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TESTING THE JURISDICTIONAL LIMITS OF THE INTERNATIONAL INVESTMENT REGIME: THE BLOCKING OF SOCIAL MEDIA AND INTERNET CENSORSHIP

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It was late Saturday, June 13, 2009 when the rumbling of a stolen election began moving through the Twittersphere.[1] On June 12th, many thought the Iranian presidential election between Mahmoud Ahmadinejad and Mir Hossein Mousavi would be close.[2] To the contrary, Ahmadinejad won a sweeping victory that defied the polls and was quickly dismissed as a fraud.[3] In reaction, the Iranian people took to the streets and riots lasted long into the next week.[4]

Despite the outrage, few traditional media outlets reported the story of Iran's growing Green Revolution.[5] Instead, the protests were mostly reported by text, tweets, and through other social media.[6] Tehran's authoritarian regime responded by taking down the telephone

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1. Steven Hodson, *Twitter, Social Media and the Revolution in Iran*, THE INQUISITR, June 16 2009, *available at* http://www.inquisitr.com/26311/twitter-social-media-and-the-revolution-in-iran/.

2. Lee Baker, *The Unintended Consequences of U.S. Export Restrictions on Software and Online Services for American Foreign Policy and Human Rights*, 23 HARV. J.L. & TECH. 537, 537-38 (2010) (citing Colin Freeman, *Iran Election: 'Unprecedented' Turnout Boosts Challenge to Mahmoud Ahmadinejad*, DAILY TELEGRAPH, June 12, 2009, *available at* http://www.telegraph.co.uk/news/worldnews/middleeast/iran//5515813/Iran-electionunprecedented-turnout-boosts-challenge-to-Mahmoud-Ahmadinejad.html; Peter Goodspeed, *Election Leaves Iran Polarized*, NAT'L POST, June 13, 2009, *availble at* http://www.nationalpost.com/m/story.html?id=1693833).

3. *Id.* (citing Glenn Kessler & Jon Cohen, *Signs of Fraud Abound, but Not Hard Evidence*, WASH. POST, June 16, 2009, A1, *availble at* http:// www.washingtonpost.com/wp-dyn/content/article/2009/06/15/AR2009061503235.html; Maziar Bahari, *'It's a Coup d'Etat'*, NEWSWEEK, June 13, 2009, *available at* http://www.newsweek.com/id/201956; Colin Freeman, *Iran Elections: Revolt as Crowds Protest at Mahmoud Ahmadinejad's 'Rigged' Victory*, DAILY TELEGRAPH, June 13, 2009, *available at* http://www.telegraph.co.uk/news/worldnews/middleeast/iran/5526721/Iran-elections-revolt-as-crowds-protest-at-Mahmoud-Ahmadinejads-rigged-victory.html).

4. The Washington Times, Editorial, *Iran's Twitter Revolution: Witnessing a New Chapter in the Quest for Freedom*, THE WASH. TIMES, June 16, 2009, A20, *available at* http://www.washingtontimes.com/news/2009/jun/16/irans-twitter-revolution.

5. Hodson, *supra* note 1.

6. *Iran's Twitter Revolution*, *supra* note 4.

system supporting SMS text messaging and blocking other cellular networks. Iran's highly computer-literate society, including bloggers and hackers, fought back, kept channels open and spread the word about functioning proxy portals.[7]

The immediacy of the reports was stunning and gripping. Twitter lists constantly gave updates and provided links to photos and videos, which acutely demonstrated the developing turmoil.[8] Photos and videos were posted on Twitter and Youtube. The video footage that emerged was "raw, unedited and dramatic";[9] it captured images of "young people throwing rocks, scenes of burning tires and vehicles, and riot police delivering savage beatings."[10] Others showed protestors peacefully shouting "Marg bar dictator!" (Death to the dictator!)[11]

Ultimately, the scene turned violent as paramilitary Basij and police rooftop snipers opened fire. Reports of deaths tweeted out, and within minutes, a gruesome picture circulated of a man lying face-up in the street, blood covering his face and pooled around his head. Other photos followed of other people bloodied or dead. Soon there were reports of nonstop shooting and opposition leaders arrested. A crackdown was under way.[12]

While Tehran was not able to completely choke off access to text and Twitter, its abuse of its citizens coupled with the crackdown on avenues of organization through social media and telecommunications brought the short lived Green Revolution to an end. The first digital revolution was over before it began.

A year before Iran was cracking down on access to Twitter and text messaging, U.S. Ambassador to Tunisia, Robert F. Godec, was providing embarrassing details of the opulent life styles of Zine El Abidine Ben Ali, the President of Tunisia, and his family to his superiors in the United States.[13] In one of the cables, Ambassador Godec referred to the Tunisian president and his siblings as "The Family" and likened them to the mafia who ran Tunisia's economy.[14] These cables were part of the tens of thousands of pages leaked to

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7. *Id.*

8. *Id.*

9. *Id. See also* YouTube videos of Iranian Revolution, IRAN'S GREEN REVOLUTION – MOVEMENT TOWARDS FREEDOM 2011 IRAN, http://iranianrevolution.wordpress.com (last visited Jan. 28, 2012).

10. *Iran's Twitter Revolution*, *supra* note 4.

11. *Id.*

12. *Id.*

13. Judy Bachrach, *WikiHistory: Did the Leaks Inspire the Arab Spring?*, WORLD AFFAIRS, July/Aug. 2011, *available at* http://www.worldaffairsjournal.org/article/wiki history-did-leaks-inspire-arab-spring.

14. Dubai, *Wikileaks Might Have Triggered Tunis' Revolution*, AL ARABIYA NEWS, Jan. 15, 2011, *available at* http://www.alarabiya.net/articles/2011/01/15/133592.html.

Wikileaks that were then disclosed in November 2010 online and to various media outlets. Ultimately, the cable was read and shared via Facebook and Twitter[15] throughout Tunisia's significant online population.[16]

Like the stolen election in Iran, these cables acted as digital tinder ready to be ignited by the rage of an oppressed people. A few weeks later, the spark was literally lit, igniting a revolution across the Arab world. Mohammed Bouazizi, a street vendor, was harassed by a policewoman for failing to have a license to sell vegetables from his street cart.[17] When local government authorities failed to intervene, he set himself ablaze outside the governmental compound in a desperate act of self-immolation.[18] His act was caught on film, streamed across the web, and shared on Facebook and Twitter. Bouazizi's single act of protest, combined with the leaked documents, fueled an entire movement across the Arab world.[19]

As the revolt blazed across Tunisia, both Egypt and Libya moved quickly to block access to the internet, social media, and telephone service. In Libya, Muammar Gaddafi's government blocked access to several internet websites. Access to Facebook was cut as protests developed in the Libyan capital.[20] Libya also cut access to Al Jazeera for its reporting on the unrest.[21]

"On January 28, 2011, Egypt's President, Hosni Mubarak, took the drastic and unprecedented step of shutting off the Internet for five days across [Egypt]."[22] Mubarak took these steps to stop the coordination of protestors on Facebook and Twitter.[23] Representatives from both Facebook and Twitter later confirmed access to their sites was being

15. Bachrach, *supra* note 13.

16. *Id.* (statement of Radwan Masmoudi, president for the Center for the Study of Islam and Democracy) ("Something like two million among ten million people have their own Facebook account.").

17. Yasmine Ryan, *The Tragic Life of a Street Vendor*, ALJAZEERA, Jan. 20, 2011, *available at* http://www.aljazeera.com/indepth/features/2011/01/201111684242518839.html.

18. *Id.*

19. Bachrach, *supra* note 13. *See also* John Thorne, *Bouazizi has become a Tunisian Protest 'Symbol,'* THE NATIONAL, Jan. 13, 2011, *available at* http://www.thenational.ae/news/worldwide/bouazizi-has-become-a-tunisian-protest-symbol.

20. Emil Protalinski, *Libya Blocks Access to Facebook, Al Jazeera, Others*, ZDNET (Feb. 18, 2011, 3:18 PM), http://www.zdnet.com/blog/facebook/libya-blocks-access-to-facebook-al-jazeera-others/302.

21. *Id.*

22. Amir Hatem Ali, *The Power of Social Media in Developing Nations: New Tools for Closing the Global Digital Divide and Beyond*, 24 HARV. HUM. RTS. J. 185, 185 (2011).

23. *Id.*

blocked.[24] Like Iran, Egypt also disrupted text messaging and Blackberry services.[25]

As the Arab Revolution spread, several more countries blocked access to social media sites, internet search engines, and news sites. Since the Arab Spring, Facebook has been either totally or partially blocked in Algeria, Tunisia, Libya, Egypt, Saudi Arabia, Iran, and Pakistan.[26] Twitter was partially blocked in Algeria, Egypt, Iran and Pakistan. YouTube remains completely blocked in Turkey and is partially blocked in Iran and Pakistan.[27] Arab states are not alone; many other nations block social media including, most notably, China, Indonesia, Vietnam, Myanmar, Uzbekistan, Cameroon, and even, to some extent, Mexico.[28]

The power of social media during the Arab Revolution should not be overblown; "digital media didn't oust Hosni Mubarak."[29] "[O]veremphasizing the role of information technology diminishes the personal risks that individual protesters took in heading out onto the streets to face tear gas and bullets."[30] At the same time, the role of social media and the internet at large during the Arab Spring cannot be denied. *Newsweek* called the protest in Egypt a "Facebook Revolt."[31] The images of the self-immolation of Bouazizi circulated in "cyberspace before being broadcast by Middle East media corporation al-Jazeera."[32]

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24. Elinor Mills, *Internet Disruptions Hit Egypt*, CNET NEWS (Jan 27, 2011, 5:06 PM), http://news.cnet.com/8301-27080_3-20029857-245.html.

25. *Id.*; Hamza Hendawi & Sarah El Deeb, ASSOCIATED PRESS, *Egypt Disrupts Internet Service in Crackdown*, THE SAN FRANCISCO CHRONICLE, Jan. 2, 2011, *available at* http://articles.sfgate.com/2011-01-28/news/27054360_1_crackdown-cell-phone-service-muslim-brotherhood.

26. *Id. See Social Media Filtering Map*, OPENNET INITIATIVE, *available at* http://opennet.net/research/map/socialmedia (last visited Jan. 28, 2011). (The OpenNet Initiative (ONI) is a collaborative partnership of three institutions: the Citizen Lab at the Munk School of Global Affairs, University of Toronto; the Berkman Center for Internet & Society at Harvard University; and the SecDev Group. Drawing on testing conducted in 2008-2009 as well as media reports collected since 2004, ONI has compiled data from on the most frequently blocked social media sites around the world. ONI maintains an interactive map that demonstrates social media sites that have been censored at any point since their creation. ONI reports the states listed above as blocking social media sitesDocument2).

27. *Id.*

28. *Id.*

29. Philip N. Howard, *The Arab Spring's Cascading Effects*, MILLER-MCCUNE, Feb. 23, 2011, *available at* http://www.miller-mccune.com/politics/the-cascading-effects-of-the-arab-spring-28575/#.

