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## CONTENTS

**Editor’s Preface**  
By Barton Legum

**PART I  JURISDICTION ........................................... 1–40**

Chapter 1  COVERED INVESTMENT  ............................................. 3  
By Cyrus Benson, Penny Madden and Ceyda Knoebel

Chapter 2  COVERED INVESTORS ............................................... 18  
By Yutaro Kawabata

Chapter 3  RATIONE TEMPORIS OR TEMPORAL SCOPE ............ 28  
By Barton Legum, Michelle Bradfield, Niccolò Castagno and Catherine Gilfedder

**PART II  ADMISSIONAL AND PROCEDURAL ISSUES .................. 41–142**

Chapter 4  ADMISSIONAL .......................................................... 43  
By Michael D Nolan and Elitza Popova-Talty

Chapter 5  THE REQUIREMENTS RATIONE PERSONAE ............... 53  
By Ayham N M Al-Mashni

Chapter 6  THE BIFURCATION OF JURISDICTION FROM MERITS, AND MERITS FROM DAMAGES ......................... 59  
By Colin Y C Ong

Chapter 7  OBJECTIONS OF MANIFEST LACK OF LEGAL MERIT CLAIMS ................................................................. 71  
By Alvin Yeo and Koh Swee Yen
Contents

Chapter 8  PROVISIONAL MEASURES ................................................. 85
           George Burn and Alexander Slade

Chapter 9  THIRD-PARTY FUNDING ........................................... 97
           Miriam K Harwood, Simon N Batifort and Christina Trahanas

Chapter 10 MULTIPARTY PROCEEDINGS AND MASS CLAIMS .... 119
          Jeffrey Sullivan, Marie Stoyanov and Lucia Raimanova

PART III  DAMAGES ............................................................. 143–156

Chapter 11 COMPENSATION FOR EXPROPRIATION ............ 145
          Alexander A Yanos

PART IV  POST-AWARD REMEDIES ..................................... 157–180

Chapter 12 ANNULMENT OF INVESTMENT ARBITRATION
           AWARDS ............................................................... 159
           Sandra Rajoo

Chapter 13 ENFORCEMENT OF AWARDS ......................... 171
           Ivan W Bilaniuk

PART V  MULTILATERAL TREATIES ................................. 183–214

Chapter 14 THE ENERGY CHARTER TREATY AND THE SPANISH
           RENEWABLE ENERGY AWARDS ............................... 185
           Clifford J Hendel

Chapter 15 THE TRANS-PACIFIC PARTNERSHIP .................... 200
           Andrew Stephenson and Lee Carroll

Appendix 1 ABOUT THE AUTHORS ...................................... 215

Appendix 2 CONTRIBUTING LAW FIRMS’ CONTACT DETAILS .. 225
Only a handful of awards were rendered in the first year of my immersion in investment treaty arbitration. This pace left time, even for an active practitioner, to study and annotate each new award. With the dramatic increase in the number of investment treaty arbitrations over the past 15 years, however, the pace of new awards is such that practitioners struggle 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 provides context for, those developments.

This first edition represents an important contribution to the field of investment treaty arbitration, and a useful new tool in the kits of practitioners. I thank the contributors for their fine work in developing the content for this volume.

**Barton Legum**
Dentons
Paris
April 2016
I INTRODUCTION

In this chapter, the author briefly explains the issues regarding covered investors in relation to investment treaty arbitrations. Given the purpose and the target readers of this Review, I will focus on juridical persons, rather than natural persons. In addition, where reference to international investment agreements (IIAs) is made, such as for the definition of investors, I will refer to the investment treaties to which Japan is a party. As of February 2016, Japan has concluded 24 free trade agreements (FTAs), and nine economic partnership agreements (EPAs) that contain investor-state dispute settlement (ISDS) clauses. Japan is also a member

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1 Yutaro Kawabata is a partner 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), p. 175–190.
4 With respect to the difference between FTAs and EPAs, ‘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
state of the Energy Charter Treaty, and signed the Trans-Pacific Partnership (TPP) on 4 February 2016. In light of the recent signing of the TPP, we have seen a significant rise in interest regarding investment treaty arbitration in Japan, and thus Japanese investors’ participation in investment treaty arbitrations may grow.

