



Confederation of Indian Industry

125 Years: 1895-2020

Roadmap for a **US-India** Trade Agreement





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**Roadmap for a
US-India
Trade Agreement**

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This report has been prepared by Ms.Sumani Dash, Consultant – International Research, CII in collaboration with Dr. Jayanta Roy, Former Economic Adviser, Ministry of Commerce and Industry, Government of India; former Regional Lead Economist, Middle East and North Africa, World Bank; and former Principal Adviser, CII.

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Executive Summary

Much has been said and written about the promise of the US-India trade, commercial, strategic and people-to-people partnership, especially in light of the upward swing in bilateral ties in the past three decades. A close relationship seems only natural between the world's oldest and largest democracies, given commonalities such as firmly rooted beliefs in democratic norms and institutions, the rule of law, dynamic and vibrant private sectors as well as the growing Indian-American diaspora providing a very real bridge between the two nations.

At the same time the trade and commercial partnership has arguably not progressed as rapidly as the strategic aspects of bilateral ties. Several trade issues over the past two years focusing on market access barriers, Intellectual Property Rights, investment norms etc have tended to dominate the narrative. This tends to overshadow the fact that from a low of just USD 16.3 billion in 1999, total bilateral trade grew to 142.64 Billion in 2018 – growth of about 775%. US FDI into India has also grown from about USD 18.35 billion in 2008 to USD 45.98 billion in 2018. These are very real and substantial gains. Given current geopolitical shifts, the time is ripe for a comprehensive look at the prospects of getting to 'yes' for a deeper bilateral trade agreement.

Through this paper, an attempt has been made to highlight the historical and current trends (overall and at a sectoral level) of commercial and trade activity between the two countries in terms of goods, services and two-way flow of investments to present a true picture of the potential of the partnership. We also analyze and put forth a detailed roadmap of the various issues which will need to be tackled for any kind of eventual trade agreement between India and the United States – this is critically important if we are to achieve a deal that is broad, deep and geared towards future growth. To this end, this report looks at two trade agreements negotiated by the United States recently, specifically, the Trans Pacific Trade Partnership (TPP) and the US Mexico Canada Agreement (USMCA), each of which was negotiated under a Democrat and Republican administration respectively. Even though the US did eventually pull out of the TPP, many of its high standard elements were retained in the final version of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and it also served as a blueprint for the USMCA in many respects.



The roadmap thus outlined is envisaged with different elements being approached and addressed at different times:

Immediate and Medium Term Steps:

- Avoid escalation
- Apex trade body in India
- Intellectual Property Rights (patents, data exclusivity, trade secrets, copyrights)
- Digital Trade (to include e-commerce norms)
- Investments (market access barriers)
- Trade in Services
- Dispute Resolution
- Competition Policy
- Government Procurement

Long Term Steps:

- Agriculture
- Labour standards
- Environmental standards

There are clearly myriad challenges and divergences in each country's positions on the various trade chapters mentioned above. However, it is our considered view that that on an annual basis, certain issues can be taken up, negotiated and implemented with a comprehensive timeline (including domestic reform wherever required) geared towards the eventual conclusion of a trade agreement. This is an ambitious proposal and will require significant determination and preparation of industry as well as domestic consensus building – a monumental task indeed. Domestic pressures on industry as a result of adherence to certain provisions in the trade agreement also comes with its own risks which will need to be mitigated. However, addressing these components is in India's own strategic and economic long-term interest, especially if India is to engage and integrate with global value chains meaningfully.



Introduction

The US-India bilateral relationship has grown and strengthened significantly in the past two decades. Viewed in the broader context of the nature of the relationship in the late 1980s, especially after India conducted its first nuclear tests, this transformation is all the more remarkable. Today, the partnership encompasses strategic, geopolitical, economic and commercial elements and true people-to-people ties.

Interestingly, after India began liberalizing its economy in 1991, the trade, investment and commercial facets of the partnership gained greater significance – the signing of the US-India nuclear agreement in 2005 however added a deep strategic rationale to the overall partnership which has since only grown in magnitude. This is due to close understanding and shared interests having developed on a range of issues such as on maritime security, cross-border and international terrorism, the regional security architecture and so forth.

In the last two years alone, India has been categorized by the US as a ‘Major Defense Partner’ and has also been accorded ‘Strategic Trade Authorization-1’ status (typically reserved for NATO allies). The two sides have also signed two major foundational military agreements - Logistics Exchange Memorandum of Agreement (LEMOA) and the Communications Compatibility and Security Agreement (COMCASA). All these designations and agreements make possible the prospect of closer military cooperation, data sharing as well as potential export of sensitive technologies from US to India.

In addition, there has been convergence on the regional security architecture (such as the concept of the ‘Indo-Pacific’ as articulated by the U.S.) and on the issue of terrorism as well, there has been very close cooperation with the U.S. and an alignment on views, especially following the Pulwama attack in February 2019.

In sum, there has been a fundamental shift in terms of the strategic convergence of both countries’ interests and values premised on preservation of a global order based on international rules that all nations can adhere to.

It is important to look at the trade related challenges in the context of the overall evolution of the partnership though – trade ties have grown significantly over time, with two-way trade expanding from USD 66.08 billion in 2008 to USD 142.64 billion 2018 – an increase of about 116% in a decade. Going even further back, two-way trade in 1999 was about USD



16.3 billion – in other words, the trade partnership has ballooned by more than 7 times in about two decades.

In 2018, India was the US's 12th largest goods export market, accounting for just over 2% of total US goods exports, while the US is India's single biggest goods export market, making up about 15.8% of India's overall goods exports. On the other hand, the US is the second largest source of imports into India, making up about 7% of India's total goods imports in 2018, while India is the tenth largest source of goods imports into the US, i.e. about 2.13% of total US goods imports.

Two-way flow of services trade in 2018 stood at USD 54.79 billion, with total US services exports to India pegged at USD 25.2 billion and total Indian services imports into the US reported at 29.6 billion.

There has been much discussion about the trade deficit between India and the US, which in 2018 stood at about USD 20.85 billion – a reduction of about 9.86% as compared to 2017.¹ The reduction came about as a direct result of concerted efforts made by India to decrease the deficit vis-à-vis the United States, mainly in the form of greater purchases of oil and gas, defense equipment etc.

The strategic underpinnings of the bilateral partnership, while growing in both scope and substance requires the strong ballast of foundational support from the US corporate sector to withstand external pressure. The current interest in Washington for building a strategic partnership with India has as much to do with India's own economic rise and the opportunities this presents to US companies – in other words, economics matters as much as geopolitics – possibly even more. A sustainable and concrete US-India bilateral partnership cannot be built without the bedrock of rapidly expanding trade and economic relations that benefit companies and shareholder interests in both nations.

The need to increase bilateral trade and investment flows thus is all the more important since the US is the world's biggest economy, and notwithstanding China's rise, will likely remain so in the foreseeable future. The US is also a major factor in the success of India's economic crown jewel – its services sector; and is also India's largest export market and second largest source of imports. For these reasons and more, the US will remain a priority market, as well as a primary commercial and investment partner requiring sustained attention from policy makers.

This paper seeks to make a case for enhanced US-India trade flows, while also addressing current realities in both countries vis-à-vis approaches to trade agreements to find a potential middle ground where both nations can come together to leverage their unique strengths while advancing trade ties.

The paper is broadly organized as follows: Chapter 1 lays out the current trends in trade and commercial activity – in terms of goods and services trade and two-way Foreign Direct

¹ The goods trade deficit in 2017 was about USD 20.85 billion according to USA Trade Online of the US Census Bureau.



Investment. The intent is to provide a holistic view of the evolving upward swing in bilateral trade and commercial engagement between the two countries over time, which in our view would justify serious contemplation of a formal trade agreement of some kind (CEPA, CECA, full fledged FTA etc).

Chapter 2 then proceeds to lay out the major trade chapters that were incorporated in the two signature trade agreements negotiated by the United States in the past few years. The Trans-Pacific Partnership Agreement (TPP) – a free trade agreement between the United States, Canada, Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam; and the US-Mexico-Canada Agreement (USMCA), which revised the North American Free Trade Agreement). The TPP was negotiated under a Democrat administration and the USMCA under a Republican administration. The final negotiated stance on major issues as viewed in each agreement is thus highlighted and wherever available, India’s position on the same is also expounded to show key differences and areas of commonality.

Though the United States ultimately (under a new Republican administration) withdrew from the TPP in 2017, the agreement is nonetheless critical since it reflected core concerns for the US and also provided a blueprint for the subsequent USMCA. With some changes, the TPP also went on to be ratified as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). A signature feature of the TPP was its adherence to much higher standards than most other trade agreements and barring a few changes and dilutions, the CPTPP kept to this core principle.

It is important to analyze both these agreements since they reveal the fundamental negotiating concerns, and priorities of the United States on a bipartisan basis. Some features such as SPS and phytosanitary standards, IPR plus provisions etc have been part of major trade agreements negotiated by the United States, and it is safe to assume that these will come up in negotiations with India as well. Given the progress in CPTPP, it is also clear that the TPP ‘gold standards’ of trade policy will feature prominently in most deep regional and bilateral trade agreements in the future. India would hence need to decide where it wishes to adhere to these WTO + standards – it is possible that these standards would become necessary in the near future to link with any Global Value Chains.

The third and final chapter of this report succinctly lays out a timeline in which the major trade chapters could be tackled between the United States and India – some issues are short term and need quick action, while others can be addressed in the medium to long term if approached pro-actively and in sequence. Some of the issues can prove to be very challenging and hence this is an ambitious proposition. However, it is important to keep in mind that for India’s own strategic and long term development and self-interest, it is imperative – even critical that the core issues vexing our trade strategy be resolved – these are the same issues that will come up in a trade negotiation with the United States and are indeed those that have held up negotiations India has attempted to conclude elsewhere (such as with the European Union and to a lesser extent, the Regional Comprehensive Economic Partnership). It is important that India pay particular attention to those concerns that require regulatory or legislative changes at the federal and state levels as well as domestic consensus building



– this will also require a comprehensive mapping of India’s own industrial competitiveness to draw an accurate picture of what is truly possible to commit to in trade talks.

The United States would also need to keep an open mind with regard to how far India is able to go given India’s own domestic developmental concerns and the way this intersects with foreign trade. Some give and take will hence be required from each side – the eventual goal must be to facilitate a trade agreement that is a ‘win-win’ for each country and must be perceived as such.

In the conclusion, we tie together all the preceding chapters and advocate for a series of sequential steps with the eventual goal of leading up and building towards a larger agreement. This report gives trade negotiators a detailed template of priorities and concerns which will need to be examined, thought through, negotiated and finally implemented.

Above all, any trade negotiations once commenced should be undertaken in good faith and keeping in mind the core concerns, priorities and domestic imperatives of each nation. Equally important that India be prepared internally – as in, any trade negotiations with the United States should be preceded by a complete inter-Ministerial review and an internal feasibility report in consultation with industry stakeholders. While the bilateral relationship has progressed significantly in the past few years, it is not yet mature enough that momentum will occur organically – the partnership needs nurturing, hand holding and constant attention – a trade agreement hence must be well thought through. . If a good faith attempt is to be made to get to an FTA with the US, India must go in fully prepared, knowing the cost-benefits. Similarly, for the US, there needs to be full recognition within the trade negotiator’s office as well as amongst Congressional leadership with regard to India’s trajectory of development, its growth potential as well as core challenges – all these will inform the way in which negotiations progress. A true and enduring trade partnership (and indeed a holistic bilateral relationship) must be built on mutual respect and understanding.

The ultimate decision on whether India is interested in and ready for an ambitious trade agreement with the United States rests with the Government of India – industry will be completely supportive of the consultative process that will help get to that decision.

Chapter I

US-India Trade: Current Status

i. Overview of US Economy and Export Market

According to the International Monetary Fund's World Economic Outlook for October 2019, global growth in 2020 is projected to improve modestly to 3.4 percent though it is categorized as 'precarious and not broad based'.²

In terms of current GDP (current \$), the United States remains the world's largest economy, followed by China, Japan, Germany, and United Kingdom.

Table 1: Top GDP performers globally

Country	GDP (Current \$) – in USD Trillions, 2018	% growth in current GDP (between 2008 and 2018)
United States	20.49	39.29%
China	13.61	196.196
Japan	4.97	-1.32978
Germany	3.99	6.513056
United Kingdom	2.82	-2.71446
France	2.78	-4.82622
India	2.73	127.4029
Italy	2.07	-13.2523
Brazil	1.87	10.18982
Canada	1.71	10.54648

Source: World Bank GDP database³

Despite the stresses caused by multiple trade related skirmishes in the past two years, the US economy remains strong and is growing. In fact, the US is on pace to have the most

² <https://www.imf.org/~media/Files/Publications/WEO/2019/October/English/text.ashx?la=en> p.xiv

³ <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD>



expansive growth in the entire history of the country – every decade since the US civil war, the US has experienced a recession but the period of 2010-2020 will mark the first decade without a significant contraction.⁴ Compared to other advanced economies, the US also performed much better in terms of current GDP (see Table 01) which grew to about USD 20.49 Trillion, from USD 14.7 Trillion in 2008 – an increase of over 39%.

The only two economies that have grown faster in GDP terms are China and India, but this is attributable to the low base both countries started from, which leaves much greater scope for rapid growth. In comparison, Germany's GDP has grown about 6% between 2008-2018 while Brazil and Canada have each grown at about 10%. On the other hand, Japan, UK, France and Italy, the other top GDP performers have experienced negative GDP growth in this decade.

At the same time, the US missed the 3% growth target in 2018 – the buoyant effects of the 2018 tax reform bill might be beginning to wear off while the various trade wars the US is engaged in could begin to serve as a drag on the economy. In 2018, the US Federal Reserve raised interest rates to keep inflation under check, but has since reversed course, slashing rates by 0.25% in July, September and October of 2019.⁵ It remains to be seen whether the real estate market, household consumption etc will hold fast.

S&P Global Ratings projected that the U.S. GDP would expand 1.8% in 2020 as against 2.3% in 2019 and 2.9% in 2018.⁶ Despite domestic political turmoil, most forecasts predict that the US will avoid a downturn in 2020. Given the contractions being experienced by multiple countries in Europe and even China, the US remains a beacon of hope for the global economy.

In this context, as India moves past the Regional Comprehensive Economic Partnership (RCEP) negotiations, having decided not to join the block, it must train its eye squarely on increasing market share in established economies like the US and EU, while also boosting exports in emerging economies of Latin and South America, Africa as well as bilaterally with China and Asian economies.

Implications for India

While the global and regional macroeconomic trends analysis are important, to get a true grip on the importance of the US-India economic and trade engagement, and its future potential, it is more important to look at import growth figures in selected sectors that are of interest to India since these indicate the possibilities for enhanced exports.

4 "For the first time in US history, a decade will pass without the country falling into a recession", Business Insider, Dec 08, 2019 <https://markets.businessinsider.com/news/stocks/us-history-recession-risk-2020-trump-obama-government-2019-12-1028745801>

5 "America's economy is resisting the pull of recession", The Economist, October 31, 2019 <https://www.economist.com/united-states/2019/10/31/americas-economy-is-resisting-the-pull-of-recession>

6 "Outlook 2020: Trump Faces Impeachment, But His Economy Is Safe", Forbes, December 10, 2019 <https://www.forbes.com/sites/kenrapoza/2019/12/10/outlook-2020-trump-faces-impeachment-but-his-economy-is-safe/#643036e05859>



Table 2 below looks at the growth in imports into the US in certain key intermediate production related sectors that are of interest from an Indian export perspective.

Table 2. US imports in selected sectors

Product category	HS Codes (combined)	Imports into the US from the world in 2018 (USD Millions)	Increase between 2008 and 2018	Imports into the US from India in 2018 (USD Millions)
Chemicals and allied industries	28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38	231,075.61	45.03%	10,004.41
Plastics and rubber	39, 40	87,490.72	55.87%	1,130.46
Leather and articles of leather	41, 43	14,741.41	31.96%	544.43
Metals and Fabricated metals	72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83	139,529.36	12.22%	2,959.18
Mechanical and electronic products	84, 85	738,509.4	47.5%	5,041.5
Vehicles, aircrafts, transport equipment etc	86,87, 88, 89	336,581.03	53%	3,048.93

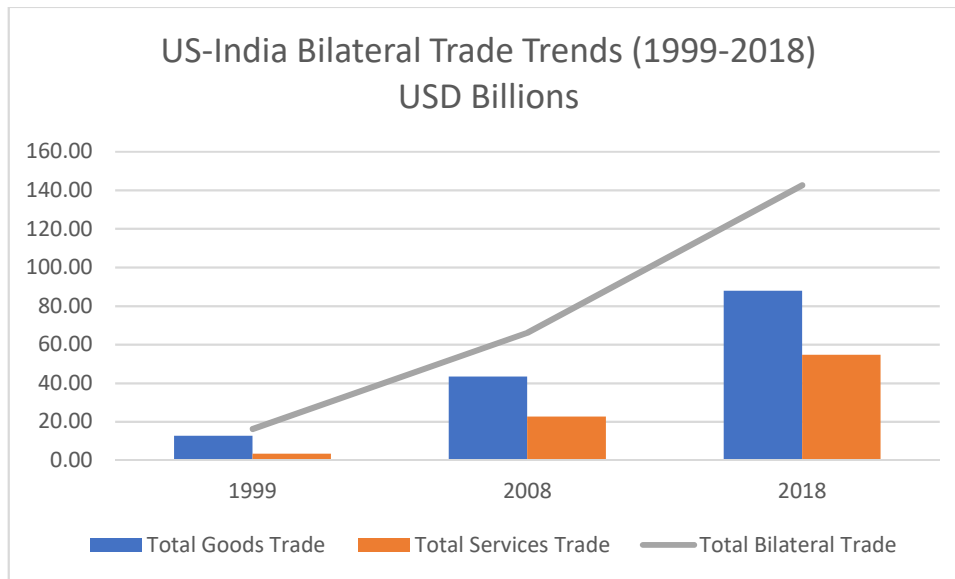
Source: USA Trade Online, US Census

The US has had an upward trajectory in terms of the growth of imports in various critical intermediary product categories. Between 2008 and 2018, plastics and rubber products; vehicles, aircrafts, transport equipment; mechanical and electronic products; and chemical and allied industries have seen the most robust growth. These are all sectors where India's exports hold potential for growth in the US market.

ii. Trade in Goods: Data and Analysis

The bilateral two-way flow in goods and services between the United States and India has grown dramatically in the two-decade period between 1999 and 2018. From a low of just USD 16.3 billion in 1999, total bilateral trade grew to 142.64 Billion in 2018 – growth of about 775%. As seen in Graph 1, two-way goods trade grew from just USD 12.76 billion in 1999 to USD 43.39 billion in 2008 and to USD 87.85 billion in 2018. Thus, the two-way flow of goods expanded by over 588% between 1999 and 2018. On the other hand, two-way trade in services was USD 3.54 billion in 1999 and this grew to USD 22.7 billion in 2008 and more recently to USD 54.79 billion in 2018. In other words, bilateral trade in services grew by over 1447% between 1999 and 2018.

Graph 01: Bilateral Trade Trends



Source: USA Trade Online, US Census Bureau

With a population base of 1.3 billion and an increasingly affluent middle class, strong economic growth trends and robust domestic institutions, India holds significant promise as a market for US companies looking to sell their goods and services. In a decentralized polity like the US, strong interest to engage with India is also found at the state level – in 2019 alone, state delegations (many led by the Governor) from Colorado, New Jersey, Indiana, Delaware and Arkansas visited various cities in India in a bid to forge greater business linkages and invite FDI back into their states. The diversity of states seeking to engage with India, and across political stripes reflects the solidly bipartisan support across the nation for growing the US-India partnership.