30. *Id.*

31. Mike Giglio, NEWSWEEK, *Inside Egypt's Facebook Revolt*, THE DAILY BEAST, Jan. 27, 2011, *available at* http://www.thedailybeast.com/newsweek/2011/01/27/inside-egypt-s-facebook-revolt.html.

32. Erika R. George, *Tweeting to Topple Tyranny, Social Media and Corporate Social Responsibility: A Reply to Anupam Chander*, 2 CAL. L. REV. CIRCUIT 23, 24 (2011) (citing

U.S. Ambassador to the United Nations, Susan Rice, captured the potential of social media when she commented "the power of social networking to channel and champion public sentiment, has been more evident in the past few weeks than ever before."[33]

The effects of blocking social media and other websites raise serious questions related to the "congenital tension" ever present between the recognition and enforcement of state sovereignty and the protection of human rights and fundamental freedoms.[34] On the one hand, states have a sovereign prerogative to protect their territorial integrity and independence from destabilizing forces like armed intervention, whether of an external or internal nature, and mass protests that threaten the life of the nation.[35] On the other hand, states also have an obligation to protect human rights such as the right to hold opinions, the freedom of expression and speech, the right to receive and transmit information, the right to hold and transmit ideas of all kinds in writing and print through any media of a person's choice, and the right to peaceful assembly.[36]

Today, this tension is made increasingly more complex by a web of overlapping international obligations stemming, not only from human rights law, but also from modern trade and investment regimes: many developing states blocking access to social media and the internet at large are members of the World Trade Organization ("WTO") and are often parties to treaties protecting investment as a means to improve economic conditions and to gain access to the ever expanding global

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Tunisia's Revolution: Watching and Waiting, THE ECONOMIST ONLINE (Jan. 15, 2011, 11:09 PM), http://www.economist.com/blogs/newsbook/2011/01/tunisias_revolution).

33. Howard, *supra* note 29.

34. FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 3 (3d ed. 2005). *See also* Muna Ndulo, *United Nations Peacekeeping Operations and Security and Reconstruction*, 44 AKRON L. REV. 769, 773 (recognizing the tension in the U.N. Charter "between the doctrines of national sovereignty and the protection and promotion of individual rights and the promotion of peace and security generally in the context of a civil war").

35. *See* Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970) [hereinafter Friendly Relations Declaration]; Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131 (XX), U.N. Doc. A/RES/2131(XX) (Dec. 21, 1965) [hereinafter Inadmissibility of Intervention Declaration] (While the Friendly Relations Declaration, and the Inadmissibility of Intervention Declaration outlawing aggression apply primarily in the context of international relations between states, and not intrastate issues, these legal principles firmly support a state's right to territorial integrity and political independence). *See also* International Covenant on Civil and Political Rights, G.A. Res. 2200 A (XXI), ¶ 1, U.N. GAOR, 21st Sess, Supp. No. 16, U.N. Doc. A/6316 at 52 (Dec. 16, 1966) [hereinafter ICCPR] (providing that a state may suspend rights protected under the ICCPR during times of declared, publicly declared national emergency threatening life to the nation).

36. ICCPR, arts. 19, 21.

market place. As a result, when states move to block and censure material on the internet as an exercise of their sovereign rights, they not only trample their human rights obligations, but they may also be in violation of other international obligations created by the international trade and investment regimes.

As goods, services, telecommunications, and other unrealized future business ventures move to and develop because of the internet, and as the internet becomes subject to increasing regulation and censorship,[37] sophisticated e-commerce business interests will no doubt turn to the protections afforded by international law to protect their interests.[38] When business interests, such as social media, overlap with and touch upon individuals' human rights, trade and investment protections may actually serve as a collateral method to enforce human rights obligations. Trends in international e-commerce are already pointing to this result.

For instance, in 2010 Google shocked the world when, in the face of China's increased censorship, it ended its nascent presence in China and began routing Chinese users to its uncensored search engine in Hong Kong.[39] Essentially the dispute between China and Google arose when Google discovered a highly sophisticated cyber attack originating from China on the Gmail email accounts of Chinese human rights activists.[40] In response, Google decided it would no longer censor Chinese internet searches as required by Chinese law. When negotiations broke down between China and Google over the dispute,

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37. *See* OPENNET INITIATIVE, *supra* note 26 (compiled list of various countries' internet regulation and censorship activities by month in 2010).

38. *See* Christopher Gibson, *A Look at the Compulsory License in Investment Arbitration: the Case of Indirect Expropriation*, 25 AM. U. INT'L L. REV. 357, 359-60 (2010) (noting it is likely that an international investment arbitration involving intellectual property rights in e-commerce is likely "given the trajectory of the modern economy, in which foreign investments reflect an increasing concentration of intellectual capital invested in knowledge goods protected by [intellectual property rights]").

39. Cynthia Liu, *Internet Censorship as a Trade Barrier: A Look at the WTO Consistency of the Great Firewall in the Wake of the China-Google Dispute*, 42 GEO. J. INT'L L. 1199, 1200-01 (2011).

40. *Id.* (citing *Google May Quit China over Cyber-Attacks*, MSNBC (Jan. 13, 2010), *available at* http://www.msnbc.msn.com/id/34831106/. A report issued by iDefense, a computer security company owned by Verisign, states that thirty-three other companies were targeted in the attack spanning the Internet, media, finance, technology, and chemical sectors. Thomas Claburn, *Chinese Spy Agency Behind Google Cyber Attack, Report Claims*, INFO. WK. (Jan. 14, 2010, 6:00 AM), http://www.informationweek.com/news/security/attacks/222300848 (claiming Adobe, Internet Web hosting company Rackspace, Dow Chemical, and Northrop Grumman are some of the companies that were targeted in these series of coordinated cyber-attacks)).

Google stunningly announced it would leave China and reroute Chinese searches through Hong Kong.[41]

Similarly, "Go Daddy.com, the world's largest domain name registration company, announced on March 24, 2010 that it would no longer sell .cn domain names, citing similar fears of hacking and an unwillingness to continue to comply with stringent government requirements."[42] In its announcement, "Go Daddy.com specifically referenced the heightened requirements for documenting and verifying the identity of domain name registrants and what it perceived to be increased threats against individual security as reasons for discontinuing the offering of new .cn domain names."[43]

Cynthia Liu makes a compelling argument that a case could be brought through the auspices of the World Trade Organization's Dispute Settlement Body ("DSB") under the General Agreement on Tariffs and Trade ("GATT") and the General Agreement on Trade in Services ("GATS") to protect against such censorship.[44] Indeed, the United States announced in October, 2011, that it would seek detailed information on the trade impact of Chinese policies that may block U.S. companies' websites in China under Article III of GATS which allows member states to request information from another member state on its measures that affect the operation of GATS.[45] The European Parliament has also passed a resolution calling on the European Union to treat Internet censorship as a trade barrier.[46]

While the DSB may provide one form of relief for such conduct, it does not provide a direct means of enforcement.[47] Generally, private

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41. Miguel Helft & David Barboza, *Google Shuts China Site in Dispute over Censorship*, N.Y. TIMES (Mar. 22, 2010), *available at* http:// www.nytimes.com/2010/03/23/technology/23google.html.

42. Liu, *supra* note 39, at 1201 (citing Alexei Alexis & Kathleen E. McLaughlin, *Muted Reaction in China Greets Go Daddy's Departure Announcement*, 27 INT'L TRADE REP. (BNA) 503 (Apr. 8, 2010)).

43. *Id.*

44. *Id.* at 1211-33.

45. Press Release, Office of the U.S. Trade Representative, Executive Office of the President, United States Seeks Detailed Information on China's Internet Restrictions (Oct. 2011), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2011/october/united-states-seeks-detailed-information-china%E2%80%99s-i.

46. Brian R. Israel, *"Make Money Without Doing Evil?" Caught between Authoritarian Regulations in Emerging Markets and a Global Law of Human Rights, U.S. ICTS Face a Twofold Quandary*, 24 BERKELEY TECH. L.J. 617, 652, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:184E:0016:0022:EN:PDF (referring to The EU's Strategy to Deliver Market Access to European Countries 2009 O.J. (C 184).

47. *See* Alberto Alemanno, *Private Parties and WTO Dispute Settlement System*, Cornell Law School Inter-University Graduate Student Conference Papers, 2 nn.5 & 6 (2004) *available at* http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1000&context=lps_clacp.

entities can petition their governments to bring a case through the DSB on an affected industry or corporation's behalf as a matter of diplomatic protection,[48] but as a matter of right, the entity has no ability to bring the case directly. Also, governments have no obligation to bring the case on the affected party's behalf.[49]

Meanwhile, the protections found in international investment law always provide for private dispute resolution, and may provide a powerful method to respond to internet censorship. Notably, the United States and China are not currently parties to an international investment arbitration agreement ("IIA"), although one is currently being negotiated.[50] However, turning back to the censorship of the internet during the Arab Revolution, many Arab nations affected by the Arab Spring, such as Egypt, Tunisia, Turkey, Morocco, and Bahrain, have entered into IIAs with the United States such that organizations like Facebook, Twitter, YouTube, and Google could take action directly for the blocking of their digital platforms. The provisions of other IIAs with non-Arab countries blocking social media, such as Vietnam, could also be invoked.[51]

While there are many facets of international investment arbitration, the purpose of this article is to demonstrate how jurisdiction could be established against sovereign states for the suppression of social media and censorship of the internet and to provide a brief, but not exhaustive, analysis of the claims that could be brought therefore. Part I of this article introduces the concept of social media and evaluates the property interests inherent in social media. Part II then turns to a brief introduction of IIAs. Much has been written concerning investment law over the last decade such that it is unnecessary to thoroughly reexamine what has already been done. The bulk of this article is devoted to Part III, which discuses whether social media, especially those services that originate in the capital exporting state, meet the definition of an investment under particular investment treaties. While the definition of an investment under IIAs is generally broad, modern investment arbitration tribunals have restricted its applicability. Therefore, from a jurisdictional standpoint, it is essential that social media and particular internet sites be considered as an investment; otherwise an arbitration tribunal would lack jurisdiction *rationae materiae* to hear the dispute. Part IV briefly illuminates the claims social media could bring for internet censorship. Ultimately,

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48. *Id.*

49. *Id.*

50. Sarah Anderson, *U.S.-China Bilateral Investment Treaty Negotiations-Fact Sheet*, INSTITUTE FOR POLICY STUDIES (Dec. 7, 2009), *available at* http://www.ips-dc.org/reports/us-china_bilateral_investment_treaty_negotiations.

51. *See* Bilateral Trade Agreement, U.S.-Viet., July 13, 2000, Statement by the President: Vietnam Bilateral Trade Agreement, 2001 WL 634226.

more research is needed in this area to fully explore how such claims are likely to be evaluated. Finally, Part V concludes that social media and internet based platforms may bring claims that will withstand the jurisdictional hurdles of international investment law.