**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 consent (i.e., an arbitration agreement), the arbitral tribunal in an investment arbitration would not have jurisdiction.

In investment treaty arbitrations, the consent to investor–state arbitration is based on the ISDS clause in an IIA, such as a bilateral investment treaty (BIT), multinational investment treaty or free trade agreement (FTA) with investment chapters. When the ISDS clause in an IIA contains a unilateral offer by the host state party to the IIA to conclude an arbitration agreement with an investor from the other contracting state to the IIA, the investor concludes the arbitration agreement by accepting this unilateral offer from the host state. An example of an ISDS clause can be found in Article 96 in the Investment Chapter of the Japan–India Economic Partnership Agreement (2011) (the Japan–India EPA). 5

Article 96.1 states:

> For the purposes of this Chapter, an ‘investment dispute’ is 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 under this Chapter and other provisions of this Agreement as applicable with respect to the investor and its investments.

Article 96.4 of the Japan–India EPA sets forth that:

> If the investment dispute cannot be settled through such consultation or negotiation within six months from the date on which the disputing investor requested the consultation or negotiation in writing, the disputing investor may submit the investment dispute to one of the following international conciliations or arbitrations

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Article 96.4 provides that the ‘disputing investor’ (as defined in Article 96.2 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 Additional Facility Rules of the ICSID Convention, under the UNCITRAL Arbitration Rules, or to arbitration in accordance with any other arbitration rules if agreed by the parties.6

In addition, Article 96.8 of the Japan–India EPA recognises the cornerstone principle that investor–state arbitrations require the consent of the disputing parties:

(a) Each Party hereby consents to the submission of investment disputes by a disputing investor to conciliation or 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 conciliation or arbitration shall satisfy the requirements of:

(i) Chapter II of the ICSID Convention or the Additional Facility Rules of the International Centre for Settlement of Investment Disputes, 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

‘[B]eing an investor of a state party to the treaty is a necessary condition of eligibility to bring’ an investment treaty arbitration.7 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.8, 9

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

---

6 In ICSID claims, the jurisdictional requirements provided under Article 25 of the ICSID Convention must also be satisfied.
8 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, p. 68.
Covered Investors

contracting state under whose treaty the investor asks for protection’, 10 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’. 11, 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., BITs and FTAs
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

For example, the Japan–India EPA defines the term ‘investor of a Party’ and ‘enterprise’
as follows:

the term ‘investor of a Party’ means a natural person or an enterprise of a Party, that seeks to
make, is making, or has made, investments14

the term ‘enterprise’ means any legal person or any other entity duly formed, constituted or
organized under applicable law, whether for profit or otherwise, and whether privately-owned or
controlled or governmentally-owned or controlled, including any corporation, trust, partnership,
joint venture, sole proprietorship, association, organisation or company15

10 OECD, ‘Chapter 1: Definition of Investor and Investments in International Investment
11 Rachel Thorn and Jennifer Doucleff, ‘Disregarding the Corporate Veil and Denial of
12 ‘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
pp. 441–500.
14 Compare with the definition of ‘investor of a Party’ under the TPP (Article 9.1):
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
15 Compare with the definition of ‘enterprise’ under the TPP (Article 1.3):
enterprise means any entity constituted or organised under applicable law, whether or
not for profit, and whether privately or governmentally owned or controlled, including
any corporation, trust, partnership, sole proprietorship, joint venture, association or
similar organisation
iii Denial of benefits clause

In relation to investors covered under investment treaties, to create ‘safeguards against the problem of treaty shopping through the creation of “sham” enterprises’, some 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), and ‘[w]hether or not an investor will be successful in bringing a claim 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’. 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), p. 3–28.


UNCTAD, Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking (2007), at 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 channeled 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.