For both countries, this expansion in trade flows has been nothing short of remarkable. It is also important to note that the expansion in trade has kept in tandem with solid progress on the strategic foundations of the partnership. It was in 1998 that India conducted nuclear tests in Pokhran which resulted in sanctions by the US – at this time, two-way trade was also quite low. The bilateral relationship has clearly come a long way since then with major milestones like the US-India civil nuclear deal signed in 2005, to India being awarded the status of ‘Major Defense Partner’ by the US in 2016, further leading to India’s upgrade to a Tier I country under Strategic Trade Authorization in 2018. Thus, progress in the strategic realm has been accompanied by advances in the trade and commercial partnership as well.

iii. Composition of Trade – Exports from India

Table 03: India's Top Goods Exports to the US - 2018

HS Code	Commodity	India's Exports to USA - 2018 (USD \$ Millions)	US's Total Imports - 2018 (USD \$ Millions)	India's %share
	Others	18,213.05	1,330,014	1.37%
HS 71	Nat Etc Pearls, Prec Etc Stones, Pr Met Etc; Coin	11,341.6	60,016.25	18.9%
HS 30	Pharmaceutical Products	6,326.6	114,988.65	5.5%
HS 84	Nuclear Reactors, Boilers, Machinery Etc.; Parts	3,339.58	377,998.6	0.88%
HS 27	Mineral Fuel, Oil Etc.; Bitumin Subst; Mineral Wax	3,223.24	233,011.79	1.38%
HS 87	Vehicles, Except Railway Or Tramway, And Parts Etc	2,809.64	300,501.51	0.93%
HS 63	Textile Art Nesoi; Needlecraft Sets; Worn Text Art	2,526.06	15,488.49	16.31%
HS 29	Organic Chemicals	2,447.48	53,513.82	4.57%
HS 03	Fish, Crustaceans & Aquatic Invertebrates	2,068.85	17,523.23	11.81%
HS 62	Apparel Articles and Accessories, Not Knit Etc.	2,053.18	37,749.38	5.44%

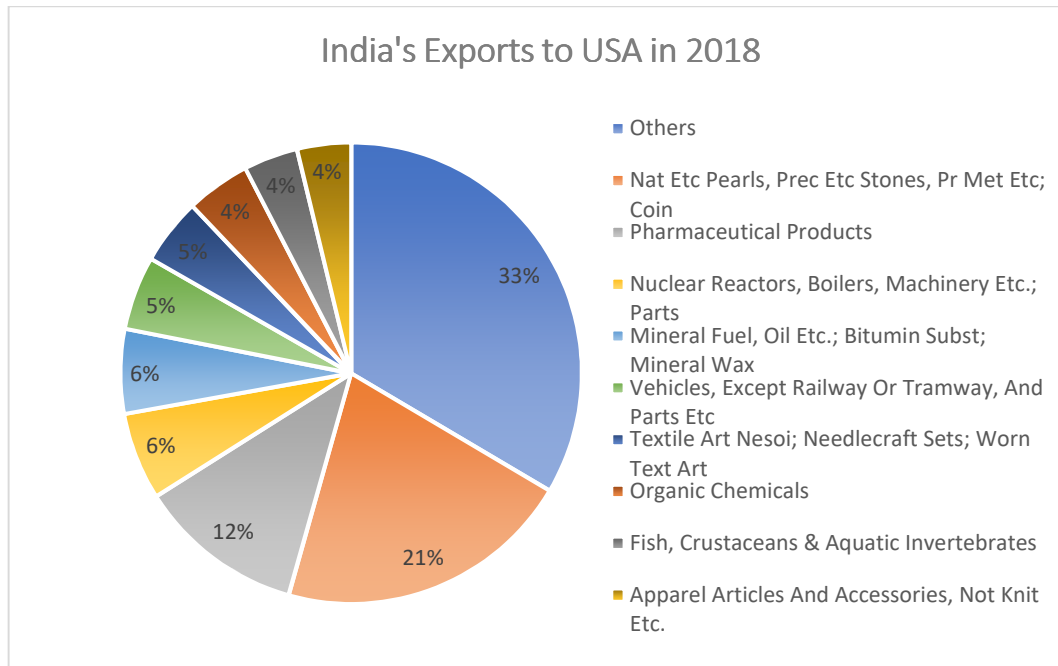
Source: USA Trade Online, US Census Bureau

As can be seen in Table 03, India's exports primacy in primary and more labour-intensive industries such as gems and jewelry, textiles and apparel continues to be reflected in its trade with the US. At the same time, India has also increased its export share in pharmaceuticals, vehicles (including parts and components), machinery and in organic chemicals, and fish, shrimp etc marine products. About 1/3 of all of India's goods exports to the US can however be attributed to gems and jewelry and pharmaceutical products alone (see Graph 02). Taken together, in 2018, the five product categories of gems and jewelry, pharma products, machinery, mineral fuels and textiles made up 54% of all Indian exports to the US. These products do not indicate sufficient value addition as yet – this remains a challenge for Indian exports globally though and is not restricted to the US.

Currently, the US's top sources of imports are China, Mexico, Canada, Japan, Germany, S.Korea, UK, Ireland, Italy, India. In terms of other top commodities imported by the US, India could try and expand its exports trade in electronics products (HS 85), HS 90 (optical, photographic etc apparatus; medical instruments etc), HS 94 (furniture), and HS 39 (plastic and articles) – these are all commodities where India has some current export competitiveness and the demand for imports in the US appears to be high (see Table 04). In the context of the electric machinery and equipment sector, where there is huge demand in the United States, India also needs to look at the linkage between trade and investment since this

has a direct bearing on manufacturing competitiveness in network products etc. India’s own imports bill is significant in this area – to become part of the electronics GVCs, India would need to pay close attention to building capacity in companies (including SMEs) that can produce intermediate products and participate in assembly, hence plugging into existing value chains. This has been mentioned in the recent Economic Survey of India as well.

Graph 02: Composition of India’s goods exports to the US



Source: USA Trade Online, US Census Bureau

Table 04: US’s top import items – 2018

	US’s top 10 import items	World Imports - Value (USD Millions)	Imports from India – Value (USD Millions)
HS 84	Nuclear Reactors, Boilers, Machinery Etc.; Parts	377,998.6	3,223.2
HS 85	Electric Machinery Etc; Sound Equip; Tv Equip; Pts	360,510.8	1,701.9
HS 87	Vehicles, Except Railway Or Tramway, And Parts Etc	300,501.51	2,809.6
HS 27	Mineral Fuel, Oil Etc.; Bitumin Subst; Mineral Wax	233,011.79	3,339.6
HS 30	Pharmaceutical Products	114,988.65	6,326.6
HS 90	Optic, Photo Etc, Medic Or Surgical Instrments Etc	92,170.54	527.5
HS 98	Special Classification Provisions, Neso	82,491.52	475
HS 94	Furniture; Bedding Etc; Lamps Neso; Etc; Prefab Bd	67,083.82	886.1
HS 71	Nat Etc Pearls, Prec Etc Stones, Pr Met Etc; Coin	60,016.25	11,341.6
HS 39	39 Plastics and Articles Thereof	59,039.1	615.6

Source: USA Trade Online, US Census Bureau



The top 10 products imported into the US make up almost 70% of all US imports. In 2018, India accounted for just about 2.13% of total imports into the US – in contrast, China makes up 21.24% of total US imports, Mexico accounts for 13.62%, and Canada is at 12.55%.

iv. Composition of Trade – Exports from United States

India has proven to be a lucrative market for US goods over the years. Goods exports from the US to India have surged from USD 3.69 billion in 1999 to USD 33.5 billion in 2018.

It is interesting to note that the top export item from US to India is the same as India's top export to the US – gems and jewelry, indicating movement along the value chain. In addition, mineral fuels (oil, and shale gas in particular) have increasingly become an important export item. Products like machinery; aircraft, spacecraft etc; organic chemicals; plastics and plastic products and edible fruits and nuts have also garnered major market share in India (US is in fact the second largest supplier for India in the category of edible fruits and nuts– just behind Cote D'Ivoire).

The US's top exports to India include capital goods, intermediate products that feed into the value chain as well as some primary products (See Table 05).

Exports from the US to India mainly comprise of finished products for final consumption and intermediate products. In particular, the US shows major market dominance in the categories of aircraft, spacecrafts etc (HS 88), edible fruits and nuts (HS 08), optical, photo apparatus, medical devices etc (HS 90).

Table 05: US's Top Goods Exports to India - 2018

HS Code	Commodity	Top US exports to India - 2018 (USD Millions)	India's total imports - 2018 (USD Millions)	US's % share
HS 71	Nat Etc Pearls, Prec Etc Stones, Pr Met Etc; Coin	7,864.09	64,720.24	12.15%
HS 27	Mineral Fuel, Oil Etc.; Bitumin Subst; Mineral Wax	6,656.14	167,871.87	3.96%
	Others	3,834.1	127,085.95	3.02%
HS 88	Aircraft, Spacecraft, And Parts Thereof	2,928.58	7,615.38	38.46%
HS 84	Nuclear Reactors, Boilers, Machinery Etc.; Parts	2,223.48	43,840.37	5.07%
HS 29	Organic Chemicals	1,559.55	22,389.71	7%
HS 90	Optic, Photo Etc, Medic Or Surgical Instrments Etc	1,550.06	9,631.33	16.09%
HS 85	Electric Machinery Etc; Sound Equip; Tv Equip; Pts	1,541.09	52,048.91	2.96%
HS 39	Plastics And Articles Thereof	931.87	15,246.9	6.11%

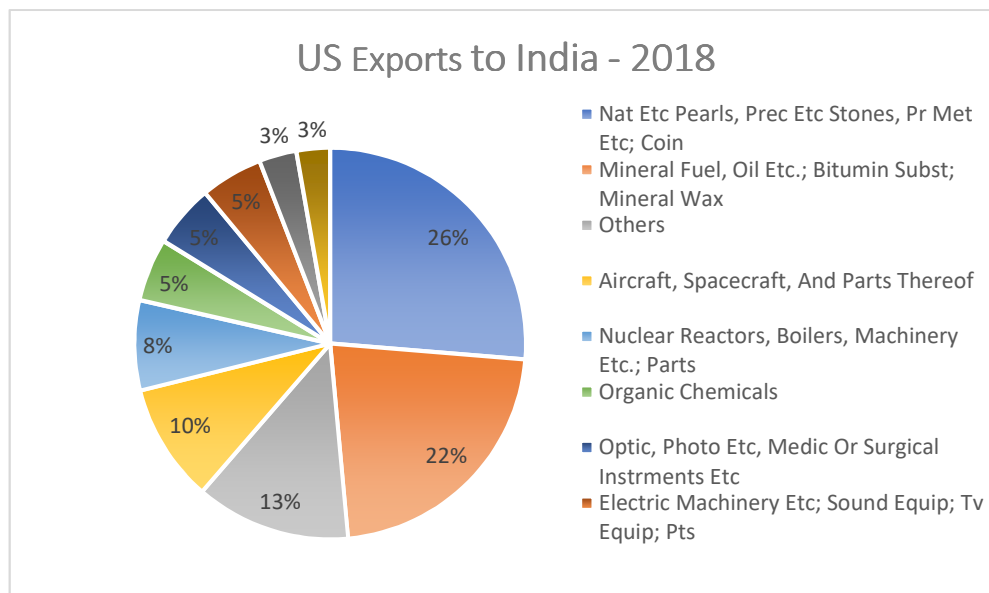


HS Code	Commodity	Top US exports to India - 2018 (USD Millions)	India's total imports - 2018 (USD Millions)	US's % share
HS 08	Edible Fruit & Nuts; Citrus Fruit Or Melon Peel	828.13	3,627.69	22.83%

Source: USA Trade Online and India's Export Import Databank (Ministry of Commerce and Industry)

As can be seen from Graph 03, gems and jewelry and mineral fuels make up nearly 48% of all of US's exports to India with aircrafts and spacecrafts etc being the next major product category. The US's market dominance in India is thus mainly concentrated in a few product categories.

Graph 03: Composition of US Goods Exports to India



Source: USA Trade Online, US Census Bureau

The US accounted for about 7% of India's total imports in 2018-2019. India's top sources of import int his period were China, USA, UAE, Saudi Arabia, Iraq, Switzerland, Hong Kong, Korea, Singapore, and Indonesia – altogether, these 10 countries account for about 53% of all of India's imports. Of these, India has significant trade deficits with all but the US and to a small extent with UAE.

The exports of a number of products from the US to India have shown improvement in the period between 2008 to 2018. Notably, the US is now the second largest source of organic chemicals into India with import value having increased from USD 8.6 billion in 2008-2009 to USD 22.39 billion in 2018-2019. The US has shown particular promise in exporting mineral fuels to India and is currently the 8th largest source for India, compared to 2008-2009, when it was the 17th largest source.

On the other hand, in electrical machinery (HS 85), even as India's imports nearly doubled from USD 25.2 billion (2008-2009) to USD 52 billion (2018-2019), the US lost market share



in terms of its imports into India (USD 1.3 billion in exports in 2008-2009, as against USD 1.5 billion in 2018-2019). In the same time period, China's exports to India in this HS code doubled from about USD 10 billion to USD 20 billion. This of course is also reflective of the coalescing of GVCs focused around the electronics industry in and around China over the past two decades, making China as well as several ASEAN countries major exporters in this sector.

Similar is the case of fertilizers (HS 31), which was the US's foremost export commodity to India in 2008-2009 – the US is now the 6th largest fertilizer exporter to India, trailing behind China, Saudi Arabia, Oman, Canada and Russia. In iron and steel too, US's overall exports to India have diminished over time – decreasing from USD 572 million in 2008 to about USD 509 million in 2018. These are all sectors where the US could potentially increase its market share in India.

Table 06: India's top import items – 2018-2019

HS Code	India's top import commodities from the world – 2018-2019	World Imports - Value (USD Millions)	Imports from USA – Value (USD Millions)
HS 27	Mineral fuels, mineral oils and products of their distillation; bituminous substances; etc	167,871.87	7,294.36
HS 71	Natural or cultured pearls, precious or semi-precious stones, precious metals etc	64,720.24	8,230.09
HS 85	Electrical machinery and equipment and parts thereof	52,048.91	1,852.93
HS 84	Machinery, mechanical appliances, nuclear reactors, boilers; parts thereof	43,840.37	3,585.01
HS 29	Organic chemicals	22,389.71	1,855.25
HS 39	Plastics and articles thereof	15,246.90	1,088.94
HS 72	Iron and steel	12,582.27	518.40
HS 15	Animal or vegetable fats and oils etc	9,994.44	8.66
HS 90	Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments etc	9,631.33	1,512.76
HS 28	Inorganic chemicals; organic or inorganic compounds of precious metals, of rare-earth metals etc	7,624.61	459.47

Source: USA Trade Online, US Census Bureau

Though the US has emerged overall as one of the top importing nations into India, there are several product categories where the US has not yet made significant inroads into the Indian market (see Table 06). This is despite the fact that these products figure amongst the top imports into India from the world. These products include inorganic chemicals (HS 28), animal or vegetable fats, oils etc (HS 15), and iron and steel (HS 72). The US has current export capacity in these product lines and could pay greater attention to growth in these sectors.



Analysis

With 15.88% of all Indian goods exports headed to the US, the country will continue to be India's largest export market in the short to medium term. So far, only the European Union (as a block of 28 nation states) comes close, accounting for 17.32% share. China with its geographical proximity and a population size bigger than that of India accounts for 5.07% of India's exports while the ASEAN bloc of countries makes up 11.35% of India's exports. Both China and ASEAN are promising markets for India and will remain so, though with India opting to stay out of the Regional Comprehensive Economic Partnership (RCEP), prospects for enhanced regional trade might get more challenging.

While India's exports to the US have grown over time, as have US exports to India, the trade in both directions does remain concentrated in a few key sectors as mentioned before. In terms of India's exports, there is also less heavy concentration of finished or value-added products that is the hallmark of the knowledge economy with diffuse GVCs. Sectors like gems and jewelry, textiles, apparel etc which are labour intensive and hence important for job creation, especially amongst India's micro and Small and Medium Enterprises hold a preponderance in exports. While these are critical sectors and need to be emphasized by policy makers, there are various other sectors that should also garner attention to boost exports to the US, such as:

- Valued added engineering (part and components)
- Processed fruits and vegetables
- Processed marine products
- Chemicals (organic and inorganic)
- Furniture and household products
- Plastics and plastic products

Focusing on diversifying India's exports basket is critically important, and this must include more value-added products as well. Similarly, for the US, diversifying exports to India is equally important – currently, gems and jewelry, mineral fuels and aircrafts and spacecrafts dominates US sales to India.

v. Recent Trade Issues

In the past two years, a spate of challenges in the trade partnership have cropped up, casting a shadow over the bilateral relationship to a large degree:

- On March 23, 2018, the US imposed tariffs of 25% on \$761 million of steel and of 10% on \$382 million of aluminum imported from India under Section 232 of the Trade Expansion Act of 1962, citing national security concerns. According to the Congressional Research Service, India's steel exports to the US in 2018 declined by 49 per cent to USD 372 million, although, aluminum exports increased by 58 per cent to USD 221



million.⁷ India has filed a complaint at the WTO against the US measure.⁸

- In April 2018, the US began a self-initiated review of India's eligibility under the Generalized System of Preferences (GSP) which allowed tariff free entry of certain exports from India into the US market. India has been a beneficiary of the GSP program since 1975 along with several other developing nations. The review was initiated at the request of the US dairy industry and medical devices industry which cited market access concerns in India.

The US administration announced in March 2019 that India was being removed as a beneficiary country from the GSP program. This also meant that India was also no longer exempt from the 2018 US tariffs on solar panels and washing machines which were imposed under Section 201 of the Trade Act of 1974.⁹

According to the Government of India, India exported goods worth about USD 5.6 billion under GSP in 2017, though the total GSP benefits accruing to India amounted to just about USD 190 million.¹⁰

- In response, in June 2019, India announced tariffs against 28 US exports including several chemicals products, steel and certain agricultural products like apples, lentils, almonds, walnuts etc.¹¹ According to the Peterson Institute, these tariffs would impact USD 1.4 billion of US exports into India or about 4.1% of total US exports in 2018.¹²

India announced additional tariffs after several rounds of postponements as it tried to pro-actively engage in bilateral trade negotiations with the US to de-escalate tensions. At the same time, high level talks have continued, including a highly visible and friendly meeting between India's Prime Minister and the US President in September 2019, raising the spectre of a 'mini-trade deal'. India's Minister of Commerce, and the US Trade Representative as well as the US Commerce Secretary have since met several times, both in India and the US in an effort to achieve a breakthrough in trade talks..

In addition, there has been increased negative rhetoric around the high skill immigration programs (the H1B and L1 in particular) with Indian companies in the United States experiencing greater challenges in accessing these. It has been reported that owing to the 'Buy American, Hire American' executive order, denials of H1B petitions and Requests for Evidence (RFEs) have spiked over the past few years.¹³

At the time of writing of this paper, a trade package had not yet been announced between the two sides that may help alleviate some of these challenges.

