



## STUDY ON IMPOSITION OF BAN ON MOBILE APPLICATIONS- INDO- CHINA BIT

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### ABSTRACT

The Research paper focuses on the India-China BIT and its effect on the ongoing developments between the two countries after the Government of India imposed a ban on more than 160 applications of the Chinese companies. The action is taken after the Galwan Valley face-off between Chinese Troops and Indian Army. The Investors of People's Republic of China in the same regard has multiple claims against the ban as it is violative of the principle of Fair and Equitable treatment, as no such treatment has been imposed on similar kind of applications as the government has banned, further the action seems arbitrary and discriminative as it is not backed by enough legal and procedural reasoning. Whereas, India can claim its defence under the Essential Security Interest principle, as the Chinese Companies have been found at many instances violating the privacy norms in other countries, moreover the Data Laws of China, is violative of data protection norms of India, putting the national security and integrity at risk. Lastly the post-pandemic scenario the International investment shows a trend of changes, such as BIT provision change, policy changes etc.

### INTRODUCTION

The investment relations between India and China has been specified under the Indo-China BIT, which was signed and executed in 2006, although India terminated the said BIT in 2018. The India-China BIT covers the important investment related clauses such as Fair and Equitable principle, Most Favoured Nation and National Treatment Policy etc, even after being terminated the said BIT is saved by the Sunset clause for the next 15 years.

Although, India and China have a history of love-hate relationship, as both the country being the neighbouring country has border dispute. The dispute only worsens with the land acquiring policy of the People's Republic of China. The Army or troops of China have been often found to trespass in the Indian territory. One such incident also happened on June 15, 2020 where the Indian Army and Chinese troops engaged in a deadly face-off, this resulted in death of 20 Indian Soldiers, and a war scare between the countries when the Prime Minister of India convened that India will, if provoked, take befitting actions against China.<sup>1</sup>

After this incident, on June 29, 2020, Indian government banned 59 Apps of Chinese Companies, with wide user base, 118 of more such Chinese mobile applications were

<sup>1</sup> HT Correspondent, The Galwan Valley face-off explained through 17 news reports, India News Hindustan times, Jun 22, 2020, 09:48 IST

<https://www.hindustantimes.com/india-news/the-galwan-valley-face-off-explained-through-17-news-reports/story-UzyJFQdaOEDgJZH2dE1MON.html>



banned in early September.<sup>2</sup> This action of Indian government created a debate point on whether such ban is violative of the International Laws and the India-China BIT clauses, as the ban prima- facie looks arbitrary, discriminative and violative of Fair and Equitable Treatment with regard to the investment made by Chinese Companies, in Indian market.

Regardless to claim the violation of Fair and Equitable treatment or arbitrary and discriminative decision, it is necessary to establish whether the mobile applications come under the purview of International Investment. For this purpose, it is pertinent to note the definition of “Investment” and “Investor” as provided under India-China BIT Article 1(b) and 1(a).<sup>3</sup>

Investment means every kind of assets which are established, acquired, it includes the changes in the form of such investment made in accordance with the national laws of the contracting party, under whose territory the investment is made and in particular, though not exclusively also includes;

- (i) Movable and immovable property, as well as other rights such as mortgages, lien or pledges;
- (ii) Shares, stock and debentures of a company and any other similar form of participation in a company;
- (iii) Rights to money or to any performance under the contract having financial value;

<sup>2</sup> PIB Delhi, Government Bans 59 mobile apps which are prejudicial to sovereignty and integrity of India, defence of India, security of state and public order, Ministry of Economics and IT, Jun. 29, 2020 8:47PM IST

<https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1635206>

(iv) Intellectual property rights in accordance with the relevant laws of the respective contracting party; and

(v) Business concession conferred by law or under contract, including concessions to search for and extract oil and other minerals.<sup>4</sup>

Investor includes any national who derive their status as nationals of contracting party from its laws in force and companies or corporations or firms and associations which are incorporated or constituted or established in the territory of either contracting party under its law in force.<sup>5</sup>

Therefore, from the above definitions, the scope of investor and investment is clear under BIT in the present situation the investors are the companies of China which are originally incorporated in the territory of People’ Republic of China under its law in force.

The mobile applications of the companies, can be regarded as investment under Art 1(b)(iv)<sup>6</sup> which includes the Intellectual Property Rights in accordance with the relevant laws.

According to Sec 2(o) of the Copyright Act, 1957<sup>7</sup>, computer programs come under the ambit of the literary work, although as the definition does not distinguish between source code and object code, both are covered under the section. For a computer work to be granted copyright protection, it is essential that the work is original. The owner of the

<sup>3</sup> Indo-China BIT. Art 1 Cl. (a) & (b)

<sup>4</sup> Id. At 3

<sup>5</sup> Id. At 3

<sup>6</sup> Id. At 3

<sup>7</sup> The Copyright Act, (14 of 1957), Sec. 2 Cl. (o), 1957.



copyrighted software has exclusive right to store and reproduce the software. Operational methods and principles of the program are not copyrighted but Patented, provided that the program is not merely an algorithm but technical invention. Similar to copyright, patent laws also allow the patent owner to give license or assign the patented work.

