

Towards a Digital India for the World



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List of Abbreviations

ABBREVIATION	FULL FORM
2021 NTE Report	2021 National Trade Estimate Report
2021 Rules	Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021
AI	Artificial Intelligence
BITs	Bilateral Investment Treaties
Blocking Rules, 2009	Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009
CIPAM	Cell for IPR Promotion and Management
Cr.PC	Code Of Criminal Procedure, 1973
DNS	Domain Name System
DPIIT	Department for the Promotion of Industry and Internal Trade
FATF	Financial Action Task Force
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FPI	Foreign Portfolio Investors
FTA	Free Trade Agreement
GDP	Gross Domestic Product
HVDs	High-Value Datasets
ICJ	International Court of Justice
IEEE	Institute of Electrical and Electronics Engineers
IETF	Internet Engineering Task Force
IoT	Internet of Things
IP	Intellectual Property
IPR	Intellectual Property Rights
ISDS	Investor-State Dispute Settlement
IT Act	Information Technology Act, 2000
ITU	International Telecommunications Union
MeitY	Ministry of Electronics and Information Technology
MIB	Ministry of Information and Broadcasting
ML	Machine Learning
NBFC	Non-Banking Financial Companies
NPD	Non-Personal Data
PE/VC	Private Equity/Venture Capital
RBI	Reserve Bank of India
SDOs	Standards Development Organisations
SEBI	Securities and Exchange Board of India
SMTP	Simple Mail Transfer Protocol
TRIPS Agreement	Agreement Trade-Related Aspects of Intellectual Property Rights Agreement
USTR	United States Trade Representative
W3C	World Wide Web Consortium
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

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Overview

Over half the world's population is online. Consequently, the digital economy now sits at the heart of globalisation and the service economy. The internet has outgrown its original purpose as an information-sharing tool. It is now an engine for economic growth, a catalyst for social change, and a potent instrument for public service delivery. The Indian digital economy exemplifies these changes. Every 10 percent increase in internet subscribers in India led to an increase of 2.4 percent in state per capita GDP.¹ However, the growth in interconnectedness in the digital ecosystem, has outpaced state capacities for supervision globally. This has precipitated a risk of fragmentation of digital markets.

The rapid digitalisation of markets and societies made the internet a bellwether for globalisation. Global e-commerce, which encompasses most digital businesses, is a near 30 trillion-dollar market.² This ecosystem is built on a bedrock of trust, between users, businesses, markets and states, and economies. However, concerns linked to individual privacy and security, commercial freedom and private property, and the rise of malign state and non-state actors, have eroded trust at each level. For instance, the largest survey of user trust in the internet, conducted in over two dozen countries including India, concluded that around half of all users distrusted the internet in 2019.³ Similarly, the visible and unprecedented balkanisation of the internet is fuelled by growing distrust between states.

Prime Minister Modi urged global leaders to resist the temptation to change the “natural flow of globalisation” at Davos in 2018. This requires concerted focus on institutional capacity building and democratised rulemaking through new compacts between private and public sectors, to re-establish trust. The digital economy is a ready testbed for governance innovation. Rules based on common values can lower costs of market entry and access, and help shield digital democracies from predatory actors. Such frameworks can aid competition and

wealth creation in the process. As a large investor in and beneficiary of both globalisation and digitalisation, India has a key role to play in enacting domestic reform and shaping external engagements, that are fit to purpose.

It is thus in India's interests to maximise access to digital markets. While digital markets facilitate the trade of products and services at vastly reduced distribution costs, they are also more vulnerable to non-tariff barriers that cut across policy areas. Such barriers often stem from a lack of trust and shared values between countries, and endanger the flow of digital trade by splintering market access. Thus, it is crucial for India to find ways to establish trust for the transfer of technology, capital and ideas. This can be achieved by pursuing a combination of multilateral, plurilateral and bilateral strategies.

Multilateral forums can help establish global rules and technical standards for new technology and enable interoperability, as seen in the case of telecom standards framed by the International Telecommunications Union (ITU). Since plurilateral agreements are increasingly setting rules and templates for digital markets, India may also consider such mechanisms to facilitate market access. And finally, the country must forge trusted bilateral partnerships, since technological and strategic goals are closely intertwined. A combination of such approaches will propel the country towards a converged approach to geostrategy and trade, and facilitate wide access to global markets.

Intermediary Liability and Market Access

Intermediary liability regimes have historically underpinned the growth of internet companies by recognising their diversity and allocating responsibility accordingly.⁴ They have also helped in providing clarity to internet infrastructure and content providers regarding their legal liability. This has enabled such providers to innovate and offer a variety of products and services over the years. Thus, intermediary liability regimes play an important role in propelling economic growth and innovation on the internet.

Harnessing the full potential of the internet is vital for the success of many government prerogatives, such as Digital India, Make in India and Aatmanirbhar Bharat. This requires a facilitative ecosystem that engenders flexibility and dynamism and enables Indian entrepreneurs to innovate and remain globally competitive. India also has a sizable segment of its population that is yet to go online. Therefore, India must take a balanced approach while regulating intermediaries - ensuring that objectives are met without compromising the ease of doing business and innovation.

The Ministry of Electronics and Information Technology (MeitY) recently notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. These Rules were framed in collaboration with the Ministry of Information and Broadcasting (MIB). According to a press release dated 25.02.2021⁵, the Rules create a harmonious and soft-touch oversight mechanism for social media platforms, online curated content platforms and digital news media platforms. Aspects pertaining to social media platforms will be overseen by MeitY. Intermediaries that do not comply with these Rules will not be eligible for the safe harbour protection under Section 79 of the Information Technology Act, 2000.⁶

The Rules require “significant social media intermediaries” (i.e., intermediaries with over 5 million users)⁷ to observe additional due diligence.⁸ Such a graded liability framework is a step in the right direction. This is because it imposes greater liability on platforms with a larger number of users, while ensuring that the larger tech ecosystem can continue to develop relatively unfettered. However, some provisions under the Rules are of concern. These are represented below.

