

LEGAL VALIDITY OF INDIA DECISION ON THE BAN OF CHINESE APPS

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Abstract:

The government of India has banned 224 Chinese apps including PUBG Mobile and PUBG Mobile Lite over privacy concerns in past few months. The government said that these apps were banned under Section 69A of the Information Technology Act, 2000 because “they are engaged in activities which are prejudicial to sovereignty and integrity of India, defence of India, security of state and public order.” The work will first stress on the reason behind the ban and includes comment on the constitutional validity of Section 69A of the Information Technology Act, 2000. Then I will analyse the decision of the ban of different constitutional pedestal like whether the ban is arbitrary under article 14 of the Constitution of India or whether it comes under the reasonable restrictions mentioned in article 19(2) of the Constitutions of India etc. Furthermore, the paper will also brief on the legal status of these Apps as the concept of Intermediaries in I.T. Act and will find out the rights of these intermediaries and answer that whether these apps have right to constitutional remedies or not. In last, it will contend against the Chinese contention that the App Ban violates WTO Rules.

The research methodology which was adopted in this work is “Doctrinal” research methodology which is based on the existing researched material like Judgment of Hon’ble Apex Court, Judgment of WTO Panel, guidelines of WTO etc.

Keywords: Reasonable Restrictions, Chinese Apps, Privacy, Intermediary, WTO, Supreme Court etc.

Introduction

The China desire of digital silk route suffered a setback because of the Indian government move against Chinese applications (apps). India is home to almost 450 million smart phones and out of 450 million almost 300 million unique users used at least one Chinese app¹. But on June 29, 2020, the Ministry of electronics and information technology (MeitY) ordered to ban 59 Chinese applications in India. The decision was made by

¹ Vikas SN, TikTok, Chinese app ban: Where things stand, The Economic Times (Jul. 04, 2020, 11:50 AM), <https://economictimes.indiatimes.com/internet/tiktok-chinese-app-ban-where-things-stand/articleshow/76771256.cms>.

invoking the power under section 69A of the 'Information Technology Act, 2000' (I.T. Act) read with 'Information Technology (procedure and safeguards for blocking of access of information by public) rules, 2009'.² Again, the MeitY on 2nd September, 2020 banned 118 others Chinese apps in India. Both the banned because of the emergent nature of threats and privacy concerns of 1.3 billion users of India³. Elaborating the emergent nature of threat the MeitY in the press release stated that these apps are "prejudicial to sovereignty & integrity of India and defense of India". Also these Chinese apps has the potential to harm the security of the state as well as the public order in India⁴.

Now, the question is what actually triggered the government of India to ban these Chinese apps. There are number of reason behind this and few of them are; first, the MeitY in past few years received many complaints from various sources about these apps that these apps in unauthorized manner surreptitiously transmits the data of Indian users which means they misuse their apps for stealing purpose and this 'data harvesting practices' was a threat to the privacy of the users⁵. Second, even the 'Computer emergency response team' (CERT-IN) which established under MeitY to strengthen the security of internet domains received hundreds of representations from citizens of India with regard to these apps on the issue of 'security of data' & 'breach of privacy' which has the potential to affect the public order⁶. Third, 'The Indian Cyber Crime Coordination Centre' who works under the 'Ministry of Home Affairs' (MHA) in one of his reports also exhaustively recommended to block the usage of malicious apps which was detrimental with the security of the State⁷. Fourth, the Chinese data sharing norms in which all the companies registered in China, or in other language we can say companies of China origin mandatorily need to share all their data to intelligence department of China irrespective of the fact in which country they operate⁸. This can be one of the reason that why only Chinese apps were malicious and not the other countries apps. Because, if these apps shared details with the Chinese intelligence agencies then this will be definitely a threat to the defense of India and on the

² 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 Electronics & I.T. (Jun. 29, 2020, 08:47 PM), <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1635206>.

³ PIB Delhi, Government Blocks 118 Mobile Apps which are Prejudicial to Sovereignty and Integrity of India, Defence of India, Security of State and Public Order, Ministry of Electronics & I.T. (Sep. 02, 2020, 5:26 PM), <https://pib.gov.in/PressReleasePage.aspx?PRID=1650669>.

⁴ PIB, supra note 2.

⁵ FE Bureau, Stricter law not knee-jerk bans needed to ensure data privacy, Financial Express (Sep. 06, 2020, 07:30AM), <https://www.financialexpress.com/industry/technology/stricter-law-not-knee-jerk-bans-needed-to-ensure-data-privacy/2075993/>.