Therefore, as per the above provisions, mobile applications are a part of intellectual property rights. Mobile applications generate revenue, by either making the application itself a purchase, or by providing certain features on the basis of in-app purchases. The applications which are completely free, generate their revenues from the in-app advertisement they allow to show to the app users. The mobile application industry generated worth USD 53 billion revenue in 2012<sup>8</sup>, the global revenue of mobile application increased in 2018 to USD 365 billion. It is projected that the industry can generate USD 935 Billion of revenues via in-app advertising.<sup>9</sup> The mobile application companies established in China, and operating in India is thus a revenue generating wide user base investment, protected by the India-China BIT.

Considering the same, the research paper focuses on the Details of India-China BIT in its first chapter.

Second Chapter of the paper provides the details on the claims that China can raise with

respect to the action of the Indian government.

The third chapter of the research paper focuses on the defences which are available to India, in the context of imposition of ban. Considering that China being the communist nation, there are certain rules and regulations of the Country which are not in consonance with local norms of several country bringing the Chinese companies under suspicion. It is necessary to dwell upon the prospective defence of India.

The final chapter deals with international investment fate post covid-19 and how the pandemic ill or is affecting various IIAs and Investment policies of the country.

## CHAPTER I

### INTRODUCTION TO BITs AND INDO-CHINA BIT

BITs are agreements between two countries and are essentially the mutual promotion and protection of investments in each other's territories by individuals and companies situated in either State. Listed below are some of the essential clauses covered under Bilateral Investment Treaties:<sup>10</sup>

1. Fair and Equitable Treatment: Enshrined in Art 3, this phrase in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each state with regard to the property of

<sup>8</sup> Nandakumar, Mobile App Industry Is The Fast Growing Segment In The New Economy, NDot, May 18, 2016 <http://www.ndot.in/blog/mobile-app-industry-fast-growing-segment-economy.html>

<sup>9</sup> J.Clement, Total global mobile app revenues 2014-2023, Mobile Internet & Apps, Aug 1, 2019 <http://www.statista.com/statistics/269025/worldwide-mobile-app-revenue-forecast/>

<sup>10</sup> Prateek Bagaria & Vyapak Desai, Bilateral Investment Treaties and India [http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Bilateral\\_Investment\\_Treaties\\_and\\_India.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Bilateral_Investment_Treaties_and_India.pdf)



foreign nationals,<sup>11</sup> it compels the host state to provide full protection and safety necessary to the investment in the territory of host state. The treatment includes the Transparency, Stability and Protection of Investor's legitimate expectation, compliance with contractual obligation, Procedural Proprietary and Due Process, Good Faith, Freedom from Coercion and Harassment.<sup>12</sup>

2. Most Favoured Nation Treatment: Enshrined in Art 4 of the BIT, this clause ensures that parties to one treaty provide treatment no less favourable than the treatment they provide investors under other treaties, or any non-members.<sup>13</sup>
3. National Treatment: Art 4 of the BIT with respect to this principle states that the investment of the contracting parties and the investors of the contracting parties shall be accorded with treatment no less favourable than that which is accorded to the investors of the host state.<sup>14</sup>
4. Non-Discrimination clause (Art 4): The main purpose of this is to promote equal treatment between foreign and domestic investors while avoiding arbitrary or discriminatory measures. Thus, this clause requires the host state to accord equal treatment under the Bilateral Investment Treaties.<sup>15</sup>
5. Expropriation: The Art 5 of BIT provides for the expropriation clause, under which the investment of investor of either Contracting Parties shall not be nationalised, expropriated or subject to the measure having the same effect as to nationalisation or expropriation, except for a public purpose in accordance

with the law on a non-discriminatory basis and with fair and equitable compensation, the amount of which shall be the genuine value of the investment expropriated immediately before the expropriation, and shall include interest, the payment should be made promptly.<sup>16</sup>

6. Essential Security Interest (Art 14): The agreement precludes the right of the host contracting party to take such necessary steps as required for the protection of its essential security interests or in circumstances of extreme emergency provided that such actions should be normally and reasonably applied on a non-discriminatory basis.<sup>17</sup>
7. Sunset clause: Originally the agreement was meant to remain in force for a period of 10 years and extendable unless the contracting party gave the other party notice of the termination of expiration. However, the Art 16 (2) also enshrines the provision that in case of termination of agreement, the agreement shall continue to be effective for a further period of 15 years from the date of its termination in respect of investments made or acquired before the date of termination of the agreement.<sup>18</sup>

Importance of Bilateral Treaty Agreements: BITs are extremely important as their main aim is to protect and promote foreign investments.<sup>19</sup> They provide the parties with the opportunity to set out definite norms that apply to investments made by the nationals in each other's territory.<sup>20</sup> Thus, BITs ensure that rules and norms are followed by all countries so as to avoid the descent into

<sup>11</sup> India-China BIT., Art 3.