Under the Rules, intermediaries are required to disable access to content within 36 hours of receiving actual knowledge through a government directive or court order.⁹ In its 2021 National Trade Estimate Report (2021 NTE Report)¹⁰, the United States Trade Representative (USTR) referred to a similar requirement under the Information Technology

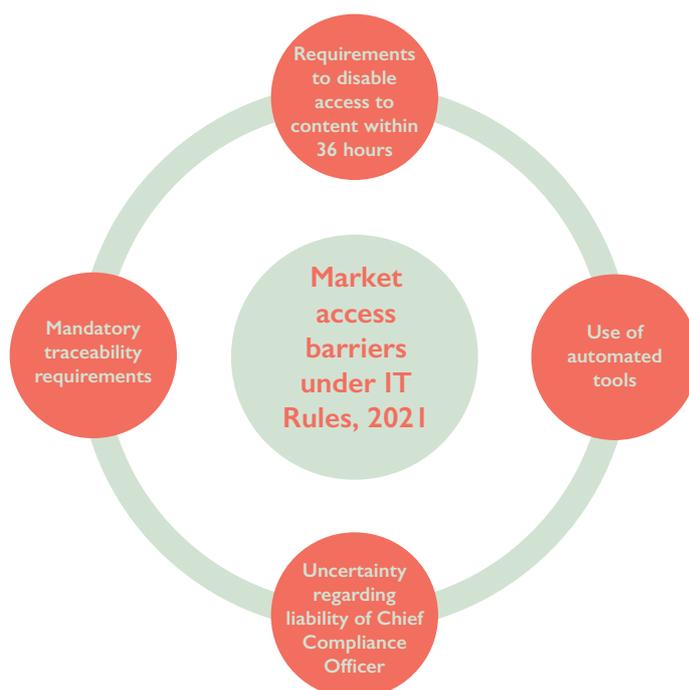


Figure 1 - Market access barriers under the IT Rules, 2021

(Intermediaries Guidelines) Rules, 2011 and stated that it discourages investment in internet services. The 2021 Rules also encourage significant social media intermediaries to use automated tools to proactively identify information depicting acts such as rape, child sexual abuse, etc.¹¹ The USTR's 2021 NTE Report cautioned against similar requirements in the Draft Information Technology (Intermediary Guidelines) Rules 2018 ("Draft 2018 Rules"), saying that it will undermine platform services by incentivising restrictive approaches to policing non-IP user generated content. Thus, these provisions in the 2021 Rules can discourage investment and hamper the ease of doing business.

The Rules also require significant social media intermediaries to appoint a Chief Compliance Officer. This Officer will be liable in any proceedings relating to relevant third-party information, data or communication link that the intermediary hosts or makes available.¹² This can erode the safe harbour framework for intermediaries, and possibly impact India's ambition to engage with the new USTR for a Free Trade Agreement (FTA).¹³ Limiting the liability of online platforms for content not protected by intellectual property rights (IPRs), is an important aspect of new FTAs. For example, the summary of specific negotiating objectives between the US and Kenya¹⁴ and the US and the UK¹⁵ for an FTA states that rules must be established to limit non-IPR civil liability of online platforms for third-party content. Thus, if India wishes to negotiate the contours of an FTA with the USTR, it may need to re-examine the uncertainty surrounding the liability of the Chief Compliance Officer, and specifically exempt him/her from any criminal liability.

The 2021 Rules also mandate traceability for significant social media intermediaries that offer messaging services on the grounds of preventing, investigating or punishing offences related to the sovereignty and integrity of India, security of the State, public order and others.¹⁶ In its 2021 National Trade Estimate Report, the USTR had referred to traceability requirements in the Draft 2018 Rules as a barrier to foreign trade, stating that they force

suppliers to undermine the privacy and security of their services. Retaining similar requirements in the 2021 Rules could thus be perceived as a significant barrier to digital trade.

Further, while the Rules provide that contents of any message will not be shared, it may not be technologically possible to implement traceability without breaking end-to-end encryption.¹⁷ Several messaging applications offer end-to-end encryption to guarantee the security of their users' communications, and such requirements could significantly impact their business models. They could also lead to a splintering of services, with end-to-end encrypted products being offered in the rest of the world and different ones being offered in India, without any interoperability between them.¹⁸ This could increase the operating costs of several businesses offering messaging services, and reduce the attractiveness of India as a market for such services. The country must therefore revisit the new Rules, given their geopolitical implications.

Content Blocking and Market Access Concerns

Globally, increasing instances of internet shutdowns are hindering the free flow of digital trade by cutting off access to digital markets. A new report indicates that India accounts for 70 percent of global internet shutdowns in 2020 – out of 155 instances of global internet disruptions, 109 were recorded in India.¹⁹ Since India aspires to become a USD 1 trillion digital economy by 2025,²⁰ maintaining unfettered access to digital markets is crucial. Thus, it must ensure that its content blocking regime does not contribute to the fragmentation of digital markets.

