

EU-India cooperation towards a Digital Economy Partnership Agreement: A steppingstone to update the multilateral economic rulebook for the 21st Century

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Identification of the problem and relevance to the EU-India strategic partnership

With the rise of digital technology, an ever-growing number of cross-border commerce is taking place in the virtual realm. Yet the rulebook for the multilateral trading system has seen only few updates since the World Trade Organization (WTO) was established in 1995, at a time when the internet was still in its infancy. The General Agreement on Trade in Services (GATS), a foundational legislative framework of the WTO, was designed to be technology-neutral, but it was difficult for policymakers to foresee the development of digital networks that make it difficult to trace the origin and destination of a commercial transaction. This, of course, has far-reaching implications for contract enforcement, taxation, and consumer protection, amongst other legitimate policy objectives. In 2017, a number of WTO members therefore decided to push for 21st century rules on electronic commerce and started negotiations for a plurilateral agreement, the so-called Joint Statement Initiative (JSI) on Electronic Commerce, which more than 86 countries have joined to date.¹ By the end of 2020, JSI negotiators developed a consolidated text and have largely found agreement on some horizontal policies, such as e-signing and e-documentation. However, cross-border data flows have emerged as a critical issue where significant differences between WTO members remain, in particular between three distinct governance models. First, a liberal approach that has few restrictions at the border (e.g., Australia and the United States). Second, a model built around regulatory safeguards (e.g., the European Union and India). Third, a state-centric model that emphasizes government-control of data flows (e.g., China and Russia).² These divergent regulatory models are layered on top of an even deeper fissure that is emerging between liberal democracies and authoritarian regimes in the cyber realm.³ While the openness of liberal democracies has been exploited to sow societal division, so-called techno-autocracies are employing technology to control their societies with increasing levels of sophistication.

These structural divisions make a meaningful multilateral outcome on data flows at the WTO increasingly unlikely. The EU and India are therefore at an inflection point for the future of the global digital economy. In the *Roadmap to 2025* that was endorsed by their leaders in July 2020, both sides emphasized their desire to strengthen a rules-based multilateral trading system.⁴ Yet in recent years, an increasing number of bilateral trade agreement are including provisions to regulate data flows.⁵ There is therefore increasing risk of a fragmentation of digital trade, a ‘splinternet’, in which might makes right. Both the EU and India therefore have a strong interest to find innovative solutions in order to avoid this scenario from becoming reality.

¹ https://www.wto.org/english/news_e/archive_e/jsec_arc_e.htm

² ECIPE, Erik van der Marel

³ See, for example, Anthony Blinken’s confirmation hearing for US Secretary of State

⁴ https://eeas.europa.eu/sites/eeas/files/eu-india_strategic_partnership_a_roadmap_to_2025_0.pdf

⁵ TAPED database

Critical analysis of the issue

Prima facie, the EU and India are natural partners to coordinate their policies on cross-border data flows, which rules-based, multilateral solutions can be built on. First, both are supporters of a data governance model that embraces regulatory safeguards. Second, as liberal democracies, they are both, in principle, committed to the free flow of information. However, a number of challenges have to be overcome to find a shared perspective on cross-border data flows.

The EU has been at the forefront of regulating the digital economy. Its 2016 General Data Protection Regulation (GDPR), which emphasizes the individual right for privacy, has served many countries as a model for privacy legislation for personal data. Only countries that are compliant with the EU's privacy regime are granted the so-called 'adequacy' decision that allows for data outflows and processing into that jurisdiction, which sets a strong incentive to follow the EU model. The EU is currently also deliberating a legislative package for the regulation of the digital economy, including rights and obligations for large platforms, fair competition, and innovative storage and processing solutions of data for new technological applications.⁶ India, has also been drafting legislation to protect the privacy of personal data for its 740 million internet users, which will likely be ratified in the coming months.⁷ This follows a landmark 2017 ruling by the Indian Supreme Court, which enshrined privacy as a fundamental right.⁸ Both the EU and India are therefore in favor of a regulatory approach that is distinct from both the liberal and the state-centric model.

Importantly, a major barrier to cross-border inflows of data is information censorship. India has a range of measures for selective filtering for content that the government considers religious hate speech or sedition. On the whole, however, data inflows to India have been comparatively free. If this remains the case in the future, shared values for liberal democracy can add to the solid foundation that EU and India have to cooperate on data flows.

With negotiations for a meaningful multilateral regime on cross-border data flows in question, more and more countries have turned to bilateral trade agreements. The Asia-Pacific region, in particular, has emerged a laboratory for new agreements that cover digital trade, but are mostly associated with the liberal regulatory model. Both the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States–Mexico–Canada Agreement (USMCA) feature chapters with some of the most comprehensive disciplines on digital trade to date. Moreover, a new generation of digital-only agreements, e.g. the Digital Economy Partnership Agreement between Chile, New Zealand, and Singapore, are serving as a model template that many governments are watching closely. While the EU has begun to include provisions on cross-border data flows in its most recent trade agreements, for example with Canada and Japan. In spite of being a net exporter of IT services India has so far refrained from making any bilateral commitments on cross-border data flows. A joint EU-India agreement on cross-border data flows would therefore send a strong signal that the regulatory safeguard model of data governance has a critical mass for multilateralization, especially between liberal democracies.

⁶ Cf. the draft proposals for the Digital Services Act, Digital Markets Act, and Data Governance Act, available at <https://ec.europa.eu/digital-single-market/en>

⁷ <https://indianexpress.com/article/opinion/columns/personal-data-protection-bill-2019-privacy-laws-7135832/>

⁸ *Puttuswamy v India* (2017)

Policy recommendations

The EU and India have a strong bilateral foundation to push for the multilateralization of their preferred model of cross-border data flows, which contains regulatory safeguards and is compatible with liberal democracy. However, a number of actions should be considered to facilitate cooperation on this issue:

(1) **Negotiate a standalone agreement on digital trade.** While it is important that the negotiations for a Bilateral Trade and Investment Agreement (BTIA) between the EU and India will be completed in a timely manner, negotiations have lasted for more than fifteen years and a number of outstanding issues are unlikely to be resolved in the near future.⁹ In order not to be left behind in a global regulatory race for digital trade, the EU and India should consider beginning negotiations for a standalone agreement on digital trade. As the 19th century industrialist Werner von Siemens famously said, ‘he who owns the standards, owns the market.’ The two sides should focus on cross-border data flows but could also consider discussing other cutting-edge digital trade issue, including e-identity, e-invoicing, personal data protection, open government data, data innovation and regulatory sandboxes, artificial intelligence, online consumer protection, and digital inclusivity. Without the burden of the BTIA negotiations, the EU and India could set a path to develop shared standards that can serve as the foundation for plurilateral or multilateral digital trade agreements at a later stage.

(2) **Ensure that data localization policies aren’t used as hidden protectionism.** While there are legitimate policy objectives for data localization, the unhindered flow of data between like-minded partners with a trusted regulatory regime enables economies of scale. Free cross-border data flows between the EU and India would allow for economies of scale that ultimately benefit the economic prospects for both sides. In both the EU and India, strong tendencies exist to use data localization policies as a hidden form of protectionism to boost domestic industry in the short term. However, in order to build scale for the regulatory safeguard model and allow for liberal democracy to succeed in the systemic competition with techno-autocracies, an open model which aspires to high regulatory standards would bring greater benefit to the economies of the EU and India in the medium- to long run.

⁹ Cf. Nicolas Köhler-Suzuki, 2021, Determinants and Impediments of the EU-India Bilateral Trade and Investment Agreement https://doi.org/10.1007/978-3-030-65044-5_8