JURISDICTIONAL CHALLENGES TO CLAIMS MADE BY TRUST & TRUST PARTICIPANTS IN INVESTMENT TREATY ARBITRATION

Alok Chaurasia[*] & *Chitresh Baheti*[**]

ABSTRACT

Claims made by trust & its participants in investment treaty arbitration is relatively a new phenomenon which has been left untouched by a majority of scholars. While trusts have no domicile across major common law jurisdictions, they have been increasingly used by states and private entities to enter into transactions that involves voluminous inflow and outflow of capital and at the same time risk protection. At the outset, the authors have provided a general description of trusts and the rights and obligations of the parties set out in trust structures. The authors aim to discuss the standing of trusts as an entity to make claims for a breach of provisions of a treaty and at the same time elucidate upon the intricacies involved for trust parties namely, trustee, protector, settlor, and beneficiary, to make a claim subsequent to a dispute arising out of the treaty provisions. Further, the authors have ventured to discuss various case laws pertaining to both standing of trusts and trust parties that expose the legal conundrums, such as control and ownership, involved in arriving at a conclusion as to standing of the concerned parties. Towards the end the authors have tried to summarise the entire discussion while

---

[*] Student, B.A. LL.B. (Hons.) FYIC, 4th Year, Dr. Ram Manohar Lohiya National Law University, Lucknow, alokchaurasia900@gmail.com.
[**] Student, B.A. LL.B. (Hons.) FYIC, 4th Year, Dr. Ram Manohar Lohiya National Law University, Lucknow, chitreshbaheti11@gmail.com.

maintaining that it is entirely upon the parties to the arbitration agreement and the drafting of the treaty provisions to include or exclude claims by trusts or trust parties.

1. INTRODUCTION

Foreign investment is an indisputable if not the most important facet of sustaining a country's economy. In order to attract Foreign Direct Investment ("**FDI**") and to extol maximum benefit out of such capital influx, international policy making efforts have increased and International Investment Agreements ("**IIAs**") at the bilateral, regional, sub-regional and inter-regional levels has attained a whole new status. With the growth of IIAs,[1] the exponential rise of International Treaty Arbitration ("**ITA**") and the prevalent use of trusts has called for the attention of majority of users and practitioner. Recent case laws have revealed that trust has been at the forefront of the ITA. The intermingling of ITA and trust has resulted in fierce battles which was beyond the expectation of the legal scholars. This article, focusing on the impediments associated with the use of trust in ITA, sets out to answer certain questions like who has the standing to bring a claim for trust and trust assets, whether the parties associated with trust can be considered as an investor, the standing of trusts in ITA etc.

[1] Malcolm Langford et al., *The Revolving Door in International Investment Arbitration*, 20 J. INT'L ECON. L., 301 (2017).

2. TRUST PRINCIPLE & TAXONOMIES

In *Empresa Ele´ctrica del Ecuador, Inc. v. Republic of Ecuador*,[2] trust has been defined as a "a contract by which a natural or juridical person transfers ownership of a given portion of its assets to a trustee, so that the trustee can use these assets to carry out a lawful purpose, which must be expressly set forth in the contract by the person setting up the trust." In other words, trust means a legal relationship created by "the 'settlor', when assets have been placed under the control of a 'trustee' for the benefit of a 'beneficiary' or for a specified purpose."[3]

From the above definition it is evident that in creation of a trust, there exists a relationship between three different entities i.e. settlor, trustee & beneficiary.[4] A settlor is a person who holds absolute ownership of a property which is to be the subject matter of the trust. Once the trust has been validly declared, the settlor ceases to have any role in the trust.[5] On creation of a valid trust, the title to the property must be vested in a trustee and the rights must be held by trustee for the beneficiaries. The trustee is not entitled to any personal or beneficial ownership in the trust property.[6] A beneficiary is a person for whom equitable ownership or partial equitable interest in real or personal property is created.[7] However, another party to trust in certain offshore territory is a Protector.[8] The major role of the protector is to supervise the functioning of trustee and