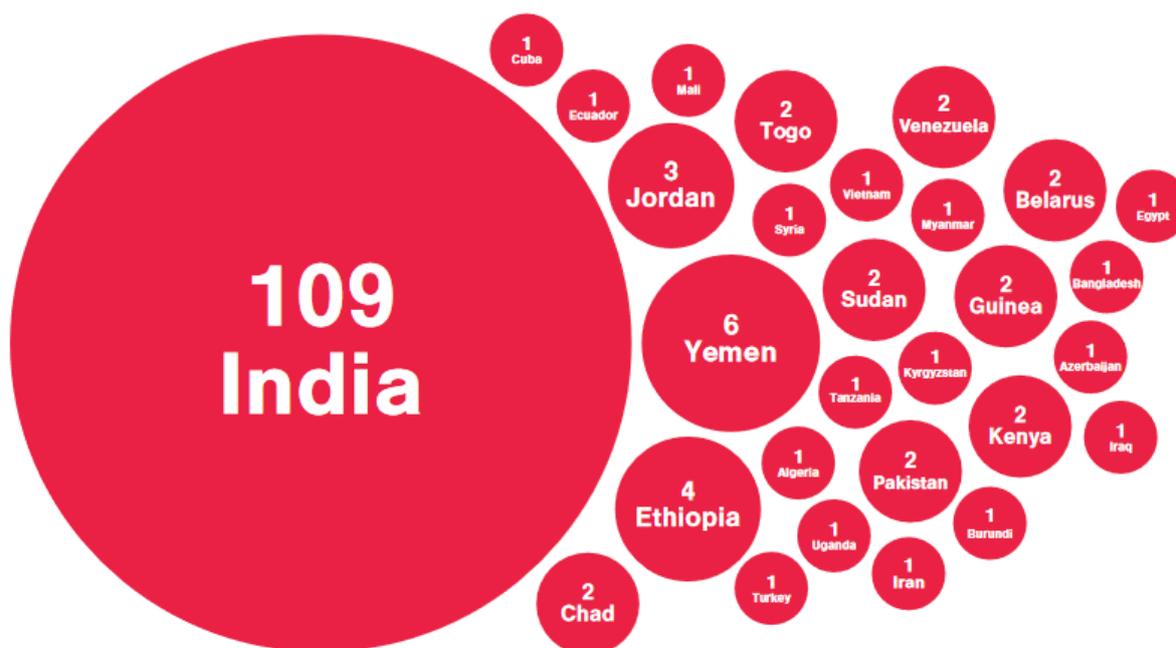


Figure 2: Number of internet shutdowns by country in 2020

Source: Access Now, *A Year in the Fight to #KeepItOn* (2021)

Currently, there are multiple laws in India that can be used to curtail access to the internet. Section 144 of the Code of Criminal Procedure, 1943 (Cr.PC) gives the state government the power to issue orders “for immediate remedy in urgent cases of nuisance or apprehended danger”. In 2017, the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 were notified under the Indian Telegraph Act, 1885. These rules allow the central and state governments to pass orders for the suspension of telecom services. There is also a provision for blocking access to content under Section 69-A of the Information Technology Act, 2000 (“IT Act”) read with the Blocking Rules, 2009 (“IT Blocking Rules”). There is confusion about how all these laws interplay with each other, which engenders uncertainty. In particular, Section 69-A and the IT Blocking Rules are often criticised on grounds such as opacity in their application, confidentiality provisions and others.²¹

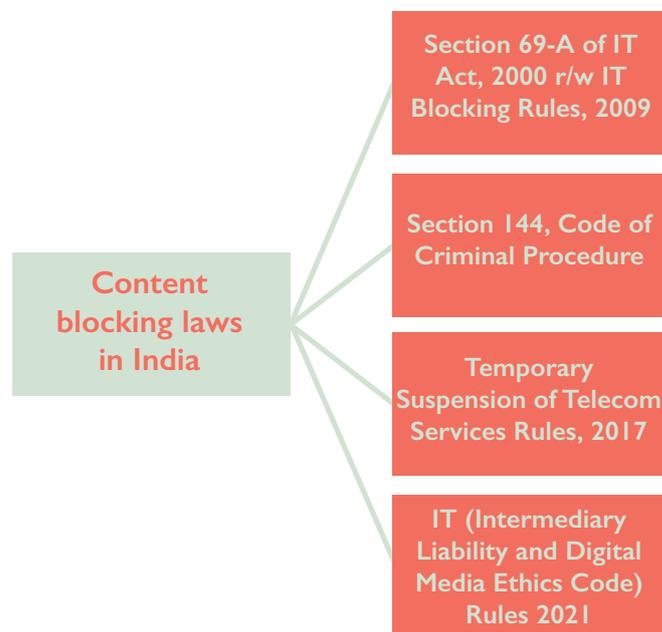


Figure 3: India's laws on content blocking

Despite these concerns, the Indian Government recently used its powers under Section 69-A of the IT Act and the IT Blocking Rules to order several US social media companies such as Twitter to block various accounts.²² It also notified Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (“2021 Rules”), which contain substantially similar blocking provisions for online curated content platforms and publishers of news and current affairs content.²³ These provisions suffer from similar infirmities as the IT Blocking Rules.²⁴

India’s blocking provisions could impact its trade relationship with the US. In its 2021 National Trade Estimate Report, the USTR identified internet shutdowns and suppression of certain digital content and services in India as a barrier to digital trade. The Report stated that such instances undermine the value of internet-based services to consumers, and impose costs on local firms that depend on them for business. In the context of the controversy surrounding Twitter, the spokesperson of the US Department of State, Ned Price, stated that the US is committed to supporting democratic values,

including the freedom of expression.²⁵ Thus, these issues could serve as friction points in the bilateral relationship.

India’s blocking provisions may also conflict with its commitments under Bilateral Investment Treaties (BITs) with various nations. BITs impose conditions on the behaviour of a host state, in order to ensure that it does not interfere with the right of any foreign investor. These include provisions that restrict the host state from expropriating investments; those that mandate Fair and Equitable Treatment (FET) to foreign investments; and allow investors to proceed against host states under the Investor-State Dispute Settlement (ISDS) mechanism for compensation if regulatory measures contravene the protections of the BIT.²⁶

India signed its first BIT with the UK in 1994, and with more than 80 countries over the years.²⁷ The country began to review its BITs with various nations in 2012, which led to the text of a new Model BIT

being approved on December 28, 2015.²⁸ Subsequently, India terminated BITs with over 58 countries in 2017.²⁹ However, many of these BITs contain sunset clauses that protect investments made while they were in force for a certain time period even after unilateral termination. For instance, the India-Australia BIT states that even after the BIT is terminated, it will continue to be effective for investments made or acquired before the date of termination for a period of 15 years.³⁰ Similar sunset clauses exist in other BITs – such as the India-UK BIT³¹, the India-Germany BIT³², the India-Sweden BIT³³ and the India-China BIT³⁴. Thus, investors covered under these clauses could still proceed against India as per the ISDS mechanism in the respective BITs.

