

A Digital Direction for BIMSTEC

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ABSTRACT The Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) was formed to foster socio-economic cooperation between its seven member nations – India, Bhutan, Myanmar, Thailand, Bangladesh, Nepal, and Sri Lanka. The group signed a free trade agreement (FTA) in 2004, but the pact is still not operational due to the lack of consensus on certain key issues. Some members like India are keen to finalise the terms of the agreement quickly and bring the matter to a close. This paper argues that it behoves BIMSTEC members to not be hasty, and instead recalibrate their approaches to the FTA so that the agreement adequately takes into account the rapid digitisation of global trade paradigms.

INTRODUCTION

The framework agreement on the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) free trade area was signed in 2004.¹ It was never operationalised, however, as member countries failed to reach a consensus on several issues.² Growing increasingly frustrated with this impasse, India softened its own stance and proposed concluding the matter with a “low ambition agreement”.³ But rather than rushing to close the matter, BIMSTEC leaders should take this time to recalibrate their approaches to the agreement and see how it can be used to address the rapidly changing nature of global trade paradigms.

The globalisation of digital technology and the ability to move data across borders now underpins an increasing amount of international trade.⁴ The pervasiveness of digital systems in trade can be seen across a variegated set of activities. First, online platforms serve as marketplaces for consumers and suppliers of a range of different products. Second, the internet allows businesses to participate in global value chains they might not have had access to before. Third, enterprises now tap the internet’s outreach potential to increase their productivity, innovativeness, and competitiveness – leading to greater global trade.⁵ Finally, digital technologies also help overcome

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traditional barriers to trade in developing countries such as insufficient infrastructure, isolated markets, and inefficient logistics.⁶

It is imperative, then, for BIMSTEC nations to design and ratify a comprehensive FTA that accounts for all aspects of the digital economy. This paper proffers three key arguments to support this proposition. First, the FTA could serve as an enabling framework for the digital economy, both at the local and regional levels. Currently, most nations within BIMSTEC do not have an adequate framework targeting key regulatory aspects of the digital economy. Research shows that the enactment of cyber laws in certain key areas could engender significant economic rewards for nations by bolstering investor confidence, acknowledging commercial prospects, and recognising the increasing dependence on technology in sectors like governance, health care, education, finance, insurance, and retail.⁷ Thus, a basal regulatory framework is necessary for BIMSTEC nations to harness digital dividends.

Second, a trade pact framed along digital lines could serve as a template for others to follow, as the digital economy is a relatively new sphere of trade governance. Many countries are already looking to update extant trade rules to accommodate different facets of the digital economy. Illustratively, provisions in recent mega-regional trade agreements such as the Trans-Pacific Partnership (TPP), the Trans-Atlantic Trade Investment Partnership (TTIP), and the Regional Comprehensive Economic Partnership (RCEP) contain several provisions pertaining to digital trade.⁸ The prospective signatories to these agreements account for a substantial proportion of global trade and foreign direct investment (FDI). In the absence of any other agreements addressing the sphere of digital trade, it follows that the provisions subsumed under the TPP and TTIP will serve as the norm and be forced upon others. Thus, a technology-centred trade pact would also insulate BIMSTEC nations

from having to adhere to templates that may be averse to their objectives.

Third, BIMSTEC countries are well placed to agree on matters of digital trade as they are similarly placed both economically and technologically. As such, an FTA drafted along digital lines could help break the stalemate currently plaguing the negotiation process.

REGULATING CYBERSPACE THROUGH THE BIMSTEC FTA

Though the espousal of amenable laws is not necessary for operationalising the digital economy, it is essential for its sustainable growth.⁹ A supportive regulatory framework plays a pivotal role in brokering trust online and securing online transactions between enterprises, public authorities, and citizens.¹⁰ While there is no ideal legal framework for the digital economy, research indicates that the availability of relevant laws in certain legal areas is essential for bolstering consumer confidence in digital transactions.¹¹ Most BIMSTEC nations do have legislation that addresses some of these areas, but several key deficits remain. These areas are:

Electronic transactions and signatures¹² – Laws pertaining to e-transactions and signatures are needed to mitigate legal ambiguity around electronic commerce (e-commerce) transactions.¹³