Before turning to the dynamics of international investment arbitration in the context of social media, it should be noted that it has been more than fifty years since the first modern bilateral investment agreement entered into force between Germany and Pakistan.[52] For the first forty years of that history, instances of disputes were relatively rare. But, over the last ten-plus years, as the number of IIAs proliferated, great growth in the number of the reported cases occurred.[53] The overwhelming majority of reported cases have been brought by investors of developed nations against developing states for treatment related to investments in infrastructure and natural resources.[54] The size and scope of the awards have resulted in many calling into question the legitimacy of international investment arbitration[55] under the perception that IIAs threaten state sovereignty and sustainable economic development.[56]

While there are legitimate concerns about the impact international investment arbitration has on these issues, the future of international investment arbitration over the next forty years could be far nobler if corporations like Google, Facebook, Twitter, YouTube, and other forms of new media embrace ideas of corporate social responsibility by using tools at their disposal to prevent abuses of human rights.[57] Certainly there are limits to speech on the internet; most countries use cybersieves to filter undesirable content.[58] Whether it is copyrighted songs in the United States[59] or political dissent in the Middle East, the goal is the same: "Countries differ not in their intent to limit access to

52. Treaty for the Promotion and Protection of Investments, Fed. Republic Ger.-Pak., Nov. 25, 1959, 457 U.N.T.S. 6575.

53. Susan D. Franck, Development and Outcomes of Investment Arbitration, 50 HARV. INT'L L.J. 435, 435 (2009).

54. *Id.* at 446.

55. Franck, *supra* note 53, at 436-37.

56. Jose E. Alvarez, Book Review, 105 AM. J. INT'L L. 377, 382 (2011) (reviewing STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW (2009)).

57. George, *supra* note 32, at 35; *see also* Anupam Chander, *Googling Freedom*, 99 CALIF. L. REV. 1, 7-8 (2011).

58. Derek E. Bambauer, *Cybersieves*, 59 DUKE L. J. 377, 379 (2009).

59. *Id. See also* Stop Online Piracy Act, H.R. 3261, 112th Cong. (SOPA allows the Attorney General to seek injunctions that would compel U.S. search engines and other sites to block domain names or search results against foreign websites that steal and sell American innovations, intellectual property, and products. The bill increases criminal penalties for individuals who traffic in counterfeit medicine and military goods, which put innocent civilians and American soldiers at risk. And it improves coordination between IP enforcement agencies in the U.S.).

material online, but in the content they ban, the precision of their blocking, and the voice they offer citizens in decision making."[60] At some point though, the threshold is breached; a state's censorship and blocking of social media and the internet at large infringes on fundamental freedoms. At that point, international investment arbitration can be used as a powerful weapon not only to protect the value of the investment, but also the rights of those whose use of the medium gave value to the investment in the first place.

AN INTRODUCTION TO SOCIAL MEDIA

Like other forms of property, economic interests in social media and other internet platforms stem from a range of rights that likely fall within the substantive and procedural protections provided by IIAs. These rights range from the value of shares in the entities that own social media, the myriad property rights now associated with domain names, the proprietary technological and intellectual property rights owned by social media, and possibly, although controversially, rights to the ultimate content of and access to users of social media.

The term "social media" refers to internet-based applications that build on the ideological and technological foundations of Web 2.0 that enable people to communicate and share resources and information.[61] In essence, social media are forms of electronic communications used for networking and microblogging, through which users create online communities and content to share information, ideas, personal messages, and other material.[62]

Examples of social media include a wide array of blogs, discussion forums, chat rooms, and wikis.[63] Prominent social media sites include Facebook, YouTube, LinkedIn, and Twitter.[64] Social media can be accessed by computer, smart and cellular phones, and mobile phone text messaging (SMS). To some degree, the entire web is one gigantic social media platform.

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60. Bambauer, *supra* note 58, at 379.

61. Bruce R. Lindsay, *Social Media and Disasters: Current Uses, Future Options, and Policy Considerations*, CONGRESSIONAL RESEARCH SERVICE R41987, 1 (Sep. 6, 2011), *available at* http://www.fas.org/sgp/crs/homesec/R41987.pdf; Andreas Kaplan & Michael Haenlein, *Users of the world, unite! The Challenges and Opportunities of Social Media*, BUSINESS HORIZONS 53, 59 (2009).

62. John M. Miller, *Is MySpace really My Space? Examining the Discoverability of the Contents of Social Media Accounts*, 30 No. 2 TRIAL ADVOC. Q. 28, 28 (2011) (citing Merriam Webster Dictionary *available at* http://www.merriam-webster.com/dictionary/social%20media).

63. Lindsay, *supra* note 61, at 1.

64. *Id.*

The use of social media is an evolving phenomenon.[65] During the past decade, rapid changes in communication technologies have enabled people to interact and share information in ways that were non-existent or commercially unavailable as recently as fifteen years ago.[66]

The property rights inherent in social media are also evolving. It is an extreme understatement to say that the shares in the corporations that developed successful social media platforms are valuable. *Forbes* lists Mark Zuckerberg's wealth at $17.5 billion;[67] Sergey Brin and Larry Page, the Google Guys, are worth $12 billion each.[68] The lawsuits underscoring the movie *The Social Network*, and the interests involved therein are immense.[69] Because shares in corporations are generally protected under modern IIAs, such economic interests in social media will generally be protected thereunder.

The intellectual property rights in both domain names of social media and the proprietary coding that make them function are also valuable property rights. "A domain name consists of two parts: a top level domain and a secondary level domain."[70] The top level domain is the domain name's suffix like .com or .org. The secondary level domain is the remainder of the address, and today often includes the names of valuable trademarks identifying a corporation's goods or services. Together, the complete domain name allows a user to link to a specific computer's IP address by routing the user to the provider of the content.[71]

Domain names are generally considered a valuable intangible property right[72] or, in rare cases, a tangible property right,[73] both of

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65. *See Id.*

66. *Id.*

67. *Forbes 400 Richest Americans, Mark Zuckerberg*, FORBES, http://www.forbes.com/profile/mark-zuckerberg (last visited Jan. 24, 2012).

68. *Forbes 400 Richest Americans, Sergey Brin*, FORBES, http://www.forbes.com/lists/2009/10/billionaires-2009-richest-people_Sergey-Brin_D664.html (last visited Jan. 24, 2012); *Forbes 400 Richest Americans, Larry Page*, FORBES, http://www.forbes.com/lists/2009/10/billionaires-2009-richest-people_Larry-Page_XFXI.html (last visited Jan. 24, 2012).

69. Facebook, Inc. v. ConnectU, Inc., No. C 07-01389, 2008 WL 4793665 (N.D.Cal. 2008) *affirmed by* Facebook, Inc. v. Pacific Northwest Software, Inc., 640 F.3d 1034 (9th Cir. 2011).

70. FAQ: Domain Name, *available at* http://domainwhiz.net/faq_domainname.html.

71. *See* Jennifer Gong, *Defining and Addressing Virtual Property in International Treaties*, 17 B.U. J. SCI. & TECH. L. 101, 109 (2011).

72. Kremen v. Cohen, 337 F.3d 1024, 1030 (9th Cir. 2003) (finding that domain names are intangible property); *see also* OBG Ltd v. Allan (2007) UKHL 21, 1 A.C. 1, 32 (separate opinion of Lord Hoffman stating "have no difficulty with the proposition that a domain name may be intangible property, like a copyright or trade mark"); *see also* 15 U.S.C. §1125(d) (2006) (treating domain names as property subject to *in rem* proceedings in the ACPA); Porsche Cars North America, Inc. v. Porsche.Net, 302 F.3d 248, 260 (4th Cir. 2002) ("Congress may treat a domain name registration as property subject to *in rem*

which are generally protectable under IIAs. In other instances, domain names have been considered contractual rights,[74] but this seems to be the minority view.[75] Rather, domain names are generally considered intangible property because registrants of domain names have the right to:

> a) possess the domain name to the exclusion of others; b) use the domain name as its 'locator' on the Internet; c) manage the domain name by designating the registrar; d) enjoy the income from the domain name; e) dispose of the domain name by sale or transfer; and f) exclude others from using its domain name.[76]

Regardless of how they are characterized, domain names have tremendous value. Corporations have paid millions to acquire domain names[77] and engaged in expensive lawsuits to prevent cybersquatting and unlawful trading upon their protected marks included within domain names. Likewise, governments have responded to these actions

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jurisdiction if it chooses, without violating the Constitution."); Mattel, Inc. v. Barbie-Club.com, 310 F.3d 293, 300 (2d Cir. 2002) ("Congress clearly intended to treat domain names as property for purposes of the ACPA's *in rem* provisions.").

73. Margae, Inc. v. Clear Link Technologies, LLC, 620 F.Supp.2d 1284, 1285 (D. Utah 2009) (finding that a website is tangible property).

74. Wornow v. Register.Com, Inc., 778 N.Y.S.2d 25, 26 (App. Div. 2004) (N.Y. statute making self-renewing contracts unenforceable do not apply to domain name registrations because a domain name that is "not trademarked or patented is not personal property, but rather a contract right that cannot exist separate and apart from the services performed by a register such as defendant."); Network Solutions, Inc. v. Umbro Int'l, Inc., 529 S.E.2d 80, 86-87 (2000).

75. Xuan-Thao N. Nguyen & Jeffrey A. Maine, *Taxing the New Intellectual Property Right*, 56 HASTINGS L. J. 1, 42-43 (2004); Jeffery A. Maine, *Tax Considerations: Domain Name Acquisitions and Web Site Development*, SK102 ALI-ABA 205, 213 (2005) ("Domain names should not be treated for tax purposes as government licenses or contracts for services, but instead should be treated as valuable intangible property"); Xuan-Thao N. Nguyen, *Cyberproperty and Judicial Dissonance: The Trouble with Domain Name Classification*, 10 GEO. MASON L. REV. 183, 203 (2001) ("decisions in Umbro and Dorer fail to correctly classify domain names"); *see also* eBay v. Bidder's Edge, 100 F. Supp. 2d 1058 (N.D.Ca. 2000); Register.com v. Verio Inc., 126 F. Supp. 2d 238, 249 (S.D.N.Y. 2000) (finding that websites should be treated as chattel and thus as property). *See Kremen* 337 F.3d at 1029 (stating that Network Solutions all but conceded that registrants have property rights in their domain names); Network Solutions, Inc. v. Clue Computing, Inc., 946 F. Supp. 858, 860 (D. Colo. 1996) (stating that Network Solution admits that domain names are intangible personal property).

76. Beverly A. Berneman, *Navigating the Bankruptcy Waters in a Domain Name Rowboat*, 3 J. MARSHALL REV. INTELL. PROP. L. 61, 66 (2003).