7 <https://economictimes.indiatimes.com/news/economy/foreign-trade/major-decline-in-indias-steel-export-to-us-increase-in-aluminum-report/articleshow/68883316.cms?from=mdr>

8 https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds547_e.htm

9 <https://www.piie.com/blogs/trade-and-investment-policy-watch/trumps-mini-trade-war-india>

10 <https://www.livemint.com/news/india/gsp-withdrawal-will-not-have-much-impact-on-india-s-exports-commerce-secy-1551788173907.html>

11 <http://www.cbic.gov.in/resources/htdocs-cbec/customs/cs-act/notifications/notfn-2019/cs-tarr2019/cs17-2019.pdf;jsessionid=8C6A07EDCD89B1C556B0CD3295F2F290>

12 <https://www.piie.com/blogs/trade-and-investment-policy-watch/trumps-mini-trade-war-india>

13 <https://www.forbes.com/sites/stuartanderson/2018/07/25/new-evidence-uscis-policies-increased-denials-of-h-1b-visas/#7a55c3625a9f>

vi. Trade in Services: Data and Analysis

The bilateral trade in services between India and the United States has registered impressive gains in the decade between 2008 and 2018. In this period, total services trade expanded from USD 22.7 billion in 2007 to USD 54.79 billion in 2018 – an increase of over 141% in a ten-year period.

In this time, India in particular boosted its services exports to the US from USD 12.6 billion in 2008 to USD 29.59 billion in 2018. (increase of 135%). On the other hand, the US's services exports increased from USD 10.04 billion in 2008 to USD 25.2 billion (increase of 151%). Thus, even though in absolute figures, India's market share in services is currently higher than the US market share in India, in terms of the growth rate in this decade, the US has made greater progress. (See Table 07)

Table 07: US-India Total Bilateral Services Trade

Trade	2008	2018
US services exports to India (in USD Millions)	10,043	25,200
India's services exports to US (in USD Billions)	12,654	29,586
Total Bilateral Services Trade	22,697	54,786

Source: US Bureau of Economic Analysis, U.S. Department of Commerce

Analyzing the granular, sectoral breakdown of services trade between US and India shows quite clearly, that India's exports to the US are significantly dominated by telecommunications, computer and information services, which makes up almost 52% of India's total services exports to the US (37.2% of all US imports in this sector). The category of 'Other Business Services' makes up about 28.7%, and travel accounts for 11% of India's total services trade.

For the US, exports are dominated by travel, (spending by international tourists from India in the US), amounting to USD 14.41 billion in 2018 (57.2% of total). Other major export categories include charges for the use of Intellectual Property (13.7% of total), travel (7.2%), other business services (5.8%).

Table 08: US-India Services Trade by sector in 2018

Commodity	India's exports to the US (in USD Millions)	US exports to India (in USD Millions)
Financial Services	473	1,233
Insurance	81	268
Maintenance and repair services n.i.e.	19	837
Other business services	8,483	1,473
Telecommunications, computer, and information services	15,335	1,295
Transport	650	1,811
Travel	3,262	14,407



Commodity	India's exports to the US (in USD Millions)	US exports to India (in USD Millions)
Government goods and services n.i.e.	56	431
Charges for the use of intellectual property n.i.e. by affiliation	1,227	3,446
Total services	29,586	25,200
Total Bilateral Services Trade	22,697	54,786

Source: US Bureau of Economic Analysis, U.S. Department of Commerce

In 2018, India's exports of telecommunication, computer and information services accounted for 37.2% of all US exports in this sector (up from 21% in 2008), showing significant market dominance by Indian companies in this sector. In other business services, India made up about 7.5% of all US imports.

India's exports in insurance (USD 81 million), financial services (USD 473 million), transport (USD 650 million) and charges for the use of Intellectual property (USD 1,227 million) have grown over time, but are still small in terms of total US imports in these sectors. The fact that India's market share in charges for the use of IP has grown is particularly gratifying since it indicates value addition within the knowledge economy. However, it is interesting to see that within this export item, U.S. parents' imports from their foreign affiliates makes up USD 366 million, i.e. about 30% of all imports from India in this category.

Table 09: Major Services Imports into the US - 2018

	India	China	South Korea	Japan	Germany
Financial Services	473	878	340	1641	655
Insurance	81	654	99	320	2,079
Maintenance and repair services n.i.e.	19	257	25	100	178
Other business services	8,483	5,443	956	3,415	5,730
Telecommunications, computer, and information services	15,335	709	43	338	1,498
Transport	650	5,025	6,498	9,186	8,937
Travel	3,262	4,532	1,451	3,586	3,632
Government goods and services n.i.e.	56	80	2,459	4,330	3865
Charges for the use of intellectual property n.i.e. by affiliation	1,227	763	459	11,813	7,039
Total services	29,586	18,341	12,330	34,727	33,613

Source: US Bureau of Economic Analysis, U.S. Department of Commerce

In comparison with other major economies that export services to the US, India's exports of telecom, computer and information services and in other business services stands out as being significant. In sectors like Insurance, India's presence is small (USD 81 million), as compared to say Germany (USD 2.1 billion), and China (USD 654 million). In charges for



the use of IP, Japan's exports amounts to USD 11.8 billion while Germany exported USD 7.04 billion – in contrast to India's USD1.23 bn. (See Table 08)

Table 10: US's major services exports – 2018 (USD Millions)

	India	China	South Korea	Japan	Germany
Financial Services	1,233	4,171	1,166	3,722	3,130
Insurance	268	335	252	2,777	330
Maintenance and repair services n.i.e.	837	1,863	1,111	1,496	1,788
Other business services	1,473	3,532	1,614	7,662	9,366
Telecommunications, computer, and information services	1,295	945	677	2,066	1,670
Transport	1,811	5,328	2,651	9,810	5,281
Travel	14,407	32,068	9,388	10,283	6,575
Government goods and services n.i.e.	431	430	400	775	180
Charges for the use of intellectual property n.i.e. by affiliation	3,446	8,467	5,043	6,606	6,443
Total Services	25,200	57,140	22,302	45,197	34,764

Source: US Bureau of Economic Analysis, U.S. Department of Commerce

Spending by international travelers from China in the US (USD 32.1 billion) surpassed that by travelers from India in 2018 (USD 14.4 billion). The US also has very strong exports in the category of Other Business Services – especially to Germany (USD 9.4 billion) and Japan (USD 7.7 billion).

The US's exports in terms of charges for the use of IP has been a strong aspect of its overall services trade – in 2018, the US exported services in this category to the tune of USD 8.5 billion to China, while to Japan this amount was USD 6.6 billion, and to Germany USD 6.4 billion – in contrast, the export amount to India was USD 3.4 billion. Indian researchers make a sizeable impact on IPR related research work being conducted in India – the data does not however reflect this reality and the potential for exponential growth. The data does however show India lags behind in the global innovation and is perhaps not adequately plugged into the IPR supply chains.

It is well known that the US prioritizes protection of Intellectual Property Rights in all its trade negotiations and in every trade partnership. With the evolution of global manufacturing landscape, while the US has lost manufacturing jobs to other low-cost economies, it has built and maintained its intellectual prowess, thus strengthening its knowledge economy – this is best exemplified through the number of patents, trademarks etc granted to US researchers and companies.

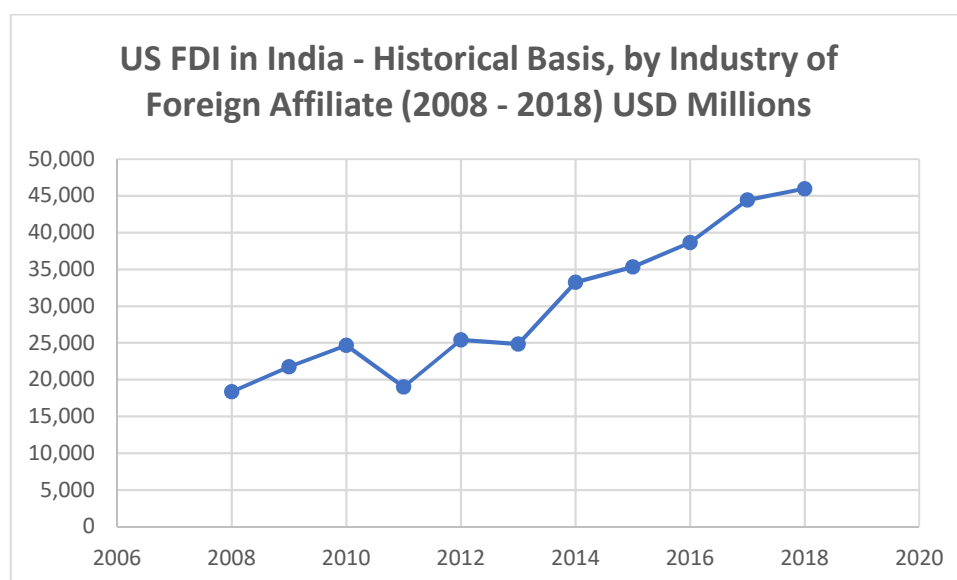
India continues to remain on the USTR's Special 301 report's 'Priority watch list' as the agency continues to find deficiencies in the overall IPR landscape. This issue has remained an important part of the trade talks between the two nations.

vii. Foreign Direct Investments

FDI from the United States into India

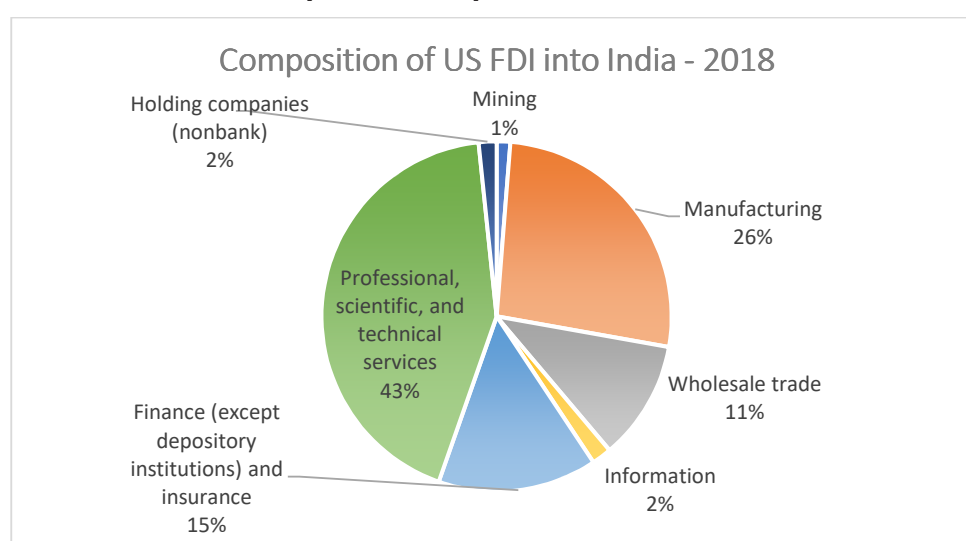
The United States has been a priority source for FDI into India over the years, growing from about USD 18.35 billion in 2008 to USD 45.98 billion in 2018.

Graph 04: FDI from US to India – historical trendline



Source: Bureau of Economic Analysis, US Department of Commerce

Graph 05: Composition of US FDI



Source: Bureau of Economic Analysis, US Department of Commerce

Currently, US FDI in India is focused on professional, scientific and technical services (43%), followed by manufacturing (26%), finance and insurance (15%), wholesale trade (11%). Within manufacturing, the major sectors that attracted investments include chemicals (USD 2.3 billion), transportation equipment (USD 1.6 billion), food (USD 1.5 billion) and computers/electronics (USD 1.5 billion).

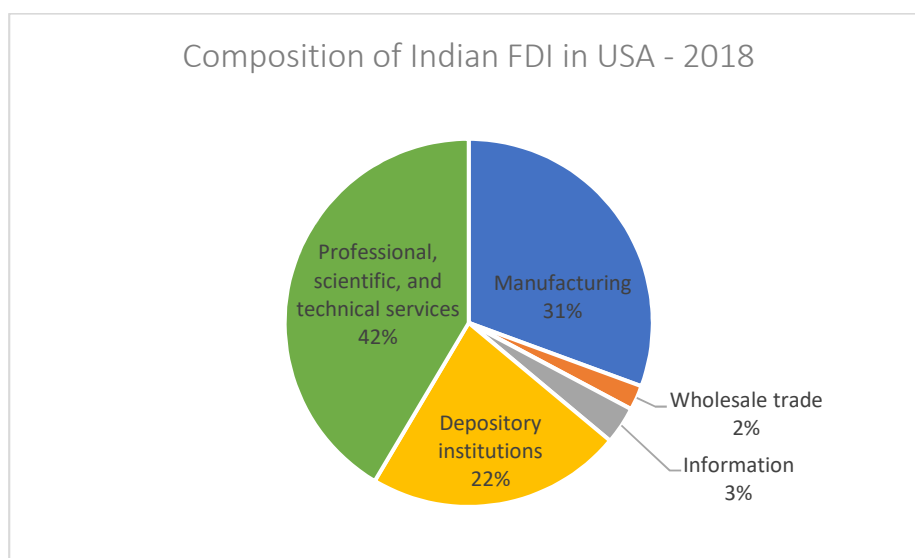
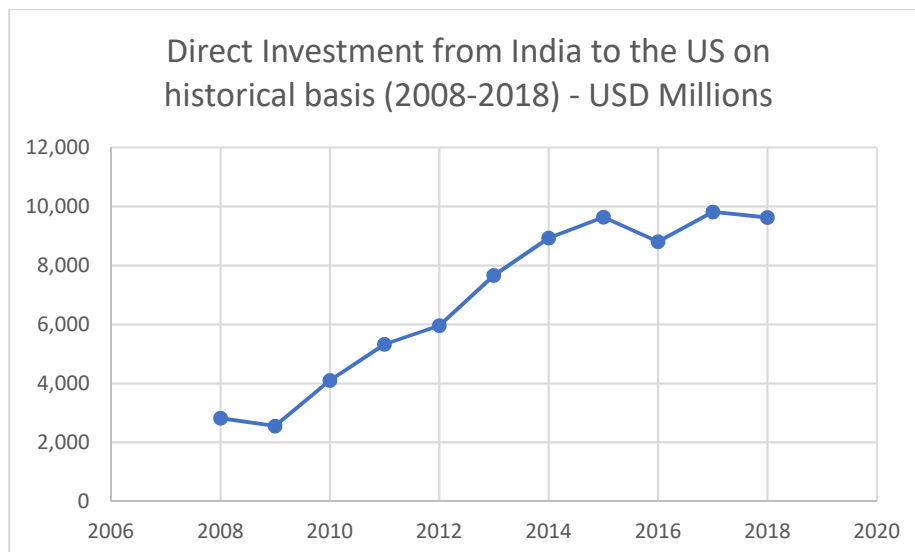


According to data published by the Department of Promotion of Industry and Internal Trade (DIPP) of the Department of Commerce and Industry, Government of India, the United States is currently ranked at #6 as a source of FDI equity flows into India – behind Mauritius, Singapore, Japan, Netherlands, and the United Kingdom.¹⁴

FDI from India

On the other hand, India’s foreign direct investment in the United States has coalesced mainly in sectors such as professional, scientific and technical services (42%), manufacturing (31%), depository institutions (22%) amongst others. Within manufacturing, the chemicals sector attracted a big portion of India’s investment (\$533 million). CII’s own survey of 100 Indian companies in 2017 indicated that these companies have cumulatively invested about USD 18 Billion in the United States, creating the more than 113,000 jobs in various states.

Graph 06: FDI from India to the US – historical trendline



Source: Bureau of Economic Analysis, US Department of Commerce

14 https://dipp.gov.in/sites/default/files/FDI_Factsheet_4September2019.pdf



Many states from the US have made a concerted effort in the past few years to attract investment from Indian corporates. Indian companies have had success in forging joint partnerships, launching greenfield ventures as well as takeover of failing manufacturing units in the United States, painting a story of rejuvenation and fresh job creation. Their presence in the United States helps Indian companies establish links with Canada, Mexico and with Central and South America which are all promising destinations for Indian products and services. JVs and acquisitions in ICT, pharmaceuticals, biotechnology and some even in the start ups, AI and robotics space in the US has greatly helped Indian companies' global growth strategy – especially because these are all sectors where the US is a recognized world leader. Establishing a presence in the United States has thus helped many Indian companies to expand their global investment footprint.

While India has become an important investment destination for the United States, especially given the large market size, rising middle class, young demographics etc, an analysis of the other Asian nations attracting US FDI shows that India continues to rank low in contrast. For example, in 2018, US FDI in Singapore amounted to USD 218.8 billion; China attracted USD 116.5 billion and Hong Kong received USD 82.5 billion. US FDI flows into Korea, Thailand, Malaysia, Indonesia and Philippines are much less than what India has received though the trendlines are ticking upwards over time.

Anticipated shifts in global supply chains as a result of the US-China trade war may skew investment commitments in the coming few years into other Asian economies. There will be other such shifts as a direct result of the RCEP agreement (minus India) if it comes to fruition.

Given that overall US overseas investment in 2018 was pegged at USD 5.9 Trillion, FDI into India amounted to just about 0.77% - a fairly small share of the total (see Table 11).

Table 11: US Direct investment position in Asian economies on a historical-cost basis

Country	Investment Volume (USD Millions) - 2018
All countries	5,950,991
Singapore	218,835
Japan	125,488
China	116,518
Hong Kong	82,546
India	45,984
Republic of Korea	41,532
Thailand	17,667
Malaysia	13,581



Country	Investment Volume (USD Millions) - 2018
Indonesia	11,140
Philippines	7,645

Source: Bureau of Economic Analysis, US Department of Commerce

India's low ranking should be a point of concern for policymakers especially since given India's economic potential and existing market size (set to grow), and in light of the fact that amongst emerging economies, India has one of the most stable legal and regulatory institutions and rule of law. Despite major strides being made in the Ease of Doing Business indicators, transaction costs, logistics costs, taxation uncertainties etc remain challenges that deter foreign investors. These need to be addressed in order to ensure greater participation of US capital in India's economic expansion.



Chapter II

US - India Trade Priorities

The United States currently has Free Trade Agreements (FTAs) with 20 countries. Most are bilateral agreements with a single nation, while a few like the newly renegotiated US Mexico Canada Agreement (formerly NAFTA) and the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), are multilateral treaties with several nations. The countries with which the US has FTAs currently are: Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru.

The United States also has a series of Bilateral Investment Treaties (BITs) intended to help protect and secure US private investment overseas, to enable the development of free-market styled policies in partner countries, while also promoting US exports – this is also the central, over-arching goal of US trade policy generally.