---

[2] Empresa Ele´ctrica del Ecuador, Inc. v. Ecuador, I.C.S.I.D. Case No. ARB/05/9, ¶ 56 (2009).
[3] Hague Convention on the Law Applicable to Trusts and on their Recognition 1985 art 2.
[4] 2 ALISTAIR HUDSON, EQUITY AND TRUST 73 (2017).
[5] Paul v. Pual, 1882 20 Ch. D. 742.
[6] PAOLO PANICO, INTERNATIONAL TRUST LAW 236 (2010).
[7] LYNTON TUCKER ET AL., LEWIN ON TRUSTS 1-009 (2017).
[8] BVI Trustee Act 1961 ch. 303, § 84(2)(d).

safeguarding the interests of settlor.[9] Unlike trustee, the settlor is not the legal owner of the property and can be removed from his fiduciary position by the beneficiary.[10] Generally, all property, real or personal, legal or equitable, can be made the subject of a trust provided that neither the policy of law nor statute bars the settlor from parting with the beneficial interest in favour of intended beneficiary.[11]

Further, the common law jurisprudence also distinguish between types of trust. A distinction has traditionally been drawn between "bare/simple/naked trust & special trust". A bare trust holds property for a single beneficiary absolutely and indefeasibly, a passive repository for beneficial owner with a single task of disposing the property to beneficial owner or as per his direction. Whereas, a trustee in a special trust have special duties to perform.[12] Another distinction has been drawn between "lawful & unlawful trust" on the basis of the objective & purpose of the trust. Another division in the nomenclature of trust is between "public & private trust" depending upon the end term beneficiary of the trust.[13] Another aspect is the distinction between "revocable & irrevocable trust". In revocable trust, the property is transferred back to the settlor or any other person appointed by the settlor, whereas, in irrevocable trust, the property is divested by the settlor permanently and cannot revert back to settlor.[14]

---

[9] *Id.*, § 86.
[10] Jasmine Trustees Limited [2015] J.R.C. 16; In the matters of the A and B Trusts (Jersey) [2012] J.R.C. 169A.
[11] PANICO, *supra* note 6, at 36.
[12] PANICO, *supra* note 6, at 15.
[13] PANICO, *supra* note 6, at 22.
[14] PANICO, *supra* note 6, at 236.

3. THE CLAIMANT CONUNDRUM

When it comes to determining a dispute under a Bilateral Investment Treaty (BIT), the first aspect to explore concerns with who is to be the claimant, to be more specific, when determining the meaning of the word 'investor', is it to be construed to mean the trust itself, or the parties attached to trust namely, trustee, beneficiary, settlor, or protector, so as to assert a claim subsequent to a dispute arising out of an alleged violation of the terms of a treaty. Traditionally, trusts are the outward face of an intricate corporate structure whose entire purpose is to maintain confidentiality of the ultimate owner. In these instances, the investment vehicles, usually a limited company, forms a part of trust assets as they invariably control the investment, consequently providing them a standing to make claims regarding the investment. However, sometimes it is the case that the trust assets include the investment in contention, in which situation it becomes pertinent to determine whether it is the trust itself that has a standing or the parties associated with the trusts i.e. trustee, beneficiary, etc. who have one.

3.1 STANDING OF CLAIMS BY TRUSTS IN INTERNATIONAL TREATY ARBITRATION

This section deals with the situations in which trusts themselves have a standing to make a claim. When it comes to covering trusts within the ambit of the term investors under a BIT, there are a handful few who expressly provide for inclusion. Chapter 11 of the North Atlantic Free Trade Agreement (NAFTA) provides for inclusion of Trusts[15], the

[15] The North American Free Trade Agreement 1992, 32 I.L.M. 289 (1993) Ch. 11 art 1139 & Ch. 2 art 201.