77. In 1998, Compaq Computer Corp. paid $3.35 million to AltaVista Technology for the right to use the "altavista.com." *Compaq and Alta Vista Settle Internet Address Dispute*, WALL ST. J., July 29, 1998, at B12; Julia Angwin, *San Jose Man Hits Gold—3.3 million web name Compaq pays big for internet address*, SAN FRANCISCO CHRONICLE, July 28, 1998, at A1.

to ensure consumers have access to their trademarks.[78] Consequently, domain names will likely be treated as a valuable property right protected under most IIAs.

In addition to the intangible property rights in domain names, domain names also contain valuable trademark rights, which are protected under IIAs. It is well established that certain domain names may be registered as trademarks.[79] Like other trademarks, under the U.S. Patent and Trademark Office guidelines for the registration of domain names as trademarks, "domain names are entitled to the protection afforded to trademarks if they are arbitrary, fanciful, suggestive, or descriptive, with acquired secondary meaning."[80] Trademarks are now almost universally protected by IIAs. As a result, trademarks included in domain names will likely be protected under IIAs as well.

Finally, social media sites routinely require terms of use contracts that possibly give them an ownership interest in user generated content ("USG"). For instance, while Facebook's terms of use ("TOU") assert that the user owns any content he or she creates and uploads to the site, its TOU also states in part, "'[f]or content that is covered by intellectual property rights, like photos and videos ('IP content'),' the user grants Facebook a 'nonexclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content' that the user posts 'on or in connection with Facebook.'"[81] Similarly, the TOU for LinkedIn, a social media platform for business professionals, mandates users grant "'a nonexclusive, irrevocable, worldwide, perpetual, unlimited, assignable, sub-licensable, fully paid up and royalty free right to [LinkedIn] to copy, prepare derivative works of, improve, distribute, publish, remove, retain, add, process, analyze, use and commercialize, in any way now known or in the future discovered, any information [the user] provide[s].'"[82] These unrestricted licenses grant social media a protected right in UGC. Under international investment law that protected right is also protected and may, even if

78. 15 U.S.C. §1125(d) (2006).

79. Image Online Design, Inc. v. Core Ass'n, 120 F. Supp. 2d 870, 878 (C.D. Cal. 2000) (stating PTO governs trademark registrations for domain names); US Dep't of Commerce, Patent and Trademark Office, Examination Guide No. 2-99: Marks Composed, in Whole or in Part, of Domain Names [hereinafter PTO Examination Guide No. 2-99] (explaining PTO policy of registering domain names as trademarks); *see also* Vincent-Joël Proulx, *Borrowing from our Common Law Cousins: American and Britsh Influences on the Merger of Canadian Trademark and Internet Domain Name Laws*, 22 ARIZ. J. INT'L & COMP. L. 505, 505-06 (2005).

80. Nguyen & Maine, *supra* note 75, at 48.

81. G. Ross Allen & Francine D. Ward, *Things Aren't Always as they Appear: Who Really Owns Your User-Generated Content*, 3 NO. 2 LANDSLIDE 49, 50 (2010) (citing Facebook, Statement of Rights and Responsibilities, http://www.facebook.com /terms.php).

82. *Id.* at 51.

controversially, extend to an interest in access to current and potential users of social media themselves.

A BRIEF INTRODUCTION TO INTERNATIONAL INVESTMENT LAW

Much has been written concerning the history, development, and theory of international investment arbitration such that much of it need not be repeated here.[83]

The purpose of IIAs is simple; IIAs safeguard investments made by qualifying investors in another state from government conduct which may impinge or otherwise mistreat the value of the investment.[84] While many of the treaties differ in language, they are relatively uniform: most grant the qualifying investment reciprocal rights, both procedural and substantive, which may be enforced if the host government mistreats the investment in a manner prescribed by the relevant agreement. These agreements generally grant foreign investors substantive rights, including national and most-favored-nation ("MFN") treatment, fair and equitable treatment ("FET"), and protection against expropriation without compensation.[85]

There are many different forms of IIAs. Today there are reportedly 2,700 to 3,000 bilateral investment treaties ("BITs"), a small number of regional free trade agreements such as NAFTA[86] or ASEAN,[87] and treaties with limited subject matter jurisdiction such as the Energy Charter Treaty[88] that allow private dispute resolution.[89]

Procedurally, an IIA permits private party investors whose investment has been mistreated to seek direct redress against the host state through the treaty's dispute resolution mechanism, usually through the an ad hoc tribunal organized under the auspices of the World Bank's International Centre for Settlement of Investment Disputes ("ICSID"), the ICSID Additional Facility rules, the United Nations Commission on International Trade Law ("UNCITRAL")

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83. *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 211-90 (2008); CAMPBELL MCLACHLAN QC, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2007); *see* Susan D. Franck, Rationalizing Costs in Investment Treaty Arbitration, 88 WASH. U. L. REV. 769, 779-81 (2011).

84. Franck, *supra* note 83, at 779.

85. Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 62 (Fall 2011).

86. North Atlantic Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

87. Association of Southeast Asian Nations, Aug. 8, 1967.

88. Energy Charter Treaty (Dec. 1994), text *available at* http://www.encharter.org/.

89. UNCTAD Investment Instruments Online, *available at* http://www.unctadxi.org/templates/docsearch_779.aspx.

Arbitration Rules, the Stockholm Chamber of Commerce ("SCC"), or some other standing arbitration body.

Ordinarily, the individual agreement will provide a specific set of definitions to determine whether a particular activity or interest will qualify for the protections of the IIA. If these jurisdictional prerequisites can be met, and the government conduct falls within the substantive protections of the IIA, the state will be held internationally responsible for its wrongful conduct to the qualifying investor.

In the context of the Arab Spring and the blocking of social media, the United States has entered into IIAs with Bahrain, Egypt, Tunisia, Turkey, and Morocco.[90] Because most social media and internet locations blocked during the Arab Spring were owned and operated by U.S. corporations, those corporations would be able to take advantage of the protections afforded under the IIAs between the United States and those governments. For the purposes of this article, the jurisdictional prerequisites and substantive claims related to the blocking and censuring of internet access shall be predominantly analyzed under the U.S.-Egypt BIT[91] since Egypt was at the center of the Arab Spring and undisputedly shut down internet access during the heart of the protests.

Social Media Meets the Jurisdictional Requirements to Bring an International Investment Claim

In international investment arbitration, three main jurisdictional prerequisites must be satisfied in no particular order: the tribunal must have jurisdiction over 1) the parties (*ratione personae)*; 2) the timing of the dispute (*ratione temporis*); and 3) the subject matter of the dispute (*ratione materiae*).[92] These issues are complicated further by jurisdictional limitations of the dispute settlement apparatus under which the dispute is brought. For instance, Article 25 of the ICSID Convention provides:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting

90. *See id.*

91. Treaty between the United States of America and the Arab Republic of Egypt concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Egypt June 27, 1992 [hereinafter U.S.-Egypt BIT].

92. *See* Impregilo S.p.A. v. Islamic Republic of Pakistan (Jurisdiction) ICSID Case No. ARB/03/3, ¶¶ 26-31 (Apr. 22, 2005). *But see* MCLACHLAN, *supra* note 83, at 10 ¶ 1.23 (noting that the "treaty provisions on nationality may be said to deal with arbitral jurisdiction over persons (*ratione personae*); the treaty provisions on investment prescribe the extent of arbitral jurisdiction over subject-matter (*ratione materiae*). But, the treaties themselves proceed simply on the basis of nationality and investment, and the dividing line between persons and things is not exact.").

> State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.[93]

Consequently, Article 25 provides an additional layer of jurisdictional hurdles that must be overcome.

In bringing claims against states blocking social media and internet access, the first two jurisdictional prerequisites are easily met. First, similar to the law of diplomatic protection, to establish nationality under the relevant IIA, a U.S. corporation need only establish it is a corporation under the laws of the state under which it is incorporated and in whose territory it has its registered office.[94] While there exist many methods to challenge nationality, in the case of social media and internet platforms such as Facebook, Twitter, Google, or YouTube, U.S. nationality would easily be established because all of these enterprises held continuous U.S. nationality prior to the Arab Spring.[95]

Likewise, such entities could also establish jurisdiction over the timing of the dispute. In considering the timing of a dispute and whether a particular IIA applies, reference must always be had to the particular IIA[96] and whether the IIA was in force or can apply retroactively to the conduct complained. Generally speaking, if a relevant IIA is in force at the time the violating conduct took place, the arbitration panel will have jurisdiction over the timing of the dispute. The relevant U.S. IIAs involved during the Arab Spring, including the US-Egypt BIT, were all in force long before the events that occurred during the Arab Spring came to pass. Consequently, social media and

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93. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 14, 1966, art. 25, 575 U.N.T.S. 159 (emphasis added) [hereinafter ICSID Convention].

94. Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3 ¶ 70 (Judgment of Feb. 5) (Second Phase) [hereinafter *Barcelona Traction*]; *see also* Tokios Tokeles v. Ukraine (Jurisdiction) 20 ICSID Rev-FILJ 205, 220, ¶¶38-40 (ICSID Case No. ARB/02/18 Apr. 29, 2004); CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 286 (2001) (stating: "Definitions of corporate nationality in national legislation or in treaties providing for ICSID's jurisdiction will be controlling for the determination of whether the nationality requirements of Article 25(2)(b) have been met.") [hereinafter SCHREUER I].; MCLACHLAN, *supra* note 83, at 146, ¶ 5.54; Azurix Corp v. Argentine Republic (Jurisdiction) (2004) 43 I.L.M. 262, ¶ 72 (ICSID Case No. ARB/01/12 Dec. 8, 2003).

95. According to the California Secretary of State website, Facebook Inc., Google, YouTube and Twitter are all Delaware corporations headquarter and registered to do business in California. *See Business Search*, CALIFORNIA SECRETARY OF STATE, *available at* http://kepler.sos.ca.gov/cbs.aspx.

96. MCLACHLAN, *supra* note 83, at 174, ¶ 6.38.

internet platforms would easily be able to establish jurisdiction over the timing of the dispute.

Establishing the final jurisdictional requirement, jurisdiction *ratione materiae*, however, is much more problematic and will be complicated by the choices of the parties to any potential arbitration.

Is the Economic Interest in Social Media an Investment?

In international investment arbitration, the only true jurisdictional limitation, *ratione materiae,* is whether the economic activity or business interest amounts to an "investment" as that term is understood in international investment law. Thus, to prevail in any arbitration challenging the blocking of social media during the Arab Spring, social media and internet platforms must prove that their economic interest in those platforms amounts to an "investment."

There are many considerations that impact whether an "investment" has been made including the language of the applicable IIA, the scope of economic interests the term covers, limitations possibly imposed by Article 25 of the ICSID Convention,[97] and territorial limitations of where the investment can be made. If the economic interest, here the interest in social media, meets these criteria, then it will satisfy the jurisdictional requirements *ratione materiae* to maintain a claim against the host state.

Economic Interests in Social Media and Internet Platforms meet the Definition of Investment as Generally Defined in IIAs.

