



A Primer on India's Digital Trade Policy

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List of Abbreviations

ASEAN	Association of Southeast Asian Nations
CEPA	Comprehensive Economic Partnership Agreement
DFFT	Data Free Flows with Trust
DPDPB	Digital Personal Data Protection Bill, 2022
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GVA	Gross-Value-Added
ID	Identity
OTT	Over-The-Top
RCEP	Regional Comprehensive Economic Partnership
STRI	Services Trade Restrictiveness Index
SACU	South African Customs Union
TRAI	Telecom Regulatory Authority of India
UAE	United Arab Emirates
WTO	World Trade Organisation

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Part I.

Introduction

In 2000, India entered a host of free trade agreements with several countries in the Association of Southeast Asian Nations (ASEAN).¹ The spurt of agreements afforded India greater economic integration with its neighbors to the East.² It also, however, prompted a sharp increase in imports, leading to concerns about the negative impact on domestic industry.³ These events pushed India towards more conservative approach to free trade agreements; choosing to favor economic policies that were more inward looking.⁴ India's trade conservatism also percolated into its digital trade outlook. The country has, in the past, supported proposals that may serve as barriers to

digital trade. Illustratively, the 2018 iteration of the Indian Data Protection Bill called for the localization of personal data of Indian citizens.⁵

These trends are, however, witnessing reversal. The past year has seen India shake off its cautious attitude to embrace trade agreements. In 2021, it announced that it was actively negotiating trade agreements with eight sets of trading partners.⁶ Digital trade is likely to be an important issue in these talks, as countries work to sure up rules of the road and benefit from cross-border digital services.

Figure 1: Top exporters of digitally-deliverable services (2021)

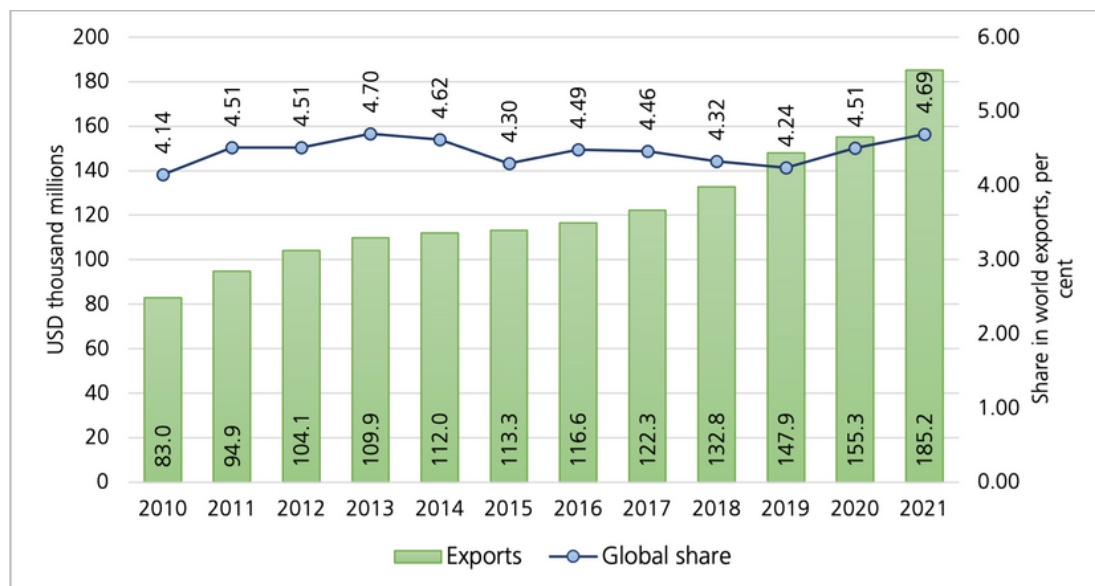


Source: [UNCTADstat](#)

Promoting digital trade aligns with India's strategic economic goals. For India, digital trade is promising in terms of growth and productivity, relative to trade in goods. Global trade patterns in the last decade indicate a rise in the services trade to gross domestic product (GDP) contrary to an overall decline in the global trade to gross domestic product.⁷ India has a strong position in services. Information technology and business process management (IT-BPM) largest export

for the country, accounting for almost half of the total services exports in 2021-22.⁹ India ranked among the top ten largest exporters in digitally deliverable services in 2021 (Figure 1). However, in the last decade the country's contribution to global share was largely stagnant (Figure 2) and the compound annual growth rate of exports in this segment is close to 7 per cent, well below other Asian competitors such as China and Singapore.

