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Should ICSID Go Gangnam Style in Light of Non-Traditional Foreign Investments Including Those Spurred on by Social Media? Applying an Industry-Specific Lens to the Salini Test to Determine Article 25 Jurisdiction

Helena Jung Engfeldt*

INTRODUCTION

On July 15, 2012, Korean pop artist Psy's music video "Gangnam Style" was uploaded to YouTube. Three months later it had been viewed over 400 million times and five months later it had been viewed over one billion times.¹ After only ten weeks online, Psy's video held the world record for most "likes" on YouTube.² The video is now the most viewed video in the history of the Internet.³

The connection between "Gangnam Style" and economic development may not be readily apparent; however, Psy's YouTube video provides an insightful lesson for refining the definition of investment under Article 25 of the Convention on the Settlement of Investment Disputes between States and

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1. Psy, *Oppa Gangnam Style*, YOUTUBE (July 15, 2012), <http://www.YouTube.com/watch?v=9bZkp7q19f0>.

2. Chenda Ngak, *Psy's 'Gangnam Style' Video Sets Guinness World Record For Most Likes on YouTube*, CBS NEWS (Sept. 27, 2012), http://www.cbsnews.com/8301-501465_162-57521660-501465/psys-gangnam-style-video-sets-guinness-world-record-for-most-likes-on-YouTube/.

3. *Gangnam Style Most Watched YouTube Video Ever*, ASSOCIATED PRESS, (Nov. 25, 2012), available at <http://bigstory.ap.org/article/gangnam-style-most-watched-youtube-video-ever>.

Nationals of Other States (ICSID Convention). This Article argues that new types of foreign investments have become possible thanks to social media.⁴ The spread of Korean pop videos, for example, has opened up a market for international entertainment investments that would not have taken place without social media. In light of these developments, the definition of “investment” should include non-traditional investments for two reasons: (1) the ICSID Convention was drafted to be inclusive, and (2) the judicially created Salini test, designed to determine the presence of Article 25 investments, was developed before anyone thought about entertainment investments.

Delegates to the World Bank drafted the ICSID Convention in the 1960s. The purpose of the Convention was to provide a procedural framework for arbitration of investment disputes that would give foreign investors an option to resolve disputes in an international forum rather than in a domestic court in a host state. The ICSID framework was limited to investment disputes, but the term “investment” was left undefined.

The delegates may not have considered entertainment ventures when they drafted the Convention, yet entertainment and other projects made possible by information-sharing on social media should benefit from ICSID arbitration. An entertainment company can market its content to an international audience on social media before branching out to set up business ventures in a host state. The international Korean entertainment industry is used as the illustrative example in this Article because Korean companies have successfully invested in host states after their entertainment products became popular in those countries with the help of social media. Currently, Korean companies cooperate with host state entities to develop host state broadcasting industries. It is argued here that investments made possible by social media⁵ should benefit from access to ICSID arbitration when they are found to positively impact host state development and the parties agree on ICSID jurisdiction.

While there is no definition of “investment” in the Convention itself,⁶ defining entertainment ventures dependent on social media as “investments” may mean a departure from a developing jurisprudence on the meaning of the term under ICSID’s Article 25. Most commentators, and arbitration awards, suggest that there is an objective definition of “investment” under Article 25,

4. For the purposes of this Article, social media is understood as a term that includes platforms, forums, and communities that allow users to communicate and share content over the Internet.

5. When referring to investments dependent on, or made possible thanks to, social media, the author refers broadly to international business ventures and cooperation between governments and foreign companies that would not likely have taken place without social media. The author does not refer to economic activity that reaches into a host state solely through the Internet.

6. Article 25 (1) of the Convention extends jurisdiction to “any legal dispute arising directly out of an investment,” but the term “investment” is left undefined. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar.18, 1965, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966).

and that the definition must be met for an investor to gain access to ICSID arbitration.⁷ Arbitration tribunals opine that certain features, collectively referred to as the Salini test, indicate investment activity.⁸ To be considered investment activity under the Salini test the project should: (1) involve a substantial contribution, (2) involve risk other than commercial risk, and (3) have a minimum duration of two years.⁹ A fourth feature, which some tribunals require before they determine something to be an “investment,” is the potential for a positive impact on host state economic development.¹⁰ Some tribunals contend that unless all three, or for certain tribunals all four, features of the Salini test are present, ICSID jurisdiction cannot be established.¹¹ Others claim that the Salini features should not be treated as mandatory criteria for a finding of investment under Article 25, but rather should guide the determination of a particular activity’s status as an investment.¹²

7. This is known as the “double keyhole approach,” where an activity must meet the definition of investment both under the parties’ consent document and under Article 25 of the ICSID Convention. *See* Global Trading Res. Corp v. Ukraine, ICSID Case No. ARB/09/11, Award, ¶ 43 (Dec. 1, 2010). *See also* Quiborax S.A. v. Plurinational State of Bolivia (*Quiborax*), ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶¶ 211-217 (Sept. 27, 2012); RUDOLF DOLZER & CHRISTOPH SCHRUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 61-62 (2008).

8. Tribunals use varying language when referring to the different parts of the Salini test. For consistency, the author refers to the parts as “features” since that was the term originally used by commentators when referring to parts of the Salini test. *See* Christoph Schreuer, *Commentary on the ICSID Convention*, 11 ICSID REV. 318, 372 (1996).

9. *See* Salini Costruttori v. Kingdom of Morocco (*Salini*), ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶¶ 52-54 (July 23, 2001). *See also* Joy Mining Machinery Ltd. v. Arab Republic of Egypt (*Joy Mining Machinery Ltd.*), ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 57 (Aug. 6, 2004); Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (*Bayindir*), ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶ 137 n.54 (Nov. 14, 2005); *Saba Fakes*, ICSID Case No. ARB 07/20, Award, ¶ 110 (July, 14 2010); *Quiborax*, ICSID Case No. ARB/06/2 at ¶¶ 219, 227.

10. *See, e.g., Saba Fakes*, ICSID Case No. ARB 07/20 at ¶ 111; Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶¶ 84-86 (Apr. 15, 2009); Mitchell v. Democratic Republic of Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, ¶ 33 (Nov. 1, 2006).

11. *See, e.g., Quiborax*, ICSID Case No. ARB/06/2 at ¶ 219; LESI-Dipenta v. Algeria (*LESI-Dipenta*), ICSID Case No. ARB/04/08, Award, ¶ II.13(iv) (Jan. 10, 2005); Victor Pey Casado v. Chile, ICSID Case No. ARB/98/2, Award, ¶ 233 (May 8, 2008); Jan de Nul N.V. v. Arab Republic of Egypt (*Jan de Nul N.V.*), ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶¶ 91-95 (June, 16 2006).

