THE INVESTMENT TREATY ARBITRATION REVIEW

Third Edition

Editor
Barton Legum

THE LAWREVIEWS

THE INVESTMENT TREATY ARBITRATION REVIEW

THIRD EDITION

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PREFACE

The past year has confirmed the usefulness of *The Investment Treaty Arbitration Review*'s contribution to its field. The biggest challenge for practitioners and clients over the past year has been to keep up with the flow of new developments and jurisprudence in the field. There was a significant increase in the number of investment treaty arbitrations registered in the first years of this decade. These cases have come or are now coming to their conclusions. The result today is more and more awards and decisions being published, making it hard for practitioners to keep up.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment, therefore, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to and the context behind those developments.

This third edition adds new topics to the *Review*, increasing its scope and utility to practitioners. It represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

Barton Legum
Dentons
Paris
April 2018

Part I

Jurisdiction

Chapter 2

COVERED INVESTORS

Yutaro Kawabata, Kojiro Fujii and Shimpei Ishido[1]

I INTRODUCTION

In this chapter, the authors briefly explain the issues regarding covered investors in relation to investment treaty arbitrations.[2] Given the purpose and the target readers of this publication, we will focus on juridical persons, rather than natural persons.[3] In addition, where reference to international investment agreements (IIAs) is made, such as for the definition of investors, we will refer to the investment treaties to which Japan is a party. As of March 2018, Japan has entered into 28 bilateral investment treaties (BITs), and 10 economic partnership agreements (EPAs) that contain investor–state dispute settlement (ISDS) clauses.[4] Japan is also a party to the Energy Charter Treaty, and signed Japan- Armenia BIT on 14 February 2018 and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[5] on

1 Yutaro Kawabata and Kojiro Fujii are partners and Shimpei Ishido is associate at Nishimura & Asahi.

2 While the definition of 'investment' is vitally important for an investor to rely on an investment treaty to bring an arbitration against the host state, the issue is outside the scope of this chapter. With respect to restructuring investments to seek investment treaty protection, see, for example, Stephen Jagusch, Anthony Sinclair and Manthi Wickramasooriya, 'Restructuring Investments to Achieve Investment Treaty Protection', in Kinnear, Fischer, et al. (ed.), *Building International Investment Law: The First 50 Years of ICSID*, Kluwer Law International (2016), pages 175–190.

3 For detailed explanations on the nationality of natural persons, please refer to texts such as Organisation for Economic Co-operation and Development (OECD), 'Chapter 1: Definition of Investor and Investments in International Investment Agreements', in *International Investment Law: Understanding Concepts and Tracking Innovations* (2008).

4 With respect to the difference between FTAs and EPAs in the Japanese context, the then Press Secretary of MoFA explained in December 2003 that 'basically FTAs are part of EPAs. EPAs are not necessarily limited to trade and investment, but also include other economic activities such as tourism, the standardization of regulations and intellectual property among other things. So it covers a wider range of economic relations' (www.mofa.go.jp/region/asia-paci/asean/year2003/summit/press1211-2.html#3). 'Japan tends to conclude such mixed agreements with a slightly broader scope which are then called economic partnership agreements', Lars Markert, 'Key Issues to Consider for (Japanese) Investors Before Commencing an Investment Arbitration', in 'The Pacific Rim and International Economic Law: Opportunities and Risks of the Pacific Century', *Transnational Dispute Management* (2015) page 4. The Japan–Philippines EPA (2008) and the Japan–Australia EPA (2015) do not contain ISDS clauses. It is also worth noting the limitations on the scope of investment disputes in certain IIAs to which Japan is a party, for example, the Japan–China BIT (1989).

5 After the withdrawal of the United States from Trans-Pacific Partnership (the TPP), the remaining 11 contracting states to the TPP concluded CPTPP to make the TPP in force among them with suspension of the application of certain provisions (see, Article 2 of CPTPP). The text of CPTPP is available at: www.mfat.govt.nz/assets/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf (last accessed on 5 March 2018).