Investors of mobile websites and applications may be protected under BITs as well. For example, experts argue that the investors of Chinese apps banned under Section 69-A of the IT Act could be protected under the India-China BIT.³⁵ The India-China BIT covers intangible properties such as IPR under its definition of “investment.”³⁶ Website domain names constitute trademarks, while the source code and user interface of a mobile app would also be protected under IPR.³⁷ The India-China BIT also protects “rights to money or performance under contract having a financial value.”³⁸ These could cover the rights enjoyed by app owners.³⁹ Thus, websites and apps could constitute “investments” protected under the India-China BIT.

While this argument has been advanced specifically in the context of the India-China BIT, it may be possible to extend its scope to other BITs as well. This is because several other BITs also define “investment” in a similar manner. For instance, the India-UK BIT includes intellectual property rights and rightful claims to money or performance under a contract in its definition of “investment.”⁴⁰ The same is true for the India-Australia BIT⁴¹, the India-Germany BIT⁴² and the India-Sweden BIT⁴³. Thus, India’s BITs may protect investors of websites and mobile applications as well.

Since websites and mobile applications are protected by BITs, investors can invoke the ISDS mechanism

in case India is seen to violate its obligations under them. For instance, India’s ban on Chinese apps under Section 69-A could be challenged on the grounds that it violates the FET provision under the India-China BIT⁴⁴. Provisions on FET also exist in other BITs.⁴⁵ Tribunals’ rulings on the FET provisions in various BITs have highlighted the importance acting in a “consistent manner, free from ambiguity and totally transparently” in order to exclude the possibility of arbitrariness in state action.⁴⁶ Tribunals have also stated that “arbitrariness” includes measures that inflict damage on investors without a legitimate purpose, and those based on discretion rather than a legal standard. It also encompasses measures taken in disregard of due process and proper procedure.⁴⁷ Given the lack of consistency and transparency in how Section 69-A is applied, investors could allege that it is applied arbitrarily, and in violation of the FET provision in India’s BITs.

Many of India’s BITs contain exceptions that allow the host country to take any action necessary to protect its “essential security interests” or in “circumstances of extreme emergency.”⁴⁸ However, this exemption usually extends only to actions that are (i) in accordance with domestic laws, (ii) reasonable and (iii) non-discriminatory.⁴⁹ Since there is a requirement of reasonableness, it may be difficult to use this exception to defend any arbitrary application of Section 69-A.

Further, for a measure to qualify under the essential security interest exemption, it must have a nexus with the objective sought to be achieved. Since the provision uses the term “necessary”, rather than “related to”, it must demonstrate a stronger connection with the intended objective.⁵⁰ For instance, in past cases, the International Court of Justice (ICJ) has held that the term “essential security interests” in the US-Nicaragua Friendship, Commerce and Navigation Treaty does not include perceived threats of aggression.⁵¹ Some arbitral tribunals have relied upon the customary international law defence of necessity, as articulated under Article 25 of the ILC Articles on Responsibility of State for Internationally Wrongful Acts. This requires an evaluation

of whether alternative measures could have addressed the issue at hand, without impacting the investor's rights under the BIT.⁵² Thus, invoking the essential security interest exemption may also require India to demonstrate reasonableness and necessity of any content blocking measures, in line with established jurisprudence.

In *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*⁵³ the Arbitral Tribunal recognised that a state cannot invoke its internal law in defence of an act that is inconsistent with its international obligations.⁵⁴ Thus, India's content blocking measures under the Information Technology Act must be compatible with its international obligations. To ensure this and preclude claims of arbitrariness under

ISDS mechanisms, the country must align its blocking regime with some core principles recognised under the Constitution. These include the principle of proportionality, which requires that blocking be rationally connected to the fulfilment of a legitimate purpose. The restrictions imposed by blocking must be reasonable, and not beyond what is required in public interest. They must also be compatible with reasonable restrictions on free speech laid down under the Constitution.⁵⁵ Such a balancing exercise can ensure that India's blocking regime does not pose hurdles to market access, and supports its ambitions for its digital economy.

