CHAPTER VII

The Sharing Economy and Trade Agreements: The Challenge to Domestic Regulation

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I. Introduction

The growth of the sharing economy has attracted increased attention as the disruption of longstanding, well-established market sectors such as transportation and hotel accommodation creates new opportunities and threatens powerful economic interests. In recent years, the sharing economy debate has focused on two companies—Uber and Airbnb—which have both dramatically reshaped their respective business sectors.

The emergence of Uber and Airbnb as significant marketplace competitors is notable not only because they are big businesses, but also because of their impact on local businesses. The development of those companies on a city-by-city, community-by-community basis has ensured that policies and regulation often involve local or regional authorities.

Much like the arrival of Walmart in small towns a generation ago, the arrival of Uber or Airbnb has proven to be controversial and contentious in most communities. Indeed, the perceived threats to small businesses—whether the local stores in the days of Walmart or local taxi drivers today—remain much the same. The existing marketplace—licensed taxi drivers or accredited hotels—typically respond with demands that the services cease operations, noting that they conduct business without the necessary licensing or regulatory approvals and that despite the consumer benefits, they threaten the viability of longstanding businesses.[2]

In many respects, the response to online competitors is as old as the commercial Internet. For the past two decades, it has been the Internet's never-ending story. Established, successful businesses face Internet upstarts who leverage the advantages of a global network and new communications technology to offer better prices, more choice, or innovative services.

In the 1990s, it was online retailers such as Amazon who presented more selection at lower prices than most bookstores could offer. In the 2000s, Wikipedia brought the decades-old encyclopedia business to an end, online music services provided greater convenience than conventional record stores, Internet telephony technologies used by companies like Skype changed the rules of international voice and video calls. Today, Netflix has challenged conventional broadcast models, Craigslist and Huffington Post have challenged conventional media, and services such as Uber and Airbnb have upended the taxi and hotel worlds.

In these David-versus-Goliath-type battles, the established businesses rarely fade away without a fight. Using their remaining influence, they often look to laws and regulations that increase costs, prohibit activities, restrict consumers, or regulate pricing to create barriers for the new entrants.[3] There is a danger that the public interest is cast aside in favour of rules that hamstring new competitors and cost consumers. From copyright reforms that blocked online video retransmitter iCraveTV from operating in Canada nearly fifteen years ago[4] to continued calls for local content requirements and fees on online video services such as Netflix,[5] the goal is too often to use law to stop or stall new Internet-enabled competition.

For example, Amazon was initially prohibited from operating in Canada as opponents cited restrictions on the foreign ownership of booksellers. The company proceeded to launch in 2002 without a physical presence (using Canada Post for order fulfillment)[6] and only formally entered the country, over the objection of the Canadian Bookseller Association, in 2010.[7] Similarly, the Canadian Radio-television and Telecommunications Commission, Canada's broadcast and telecom regulator, tried to regulate the pricing of Internet telephone services in Canada in 2005 before the Canadian government overruled it on the issue.[8]

Given that history, the current fights against companies such as Uber and Airbnb should come as little surprise. The battles are being waged in city halls around the world as the established businesses lobby for regulations that would either block the services or require price controls to increase costs. While Uber has faced mounting legal challenges involving labour and fair business practice issues which led to dramatic changes among corporate leadership in June 2017, the applicability of sector-specific rules and regulations have remained murky, with Uber and similar sharing economy companies frequently falling through the cracks and avoiding conventional legal requirements.

The question of new regulations is a complex one, but the aim of this paper is not to assess the merits of specific regulations or even address the perceived need to regulate. Beyond debates about the appropriate form of regulation is the question of the right to regulate. Regardless of one's position on the benefits or harms of the sharing economy, it seems reasonable to conclude that local, regional, and national governments should have the authority to determine for themselves and their citizens whether to implement regulatory frameworks.