Although most BIMSTEC countries have laws that bring e-transactions and e-signatures into their fold, issues continue to persist. For instance, one of the purported aims of Myanmar's e-transaction law is to grant legal protection to electronic records. However, it explicitly excludes from its ambit wills, negotiable instruments, title documents, and all instruments that require registration with the government.¹⁴ Thus, this provision of the Myanmar e-transaction law inadvertently thwarts the delivery of key e-governance services.¹⁵

Cybercrime¹⁶ – Most statutory provisions addressing cybercrime in BIMSTEC countries are

subsumed within broader technology legislations. In India, for instance, the Information Technology Act, 2008, looks at crimes as a subset of specific issues such as data protection and electronic records. Cybercrimes are often brought within the purview of extant criminal legislations, like the Indian Penal Code, 1860, which does not adequately address traditional criminal conduct using information and communications technologies, or new forms of criminality.

Consumer protection¹⁷ – Online trade differs from traditional physical trade in that consumers generally do not directly interface with suppliers. Thus, adequate consumer protection laws are necessary to protect online consumers and bolster their confidence. The need for adequate consumer protection is even greater in developing nations that have populations with relatively low literacy levels. While most BIMSTEC nations do have some form of consumer protection legislation in place, several of these legislations lack sufficient safeguards for consumer interests in the digital realm.

Data protection¹⁸ – Personal data is being called the new “oil” as it is an increasingly relevant revenue source for many technology companies. For instance, Google searches and Facebook use may be ‘free’, but in reality, these services are given in return for the grant of rights to use customers’ data for marketing purposes.¹⁹

An examination of regulatory frameworks in BIMSTEC countries reveals that data protection laws in the region are either inadequate or non-existent. For instance, data protection provisions in the Indian Information Technology Act do not cover how personal data may be collected, shared, processed or used.²⁰ They only provide compensation for any unlawful loss or gain that arises from a misuse of personal data.²¹

Intellectual Property (IP) rights²² – IP systems within the region should be evaluated to see where key deficits remain. Additionally, norms should be created in a way that reflects common priorities

within the group, such as safeguarding traditional knowledge and ensuring access to medicines.

In view of the impending increase in online activity by the private sector as well as the public administration in the BIMSTEC region, member nations must address the deficits in their legal frameworks. As the passage of individual legislation in each country can be onerous, the BIMSTEC FTA may be a more practical way to go about this exercise.

LESSONS FROM THE PAST: HISTORICAL TRENDS IN LEGAL STANDARD SETTING

Historically, legal standards in areas affecting the technology space, such as IP, have been dictated by the economic interests of the wealthier nations.²³ Illustratively, IP regimes in most developing countries find their foundation in IP statutes of the colonial powers that governed these nations.²⁴ Even when these countries shed their colonial status, their relative inexperience with IP forced most of them to continually adhere to imperial IP norms.²⁵ A few, however, began to review the operations of the IP systems left to them by their colonisers and decided to tailor these frameworks to suit domestic circumstances.²⁶ For instance, India designed a patent regime for a country with a low research-and-development base, a large population of poor people, and high drug prices.²⁷ The ensuing patent statute – the Patents Act of 1970 – catalysed the creation of a booming generic drugs industry.²⁸ Soon, other developing nations followed suit and passed patent laws that weakened pharmaceutical patent rights.²⁹ The proliferation of generics manufacturing in developing countries served as a direct threat to the hegemony of Western pharmaceutical companies.

Emboldened by their success in the pharmaceutical sector, developing countries began to challenge Western dominance in other key areas of IP. For instance, they questioned whether global IP standards in copyrights and patents adequately stimulated the diffusion of knowledge.³⁰ Thus,

they endeavoured to adjust these standards by seeking revisions of the Paris and Berne conventions. However, their attempts were unsuccessful. Even so, in forums such as the World Intellectual Property Organization (WIPO), the United Nations Conference on Trade and Development (UNCTAD), and the United Nations Educational, Scientific, and Cultural Organization (UNESCO), developing country blocs did succeed in thwarting the US' attempts to tilt IP standards in its favour.³¹

