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GOVERNMENT BLOCKING OF SOCIAL MEDIA PLATFORMS AS EXPROPRIATION OF CONTRACTUAL RIGHTS

by Aram Aghababyan

I. INTRODUCTION

Browsing social media has become an integral part of our daily life. With the average person in 2023 spending two hours and 30 minutes online and with 4.76 billion users worldwide,[1] social media platforms have grown to penetrate even the most remote areas of the globe. Today, Facebook, YouTube, TikTok, Instagram, WhatsApp, and Spotify are among the most popular applications used worldwide.[2] According to a 2023 study, the average number of social media accounts for one person is 6.7,[3] and 300 hours of video are uploaded on YouTube every single minute.[4]

Historically, the contents of traditional media such as newspapers, films, television, and radio, were controlled by states or large corporations. Only the privileged few were able to create, publish, or telecast media content. With the advent of the internet and services such email, wikis, blogs, and YouTube, this monopoly ended, providing leeway for everyone to create, publish, and share their content. As the famous YouTube slogan "broadcast yourself!" suggests, anyone with an internet connection became a broadcaster of their own media content.

Nowadays, businesses and governments rely heavily on social media to interact with each other, advertise their products, and services, communicate with the public, provide public services, and even advance their political campaigns.[5] The U.S.

[1] Deyan Georgiev, *How Much Time Do People Spend on Social Media in 2024?*, TECHJURY (Jan. 3, 2024), https://techjury.net/blog/time-spent-on-social-media/#gref/.

[2] *See* David Curry, *Most Popular Apps (2024)*, BUSINESS OF APPS (Jan. 30, 2024), https://www.businessofapps.com/data/most-popular-apps/.

[3] Brian Dean, *Social Network Usage & Growth Statistics*, BACKLINKO (Feb. 21, 2024), https://backlinko.com/social-media-users/.

[4] Danny Donchev, *40+ Mind Blowing YouTube Facts, Figures and Statistics – 2024*, FORTUNELORDS (Feb. 27, 2024), https://fortunelords.com/youtube-statistics/.

[5] *See, e.g.*, Knowledge at Wharton Podcast, *How Social Media is Shaping Political Campaigns*, KNOWLEDGE AT WHARTON (Aug. 17, 2020), https://knowledge.wharton.upenn.edu/podcast/knowledge-at-wharton-podcast/how-social-media-is-shaping-political-campaigns/.

Supreme Court in 2017 classified social media platforms as "principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.'"[6]

In parallel, the need to regulate social media platforms has been growing as rapidly. During the past decade, initiatives for regulation have been coming from the European Union, U.S. politicians, and privacy activists.[7] While those initiatives were coming from countries that adopted ideologically democratic attitudes towards open cyberspace and internet freedom,[8] other countries like China,[9] Russia, North Korea, and Nigeria[10] tend to perceive internet freedom as a threat and are inclined to apply restrictive ideologies.[11] While referring to this divide between democratic and restrictive approaches toward the internet, Clyde Crews framed the phenomenon as "splinternet."[12]

Countries blocking social media platforms belong to restrictive ideology groups. As social media platforms are powerful tools to share public opinions, repressive governments, where critiques of the ruling elite and military are subject to censorship, have a hard time censoring the decentralized social media content. A much simpler solution is to block the platform in its entirety and eliminate the problem itself. When blocking social media platforms, countries provide

[6] Packingham v. North Carolina, 582 U.S. 98, 107 (2017).

[7] *See generally* Alex Rochefort, *Regulating Social Media Platforms: A Comparative Policy Analysis*, 25 COMMC'N L. & POL'Y 225 (2020).

[8] Ron Deibert, *Authoritarianism Goes Global: Cyberspace Under Siege*, 26 J. DEMOCRACY 64, 65 (2020).

[9] *See* Guangchao Charles Feng & Steve Zhongshi Guo, *Tracing the Route of China's Internet Censorship: An Empirical Study*, 30 TELEMATICS & INFORMATICS 335 (2013).

[10] Stanislav Budnitsky & Lianrui Jia, *Branding Internet Sovereignty: Digital Media & the Chinese–Russian Cyberalliance*, 21 EUR. J. CULTURAL STUD. 594 (2018).

[11] *See* Anders Henriksen, *The End of the Road for the UN GGE Process: The Future Regulation of Cyberspace*, 5 J. CYBERSECURITY 1, 5 (2019).

[12] L.S., *What Is the "Splinternet"?*, THE ECONOMIST (Nov. 22, 2016), https://www.economist.com/the-economist-explains/2016/11/22/what-is-the-splinternet/.

controversial and vague reasons, ranging from the impossibility of censorship to unstable political situations, and protection of public morals.[13]

Where the blocking of the social media platform can be in conformity with the local laws and regulations, it can nevertheless violate international obligations enshrined in international investment agreements ("IIA"). Therefore, this paper examines whether blocking social media platforms in the host economy would violate protections against expropriation in IIAs and whether social media companies can resort to investor-state dispute settlement (ISDS) to address the platform blockings. This paper does not examine the physical assets of social media companies and focuses merely on the virtual presence of social media companies in host economies.

The article will first examine the characteristics and business models of social media platforms. Then, it will define what constitutes a governmental ban/blocking of social media platforms by delving into the types and methods presently employed. The paper will then break down the virtual assets of social media companies and will assess those towards the coverage scope of IIAs and the International Centre for Settlement of Investment Disputes (ICSID) Convention. By identifying the possibly-to-be-affected assets of social media companies in case of government blocking, the paper will then observe the "admission," "establishment,"' "legality," "economic contribution," and "territoriality" requirements provided in IIAs. After determining the expropriation as the most likely-to-be-breached protection, the paper will concentrate on discussing the government blocking of social media platforms as an expropriation of contractual rights. Finally, the paper will observe any possible host state defenses that can be invoked against ISDS claims to arise out of the government's ban/blocking of social media platforms.

In this paper, the author argues that the government's blocking of social media platforms *can* amount to an indirect expropriation of contractual rights and that there exists a fair chance for social media companies to overcome the jurisdictional stage of a possible ISDS case. In doing so, the paper will analyze the existing IIAs and

[13] Ekaterina Shireeva et al., *Blocking Social Media. Reasoning and Legal Grounds*, *in* DIGITAL TRANSFORMATION & GLOBAL SOCIETY 139, 139 (Daniel A. Alexandrov et al., eds., 2017).

draw extensively on identifying cases in ISDS jurisprudence, including the Iran-US claims tribunal, WTO, ICJ, and PCIJ decisions supporting its position.

It is important to note that the paper does not intend to portray the current ISDS system as efficiently equipped to deal with government blocking of social media platforms. There are conflicting awards addressing the issues of territoriality, the contribution of assets/money, contribution to the economic development of the host state, admissibility, legality requirements, and the issues connected with intangible assets. Therefore, it is not the intention to analyze where the prevailing view of the investment tribunals on the issues to be discussed stands. Instead, the paper intends to prove that there exists a chance/possibility that the investment tribunals will exercise their jurisdiction over the social media company disputes and will rule that the blocking of the relevant social media companies would amount to an indirect expropriation of the claimant's contractual rights.

II. SOCIAL MEDIA COMPANIES: STRUCTURE AND BUSINESS MODEL

As social media platforms are free to use, many mistakenly presume that the data generated by the platforms is of no value.[14] In fact, YouTube, Facebook, TikTok, and others are profit driven commercial platforms.

Social media companies collect data from the users that join their platform, and the data generated by them has a huge monetary value. social media platforms primarily generate profit based on targeted advertisements, which target the audience based on the user's personal data. Social media users are a huge audience, and businesses, politicians, and even traditional media companies spend enormous financial resources to advertise their products and services to them or to advance their political campaigns with them.[15]

An excerpt from the November 2007 Facebook user agreement provides:

> By posting User Content to any part of the Site, you automatically grant, and you represent and warrant that you have the right to grant, to the Company

[14] Tama Leaver, *The Social Media Contradiction: Data Mining and Digital Death*, 16 M/C J. (2013), https://journal.media-culture.org.au/index.php/mcjournal/article/view/625.