Protocol on Finance and Investment of the Southern African Development Community (SADC) contains an article covering trusts within the meaning of the term investors.[16] The BIT between Canada and Costa Rica states the term investor to mean 'any entity constituted or organized under applicable law, whether or not for profit, whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association'.[17] In the abovementioned BITs, the dilemma regarding the standing of trusts has been comprehensively dealt with. However, the question that arises, in cases where the terms of a treaty do not expressly mention the inclusion of trusts, is whether such entities could be covered under 'investor' provided a constructive interpretation is given to the terms of a treaties who usually use the test of incorporation, the seat of business and control test, or a combination of these criteria to identify investor.[18]

3.1.1 Seat and Place of Incorporation

Various treaties provide varied definitions of the term 'investor', for example, the Cyprus-Serbia-Montenegro (hereinafter 'CSM treaty') states that an investor is, "a legal entity incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of one Contracting Party, having its seat in the territory of that Contracting Party and making investments in the territory of the other Contracting Party"[19]. It could become problematic to include trusts in a BIT if it encapsulates the tests for incorporation and seat to determine standing

[16] S.A.D.C. Protocol on Finance and Investment 2010 annex 1 art 1(2).
[17] Canada–Costa Rica B.I.T. 1999 art 1(b) (i).
[18] JESWALD W. SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT 376, 377 (2013).
[19] Cyprus-Serbia and Montenegro B.I.T. 2005 art 1 (3) (b).

because, firstly, trusts have no legal personality as explained above, secondly, common law jurisdictions recognize only the notion of domicile not seat and in cases where seat or domicile is to be established reference will have to be made to domestic law. In India, for instance, the creation of trust does not require a domicile or seat, let alone incorporation, essential requirements are that the parties have to obtain the permission of a civil court and the person creating such trust should be competent to contract.[20]

3.1.2 Trusts established According to the Applicable Laws of the Contracting Parties

The Energy Charter Treaty ("**ECT**") proclaims an investor to be "a company or 'other organisation' organised in accordance with the law applicable in that contracting party".[21] Under this definition a trust established according to the laws of India, or for that matter of fact, of any country, would qualify as an investor under a BIT containing such definition making it flexible for parties to make a claim.

3.1.3 Applicable Laws and Control

The Switzerland-UAE BIT defines investor as "companies including corporations, partnerships, associations and other organizations, which are constituted or otherwise duly organised under Swiss law, as well as companies not established under Swiss law but effectively controlled by Swiss nationals or by companies established under Swiss law".[22] Two essentials can be culled out the definition, (1) trust must be included in the

[20] Indian Trusts Act, 1882, § 7.
[21] Energy Charter Treaty 1994, 34 I.L.M. 373 (1995) art 1(7) (a) (ii).
[22] Switzerland–UAE B.I.T. 1999, art 1(1) (a) (ii).

term 'other organisation' established under Swiss law and (2) control by Swiss nationals of the same. Establishing control will invariably lead us to the question, whether the control is administered by the trustee, settlor, beneficiary etc. Further, if the trustee is a Swiss national and the beneficiary of Indian origin, will the tern 'investor' still cover the trust?

3.1.4 Nationality Principle

Another principle that tribunals are increasingly considering is regarding that of nationality of trusts where emphasis is placed on the creation of trust according to the applicable laws of the contracting parties rather than the nationality of the trustee or the beneficiaries. In the ongoing claim in *Strategic Infrasol v. India*,[23] where the claimants happened to be a limited liability company based in UAE and a joint venture (whose standing can also be questioned) created by Thakur Family Trust and Ace Hospital Management. The main contention made was regarding the nationality of the Thakur trust which was allegedly established in India but was managed by the trustee who was a resident of UAE thus, making the trust a national of UAE.