Yet that right to regulate has been gradually overtaken by the expansion of trade agreements that have extended their ambit beyond conventional tariff reduction into economic regulation. In fact, the initial shift into issues such as intellectual property protection and trade in services has largely given way to agreements that cover virtually every aspect of a modern economy, including environmental protections, labour rights, and educational standards. This expansion will soon include the sharing economy, with rules that will govern key aspects of sharing economy services as the agreements make inroads into the digital economy, often before a sector is fully developed. In doing so, the regulatory powers currently vested in national, regional, and local governments to establish regulations governing this emerging economic powerhouse will give way to regulation through trade agreements, with legal, policy, and regulatory standards made within the context of global trade flows.

This paper examines the intersection between the sharing economy and international trade agreements. The result of such intersections is likely to restrict the right to regulate, and disputing the wisdom of using closed-door negotiations that typify the negotiating framework for massive trade deals to address an increasingly challenging policy matter.

Trade agreements and global trade rules have become a critical aspect of the digital economy. Often characterized as "harmonization" of rules for aspects of the economy that operate on a global platform, the resulting rules run the risk of "Americanization," with the export of standards from the United States (the dominant digital economy) to other markets.

The paper assesses the intersection between the sharing economy and international trade agreements in three parts. Section II focuses on recent efforts to regulate Uber and Airbnb, two of the leading sharing economy companies. While there are many other examples of disruptive sharing economy businesses, the pressure to address Uber and Airbnb upon entry into a local market has been mirrored around the globe. Drawing on examples from North America, Europe, and Asia, the paper highlights how politicians and regulators have sought to block, harness, or embolden sharing economy businesses by relying on an evolving regulatory toolbox.

Section III highlights how global trade rules and treaties have been used to establish legal frameworks for the digital economy, often before the full development of those sectors. The paper focuses on two treaty initiatives—the World Intellectual Property Organization's Internet treaties in the 1990s and the Anti-Counterfeiting Trade Agreement in the 2000s—to demonstrate how incumbent businesses frequently use their political and market power to establish rules that govern how emerging technologies can be used in the marketplace. The development of rules before new businesses and new business models can fully develop invariably means that the resulting regulations favour the established players, creating significant barriers to entry.

Section IV considers what happens when sharing economy regulation intersects with emerging global trade agreements. The analysis centres on two agreements: the Trans Pacific Partnership (TPP), which was concluded in 2015, and the Trade in Services Agreement (TiSA), which is still the subject of ongoing negotiation. Moreover, it notes that the North American Free Trade Agreement (NAFTA), which was embroiled in a contentious renegotiation process that began in the fall of 2017, has identified the digital economy as a key area for discussion. These agreements feature (or are likely to feature) provisions with direct implications for the regulation of sharing economy services, including restrictions on local regulations, privacy and data transfer rules, and provisions on localization requirements.

II. Growth of the Sharing Economy and Emergence of Regulatory Demands

Companies such as Uber and Airbnb are less than ten years old, yet both (alongside many other sharing economy businesses) have had a remarkable disruptive effect on the economy and longstanding regulatory approaches. Uber, based in San Francisco, currently operates in 662 cities and eighty-two countries around the world.[9] It offers several tiers of service, ranging from upscale town cars with professional drivers (Uber), to low-cost privately owned "regular cars" driven by amateur or part-time drivers (UberX, or UberPOP in Europe). Uber XL (oversized vehicles, used for hauling cargo) is another subdivision of Uber. While the company is losing money, it now generates more than $5 billion in revenue annually.[10]

Uber is not regulated in the vast majority of cities in which it operates, but that is slowly changing. Most regulation occurs at the municipal level, although as detailed below, some states and provinces have regulated it (often in conjunction with supporting municipal legislation). Moreover, the Philippines recently became the first country to legislate Uber at the national level.

The growth of Airbnb is similar to Uber. The company is also based in San Francisco, offering a digital platform for short-term rentals of private accommodation. Airbnb currently features over 2 million listings in 34,000 cities and 191 countries. It is a privately held company, but estimates suggest that its bookings are valued at over $10 billion annually.