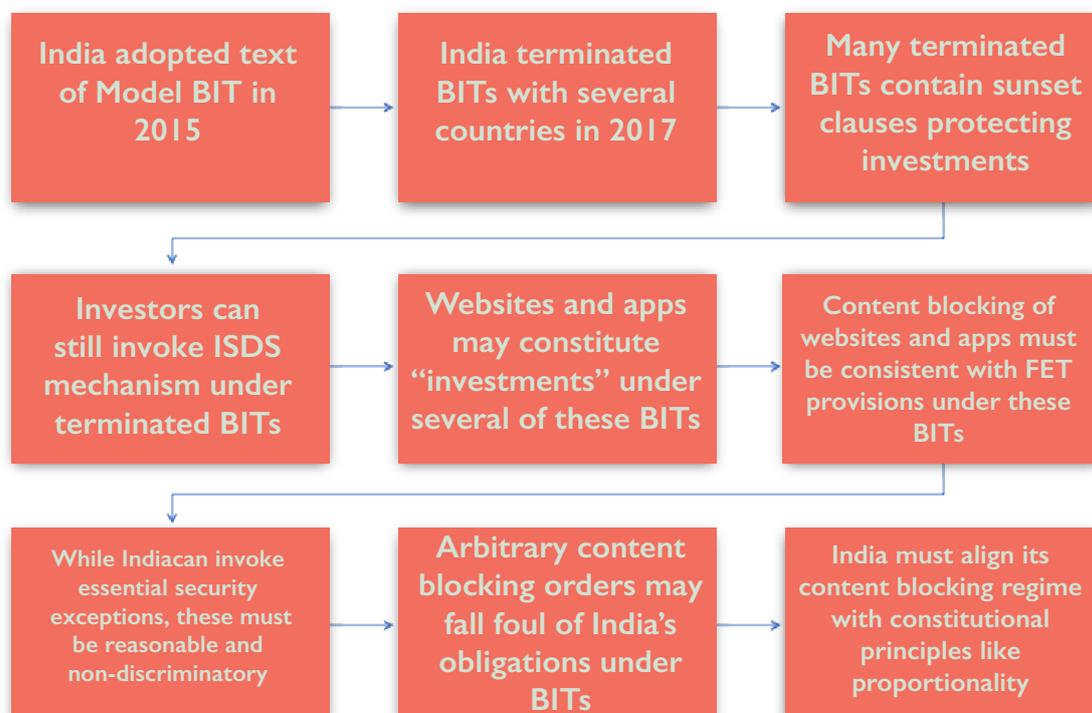


Figure 4: Relationship between Indian BITs and content blocking

Open Internet Standards

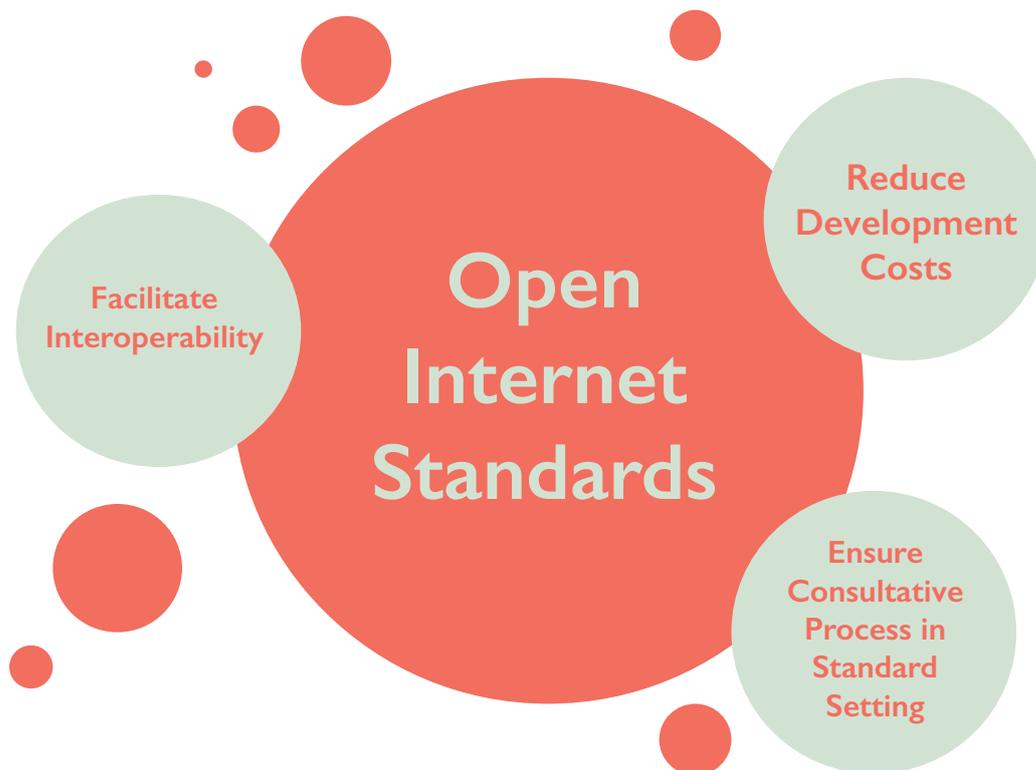


Figure 5: Advantages of open internet standards

Open internet standards are critical for the growth and evolution of technology, as well as laying down best practices for consumers and industries. While there is no single definition of an open standard, there is consensus around the norm that open standards should be adopted and maintained by independent non-profit organisations. These include organisations such as the Internet Engineering Task Force (IETF), the World Wide Web Consortium (W3C), and the Institute of Electric and Electronic Engineers (IEEE) Standards Association (among others), that currently play a key role in promoting an open approach to standards development.⁵⁶

These organisations require standards to be developed through open decision-making, with all stakeholders being allowed to participate in deliberations. They also encourage sharing such standards on a royalty-free basis, and removing constraints on re-use of the standard.⁵⁷

Open standards provide a wide array of tangible benefits. These include reduced development costs for small businesses and organisations, and encouragement of innovation and competition in the software and services markets. The most prominent example of open standards in recent times is that of the World Wide Web, which has



been governed by the continuous development and maintenance of protocols and technical standards. Standards such as Simple Mail Transfer Standards (SMTP) that facilitate emails, and the Domain Name System (DNS) are also open standards.

An advantage of open standards is that they are developed in a consultative manner. Standards Development Organisations (SDOs) receive feedback from multiple stakeholders before arriving at any decision. This ensures that the interests of varying stakeholders are treated on par with one another, by giving all of them an equal opportunity to participate in the process. It also ensures that any resulting technology, protocol or standard is evolved with the general consensus of those involved in the process. This leads to transparency and accountability in standard-setting.

Open standards are also crucial to interoperability. They help ensure that the growth of the internet is not constrained by a particular technology or vendor. This enables consumers to choose the product that fits their needs, without fearing any loss of functionality or control over their data. It also provides fair market conditions for businesses to compete. An example of an area in which a universal open standard has been developed is 5G. The International Telecommunications Union (ITU) released the IMT-2020 specifications for 5G in November 2020.⁵⁸

Thus, India must commit to maintain open standards for the internet and ensure that a lack of interoperability does not hinder growth. This can take the country closer to its goal of becoming a USD 1 trillion digital economy by 2025.

