Unpacking India's Digital Trade Diplomacy

Arindrajit Basu
Non-Resident Research Fellow, Center for Internet & Society, India
Email: arindrajit@cis-india.org

As the regulation of data and its socio-economic dividends becomes an increasingly critical domestic policy priority world over, a number of global forums are seeking to craft rules that shape attendant cross-border implications. Unsurprisingly, given India's considerable economic heft, much attention has been paid to the stances adopted both in terms of domestic policy formulation and diplomatic posturing. India has eschewed a 'one-size-fits-all' approach to negotiating digital trade forums and adopted a more circumspect and context-specific approach driven by a critical appraisal of strategic interests and a desire to preserve domestic policy space for a dynamic and rapidly growing digital economy. In this article, I map the range of forums negotiating provisions on international trade and how India has engaged with and navigated this canopy of global agreements.

India's engagement with global forums on digital trade

Notwithstanding the claims of its demise, the World Trade Organisation (WTO) remains at the forefront of key global governance issues, including the digital economy. In 1998 at the second ministerial conference, WTO began negotiations on e-commerce and agreed to impose a temporary moratorium on customs duties on electronic goods and services. They also agreed to establish a Work Programme to deal with other issues related to e-commerce with negotiations across four tracks: goods, services, intellectual property and development. The moratorium is still in force twenty-four years later and was extended at the 2022 Geneva Ministerial till 2025. India, along with South Africa, has vocally opposed the repeated extension of the moratorium citing its inequitable impact on the developing world in terms of revenue losses and further dependence on the products created by the developed world.

Several countries, largely in the developed world, felt that the work programme on e-commerce was making glacial progress. Consequently, in 2017, seventy-one WTO members got together to ferment what is now known as the Joint Statement Initiative (JSI) on electronic commerce to "initiate exploratory work towards future WTO negotiations on trade-related aspects of e-commerce". More countries, including China, joined in 2019, and as of 2022, the JSI counts eighty-six WTO members accounting for ninety per cent of World Trade.

India has firmly chosen to sit outside the JSI as it allegedly subverts the integrity of the WTO framework that legally requires consensus from all member states. By shifting the focus away from the Work Programme, India, along with South Africa, argues that the JSI members are attempting to steamroll a plurilateral initiative which violated the WTO's governing legal framework.

For emerging economies like India, where the digital economy and the policy to govern it is still evolving, this is not an acceptable imposition. Therefore, India has tried to revitalise the Work Programme's agenda which requires consensus from all WTO members to go forward.

In particular, India is concerned about rules that impose restraints on domestic policy around data localisation — that is a legally mandated restriction on the cross-border flow of data belonging to Indian citizens. A 2019 draft agreement published by JSI members prevents domestic policy mandates restricting the cross-border transmission of information by electronic means and the local storage of computing facilities along with an exception that allows violations on the grounds of a 'legitimate public policy objective'.

Now, India has put in place several domestic policy measures that impose data localisation, including notably a 2018 directive from the Reserve Bank of India that mandates restrictions on the cross-border flow of financial data. The 2019 draft allows for exceptions on the grounds of 'legitimate public policy objectives', thus, ostensibly providing India with some domestic policy space. However, this does open India up to potential litigation at the WTO, where the judicial bodies have held for the side invoking a general exception only in two out of the forty-eight instances where they have been invoked.

Given the heavily contested progress at the WTO, states have also tried to bring digital trade provisions into "mega-regional" trade agreements, including the Regional Comprehensive Economic Partnership (RCEP) and the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP). These agreements are crafted similarly to the draft WTO text discussed above.

India has not signed these agreements that have brought on board several Indo-Pacific powers. However, reports suggested that India was instrumental in crafting an additional exception on the grounds of 'essential security interests' in the RCEP, which, unlike the 'legitimate public policy' exception discussed above provides full discretion to the state invoking it. Ultimately, India's decision to not sign RCEP was reportedly not because of the e-commerce chapter, thereby indicating a willingness on India's part to engage with and sign up for digital trade agreements if compatible with India's interests.

India has also cautiously engaged with plurilateral mechanisms such as the Indo-Pacific Economic Framework (IPEF) that aim to ferment trade agreements in the Indo-Pacific region. While India is a key member of the IPEF and has signed onto the pillars of trusted supply chains, a fair economy and a clean economy (clean energy), it has chosen to be an observer rather than participate in or commit to the 'trade' pillar of the IPEF till the contours of the overall framework emerge. Officials from the United States, which is the key architect of the IPEF, have indicated that they desire collaboration concerning devising standards for cross-border flows, data protection and artificial intelligence governance. Given this ambitious agenda, it may be too early for India to commit to the trade pillar of the IPEF right away.

Rather than prematurely commit to multilateral or plurilateral obligations, India has preferred to negotiate bilateral trade agreements with key partners. For example, a Free Trade Agreement (FTA) with the United Arab Emirates does not impose strict digital trade obligations on either party. It only states that both parties should "endeavour" to promote the cross-border flow of information subject to existing laws and regulations and adopt laws protecting personal information. Further, India has signed a bilateral trade deal with Australia without inserting a chapter on digital trade, whereas a potential deal with the United Kingdom has run up against roadblocks reportedly due to disagreements over cross-border flows.

Factors shaping India's digital trade diplomacy

Like with other regimes, India's digital trade diplomacy has been driven by an appraisal of immediate strategic interests which is in turn shaped by the interests of key domestic stakeholders combined with institutional capacity and cohesion within the government. India's immediate interest is to secure the domestic policy space needed to enable its nascent digital economy to grow while protecting consumers' and users' rights and domestic businesses as they integrate with the digital economy. Data localisation has been a policy priority for government ministries across the finance, health and electronics sectors, but remains an issue on which multiple stakeholders continue to engage with the government. While foreign

technology companies have always been opposed to data localisation in any sector due to increased compliance costs, reports suggest that policymakers may be more receptive to recent requests by Indian start-ups to ease localisation requirements in domestic law. However, till robust domestic consultations are completed and a robust and holistic policy is put in place, it would be premature to accept legal obligations imposed externally by signing up to trade agreements.

At the same time, sitting out of trade agreements entirely would mean that the standards governing digital trade would get brokered without India at the table. Therefore, like with the e-commerce chapter of RCEP, opportunities have been sought to diplomatically engage at multiple forums. However, commitments have been made and obligations accepted only when domestic policy space is assured. Bilateral trade agreements also serve as an option where two parties are on equal footing at the negotiating table and a mutually acceptable agreement can be brokered without multilateral pressure.

India has not stepped away from multilateral conversations entirely either. Even though they are not formally a part of the JSI, India's communications to the WTO, often jointly co-authored with South Africa, are well-researched and explore legally and economically sound points of view. This has been made possible both through the construction of in-house capacity within government institutions negotiating international trade as well as increasing engagement with external experts such as trade lawyers at firms and academics.

The normative rigour of India's trade diplomacy is not a new phenomenon and has been in place since the 1990s when India started robustly engaging with the increasingly complex negotiations at the World Trade Organisation. This expertise has helped India navigate the new era of bilateral and regional trade agreements as well. Further, crucially, India has not allowed disagreements on digital trade to impact cooperation with countries such as Japan, Australia and the USA through other avenues, including cybersecurity and supply chain resilience through mechanisms such as the Quadrilateral Security Dialogue. This flexibility combined with a fierce assertion of strategic interests and preservation of domestic policy space has been the hallmark of India's digital trade diplomacy, and will serve Indian interests well going forward.