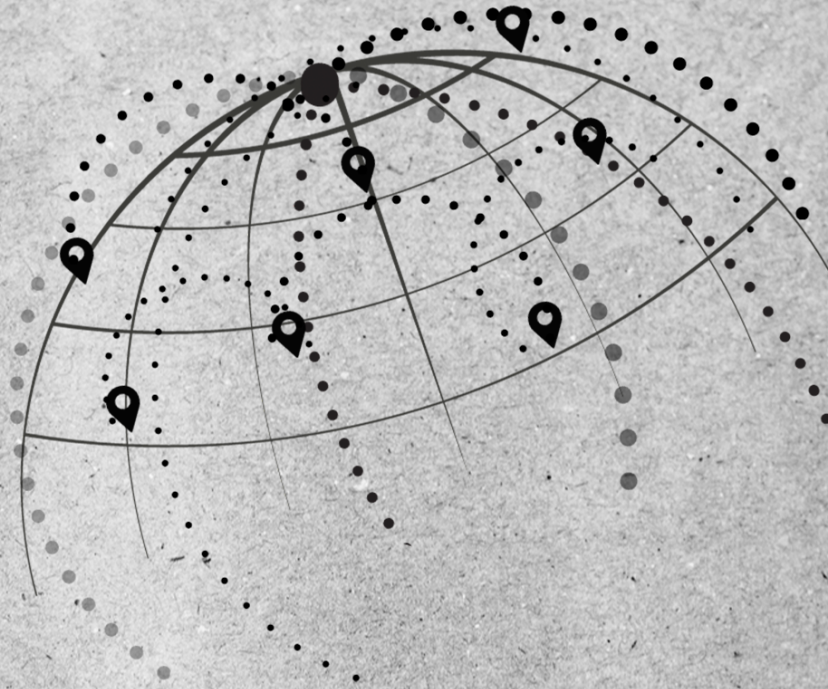




The Dialogue™

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EVENT REPORT

**INFLUENCE OF INDIA'S DIGITAL PERSONAL  
DATA PROTECTION ACT 2023 ON CROSS  
BORDER DATA TRANSFERS**

**A Global Perspective**



EVENT REPORT

# **INFLUENCE OF INDIA'S DIGITAL PERSONAL DATA PROTECTION ACT 2023 ON CROSS-BORDER DATA TRANSFERS** A Global Perspective

*Copyedited by Akriti Jayant*

*Designed by Shivam Kulshreshtha*

The Dialogue™ is a public policy think tank with a vision to drive a progressive narrative in India's policy discourse. Founded in 2017, we believe in facilitating well-researched policy debates at various levels to help develop a more informed citizenry, on areas around technology and development issues. The Dialogue™ has been ranked as the world's Top 10 think tanks to watch out for, by the Think Tank and Civil Societies Programme (TTCSP), University of Pennsylvania in their 2020 and 2021 rankings.

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**Suggested Citation**

Shekar K., & Sharma, V. (2023). Event Report | Roundtable on Influence of India's Digital Personal Data Protection Act 2023 on Cross-border Data Transfers: A Global Perspective. The Dialogue™

**Catalogue No.**

TD/PGD/ER/1123/04

**Publication Date**

November 6, 2023

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# 1 OVERVIEW

The Dialogue hosted a virtual roundtable discussion titled "Influence of India's Digital Personal Data Protection Act 2023 on Cross-border Data Transfers: A Global Perspective" on 29th September 2023. The primary objective of the session was to understand the impact of the Digital Personal Data Protection Act of 2023 ("Act") on global digital trade, specifically in relation to section 16 of the Act, which provides for the cross-border transfer of data.

**Mr. Kazim Rizvi**, the Founding Director of The Dialogue, moderated the roundtable discussion, and we were joined by the following esteemed participating panellists:

- **Mr. Anupam Chander**, Scott K. Ginsburg Professor of Law and Technology, Georgetown University Law Center,
- **Mr. Nigel Cory**, Associate Director, Trade Policy, Information Technology and Innovation Foundation, and
- **Mr. Raman Jit Singh Chima**, Global Cybersecurity Lead, Access Now.