⁶ PIB supra note 3.

⁷ ANI, India Bans 118 More Mobile Apps Including PUBG, WeChat, Business World (Sep. 02, 2020), <http://www.businessworld.in/article/India-bans-118-more-mobile-apps-including-PUBG-WeChat/02-09-2020-315900/>.

⁸ Aashish Aryan, China data-sharing law a key issue, banned apps get 48 hours to clarify, The Indian Express (Jul. 01, 2020, 11:20AM), <https://indianexpress.com/article/business/companies/china-data-sharing-law-a-key-issue-apps-get-48-hours-to-clarify-6484204/>.

integrity of India. Apart from the government justification, many experts also believe that this decision on the ban of the Chinese apps can be a retaliatory measure of China intervention in ‘Galwan Valley’ in which 20 Indian Soldiers martyred between the border clash near line of actual control (LAC). As there was a nexus between the Galwan valley clash and the decision on the app ban⁹.

Furthermore, to analyse the validity of the decision on the app ban there are different aspects that need to be discussed. First, on the constitutional validity of section 69A of the I.T. Act. Second, on the legal status of apps in India and what are their rights. Third, about the constitutional validity of the decision because as per article 13 of the Constitution of India, if anything that violates fundamental right is unconstitutional, this is why we need to emphasize on the constitutional aspects as well. Fourth, we need to check whether any international obligations has been violated by this decision as China in his press release alleged that the move was discriminatory and violates World trade organization (WTO) rules. Lastly, the analysis includes the implications of the decision on the ban on Chinese apps on the economies of both the countries as well as in the world.

Constitutional Validity of Section 69A & rules made under sec. 69A of the I.T. Act, 2000

Section 69A of the act gives power to the central government or any of its officers authorised to block the access of information for public access through any computer resource but only in those cases where blocking is necessary and expedient. Furthermore, the section also brief when the issue is necessary or expedient like in the case when something is in the interest of sovereignty and integrity of India, defense of India, security of India etc. and the reason behind the blocking must be recorded in writing.¹⁰ Here blocking can be considered as censorship which means complete suppression of the information. Now, the question is whether this censorship violates the fundamental right mentioned in article 19 of the Constitution of India which talk about the freedom of speech & expressions and whether the concept of censorship can be entertained in a democratic country like India.

The Hon’ble Apex court in the case of *Shreya Singhal v. Union of India*¹¹ declares section 69A of I.T. Act and the rules framed under the provision as constitutional in nature. The Supreme Court justified the

⁹ PTI, Galwan clash made Indians reduce Chinese app usage even before govt. ban: Nielsen Media, The Hindu (Jul. 10, 2020, 12:29 PM), <https://www.thehindu.com/news/national/galwan-clash-made-indians-reduce-chinese-app-usage-even-before-govt-ban-nielsen-media/article32039949.ece>.

¹⁰ Apar Gupta, Commentary on Information Technology Act (3rd ed. Lexis Nexis, 2016).

¹¹ (2013) 12 S.C.C. 73.

constitutionality on these grounds, first, in Constitution of India in article 19 we have freedom of speech and expression as our fundamental rights but these fundamental rights are subject to reasonable restrictions as highlighted in article 19(2) of the Constitution of India and the ground on which the central government order the blocking is same as the restrictions mentioned in the article like on the issue of sovereignty, integrity, defense, public order etc. Second, under section 69A the Central government must record the reason for blocking in writing, if the reason is recorded in writing then the aggrieved can approach the Hon'ble Supreme Court under article 32 of the Constitution of India to challenge if the reason is arbitrary, erroneous or unconstitutional. So, the writing in this will work as a safeguards in case of violation of the fundamental rights. Apart from this rules made under this provision provide detailed procedure which is mandatory for the government to follow before blocking access to any content and as per the Apex Court these rules are also within the framework of the Constitution¹². Apart from this, on the issue of censorship many experts believe that the blocking of any content cannot be considered as censorship but 'balanced flow of information'.

Apart from this we have presumption of Constitutionality used by the courts during interpretation of Statute and Rule. This means that there must be presumption in the favour of constitutionality of the laws unless compelled by their language that it violates fundamental right of the Constitution¹³. The same doctrine applies to section 69A of the I.T. Act along with the rule made under the section 69A.

