



expert talk

THE 'TIKTOK BAN': Illegality of India's ban on Chinese apps under international law

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BACKGROUND

1. On 29 June, the Indian Ministry of Electronics and IT (“**MEIT**”) released a press note (“**Blocking Order**”), announcing that it had banned 59 mobile applications based out of China (“**Chinese Apps**”) under Section 69A of the Information Technology Act 2000ⁱ. This Blocking Order was prompted by national security concerns arising from China’s data-sharing law that requires companies of Chinese origin to share the data collected by them with Chinese intelligence agencies (“**Chinese Data Law**”). Subsequently, on 24 July, the Indian government also blocked 47 additional apps that were reportedly clones or lite versions of the Chinese Apps.ⁱⁱ

REGRESSIVE TURN IN INTERNATIONAL DIPLOMACY

2. Tensions between India and China have been brewing for the past few months, due to India placing higher restrictions on Chinese FDIⁱⁱⁱ and its public turn to ‘*Aatmanirbharta*’, a clarion call for Indian consumers and businesses to use domestic products,^{iv} and lower India’s significant dependence on Chinese imports. However, the immediate catalyst for the Blocking Order seems to be the spurt in clashes across the Indo-China border, which have resulted in martyrdom of several Indian soldiers, such as at Galwan valley.^v These clashes have also had other fallouts, such as Indian and Chinese customs authorities delaying each other’s exports by invoking extremely stringent customs inspections.^{vi}

3. Viewed in this light, the Blocking Order is a clear spill-over of the military tensions between the two States. Though the Order itself does not mention this background, abundant public debate surrounding it has confirmed as much. This is a regressive shift in the way states deal with their diplomatic disputes.

4. Many of the international diplomacy efforts towards the end of the 20th century, including notably the discussions surrounding the GATT and WTO, were focused on reaching consensus that military or diplomatic tensions should not be carried over into economic or trade conflicts, as the latter can severely hamper global economic growth and development. Incidents such as the Blocking Order threaten to unravel this consensus that has developed since.

IS THERE RECOURSE AGAINST THE BLOCKING ORDER UNDER INTERNATIONAL INVESTMENT LAW?

5. Actions such as India's are not uncommon, insofar as foreign investment in any country is often subjected to norms and regulations which may appear unfair, arbitrary or discriminatory to foreign investors. Moreover, foreign investors are often unfamiliar with the correct fora and procedures by which they can make



representations against or challenge these laws in the host state. This creates a big uncertainty for the foreign investor, and often results in reduced outflow of foreign investment.

6. To mitigate this uncertainty, States enter into bilateral or multilateral investment treaties with each other. Under these treaties, States assure the investors of the other state that any investment made in their territory would be offered a minimum number of protections. If these protections are violated, the individual investor is offered a right to directly sue the host State before an international arbitral tribunal.

7. This procedure is known as investor-state dispute settlement (“**ISDS**”). In practice, it works a lot like a regular commercial arbitration, with the difference that ISDS is largely decided as per international law, and in particular, the terms of the bilateral or multilateral investment treaty under which the claim is being brought. The final award of such an arbitration needs to be enforced in a place where the respondent state has assets, much like in commercial arbitration.

8. India and China have a bilateral investment treaty which was entered into force in 2007 (“**the BIT**”). Although it was terminated by India in October 2018,^{vii} Article 16 of the BIT (commonly known as the “sunset clause”) provides that investments made before the BIT was terminated would continue to be protected under the BIT for 15 years. Most of the Chinese Apps have been operating in India before 2018. TikTok, for instance, had been launched outside China by 2017, and had an estimated 120 million Indian users by June 2019.^{viii}

9. An important pre-condition to avail the BIT’s benefits is that the foreign investor must have assets that qualify as an ‘investment’ under the BIT. The BIT does not expressly label websites or apps as ‘investments’. However, the definition is broad enough for Chinese Apps to be encompassed within it.

