

INDIA - EU PROPOSED FREE TRADE AGREEMENT - ISSUES SURROUNDING DATA PROTECTION AND SECURITY

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In June 2007, the European Commission and the Indian government started negotiating the EU-India Free Trade Agreement. One of the most ambitious negotiations, the FTA will mean a massive slashing of India's import duties and include trade in services, investment, intellectual property rights, competition policy and government procurement.¹ The FTA will have far-reaching consequences on national, state and local laws and policies that are seen to restrict free trade of European imports and therefore, on the lives and livelihoods of Indian citizens

Among the numerous controversies surrounding the proposed India - EU FTA, the author would like to confine this piece to data protection and security issues which have arisen during the negotiations between the parties. Given the veil of secrecy that shrouds the negotiations, no authoritative text is available as regards the respective negotiating positions of the EU and India.²

Data Protection under proposed FTA

Article 14 of the India EU FTA essentially replicates TRIPS requirements on data protection. It provides for data protection with respect to Pharmaceutical data submitted in order to obtain market authorization.³ The provision begins with text stating "When a Party requires," rather than requiring protection in all cases. Furthermore, the unambiguous language used in this provision only requires protection and not exclusivity. The text preserves the TRIPS flexibility by stating that such protection must be provided only against unfair commercial use, rather than for any use. It also preserves the safeguards such as applying where the origination of the data required "considerable effort," rather than all data. This text, which has been agreed to by the parties, stands in stark contrast to what the US has proposed in the TPPA. The agreed text in the

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1. Executive Summary, Qualitative analysis of a potential Free Trade Agreement between the European Union and India, Centre for the Analysis of Regional Integration at Sussex & CUTS International,
 2. Lee Dae-woo, India and the EU opt for partial Free Trade Agreement, Spring 2013 POSRI Chindia Quarterly.
 3. James Love, Negotiating Text, EU/India FTA (BTIA), March 2013, Knowledge Ecology International, Available on: <http://keionline.org/node/1691>.

EU-India FTA leaves the policy space open to determine the best methods for implementation and avoids the problems of exclusivity, which include ethical concerns.⁴

Similarly, Article 15 provides for Data Protection on Plant Protection products and lays down certain rules for preventing duplicative testing. This provision is ought to be deliberated upon in light of the legislative developments in India. India's stand regarding this issue is to provide full protection from undisclosed information by the laws in the negotiating states, which are only subject to the flexibilities in the TRIPS agreement. However, the EU proposes that certain efficacy and safety standards ought to be determined, before authorization regarding the placing on the market of plant protection products. Further, the parties must also recognize a temporary right to the owner of a test or study report submitted for the first time to achieve a marketing authorization for a plant protection product. During this period, the test or study report should not be used for the benefit of any other person aiming to achieve a marketing authorization for plant protection product, except when the explicit consent of the first owner is proved, thereby protecting his data.⁵

European Union's Data Security Standards

Article 25 of the current Data Protection Directive, contains a requirement for data to be transferred outside of the EU in order to fulfill their high privacy standards. It commands that data related to European citizens can be transferred outside EU borders only if the legal system of the host country provides a similar degree of protection.⁶ The EU requires other countries to create independent government data protection agencies, register databases with those agencies, and in some instances, the EC must grant prior approval before personal data processing may begin.⁷

4. Krista Cox, Quick Reaction to the EU/India FTA (BTiA) Negotiating Text, Knowledge Ecology International, Available at: <http://keionline.org/node/1693>

5. Supra note 3.

6. Osvaldo Saldias, Cloud-friendly regulation: The EU's strategy towards emerging economies, Internet Policy Review, April 2013, Available at: <http://policyreview.info/articles/analysis/cloud-friendly-regulation-eu%E2%80%99s-strategy-towards-emerging-economies>

7. Susan Aaronson, *Internet Governance or Internet Control? How To Safeguard Internet Freedom*, Cicero Foundation Great Debate Paper, No. 13/01, February 2013, Available on: http://www.cicerofoundation.org/lectures/Aaronson_Internet_Governance.pdf