[15] Grace Manthey, *Presidential Campaigns Set New Records for Social Media Ad Spending*, ABC7 LOS ANGELES (Oct. 29, 2020), https://abc7.com/presidential-race-campaign-spending-trump-political-ads-biden/7452228/.

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Although these kinds of agreements have become a rarity, the main business model of social media companies remains to collect and repackage the gathered data into trends and patterns for the later use and extraction of profit. Personal data collected by social media companies has become a new commodity. Social media platforms are new goldmines where the mineral that is being extracted is the user data. To provide some metrics, the annual worldwide average revenue per user ("ARPU") of META was reported to be US$29.25 during the 2019 period,[17] which sheds some light on why its market capitalization was *US$720 billion* in August 2020.[18]

While for social media platforms, the primary way of generating profit remains advertisement, some platforms rely on a mix of income stream methods. One such combination of income methods is to sell subscriptions in exchange for premium features (YouTube/LinkedIn).

In short, social media platforms evolve rapidly, and it is impossible to categorize or discuss all of the types as they introduce new features with every new release. What is essential is that social media platforms grow their user base and penetrate new digital economies rapidly without the need to have a physical footprint in the foreign economy.

A. *Defining the Social Media Company Ban/Blocking*

What does banning a tech company entail? Governments can employ a wide array of tools and techniques to block the social media platform's access. Such techniques include but are not limited to: blocking the specific domain name; blocking the IP

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[16] *Terms of Use*, FACEBOOK (Dec. 13, 2006), http://www.facebook.com/terms.php [https://web.archive.org/web/20070210022156/http://www.facebook.com/terms.php].

[17] Facebook, Inc., Annual Report (Form 10-K), at 48 (Jan. 29, 2020).

[18] Trefis Team, *Facebook Added Over $350 Billion in Value Since 2016. Can It Repeat?*, FORBES (Aug. 5, 2020), https://www.forbes.com/sites/greatspeculations/2020/08/05/facebook-added-over-350-billion-in-value-since-2016-can-it-repeat/?sh=482832617f4d/.

address; or else requesting the search engines to remove specific content from search results. Governments use their powers to order internet service providers ("ISP") to restrict access to particular websites. For the purpose of this analysis, inaccessibility is an essential and necessary component for the measure to be considered a ban.

The blocking of the service can be classified as national, local or inner.[19] With national blocking, one or all social media platforms become inaccessible from anywhere in the country. North Korea's isolation from the internet and China's great firewall fall into this category.[20] Local blocking refers to either when the service is blocked partially in some cities/regions or when one or several ISPs block the service, but it remains accessible through others. An example is the 2015 Tajikistan social media ban, where five ISPs blocked social media platforms, but the access was possible through others.[21] Inner blocking occurs when the company or organization blocks access to internet services, including social media platforms for its employees. Such blocking is common practice in universities and companies and is driven by productivity concerns. As inner blocking is done by private organizations and has a limited effect on the accessibility of the service (the social media platform could be accessed outside the organization network), this type of blocking falls outside the scope of this analysis.

The duration of the blocking is also of significance. Investment tribunals consider the duration of expropriatory measures together with the intent and effect caused.[22] Tribunals also consider the "duration and intensity of the economic deprivation suffered by the investor" when examining the measure.[23] For the reasons mentioned

[19] Shireeva et al., *supra* note 13, at 142.

[20] *See* Harsh Taneja & Angela Xiao Wu, *Does the Great Firewall Really Isolate the Chinese? Integrating Access Blockage with Cultural Factors to Explain Web User Behavior*, 30 INFO. SOC'Y 297, 297 (2014).

[21] Megan Eaves, *Access to Social Media Sites Blocked in Tajikistan*, LONELY PLANET (Aug. 26, 2015), https://www.lonelyplanet.com/news/access-to-social-media-sites-blocked-in-tajikistan.

[22] Azurix Corp. v. Argentina, ICSID Case No. ARB/01/12, Award, ¶¶ 308–322 (July 14, 2006).

[23] Telenor Mobile Commc'ns A.S. v. Hungary, ICSID Case No. ARB/04/15, Award, ¶ 70 (Sept. 13, 2006); *see also* LG&E Energy Corp. v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 189–193 (Oct. 3, 2006).

above, short-term site-blocking causing minor economic consequences for the social media company are unlikely to constitute violation of IIAs.

B. *Defining the Banning Measures*

Recently, Instagram and Facebook were banned by the Russian courts for "carrying out extremist activities."[24] In 2020, TikTok was banned in India in accordance with the decision of the Ministry of Electronics and Information Technology under section 69A of India's Information Technology Act by invoking the grounds of security of state and public order.[25] Likewise, for failing to remove offensive content, access to YouTube was blocked for 1000 days in 2015 by the Pakistan Telecommunication Authority, following an order of the Supreme Court of Pakistan.[26]

Remarkably, cases have been recorded where no formal regulation or decision has been adopted when blocking access to the social media platform. For example, in 2021, the Attorney General of Nigeria announced the indefinite ban of Twitter[27] in an oral statement. Such ban was in violation of Nigeria's laws and constitution.[28] Similarly, the Armenian government adopted no official announcement or regulation when blocking access to the TikTok platform for 43 days during the 2020 military conflict.[29]

When governments fail to adopt specific regulations or acknowledge their role in blocking access to internet platforms, tribunals may interpret this as a breach of due

[24] Pjotr Sauer, *Russia Bans Facebook and Instagram under "Extremism" Law*, GUARDIAN (Mar. 21, 2022), https://www.theguardian.com/world/2022/mar/21/russia-bans-facebook-and-instagram-under-extremism-law.

[25] Press Release, Ministry of Electronics & IT, Government Blocks 118 Mobile Apps Which are Prejudicial to Sovereignty and Integrity of India, Defence of India, Security of State and Public Order (Sept. 2, 2020), https://www.pib.gov.in/PressReleasePage.aspx?PRID=1650669.

[26] Hassan Belal Zaidi & Iftikhar A. Khan, "*No Solution But to Persist with YouTube Ban*," DAWN (Feb. 7, 2015), https://www.dawn.com/news/1162061/.

[27] Twitter, originally known for its microblogging service, has recently evolved into "X."

[28] Akinola Akintayo, *Nigeria's Decision to Ban Twitter Has No Legal Basis. Here's Why*, CONVERSATION (June 24, 2021), https://theconversation.com/nigerias-decision-to-ban-twitter-has-no-legal-basis-heres-why-163023.

[29] TikTok Restricted in Azerbaijan and Armenia amid Clashes over Nagorno-Karabakh, NETBLOCKS (Sept. 14, 2022), https://netblocks.org/reports/tiktok-restricted-in-azerbaijan-and-armenia-amid-clashes-over-nagorno-karabakh-3An4pky2.

process obligations in either the context of expropriation (See the decision in AIG Capital Partners v. Kazakhstan)[30] or fair and equitable treatment ("FET") (see in Cairn Energy v. India).[31] Additionally, when governments do not announce or conceal the fact that they blocked access to the platform, issues of attribution under customary international law of state responsibility could arise.[32]

III. SOCIAL MEDIA COMPANIES AND THE DEFINITION OF "INVESTMENT"

Before discussing possible violations of IIA protection standards, it is of paramount importance to understand whether the assets of social media companies qualify as "investments" at all and thereby benefit from IIA protections. The existence of a covered investment is a procedural prerequisite for resorting to dispute settlement provisions of an IIA and for the tribunal's jurisdiction.[33]

There is no generally agreed definition of "investment" and therefore the coverage of IIAs varies from treaty to treaty.[34] Some early IIAs, like the first-ever concluded bilateral investment treaty ("BIT") between Germany and Pakistan, cover only capital investments in the form of "foreign exchange, goods, property rights, patents, and technical knowledge."[35] In subsequent treaties, states often agreed on a more expansive and detailed list of investments to be covered. New generation IIAs typically contain a defined list of assets that could qualify as "investments" and benefit from the protection of the treaties. These "investments" vary from concessions and debt instruments to intellectual property rights ("IPR"), and contractual rights.[36]

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[30] AIG Cap. Partners, Inc. v. Kazakhstan, ICSID Case No. ARB/01/6, Award, ¶ 10.5.1 (Oct. 7, 2003).