Legal Status of Applications (apps) in India

As per section 2(1) (w) of the I.T. Act these apps are considered as 'Intermediaries' in India. The provision of the I.T. Act define intermediaries as "any person who on behalf of another person receives, stores or transmits that electronic record or provide any service with respect to that record".¹⁴ The question is why these application is considered as intermediaries; first, like for example 'Amazon' an application that sell different variety of product online in India, in this different seller in the India upload the description of their product which means the app Amazon receive the information, then Amazon stores the information on its website and then transmits it to the buyers in India. Similar to this other applications operates and all the Chinese apps banned is also considered as intermediaries.

¹² Smitha Krishna Prasad, Freedom of Online Speech, Nishith Desai Associates (Mar. 26, 2015), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20Hotline/IT_Act_Hotline_March_26_2015.pdf.

¹³ Unknown, Explained: Doctrine of 'Presumption of Constitutionality', Civils Daily (Jan. 13, 2020), <https://www.civildaily.com/news/explained-doctrine-of-presumption-of-constitutionality/>.

¹⁴ Vakul Sharma, Information Technology Law and Practice (6th ed. Lexis Nexis, 2017).

As per Indian laws intermediaries can also be responsible for the offence mentioned in I.T. Act & other criminal laws prevailing in India but the government of India by considering the expanding functions of the intermediaries as well as the purpose introduced the concept of 'Safe Harbour' which exempt the liability in few cases¹⁵. The concept of Safe Harbour was introduced after the case of *Avnish Bajaj v. State*¹⁶, popularly known as DPS MMS Scandal Case. In this case, a third person uploaded an obscene video to sell on Bazeem.com (website), after when the video become viral the police arrested and initiate the prosecution on Avnish Bajaj who was the CEO of the website which means the head of the intermediary. Aggrieved of this Avnish Bajaj approached the Delhi High Court and contended that obscene video was transferred directly to the buyer from the seller and without any intervention of the website and even the intermediary immediately removed the video after the knowledge of the obscene nature of the content. The court in this case didn't declared Avnish Bajaj as guilty which means no liability of the intermediary.¹⁷ After this the government amended the provision of section 79 of the I.T. Act which provides immunity to the intermediary from the liability in few cases like when the intermediaries doesn't play any role in initiating the transmission, selecting the receiver of the transformation & by not modifying the information contained in the transmission and most important by observing due diligence in discharging their duties etc.

But, the banned Chinese apps are not entitled for any immunity under Safe Harbour principle because as per the contention of the MeitY the Chinese apps surreptitiously transmitting the user data in an unauthorized manner outside the India which is a major privacy concerns, also in these cases the intermediaries were playing active role in initiating the transmission and by not observing the due diligence. This justify that the Safe Harbour or immunity under section 79 of the I.T. Act doesn't apply to ban Chinese apps.

Now, if we talk about the rights of intermediaries then they are entitled to few fundamental rights enshrined in the Constitution of India. Like in case when the government take any decision against the intermediaries and if the decision is arbitrary in nature then it violates their article 14 because 'arbitrariness is antithesis to equality' as highlighted in the case of *E.P. Royappa v. State of Tamil Nadu*¹⁸. Also, if the government block their access without reasonable grounds as mentioned in article 19(2), then also it violates the fundamental

¹⁵ Nishad Nadkarni, India: The Conundrum of Intermediary Liability in the Last Decade, Mondaq (Apr. 23, 2020), <https://www.mondaq.com/india/trademark/921920/the-conundrum-of-intermediary-liability-in-the-last-decade>.

¹⁶ (2005) 3 CompLJ 364 Del.

¹⁷ Vivek Kumar Verma, Avnish Bajaj vs. State (DPS MMS Scandal Case), Indian Case Law (Oct. 20, 2013), [https://indiancaselaws.wordpress.com/2013/10/20/avnish-bajaj-vs-state-dps-mms-scandal-case/#:~:text=State%20\(DPS%20MMS%20Scandal%20Case\),-Posted%20by%20Vivek&text=FACTS%3A,with%20the%20user name%20alice%20Delec](https://indiancaselaws.wordpress.com/2013/10/20/avnish-bajaj-vs-state-dps-mms-scandal-case/#:~:text=State%20(DPS%20MMS%20Scandal%20Case),-Posted%20by%20Vivek&text=FACTS%3A,with%20the%20user name%20alice%20Delec).

¹⁸ 1974 AIR 555; 1974 SCR (2) 348.

right of speech & expression and the intermediaries can approach the Hon'ble High Court or Hon'ble Supreme Court. Even in the recent decision on the ban on the Chinese apps, these apps can challenge the decision of the ban in the Hon'ble Supreme Court under article 32 of the Constitution of India.

