

The Great Disconnect in India's Digital Trade Policy

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Introduction

While the COVID-19 pandemic devastated many economic sectors, it catapulted the growth of the information communications and technology (ICT) sector. Between 2018 and 2022, the world gained 1.5 billion new internet users. In 2020, the first year of the COVID-19 pandemic, the share of global internet users increased by 6 percent—some 500 million people. This is the highest increase in history. Although growth slowed in 2021 and 2022, the number of internet users still grew faster than most years during the past two decades. The vast majority of this growth is attributed to low-income and lower-middle-income countries—countries such as India.

Yet, unlike other countries, India has not pursued market access or favorable regulatory environments through preferential trade agreements (PTAs), standalone digital trade agreements, or digital economy agreements. In fact, India consistently undermines its ICT interests in multilateral discussions at the World Trade Organization (WTO). This behavior sets it apart from the emerging global norms toward liberalization in digital trade. However, India's approach aligns with an increasingly protectionist actor: the United States.

India's Growing Technology Sector

The ICT sector is hugely important to the Indian economy, contributing approximately 13 percent to its gross domestic product (GDP). India seeks to grow this sector to \$1 trillion by 2025, or 20 percent of GDP. All subsectors of India's technology industry, including information technology (IT) and business process management, IT-enabled services, engineering research and development, hardware, software products, and ecommerce, recorded double-digit growth in 2022.

Additionally, India is renowned for its highly skilled and mobile ITC professionals. In the 2019 fiscal year, Indian nationals accounted for 74.5 percent H-1B visa petitions for both initial and continuing employment in the United States.¹ In 2021 and 2022, the top three sponsors of H-1B employees were Amazon, Google, and Meta.² India has significant interests in the ICT sector, and should want to ensure that it does not face trade barriers and global immigration policies that inhibit the expansion of its ICT sector and the mobility of its ICT professionals.

India and Digital Trade at the WTO: The Consistent Objector

Digital trade issues have been important to the WTO's agenda since its early days. In 1998, WTO members adopted the Declaration on E-Commerce, which established a comprehensive "Work Program" to examine all trade-related issues relating to global ecommerce. The declaration also provided for a provisional moratorium on customs duties on electronic transmissions pursuant to which members agreed not to impose customs duties on digital transmissions (this ecommerce work program was formally adopted by the General Council in 1998).

However, the customs duty moratorium has become extremely contentious in recent years. It was the subject of intense negotiations—led by India—at the Twelfth Ministerial Conference in June 2022. While members finally agreed to maintain the moratorium until the Thirteenth Ministerial Conference in 2024, it did not survive that conference: the customs duty moratorium is set to expire at the WTO’s Fourteenth Ministerial Conference or March 31, 2026, whichever is earlier.³

India’s opposition to maintaining the customs duty moratorium stems from its long-standing belief that the practice significantly impairs developing countries’ ability to generate revenue. India first raised concerns about the moratorium in 2001. But its more recent opposition is rooted in arguments laid out in several papers circulated with South Africa since 2018. India considers that developing countries in the WTO could generate forty times more tariff revenue by imposing customs duties on electronic transmissions compared to developed members, many of which have low-bound duties on the physical imports of digital products.⁴ Further, India emphasized a paper commissioned by the UN Conference on Trade and Development (UNCTAD) argued, based on forty-nine digital products, that the potential annual tariff revenue loss for developing-country members would be \$10 billion using average-bound duties and \$5.1 billion using average most-favored-nations applied rates.⁵

Other Issues and the E-Commerce JSI

Outside the customs duty moratorium, India has submitted over forty papers in various WTO forums on consumer protection, digital public infrastructure, and competition. India identifies the digital divide as the common denominator underlying the challenges facing developing countries in those and other digital-economy areas. India also posits that increased data flows provide established online platforms with a competitive advantage, further entrenching the digital divide between developed and developing countries.⁶