Copyright Laws and Data Protection

India is party to 58 multilateral treaties that create obligations related to intellectual property, according to the World Intellectual Property Organization (WIPO).⁵⁹ These include trade agreements under the WTO, including the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement); WIPO Agreements and other multilateral treaties coordinated by the United Nations and its organs. Besides these, India also has numerous bilateral commitments on intellectual property with its trading partners. Intellectual property is an important topic in trade negotiations, because an effective and predictable intellectual property regime guarantees monetization of IP rights for investors. Commitment to a common standard of protection helps create a predictable and enabling framework.

The USTR has repeatedly included India in the Priority Watch list under the Special 301 Report.⁶⁰ The Report investigates the adequacy of intellectual property protection accorded by trading partners of the United States. It finds India's response to long standing issues inadequate. Among other things, the Report notes that the draft Copyright Amendment Rules proposed by the Department for Promotion of Industry and Internal Trade (DPIIT) in 2019 will broaden the scope of statutory licensing to encompass online broadcasting, despite a Bombay High Court ruling stating otherwise.⁶¹ It also states that these Rules may have severe implications for internet content-related right holders. It further notes that the granting of licenses under Chapter VI of the Indian Copyright Act, 1957 and overly broad exceptions for certain uses raises concerns about the strength of copyright protection in India. The provisions under Chapter VI preclude commercial negotiation, and thus diminish the capacity of rights-owners to fully monetise their IP.

Copyright concerns in India are two-fold: inconsistent enforcement of copyright and legislative interventions that enable copyright expropriation. The country has adopted positive measures for better copyright enforcement, such as institutionalising the Cell for IPR Promotion and Management (CIPAM) under the DPIIT, amendments to penalise camcorder piracy and judicial innovations such as dynamic blocking of websites that host infringing content. However, concerns on the expropriation of copyright persist.



Figure 6: Concerns regarding copyright protection in India

Concerns regarding expropriation also extend to the intellectual property protection accorded to data. Data is a key driver of growth in the digital economy, and is now regarded by many as the most valuable resource in the world. Data-driven insights are enabling businesses to transform their operations and enhance productivity.⁶² However, India’s policymaking efforts could dilute the intellectual property rights that entities enjoy over their data. The Draft E-Commerce Policy, 2021⁶³ requires the development of a suitable framework for sharing community data with start-ups and firms. It states that data emanating from India must first be used for domestic entities, and retains recommendations of earlier drafts encouraging data sharing for industrial development. Further, it retains recommendations regarding the regulation of cross-border data flows pertaining to Indians and transactions taking place in India, stating that violation of such safeguards can attract heavy penalties. These requirements raise pertinent questions on intellectual property protection vis-à-vis facilitating trade with other nations.

The revised framework on non-personal data (NPD) contains mandatory data sharing requirements for private entities.⁶⁴ While it acknowledges that compilations of data demonstrating non-trivial skill and creativity are protected under copyright law, it proceeds to mandate data sharing of specified subsets of raw data for designated High-Value Datasets (HVDs).

It states that the extraction of such pre-set fields will not violate copyright, but does not provide any reasoning for this conclusion. However, the TRIPS Agreement provides that compilations of data that constitute intellectual creations due to their selection or arrangement shall be protected as such, without prejudice to any copyright subsisting in the data itself.⁶⁵ The Copyright Act, 1957 also protects compilations of data that demonstrate originality as “literary works”, in line with India’s obligations under TRIPS.⁶⁶ The revised NPD report acknowledges that the nature of data within a database is irrelevant for the purposes of copyright protection. However, its recommendations are inconsistent with India’s obligations under the TRIPS Agreement, as it mandates sharing subsets of raw data.

Similarly, the revised NPD report recognises trade secrets protection for any compilation of NPD that is “inherently non-public or secret”. However, it creates an exception to such protection for “ordinarily and freely available raw data”. The meaning of “ordinarily and freely available” is not explained. The TRIPS Agreement requires WTO Members to protect undisclosed information, to protect against unfair competition.⁶⁷ While TRIPS also extends this protection to “secret” information, it defines such information as that which is “not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question”⁶⁸. In this way, it offers more clarity than the revised NPD report

on trade secrets protection. Further, the USTR's Special 301 Report has flagged inadequate trade secrets protection in India as a pressing concern. In this backdrop, the revised NPD report is unclear regarding trade secrets protection for underlying data in India.

The TRIPS Agreement also states that any exceptions or limitations to exclusive rights must be confined to (i) certain special cases that (ii) do not conflict with normal exploitation of the work, and (iii) do not unreasonably prejudice the legitimate interests of the right holder.⁶⁹ However, the revised NPD report provides very broad grounds for the appropriation of IP.

In light of the issues mentioned above, there is a need to rationalise India's intellectual property rights regime with aspects of data ownership. The Copyright Office of the Department for the Promotion of Industry and Internal Trade (DPIIT) had invited suggestions for amending the Copyright Act in the light of changes brought about by use of the internet, digitalization and an increasingly globalized market for digital content in October 2020.⁷⁰ The DPIIT notified the Copyright (Amendment) Rules, 2021 in April 2021. These Rules contained procedural changes regarding the registration of copyright societies and distribution of royalties among others, but nothing more substantive.⁷¹ There is a need to reimagine India's intellectual property framework to ensure that it is fit-for-purpose in a digital era. A step towards this could be taken by drafting a new National IPR Policy, which builds on the vision of India's National IPR Policy 2016 to create a conducive ecosystem for intellectual property. This will help in establishing an IPR framework that can keep pace with advancement in technologies, digitalisation and globalisation.



Figure 7: Concerns regarding data protection in India's recent policies

Capital and Trust

The COVID-19 pandemic has intensified the competition for foreign investment, spurred by national campaigns to shift supply chains and the urgent necessity to reverse recessionary trends. Capital inflows in Asian economies could drop by as much as 45 percent.⁷² Fortunately, FDI inflows to India increased by 13 percent in 2020, boosted by investments in the digital sector. India raised the foreign equity caps for defence in December 2020.⁷³ The Rajya Sabha passed the Insurance (Amendment) Bill, 2021 in March, to increase FDI in insurance.⁷⁴ The country has also introduced concomitant measures to improve its business environment.