8 March 2018. Recently, we have seen a significant rise in interest regarding investment treaty arbitration in Japan, which led to the government's recent action plan to accelerate negotiations of IIAs with a view to increasing the number of its IIA partner countries to 100.[6]

II INVESTORS ELIGIBLE TO BRING INVESTMENT TREATY ARBITRATIONS

i Investor–state dispute settlement clauses in IIAs

Investment arbitration is a form of arbitration, which means that there must be an agreement between the investor and the host state to submit their dispute to arbitration; without such an arbitration agreement, the arbitral tribunal in an investment arbitration would not have jurisdiction over the dispute.

In investment treaty arbitrations, the consent of the host state to investor–state arbitration is given by the ISDS clause of an IIA. Where the ISDS clause of an IIA contains a unilateral offer by the host state party to the IIA to arbitrate a certain dispute with an investor of the other contracting state, such an investor can conclude the arbitration agreement by accepting this unilateral offer by submitting a request for arbitration with respect to an actual dispute. Therefore, the arbitration agreement is subject to the conditions stipulated in the IIA. As one of such conditions, the definition of 'investor' in the IIA sets a scope of persons eligible to bring investment arbitrations under the IIA. An example of an ISDS clause can be found in Article 10.13 of the Japan–Mongolia Economic Partnership Agreement (2016) (the Japan–Mongolia EPA).[7] Article 10.13.1(f) states:

> *the term 'investment dispute' means a dispute between a Party and an investor of the other Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation of the former Party under this Chapter with respect to the investor of that other Party or its investment in the Area of the former Party . . .*

Article 10.13.4 of the Japan–Mongolia EPA sets forth that:

> *[i]f the investment dispute cannot be settled through such consultations within 120 days from the date on which the disputing investor requested in writing the disputing Party for consultations, the disputing investor may, subject to paragraph 6, submit the investment dispute to one of the following international arbitrations . . .*

Article 10.13.4 provides that the 'disputing investor' (as defined in Article 10.13.1(a) as 'an investor who is a party to an investment dispute') may submit the investment dispute to arbitration in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), under the ICSID Additional Facility Rules, under the UNCITRAL Arbitration Rules, or to any arbitration in accordance with other arbitration rules if agreed by the disputing parties.

In addition, Article 10.13.8 of the Japan–Mongolia EPA recognises the cornerstone principle that investor–state arbitrations require the consent of the disputing parties:

6 See: www.mofa.go.jp/mofaj/ecm/ec/page24_000606.html (in Japanese, last accessed on 5 March 2018).

7 See: www.mofa.go.jp/files/000067716.pdf (last accessed on 5 March 2018).

(a) Each Party hereby consents to the submission of investment disputes by a disputing investor to arbitration set forth in paragraph 4 chosen by the disputing investor.

(b) The consent given under subparagraph (a) and the submission by a disputing investor of an investment dispute to arbitration shall satisfy the requirements of:

(i) Chapter II of the ICSID Convention or the ICSID Additional Facility Rules, for written consent of the parties to a dispute; and

(ii) Article II of the New York Convention for an agreement in writing.

ii Definition of 'investors' (or 'nationals') in IIAs

A necessary condition of eligibility for bringing an investment treaty arbitration is to be an investor of a state party to the treaty.[8] But who can be an investor potentially eligible for protection under the applicable investment treaty? This question is addressed by the IIA provisions that define the investors (or nationals) potentially eligible to bring an investment arbitration claim against the host state.[9],[10]

With respect to legal persons, 'it is the general practice in investment agreements to specifically define the objective criteria which make a legal person a national, or investor, of a Party, for the purposes of the IIA'. 'There is no single test used by all investment treaties to define the link required between a legal person seeking protection under the treaty and the contracting state under whose treaty the investor asks for protection',[11] but in 'investment treaties the nationality of corporations is typically defined by [their] place of incorporation, [their] siège social, the nationality of a controlling shareholder, or a combination of the three'.[12]

With respect to IIAs to which Japan is a party, commentators summarise the definition of 'enterprises and companies' in 'Japan's "new generation" BITs/FTAs' (i.e., IIAs entered into after 2002) as generally being '"any legal person or any other entity duly constituted or organized", combined with illustrative examples'. The nationality of enterprises is determined by the applicable law under which they are constituted or organised.[13]

---

8 OECD, 'Chapter 1: Definition of Investor and Investments in International Investment Agreements', in *International Investment Law: Understanding Concepts and Tracking Innovations* (2008), page 9.