(a) First, intangible properties such as intellectual property rights (“**IPR**”) are expressly considered as ‘investment’ under the BIT. Apps can be considered as IPR in three ways:

(i) The source code and user interface of a mobile app will constitute IPR.

(ii) Apps enjoy market share and goodwill, which are widely recognised as IPR.

(iii) A website domain name shall constitute a trademark.^{ix}

(b) Second, contractual rights to receive money, or some performance having



financial value are expressly considered as 'investment' under the BIT. The App owners would own such rights in three ways:

- (i) App owners gain revenues from their apps by allowing ads. These contractual rights to allow ads in exchange for payments may be considered as rights to money under contracts.
- (ii) Similarly, app owners often have terms of agreement with their end users whereby the users agree for the app owner to be able to use or own data pertaining to the use of the app. This can also be seen as a right to performance under a contract having a financial value.

10. Therefore, the Chinese Apps are likely to be considered as 'investments' protected under the BIT.

WHAT PROTECTIONS OWED TOWARDS THE CHINESE APPS MAY HAVE BEEN BREACHED?

11. An investment enjoys a range of protections under the BIT such as right to freely repatriate profits, guarantee of full protection and security, most favoured nation treatment, etc. The Blocking Order most squarely threatens two protections in particular.

12. The first is the protection against expropriation or nationalisation under Article 5 of the BIT. If a State expropriates or nationalizes an investment, it must provide fair and equitable compensation to the investor.

13. Generally, expropriation is understood in its 'direct' sense, i.e., when the government takes over the ownership of a property. However, international investment law also envisages 'indirect expropriations', where the investment is adversely affected without any formal transfer of its ownership. In the same vein, the BIT expressly recognises indirect expropriation as intentional measures that render an investment substantially unproductive or incapable of yielding a return.

14. It is clear that the Blocking Order has rendered the Chinese Apps substantially unproductive and incapable of yielding any return to their owners, whether through ad-based revenues, memberships, or otherwise. Therefore, the Blocking Order may constitute an indirect expropriation.

15. However, the BIT provides that a measure will not be considered expropriation if it is a regulatory measure taken in public interest in a non-discriminatory manner.^x As to whether the Blocking Order fulfils these criteria, the following points may be noted:

- (a) Regulatory nature: It is clear that the Blocking Order was made in exercise of regulatory powers;



- (b) Public Interest: The Blocking Order was purportedly made for national security, public order and protection of data privacy. Therefore, the blocking is ostensibly in public interest;
- (c) Non-discriminatory: Discrimination occurs when investments in like circumstances are treated differently.^{xi} Although the Order doesn't say so, it is clear that the blocked Apps were exclusively Chinese. The owners of the Chinese Apps could demonstrate that other apps from countries having data laws similar to the Chinese Data Law were not blocked. Moreover, certain other prominent Chinese apps continue to operate in India.^{xii} Either of these facts may amount to discrimination. Notably, the Chinese State has already labelled the Blocking Order as discriminatory.^{xiii}

16. The second protection threatened by the Blocking Order is the guarantee of "fair and equitable treatment" ("**FET**") provided in Article 3 of the BIT. FET is understood as encompassing, inter alia, the obligation to accord due process to investors. Due process requires that the host state must give advance notice of adverse action to the concerned investors, provide them an opportunity of being heard, and decide the matter by a fair and unbiased adjudicator.^{xiv}

17. These due process requirements are largely built into the Information Technology (Procedures and Safeguards for blocking for access of information by public) Rules 2009 ("**Blocking Rules**"), under which the Blocking Order was passed. The ordinary procedure for blocking under the Blocking Rules is as follows:

- (a) Any person may raise a complaint to the nodal officer of a Central or State ministry to block a website or app.^{xv}
- (b) If the ministry is satisfied that there is need to take action on the complaint, the nodal officer will forward the complaint to a 'Designated Officer' of the Central Government.
- (c) A committee headed by the Designated Officer ("**Committee**") will then notify the person/entity hosting that website/app ("**Host**"), and ask the Host to respond to the complaint in person before the Committee.
- (d) After hearing the Host, if the Committee is satisfied that the requirements of Section 69A are fulfilled, it will make a recommendation to the Secretary, MEIT, Government of India ("**IT Secretary**").
- (e) If the IT Secretary approves the recommendation, the Designated Officer shall direct any government agency or intermediary to block the website or app.



