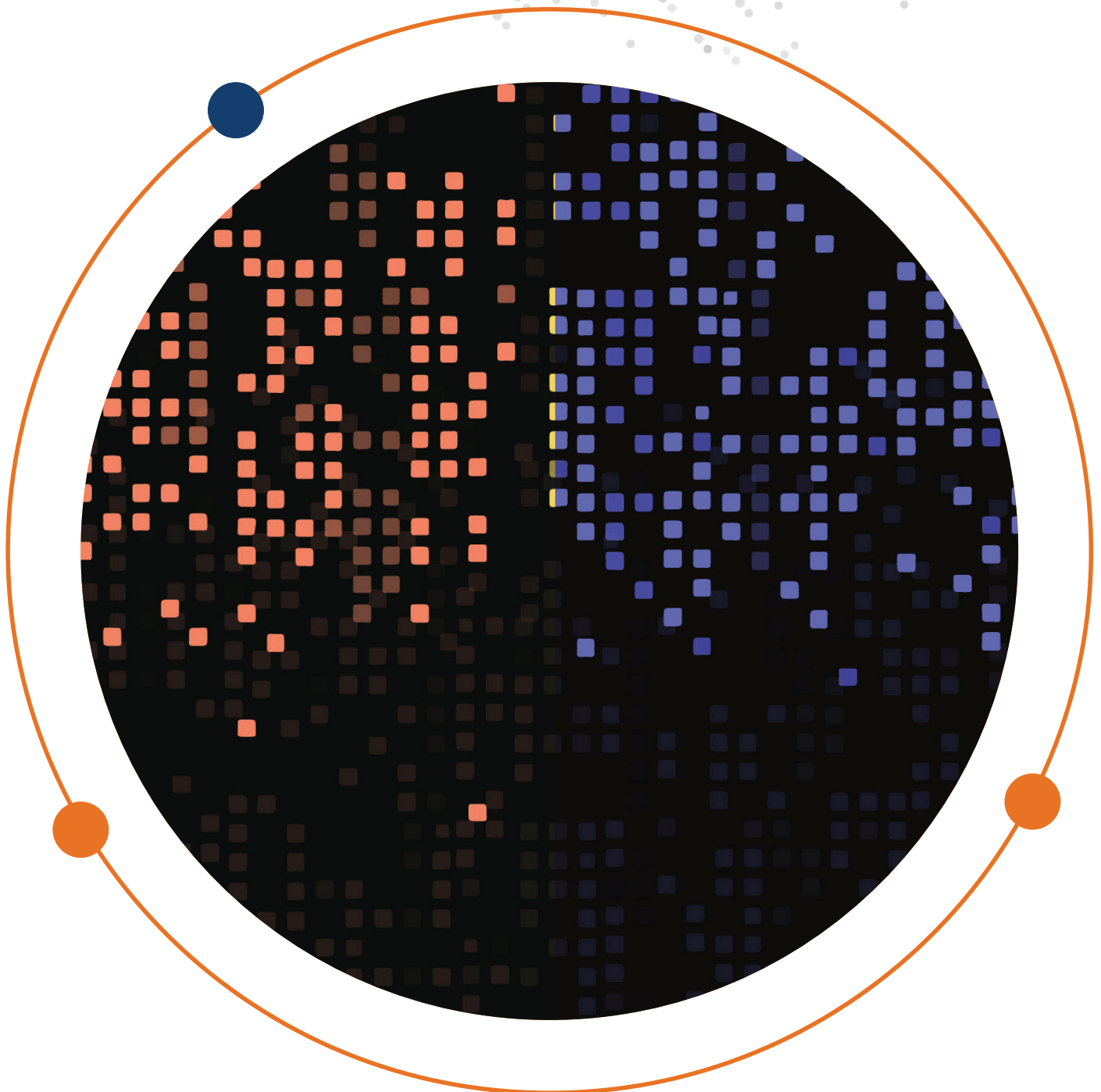


ASSESSING
INDIAN DIGITAL TRADE POLICIES:
WILL THEY SUPPORT A \$5 TRILLION
ECONOMY?



ABOUT THE AUTHOR

Mark Linscott is a senior fellow with the Atlantic Council's South Asia Center and a senior advisor with The Asia Group. Prior to joining the Atlantic Council, Mr. Linscott was the assistant US trade representative (USTR) for South and Central Asian Affairs from December 2016 to December 2018. In this position, he was responsible for development of trade policy with the countries comprising South and Central Asia, including Bangladesh, Bhutan, India, Iran, Kazakhstan, Kyrgyzstan, Maldives, Nepal, Pakistan, Sri Lanka, Tajikistan, Turkmenistan, and Uzbekistan.

