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Issue Brief

India's Apps Ban: Preparing for Long Haul

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Summary

China has pointed to WTO rules violation in India's apps ban. However, with its muscular digital protectionist policies, the possibility of Beijing taking the issue to WTO is limited. But, what if China approaches WTO? How should India respond to it? To answer these questions, one needs to understand the basis for a WTO case and to what extent international trade rules apply in the case. The line between legitimate domestic regulation and violation of international trade rules is often delicate. While India's decision is defensible under both domestic IT laws and international trade rules, it is important that any ambiguity in the ban order that can be challenged at WTO is effectively addressed.

On June 29, 2020, the Government of India (GOI) decided to ban the usage of 59 Chinese apps in India. Though the decision came amid heightened tensions between India and China in Ladakh, the GOI had invoked security reasons to block the apps. The interim order issued in this regard by the Ministry of Electronics and Information Technology cited section 69A of the Information Technology Act, which gives the central government the power to block public access to any information online. The order stated that certain apps are "prejudicial to sovereignty and integrity of India, defence of India, security of state and public order." It also stated that the ban "will safeguard the interests of crores of Indian mobile and internet users", and added that the decision "is a targeted move to ensure safety and sovereignty of Indian cyberspace."[1]

Responding to the ban, Chinese Foreign Ministry spokesman Zhao Lijian stated that China is "strongly concerned" about India's decision and that "the Indian government has the responsibility to protect the legitimate rights and interests of international investors in India, including Chinese businesses, in accordance with market principles."[2] The spokesperson of Chinese Embassy in India, Counsellor Ji Rong, also responded stating that India's measure is selective and discriminatory and "runs against fair and transparent procedure requirements, abuses national security exceptions, and suspects of violating the WTO rules."[3]

Nonetheless, a couple of days later, the Ministry of Electronics and Information Technology sent 77 questions to the banned Chinese apps companies and gave them three weeks to respond to the questionnaire.[4] Latest in this move, India has banned 47 more apps which were mainly clones of the 59 apps banned earlier. According to reports, the Ministry of Home Affairs has prepared a list of more than 250 Chinese apps that may be outlawed on the grounds of national security breaches.[5]

Responding to the latest developments, the Chinese Embassy spokesperson, Counsellor Ji Rong, stated that "The Indian government has the responsibility to protect the legitimate rights and interests of international investors in India, including Chinese businesses, in accordance with market principles." The

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[1] **"Government Bans 59 mobile apps which are prejudicial to sovereignty and integrity of India, defence of India, security of state and public order"**, *Press Information Bureau*, Government of India, June 29, 2020.
[2] **"Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on June 30, 2020"**, *Ministry of Foreign Affairs of the People's Republic of China*, June 30, 2020.
[3] **"Statement on India's blocking certain Chinese mobile apps by Spokesperson of the Chinese Embassy in India Counselor Ji Rong"**, *Embassy of the People's Republic of China in the Republic of India*, June 30, 2020.
[4] Aditya Kalra, **"India quizzing owners of banned Chinese apps over content and practices"**, *Reuters*, July 14, 2020.
[5] **"India bans 47 more Chinese apps, clones of 59 banned apps; another 275 on radar including PubG"**, *The Economic Times*, July 29, 2020; Karishma Mehrotra, **"Centre now bans 47 clones of Chinese apps banned earlier"**, *The Indian Express*, July 28, 2020; and Megha Mandavia**,** Surabhi Agarwal and Rahul Tripathi, **"275 more Chinese apps on India's radar, list includes PubG, Resso"**, *The Economic Times*, July 29, 2020.

spokesperson added that "China will also take necessary measures to safeguard the legitimate rights and interests of Chinese companies."[6]

Though China has pointed to the World Trade Organisation (WTO) rules violation, it is not clear whether it will approach WTO against the Indian apps ban. With its muscular digital protectionist policies, the possibility of China taking the issue to WTO appears limited. However, what if China approaches WTO? In such case, how should India respond to it? To answer these questions, one needs to understand the basis for a WTO case and to what extent international trade rules apply to this geo-blocking. This brief examines the possible WTO ramifications of India's apps ban and China's dilemma in approaching the dispute settlement body.