12. *See, e.g., Biwater Gauff Ltd. v. United Republic of Tanzania (Biwater Gauff)*, ICSID Case No. ARB/05/22, Award, ¶¶ 312-313 (July 24, 2008); MCI Power Group LC v. Ecuador, ICSID Case No. ARB/03/6, Award, ¶ 165 (July 31, 2007). The Ad Hoc Committee in *Malaysian Historical Salvors* adopted a particularly flexible and inclusive definition of Article 25 investments. *See* *Malaysian Historical Salvors v. Malaysia (Malaysian Historical Salvors)*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 80 (Apr. 16, 2009). At ¶ 69, the Ad Hoc Committee noted that while Article 25 was meant to indicate some outer limits to ICSID’s jurisdiction, “little more about the nature of outer limits is indicated in the *travaux* than is contained in Article 25(1).” At ¶ 72, the Ad Hoc Committee concluded that it views the outer limits to require that a dispute be a legal dispute, that the parties to the dispute must be a contracting state and a national of another contracting state, and that the term “investment” does not mean “sale.”

The Salini test was developed in response to a lack of a definition of “investment” in the ICSID Convention itself and evidence in the Convention’s negotiation history suggests that Article 25 jurisdiction has outer limits.¹³ While some commentators argue that the Convention text, and its negotiation history, support an inclusive understanding of investment to include any “activity or asset” that is “colorably economic in nature,”¹⁴ the prevailing view is that “purely commercial” transactions, like a one-time shipment of goods, do not qualify as Article 25 investments.¹⁵ In an effort to establish some guidance on what the outer limit of Article 25 jurisdiction should be, Professor Christopher Schreuer, in the preliminary publication of what has become the most referenced scholarly work in investment arbitration awards, *The ICSID Convention: A Commentary*,¹⁶ first identified the features that make up the Salini test.¹⁷ Building from the 1997 decision in *Fedax v. Venezuela* to the 2012 decision in *Quiborax v. Bolivia*, tribunals seem to agree that the features of contribution, risk, and duration reflect a commonsense understanding of “investment” that was intended by the Convention’s drafters.¹⁸ What is less clear, and what this Article addresses, is how to use these features to distinguish “purely commercial” activities from “investments.”

This Article argues that modern investment activities centered on intellectual property—and promoted by social media—are unlikely to have the same features as investments, which arbitrators may have envisioned when the Salini test became popular. When much of the Salini case law was decided, investments through social media did not exist, and the cases before tribunals did not prompt arbitrators to consider whether the types of activities discussed in this Article amounted to Article 25 investments. Instead, the Salini features and their boundaries were developed based on a model of brick-and-mortar industrial activity.

13. HISTORY OF THE ICSID CONVENTION 566 (2008).

14. Julian Davis Mortenson, *The Meaning of “Investment”: ICSID’s Travaux and the Domain of International Investment Law*, 51 HARV. INT’L L.J. 257, 315 (2010).

15. This was perhaps most clearly asserted when the ICSID Secretary General refused to register a request for arbitration of a dispute arising from a sale of goods transaction as manifestly outside ICSID’s jurisdiction. See I.F.I. Shihata & A. Parra, *The Experiences of the International Centre for Settlement of Investment Disputes*, 14 ICSID REV. 299, 308 (1999).

16. TONY COLE, CITATIONS IN INTERNATIONAL INVESTMENT ARBITRATION AWARDS AND DECISIONS IN A CANON FOR ARBITRATION AND INVESTMENT LAW (2012), available at <http://arbitrationandinvestmentlaw.wordpress.com/2012/01/09/citations-in-international-investment-arbitration-awards-and-decisions/>.

17. Christoph Schreuer, *Commentary on the ICSID Convention*, 11 ICSID REV. 318, 371 (1996).

18. See *Fedax v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, ¶ 43 (July 11, 1997). See also *LESI-Dipenta*, ICSID Case No. ARB/04/08 at ¶ II 13 (iv); *Saba Fakes v. Republic of Turkey (Saba Fakes)*, ICSID Case No. ARB 07/20 at ¶ 110; *Quiborax*, ICSID Case No. ARB/06/2 at ¶ 219.

To find the objective meaning of investment under ICSID's Article 25 in 2014, we should continue to consider the features suggested in Salini as a starting point and follow the line of cases that support a flexible, holistic application of test features, eschewing cases that require each feature to be met to confer Article 25 jurisdiction. As noted by the tribunal in *Biwater Guff v. Tanzania*, approaching the Salini features as mandatory requirements "risks the arbitrary exclusion of certain types of transaction from the scope of the Convention."¹⁹ Beyond emphasizing the importance of flexibility to encompass less traditional investments, like the entertainment ventures discussed here, the tool of industry-specific analysis is offered to guide tribunals in distinguishing between activities that are not typically investments, such as the sale of goods, and activities that should be considered investments. What is suggested here is not an expansion of the Article 25 definition of investment, but rather a way to apply the Salini features to new economic activities.

Recently, some tribunals have rejected the development feature as a necessary condition for finding Article 25 "investment."²⁰ While requiring the development feature would be unnecessary, the potential for host state development should always be considered when ICSID jurisdiction is disputed. Since ICSID was set up by an organization with a development focus, ICSID is different from other international arbitration frameworks. A desire to have private investment fuel host state development was a driving force behind the ICSID Convention. Even if a development feature cannot be read into the term investment itself, when interpreting investment under Article 25, a development feature should be considered.²¹ However, as suggested by Professor Schreuer, we should not limit our analysis to readily measurable contributions to GDP, but instead "should include development of human potential, political and social development, and the protection of the local and the global environment."²² Activity that has significant potential to positively impact host state development should favor a finding of Article 25 jurisdiction.

Investment activities fueled by information sharing on social media often furthers the ICSID Convention's goal of positively impacting economic development, but it may not meet the Salini test's most agreed upon features of substantial contribution, risk, and duration. International entertainment projects

19. *Biwater Gauff*, ICSID Case No. ARB/05/22 at ¶ 314.

20. *Quiborax*, ICSID Case No. ARB/06/2 at ¶¶ 220-225.

21. The first sentence of the preamble to the ICSID Convention expresses "the need for international cooperation for economic development and the role of private international investment therein." ICSID CONVENTION, REGULATIONS, AND RULES 11 (2005), available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

22. CHRISTOPH SCHREUER, THE ICSID CONVENTION – A COMMENTARY 134 (2nd ed. 2009) (noting that in the 2009 *Malaysian Historical Salvors* annulment at ¶ 80(b), the arbitrator rejected ICSID jurisdiction because he found no contribution to host state development. The annulment was based in part on the arbitrator's interpretation of "the alleged condition of a contribution to the economic development of the host state" as excluding small contributions and those of a cultural and historical nature).

spurred on by social media positively impact the development of host state broadcasting industries and host state talent; however the contributions may seem smaller, the risks involved may be harder to quantify, and the duration may be shorter compared to industrial contracts.