<sup>12</sup> Rudolf Dolzer & Christoph Schreuer, Principles of Investment Law, 130-148, (2008).

<sup>13</sup> India-China BIT., Art 4.

<sup>14</sup> Id. At 13

<sup>15</sup> Id. At 13

<sup>16</sup> India-China BIT., Art 5.

<sup>17</sup> India-China BIT., Art 14.

<sup>18</sup> India-China BIT., Art 16.

<sup>19</sup> Surya P. Subedi, International Investment Law-Reconciling Policy and Principles, 83, (2008).

<sup>20</sup> M. Sornarajah, The International Law on Foreign Investment, 184, (3<sup>rd</sup> ed. 2010).



chaos. Their commitment to host country is for long term<sup>21</sup>

### India- China BIT

India came into a bilateral investment treaty with China in 2006 and gave it the most favoured nation clause. This however came to an end in 2018, when India ended the BIT, stating unconscionable conduct of the People Liberation Army in Indian territory. However, in the event of termination, the Saving clause put under the Treaty would come into effect in order to mitigate the disadvantageous impact of such conduct by the host nation. According to Article 16(2) of the India-China BIT<sup>22</sup>, in case of unilateral termination, the treaty 'shall continue to be effective for a further period of fifteen years from the date of its termination in respect of investments made or acquired before the date of termination of this Agreement'. Essentially the Chinese BIT, continues to protect the Chinese investments under international law, as long as the investment was made before 3<sup>rd</sup> October 2018.

The relationship between India and China has been a tumultuous one for a while. However, in the last decade or so, when the FDI began flowing into India and sophisticated products started being available at an affordable price, the perception towards China began changing and Indians essentially began overlooking the proclivity of encroachments. So much so that a lot of governments were actually being criticised for not following the Chinese model of growth.

However, as the origin of the Corona virus pandemic has been traced back to China and

the recent encounter at the Galwan Valley which has been seen as a deliberate intrusion has increased tension between the two countries, in a way, the strained peace India had with China seems to be over now as a result of the issues going on. Therefore, in an attempt to ease the situation, certain strict decisions have been by taken by the Government which has been in the form of a ban on Chinese investments. Currently, many Chinese companies have an active investment in India either in manufacturing businesses like Oppo or Haier or a passive investment in various new technology businesses like Byju, Ola etc.

The measures that India has taken may or may not be questioned before an independent arbitral tribunal. However, there may be other foreign investments that might get adversely affected if a Chinese investment in the country gets expropriated or suffers any kind of damage. These foreign investors, too, can initiate BIT arbitration against India. If not dealt with diplomatically, India could be at the receiving end of a flurry of arbitrations with the measures being undertaken currently as well as a lot of backlash. Therefore, if the Indian Government decides to take this belligerent step and prohibit Chinese investment in India as well as pull back all the approval granted to do business there is without a doubt that the investors would be adversely hit by such a decision. The intended norm under International Law, to lighten such a situation at the high table, is to opt for International Arbitration, invoking BIT.<sup>23</sup>

### CHAPTER II

<sup>21</sup> Id. At 19

<sup>22</sup> Id. At 18

<sup>23</sup>Abhileen Chaturvedi, Conflict With China-India's BIT Dilemma, Opinion- The Hindu Business line, Aug. 11, 2020



### GROUND S UNDER WHICH CHINESE COMPANIES MAY INVOKE BIT

A Chinese Company could possibly institute International Arbitration, invoking BIT, claiming violation of the treaty on the following grounds:<sup>24</sup>

1. Fair and Equitable treatment;
2. Discrimination and Arbitrary ministerial decision; or
3. Expropriation

#### Fair and Equitable Treatment

The interpretation of the “fair and equitable treatment” doesn’t remain the same, and it varies with time and with the circumstances of each case. It is, therefore, challenging to establish a static concept of these declared notions. However, the disputing nation will need to prove that is existence of wilful neglect and subjective bad faith to prove; that there exists a breach of fair and equitable treatment obligation as per the BIT.

However, it is vital that the ministerial decision must be supported with substantial reasoned judgement/information by the host nation. Further, it is trite law that in case of any official decision restricting foreign investment citing national security would result in the inapplicability of any other provision that is put under the BIT.

A collective ban on the fifty-nine Chinese apps which has been imposed through a press release relies on Section 69 A of the Information and Technology Act. This press

release which was not a legal order provides vague and generic grounds for the ban of these apps. This ban is legally susceptible as it appears to have not been imposed according to the procedures enshrined within the website blocking rules of 2009. These rules provide for state that there is a process which includes a notice, a hearing and a reasoned order before the ban. If these rules are not followed. The ban will be considered to be arbitrary.<sup>25</sup>

Moreover, the cancellation of contracts of Chinese companies could be challenged as arbitrary and thus a violation of the Fair and Equitable Treatment owed to Chinese investors. India has already lost two Bilateral Investment Treaty claims namely *Devas V India* and *Deutsche Telekom V India* wherein it was held that India was guilty of violating the FET provision for arbitrarily cancelling contracts impacting foreign investors without following the process required. Therefore, Chinese investors can make a strong case claiming that India is violating the Fair and Equitable Treatment under the India- China Bilateral Investment Treaty.