The United States currently has a trade-weighted average import tariff rate of 2.0 percent on industrial goods. One-half of all industrial goods entering the United States enter duty free.¹⁵

The US Congress establishes the central objectives of US negotiations focusing on trade – this is laid down in the Trade Promotion Authority (TPA) which was last authorized in 2015. Over time, U.S. FTAs have remained dynamic, evolving in scope, and priorities as well as commitments on both sides. The first US FTA negotiated was with Israel in 1985 and was only 14 pages in length, focusing primarily on the removal of bilateral tariffs. The North American Free Trade Agreement (NAFTA), (which was recently re-negotiated and re-branded as the USMCA) came into force in 1994 and contains many of the operating principles of subsequent US FTAs and was the first trade agreement to include provisions on IPR protection, labour, and the environment.¹⁶

¹⁵ "Industrial Tariffs", United States Trade Representative <https://ustr.gov/issue-areas/industry-manufacturing/industrial-tariffs>

¹⁶ "International Trade and Finance: Overview and Issues for the 116th Congress" Congressional Research Service, Jan 28, 2019 <https://crsreports.congress.gov/product/pdf/R/R45474> p.10



The most important provisions in most US FTAs include¹⁷:

- Tariffs and Market Access: Elimination of most tariffs and nontariff barriers on goods, services, and agriculture over a period of time, and specific rules of origin requirements.
- Services: Commitments on national treatment, most-favored nation (MFN) treatment, and prohibition of local presence requirements.
- IPR Protection: Minimum standards of protection and enforcement for patents, copyrights, trademarks, and other forms of IPR. FTAs after NAFTA have new commitments reflecting standard protection similar to that found in U.S. law.¹⁸

Non-tariffs barriers have become a major source of concern for the US and hence TPA 2015 tried to address these. For example, TPA 2015 accords primacy to provisions on state owned enterprises, digital trade in goods and services and localization policies within US negotiating principles.

In addition, TPA 2015 adds three new negotiating objectives to the agriculture sector – more robust trade rules on sanitary and phytosanitary (SPS) measures (international standards and science based approaches); ensuring transparency in how tariff-rate quotas (TRQs) are administered to prevent impediments to market access and; ensuring that a country's system to protect or recognize Geographical Indicators (GIs) are not used improperly.

In terms of Foreign Direct Investments, the TPA calls on US trade negotiators to reduce or eliminate barriers to foreign investment, while ensuring that foreign investors in the United States are not accorded greater investment protections than domestic investors in the United States. Thus, non-discriminatory treatment, free transfer of investment-related capital flows, reducing or eliminating local performance requirements, and including established standards for compensation for expropriation consistent with U.S. legal principles and practices are identified as major objectives. These provisions form the core of many of the Bilateral Investment Treaties (BIT) negotiated by the United States with other countries.¹⁹

The TPA further allows for Investor-state dispute settlement (ISDS) which enables private foreign investors to seek international arbitration against host governments to settle claims over alleged violations of foreign investment provisions in FTAs.²⁰

As such, the TPA 2015 provides a good lens to understand the over-arching principles of the US negotiating stance on various trade matters. In the next section, we undertake a broad analysis of major chapters in the Trans Pacific Trade Partnership (TPP) and the US-Mexico-Canada Free Trade Agreement (USMCA). The USMCA is the most seminal trade agreement yet concluded under the Trump administration which had expressed major reservations about the benefits of global and regional trade. The agreement thus signifies the Trump administration's (and hence Republican party's) most critical considerations with

17 Ibid

18 These provisions are what have come to be known as TRIPS-Plus commitments in IPR.

19 "International Trade and Finance: Overview and Issues for the 116th Congress" Congressional Research Service, Jan 28, 2019 <https://crsreports.congress.gov/product/pdf/R/R45474> p.6

20 Ibid.



regard to trade. While the agreement was concluded under a Republican administration, it echoes the chief priorities of TPA 2015 (passed during a Democrat administration), which has been the template for all major US FTA negotiations. USMCA also received major input from the Democratic party leaders (resulting in several amendments to the agreement before finalization) without whose support it would not have passed in the US Congress.²¹ The agreement thus reflects bipartisan Congressional priorities as far as trade is concerned.

In addition, we also look at provisions of the original Trans-Pacific Trade Partnership agreement (TPP), the largest multi-lateral trade agreement. Negotiations for the TPP were led by the US and many of its provisions reflected US strategic and trade priorities under a Democrat administration. Though the current US administration pulled out of the TPP (which had been signed but not ratified) in 2017, the agreement does help provide an overview of the Democrats' US trade imperatives at the time, especially since the finally signed Comprehensive and Progressive Agreement for Trans-Pacific Partnership (which included the original parties to the TPP, minus the United States) removed some of the provisions that were mainly pushed by the United States. It is also important to examine provisions of the TPP because of the 12 parties to the agreement, six are categorized by the United Nations as being 'developing countries' – these include – Brunei, Chile, Malaysia, Mexico, Peru, and Vietnam.²² It is worthwhile to note the high standards other developing countries have accepted in an international trade deal.

These agreements help paint a comprehensive picture of the United States' biggest considerations for global trade – and advocated for broadly by both Democrats and Republicans. The next section looks at the various chapters that will inform a US-India trade agreement from the lens of these priorities which will then need to be balanced against India's own unique perspectives. The balancing of these competing priorities in light of the clearly burgeoning trade and investment relationship (as seen in the previous section) will be at the heart of all trade negotiations between the two countries – whether a more limited 'trade deal' or a full-scale Free Trade Agreement down the road.

Agriculture

The principal negotiating objective of the United States with regard to trade in the agriculture sector is to open up opportunities for exports of US agricultural products in foreign markets which are comparable and broadly equivalent to the kind of opportunities that are provided to foreign exports in US markets.

TPP: TPP sought to materially increase the overseas markets to which U.S. agricultural products have preferential access. In particular, the US's interests lay in the possibility of lower or zero tariffs for agricultural products and also increasing the quantity of products that

²¹ At the time USMCA was signed, the Republican party controlled the US Senate but not the House of representatives – under Article 8 of the US Constitution, the US Congress has the sole authority to regulate commerce with foreign nations, FTAs have to pass both the US Senate and House of Representatives.

²² https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2018_Annex.pdf



may be imported on preferential terms under tariff rate quotas (TRQs).²³ Amongst the various products in which the US agreed to lower or eliminate its tariffs over time under the TPP were – beef, dairy, rice, cotton, sugar, tobacco, tree nuts, peanuts, wine etc. In turn, the US also extracted tariff concessions on other TPP signatories in beef, pork, poultry, dairy etc.

Other notable provisions in the TPP related to agriculture include:

- **Sanitary and Phytosanitary Measures (SPS):** Besides lowering tariffs on agricultural products in the various parties to promote greater agricultural exports, the TPP also called for higher SPS standards.²⁴ This included a commitment to base SPS measures either on international standards or on objective scientific evidence and to select risk management measures that are no more trade-distorting than necessary. The SPS standards also committed countries to provide rapid notification of shipments held on importation. All parties further agreed that SPS disputes are to be addressed first in technical consultations, leading next to dispute settlement procedures.
- **Export subsidies:** The Goods chapter in the TPP includes a commitment by all TPP Parties to eliminate agricultural export subsidies on goods sold in TPP markets.²⁵
- **Export restrictions:** The TPP limits export restrictions on food products to six months, requires notification of other TPP Parties in advance when a country imposes such restrictions, and mandates consultation with interested TPP importing countries if the restriction remains in place more than 12 months.²⁶
- **State Trading Enterprises:** TPP partners agreed to work together in the WTO to improve transparency around the operations of agricultural export state trading enterprises, and have agreed on rules preventing these enterprises from receiving special governmental financing or trade-distorting restrictions on exports.
- **Agriculture biotechnology:** TPP includes commitments to provide transparency on government measures on biotechnology trade. It also provides for information sharing, and procedures for parties to follow when the low-level presence of biotech material is detected in a shipment of agricultural commodities or food products.
- **Technical barriers:** TPP further sought to tackle technical barriers to trade in wine and spirits by creating common definitions of these products and by establishing parameters for labeling and certification.

USMCA: All food and agricultural products that enjoyed zero tariffs under the North American Free Trade Agreement (NAFTA) remained at zero tariffs under USMCA. In addition, there was a hard-fought battle over increased market access the prized Canadian dairy, poultry, egg (and egg products) market since the sector continued to be governed by domestic supply management policies in Canada and were also protected from imports by high over-quota tariffs.

23 “TPP: American Agriculture and the TransPacific Partnership (TPP) Agreement”, Congressional Research Service, Aug 30, 2016 <https://fas.org/sgp/crs/misc/R44337.pdf>

24 “The Trans-Pacific Partnership (TPP): Key Provisions and Issues for Congress”, Congressional Research Service, June 14, 2016 <https://fas.org/sgp/crs/row/R44489.pdf> p.41

25 <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-National-Treatment-and-Market-Access-for-Goods.pdf>

26 Ibid.



The United States was able to secure concessions from Canada for enhanced opportunities for US exports of dairy, poultry, and eggs, to Canada and in exchange the US provided new access to Canada for dairy, peanuts, processed peanut products, and a limited amount of sugar and sugar containing products.

USMCA incorporates many of the provisions in the agriculture chapter of the TPP such as those related to export restrictions, export subsidies, biotechnology etc. Other notable provisions of the USMCA include²⁷:

- **Improved Agricultural Trading Regime:** Under USMCA, several key provisions would further expand the Canadian and Mexican market access to U.S. agricultural producers. With a few exceptions (wheat grading between Canada and Mexico), provisions aim to improve the trading regime in wheat, cotton and spirits, wine, beer, and other alcoholic beverages.
- **SPS provisions:** USMCA's SPS chapter builds on the significant progress made under TPP in strengthening SPS provisions.
 - The agreement would establish a new mechanism for technical consultations to resolve SPS issues while also providing for increasing transparency in the development and implementation of SPS measures
 - Advance science-based decision-making
 - Improve processes for certification, regionalization and equivalency determinations
 - Conduct systems-based audits; improving transparency for import checks
 - Promote greater cooperation to enhance compatibility of regulatory measures.
- **Geographical Indications (GIs):** The United States, Canada, and Mexico agreed to provide procedural safeguards for recognition of new GIs, which are place names used to identify products that come from certain regions or locations.
- **Protections for proprietary food formulas:** all parties committed to protect the confidentiality of proprietary formula information for both domestic and imported products in the same manner. USMCA also limits such information requirements to what is necessary to achieve legitimate objectives.

India and the United States have had a complicated relationship with regard to agricultural trade and regulations. Both tariff and non-tariff barriers (including SPS regulations, technical barriers and issues specific to biotechnology) have come up in bilateral discussions and in many cases these are yet to be resolved. India, for the most part has wanted to keep agricultural trade out of the purview of trade discussions.

Bilateral discussions focusing on enhancing agricultural trade will thus need to take into account each country's competing interests and domestic compulsions in this sector.

²⁷ "Agriculture provisions of the US-Mexico-Canada Agreement", Congressional Research Service, April 08, 2019
<https://crsreports.congress.gov/product/pdf/R/R45661> p.07



Labour Standards

The US Congress has included worker rights and labour standards as a principal negotiating objective in Trade Promotion Authority (TPA) legislation since 1988.²⁸ Labour standards were first included in the North American Agreement on Labour Cooperation (NAALC), signed as a side agreement to NAFTA in 1994 with its own dispute resolution mechanism. This was the first binding labour provision found in a free trade agreement. Commitments have since expanded so as to require countries to not just enforce their own domestic labour laws, but to also adopt and enforce international recognize labour standards (such as core principles of the International Labour Organization).

A 2016 report by the International Labour Organization found that the number of bilateral and plurilateral trade agreements increased significantly from 41 in 1995 to 267 in 2016. Of the latter, there were a total of 77 trade agreements with labour provisions, involving 136 economies.²⁹

The May 10 agreement signed on a bipartisan basis by Congressional leaders under the Bush White House in 2007 placed provisions related to labour and environment at the forefront of US trade negotiations. Major principles of the May 10th agreement have thus also been incorporated into the TPA 2015 and are included in major US trade agreements.

The language with regard to protecting labour rights as provided in the May 10th Agreement is echoed in 'core labour standards' in the TPA and requires the United States and FTA partners to commit to enforcing the major international labour principles enshrined in International Labour Organization's (ILO's) 1998 Declaration on Fundamental Principles and Rights at Work. These rights are:

- the freedom of association
- the effective recognition of the right to collective bargaining
- the elimination of all forms of compulsory or forced labour, the effective abolition of child labour, including the worst forms of child labour, and
- the elimination of discrimination in respect of employment and occupation.

Although labour standards are not part of WTO rules, TPA procedures require labour chapters to be subject to the same dispute settlement procedures as all other obligations.³⁰ This would mean that a labour dispute could result in trade sanctions or withdrawal of trade concessions till the dispute is resolved. Both the TPP and subsequently USMCA thus called on parties to uphold and enforce not just their own domestic laws pertaining to labour but also core principles enshrined in the ILO.

28 "Worker Rights Provisions in Free Trade Agreements (FTAs)", Congressional Research Service, Aug 2 <https://fas.org/sgp/crs/misc/IF10046.pdf>

29 "Labour-related provisions in trade agreements: Recent trends and relevance to the ILO", International Labour Organization, 29 Sept 2016 https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_530526.pdf

30 <https://fas.org/sgp/crs/row/IF10972.pdf>



TPP: included the following provisions to protect labour rights³¹:

- Protect the freedom to form unions and bargain collectively.
- Eliminate exploitative child labour and forced labour.
- Protect against employment discrimination.
- Require laws on acceptable conditions of work related to minimum wages, hours of work, and occupational safety and health.
- Prevent the degradation of labour protections in export processing zones.
- Combat trade in goods made by forced labour in countries inside and outside TPP.
- Establish a transparent and responsive process to allow for labour unions, advocates, and other stakeholders to raise concerns regarding any TPP country's adherence to the labour commitments.

The TPP further included specific commitments by Vietnam, Malaysia, and Brunei to bring about compliance with the high labour standards included in TPP. This includes reforms that are to undertaken by each country before TPP comes into force. Terms of the plans are enforceable and subject to dispute settlement. For these three countries, TPP also included expansive implementation and monitoring guidelines, with 3 tiers of oversight to serve as a check.³² Mexico was to also develop parallel labour reforms, including to better protect collective bargaining and reform its system for administering labour justice.

The enforcement provisions of the TPP's labour standards chapter was made subject to consultative, cooperative and dispute resolution mechanisms, including trade sanctions – same as the commercial commitments in the agreement. This was especially critical since over time, enforcement of labour standards has become a key issue in domestic debate with regard to the efficacy of trade agreements signed by the United States.

The fact that the developing countries that were party to the TPP signed on to the stringent rules of the labour chapter is especially noteworthy.

USMCA: In addition to requiring parties to uphold the ILO provisions mentioned earlier in this section, USMCA also adds “acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health” as conditions to be met. In case of suspected labour violations, there can be consultations between the parties to reach a solution, followed by Ministerial consultations and then the establishment of an independent panel to review the issue.³³

The USMCA also commits parties to:

- not waive or otherwise derogate from labour statutes or regulations to promote trade and investment;
- not fail to effectively enforce labour laws through a “sustained [consistent or ongoing] or

³¹ TPP Labour fact-sheet, USTR <https://ustr.gov/sites/default/files/TPP-Protecting-Workers-Fact-Sheet.pdf>

³² “Labour Standards in the TPP”, Peterson Institute for International Economics https://www.piie.com/publications/chapters_preview/7137/15iie7137.pdf

³³ “Chapter 23: Labour”, US-Mexico-Canada Agreement, United States Trade Representative <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23-Labour.pdf>



recurring [periodically or repeatedly] course of action or inaction” in a manner affecting trade or investment between parties; and

- promote compliance with labour laws through appropriate government action, such as appointing and training inspectors or monitoring compliance and investigating suspected violations.

In addition, USMCA further prohibits the import of goods made by forced labour, and also adds new commitments related to violence against workers, migrant worker protections, and workplace discrimination. The agreement further states that each party would retain the right to “exercise reasonable enforcement discretion and to make bona fide decisions” on the allocation of enforcement resources. The provisions related to rights of migrant workers are unique to USMCA - these were not included in the TPP.

Like the side agreements signed by specific countries in the TPP, Annex 23-A in USMCA’s labour chapter commits Mexico to enact specific labour laws as a pre-condition for USMCA to come into force. In particular, Annex-23A would commit Mexico to³⁴:

- Eliminate all forms of forced or compulsory labour;
- Protect the right of workers to engage in collective bargaining and to organize, form, and join the union of their choice;
- Prohibit employer interference in union activities, discrimination, or coercion against workers;
- Provide in labour laws for the exercise of a personal, free, and secret vote of workers for union elections and agreements;
- Establish and maintain independent and impartial bodies through legislation to register union elections and resolve disputes relating to collective bargaining agreements and recognition of unions
- Establish independent labour courts.

Consequently, Mexico has made changes to its federal labour law to comply with the provisions specific to it in the USMCA and has also outlined an ambitious roadmap with annual benchmarks to implement its labour reforms over four years – this especially applies to worker rights to engage in collective bargaining and minimum wages. For example, the Mexican government has pledged to keep increasing wages by at least two percentage points above the inflation rate each year.³⁵

Democrat congressional leaders in the US House of Representatives especially sought stronger commitments on enforcement provisions in the labour chapter in order to give their assent to passage of the law.

The Mexican government for its part has pledged to spent millions to implement the necessary laws that would improve labour conditions in Mexico.³⁶

34 “USMCA Labour Provisions”, Congressional Research Service, Sept 12, 2019 <https://crsreports.congress.gov/product/pdf/IF/IF11308>

35 Letter from the Mexican President to Congressman Richard Neal, Chairman of the House Ways and Means Committee <https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/10.17.19%20AMLO%20Neal%20letter.pdf>

36 “Mexico throws 900 million at labour to entice Democrats on USMCA”, Bloomberg News, October 17, 2019 <https://www.bloomberg.com/news/articles/2019-10-17/mexico-throws-900-million-at-labour-to-entice-democrats-on-usmca>



India has been a founding member of the ILO and has ratified 45 Conventions and one Protocol, (42 are in force).³⁷ For example, India has ratified the ILO's Worst Forms of Child Labour Conventions, 1999; the Minimum Wage Convention, 1973; Discrimination (Employment and Occupation) Convention, 1958; Abolition of Forced Labour Convention 1957; Equal Remuneration Convention, 1951; and the Forced Labour Convention, 1930.³⁸ India has some 52 federal labour laws and over 200 state specific labour laws which further guide issues related to worker rights.

However, India has been reticent about making labour laws and reforms a part of trade agreements, similar to the stand taken by several other developing nations. For Democrats in the US Congress in particular, labour rights and protections have become fundamental to support for free trade agreements that the US is party to and hence the labour chapter will likely be a key demand to secure bipartisan support. This issue will thus need intensive negotiations to resolve in a manner that is acceptable to both countries.

Environment

NAFTA was the first US trade agreement that incorporated environmental provisions through the North American Agreement on Environmental Cooperation (NAAEC), a side agreement. Since then, environmental issues have transitioned from side agreements to substantive chapters within the main FTA texts, and increasingly also include cooperation and dispute settlement mechanisms.³⁹ Thus, recent trade agreements, including the TPP and USMCA have made violations of environmental provisions subject to dispute resolution the same way the commercial aspects of the agreement are. The Trade Promotion Authority (TPA) 2002 included environmental provisions as a principal negotiating objective in US trade agreements.

Though the linkage between trade and environmental protection continues to be debated domestically, provisions related to the environment are now firmly ensconced within the lexicon of formal trade agreements that the US negotiates with partners – whether at a bilateral or multilateral level.

TPP: The Environment chapter of the TPP was included in the main text of the TPP, (and was not a side agreement), reflecting the importance of this chapter to negotiating parties. Provisions included⁴⁰:

- Protect and conserve flora and fauna, including through action by countries to combat illegal wildlife and timber trafficking.
- Promote sustainable fisheries management.