Will China Approach WTO?

WTO is a multilateral institution that regulates global trade. It serves as an essential forum for negotiating multilateral trade agreements and settling trade disputes among member states. The WTO agreements cover trade in both goods and services. While the General Agreement on Tariffs and Trade (GATT) covers goods trade, the General Agreement on Trade in Services (GATS) covers services trade. These two agreements deal with a range of topics including agriculture, textiles and clothing, banking, telecommunications, government purchases, industrial standards and product safety, food sanitation regulations, intellectual property, and much more. In addition, WTO has one of the most active international dispute settlement mechanisms that operates through panels and appellate bodies.[7] If a member believes that another member is violating an agreement or a commitment made at WTO, then that member has the right to approach the dispute settlement body.

As stated, the prospect of China approaching WTO against India's apps ban appears minimal. Such a move could prove to be counterproductive for China, given the country's stringent censorship laws. In fact, China is known to be one of the most repressive countries when it comes to regulating the internet and other digital services. According to international trade law experts, Beijing's internet censorship system, popularly known as the 'Great Firewall', is a barrier to free and fair trade. The United States Trade Representative (USTR) office in its 2016 report observed that "China's filtering of cross-border internet traffic has posed a significant burden to foreign suppliers, hurting both internet sites themselves, and users who often depend on them for their businesses."[8] The report also noted that "eight of the top

[6] **"Response to media query by Spokesperson of Chinese Embassy in India Counselor Ji Rong on the restriction on WeChat of sending and receiving messages in India"**, *Embassy of the People's Republic of China in the Republic of India*, July 28, 2020.
[7] The WTO dispute settlement system has jurisdiction over any difference that may arise between member states, above and beyond the provisions of any of the "Covered Agreements" provided for in Appendix 1 of the Dispute Settlement Understanding (DSU). See **"Understanding on rules and procedures governing the settlement of disputes"**, Annex 2 of the WTO Agreement.
[8] **"2016 National Trade Estimate Report on Foreign Trade Barriers"**, *United States Trade Representative*, March 2016, p. 91.

25 most trafficked global sites" have no access in China and much of "the blocking appears arbitrary."[9]

The 2019 USTR report on China's WTO compliance notes that Beijing often invokes 'national security' to justify its secure and controllable ICT policies. China's National Security Law and Counterterrorism Law of 2015, Cybersecurity Law of 2016, and Cryptography Law of 2019 are cases in point. Interestingly, the report also argues that China's real intention of imposing severe restrictions on a wide range of information and communications technology (ICT) products and services is to support China's technology localisation policies and replacement of foreign products and services with domestic ones.[10]

According to the Freedom House, China is one of the world's worst abusers of internet freedom, and the scale of content removals and website and app closures in the country has considerably increased in the last few years.[11] Many international news outlets, especially those with Chinese-language websites, and most of the international social media and messaging platforms are completely blocked in China.[12] Concerning Beijing's internet censoring, the rights of foreign firms outlined in GATS have rarely been honoured. Also, China has provided "no prior notice or explanation of its actions, reference to a particular law or regulatory rule, or provision for appeal to an independent body."[13] These due process violations could form one route for arguing a WTO case.

Table 1: Popular Websites and Apps Blocked in China

Search Engines	News Media	Productivity tools	Social Media	Streaming
Google	New York Times	Gmail	Facebook	YouTube
Amazon	BBC	Dropbox	Instagram	Netflix.com
Wikipedia	Financial Times	Google Apps	Twitter	Daily Motion
Yahoo	Wall Street Journal	Microsoft OneDrive	Snapchat	Vimeo
DuckDuckGo	Reuters	Slack	Pinterest	Twitch
Startpage.com	CNN	Google Play	Quora	Periscope
	TIME	Hootsuite	Tumblr	Pandora
	The Guardian		Reddit	Spotify
				Soundcloud

Sources: Compiled by the author based on various media reports.

[9] Ibid.
[10] **"2019 Report to Congress on China's WTO Compliance"**, *United States Trade Representative*, March 2020.
[11] **"China: Freedom on the NET 2019"**, *Freedom House*, 2019.
[12] Ibid.
[13] Claude Barfield, **"China's Internet Censorship: A WTO Challenge is Long Overdue"**, *American Enterprise Institute*, April 29, 2016.