Given their popularity and significant revenues, the two companies have been the prime targets for regulation.[11] This part of the paper examines the regulatory challenges faced by governments at all levels in seeking to adapt conventional regulation to the sharing economy environment, highlighting the myriad of legal strategies that have been adopted around the world.

i. Uber

Uber considers itself a digital service connecting drivers and passengers rather than a transport service. The distinction is critical, since transport services are typically subject to extensive rules on driver qualifications, road rules, and insurance requirements.[12] Uber and similar platforms argue that they are technology companies or platforms that do not themselves provide a transport service but rather facilitate the provision of transport services by individual drivers.[13]

The European Union's highest court is set to rule on the issue next year.[14] The complexity of the issue is illustrated by the court's description of the case, which arises from proposed regulations in Spain:

> If the service provided by UBER SYSTEMS SPAIN, S.L. were not to be considered to be a transport service and were therefore considered to fall within the cases covered by Directive 2006/123, the question arising is whether Article 15 of the Law on Unfair competition—concerning the infringement of rules governing competitive activity—is contrary to Directive 2006/123, specifically Article 9 on freedom of establishment and authorisation schemes, when the reference to national laws or legal provisions is made without taking into account the fact that the scheme for obtaining licences, authorisations and permits may not be in any way restrictive or disproportionate, that is, it may not unreasonably impede the principle of freedom of establishment.
>
> If it is confirmed that Directive 2000/31/EC is applicable to the service provided by UBER SYSTEMS SPAIN, S.L., the question arising is whether restrictions in one Member State [regarding] the freedom to provide the electronic intermediary service from another Member State, in the form of making the service subject to an authorisation or a licence, or in the form of an injunction prohibiting provision of the electronic intermediary service based on the application of the national legislation on unfair competition, are valid measures that constitute derogations from paragraph 2 in accordance with Article 3(4) of Directive 2000/31/EC.[15]

At the heart of the regulatory debate is whether Uber is, as it claims, operating as a pure technology company, providing a matchmaking service to willing participants, or whether it is operating in effect as an unlicensed taxi service.[16] While the distinction is critical in many jurisdictions, being treated as a technology company does not guarantee the ability to operate. For example, Uber is registered in Taiwan as a software company and not a taxi service, however the government has still not permitted it to operate within the country.[17]

Early indications suggest that the court is likely to rule that Uber should be viewed as a transportation service. In May 2017, the European Court of Justice's advocate general, Maciej Szpunar, ruled that Uber may be innovative, but it falls within the field of transportation.[18] If upheld, the ruling would mean that Uber would fall under national regulations and would be required to obtain the necessary licences and authorizations. The opinion noted the central role of Uber in virtually all aspects of the service, including price setting and establishing conditions on drivers. In light of its active control, the advocate general ruled that it could not be viewed as a mere intermediary.

As Uber has grown, so too have efforts to impose regulation with numerous jurisdictions employing a wide range of measures.[19] In the United States, twenty-two states passed comprehensive ride-hailing legislation in 2015 alone.[20] Some cities have endeavoured to establish equivalent regulations for traditional taxis and Uber drivers. For example, regulators in Austin, Texas, insisted that Uber drivers (and competitors such as Lyft) be fingerprinted in the same manner as taxi drivers. The issue became particularly urgent after the police investigated at least seven alleged sexual assaults by ride-share drivers in 2015. The companies challenged the city measure, but lost in a public vote, leading both to halt operations in the city.[21]

Safety measures are a common regulatory requirement for Uber and similar services.[22] The company ceased operations in Kansas after the *Kansas Transportation Network Company Services Act* imposed stricter insurance and driver screening requirements. The bill requires companies to certify that drivers have comprehensive and collision insurance, and requires new drivers to undergo a background check performed by the Kansas Bureau of Investigation.[23] The city of Eugene, Oregon, sued Uber in March 2015, and went to court to stop the company from operating until it met what the city described as "minimum safety requirements."[24]