³⁷ <https://www.ilo.org/newdelhi/areasofwork/international-labour-standards/lang-en/index.htm>

³⁸ "ILO – India Country Profile" International Labour Organization https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0:0::NO:11200:P11200_COUNTRY_ID:102691

³⁹ "Environmental Provisions in Free Trade Agreements", Congressional Research Service May 28, 2015 https://www.everycrsreport.com/files/20150528_IF10166_2afb8d09e608bea593fea5e1fc0e945427a7a40c.pdf

⁴⁰ <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-5>



- Establish rules to prohibit some of the most harmful fisheries subsidies, such as those that contribute to overfishing.
- Promote long-term conservation of marine species, including sharks, sea turtles, seabirds and marine mammals.
- Combat illegal fishing, including by implementing port state measures and supporting increased monitoring and surveillance.
- Establish strong and enforceable environment obligations, subject to the same dispute settlement mechanism as other obligations in TPP.
- Secure commitments to effectively enforce domestic environmental laws, including laws that implement multilateral environmental agreements, and commitments not to waive or derogate from the protections afforded in environmental laws for the purpose of encouraging trade or investment.
- Ensure transparency related to the implementation and enforcement of the environment commitments, including by requiring TPP countries to provide opportunities for public participation.
- Require TPP countries to ensure access to fair, equitable and transparent administrative and judicial proceedings for enforcing their environmental laws, and provide appropriate sanctions or remedies for violations of their environmental laws.
- Establish a framework for conducting, reviewing, and evaluating cooperative activities that support implementation of the environment commitments, and for public participation in these activities.
- Establish a senior-level Environment Committee, which will meet regularly to oversee implementation of environment commitments, with opportunities for public participation in the process.

In addition to the specific commitments in the environment chapter, the TPP also aimed to:

- Eliminate tariffs on environmental goods such as solar panels, wind turbines, water treatment systems, and air quality equipment.
- Facilitate trade in environmental goods and services.

USMCA: USMCA built upon several provisions of the TPP's environment chapter and made them more specific and enforceable, especially the sections on removing subsidies for illegal fishing, protections of specific marine animals etc. New commitments on marine littering, and air quality are also notable in the agreement. On expected lines, there was no reference to the Paris Climate Agreement.⁴¹

The USMCA calls upon all parties to the agreement to adopt, maintain, enforce, and not derogate from environmental laws, including the following seven multilateral environment agreements:

- a) The Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended;

⁴¹ The United States administration announced its intention to pull out of the Paris accord on June 01, 2017. Formal notification to this effect was sent on November 04, 2019.



- b) Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as adjusted and amended;
- c) Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, done at London, February 17, 1978, as amended;
- d) Convention on Wetlands of International Importance Especially as Waterfowl Habitat, done at Ramsar, February 2, 1971, as amended;
- e) Convention on the Conservation of Antarctic Marine Living Resources, done at Canberra, May 20, 1980;
- f) International Convention for the Regulation of Whaling, done at Washington, December 2, 1946;
- g) the Convention for the Establishment of an Inter-American Tropical Tuna Commission, done at Washington, May 31, 1949.

The Environment chapter includes enforceable environmental obligations including commitments to combat trafficking in wildlife, timber, and fish; to strengthen law enforcement networks to stem such trafficking; and to address pressing environmental issues such as air quality and marine litter.⁴²

Major environment obligations in the USMCA include⁴³:

- Prohibitions on harmful fisheries subsidies, such as for those involved in illegal, unreported, and unregulated (IUU) fishing.
- New protections for marine species like whales and sea turtles, including a prohibition on shark-finning and commitment to work together to protect marine habitat.
- Obligations to enhance the effectiveness of customs inspections of shipments containing wild fauna and flora at ports of entry and ensure strong enforcement to combat IUU fishing.
- First-ever articles to improve air quality, prevent and reduce marine litter, support sustainable forest management, and ensure appropriate procedures for environmental impact assessments.
- Requiring the Parties to adopt, maintain and implement our relevant obligations under seven multilateral environmental agreements (MEAs).
- Robust and modernized mechanisms for public participation and environmental cooperation.
- The United States and Mexico have negotiated a separate Environment Cooperation and Customs Verification Agreement that will help bolster efforts to combat trade in illegally taken wildlife, fish and timber.

The USMCA also seeks to reinvigorate the Commission for Environmental Cooperation (CEC), which was established as part of the North American Agreement on Environmental

⁴² <https://usmca.com/environment-usmca-chapter-24/>

⁴³ <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing>



Cooperation (NAAEC), the side agreement to the original NAFTA agreement focusing specifically on environment. The CEC is authorized amongst other things to accept citizen complaints with regard to environmental violations under the USMCA.

Similar to the labour chapter, the environment chapter of the USMCA also drew concern from Congressional Democrats with regard to the enforceability of the provisions. Amendments to the final text thus included language that said, “In a Manner Affecting Trade and Investment.” The presumption hence is that an environmental dispute between the parties affects trade and investment unless a respondent party can prove otherwise.⁴⁴

The agreement also establishes the USMCA Interagency Environment Committee for Monitoring and Enforcement, again similar to the labour chapter, and calls for environment-focused attachés in Mexico to monitor compliance.⁴⁵ This last provision caused a last-minute controversy as Mexico reacted angrily to the news that US diplomats would be posted to the US embassy in Mexico to confirm enforcement. Assurances from the USTR that the diplomats would only provide “technical assistance” rather than act unilaterally helped diffuse the situation.⁴⁶

India is party to the seven environment focused agreements that USMCA mandates all parties to accede to. However, India, and many other developing countries have maintained that non-trade issues such as those related to environmental protections and conservation cannot be a part of trade agreements. India’s position has been that trade, as with any commercial activity does have environmental dimensions, trade agreements may not be the best policy instruments to address concerns related to the environment. However, given the number of developing countries that became party to the TPP, it appears that at least some nations are beginning to sign on to environment focused chapters within FTAs.

The US and India have been on opposing camps at the WTO and other forums on several environmental measures such as those related to curbing subsidies for illegal, unreported and unregulated (IUU) fishing. Both sides have had differing viewpoints on this issue though it was considered ‘low hanging fruit’ at WTO talks.⁴⁷ This is but one example that indicates the extent to which such disagreements can run deep.

Given that all trade agreements the US has been a party to (since NAFTA) have included environmental provisions, this will likely be a sticking point in US-India trade negotiations and will need to be tackled, taking into account each country’s development trajectory and priorities.

44 USMCA: Amendment and Key Changes”, Congressional Research Service, January 10, 2020 <https://crsreports.congress.gov/product/pdf/IF/IF11391>

45 USMCA: Amendment and Key Changes”, Congressional Research Service, January 30, 2020 <https://crsreports.congress.gov/product/pdf/IF/IF11391>

46 “Mexico and US settle row over USMCA labour enforcement”, Financial Times, Dec 16, 2019 <https://www.ft.com/content/013a7816-2039-11ea-92da-f0c92e957a96>

47 “EU, US oppose India on ending sops that aid illegal fishing”, Economic Times, May 30, 2019 <https://economictimes.indiatimes.com/news/economy/foreign-trade/eu-us-oppose-india-on-ending-sops-that-aid-illegal-fishing/articleshow/69588258.cms?from=mdr>



Intellectual Property Rights

The US Congress has made protection of Intellectual Property Rights (IPR) a principal negotiating objective for trade agreements since the passage of fast track authority in 1988. The priority accorded to IPR can be viewed in the context of the US's comparative advantage in IPR, and the importance attached to it in wide sectors of the US economy. The TPA 2015 further re-committed the US to the principles enshrined in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) but also went beyond it by also prioritizing "ensuring that the provisions of any trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law". Therefore, effectively, the US's trade negotiating principles commits the country to securing what is known as TRIPs-PLUS protections for IPR.⁴⁸

Other provisions included in TPA 2015 are strong protection of new technologies; standards of protection that keep pace with technological developments; nondiscrimination in the treatment of IPR; and strong enforcement of IPR. Trade agreements should further aim to ensure fostering innovation and access to medicine. TPA 2015 also states that negotiation of the prevention and elimination of government involvement in violations of IPR such as cybertheft or piracy, as well as protection of trade secrets and proprietary information are notable objectives.

Some of the most hard-fought battles in TPP negotiations occurred with regard to IPR protections as the provisions did call for more enhanced protections than what is currently mandated by the WTO. This was a major issue for the US in particular – so much so that once the US withdrew from the TPP in 2017, the final negotiated successor agreement to the TPP, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) suspended articles on IPR protections such as market exclusivity rules for biologic drugs, strict copyright enforcement priorities etc.⁴⁹

TPP: Some of the notable components of the TPP's IPR chapter, which went beyond or were updated from other FTAs entered into by the US are:

- **Patents:** The TPP broadly sought to establish consistent and harmonized patent regimes in all the parties to the agreement. Amongst other provisions, for the patentability criteria, the TPP mentions "new uses of a known product, new methods of using a known product, or new processes of using a known product." The agreement further provides that a patent applicant may request an extension of a patent term in case of 'unreasonable delays' which is defined as a delay lasting more than five years from the date of filing, or three years from a request for examination.
- **Data Exclusivity:** Data exclusivity refers to the protection of test data submitted by an 'originator' or brand name drug company to gain marketing approval for a given drug so that a generic drug manufacturer company may not rely on such data to create a

⁴⁸ This is a major point of departure since India adheres to WTO-TRIPS provisions on IPR, while the US is likely to insist upon TRIPS Plus provisions

⁴⁹ <https://www.whitecase.com/publications/alert/cptpp-enters-force-what-does-it-mean-global-trade>



generic competitor for a period of time.⁵⁰ TPP provides five years of data exclusivity for small molecule pharmaceuticals and also allowed for that period to run concurrently if the country grants marketing approval within six months of receiving an application. For biologics, TPP granted data exclusivity period of eight years or, alternatively, five years coupled with “other measures... to deliver a comparable outcome in the market.”⁵¹ The TPP became the first ever free trade agreement that specifically included protection commitments for biologics.

- **Enforcement in Digital Environment:** The TPP further affirmed that enforcement procedures (civil and administrative procedures and remedies, provisional measures, and criminal procedures and penalties) are available equally to trademark, copyright etc. infringement including in the digital environment.
- **Trade secrets:** The TPP called for criminal liability and penalties for trade secret theft, including cybertheft – this stipulation extends to State owned enterprises as well which are subject to trade secret protection requirements.
- **Copyright and balance:** the TPP provided for copyright term of life plus 70 years for most works which is much higher than the TRIPS minimum term of life plus 50 years. The agreement also commits parties to “endeavor to achieve an appropriate balance” in copyright systems, including digitally, through exceptions for legitimate purposes. The agreement also adopted the “Notice and takedown” system (similar to what is provided for in US law) to address intermediary liability by which right holders notify online service providers of infringing content to request removal of that content, while allowing alternative systems (e.g., “notice and notice” in Canada).⁵²
- **Trademarks:** TPP mandates more robust protection and enforcement of trademarks, including for ‘collective marks’.
- **Geographical indications (GIs):** The TPP called for GIs to be protected through trademarks or other legal means and laid out administrative procedures for recognizing and opposing GIs, including ways to determine when a name is common.⁵³

USMCA: The USMCA’s IPR chapter committed all parties to ratify or accede to: (a) Patent Cooperation Treaty (b) Paris Convention; (c) Berne Convention; (d) WCT (e) WPPT. Each party is to also ratify or accede to (before USMCA comes into force) the following agreements: (a) Madrid Protocol; (b) Budapest Treaty; (c) Singapore Treaty (d) UPOV 1991 (e) Hague Agreement (f) Brussels Convention.⁵⁴

A lot of the IPR provisions that were built into the TPP found reflection in the USMCA as well, such as protections for patents, GIs, trademarks, trade secrets etc. The parts of TPP that were suspended in the final amended CPTPP (in which the US is not a party) also found themselves incorporated into the final USMCA text. Notable amongst there were:

⁵⁰ <https://fas.org/sgp/crs/row/R44489.pdf> p.49

⁵¹ Ibid.

⁵² Ibid. p.52

⁵³ Ibid.

⁵⁴ <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/20-Intellectual-Property-Rights.pdf>



- **Biologics:** As mentioned in the previous section, data exclusivity for biologics came up for heated debate in TPP negotiations and received just as much attention in the run up to the USMCA finalization. In the US, biologics receive a 12-year period of exclusivity. The original USMCA text would have required a 10-year period of protection, this requiring Canada to raise its exclusivity period by 2 years and Mexico by 5 years. However, owing the fierce opposition by US House Democrats, this stipulation was removed in the final amended agreement.
- **Industrial Designs:** while protections for Industrial Designs were mentioned in the TPP, USMCA specifies a minimum term of 15 years of protection for industrial designs (NAFTA only provided for 10 year protection).⁵⁵
- **Enforcement of IPR rules:** USMCA includes commitments on civil, criminal, and other national enforcement for IPR violations, such as copyright enforcement in the digital environment, criminal penalties for trade secret theft and camcording, and ex-officio authority for customs officials to seize counterfeit trademark and pirated copyright goods.⁵⁶
- The USMCA also dropped language referencing ‘balanced’ approach to copyright laws which would have empowered users as well.
- **Safe Harbors:** USMCA called upon the establishment of copyright safe harbors to shield internet service providers that do not directly benefit from the infringement. This clause mirrors provisions found in Section 230 of the Communications Decency Act (CDA)⁵⁷ and was not included in the TPP.

When the final negotiated CPTPP was signed (following the US pullout), the agreement deleted about 22 provisions that had been part of the TPP final text, including those related to patent delays, pharmaceutical patent test data, technology protection, and copyright term length⁵⁸ etc.

Thus, the IPR chapter in particular lost several elements that had been pushed as high priority for the US administration. It is not surprising therefore that these components are now firmly within the purview of the USMCA.

India and the United States have had a tense relationship with regard to IPR issues for some time now. India is currently on the USTR’s Special 301 IPR report’s ‘Priority Watch List’ for alleged ‘IPR violations’ though India considers the Special 301 report a unilateral effort on the part of the US. The impact of the designation has nevertheless reverberated to overall bilateral ties as well. Section 3(d) of the Indian Patents Act has in particular, come under scrutiny in the US since it excludes from patentability criteria new forms of a known substance that does not result in “enhancement of the known efficacy of that substance.”

⁵⁵ India’s Designs Act allows for the registration of industrial designs. The Designs Rules, which detail classification of design, conform to the international system and are intended to take care of the proliferation of design-related activities in various fields: <https://www.export.gov/article?id=India-Protecting-Intellectual-Property>

⁵⁶ <https://crsreports.congress.gov/product/pdf/IF/IF11314>

⁵⁷ “Outdated safe harbor laws have no place in trade agreements” The Hill, August 2, 2019 <https://thehill.com/opinion/technology/458545-outdated-safe-harbor-laws-have-no-place-in-trade-agreements>

⁵⁸ “The CPTPP: (Almost) One Year Later, Center for Strategic and International Studies, November 05, 2019 <https://www.csis.org/analysis/cptpp-almost-one-year-later>



India's Supreme Court has interpreted this judgement to mean "therapeutic efficacy". While India remains wholly committed to its commitments and obligations under the TRIPS Agreement, US expectations (now enshrined in its various FTAs) that require parties to adhere to 'TRIPS-Plus' provisions will certainly bring up disagreements.

In addition, issues related to data exclusivity (especially for biologics), copyright terms, trade secret laws, piracy etc have been challenging topics in bilateral talks, as have enforcement mechanisms. These issues are likely to remain contentious in the near future since both sides have competing interests and priorities. The IPR chapter will thus require intense negotiations and compromise.

Digital Trade

The TPA 2015 calls for governments to refrain from enacting measures that impede digital trade in goods and services and also extends that commitment to cross-border data flows, data processing, and data storage. It also calls for wider protections for trade secrets and security of data held by governments for regulatory purposes. The IPR objectives in the TPA makes advancing robust IPR for technologies for digital trade a priority, and also commits to extending the existing WTO moratorium on duties on electronic commerce transactions.

The TPP contained far reaching provisions related to digital trade which were later emulated in the USMCA as well. While the TPP and other such agreements include a chapter on 'Electronic Commerce', interestingly, the USMCA is the first agreement to include a chapter on 'Digital Trade'. While e-commerce appears to specifically reference the sale and purchase of electronic goods and services, 'digital trade' is a much broader catch-all term that would encompass both traditional e-commerce and also the kinds of new disruptive businesses that are the hallmark of the digital age.

Since there is much similarity in the chapter's contents in both the TPP and USMCA, some of the key provisions echoed in both agreements are:

- **Personal information protection:** Both agreements include provisions to protect personal information. USMCA however goes beyond the TPP by invoking OECD and APEC norms and recognizes that "APEC Cross- Border Privacy Rules system is a valid mechanism to facilitate cross-border information transfers while protecting personal information."⁵⁹
- **Non-discriminatory treatment:** both the TPP and the USMCA committed that no party shall accord less favorable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like digital products.
- **Data localization:** Prohibitions on requiring covered persons to use or locate computing facilities in a particular territory as a condition for conducting business.⁶⁰ While the TPP

⁵⁹ <https://usmca.com/digital-trade-usmca-chapter-19/>

⁶⁰ Ibid.



- had exceptions to this rule for 'legitimate public policy' goals, as well as a carve out for financial services companies, the USMCA does away with these.
- **Source code disclosure:** Prohibitions on forced disclosure or transfer of source code. Only exception to this rule is if the request for such disclosure comes from a regulatory or judicial authority for a specific investigation, inspection etc. The USMCA also extended this to include algorithms expressed in that source code also.
 - **Cross-border flow of data:** Removing restrictions on the cross-border flow of data and limits on where data can be stored and processed. (The language in the USMCA on this point is stronger).
 - **Open government data:** The USMCA includes provisions on all parties making available open government data. The agreement also mandates that such data should be machine-readable and open format and can be searched, retrieved, used, reused, and redistributed. The TPP did not include such provisions.
 - **Customs duties:** The USMCA further prohibits customs duties, fees etc in the import or export of digital products transmitted electronically but does allow the application of internal fees or taxes in a manner consistent with the agreement.
 - **Cybersecurity:** The USMCA calls for risk-based approaches to tackle cybersecurity threats, referring to these as "more effective than prescriptive regulation in addressing those threats". The TPP did not specify any particular approach to cybersecurity.

Between the TPP and USMCA, far reaching provisions on digital trade have been incorporated. Even with the dilution of certain elements (especially those related to IPR) in the final negotiated CPTPP, there are many provisions in the original TPP text that have been retained. Notable amongst these are the components of the e-commerce chapter which remained in the final CPTPP agreement, especially the provisions with regard to prohibitions on discriminatory treatment of so-called "digital products" created in another member state; mandating cross-border transfer of information (including personal information); data localization (except to further public policy objectives); prohibition on forced transfer or disclosure of source code (except in cases of critical infrastructure) etc.

The fact that these provisions remained in the final agreement even after the US had pulled out is further evidence of the importance of the e-commerce chapter and its components to all parties.

On issues like data localization, cross-border flow of data, customs duties on digital products etc, India has adopted policies that have run counter to the objectives laid out in the TPP, and the USMCA. Given the trajectory of events leading up these trade agreements, it seems almost certain that the US will insist upon inclusion of provisions related to digital trade in any trade agreement. Again, this is an area that enjoys bipartisan support in the US, but the debate is far from settled in India where e-commerce and digital trade are burgeoning sectors with tremendous room for growth – jostling between domestic compulsions and foreign investment provisos is thus only expected.

The digital trade chapter is hence likely to attract much scrutiny in each country and will need to be dealt with sensitively on both sides to arrive at a 'win-win' in trade talks.