To regain control of the IP narrative, the US adopted a strategy of forum shifting in the 1980s. It argued that IP was a key determinant of international trade, and thus must fall within the scope of the General Agreements on Tariffs and Trade (GATT) negotiations.³² The end result of the GATT negotiations on IP was the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The US manoeuvred the TRIPS negotiation process in ways that kept most developing nations from influencing outcomes in any significant way.³³ However, it also lost a fair amount of its political capital with emerging countries in the process. As a result, subsequent attempts to strengthen IP protection in a multilateral setting were largely unsuccessful.³⁴

The exhaustion of multilateral trading platforms as a means for strengthening global IP standards prompted the US to deploy its forum shifting strategy once again. Preferential Trade Agreements (PTAs) became the new vehicle for exporting stronger IP standards around the world. PTAs allowed the US and the EU to advance a standards' setting agenda with considerably less effort than in a multilateral forum like the World Trade Organization.³⁵ The bilateral setting generally allowed the more powerful nation to wield its economic clout and ensure outcomes that primarily favoured its own interests.³⁶

The standards in these agreements were generally informed by private interests whose lobbying activities held (and still do hold) sway in the regulatory workings of developed countries and international forums.³⁷ As such, they were

largely detached from the traditional goals of a domestic IP system which sought to strike a balance between commercial profitability and the general public welfare. The concerns of private entities generally did not cater to matters of public interest and could thwart the delivery of important public goods such as education and health care.³⁸

The TPP, the RCEP and the TTIP are a new breed of PTAs. As stated earlier, these agreements are generally between countries that account for a substantial portion of world trade and FDI, in which two or more of the parties primarily drive the treaty agenda. These parties are generally nations – or groups of nations – that serve as hubs for global value chains such as the US or the EU.³⁹ Although both the TPP and the TTIP are in the negotiations phase, the TPP's IP chapter was leaked in 2015. The leaked text revealed that the standards set down again aim to serve the interests of the more powerful nations. Broadly, these provisions aim to strengthen patents in the pharmaceutical sector, jeopardising access to medicines in most member countries.⁴⁰

The historical context set out above serves as a guide to how developing nations will be forced to adhere to standards set out in TPP or TTIP when they come into force. As IP became increasingly relevant to economic outcomes in developed nations, the developed nations deployed a variegated set of strategies across different forums to ensure that global standards were aligned with their interests. Similarly, as other aspects of digital trade become more significant, developed nations will once again ensure that standards in these areas that align with their interests become the global norm. BIMSTEC nations can counter this narrative by developing and implementing a digitally-centric FTA with norms that serve the interests of member nations, both at the domestic and regional levels.

BREAKING THE STALEMATE

An FTA centred on digital themes could help break the stalemate currently plaguing BIMSTEC

negotiations, as the group holds several advantages as a platform for cooperation on issues pertaining to digital trade. First, it lends itself well to regional integration in terms of physical connectivity.⁴¹ The grouping currently has three projects underway which, when completed, will allow the seamless movement of goods and vehicles through the region.⁴² The first is the Kaladan Multimodal project that links India and Myanmar.⁴³ The project will specifically connect Kolkata to the Sittwe port in Myanmar.⁴⁴ The second is the Asian Trilateral Highway that links India and Thailand through Myanmar, which is expected to be completed this year.⁴⁵ The third is the Bangladesh, Bhutan, India, and Nepal (BBIN) pact on the movement of goods and vehicles between these countries.⁴⁶

Second, unlike the South Asian Association for Regional Cooperation (SAARC), where progress has been stymied by the rift between India and Pakistan, BIMSTEC is not weighed down by any regional tensions.⁴⁷ In its 30-year history, SAARC has made little headway in terms of either regional trade or connectivity. BIMSTEC is poised to chart a different path.

Third, BIMSTEC nations are all similarly situated in terms of socio-economic development, having populations that are largely reliant on mobile phones for connectivity, and are aligned on digital issues like the treatment of intellectual property (IP) such as safeguarding traditional knowledge and ensuring access to medicines.