18. In blocking the Chinese Apps, no such procedure was followed.^{xvi}

19. On the other hand, in emergency cases where no delay is acceptable, the Blocking Rules allow the Designated Officer to recommend blocking without placing the complaint before the Committee or hearing the Host. However, such a blocking can only be temporary. In such case, within 48 hours of blocking, the complaint must be brought to the Committee and the Host must be given an opportunity of being heard. It is only after this that the blocking can be made permanent.

20. The Blocking Order appears to have followed the emergency procedure.^{xvii} However, the Chinese Apps have been operating in India for quite a few years. Similarly, the Chinese Data Law has been in place much before the Order. Therefore, there was no apparent 'emergency' that justifies the use of this procedure.

21. Moreover, the Blocking Rules mandate that a complaint has to be decided within 7 working days from the date of receiving it from the nodal officer. It has now been more than 3 weeks since the Blocking Order, but there is no news of the emergency order being confirmed by the Committee.^{xviii}

22. These procedural irregularities may violate India's obligation to accord due process to Chinese investors.

WHAT DEFENCES CAN INDIA TAKE?

23. Article 14 of the BIT provides that the protections offered thereunder do not restrict a state from taking any action for the protection of its 'essential security interests' or in circumstances of 'extreme emergency'. The Indian state may seek to defend itself under this provision. However, this provision is unlikely to apply, since:

- (a) There is no 'extreme emergency'. Both the Chinese Apps and the Chinese Data Law have been in place for quite some time.
- (b) The term 'essential security interests' is interpreted narrowly, such that a perceived threat of aggression or isolated clashes may not be enough to invoke this clause.^{xix} More particularly, India would have to show that the Apps gathered the kind of data which when shared with the Chinese State could be used by the latter for a strategic military advantage.

24. In addition, Article 14 only exempts those actions that are taken in accordance with domestic laws, reasonably applied and on a non-discriminatory basis. As



discussed previously, it is questionable whether the Blocking Order was in accordance with Indian laws and non-discriminatory in nature. Moreover, such measures do not satisfy the threshold of necessity and proportionality under international law in any event.

25. Thus, not many defences seem to be available to India to justify its conduct.

WHAT RELIEFS WILL THE OWNERS OF THE CHINESE APPS BE ABLE TO SEEK AGAINST INDIA?

26. The most common remedy sought under international investment law is compensation. This would include any reputational harm suffered by the Apps, the lost profits for any period of time during which the Apps were blocked, as well as interest on the same. These numbers can be significant; TikTok alone earned a profit 3.4 crore in the previous financial year, and was expected to more than double its revenues this year.^{xx}

27. If the Apps are forced to wind up their operations in India altogether, the lost profits could be forward looking and include future losses. In such a case, the measure for compensation will be “full compensation”, which would wipe-out the effect of such measure entirely.

28. On the other hand, the Chinese Apps may also seek restitution, i.e., reversal of the Blocking Order and reinstatement of the Apps in India. This remedy is sought more rarely, but is nevertheless available.^{xxi}

29. There may also be an avenue to seek temporary measures, such as suspension of the Blocking Order pending the arbitration.

CONCLUSION

30. International diplomacy experts may differ on what kind of an approach India must take to counter China’s military aggressions, or its exertion of economic dominance over India. It may well be the case that in good time the actions taken by India are able to contain Chinese aggression. However, measures such as the Blocking Order should still be discouraged, not only because they reflect a regressive approach to international diplomacy, but also because they are often executed in a manner that violates India’s obligations under international law.