Rules of Origin

Rules of Origin (ROO) are laid down to determine the country of origin of imported products. As part of FTAs, preferential ROO are applied so as to ensure that preferential tariff benefits are given to eligible products (made wholly or in large part within the region) from the country/countries party to an agreement.

A tariff-shift method and/or regional value content (RVC) method is applied in cases where a good is not wholly obtained in the region.⁶¹ Goods may qualify if the materials are sufficiently transformed within the region so as to change in tariff classification within the Harmonized Tariff Schedule (HTS) – in other words, a ‘tariff shift’. The degree of transformation can differ based on the product. In some cases, there is also a requirement for a minimum threshold of RVC in addition to a tariff shift. If a good does not meet ROO requirements for preferential tariff benefits, it can typically be imported under most-favored nation (MFN) tariff rates.

While ROOs help regulate the kinds of products receiving tariff benefits under an FTA, stringent rules can also impact more import sensitive sectors.

Several measures undertaken in both the TPP and USMCA under the Rules of Origin chapter are important to take note of since these are likely to be replicated in future trade agreements.

TPP: Some product specific ROO in TPP require that a minimum ad valorem percentage of the product must be produced in the FTA region. There are also RVC content rules for many products (automobiles, appliances, machine tools etc). One ROO also specifies that the value of foreign content in a particular product should not exceed a maximum percentage (10% in TPP). ROO for certain other products require that some kind of manufacturing or processing operation must be completed within the region (for example, a chemical reaction).⁶²

The TPP allows for ‘Accumulation’ within the ROO. In other words, a manufacturer in a TPP country can use inputs from other TPP partners such that the finished product would qualify for tariff benefits under the agreement. This rule was intended to help develop new regional value chains and supply chains within the TPP region – a huge selling point for all the parties since this would ensure manufacturing and job creation in various sectors across the specific countries in a complementary manner.

New ROO specific to certain sensitive sectors were incorporated in the TPP:

- **Textiles, apparel and footwear:** To qualify for reduced tariffs, textiles and apparel must meet the ‘yarn forward’ ROO, which requires the use of U.S. or other TPP country yarns and fabrics (with only a few exceptions), in textile and apparel products traded within the TPP area. Footwear manufacturers can have their shoes covered for low tariffs under the ‘tariff shift method’ or by gauging how much of the product’s value was added within the TPP region.

⁶¹ <https://crsreports.congress.gov/product/pdf/IF/IF11387>

⁶² “The Trans-Pacific Partnership (TPP): Key Provisions and Issues for Congress” Congressional Research Service, June 14, 2016 <https://fas.org/sgp/crs/row/R44489.pdf> p.20



- **Motor Vehicles:** The ROO for the auto sector in the TPP mandated 45%-55% regional value content for autos and 35%- 45% for auto parts, depending on the calculation method. Under NAFTA, 62.5% of a vehicle's content had to be manufactured in the participating nations – the ROO for auto sector in the TPP was thus considered to be weaker.⁶³

The TPP also allowed for recovered materials used in the production of a remanufactured product to count as TPP materials, which would allow for remanufactured goods to count as 'TPP originating'. The ROO chapter further specifies that the routes taken by TPP goods to reach customers do not impact preferential tariff benefits – provided that the goods remain in the control of customs authorities in non-TPP countries and also does not undergo any operation outside of the TPP region except for unloading; reloading; separation from a bulk shipment; storing; labelling or marking required by the importing Party etc..⁶⁴

USMCA: The changes made in the Rules of Origin chapter in the USMCA came in for considerable debate and scrutiny in the run up to the finalization of the agreement. Some of the measures that sought to tighten ROO are:

- New motor vehicle ROO and procedures, including product-specific rules and requiring 75% North American content.
- Wage requirements that mandate that 40%-45% of auto content be made by workers earning at least \$16 per hour. This was a particularly important criteria for the US, given criticism that labour wages in Mexico led to the shifting of auto manufacturing to Mexico, thus causing significant job losses in this sector.
- The ROO chapter further mandated that 70% of a vehicle's steel and aluminum must originate in North America. The USMCA also requires that steel be melted and poured in North America.
- ROO certification enforcement was also streamlined in the USMCA.

The USMCA contains a separate chapter for the Textiles sector since it was considered more sensitive. While the agreement followed the same 'yarn forward' rule within ROO for the textiles industry, it specifies that sewing thread, coated fabric, narrow elastic strips, and pocketing fabric used in apparel and other finished products have to be made in a USMCA country to qualify for duty-free access to the United States.⁶⁵ At the same time, the agreement does provide for some exceptions - with some adjustments, the USMCA would "allow duty-free access for limited quantities of wool, cotton, and man-made fiber apparel made with yarn or fabric produced or obtained from outside the NAFTA region, including yarns and fabrics from China and other Asian suppliers."⁶⁶

In particular, the increased wage and North American content requirements in the auto sector were considered to be significant changes as compared to both NAFTA and TPP.

⁶³ Ibid.

⁶⁴ "Chapter 04 – Rules of Origin, US-Mexico-Canada Agreement" <https://usmca.com/rules-of-origin-usmca/>

⁶⁵ "Textile and Apparel Sectors Disagree on Certain Provisions of the Proposed U.S.-Mexico-Canada (USMCA) Agreement" Congressional Research Service, March 05, 2019 <https://fas.org/sgp/crs/row/IF11124.pdf>

⁶⁶ Ibid.



Some trade agreements like NAFTA, and also TPP have set limits on a threshold of non-originating content which is considered 'de minimis' – in other words that such a level does not make a product 'non-originating' even if the good does not qualify for tariff change RVC requirement. This level was 7% under NAFTA and was increased to 10% under the TPP – USMCA followed the TPP change and also fixed the limit at 10%.⁶⁷

USMCA also allowed for origination provisions for recovered materials in re-manufactured products – same as the TPP. And also similar to the TPP, the USMCA also provides for 'Accumulation' i.e. - products of one country can be further processed or added to products in another Party as if they had originated in the latter, thus meeting originating requirements and can hence receive tariff benefits.

India has typically insisted on stronger and more stringent ROOs in its trade agreements with partner countries. For example, in its FTAs with Japan, Korea and ASEAN, the ROO specified requires change in tariff subheading (CTH) and minimum value addition of 35 per cent.

Trade in Services

A major trade negotiating objective laid down by the TPA 2015 is "to ensure that trade agreements do not require changes to the immigration laws or obligate the United States to grant access or expand access to visas issued under the Immigration and Nationality Act." This comes down to the fact the immigration policy is typically under the purview of the US Congress and hence does not appear in trade negotiations much.

As trade globally has expanded, especially with the onset of digital trade, e-commerce etc, the purchase and sale of services across borders has become an increasingly important feature of all countries' trade profiles and thus the trade in services chapter has become more crucial.

TPP: echoing other US FTAs, TPP follows a 'negative list' approach (as against GATS which follows a positive list approach) for all types of services unless specifically excluded by a partner country. Using the negative list approach also means that any new type of service developed after an FTA comes into force is covered by the agreement unless it is specifically and particularly excluded.

Each TPP country (including the United States) has a list of specific industries that were exempted from TPP services trade obligations. For example, the TPP specifies that in the maritime sector, only U.S.-flag vessels may carry cargo between U.S. ports and must be staffed by U.S. crew.⁶⁸ Other sectors in this list include accounting services in Japan, audio-visual in Vietnam, financial services in Malaysia, hospitality in Singapore, insurance services in Australia, legal services in Chile, printing in Mexico etc.⁶⁹

⁶⁷ "Chapter 04 – Rules of Origin, US-Mexico-Canada Agreement" <https://usmca.com/rules-of-origin-usmca/>

⁶⁸ "The Trans-Pacific Partnership (TPP): Key Provisions and Issues for Congress" Congressional Research Service, June 14, 2016 <https://fas.org/sgp/crs/row/R44489.pdf> p.32

⁶⁹ Ibid.



- As with other FTAs, there are some core obligations (subject to some country-specific exceptions) that all TPP members agreed to⁷⁰:
- National treatment which provides that no country can discriminate in favor of its own service providers
- Most Favored Nation (MFN) treatment which means TPP countries cannot discriminate in favor of one TPP country over another.
- To ensure market access, TPP committed each country to not impose quantitative restrictions on the number of service suppliers, the total value or volume of services provided, the number of persons employed, or the types of legal entities or joint ventures employed by a foreign service provider
- Prohibition on local presence requirements such that no TPP country can mandate that a TPP-based service provider must establish an office or affiliate, or to be resident, in its territory in order to supply the service.

The chapter also states support for mutual recognition of professional qualifications that can help certify service providers⁷¹ and calls for transparency in the way government regulations are developed and applied in various sectors.

Delivery of services through workers travelling to the location where a service is being consumed is known as Mode 4 delivery under the GATS agreement. Temporary movement (especially entry) of non-immigrant workers has however been a sensitive issue for most countries and hence TPP did not offer concessions on expanded commitments or more visas for temporary entry, committing just to transparency and stability in regulations governing such programs.

Market access for express delivery services was a major priority for the US in TPP negotiations especially in view of cases where a government run system provides express delivery services competing with private sector providers. The agreement stipulates that the “postal system cannot use revenue generated from its monopoly power in providing postal services to cross-subsidize an express delivery service.”⁷² TPP also did not include a De Minimis which would ensure that shipments valued below the de minimis threshold receive expedited customs treatment and pay no duties or taxes.

USMCA: The USMCA contains the core provisions in the Trade in Services chapter as were outlined in the TPP. Like the TPP, the provisions in the Trade in Services chapter in USMCA also did not apply to government procurement rules for any of the concerned parties.

The Trade in Services chapter in the USMCA left untouched Treaty NAFTA (TN) which allows a certain number of Canadians and Mexicans to work in the US each year – this was viewed as a concession by the current US administration which had been calling for limits

⁷⁰ “Summary: Cross Border Trade in Services”, TPP, <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Cross-Border-Trade-in-Services.pdf> p.2

⁷¹ i.e. Mutual Recognition Agreements

⁷² “The Trans-Pacific Partnership (TPP): Key Provisions and Issues for Congress” Congressional Research Service, June 14, 2016 <https://fas.org/sgp/crs/row/R44489.pdf> p.32



on TN visas as part of the “Buy American, Hire American” initiative. At the same time, the numbers of eligible workers under the initiative also did not expand.

Like TPP, USMCA too had a major emphasis on market access for express delivery service providers. A lot of the same provisions found in the TPP thus were adopted into the USMCA in an effort to level the playing field between foreign private express delivery services and those owned and operated by government service providers. The agreement requires independence between express delivery regulators and providers, prohibits the requirement of providing universal postal service as a prerequisite for express delivery, and prohibits fees on express delivery providers for the purpose of funding other such providers.⁷³

One major departure in the USMCA is that the agreement did specify a De Minimis threshold for duty free treatment which had not been done in the TPP. Canada agreed to raise its de minimis level from C\$20 to C\$40 for taxes. Canada further agreed to provide for duty free shipments up to C\$150. Mexico will continue to provide USD \$50 tax free de minimis and also provide duty free shipments up to the equivalent level of USD \$117.⁷⁴ A footnote in the text however does say that the US can lower its threshold (currently set at USD \$800 – the highest limit as compared to any other country) for the sake of reciprocity – this leaves the door open for the US to lower its de minimis threshold to match what is on offer from Canada and Mexico.

According to a report by the CATO Institute, “in 2017, U.S. consumers spent \$4.1 trillion on goods with imports totaling \$2.3 trillion (57 percent). In contrast, U.S. consumers spent \$9.2 trillion on services, only \$550 billion (six percent) of which were imported. What this wide disparity in import penetration—six percent for services versus 57 percent for goods—suggests that the United States maintains significant barriers to trade in services.”⁷⁵ The report further suggests that the US missed an opportunity to further open up services trade through the USMCA – pointing specifically to the prohibition on foreign competition in maritime shipping, commercial air services, and trucking services, all of which contribute towards inflated transportation costs which are then factored into the costs of goods and services purchased by ordinary Americans.

USMCA also states that “each Party shall consult with relevant bodies in its territory to seek to identify professional services where at least two of the Parties are mutually interested in establishing a dialogue on issues that relate to the recognition of professional qualifications, licensing, or registration.”⁷⁶ Support for negotiation and conclusion of Mutual Recognition Agreements (MRA) is thus built into the agreement – this extends to various facets of services trade.

For India, services trade, especially in terms of exports has been a major source of revenue and it is also an area where Indian companies have built tremendous competitiveness.

⁷³ <https://usmca.com/cross-border-trade-in-services-usmca/>

⁷⁴ <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing>

⁷⁵ “USMCA: A Marginal NAFTA Upgrade at a High Cost” Cato Institute, April 10, 2019 <https://www.cato.org/publications/commentary/usmca-marginal-nafta-upgrade-high-cost>

⁷⁶ Annex 15-C in Chapter 15 of the USMCA: <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/15-Cross-Border-Trade-in-Services.pdf>



Liberalizing norms governing trade in services has hence been viewed as an offensive interest for India. India has also raised the issue of mutual recognition of the qualifications of professionals like doctors, nurses etc. This would entail intensive MRA consultations with the US between the regulatory agencies of both nations. In trade talks, India has tended to push for greater Mode 4 access – that is, trade in services through the presence of natural persons in the partner country’s territory – this is in part due to the Indian private sector’s own competencies as well as massive pool of skilled workforce. At the same time, Mode 4 has been a very sensitive area since it impacts immigration policies (this is true not just for the US, but also EU, other Asian countries etc) and is politically charged.

India has been particularly concerned about temporary skilled worker visa programs in the United States, since these effect Indian nationals working in the United States and constitute a major chunk of India’s services exports. India is currently challenging U.S. fees for worker visas at the WTO and is closely watching potential U.S. action that could impact the H1B (specialized worker) visa program. India has, for many years now also sought to negotiate and conclude a “totalization agreement” with the United States which would help workers who work in each country for short periods of time and on a temporary basis, a way to avoid double taxation on social security – so far however, these talks have been fruitless.

Beyond the political sensitivities surrounding Mode 4 trade in services, there is a very real trend currently towards Automation and Robotics in almost every facet of economic activity – services trade across sectors is equally impacted by this trend and as companies adapt to the new technological disruptions, the debate around Mode 4 market access is likely to become less critical – for now though, it will continue to be a key demand.

India also maintains restrictions in market access in investments in several sectors such as insurance, banking, securities, motion pictures, accounting, construction, architecture and engineering, retailing, legal services, express delivery services and telecommunications.⁷⁷ These are likely to come in for enhanced scrutiny in trade talks between the two countries.

Investment

The Investment chapter in any FTA is considered critical since it outlines how each party intends to protect foreign investments from the partner country in its territory – this in turn helps secure and maintain FDI inflows. Stability in the political and legal environment, assurances against arbitrary expropriation of investment value, assets and property via through legislative or regulatory action), transparent and predictable public policy measures, and speedy access to justice are strong guarantees for foreign investors.

The investment chapter of both TPP and USMCA share several features and components that are geared towards creating a level playing field and protections for investments and investors from each country that is party to the agreement⁷⁸. Since many of the articles

⁷⁷ <https://www.export.gov/article?id=India-Trade-Barriers>

⁷⁸ TPP Investment Chapter: <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>; USMCA Investment



within the two are similar, these have been summarized together:

- **Definition:** Both the TPP and USMCA detail what constitutes an ‘investment’ in more defined terms than had been done under NAFTA. An investment is defined as an asset that is owned or controlled by investor and which has the attributes of an investment such as commitment of capital, the expectation of gain or profit, assumption of risk etc. Some examples included in the agreement include enterprises, shares, stocks, bonds, other debt instruments, derivatives, intellectual property rights, licenses, or other tangible or intangible, movable or immovable property such as liens, mortgages, pledges etc.
- **Minimum Standard of Treatment:** Both agreements require each party to accord covered investments “treatment in accordance with customary international law.” Clarifications have been added that the concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond the minimum standard treatment of aliens under customary international law.⁷⁹ The agreement further also states that government action or inaction would not necessarily violate the MST rule in the chapter if only it goes against an ‘investor’s expectations’ even if there is loss or damage to a covered investment as a result. The USMCA added a footnote that further clarified that whether an investor’s expectations are reasonable is further deemed as dependent on the extent of binding written assurances provided by the government to an investor, the nature and extent of (or potential for) governmental regulation in the specific sector.
- **National Treatment and MFN treatment:** The TPP and USMCA require that each country accord investors and investments of another country treatment that is no less favorable than that it accords, in like situations, to its own investors or the investors of any other country throughout the life of the investment. Both agreements further provide that “whether treatment is accorded in “like circumstances” depends on the totality of the circumstances, including whether the treatment at issue distinguishes between investors or investments based on legitimate public welfare objectives.”
- **Expropriation and Compensation:** The agreements provide that expropriation or nationalization can only be done for a public purpose, and in a nondiscriminatory manner, with prompt, adequate, and effective compensation, in accordance with due process of law. Compensation for expropriation is further to be done in fair market value terms in market rate of exchange. While indirect or regulatory expropriation is still included, the agreement also affirms that “non-discriminatory regulatory actions designed to protect legitimate public welfare objectives, such as health, safety and the environment do not constitute indirect expropriation except in rare circumstances.” Further, this particular article does not apply to the issuance of compulsory licenses granted in relation to IPR in keeping with TRIPS Agreement or to the revocation or limitation of IPR which is consistent with the TRIPS agreement.
- **Performance Requirements:** The TPP and USMCA also eliminated the need for performance requirements for investors and investments including with regard to exports,

Chapter: <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf>

79 <https://fas.org/sgp/crs/row/IF11167.pdf>



domestic content, purchasing products or services from domestic suppliers, transfer of technology etc.

- **Senior Management and Boards of Directors:** both agreements further prohibit parties from imposing requirements that a covered investment appoint to senior management positions a person of a particular nationality. It is further clarified that a country could require that a majority of the Board of Directors or any committee of a covered investment be of a particular nationality or resident in the particular territory as long as this does not materially impair the ability of the investor to exercise control over such as investment.
- **Investor-State Dispute Settlement (ISDS):** While the TPP had strong Investor-State Dispute resolution provisions, these have been significantly watered down in the USMCA. The latter altogether eliminates the provision of ISDS for investments vis-à-vis Canada by stating that three years after USMCA comes into force, ISDS mechanisms would be phased out. Unless there is an independent agreement, investors in both countries would only have recourse to domestic courts or other dispute resolution mechanisms.⁸⁰

USMCA further places new restrictions on the use of ISDS with respect to Mexico – i.e. investors can only bring cases with respect to breach of national treatment, MFN treatment or direct expropriation. Thus, claims related to ‘right to invest’ provision, violation of MST and indirect appropriation will only be covered under state-to-state dispute resolution under the agreement.⁸¹ In addition, claims related to government contracts in covered sectors like oil and gas, power generation, telecommunications, transportation, and infrastructure would still have recourse to arbitration under USMCA ISDS (in such cases, claimants need not exhaust local remedies first). Canada and Mexico of course have recourse to ISDS provisions in relation to each other since both are also party to the TPP which has such protections built in.

The investment chapter of the TPP and USMCA have several components that diverge from the investment model that India has been following for several years now. India unveiled a Model Bilateral Investment Treaty (BIT) in 2018 and in 2017 terminated BITs with 57 nations.⁸² For the remaining 25 countries, India has asked for joint interpretive statements (JIS) to clarify ambiguities in treaty texts so as to avoid expansive interpretations by arbitration tribunals.⁸³ This was mainly prompted by several legal cases that India found itself embroiled in through the Investor State Dispute Resolution mechanism. Currently India is involved in about 15 such cases.