Placing an industry-specific lens on the Salini features to determine Article 25 jurisdiction would best help us use the Salini case law to evaluate new economic activities like those mentioned in this Article. Salini features are present in different ways depending on the industry, so when assessing an activity's features an industry-specific lens is appropriate to determine whether the activity is an investment.

Some have rejected an industry-specific approach. In the later-annulled decision of *Malaysian Historical Salvors v. Malaysia*, the sole arbitrator of the case specifically rejected an industry-specific analysis when discussing the development feature of the Salini test.²³ Instead, the litmus test must be the investment's "overall contribution to the economy of the host state" and "the frame of reference for the purposes of determining investment under the ICSID Convention cannot depend on whether the contract is the largest ever made within its particular industry."²⁴ However, without an industry-specific approach to assess the features of an investment, a rigid interpretation of the Salini features may result that does not account for variances between industries. This will be to the detriment of industries whose activities may not exhibit the same features as traditional investments. While much language in arbitration awards and commentary cautions against a checklist-like approach to the Salini features of investment, some case law treats the features as a mandatory test. As one tribunal noted, "to qualify as an investment, the project in question must constitute a substantial commitment on the side of the investor."²⁵ Any investment project, it elaborated, "must have a certain duration."²⁶ Another arbitrator noted that "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 [t]ribunal will hesitate (and probably decline) to make a finding of 'investment.' However, even if they are all present, a [t]ribunal 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.'"²⁷ Similarly, a different arbitrator considered the four Salini features as "requirements for an investment to benefit from the international protection of ICSID."²⁸ With this kind of mandatory

23. ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 135 (May 17, 2007).

24. *Id.*

25. *Bayindir*, ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶¶ 131-132 (Nov. 14, 2005).

26. *Id.*

27. *Malaysian Historical Salvors*, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 106(e) (May 17, 2007).

28. *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶¶ 114-115

language, combined with de facto precedent-building in investment law, the Salini features may over time solidify as mandatory requirements.

Without access to ICSID arbitration, firms in the entertainment industry may find it hard to remedy any losses incurred by adverse host state action. As a result, new economic activities may become less prevalent. In some ways, the loss to these firms can be written off as money spent on developing entertainment content and setting up partnerships with host state entities and private entities within the host state. In other ways, the losses are non-traditional in that they include more loss of human capital than traditional investments. Developing an entertainment talent for a particular market could be a wasted effort, especially if the foreign firm is shut out of host state Internet domains or if intellectual property is unlawfully copied. Entertainment firms dependent on social media for their business model may be particularly vulnerable and in need of an effective dispute resolution mechanism to protect them from Internet shut downs and unlawful copying. Figuring out how to calculate damages in these cases may prove challenging, but any difficulty in this regard should not stand in the way of protecting these activities in the first place.

Should an investment spurred on by, and dependent on, social media not pass the Salini test, and therefore not have access to ICSID arbitration, other international arbitration options may be available depending on the underlying contract or treaty. Parties may be able to resolve disputes that do not qualify as Article 25 investment disputes via alternative frameworks, such as arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL) or the Stockholm Chamber of Commerce (SCC). However, ICSID is the most transparent system currently in place,²⁹ and a shift towards

(Apr. 15, 2009).

29. A rule change in 2006 requires ICSID to “promptly include in its publications excerpts of the legal reasoning of the Tribunal” even when party consent for full publication cannot be obtained. See Rule 48(4) of THE ICSID RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (2006). Such excerpts appear to be inclusive. See *OKI Pankki Oyi v. Republic of Estonia*, ICSID Case No. ARB/04/6, Award, (Nov. 2007), 22 ICSID Rev. 466 (2007), where the excerpt comprises thirty-three pages of the tribunal’s reasoning. Recently, the United Nations Commission on International Trade Law (UNCITRAL) has worked towards transparency in investment arbitrations. However, new UNCITRAL rules on transparency will currently only apply to investment treaties concluded on or after April 1, 2014 unless the parties voluntarily opt-in to the new rules. See PRE-RELEASE PUBLICATION OF UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (2013), available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf>. The Arbitration Rules of the Stockholm Chamber of Commerce (SCC) provide that unless otherwise agreed to by the parties, the SCC and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award. See ARTICLE 46 OF THE SCC ARBITRATION RULES 20 (2010), available at http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYC_K_1_100927.pdf. The London Court of International Arbitration Rules (LCIA) provide that unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to maintain confidentiality. Also, the LCIA does not publish any part of an award without the prior written consent of all parties and the arbitral tribunal. See ARTICLE 30 OF THE LCIA ARBITRATION RULES 14 (1998), available at http://www.lcia.org/Dispute_Resolution_Services/

solving investment disputes under other frameworks could mean a step back towards secrecy. To the extent that secrecy is equated with a less legitimate dispute resolution mechanism, investment arbitration would be undermined by such a shift. Further, to the extent that other international arbitration options are unavailable, effective dispute resolution may be unattainable and economic development would consequently be stifled.

I.

A SHIFT TOWARDS INTANGIBLE FOREIGN INVESTMENT

Any definition of the term “investment” will necessarily be limited by society’s experience of different kinds of entrepreneurial activity. During the drafting of the ICSID Convention, then World Bank General Counsel and the Convention’s primary architect, Aaron Broches, noted that attempts to define investment “were always directed towards particular facts or situations which the parties or governments had in mind while the matter envisaged by this Convention was more fluid.”³⁰ We should continually evaluate how new activities align with our understanding of the term “investment” and the development goal behind the ICSID Convention. New entrepreneurial activities may not fit the model of traditional investment projects like infrastructure projects, but they can still be the kinds of activities that serve the same broad policy goal of host state economic development. The industrial side of foreign investment continues,³¹ but new activities focused on information and intellectual property will increasingly share the stage of investment projects. Some of these new activities have become possible thanks to social media, as in the following example of international partnerships in the entertainment industry.

A. Activities Spurred on by Social Media as Article 25 Investments: the Korean Entertainment Example

The term “Hallyu,” which is Korean for “wave,” initially came from the title of a CD published by the Korean Ministry of Culture, Sports and Tourism in 1999 and was adopted by Chinese reporters to describe an emerging international Korean entertainment phenomenon.³² The reporters were amazed at the fast-growing popularity of Korean entertainment products and Korean culture in China.³³ This entertainment wave was driven by Korean pop music,

ARBPrintable_versions.aspx.