3.1.5 Conflict of Laws

Another highlighting factor which has been recently taken into consideration while determining the jurisdiction of the claims brought by the trust in ITA is the conflict of laws. Trust instruments and its interrelated concepts including but not limited to incorporation, seat and control are generally interpreted in the light of extent and applicability of

---

[23] Strategic Infrasol Foodstuff L.L.C., The Joint Venture of Thakur Family Trust, U.A.E. with Ace Hospitality Management D.M.C.C., U.A.E. v. India, Notice of Arbitration ¶ 8, 9 (2015) & Reply to Second Notice of Arbitration (2017).

domestic laws. The permissibility of recourse to municipal laws to interpret such matters has been examined by the ICSID in the case of *Capital Financial Holdings Luxembourg v. Cameroon*,[24] & *Orascom v. Algeria*.[25] In *Capital Financial*, the tribunal held that the *renvoi* to municipal law is permissible, whereas, in *Orascom*, the tribunal did not reject the renvoi to municipal laws, however, it took the view that even if domestic laws were applied instead of principle of *effet utile*, the nationality of the trust would be the same. Based on the above, it can be contested that the jurisdiction of the claims brought by trust have a bearing upon the municipal laws. Moreover, as mentioned above, few investment treaties expressly include trusts under the definition of 'investors' in the respective BITs & therefore, following the views endorsed in *Capital Financial* and *Orascom*, this could lead to broad interpretation of word 'investor' and in turn providing trusts a standing to sue.

3.2 STANDING OF CLAIMS BY TRUST PARTIES IN INTERNATIONAL TREATY ARBITRATION

Recent developments in the landscape of Investment Arbitration has led many to question the jurisdictional challenges to claims made by trust parties namely, trustee, beneficiary, settlor and protector. A plethora of cases with diverse jurisdictional and legal complexities have thrown light on the problems involved in claims made by trusts in investment arbitration.

---

[24] Capital Finan. Holdings Luxembourg SA v. Cameroon, ICSID Case No. ARB/15/18, Final Award. 22 June 2017.
[25] Orascom TMT Investments Sa`rl v. Algeria, ICSID Case No ARB/12/35, Final Award, 31 May 2017.

Under investment treaties, the most highlighted case discussing the issue of control over the trust and its assets is *Saba Flakes*.[26] In this case, the claimant had acquired 67% shareholding in a leading telecommunication company 'Teslim'. As per the agreement, the claimant was entitled to the legal title of shares whereas Mr. Uzan was entitled as beneficial owner of the shares.[27] The tribunal observed that the:

> *... [t]he separation of legal title and beneficial ownership rights does not deprive such ownership of the characteristics of an investment within the meaning of the ICSID Convention or the Netherlands-Turkey BIT. Neither the ICSID Convention, nor the BIT make any distinction which could be interpreted as an exclusion of a bare legal title from the scope of the ICSID Convention or from the protection of the BIT.*[28]

In other words, the tribunal ruled that both the trustee as well as the beneficiaries could have the standing to bring a claim under the ICSID Convention & treaty.

Another watermark judgement in determining the jurisdiction claim of the trust parties is that of *Blue Bank v. Venezuela*, a claim arose out of the Barbados–Venezuela BIT (1994) which provided for definition of 'investment' as "every kind of asset invested by nationals or companies of one Contracting Party in the territory of the other Contracting Party".[29] Blue Bank was appointed as a trustee to the Qatar trust created under the laws of Barbados. Blue bank was to administer, manage, and ensure smooth functioning of the assets of the trust. The trust included shareholdings in two companies who in turn were indirect shareholders in

---

[26] Saba Fakes v. Turkey, I.C.S.I.D. Case No. ARB/07/20, ¶ 2, 125, 133 (2010).
[27] Id, ¶ 133.
[28] *Id.*, ¶ 134.
[29] Barbados–Venezuela B.I.T., (1994) art I (a).