India's digital sector has shown particular resilience to external economic shocks. It has witnessed a consistent inflow of capital. Approximately 80 percent of Venture Capital (VC) investments in India in 2019 were concentrated in four sub-sectors: consumer tech, software/SaaS, fintech, and business-to-business commerce and tech. In 2019, the PE/VC industry deployed capital valuing USD 45 billion in the country, about 70 percent higher than in 2018.⁷⁵ Notably, in light of fresh capital inflow in India's digital sector, the total FDI inflow in the first five-months (April - August) of the financial year 2020 was USD 35.73 billion, which is the highest ever, and about 13 percent higher as compared to first five months of 2019-20 (USD 31.60 billion).⁷⁶

Average VC deal size by sectors (\$B)

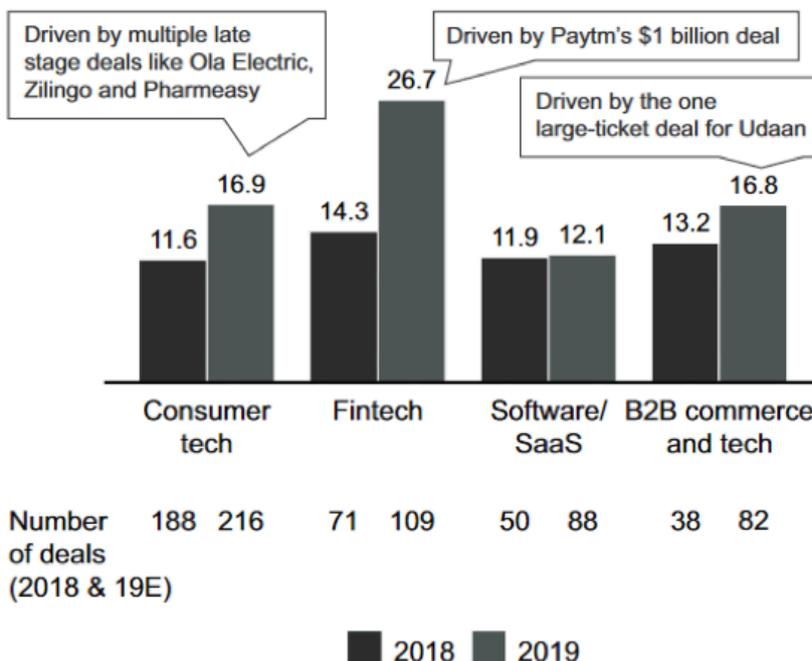


Figure 8: Average VC size by sectors

Source: Bain & Company and IVCA, India Venture Capital Report (2020)

The Indian Government must facilitate the growth and development of the digital ecosystem by reducing legal-regulatory uncertainties. To this end, it is important to avoid actions that can alter the legal status of a business overnight.

In February 2020, the Financial Action Task Force (FATF) put Mauritius on the 'grey list' due to non-compliance. Jurisdictions under the grey list face increased monitoring due to the presence of structural deficiencies. Consequently, in October 2020 the Reserve Bank of India (RBI) communicated its decision to ban investments in finance companies (including Non-Banking Financial Companies and fintech start-ups) from Mauritius and other non-FATF-compliant jurisdictions.⁷⁷ It is unclear if the restriction placed by the RBI is applicable to both existing investments and on greenfield investments. This is despite the fact that Mauritius was the second-largest source of FDI for India in FY2020.

In February 2021, RBI announced that new investors who operate from jurisdictions that are non-compliant with the FATF must hold less than 20 percent of the voting power in existing NBFCs, or companies seeking a Certificate of Registration (CoR).⁷⁸ It said that new investors must not be allowed to acquire 'significant influence' in the investee. The move came days after RBI proposed tighter regulation of the shadow-lending sector.

A restriction on capital without affording adequate time to market participants to adjust to a new regulatory environment risks damaging business confidence. The RBI's decision to disallow financial firms with investment from Mauritius has had a significant impact on start-up funding in India.⁷⁹ For example, the RBI has returned the application of CarDekho, which was applying for a Non-Banking Financial Company (NBFC) license.⁸⁰ For investors, this could mean rerouting investments from FATF compliant countries like Singapore -adding compliance and legal costs.

It is worth noting that at least 42 Mauritius based VC funds/investors are registered with the Securities and Exchange Board of India (SEBI). The guidance

from FATF to its members (which includes India) in circumstances when a jurisdiction is put under the grey list is to consider such parameters in their risk analysis. SEBI has refrained from restricting participation by Mauritius-based Foreign Portfolio Investors (FPIs) and new applicants. It has subjected them to enhanced monitoring, which is a pragmatic move. The securities regulator issued a clarification stating that Mauritius-based portfolio investors will continue to be eligible for registration under its Foreign Portfolio Investment Regulations.⁸¹ It noted that the FATF does not call for the application of enhanced due diligence to be applied to these jurisdictions but encourages its members to consider such information in their risk analysis.

A divergence in regulatory approaches between the RBI and SEBI with respect to investments from Mauritius, highlights a lack of certainty on investment norms. This necessitates a harmonised approach that allows businesses to anticipate regulatory transitions and minimise any adverse impact. More importantly, efforts should be made to allow the import of capital instead of a blanket restriction.

Consumer Protection

Digital transformation changes the ways in which consumers interact with each other and the online marketplace. Consumer data has become an essential economic asset powering new and innovative business models, technologies, and transactions. This has implications for consumer policy issues such as information asymmetries and inadequate disclosures, misleading and unfair commercial practices, consumer fraud, product safety, dispute resolution and grievance redressal. There is a need for India to ensure that its consumer protection regime is relevant to a digital era. India has already taken the first step towards this by enacting new laws for consumer protection in the past two years.⁸²

A large number of businesses have begun employing data processing technologies in recent years, such as Artificial Intelligence (AI), Machine Learning (ML), blockchain and the Internet of Things (IoT) to derive insights on consumer behaviour. These insights are used to personalise digital services and improve customer experience. India has one of the highest percentages of companies that are early-adopters of AI systems (19%).⁸³ Unlike earlier technologies that were deterministic in nature, these new technologies are probabilistic. Therefore, deterministic frameworks may not be suitable for their regulation. To ensure adequate consumer protection, there is a need to evolve standards that are suited to the probabilistic nature of such technologies.

