signed by Respondent do impose similar additional requirements (¶¶ 336-339). However, as a matter of fact, Claimant was involved in the management of Clorox Venezuela; for instance, Claimant appointed directors and approved the financial statements of Clorox Venezuela as its sole shareholder (¶ 351).

The BIT does not preclude Claimant from becoming a protected investor by acquiring the shares of Clorox Venezuela, rather than making the initial contribution (¶ 340). The BIT expressly recognizes shares as an example of an investment (¶¶ 341, 349). The BIT does not contain a denial of benefits provision, which would allow the Contracting States to deny the benefits of the treaty to a company that is ultimately controlled by nationals of a third State (¶¶ 343-344).

Claimant criticizes Respondent's argument that holding shares of a Venezuelan company is not enough to be considered an investor (¶ 356). The case law supporting Respondent's position stems from ICSID cases which are inapplicable (¶ 358). Further, it is evident that the investment in this case, *i.e.* Clorox Venezuela, is within the territory of Venezuela (¶ 362). Pursuant to all of the above, Claimant is undoubtedly an investor under the BIT (¶ 345).

3.2.3 Claimant did not engage in an abuse of process

Claimant rebuts Respondent's argument that Clorox Spain was created and acquired the shares of Clorox Venezuela only when the dispute was already foreseeable (¶ 374). Even if price regulation was a foreseeable policy, Claimant could not have foreseen that the Superintendence was going to exercise its discretionary powers arbitrarily (¶ 375). Further, the present dispute did not begin until September 2014, years after Claimant's incorporation and its acquisition of Clorox Venezuela (¶ 380). Finally, the dispute was not foreseeable even in 2011 (¶ 381). In this sense, Claimant's incorporation is not abusive (¶ 376).

Claimant defines abuse of law as a State taking advantage of its rights arbitrarily, causing unjustified damage to the other State (¶ 382). In this sense, Claimant defined an abuse of process as the act of using a procedural instrument to achieve results that are not consistent with the *ratio legis* of procedural laws (¶ 382).

Claimant concedes that, if the corporate reorganization had taken place after the dispute had begun, then it would have been abusive (¶ 383). On the contrary, "nationality planning" may be justified (¶ 384). In this regard, Claimant states that at the time of the corporate reorganization, there were no signs of the dispute. While conceding that price regulation existed before 2011, Claimant argues that the controversy arises from the adoption of drastic measures in 2012, which were considerably different than the Price Regulation Law of 2011 and any prior regulations (¶¶ 386, 391). Before 2012, on average Clorox Venezuela operated with a 40% gross margin and a 20% operating margin (¶ 389). In 2012, Venezuela began fixing prices arbitrarily, disregarded Claimant's comments, failed to compensate aggrieved

companies and suddenly broadened the scope of the regulation (¶ 390). After these changes, Claimant had to operate at a loss (¶ 392).

Relying on the *Mavrommatis* case, Claimant states that a dispute begins when a regulation is enacted and diverging points of view are expressed (¶¶ 394, 395). Considering the above, Claimant places the origin of the dispute in 2014, when the price increase set by the Superintendence showed that it would be impossible to reach an amicable solution (¶ 396). Only then did Venezuela show that it would continue to act illegally (¶ 397). In April 2014, Respondent had appointed a sponsor for Clorox Venezuela and met with representatives of the company, making a commitment to remedy the abusive regulations and provide relief (¶ 398). The exact moment when the dispute begun was, according to Claimant, when Respondent failed to deliver these promises in September 2014 (¶¶ 399, 400). Respondent rebuts by pointing out a meeting held between Clorox Venezuela and Respondent in 2009 (¶ 402). Nonetheless, Claimant states that dialogue cannot be considered a dispute, and that the meeting was requested by Respondent (¶ 403).

Respondent overstates the existing case law and misreads Claimant's case. Respondent proposes, in order to determine the foreseeability of the dispute, a very high threshold on the basis of the prevailing case law (¶¶ 411, 420). Further, the foreseeability test is objective, relying on the perspective of a hypothetical reasonable third person (¶ 414). In this sense, the Tribunal must consider that Clorox Venezuela had been making profits for nearly two decades (¶ 414). The President's speech of 2011 adds nothing to this case and was a typical political tactic used in this regime (¶ 414). The Price Regulation Law of 2011 should not be considered as the starting point of the dispute as its arbitrary execution, which only took place in 2014, was not foreseeable (¶¶ 416-418). This regulation was just one of many of the interventionist policies of Venezuela and should not be decisive in this regard (¶ 421). That Clorox International took steps to protect its investment that later proved necessary cannot become the basis for Respondent's argument (¶ 425).