Constitutional Validity of the Decision of Apps ban by the MeitY

To comment on the Constitutional validity, different aspects need to be reviewed one by one. First, a decision can be unconstitutional if it violates the fundamental rights as mentioned in the Constitution of India. Now, the first question is whether the decision of the ban of the Chinese apps violates their article 14 of the Constitution of India.

➤ Article 14 & the decision on the ban of Chinese apps

As per article 14 of the Constitution of India, State should not deny 'Equality before law' which prohibits discrimination. Now the point is the decision of ban only includes Chinese apps and not the other countries apps which means that intermediaries can argue that the ban violates their article 14 as the move was discriminatory. As in the case of *Ramesh Prasad v. State of Bihar*¹⁹, the Apex Court stated that ambit of protection under article 14 is very wide and this provision aims at striking down hostile discriminatory practices or oppression of inequality. Now the government can contend that the classification is based upon reasonable grounds of distinction as article 14 doesn't prohibit different treatment of unequals. The Hon'ble Supreme Court in *State of West Bengal v. Anwar Ali Sarkar*²⁰ laid down test to pass for permissible classification for reasonable ground of distinction. "To pass for the test two requirements are mandatory, namely: (1) the classification must be based on intelligible differentia which distinguished person or things from others left out of the group, and (2) the intelligible differentia must have a rational nexus with the object sought to be achieved by the statute in question²¹. Commenting on the first requirement in this scenario that why only Chinese apps are targeted first because one of the grounds of the ban was the Chinese data sharing norms in which Chinese origin companies are under obligation to share the data with the Chinese intelligence department and second Indian Cyber Crime Coordination Centre under HMA also sends the exhaustive list of malicious apps, these clearly justify the Chinese apps being different from others. On the second criteria the objective in this scenario is to safeguard the sovereignty & integrity of the nation, maintain the public order &

¹⁹ AIR 1978 SC 327.

²⁰ AIR 1952 SC 75.

²¹ Uma Pal, Right to equality- A Fundamental Right, Legal Service India (2015), <http://www.legal-servicesindia.com/article/1688/Right-To-Equality--A-Fundamental-Right.html>.

security of the State etc. we need to understand that there is a very strong nexus between the decision of the app ban and the objective sought to be achieved. In one of the report discussed in the Parliament of India, it was alleged that a Chinese data firm 'Zhenhua Data' spied on 10,000 Indian entities including the present & former Prime Minister of India, President of India, fifteen former army chiefs, few Chief Ministers and many others prominent person of India. As per the reports the 'Zhenhua Data' firm works with Chinese intelligence, military & security agencies and they store all their data in 'Overseas key Information Database (OKIDB).²² These reason clearly contends that why the selective approach in the ban of apps is justified. Another important aspects in article 14 is 'arbitrariness'. The Hon'ble Supreme Court in *E.P. Royappa v. State of Tamil Nadu*²³ emphasized that 'equality is antithetic to arbitrariness' which mean even the authority act arbitrary then also it violates the fundamental right under article 14. But, in this case there was proper press release in writing including the reason of the ban. By this we can say that the ban was not even arbitrary and with regard to the reason intermediaries has all the right to challenge internally in MeitY as well as in Hon'ble Supreme Court.

➤ Article 19 & the decision on the ban of Chinese apps

In this two rights are in question, first under article 19(1) (a) of "right to freedom of Speech and Expression" and the second is under article 19(1) (g) "right to practice any profession, or to carry on any occupation, trade or business". Hon'ble Supreme Court in *Brij Bhushan v. State of Delhi*²⁴ highlighted that freedom of speech and expression under article 19(1) (a) is *sine qua non* for a healthy democracy and part of the basic structure of human rights that create negative obligations on the State. But these rights are not absolute in nature and subject to some restrictions mentioned in article 19(2) of the Constitution of India²⁵.

As per the press release the ban was done in the interest of sovereignty and integrity of India, defense of India, security of State and public order.²⁶ In article 19(2), these restrictions are clearly mentioned. The application of these restrictions in these cases already explained in above points that how the breach of privacy is a concern, how they harvest data, how they surreptitiously transmit data of Indians in unauthorized manner and how different data firm stores data of Indian prominent personalities including the PM, Army chiefs etc. and

²² Suchitra Karthikeyan, Chinese Data Firm Zhenhua Data 'spied' On 10,000 Eminent Indians, Republic World (Sep. 17, 2020, 06:34PM), <https://www.republicworld.com/world-news/china/chinese-data-firm-zhenhua-data-spied-on-10000-eminent-indians.html>.

²³ (1974) 4 SCC 3.