In *LG&E V Argentina* the tribunal first applied the BIT, secondly and in the absence of rigid provisions, general international law would be applied and third, the Argentine domestic law specifically the gas law which governs the natural gas sector. The latter is

<https://www.thehindubusinessline.com/opinion/conflict-with-china-indias-bit-dilemma/article32328538.ece#>

<sup>24</sup> Gagan Kumar, Ban on Chinese Investment Should India Bother About Bilateral Investment Treaty, Legally Speaking- The Daily Guardian, July 22, 2020, 5:50AM

[https://thedailyguardian.com/ban-on-chinese-](https://thedailyguardian.com/ban-on-chinese-investments-should-india-bother-about-bilateral-investment-treaty/)

[investments-should-india-bother-about-bilateral-investment-treaty/](https://thedailyguardian.com/ban-on-chinese-investments-should-india-bother-about-bilateral-investment-treaty/)

<sup>25</sup> Prabhash Ranjan, Chinese Investment Enjoy Treaty Protection. Beijing Can Drag New Delhi To Tribunal, Opinion- The Print, July 4, 2020, 10:48AM IST. <https://theprint.in/opinion/chinese-investments-enjoy-treaty-protection-beijing-can-drag-new-delhi-to-tribunals/453880/>



applicable in view of its relevance for determining the Argentina's liability.<sup>26</sup>

In *Vodafone V India* the arbitral award rendered in this case found the Indian Government guilty of violation of the Fair and Equitable Treatment standard under Article 4(1) of the India- Netherlands Bilateral Investment Treaty. While the Indian government has not been asked to pay compensation, it has been directed to pay around Rs 40 crore as partial compensation for the legal cost and to refund the tax which has been collected so far.<sup>27</sup>

Discrimination and Arbitrary ministerial decision

The second major alleged breach according to the Treaty is discrimination and arbitrariness. The settled position of law against the allegation is, 'discrimination requires intentional treatment in favour of a national investor and to the detriment of a foreign investor; a treatment that doesn't apply to other nationals in a similar situation'. In order for something to certify as discrimination and arbitrariness bad faith or wilful disregard of the due process of law is a requirement. In regards to India blocking and banning fifty-nine apps that were exclusively Chinese could amount to discrimination as these investments have been treated differently.

Expropriation

The most common, out of all the accusations in case of any Bilateral Investment Treaty breach dispute before the International Arbitration forum is of Expropriation. Expropriation is of two types: direct and indirect depending upon the conduct of the host nation. The former can be termed as one which arises due to forcible State action using either legislative or administrative action. At the same time, the latter can be defined as a gradual or growing form of going towards expropriation. The blocking order has rendered the Chinese Apps significantly unprofitable and essentially incapable of yielding any return to their owners as there is no form of ad-based revenues, memberships etc and could thus constitute an indirect expropriation.<sup>28</sup>

Furthermore, as per the expropriation clause enshrined under Art. 5 of the India-China BIT<sup>29</sup>, the expropriation can be made in the interest of public purpose, but there seems no reason according to which the banned companies' apps, were acting against the public interest. The sub-clause 2 of the Art. further enables the investor companies to review the expropriation, valuation of investment by its judicial or independent authority as per the principles set out under the Art.<sup>30</sup>

CHAPTER III

<sup>26</sup> LG&E Energy Corp., LG&E Capital Corp, and LG&E International Inc v. Argentine Republic, ICSID Case No. ARB/02/1, (2006). <https://jsumundi.com/en/document/decision/en-lg-e-energy-corp-lg-e-capital-corp-and-lg-e-international-inc-v-argentine-republic-decision-on-liability-tuesday-3rd-october-2006>

<sup>27</sup> Pushkar Anand, *Vodafone v. India, End of Saga*, Opinion, *Business- The Wire*, Sep. 26, 2020,

<https://thewire.in/business/vodafone-india-end-of-a-saga-investment-treaty-arbitration>

<sup>28</sup> Ikigai Law, *India Ban on Chinese App: Recourse Under International Investment Law*, Digital Economy- Ikigai Law, July 28, 2020, <https://www.ikigailaw.com/indias-ban-on-chinese-apps-recourse-under-international-investment-law/>

<sup>29</sup> India-China BIT., Art 5.

<sup>30</sup> India-China BIT., Art 5 Cl. 2.