The analogy between this case and the *Philip Morris* case is inadequate (¶ 421). In that case, the claimant had warned the Australian government that the enactment of a tobacco regulation would breach its rights (¶ 421).

The reorganization of Clorox Venezuela had been planned in 2010, even before the President's speech (¶ 426). In 2011, Clorox International incorporated Clorox Spain, contributing 100% of the shares of Clorox Venezuela as capital stock (¶ 426). The definition of "investor" under the BIT includes direct and indirect investments (¶ 427).

3.2.4 Claimant did not engage in treaty shopping

Respondent confuses the concepts of treaty shopping, lifting of the corporate veil and abuse of process (¶ 429). Further, this cannot be considered a case of treaty shopping.

Respondent relies on *Phoenix Action v. Czech Republic*; however, in that case, the claimant had created artificial companies that served the sole purpose of raising domestic disputes to an international investment arbitration, and this was *after* the grievances had already occurred (¶ 432). The policies that affected Clorox Venezuela started in 2012 when Respondent fixed the company's prices below production costs, and later added further measures that were detrimental to Clorox Venezuela's business (¶ 430). This was long after the corporate reorganization of Clorox International.

Claimant submits that the lifting of the corporate veil is an extraordinary remedy and the separate entity principle remains the rule (¶ 433). Further, Respondent did not even argue that Claimant used its legal personality as a Spanish corporation to commit a fraud (¶ 433). Considering this, the request to lift Claimant's corporate veil is unfounded (¶ 433). The arguments on fraud and evasion of the law formulated by Respondent seem to actually refer to the issue of treaty shopping and not corporate personality (¶ 435). Based on the above, there are not material arguments that should lead the Tribunal to decline its jurisdiction (¶ 436).

4. Positions of the Parties on Merits

4.1 Claimant's Position

The applicable law is the BIT, complemented by international law and the law of Venezuela (¶¶ 499-502). Respondent cannot evade its international responsibility by invoking its own domestic law (¶ 503). Respondent breached the BIT, through the following actions: expropriating Claimant's investment with no duly compensation; failing to guarantee fair and equitable treatment; failing to grant full protection and security to the investment; undermining the management, development, use and enjoyment of the investment (¶ 504).

Claimant requests full compensation, amounting to 184.6 million US dollars (considering damages since September 2014), plus interest (¶ 615).

4.2 Respondent's Position

Respondent points out that price regulation has been in place in Venezuela since 1944 (¶ 647). The products manufactured by Claimant have been regulated since 2003 (¶ 648). Claimant breached the applicable labor and commercial legislation (¶ 650). Further, the tax authorities did not incur in unreasonable delay in solving Clorox Venezuela's requests for reimbursement of tax credits (¶ 660), and Venezuela's foreign exchange system was in place since before Claimant's investment (¶ 662).

Claimant omitted crucial elements from Venezuelan law. For instance, Clorox Venezuela had access to several mechanisms to request the tax credits it was owed and did not use these (¶ 669). Further, the occupation of the premises of Clorox Venezuela was only temporary (¶ 658).

Claimant accepts that the theory of police powers applies to this dispute, resulting in a presumption of legitimacy regarding Respondent's acts (¶ 690). Respondent argues that its regulation was not arbitrary and did not affect the alleged investment of Claimant (¶ 693), as did not discriminate against the investment, but rather only regulated its internal market (¶¶ 697-734).

Venezuela did not commit a creeping expropriation (¶ 735). The standard of proof in this regard is high (¶ 736). Claimant would have to prove, *inter alia*, that there was a deliberate intent to achieve this result (¶ 741). Further, in this case, Clorox Venezuela voluntarily ceased operations and Respondent merely continued its operations to ensure the jobs of the employees (¶ 738).

Venezuela did not breach the standard of fair and equitable treatment. There were several internal remedies available to Claimant, and further, Respondent did not make any specific commitments to Claimant (¶¶ 749-754). Additionally, Respondent granted full protection and security to the investment (¶ 756). Claimant's argument to the contrary is surprising, considering that the company left Venezuela and abandoned 300 employees (¶ 759).

Claimant's calculation of damages is excessive and founded on erroneous assumptions (¶¶ 761-777). Further, the Tribunal should consider the bolivar as a convertible currency (¶ 778). Finally, the Tribunal should apply the findings of the *Iran–United States Claims Tribunal* to reject the use of compound interests and avoid a disproportionate compensation (¶ 779). Based on the above, Respondent requests the Tribunal to decline jurisdiction and reject all of Clorox Spain's claims.