²⁴ AIR 1950 SC 129.

²⁵ State v Charulata Joshi, (1999) 4 SCC 65.

²⁶ PIB, supra note 2.

these activities are definitely prejudicial to sovereignty & integrity of the nation and the other grounds mentioned behind the ban.

The applicability of article 19 is only to the Citizens of India and not to the foreign national, The Apex Court in the case of *State Trading Corporation of India Ltd. v. Commissioner of Income Tax*²⁷, stated that companies doesn't fall under the ambit of citizen and hence, cannot enforce their rights under article 19. As in this case all are Chinese Apps and head of many banned apps belongs to other countries and they are not basically the Citizen of India which is one of the requirement to approach the Constitutional Courts in violation of article 19. Though, this decision can be challenged by any shareholders if citizen of India as highlighted in the case of *Bennet Coleman & Co. v. UOI*²⁸.

➤ Article 21 & the decision on the ban of Chinese apps

The importance of article 14, 19 & 21 of the Constitution of India was highlighted in plethora of cases including *Maneka Gandhi v. Union of India*²⁹, *Bachan Singh v. State of Punjab*³⁰ and most recently in *Navtej Singh Johar & Others v. Union of India & Others*³¹. Article 21 can be enforced by person and person as per Indian law includes companies as well.³² Article 21 safeguards the company's right against erroneous or arbitrary administrative or legislative actions. If the State wants to deprive the companies of their fundamental rights, it must be done as accordance with the 'procedure established by law'³³.

To ban the access of these apps the government need to follow procedure and the procedure is mentioned in section 69A of the I.T. Act read with Information Technology (procedure and safeguards for blocking of access of information by public) rules, 2009³⁴. The blocking rule two blocking procedure. First, under rule 6 any person can send the request in writing with the alleged offending information to the Nodal officer for blocking of access then there is examination of request by 'Committee for examination of request' established under rule 7 then the committee submit their recommendation that whether it comes under the ambit of section 69A of the act. After this the designated officer on approval of the request by the Secretary

²⁷ [1964] 4SCR 99.

²⁸ (1972) 2 SCC 788.

²⁹ 1978 AIR 597; 1978 SCR (2) 621; 1978 SCC (1) 248.

³⁰ AIR 1980 SC 898; (1980) 2 SCC 684.

³¹ AIR 2018 SC 4321.

³² S.C. Mitra, *Commentary on the general clauses act, 1897* (2nd ed. Orient Publishing Company, 2015).

³³ P. Srinivas Reddy, *Reviewing Company's Fundamental Right to Freedom of Speech and Expression*, ICLR, 92-93 (2017).

³⁴ *Information Technology (Procedure and safeguards for blocking for access of information by public) Rules, 2009*, Rules of Ministry of Electronics and Information Technology, 2009 (India).

department of I.T. (DeitY) direct any agency or intermediary to block the access. In this procedure a proper notice to the intermediary as well as proper hearing is required. But, the second procedure under rule 9 can be used in the case of emergency where no delay is acceptable. In this the designated officer directly approach to Secretary DeitY for approval of blocking request and if satisfy the Secretary DeitY issue interim direction for the blocking and in this no notice or hearing is required. Though, after the direction the designated officer within 48 hours required to place the request before the committee under rule 7³⁵.

This means that the procedure is fulfilled. Also, one of the contention of the banned intermediaries that the decision violates the principle of natural justice as they remain unheard was also not justified as under emergency procedure no notice or hearing required because in these cases “no delay is acceptable”.

Analysis of International Obligations

Just after the decision of the ban, China Spokesperson for the Chinese embassy in New Delhi in his statement said that the Indian Government move to ban Chinese apps violates World Trade Organization (WTO) rules.³⁶ Apart from this many expert also believe that there are few other obligations are also in question after the decision of ban.

➤ The decision of Apps Ban and the World Trade Organization (WTO) Rules

One of the major objective of the WTO is to ensure the flow of trade smoothly and as freely as possible by lowering trade barriers between the nations in other language we can say that WTO promotes trade liberalization.³⁷ As we know that in the present case China alleged that India decision to ban only Chinese apps is not only selective but also discriminatory & violates WTO rules and also urged the government of India to make the environment of Indian Market more open and fair³⁸. As per article III of the ‘Dispute Settlement Understanding’ (DSU), the WTO offer mechanism in which any WTO members can enforced their

³⁵ Geetha Hariharan, Is India’s website-blocking law constitutional? Law & procedure, The Centre for Internet & Society (Dec. 11, 2014), <https://cis-india.org/internet-governance/blog/is-india2019s-website-blocking-law-constitutional-2013-i-law-procedure>.