30. HISTORY OF THE ICSID CONVENTION 704 (2008).

31. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES 19 (2012).

32. Ju Young Kim, Rethinking Media Flow under Globalization: Rising Korean Wave and TV and Film Policy Since the 1980s, 12 (May 2012) (unpublished PhD thesis, University of Warwick), available at http://wrap.warwick.ac.uk/1153/1/WRAP_THESIS_Kim_2007.pdf.

33. *Id.*

known as K-pop, and by Korean TV dramas and Korean movies. More so than other Hallyu content, K-pop has captured an international audience through the Internet. Social media has allowed artists to bypass traditional media and move straight to creating a fan base online. “Social-media-savvy K-pop stars are now tweeting, YouTubing, and Facebooking their way up music charts across and beyond Asia.”³⁴ Korean labels have found social media sites to be effective tools to market their artists around the globe.³⁵ Fans “going gaga” for K-pop in places as diverse as France and Peru³⁶ and Facebook-orchestrated K-pop flash mobs erupting everywhere from Sweden to the United States demonstrate the extent of K-pop’s global success, facilitated by social media.³⁷ In 2011, K-pop label S.M. Entertainment held a sold-out concert at Madison Square Garden in New York City, an event that was high profile, but not wholly unique.³⁸ K-Pop concerts have sold out venues around the world, and in places where the labels have not yet ventured, locals stage their own K-Pop cover concerts and thousands show up.³⁹

Building on their viral success, Korean entertainment companies now collaborate with foreign governments, and foreign companies, for mutual benefit.⁴⁰ Broadcast content is the latest commodity between Korea and

34. Lina Yoon, *Korean Pop, With Online Help, Goes Global*, TIME (Aug. 26, 2010), <http://www.time.com/time/world/article/0,8599,2013227,00.html>.

35. See Choe Sang-Hun & Mark Russell, *Bringing K-Pop to the West*, N.Y. TIMES (Mar. 5, 2012), <http://www.nytimes.com/2012/03/05/business/global/using-social-media-to-bring-korean-pop-music-to-the-west.html?pagewanted=all>.

36. In France, the SM Town Live in Paris event sold out within fifteen minutes. See *SM Town Live in Paris to Add Another Concert Date?* MTVK (May 2, 2011), <http://www.mtviggy.com/blog-posts/sm-town-live-in-paris-to-add-another-concert-date/>. In Peru, K-pop fans organized flashmobs and lip-syncing concerts with the goal of convincing the K-pop labels to go to Peru. See *SM Town in Peru (1st Fan Meeting) KPop in Peru*, YOUTUBE (Oct. 14, 2011), <http://www.YouTube.com/watch?v=hjrFwzPIAsw>.

37. See Ah-young Chung, *K-pop Takes European Fans by Storm*, THE KOREA TIMES (June 12, 2012), http://www.koreatimes.co.kr/www/news/art/2012/05/201_88765.html. See also Hanna Fahl, *Koreanska Poptåget Har Natt Sverige*, DAGENS NYHETER (Sept. 24, 2012), <http://www.dn.se/kultur-noje/musik/koreanska-poptaget-har-natt-sverige>; Wi Tack-Whan, *Psy’s Gangnam Style Arrives in Sweden*, KOREA.NET (Oct. 3, 2012), <http://www.korea.net/NewsFocus/Culture/view?articleId=102747>; *University of Pennsylvania: Flash Mob-Gangnam Style*, YOUTUBE (Sep. 23, 2012), <http://www.YouTube.com/watch?v=BcBdDo2A1pc&feature=related>.

38. Jon Caramanica, *Korean Pop Machine Running on Innocence and Hair Gel*, N.Y. TIMES, Oct. 25, 2011, at C1.

39. *K-pop in Peru*, YOUTUBE (July 8, 2012), <http://www.YouTube.com/watch?v=K-NvGeHgq4M>.

40. *Caracol TV, Arirang TV Ink Cooperation Agreement*, TTVNEWS (Sep. 9, 2011), http://www.ttvmedianews.com/scripts/templates/estilo_notas.asp?nota=eng%2FProducci%F3n%2FC ontenidos%2F2011%2F08_agosto%2F24_Caracol_TV_acuerdo_Arirang_TV_corea; Roberto Corrente, *Asia Is a Key Market*, TTVNEWS, (accessed Oct. 12, 2013), http://www.todotvnews.com/scripts/templates/estilo_notas.asp?nota=eng%2FEjecutivos%2FEntrevist as%2F2011%2F11_noviembre%2F14_noviembre_roberto_corrente_caracol_tv_internacional. If anything, entertainment partnerships are less likely to be subject to the criticism that foreign

Colombia,⁴¹ and the two countries are engaged in international co-productions to produce content for both markets.⁴² Colombia and Korea have agreed to quickly implement a newly signed Free Trade Agreement (FTA), which includes a section on investment arbitration and stronger protections of intellectual property specifically to protect K-pop in Colombia.⁴³ Article 15.4 of the FTA obligates the parties to “grant and ensure adequate, effective, and non-discriminatory protection of intellectual property rights, and provide for measures for the enforcement of such rights.”⁴⁴

By bringing their entertainment industry expertise along with technical support, the Korean investors are developing a market for their entertainment content, while at the same time helping Colombia develop its domestic entertainment and broadcasting industries. Besides Colombia benefitting from Korean companies’ expertise on an industry level, the K-pop movement in Colombia appears to be a way to develop Colombian entertainment talent. As part of Korean companies’ foreign strategy, they host K-pop contests where K-pop fans around the world compete for a chance to go to Korea and perform. According to participant Andrea Velasquez Garcia, who participated in a Colombian K-pop reality show, the dream for singers in those kinds of shows “is to grow as a group and represent Colombia in other countries.”⁴⁵

Peru represents a recent example of how social media is paving the way for Korean entertainment investments. Peruvians found K-pop on YouTube and they became fans at a time when no K-pop artist had ever set foot on Peruvian soil.⁴⁶ By late 2012, K-pop group Super Junior drew a crowd of 14,000 in Lima, and in April 2013, 13,000 fans attended K-pop group Big Bang’s Lima concert.⁴⁷

While Latin America is a new partner and emerging consumer of Korean entertainment content, Japan remains the biggest foreign market. Continued success has prompted Korean artists and actors to set up long-term presence in

investment does not benefit the host state. For example, unlike industrial projects, entertainment projects lack concerns about negative environmental impact.