The roundtable discussion was followed by a Q&A session with the participants. Note that the roundtable event was governed by the Chatham House Rules; therefore, this report does not attribute any comment or observation to any specific speaker.

## 2 KEY RECOMMENDATIONS

The discussions produced several clear recommendations that are likely to benefit policymakers as they further deliberate on and formulate the corresponding rules for cross-border data transfers:

- Policymakers should shift from considering stringent data localisation measures to embracing a relatively relaxed regime on data flows, which stakeholders welcome.
- Currently, the industry and the public face significant regulatory uncertainty regarding the various nuances of the law concerning Cross-border Data Flows (CBDF). A clear, consistent framework to govern cross-border data flows, along with well-defined rules to provide regulatory certainty, is needed.
- The role of the authority established under the Act, known as the Data Protection Board of India (“DPB”), remains unclear concerning data flows. Clarity is necessary regarding the Data Protection Board's powers and the notification of the law, and there are concerns about transparency in rulemaking.
- Addressing capacity-building and training issues is essential, particularly in providing better assistance for data requests with foreign jurisdictions and offering flexible data transfer mechanisms.
- Since policymakers have yet to release a negative list for CBDF, there is an opportunity to address these concerns, as well as other concerns raised by the industry and civil society, as they proceed to determine the specifics of the laws.

## 3 DISCUSSION POINTS

The event's focal point centred on the contextual influence on digital trade, particularly regarding cross-border data transfers as provided for under the Act. The roundtable also shed light on highlighting certain notable global practices that facilitate cross-border data flow and identified measures that may impede digital trade and potentially harm domestic markets. Please note that the views summarised in this report are personal and do not represent the views of the speakers' organisation or The Dialogue.

### 3.1. Transitioning from Stringent Data Localisation to a Relaxed Regime

The moderator of the roundtable asked the panellists for their observations regarding the legislature's shift from contemplating stringent data localisation measures to a relatively relaxed regime on data flows. Under this new approach, data flows are permitted by default, with sectoral regulators correspondingly granted statutory authority to enact data localisation laws for greater protection.

The panel agreed that the shift from a stringent data localisation regime benefits India's burgeoning global digital trade, aligning more with the international global consensus on the merits of global digital trade. It was emphasised in the discussion that despite ongoing legislative deliberation and debates on data privacy and localisation in India, current laws represent significant progress. The crucial aspect lies in what comes next in practice, beyond legislative levels. India's timely entry into this global

dialogue was praised, highlighting the need for cooperation and consensus-building.

Furthermore, the panel raised crucial concerns about India's data protection law. They highlighted potential challenges for businesses in understanding their obligations and advocated for clarity in regulations. The enforcement mechanism, involving a complicated appellate process, was deemed impractical for the numerous affected enterprises. One panellist also noted that Europe's innovative enforcement mechanisms primarily target digital enterprises, leaving other industries largely untouched, which differs from the situation in India. Overall, the law mirrors GDPR principles, emphasising comprehensive coverage and requiring a legal basis for data processing. Notably, it includes provisions for processing publicly available personal information, potentially impacting generative AI training datasets.

It was additionally highlighted that the law did not address certain critical issues, such as allowing sectoral regulators to maintain their own rules without mandatory consultation with the DPB when formulating their sector-specific regulations. India's approach to cross-border data transfers was observed to be substantially different from adequacy frameworks like the GDPR in the EU. The law's emphasis on law enforcement access to data rather than protecting individuals' rights was deemed adverse to global norms. The complexity of the law raised compliance and compatibility concerns, especially given the ever-growing complexity of the global data protection landscape. Lastly, the discussion noted that obtaining a favourable adequacy

decision by the EU may be unlikely with the current regime, and corresponding rules, which are yet to be released, will likely clarify the legal and regulatory landscape further.

Additionally, the panel discussed the need for Indian law enforcement to address capacity-building and training issues. The panel highlighted the need for potential regulatory changes to provide better assistance for data requests with foreign jurisdictions and to offer flexible data transfer mechanisms, including tools like certifications and trust marks, to facilitate international data transfers and ensure India's regime aligns with global best practices for interoperability with trading partners.

### **3.2. Publishing a Negative List for CBDF**

Taking note of the proposed amendments, the moderator asked the panel for their views on the DPDP Act, 2023, which provides for a negative list for CBDF, and its potential impact on international data flows, especially concerning law enforcement and national security.