Rather than focusing on operational safety rules, some cities have passed regulations that challenge Uber's business model. For example, Uber stopped operating in Anchorage, Alaska, after the city demanded its drivers accept cash payments, contrary to its credit-card only approach.[25] In 2016, the Indian city of Delhi banned the use of surge pricing, a controversial practice that increases Uber rider costs during busy periods.[26]

Another regulatory approach has been to focus on regulating the technology used by Uber, namely smartphone apps. For example, in Texas, the Houston City Council took steps to regulate smartphone apps that connect drivers with passengers, such as Uber and Lyft.[27]

Canadian cities have frequently focused their regulatory efforts on revenue generation. Uber is active and regulated in five Canadian cities: Toronto, Waterloo, Ottawa, Niagara, and Edmonton.[28] In Niagara and Ottawa, Uber pays a $7,253 annual licensing fee, plus 11 cents per trip; in Toronto, the company paid a $20,000 upfront one-time fee, a $15 per driver annual fee, and 30 cents per trip; in Edmonton, it pays $50,000 a year and 6 cents a trip; in Waterloo it also pays $50,000 a year, plus 11 cents a trip.

At the provincial level, the Legislative Assembly of Alberta passed Bill 16, the *Traffic Safety Amendment Act, 2016*, which came into force on May 27, 2016.[29] One of the major effects is the creation of an administrative penalty of a maximum of $50,000 to a transportation network company for each day of non-compliance with the legislation. The province has left the burden of inspection to the companies themselves, and the mechanical inspections to the cities.

In the United States, statewide regulations tend to be more general, while municipal regulations are more focused and specific.[30] As concerns regarding Uber and antitrust have begun to mount, there has been some consideration to the applicability of federal antitrust rules.[31] The Federal Trade Commission is an independent agency tasked with promoting consumer protection and eliminating and preventing anticompetitive business practices. By law, the FTC's power to regulate interstate commerce is just as broad as that of Congress. Since the 1980s, the FTC has been critical of taxi and limousine commissions for being anti-competitive, and has brought suits against cities. In 1984, the FTC brought cases against Minneapolis and New Orleans regarding their taxi regulation practices, merely because interstate travellers take taxis to and from the airport when they fly across state lines. The FTC has yet to become active against companies such as Uber, which may be California-based, but operates in multiple states.

American antitrust laws, however, allow states some exceptions to adopt anticompetitive business regulations, but these rights do not extend to cities. Cities are subject to federal antitrust laws unless states pass legislation absolving them. For example, Minneapolis ended up avoiding the 1984 taxi lawsuit by acceding to the FTC and permitting more competition. New Orleans, on the other hand, succeeded in lobbying the state of Louisiana to authorize its anti-competitive actions, to the detriment of consumers.[32] This raises questions of whether city-based regulations could override national anti-trust rules.

The city of Philadelphia serves as an interesting case study for jurisdictional issues. Since state law overrides local policies, Philadelphia faced a blurred line between city and state politics. The Philadelphia Parking Authority (PPA) has worked aggressively to halt transportation network company (TNC) operations by ticketing drivers and impounding cars. The mayor of Philadelphia has no jurisdiction over the PPA because it is a state-chartered agency, and has not openly challenged PPA activity around ride-sharing. However, the Philadelphia City Council passed a resolution supporting ride-sharing and urging statewide action to permit TNCs in Philadelphia. Elsewhere in Pennsylvania, TNCs may now operate legally thanks to a two-year experimental licence recently issued by the state's Public Utilities Commission.[33]

Washington State law allows municipalities to regulate licensing for taxis and other vehicles, while the state oversees limousines. TNC lobbyists are making a push to change Washington law and give the state jurisdiction over all vehicle licensing, which would provide uniformity across markets.[34]