## INDIA'S ESSENTIAL SECURITY INTEREST

The Government of India banned around 168 apps of Chinese companies from the India app stores, during the late of June and early September. This decision of the Indian government is being claimed to be in the interest of sovereignty and integrity of India, defence of India, security of state and public order. India has been for a while leading in innovations and technological advancement, and with the advancement the need of cyber security has increased. The ban includes expulsion of apps with wide user data base, including Pubg, Tiktok, Alibaba, Sheen, WeChat, UC Browser, etc.<sup>31</sup>

As per the Ministry of Information technology, there were numerous complaints from various public representative, both outside and inside the Parliament, that the alleged apps were stealing and transmitting user data in an unauthorised manner to the servers located outside India. The complaints that have been flagged have also been raised by the Indian Cyber Crime Coordination Centre, Ministry of Home Affairs on the receipt of complaints by the citizens regarding the breach of privacy impacting the public order.<sup>32</sup> The data mining therefore added onto the threat of National Security with respect to the recent unsettling border tension developments between the nation, making the actions immediate in nature. The

banning is to safeguard the Indian mobile and internet users from any breach in the cyberspace.

The blocking action which prompted the decision in favour of national security comes from the fact that as per the Cyber Laws and Data Sharing Laws of People Republic of China, the companies, including the app data companies which are of Chinese origin has to compulsorily share the user data collected by them, in reference to the app permission, which the user knowingly or unknowingly give consent to, with the intelligence agencies and the government, irrespective of the country they are operating in. The information so collected is said to be a part of assessment which includes that the companies has to disclose logging information including real names, usernames, account names, network addresses, time of use, chat logs, call logs, and the type of device being used.<sup>33</sup> Although the names of companies have not been mentioned but it includes companies which provides the services like chat features, blogs, public accounts, video sites etc for example; WeChat Messaging app or apps of Tencent group. The regulatory change of China also raised the alarm in USA when the US FCC chairman advanced his concerns regarding the security threats arising from ZTE and Huawei for having their close ties

<sup>31</sup> PIB Delhi, Government Bans 59 mobile apps which are prejudicial to sovereignty and integrity of India, defence of India, security of state and public order, Ministry of Economics and IT, Jun. 29, 2020 8:47PM IST

<https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1635206>

<sup>32</sup> PIB Delhi, Government Block 118 mobile apps which are prejudicial to sovereignty and integrity of India, defence of India, security of state and public

order, Ministry of Economics and IT, Sep. 02, 2020, 5:26PM IST  
<https://pib.gov.in/PressReleasePage.aspx?PRID=1650669>

<sup>33</sup> Al-Jazeera, China Steps Up Online Crackdown Seeks Detailed User Data, Science and Technology-Al Jazeera, Nov. 15, 2018.  
<https://www.aljazeera.com/news/2018/11/15/china-steps-up-online-crackdown-seeks-detailed-user-data/>



with the Chinese government and intelligence agencies.<sup>34</sup>

Moreover, Chinese company TikTok was fined in South Korea by the Korea Communications Commission, for 186m won. The watchdog Journalist found that TikTok was allegedly collecting data of children under 14-year-old without the consent of their legal guardian. The regulator found the data records of more than 6000 children, over 6 months, violating the local privacy laws. Furthermore, Chinese companies also promptly failed to inform the users that their personal data were being transferred to overseas.<sup>35</sup>

Considering the range of permissions asked by the apps by the user, such critical information includes the details of the biometrics of the user, payment information, geolocation, pictures, other person details. Data mining of such personal details, makes the active users of such application vulnerable to the cyberspace privacy breach and identity theft, which is directly against the public order. Furthermore, India encountered more than 40,000 cyber-attacks from China during June 23, 2020, which were focused on crippling the Indian Information websites and Country's Financial Payment System<sup>36</sup> therefore, app ban given the

emergent nature of threats from these apps and the activities they were involved in to disrupt the sovereignty, integrity, defence and security of the nation can be justified.

The India- China BIT provides for the principle of Essential Security Interest in cases of extreme emergency in its Art 14, which states that;<sup>37</sup>

*“ARTICLE 14: Exceptions 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”<sup>38</sup>*

Similar approach has been used by India while invoking various BITs including the India-Egypt BIT, 1997. As per the Art 14 the actions of India can be justified if its application is in conformity with the Laws of India. The laws so invoked in the present case for banning of the mobile application by the Ministry includes Sec 69A of the Information Technology Act, 2000<sup>39</sup> and Rule 9 of IT (Procedure and Safeguards for Blocking for Access of information by Public) Rules, 2009.<sup>40</sup>

<sup>34</sup> FCC Designates Huawei and ZTE As National Security Threats, MCI v. FCC, 515 F.2d 385 (D.C. Cir. 1974),

<https://docs.fcc.gov/public/attachments/DOC-365255A1.pdf>

<sup>35</sup> BBC News, Tiktok Fined for Mishandling Child Data in South Korea, News-Technology-BBC News, Jul. 15, 2020. <https://www.bbc.com/news/technology-53418077>

<sup>36</sup> Abhinav Sahay, 40,300 Cyber Attacks In Last 4-5 Days From China, More Coming: Maharashtra Cyber Department, India News, Jun. 23, 2020.

<https://www.hindustantimes.com/india-news/40-300-cyber-attacks-in-the-last-4-5-days-from-china-more-coming-maharashtra-cyber-department/story-I1ck3vd94dT9mUv6d7vVCM.html>

<sup>37</sup> India-China BIT., Art 14.