While the panel largely commended India's unique approach of focusing on a negative list rather than a positive one, avoiding the complications seen in many other countries, they also highlighted that releasing a list of jurisdictions where data might be restricted might provoke and upset some parties.

The panel noted that while the new data protection law attempts to address these issues, a comprehensive solution may require the establishment of data bilateral treaties or multilateral agreements. They cited examples from relevant Indonesian and Australian legal frameworks, emphasizing the importance of a clear, consistent framework to govern cross-border data flows and the necessity for well-defined rules to provide certainty to firms and encourage responsible data management.

The panel stressed the importance of establishing best practices based on international norms for cross-border data flows. They highlighted the ideal scenario of applying overlapping principles across different jurisdictions, such as India, Indonesia, and the UK. The speaker suggested that India could potentially follow the UK's model, which has demonstrated transparency in conducting assessments and cost-benefit analyses regarding data governance. The panel also emphasized the need for detailed discussions on law enforcement and government access to data in India and collaboration with international partners. The speaker urged for improvements in the Mutual Legal Assistance (MLA) system, including digitisation and pragmatic updates, to address legitimate needs and discourage data localisation.



### 3.3. Collaborative Efforts and India's Role in the Global South

The discussion then turned towards discussing collaborative efforts to resolve potential issues, particularly in the context of data and global supply chains, and deliberating on India's potential role in influencing the Global South, emphasizing the importance of data access for emerging technologies like AI.

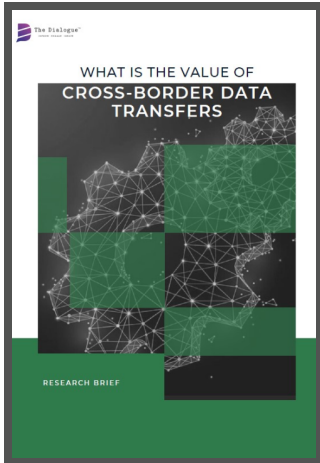
The panel highlighted some critical concerns. They observed that the Indian data access and law enforcement system is flawed, with frequent requests lacking legal basis and involving political interference. Unlike other G7+ jurisdictions, India's data access powers lack judicial oversight and may have a marginal impact on shaping laws concerning cross-border data transfers in the Global South. Additionally, they noted that the need for selective data control measures might have motivated the creation of a negative list; however, it is extremely critical to define and consistently apply criteria that encourage and nurture relations with other countries.

Clarity is needed regarding the Data Protection Board's powers and the notification of the law, and concerns exist about transparency in rulemaking. Overall, India's data governance landscape faces challenges that hinder its global leadership aspirations. The panel stressed the need for collaborative efforts to improve the relationship between jurisdictions, particularly concerning data transfer, access, and the Cloud Act initiative, acknowledging that progress might not happen in the immediate future.

### 3.4. Security and Global Digital Trade

The panel stressed the importance of both adequacy and harmonisation of laws among countries, whether by strengthening domestic legal regimes and enforcing them or by establishing intergovernmental frameworks. This would facilitate trade, competition, and easier market access while protecting sovereign interests and supporting economic growth. The security debate was considered crucial, especially in the digital economy era. The discussion underscored the necessity of building trust for data flows, which could potentially be achieved through a multilateral framework with trusted partners such as the EU, the US, the UK, and Australia. The discussion also highlighted the need to involve security establishments in such dialogues and to pave the way for a clearer and more transparent CBDF mechanism in India.

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What is the Value of Cross-border Data Transfers



RESEARCH REPORT

Principle-Based framework towards Cross-Border Data Transfers



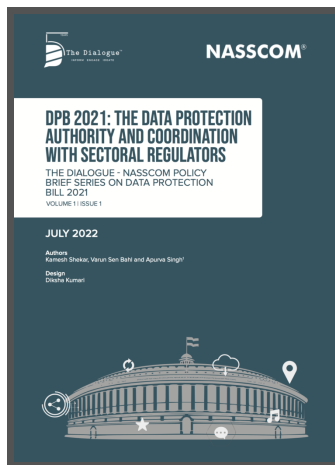
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