9 'IIAs typically include also a provision specifying the requirements of nationality, location, place of incorporation, etc. for a person or entity making an investment to be protected by, and thus, to be able to rely on, the IIA. Together with the definition of "investment", this is usually found in the initial article of the treaty which, *inter alia*, defines who are the "investors" or "nationals" benefiting from treaty protections,' Andrew Newcombe and Lluís Paradell, Chapter 1, 'The Historical Development of Investment Treaty Law', *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, 2009, page 68.

10 With respect to the definition of 'investors', UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* (2007), at 15–17, available at: http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=196, provides a concise but comprehensive explanation of various definitions in investment treaties.

11 OECD, 'Chapter 1: Definition of Investor and Investments in International Investment Agreements', in *International Investment Law: Understanding Concepts and Tracking Innovations* (2008), page 18.

12 Rachel Thorn and Jennifer Doucleff, 'Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and Concept of Investor', in *The Backlash Against Investment Arbitration*, Kluwer Law International (2010), page 6.

13 Shotaro Hamamoto and Luke Nottage, 'Japan', in Chester Brown and Devashish Krishan, eds., *Commentaries on Selected Model Investment Treaties* (OUP, 2013), pages 355–356.

For example, the Japan–Mongolia EPA defines the terms 'investor of a Party' and 'enterprise' as follows:

> *[T]he term 'investor of a Party' means:*
> *(i) a natural person who is a national of a Party under the law of the Party; or*
> *(ii) an enterprise of that Party,*
> *that seeks to make, is making or has made investments in the Area of the other Party.*[14]

> *[T]he term 'enterprise' means any juridical person or any other entity duly constituted or organised under the applicable laws and regulations, whether or not for profit, and whether private or government owned or controlled, including any corporation, trust, partnership, joint venture, sole proprietorship, joint venture, association, organisation or company.*[15]

The Japan–Switzerland EPA (2009) is a unique example that adopts a definition of 'investor' with an additional requirement that the investor carry out substantial business activities in its home state (Article 85(g)),[16] which prevents an investor of a third country or the host state from being protected by the investment chapter of the EPA through creation of a shell company in the home state.[17] In contrast, most of the recent Japanese IIAs are designed to prevent such treaty shopping by a 'denial of benefit' clause as discussed below.[18]

The TPP, which was signed in February 2016, covers broader types of entities as entitled to its protection of investments, compared to the traditional investment treaties of Japan. An 'investor of a Party' means 'a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party' (Article 9.1). As an 'investor of a Party' includes that party itself, investments made by governmental organisations are covered by the TPP Investment Chapter. In addition, an 'enterprise of a Party' includes 'an enterprise constituted or organised under the law of a Party, or a branch [of a foreign enterprise] located in the territory of a Party and carrying out business activities there' (Article 9.1). Though such definitions of investors have been adopted by NAFTA (1994) and the US Model BIT (2012), there have been very few examples, so far, of IIAs concluded by Japan that have such broad definitions of investors.

14 Article 1.2(l).

15 Article 1.2(f).

16 'Some treaties add other requirements, such as the need actually to carry out business in the home state . . . where no such additional requirements have been stipulated, tribunals generally conduct a review limited to determining whether the legal entity satisfies the formal definition of investor under the treaty and refuse to incorporate additional requirements that the treaty drafters did not include.' Nigel Blackaby, Constantine Partasides, et al, *Redfern and Hunter on International Arbitration* (6th Edition, Kluwer Law International, 2015), pages 441–500.

17 This approach was followed by Japan-EU EPA concluded in December 2017 (Chapter 8, Article 1.5(p)), although the concluded agreement does not contain provisions of investment protection so far. The text of the concluded agreement subject to legal scrubbing is available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1684.

18 Not all IIAs to which Japan is a party contain a denial of benefits clause, but 'All of Japan's "new generation" BITs/FTAs except the Japan–Switzerland FTA (2009) include denial of benefits clauses.' Shotaro Hamamoto and Luke Nottage, 'Japan', in Chester Brown and Devashish Krishan, eds., *Commentaries on Selected Model Investment Treaties* (OUP, 2013), pages 355–356.