<sup>38</sup> Id. At 37

<sup>39</sup> The Information Technology Act, (21 of 2000), § 69A, (2016).

<sup>40</sup> IT (Procedure and Safeguard for Blocking for Access of Information by Public) Rules, G.S.R. 781 (E)., Rule 9, (2009).



Sec 69A(1)<sup>41</sup> provides the power to issue directions for blocking for public access of any information generated, transmitted, received, stored or hosted through a computer resource where the Central Government or authorised officer is satisfied that for the interest of sovereignty and integrity of India, defence and security of India, or public order, it is expedient to do so provided that it may be subject to the provisions of sub-section 2 and the reasons for such direction shall be recorded in writing. Further Sub-section 2 provides that the procedure and safeguard shall be in consonance to the prescribed procedure.<sup>42</sup>

The procedure laid down under the IT Rules 2009, is of two types the Usual Procedure [Rule 7] and the Emergency procedure [Rule 9].<sup>43</sup>

As per the Emergency procedure, without any delay the Designated officer shall examine the complaint on the scope of the grounds mentioned in Sec 69(1) of the IT Act and shall submit the request of specific recommendations to the Secretary, Department of Information Technology. The Secretary if satisfied may block the computer source by interim order after recording the reasons. Although, the rule requires that within 48 hours of such interim order, the Designated officer has to refer the complaint to the committee formed under Rules 7 of IT Rules, 2009, for approval. The committee after working as per Rule 7<sup>44</sup> and hearing the

parties may recommend to the Secretary to pass Final Order either confirming or revoking the Interim Order passed.<sup>45</sup>

As per the safeguards confirmed by the Hon'ble Supreme Court in Shreya Singhal v. UOI<sup>46</sup> case in which the constitutionality of Sect 69A was challenged, (i) the reason of the ban has been explicitly specified to be the 'interest of National Security', as it was alleged that the companies were involved in unauthorised data sharing and (ii) the government called up the Chinese app providers to provide justification on their data-sharing norms under the said laws.

The Hon'ble Supreme Court of India also in Anuradha Bhasin v. UOI<sup>47</sup> noted that any restriction on fundamental rights must be necessary to achieve a legitimate aim, and in absence of any alternative to achieve such aim, it shall constitute of the least restrictive measure. In the present case, the invocation of BIT cannot prevent the application from being operative in the territory of India, neither the Republic of India, compel the China on changing their Data Privacy laws, therefore, to safeguard the Indian citizens from any such breach it was expedient for the Government to impose such ban, until and unless the policy is changes and has become more trustworthy.

As referred previously, the claim is sought under Art 14 of the Indo-China BIT, although the language does not explicitly mention the

<sup>41</sup> The Information Technology Act, (21 of 2000), § 69A Cl. 1, (2016).

<sup>42</sup> The Information Technology Act, (21 of 2000), § 69A Cl. 2, (2016).

<sup>43</sup> Id. At 40

<sup>44</sup> IT (Procedure and Safeguard for Blocking for Access of Information by Public) Rules, G.S.R. 781 (E), Rule 7, (2009).

<sup>45</sup> IT (Procedure and Safeguard for Blocking for Access of Information by Public) Rules, G.S.R. 781 (E), Rule 9, (2009).

<sup>46</sup> Shreya Singhal v UOI., 5 SCC 1 (2015)

<sup>47</sup> Anuradha Bhasin v UOI., SC 1725 SCC OnLine (2019).



requirements to be self-judged, but considering the previous BIT of India with Bangladesh and the necessity of the actions considering the current relations of India and China after Galwan attack, the self-judging nature can be justified. The defences that can be invoked by the China includes, FET, Discriminatory and Arbitrary action, or expropriation, but in any case, if the decision is supported with reasoned information by the host nation, and the restriction is in reference to national security it will result in inapplicability of principle of FET, no proper compensation in case of expropriation by the host state in interest of essential security.<sup>48</sup> The burden of proof to prove the discrimination and arbitrariness will fall on the investor nation, as the judgement regarding the national security is at the discretion of the subjective opinion of the host nation.

As observed in CMS Gas Transmission Company v. Argentine Republic<sup>49</sup>, there need not be one conclusive event of national security threat, unfolding series of events can also be a threat to a country and enough for the country to speculate on the issue of national security. Therefore, the imminent threat may also arise from a long series of incidents. The point to note while invoking the exception is that there should exist a nexus between the measures taken and interest pursued provided it is non-discriminatory, necessary and reasonable. In the current scenario, the India China relations rising level of tensions, post the pandemic lockdown, Galwan attack and repeated trespassing of Chinese troops in Indian

territory. The near war possibility between India and China, raises enough suspicion, that as per the Chinese laws, the essential data of the citizens might get appropriated in such a way which can be prejudicial to National Security and Defence. Therefore, the imposition of ban in such case becomes the need of the hour.