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 channeled 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.
As an example of a denial of benefits clause, Article 11.7 of the Japan–India EPA\textsuperscript{21,22} states:

\begin{quote}
subject to prior notification to and consultation with the other Party, a Party may also deny the benefits of the Chapter to an investor of the other Party that is an enterprise of the other Party and to its investments, where the denying Party establishes that:

(a) the enterprise has no substantial business activities in the Area of the other Party; and
(b) the enterprise is owned or controlled by an investor of a non-Party or of the denying Party.
\end{quote}

The phrase ‘owned or controlled by an investor’ is further clarified in Article 3(d) of the same instrument:

\begin{quote}
an enterprise is: (i) ‘owned’ by an investor if more than 50 percent of the equity interests in it is beneficially owned by the investor; and (ii) ‘controlled’ by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions
\end{quote}

Thus, according to the provisions of the Japan–India EPA, (1) a Japanese corporation formed 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 Indian government if it has made ‘investments’ (as defined in the Japan–India EPA) in India; however, (2) the Japanese corporation may be denied protection under the Japan–India EPA if the requirements for the Indian government to deny benefit in accordance with Article 11.7 are met because more than 50 per cent of the stock of the Japanese corporation is owned by an Indian company.

\textsuperscript{21} 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., \textit{Commentaries on Selected Model Investment Treaties} (OUP, 2013), pp. 355–356. As for the Japan–Switzerland FTA, enterprises that have no substantial business activities in the host state are excluded from the definition of investors.

\textsuperscript{22} Compare with the denial of benefits clause in the TPP signed by Japan on 4 February 2016 under Article 9.15:

\begin{quote}
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.

2. 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 persons of a non-Party own or control the enterprise and the denying Party adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.
\end{quote}
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’.23 ‘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).’24 For example, one of the IIAs to which Japan is a party, the Japan–Egypt BIT (1977), provides:

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’.  

As shown above, there are investment treaties 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 investment treaties 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’. The TPP signed by Japan on 4 February 2016, 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 RECENT CASES 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. Thus, the author will not discuss these cases in this chapter, as I consider such an exercise to be outside the scope of this book. Having said that, I will briefly introduce a recent case concerning covered investors in connection with investment treaty arbitrations: National Gas


28 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), p. 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).
Jurisdiction

S.A.E, 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’.  

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.  

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.  

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’ and, adopting the arbitral tribunal’s approach in Autopista, stated that Article 25(2)(b) of the ICSID Convention ‘separately establishes a subjective test and an objective test’: (1) ‘the 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’.  

Citing the Vacuum Salt award, 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. 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’.

29 Para. 155 of the National Gas arbitral award.
30 Para. 144.
31 Paras. 75–99.
32 Para. 120.
33 Autopista Concessionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5.
34 Paras. 130–131.
35 Vacuum Salt Products Ltd. v. Republic of Ghana, ICSID Case No. ARB/92/1.
36 Para. 133.
37 Para. 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 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.38

[Emphasis added]

In conclusion, the arbitral tribunal in National Gas decided that it has no jurisdiction over the Claimant’s claim because the Claimant has not satisfied the objective test in the second part of Article 25(2)(b) of the ICSID Convention.39

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.40

38 Para. 136.
39 Para. 149.
40 Para. 146.
Appendix 1

ABOUT THE AUTHORS

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Yutaro Kawabata frequently acts as counsel in international arbitrations under the UNCITRAL, ICC, JCAA and other institutional rules, and court litigation at all levels of the Japanese judicial system. During his career at Nishimura & Asahi, he has represented numerous multinational companies in various industries, such as the automobile, pharmaceutical, food and beverage, apparel and franchise industries. Mr Kawabata’s ambition is to provide efficient and practical services to clients in relation to disputes with international aspects, using his experience of many years spent living outside Japan. He also focuses on providing advice on the resolution of commercial disputes, in particular termination of capital and business alliances, and termination of continuous long-term contracts under Japanese law.

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