41. Airang Today, *Hallyu in Colombia*, YOUTUBE (June 12, 2012), http://www.YouTube.com/watch?v=HsL_MzfRVCo.

42. *Id.*

43. *See, e.g., Korea Signs FTA with Colombia*, CHOSUN ILBO (June 26, 2012), http://english.chosun.com/site/data/html_dir/2012/06/26/2012062600935.html.

44. *Intellectual Property Rights*, Colombia-Korea Free Trade Agreement, Colom.-S. Kor., ch. 15, Feb. 21, 2013, (draft text of FTA agreement), available at http://www.sice.oas.org/TPD/Col_kor/Draft_Text_06.2012_e/CH15IPR.pdf.

45. Arirang Issue, *Hallyu in Colombia*, YOUTUBE (June 20, 2012), http://www.YouTube.com/watch?v=HsL_MzfRVCo.

46. *SM Town in Peru (1st Fan Meeting) KPop in Peru*, YOUTUBE (Oct. 14, 2011), <http://www.YouTube.com/watch?v=hjrFwzpIAsw>.

47. Anjani Trivedi, *Forget Politics, Let’s Dance: Why K-Pop is a Latin American Smash*, TIME WORLD (Aug. 1, 2013), <http://world.time.com/2013/08/01/forget-politics-lets-dance-why-k-pop-is-a-latin-american-smash/>.

Japan. Most male Korean K-pop stars have their own official stores in Tokyo.⁴⁸ Some Korean artists now produce content specifically tailored to the Japanese market, featuring Japanese language songs.⁴⁹ Reportedly, 84 percent of K-pop profits in Japan go to Japanese distributors and 8 percent to Japanese promoters,⁵⁰ showing that Hallyu benefits host states receiving the Korean investments.

So how would these activities give rise to breaches of investment law obligations? While this author cannot predict any particular disputes that may arise, some potential scenarios demonstrate breaches of investment law obligations. In the case of Korean entertainment investments in Japan, some people oppose the Korean influence on Japanese culture and have protested outside TV stations to limit Korean TV content. In 2011, up to 6,000 protesters gathered outside Japanese Fuji Television Network to protest the amount of Hallyu content shown on TV and demand that the station air more Japanese content and that the government cancel Fuji TV's broadcasting license on account of its airing too much Hallyu programming.⁵¹ If these kinds of demands were satisfied, or if a government TV station would breach contracts made with Korean companies directly, a case could be made that an investment law obligation has been violated. In 2006, Chinese officials, celebrities, and media complained about what they viewed as Korean culture's extensive influence over China.⁵² Chinese legislators considered banning or limiting foreign drama TV during prime time, between eight and ten p.m.⁵³ Should such legislation come into effect, one could argue that an investment law obligation, such as national treatment, has been violated.

Besides direct state measures aimed at Korean entertainment interests, the Colombia-Korea FTA contains clear language obligating the state parties to enforce intellectual property rights,⁵⁴ and a passage in the new trilateral

48. Anthony Faiola, *Japanese Women Catch the "Korean Wave"*, WASH. POST (Aug. 31, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/30/AR2006083002985.html>.

49. Patrick St. Michel, *How Korean Pop Conquered Japan*, THE ATLANTIC, (Sept. 13, 2011), <http://www.theatlantic.com/entertainment/archive/2011/09/how-korean-pop-conquered-japan/244712/>.

50. 加藤達也, *本国薄利'韓流ブーム'に疑問 日本依存...5年後には消える?*, SANKEIBIZ, (May 12, 2012), <http://www.sankeibiz.jp/macro/news/120512/mcb1205120501003-n2.htm>.

51. *Hundreds of Japanese Protest Against Korean Wave*, CHOSUN ILBO (Aug. 9, 2011), http://english.chosun.com/site/data/html_dir/2011/08/09/2011080901004.html

52. *Taiwan, China United in Backlash Against Korean Wave*, CHOSUN ILBO (Jan. 11, 2006), http://english.chosun.com/site/data/html_dir/2006/01/11/2006011161009.html. See also Evan Osnos, *Asia rides wave of Korean pop culture invasion*, CHIC. TRIB., (Dec. 23, 2005), http://articles.chicagotribune.com/2005-12-23/news/0512230216_1_pop-culture-korean-wave-soap.

53. *Id.*

54. Article 15.4 of the draft agreement endeavors to "grant and ensure adequate, effective, and non-discriminatory protection of intellectual property rights, and provide for measures for the enforcement of such rights." *Intellectual Property Rights*, Colombia-Korea Free Trade Agreement,

investment agreement between China, Japan, and Korea could be interpreted to suggest an active duty on the state parties to protect foreign intellectual property rights under its domestic law.⁵⁵ Any failure on the part of Colombia, China, or Japan to protect the copyright of Korean entertainment content within its respective borders could give rise to an investment claim.

II.

APPLYING AN INDUSTRY-SPECIFIC LENS TO THE SALINI TEST

As the recent FTA between Colombia and Korea indicates, at least these countries want to give entertainment partnerships the assurance of access to international arbitration. Such access may nevertheless be denied under the ICSID Convention if a tribunal applies Salini case law without considering industry-specific features of the entertainment industry. While partnerships that have resulted from online sharing in the entertainment industry may not fit within the boundaries of existing Salini test case law, they would fit if we put on an industry-specific lens in applying the Salini features.

ICSID tribunals have examined Salini's substantial contribution feature in a number of cases. Tribunals have considered contributions including know-how, personnel, equipment, money spent, and loans.⁵⁶ The amount of physical work involved in a project has also been considered to show a "substantial contribution."⁵⁷ In some cases, contributions have been considered insufficient when compared with "commercial" contracts,⁵⁸ or contracts for concession of public services.⁵⁹ One arbitrator considered that if one or several of the Salini features were weakly present, as he found the substantial contribution feature to

Colom.-S. Kor., ch. 15, Feb. 21, 2013, (draft text of FTA agreement), *available at* http://www.sice.oas.org/TPD/Col_kor/Draft_Text_06.2012_e/CH15IPR.pdf.

55. Article 9(1)(a) of the treaty reads, "[e]ach Contracting Party shall, in accordance with its laws and regulations, protect intellectual property rights." Agreement Among the Government of Japan, the Government of the Republic of Korea, and the Government of the People's Republic of China for the Promotion, Facilitation, and Protection of Investment, Japan-S. Kor.-China, art. 9(1)(a), May 30, 2012, *available at* http://www.mofa.go.jp/announce/announce/2012/5/pdfs/0513_01_01.pdf.

56. *See Salini*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 53 (July 23, 2001). *See also* Malaysian Historical Salvors v. Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 109 (Apr. 16, 2009); *Bayindir*, ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶ 131 (Nov. 14, 2005); *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶¶ 229-231 (Sept. 27, 2012).