32. The Chinese State itself would be unlikely to be able to have India’s decision reversed before a WTO panel, given the absence of any sector-specific commitments owed by India towards mobile app operators,^{xxii} and the plethora of general and security exceptions under GATS.



33. In this scenario, Chinese investors would likely resort to claims against the Indian state directly through the ambit of international investment law. If these claims succeed, India may have to recall the Order or pay large sums in compensation.

ⁱ Press Information Bureau, Delhi. (2020, June 29). Government Bans 59 mobile apps which are prejudicial to sovereignty and integrity of India, defence of India, security of state and public order. Delhi, Delhi, India. Retrieved from <https://pib.gov.in/PressReleasePage.aspx?PRID=1635206>.

ⁱⁱ Shrivastava, R., & Sandhu, K. K. (2020, July 27). *India bans 47 Chinese apps; over 250 more under scanner for user privacy violation*. Retrieved from India Today: <https://www.indiatoday.in/india/story/pubg-alibaba-xiaomi-to-be-banned-india-prepares-list-of-over-250-chinese-apps-1704814-2020-07-27>.

ⁱⁱⁱ Padakandla, S. R., & Sahoo, N. (2020, May 1). *India's China FDI Gamble*. Retrieved from The Diplomat: <https://thediplomat.com/2020/05/indias-china-fdi-gamble/>.

^{iv} Press Information Bureau Delhi. (2020, May 13). *Ek Sankalp, Ek Lakshya – Aatmanirbhar Bharat: Shri Amit Shah*. Retrieved from Press Information Bureau, Government of India: <https://pib.gov.in/PressReleasePage.aspx?PRID=1623511>.

^v Hindustan Times Correspondent. (2020, June 22). *Galwan Valley clash: Chinese commanding officer among several killed along LAC*. Retrieved from Hindustan Times: <https://www.hindustantimes.com/india-news/chinese-commanding-officer-killed-in-galwan-valley-clash/story-oRS6OrVIT92GCVIYAGUGhK.html>.

^{vi} Jestin, P. (2020, July 03). *India Customs tightens clearance process for Chinese imports*. Retrieved from Independent Commodity Intelligence Services: <https://www.icis.com/explore/resources/news/2020/07/03/10526200/india-customs-tightens-clearance-process-for-chinese-imports>.

^{vii} Department of Economic Affairs. (n.d.). *Bilateral Investment Treaties (BITs)/Agreements*. Retrieved from Department of Economic Affairs (DEA), Government of India: <https://dea.gov.in/bipa?page=5>.

^{viii} Iqbal, M. (2020, June 23). *TikTok Revenue and Usage Statistics (2020)*. Retrieved from Business of Apps: <https://www.businessofapps.com/data/tik-tok-statistics/>.

^{ix} Mathew, D. (2001). Testing the Jurisdictional Limits of the International Investment regime: The Blocking of Social Media and Internet Censorship. *Denver Journal of International Law and Policy*, 400.

^x This is similar to the well-known 'police powers' doctrine in international investment law, that gives a State free reign to regulate public interest in its territory, even if it adversely affects investment.

^{xi} ADC Affiliate Limited and AADC & AMC Management Ltd v. The Republic of Hungary, ICSID Case No. ARB/03/16 (September 27, 2006), ¶1442; Mercer International Inc. v. Canada, ICSID Case No. ARB (AF)/12/3 (March 2, 2018), ¶17.6.