There is no doubt that investors include state enterprises if the definition of 'investors' in an IIA expressly provides that they include entities owned or controlled by a government (e.g., Article 1.2(f) and (l) of the Japan–Mongolia EPA).[19] Moreover, they do so even without such express languages in an IIA, because state enterprises ordinarily have separate legal personality and are organised in accordance with the home state's law.[20] In the context of ICSID arbitrations, the applicable criteria are slightly different: the tribunals dealing with cases where a state enterprise is a claimant have to decide whether such state enterprise is 'a national of another Contracting State' under Article 25 of the ICSID Convention. The arbitral tribunals in *CSOB*,[21] *Rumeli Telecom*[22] and *BUCG*[23] applied the 'Broches test'[24] and concluded that the claimant investor was not disqualified as 'a national of another Contracting State'.

iii Denial of benefits clause[25]

In relation to investors covered under investment treaties, to create 'safeguards against the problem of treaty shopping through the creation of "sham" enterprises',[26] '[s]ome treaties seek to limit the scope of protection to protected investors by means of treaty clauses allowing the state parties to deny treaty benefits to investors that do not have substantial business activities in their home state and which are controlled by entities or persons of a third state' (denial of benefits clauses),[27] and '[w]hether or not an investor will be successful in bringing a claim

19 Jeswald W. Salacuse, *The Law of Investment Treaties* (2nd Edition, OUP, 2015), page 211.

20 Page 212.

21 *Ceskoslovenska Obchodini Banka A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999.

22 *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008.

23 *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017.

24 '[A] government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function,' C H Schreuer, *The ICSID Convention: A Commentary* (2nd Edition, Cambridge University Press, 2012), page 161.

25 For a comprehensive analysis on denial of benefits clauses, see Rachel Thorn and Jennifer Doucleff, 'Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of Investor', in *The Backlash against Investment Arbitration*, Kluwer Law International (2010), pages 3–28.

26 Lee M Caplan and Jeremy K Sharpe, 'United States', in Chester Brown and Devashish Krishan, eds., *Commentaries on Selected Model Investment Treaties* (OUP, 2013), page 812.

27 Nigel Blackaby, Constantine Partasides, et al, *Redfern and Hunter on International Arbitration* (6th Edition, Kluwer Law International, 2015), pp. 441–500. 'When the objective criteria used may include investors to whom a Party would not wish to extend the treaty protection, some treaties include "denial of benefits" clauses allowing exclusion of the investors in certain categories,' OECD, 'Chapter 1: Definition of Investor and Investments in International Investment Agreements', in *International Investment Law: Understanding Concepts and Tracking Innovations* (2008), page 8. Note also that:
'if the investment is structured in a way to avail itself of the substantive protection of an investment treaty, it has to be ensured that the investment does not run afoul of so-called 'denial of benefits' clauses which deny pure 'mailbox companies' the recognition as an investment or an investor.'
Lars Markert, 'Key Issues to Consider for (Japanese) Investors Before Commencing an Investment Arbitration' in 'The Pacific Rim and International Economic Law: Opportunities and Risks of the Pacific Century', *Transnational Dispute Management* (2015) page 6.

before a tribunal under the treaty will . . . turn on whether the host state has recourse to a denial of benefits clause, conferring it with the right to refuse treaty protections to a given investor or group of investors on the basis of certain agreed criteria'.[28, 29]

As an example of a denial of benefits clause, Article 10.16.2 of the Japan–Mongolia EPA[30] states:

> *[a] Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of the other Party and to its investments if the enterprise is owned or controlled by an investor of a non-Party and the enterprise has no substantial business activities in the Area of the other Party.*

Thus, according to the provisions of the Japan–Mongolia EPA, (1) a Japanese corporation constituted under the Japanese Companies Act (for example, a *kabushiki kaisha*) would fall under the definition of 'investor of a Party', which may be eligible to bring an investment arbitration against the Mongolian government if it has made 'investments' (as defined in the Japan–Mongolia EPA) in Mongolia; however, (2) the Japanese corporation may be denied protection under the Japan–Mongolia EPA if the requirements for the Mongolian government to deny benefit in accordance with Article 10.16.2 are met because more than 50 per cent of the stock of the Japanese corporation is owned by a US company, and the Japanese corporation does not carry out substantial business activities in Japan.