While regulation in the United States and Canada has generally focused on operational and taxation issues, other countries have targeted the freedom to operate. In the European Union, regulators in the Netherlands, Portugal, France, Spain and Germany have taken action based on existing legal frameworks that resulted in administrative or criminal charges against Uber drivers and management. In response, Uber submitted complaints to the European Commission against Spanish, German, and French court bans for violation of Article 49 (right of establishment) and Article 56 (freedom to provide services) of the *Treaty on the Functioning of the European Union*. In other countries, such as Denmark, legal decisions are still pending.[35]

Legal actions challenging Uber's right to operate are not uncommon in Europe with judges targeting both the company and its executives. For example, in France a judge slapped Uber with an €800,000 fine for running the "illegal" UberPOP service, using unlicensed drivers. It also fined two of the company's senior executives €50,000.[36]

Similarly, a Dutch court banned UberPOP on the grounds that it ran afoul of licensing laws for commercial drivers. Uber is challenging that ruling.[37]

The Philippines was the first country to regulate Uber on a national basis.[38] Uber has urged other countries to use the Philippines' legislation as a model to create similar nationwide legislation.[39] The Philippines law provides nationwide regulations for app-based transport services. It introduced a new type of classification called transportation network vehicle service that allows TNCs such as Uber to operate within the existing regulatory framework.[40] The Philippines' Uber requirements feature several technical requirements including limits on the age of vehicles, inclusion of a GPS system, use of sedans, and clearance requirements for drivers. The rules also establish citizenship and national ownership requirements. All drivers must provide evidence of Filipino citizenship and companies offering the services must demonstrate at least 70 per cent domestic ownership.[41]

ii. Airbnb

Airbnb offers a digital platform for short-term rentals of private accommodation. Airbnb is not regulated in the vast majority of cities in which it operates. Where it is regulated, most regulation occurs at the municipal level, although some states or provinces have begun to take notice of potential regulatory authority. At the country level, both Iceland and Aruba have pursued national regulation.

The chief anti-Airbnb concern typically focuses on affordable housing, as critics argue that Airbnb rentals make it difficult for full-time residents to find affordable housing in cities such as Berlin, Paris, and Vancouver. Airbnb has faced persistent criticism from city officials in Barcelona and Paris over its impact on local housing markets.[42]

The European Commission released a report in 2016 urging governments to *not* ban Airbnb unless it is the last resort.[43] The commission concluded that banning short-term lets of apartments "appears difficult to justify" when limits on the maximum number of days that apartments can be rented out would be a more appropriate measure.[44]

In 2014, Airbnb and the city of Amsterdam entered into a partnership that was the first of its kind in Europe. The municipality only allows residents to rent out their homes for up to sixty days per year, and customers are supposed to pay a tourist tax via Airbnb (enforcement is questionable as Airbnb would have to share data with the city). Without this regulation, Airbnb would create an incentive for illegal renting with negative consequences for the local residents (higher rents, nuisance, and speculation).[45]

Most Canadian cities have not regulated Airbnb. The only jurisdictions that have passed regulations are the Province of Quebec and two British Columbia towns, Tofino and Penticton. Quebec's regulations took effect in April 2016. They require the collection of lodging taxes (up to 3.5 per cent), and business registration for those who rent out accommodations on a full-time basis.[46] Violations carry fines that range from $500 to $50,000.

Vancouver has pledged to target properties dedicated to being Airbnb rentals with an "empty-homes tax," which carries a maximum fine of $10,000 for anyone who evades the applicable charge.[47] It has also proposed

> a new business-licence system for short-term rentals through websites like Airbnb to deal with "dangerously" low vacancy rates. […] [T]he new regulations would allow short-term rentals in principal residences that are either owned or rented[,] [b]ut the proposed changes would make daily or weekly rentals illegal in homes that aren't principal residences or are structures like boats or trailers.[48]

Current regulations that require a minimum thirty-day rental period will be amended to permit short-term rentals.[49]

