Investment claims vis-à-vis India's ban on Chinese applications: Mapping India's position under India-China BIT

- *by Rakesh Kumar Sahu, Year IV*
National University of Study and Research in Law, Ranchi
&
Rajarshi Singh, Year IV
National University of Study and Research in Law, Ranchi

Introduction

The recent India-China border standoff has stressed the relationship between the two Asian superpowers. The effects of this tension, in addition to the border, are now being felt equally in the arena of commerce. This is manifest in India's decision to penalize China financially by implementing a ban on 59 Chinese mobile applications. This decision, however, is not free from ramifications and can potentially backfire against India in the form of investment claims arising under the India-China BIT of 2006 (BIT). Though this BIT was unilaterally terminated by India in 2018, the sunset clause under Article 16(2) of the India-China BIT provided that in case of unilateral termination, the treaty shall continue to be effective for a further period of 15 years from the date of termination for the investment made prior to the termination date. Consequently, allowing Chinese investors to bring claims against India, for breach of standards of protection as envisaged in the BIT, for any investment made prior to the date of termination. The authors through this paper attempt to ascertain whether the standards of protection envisaged under the India-China BIT are impinged by the government's decision to ban Chinese apps, and what are the defenses that India can take recourse to under the BIT and customary international law, in investment arbitrations arising from such a breach.

FET and the mandate of due process

Chinese investors may base their claim on violation of the Fair and Equitable Treatment clause ("**FET**") under Article 3(2) of the BIT. An FET clause obligates the parties not to act arbitrarily and to abide by the due process of the law with respect to the investments made. This protection reflects upon the manner in which the ban on Chinese apps was implemented. The Government of India on

June 29, 2020, notified a press release invoking its powers under section 69A of the Information Technology Act 2000 ("IT Act") to effectuate a ban on 59 Chinese applications.[1]

It is pertinent to note that the sudden press release seems to bypass the procedure laid down in the IT (Procedures and safeguards for blocking for access of information to public) Rules 2009[2] for implementing such ban. The procedure established in these Rules stipulates that a prior notice ought to be given to the concerned intermediary, which should then be followed by a hearing before a final order banning such intermediary is issued. Such an action can only be justified in cases of emergency in accordance with Rule 9 of the above Rules. The emergency rule empowers the government to impose a ban on a particular intermediary without prior notice or due process. Additionally, the validity of such action depends on the necessity and expediency of the situation. If such measure could be justified as necessary, an FET clause violation due to the ban could be resisted. However, if India fails to demonstrate the element of necessity a strong presumption can be drawn in favor of the arbitrariness of this decision. This may provide a strong footing for Chinese investors to claim a violation of FET. It is important to note that India in this regard does not have a good track record. Previous investment arbitration tribunals, in which India was the responding state, have held India guilty of violating the FET protection by arbitrarily canceling contracts of foreign investors without adhering to due process.[3]

Expropriation, MFN, and limitation of liability

Expropriation occurs when a state takes control of the foreign investor's property in the host country. The India-China BIT under article 5 affords such right against expropriation, which bars India from dispossessing the Chinese investors of its investments made pursuant to the treaty and further from introducing measures equivalent to such expropriation. The provision, however, exempts actions in furtherance of a 'public purpose' in accordance with the law on a non-discriminatory basis and against fair and equitable compensation. Thus, it is pertinent to prove that the action was in furtherance of a

[1] Ministry of Electronics and Information technology, 'Government Bans 59 mobile apps which are prejudicial to sovereignty and integrity of India, defence of India, security of state and public order' (29 June 2020) https://pib.gov.in/PressReleseDetailm.aspx?PRID=1635206 accessed on 5 July 2020.

[2] Information Technology (Procedures and safeguards for blocking for access of information to public) Rules (27 October 2009) <https://upload.indiacode.nic.in/showfile?actid=AC_CEN_45_76_00001_200021_1517807324077&type=rule&filename=blocking_for_access_of_information_rule_2009.pdf> accessed on 25 August 2020.

[3] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Pvt. Ltd., Telecom Devas Mauritius Ltd. v India* PCA Case No. 2013-09, Award [25 July, 2016]; *Deutsche Telekom v India* PCA Case No. 2014-10, Interim Award [13 December, 2017].

public purpose and was not discriminatory in nature. Maintenance of 'public order' in the press release as one of the reasons to justify the ban could be argued in such a situation. However, it also has to be justified on a non-discriminatory basis.