As noted above, the treaty shopping through establishing a shell company in the home state can also be prevented by adopting a restrictive definition of 'investor' requiring it to carry out substantial economic activities in the home state. The difference between these two approaches is as follows. First, while whether the requirements for the definition of 'investor' are fulfilled or not is jurisdictional issue, which an arbitral tribunal has the power to decide by its own initiative (competence-competence),[31] the host state has discretion as to whether

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28 Rachel Thorn and Jennifer Doucleff, 'Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of Investor', in *The Backlash against Investment Arbitration*, Kluwer Law International (2010), page 6.

29 UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* (2007), at page 104 (available at http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=196) interestingly explains that economic policies of the contracting states affect whether denial of benefit clauses will be set forth in their investment treaties:
'Most BITs, however, do not contain a denial-of-benefits clause. This could allow investors from third countries to benefit from the agreement. This effect may not necessarily be against the interests of the contracting parties. For instance, small economies such as Singapore and Mauritius have used the 'platform concept' under which they have been the base for third party foreign investment to be channelled into China or India, with which they have BITs. On the other hand, investors of non-parties might merely establish a shell company under the laws of a contracting party to benefit from treaty protection, unless the BIT requires that the assets be first located in the platform country.'

30 Compare with the denial of benefits clause in the TPP under Article 9.15.1:
'A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of that other Party and to investments of that investor if the enterprise:
(a) is owned or controlled by a person of a non-Party or of the denying Party; and
(b) has no substantial business activities in the territory of any Party other than the denying Party.
This clause also allows the host state to deny the benefit of the investment chapter to an investor which is owned or controlled by a person of host state.'

31 Nigel Blackaby, Constantine Partasides, et al, *Redfern and Hunter on International Arbitration* (6th Edition, Kluwer Law International, 2015), pages 340–341.

it invokes denial of benefit clause in a dispute. Secondly, it is established that an investor (claimant) bears the burden to prove that it falls within the definition of 'investor'.[32] On the other hand, the case law is divided as to which disputing party bears the burden to prove that the conditions for invoking the denial of benefit clause are fulfilled.[33]

iv Locally incorporated but foreign-controlled companies and Article 25(2)(b) of the ICSID Convention

In relation to parties to investment arbitrations, there is also an issue concerning whether legal entities established in the host state (having the nationality of that state) may become a party to investment arbitrations. In this regard, it is relevant to refer to Article 25 of the ICSID Convention on the jurisdiction of the International Centre for Settlement of Investment Disputes (the Centre) concerning juridical persons:

> *(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State . . .*
> *(2) 'National of another Contracting State' means:*
> *(a) [omitted]*
> *(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.*

The second part of Article 25(2)(b) of the ICSID Convention, which extends the jurisdiction of the Centre, was set forth because '[i]t is quite usual for host States to require that foreign investors carry on their business within their territories through a company organized under the laws of the host country', and '[i]f no exception were made for foreign-owned but locally incorporated companies, a large and important sector of foreign investment would be outside of the scope of the Convention'.[34] According to Schreuer, '[a] number of bilateral investment treaties provide that companies constituted in one State but controlled by nationals of the other State shall be treated as nationals of the other States for purposes of Art. 25(2)(b).'[35] For example, one of the IIAs to which Japan is a party, the Japan–Egypt BIT (1977), provides:

32 See, *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award [Redacted], 5 March 2011, paragraphs 219–227.

33 The tribunals of *Pac Rim Cayman* and *Ulysseas* decided that host state bears the burden (*Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, 1 June 2012, paragraphs 2.2–2.15; *Ulysseas, Inc. v. Ecuador*, Interim Award, 28 September 2010, paragraph 166), In contrast, the tribunal of *Guaracachi America* decided that the burden of proof is borne by the claimant (*Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, paragraphs 366–384).