Figure 2: India- Exports and global share in digitally deliverable services (2010-2021)



Source: [UNCTADstat](#)

Against this backdrop, this paper outlines India’s positions on digital trade provisions in a bid to create a guideline on what prospective trade partners can expect in negotiations. Specifically, it seeks to understand India’s digital trade positions in its recently executed agreement with the United Arab Emirates.¹⁰

Such considerations may be useful for prospective trading partners to craft effective negotiation strategies for finding consonance in matters related to digital trade.

Part II.

India and Trade Agreements: Moving from Isolationism to Globalism

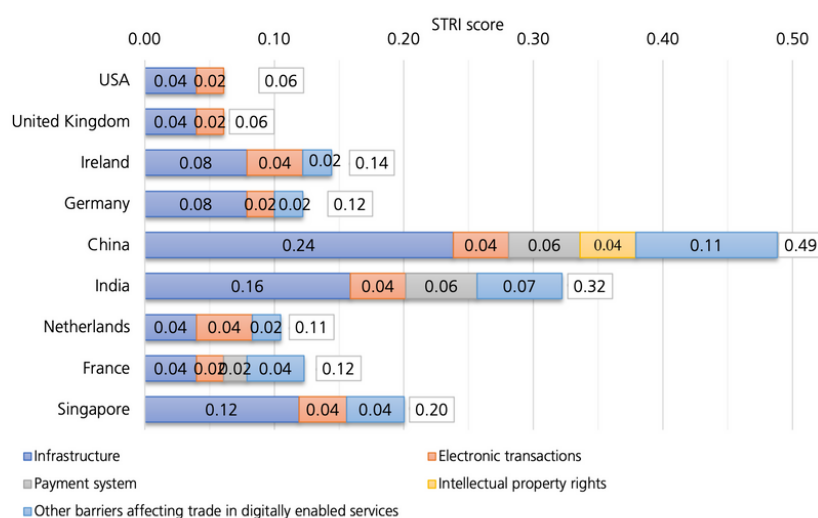
India has largely abstained from deep commitments on services. Illustratively, it opposed the liberalization of services in the Uruguay round of negotiations under the General Agreement on Tariffs and Trade (GATT).¹¹ Part of the reason for its avoidance from trade commitments in services was that the Indian State had a monopoly in sectors such as finance, transport, and communications at the time issues around cross-border trade in services were contemplated at the GATT.¹² In addition, developing nations, including India, strongly felt that the format of the Uruguay Round was rigged to favor the interests of advanced industrial nations.¹³ Developed and developing nations were also at a bit of an impasse regarding concessions in the event of service trade liberalization. Developing countries argued for a balancing of the right of foreign firms in service sectors to establish their places of business “with the right of migration of labor”, which [was] “unacceptable to major industrial countries.”¹⁴

In the following decade, India’s service sector began to account for an increasing proportion of gross domestic product (GDP). Illustratively, in 1999 services accounted for 46 per cent of GDP as compared to 36

per cent in 1980.¹⁵ The uptick in the economic contribution of services India softened domestic policy on investment flows in software services, but allowed only “55 per cent foreign equity participation in software services in World Trade Organisation (WTO) commitments.”¹⁶ Despite liberalization domestically, India maintained a hawkish stance on similar commitments in multilateral trade talks.

India’s conservatism towards free trade reached its ostensible apogee when the country decided to withdraw from the Regional Comprehensive Economic Partnership (RCEP) in 2019.¹⁷ The RCEP is a plurilateral arrangement between ASEAN countries, Australia, Japan, Korea, China, New Zealand. In addition, India also announced “its intent to review three major Comprehensive Economic Partnership Agreements (CEPAs) with ASEAN, the [Republic of Korea] and Japan.”¹⁸ The decision was guided by discontent with the rising trade deficit with its CEPA partners.¹⁹ The focus was squarely on increasing exports, and preferencing domestic produced goods over imported ones.