#### CHAPTER IV

#### FUTURE OF INTERNATIONAL INVESTMENT POST PANDEMIC

The Pandemic has resulted in a similar global slow down as was last seen during the great depression although the problem faced by a country is somewhat common internationally. The problem includes the global slowdown in manufacturing, demand, exports etc. The measure taken as safeguard has more or less effected the nations in the similar fashion, although the lockdown has been particularly harsh on small, developing nations as it has been on the developed nation. However, the developed nation has also realised that the maximum investment made on establishing the manufacturing unit at one place in bulk has resulted in extremely disrupted supply chain. Therefore, the states are looking an easy way out so to diversify their investments. This search for easy way out is affecting the previously established balance between the international investment agreements and investments of the countries. The imposition of lockdown, shutting down of offices, diverting the factories to produce ventilators, PPE kits, sanitizers, controls on price of medicine and other similar measures taken by states could amount to breach of

<sup>48</sup> Gagan Kumar, Ban on Chinese Investment Should India Bother About Bilateral Investment Treaty, Legally Speaking- The Daily Guardian, July 22, 2020, 5:50AM IST, <https://theguardian.com/ban-on->

[chinese-investments-should-india-bother-about-bilateral-investment-treaty/](https://chinese-investments-should-india-bother-about-bilateral-investment-treaty/)

<sup>49</sup> CMS Gas Transmission v. Republic of Argentine, ICSID Case No. ARB/01/8, (2007).



investment treaty provisions, as such measure directly or indirectly affect foreign investors. Taking over of foreign assets even for the use of making it as quarantine centre or for the use of State for different purpose from their original purpose could amount to expropriation, such diversion of production facilities to produce a different product could also amount to violation of fair and equitable treatment. Although measures to protect the health of public are regulatory in nature and thus the expropriation arising out of the same cannot be compensated even when property is affected, it will not amount to violation of fair and equitable standard as they are taken in the public interest.<sup>50</sup> The principle of National security can also be applied, as the application of measures under National security are not only against the military threats, but can also applied to the threat of public order and security in case of pandemics and similar crises. The necessity of defence of such actions of countries can be justified by the human rights with reference to safeguarding the human life and health, and the only defence left with the investors would be proving that any such other less harming alternative could have been applied.<sup>51</sup>

Therefore, it is extremely necessary to find that new balance in the coming treaties keeping in reference the sustainable development as a goal. The already established treaties only focused on the provision which protected the investments and did not included any regulatory space or defences to liabilities.

Although most of the treaties enshrine the sunset clause, the states, given the legitimacy crisis in investment arbitration are terminating the treaties along with their sunset clause, which is responsible in keeping the obligation alive for a period of time after the termination of treaty.

The European Union ensured that the intra-European investment treaties are terminated by consent. India and Indonesia unilaterally terminated their investment treaties with the intention of replacing the same with the new model treaties which are more balanced as per the need of the hour. Ecuador also terminated the treaties on the advice of President's Commission on the subject of investment treaties. South Africa has also terminated several of its treaties unilaterally to replace them with the domestic legislation and returning to the doctrine of Carlos Calvo making the foreign investment a matter exclusive to the domestic laws.<sup>52</sup>

Therefore, the change in the policy making with regards to the lasting impact on future investment is visible already, the UNCTAD's Investment Policy Monitor shows that the policy responses of different countries are different, as some of the measures include supporting the investors and domestic economy generally, it also includes policies necessary to protect the critical domestic industries, particularly the health sector. However, simultaneously policies further increasing the measures related to the screening of the foreign investment for national security reasons were also noted.<sup>53</sup>

<sup>50</sup> M. Sonaraja, The Covid-19 Pandemic and Liability under investment treaty, Investments- Bilateral.org, Aug. 11, 2020, <https://www.bilaterals.org/?the-covid-19-pandemic-and>

<sup>51</sup> Id. At 50

<sup>52</sup> Id. At 50

<sup>53</sup> UNCTAD, Countries Launch Investment Policies To Counter Covid-19, UNCTAD, Apr. 3, 2020, <https://unctad.org/news/countries-launch-investment-policies-counter-covid-19>



Similar change was seen when India made it compulsory for any foreign investors of the neighbouring country to seek approval mandatorily of the Central government before making any investment, this revision in policy came out to curb the opportunistic take overs and acquisitions of Indian Companies due to the current Pandemic.<sup>54</sup>

Whereas Japan, to diversify the supply chain after experiencing the crunch due to Covid-19 is offering its manufacturers, subsidies to shift the production units from China to countries like India, or Bangladesh. Japan by this move aims to reduce the dependency of supply on a particular region and to establish a system which provides for much stable supply of medical materials and electronic components even in emergency. The actions of Japan have resulted in a different set of International equations as India on the other hand is also providing certain incentives to welcome such investment ventures of different nations.<sup>55</sup>

From the above instance it is clear that the Post Pandemic approach of countries towards the international investment is going to change, as the countries will now seek to bring a change in its BIT and update it in accordance to such emergency conditions. The need to provide domestic economic boost might also raise on several accounts concerns related to the BITs, but to bring the international investment back on track, it is highly necessary for the states to promote more investor friendly norms in BIT and International investment agreements. Such

actions can come from providing easier screening process in case of international investment, incentives, economy stimulus packages to all the lockdown hit industries of the territory, etc.