57. *Jan de Nul N.V.*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶ 92 (June 16, 2006) (noting that "the amount of work involved [including the mobilization of two heavy ships for a period of approximately 19 months] and the related compensation show that the Claimants' contribution was substantial").

58. *Malaysian Historical Salvors*, ICSID Case No. ARB/05/10 at ¶ 109.

59. *Joy Mining Machinery Ltd.*, ICSID Case No. ARB/03/11 at ¶ 59.

be in the case before him, other Salini features must be more clearly present to find an Article 25 investment.⁶⁰

The industry-specific lens is particularly useful in providing a more precise analysis of the Salini feature of substantial contribution. A substantial contribution for an entertainment company may appear unsubstantial compared with industrial investments. However, when a foreign firm has spent time and money developing entertainment content for a particular host state market,⁶¹ their activity should be compared with other entertainment ventures and not other industrial ventures.

A foreign firm's investment in developing broadcast content and local talent in Colombia appears substantial when compared with entertainment industry projects where content is simply sold to foreign markets. In the entertainment industry, simply selling content abroad or going on tour abroad are the common international aspects of the industry. Going beyond these activities and engaging in co-productions with a host state appear substantial in comparison. Rather than comparing each activity with previous investments that have been subject to ICSID arbitration, or comparing each time to concession contracts of public services, the industry-specific lens advanced here suggests that an activity should be compared with other activities within its same industry.

Drafters of the Convention suggested that Article 25 jurisdiction should only extend to claims that exceed a certain monetary limit, but that idea was rejected.⁶² The particular limit discussed was \$100,000, but imposing any limit was rejected "because disputes involving small amounts could be important as test cases, whereas there would be other cases in which it would be impossible to place a pecuniary value on the subject-matter of a dispute."⁶³ Just as the quoted passage predicts, putting a price tag on some projects may be difficult, but this should not necessarily preclude Article 25 jurisdiction. Tribunals naturally list quantifiable contributions, because they are measurable. However, such listings do not mean that contributions that are not easily quantifiable are not important when evaluating the contribution feature.⁶⁴

The substantiality of the contribution may be more difficult to determine at the outset of an entertainment project because it is harder to price intellectual

60. *Malaysian Historical Salvors*, ICSID Case No. ARB/05/10 at ¶ 112.

61. Korean talent agencies often train artists for years before producing them, teaching them foreign languages with the international market in mind. See Choe Sang-Hun & Mark Russell, *Bringing K-Pop to the West*, N.Y. TIMES (Mar. 5, 2012), <http://www.nytimes.com/2012/03/05/business/global/using-social-media-to-bring-korean-pop-music-to-the-west.html?pagewanted=all>.

62. HISTORY OF THE ICSID CONVENTION 567 (Vol. II-I 2008).

63. *Id.*

64. For an example of quantifiable contributions, see *Quiborax*, ICSID Case No. ARB/06/2 at ¶¶ 229-231. See also *Jan de Nul N.V.*, ICSID Case No. ARB/04/13 at ¶ 92 (providing examples of quantifiable contributions).

property and a transfer of know-how than it is to price tangible property involved in an industrial project. For many industrial projects, a transfer of know-how is part of the contribution that an investor makes to a host state, but it is rarely the main part. Tribunals tasked with evaluating the Salini contribution feature have not considered if a transfer of know-how could be enough to meet the contribution feature on its own. In *Salini Costruttori and Italstrade v. Morocco*, *Malaysian Historical Salvors v. Malaysia* and *Bayindir Insaat Turizm Ticaret Ve Sanayi v. Pakistan*, the tribunals all stated that the claimants had used their know-how, or contributed their know-how, as part of a contribution to the host state, but no tribunal has addressed how to treat a transfer of know-how as the sole contribution.⁶⁵ When evaluating the contribution feature for an entertainment project, tribunals may struggle to measure the contribution if most of it comprises intellectual property or know-how. This is especially true if a conflict arises early in a project, before the project has had a chance to produce its expected benefits. In that situation, a tribunal should consider a project's potential to positively impact host state development as a tiebreaker when determining Article 25 jurisdiction. Unlike the approach taken by the sole arbitrator in *Malaysian Historical Salvors v. Malaysia*, where the arbitrator suggested that a weak presence of one or more Salini features required a stronger presence of other features,⁶⁶ the approach suggested here is that the development feature specifically be given more weight when another feature is difficult to evaluate because of the particularities of an industry or when another feature is less important for a finding of an investment.

The risk feature of Salini has also been examined in a number of cases. Considered risks include increases in labor costs, modifications in host state law, damage done to physical investment property, long project duration, risk allocated solely to the investor, and the magnitude and complexity of a project.⁶⁷ These cases seem to require particular risk that is different from ordinary commercial risks.⁶⁸ However, while a risk for contractual breach could surely be viewed as a commercial risk, a foreign investor always faces additional risks. Contracting with a host state as opposed to a private entity carries a greater risk because a host state will not act as a private entity. A state entity dealing with a foreign investor will be subject to different pressures, consider different values, and face different reputational concerns compared with a private entity.

65. See *Salini*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 53 (July 23, 2001). See also *Malaysian Historical Salvors*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 109 (Apr. 16, 2009); *Bayindir*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶ 131 (Nov. 14, 2005).

66. *Malaysian Historical Salvors*, ICSID Case No. ARB/05/10 at ¶ 112.

67. See, e.g., *id.*, *Salini*, ICSID Case No. ARB/00/4 at ¶¶ 55-56; *Jan de Nul N.V.*, ICSID Case No. ARB/04/13 at ¶ 92; *Bayindir*, ICSID Case No. ARB/03/29 at ¶ 136.

68. See, e.g., *Malaysian Historical Salvors*, ICSID Case No. ARB/05/10 at ¶ 112; *Joy Mining Machinery Ltd.*, ICSID Case No. ARB/03/11 at ¶ 57.

Even though risks may be harder to quantify, social media driven investments may be particularly vulnerable to adverse host state activities. Copying intellectual property or blocking access to a social media website is probably easier to do than expropriating tangible investment property such as a railroad project or a mining operation.⁶⁹ Once intellectual property is shared, its owner hopes that it was shared with a trustworthy partner, and if not, the owner would want to make sure there are effective ways to remedy any harm. Investments dependent on Internet access could be effectively shut out of a host state market where the investments used to be welcome in the event that government officials instruct host state Internet Service Providers to turn off the power to Internet infrastructure. The world has seen Internet shutdowns happen when a host state disapproves of particular content shared on social media, as happened at the start of the Arab Spring in 2011 and in Pakistan and Syria in 2012.⁷⁰ Depending on how centralized or decentralized the Internet is in a particular host state, it is either easier or more difficult for the host state government to shut down Internet platforms. Consequently, the likelihood of an Internet shutdown should be part of the risk analysis for any social media dependent investments.

