IT for Change's Response to the USTR's Request for Comments on Significant Foreign Trade Barriers for the 2026 National Trade Estimate Report

IT for Change
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Background

IT for Change (www.itforchange.net) is a not-for-profit organization based in India and engaged in policy research, advocacy, and institutional capacity-building on digital rights. A key area of our work is to promote policies for fair and inclusive digital economies. Our submission intends to inform the Office of the United States Trade Representative (USTR)'s assessment of significant foreign trade barriers with respect to India.

Along with the report on reciprocal tariffs, the USTR's National Trade Estimate Report (NTE Report) 2025 formed an important precursor to the US's announcement of increased tariffs against a range of countries, including India. As the USTR begins the process to identify significant foreign trade barriers for the National Trade Estimate Report 2026, our submission collates a list of Indian laws, rules, regulations, and policies pertaining to the digital economy, which were flagged in the NTE Report 2025. We argue that these policies constitute a legitimate exercise of the Government of India's sovereign powers to protect citizens and promote fair competition in the digital economy, and have parallels in regulatory measures in the US.

Moreover, their withdrawal may result in the further distortion of digital markets in favour of Big Tech companies, thereby harming the stated goal of maintaining free and fair trade, and enabling open and fair competition in the digital economy. Accordingly, we denounce the characterisation of these policy measures as "significant trade barriers" and call for the USTR to adopt an approach grounded in respect for states' sovereign right to regulate their digital economies in the public interest.

Regulatory measures essential to safeguarding the public interest in the digital economy

Under the guise of eliminating trade barriers in the digital economy, the NTE Report, 2025 targeted a plethora of domestic policies, regulations, and governance mechanisms that have been proposed or enacted by trading-partners of the US. Among others, the report identified import policies, sanitary and phytosanitary measures, public procurement practices, and a diverse range of subsidies. However, instead of being rooted in empirical evidence or data, the report's findings and suggestions relied on industry polemic and failed to recognise the public interest justifications of the introduction of such laws by sovereign nation-states. The consequences of adopting this approach are significant.

For one, the NTE Report, 2025 and the current US administration's trade policy remain oblivious to the needs of contextually informed governance and democratic accountability — key pillars of governance historically recognised by the US. Given that the laws and policies targeted under the NTE Report, 2025 closely mirror regulatory measures in the US, the USTR's opposition to their adoption elsewhere suggests an implicit denial of other states' sovereign right to regulate the digital economy in public interest.

NTE Reports, at their core, are statements about the policy priorities of the US administration. In light of the concerns stated above, we urge the exclusion of such policies and laws from the NTE Report of 2026, to preserve the necessary policy space for sovereign nation states to protect their citizens' rights, and build digital ecosystems based on principles of regulatory accountability, equity, and public interest.

More specifically, the NTE Report of 2026 must exclude the following measures from its ambit:

a. <u>Restrictions on cross-border data flows:</u> In a globalized digital economy, it is essential for all countries, and especially developing ones, to retain a certainlevel of control over data flows. Not only do such measures aid theimplementation of varying privacy and data protection requirements, depending on factors like data sensitivity and potential for national security harms, they can also act as precursors to the development of a competitive local ecosystem of digital infrastructures and services.

   In fact, restrictions on cross-border data flows are also embedded in manypolicy interventions in the US. These include, among others, i) the ProtectingAmericans' Data from Foreign Adversaries Act of 2024, ii) Executive Order 14117 (Preventing Access to Americans' Bulk Sensitive Personal Data andUnited States Government Related Data by Countries of Concern), iii) Montana's Genetic Information Privacy Act, and iv) the 2023 Amendment to California's Confidentiality of Medical Information Act.

   Accordingly, we urge the exclusion of the following Indian laws and policies from NTE Report 2026:

   i. Restrictions and conditions on cross-border data flows under the Digital Personal Data Protection (DPDP) Act, 2023 and draft DPDP Rules, 2025. These regulations serve to protect Indian citizens from privacy risks, do not impose disproportionate compliance obligations, and do not discriminate unjustifiably against U.S. companies.

   ii. Sectoral data localization requirements imposed by regulatory authorities including the Reserve Bank of India and the Insurance Regulatory Development Authority of India. By their very nature, these sectoral restrictions are need-based and proportionate.

b. Fair competition and market structure regulation: Digital markets, especially those mediated by platforms that enjoy direct and indirect network effects, are particularly prone to the first-mover advantage. A growing body of research scholarship and regulatory experience — put forth by bodies like the Federal Trade Commission and the Department of Justice (DoJ) in the US, the Competition and Markets Authority in the UK, the Directorate General for Competition in the EU, and the Competition Commission of India — have identified the many anti-competitive mechanisms that enable early movers to consolidate their market positions in the digital economy.