- ^{xii} Bhattacharya, A. (2020, July 21). *While TikTok is banned, another app by its parent company is going strong in India*. Retrieved from Scroll.in: <https://scroll.in/article/968039/while-tiktok-is-banned-another-app-by-its-parent-company-is-going-strong-in-india>.
- ^{xiii} Patranobis, S. (2020, July 3). *Ban on apps discriminatory under WTO rules: Beijing*. Retrieved from Hindustan Times: <https://www.hindustantimes.com/india-news/ban-on-apps-discriminatory-under-wto-rules-beijing/story-RnfGArJ9QVe7tM6e1OltPqK.html>; Ray, A. (2020, June 30). *India's ban on TikTok and other Chinese apps 'selective, against WTO rules': China*. Retrieved from Live Mint: <https://www.livemint.com/news/india/india-s-ban-on-tiktok-and-other-chinese-apps-selective-against-wto-rules-china-11593521903807.html>.
- ^{xiv} ADC Affiliate Limited and AADC & AMC Management Ltd v. The Republic of Hungary, ICSID Case No. ARB/03/16 (September 27, 2006), ¶1435.
- ^{xv} The Central Government can also notify other specific agencies to whom such complaint may be raised.
- ^{xvi} Dhonchak, A., & Purohit, N. (2020, July 1). *Is India's ban on Tiktok and 58 other Chinese Apps consistent with the provisions of IT Act?* Retrieved from Scoll.in: <https://scroll.in/article/966131/is-indias-ban-on-tiktok-and-58-other-chinese-apps-consistent-with-the-provisions-of-it-act>.
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- ^{xviii} India.com News Desk. (2020, July 13). *TikTok Returning in India After July 22?* Retrieved from India.com: <https://www.india.com/news/india/tiktok-ban-news-tiktok-returning-in-india-after-july-22-4082162/>.
- ^{xix} Moon, W. J. (2012). Essential Security Interests in International Investment Agreements. *Journal of International Economic Law*, 481-500.
- ^{xx} Manali, & Mudit, K. (2020, June 30). *How much money does TikTok make in India?* Retrieved from Business Today: [https://www.businesstoday.in/sectors/it/tiktok-ban-chinese-apps-banned-in-india-bytedance-wechat-helo-club-factory/story/408446.html#:~:text=The%20video%20platform%20clocked%20in,of%20Corporate%20\(MCA\)%20filings](https://www.businesstoday.in/sectors/it/tiktok-ban-chinese-apps-banned-in-india-bytedance-wechat-helo-club-factory/story/408446.html#:~:text=The%20video%20platform%20clocked%20in,of%20Corporate%20(MCA)%20filings).
- ^{xxi} Enron Corporation and Ponderosa Assets L.P., ICSID Case No. ARB/01/3 (January 14, 2004), ¶179; Dolzer, R., & Schreuer, C. (2012). *Principles of International Investment Law*. Oxford University Press, p. 293-294.
- ^{xxii} Government of India. (1998, February 26). *Indian Papers/submissions in WTO - General Agreement of Trade in Services (GATS) Schedule of Specific Commitments*. Retrieved from Department of Commerce, Ministry of Commerce and Industry: https://commerce.gov.in/international_next_WTO.aspx?LinkID=31&id=20.



About Us

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- Advising an Indian company for its dispute against a Turkish employer relating to the construction of a circulating fluidized bed combustion boiler in Istanbul, Turkey (ICC Rules, Turkey seated, Turkish law)
- Representing a Singaporean and an Indian company in an ad-hoc arbitration concerning termination of a contract for conversion of a mobile offshore drilling unit to a mobile offshore production unit, against an Indian state-owned enterprise (India seated, Indian law)
- Representing two Singaporean upstream oil and gas companies in an arbitration for their disputes under a joint venture agreement against their ex-managing director for breach of fiduciary duties and non-compete agreement (SIAC Rules, Singapore seated, Singapore law)
- Representing an Indian company in an arbitration concerning the termination of a contract for the construction of an ethanol and power plant in Philippines against an Australian employer and Filipino co-contractor (SIAC Rules, Singapore seated, English law)
- Advising a Singaporean company for its disputes under a charter party settlement agreement with a shipping company based in Bahamas (LMAA Rules, London seated, English Law)



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- Mr. Tom Glasgow, CIO (Asia) of Omni Bridgeway

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