The India-China BIT also provides for a National Treatment clause and a Most Favored Nation (MFN) clause to accord similar treatment to Chinese investors as is accorded to domestic and third state investors. This clause obligates the host state to not indulge in discriminatory conduct against foreign investors. The MFN clause gains relevance in light of the fact that though these apps were banned on account of safety concerns, all of these apps were Chinese. None of the apps on this list of banned apps were from any other state. Hence, a claim of discriminatory conduct may find support under the present factual matrix.

A claim of violation of MFN clauses could be resisted in accordance with the limitations on the operation of MFN clauses. It includes certain implicit limitations that tend to emerge from the text of the treaty itself. In the case of India-China BIT, this limitation springs from article 14, which is the exception clause. An exception clause shields host states from liability arising out of actions taken in exceptional circumstances to protect their essential security interests. If a measure can be justified under the stringent requirements of an exception provision, it is difficult to envisage a situation where it would have violated standards of protection in the first place.[4] For instance, in *CMS Gas Transmission v. Argentina*,[5] the tribunal rejected the argument that the MFN clause overrides the emergency clause (exception clause) in US-Argentina BIT.[6] It was consequently deliberated that the exceptions which preclude the application of a BIT as a whole cannot be overridden by the operation of an MFN clause of the same treaty.[7] It follows the rule of *ejusdem generis* whereby the operation of the MFN clause does not exceed beyond the scope and application of the basic treaty itself. Thus, it can be argued that the exception under Article 14 of the India-China BIT has the potential to resist claims of MFN clause violation stemming from the treaty. The ambit of the exception clause contained in Article 14 is discussed in depth in part IV of this article.

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[4] Andrew Newcombe, 'General Exceptions in International Investment Agreements' (BIICL Eighth Annual WTO Conference, London, May 2008).
[5] *CMS Gas Transmission Co. v Argentina*, ICSID Case No. ARB/01/8, Award [May 12, 2005] ('CMS v Argentina')
[6] Treaty concerning the Reciprocal Encouragement and Protection of Investment United States/Argentina (signed 14 November 1991, entered into force 20 October 1994) ('United States/Argentina BIT') art 11.
[7] Trung Nguyen, 'Most Favoured Nation Clause in Investment Treaties' [2015] SSRN Electronic Journal 39.

In addition to investment law, violation of MFN status is also relevant from the lens of international trade law and could potentially trigger a breach of World Trade Centre ("WTO") obligations existing between India and China. However, it is pertinent to note that member states are allowed to refrain from being bound by these obligations on certain matters involving 'national security'. Article XXI of the General Agreement on Tariffs and Trade[8] ("GATT") provides for such exceptions known as 'Security exceptions'; interestingly it states that the exemption is granted to any action which is considered necessary for the protection of 'essential security interests'. It was on 5th April 2019 that in a WTO settlement between Russia and Ukraine,[9] WTO upheld the invocation of the national security exception under GATT to justify the trade blockade by Russia which breached certain WTO obligations, for purpose of national security.

Protection of essential security interest: Treaty-based exception

Since arbitration jurisprudence is guided largely by contractarian origins, these treaties typically set out procedural preconditions for submitting a claim, the substantive obligations owed by the contracting states to a foreign investor, and remedies available in the event of a breach.[10] These BITs provide the legal basis for investor-state claims by defining the contours of a State's obligation to foreign investors. This is of particular significance since the India-China BIT includes an exception clause that stipulates:

> *"Article 14: Exception - Nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis."*

This exception clause, unlike other BITs,[11] does not subject the invocation of "essential security interest" defense, to the condition of necessity. This essentially means that India does not have to demonstrate that the ban was '*necessary*' to secure its 'essential security interest', rather it can avail this defense merely on the premise that its actions were '*for*' securing such interests. Though this provision exempts the host State from incurring responsibility if its actions are in furtherance of the protection of 'essential security interests', it does not go on to define what constitutes an 'essential security

[8] General Agreement on Tariffs And Trade (1 January 1948) BISD I/14-15, art XXI.
[9] WTO, *Russia - Measures Concerning Traffic in Transit* (5 April 2019) WT/DS512/R.
[10] Beharry, Christina L. & Melinda E. Kuritzky. 'Going Green: Managing the Environment Through International Investment Arbitration.' (2015) 30(3) American University International Law Review 383-429.
[11] *Argentina/United States BIT* (n 5).