34 Aaron Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States', in *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law*, Kluwer Academic Publishers (1995), page 205.

35 C H Schreuer, *The ICSID Convention: A Commentary* (2nd Edition, Cambridge University Press, 2012), page 310.

> *Each Contracting Party shall consent to submit any legal dispute that may arise out of investment made by a national or company of the other Contracting Party to conciliation or arbitration, in accordance with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington on March 18, 1965, at the request of such national or company. Any company of the former Contracting Party which was or is controlled by nationals and companies of the other Contracting Party prior to or on the date on which the parties to such a dispute consent to submit the dispute to conciliation or arbitration shall in accordance with the provisions of Article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of such other Contracting Party.*

While similar provisions are found in IIAs to which Japan is a party, such as the Japan–Sri-Lanka BIT (1982), Japan–Bangladesh BIT (1998) and Japan–Mongolia BIT (2001), the 'new generation' BITs and FTAs (other than the BIT with Vietnam), 'omit this provision completely'.[36]

As shown above, there are IIAs that address the issue of locally incorporated companies that are controlled by foreign investors by expanding jurisdiction so that the local entities may bring a claim against the host state.

On the other hand, there are also IIAs that take a different approach by providing that 'an investor may submit to arbitration a claim against the host State on behalf of an enterprise constituted or organized under the host State's law, which the investor owns or controls directly or indirectly'.[37], [38] The TPP adopts this approach under Article 9.19.1.(b): 'the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit [a claim] to arbitration'.

III A RECENT CASE CONCERNING COVERED INVESTORS

Investment treaty arbitration cases where jurisdiction (*rationae personae*) is an issue are introduced and discussed in great length and depth in treatises and commentaries.[39] Thus, we

36 Shotaro Hamamoto and Luke Nottage, 'Japan', in Chester Brown and Devashish Krishan, eds., *Commentaries on Selected Model Investment Treaties* (OUP, 2013), page 356.

37 C H Schreuer, *The ICSID Convention: A Commentary* (2nd Edition, Cambridge University Press, 2012), page 311. For example, Article 1117 of the NAFTA and Article 24 of the US Model BIT. For a commentary on Article 24 of the US Model BIT and 'derivative right of action', see Lee M Caplan and Jeremy K Sharpe, 'United States', in Chester Brown and Devashish Krishan, eds., *Commentaries on Selected Model Investment Treaties* (OUP, 2013), pages 825–826.

38 With respect to further reading on shareholder's rights, see Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law*, Kluwer Law International (2010), pages 97–150.

39 For further reading on jurisdiction (*rationae personae*) and related ICSID cases, see relevant sections of C H Schreuer, *The ICSID Convention: A Commentary* (2nd Edition, Cambridge University Press, 2012). With regard to the famous *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18 (*Tokios Tokelès*), see, for example, Pierre Tercier and Nhu-Hoang Tran Thang, 'Criteria to Determine Investor Nationality (Juridical Persons)', in Kinnear, Fischer, et al (ed.), *Building International Investment Law: The First 50 Years of ICSID*, Kluwer Law International (2016), page 141. One interesting issue that will not be addressed in this Chapter is the difference in various arbitral tribunals' approach depending on whether the claimant is an investor falling under the first part of Article 25(2)(b) of the ICSID Convention or the second part of the said article (compare *Tokios Tokelès* with *TSA Spectrum de Argentina SA v. Argentina Republic*, ICSID Case No. ARB/05/5, and *National Gas* introduced in this chapter).

will not discuss these cases in this chapter, as we consider such an exercise to be outside the scope of this book. Having said that, we will briefly introduce a recent case concerning covered investors in connection with investment treaty arbitrations: *National Gas SAE*, ICSID Case No. ARB/11/17, wherein an arbitral award was rendered on 3 April 2014 (*National Gas*), and the arbitral tribunal addressed the issue of the test to determine 'foreign control' under the second part of Article 25(2)(b) of the ICSID Convention, which was a 'relatively novel point'.[40]