Simply put, social media and internet platforms must meet the definition of an investment "because only the assets or interests of investors that fall within its scope are entitled to the protections of the treaty."[98] If, and only if, social media meets this threshold requirement can social media platforms move forward to their substantive claims.

Almost all IIAs define investment similarly.[99] Under most IIAs, the term is first defined broadly to include "every kind of asset"[100] and

97. ICSID Convention, *supra* note 93, Art. 25(1); *see also* Fedax N.V. v. Republic of Venezuela, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/96/3 (July 11, 1997); Mihaly Int'l Corp. v. Democratic Republic of Sri Lanka, Award ICSID Case No. ARB/00/2 (Mar. 15, 2002).

98. Mahnaz Malik, *Recent Developments in the Definition of Investment in International Investment Agreements*, *available at* www.iisd.org/pdf/2008/dci_recent_dev.pdf.

99. MCLACHLAN, *supra* note 83, at 171, ¶ 6.26.

100. ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 65 § 1.51 (2009) (citing UK-USSR BIT (now UK-Russia) Art. 1(a)(1989); US-Argentina BIT, Art. I(1)(a) (1991)); *see also* U.S.-Egypt BIT, *supra* note 91, Art. I(1)(c).

then a non-exhaustive list of rights or interests in property follows.[101] Most U.S. treaties protecting investments are broadly defined in this manner.[102]

The tendency of modern investment agreements, especially the model agreements of capital exporting states, has been to broaden the scope of the definition of investment to include many economic interests and activities that were not originally protected under early treaties and customary international law.[103]

Originally, the term investment was confined to foreign direct investment, meaning capital that flowed from the enterprise of a person located in one state, to the enterprise of an entity controlled by the laws of another state.[104] However, the meaning of the term foreign direct investment, as it was originally understood, gradually grew more inclusive.[105] For instance, the protections offered to foreign investors were expanded in 1938, when Mexico nationalized American oil companies.[106] In response, the United States insisted that the rules

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101. MCLACHLAN, *supra* note 83, at 163, ¶ 6.01. While most IIAs are similar, it should be noted the various activities or interests covered in most IIAs are not always consistent with one another given the various types of IIAs that exist. *See* Noah Rubins, *The Notion of 'Investment' in International Investment Arbitration* in ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS 284 (Norbert Horn & Stefan M. Kröll eds., 2004). Be aware that some IIAs, such as the North American Free Trade Agreement, do not follow this method. Instead, NAFTA sets a forth a broad, but *exhaustive* list of covered economic activities that is contrasted by examples of commercial transactions which do not amount to investments. *Id.*

102. *See* 2004 U.S. Model BIT (2004).

103. M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 9 (2d ed. 2004).

104. *Id.* According to the United Nations Conference on Trade and Development (UNCTAD), foreign direct investment is defined specifically as an "investment involving a long-term relationship and reflecting a lasting interest of a resident entity in one economy (direct investor) in an entity resident in an economy other than of the investor. The direct investor's purpose is to exert a significant degree of influence on the management of the enterprise resident in the other economy. FDI involves both the initial transaction between the two entities and all subsequent transactions between them and among affiliated enterprises, both incorporated and unincorporated. FDI may be undertaken by individuals, as well as business entities." *See also* Organization for Economic Co-Operation and Development (OECD), *Benchmark Definition of Foreign Direct Investment* (3d ed. 1996), *available at* http://www.oecd.org/data oecd/10/16/2090148.pdf ("Foreign direct investment reflects the objective of obtaining a lasting interest by a resident entity in one economy ('direct investor') in an entity resident in an economy other than that of the investor ('direct investment enterprise'). The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence on the management of the enterprise. Direct investment involves both the initial transaction between the two entities and all subsequent capital transactions between them and among affiliated enterprises, both incorporated and unincorporated.").

105. Malik, *supra* note 98, at 2.

106. ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 397-402 (John H. Jackson ed., 2002). As is well known, in 1938, in response to Mexico's nationalization of

related to expropriation and nationalizing upon prompt, adequate, and effective compensation also be applied to alien's physical property located in the host state's jurisdiction.[107]

Later, in response to the International Court of Justice's decision in the *Barcelona Traction Case*,[108] modern investment agreements expanded the term investment to include many forms of intangible property including leases, mortgages, liens, some classes of loans, and shares of stock in corporations.[109] After *Barcelona Traction*, capital exporting states immediately addressed shareholder protection and other forms of intangible property in a new wave of international investment agreements.[110]

In addition to these forms of intangible property, capital exporting states next began to include protection for intellectual property[111] and some forms of government contracts.[112] For example, many BITs now "provide a detailed listing of the types of intellectual property that may be considered as a form of investment asset, for example, 'copyrights, patents, utility-model patents, industrial designs, trade-marks, trade-names, trade and business secrets, technical processes, known-how, and goodwill.'"[113]

To date no decision concerning an intellectual property rights-centered arbitration has been publicly reported.[114] However, arbitration

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American oil companies, U.S. Secretary of State Hull argued that compensation for expropriation should be "prompt, adequate, and effective." Mexico argued that the American investors should simply receive expropriation compensation on par with domestic investors according to the laws of the host government (the Calvo doctrine). Since the 1930s, the United States and other capital exporting countries have incorporated the language of Hull's formula into hundreds of Friendship, Commerce, and Navigation treaties and more modern BITs. Since then, Hull's formula has become the standard for modern IIAs. *Foreign Direct Investment (FDI)*, UNCTAD, *available at* http://www.unctad.org/templates/Page.asp?intItemID=3164&lang=1. *See also* OECD BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT (3d ed. 1996), OECD, *available at* http://www.oecd.org/dataoecd/10/16/2090148.pdf.

107. LOWENFELD, *supra* note 106, at 397-402.

108. Barcelona Traction, *supra* note 94, at 7.

109. *See* SORNARAJAH, *supra* note 103, at 10-11.

110. *See* Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, 15 (July 20). Although the treaty at issue in ELSI was negotiated and concluded long before the International Court of Justice reached its judgment in *Barcelona Traction*, it was not until after that case that many capital exporting states began to renegotiate its previous treaties protecting foreign investment through more modern bilateral trade and investment agreements.

111. SORNARAJAH, *supra* note 103, at 11.

112. *Id.* at 13.

113. Gibson, *supra* note 38 at 358 (citing German Model Treaty Concerning the Reciprocal Encouragement and Protection of Investment issued by the Federal Ministry of Economics and Labour, art. 1 (2005), *available at* http://www.fes-globalization.org/dog_publications/Appendix%201%20German%20Model%20Treaty.pdf).

114. *Id.* at 359.

panels have found that the following intangible property rights amount to investments: (1) an office construction project consisting mainly of plans and various regulatory approvals; (2) a performance contract to perform liaison customs duties;[115] (3) a hotel construction and operation contract;[116] (4) a concession agreement to develop and operate a local port terminal;[117] (5) an investment in local securities;[118] and (6) debt instruments issued by a sovereign state as broadly defined under various investment agreements.[119] Likewise, claims over rights in broadcast media[120] and rights in telecommunication properties[121] have been held to be an investment.

The trend in these cases is to prefer a broad view of the term investment, at least as that term is defined by the IIA. While a few tribunals have been reluctant to base decisions on jurisdiction solely on the language that investment means "every kind of investment,"[122] others have relied on similar language.[123] Other tribunals have simply preferred not to read any limiting phrases into the definition of investment unless the treaty provides one itself.[124]

More importantly, these cases exercise an explicit deference to the host state's conscious decision to protect investments covered by the relevant investment agreement.[125] Under this analysis, tribunals simply look to the relevant IIA's definition of investment, and assess under the customary rules of treaty interpretation as codified in the

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115. Société Générale de Surveillance S.A. v. Republic of the Phil., ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶¶ 99-111 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).

116. Holiday Inns v. Kingdom of Morocco, ICSID Case No. ARB/72/1, Order taking note of the discontinuance (Oct. 17, 1978).

117. Lanco Int'l, Inc. v. Argentine Republic, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, §15 (Dec. 8, 1998), 40 I.L.M. 457 (2001).

118. Gruslin v. Malaysia, ICSID Case No. ARB/99/3, Award, ¶ 24.1 (Nov. 27, 2000).

119. Fedax N.V. v. Republic of Venezuela, ICSID Case No. ARB/96/3, Objections to Jurisdiction, ¶¶ 1, 16 (July 11, 1997).

120. Lauder v. Czech Republic, 9 ICSID Rep. 62, Award (2001) (addressing television broadcast rights in the Czech Republic); CME Czech Republic B.V. (The Netherlands) v. Czech Republic, 9 ICSID Rep 121, Partial Award (2001) (addressing television broadcast rights in the Czech Republic for the same conduct complained of in *Lauder*); Nagel v. Czech Republic, 13 ICSID Rep. 33, Award (SCC Case 49/2002 Sept. 9, 2003).

121. Rumeli Telekom A.S. v. Kazakhstan, ICSID Case No. ARB/05/16, Award, ¶ 322 (July 29, 2008).

122. *See* Petrobart Ltd. v. Kyrgz Republic, SCC Case 126/2003, Award (Mar. 29, 2005); Jan de Nul N.V. & Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Jurisdiction (June 16, 2006).

123. *See, e.g.*, Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶¶ 118, 121 (Mar. 21, 2007) (relying on the language "any kind of property").

124. Tokios Tokeles v. Ukraine, *supra* note 94, at 52.

125. Julian Davis Mortenson, *The Meaning of "Investment": ICSID's* Travaux *and the Domain of International Investment* Law, 51 HARV. INT'L L.J. 257, 270 (2010).

Vienna Convention of the Law of Treaties ("VCLT")[126] whether the definition of investment in the IIA is broad enough to cover the asset or enterprise in question. If the economic activity or interest falls within the class of activities and interests protected as an investment, jurisdiction under the relevant IIA is appropriate.

Based on this broadening trend, social media and internet platforms such as Facebook, Google, Twitter, or YouTube would likely be able to prove that their economic interests in such platforms amount to an investment under today's modern IIA structure.

Specifically applying U.S. based social media's interests under the US-Egypt BIT,[127] investment under that agreement "means every kind of asset owned or controlled" including but not limited to *tangible and intangible property rights*, *shares*, stock, *valid intellectual and industrial rights* such as trademarks, permits, and licenses, etc.[128]

According to the customary tools of treaty interpretation found in Articles 31 and 32 of the VCLT, terms such as "every kind of asset," "every kind of investment," "intangible property rights," and "intellectual property rights" are broad enough to include the property rights included in domain names discussed above.[129]

Giving due regard to Article 31, with its emphasis that the terms of the treaty shall be interpreted (1) in good faith (2) in accordance with the *ordinary meaning* to be given to the terms of the treaty (3) in their context and (4) in the light of the treaty's object and purpose, it is highly likely that the terms "every kind of asset" including intangible property such as intellectual and industrial rights includes interests in the shares of social media corporations, the value of trademarks inherent in the domain names of social media, and may even apply to the UGC that would have been posted on the social media's platforms had internet service not been interrupted and access to social media disabled during the protests in Egypt and other Arab nations.