While the US follows an asset-based definition of what constitutes an investment, under the Indian model BIT, an investment in order to be covered, must constitute an enterprise according to the laws in India. Also, the investor must prove to have committed capital for

⁸⁰ <https://fas.org/sgp/crs/row/IF11167.pdf>

⁸¹ Ibid.

⁸² “Why India’s Model BIT needs a thorough relook” Business Standard, Dec 31, 2018 https://www.business-standard.com/article/economy-policy/why-india-s-model-bilateral-investment-treaty-needs-a-thorough-relook-118123100150_1.html

⁸³ Government of India, Ministry of Finance, Department of Economic Affairs, Office Memorandum – “Regarding Issuing Joint Interpretative Statements for Indian Bilateral Investment Treaties”, Feb. 8, 2016, http://indiainbusiness.nic.in/newdesign/upload/Consolidated_Interpretive-Statement.pdf



a certain duration, assumed risk and assisted in economic development of India. The latter stipulation in particular could be considered a 'performance requirement' that is prohibited under the TPP and USMCA (along with domestic content, export percentage etc requirements – which may run contrary to regulatory impulses in India).

India's Model BIT also leaves out some of the major clauses in the TPP and USMCA as outlined above, including the most-favored nation (MFN) clause and the catch-all assurance of 'fair and equitable treatment'. Further, while the USMCA requires investors to "exhaust local remedies" by first filing their complaints in the courts or administrative tribunals of the host state and waiting 30 months before initiating arbitration (unless such action would be "obviously futile or ineffective")⁸⁴, India's model mandates investors to first exhaust court remedies for five years, followed by nine months to negotiate and initiate and also restricts the tribunal's power to only awarding monetary compensation (thus excluding 'punitive or moral damages or any injunctive relief').⁸⁵

While India's Model BIT does allow recourse to Investor-State Dispute Settlement through arbitration tribunals, investors need to satisfy a number of conditions before they can do so and under specific terms, including a stringent timeline for the submission of any claims. Importantly, India's version also excludes areas like government procurement, taxation, subsidies, compulsory licenses (in relation to IPR) and national security.

These are just some of the provisions where there are clear differences in approaches to investment protection as adopted and supported by both nations which will need to be negotiated in trade talks.

Dispute Settlement

In addition to the dispute resolution mechanisms outlined in the Investment chapter of both the TPP and USMCA relating mainly to ISDS, both agreements (as with many other FTAs) call for a separate chapter on Dispute Settlement to tackle state-to-state disputes. The Dispute Settlement mechanism under NAFTA was widely considered unworkable because parties could block the appointment of experts on the consultative panels that were to address and resolve cases. USMCA sought to address these though there remains debate whether this was adequately accomplished in the final agreement.

The broad aim of the chapter under the TPP and USMCA appears to be to resolve disputes in a cooperative manner.⁸⁶ The major steps involve:

- Initial consultations between the parties

⁸⁴ <https://fas.org/sgp/crs/row/IF11167.pdf>

⁸⁵ https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf

⁸⁶ <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/31-Dispute-Settlement.pdf>; <https://ielp.worldtradelaw.net/2019/09/usmca-a-serious-enforcement-mechanism-will-require-serious-changes-to-usmcas-dispute-settlement-prov.html>



- Good offices, conciliation, or mediation; and (if no resolution)
- establishment of a dispute settlement panel

Both TPP and USMCA allows the complaining party to select the forum for dispute settlement – for example WTO or USMCA. However, once the selection is made, the case cannot be brought to multiple forums. The agreement calls for consultations within 30 days (15 days for perishable goods). If consultations fail to resolve the matter, a request for establishment of a panel is to be submitted in writing within 30 days (for perishable goods) under both agreements or 60 days under TPP and 75 days under USMCA from the date of receipt of the request for consultations. Interested third parties with ‘substantial interest’ in the matter are also allowed to join as complaining party. A roster of up to 30 individuals willing and able to serve as panelists established by consensus is to be drawn up and maintained– the roster would remain in effect for a minimum of three years or until parties constitute a new roster. For labour and environment disputes, disputing parties select a panelist with expertise or experience in labour or environmental law or practice.

Dispute settlement panels under both agreements are to be composed of three or five members – each side appoints two and a Chair is appointed by mutual consent. If there is no mutual consent, the disputing party selected by lot makes the decision. If a party fails to select a panelist within 15 days, then panelists are selected by lot. After the panel renders its decision, the unsuccessful party is to implement remedying measures – this is to be done within 45 days of the receipt of the panel report. If it does not, the aggrieved party may seek compensation, suspension of benefits, or fines.

One important point of departure between the two agreements is the fact that to resolve the issue of ‘panel blocking’, the TPP enabled the TPP’s Commission to appoint panelists if the parties fail to agree on a roster. Such a provision has not been incorporated into the USMCA, potentially creating similar problems in dispute settlement as had plagued NAFTA wherein panels remain defunct since parties can refuse to nominate panelists.

India’s approach to dispute resolution has evolved in the past decade or so and much of the current thinking is enshrined in the latest version of the Model BIT unveiled by India. The broad characteristics of India’s approach have been described in the previous section and will inform talks for this chapter in any trade treaty.

Competition Policy

Competition law and policy establishes, maintains and promotes market competition by regulating anti-competitive business practices. There are two broad schools of thought guiding the objective for formulating Competition Policy – the economic i.e. – maximizing efficiency within the market economy and second, non-economic – to facilitate public interest by fostering equity and fairness.⁸⁷ It can be argued however that competition policy in most

⁸⁷ “Objectives of Competition Policy” OECD <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/27122227.pdf> p.1



countries seeks to achieve both of these objectives in a balanced manner. Trade agreements signed by both the US and India have included chapters relating to Competition Policy and this will be an important component for discussion in trade talks.

TPP: Some of the dominant provisions in the Competition Policy chapter in the TPP are as follows⁸⁸:

Procedural fairness: TPP lays out several important articles to ensure procedural fairness in the way competition policy is implemented and investigations conducted:

- The TPP called upon all parties to formulate and enforce competition laws to all commercial activities in their territories by establishing appropriate authorities for this purpose. Exclusions are allowed for transparent 'public policy' or 'public interest' grounds.
- The agreement further stated that before a party imposes a sanction or remedy against a person for violating its national competition laws, information about the competition concerns are to be relayed and the person has legal recourse, that is – 'reasonable opportunity to be represented, hear and present evidence in its defence, cross-examine witnesses etc.
- Investigations are to be conducted under the competition laws within defined timelines or within 'a reasonable time frame'. Each party is to maintain rules of procedure and evidence for enforcement proceedings.
- To provide the opportunity to seek review of a sanction or remedy, including any alleged errors, in a court or other independent tribunal established under the party's laws.
- Maintaining confidentiality in public notices, during the investigation.
- If a country's competition authority alleges a violation, the burden of proof to make evident such violation rests with the authority.

The TPP further stated that parties should consult the APEC Principles to Enhance Competition and Regulatory Reform while adopting or maintaining domestic competition laws.

Private right of action: the agreement also calls upon all parties to set up an Independent Private right of action for a person to seek redress from a court or other independent tribunal for injury to that person's business or property caused by a violation of national competition laws.

Cooperation: the agreement sought to foster cooperation in the development of competition policies, exchange of information etc. and called for technical cooperation between the various parties.

Consumer protection: to protect the interests of consumers, the chapter specifically highlights fraudulent and deceptive commercial activities that cause actual or imminent harm to consumers. Consumer protection laws to deal with such situations is to be adopted to maintained in all parties – the TPP also recognized the trans-national nature of such activities and hence called for enhanced cooperation in this area.

⁸⁸ <https://ustr.gov/sites/default/files/TPP-Final-Text-Competition.pdf>



The TPP called for transparency in competition policy and laws in each country that is party to the agreement and made a provision for consultations amongst the parties in case of disagreements – this chapter is outside the purview of dispute settlement under the TPP.

USMCA: while the overarching provisions of the articles under the Competition Policy chapter of the TPP carried over to the USMCA, the latter agreement did add/make some changes to further tighten and further clarify certain provisions⁸⁹.

- **National laws outside the territory:** One important distinction in the USMCA is that while the Competition Policy chapter called for all parties to enforce competition laws in all areas of commercial activities in its territory, it further stated “this does not prevent a Party from applying its national competition laws to commercial activities outside its borders that have an appropriate nexus to its jurisdiction.” This opens up the possibility of a country’s domestic competition laws being applied elsewhere, as long as there is a linkage to the said commercial activity.
- **Treatment:** The USMCA further states that the enforcement policies of competition authorities must:
 - Treat persons of another Party no less favorably than persons of the Party in like circumstances (national treatment)
 - Limit remedies relating to conduct or assets outside the party’s territory to situations in which there is an appropriate nexus to harm or threatened harm affecting the party’s territory or commerce.
- **Counsel participation:** Under the kinds of legal recourse available to persons, the USMCA also allows for the person’s counsel to participate in all meetings or proceedings with the national competition authority and also recognizes the confidentiality of lawful communications between the person and counsel concerning the soliciting or rendering of legal advice. These provisions hence further bolster the legal avenues available.
- **Mergers:** The USMCA further adds a provision with respect to reviews of merger transactions to allow early consultations between the national competition authority and the merging persons, including on potentially dispositive issues. This provision seeks to take into account M&A activity which could potentially be seen as monopolistic or have anti-competitive features.
- **Transparency:** Each country is to maintain transparency in the criteria used for calculating a fine for a violation, and also any fines imposed based on the person’s revenue or profit, are to be considered based on that specific party’s territory. The objective behind this provision seems to be to ensure that any fines for violating national competition laws are not calculated on headquarter earnings or profit (in the case of MNCs) which would help contain the damages.

India’s Competition Policy is enshrined in a 2002 law. The India-Japan CEPA has a chapter on ‘Competition’ that mention that “each party shall, in accordance with its laws and regulations, take measures which it considers appropriate against anticompetitive activities,

⁸⁹ https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/21_Competition_Policy.pdf



in order to facilitate trade and investment flows between the Parties and efficient functioning of its market.”

The chapter also calls for cooperation based on available resources; non-discrimination in application of anti-competition laws in like circumstances; implementing administrative and judicial procedures in a fair manner to control anti-competitive activities; promoting transparency in implementation of competition laws and policy. The chapter (like TPP and USMCA) is also not subject to dispute settlement mechanisms.

The United States is likely to argue for more stringent and detailed provisions in the Competition chapter in trade talks with India. Some anti-competition cases have recently been brought against US MNCs in India and these could potentially lay the groundwork for the central issues that would inform this chapter.⁹⁰ At the very least, issues related to confidentiality, transparency, full legal recourse, application of laws outside of jurisdiction will come for enhanced scrutiny.

Government Procurement

Government procurement is the process by which a government acquires goods or services for its own purposes and not for commercial sale, or for the production or supply of goods intended for further sale or distribution. Globally, government procurement accounts for a large share of economic and commercial activity.

On a multi-lateral level, government procurement has been addressed by a plurilateral agreement – the Government Procurement Agreement (GPA) under the WTO signed in 1996. The GPA has only 20 parties comprising of 48 WTO members. Another 34 WTO members/observers participate in the GPA Committee as observers. Out of these, 10 members are in the process of signing on to the Agreement.⁹¹ In addition, many countries have bilateral agreements with other nations to regulate the rules around government procurement. The fundamental aim of the GPA and other government procurement focused agreements is to mutually open government procurement markets among treaty parties.

US FTAs have typically extended national and nondiscriminatory treatment among parties and promoted transparency in the tendering process of government procurement.⁹²

TPP: The Trans-Pacific Partnership (TPP) was the first such international trade agreement to comprehensively tackle the issue of government procurement through a dedicated chapter. The TPP comprised of a medley of economies at various stages of development, each with

⁹⁰ “India orders antitrust probe of Amazon, Walmart's Flipkart”, Reuters, January 13, 2020 <https://www.reuters.com/article/us-india-antitrust-ecommerce/india-orders-antitrust-probe-of-amazon-walmarts-flipkart-idUSKBN1ZC1BO>

⁹¹ “Agreement on Government Procurement”, World Trade Organization (WTO) https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

⁹² “NAFTA Renegotiation and the Proposed United States-Mexico-Canada Agreement” Congressional Research Service Feb 26, 2019 <https://crsreports.congress.gov/product/pdf/R/R44981> p.21



varying levels of regulations, including with regard to domestic sourcing in procurement and transparency - making this chapter all the more remarkable. While the chapter laid out certain basic principles and rules for government procurement that all parties must adhere to, the agreement did also provide for transitional measures (adjustment) taking into account the developmental and economic compulsions of each party.

Like the GPA, the TPP had broad coverage sectors for each country – that is, goods and services in select areas by central and/or sub-national entities that are covered by the government procurement rules including the thresholds for each. Some of the main principles at the heart of this chapter include:

- **National Treatment and non-discrimination:** with respect to any measure regarding covered procurement, each party is to accord treatment that is no less favorable than that given to its own procuring entities. Each party commits not to discriminate based on foreign ownership (including for locally established suppliers).
- **Procurement methods:** each party must adhere to open tendering procedures for covered procurement.
- **Rules of Origin:** covered procurement should be accorded the same rules of origin that are accorded to that good in normal course of trade.
- **Offsets:** with regard to covered procurement, parties commit not to enforce or impose any offset obligations at any stage of a procurement.

Broad exclusions to the chapter include:

- Acquisition and rental of land, existing buildings or other immovable property
- Non-contractual agreements- including cooperative agreements, grants, loans, equity infusions, guarantees, subsidies, fiscal incentives
- Services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes securities
- Foreign aid or international grants, loans or other assistance
- Public employment contracts

Amongst the exceptions to the chapter are measures necessary to protect intellectual property and environmental measures necessary to protect human, animal or plant life or health.

Transitional measures for developing countries include (by agreement) transparent price preference programs for domestic suppliers, offset measures, delayed application of obligations etc – these rules are specific to each party and spelled out separately for each.

The TPP also laid out detailed rules for publication of procurement information, notices of intended procurement as well as extensive rules governing conditions for participation in a procurement bid, qualifications of suppliers, tender documentation, timelines for procurement etc. The agreement further commits parties to setting technical specifications in terms of performance and functional requirements rather than design and or descriptive characteristics (which can be subjective) and calls upon parties to base technical specifications on international



standards or national standards. The basic purpose of all these rules is to ensure that parties are not using technical specifications or conformity assessment procedures intended to create 'unnecessary obstacles' to trade.

The TPP further called upon each Party to establish at least one impartial administrative or judicial authority to review a challenge or complaint by a supplier alleging breach of the rules set forth in the government procurement chapter.

Exclusions in the coverage agreed to by the US included Buy America requirements attached to federal funds for state and local mass transit and highway projects and water projects; small business and other set-asides; procurement of transportation services; human feeding programs; and sensitive elements of Department of Defense procurement, including defense systems, materials and textiles. In addition, the TPP also left out commitments to cover state or local government procurement though this was open for negotiation in the future.⁹³

USMCA: The USMCA's government procurement chapter applies only to such procurement between Mexico and the United States, precluding Canada. Interestingly, this makes the agreement the first U.S. FTA not to include procurement commitments for all parties.⁹⁴ Procurement opportunities and obligations between the United States and Canada will continue to be guided and covered by the WTO GPA which both countries are party to. Mexico is not party to the GPA.

The USMCA's government procurement chapter thus contains provisions similar to what the US had agreed to vis-à-vis the TPP, including the same main principles, exclusions and exceptions as mentioned above.

In addition, the agreement also excludes from US commitments, government procurement from the financial services chapter and textile and apparel procured by the Transportation Security Administration (TSA) under the "Kissell Amendment." The USMCA uses a negative list approach for services (that is – all services are allowed unless expressly excluded).⁹⁵

⁹³ <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Government-Procurement.pdf> p.3

⁹⁴ "NAFTA Renegotiation and the Proposed United States-Mexico-Canada Agreement (USMCA)", Congressional Research Service, February 26, 2019 <https://crsreports.congress.gov/product/pdf/R/R44981> p.81

⁹⁵ Ibid. p.22



Chapter III

Getting to 'Yes': Sequencing the Roadmap for a Deep Bilateral Trade Agreement

In the first section of this paper we have attempted to make a case that the trade partnership between the US and India is strong and has enormous potential to grow – the right trade architecture can provide a much greater impetus and could place the growth trajectory in the fast lane. By the same token, chapter 2 highlighted the specific priorities for the United States as reflected in two major trade agreements negotiated by a Democrat and a Republican administration, as well as India's current policy stance on each of these. The latter also brings up the challenges that are likely to meet trade negotiators on both sides given the often-divergent views and positions of each country in trade matters.

That said, as the interest in plurilateral trade agreements appears to be temporarily waning somewhat in both nations (reflected in the US pull-out from TPP and India's withdrawal from RCEP), the focus for both seems to be on bilateral trade agreements instead. While the US has articulated interest in negotiating a trade agreement with the United Kingdom (post Brexit), the European Union, Japan etc, India is once again seeking to train its sights on markets in the European Union and also the United States amongst others.

We thus argue that with political will (which will need to be cultivated by the leadership in both nations), and with enough preparation, a broader trade agreement may be a feasible option to consider bilaterally. It will require perseverance, a deep and nuanced understanding of each other's' priorities and developmental imperatives as well as creative thinking on the stickiest issues that are bound to come up. Domestic consensus will also need to be built, taking into account the opposition's interests and key concerns to enable successful passage of any trade agreement in the future.

The major demands likely to come up in trade negotiations with the US have also come up with the EU and now more and more likely with Asian economies as well. In order for India to integrate with Global Value Chains that often span Asia, Europe, and North America, it is



critical for India to begin laying the groundwork for a trade framework that makes it easier for MNCs (and domestic Indian firms) to truly begin to see how India can be positioned as a manufacturing and exports hub – this after all is the key concern of the ‘Make in India’ campaign also.

China has begun to adopt many such provisions domestically as well (for example in Intellectual Property Rights – patent linkages etc. India’s trade policy thus needs significant re-working – this work must begin now and is important to undertake irrespective of a trade deal with the United States. It is in India’s own long term strategic and commercial best interest to do so.

In this section we thus look at the short-term, medium term and long-term steps that need to be taken to implement a broader trade agreement down the road, and hence enable both parties to finally get to - ‘Yes’!

Immediate and Medium Term Steps

1. Central Imperative: Avoid Escalation

It is imperative that both sides put in place a robust mechanism to de-escalate trade issues. There needs to be adequate safeguards and channels of communication and consultation (especially behind closed doors) to ensure situations remain contained.

2. Apex trade body in India⁹⁶

An “apex entity” should be created that has a clear mandate from the Prime Minister to consult with stakeholders and manage the process of developing an overall comprehensive trade strategy and conducting all trade negotiations. This entity cannot however be solely responsible for implementation since that will by necessity involve many players in and outside the government. The apex body’s role in the implementation phase would thus be to act as coordinator and convener, and to have the mandate to monitor and assess implementation by relevant agencies within the government.

Such a body would have the authority and decision-making power (since it will report directly to the Prime Minister and have his blessings) to move on sensitive trade issues with American (and other) counterparts in swifter and more decisive ways than is the case right now.

