DEFINITION OF “INVESTMENT”
A voice from the eye of the storm

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Michael Hwang S.C
Senior Counsel and Chartered Arbitrator
#25-01, One Marina Boulevard
Singapore 018989

michael@mhwang.com

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SCHEME OF PRESENTATION

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Part II  What is Investment? – The components of the *Salini* Test

Part III  The ‘Outer Limit’ approach
PART I : Introduction to different approaches taken by various tribunals to the definition of “investment”
Art 25(1) of the ICSID Convention states:

**Article 25**

“(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an **investment**, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.” (emphasis added)
“Investment” in a BIT

Malaysia UK BIT

Article 1 — Definition
For the purposes of this Agreement

(1)(a) “investment” means every kind of asset and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
(ii) shares, stock and debentures of companies or interests in the property of such companies;
(iii) claims to money or to any performance under contract, having a financial value;
(iv) intellectual property right and goodwill;
(v) business concessions conferred by the law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.
Different definitions of ‘investment’

- ICSID jurisprudence has defined ‘investment’
- This may be inconsistent with BIT definitions
- What happens when the definitions of ‘investment’ clash?
Traditional Approach

Traditionally, tribunals have regarded the ICSID Convention as controlling:

“A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties’ consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT” (emphasis added)

- CSOB v. The Slovak Republic (1999)

Recent cases such as RSM Production Corporation (2009) and Phoenix Action (2009) have also found the ICSID Convention as controlling
PART II: What is “Investment” - The components of the *Salini* Test
What is “Investment” - the Salini test

- Need for a certain but yet a non-restrictive test

- Commonly accepted characteristics:
  - A financial commitment (in money or other terms)
  - Risk
  - Duration (at least 2 years? (Japan-Mexico FTA: loan or debt security for at least 3 years))

- Controversial characteristics:
  - Contribution to host state’s economic development
  - Transfer of capital?
  - Regularity of profit and return (increasingly unpopular)
  - Assets invested in accordance with the laws of the host State (Phoenix Action) (common in Asian BITs)
  - Assets invested bona fide (Phoenix Action)
Must *Salini* criteria be met for an “investment”?

- **Two approaches have been taken:**
  - **Jurisdictional Approach**
    - All the established hallmarks of “investment” must be present before a contract can even be considered as an “investment”
  - **Typical Characteristics Approach**
    - “…it seems possible to identify certain features that are typical to most of the operations in question: the first such feature is that the projects have a certain duration... The second feature is a certain regularity of profit and return... The third feature is the assumption of risk usually by both sides... The fourth typical feature is that the commitment is substantial... The fifth feature is the operation’s significance for the host State’s development... These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention.”
Must *Salini* criteria be met for an “investment”?  

- Other Tribunals have opined that the *Salini* test were guidelines and not jurisdictional, following the statement by Schreuer that the components of the *Salini test* were only guidelines.

- “The classical *Salini* hallmarks are not a punch list of items which, if completely checked off, will automatically lead to a conclusion that there is an “investment.” If any of these hallmarks are absent, the tribunal will hesitate (and probably decline) to make a finding of “investment.” However, even if they are all present, a tribunal will still examine the nature and degree of their presence in order to determine whether, on a holistic assessment, it is satisfied that there is an ICSID “investment.”

- MHS Award Decision
The salvage contract in question was not an “investment” because:

- Contributions made by the Claimant were similar to those which might have been made under a commercial salvage contract.
- Although the Contract took almost four years to complete, the original stipulated duration of the Contract was only for 18 months (ICSID jurisprudence: minimum length of two years).
- The Claimant had not shown that the risks assumed under the Contract was anything other than ordinary commercial risks of a salvage award because salvage contracts were typically on a “no finds-no pay” basis.
- There was no significant contribution to be made to the host state economy.
PART III: The ‘Outer Limit’ Approach
MHS Annulment Award – Majority

- Majority: 2 members of Annulment Committee in MHS decided that:
  1. The BIT definition of “investment” ("every kind of asset") controls;
     - The contract between the Government of Malaysia and MHS is “one kind of asset”; the right to salvage may be treated as a “business concession conferred under contract” (Art 1(a)(v) Malaysia-UK BIT) – thus an “investment”
  2. “Investment” in Article 25(1) deliberately left undefined;
  3. *Salini* conditions for “investment” were not jurisdictional conditions
MHS Annulment Award – Majority

- Key is whether a state has consented to ICSID arbitration
  - consent can be found in Treaty

- Investment” in Article 25(1) not intended to operate as an additional jurisdictional threshold

- “It cannot be accepted that the Governments of Malaysia and the [UK] concluded a treaty providing for the arbitration of disputes, with the intention that the only arbitral recourse provided… that of ICSID, could be rendered nugatory by a restrictive definition of a deliberately undefined term…”
MHS Annulment Award – Dissent

- Minority: 1 dissenting member of the Annulment Committee
  - the word ‘investment’ in Art 25(1) of the ICSID Convention had to be construed in order to place an ‘outer limit’ to an ICSID investment beyond which party agreement to what constitutes an investment would be ineffectual to create an ICSID investment
  - “A reasonable inference is that Contracting States [to the ICSID Convention] did not agree that these burdens on them would apply to benefit transactions which did not promote the economic development of the host State. It is difficult to see why a purely commercial entity, intended only for the enrichment of its owners and not connected with the economic development of the host State, is entitled to bring before ICSID a dispute concerning an investment in the host State. Schreuer notes that “it was always clear that ordinary commercial transactions would not be covered by the Centre’s jurisdiction…””
MHS Annulment

- Majority decision relied upon the following quotation from the Report of the Bank’s Executive Directors
  
  “No attempt was made to define the term “investment” given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).”