The claimant in *National Gas* was a corporation established under the laws of Egypt (the Claimant). Ninety per cent of the Claimant's shares were owned by CTIP Oil & Gas International (CTIP), a company incorporated under the laws of the Jebel Ali free zone in the United Arab Emirates (UAE), which was wholly owned by a company called REGI, incorporated under the same law. The arbitral tribunal in *National Gas* found that CTIP was a shell company 100 per cent owned by REGI, and REGI was also a shell company 100 per cent owned by Mr Reda Ginena (a dual national of Egypt and Canada), and in 'commercial reality' Mr Ginena controlled the Claimant.[41]

Faced with an ICSID claim by the Claimant based on the treaty between Egypt and the UAE on the Encouragement, Protection and Guarantee of Investments signed on 11 May 1997 and the ICSID Convention, Egypt asserted that there was a lack of jurisdiction, including jurisdiction *rationae personae* because the Claimant was not under 'foreign control', which is an objective requirement for the finding of jurisdiction under Article 25(2)(b) of the ICSID Convention.[42]

The arbitral tribunal in *National Gas* found that 'from the text of the ICSID Convention, it is clear that the parties' consent, even if otherwise established, may not suffice to establish jurisdiction before an ICSID tribunal'[43] and, adopting the arbitral tribunal's approach in *Autopista*,[44] stated that Article 25(2)(b) of the ICSID Convention 'separately establishes a subjective test and an objective test': (1) '[t]he parties have agreed to treat the said company as a national of another Contracting State for the purposes of this Convention' and (2) 'the said company is subject to foreign control'.[45]

Citing the *Vacuum Salt* award,[46] the arbitral tribunal in *National Gas* decided that the 'objective test is not satisfied by mere agreement by the Parties' and '"foreign control" must be established objectively'.[47] The arbitral tribunal in *National Gas* stated that the objective test concerning 'foreign control' in Article 25(2)(b) of the ICSID Convention 'may take into account the express agreement of both disputing parties and the Contracting Parties to the ICSID Convention' and, by further reference to the *Vacuum Salt* and *Autopista* decisions, stated that 'such agreement may operate as "a rebuttable presumption"', and that an 'agreement based on "reasonable criteria" without formalities would ordinarily suffice'.[48]

40 Paragraph 155 of the *National Gas* arbitral award.

41 Paragraph 144.

42 Paragraphs 75–99.

43 Paragraph 120.

44 *Autopista Concesionada de Venezuela CA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5.

45 Paragraphs 130–131.

46 *Vacuum Salt Products Ltd v. Republic of Ghana*, ICSID Case No. ARB/92/1.

47 Paragraph 133.

48 Paragraph 134.

The arbitral tribunal's views in *National Gas* on the 'significant difference' between the first and second part of Article 25(2)(b) provide an important perspective in understanding Article 25(2)(b):

> *In the Tribunal's view, there is a significant difference under Article 25(2)(b) between (i) control exercised by a national of the Contracting State against which the Claimant asserts its claim and (ii) control by a national of another Contracting State. The latter situation violates no principle of international law and is consistent with the text of the ICSID Convention. On the other hand, the former situation violates the general limitation in Article 25(1) and the first part of Article 25(2)(b) of the ICSID Convention in regard to both Contracting States and nationals (including dual nationals). In other words, the latter is consistent with the object and purpose of the ICSID Convention; but the former is inconsistent: it would permit the use of the ICSID Convention for a purpose for which it was clearly not intended and it would breach its outer limits. As already noted above, Article 25(2)(b) operates only as a qualified exception to the general limitation to ICSID jurisdiction in Article 25: a sardine cannot swallow a whale.*[49]

In conclusion, the arbitral tribunal in *National Gas* decided that it had no jurisdiction over the claimant's claim because the claimant had not satisfied the objective test in the second part of Article 25(2)(b) of the ICSID Convention.[50]

It is also worth noting that the arbitral tribunal in *National Gas* expressly mentioned that its:

> *factual findings imply no criticism of Mr Ginena: the Tribunal recognises that his choice of corporate structure was made in good faith for legitimate fiscal reasons; it was not designed as an exercise in forum shopping under the Treaty; and whilst CTIP and REGI are both shell companies, neither are shell entities.*[51]

49 Paragraph 136.

50 Paragraph 149.

51 Paragraph 146.

Appendix 1

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