³⁶ CGTN, China: India’s ban on Chinese apps may violate WTO rules, CGTN (Jul. 01, 2020, 12:25PM), <https://news.cgtn.com/news/2020-07-01/China-India-s-ban-on-Chinese-apps-may-violate-WTO-rules-RLyGBm nSaQ/index.html>.

³⁷ Kym Anderson, World Trade Organization Introduction, Britannica (May 23, 2017), <https://www.britannica.com/topic/World-Trade-Organization>.

³⁸ Reuters Staff, China says India’s ban on Chinese apps may violate WTO rules, Reuters (Jun. 30, 2020, 07:31PM), [https://in.reuters.com/article/india-china-apps/china-says-indias-ban-on-chinese-apps-may-violate-wt o-rules-idINKBN2412BV](https://in.reuters.com/article/india-china-apps/china-says-indias-ban-on-chinese-apps-may-violate-wt-o-rules-idINKBN2412BV).

rights as per WTO agreement against the other member countries³⁹. Now the question is whether the WTO principles will apply on these online services or not and which rules the China is talking about.

Answering the first question that whether the WTO rules apply in this case, this is the case of service through internet, so, 'the general agreement on trade in services' (GATS) may apply here. Though, there is one exception to this concept as many apps like Club Factory, Shein etc. sell clothing products in India, so, this may also come under 'the general agreement on tariffs and trade (GATT). Hence, both GATS & GATT can apply here. After the case of United States and Antigua online gambling dispute⁴⁰, it is clear that in this scenario where the intermediaries companies providing services from abroad can also enforced their right if violated as per the procedure mentioned in DSU. Now the second part which rules China is talking about. The two fundamental rule of WTO that prohibits discrimination is the concept of 'most favoured nation' (MFN) and the provision of 'national treatment principle' which is in question after the Indian Government decision. The concept of MFN is mentioned in article 1 of the GATT and article II in the GATS, in this if any advantage, favour, privilege or immunity granted to any country then as per this principle all the countries are entitled for the same for the like product. Under this provision country like India who is the member of WTO cannot prohibit the use of one country apps and allow the other countries apps. Second, the provision of national treatment which is in article III of GATT & article XVII of GATS under which the member countries is under obligation to give equal treatment to domestic as well as foreign goods for the like products, but this applies only when the product enter into the market as in this case the access of Chinese apps ban in India this is why whether this provision will apply or not is a point of debate. If we apply this provision then the move by the government violates the 'national treatment principle' as it discriminates between the domestic apps and Chinese origin apps⁴¹.

But these rules have some exception under which the member country is not under any obligation. As per article XX & XXI of GATT⁴² and article XIV & XIV bis* of GATS⁴³, there is the provision of general as well as security exceptions. General exceptions includes many things like privacy of the individuals, public order

³⁹ Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organizations art. 3(2), Apr. 15, 1994, 1869 U.N.T.S. 401.

⁴⁰ Isaac Wobl, The Antigua-United States Online Gambling Dispute, United States International Trade Commission Journal of International Commerce and Economics (July, 2009), https://www.usitc.gov/publications/332/journals/online_gambling_dispute.pdf.

⁴¹ Principles of the trading system, World Trade Organization, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#:~:text=1.,for%20all%20other%20WTO%20members.

⁴² General Agreement on Tariffs and Trade art. 20 & 21, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153.

⁴³ General Agreement on Trade in Services art. 14, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167.

etc. which was one of the ground for the blocking of Chinese apps in India. Furthermore, as per security exceptions under which the member country take any action for protecting the essential security interests of their State. Same in this scenario as India can argue that the reason of the ban was to protect the essential security interests of the State⁴⁴.

Recently, the WTO Panel in Ukraine and Russian Federation dispute said that, mere political or economic difference between members cannot considered as emergency to invoke the exceptions. As in this case also the Russian Federation adopted the trade restrictive measures against Ukraine for the purpose of protecting its national security.⁴⁵ In light of the recent case, China can also contend that the ban was because of the conflict between Indian troops and Chinese troops in Galwan valley over the border dispute and not because of the privacy threats to Indians.

But many expert believes that China will not invoke WTO dispute settlement mechanism because China also adopted these kind of policies in their own countries as many United States apps are banned in China and China is very much popular for his rigorous policy and censorship of foreign content. So, approaching WTO will not be a good move for China in the long run.