If particular risk is required, putting an industry-specific lens on the risk feature shows that entertainment firms investing through social media face the particular risk of Internet censorship. That risk could typically only materialize through adverse state action, as opposed to actions by private entities. If particular risk is required, an industry-specific approach to the risk feature of the Salini test suggests that we should look specifically at entertainment industry risks, such as lost intellectual property and Internet censorship, to see if those kinds of risks are present in a particular project.

A passage from *Salini Costruttori v. Morocco* about the duration of a construction project suggests that an industry-specific approach to the features is proper. As the tribunal noted, “a construction contract that stretches out over many years, for which the total costs cannot be established with certainty in advance, creates an obvious risk for the [c]ontractor.”⁷¹ In this passage, the tribunal distinguishes long-term construction projects from those of a normal duration and in doing so suggests an industry-specific approach to determining the level of economic risk. While construction projects may carry the risks of unanticipated costs, and general uncertainty due to long project duration, other projects carry different risks. Risks in a broadcasting project are less likely to

69. It is easier to reproduce copyrighted material or turn off the power to Internet infrastructure than it is to force workers off a construction site or take control over foreign-owned physical property.

70. See, e.g., Editorial, *YouTube Ban*, THE EXPRESS TRIBUNE (Oct. 4, 2012), <http://tribune.com.pk/story/446837/YouTube-ban-2/>; Martin Chulov, *Syria shuts off internet access across the country*, THE GUARDIAN (Nov. 29, 2012), <http://www.guardian.co.uk/world/2012/nov/29/syria-blocks-Internet>.

71. *Salini*, ICSID Case No. ARB/00/4 at ¶ 56.

involve unanticipated costs, or general risks from long duration, but instead may involve risks of lost intellectual property and Internet censorship.

The duration feature of Salini has also been considered in a number of cases. A construction contract for thirty-two months, and later extended to thirty-six months, was found to have “complied with the minimal length of time of 2-5 years.”⁷² One tribunal considered a project to have insufficient duration because the contract was paid in full at an early stage.⁷³ In the subsequently annulled decision in *Malaysian Historical Salvors v. Malaysia*, a four-year contract was found to “satisfy” the duration “factor” of Salini only in a quantitative sense.⁷⁴ The original contract was for eighteen months, and “the [c]ontract was only able to meet the minimum length of time of two years” because the contract was later extended.⁷⁵ The arbitrator considered that time extensions should only be allowed to count towards satisfying the duration feature when the underlying contract positively impacts the economy and development of the host state.⁷⁶ As one tribunal noted, “duration is the paramount factor which distinguishes investments within the scope of the ICSID Convention and ordinary commercial transactions.”⁷⁷

Under these cases, no activity has failed the Salini test because the activity was of insufficient duration. Two years appears to be the shortest duration that satisfies the Salini test.⁷⁸ However, a case of shorter duration may be accepted should it be tested. How would an entertainment investment be viewed in light of a two-year minimum duration?

While certain duration may be a natural consequence of any substantial industrial project, a shorter duration should not disfavor a finding of investment in the entertainment industry. Instead, because no tangible property is involved, an entertainment project may make a substantial contribution in a shorter time. The duration of an international entertainment project may not be determined at the start of a project, or it may initially be given a short duration to test how viable the particular project is. How should we evaluate such a project for purposes of the duration feature? The arbitrator in *Malaysian Historical Salvors v. Malaysia* suggested that planned duration, rather than actual duration, matters.⁷⁹ If planned duration were the standard, how should we view planned duration of an entertainment contract without a longer specified duration?

72. *Id.* at ¶ 54. However, see also *Jan de Nul N.V.*, ICSID Case No. ARB/04/13 at ¶¶ 93-95 (finding an activity that took place for slightly less than two years still qualified as an “investment” under Article 25).

73. *Joy Mining Machinery Ltd.*, ICSID Case No. ARB/03/11 at ¶ 57.

74. *Id.* See also *Malaysian Historical Salvors*, ICSID Case No. ARB/05/10 at ¶ 110.

75. *Malaysian Historical Salvors*, ICSID Case No. ARB/05/10 at ¶¶ 110-111.

76. *Id.*

77. *Bayindir*, ICSID Case No. ARB/03/29 at ¶ 133.

78. See, e.g., *Salini*, ICSID Case No. ARB/00/4 at ¶ 54; *Jan de Nul N.V.*, ICSID Case No. ARB/04/13 at ¶¶ 93-95.

79. *Malaysian Historical Salvors*, ICSID Case No. ARB/05/10 at ¶ 110.

According to a Colombian director, the K-pop program in Colombia started out as an experiment that turned into a long-term project when it proved successful.⁸⁰ If a conflict attributable to Colombian state action arises six months into a project initially set for one year, should we deny ICSID jurisdiction because the project fails to comply “with the minimal length of time upheld by the doctrine, which is from 2 to 5 years?”⁸¹ Doing so would mean that any project without an initially long timeline would be viewed as less likely to be an Article 25 investment compared with projects that have a longer timeline determined at the outset. If the realities of certain industries make long-term, firm timelines less common, that should not preclude activities in those industries from being viewed as Article 25 investments. There is no indication in the text or negotiation history of the ICSID Convention that its jurisdiction should be limited to investment projects in certain sectors of the economy. A draft proposal of the Convention suggested that a duration requirement be imposed, but several delegates opposed any specific time limit, and rejected this proposal.⁸²

While duration may be an illustrative feature of some investments, it may be less important for others. For an industrial investment, such as the highway construction contract in *Bayindir Insaat Turizm Ticaret Ve Sanayi v. Pakistan*, duration may be illustrative, and even a paramount factor for finding an Article 25 investment.⁸³ Duration could be used as one way to distinguish between situations where a foreign firm plays a bigger role in an industrial project, compared with when the firm is simply selling building components to be used in a project. However, examining the duration of intangible investment projects may be less illustrative. A foreign firm may provide significant intangible contribution in much shorter time than if it were to provide a tangible contribution in a field like construction. That is why instead of comparing the duration of an entertainment venture to the duration of a typical industrial investment, duration should be evaluated through an industry-specific lens. An

80. Airang Today, *Hallyu in Colombia*, YOUTUBE (June 12, 2012), http://www.YouTube.com/watch?v=HsL_MzfRVCo.

81. *Salini*, ICSID Case No. ARB/00/4 at ¶ 54.

82. HISTORY OF THE ICSID CONVENTION 116, 705, 707 (Vol. I 2008) (noting that “investment” was defined as “any contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for not less than five years”).