5. Tribunal's analysis

5.1 Burden of proof

The discussion concerning burden of proof is largely rhetoric, as Claimant openly admits that it must prove to the Tribunal that it is an investor whose investment is protected by the BIT (¶ 784). The Tribunal concludes that Claimant bears the burden of proof on jurisdiction (*rationae personae*, *rationae materiae* and *rationae temporis*) while also stating that Respondent bears the burden of proof for the affirmative defenses that it raised (¶ 784). Claimant does not have to prove that it did not commit an abuse of law or incur in treaty shopping (¶ 785).

5.2 Whether Claimant is an investor of an investment protected under the BIT

The Tribunal concludes that Clorox Spain has *prima facie* the characteristics to be considered a protected investor under the BIT, and the assets it holds have *prima facie* the characteristics to be considered a protected investment under the BIT (¶ 794). Therefore, the only relevant point of discussion is whether Claimant made the investment which it holds (¶ 794).

5.2.1 Definition of an investor under the BIT

The BIT considers legal entities, including companies, organized pursuant to the laws of one of the Contracting States, to be investors (¶ 795). That Claimant is a Spanish company is an undisputed fact, and there are no additional requirements for the investor to carry out a business operation in its home state, rendering the argument on whether Claimant is a shell company to be futile (¶ 796). Therefore, Claimant could be considered *prima facie*, a protected investor (¶ 797). Nonetheless, to definitely reach this status, an investor must have made the investment which it holds (¶ 798).

5.2.2 Definition of an investment under the BIT

The BIT considers any type of assets, including shares, to be protected investments (¶ 799). That Claimant owns 100% of the capital stock of Clorox Venezuela is an undisputed fact and, therefore, Claimant holds an asset that *prima facie* meets the criteria of a protected investment under the BIT (¶ 800). Nonetheless, these assets must have been in fact *invested* by the party seeking protection under the BIT (¶¶ 801, 802). This is confirmed by the rules of treaty interpretation found on the Vienna Convention (¶ 802). In the absence of the action of

making an investment, there will be no protection under the BIT (¶ 802). Further, nothing in the wording of the BIT requires that the investment is held directly rather than indirectly *i.e.* through a subsidiary, or that the investor makes the initial contribution, rather than eventually acquiring the investment (¶¶ 803, 804). Claimant's allegation that Respondent is seeking to introduce additional requirements to the BIT is not completely true, as the action of making an investment in fact stems from the text of the BIT (¶ 804).

5.2.3 Did Claimant make an investment in Venezuela?

Relying on *Quiborax v. Argentina*, the Tribunal notes that the object of an investment is different than the action of making an investment (¶ 806). The point of discussion is whether Claimant became an investor under the BIT through the corporate reorganization (¶ 810). It is undisputed that The Clorox International Company and The Clorox Company, two American companies, made an investment in Venezuela in the 1990s (¶ 811). Claimant stated that the contribution of Clorox Venezuela to the Venezuelan economy was attributable to Claimant as its sole shareholder (¶ 814). The Tribunal does not agree, as it cannot overlook the requirement that the investor executes the action of investing which is found on the BIT (¶ 815). Holding the investment indirectly is not an issue, but rather whether an investment was made (¶ 816).

In this case, two American companies, which are not protected by the BIT, made the initial investment, and Claimant subsequently received the investment (¶ 818). This would not be an obstacle to the Tribunal's jurisdiction, as long as Claimant had in fact *invested* in the shares (¶ 818). The discussion on the whether the *Salini* test is met is futile as that case is unreliable and inapplicable (¶ 819).

Pursuant to the BIT, the action of making an investment does not necessarily have to entail the payment of a price (¶ 824). Any transfer of value would suffice (¶ 824). However, the Tribunal considers that in this case there was no such transfer whatsoever (¶ 826). Claimant could not have contributed to Clorox Venezuela, because receiving the shares of Clorox Venezuela was a condition to its existence (¶¶ 830, 831). The shares of Clorox Venezuela were transferred from Clorox International to Claimant as an initial contribution in kind (¶ 828), and as such, were not truly acquired by Claimant, as required by the BIT (¶ 831). Further, Claimant failed to prove that it subsequently injected capital or contributed in any way to Clorox Venezuela (¶ 832).

Pursuant to the above, Claimant cannot be considered to be a protected investor under the BIT without having made an investment, and the Tribunal lacks jurisdiction to hear the case (¶¶ 835, 836).

6. Costs

The Tribunal orders Clorox Spain to reimburse Venezuela for costs and expenses, and bear the full costs and expenses of the arbitration proceedings (¶ 847).