Furthermore, neither treaty excludes interests in domain names or internet platforms specifically or any other similar enterprise that could be analogized to such platforms predating the internet. Moreover, the treaty, as well as those with Turkey and Tunisia, fails to provide any type of explanatory phrase within the treaty itself, such as the footnotes now included in the current US Model BIT which limits the types of interests that may be considered an investment.

Consequently, based on the broad language in the US-Egypt BIT, as well as other similar IIAs, it is highly likely that the interests in

126. Vienna Convention on the Law of Treaties arts. 31-32, May 23, 1969, 1155 U.N.T.S. 331.

127. U.S.-Egypt BIT, *supra* note 91, art. I(c).

128. *Id.* art. I(c)(i)-(vii).

129. VCLT, *supra* note 126, arts. 31-32.

social media will amount to an investment as that term is defined in the US-Egypt BIT, and most likely the US BITs with other Arab nations.

Overcoming Additional Jurisdictional Requirements under ICSID

Despite the broad range of economic interests and activities protected as an "investment" under the relevant IIA, jurisdiction may still not be appropriate if it fails to meet the term investment as understood under Article 25 of the ICSID Convention.

As stated above, Article 25 of the ICSID Convention provides that: the "jurisdiction of the Centre shall extend to any legal dispute arising directly out of or in relation to an investment."[130] The ICSID Convention intentionally did not define the term investment. Extensive research into the *travaux préparatoires*[131] of the ICSID Convention decidedly demonstrates "[n]o attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre."[132]

As noted by Julian Mortenson, the original drafters of the Convention sought to limit the types of disputes that could be brought before ICSID.[133] However, the drafters also wanted to ensure that a wide range of economic interests and activities could be adjudicated by the Centre.[134] To resolve this impasse, the United Kingdom's delegation suggested that the ICSID Convention leave the term investment undefined and add a new subsection to Article 25 which defined the Centre's jurisdiction. This mechanism established "a procedure for states to notify other signatories of the categories of dispute that they would not consider submitting to arbitration."[135]

This approach provided a broad and open-ended definition of the term investment that could be limited or expanded by the individual state members through arbitration agreements, notifications to the Centre under Article 25(4), and reservations from the Convention.[136]

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130. Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 25(1), March 18, 1965, 575 U.N.T.S. 159 (1965).

131. Mortenson, *supra* note 125, at 259, 270.

132. Salini Costruttori S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 51 (July 23, 2001). *See also* Waguih Elie George Siag v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction, ¶ 65 (Apr. 11, 2007).

133. Mortenson, *supra* note 125, at 280-86.

134. *Id.*

135. *Id.* at 290 (citing Summary Proceedings of the Legal Committee Meeting (Dec. 8, 1964), in 2 HISTORY OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 59, 821-22 (1968)).

136. *Id.* at 293.

Based on this broad approach, many arbitration decisions have held that jurisdiction is nearly a nonjusticiable issue that merges with the question of party consent.[137] Tribunals following this approach have approved an extraordinarily wide array of investments including many of those listed above.[138]

Other ICSID tribunals, however, have taken a far more restrictive approach based on Christoph Schreuer's seminal treatise on the ICSID Convention in which he listed several factors considered "typical" of economic interests found to be an investment under previous ICSID proceedings including:

- "a certain duration" of the enterprise,
- "a certain regularity of profit and return,"
- an "assumption of *risk*,"
- a "substantial" commitment by the investor, and
- some "significance for the host State's development."[139]

Since Schreuer's original commentary, tribunals have turned these factors into a prescriptive set of requirements.[140] For instance, in *Salini Costruttori v. Morocco*, a case involving a highway construction contract, the tribunal turned Schreuer's factors into a rigid test now known as the *Salini Test*.[141] In its decision, the tribunal determined the claimant's contractual rights were not investments under Article 25 of the ICSID Convention, but were instead mere unenforceable promises. Since *Salini*, other tribunals have gone on to reject a totality-of-the-circumstances balancing of the factors, preferring an objective fulfillment of each element.[142]

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137. *Id.* at 269 (citing Gruslin v. Malaysia, ICSID Case No. ARB/99/3, Award, ¶¶ 13.5-13.6 (Nov. 27, 2000), 5 ICSID Rep. 483 (2006); Lanco Int'l, Inc. v. Argentine Republic, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, § 48 (Dec. 8, 1998), 40 I.L.M. 457 (2001)).

138. U.S.-Egypt BIT, *supra* note 127.

139. SCHREUER I, *supra* note 94, art. 25, ¶ 122.

140. Mortenson, *supra* note 125, at 272.

141. Salini Costruttori v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶¶ 55-57 (July 23, 2001), 42 I.L.M. 609 (2003).

142. Mortenson, *supra* note 125, at 273 (citing Helnan Int'l Hotels, A.S. v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Decision on Objection to Jurisdiction, ¶ 77 (Oct. 17, 2006); Saipem, S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 99 (Mar. 21, 2007); Malaysian Historical Salvors v. Malay., ICSID Case No. ARB/05/10, Award on Jurisdiction ¶ 106(e) ("If any of [the Salini factors] are absent, the tribunal will hesitate (and probably decline) to make a finding of "investment.")). Mr. Mortenson, however, has noted that other tribunals have hinted at a more liberal version of Salini. *See* Mortenson, *supra* note 125, at 273 (citing L.E.S.I., S.p.A. v. République algérienne démocratique et populaire, ICSID Case No. ARB/05/3, Award for Lack of Jurisdiction (July 12, 2006) Consortium Groupement Lesi-Dipenta v. République algérienne démocratique et populaire), ICSID Case No. ARB/03/8, Award for Lack of Jurisdiction

Schreuer later commented it was "unfortunate" that such practice had occurred.[143] As Schreuer explained in his second edition to his commentary, these elements were not meant to establish individual elements necessary for jurisdiction, but were merely typical of the types of economic interests brought forth under the ICSID Convention.[144] Nevertheless, as noted by Mortenson, since 2006, seven decisions have adopted the *Salini* approach, while two – *Biwater Gauff v. Tanzania* and the *Malaysian Historical Salvors* annulment – rejected it.[145] Other cases not noted by Mortenson also rejected the *Salini* test as a set of prescriptive requirements.[146]

As Mortenson notes, certain types of enterprise will likely be unaffected by the incorporation of Schreuer's factors as a prescriptive test;[147] indeed, Schreuer pulled the factors from those industries that were often brought before an ICSID body in the first place. But such rigid jurisdictional requirements will likely continue to affect pure services contracts, financial interests, and other forms of intangible property rights such as intellectual property and interests in internet based platforms.

Nevertheless, interests in social media and other internet platforms can make a compelling case that they fall within the scope of the so-called *Salini* test. But, even if such interests do not meet these rigid requirements, it is possible to bring the claim outside of ICSID or to have a hand in the selection of the tribunal itself, such that the members of the tribunal do not follow the *Salini* test. Consequently, it is still possible that interests in social media and other internet platforms will fall within the jurisdictional prerequisites to bring a claim for state suppression of internet service and the blocking of social media.

Remaining Limits on Jurisdiction Ratione Materiae: Territorial Requirements

A further limitation on jurisdiction *ratione materiae* may exist if the IIA limits the subject matter jurisdiction of a tribunal to those cases

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(Jan. 10, 2005), 19 ICSID REV.-FOREIGN INV. L.J 426 (2004); and Phoenix Action, Ltd. v. Czech, ICSID Case No. ARB/06/5, Award, ¶ 85 (Apr. 15, 2009) (turning Gaillard's approach into a rebuttable presumption that any economic activity contributes to the domestic economy).

143. CHRISTOPH SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH, & ANTHONY SINCLAIR, THE ICSID CONVENTION: A COMMENTARY 133, ¶ 171 (2d ed. 2009).

144. *Id.* ¶ 172.

145. Mortenson, *supra* note 125, at 277.

146. *See, e.g.*, Toto Costruzioni Generali S.P.A. v Republic of Leb. ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶¶ 82-84 (Sept. 11, 2009); L.E.S.I. S.p.A. et Astaldi S.p.A. v. République algérienne démocratique et populaire, ICSID Case No. ARB/05/3, Decision on Jurisdiction, ¶ 72(iv) (Jul. 12, 2006).

147. Mortenson, *supra* note 125, at 315.

over an investment that is made within the territory of the host state.[148] Few cases have turned on this requirement, focusing instead on whether an investment has been made as a whole. However, if such a requirement is necessary or read into the relevant IIA, then it surely will be raised as an objection to jurisdiction in a case involving social media because of the internet's nature to be "created" outside of the host state.

It should be noted at the outset that no such requirement in the definition of investment exists in the US-Egypt BIT or the U.S.-Turkey BIT, although each require territoriality in the application of its MFN and national treatment standards. By contrast, the US-Tunisia BIT mandates territoriality in the definition of investment. Consequently, according to the customary rules of treaty interpretation, in any potential arbitration between a U.S. based social media platform and Egypt, territoriality is not a necessary requirement.

However, assuming *arguendo* that territoriality is explicitly or implicitly required by the relevant IIA, territoriality will not necessarily deprive a tribunal of jurisdiction merely because the social media platform is owned, controlled, or originated by U.S. corporations situated in U.S. territory. Rather, the trend in international investment arbitration, especially with respect to intangible property, looks not to the physical location of the property making up the investment, but rather to where the benefits of the investment flow.[149] If the benefits of the investment touch and concern the state with which a dispute exists, jurisdiction will likely be upheld.

For example, in *Fedax N.V. v. Republic of Venezuela*,[150] the tribunal recognized the existence of an investment in debt instruments acquired on the secondary market even though those instruments were not held in the territory of Venezuela. There the tribunal held that it is a standard feature of financial transactions that the funds involved are "not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere."[151] Nevertheless, because the benefits of such instruments – credit available to Venezuela – were used by Venezuela

148. MCLACHLAN, *supra* note 83, at 180, ¶ 6.59.

149. *See* Fedax N.V. v. Republic of Venezuela, ICSID Case No. ARB/96/3, Objections to Jurisdiction, ¶ 41 (Jul. 11, 1997), 5 ICSID Rep. 186 (2002); Ceskoslovenska Obchodní Banka, A.S. v. Slovak Republic, ICSID Case No. ARB/97/4, Objections to Jurisdiction, ¶ 90 (May 24, 1999), 14 ICSID REV.-FOREIGN INV. L.J. 251 (1999) [hereinafter *CSOB v. Slovak Republic*]; Société Générale de Surveillance S.A. v. Islamic Republic of the Pak., ICSID Case No. ARB/01/13, Objections to Jurisdiction, ¶ 125 (Aug. 6, 2003) 8 ICSID Rep. 406 (2005) ; Société Générale de Surveillance S.A. v. Republic of the Phil. ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶¶ 99 -107 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005); Alpha Projektholding GmbH v. Ukr., ICSID Case No. ARB/07/16, Award, ¶¶ 277-79 (Nov. 8, 2010).