China's data security law gives ample discretion to the government over allowing and blocking internet services. Beijing uses the phrase 'internet sovereignty' as a broad framework for all of its activities related to the internet. This digital protectionism as per the WTO rules is discriminatory since it helps Chinese companies in domestic markets against international companies.[14] In February 2018, the US notified the members of the WTO Council for Trade in Services that China's 'internet sovereignty' policy significantly impairs cross-border transfer of information and hurts trade in services.[15] It also noted that China's measures would affect market access and national treatment commitments under GATS for many services.[16]

It is important to understand how 'internet sovereignty' and 'Great Firewall' are in violation of China's WTO obligations under GATT, GATS as well as its Protocol of Accession. First, Chinese policies and measures provide a competitive advantage for local products and companies, and hence breach Article III: 4 of GATT and Article XVII of GATS.[17] Moreover, China does not maintain any judicial or arbitral system to review its measures, and this potentially violates Articles X: 3(b) of GATT and Article VI of GATS.[18] Similarly, the 'Great Firewall' is also contrary to Article I:1 of GATS, which talks about relevant measures that affect trade in services, including value added telecommunications services.[19]

China argues that its data security law is fully compliant with the WTO rules. It cites general and security exceptions under GATT and GATS to substantiate its claim. Nonetheless, China's extensive blocking of internet access is arbitrary and disproportionate. China knows that its policies represent a form of digital protectionism and breach of current WTO rules. It is in this context that the possibility of China approaching WTO against the Indian decision to ban certain apps appears limited. On the other hand, even if China approaches WTO, India has multiple options including security exceptions to counter China. However, the complexity of international trade rules would bring its own set of challenges for India.

[14] Li Yuan, **"Behind the Great Firewall, the Chinese Internet Is Booming"**, *The Wall Street Journal*, June 08, 2017.
[15] **"Communication from the United States: Measures Adopted and Under Development by China Relating to its Cybersecurity Law"**, *World Trade Organisation*, February 23, 2018.
[16] Ibid.
[17] **Article III of the GATT** and **Article XVII of the GATS** discuss the National Treatment on Internal Taxation and Regulation.
[18] While **Article X: 3(b) of the GATT** stipulates that every member should have in place tribunals and procedures that allow for the review and correction of administrative actions, **Article VI of the GATS** demands objective and transparent criteria for domestic regulations of the services.
[19] **Article I:1 of the GATS** discusses specific market-access commitment in relation to the supply of a service.

WTO and India's Apps Ban

The potential basis for a WTO complaint against Indian apps ban could be that it discriminates against foreign firms and hence hinders the legitimate flow of goods and services. Non-discrimination is key to WTO law and policy. The two principal anti-discrimination obligations in both GATT and GATS are the Most-Favoured-Nation (MFN) treatment and the National Treatment (NT). While MFN treatment obligation prohibits a member from discriminating between and among other members, a national treatment obligation prohibits a member from discriminating against other members.[20] In addition to this general anti-discrimination principles, GATS, which is more relevant in the context of India's apps ban, has some sector and mode-specific obligations including obligations of market access.[21]

Since the apps that India banned are via internet media, the case would likely fall under violation of trade in services. Therefore, if it comes to it, India may invoke some provisions of both general and security exceptions of GATS to defend the ban. Article XIV of GATS is the most relevant article when looking at restrictions on data flows and their impact on trade. For instance, Article XIV (ii) grants members the power to enforce decisions that are contrary to general rules of WTO in certain circumstances – to protect public morals, maintain public order and to protect the privacy of individuals. Moreover, Article XIV bis (security exceptions) states that nothing in the agreement shall be construed "to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests [...] taken in time of war or other emergency in international relations."[22]

India has taken specific market access and national commitments for telecommunication services like voice mail, data and message transmission services, online information and data processing, audio-visual, etc.[23] However, India has no specific commitment to market access in digital services and apps. Similarly, there is no bilateral agreement between India and China concerning mobile applications. The issue of intellectual property rights violation is also not applicable in this geo-blocking. Therefore, the ban decision will be free from scrutiny under these provisions.

