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The Domain of Investment Law: What is an Investment?

Julian Davis Mortenson (University of Michigan Law School) · Thursday, October 13th, 2011 · Institute for Transnational Arbitration (ITA), Academic Council

Article 25 of the ICSID Convention famously limits ICSID jurisdiction to "legal dispute[s] arising directly out of or in relation to an investment." Uncertainty about the outer limits of this provision erupted into controversy about a decade ago, when *Salini Costruttori v. Morocco* kicked off a series of cases that imposed sharp limits on the kinds of assets that can constitute an ICSID "investment." In recent years, individual tribunals have refused to hear claims involving, variously, a foreign-owned marine salvage corporation, a fourteen-year mining construction contract, and a corporate law firm in the Congo capital of Kinshasa. In each of these cases (one of which was later annulled), the relevant bilateral investment treaties (BIT) clearly protected the foreign assets as an "investment." But in each of these cases, the tribunal ruled that the complaining investors were out of luck, because their assets were not also "investments" within the meaning of Article 25.

Tribunals adopting this approach share a common heritage: their misreading of the first edition of Christoph Schreuer's treatise on the ICSID Convention. Schreuer observed, quite accurately, that most ICSID cases had involved investments that were characterized by (i) "a certain duration" of the enterprise, (ii) "a certain regularity of profit and return," (iii) an "assumption of risk," (iv) a "substantial" commitment by the investor, and (v) some "significance for the host State's development." Despite Schreuer's admonition that "these features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention," many tribunals following *Salini* have converted these descriptive observations into prescriptive requirements for Article 25 jurisdiction. There are important differences in how tribunals have done so. But variations on the *Salini* test now dominate discussion of Article 25.

As a result, even where states write a BIT or investment contract that explicitly protects a given category of assets, they can't offer ICSID review as a reliable back-end guarantee unless the BIT definitions are themselves sure to satisfy *Salini*'s abstract and unpredictable demands. No matter how much a host state may wish to promote precisely the sorts of mining projects, salvage operations, or professional services firms at issue in a given case, *Salini* may keep the state from using ICSID to do so.

This approach to investment law profoundly misconceives the object and purpose of the ICSID Convention. As I explained in an article published last year, the Convention was actually meant to give states almost complete discretion to tailor the ICSID guarantee to their liking. If states wanted to encourage a given category of economic activity, they were free to offer ICSID protections as one means of attracting that activity. Given the advantages of such flexibility, the historical understanding was that the "investment" requirement of Article 25 would include *any* plausibly economic activity or asset that a state meant to subject to ICSID jurisdiction—with no further questions asked. The next two posts will describe how that understanding came into being.

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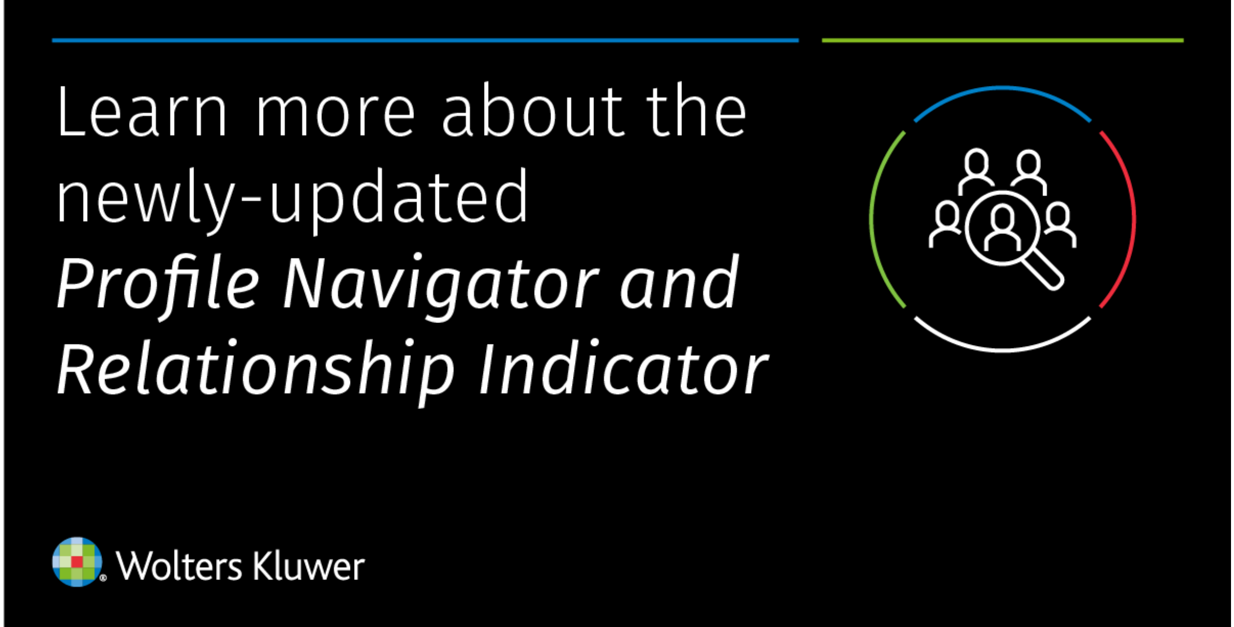

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