interest.' The factual matrix, before a State can invoke this defense under a BIT, must demonstrate that (i) there is a legitimate threat; (ii) the threat qualifies the threshold of "essential security"; and (iii) the measure taken by the host State has a nexus to such security interests of the state.[12]

An "essential security" clause temporarily limits the application of substantive provisions under investment treaties, abrogating certain investor rights against the host state.[13] However, what qualifies as "essential security" is devoid of a uniformly accepted definition in the realm of international investment law. To this end, the arbitral tribunal in *CMS v Argentina*,[14] deliberating on this very same question, held that "essential security interest" includes immediate political and national security concerns.[15] Such an interpretation also finds support from the definition according to this provision in other BITs. For instance, the US–Ukraine BIT notes that 'essential security interests would include security-related actions.' These provisions, however, must be interpreted in a restrictive manner.[16]

Since India's decision to ban these apps was driven by concerns about national security and data breaches, it does have a solid footing to defend Chinese claims under this exception. Moreover, if India is able to prove before the tribunal, as it has claimed in the press release, that the activities engaged in by these apps were "prejudicial to sovereignty and integrity of India, defense of India, security of the state and public order", in principle, it should be able to meet the threshold of "essential security interest" as envisaged under this BIT.

Defenses stemming from customary international law

In addition to the treaty-based defenses, India can also take recourse to defenses enshrined in customary international law.

a) Necessity

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[12] Anirudh Krishnan and Radha Raghavan, 'Economic measures against China: a BIT to chew on' (*The New Indian Express*, 17 July 2020) <https://www.newindianexpress.com/opinions/2020/jul/17/economic-measures-against-china-a-bit-to-chew-on-2170843.html> accessed on 18 July 2020.

[13] Jose´ E. Alvarez, *The Public International Law Regime Governing International Investment* (Hague, Hague Academy of International Law 2011) 282–4; Boru Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford, OUP 2011) 181–2.

[14] *CMS v Argentina* (n 4).

[15] *CMS v Argentina* (n 4) ¶¶359-360.

[16] *Enron Corp., Ponderosa Assets, L.P v Argentina*, ICSID Case No. ARB/01/3, Decision on Annulment [July 30, 2010] ¶331.

One such defense is that of necessity as originating from Article 25 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. While the existence of necessity as a ground for precluding wrongfulness under international law is no longer disputed, there is also consensus to the effect that this ground is an exceptional one and has to be addressed in a prudent manner to avoid abuse.[17]

The existing state practice, decisions of international forums, and scholarly writings[18] amply support that a restrictive approach must be taken while considering the claim of necessity. Hence, the applicability of this defense will depend on a case-to-case basis, bestowing attention to the obligations arising out of the instrument as well as the surrounding circumstances applicable such as the nature of the obligation, the extent of the impact, the expediency of the disputed measure and the underlying factual situation.

b) Police Power

The tribunal in *Philip Morris v Uruguay* considered that the police power of States was reflected in customary international law and applies to the expropriation analysis accordingly.[19] This holding was further acknowledged in *Saluka v Czech Republic*.[20] In *Philip Morris,* the tribunal held that the "*State's reasonable bona fide exercise of police powers in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic damage to an investor and that measures taken for that purpose should not be considered expropriatory.*" Hence, India can invoke the doctrine of police power since the ban was in furtherance of 'public order.'

Conclusion

Looking at the crystal ball, the ban can potentially trigger several investment disputes against India. Though the ban garnered public support in India, as a retaliatory measure with regard to the ongoing tensions with China, it significantly affected the Chinese investors who had investment interests in

[17] Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, ILC Yearbook 2001/II (2), 80 ¶2; *CMS v Argentina* (n 4) ¶317.
[18] August Reinisch, 'Necessity in Investment Arbitration' (2010) 41 Netherlands Yearbook of International Law 142; Eric Wyler, *L'Illicite et la Condition des Persones Privées* (Paris, Pedone 1995) 192; Badar AlModarra, 'The Defence of Necessity in International Law and Investor Versus State Dispute Settlement' (2019) 23(37) Journal of Legal Studies 78.
[19] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award [July 8, 2016].
[20] *Saluka Investments BV v. Czech Republic,* PCA Case No. 2001-04, Partial Award [March 17, 2006].

India. The essential interest exception under the India-China BIT, stemming from national security, would be the strongest justification and undoubtedly forms the core argument in favor of India. However, the BIT does provide ample room to accommodate the claims of Chinese investors. It would hence be interesting to note how these investment claims would be addressed by arbitral tribunals or other judicial or quasi-judicial platforms.