However, due to the complexity of rules and commitments, citing the general exceptions in GATT and GATS will not be sufficient to explain whether India's decision violates the WTO rules. It instead demands a more specific but comprehensive analysis of India's sectoral commitments and WTO exceptions. For instance, it may seem that since India has invoked security exceptions and the

[20] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials, Cambridge University Press, Cambridge,* 2017, p. 306.
[21] **"The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines"**, *WTO.*
[22] **"General Agreement on Trade in Services"**, Uruguay Round Agreement, *WTO.*
[23] **"India: Schedule of Specific Commitments"**, GATS, *WTO*, April 15, 1994.

country has not taken any separate commitment on digital services and apps, the likelihood of challenging the ban in WTO is limited. However, past disputes at WTO and practices such as the two-tier test show that the Indian decision can also be challenged.

First, the GOI notification comprises a couple of things that can invite scrutiny to possible violation of the MFN treatment. For instance, the phrase "emergency measures" is vague since it does not mention any specific emergency. Instead, the notification refers to data theft and privacy breaches by 59 apps. Moreover, since no prior notice was given to the banned apps, and no action was taken against other countries' apps that are also a risk to data security and privacy, it could be considered as a unilateral measure. Many European and American companies like Amazon, Facebook, Uber and Zoom have come under similar scrutiny for their data mining policies.[24] The Ministry of Home Affairs recently raised similar security concerns over Zoom, but no action was taken.

Further, the GATS document also states that "The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society." In this regard, the WTO Appellate Body has introduced a two-tier test demanding that the country show that "measures are necessary for public morals and order or for national security" and that the country "pursues a less trade-restrictive measure to obtain its objectives if one is reasonably available, taking into account the interest being pursued and the desired level of protection."[25]

Summing Up

While India's decision to ban Chinese apps is legally tenable in the framework of both domestic IT laws and international trade rules, it is important that any ambiguity in the ban order that can be challenged at WTO is effectively addressed. The line between legitimate domestic regulation and violation of international trade rules is often very thin. For that reason, India should be prepared to counter the Chinese

[24] Shubhangi Agarwalla and Siddharth Sonkar, **"Examining the Legal and Policy Process Behind India's Ban on Chinese Apps"**, *The Wire*, July 07, 2020.

[25] **"GATS – Article XIV (Jurisprudence)"**, *WTO Analytical Index*, As of December 2019, pp. 2-4. The Appellate Body in the case of "US – Gambling" asserted that Article XIV exceptions need to pass this two-tier test. It also observed that the standard of 'necessity' under Article XIV (a) is an objective standard, and its determination requires the application of a weighing and balancing test. In other words, if a less trade-restrictive alternative is available for member states, they should prefer that instead of a permanent ban that affects trade disproportionately. Later, the panel on "Argentina – Financial Services" and "EU – Energy Package" underscored the findings of the "US-Gambling" case. See **"US – Gambling"**, *WTO*, Dispute Settlement: One-Page Case Summaries; **"Argentina – Financial Services"**, *WTO*, DS453: Argentina — Measures Relating to Trade in Goods and Services; and **"EU – Energy Package"**, *WTO*, DS476: European Union and its Member States — Certain Measures Relating to the Energy Sector.

arguments pertaining to discrimination and online protectionism. The decision to ban the apps may also go through Article XIV chapeau requirements, passing the two-tier test. As this provision is fact-specific, it could prove to be a complicating factor.

The Ministry of Electronics and Information Technology has given three weeks for the banned apps to respond, failing which the ban imposed will become permanent.[26] However, a permanent ban on online services is more prone to be found against the spirit of the WTO rules. There is a chance that a panel might rule that permanent blocks are incongruous with the WTO stipulations, even given the public order and security exceptions. Therefore, future policies will have to take into account some of the these factors, including the objective standard of 'emergency' and 'necessity' as well as concerned parties' right to be heard.

[26] Rahul Shrivastava, **"Will take penal action if found operating despite ban: Govt to 59 Chinese apps"**, *India Today*, July 21, 2020.

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