[31] Cairn Energy PLC v. India, PCA Case No. 2016-07, Final Award, ¶ 1722 (Dec. 21, 2020).

[32] Simon Olleson, *Attribution in Investment Treaty Arbitration*, 31 ICSID REV. - FOREIGN INV. L. J. 457, 472 (2016).

[33] ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 162 (2009).

[34] Christoph Schreuer, *Investments, International Protection*, *in* MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW 1, 37 (2013).

[35] Treaty Between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, art. 8.1, Nov. 25, 1959, 457 U.N.T.S. 23 [hereinafter Germany-Pakistan BIT].

[36] *See* Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, art. 1, Apr. 20, 2012 , https://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [hereinafter U.S. Model BIT].

As the great majority of the IIAs were signed between prior to the existence of either the digital economy or social media companies, they were typically drafted with physical assets and traditional services in mind, and do not address the specificities of digitalization or specifically consider forms of innovative investments.[37]

For that reason, though 98% of IIAs contain a defined list of "investments,"[38] definitions covering digital platforms are hardly ever found. However, where the list of covered "investments" contains no express reference to digital platforms, certain assets of social media companies may still fall under the defined list of "investments." Alternatively, the digital platforms/assets could still fall under the broad-asset-based definitions of IIAs,[39] such as "every kind of asset," or "every kind of economic interest," which leave broad room for interpretation to include undefined and possibly innovative types of assets.[40]

A. *Assets of Social Media Companies as "Investments"*

Though social media platforms possess both tangible and intangible assets, given tangible assets are already extensively analyzed in scholarship and the controversies arising thereof are well established, this analysis focuses on intangible assets. Such intangible assets forming part of social media companies include patents, trademarks, trade secrets, know-how, contractual rights, equity, and data.[41]

The first and only instance where a technology platform initiated an ISDS claim is that of Uber's dispute notice issued against Columbia. The notice of dispute listed

[37] U.N. CONF. ON TRADE & DEV. (UNCTAD), WORLD INVESTMENT REPORT 2017: INVESTMENT & THE DIGITAL ECONOMY 158 (2017).

[38] Dafina Atanasova, *Definition of Investment*, JUS MUNDI WIKI NOTES (Dec. 27, 2023), https://jusmundi.com/en/document/wiki/en-definition-of-investment/.

[39] JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 177 (2d ed. 2015).

[40] Enikő Horváth & Severin Klinkmüller, *The Concept of "Investment" in the Digital Economy: The Case of Social Media Companies*, 20 J. WORLD INVEST. & TRADE 577, 590 (2019).

[41] *See* Matthew R. Dardenne, *Testing the Jurisdictional Limits of the International Investment Regime: The Blocking of Social Media and Internet Censorship*, 40 DENV. J. INT'L L. & POL'Y 400, 409 (2012).

what Uber asserted to be protected "investments" of the company submitted under the 2012 U.S.-Colombia Trade Promotion Agreement,[42] including:

> "intellectual property rights," including the right to license and use the Uber Platform, including the Uber applications, websites, content, and products, as well as the Uber trademark and associated goodwill, in Colombia; and . . . "intangible . . . property rights," including the network of contacts between Uber (through a subsidiary) and Uber riders and Driver Partners, as applicable, to access and use the Uber Platform in Colombia.[43]

Uber's assets in many respects are similar to the intangible assets of social media platforms. In this case, Uber had a limited physical presence in Columbia.[44] What is surprising is that Uber listed the network of contacts between Uber, riders, and driver-partners as part of the affected investments by Columbia's measure, which required "telecommunication companies in Colombia to suspend transmissions, data storage, and access to the Uber Platform in Colombia."[45]

One can draw parallels between the ban of Uber in Columbia and the blocking of social media companies. While the case was eventually settled without reaching the adjudication stage, it shows that ISDS could be a powerful method of addressing the ban of digital platforms.

B. *Contractual Rights as "Investments"*

Whether the end-license user agreements ("User Agreements") fall under the protection of IIAs will depend on the definition of "investment" incorporated in the respective IIAs. Formulations used in the IIAs can vary from treaty to treaty: some treaties expressly mention contractual rights[46] whereas others contain formulations

[42] United States-Colombia Trade Promotion Agreement, Nov. 22, 2006.

[43] Uber Technologies, Inc. v. Colombia, Notice of Dispute under the United States–Colombia Trade Promotion Agreement, Dec. 30, 2019, https://www.italaw.com/sites/default/files/case-documents/italaw11118.pdf.

[44] *Id.* at 2.

[45] *Id.*

[46] *See, e.g.*, Treaty Between the Government of the United States of America and the Government of the Republic of El Salvador Concerning the Encouragement and Reciprocal Protection of Investment, art. 1(d)(iii), Mar. 10, 1999.

like "claims to money,"[47] "claim to performance," and "right to future income,"[48] each of which can be interpreted to cover contractual rights. Most notably, the treaty entered into between Denmark and Slovenia in 1999 mentions "claims to money and claims to performance pursuant to contract having an economic value" as a covered investment.[49] Analyzing all different types of provisions found in IIAs, Dolzer and Schreuer concluded that "practically all investment treaties state that contracts are covered by the term 'investment.'"[50]

While contractual rights continue to be listed in IIAs, a rising trend is to limit the scope of investment and leave out mere "[c]ommercial contracts for the sale of property or services by a national or enterprise in the territory of a Contracting Party."[51] This approach, which originated in NAFTA[52] and has been relied upon by tribunals,[53] was identically imported to subsequently concluded IIAs in order to narrow the scope of their application.[54] However, the approach to exclude mere contractual rights is by no means used in all IIAs concluded after 1992 and is non-existent in IIAs concluded prior to 1992. The latter provides broad leeway to consider User Agreements with social media platforms to fall under the definition of the "investment."

[47] *See, e.g.*, Agreement Between the Republic of Chile and the Republic of South Africa for the Reciprocal Promotion and Protection of Investments, art. 1(2)(c), Nov. 12, 1998.

[48] *See, e.g.*, Agreement Between the Republic of Turkey and the Republic of Tunisia Concerning the Reciprocal Promotion and Protection of Investments, art. 1, May 29, 1991.

[49] Agreement Between the Government of the Republic of Slovenia and the Government of the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments, art. 1(1)(iii), May 12, 1999.

[50] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 69 (2d ed. 2012).

[51] Agreement on the Promotion and the Protection of Investments Between the Kingdom of Spain and the United Mexican States, art. 1(2)(i), June 23, 1995.

[52] North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M 289 (1993).

[53] Bayview Irrigation Dist. v. Mexico, ICSID Case No. ARB(AF)/05/1, Final Award, ¶ 104 (June 19, 2007); Apotex Inc. v. United States of America, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, ¶ 239 (June 14, 2013).

[54] David A. Gantz, *Increasing Host State Regulatory Flexibility in Defending Investor-State Disputes: The Evolution of U.S. Approaches from NAFTA to the TPP*, 50 INT'L LAW. 231 (2017).

When interpreting IIAs, tribunals have arrived at conflicting conclusions. Where tribunals like that in *Alps Finance and Trade AG v. Slovakia*[55] were against commercial contracts being classified as investments without certain qualities like duration, contribution, and risk[56], others were inclined otherwise. In *Tidewater v. Venezuela*, the tribunal found that "investment is capable of including . . . tangible and intangible assets, including contractual rights", and thereby held that the scope of the IIA protection could be extended to include contractual rights.[57]

When discussing social media user agreements, it is essential to address those in totality and not in isolation. Thus, for example, some social media platforms have penetrated foreign digital economies in a way that the entire population has contracted to use the social media platform. This should be observed distantly from the mere commercial or service contracts, especially given the enormous underlying value of those commercial contracts in totality.