The lack of tangible progress and growing disagreement in the WTO E-commerce Work Program spurred a few members to pursue an alternate route, called the Joint Statement Initiative on E-commerce (E-Commerce JSI).⁷ Those negotiations began in January 2019, and in July 2024 the co-conveners (Australia, Japan, and Singapore) produced the Agreement on E-Commerce. Currently, ninety-one WTO members, accounting for 90 percent of global trade, are contemplating how to incorporate this agreement into their WTO commitments. They face a gargantuan task after India blocked the adoption of another JSI on investment facilitation.⁸ India did not participate in the E-Commerce JSI, nor is it party to the E-Commerce Agreement. In fact, India and South Africa have argued that JSIs are neither plurilateral nor multilateral agreements within the WTO Agreement because they are not the result of consensus-based decision-making as enshrined in that treaty.⁹

India’s Digital Trade Policy in Its Preferential Trade Agreements

India has concluded twenty-one reciprocal PTAs. Except for the latest agreements that it concluded with the United Arab Emirates (UAE), Australia, and the European Free Trade Association (EFTA) countries (which include Iceland, Liechtenstein, Norway, and Switzerland), India’s agreements are typically shallow, limited to goods, and exclude sensitive sectors. (See table 1 below.)

India's Preferential Trade Agreements

Name of Agreement	Member Countries (Includes India)	Year of Entry into Force
EFTA-India FTA	European Free Trade Association*	2024
India-United Arab Emirates (UAE) Comprehensive Economic Partnership Agreement	United Arab Emirates	2022
Australia-India Economic Cooperation and Trade Agreement (ECTA)	Australia	2022
India-Mauritius Comprehensive Economic Cooperation and Partnership Agreement	Mauritius	2021
ASEAN-India (Services) Agreement	ASEAN	2015
India-Japan FTA	Japan	2011
India-Malaysia ECA	Malaysia	2011
Association of Southeast Asian Nations (ASEAN) - India Framework Agreement	ASEAN (Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam)	2010
India-Korea FTA	Korea	2010
ASEAN-India (Goods) Agreement	ASEAN	2010
Finland-India Economic Cooperation Agreement*	Finland	2010
India – Mercado Común del Sur (MERCOSUR) FTA	MERCOSUR (Argentina, Bolivia, Brazil, Paraguay, Uruguay)	2009
India-Nepal Treaty of Trade	Nepal	2009
Chile India PTA	Chile	2007
Asia Pacific Trade Agreement	Bangladesh, China, Laos, Korea, Sri Lanka	2006
Bangladesh-India FTA	Bangladesh	2006
Bhutan-India Trade, Commerce, and Transit Agreement	Bhutan	2006
South Asian Free Trade Area (SAFTA)	Bangladesh, Bhutan, Maldives, Nepal, Pakistan, Sri Lanka	2006
India-Singapore Comprehensive Economic Cooperation Agreement (CECA)	Singapore	2005
India-Thailand Framework Agreement	Thailand	2004
India- Afghanistan PTA	Afghanistan	2003

* Agreement signed but not yet in force

Source: Trade Agreement Provisions on Electronic-commerce and Data (TAPED)

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Thus far, India has included ecommerce or digital trade-related provisions in seven agreements, with dedicated digital trade chapters in only two PTAs: the India-Singapore Comprehensive Economic Cooperation Agreement (CECA) and the India-UAE Comprehensive Economic Partnership Agreement (CEPA).¹⁰ The ecommerce chapter of the India-Singapore CECA, which was signed in 2005, contains only six provisions. Interestingly, one of the main substantive provisions is the incorporation of a bilateral customs duty moratorium on electronic transmissions. (The prohibition does not apply to internal taxes or other non-discriminatory internal charges.) Each party has the right to determine “the customs value of imported carrier media bearing digital products according to the cost or value of the carrier medium alone, without regard to the cost or value of the digital products stored on the carrier medium.” This view is consistent with India’s stance at the WTO. The PTA also includes nondiscrimination obligations with respect to digital products.