83. However, even industrial investments may no longer meet a duration criterion in light of advances in building technology. Currently, companies build high rises in a matter of weeks. In 2012, builders in China put up a three-story building in just nine days and a thirty-story hotel in just fifteen days. See, e.g., Xiaoyun Yao, *China builds “instant high-rise” in just 9 days*, BBC NEWS ASIA (May 12, 2012), <http://www.bbc.co.uk/news/world-asia-18066615>; Joe Jackson, *Chinese Builders Construct 30-Story Hotel – in 15 Days*, TIME NEWSFEED (Jan. 10, 2012), <http://newsfeed.time.com/2012/01/10/chinese-builders-construct-30-story-hotel-in-15-days/>. As of February 2013, builders are attempting to build the tallest building in the world in just ninety days. See Michelle Florcruz, *China’s Skyscraper Boom: China Attempts to Build Tallest Building in 90 Days*, INT’L BUS. TIMES (Dec. 19, 2012), <http://www.ibtimes.com/chinas-skyscraper-boomchina-attempts-build-tallest-building-90-days-951486>.

industry-specific lens may suggest that a shorter duration is appropriate because the realities of the entertainment industry preclude fixed contracts of longer duration. In addition to being less common, long-term fixed contracts simply may not be necessary. Without a need to build tangible structures, an entertainment project can become productive faster than an industrial project. If a project positively impacts the development of a host state broadcasting industry in a short time, it seems counter to the World Bank's and ICSID's development goal to deny Article 25 jurisdiction.

Finally, the disputed feature of positive impact on host state economic development has been dealt with in a number of cases. Tribunals have found activities positively impacting development to include infrastructure construction, transfer of know-how, and development of host state banking infrastructure.⁸⁴ Activities that tribunals have found not to exhibit the development feature include issuance of a bank guarantee,⁸⁵ a marine salvage contract of perceived low monetary value,⁸⁶ and operating a law firm in a host state.⁸⁷

In *Malaysian Historical Salvors v. Malaysia*, the arbitrator required a significant impact on host state development to satisfy Salini's development feature. Without requiring significance, it was argued that any transaction that contributes to host state GDP would contain the development feature.⁸⁸ The arbitrator found no significant impact, and discounted cultural and historical contributions for failing to significantly impact Malaysia's economic development.⁸⁹ The arbitrator rejected the claimant's submission that its contribution "must be measured in the context of the fact that it was the largest in the industry." The arbitrator asserted that "whether the [c]ontract is an 'investment' under the ICSID Convention cannot depend on whether the [c]ontract is the largest ever made within its particular industry."⁹⁰ The arbitrator also distinguished between those benefits that last, and those that do not, and argued that certain projects like public and banking infrastructure are likely to provide positive economic development while the marine salvage contract's ability to lead to a thriving tourism industry, as argued by the claimant in the case, was more speculative.⁹¹ Had the arbitrator accepted an industry-specific

84. See generally *Salini*, ICSID Case No. ARB/00/4 at ¶ 57; *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 88 (May. 24, 1999); *Jan de Nul N.V.* ICSID Case No. ARB/04/13 at ¶ 92; *Bayindir*, ICSID Case No. ARB/03/29 at ¶ 137.

85. *Joy Mining Machinery Ltd.*, ICSID Case No. ARB/03/11 at ¶¶ 54-62.

86. *Malaysian Historical Salvors*, ICSID Case No. ARB/05/10 at ¶ 110.

87. *Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, ¶¶ 33, 39 (Nov. 1, 2006).

88. *Malaysian Historical Salvors*, ICSID Case No. ARB/05/10 at ¶ 110.

89. *Id.* at ¶¶ 132, 138.

90. *Id.* at ¶ 135.

91. *Id.* at ¶ 144.

analysis, he would likely have found the marine salvage contract in the case to contribute to economic development.

The annulment committee in *Patrick Mitchell v. DRC* only required some form of contribution to host state development, but despite setting a lower bar, the committee concluded that because the award failed to show that the claimant, through his know-how, specifically assisted DRC in getting investors, the claimant had not made any contribution to DRC's development.⁹² Again, an industry-specific lens may have yielded a different outcome.

While the development feature is the most disputed prong of the Salini test, it could offer particular guidance for distinguishing purely commercial activities from investments when the other Salini features are more difficult to apply. In most cases, a claimant's use of, or transfer of, particular know-how is mentioned as a benefit to a host state, but it does not appear to be given much weight compared with more tangible contributions like building a highway. This happens because tangible benefits are apparent, and there is no need to engage in the more difficult assessment of what benefit a host state would likely get from a transfer of know-how or intellectual property. However, for new economic activities, the intangible benefits are likely to dominate over tangible ones, and a tribunal would need to determine what expected benefits, if any, would come from a project. While an infrastructure project may provide substantial benefit for a long time, a transfer of knowledge, intellectual property, or know-how may provide substantial benefit for an indefinite period of time. A knowledge transfer, without any accompanying tangible project, could potentially contribute more to host state economic development than a tangible project without a knowledge transfer.

What positively impacts host state development differs depending on the sector of the economic project. Evaluating an activity within a particular industry would more easily include all development-friendly activities, such as the above described entertainment projects, or other projects with intangible benefits. There is nothing in the negotiation history of the ICSID Convention that suggests the drafters had entertainment projects in mind in the 1960s. However, by leaving the term "investment" undefined, the Convention has the potential to remain relevant as new kinds of investments emerge.

CONCLUSION

Some 2014 investments may have different features compared with the features typical of investments when the Salini case was decided in 2001. While contribution, risk, and duration may be commonsense features of an investment, these features should be viewed through an industry-specific lens to encompass new types of investments emerging in the economy. In the entertainment industry, contributions may be smaller in monetary terms, compared with

92. *Democratic Republic of Congo*, ICSID Case No. ARB/99/7 at ¶¶ 33, 39.

industrial projects, but they may still be substantial when compared with other entertainment ventures. Particular risks may include a possibility of infringement on intellectual property laws and Internet censorship rather than possible loss of money put toward tangible structures. Long project duration may be less likely to be contractually fixed at the outset since the success of entertainment projects depends on consumer behavior and preferences.

Evaluating the Salini features of contribution, risk, and duration may prove more difficult for information-age driven activities. When they are evaluated, Salini's development feature could serve as a tiebreaker to distinguish purely commercial activities, such as a simple sale of goods, from activities that should be considered investments. Investment activities made possible thanks to information-sharing on social media will likely positively impact host state development of human capital and the spreading of knowledge. Developing intangible values promotes the Convention's goal of cooperation for economic development. Entertainment project disputes should not be shut out of ICISD on account of a jurisdictional test that may not be well suited for these new activities.