➤ **The decision of Apps Ban and other obligations**

There are many other declarations, covenants etc. which is in question after the India decision to ban the Chinese apps. But, we will discuss only ‘Universal declaration of human rights 1948’ (UDHR) and ‘International Covenants of Civil and Political Rights, 1966’ (ICCPR). First, in UDHR as per article 7, everyone is entitled for equal protection of Law and all are equals before law and as per article 19, everyone has the freedom of opinion and expression.⁴⁶ Second same kind of provisions are also in ICCPR. But, these international obligations are not binding as they are subject to reasonable restrictions as per International laws and National laws. Also as per article 2 of the United Nation Charter which is the guiding principle of many international obligation, all member states are sovereign and have all the rights to protect their sovereignty as

⁴⁴ Rajeesh Kumar, India’s Apps Ban: Preparing for Long Haul, Manohar Parrikar Institute for Defence Studies and Analyses (Jul. 29, 2020), <https://idsa.in/issuebrief/indias-apps-ban-rkumar-290720#:~:text=WTO%20and%20India's%20Apps%20Ban&text=Similarly%2C%20there%20is%20no%20bilateral,from%20scrutiny%20under%20thes%20provisions.>

⁴⁵ William Alan Reinsch, the WTO’s first Ruling on National Security: What Does It Mean for the United States, Center for Strategic & International Studies (Apr. 05, 2019), <https://www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states>.

⁴⁶ Universal declaration of human rights art. 7 & 19, Dec. 10, 1948, UNGA Res 217 A (III).

well.⁴⁷ So, as per the above analysis, prima facie, we can say that India move doesn't violates any international obligations including the WTO rules.

Aftermath of the decision of the ban

In this section we will try to analyse the different implications of the decision of ban in India, China as well as in the world. Initially, the decision of the ban created two rights for the aggrieved as they can approach the Indian domestic jurisdiction to challenge the decision basically Supreme Court under article 32 of the Constitution of India to declare the decision unconstitutional, arbitrary or erroneous and second right to invoke WTO dispute mechanism procedure to declare this as discriminatory practice. Now we will discuss the other implications of the ban. First from the perspective of economy in both India & China. Definitely, this decision give a blow to the Chinese economy as well to the China dream of digital silk route for example one of the banned app Tik Tok's parent company generated \$5.8 million in revenue from India in 2019 and this year they were expecting increase in the revenue because of the lockdown as many people were using the app most of the time. Apart from this the other apps like SHAREIt has almost 400 million users in India and UC Browser, a Chinese app was second in the market share after Google Chrome.⁴⁸ So, these statistics of only three apps out of 177 are very much sufficient to justify the effect on the Chinese economy because of the Indian digital strike.

Now, the impact on the Indian economy is two folded means advantages as well as disadvantages. First, the disadvantage part as many Chinese apps investment will not come in India. As ByteDance talked about to invest \$1 billion in India⁴⁹ and same with the other apps which mean this will definitely affect the investment rate and will decrease the employment because there will be no fresh recruitment by Chinese app offices in India and even termination of the existing employee in India because there apps are not operating in India. Also, China alleged that Indian market environment is not open & fair and Indian government adopted a discriminatory practices only because of the border dispute. This may give a wrong signal to the world and may affect the incoming investment in the future from China as well from the other countries which has the potential to stop the growth of different sectors. Talking about the advantage, many experts believe that this is

⁴⁷ Charter of the United Nations and Statute of the International Court of Justice art. 2, June 26, 1945, 1 UNTS XVI.

⁴⁸ K. Bharat Kumar, The Hindu Explains- What will be the impact of Chinese apps ban, The Hindu (Jul. 05, 2020), <https://www.thehindu.com/news/national/the-hindu-explains-what-will-be-the-impact-of-chinese-apps-ban/article31991127.ece>.

⁴⁹ PTI, TikTok's parent ByteDance plans USD 1 billion investment in India in next 3 years, The Economic Times (Apr. 19, 2019), <https://economictimes.indiatimes.com/tech/internet/tiktoks-parent-bytedance-plans-usd-1-billion-investment-in-india-in-next-3-years/articleshow/68953617.cms?from=mdr>.

the first step of decoupling from the Chinese economy as in many front Indian markets are entirely depended on the Chinese Markets, this will a threat on the Independence of the Indian Market.⁵⁰ Furthermore, the ban will provide an opportunities for the Indian Companies specifically the startups to grow and build better alternatives of the banned Chinese apps and this will also boost the Indian economy.⁵¹

The decision of the ban has other aspects as well. Firstly, this give a message to the neighbouring countries with regard to the Indian Sovereignty and create pressure on China as many experts alleges that, China sponsor terrorism in Pakistan against India by intelligence reports, arms & ammunition facilities, apart from this China always want to encroach Indian territory even during this pandemic China is doing his best to encroach Indian territory. So, this decision may create a pressure on the Chinese Government to not indulge in these practices.⁵² Secondly, one of the major reason of the ban is to safeguard the Indian sovereignty, integrity, defense, public order etc. as these apps can be a privacy threat to the security of the nation as millions of people downloaded Chinese apps in the past and now this move will safeguard the interest of 1.3 billion people and also protect the National interest.