### CONCLUSION

The relationship between India and China has always been strained. Despite rounds of negotiations taking place and treaties being signed, the two countries have never had mutual trust. With the recent Galwan attacks which led to India banning Chinese apps citing that they were compromising national security, as well as India extending a friendly hand towards Taiwan has further soured the relations between the two countries. There are certain defences that India can take to justify the ban of these apps with the Essential Security Interest being the main one as it can be said that companies as per the Cyber Laws and Data Sharing Laws of People's Republic of China have to compulsorily share the user data like name, call logs, chat logs, location etc collected by them in reference to the app permission which the user has knowingly or unknowingly given consent to. As it was found in South Korea that TikTok was allegedly collecting data of children under the age of fourteen without the consent of their legal guardians and therefore fined them for 186 million won. Due to incidents like

<sup>54</sup> Pricilla Jebaraj, Government Nod Mandatory for FDI from Neighbouring Countries, The Hindu, Apr. 19, 2020, <https://www.thehindu.com/business/Economy/government-nod-mandatory-for-fdi-from-neighbouring-countries/article31379229.ece>

<sup>55</sup> Isabel Reynold & Emi Urabe, Japan to Fund Firms to Shift Production Out of China, Economics-Bloomberg, Apr. 9, 2020, 05:30AM GMT +5:30, <https://www.bloomberg.com/news/articles/2020-04-08/japan-to-fund-firms-to-shift-production-out-of-china>



this, it has thus been regarded as an issue of national security.<sup>56</sup>

However, at the same time, when India revoked the BIT it had with China in 2018, there is a clause within it which states that Chinese companies are still protected by the Bilateral investment treaty fifteen years from the date of its revocation provided that the investments have been made or acquired before 3<sup>rd</sup> October 2018. Chinese companies can thus invoke BIT on the grounds of Fair and equitable treatment, Discrimination and Arbitrary ministerial decisions and expropriation. This could ultimately prove to be a barrier for India if taken to the international arbitrary courts. The coronavirus pandemic whose origin has been traced back to China has made countries wary of it due to extreme disruption in the supply chain of various countries which resulted in heavy losses, therefore there is no way of knowing how this situation would play out if China decides to opt for International Arbitration, invoking BIT under International Law.

It is not only China which would be invoking the arbitration clause because due to the pandemic the treaties between the various countries have become haywire and thus international courts will be flooded with

cases post the novel coronavirus pandemic as seen with Japan who, in order to diversify its supply chain after experiencing issues due to Covid- 19 is therefore offering subsidies to its manufacturing unit to shift the production units from China to developing countries like India or Bangladesh as an effort to establish a system which provides for a much more stable supply of medical materials and electronic components especially in cases of emergency.<sup>57</sup> South Korean Companies are also seeking an option to exit China and establish their units in countries like India, Vietnam.<sup>58</sup> Growing anti-China sentiment have also been noted in Australian market, considering its heavy dependency of around \$55.52 Billion on imports from China.<sup>59</sup> Further, Australia, similar to USA has raised its concern about Huawei, a Chinese company being a threat to national security.<sup>60</sup> Hence the future of investment relations between China and other countries are hanging by a thread.

This opens floodgate of opportunities for developing nation, and to welcome the changes developing nation is also offering inventive and land resource to interested countries, in an attempt of trying to give a boost to foreign investment. The post-Pandemic equation will result in formation of new bi-lateral investment treaties between

<sup>56</sup> BBC News, Tiktok Fined for Mishandling Child Data in South Korea, News-Technology-BBC News, Jul. 15, 2020. <https://www.bbc.com/news/technology-53418077>

<sup>57</sup> Id. At 57

<sup>58</sup> Metrosaga, South Korea and Japan look to Shift Companies Out of China; Advantage India, Apr. 17, 2020. <https://metrosaga.com/south-korea-and-japan-look-to-shift-companies-out-of-china-advantage-india/>

<sup>59</sup> Global Times, Australians 'Overreact' Against Chinese Product; To Harm Their Interest, Jun. 14,

2020, 10:13PM. <https://www.globaltimes.cn/content/1191586.shtml#:~:text=According%20to%20Liu%2C%20labor%20intensive,quarter%20of%20its%20total%20imports.>

<sup>60</sup> Christina Zhou & Jason Fang, Why Australia Is Prepared to Ban Huawei From Its 5G Network While the UK And Germany Aren't, China-Power-ABC News, Mar. 7, 2019, 12:15AM. <https://www.abc.net.au/news/2019-03-07/why-is-the-uk-seemingly-not-as-worried-about-huawei-as-australia/10866848>



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various developed and developing countries, but it will also result in violation of certain old BITs which only focused on protection of investment and not sustainable development, because due to the emergency of quick actions to curb pandemic, and global lockdown there might be certain necessary steps taken by countries in their territory which would have been generally violative of IIAs and BITs. Hence, the new International investment era might bring some position changes and many BIT disputes.

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