The digital trade chapter of the India-UAE CEPA, which was signed in 2022, is considerably more developed. Even though it contains soft obligations, it remains India’s most comprehensive digital trade chapter: it contains twenty provisions on topics such as authentication, online consumer protection, and personal data protection. Noticeably absent is any provision on the nondisclosure of source code.

Notable provisions in the India-UAE CEPA include soft commitments on data protection and cross-border data flows. Under the latter provisions, the parties maintain the right to restrict cross-border data flows and impose data localization requirements. Those data-related provisions have become standard in new-generation digital trade agreements, although with divergent levels of legal bindingness. The prohibition on applying customs duties on electronic transmissions is also of note. Ironically, this prohibition is subject to the outcome of the WTO discussions under the E-Commerce Work Program.¹¹ In other words, the customs duties moratorium between India and the UAE could expire with the WTO customs duty moratorium that India worked to eliminate.

The negotiations in which India has managed not to undertake digital trade obligations are just as important, and potentially more revealing, than those in which it has. Specifically, India’s most recent PTAs—the Australia-India Economic Cooperation and Trade Agreement and the EFTA-India Free Trade Agreement—do not contain digital trade chapters. This is an anomaly, particularly for Australia, which is a digital trade champion. One glaring similarity between those agreements is that India’s negotiating partners are advanced developed economies.

Moreover, India took an active role in the negotiation of the Regional Comprehensive Economic Partnership, but did not sign it. Reports suggest that India had reservations about certain provisions in the ecommerce chapter.¹² Although subject to generous exceptions, this chapter includes hard commitments on data localization and cross-border data, unlike the India-UAE CEPA.¹³

India is currently negotiating PTAs with several other trading partners. Negotiations with the European Union and the United Kingdom are advanced, and both are anticipated to include dedicated chapters on digital trade. The EU has presented a proposal for a chapter on digital trade with provisions on cross-border data flows and protection of source codes.¹⁴ The UK, meanwhile, considers digital trade a priority sector where India maintains barriers in the form of source code

disclosures and data localization requirements.¹⁵ How much policy space India can carve out in those agreements with two of its most important trade partners remains to be seen.

India's Digital Alignment With the United States

India and the United States have become increasingly aligned on digital trade issues, albeit for different reasons. While the United States has a distinct national security rationale underpinning its policymaking, India's interests are principally driven by mercantilism. For example, India has refused to join the trade pillar of the U.S.-led Indo-Pacific Economic Framework (IPEF), which was envisaged to address digital trade issues.¹⁶ According to reports, India did not find sufficient benefit in being a party to it.¹⁷ Other countries shared India's misgivings. In October 2023, the United States changed its hitherto liberal stance on digital trade and withdrew its proposals on cross-border data flows, data localization, and source code within the context of the E-Commerce JSI negotiations. Subsequently, in November 2023, the Joe Biden administration suspended negotiations on digital economy under the trade pillar. It is too early to predict Donald Trump's digital trade agenda in his second administration. However, the postponement of the TikTok ban could signal a less confrontational approach to digital trade with China. On the other hand, it also remains to be seen whether the strong tech influence in his administration will cool down the domestic antitrust proceedings and focus only on ones taking place abroad.

India is also more comfortable engaging with the United States on bilateral deals. Specifically, in May 2022, Indian Prime Minister Narendra Modi and U.S. President Biden informally launched the Initiative for Critical and Emerging Technology. Led by the Indian National Security Council Secretariat and the U.S. National Security Council, the initiative looks to "expand partnership in critical and emerging technologies."¹⁸ Although it is not focused on digital trade between the two countries, it supports U.S.-India collaboration in ensuring supply-chain resilience in critical minerals and semiconductors, which are crucial to the digital economy. It also supports steps that provide enhanced access to top Indian artificial intelligence scientists, engineers, and entrepreneurs to go to the United States, including policies and regulations that streamline visa processing, modernize the H-1B application process, and clarify the rules for O-1 visas.¹⁹