Mr. Linscott previously served as the assistant US trade representative for World Trade Organization (WTO) and Multilateral Affairs from 2012 to 2016 with responsibility for coordinating US trade policies in the WTO. His team was responsible for negotiation and implementation of WTO accessions and the Trade Facilitation Agreement and regionally in the Trans-Pacific Partnership (TPP) and Trans-Atlantic Trade and Investment Partnership (TTIP) on customs matters, government procurement, subsidies and trade remedies, and technical barriers to trade.

Mr. Linscott also served as the assistant US trade representative for Environment and Natural Resources from October 2003 to March 2012. In this capacity, he oversaw all trade and environment issues for USTR, including related free trade agreement (FTA) negotiations, such as the TPP, and the WTO and OECD. From 1996 to 2002, Mr. Linscott represented the United States at the US Mission to the WTO in Geneva, covering issues such as trade in services, customs, antidumping, subsidies, and government procurement. Prior to serving in Geneva, he worked in the Office of WTO and Multilateral Affairs in USTR Washington. He holds a BA in economics from the University of Virginia and a JD from Georgetown University Law Center.

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Mark Linscott

Executive Summary

The ongoing COVID-19 pandemic has forced nearly all public policy questions to be seen through the lens of how to detect and respond to the disease as it spreads rapidly across the globe. These include obvious questions of national health care policy and whether there is a place for international efforts to coordinate their national responses. Trade policy has come to the fore as a growing number of countries restrict exports of critical medical supplies to ensure sufficient availability for patients in-country. In this crisis, international collaboration to keep trade flowing has been limited and has not prevented many countries from imposing new trade restrictions.

The importance of digital policies has grown as countries seek to harness the tools of big data, artificial intelligence (AI), and vital infrastructure to trace outbreaks of the virus and assist efforts to find cures and vaccines. While digital tools are proving vital in efforts to track outbreaks and trace contacts, legitimate concerns are growing about potentially invasive government surveillance even after the virus retreats.

These policy areas—health, trade, and digital—overlap in the international, national, and local efforts to reduce the duration of the pandemic and mitigate its effects with respect to human lives and economic well-being.

The analysis in this paper, while initially conducted before anyone had ever heard of COVID-19, has been impacted by its sudden emergence and will likely require updating to assess the experiences of this ongoing crisis. The paper, which focuses on the U.S.-India bilateral relationship, concludes with a series of questions, as opposed to policy recommendations. This is due partly to the very complexity that all governments confront in mapping out digital policies given the ubiquitous role digital networks and devices play in our daily lives. But these questions may have even more tangible relevance now that COVID-19 is forcing a reckoning with a severe interruption in global economic growth, which could be on the scale of the Great Depression in the 1930s. Ultimately, the governments of India, the United States, and other nations will determine for themselves what answers are relevant to their individual circumstances.

Introduction

The descriptors and range of issues shift, but it is increasingly apparent that the interplay of digital technologies and international trade is only growing and may soon seep into nearly every corner of multilateral, regional, and bilateral trade policy and trade negotiations.

The descriptors include “digital,” “digital trade,” “electronic commerce” (or “e-commerce”), and “information and communication technology.” The range of issues has grown from an early focus on tariffs on electronic transmissions in the World Trade Organization (WTO) to a full array of commercial and government activities and policies, including digital market places, digital payment platforms, ownership and use of data, data localization policies, and law enforcement and national security considerations.

Over the course of this year, the Atlantic Council’s South Asia Center, teaming with the U.S.-India Strategic Partnership Forum, will release a series of issue papers on specific digital trade issues (the descriptor we prefer) and frame these in the context of the U.S.-India bilateral trade relationship. This analysis will include our assessment of the potential for conflict or collaboration between the two countries with ideas on how to avoid digital trade issues becoming the next battleground in this relationship. This first paper is a framing one, intended to set the stage for asking relevant questions on specific topics taken up in later papers, such as data localization and e-commerce marketplaces. Not surprisingly, the current circumstances of the COVID-19 pandemic are directly relevant to these specific issues. Additionally, the issues highlighted in this series are already relevant in multiple sectors across national economies, from healthcare to retail distribution to financial services. Digital trade is not a single sector phenomenon.

