

Social media platforms as expropriated investors

Reviewing state measures from the perspective of international investment law

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The reach and expanse of social media in the past decade has been enormous. With its growth, several legal issues have emerged. Particularly, instances of refusal to share personal data of users have led [platforms to shut down their operations in some states](#). These developments raise concerns if the conventional understanding and interpretation of investments and investor-state disputes must be modified for fitting modern forms of business models like social media platforms.

Therefore, on the one hand the concept of such platforms as investors and how their investments are susceptible to expropriation needs to be discussed. On the other, the measures taken by the host states against the platforms have to be examined.

Social media platforms as investors

Investors have the right to refer a dispute to international investment arbitration under various normative regimes such as [international contracts](#), [bilateral investment treaties](#) and [multilateral investment treaties](#).

In order to initiate such an arbitration, the assets of social media platforms must fall under the definition of investment as it has been internationally recognized. It is an [international practice](#) to broadly interpret 'investment' made by an enterprise. The prerequisites to be fulfilled in order to qualify as an investment under the [Convention on the Settlement of Investment Disputes between States and Nationals of Other States \(ICSID Convention\)](#) are contributions in money or other assets, a certain duration, an element of risk, an operation made in order to develop an economic activity in the host State, assets invested in accordance with the laws of the host State and bona fide investments of assets.

The [tribunal](#) had emphasized that *“an extensive scrutiny of all these requirements is not always necessary, as they are most often fulfilled on their face, overlapping or implicitly contained in others.”*

Thus, if a company owning a social media platform opens a subsidiary company in a different jurisdiction and sets up a local office to employ workforces for processing the execution of local projects, such actions should be considered as an investment.

Moreover, the conventional understanding of what constitutes an asset of a foreign enterprise has gone through significant changes and modification. The assets

of social media platforms can be classified into two – tangible and intangible assets. [Tangible or physical assets](#) are those existing materially. They have economic or commercial value. This could be for example buildings, equipment and inventory.

On the other hand, the most important good of social media platforms are their [intangible or digital assets](#). Digital assets refer to content in any format that is stored digitally and provides value to the company. For social media platforms digital assets are their user base and the data that they generate. In [investment arbitration](#), contracts and subscriptions are understood to be assets as well. It has been [widely observed](#) that both tangible and intangible assets are [susceptible to expropriation](#).

The business model of social media platforms

Social media platforms gained prominence only a decade ago and became worth billions of dollars rapidly. Such a phenomenon has been termed to be [extraordinary](#) and truly signifies this distinct form of business model.

These platforms [coordinate the demand of distinct groups of customers who are dependent on each other](#). They essentially make money by [renting out spaces](#) for advertising, engaging with application developers and most importantly by selling user information to advertisers.

Furthermore, such platforms do not require physical assets in abundance. The data obtained by users is their [principal asset](#), which also forms a part of their digital assets. This way, the social media platforms invest less as compared to what they reap in return. Hence, for social media platforms it is evident that the amount invested and the value of the return on investments are not always proportional as it has also been [recognized](#) internationally.

Government measures against social media platforms

All around the globe there have been instances where the government has taken measures directed towards foreign social media platforms for [privacy issues](#), [personal data](#), [user's correspondence](#) and for [maintaining peace and order](#) in the society.

In the case of [Cengiz and Others v. Turkey](#), the European Court of Human Rights found that blocking of YouTube in Turkey violated the right to freedom of expression. Turkey had blocked Youtube [several times](#) between 2008 and 2016. Such incessant banning of the website impacts its business prospects.

On the other hand, there has been a rising support for foreign direct investment in information technology sector where [numerous countries](#) have invited foreign information technology companies to invest in their territories. It is important to note that such instances constitute the basis of legitimate expectations.

Legitimate expectations can be created by government officials of a country [stating](#) that they will be following a particular stream of politics accompanied by the necessary actions. Therefore, it may be inferred that after such statements

regarding information technology companies a ban of them may violate legitimate expectations. The violation of such expectations might be qualified as expropriation. Expropriation [refers](#) to the legitimate need and the right of the government to take private property for public purposes. The investor must be compensated for such an expropriation. A detailed study can be found [here](#).

In light of the Youtube ban by Turkey, social media platforms should raise such issues of government measures against them to the pedestal of an investor-state dispute and demand compensation.

It is imperative that the government measure needs to cause [substantial and permanent economic deprivation](#) to the social media platforms. A temporary blocking of such platforms cannot constitute an expropriation. However, if the deprivation is caused by a temporary ban which [effectively neutralizes the assets](#) of these platforms, then such platforms are said to be expropriated by the government.

Sometimes, governments may introduce laws in good faith which are not directed against any enterprise. For example, the Indian government [blocked](#) several social media platforms in the state of Jammu and Kashmir after [revoking the highly controversial Article 370 of the Indian constitution](#). Additionally, there was a furor in the Indian parliament as the opposition leaders were [put under house arrest](#). Due to the ban on internet no social media site could be accessed by anyone in that state. The government claimed that it was necessary to have the ban as there have been numerous instances where these sites were used by terrorist groups for spreading separatist propaganda.

Such laws may be violating legitimate expectations and may constitute expropriation. Additionally, when an indirect Government measure [substantially affects the legitimate benefits](#) associated with a right conferred by the host state, it is necessary that the conferment in question is rendered useless in order to constitute expropriation. Assessments of such nature are very fact specific and cannot be generalized easily.

Conclusion

The preceding sections demonstrate that a new business model has come up bringing along its own set of legal complexities. These complexities, when addressed at an international level, raise concerns how social media platforms should be assessed in the current backdrop of conventional investor-state dispute resolution system.

A tribunal facing the problem of weighing the right of the host state to protect peace and order in its territory on the one hand and the expectations of a social media platform to conduct its business on the other, must adapt its conventional jurisprudence to this new field. As an arbitration tribunal cannot be asked to judge which periods of a ban were arbitrarily, since the state can sovereignly decide on matters of internal peace and security, the investor needs to be compensated for the loss of opportunity to make profits.

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