   Activities like predatory pricing, algorithmic collusion, and self-preferencing, allow asset-light software companies to scale quickly, while "killer acquisitions" can allow dominant platforms to buy out fledgling startups to eliminate future possibilities of competition. In fact, the DoJ's recent actions demanding ByteDance to divest from TikTok — a highly popular social media platform in the US — further indicate the administration's recognition of the need to take action against dominant foreign MNEs, when they pose risks to the interests and security of consumers, businesses and other domestic participants in the digital economy.

   Similarly, the DoJ's actions against Google on the grounds of abuse of monopoly power signal its recognition of the need to curb the risks of marketmonopolization by Big Tech entities– risks that India is increasingly contending with as well, across a range of digital domains includinge-commerce, electronic payments, social networking, online search, app stores, and operating systems. In this context, it is imperative that countries be allowed to freely frame their rules and regulations — to ensure heightened domestic competition as well as public interest-driven distribution of data dividends.

   We, therefore, urge the exclusion of the following Indian laws and policies from the NTE Report, 2026:

   i. Policies to promote competition in digital markets in India (such as the proposed Digital Competition Bill)

   ii. Market ceilings in electronic payment services (like the 30 percent cap on all foreign e-payment service suppliers)

   iii. Prohibition of Foreign Direct Investments (FDIs) in inventory-based e-commerce

None of these policies discriminate against US-based entities. They all represent proportionate regulatory responses to well documented harms in digital ecosystems, including India's.

c. Taxation of digital products and services: The NTE Report 2025 explicitly flags the US administration's long-lasting concerns with India's outlook towards taxing digital products and services, including its six percent equalization levy on all digital advertising, and the more recent two percent Digital Services Tax (DST) on foreign electronic commerce and digital service providers. As the report points out, the US's threat of imposing a Section 301 trade action on Indian goods has forced the Indian government to roll back its plan of enforcing the two percent DST, and to initiate a process to remove the six percent equalisation levy.

   DSTs on activities such as online advertising and cloud storage can be critical sources of revenue for countries in respect of digital services offered in their jurisdictions. Moreover, such services are often built on data, labour and natural resources contributed by such states, their citizens and their domestic enterprises– a process that is likely to accelerate with the growing development and adoption of large-scale Artificial Intelligence systems by corporations in advanced economies like the US. Fair taxation of these services is crucial towards redressing the global asymmetries of the digital economy and bridging the digital divide. Multilateral initiatives to address tax injustice in the digital economy are ongoing, such as through the proposed United Nations Framework

   Convention on International Tax Cooperation. In the absence of an international political consensus on the issue, developing countries face monumental costs of base erosion and profit shifting, as digital behemoths take advantage of an anachronistic international tax architecture and its arcane rules on physical presence and permanent establishment. Against this backdrop, it is imperative that digital trade regimes respect and enable the fiscal sovereignty of all countries, including the right to tax cross-border digital services.

   The USTR must therefore refrain from labelling the legitimate and sovereign right to tax as a non-tariff barrier.

d. Compliance with consumer protection and security requirements — The rapid adoption of digital products and services in India can be attributed, in large part, to state interventions like the creation of Digital Public Infrastructures and the recently announced IndiaAI Mission. However, as software-based platforms grow in scale and consolidate their respective markets, it has become increasingly evident that a hands-off approach to governance is insufficient to deal with the numerous harms occasioned by actors in the digital ecosystem. Take, for example, the case of US-based social media intermediaries. Protected by Section 230 of the Communications Decency Act, such information behemoths have fuelled a range of political and social challenges — including proliferation of misinformation and "deepfakes", and algorithmic manipulation of individual and community behaviors.

Accordingly, we urge for the following policy interventions by the Indian government to be excluded from the ambit of the NTE Report 2026:

i. Due diligence requirements under Information Technology Rules, 2021 (which target only "significant social media intermediaries", i.e. those which have more than 5 million registered users in India). Such rules are neither discriminatory nor arbitrary

ii. Local testing standards and source-code disclosures under the Communication Security Certification Scheme.

Conclusion

Local testing standards and source-code disclosures under the Communication Security Certification Scheme. The measures flagged in the NTE Report 2025, including those advanced by India (as outlined above), represent a sovereign's rightful efforts to regulate the digital economy in the interests of consumers, workers, small enterprises and the generalb public. Such measures are aligned with global best practices in digital regulation and are often mirrored in US policymaking. We urge the USTR to adopt a more constructive and balanced approach, like the one reflected in the NTE Report 2024, which acknowledged the importance of domestic regulatory space in the face of a dynamic digital paradigm. Reverting to this precedent in the NTE Report 2026 will advance fair competition, respect for digital sovereignty, and the shared goal of equitable global trade.