Digital commerce and the World Trade Organization

No international consensus exists regarding the rules of digital trade on par with that of services or goods in the WTO. International digital trade is instead governed by a patchwork of bilateral and regional trade agreements that have not produced consistency on divisive issues of privacy, freedom of information, digital commerce, and more. As digital commerce assumes a greater share of global trade, covering both goods and services, a comprehensive multilateral consensus for best practices in digital trade could resolve these ongoing debates.

To address this, a large number of members of the WTO launched an ongoing plurilateral negotiation on electronic commerce in March 2019, following on a ministerial statement on their aspirations in this area at the Buenos Aires Ministerial Conference in December 2017. These negotiations are broad in scope, covering issues related to making permanent the long-standing WTO moratorium on duties on electronic transmissions, cross-border data flows, data localization requirements, forced disclosure of source code, barriers to cross-border digital sales, and more.

To date, eighty-two WTO Members are participating in these negotiations, developed and developing, large and small. The wide range of issues under debate in this plurilateral format highlight the degree to which many governments and stakeholders view unresolved issues in digital commerce as being inherently trade-related.

An international coalition of industry stakeholders from countries as diverse as Japan, Nigeria, Brazil, the United States, the member states of the European Union, among others publicized its wish list for the negotiations, although now the course of those negotiations will depend on how the COVID-19 crisis unfolds in coming months and even into 2021.

The list, taken directly from the global industry position paper, is quite extensive:

1. Prohibit internet tariffs and customs formalities on electronic transmissions;
2. Facilitate the flow of data across borders;
3. Prohibit requirements to localize the storage and processing of data;
4. Ensure the protection of personal data;
5. Prohibit requirements to disclose source code, algorithms, or encryption keys;
6. Promote government cooperation and regulatory best practices for cybersecurity;
7. Promote state-of-the-art good regulatory practices in the regulation of digital services;
8. Pursue “TFA-plus” provisions that facilitate e-commerce, including through increasing de minimis levels and simplifying customs clearance for low-value shipments
9. Promote acceptance of electronic contracts, signatures and authentication;
10. Ensure the adoption of non-IP (intellectual property) intermediary liability protections;
11. Expand market access for services;
12. Expand market access for information and communication technology goods through accession to the WTO Information Technology Agreement; and,
13. Facilitate access to and use of government data.

India is not a participant in the negotiations and has been highly critical of them, even opting not to become an observer. India argues that as a plurilateral negotiation, it does not adequately represent the interests of the entire WTO membership. India also has expressed concerns that the negotiations will result in outcomes that diminish developing countries’ policy space.

That said, the Internet and Mobile Association of India (IAMAI), a tech services industry group, has advocated for many of the policies that are under negotiation in the WTO. In its report on “Digital Technology Policy for India’s USD 5 Trillion Economy,” IAMAI suggests that it “is imperative for the government to re-look, re-boot and re-think its technology policy.”

The U.S.-India trade relationship

Even if the United States and India will not be engaging multilaterally in the WTO on digital trade issues for the foreseeable future, during US President Donald J. Trump’s recent trip to India, he and Prime Minister Narendra Modi noted their expectation to negotiate a “comprehensive” trade deal in the near future. Whatever form this negotiation might take, there are good prospects that a number of digital trade issues will be taken up as part of it.

Ideally the United States and India will build on their continuing efforts to reach a first-generation

agreement by engaging on specific challenges in the digital trade space, progressing together to advance cooperative approaches, and taking steps to avoid new trade conflicts. The downside risks include the possibility that recent U.S.-India bilateral trade tensions will increase as a result of new measures, such as data localization requirements in India and a new “equalization levy” on e-commerce transactions.

All experts and authorities seem to agree that the potential of the Indian digital market is huge and that India has already taken giant strides in its efforts—government-induced and private sector-inspired—to digitalize the Indian economy and democratize access to digital services. A key challenge for the central and state governments will be to regulate smartly, being thoughtful and transparent in identifying priorities and objectives, and avoiding the trap of raising protectionist barriers in response to influential and persuasive political forces.