A notable development towards considering the contracts in totality as "investments" is the award in *EMV v. Czech Republic*,[58] in which the tribunal ruled that contracts presented by the claimant were investments[59] under the Belgium Luxembourg Economic Union-Czech Republic BIT.[60] A similar type of reasoning was employed by the *Mytilineos v. Serbia*[61] tribunal, which referred to the combined effect of nine contracts and found that they could constitute "investments"[62] under the broad asset-based definition of the Greece-Serbia BIT (1997).[63] Therefore, it is

[55] Alps Finance & Trade AG v. Slovakia, UNCITRAL, Award (Mar. 5, 2011).

[56] *Id.* ¶¶ 103-106.

[57] Tidewater Investment SRL v. Venezuela, ICSID Case No. ARB/10/5, Award, ¶ 118 (Mar. 13, 2015).

[58] European Media Ventures SA v. Czech Republic, UNCITRAL, Partial Award on Liability (July 8, 2009).

[59] *Id.* ¶ 40.

[60] Agreement Between the Belgium-Luxembourg Economic Union and Czechoslovak Socialist Republic Concerning the Promotion and the Reciprocal Protection of Investments, Apr. 24, 1989.

[61] Mytilineos Holdings SA v. Serbia & Montenegro (I), UNCITRAL, Partial Award on Jurisdiction (Sept. 8, 2006).

[62] *Id.* ¶¶ 125, 136.

[63] Agreement Between the Government of the Hellenic Republic and the Federal Government of the Federal Republic of Yugoslavia on the Reciprocal Promotion and Protection of Investments, June 25, 1997.

possible that the tribunals in the case of a hypothetical dispute will look at the user agreements with the social media companies in totality rather than in isolation.

In their 2018 article, Enikő Horváth and Severin Klinkmüller note that "the user agreements could be terminated within a matter of several clicks [by users themselves] and do not involve long-term commitments by either party."[64] However, it will be erroneous to presume that millions, or even billions, of users would want to terminate their contracts because the state adopts a regulation to block the operation of the platform. That said, if terminated/made ineffective by a state itself, the user agreements will become subject to interference by a third, uninvolved party (the state regulation). Such measures will interfere with the rights and obligations of the parties to the contract and can potentially violate protections enshrined in respective IIAs.

IV. ADDITIONAL JURISDICTIONAL REQUIREMENTS

A. *Territoriality*

social media companies' assets need to meet certain additional requirements to qualify as an "investment" under IIAs. The place where those assets are held will be decisive since the IIAs are limited in their application to only the specified and mutually agreed-on territory. Many IIAs explicitly refer to "investments made in the territory in the definition of investment. Territorial requirements could be spotted in the applicability of the dispute settlement provisions as well. By way of an example, the Energy Charter Treaty dispute settlement provisions limit the possible disputes to be submitted for international arbitration to the investments made "in the Area of the [Contracting Party]".[65]

Other IIAs, like the Argentina–U.S. BIT, contain separate provisions providing a definition of territory.[66] Those define territory as the territory of a contracting

[64] *E.g.*, Horváth & Klinkmüller, *supra* note 40.

[65] Energy Charter Treaty, art. 26.1, Dec. 17, 1994, 2080 U.N.T.S. 100 [hereinafter ECT].

[66] Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, art. I(1)(f), Nov. 14, 1991, 31 I.L.M. 124 (1992) [hereinafter Argentina-U.S. BIT].

party,"[67] "some part of the territory,"[68] or outside the land territory of the state extending to the 'exclusive economic zone,'"[69] and even any "part of the sea upon which sovereignty/jurisdiction is exercised."[70]

Fewer others, like the Spain-Morocco BIT, contain no specific provision on the definition of the term territory.[71] It is important to note that where parties do not specify the territorial scope in the IIA and nor can such intention be inferred from the IIA, the treaty applies in respect of the state's entire territory pursuant to Article 29 of the Vienna Convention on the Law of Treaties ("VCLT"), which provides, "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."[72]

While with tangible assets, the territoriality requirement is easily ascertainable,[73] things become complicated with mixed or purely intangible assets. With mixed types of assets, the investment operation as a whole is considered. Tribunals referred to the "sufficient portion"[74] of an investment or the general unity of an investment operation[75] to be located in the host state's territory when addressing the territorial nexus of IIAs.

The borders and definition of territory become even more complicated when it comes to assets of an intangible nature. While defining the scope of protected

[67] *E.g.*, Agreement Between the Swiss Federal Council and the Government of the Republic of Armenia on the Promotion and Reciprocal Protection of Investments, art. 1(4), Nov. 19, 1998.

[68] *E.g.*, Agreement Between the Government of the Federal Republic of Germany and the Palestine Liberation Organization for the Benefit of the Palestinian Authority Concerning the Encouragement and Reciprocal Protection of Investments, art. 1(4)(b), July 10, 2000.

[69] Agreement Between the Macedonian Government and the Spanish Government on the Promotion and Reciprocal Protection of Investments, art. 1(4)(a), June 20, 2005.

[70] *Id.* art. 1(4)(b).

[71] Spain and Morocco Agreement on the Promotion and Mutual Protection of Investments, Sept. 27, 1989, 1669 U.N.T.S. 209.

[72] Vienna Convention on the Law of Treaties, art. 29, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

[73] Micula v. Romania (I), ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶¶ 125-127 (Sept. 24, 2008).

[74] *E.g.*, SGS Société Générale de Surveillance S.A. v. Paraguay, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶ 117 (Feb. 12, 2010).

[75] *E.g.*, Ceskoslovenska Obchodni Banka, A.S. v. Slovakia, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 72 (May 24, 1999).

investments, many IIAs refer to "intangible" forms of assets. The first-ever concluded BIT between Germany and Pakistan in 1959 already lists some forms of IPRs.[76] Intellectual property rights, know-how, goodwill, rights to perform the commercial activity, titles to money or to any performance having an economic value, and contracts, are regularly listed as part of covered investments in the overwhelming majority of IIAs.[77]

As subjecting abstract and borderless assets, like contracts, IPRs, and know-how, to the state's territory makes little sense, tribunals have identified separate criteria to link intangible assets to a host state's territory.[78] The *Abaclat v. Argentina* decision serves as a significant breakthrough from the onerous territorial requirements and offers a solution that can be applied for social media companies' intangible assets. Deciding on a claim submitted by around 60,000 bondholders (as separate claimants), the majority of the tribunal found:

> that the determination of the place of the investment firstly depends on the nature of such investment. With regard to an investment of a purely financial nature, the relevant criteria cannot be the same as those applying to an investment consisting of business operations and/or involving manpower and property. With regard to investments of a purely financial nature, the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred.[79]

When discussing the *Abaclat* decision, it is important to mention that the *Abaclat* jurisdictional and admissibility decision was a matter of controversy and generated a lengthy dissent by Professor George Abi-Saab,[80] in which he specifically addressed the findings of the tribunal on the territorial scope of the Argentina-U.S. BIT. Notably, Abi-Saab argued that the territorial link is inherent in Article 25 of the ICSID

[76] *E.g.*, Germany-Pakistan BIT, *supra* note 35, art 8.1.

[77] Simon Klopschinski et al., *Intellectual Property as Investment*, *in* THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS UNDER INTERNATIONAL INVESTMENT LAW 143-146 (2023).

[78] *Id.*

[79] Abaclat v. Argentina, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 374 (Aug. 4, 2011).

[80] *See Abaclat*, Dissenting Opinion of Professor Georges Abi-Saab (Aug. 4, 2011).

Convention, despite the lack of such wording in it.[81] This view is also supported by Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States referring to the flow of investment in the territory as the "primary purpose of the Convention".[82] For the aforementioned reasons, intangible assets will have additional difficulties qualifying as "investments" in the host state's territory under the ICSID convention.