150. Fedax, ¶ 41.

151. *Id.*

for its various needs, the interest in the promissory notes and other debt instruments were considered an investment in the territory of Venezuela.[152]

Similarly, in both *SGS v. Pakistan*,[153] and *SGS v. Philippines*,[154] the tribunals noted that the pre-shipment customs inspection service contracts, carried out predominately outside the host country, amounted to an investment in the territory of Pakistan and the Philippines because the benefits of those services occurred in the territory of the host governments. In *SGS v. Pakistan*, the tribunal noted that the contract may not meet the "'traditional' notion of an investment, [but] nevertheless [the contracts] fall within the category of new investments covered by [the] BIT."[155] Also, the contracts caused an "injection of funds into the territory of Pakistan for the carrying out of SGS's engagements under the [service contracts]."[156] These attributes of the economic interests involved amounted to an investment in the territory of Pakistan.

In *SGS v. Philippines*, the tribunal went further by explaining the contract was designed "to provide services, within and outside the Philippines, with a view to improving and integrating the import services and associated customs revenue gathering of the Philippines."[157] Because those services were rendered for the benefit of the Philippines, and the customs reports and licenses were issued directly to the Philippines and not to any outside non-territorial agency, the tribunal considered that a "substantial and non-severable aspect of the overall service was provided in the Philippines."[158] Together, these facts qualified the service as one provided in the Philippines.

Likewise, in *CSOB v. the Slovak Republic*, the tribunal found that the "'entire process' of economic activity, even though particular aspects of it were not locally performed"[159] amounted to an investment in the territory of the Slovak Republic.

Finally, in *Alpha Projektholding GmbH v. Ukraine*, the tribunal dismissed the Ukraine's arguments that funds transferred outside the Ukraine for the benefit of a hotel construction project in the Ukraine

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152. *Id.* ¶ 42.

153. SGS Société Générale de Surveillance S.A. v. Islamic Republic of the Pak., ICSID Case No. ARB/01/13, Objections to Jurisdiction, ¶ 125 (Aug. 6, 2003), 8 ICSID Rep. 406 (2005) [hereinafter SGS v. Pak.].

154. SGS Société Générale de Surveillance S.A. v. Republic of the Phil., ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶¶ 99 -107 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005) [hereinafter SGS v. Phil.].

155. SGS v. Pak., ¶ 126.

156. *Id.* ¶ 136.

157. SGS v. Phil., ¶ 101.

158. *Id.* ¶ 102.

159. *Id.* ¶ 110 (citing *CSOB v. Slovak Republic*, *supra* note 149, ¶ 88).

did not meet the territoriality requirement of the relevant IIA.[160] Rather, because those funds were utilized for the benefit of the Ukraine, territoriality was met.

Based on this trend, interests in social media may also meet the territoriality requirements explicitly required or implicitly read into Arab BITs with the U.S. because the benefit of the investment in social media is located everywhere, including inside the host government.

Like sophisticated financial transactions, the use and structure of social media and the internet pay little attention to state boundaries. Rather, social media and the internet center on the user of the platform and the manner in which those users facilitate and further online relationships and share information. With respect to social media specifically, users create all of the content and provide the value of the platform from where ever they are, not where the platform exists. This phenomenon has resulted in a sea change in how we communicate and see the world such that news, events, business, and all other aspects of life are no longer solely broadcasted *to* others but broadcasted *by* others,[161] resulting in an immense value to the state in which social media exists.

Consequently, the location of the social media platform is largely irrelevant, because the benefits of its effects are everywhere, all at once, both inside and outside the host government. By extending the analysis of previous cases involving intangible property where territoriality was met when the state was benefited by the investment, tribunals will be able to uphold jurisdiction on any potential case involving social media.

No doubt, upholding jurisdiction in this manner will be controversial. Critics will likely argue that permitting a case to be brought where an investment was not actually made in the host state betrays the original purpose of agreements protecting foreign direct investment. But such criticism fails to realize the nature of and movement to e-commerce. The investment is not made in any one national jurisdiction. Like space above, the internet is everywhere, all around us, and omnipresent. The fact that the internet knows no national boundaries is what creates its true value. It allows information to be shared instantly, all at once, everywhere. When states block the internet they deprive the internet of its value and the value of the investment made therein.

Another criticism lies in the traditional notion of positivism. Historically, states, as a function of sovereignty, placed conditions on

160. Alpha Projektholding GmbH v. Ukr., ICSID Case No. ARB/07/16, Award, ¶¶ 277-79 (Nov. 8, 2010).

161. *See* Scott Monty, Foreword to ERIK QUALMAN, SOCIALNOMICS: HOW SOCIAL MEDIA TRANSFORMS THE WAY WE LIVE AND DO BUSINESS, xiv (2011).

the entry of aliens and their property within its borders.[162] To stoke investment and improve economic conditions within their borders, states have given up attributes of their sovereignty by entering IIAs. Historically, then, to be included within the subject matter jurisdiction of the IIA, the investment must have been located physically within the state's borders or targeted to specifically affect interests therein. Despite the modern trend articulated above, allowing economic interests in e-commerce to gain access to the state's market simply because the investment exists online and has collateral benefits for the state will strip the state of far more sovereignty than it originally intended. Even in those cases where intangibles were held outside the state, the overall investment was specifically targeted to the respondent state. In a general sense, interests in social media are not.

However, with the ever increasing scope of investments protected within today's modern investment law regime, protections have been extended far beyond those originally contemplated, and will often be located outside the host government. Had the state intended to restrict the scope of investments that may have been protected, the host states should have included exceptions or restrictions in the relevant IIA. Moreover, social media platforms often do make actual investments in the host states to further the reach of their platforms. For instance, Facebook often hires programmers and staff members overseas to extend its platforms in new markets.[163]

Like in *SGS v. Pakistan* and *SGS v. Philippines*, where the tribunals considered that having local offices in the host governments constituted part of the overall investment,[164] these activities may overcome general objections to any arguments based on positivism.

Despite the tension between the scope of investments under IIAs and between limitations on jurisdiction found in both IIAs and Article 25 of the ICSID Convention, international investment law has proven highly adept at allowing new forms of commerce to be protected under investment protection. While there are legitimate arguments for not recognizing new media as an investment in the territory of a host state, it is highly unlikely such a result will occur given the size, scope, and growth of e-commerce. Consequently, given the internet's effects on all states, and modern trends in international investment arbitration, it is far more likely that investment in social media will meet the jurisdictional requirements embedded in international investment law.

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162. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 531 (7th ed. 2008).

163. *See generally* Facebook Careers, http://www.facebook.com/careers/ (last visited Jan. 21, 2012) (listing job openings, with many international postings in host countries).

164. *See* SGS v. Phil., ¶ 104 -08.

The Substantive Protections in International Investment Agreements Prevent States from Blocking Websites

Once interests in social media meet these jurisdictional thresholds, potential claimants must still prove that their interests have been mistreated under the relevant IIA. IIAs contain a myriad protections for covered investors. By and large though, most contain three core protections: (1) the prohibition on expropriation without adequate, prompt, and effective, compensation; (2) the obligation to afford fair and equitable treatment; and (3) the obligation to afford similar treatment as other aliens and nationals.

No attempt is made here to thoroughly exhaust and analyze whether censorship during the Arab Spring, or by other states such as China, violated these substantive protections. Such an effort goes beyond the scope of this article, and would require a significant discussion of the substantive protections, a detailed analysis of international responsibility including conditions precluding wrongfulness during national emergencies, and a comprehensive examination of the factual situation in each state that blocks social media.

However, on a cursory review of at least the standards on expropriation and the obligation to afford fair and equitable treatment, it is likely that such states have breached the protections afforded in relevant investment agreements.

Blocking Access to Social Media and the Internet May Amount to Expropriation

International law has long prohibited nationalizations and expropriations without adequate, prompt, and effective compensation (the Hull formula). This standard has long been included in modern IIAs.[165]

The US-Egypt IIA is typical of most expropriation provisions. It provides:

> No investment or any part of an investment of a national or company of either Party shall be expropriated or nationalized by the other Party or by a subdivision thereof or subjected to any other measure, direct or indirect, if the effect of such other measure, or a series of such other measures, would be tantamount to expropriation or nationalization . . . .

165. *See, e.g.*, North American Free Trade Agreement art. 1110, Dec. 17, 1992, 32 I.L.M. 289 (1993); Bilateral Investment Treaty, U.S.-Egypt, Art. III(1), Mar. 11, 1986, *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002813.asp.

Most IIAs, including the US-Egypt BIT, do not provide a definition of expropriation. However, expropriatory conduct is generally held to include

> not only open, deliberate[,] and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[166]

An expropriation can take many forms and be both direct and indirect.[167] As can be expected, many tribunals have taken a broad view of what amounts to an expropriation.[168] Under this view a government measure that interferes with the use of foreign investors' property such that they cannot use the property or reap expected benefits there from amounts to an expropriation.[169] Other tribunals have taken a much more narrow view.[170] In these cases, conduct considered expropriatory occurs when the regulatory action deprives the claimant of control of his company, interferes directly in the internal operations, or displaces the claimant as the controlling shareholder.[171]

In analyzing the Arab Spring, these competing methods would likely be pitted against each other in any case involving the crackdown on social media. Balancing the police powers of the state, the proportionality of the means involved, and other factors will also weigh heavily on any potential tribunal.

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166. Metalclad Corp. v. United Mexican States, ICSID Case No. ARB/97/1, Award, ¶ 103 (Aug. 30, 2000), 40 I.L.M. 36 (2001).

167. MCLACHLAN, *supra* note 83 at 290-97, ¶¶ 8.68 – 8.89.

168. Starrett Housing Corp. v. Iran, 4 Iran-US Cl. Trib. Rep. 122, 154 (1983); Tippets v. Iran, 6 Iran-US Cl. Trib. Rep. 219, 225 (1984); Metalclad v. United Mexican States, ¶ 107; Waste Mgmt., Inc., v. United Mexican States, ICSID Case No. ARB(AF)00/3, Award, ¶¶ 143-44 (Apr. 30, 2004), 43 I.L.M. 967 (2004).

169. John B. Fowles, *Swords into Plowhsares: Softening the Edge of NAFTA's Chapter 11 Regulatory Expropriations Provisions*, 36 CUMB. L. REV. 83, 85 (2006).

170. S.D. Myers, Inc. v. Canada, 40 I.L.M. 1408, ¶¶ 281-82 (NAFTA/UNCITRAL 2000); Pope & Talbot Inc. v. Canada, 40 I.L.M. 258, ¶¶ 96, 100-02 (NAFTA 2000); Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, ¶ 100 (2002); Methanex Corp. v. United States, 44 I.L.M. 1345, ¶ 23 (NAFTA/UNCITRAL, 2005).