Figure 3: OECD- Digital Services Trade Restrictiveness Index (STRI), 2021



Note: India’s hawkish stance on cross-border trade in services reflects in the OECD’s Digital Services Trade Restrictiveness Index (STRI) where it was the 4th most restrictive jurisdiction across the countries sampled.^{20,21}

Source: [OECD Digital STRI](#)

Over the last year, however, India has taken a marked change in stance towards trade. It recently signed a CEPA with the United Arab Emirates (UAE). It is also in free trade negotiations with the United Kingdom, Israel, the Gulf Cooperation Council, Canada, the Eurasian Economic Union, the South African Customs Union (SACU) and the European Union. The primary driver for India's about-turn on trade policy is record growth in exports.²² In 2021, Indian exports rose to USD

396 billion, which was 21 per cent higher than previous the record set in 2018.²³ India's revised stance on free trade also emanates from an impetus to establish supply chain resilience by diversifying source of production, and geopolitical upheavals across different parts of the world.²⁴

Part III.

Is India's Domestic Digital Legislative Agenda Aligned with its Outward Looking Trade Policy?

1. Data Protection

India's newfound trade openness is possibly translating into the latest draft of its data protection law, the Digital Personal Data Protection Bill, 2022 (DPDPB). Section 17 of the DPDPB establishes a mechanism for the transfer of personal data across borders, provided prescribed conditions are met.²⁵ These conditions will be brought in through Rules created under the DPDPB once it is enacted. Conversely, previous iterations of the Data Protection Bill had requirements to localize data.

2. Telecom

In September 2022, the Indian Department of Telecommunications issued the Draft Indian Telecommunications Bill, 2022. The Bill seeks to upgrade India's telecommunications law, which is over one hundred years old. Among other things, the Telecommunications Bill brings communications Over-The-Top (OTT) applications like Whatsapp under the definition of telecommunications and subjects these services to licensing requirements. In addition, the wide scope of the definition of telecommunications, which creates scope for other digital applications to be brought under the aegis of the Bill as well.²⁶ Recent consultation papers released by the Telecom Regulatory Authority of India (TRAI) indicate that there is an intention to bring video-on-demand applications under the scope of the telecom bill as well. Telecom Bill, 2022, is likely to conflict with India's progressive trade outlook. It has the potential to unnecessarily fetter digital trade flows and place arbitrary restrictions and costs on digital businesses. Illustratively, a recent article indicated that the Indian telecommunications regulator, is mulling over revenue sharing between video OTTs and telecom service providers, to compensate the latter for the alleged bandwidth consumption of the former.²⁷ The move would heighten the bargaining power asymmetry between OTTs and telcos, whom the former depends on to reach the consumer. It would also serve as a barrier to entry for

smaller OTT services that would not be able to afford such carriage fees. Currently, the TRAI has no jurisdiction to do so, but it could take such actions if the Telecom Bill, 2022 is passed.

3. Consumer Protection

In 2019, India issued a new consumer protection law to account for the digital economy, the Consumer Protection Act, 2019. Section 2(9) of the Consumer Protection Act, 2019 establishes six rights for consumers, namely:²⁸

- i. Protection against the marketing of goods, products or services which are hazardous to life and property.
- ii. Information about the quality, quantity, potency, purity, standard and price of goods, products or services, to shield the consumer against unfair trade practices.
- iii. Assured access, where possible, to a variety of goods, products or services at competitive prices.
- iv. To be heard and to be assured that consumer's interests receive due consideration at appropriate fora.
- v. To seek redressal against unfair trade practice or restrictive trade practices or unscrupulous exploitation.

It remains to be seen how well India harmonizes its domestic positions with external policy on digital issues, as most of the proposed laws are likely to be revised based on feedback from public consultations.

Part IV.

Straight Talk on Digital Trade: Where Does India Stand?

This section discusses India's positions on different issues relevant to digital trade by analyzing its commitments in the India-United Arab Emirates (UAE) CEPA. While some provisions in the agreement signal a greater openness from India, others (or the absence thereof) indicate that there are certain issues on which India may retain its conservatism.²⁹