Similarly, in *Nova Scotia Power v. Venezuela (II)*, the contractual rights to coal were at stake, which had no actual physical presence in the Venezuelan territory. There the tribunal found:

> [t]he contractual rights to coal under the Confirmation Letters are properly characterized as an intangible asset. The coal to be purchased was located in Venezuela, but NSPI carried out no physical in-country activities in connection with this and had no established, physical, in-country presence. . . . A contractual right by its very nature has no fixed abode in the physical sense, for it is intangible. However, a lack of physical presence is not per se fatal to meeting the territoriality requirement . . ..[83]

The tribunal also pointed out that the appropriate criteria for understanding whether the contractual rights could be considered investments is the benefit to the host state concerned. To borrow the tribunal's words, "[the] 'benefit' does not necessarily have to be economic development, a highly subjective element."[84] In other instances hedging agreements and promissory notes were qualified as investments, in *Deutsche Bank v. Sri Lanka*,[85] and *Fedax v. Venezuela*,[86] respectively.

Accordingly, if generating an economic benefit for the host state, intangible assets such as contracts, IP rights, and others can be localized to the host state's territory without the need to have any on-the-ground physical presence.

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[81] *Id.* ¶ 74.

[82] Int'l Bank for Reconstruction & Dev., *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, ¶ 12 (Mar. 18, 1965) [hereinafter ICSID Report].

[83] Nova Scotia Power Inc. v. Venezuela (II), ICSID Case No. ARB(AF)/11/1, Excerpts of Award, ¶ 130 (Apr. 30, 2014).

[84] *Id.*

[85] Deutsche Bank AG v. Sri Lanka, ICSID Case No. ARB/09/2, Award, ¶ 14 (Oct. 31, 2012).

[86] Fedax N.V. v. Venezuela, ICSID Case No. ARB/96/3, Award, ¶ 29 (Mar. 9, 1998).

B. *Contribution of Money and Assets*

When defining the ordinary meaning of investment under the VCLT,[87] ICSID and non-ICSID tribunals have identified and followed criteria referred to as the *Salini* criteria.[88] The contribution of money or assets is one of the requirements of the *Salini* criteria. This consideration is of particular importance when it comes to intangible assets of social media companies.

According to the *Poštová banka and Istrokapital v. Greece* tribunal, "[a]n investment, in the economic sense, is linked with a process of creation of value."[89] Notably, the *Abaclat* tribunal referred to the created value of the investment while discussing investments with no physical presence in the host country. Ruling that the purchase of security entitlements is a contribution of capital, the tribunal also found that "the only requirement regarding the contribution is that it be apt to create the value that is protected under the BIT."[90]

Keeping the types of assets of social media companies in mind, it is important to mention that the contribution of capital is not only limited to the contribution of financial resources but can take different forms. As identified by the *Deutsche Bank v. Sri Lanka* tribunal, "[a] contribution can take any form. It is not limited to financial terms but also includes know-how, equipment, personnel[,] and *services*."[91] Additionally, in the *L.E.S.I. v. Algeria* tribunal's words, "the investor [should] commit some expenditure, in whatever form, in order to pursue an economic objective."[92]

As social media platforms provide services to 58.11% of the world population, it will be difficult to argue before the arbitral tribunal that social media companies have not provided services to the host economy. social media services are heavily relied upon by the businesses who chose to market their products/services. As earlier

[87] *E.g.*, VCLT, *supra* note 72, art. 31(1).

[88] *See* Salini Costruttori S.p.A. v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 16, 2001), 42 I.L.M. 609 (2003).

[89] Poštová Banka, A.S. v. Greece, ICSID Case No. ARB/13/8, Award, ¶ 361 (Apr. 9, 2015).

[90] *Abaclat*, Decision on Jurisdiction and Admissibility, ¶ 365.

[91] *Deutsche Bank*, Award, ¶ 297.

[92] L.E.S.I., S.p.A. v. Algeria, ICSID Case No. ARB/05/3, Decision on Jurisdiction, ¶ 72 (July 12, 2006).

discussed, heads of states, ministries, and other government officials themselves are heavy users of social media when it comes to communicating with the public.[93]

It is worth mentioning that the tribunals have not defined any minimum amount of expenditures to meet the contribution requirements and limited themselves to formulations like "significant"[94] or "substantial"[95] contributions. The *Phoenix Action v. Czech Republic* tribunal went even further to find that even nominal price "is not a bar to a finding that there exists an investment".[96] social media companies spend enormous amounts to offer their services in new markets. According to the Macrotrends.com data, Facebook's expenditure for a period of 12 months as of March 31, 2021, was USD 56.243 billion,[97] USD 3.858 billion for Twitter[98], and USD $2.252 billion for Pinterest.[99]

The expenditures of social media companies associated with the host economy include but are not limited to (1) expert costs to conduct market research targeting the host economy; (2) marketing and sales expenses aimed at the host economy; (3) server and technology maintenance expenses for every additional user and their uploaded content; (4) translation expenses to have the platform accessible in the local language of the host country; (5) increased expense of content moderators to address the unwanted content uploaded from the host country; and (6) local trademark and patent registration expenses.[100] Hence, with social media companies, ISDS tribunals

[93] Arthur Mickoleit, *Social Media Use by Governments: A Policy Primer to Discuss Trends, Identify Policy Opportunities and Guide Decision Makers* 44 (OECD, Working Paper on Public Governance No. 26, 2014).

[94] RSM Prod. Corp. v. Grenada, ICSID Case No. ARB/05/14, Award, ¶ 240 (Mar. 13, 2009).

[95] Strabag SE v. Libya, ICSID Case No. ARB(AF)/15/1, Award, ¶ 132 (June 29, 2020).

[96] Phoenix Action, Ltd v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 119 (Apr. 15, 2009).

[97] *Meta Platforms Operating Expenses 2010-2023 | META*, Macrotrends, https://www.macrotrends.net/stocks/charts/META/meta-platforms/operating-expenses (last visited Feb. 29, 2024).

[98] *Twitter, Inc. Revenue 2013-2022 | TWTR*, Macrotrends, https://www.macrotrends.net/stocks/delisted/TWTR/twitter/revenue (last visited Feb. 29, 2024).

[99] *Pinterest Operating Expenses 2018-2023 | PINS*, Macrotrends, https://www.macrotrends.net/stocks/charts/PINS/pinterest/operating-expenses (last visted Feb. 29, 2024).

[100] *See, e.g.*, Facebook Inc., Annual Report, *supra* note 17, at 61.

would have no difficulties identifying substantial or significant expenditures directed towards the host economy to pursue economic objectives.

C. *Contribution to the Development of the Host State's Economy*

Tribunals have considered the contribution to the development of the host state's economy as an additional requirement for the identification of an investment. Such requirements can be found in the preambles of IIAs[101] and the ICSID Convention.[102] Tribunals have found that such contribution should be "substantial,"[103] and that "serv[ing] the public interests"[104] meets that requirement. Thus, for similar reasons as discussed in the previous section, it will be plausible to argue that social media companies contribute to the host state's development by serving the public interests.

D. *Admission, Establishment, and Legality Requirements*

There is no customary obligation under general international law for states to admit foreign investments. Each state is free to decide its internal rules for admission and establishment of investments. The states can choose to admit all kinds of investments or limit admission to certain types of investments or sectors.[105] As indicated by Dolzer and Schreuer, the admission requirement refers to the "right of entry" of the investment. In contrast, the right of establishment refers to the conditions under which the investor "is allowed to carry out its business during the period of the investment."[106]

While the formulation of admission requirement provisions in IIAs can have implications on states' obligations to amend their inner legislation, that rarely happens.[107] Many treaties refer to admission requirements providing that those must

[101] *See, e.g.*, U.S. Model BIT, *supra* note 36.

[102] *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Preamble, Mar. 18, 1965, 575 U.N.T.S. 159.

[103] Malaysian Hist. Salvors SDN v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 143 (May 17, 2007).

[104] *Salini*, Decision on Jurisdiction, ¶ 57.

