

KEY THREATS TO DIGITAL TRADE 2023

India

The United States and India have a longstanding economic relationship. It is encouraging to see reinvigorated efforts through bilateral initiatives such as the Trade Policy Forum, facilitated through the United States-India Strategic Dialogue.

However, there remains significant imbalance and misalignment on the US-India economic relationship.

The US' extension of market access, trade and openness to Indian companies to operate and succeed in the US has not been reciprocated by the Indian side. For instance, despite the strength of the US digital services [export](#) sector and enormous growth potential of the online services market in India, the US ran a \$27 billion deficit in trade in digital services with India in 2020. This stark imbalance can be attributed to a few factors:

1

India's patently protectionist posture towards US digital services providers, which has intensified as India pursues its "Atmanirbhar Bharat" (or "self-reliant India") economic development strategy.

The Indian government has deployed a variety of tools to champion their protectionist industrial policy and to tilt the playing field in favor of domestic players. These include the adoption of discriminatory regulation and policies (e.g. geospatial guidelines which provide preferential treatment to Indian companies), restrictions on cross-border data flows, and competition policy and rulings as a smokescreen for protectionist industrial policy and import substitution.

2

India is increasingly veering from longstanding democratic norms and values, and seeking greater government censorship and control over political speech. This has made it extremely challenging for US companies to operate in India.

Indian policymakers and political leaders are moving at pace and increasing censorship practices and restrictions on companies that fail to take down content political leaders deem objectionable. Internet shutdowns, the blocking of services, and intimidation of local employees of online platforms have all been features of this campaign. State institutions have also been employed to [threaten](#) and [pressure](#) foreign companies and their workers into compliance, reflecting the broader global trend of '[hostage measures](#)' pioneered by Russia.

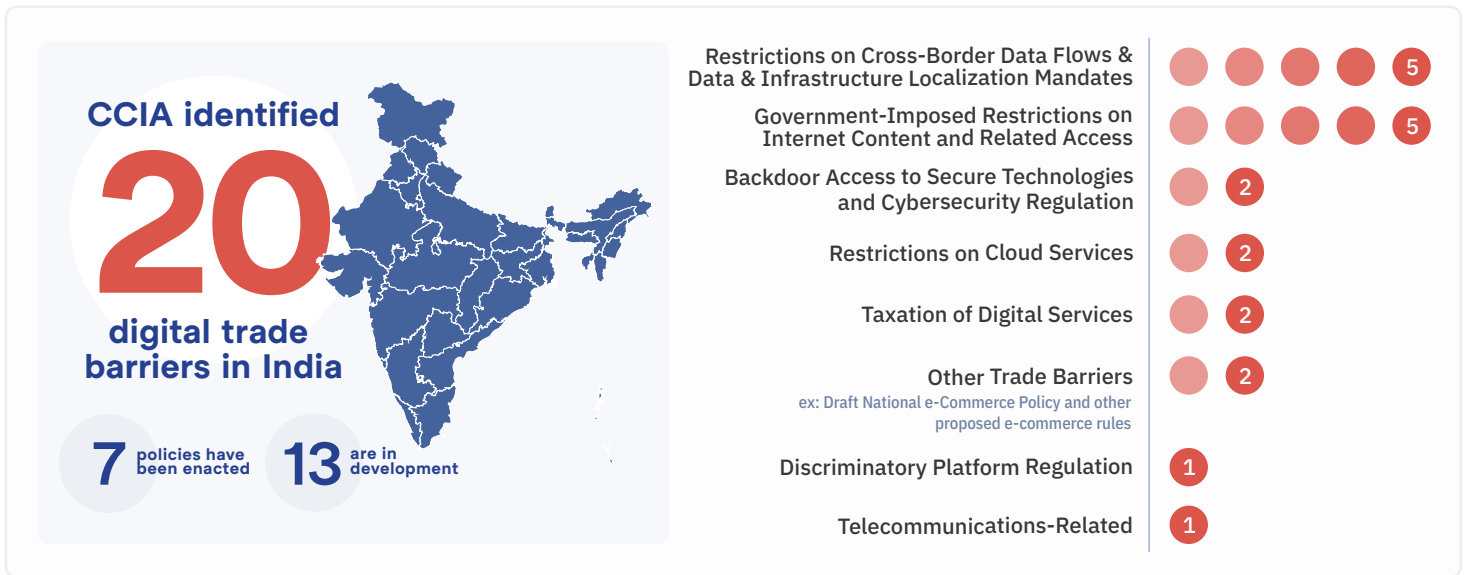
3

India is increasingly emboldened to chart its own path and sees itself as a waymaker in breaking international standards and norms and encouraging others to do the same.