THE WAY FORWARD

The BIMSTEC Technology Working Group will have to take the lead in drafting a set of provisions for BIMSTEC's digital-centric FTA. While it designs this framework, the group should keep the following principles in mind:⁴⁸

- **Functionality**⁴⁹

A regulatory strategy that employs a functionality-based approach starts by

evaluating what regulatory goals to strive for, and how they can be efficiently realised, regardless of externalities such as technologies.⁵⁰

Functional regulation recognises that the inherent differences in different technologies might call for these technologies to be regulated differently.⁵¹ Further, it also recognises that technology is rapidly evolving. An example of a functional policy prescription would be technology neutrality or technology agnosticism.⁵² The latter is deemed to be a better criterion as it lends a broader scope to regulation.⁵³

- **Flexibility**⁵⁴

The regulatory framework must promote dynamism and innovation by favouring a flexible, performance-based approach over rigid, prescriptive standards.⁵⁵

Competition typically enables a dynamic marketplace.⁵⁶ Thus, when it comes to regulating the commercial digital ecosystem, regulatory agencies should defer decision making to the markets as much as possible.⁵⁷ If interventions are required, regulators should seek to prescribe standards that can be enforced *ex-post* as opposed to *ex-ante*.⁵⁸ This will allow regulations to keep step with evolving technologies and marketplaces.⁵⁹

- **A bottom-up approach**⁶⁰

Taking a bottom-up approach means applying a consistent set of criteria to assess the market share within online networks and target areas where regulatory issues may arise in the future instead of judging how they came up in the past.⁶¹

A framework based on these principles will allow for greater market and technological neutrality, which are important considerations for cross-border digital commerce.⁶² It will also facilitate the achievement of regulatory objectives

in a cost-effective way.⁶³ Finally, it will engender a modicum of flexibility which will allow innovation to go on unfettered while meeting larger regulatory objectives.⁶⁴

A concerted effort must be made to ensure that the provisions of the FTA are drafted in a way that meets the interests of member nations. For instance, in the case of IP, special care should be taken to ensure that provisions do not jeopardise a country's ability to safeguard its traditional knowledge resources. Further, they should be geared towards larger development goals like increasing access to knowledge and medical care. Moreover, the FTA must address intraregional concerns in digital trade by including provisions that allow for the free cross-border movement of data and ensure that individuals and small businesses in all member countries can take advantage of e-commerce platforms and communicate efficiently at low cost, as well as access, move, and store data freely.

An FTA that addresses the digital aspects of commerce could benefit BIMSTEC in several ways. First, it could help fill several gaps in extant domestic regulatory frameworks that could stimulate innovation and growth at the local level. Second, it could allow for a freer and more open internet in the region and promote commerce without borders. Thus, it could help foster greater intra-regional trade. Third, it would insulate member nations from having to follow standards like those set out in the TPP. Given the historical background of how standards have traditionally been espoused, it is inevitable that BIMSTEC countries will be forced to adhere to the TPP norms if they are unable to create a template of

their own. It would also give countries which are part of the RCEP agreement, like India and Thailand, considerable leverage in the negotiation process. Fourth, it could be a source of considerable soft-power for BIMSTEC. If member nations were to bring out this FTA before the TPP, it would be the first agreement to take on digital trade and promote electronic commerce. Finally, digital trade could provide the common ground that could help break the current impasse within BIMSTEC free trade negotiations. BIMSTEC members are perfectly placed to agree on digital issues as they are similarly placed in terms of their economic standing and the development of their digital ecosystems.

The process of developing this agreement must be informed by lessons from the past. A historical assessment of the BIMSTEC FTA negotiations reveals that a dynamic of this sort can only work if members' objectives are aligned closely with one another. IP is one such area where BIMSTEC nations share common ground. As mentioned earlier, most BIMSTEC nations have similar priorities when it comes to IP, such as the preservation of traditional knowledge and ensuring access to medicines. IP could form the basis of an informed framework for engagement, which would also reflect other priorities of BIMSTEC countries in matters of digital trade. This would then leave behind the traditional discord between member nations and ameliorate addressing key policy fields for cooperation. A measured and coordinated approach will thus ensure long-term success for the BIMSTEC grouping and the development of a robust digital economy within the region. 

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