171. Joel C. Beauvais, Note, *Regulatory Expropriations under NAFTA: Emerging Principles and Lingering Doubts*, 10 N.Y.U. ENVTL. L.J. 245, 248 (2002); Michael G. Parisi, *Moving Towards Transparency? An Examination of Regulatory Takings in International Law*, 19 EMORY INT'L L. REV. 383, 391 (2005).

Nevertheless, a strong case can be made that under either view, the economic interest in social media is expropriated when states shut down internet access and block social media. Under the broad view, the government measures taken certainly interfered with social media and internet services' expected property rights and prevented those interests from receiving the expected benefits inherent therein. Under the narrow view though, the actions taken by Egypt and other Arab States did not divest shareholders of their shares, wrest control of any corporation away from its officers, or even interfere with the corporation's internal affairs. Then again, even under the narrow view, blocking access to the domain name may be akin to preventing someone access to their physical property such that a digital taking has occurred even under the narrow view.

Whether an expropriation has occurred will also depend heavily on the facts of the situation. Given the political turmoil in Egypt, Tunisia, Libya, and other Arab States since 2011, states will certainly argue their actions were taken in a time of national emergency and invoke necessity, both as a non-precluded measure, if available under the relevant IIA, and as a condition precluding the wrongfulness of their conduct under customary international law. Necessity is available as a non-precluded measure if the relevant IIA provides necessity as a basis for not providing the requisite standards of treatment.[172] Indeed the US-Egypt BIT contains such a clause in Article X allowing "all measures necessary for the maintenance of public order. . . ."[173]

Under customary international law as reflected under Article 25 of the Articles of State Responsibility,[174] necessity "may not be invoked by a State as a ground for precluding the wrongfulness of an act . . . unless the act: (*a*) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (*b*) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."[175] Article 25 also states that "necessity may not be invoked by a State as a ground for precluding wrongfulness if . . . the State has contributed to the situation of necessity."[176]

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172. *See* LG&E Energy Corp. v. Argentine Republic (Award) ICSID Case No. ARB/02/1, ¶¶ 226-61 (recognizing that the "state of necessity" exist in international law, particularly in ¶ 245) (2006); CMS Gas Transmission Co. v. Argentine Republic (Award) ICSID Case No ARB/01/8, ¶¶ 101-09, 121-36 (2005); Sempra Energy Int'l v. Argentine Republic (Annulment Proceeding) ICSID Case No. ARB/02/16, ¶¶ 159-200 (2010).

173. U.S.-Egypt BIT, *supra* note 91, art. X.

174. *See Gabcikovo-Nagymaros Project* (Hung. v. Slovn.), 1997 I.C.J. 7, 39-41 (Sept. 25).

175. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/RES/56/83, art.25(1) (Jan. 28, 2002).

176. *Id.* art. 25(2).

Whether either condition removes potential liability for the blocking of internet access during the Arab Spring will depend heavily on the facts of each state's conduct, and the manner in which such conditions are interpreted under traditional methods of interpretation.[177] Nevertheless, depending on the specific tribunal's view, it is highly possible that certain forms of internet censorship during the Arab Spring and in other states amount to an expropriation of the investment in social media and other internet platforms.

Denying Access to Social Media and the Internet Likely Violates the Fair and Equitable Treatment Standard

Most IIAs require the host government treat an investment in accordance with the fair and equitable treatment ("FET") standard. FET is a fixed standard that applies a level of treatment owed to foreign investors regardless of how a host state treats its own nationals.[178]

While most IIAs outright require FET, the US-Egypt BIT merely requires that the "treatment, protection and security of investments shall never be less than that required by international law and national legislation." Such language likely means that Egypt only applies the minimum standard of treatment ("MST") found in customary international law. Typically, the MST requires foreign nations to treat aliens and their property in a manner that would avoid "an outrage, [ ] bad faith, [some] willful neglect of duty, or [ ] an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[179]

Since the decision in *Glamis Gold, Ltd v. United States of America*,[180] it has been discussed whether the MST has evolved beyond the *Neer* standard to include some of the substantive protections afforded by the FET standard.[181] Based on *Glamis*, it is likely that the MST is still a floor, below FET; whether the reaches of that floor have shifted higher is another issue.

However, if a claim is brought under some other IIA protecting the fair and equitable treatment of investments, then the state suppression of internet access and the blocking of social media may violate the FET standard dependent on the facts of the suppression.

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177. *See generally* Javier Garcia Olmedo, *The Balance between NPM Clauses and Investors Protection under Bits: The Enron Annulment Decision*, 16 No. 1 INT. B. ASS'N ARB. NEWS 178 (2011).

178. Margaret Clare Ryan, *Glamis Gold, Ltd. v. The United States and the Fair and Equitable Treatment Standard*, 56 MCGILL L.J. 919, 927 (2011).

179. Neer v. United Mexican States, 4 R.I.A.A. 60, 61-62 (1926).

180. Glamis Gold, Ltd v. United States of America, Award, 48 ILM 1039 (June 8 2009).

181. *See* Ryan, *supra* note 178, at 928; *see also* Merrill & Ring Forestry LP v. Canada 48 ILM 1038 (2010).

Cases involving the FET standard fall into two broad categories: (1) the treatment of investors in the courts of the host government; and (2) administrative or executive decision making. In the case of the Arab Spring, the actions to shut down internet activity and block social media fall within the second category.

The majority of cases involving FET in the context of administrative decision-making have been concerned with the licensure of investments, or a fundamental change in the law affecting the investment climate.[182] In determining whether the FET standard has been breached, tribunals often evaluate these issues according to the legitimate expectations of the investor and whether the investor's property rights have been afforded due process.[183]

In *Tecmed*, the tribunal considered that the FET standard, in light of the good faith principle established by international law, required host governments to provide investments "treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment[,]"[184] including the host State (1) "to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations[;]"[185] (2) to act consistently, without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities;[186] (3) to "use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments[;]"[187] and (4) "not to deprive the investor of its investment without the required compensation."[188]

The tribunal continued:

> [F]ailure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and

182. MCLACHLAN, *supra* note 83 at 233-34 ¶ 7.99.

183. *Id.*; *See also* Occidental Exploration and Production Co v. Republic of Ecuador (Award) UNCITRAL (2004); Técnicas Medioambientales Teemed S.A. v. United Mexican States ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), 43 I.L.M 133, ¶173 (2004).

184. Técnicas Medioambientales Teemed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), 43 I.L.M. 133, ¶154 (2004).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

> protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle.[189]

The FET standard also requires the host government to provide due-process in its decision making. Where states engage in a process of discrimination, lack of transparency, use of powers for improper purposes, inconsistently, for purposes of coercion and harassment, or in bad faith, due process is denied to the investor.[190]

Each of these considerations applies in some manner to the Arab Spring, and how access to the internet and to social media was blocked during the protests. While these actions must again be taken in context with the state's need to respond to the emergency presented by the protests and demonstrations, there is a strong case that the states violated the substantive rights to FET held by digital platforms.

CONCLUSIONS

Social media's power to organize and speak is undeniable. During the protests in Cairo, one activist powerfully tweeted: "We use Facebook to schedule the protests, Twitter to coordinate, and YouTube to tell the world[.]"[191] When we look back at the Arab Spring and its consequences, perhaps we will be able to add that Facebook, Google, Twitter, and YouTube used the power of investment law to defend the right to protest, coordinate, and tell the world.

Bringing claims on behalf of social media and other internet platforms will be filled with procedural and substantive pitfalls. But, based on current trends in international investment arbitration, it is highly likely that such platforms will meet the jurisdictional challenges that will ultimately be raised by those states blocking access to social media and the internet at large.

If social media and internet platforms can successfully hurdle those jurisdictional bars, and ultimately prove their substantive claims, international investment law can be used as a powerful tool, by powerful corporations, to uphold and enhance the human rights of oppressed peoples.

Between November 1989, as the Berlin Wall began to tumble, and December 1991, the fall of the Soviet Union, the world watched in amazement how economic and political liberalization lifted the Iron Curtain.[192] At the fall of the Soviet Union, three persons, the President,

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189. *Id.*

190. MCLACHLAN, *supra* note 83, at 239 ¶ 7.115.

191. Howard, *supra* note 29.

192. *See* Moran R. Davis, *How Central Asia was Won: A Revival of the "the Great Game"* 36 N.C. J. INT'L L. & COM. REG. 417, 418 (2011) *citing* JOHN LEWIS GADDIS, THE

the Pope, and the Prime Minister – Ronald Reagan, John Paul II, and Margaret Thatcher – were praised for their roles above all others in lifting the Iron Curtain.[193] Today, there exists a digital curtain shrouding totalitarian and oppressive regimes preventing peoples' basic human liberties: freedom of speech, assembly, thought, expression, and assembly. Private actors have tools that did not truly exist at the collapse of the Soviet Union to affect such sweeping change. Today they do. Facebook, Google, and Twitter have the power, and the means, to challenge those who would oppress and prevent the establishment of self-government.

Such would be a welcome development. Recent scholarship on the intersection of human rights and international investment law tends to bemoan international investment law's impact on human rights.[194] However, the issue of internet censorship and the blocking of social media presents a new opportunity to demonstrate how international investment law can be used to defend and increase access to human rights, albeit in a nontraditional method.

COLD WAR: A NEW HISTORY 273-41 (2005) (analyzing the significant themes permeating the Cold War); PAUL KENGOR, THE CRUSADER: RONALD REAGAN AND THE FALL OF COMMUNISM 288-91 (2006) (detailing President Ronald Reagan's personal role in subverting the Soviet system of government); DON OBERDORFER, FROM THE COLD WAR TO A NEW ERA 245-48 (1998) (narrating the Cold War from 1983-1992); PETER SCHWEIZER, REAGAN'S WAR: THE EPIC STORY OF HIS FORTY-YEAR STRUGGLE AND FINAL TRIUMPH OVER COMMUNISM 279 (2002) (summarizing and analyzing the fall of the USSR and the associated repercussions).

193. *See* JOHN O'SULLIVAN, THE PRESIDENT, THE POPE, AND THE PRIME MINISTER: THREE WHO CHANGED THE WORLD (2006) (profiling President Ronald Reagan, British Prime Minister Margaret Thatcher, and Pope John Paul II and their roles in the fall of the Soviet Union).

194. *See* Megan Wells, *Bilateral Investment Treaties: A Friend or Foe to Human Rights*, 39 DENV. J. INT'L L & POL'Y 483, 484 (2010); Marc Jacob, Inst. for Dev. & Peace, International Investment Agreements and Human Rights 24 (2011), *available at* http://www.humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf; Valentian S. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law*, 42 Colum. Hum. Rts. L. Rev. 797, 800-01 (2011); Barnali Choudhury, *Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements* 49 COLUM. J. TRANSNAT'L L. 670, 672 (2011).