1. Cross Border Data Flows

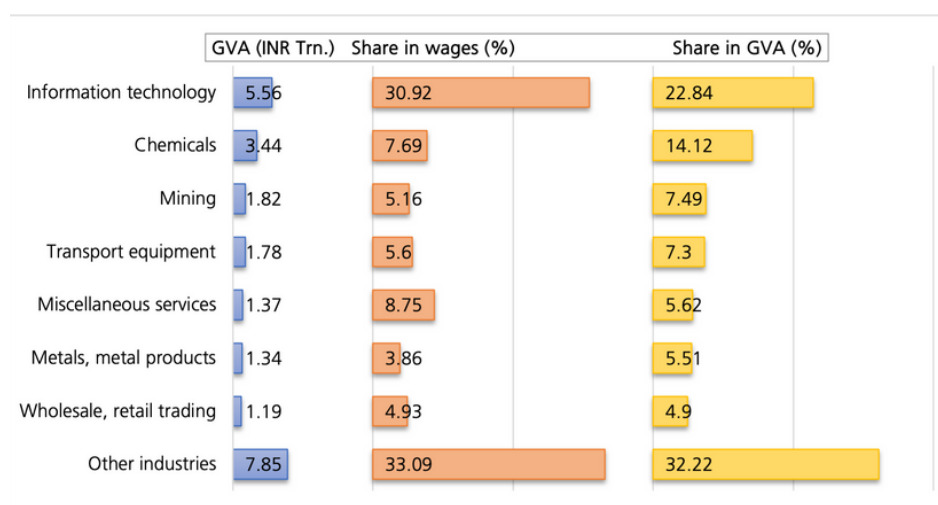
In 2019, G20 member countries endorsed the concept of Data Free Flows with Trust (DFFT). DFFT calls for cooperation between countries to encourage interoperability between data protection regimes, to reduce friction in the transfer of data across borders. India rejected the proposal at the time of its introduction noting that it was neither "well-understood" nor comprehensively implemented by most nations.³⁰ It also noted that unfettered data flows could be antithetical to its concerns around accessing data, and exacerbate the divide between the digital haves and have-nots.³¹

Recent developments, however, indicate that India has decided to embrace DFFT. In 2022, it released the Draft Digital Personal Data Bill, which provides for the

transfer of personal data outside India to countries which will be notified once the Bill is passed into law. Ostensibly, notified countries will be what the Indian state deems as trusted geographies i.e., jurisdictions where there are assurances that the data of Indian citizens will be protected.³² The UAE-India CEPA also contains a provision regarding free cross-border data flows, albeit it is a weaker commitment than similar provisions found in agreements between developed nations. For instance, the UAE-India CEPA commits to "endeavoring to promote electronic information flows across borders".³³ Comparatively, the Trade Cooperation Agreement between the United Kingdom and the European Union sets out firm restrictions on prohibitions to cross-border data flows.³⁴

India's about-face on DFFT, and other commercially-linked digital trade issues, likely emanates from improving commercial prospects for its booming information technology (IT) exports sectors. As per a recent account, Indian IT accounts for 30.92 per cent of wages and 22.84 per cent of Gross-Value-Added (GVA) (Figure 4).³⁵

Figure 4: Industry-wise GVA, wages share and GVA share



Source: CMIE 2018-19 (Retrieved from Shah (2022))

2. Custom Duties on Electronic Transmissions

Since 1998, WTO members have agreed to refrain from imposing custom duties on “electronic transmissions”.³⁶ The moratorium was recently extended at the 12th Ministerial Conference of the WTO in Geneva in 2022 until the next ministerial in 2023.³⁷ In the past, India has opposed the moratorium on custom duties on electronic transmissions, citing that it incurs significant losses in tax revenue because of it. However, the CEPA with UAE indicates that India has changed its position on this issue. Article 9.15 in the India-UAE CEPA provides that each party will maintain its practice of refraining to impose custom duties on electronic transmissions.³⁸ However, there is a caveat that neither party shall be prevented from imposing internal taxes on content transmitted electronically.³⁹ Importantly, in 2016, India introduced an equalization levy, a direct tax on the income earned by foreign companies providing online advertisement services in the country.⁴⁰

3. No Prior Authorization

The principle of prior authorization is that a business requires an express approval before it offers its products or services in a market.⁴¹ The India-UAE CEPA does not encompass a commitment for no prior authorization. While India has not introduced a licensing regime for digital services, there are legislative proposals in the works that suggest this may not always be the case. In 2022, India introduced the Draft Indian Telecommunications Bill, 2022, which provides for bringing communications OTT applications like Whatsapp under the ambit of a telecommunications licensing regime, meaning that such services would require permission before operating within India.