Lastly, the ban of the Chinese apps triggered a debate in the world and few countries like United States want to do the same and few countries believes that the decision is not justified. Just after the decision of the ban, the United State Secretary of State Mike Pompeo said that Indian move is justified and United State may also adopt this move to safeguard the privacy of their citizens. Even many United State lawmakers in the past raised the concern of Chinese data sharing norms with the intelligence agencies as controlled by the Chinese Communist Party.⁵³ Though, there are other countries like Australia who has not decided to ban the Chinese apps at this stage but they will review the situation and will make decisions based on its national interest.⁵⁴

Conclusion

⁵⁰ Priyanka Chandani, Why India's virtual war on Chinese apps is significant, Deccan Chronicle (Sep. 04, 2020, 05:43PM), <https://www.deccanchronicle.com/technology/in-other-news/040920/why-indias-virtual-war-on-chinese-apps-is-significant.html>.

⁵¹ Swarnendu De, Ban on Chinese apps and its impact on the Indian Startup Ecosystem, Innofied (Jul, 23, 2020), <https://www.innofied.com/impact-of-chinese-apps-ban-on-the-indian-startup-ecosystem/>.

⁵² DECCAN, supra note 50.

⁵³ Elizabeth Roche, After India, US may also look at banning China's TikTok, other apps, Livemint (Jul. 07, 2020, 02:51PM), <https://www.livemint.com/news/world/after-india-us-may-also-look-at-banning-china-s-tiktok-other-apps-11594112265641.html>.

⁵⁴ PTI, Australia says no India-like ban on Chinese apps at this stage despite tensions with Beijing, The Print (AUG. 13, 2020, 06:24PM), <https://theprint.in/diplomacy/australia-says-no-india-like-ban-on-chinese-apps-at-this-stage-despite-tensions-with-beijing/481019/>.

The ban of the Chinese apps also called as digital strike by India triggered the debate in India as well in the world that whether the reason behind the ban is the territorial disputes or the privacy threat on the nation. But the press release of the MeitY completely ignore the existence of territorial dispute and stressed on the misuse of Chinese apps in an authorized manner. The ban was also backed with the list of malicious apps provided by Ministry of Home Affairs which are detrimental to national security. The ban was done by invoking the power of the government in section 69A of the Information Technology Act, 2000. The issue of the constitutional validity of this provision along with the rules made under this was settled in the celebrated case of *Shreya Singhal*⁵⁵ as it comes under the reasonable restriction mentioned in article 19(2). But the Constitutional validity of this decision is in question. Though, the arguments are in favour that the decision of the ban is constitutionally valid. First, as the decision was not arbitrary and doesn't violate article 14 of the Constitution of India. Second, all the grounds mentioned in the press release for the ban comes under the ambit of article 19(2). Third, the procedure is fulfilled as the order was in writing as per the blocking rules which means procedure under article 21 is also fulfilled. Fourth, we have presumption of Constitutionality in Indian Constitution. Commenting on the International obligation as China always alleged that India move violates WTO rules as it discriminatory in nature. The reason for the discrimination is the concept of 'most favoured nation' (MFN) and 'national treatment principle' in GATT & GATS. But, the national security exception in GATT & GATS will act as counter argument on China allegation. But, how much this fall under the exception, this will be decided by the WTO Panel. Many experts believe that China will not approach the WTO panel because even China is famous worldwide for their censorship policy of the foreign content. Lastly, the impact of the ban is not only on the Chinese economy but also on the Indian economy. As it gives wrong signal to Chinese investors and the other foreign investors about the Indian market because of haste nature of the decision as why anyone will invest in India where the government even didn't follow the principle of natural justice as lots of intermediaries remain unheard as there was no proper hearing before the decision of the ban. But, we also need to consider that National interest is always important than foreign investment and India as per domestic laws and as per International rules is free to take any decision to safeguard his National interests.

⁵⁵ (2013) 12 S.C.C. 73.