Taxation is another concern associated with Airbnb. In 2016, the Province of Ontario convinced the company to email hosts in the province to urge them to declare their Airbnb-generated income for income tax purposes. The company also reminded hosts about consumer protection laws and their responsibilities regarding cancellations and refunds.[50]

Some jurisdictions have established legal restrictions on who may rent properties using Airbnb. For example, the city of San Luis Obispo, California, passed a comprehensive ordinance that requires that the dwelling be owner-occupied; owner presence is encouraged but not mandated in the ordinance due to difficulties in enforcing such a requirement. However, to alleviate neighbourhood concerns, the city requires homestay hosts or a "designated responsible party" to be within a fifteen-minute drive of the property and available via telephone 24-hours a day, seven days a week, while rentals are occurring.[51]

Some cities have established limits on rentals, including how often people can rent space, how many rentals must occur before the city collects taxes, and how often hosts must rent their space before inspections are required. After a certain number of rentals, the city requires inspections to ensure adherence to applicable building codes.[52]

The most restrictive approach is a full ban on the service. The State of New York passed an anti-home-sharing law in 2016 that threatens to fine New Yorkers up to $7,500, for advertising their home on sites like Airbnb. While the law effectively makes Airbnb illegal, many properties remain advertised for rent on the platform.

Other cities simply restrict the ability to rent out specific properties. In May 2016, Berlin officials implemented one of the world's toughest clampdowns on Airbnb. City officials have promised to reject 95 per cent of requests by landlords to rent places on a short-term basis. City officials have received more than 500 legal complaints over the murky provisions of the new law, which were challenged by Wimdu, a German Airbnb competitor.[53]

While most regulation arises at the municipal level, there are at least two examples of national legislation. Iceland established national rules that limit the right to rent homes for more than ninety consecutive days or to generate revenue that exceeds 1 million Icelandic krona ($12,000).[54] Moreover, permits, including approvals from health and fire departments, are required to operate an Airbnb rental.[55] Airbnb recently signed an agreement with the Aruba government that is said to help "create a framework to allow the Aruba Tourism Authority and Airbnb to address the issue of taxes, host accommodation standards and regulations and ensure that it is in line with Aruba's tourism policy."[56]

Sharing economy regulation at the national, provincial/state, and local levels has emerged as a global issue with a myriad of rules and regulations becoming increasingly common. Those rules typically reflect local policy choices as communities grapple with both the benefits and drawbacks of new services that disrupt longstanding business models. Yet just as the markets for services such as taxis and accommodation have been disrupted by Uber and Airbnb, so too are trade agreements disrupting conventional regulatory models by overtaking policy choices that have traditionally been developed and implemented by local or regional governments. The power of trade agreements to shape digital policy is the subject of section III of this paper.

III. How Trade Agreements Can Shape Digital Policy

Trade agreements and international economic treaties are typically associated with measures designed to enhance trade through tariff reduction. Indeed, for decades trade negotiations were largely premised on increasing the flow of goods across borders by lowering tariffs applied to imports. While tariff reduction remains an important component of many trade deals, newer agreements frequently focus on economic regulation such as intellectual property enforcement, health regulation, and environmental standards. Trade agreements are often a poor place to negotiate these issues, which have traditionally fallen within the purview of international organizations that develop consensus-based treaties with broad stakeholder participation. A fuller examination of emerging treaties such as the TPP and TiSA is contained at section IV of this chapter.

This part examines how trade agreements and global treaties can shape digital policy by considering two treaties: the World Intellectual Property Organization's (WIPO) Internet treaties and their inclusion of anti-circumvention rules, as well as the Anti-Counterfeiting Trade Agreement (ACTA), which contained various measures designed to regulate Internet-based providers and activities. In the case of the WIPO Internet treaties, the anti-circumvention rules became firmly entrenched within domestic laws worldwide and had a significant impact on many Internet-based businesses. In the case of ACTA, the treaty has yet to take effect, but the Internet-related provisions have resurfaced in other trade deals.