[105] *See* DOLZER & SCHREUER, *supra* note 50, at 88.

[106] *Id.* at 92.

[107] *Id.* at 94.

be "in accordance with [local] legislation,"[108] thus creating no obligation for the contracting state to amend its inner legislation. Other treaties containing admission requirements provide lists that either include or exclude specific sectors from admission. It is worth mentioning that unfavorable admission or establishment requirements could be trumped by the operation of national treatment ("NT") and most favored nation ("MFN") clauses if incorporated in the relevant IIAs.[109]

While social media companies operate in cyberspace and care little about the admission and establishment requirements, those still play a deciding role. What is essential with admission requirements is that non-compliance with those might limit the state's scope of consent and the investor's right to resort to ISDS.[110]

As social media platforms are unique and operate anywhere where the internet is accessible, they do not bother establishing a physical presence in host economies, needless to say, undergoing the lengthy admission and establishment procedures existent under local legislations. Thus, their operation in the host economy can run against local laws and regulations unless the local legislation allows it. Therefore, the virtual operation of social media companies raises issues regarding the legality of the investments.

Requirements of legality can be found under the definition of investments or elsewhere in the IIA.[111] The definition of investments under the Germany-Philippines BIT provides for admission, acceptance, or establishment of investments "in accordance with the respective laws and regulations of either Contracting State."[112] Similarly, many IIAs extend their coverage to investments made "in accordance with [the contracting state's] laws and regulations" without referring to the admission and

[108] Federal Ministry for Economics and Technology, *German Model Treaty 2008*, art. 2.1 (2008), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2865/download.

[109] *See e.g.*, DOLZER & SCHREUER, *supra* note 50.

[110] *Id. at* 96.

[111] *Id.* at 92.

[112] Agreement Between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments, art. 1(1), Apr. 18, 1997.

establishment.[113] While both examples require investments to be made in accordance with the laws and regulations of the host state, the legality requirement is distant from admission requirements.[114] The legality requirement is broad and relates to all possible cases of illegality, whereas the admission requirements refer to the legality of pre-approval,[115] necessary permissions,[116] or admission prerequisites.[117]

Not all IIAs contain express legality requirements when it comes to defending the scope of covered investments.[118] Absent such requirements, the illegality of the investment serves no bar at least for the jurisdiction of the tribunal.[119]

As social media companies typically do not attempt to register their platforms in host countries, it might be difficult to argue that an unregistered platform operating solely on the internet meets the admission requirements provided that such requirements exist under the host country's legislation. Nevertheless, it is worth mentioning that investment arbitration tribunals have considered that only severe[120] and non-trivial[121] violations could meet the illegality bar.[122] Therefore, if there are no express investment policies against social media platforms, the illegality requirement will not be met.[123]

[113] Agreement Between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments, art. 1(1)(d), June 16, 2019.

[114] *See* Michael Polkinghorne & Sven-Michael Volkmer, *The Legality Requirement in Investment Arbitration*, 34 J. INT'L ARB. 149, 149-150 (2018).

[115] *See* Öztaş Constr., Constr. Materials Trading Inc. v. Libya, ICC Case No. 21603/ZF/AYZ, Final Award, ¶ 115 (June 14, 2018).

[116] *See* Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya, ICC Case No. 21537/ZF/AYZ, Award, ¶ 293 (Nov. 17, 2018).

[117] *See*, *e.g.*, *Deutsche Bank*, Award, ¶ 300.

[118] *See*, *e.g.*, ECT, *supra* note 65, art. 1.6.

[119] *See* Ascom Group S.A. v. Kazakhstan, SCC Case No. 116/2010, Award, ¶ 812 (Dec. 19, 2013).

[120] *E.g.*, Energoalians LLC v. Moldova, UNCITRAL, Award, ¶ 261 (Oct. 23, 2013).

[121] *E.g.*, Quiborax S.A. v. Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶ 266 (Sept. 27, 2012).

[122] *E.g.*, Olympic Ent. Grp. AS v. Ukraine, PCA Case No. 2019-18, Award, ¶ 60 (Apr. 15, 2021).

[123] *See* Tethyan Copper Co. v. Pakistan, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, ¶ 1445 (Nov. 10, 2017).

What is crucial in the context of this article is that the state's failure to prosecute the unlawful situation estops the state from invoking an illegality objection in front of the tribunal. Numerous tribunals have supported this view. In *Desert Line v. Yemen*[124] the tribunal found that, "the host state which has for some time tolerated a legal situation is thereafter precluded from insisting later, against the investor, that the situation was unlawful from the beginning."[125]

Similarly, in *Railroad Development v. Guatemala*, the tribunal pointed out the non-objection by the government to the unlawful situation and concluded that it would be against the principles of fairness to accept the jurisdictional objection on the grounds of unlawfulness.[126] The *Mabco v. Kosovo* tribunal adopted the same approach, stating that illegality cannot be raised as a jurisdictional defense if the state was aware of it and raised no objections.[127] Therefore, an illegality of jurisdictional objection cannot be raised if (1) the state was aware of the unlawful situation, and (2) the state did not object to the existence of an unlawful situation.

The operation of social media companies will likely meet both of the above criteria. First, it would be absurd to argue that the government did not know about the illegal operation of the social media platform as all the information is readily accessible on the internet. Second, states did not object to the situation of unlawfulness created by the operation of social media platforms, and—which is more important—state officials themselves heavily rely on social media. As already discussed, heads of state and government officials are everyday users of social media platforms in their official capacity,[128] and they use social media platforms as their primary channel of communication with the public.[129]

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[124] Desert Line Projects LLC v. Yemen, ICSID Case No. ARB/05/17, Award ¶ 105 (Feb. 6, 2008).

[125] *See* DOLZER & SCHREUER, *supra* note 50, at 94; *Desert Line*, Award, ¶¶ 97-110.

[126] R.R. Dev. Corp. v. Guatemala, ICSID Case No. ARB/07/23, Award, ¶ 82 (June 29, 2012).

[127] Mabco Constrs. SA v. Kosovo, ICSID Case No. ARB/17/25, Decision on Jurisdiction, ¶ 409 (Oct. 30, 2020).

[128] *See, e.g.*, Zhaoyin Feng, *China and Twitter: The Year China Got Louder on Social Media*, BBC (Dec. 29, 2019), https://www.bbc.com/news/world-asia-china-50832915/.

[129] Stacy Jo Dixon, *World Leaders with the Most Twitter Followers as of June 2020*, STATISTA (Apr. 28, 2022), https://www.statista.com/statistics/281375/heads-of-state-with-the-most-twitter-followers/.

V. BANNING SOCIAL MEDIA COMPANIES AS EXPROPRIATION

Protections against both direct and indirect expropriation can be found in virtually all IIAs.[130] However, in practice, states rarely directly expropriate the property as it will create an unfavorable image and hurt the country's investment climate.[131] As pointed out by the *Metalclad* tribunal:

> measures equivalent to expropriation include covert or incidental interference with the use of property which has the effect of depriving the owner of . . . the use or reasonably-to-be-expected economic benefit of property even if *not necessarily to the obvious benefit of the host State*.[132]

As customary international law does not per se preclude states from expropriating alien property,[133] one of the criteria for any expropriation to be lawful is the payment of or a reasonable offer to pay compensation.[134] At the time of writing, the author is unaware of any cases where the government has paid or offered to pay compensation after blocking a social media platform. For those reasons, the study will exclude the discussion of the lawfulness of expropriation from its scope. Similarly, the article will leave out the discussion of regulatory powers of host states in relation to expropriation, since it is highly fact-dependent, and it will be speculative to try to define a universal formula addressing all social media platform blocking cases.

A. *Expropriation of Contractual Rights*

As the main business of social media platforms is to collect data from their users, they require the users to enter into user agreements with the social media platform they are registering with. Some platforms go even further and provide that such user agreements also apply to the users who have not registered with the platform but have nevertheless used it.[135] User agreements are periodically updated and adjusted

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[130] *See* DOLZER & SCHREUER, *supra* note 50, at 89.