- Accordingly, applying the MHS Annulment Committee (majority’s) interpretation, a state would either have to
  - Modify the definition of “investment” in existing and future BITS
  - Submit an Article 25(4) notification
Article 25(4)

“Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1)”
Origin of the term ‘outer limit’

- The term ‘outer limit’ was first used by the Chairman of the Regional Consultative Meeting of Legal Settlement of Investment Disputes when he reported on 9 July 1964 that:

  - “The purpose of Section 1 is not to define the circumstances in which recourse to the facilities to the Center would in fact occur, but rather to indicate the outer limits within which the Center would have jurisdiction provided the parties’ consent had been attained. Beyond these outer limits no use could be made of the facilities of the Center even with such consent.”
Different ways of stating the Outer Limit approach

- Before the MHS Annulment Award, other tribunals stated the ‘Outer Limit’ approach in different ways.
  - Some stated that the definition of “investment” under Art 25(1) could not be expanded by treaty definition (*Phoenix Action*)
  - Others stated that the jurisdiction of the Tribunal was contingent upon the existence of an investment within the meaning of Art 25(1) of the ICSID Convention (*Bayindir*)
  - Yet others stated that an investment had to satisfy both the definition of investment under Article 25(1) and the BIT (*CSOB*)

  - **two-fold test** must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim:
    1. whether the dispute arises out of an investment within the meaning of the Convention and, if so,
    2. whether the dispute relates to an investment as defined in the Parties’ consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT
How does this impact on the Outer Limit Approach?

- Strictly speaking, even if the *Salini* test were only treated as guidelines, this would not be the same as saying that they disagreed with the Outer Limit Approach because a Tribunal could theoretically treat the *Salini* test as only a guideline but still find that the definition of “investment” under Art 25(1) has not been fulfilled.

- Accordingly, whether or not the *Salini* test is merely a guideline does not detract from the proposition that Art 25(1) should act as an outer limit to the definition of “investment”.
Reasons why an outer limit approach may be applied

- Definition of “investment” is linked to the concept of consent to ICSID jurisdiction. In that context, did state parties intend the definition of investment to be determined solely by the BIT definition of investment without the safeguard of Art 25(1)?

- Most BIT definitions of investment are very broad. It is difficult to imagine that States had intended to open themselves up to ICSID arbitration on “every kind of asset” (UK, Germany, France, Netherlands Model BITS) or “every kind of investment” (US-Congo BIT).

- An international investment agreement (IIA) such as a BIT or FTA is primarily an agreement between two or more contracting States. While states intended the definition of investment to be all-encompassing with respect to defining their treaty obligation to other states, it is unclear if they consented to the same all-encompassing definition to be enforced against them by individual investors.
Exclusion of the Outer Limit approach?

- Some Tribunals have taken the view that Art 25 is absolute because the ICSID Convention is a multilateral treaty, whose terms cannot be changed by bilateral agreement. This might be too rigid an approach.
- Can the issue be resolved by treating consent as paramount?
- The ‘Outer Limit’ represented by Art 25(1) exists solely for the benefit of the Contracting States in defining their consent to jurisdiction and it is submitted that a state can waive such an outer limit by specifically consenting to submit a particular dispute with a known investor to ICSID arbitration or by specifically stating that a particular transaction will be considered an investment.
- But general words like “every class of asset” should not be considered sufficient to found either waiver or consent.
- E.g. inserting an ICSID arbitration clause into the contract that gives rise to the dispute might be construed as an exception to Art 25(1) (Joy Mining)
Problems with the MHS Annulment (majority’s) approach

- Art 25(4) notifications are usually used when the State has a particular interest in a particular type of claim not being heard or only hearing claims of a certain nature. Very few notifications have been made in the past.
- If Tribunals can take care of the problem by adopting an ‘outer limit’ approach, it seems unnecessarily cumbersome to require each of the 143 states to formulate an Art 25(4) restriction (which may differ from state to state) to address the problem.
- Even after submitting a Art 25(4) notification, states may still need to modify existing BITS (PSEG).
- Arguable that most-favoured nation (MFN) clauses may cause any broader definition of investment in another BIT to apply to the renegotiated BIT.
- Various state respondents (e.g. Malaysia in MHS, Tanzania in Biwater, the Czech Republic in Phoenix Action, the Slovak Republic in CSOB, Venezuela in Fedax, have taken the position that that ‘investment’ within the meaning of section 25(1) of the ICSID.
- Convention can be different from the BIT definition.
Contribution to host state’s economic development

- Although some tribunals and authors have commented that this requirement is unnecessary, this requirement can be a useful component of the Salini test
  - preamble of the ICSID Convention refers to economic development
  - non-economic development (such as arts and culture) was not one of the stated purposes of the ICSID Convention
  - logical to use economic development as a marker as the investor would invariably be compensated for his improvement to the state with money or something of monetary value
  - At least some states have reaffirmed that economic development is a major purpose of concluding IIAs (see Multi-year Expert Meeting on Investment for Development on its first session, 10-11 February 2009)
  - criterion of “significant contribution to economic development” would help to sieve out vexatious and de minimis claims, reducing the financial cost to states of defending such claims
Conclusion – The Way Forward

- No doctrine of binding precedent in investment treaty arbitration
- MHS annulment was not a unanimous decision
- MHS itself has to be reheard
- Other contemporaneous decisions (*RSM Production Corporation* and *Phoenix Action*) not consistent with the MHS Majority approach
- States may rely on the “authorised investment” approach as a safeguard