

# Kluwer Arbitration Blog

## The Domain of Investment Law: Drafting the Convention (Part 1)

Julian Davis Mortenson (University of Michigan Law School) · Tuesday, October 18th, 2011 · Institute for Transnational Arbitration (ITA), Academic Council

My [last post](#) described the ongoing controversy about the proper scope of “investment” under Article 25 of the ICSID Convention. The next two posts will draw on [my recent article](#) to argue that this controversy should be resolved consistently with the historical understanding of the term. Far from incorporating the limitations exemplified by the *Salini* test, the Article 25 understanding of “investment” in fact incorporated profound deference to state definitions of the term. As I will explain, the compromise hammered out by the drafters was that the “investment” requirement of Article 25 would include *any* plausibly economic activity or asset, full stop.

As described at length in the article, the debate over the definition of investment was probably the most inflammatory issue facing the ICSID Convention during its multi-year drafting process. Many commentators and diplomats had long argued (often stridently) that no investment convention should protect more than a few narrow categories of economic activity. Many others had disagreed (often vehemently), urging that states should be free to encourage any form of economic activity they wanted to. This issue was at the core of a multi-year fight about the very identity of this nascent regime, and on that score it is hard to overstate its significance.

Despite profound disagreement about which approach was best, both sides of the debate agreed for years about one thing: the bare term “investment” (if it were adopted) would throw the ICSID door wide open to a spectacularly vast range of assets and activities, leaving the consent of signatory states as the sole limit on investment jurisdiction. Some worried about that prospect; others embraced it. For but one example, the Indian delegate to one of the earliest meetings said that failing to define the word “investment” would leave “[o]nly one limitation ... explicitly stated, namely the consent of parties, and ... would probably expose States to pressure to consent to arbitrate disputes which would not be arbitrable under any [current] international law or understanding.” It was precisely this understanding of the bare term “investment” that led capital-importing states like India to push so fiercely for a narrowing definition.

If the two sides agreed on anything, in other words, it was that adopting the bare term “investment” would let states make use of ICSID in any way they saw fit. This was true in internal debates at the World Bank before a draft proposal was submitted to the world. It was true at a series of regional conferences that debated the World Bank proposal once it was finally drafted. And it was true throughout the preliminary debates at the drafting convention that finalized the treaty for promulgation by the World Bank. The next and final post will explain how a concrete political

bargain led to the adoption of precisely that bare term “investment” as the touchstone for ICSID jurisdiction.

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