[131] *See* Christoph H. Schreuer, *The Concept of Expropriation under the ETC and other Investment Protection Treaties*, TRANSNAT'L DISP. MGMT., Nov. 2005, https://www.transnational-dispute-management.com/article.asp?key=596.

[132] Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1, Award, ¶ 103 (Aug. 30, 2000).

[133] *See* DOLZER & SCHREUER, *supra* note 50, at 100.

[134] Rusoro Mining Ltd. v. Venezuela, ICSID Case No. ARB(AF)/12/5, Award, ¶ 407 (Aug. 22, 2016).

[135] *See Terms of Service*, TIKTOK, https://www.tiktok.com/legal/page/us/terms-of-service/en (last accessed Feb. 29, 2024) [hereinafter TikTok U.S. ToS].

to the needs of specific countries and regions where the user is located. The courts in the U.S. have determined that user agreements are valid and enforceable[136] and create a proper balance between the parties' rights and obligations.[137] social media platforms extract their profit by relying on such agreements, in the case of Facebook, resulting in a profit of approximately *USD 30 per user*. Hence, it should be discussed whether the ban of the social media platform in a foreign country could amount to an indirect expropriation.

The terms of use of TikTok (U.S.) provide, "[b]y accessing or using our Services, you confirm that you can form a binding contract with TikTok, that you accept these Terms and that you agree to comply with them."[138]

Agreements like this are widespread, and users of the platform validly consent and are bound by these obligations stipulated therein. As discussed in the preceding chapters, the contractual rights could constitute investments under certain IIAs. By blocking the social media platforms, a state interferes with the user agreements of social media companies and users to the extent that they deprive the agreements of any value.

The expropriation of contractual rights has been considered possible by the Permanent Court of International Justice (PCIJ) in *Certain German Interests in Polish Upper Silesia* case where the court found that by taking possession of the Chorzow factory, the respondent expropriated the contractual rights of the company.[139] Similarly, Iran–US claims tribunal in *Amoco International Finance Corp v. Iran* case found that, "[e]xpropriation, . . . may extend to any right which can be the object of a commercial transaction, i.e., freely sold and bought, and thus has a monetary value."[140]

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[136] *See* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1450–53 (7th Cir. 1996).

[137] Perry Viscounty et al., *Social Networking and the Law: Virtual Social Communities Are Creating Real Legal Issues*, 18 BUS. L. TODAY 58, 59-60 (2009).

[138] TikTok U.S. ToS, *supra* note 135.

[139] *See* Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgment, 1926 P.C.I.J. (ser. A) No. 7, at 44 (May 25).

[140] Amoco Int'l Fin. Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, ¶ 108 (1987).

In the *Siemens v. Argentina*, the tribunal analyzed Germany-Argentina BIT, and concluded that contractual rights in terms of the Treaty may be expropriated.[141] While referring to the contract between the state and the investor, the tribunal observed that the state could incur international responsibility if it used its "superior governmental power" to interfere with the contract execution.[142]

The tribunal in *EMV v. Czech Republic* found that "the rights contained in a contract between an investor and another private party are capable of being expropriated by the State."[143] Nevertheless, the tribunal emphasized that the state would expropriate the contractual obligations if it substantially amended or terminated contracts between two private parties.

Likewise, in another ICSID case, *L.E.S.I. v. Libya*, the tribunal found that the contractual rights could be indirectly expropriated where the expropriation "can result from a substantial loss of contractual rights."[144] In *Saipem v. Bangladesh* tribunal found that the contractual rights arising out of ICC arbitration award are capable of being expropriated.[145] Other tribunals found that contractual rights fall under the broad concept of expropriation[146] and in some cases form an integral part of investments can be expropriated[147]

If these decisions are projected on the scenario of a government blocking social media platforms, there is a likely chance that the tribunals will consider user agreements as being capable of expropriation. As social media platforms heavily rely on user agreements to operate and derive substantial profit from such user agreements, those should be considered an integral part of their investment. When blocking the social media platforms, governments exercise their superior powers by

[141] Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Award, ¶ 267 (Jan. 17, 2007).

[142] *Id.* ¶¶ 253, 258.

[143] *European Media Ventures*, Partial Award on Liability, ¶ 84.

[144] *L.E.S.I.*, Decision on Jurisdiction, ¶ 131.

[145] *See* Saipem S.p.A. v. Bangladesh, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶¶ 127-128 (Mar. 21, 2007).

[146] *See, e.g.*, Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan, ICSID Case No. ARB/03/29, Award, ¶ 441 (Aug. 27, 2009).

[147] *See* Caratube Int'l Oil Co. v. Kazakhstan (II), ICSID Case No. ARB/13/13, Award, ¶ 822 (Sept. 27, 2017).

ordering ISPs to suspend the operation of the social media platforms. They interfere substantially with the contractual rights of social media companies by depriving them of the possibility to extract user data and generate profit from the sales. Therefore, there is a likely prospect that ISDS tribunals will consider the user agreements being expropriated by the State.

VI. POSSIBLE HOST STATE DEFENSES

Social media companies are increasingly becoming subject to interference by state regulatory authorities. The recent TikTok ban in India and Pakistan, as well as the ban on Telegram in Russia and Indonesia are prime examples of such severe interference. When blocking[148] or threatening to block[149] the operation of a social media platform in its entirety, it has become standard practice to refer to national security concerns,[150] protection of public morals,[151] "unstable political situation[s],"[152] and the "violation of the inviolability of private life."[153] Recently, Nigeria indefinitely suspended the operation of Twitter, and issued a statement: "Micro-blogging site was being used to undermine 'Nigeria's corporate existence' through the spreading of fake news that [had] 'violent consequences.'"[154]

While States can provide justifications for blocking social media platforms including, in some cases, based on internal laws and regulations, blocking measures should still be assessed having in mind the host state's international obligations

[148] *See* Rajesh Roy & Shan Li, *India Bans TikTok, Dozens of Other Chinese Apps after Border Clash*, WALL ST. J. (June 30, 2020), https://www.wsj.com/articles/india-blocks-dozens-of-chinese-apps-including-tiktok-following-border-clash-11593447321/.

[149] *See* Tali Arbel et al., *US Bans WeChat, TikTok from App Stores, Threatens Shutdowns*, AP NEWS (Sept. 18, 2020), https://apnews.com/article/donald-trump-us-news-ap-top-news-international-news-technology-a439ead01b75fc958c722daf40f9307c/.

[150] *See* Himanshu Singh Rajpurohit & Tilak Dangi, *Is India's Ban on TikTok and other Apps Justified by the WTO National Security Exception?*, REGULATING FOR GLOBALIZATION (Oct. 27, 2020), https://regulatingforglobalization.com/2020/10/27/is-indias-ban-on-tiktok-and-other-apps-justified-by-the-wto-national-security-exception/.

[151] *See* Declan Walsh, *Pakistan Lifts Facebook Ban but 'Blasphemous' Pages Stay Hidden*, GUARDIAN (May 31, 2010), https://www.theguardian.com/world/2010/may/31/pakistan-lifts-facebook-ban/.

[152] Shireeva et al., *supra* note 13, at 144.

