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The Domain of Investment Law: Drafting the Convention (Part 2)

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My previous post described years of apparently intractable debate between two opposing camps of international lawyers about what kinds of economic activity should get international investment protections. This post will explain how that dispute was settled for the purpose of ICSID jurisdiction, and with what legal result.

As the dispute ground on throughout the final drafting convention in Washington D.C., the delegates tried to resolve the problem by passing it off to a special subcommittee. The subcommittee's members went off for a week of sequestered debates, which got them exactly nowhere. They returned, eight days later, with a pair of incompatible proposals. The first proposal excluded any definition of investment and was understood to entail no limitation other than host state consent—it simply reiterated the long-held policy of the jurisdictional maximalists. The second proposal carefully delineated a closed list of eligible enterprises, prohibiting ICSID jurisdiction beyond that list of closely defined categories—it distilled, in other words, the jurisdictional minimalists' efforts to lock ICSID access down at the front end. The head of the working group reported with evident dejection that "there was no possibility of reconciliation of the two proposals within the Working Group itself." And so the whole thing almost went off the rails.

But that's not what happened. Instead, after some further (and archivally invisible) back-stage activity, the United Kingdom came up with an eleventh-hour compromise that broke the logjam. The U.K. Compromise, in a new and carefully calibrated balancing of the two sides' interests, paired two things for the first time:

> 1. It adopted a substantive formulation based on the bare term "investment," which everyone understood to enact the open-ended, purely consent-based approach to ICSID jurisdiction
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> 2. It expressly connected that formulation with a flexible mechanism for individual states to impose case-by-case limitations. Specifically, it contemplated a series of "opt-outs" through which any state could craft its own definition of investment on the basis of its own particular preferences, either as unilateral "notifications" to the ICSID Secretariat or through subsequent bilateral arrangements.

This compromise was a stroke of diplomatic genius. The opt-out mechanisms convinced advocates of narrow jurisdiction to vote in large numbers for precisely the jurisdictional phrase they had spent the last several years opposing, and the compromise passed by an overwhelming vote. ICSID jurisdiction would thus extend to any plausibly economic activity or asset, and states were permitted to narrow arbitral jurisdiction in their own particular cases through a variety of tailored opt-out mechanisms.

This view of the historical arrangement is amply reflected in the drafters' ensuing discussion. For just one example, the chairman of the conference—who actually had significant reservations about the maximalist approach—explained that, under the U.K. proposal, "each Contracting State could, in effect, write its own definition" of investment. And after the conference wrapped up, he gave a deeply revealing explanation of the outcome to his colleagues at the World Bank. In suggesting examples of disputes that "had nothing to do with investments," he rattled off a list of profoundly personal activities that—rhetorically at least—are completely removed from the marketplace: "the status of persons, marriage and divorce, adoption, nationality, the coming of age." By contrast, he described disputes "[i]n the case of investments" as being characterized simply by "decision[s] that a party owed to the other party a certain sum of money."

Arbitral tribunals have no justification for straying from this capacious historical understanding of "investment". States have long developed investment policy precisely as Article 25 envisages, tailoring individualized packages of investment incentives just as the drafters anticipated they would. As described on pages 293-296, 303-304, and 308-309 of my article, states have excluded whole categories of industry from the coverage of BIT protection. They have required explicit approval by a central investment registry. They have imposed minimum durational requirements. They have carved out ordinary commercial enterprise from the scope of investment protections. They have ruled certain critical industries out of bounds. They have provided exceptions for specific types of government expropriations or certain kinds of emergencies. They have even, in some cases, adopted the principal *Salini* criteria as substantive elements of their BITs. These exclusions and others collectively represent the U.K. Compromise made good: countries responding to anxiety about an overly broad definition of investment by taking up the ICSID Convention on its offer to define investment for themselves.

On this background, the most faithful historical interpretation of Article 25 might well render "investment" non-justiciable, with enforcement depending entirely on political give and take as state actors hammer out subsequent agreements. But the VCLT's attention to non-historical modes of interpretation, combined with a reasonable presumption against surplusage, makes such strong medicine perhaps unwise. In my view, the appropriate standard for implementing the wide-open historical understanding is a formulation turning on the existence of a "plausibly economic asset or activity." On this understanding, even a simple shipment of goods qualifies as an ICSID investment—although as recent decisions like *Romak v. Uzbekistan* suggest, tribunals may quite defensibly demand that "in such cases, the wording of the [BIT] must leave no room for doubt that the intention of the contracting States was to accord to the term 'investment' an extraordinary and counterintuitive meaning."

The bottom line is this. Given the object and purpose of the ICSID Convention, given its unequivocal drafting history, and given the actual practice of states within the ICSID system, tribunals ought to reject the *Salini* test and adopt a far more deferential posture to the considered judgment of the states-parties. If an activity or asset is plausibly economic in nature, it is subject to Article 25 "investment" jurisdiction.

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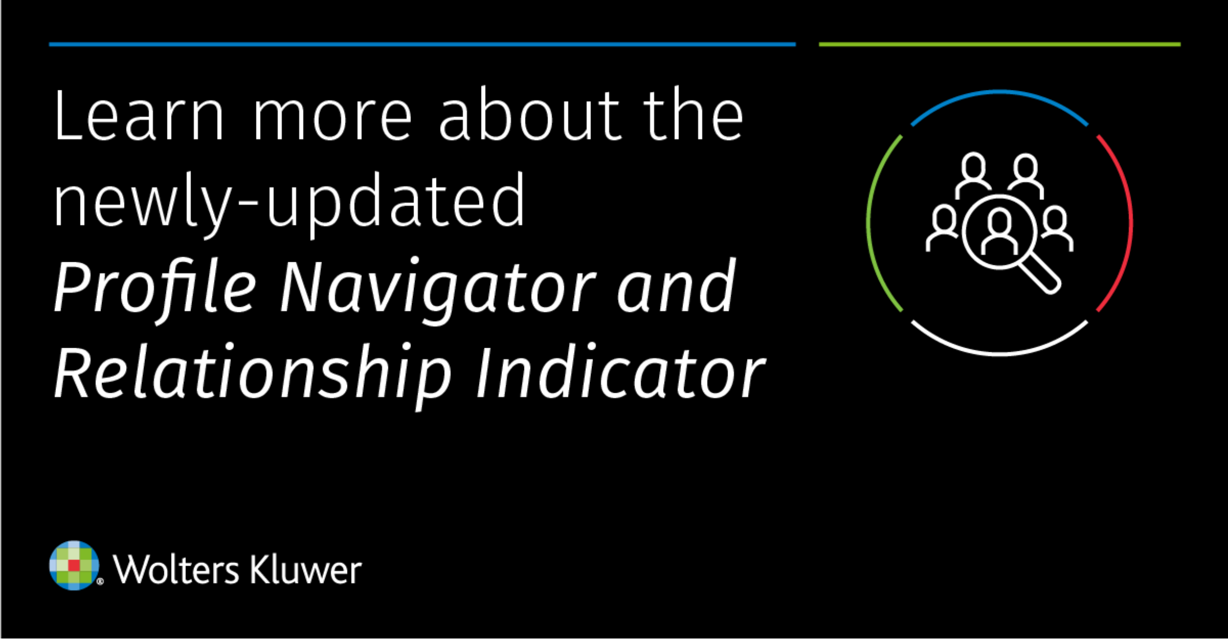

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