Fortunately, countries worldwide continue to experiment with regulatory frameworks that balance privacy interests, cybersecurity and law enforcement imperatives, and growth and competition priorities. Indian stakeholders appear to be divided on issues such as data flows and data localization. While some quarters have pushed hard for limits on data flows and restrictions on storing data abroad, others have pressed a very different agenda. For example, the Advisory Committee to the Ministry of Electronics and Information Technology on Artificial Intelligence noted that “cross border flow of data is essential for the natural and progressive development of the availability of data and the inculcation of skill sets in India’s workforce for technologies such as AI.” India is in the midst of a long process of further developing its regulatory framework and has several major regulatory reforms pending, including the Personal Data Protection Bill, now with a joint parliamentary committee, which plans to report at the start of the Monsoon session of Parliament in July, and the draft electronic commerce policy, which is under the authority of the Department of Promotion of Innovation and Internal Trade in the Ministry of Commerce and Industry. Just recently, the Ministry of Electronics and Information Technology accelerated its work on a third major stream of regulatory change in the form of amendments to the Information Technology Act, 2000. Approaches in these pending regulatory changes tend to emphasize a focus on protecting the domestic market for domestic companies, potentially impacting India’s strong interests in encouraging increased foreign direct investment (FDI) and its position as a global leader in information technology.

Likewise, the United States has increasingly considered alternative regulatory frameworks to protect individual privacy and security. While the federal government policy has pursued a relatively laissez-faire approach to date, domestic debates increasingly weigh the individual costs of lost privacy and security of personal information that might arise from unregulated global data flows. The California Consumer Privacy Act (CCPA) entered into force on January 1, 2020, implementing restrictions on companies’ abilities to gather and use personal data without permission for the first time. Already this legislation has forced technology companies to amend their data privacy protocols nationally.

Ideally, this formative period will provide India and the United States an opportunity to engage in dialogue that informs their emerging regulatory approaches as they are developed, before positions solidify and tensions grow further.

Need to develop policies informed by transparent and inclusive assessment of interests

The present moment, as India looks ahead to 2022 when it will host the Group of Twenty (G20), could be a critical one for India to steer towards a regulatory approach that can become a global model for protecting privacy, guarding against threats to national security, and incentivizing private sector growth and development. The growth potential globally is tremendous. For example, sales by small- and medium-sized enterprises on Amazon in 2018 were \$160 billion, up from only \$100 million in 1999. A significant proportion of this has involved sales shifting from big consumer brands to small brands.

As India further considers and implements regulations related to digital trade issues, it might pause and reassess the direction of future Indian policies based on assessments of its interests flowing from the following questions:

- What are other countries doing with respect to data localization?
- How are discussions proceeding in the WTO negotiations in which a range of country experiences and approaches are under discussion?
- How might future Indian policies affect its ability to attract foreign direct investment?
- What might be the implications for existing and future Indian tech companies, in terms of exports and external investment, if other countries in the region and globally follow India's lead?
- What policies are best in reducing costs for Indian firms and promoting opportunities for the Indian workforce?
- How should a range of policy objectives be balanced? Should certain ones, such as law enforcement and national security, be prioritized and prevail over other ones, such as citizens' interests in data privacy and efforts to promote greater FDI and Indian exports and investment abroad?
- Is India primarily motivated to protect and nurture certain national champions, and if so, what might be the implications for promoting greater competition in the Indian market?
- How might new Indian regulatory policies on data localization affect the environment for home-grown Indian start-ups, particularly in emerging technologies that will be critical for the remainder of the 21st century, such as AI?
- Ultimately, what policies can best advance the government's interest in becoming a \$5 trillion economy?

Digital trade in a COVID-19 world: Higher stakes, great opportunities

The COVID-19 crisis struck suddenly and ferociously and its impacts, still unfolding, bring a whole new perspective on questions of digital trade policies. Even in this early phase of the pandemic, with the number of infections and deaths still increasing globally, governments, multinational companies, small and medium-sized businesses, and individuals are relying on access to digital and cloud-based networks to respond. They need these networks to obtain real-time information, to communicate effectively, and to continue to do business, even as the global economy has fallen into a recession, perhaps even a long and deep one, largely generated by the devastating impacts of closing down economies through quarantines and social distancing.

In many respects, the COVID-19 pandemic may irreversibly change the global political and economic landscape. Digital trade policies could offer better approaches in the future to addressing global challenges, both large and small, and could promote new digital technologies to advance economic growth more rapidly and equitably, even though the lost ground resulting from a global recession will take time to recover. Ideally government policies could be aligned and even coordinated multilaterally in the WTO and G20, but regardless, bilateral cooperation will be important and the United States and India might lead the way.

The United States and India are at a pivotal moment in their economic relationship, even as the strategic and defense relationship continues to blossom based on shared interests in countering terrorism, ensuring a free and open Indo-Pacific region, and now defeating the COVID-19 pandemic. The two countries also have shared interests in expansion of the Indian economy, accelerating economic opportunities for Indian citizens, and increasing bilateral trade. How developments unfold on digital trade issues will be significant determinants in their future success together. ■



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