[153] *Id.*

[154] ABC Sunday Extra, *Nigeria's Twitter Ban*, ABC AUSTRALIA (June 27, 2021), https://www.abc.net.au/radionational/programs/sundayextra/nigerias-twitter-ban/13410424/.

governed by public international law. As states cannot invoke their domestic law as a justification for their otherwise wrongful conduct under international law, a thorough examination of possible defenses under general international law will be necessary.[155]

A. *Necessity as a Defense*

Where a necessity defense can be included in IIAs,[156] it also forms part of general international law.[157] Necessity provisions found in IIAs provide a more detailed definition referring to the situations of "public order," "restoration of international peace or security," and "essential security interests."[158] Observing the analogy between treaty provisions and customary international law, the annulment committee in *CMS v. Argentina*, distinguished the two approaches. The committee found that the IIA provision refers to "the conditions under which the treaty [might] apply."[159] In contrast, Article 25 of the International Law Commission's Articles on State Responsibility excludes the application of the defense "unless certain stringent conditions are met."[160] Additionally, it is worth noting that states themselves need to bear the burden of proof when invoking the necessity defense.[161]

When it comes to necessity as a ground for precluding the wrongfulness of the conduct under general international law, states need to be aware that necessity defense will be accepted in exceptional situations only.[162] In the words of the *Gabčikovo-Nagymaros* judgment in Hungary v. Slovakia, (1) an "essential interest" of the state must be at stake, (2) such interest must be threatened by "grave and imminent peril" (3) the wrongful act must be "the only means" of safeguarding the

[155] Int'l L. Comm'n, Responsibility of States for Internationally Wrongful Acts, art. 3, U.N. Doc. A/RES/56/83 (2002) [hereinafter ILC Articles].

[156] *See e.g.*, Argentina-U.S. BIT, *supra* note 66, art. XI.

[157] *See* ILC Articles, *supra* note 155, art. 25.

[158] *See e.g.*, Argentina-U.S. BIT, *supra* note 66, art. XI.

[159] CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Decision of the Ad hoc Committee on Argentina's Application for Annulment, ¶ 129 (Sept. 25, 2007).

[160] *Id.*

[161] *See* Unión Fenosa Gas, S.A. v. Egypt, ICSID Case No. ARB/14/4, Award, ¶ 8.38 (Aug. 31, 2018).

[162] *See* Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, ¶ 51 (Sept. 25).

interest and (4) the state itself must not have contributed to the wrongful act in question.[163]

As the defense of necessity existing both in IIAs and under customary international law has a high bar, most cases of government blocking of social media platforms will fall below that threshold. Reasons such as the protection of public morals or disagreement with the platform's content would fall short of the necessity defense. However, social media platform blocking connected with military conflicts or the spread of violence may meet the bar of the necessity defense, depending on the circumstances.

B. *National Security Exception as a Defense*

It has been a long-standing practice for states to rely on their national security interests when acting in violation of the General Agreement on Tariffs and Trade (GATT).[164] Article XXI of the GATT provides, "[n]othing in this Agreement shall be construed to require any contracting party to furnish any information the disclosure of which *it considers* contrary to its essential security interests."[165]

The national security exception clauses were later "imported" into other international economic treaties, including many IIAs.[166] Unlike GATT Article XXI—which has only recently been interpreted by a tribunal[167]—the security exception clauses enshrined in investment treaties were a subject of controversial scholarly debate and interpretation. As rightly observed by Sebastián Blanco and Alexander Pehl, "[t]he race between the interpretation of national security clauses and treaty modifications keeps the arbitrators entertained and investors undecided."[168]

National security clauses enshrined in IIAs operate as exceptions, allowing states to adopt measures that would have been otherwise inconsistent with their treaty

[163] *Id.* ¶ 52.

[164] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

[165] *Id.* art. XXI(a) (emphasis added).

[166] SEBASTIÁN MANTILLO BLANCO & ALEXANDER PEHL, NATIONAL SECURITY EXCEPTIONS IN INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS: JUSTICIABILITY AND STANDARDS OF REVIEW 2 (2020).

[167] Panel Report, *Russia – Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019).

[168] MANTILLO BLANCO & PEHL, *supra* note 166.

obligations under the respective IIA. Starting as early as 1959, references to national security exceptions could be spotted in IIAs.[169] The national security exception clauses could be included as carve-outs addressing only certain treatment standards[170] or as a free-standing provision in the IIAs.[171]

The formulation of the clause plays a deciding role. The GATT provision already cited above uses the "*it considers*" formulation, which allows the state to judge itself on the existence of the essential security interest. In contrast, in investment arbitration, many clauses do not include the self-judging "it considers" or "it determines to be" formulations. As of 2020, there were no instances recorded where the arbitral tribunal ruled on "it considers" formulation clauses concerning IIAs.[172] Instead, when referring to the Article XI of the "famous" Argentina-U.S. BIT,[173] tribunals ruled that "national security exception" clauses are not self-judging,[174] unless the treaty explicitly provides so.[175] The tribunals also observed that while states have some degree of deference when assessing the "essential security interest" situations, such deference is not unlimited.[176]

Accordingly, in the case of a hypothetical dispute arising out of the blocking of an social media platform, the wording of an IIA will play an essential role. If the national security exception clause has an "it considers" type formulation, it will be in principle possible for the state to argue that the blocking of the social media platform is done to protect their essential security interest. In alternative scenarios, such an argument may not stand as the scrutinizing of the measure at hand to decide whether the

[169] *See e.g.*, Germany-Pakistan BIT, *supra* note 35, Protocol Point 2.

[170] *See e.g.*, *id.* art. 3(3).

[171] *See e.g.*, Argentina-U.S. BIT, *supra* note 66, art. XI.

[172] *See* MANTILLO BLANCO & PEHL, *supra* note 166, at 43.

[173] Argentina-U.S. BIT, *supra* note 66, art. XI.

[174] *See, e.g.*, CC/Devas (Mauritius) Ltd. v. India, PCA Case No. 2013-09, Dissenting Opinion of Arbitrator David R. Haigh, ¶ 79 (July 25, 2016); *see also* Shin-yi Peng, *Cybersecurity Threats and the WTO National Security Exceptions*, 18 J. INT'L ECON. L. 449 (2015).

[175] Mobil Expl. & Dev. Arg. Inc. Suc. Arg. v. Argentina, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, ¶ 1037 (Apr. 10, 2013).

[176] Deutsche Telekom AG v. India, PCA Case No. 2014-10, Interim Award, ¶ 235 (Dec. 13, 2017).

measure was adopted to aid the state's essential security interest or not will fall within the jurisdiction of the tribunal.

VII. CONCLUSION

Social media companies with only a virtual presence in host economies will face a plethora of jurisdictional and procedural hurdles when submitting an ISDS claim. Importantly, they will need to first prove that intangible assets such as user agreements constitute covered investments within the meaning of the relevant IIA and, if relevant, the ICSID convention. They will also have to present additional evidence supporting that their investments have met the admission, establishment, and legality requirements present in IIAs and customary international law. However, as demonstrated above, social media companies will have little difficulty in conquering this stage due to their widespread nature.

Perhaps, the most controversial of all for social media companies will be to meet the territoriality requirements of the IIAs given their virtual presence in the host economy. However, even in light of the numerous cases attaching great importance to the territorial link, it was still possible to identify decisions that give little importance or disregard the territoriality requirements when it concerns intangible assets such as contractual rights. Tribunals supporting the latter, the milder territoriality approach still ask that the company's operation involves a contribution of assets or the investment to contribute to the development of the host state's economy. As presented above, social media companies will have no difficulty submitting evidence supporting the latter.

Turning to the discussion of expropriation, social media companies' likely-to-be-expropriated assets are user agreements, which become ineffective and deprived of value once the government interferes and bans the operation of the platform. As ISDS and international law tribunals have recognized the possibility of commercial contracts to be expropriated in a number of cases, if the jurisdictional and procedural requirements are met, social media companies have a realistic chance to successfully argue an expropriation claim arising out of the social media ban.

As for the host states, it will be impractical to resort to national security and necessity defenses to get the claims dismissed, as the bar of meeting those is extremely high. The social media blockings that occur for "veiled" reasons of censorship will likely fall short of the necessity or national security exception defenses' requirements.

To conclude, on the one hand, we have a rapidly evolving digital economy disregarding the borders and disrupting the traditional conceptions of territoriality in international law, and on the other hand, the IIA framework is perplexed in notions of territoriality and brick and mortar businesses. The advent of the internet and digital services' industry continues to prove the impracticability of such an approach, threatening to leave out the internet industry from the IIA protections. Despite these difficulties, even under the current ISDS framework, social media companies have a realistic chance of success if they resort to ISDS in case of social media platform blocking by governments.

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