This law mandates that European countries doing outsourcing business with countries that are not certified as data secure have to follow stringent contractual obligations which increases operating costs and affects competitiveness.⁸ European industry representatives are worried about India's expansion of its share of the European outsourcing market, which already stands at 30 percent of India's \$100 billion IT and business process outsourcing industry, possibly resulting in the compromise of some personal data.⁹

India's want for Data Secure Status

Owing to the importance of cross-border data flows to or from the 27 countries of the EU, developing nations such as India and China are finding it difficult to make their laws interoperable with the EU's stringent privacy provisions, thereby affecting the trade policies.¹⁰ India has demanded for granting of a data secure status by the EU and incorporating an investment protection clause in the FTA in the recent talks. The EU's refusal to grant such a status to India has prevented the flow of data, including such information which may vital for India's IT services industry wanting an outsourced market access.¹¹ It also obstructs the free flow of sensitive information to India, such as information about patients for telemedicine, under data protection laws in the EU.¹² This has also impacted the movement of people through restrictions on business development as it restricts transfer of personal data to locations outside EU, unless the importing country ensures adequate data protection. India has been arguing that since US has a safe harbour pact with the EU, and that the US and India have a data adequacy agreement, therefore the EU should give data adequacy status to India.¹³

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8. PTI, India-EU FTA Talks Fail to Bridge Gaps, Available at: <http://www.livemint.com/Politics/jO5DSVLjGMUay9mopfMPGL/IndiaEU-FTA-talks-fail-to-bridge-gaps-ministerial-meet-unl.html>
 9. Asia Briefing, India-EU Free Trade "Early Harvest" Deal Looks Possible, May 2013, Atlantic Sentinel, <http://atlanticsentinel.com/2013/05/india-eu-free-trade-early-harvest-deal-looks-possible/>
 10. Interview with Rosa Barcelo, Privacy Coordinator, Policy Coordinator, European Commission DG CONNECT, 7/24/2012. Also see Gregory Shaffer, "Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of US Data Privacy Standards," Yale Journal of International Law 25, Winter 2000, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=531682.
 11. PTI, EU talks on FTA expected to make headway, Hindustan Times, April 2013, <http://www.hindustantimes.com/world-news/Europe/India-EU-talks-on-FTA-expected-to-make-headway/Article1-1044596.aspx>
 12. Deepak Rao, What to expect from the India-EU FTA, <http://www.gatewayhouse.in/what-to-expect-from-the-india-eu-fta/>
 13. PTI, Small gap posing difficulty in finalising India-EU FTA : Rao, Financial Chronicle, June 2013, Available at: <http://www.mydigitalfc.com/news/small-gap-posing-difficulty-finalising-india-eu-fta-rao-210>

The Data Security Council of India estimates that outsourcing business can further grow by \$50 billion per annum once India is recognized as a “data secure” destination. India is still not considered a “data secure” country as per EU law. This increases operating costs for India companies, affects competitiveness and decreases confidence of European firms in doing business in India. India has already amended the Information Technology Act in 2006 to ‘give a fillip to the growth of electronic based transactions, to provide legal recognition for e-commerce and e-transactions, to facilitate e-governance, to prevent computer based crimes and ensure security practices and procedures in the context of widest possible use of information technology worldwide’, thus, New Delhi argues that the existing laws meet the required EU standards and is compliant with the European law on data protection.¹⁴

Proposed Compromise

The European Commission has been stressing that the issue of data protection adequacy should remain separate from the FTA and that India must meet the EU requirements for adequacy under the process set out in the 1995 Data Protection Directive. With the EU currently revising its data protection rules, this remains a front page issue and the Commission will not want to lose face by seeming to grant data adequacy as a concession to sign an agreement. Nasscom on discussion with the EU Chief Negotiator regarding this issue got some positive indications, with the EU expressing a clear willingness to work alongside India to plug the gaps and secure adequacy status. The EU has expressed willingness to set up a Joint Working Group (JWG) to look into these issues.¹⁵

14. Dr. Dinoj Kumar Upadhyay, India-EU FTA: Building New Synergies, Indian Council for World Affairs, November 2012, <http://www.icwa.in/pdfs/VPIndiaEUTFa.pdf>.

15. EU-India FTA Discussions Gather Steam, NASSCOM, Available at: <http://www.nasscom.in/euindia-fta-discussions-gather-steam?fg=235321>