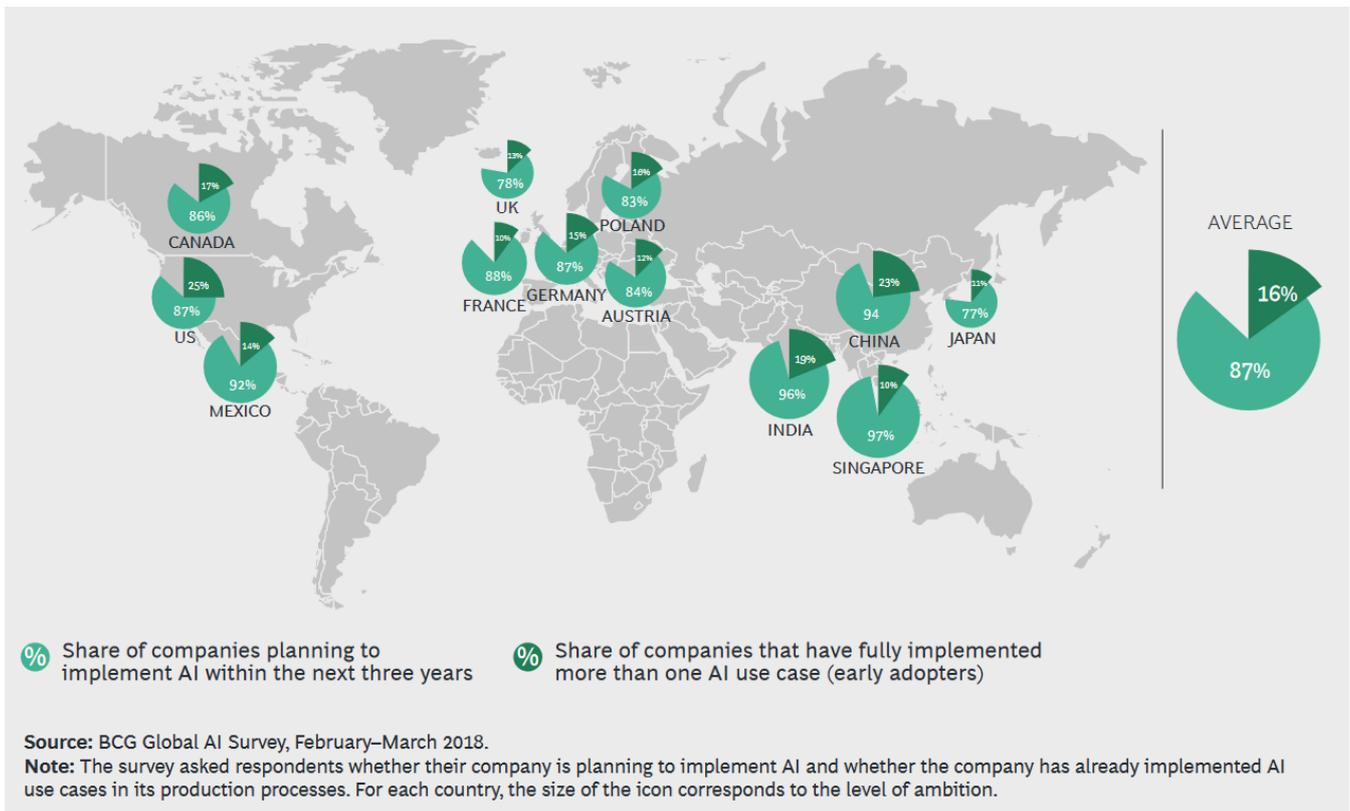


Figure 9: Adoption of AI in India and other countries
 Source: Boston Consulting Group, *AI In the Factory of the Future* (2018)

India recognises the significance of AI and other emerging technologies for economic growth driven by digitalisation. In June 2020, it joined leading economies such as the USA, the UK, EU and Canada, among others, in launching the Global Partnership on Artificial Intelligence to guide the responsible use and development of AI.⁸⁴ It also organised the Responsible AI for Social Empowerment Summit (RAISE 2020) to set a course for deploying AI in sectors such as agriculture, healthcare and education.

India has also recognised the need to use AI ethically and responsibly. The National Strategy for AI released by NITI Aayog in 2018 recommended establishing mechanisms to ensure that AI is used in a responsible manner.⁸⁵ In February 2021, it released a document entitled “Towards the Development of Responsible AI for All”⁸⁶, where it identified principles such as privacy, security, transparency and accountability (among others) for the responsible management of AI. While this is laudable, there is a need for the country to initiate and engage in global conversations regarding standard-setting for technologies like AI, ML and the IoT as we step into a digital era.

Globally, consumer organisations are concerned about the impact of possible learning or design biases upon consumer choice and welfare.⁸⁷ There are also concerns surrounding the use of AI in price differentiation and the manipulation of consumer preferences. Setting standards and guiding principles for the deployment of AI and other technologies are essential to ensure that they are used in a manner that maximises consumer welfare.

At the high-level government meeting of ICANN-55 held in Marrakech in 2016, the Hon’ble Minister for Electronics and Information Technology, Ravi Shankar Prasad affirmed India’s commitment to a multi-stakeholder approach to internet governance and noted the importance of local voices in shaping a global governance model.⁸⁸ India must take this notion forward and follow a multi-stakeholder approach to identify and establish standards for

emerging technologies like AI/ML. By actively facilitating such conversations, the country can ensure that it has a consumer protection regime that is equipped to meet the challenges of the digital era.

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