Given the early-stage development of the sharing economy and the regulations associated with companies such as Uber and Airbnb, the experience with the two treaties provides an early warning on how established organizations can often shape laws well before new entrants have fully developed and therefore hamper domestic regulations, as well as potential competitors and their disruptive business models.

i. WIPO and Anti-Circumvention Rules

Since their conclusion in 1996, the World Intellectual Property Organization's Internet treaties—the WIPO Copyright Treaty (WCT) and WIPO Performances and the Phonograms Treaty (WPPT)—have had a transformative impact on the scope of copyright law, creating what some experts have referred to as "super-copyright"[57] or "para-copyright."[58] Both treaties feature a broad range of provisions targeting digital copyright issues; however, the most controversial provisions mandate the establishment within ratifying states' national law of anti-circumvention provisions that provide "adequate legal protection and effective legal measures" against the circumvention of effective technological protection measures.[59]

The promise of technological protection measures (TPMs) was long touted by movie, music, and software industry associations as providing important protections for their products, by using technology to prevent unauthorized access or use. Despite the support for TPMs, many advocates have acknowledged that all TPMs can be defeated. For example, in 2000, the Secure Digital Music Initiative (SDMI) launched a public challenge to encourage the public to test whether it could crack the digital lock system, viewed at the time as unbreakable technological protections.[60] A team of security researchers cracked SDMI with relative ease, confirming the technology community's view that no system is foolproof.[61]

Given the flawed protection provided by TPMs, supporters of technological protections lobbied for additional legal protections to support them. Although characterized as copyright protection, this layer of legal protection does not address the copying or use of copyrighted work. Instead, it focuses on the protection of the TPM itself, which in turn attempts to ensure that the content distributor, not necessarily the creator or copyright owner, controls how the underlying content is accessed and used.

Both the WCT and WPPT contain anti-circumvention provision requirements. Article 11 of the WCT provides that

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.[62]

Similarly, Article 18 of the WPPT provides that

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.[63]

The initial work behind the WIPO Internet treaties began in 1989, with work on model provisions for legislation in the field of copyright.[64] The interplay between law and technology—which later would come in the form of anti-circumvention legislation—did not start in earnest until December 1994.[65] The issue did take hold, however, and over the next two years, several committee sessions followed by a WIPO Diplomatic Conference, in December 1996, led to the agreement on the treaties.[66]

The diplomatic conference in December 1996, which ultimately resulted in the conclusion of the WIPO Internet treaties, featured debate in both the main committee and within the plenary on the anti-circumvention provisions. The starting point for the diplomatic conference was the United States–backed "Basic Proposal" that provided that

> (1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law.
> (2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph (1).[67]

Several countries called for narrowing the scope of the provisions. For example, Jamaica noted that "in the view of her Delegation, the formulation 'any of the rights covered by the rights under the Treaty' was too broad and imprecise and its proposed amendment would not contravene the basic intention of the Article."[68] The Australian delegation sought to modify the provision to "confine its operations to clear cases of intended use for copyright breaches."[69] The Norwegian delegation "agreed with those who had proposed narrowing the scope of those provisions, for the main reason that such provisions should not prevent legitimate use of works, for example, private and educational uses, and use of works which had fallen into the public domain."[70] The German delegation also "joined those Delegations which had considered that the scope of the provisions in question should be narrowed."[71] Only three delegations—the United States, Columbia, and Hungary—were substantially satisfied with the scope of the proposal.