two Venezuelan companies, namely, ITC as well as Hamesa.[30] The central question arising out of the dispute was whether, Blue Bank, provided the ownership and control over the assets of the trust, as a trustee, had a standing to bring a claim. The tribunal after detailed analysis arrived at the conclusion that, Blue Bank did not own the assets of the trust but was merely managing and administering them.[31] The tribunal cleared the fact that under the BIT an active investment was required by party making a claim which was not the case in the present instance as Blue Bank cannot "be considered as having committed any assets in its own right, as having incurred any risk, or as sharing the loss or profit resulting from the investment".[32] Further the tribunal, after making inquiries as to whether the trustee could make decisions independently of the beneficiary, arrived at a conclusion that Blue Bank was not in a position to "perform many essential trustee functions independently, but, with respect to them' was 'under the control of Hampton (beneficiary), who had effective control over Blue Banks's management of Qatar Trust."[33] Owing to the above, only Hampton could make claims regards to dispute arising out of BIT. The case is illustrative of the fact that tribunals tend to put aside the conventional trust structures or pierce the veil to have a closer look at intricate trust instruments before adjudicating a claim.

The recent judgement in the same line is that of *Mercer v. Canada*,[34] which is a dispute under NAFTA involved Mercer LLC, the claimant, that was a publicly listed entity established under the laws of the

---

[30] Blue Bank Int'l & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, I.C.S.I.D. Case No. ARB12/20, ¶ 46 (2017).
[31] *Id.*, ¶ 163.
[32] *Id.*, ¶ 163-64.
[33] *Id.*, ¶ 196.
[34] Mercer Int'l, Inc. v. Govt .of Canada, I.C.S.I.D. Case No. ARB(AF)/12/3.

State of Washington. Mercer owned and operated industrial plants in Canada through its wholly owned subsidiary Celgar that was responsible for the plants as a trustee.[35] Both the entities formed a Canadian limited partnership by the name of Celgar partnership, in which, Mercer was a limited partner with 99.9% economic interest while Celgar had a 0.1% economic interest.[36] This in a way provided Mercer LLP a standing to make a claim as it was in control of investment and other decisions. However, what needs to be examined here is the fact that Mercer LLP was not owner of trust assets and the beneficiary here was the Celgar partnership, yet when the claim was made it was made under the name of Mercer LLP, neither the trustee nor the beneficiary were made a party to the claim. This reveals un unavoidable fact that designations such as trustee and beneficiary have no standing if ultimately all economic interest accrues to a third entity within the trust structure.

The underlying difficulties posed by the aforementioned problem relates to which party has, as claimant, the requisite investment through control or ownership. In other words, the relationship between qualifying nationals and protected assets can be elaborated upon by the use of concepts of ownership and control.

3.2.1 Ownership

The notion of ownership is prima facie not problematic, however, where legal and beneficial ownership of the trust assets tends to be with different persons, the question of the relevant person exercising the control arises. The ruling in *Saba Flakes,* as discusses above, supports that the

---

[35] *Id.*, Request for Arbitration, Apr. 30, 2012, ¶ 1.
[36] *Id.*, ¶ 13.

"separation of legal title and beneficial ownership did not deprive such ownership characteristics of an investment" and therefore is of no relevance, however, the general international law unconditionally treats beneficial ownership rather than legal ownership as the proper criteria for assessment of claims and standing of the parties.[37] It is submitted that the principle of general international law is also relevant in the present scenario with consequences such as "in case of split between a legal owner and a beneficial owner, it is only the beneficial owner which can be compensated".[38] This can also be supported with a fact that in the absence of beneficial ownership, the investment wouldn't have been made at the first place. The similar line of reasoning can be deduced from the ruling of *Blue Bank* where justifying that the claimant had not "committed any assets in its own right", had not "incurred any risk", and was not "sharing the loss or profit resulting from the investment". Similarly, ICSID tribunals have considered the same criteria while examining the 'investment' under Article 25 of ICSID Convention (also known as *Salini* test).[39] Moreover, various panels have looked into same characteristics while assessing the investment under various IIA.[40] Therefore, it can be concluded that to be considered as an investor, the requirement of having some beneficial interest in the trust assets is a prerequisite condition.[41]

---

[37] Int'l Technical Products Corp. v. Iran, Award of 28 Oct. 1985, 9 Iran-US C.T.R. 206

[38] Occidental Petroleum Corp. & Occidental Exploration & Production Co. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Dissenting Opinion of Prof. B. Stern to Award of 5 Oct. 2012, para. 144

[39] Salini Costruttori v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001, para. 52

[40] Georgia-Switzerland BIT, Art. 1(2); ASEAN Comprehensive Investment Agreement, Art. 4(2), n. 2.