4. Access to Source Code

As algorithms play a seminal role in shaping behavior online, an increasing number of countries are mooted legislation to make algorithmic functioning more transparent.⁴² This often involves calls for making the source code of algorithms available to regulators/decision-makers, which raises concerns about forced technology transfers and other risks to intellectual property.⁴³

The 2019 Draft E-Commerce Policy contains a clause where the Indian State “reserves its right to seek

disclosure of source code and algorithms”.⁴⁴ The rationale provided is that as decision-making becomes increasingly automated, it may be necessary to understand how algorithms and artificial intelligence technologies make them, to safeguard the public interest. As there was no commitment prohibiting forced access to source code in the UAE-India CEPA, it can be presumed that India may be holding firm to this stance.

5. Cooperation on Digital Products

The Indian State has backed and incepted several types of digital public infrastructure. In 2009, it founded the Unique Identification Authority of India which created the Aadhaar digital identity system. The Aadhaar ID collects a person’s biometric and demographic information and serves as a “strategic policy tool for social and financial inclusion, public sector delivery reforms, managing fiscal budgets”.⁴⁵ It can be used for online or offline verification for a number of different services, including opening a bank account. Another important state-led innovation is the Unified Payments Interface, launched by the National Payments Council of India – a joint initiative of the Reserve Bank of India and the Indian Banks’ Association.⁴⁶ Broadly, the UPI makes digital wallets interoperable – so that consumers are not locked in to a particular application. India seeks to export these innovations to other countries (particularly emerging market economies).⁴⁷

6. Protection of Personal Data and Privacy

The Digital Personal Data Protection Bill, 2022, is a principle-based legislation that will depend significantly on delegated legislation. Consequently, its substantive measures will only be known after it is enacted. In the context of the Bill and trade, some have raised concerns about the independence and scope of the data protection authority created under the Bill, the Data Protection Board, as the appointment of its chief executive is made by the Central Government.⁴⁸ The lack of independence of the Data Protection Board may, in turn, prompt trade issues such as preventing India from getting adequacy status with other jurisdictions like the European Union. Article 45 of the European Union’s General Data Protection Regulation, outlines the criteria for assessing the adequacy of data protection in another jurisdiction when considering permissions for cross-border transfer of personal data. This includes the existence of one or more independent supervisory data protection authorities.⁴⁹

The condition may create a roadblock for cross-border data flows between India and the EU, if the European Data Protection Authority is not satisfied with the supervisory ambit and the level of independence afforded to the Indian Data Protection Board.

7. Online Consumer Protection

Trade provisions geared towards bolstering online consumer trust include those pertaining to online consumer protection, unsolicited commercial electronic messages, and data protection. The India-UAE CEPA contains these provisions, each affording strong protections to consumer rights online. Specifically, the provision on online consumer protection provides that both countries will introduce provisions to protect consumers from misleading, fraudulent, and deceptive commercial practices.⁵⁰

8. Unsolicited Commercial Electronic Messages

Another provision pertaining to consumer protection online in the India-UAE CEPA relates to unsolicited electronic messages or spam. Specifically, it provides that both nations will adopt measures to:⁵¹

- a. Ensure that any sender of spam gives consumers an option to opt-out of receiving such messages;
- b. Require that consumer consent be obtained before such messages are sent; and
- c. Mitigate the sending of such messages to consumers.

The provision also provides that both countries will bring in measures for consumer grievance redressal against such messages. The provision is comprehensive and indicates a firm commitment towards safeguarding users from uninvited harassment from online marketers.

Part V. Conclusion

Overall, there is significant common ground that can be found between countries seeking liberal digital trade commitments and India on most issues. Prior authorization and access to source code, may, however serve as sticking points. At the same time, India's access code concerns could be allayed through the inclusion of exemptions for law enforcement and judicial access, which are currently present in the trade

cooperation agreement between the United Kingdom and the European Union. Similarly, on prior authorization, it is uncertain whether the current legislative proposals will pass muster, as they may serve as friction points for domestic start-ups.

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- ²¹ The OECD Digital STRI identifies, catalogues and quantifies regulatory barriers that affect trade in digitally enabled services across 80 countries and economies. The indices take values between 0 to 1, where 0 is completely open and 1 is completely closed. The index scores the countries across five sub-indices i.e., digital infrastructure, electronic transactions, payment systems, intellectual property rights and other regulatory barriers.
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