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Keeping Up with the Notion of Investment: the Case of the Energy Charter Treaty

Crina Baltag (Managing Editor) (Stockholm University) · Monday, April 16th, 2012

The notion of ‘investment’ has been one of the most controversial issues in arbitral proceedings instituted under the ICSID Convention. The award rendered by the UNCITRAL arbitral tribunal in *Romak v. Uzbekistan* has brought the issue outside of the ICSID context and concluded that, despite the broad definitions of ‘investment’ in Bilateral Investment Treaties (BITs), the term ‘investment’ has an inherent meaning that cannot be ignored. Although not as disputed as the notion of ‘investment’ within the ICSID Convention, the meaning of ‘Investment’ under the Energy Charter Treaty (ECT) is still open to debate.

In *Petrobart v. Kyrgyzstan* (the ECT-based claim), the tribunal decided that a contract for the sale of gas condensate constitutes an Investment since the definition of this notion under the ECT encompasses “any right conferred by law or contract or by virtue of any licenses or permits ...” Although the *Petrobart v. Kyrgyzstan* tribunal regarded the notion of ‘Investment’ as a broad one, the definition contained in the ECT appears to indicate the opposite and, thus, excludes ordinary commercial transactions such as the sale of goods.

Article 1(6) of the ECT defines the term ‘Investment’ as follows:

‘Investment’ means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
- (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
- (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
- (d) Intellectual Property;
- (e) Returns;
- (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at

or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the “Effective Date”) provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

‘Investment’ refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as ‘Charter efficiency projects’ and so notified to the Secretariat.

The first paragraph of Article 1(6) includes in the definition of the notion of ‘Investment’ any kind of assets owned or controlled directly or indirectly by an ‘investor’ and provides for a non-exhaustive list of such assets, similar to most definitions of ‘investment’ found in BITs. However, this broad enumeration is qualified under the subsequent paragraphs of Article 1(6). Paragraph 3 restricts the notion of ‘Investment’ to “investment associated with an Economic Activity in the Energy Sector[.]” It is, thus, not only the association between the ‘Investment’ and an Economic Activity in the Energy Sector (which under Article 1(5) of the ECT means “an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises”), but also the character of “investment” that particularizes the notion of ‘Investment’ under the ECT. This is also confirmed by paragraph 2 of Article 1(6): “‘Investment’ includes all investments ...”

The use of quotation marks and capital letter to identify the defined meaning of ‘Investment’ and the use of the term ‘investment’ in lower case indicate that the two terms were intended to have different meanings. This was also acknowledged by the drafters of the ECT during the negotiations: “the practice in the ECT [is] of using initial capital letters to identify defined terms. ...[W]e could find no persuasive rationale that would justify departing from the ECT’s existing usage.” Consequently, despite the non-exhaustive list contained in Article 1(6), not every asset constitutes an ‘Investment’ under the ECT, but only those assets that satisfy a double threshold: they are investments within the ordinary meaning of the term and they are associated with an Economic Activity in the Energy Sector.

But in the end, the thorny question remains: what is the ordinary meaning of the term ‘investment’? Is it “the commitment of funds or other assets with the purpose to receive a profit, or ‘return’, from that commitment of capital”, as the tribunal in *Romak v. Uzbekistan* opined? Or is it a notion defined by three elements: contribution, certain duration and risk, which the tribunal in *Saba Fakes v. Turkey* found to be “necessary and sufficient” to qualify the ordinary meaning of ‘investment’? The debate is still open.

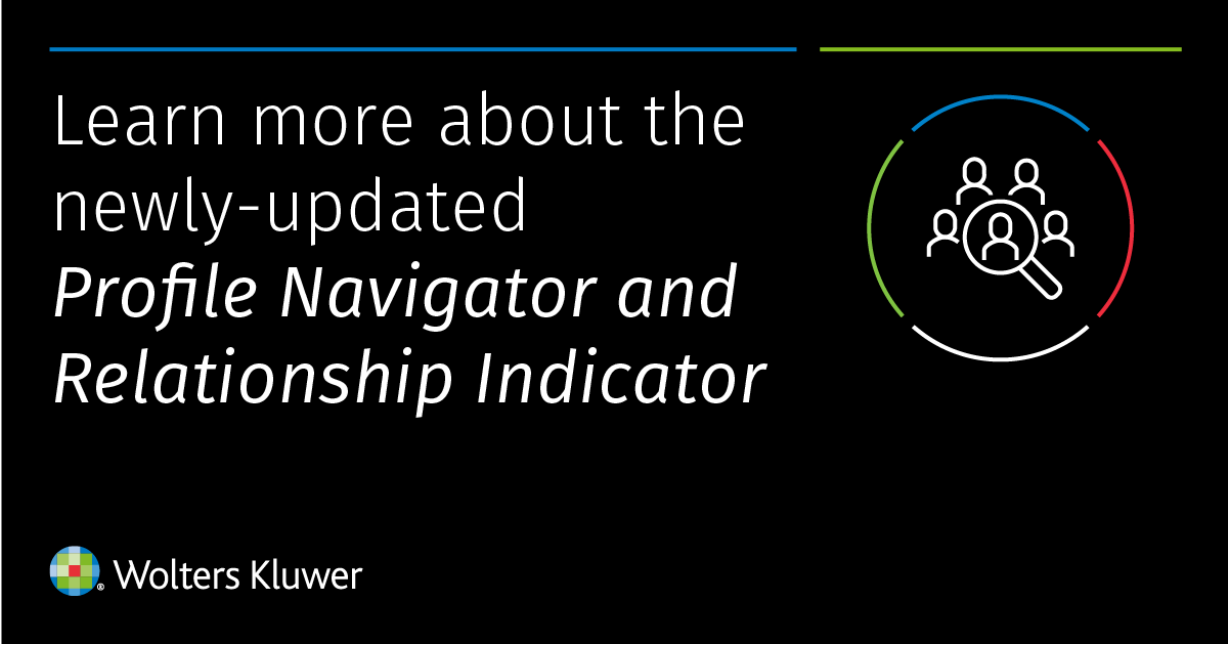
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