[41] Hanno Wehland, *Blue Bank International v. Venezuela: When Are Trust Assets Protected under International Investment Agreements?*, 34(6) J. INT'L ARB. 947 (2017).

3.2.2 Control

The concept of control has eluded academicians and practitioners alike. In the context of ITA, control cannot be understood to have a singular connotation rather it has multifaceted undertones, i.e. legal and de facto control. Article 1(6) of the ECT provides for definition of investment and further explanation to the article states that "control of an investment means control in fact, determined after an examination of the actual circumstances in each situation". It goes on to state that the "examination shall include a consideration of all relevant factors, including the investor's financial interest, including equity interest, in the Investment, his ability to exercise substantial influence over the management and operation of the Investment, and his ability to exercise substantial influence over the selection of members of the board of directors or any other managing body". On similar lines, Article 1(1) (j) of the Poland-U.S.A. BIT defines control as "having a substantial interest in or the ability to exercise substantial influence over the management and operation of an investment". A slightly different approach can be observed in Egypt-U.S.A. BIT which elaborates upon control as "means to have a substantial share of ownership rights and the ability to exercise decisive influence".[42]

From above examples, a more accurate difference that merits attention is that between rights arising out of ownership and actual exercise of power, direction and decision making. While it will be unfair to say that both are mutually exclusive for control or presence of either of them is an absolute

---

[42] *Id*.

requirement to establish control, the tribunals have emphasised while evaluating control both the aspects have to be taken into consideration.[43]

3.2.3 The Interplay between Ownership and Control

The concepts of ownership and control have been at crossroads due to their intertwined nature with some experts arguing that, irrespective of the terms of agreement, control should be the definitive requirement when it comes to defining the relationship between qualifying nationals and protected assets. Proponents argue that while ownership does not guarantee control, the latter in addition to decision making power also encompasses other rights such as mortgage, hold, leases etc.[44] However, this approach fails to understand that ownership does not amount to control and control does not amount to ownership, both can be exercised without the need for other, i.e. ownership can be exercised without control and vice versa. In case an agreement stipulates both the conditions as a requirement it would be appropriate to evaluate both ownership and control before arriving to a conclusion.

4. CONCLUSION

This article has focused on the potential for use of trust and related parties, the operability and effectiveness of the arbitration clause, the extent to which a treaty provision can be said to be binding on the party against whom the arbitration provision is sought to be enforced, proper representation of parties, and arbitrability. As the preceding analysis suggests, trusts have a standing to sue in case the treaty provisions provide

---

[43] Aguas del Tunari v. Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction of 21 Oct. 2005, para. 227.
[44] Z. DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 300 (2009).

for their inclusion. If one goes by the aforementioned examples, it is easy to ascertain standing based on nationality, place of incorporation or seat, however, the same cannot be said for trust parties, as that is dependent on the person who's in control of the investment made despite an outward manifestation of investment poured by some other entity. However, as we have seen from the emerging jurisprudence that beneficial ownership by qualified nationals has gradually become a condition requisite for bringing claims. It is apparent from the above discussed cases like *Flakes, Blue Bank & Marcena* that each represents a varied set of facts for example *Flakes* involved the tussle between beneficial and legal ownership, *Blue bank* discussed whether trustees can be considered protected investors. A more comprehensive approach to resolve the diversity in issues is to consider the substance of the treaty *in toto* and cater to the requirements of the treaty on a case to case basis rather than sticking to old precedents because each case presents a vastly different and complex set of structures than seen previously.