Conclusion: Reconciling India's Approach to Digital Trade

India's digital trade policy appears to be replete with contradictions. While it is a major exporter of digital skills and services with one of the fastest-growing ICT markets in the world, India has pursued policies that appear inimical to its own interests and contrary to many of the emerging global norms on digital trade. At the multilateral level, India has induced the expiry of the customs duty moratorium, which has been a mainstay in digital trade for almost thirty years. It has refused to join digital trade-related negotiations and has instead chosen to criticize them at every turn and even jeopardize the E-Commerce Agreement's incorporation into the WTO rulebook. While India has done better in its PTAs, it has avoided entering into hard obligations on issues such as cross-border data flows and data localization. It has also evaded digital trade agreements with advanced economies. But it has also aligned with the United States' own changing norms on digital trade and proved willing to bilaterally partner with the United States to produce technologies critical for digital trade.

India's rather coquettish approach to hard rules and commitments in digital trade is rooted in how it has historically seen its interests. Although it has become a leading services economy, India has always been reluctant to liberalize trade in services. In fact, it opposed services liberalization

during the Uruguay Round.²⁰ A principal reason is that most services in India, including financial services and communications, were historically provided through state-owned monopolies.

Obviously, the Indian state had a strong interest in maintaining its uncontested market share. As the domestic services economy dominated the nonservices sectors, India liberalized its domestic services market, including by softening its domestic policy on investment flows in software services. In contrast, India limited its offerings to potential foreign competitors in those digital-facing sectors at the WTO. India's hawkish stance on digital trade liberalization continues to shape its external digital trade policy to date.²¹

Going forward, it is unclear whether India can continue to dance around digital trade obligations in its advanced negotiations with the EU and UK. Their deep interest in binding digital trade commitments makes it unlikely that India can elude all hard commitments, especially on cross-border data flows and the EU's uncompromising stance on data protection. What is patently clear, however, is that India prefers to maintain as much policy space as possible when it comes to digital trade.

The United States and India, on the other hand, have increasingly converging views on digital trade issues. They both eschew obligations on cross-border data flows, data localization, and source code to maximize their domestic policy space. They are also both less interested in the WTO's digital trade agenda. Although the Biden administration took the digital economy off the table in IPEF, both countries should explore dialogue on digital trade in other, less formal forums, including bilaterally. Each country has what the other needs: India offers digital skills and innovation, while the United States brings capital, know-how, and advanced technology to the table. They could, for example, conclude a light-touch agreement similar to the India-UAE CEPA. This deal could include enhanced access to the U.S. ICT labor market for India's skilled professionals by creating an increased India-only H-1B visa allocation (however, this could be jeopardized by the recent intra-Republican spat over those visas). Although unlikely allies from afar, the United States and India are more similar in digital trade issues than they are different. It could serve each of them well to at least initiate bilateral talks on this topic.

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¹ U.S. Citizenship and Immigration Services, "H-1B Petitions by Gender and Country of Birth Fiscal Year 2019," <https://www.uscis.gov/sites/default/files/document/data/h-1b-petitions-by-gender-country-of-birth-fy2019.pdf>.

² Daniel Costa and Ron Hira, "Tech and Outsourcing Companies Continue to Exploit the H-1B Visa Program at a Time of Mass Layoffs," Economic Policy Institute, April 11, 2023, <https://www.epi.org/blog/tech-and-outsourcing-companies-continue-to-exploit-the-h-1b-visa-program-at-a-time-of-mass-layoffs-the-top-30-h-1b-employers-hired-34000-new-h-1b-workers-in-2022-and-laid-off-at-least-85000-workers>.

³ WTO, Work Programme on Electronic Commerce Ministerial Decision, WT/MIN(24)/38, WT/L/1193, March 4, 2024.

⁴ Communication from India and South Africa (General Council), "Work Programme on Electronic Commerce, The E-commerce Moratorium and Implications for Developing Countries," WT/GC/W/774, June 4, 2019.