The proposed apex entity can be called the National Trade Policy Council (NTPC). It will ensure that all agencies that are involved with trade activities — line ministries, regulatory bodies, state governments — know what the goals are. They are fully informed of the priorities that are defined by the strategy, and use it as a framework that guides their activities. The

⁹⁶ Roy, Jayanta Dr. “PM needs to oversee trade policy and negotiations”, Business Standard, Op-Ed, Nov 13, 2019 https://www.business-standard.com/article/opinion/pm-needs-to-oversee-trade-policy-and-negotiations-119111300019_1.html



NTPC should be chaired by a minister who reports directly to the PM. The Council should include senior representatives of all relevant ministries and regulatory agencies. It should have the mandate to create technical committees that bring together sectoral or issue-specific experts to provide inputs on the design or implementation of specific dimensions of the trade strategy.

The NTPC could have two offices — Office of the Chief Trade Negotiator, and the National Logistics and Trade Facilitation Council (NLTF). The office of the Chief Negotiator would be responsible for all trade negotiations at multilateral, regional, and bilateral levels. The office could have a multi-lateral unit (to engage with WTO, UNCTAD etc) and a separate bilateral/regional unit. The negotiations with the United States would thus fall to the Europe and Americas Department within the bilateral/regional unit – the other two being the Southeast Asia (SEA) and Africa, West and Central Asia (AWCA) departments.

Creating such a specialized agency to tackle trade specifically would provide more ‘teeth’ the way USTR does and thus put Indian and American negotiators on an even footing.

There are several trade chapters which will require preparation and internal work over a slightly longer period. These issues require deeper analysis, and in some cases regulatory changes or a change in the administration’s stand that requires consensus building within the country.

Intellectual Property Rights

Protection for Intellectual Property Rights in India has been a major sticking point in US-India trade and commercial relations. The issue has come up year after year as the United States has unilaterally placed India on its Special 301 ‘Priority Watch List’ and ‘Watch List’ in different years.

Patents: the patentability criteria adopted under US law is quite broad and many clauses directly contradict Section 3(D) of India’s Patent Law which for example, specifically excludes from patentability criteria new forms of a known substance that does not result in “enhancement of the known efficacy of that substance” (interpreted by India’s Supreme Court to mean “therapeutic efficacy”). India’s position has been that Section 3(D) is fully compliant with the TRIPS agreement. The TPP and USMCA further also has a provision on extension of patent terms for ‘unreasonable delays’ which could be a potential sticking point.

Data Exclusivity: Under US law, data exclusivity for biologics extends to 12 years – under the TPP the term was 8 years while USMCA attempted to push this to 10 years (which was finally not agreed upon). The TPP provided five years of data exclusivity for small molecule pharmaceuticals (can run simultaneously with a patent term). The US will likely push for longer data exclusivity terms including for biologics in future agreements too – it is of key importance to the agro-chemical and pharmaceutical industries. These are however, viewed by some as part of TRIPS-Plus provisions. India does not currently have a law dealing with data exclusivity and has high interest from Indian generic drug manufacturers, activists etc with regard to access to affordable pharmaceutical products

Trade Secrets: The United States has been interested in India adopting specific domestic legislation to deal with trade secrets – India however contends that its current legal framework adequately affords protection for trade secrets.



	<p>Copyright: Under TRIPS, copyright protection is afforded for term of life plus 50 years – however, both the TPP and USMCA have adopted TRIPS Plus provisions that is, copyright protection of term of life plus 70 years. India is more likely to want to adhere to TRIPS specifications in this area. The USMCA also did away with the ‘balance’ provision which afforded exceptions to copyright rules for legitimate purposes – this could be another sticking point.</p>
<p>Digital Trade</p>	<p>The following issues need greater scrutiny:</p> <ul style="list-style-type: none"> – Personal Information protection – Non discriminatory treatment – Data localization – Source code disclosure (except in certain cases demanded by regulatory authorities) – Cross border flow of data (including limits on where the data is to be stored and processed) <p>The above are all matters where the US has taken a strong position in its trade agreements – the same stipulations are thus echoed in both the TPP and USMCA. The fact that many developing countries (as part of TPP) also agreed to these measures (like no data localization norms, free cross border flow of data, no source code disclosure etc) is also notable.</p> <ul style="list-style-type: none"> – A taskforce on digital trade should be constituted urgently so that these issues can be tackled – this must be done with adequate and consistent industry input on both sides. Dedicated negotiations could prove to be fruitful in resolving this sector over the short to medium term.
<p>Rules of Origin</p> <p>Recent US trade agreements have made Rules of Origin a central priority with a special focus on textiles and autos in the USMCA. The effort appears to be to ensure that a large portion of an imported product (in order to avail of tariff benefits under the agreement) is sourced and manufactured within the parties to the agreement. The basic reason is to ensure that wholly manufactured products but also parts, and components are not completely sourced from non-parties while availing tariff benefits.</p>	<ul style="list-style-type: none"> – The United States and India would need to engage in intensive conversations to resolve ROO priorities for each in sectors like textiles, automobiles and auto parts, components, as well as in products like ICT products, solar panels etc. – As mentioned earlier, India has typically insisted on stronger and more stringent ROO. ROO in recent trade agreements concluded by India set a change in tariff subheading (CTH) and minimum value addition of 35 per cent. On the other hand, the US has stricter and much higher threshold for tariff free imports under sectors like automobiles, auto parts and components, as well as for steel and aluminum used in this sector. ROO for textiles have been made stricter under USMCA too though there are flexibilities built in as well. – Both countries would need to come to agreement on ROO relating to broad swathes of commercial activity and various sectors. Current configuration of Global Value Chains would need to be accounted for while framing such rules – both nations will likely need some flexibilities in terms of sourcing inputs from low cost Asian economies while leveraging their own technological, and R&D prowess in producing final products – this will differ from sector to sector.



<p>Investment: As mentioned in the Investment section under Chapter 2 of this report, there are several elements of departure between India and the US's approaches to FDI.</p>	<ul style="list-style-type: none"> – Definition: The US follows an asset-based definition of 'investment' which is quite broad in its scope. India on the other hand uses a set definition based on the enterprise laws of the country which includes intangibles like 'contributing to the development of India'. – National Treatment and Most Favored Nation: Equal treatment on the basis of national treatment and MFN is included in US's trade agreements while these do not figure in India's Model Bilateral Investment Treaty or in trade agreements concluded. – Minimum Standard of Treatment: based on customary international law is another component that is included in US led investment chapters – Expropriation and Compensation: There are likely to be differences in the way this sub-section is applied in each country. Also, in the TPP and USMCA, this did not apply to IPR/Compulsory License issues even though exceptions on health-related public policy concerns are possible under the chapter. India is likely to take exception to this. – Performance requirement: including export quotas, domestic content etc. are expressly prohibited in trade agreements acceded to by the US. India on the other hand would likely require flexibilities on this front given its domestic developmental compulsions. – Composition requirements of senior management/ Board of Directors: especially as these relate to nationality of personnel (including numerical limits) and control of the company. Such provisions as reflected in investment norms for the insurance sector in India for example will need to be approached strategically. – Investor-State Dispute Settlement: The USMCA has diluted recourse to ISDS even though the US has been relatively successful in ISDS claims against it. India however is currently embroiled in 15 such cases. Under the revised Model BIT, while India does allow recourse to ISDS, this can be done under very stringent conditions and after exhausting local avenues for redressal (the latter is true for USMCA as well though timelines vary).
<p>Trade in Services</p>	<p>Issues likely to be raised in the Trade in Services chapter include:</p> <ul style="list-style-type: none"> – National treatment and MFN status – Prohibition on quantitative restrictions – No local presence requirements – Market access for express delivery services – Support for MRAs – Commitments on Mode 4 mobility of skilled labour <p>For India, there is high interest that MRA agreements in services include various professional services such as for doctors, nurses etc where there is currently no mutual recognition of qualifications with the US. India will also likely push for some commitments from the US in maintaining the stability and certainty in the high skill worker program (especially H1B and L1 programs). The US would also demand market access in various services sectors that are currently not open to full FDI including in accounting, insurance, legal services, architecture etc. The US is also likely to push for De Minimis thresholds for express delivery services – this was included in the USMCA though not in the TPP.</p>

	<p>India’s offensive interest has been in trade in services over the past three decades with a specific focus on Mode 4 labour mobility.⁹⁷ While fully recognizing that Mode 4 trade in services is a challenging area since it relates to a country’s overall immigration and visa policies (issues that are highly sensitive and controversial at this point of time), India could request for reassurances from the United States on maintaining the integrity of the skilled labour visa program as well stability in the regulatory and administrative framework around it to provide greater certainty to business interests. In the long term, the disruptive influences of Automation and Artificial Intelligence could make Mode 4 labour mobility less relevant for Indian industry.</p> <ul style="list-style-type: none"> – In the immediate to medium term though, this will continue to be a priority negotiating ‘ask’ for industry and needs to be tackled. – A bilateral working group could be set up to come up with some creative solutions. Such an effort must have significant industry input. <p>In addition, a US-India Totalization Agreement or a double-taxation avoidance agreement has been an ‘ask’ from the Indian side for well over a decade. Indian industry in the U.S. pays approximately \$1 billion towards social security, which is only redeemable after 10 years. Since a typical term of a temporary high skill visa holder is 3-6 years, such workers are unable to derive any benefits. The U.S. view has been that due to the incompatibility of the two countries’ social security systems, the Totalization Agreement may not be plausible in the current context.</p> <ul style="list-style-type: none"> – Given that this is a priority for Indian industry, a bilateral study group could be set up to undertake deep analysis of the issues at stake and what regulatory requirements would need to be met in order for a Totalization Agreement to even be a feasible prospect. – Such a detailed study could finally help either move the needle on this issue or help get past it if it is not feasible as the US has contended.
<p>Dispute Resolution</p>	<p>Like the Investor – State Dispute Resolution (ISDS) section in the Investment chapter, the state-to-state Dispute Resolution chapter will likely need intense negotiations on issues such as:</p> <ul style="list-style-type: none"> – MFN status and ‘fair and equitable treatment’ norms – Exhaustion of local remedies (and timelines therein) – Conditions for approaching arbitration tribunals – Exclusions to ISDS – Panel composition in state to state dispute resolution
<p>Competition Policy</p>	<p>Much negotiation will be required to find common ground on competition policy as it figures in current and US trade agreements. In particular, issues related to confidentiality in investigations, full legal recourse, application of domestic law outside jurisdiction in certain instances are likely to prove sticky.</p>

⁹⁷ Mode 4 in Trade in Services is defined by the WTO as: presence of persons of one WTO member in the territory of another for the purpose of providing a service. It does not concern persons seeking access to the employment market in the host member, nor does it affect measures regarding citizenship, residence or employment on a permanent basis: https://www.wto.org/english/tratop_e/serv_e/mouvement_persons_e/mouvement_persons_e.htm



Government Procurement	<p>Currently, India is not party to the WTO Government Procurement Agreement while the United States is. The major issues that will need to be negotiated in a government procurement chapter between the two countries include:</p> <ul style="list-style-type: none"> – National treatment and non-discrimination – Transparency in tendering, bidding processes – Coverage of sectors plus exclusions – Offsets and their applicability – State and local coverage – Transitional measures <p>India again follows the negative list approach in services while the US follows the positive list approach – thus the number of sectors open to bidding can be very different in each nation.</p>
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Long Term Steps

There are a few final but critical trade chapters that will likely require greater ground work, preparation and consensus building over a longer period of time. These require systemic reforms and will also need major cooperation and buy-in from state and local stakeholders.

Agriculture	<p>Agriculture is a sensitive area in trade talks and this is true for both the United States and India. 58% of people in India count on agriculture for their livelihoods though the sector contributes about 15-20% to India's GDP.⁹⁸ Challenges like small and increasingly fragmented land holdings, lack of availability of financial assistance and loans at favorable terms, thin margins, lack of value-added agricultural production, lack of adequate warehousing, and cold chains are some of the major issues that have been stress points for the sector in India.</p> <p>While India does have higher tariff rates for many agricultural products, there is also the issue of subsidies and other protections offered by developed countries (including the United States) to its own agricultural sector.</p> <p>In addition, there are issues related to Sanitary and Phyto-sanitary (SPS) measures and technical barriers to trade, which have made agricultural exports from India difficult. These issues have been hard fought at multi-lateral forums including the WTO.</p> <p>This sector will need a balanced approach in trade negotiations with the United States. Principally, the following issues will need to be tackled:</p> <ul style="list-style-type: none"> – Sectors where tariffs can be reduced and/or eliminated in a phased manner. This would include consultations with industry, and robust measures to boost domestic industry over time to ensure that the specific sectors/products are able to compete. – Better harmonization of standards and regulations to reduce SPS issues and technical barriers.
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⁹⁸ <https://data.worldbank.org/indicator/NV.AGR.TOTL.ZS>; http://www.cuts-citee.org/pdf/CUTS-Submission_to_Parliamentary_Standing_Committee_on_Commerce_for_Indias_Engagement_with_Free_Trade_Agreements.pdf



Labour	<p>Labour standards and compliance has been a long-standing issue in US-India trade relations and it will be a strident demand from the Democrats in the US Congress.</p> <ul style="list-style-type: none">– India will need to determine whether (and in a phased manner), it can sign on to the principles enshrined in the International Labour Organization’s (ILO’s) 1998 Declaration on Fundamental Principles and Rights at Work. India is currently party to a few but not all the principles.– Domestic labour reforms (such as minimum wages, labour contract terms, hours of work and occupational safety and health etc) that may need to be enacted at the state and federal level in India will also need to be examined. India will thus need to make a determination on which reforms fit within its own development and growth priorities and trajectory; where political consensus might be possible; which states could be incentivized to enact such reforms and so forth. In particular, India will need to weigh the trade-offs between health and safety, on the one hand, and productive efficiency on the other.– The kind of monitoring and implementation guidelines and mechanism that may be acceptable in each country.– Substantial reduction in agricultural subsidies in both countries in a phased manner. <p>As mentioned earlier, so far India has been reticent with regard to labour chapters in trade negotiations. There will thus need to be intensive dialogue and negotiations (both internally and with the US) on how much and how far India may be willing to go in incorporating a labour chapter in a trade deal.</p>
Environment	<p>The tensions between the compulsions of economic growth/ development and environmental sustainability and protection is one that is experienced by most countries (whether developed or developing). Given the worldwide awareness around the issue of climate change and environmental degradation at a global scale, there is now enhanced pressure on countries to adopt higher environmental standards.</p> <p>India, for its own long-term interests has taken on the mantle of protecting the environment domestically – this is also exemplified in the current government’s mantra of ‘Zero Defect-Zero Effect (on the environment)’ when it comes to manufacturing standards- India is also party to the Paris Climate Change treaty. At the same time, India is also firmly committed to the principles of ‘Common but Differentiated Responsibilities and Respective Abilities’ when it comes to global negotiations on environmental protections.</p> <p>However, India has been wary of enforceable environmental standards being built into trade agreements especially in light of the perception that these could constrain the country’s growth over time.</p> <ul style="list-style-type: none">– It appears that India is already party to most of the seven international environmental agreements that all parties to the USMCA had to accede to – the Environment Ministry may need to weigh in on stipulations in the context of a trade agreement though.– Provisions related to marine littering, subsidies for illegal fishing, and air quality are amongst the clauses that will need detailed discussions domestically in India as well as negotiations with the United States.– Technology sharing (such as for clean carbon) and collaboration on clean energy as well as best practices learnings could be important parts of the trade pact.



Chapter IV

Conclusion

The sections outlined in this report lay out for the first time, a detailed map of the major trade priorities for the United States as seen through the two major trade agreements negotiated under each respective party in the past few years – the Trans-Pacific Trade Partnership and the US-Mexico-Canada Agreement. Even though the US eventually pulled out of the TPP, it is instructive to examine the agreement since it did receive acceptance from many other developed and developing countries – even though some of the high standards clauses were diluted in the final CPTPP agreement (minus the United States), the agreement still does retain a major chunk of the priority chapters and clauses that were advocated by the United States before it withdrew. The TPP also went on to serve as a blueprint for improvement of the decades old NAFTA agreement (which was eventually ratified into the USMCA).

In particular, it is important to look at these two agreements because they represent the core interests of both Democrats and Republicans and included final stage compromise to achieve bipartisan consensus.

It is almost certainly guaranteed that any future trade agreement negotiated by the United States will adopt core elements of the TPP and USMCA – irrespective of which administration is in power. This report hence outlines an ambitious roadmap in which some kind of a trade agreement could potentially be negotiated between the United States and India – this could take the form of a CEPA, a CECA, or perhaps even an FTA – that depends entirely on the two nations and how far each is willing to go. There are several components to such an agreement that can and should be tackled immediately while some others will require more preparation, ground work and consensus building including implementing domestic reforms.

CII also proposes that each side take steps to tackle certain chapters each year – this will in and of itself prepare the groundwork for detailed trade negotiations, while allowing time for more complicated issues to play out.

- This will allow each side to consistently engage with, prioritize, tackle and attempt to solve core concerns in a mutually beneficial manner.



- Confidence building steps need to be undertaken to break down market access barriers on both sides while building mutual trust and understanding of each other's major priorities and domestic compulsions.
- Such sequential action drawn from the broad framework outlined in this report would be the best way to bring the two massive economies to become more closely inter-linked with each other while enhancing the comfort level in each country's private sector in doing business with the other.
- The sequential phasing should include significant input from industry – a few core sectors should be tackled each time. Incremental domestic steps where necessary should also be undertaken with specified timelines for framing and implementation.

In sum, an ambitious and high standard trade agreement is possible to achieve with determination on both sides. Indian industry and CII stand ready to assist the government in this endeavor.



Confederation of Indian Industry

125 Years: 1895-2020

The Confederation of Indian Industry (CII) works to create and sustain an environment conducive to the development of India, partnering industry, Government, and civil society, through advisory and consultative processes.

CII is a non-government, not-for-profit, industry-led and industry-managed organization, playing a proactive role in India's development process. Founded in 1895 and celebrating 125 years in 2020, India's premier business association has more than 9100 members, from the private as well as public sectors, including SMEs and MNCs, and an indirect membership of over 300,000 enterprises from 291 national and regional sectoral industry bodies.

CII charts change by working closely with Government on policy issues, interfacing with thought leaders, and enhancing efficiency, competitiveness and business opportunities for industry through a range of specialized services and strategic global linkages. It also provides a platform for consensus-building and networking on key issues.

Extending its agenda beyond business, CII assists industry to identify and execute corporate citizenship programmes. Partnerships with civil society organizations carry forward corporate initiatives for integrated and inclusive development across diverse domains including affirmative action, healthcare, education, livelihood, diversity management, skill development, empowerment of women, and water, to name a few.

India is now set to become a US\$ 5 trillion economy in the next five years and Indian industry will remain the principal growth engine for achieving this target. With the theme for 2019-20 as 'Competitiveness of India Inc - India@75: Forging Ahead', CII will focus on five priority areas which would enable the country to stay on a solid growth track. These are - employment generation, rural-urban connect, energy security, environmental sustainability and governance.

With 68 offices, including 9 Centres of Excellence, in India, and 11 overseas offices in Australia, China, Egypt, France, Germany, Indonesia, Singapore, South Africa, UAE, UK, and USA, as well as institutional partnerships with 394 counterpart organizations in 133 countries, CII serves as a reference point for Indian industry and the international business community.

Confederation of Indian Industry

The Mantosh Sondhi Centre

23, Institutional Area, Lodi Road, New Delhi – 110 003 (India)

T: 91 11 45771000 / 24629994-7 • F: 91 11 24626149

E: info@cii.in • W: www.cii.in

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