

COVID-19 and its Two-Folded Impact vis a vis India's Export Restriction on Drugs

written by Rajeev Rambhatla | March 24, 2020



COVID 19 and Drug Export Restriction

The fear that has been gripping the world for over 60 days has now started showing its obvious impact on various industries and cross borders trades, showcasing its fearsome two-headed attacks, that not only leave a nation (if not the world) into a medical emergency but also attacks the vital organs of the nation's (if not the world's) economy. In response to such drastic detrimental changes in the economies, most countries are putting up barriers to safeguard their economy and people from the harsh effect of such two folded physical and financial onslaught that has disrupted global affairs. However, such barriers come with a range of repercussions attached to them, given the shared business environment which existed before this ongoing pandemic. The business harmony among nations that existed prior to this ongoing disaster lead to the ratification of various cross-border investments and business treaties between the countries to boost and help in creating a surge in their respective economies.

The pandemic better known as COVID-19 or coronavirus ('the virus') has created a notable mark on world trade and has posed a risk to the macro-economy as the production of goods and services has been halted and not to forget the hindrances in travel/logistics and cutting off supply chains.[1] Such a sudden halt in cross-border travel and movements has hugely affected trade. India, being a new recipient of the virus, has started to take stringent steps in order to contain the spread of the virus that might potentially rupture the whole medical system and economy of India, if strict steps are not taken to stop such a virus in its nascent stage itself.

INDIA'S

MEASURES TO MAINTAIN ITS DOMESTIC STOCKPILES

India, being the largest manufacturer and supplier of generic medicines in the world, constitutes over 20% of the global market, notably, the majority of the investments in the Indian Pharmaceutical sector are from foreign entities. India, in the wake of the ongoing pandemic, has restricted the export of 26 active pharmaceutical ingredients to protect its domestic supply. Such export restrictions will impact products such as "*paracetamol, several antibiotics including Tinidazole and erythromycin, the hormone progesterone and vitamin B12.*"[2]

Such restrictions have caused potential fear and warning in the global market and it is sending a signal of disruptions in the supply chain. These barriers to export are likely to result in international arbitration claims and would significantly hamper foreign investment in India. Since most of the pharmaceutical companies in India are foreign companies, any export restrictions would hamper the prolonging benefits of such companies. Hence, such defensive action would directly and/or indirectly affect the Indian economy as such foreign-owned companies would resort to the claims under investment treaties that India has signed with them. Playing devil's advocate, one would say that most of these Bilateral Treaties/Multilateral Treaties/Trade Agreements, etc. usually contain a Force Majeure clause, and judging by the circumstances of the current global situation, the ongoing pandemic seems to fit the bill for that clause perfectly. This is one defense India must and probably will take while countering any potential internal arbitration claims that may await post the resolution of this ongoing global crisis.

INTERNATIONAL

IMPLICATIONS OF INDIA'S MEASURES

To deeply understand the impact of the export barriers imposed and their repercussions, one must know what are the basic factors involved in various foreign investments. Generally, whenever the foreign private investor (Foreign Direct Investment) wants to invest in cross-border locations, such investors enter into an Investment Treaty.

The treaty can be a bilateral Treaty ('BIT') or Multilateral Treaty ('MIT') consisting of negotiated terms and conditions between the state(s) and such foreign investor(s) and whenever there is a violation, contradiction, or dispute of such terms mentioned in the treaty, such disputes are redressed by the Alternative Dispute Resolution ('ADR') mechanism and the Investment Treaties provide the investor direct recourse against the host by allowing it to commence International Commercial Arbitration.

In the current situation, aggrieved foreign pharmaceutical investors might resort to such dispute redressal should they be adversely affected by India's measures to restrict exports. Talking about the protection provided by the Investment Treaty, the investment treaties generally provide for the following protection(s) to the investor:

1. Fair and Equitable Treatment: It obligates the host state to take into consideration the legitimate requirement of the investor and prohibit actions that are arbitrary and not transparent.
2. Discrimination: This prevents the host state to treat the investment of the investor the same as the investment from any other investor within its own state.
3. Expropriation: Prevents the host state from indulging in direct or indirect expropriation without due process and fee.
4. Protection and Security: Obligates the host state to provide for a secure investment environment and protect the investor from any harm by the third party.
5. Umbrella Clause: It requires the host state to keep in mind any obligations that might be created on its covered foreign investments, whether in contracts, treaties, or otherwise.[3]

Following the protections mentioned above, such as restrictions on the export of generic medicines and pharmaceutical ingredients, the Foreign

Pharmaceutical Companies can initiate a varied range of actions, which the Indian Government will come to expect in the coming weeks.

CONCLUSION

Any action that the Indian government would take as of now in lieu of this ongoing pandemic the globe is facing alongside India, would be construed in a way that would harm the economy of India. The question now lies to what extent the economies, people, and countries have to suffer both socially and financially, to strike a balance.

The dual-edged sword hit that the globe has taken would result in slowing down of economies due to the barriers, closure of cross border trade, disruption of supply chain world, etc. Therefore, it is best for the Indian Government to focus on dealing with the current threat that is the spread of the virus. For the Foreign Pharmaceutical Companies and the investors, the current action points would be to check if they are being affected by the measures taken by the Indian government and if they are adversely affected, they need to ascertain which provisions of existing MITs and BITs India have been violated in order to institute any claims or international commercial arbitration proceedings against the Indian Government.

Umbrella Clauses, Dispute Resolution Clauses, and Most Favoured Nation ('MFN') clauses kick into effect usually when such claims are being instituted. The Indian government, on the other hand, has the mammoth task of containing the virus' spread in a country with a humongous population and an expansive landmass. Defending itself in international commercial arbitration proceedings is not the priority but India will do so to the best of its abilities should the need arise. One thing is for certain though, the impact of the virus would be seen in the world long after it has been eradicated. It will impact socio-political and global financial relations amongst many other factors for the foreseeable future. One can only hope that mankind finds a way to pull through these tough times for in the words of Stephen Hawking *"We are very very, small but we are profoundly capable of doing very, very big things"*.

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- [1] Japanese Finance Minister Taro Aso. G20 gathering in Riyadh, Saudi Arabia, February 24, 2020
 - [2] India to Restrict 10% of Medicine Exports Due to Coronavirus," European Pharmaceutical Review (March 4, 2020)
 - [3] James P. Duffy IV Ben Love, India's Export Restrictions on Drugs Over Coronavirus Fears Raise Potential Investment Treaty Issues, <https://www.reedsmith.com/en/perspectives/2020/03/indias-export-restrictions-on-drugs-over-coronavirus>.

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