For instance, in the WTO, India remains vehemently opposed to the renewal of the customs duties moratorium on electronic transmissions, and is soliciting other WTO members to support its position. Regulation processes in India are increasingly opaque, with little stakeholder consultation and proper application of due processes and WTO good regulatory practices. With India's leadership in the global arena as the G20 President this year, they are seeking to export the Indian model of digital governance and [digital public infrastructure](#), particularly to the Global South.

Even in cases where there are existing bilateral agreements with the US, the Indian government has not followed these agreements. For instance, in spite of the bilateral agreement between the US and India in November 2021 on digital services taxes, the Indian government has explicitly stated that it will not stop enforcing their digital taxes until there is more clarity and assurance about the OECD global agreement. This has resulted in US digital firms continuing to pay the taxes and damage to the US tax base.

In all, the current picture requires addressing distortive policies to achieve a trusted and balanced partnership between like minded democratic allies. US companies are keen to support the overall bilateral economic and strategic relationship, but need a consistent and predictable legal and regulatory landscape to feel confident about making significant technology investments and continuing to grow their presence in India. India's concept of "self reliance" should not lead to discriminatory regulations or practices against US companies. It is possible for India to achieve its objectives for working more closely with trusted partners like the US, while enabling companies from trusted countries to build with India for India and the world.



The following sections profile the most problematic policies that currently concern the technology industry in India:

Government-Imposed Restrictions on Internet Content and Related Access Barriers

In 2021, **amendments to the IT Act** went into effect imposing [additional requirements](#) under the Intermediary Rules and imposing new obligations on intermediaries, such as strict timelines for takedown requests and significant penalties for noncompliance. Under India’s Rules, Intermediaries must remove content within 24 hours upon receipt of a court order or Government notification and deploy tools to proactively identify and remove unlawful content. There are also provisions concerning law enforcement assistance provisions, including a requirement to enable tracing out of such originators of information on its platform at the request of government officials.

On October 28, 2022, the Ministry of Electronics and Information Technology [released](#) the final version of its **content moderation amendment**, which stipulated that government Grievance Appellate Committees would have the ability to hear complaints from users regarding social media providers’ content moderation decisions and reverse such decisions of platforms. The panel, now established, enforces rules that require social media providers to acknowledge user complaints within 24 hours and address users’ requests within 15 days—further, if the request seeks the removal of content, the social media provider would be obligated to address that complaint within 72 hours. On January 17, 2023, the Ministry released another [amendment](#) for consultation, which requires platforms to make reasonable efforts to prevent from being published, content fact-checked as fake or false by the government’s Press Information Bureau.

Draft Indian Telecommunication Bill

The [legislation](#) would redefine “telecommunication services” to include a wide range of internet-enabled services that bear little resemblance to the telephony and broadband services previously governed by this regulatory regime. Telecommunications services providers would then be subject to onerous obligations including licensing requirements; government access to data; encryption requirements, internet shutdowns, seizure of infrastructure, and possibly monetary obligations for the sector. This will undermine digital security and freedom of expression and impose a first of the kind global authorization/licensing requirement for any digital firm.

Taxation of Digital Services

In March 2020, the Indian Parliament [expanded](#) the scope of India's existing "**equalization levy**" in its amended national 2020 Budget. This included a new 2 percent tax on the sale of goods and services by non-Indian companies over the internet into India, the scope of which is far broader than digital services taxes of the Europeans, for example. The new equalization level follows previous protectionist tax measures in India against foreign digital services. In 2016, the government introduced a 6 percent level on foreign digital advertising businesses. The government also [proposed](#) the concept of "significant economic presence" in 2018, but deferred implementation until there was international consensus on this question. The Indian government has explicitly stated that the country will not stop enforcing their digital taxes until there is more clarity and assurance about the OECD global agreement and its impact. The uncertainty of this status quo has resulted in US digital firms continuing to pay the taxes. This is despite the [agreement](#) struck between the US and India in November 2021 for the Indian government to transition "from the existing India equalization levy to the new multilateral solution" and a commitment between the two parties to "working together through constructive dialogue on this matter."

