OPINION PIECE

Enabling and regulating the digital economy

By Anupam Chander, Georgetown University Law Center

The internet is the twenty-first century's Silk Road, powering trade across the globe in ways heretofore impossible. The internet arrived on many nations' shores without much prior preparation by governments, and it would take time to see how the internet would transform every part of life – from socializing, to learning, to creating. Regulators were often left struggling to catch up, eager to embrace the opportunities the digital economy offered for their citizens, yet concerned about the disruptions and other challenges that accompanied it. The regulatory framework for the digital economy developed at both the international and national levels, proceeding from an initial, largely enabling, phase to the recent more regulatory phase.

The first phase of internet regulation focused largely on enabling new forms of electronic commerce. At UNCITRAL in 1996, the nations of the world agreed to recognize electronic contracts and records in their domestic law. The United States led the world in removing legal risks for internet enterprises for the actions of their users, including for users' copyright infringement or defamation. At the WTO in 1998, the Ministerial Council agreed on a moratorium on customs duties on electronic transmissions, spurring cross-border trade in digital products.

Although they were conceived at the dawn of the internet age, the WTO's foundational agreements addressed telecommunications and other electronic networks, including the internet. The General Agreement on Trade in Services (GATS) recognized four modes of supply, including cross-border trade, in which the supplier and the consumer transact from their respective home economies across a border. Many members made specific commitments to liberalize cross-border trade in database services, data-processing services, computer services, telecommunications services, as well as other services, such as financial services and travel agency services, to name a few, that could now be provided across borders electronically. Indeed, in its first decade, the WTO would face a dispute where a member state complained that another member state's ban on internet gambling was inconsistent with its commitments on cross-border supply (*US – Gambling*).

Even during this early period, governments enacted laws to address some growing concerns. The European Union promulgated a directive to regulate the automated data-processing of personal information. A 1996 WIPO treaty promoted national laws that would strengthen efforts to protect copyrighted works through encryption and other technological tools. Some countries extended existing censorship from print and broadcasting media to the internet, often barring controversial information and even entire internet platforms from abroad as a result.

As the digital economy has grown, governments have sought to impose greater control over the internet. In this second, regulatory phase of governmental intervention, national governments have contended more deeply with issues such as free expression, data privacy, algorithmic decision-making and taxation. Even local governments have found themselves grappling with taxi and hotel regulations and, on occasion, smart city deployment. As data has emerged as the lifeblood of the digital economy, governments have sought to protect privacy amidst global flows, as evidenced in the European Union's strengthened data privacy regime, the General Data Protection Regulation.

The rise of cloud computing, in which the storage and processing of information are provided as a service from remote computers, gives individuals and companies access to powerful computers that they could not otherwise afford on their own. Cloud computing, however, increases jurisdictional complexities. The United States recently adopted the "Cloud Act" to promote regulated data-sharing across borders. Governments have become increasingly concerned about the movement of data across borders, but national measures mandating that data be localized at home by their very nature disfavour foreign providers. Eleven Pacific states have adopted a free trade agreement – the CPTPP – that ensures that restrictions on cross-border data flows will be justified by legitimate public policy interests, rather than used to discriminate against foreign suppliers. Privacy, cybersecurity and traditional consumer protection have become critical components of international trade, and trade agreements will have to assure these values.

The regulatory framework will find new challenges in the latest technological innovations. The internet undergirds the most revolutionary technologies of this century, including smart cities, the sharing economy, virtual and augmented reality, artificial intelligence, and robotics. Such technologies will require both enabling and regulatory interventions, both at the national and international levels.