⁵ Rashmi Banga, "Growing Trade in Electronic Transmissions: Implications for the South," UNCTAD Research Paper No. 29 UNCTAD/SER.RP/2019/1 (2019) https://unctad.org/system/files/official-document/ser-rp-2019d1_en.pdf.

⁶ Minutes of the Meeting, Dedicated Discussion on Electronic Commerce, WT/GC/WPEC/M/3, 6 April 2023, para.1.111.

⁷ Castillo and Kugler, p. 270.

⁸ Rachna Uppal and Emma Farge, "India, South Africa Block Major Investment Deal at WTO Talks," Reuters, February 29, 2024, <https://www.reuters.com/world/india-south-africa-block-investment-deal-wto-talks-2024-02-28>.

⁹ Communication from India and South Africa, "Legal Status of Joint Statement Initiatives and Their Negotiated Outcomes," WT/GC/W/819, 19 February 2021.

¹⁰ Mira Burri, Maria Vasquez Callo-Müller and Kholofelo Kugler, TAPED: Trade Agreement Provisions on Electronic Commerce and Data, available at: <https://unilu.ch/taped> (accessed January, 12 2025).

¹¹ India-UAE CEPA, Article 9.15.

¹² Rahul Nath Choudhury, “Why Did India Betray RCEP?” East Asia Forum, December 21, 2019, <https://eastasiaforum.org/2019/12/21/why-did-india-betray-rcep>.

¹³ RCEP, Article 12.14 & 12.15.

¹⁴ “Digital Trade, India-EU Free Trade Agreement,” draft, December 15, 2022, <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/d951642d-d023-4d7f-86c5-258bb83435b9/details>.

¹⁵ UK Department of International Trade, “UK-India Free Trade Agreement: The UK’s Strategic Approach,” January 2022, p. 24, <https://assets.publishing.service.gov.uk/media/61e1b75e8fa8f5058d5a76bf/uk-india-free-trade-agreement-the-uks-strategic-approach.pdf>.

¹⁶ IPEF, Ministerial Text for Trade Pillar of the Indo-Pacific Economic Framework for Prosperity (adopted in September 2022), [https://ustr.gov/sites/default/files/2022-09/IPEF%20Pillar%202021%20Ministerial%20Text%20\(Trade%20Pillar\)_FOR%20PUBLIC%20RELEASE%20\(1\).pdf](https://ustr.gov/sites/default/files/2022-09/IPEF%20Pillar%202021%20Ministerial%20Text%20(Trade%20Pillar)_FOR%20PUBLIC%20RELEASE%20(1).pdf).

¹⁷ Amiti Sen, “IPEF Trade Pillar: India to Wait for Outcome Before Its Final Decision,” BusinessLine, October 24, 2024, <https://www.thehindubusinessline.com/economy/ipef-trade-pillar-india-to-wait-for-outcome-before-its-final-decision/article68792536.ece>.

¹⁸ The White House, “Readout of President Biden’s Meeting With Prime Minister Modi of India,” May 24, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/24/readout-of-president-bidens-meeting-with-prime-minister-modi-of-india>.

¹⁹ The White House, “Fact Sheet: The United States and India Committed to Strengthening Strategic Technology Partnership,” January 6, 2025, <https://www.whitehouse.gov/briefing-room/statements-releases/2025/01/06/fact-sheet-the-united-states-and-india-committed-to-strengthening-strategic-technology-partnership>.

²⁰ Katarzyna Kaszubska, “Deconstructing India’s Position on the Trade in Services Agreement,” Observer Research Foundation Issue Brief, Issue no. 146, June 2016, p. 4, https://www.orfonline.org/wp-content/uploads/2016/06/ORF-IssueBrief_146_Kaszubska.pdf.

²¹ Meghna Bal and Niharika, “A Primer on India’s Digital Trade Policy,” Friedrich-Ebert-Stiftung and Koan Advisory, April 2023, p. 3, available at: <https://library.fes.de/pdf-files/bueros/indien/20262.pdf>.