India remains opposed to the World Trade Organization's **moratorium on customs duties on electronic transmissions** and [believes](#) that ending the moratorium will promote the growth of domestic businesses, despite broad evidence suggesting the moratorium is not only crucial to cross-border data flows, but supports small-and-medium sized enterprises, many of whom are exporters and themselves beneficiaries of the moratorium. Any imposition of new duties on electronic transmission would be inconsistent with India's WTO commitments and would significantly impact foreign firms's ability to access and operate in India's increasingly growing digital economy.

Restrictions on Cross-Border Data Flows

The Department of Science and Technology [published](#) **Geospatial guidelines** in February 2021 relating to geospatial data and associated services, including maps, and the Cabinet approved them in December 2021. These guidelines prevent foreign (including US) companies from entering into meaningful partnerships with Indian companies and building innovative technologies using higher resolution geospatial data in India. Based on the text of the guidelines and the government's public comments during Parliamentary sessions, these guidelines aim to provide preferential treatment to Indian companies, outlining different requirements and usage controls for foreign companies than those for local Indian companies.

The Ministry of Electronics and Information Technology (MeitY) [released](#) a **Draft Digital Personal Data Protection Bill**, 2022 in November 2022. The legislation marks a notable improvement from prior iterations of national privacy legislation in India, there are a [number of items](#) that lack sufficient clarity on how they will be implemented. For example, the legislation would be strengthened by including a clear enforcement timeline for companies impacted, with at least 24 months allowed for implementation; facilitating data flows by adopting clear guidelines for legitimate activities by data fiduciaries; aligning requirements related to children's data with global standards and norms; proactively supporting cross-border data flows through certifications, standard contractual clauses and binding corporate rules in lieu of an opaque process leading to a white list of pre-approved countries; tightening the definition of "data breach" to avoid over-reporting; removing the exemption from the rules applied to India's Central Government; and removing redundant and superfluous requirements for data fiduciaries and data processors.

Restrictions on Cloud Services

In 2020, the Department for Promotion of Industry & Internal Trade extended its demand for **minimum local content to the procurement of software and services**. As per the [Notification](#), the local requirement to categorize a supplier as a 'Class I' supplier is 50% and a Class 2 Supplier is 20%. Up to this date, the formula for calculation of Local Content has not been explicitly defined and has been left to the discretion of the different procurement agencies. This policy introduces market entry barriers that impact specifically multi-national companies that have global R&D centers and therefore

cannot assign the cost of development to one country; in addition, investments made in the ecosystem (such as the build of data centers or investments in startups) have also been ignored. Industry reports that this requirement is increasingly appearing across tenders issued not only by government agencies, but public sector units and educational institutions.

In April 2022, India began to tighten its **restrictions on cloud services providers and virtual private network (VPN) providers** through extremely invasive Indian Computer Emergency Response Team [requirements](#) for cloud service and VPN providers to collect the personal information—including customers’ names and IP addresses. VPN, cloud, and several other IT services providers would be required to log their customers’ activity and surrender that information to Indian authorities when demanded. Firms that decline to undergo this broad-sweeping surveillance on their users would have to leave India’s prominent market. The mandate is now in effect (despite lack of clarity on how the KYC (know your customer) obligations needs to be met,

Discriminatory Platform Regulation

On December 22, an Indian parliamentary panel [recommended](#) that India adopt a “**Digital Competition Act,**” which would include European Digital Markets Act-like ex-ante regulations for “systemically important digital intermediaries.” The proposed rules appear to be largely targeted at US tech companies in the same manner as the DMA in the European Union. On February 6, the Committee [makeup](#) was announced.

Competition Commission of India Rulings on Mobile Phone Operating Systems

In October 2022, the Competition Commission of India issued far-reaching orders seeking changes to how the [Android](#) operating system and the [Google Play](#) store function in India. While ostensibly seeking to address competition issues, the order, which is under appeal, may lead to a fragmented, more expensive and less sustainable market for applications, and introduce significant cybersecurity risks into the mobile ecosystem.

More concerningly, the orders go considerably farther than similar rulings in other jurisdictions, including the EU, and contain factual inaccuracies as well as unsupported and overbroad remedies. They point to a pattern of concerning behavior on the part of the Government of India, seeking to use antitrust laws as a smokescreen for protectionist industrial policy. There are also a number of due process violations, including ordering remedies in the absence of any finding of abuse of dominance, ignoring key evidence, as well as overbroad remedies based on unsupported claims.