United States law professor Pam Samuelson chronicles what followed given the rising opposition to the basic proposal in her 1997 law review article, "The U.S. Digital Agenda at WIPO":

> Facing the prospect of little support for the Chairman's watered-down version of the U.S. White Paper proposal, the U.S. delegation was in the uncomfortable position of trying to find a national delegation willing to introduce a compromise provision brokered by U.S. industry groups that would simply require states to have adequate and effective legal protection against circumvention technologies and services. In the end, such a delegation was found, and the final treaty embodied this provision in article 11.[72]

The compromise position was to adopt the far more ambiguous standard: "to provide adequate legal protection and effective legal remedies." Not only does this language not explicitly require a ban on the distribution or manufacture of circumvention devices, it does not specifically target both access and copy controls. In fact, the record makes it readily apparent that the intent of the negotiating parties was to provide flexibility to avoid such an outcome. Countries were free to implement stricter anti-circumvention provisions consistent with the basic proposal (as the United States ultimately did), but consensus was reached on the basis of leaving the specific implementation to individual countries with far more flexible mandatory requirements.

While that may have been the intent of the treaty provision, its aftermath has been far different. As one of the primary supporters of the WIPO Internet treaties, the United States was one of the first to attempt to implement the obligations into national law. Several implementing bills were tabled before the United States Congress. Then Senator (later Attorney General) John Ashcroft introduced the *Digital Copyright Clarification and Technology Education Act of 1997*.[73] Rick Boucher (D-VA9) and Tom Campbell (R-CA15) introduced parallel legislation in the House of Representatives as the *Digital Era Copyright Enhancement Act of 1997*.[74] Neither bill included provisions on anti-circumvention devices.

The Ashcroft and Boucher bills were abandoned, however, after legislation that ultimately led to the *Digital Millennium Copyright Act* (DMCA) gained congressional momentum. Representative Howard Coble introduced what would later become the DMCA with the *WIPO Treaties Implementation Act*.[75] During hearings on the bills, United States government officials acknowledged that the implementing legislation went beyond WIPO Internet treaty requirements. The United States' chief policy spokesperson and proponent of the DMCA, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, Bruce A. Lehman, admitted during his congressional testimony that the provisions went beyond the requirements of the treaties.[76] Lehman stated that the administration's aim was not confined to changing United States law. Rather, it hoped that the United States model would be used to convince others to implement the WIPO Internet treaties.

That approach remains in place today, with the United States the lead proponent of the Anti-Counterfeiting Trade Agreement and the TPP (both discussed below) which include anti-circumvention provisions designed to narrow the flexibility found in the WIPO Internet treaties and provide a model for other countries to follow.[77]

The history of the anti-circumvention legislation is notable because it demonstrates the enormous influence that international agreements can have over domestic legislation. Indeed, there is a great likelihood of unintended consequences when crafting rules before technology and the market have fully developed. In the case of anti-circumvention rules, it meant applying regulations to consumer products and digital services that simply did not exist at the time of treaty negotiations. For sharing economy services that are at an early stage of development, the anti-circumvention rule experience highlights how global rules may ultimately have a significant impact over the future regulatory environment.

ii. ACTA and the Internet

On October 23, 2007, the United States, the European Union, Canada, Japan, and a handful of other countries announced plans to negotiate the ACTA.[78] The behind-the-scenes discussions had apparently been ongoing for several years, leading some countries to believe that a full agreement could be concluded within a year, to coincide with the end of the Bush administration. Few paid much attention, as the agreement itself was shrouded in secrecy. ACTA details slowly began to emerge, however, including revelations that lobby groups had been granted preferential access, the location of various meetings, and troubling details about the agreement itself.

As the public pressure mounted, the talks dragged along with participating countries increasingly defensive about the secrecy and the substance. The agreement was ultimately concluded in 2010—years after the initial target—and some of the most troubling provisions were abandoned. Yet the final agreement still raised serious concerns, both for the way the agreement was concluded as well as for the substance.

When ACTA was formally signed by most participants, in October 2011 in Tokyo, Japan, few would have anticipated that less than a year later, the treaty would face massive public protests and abandonment by leading countries. But with tens of thousands taking to the streets in Europe in the spring of 2012, ACTA became the poster child for secretive, one-sided intellectual property agreements that do not reflect the views and hopes of the broader public. By July 2012, the European Parliament voted overwhelmingly against the agreement, effectively killing ACTA within the EU.[79]

ACTA's lack of transparency was a consistent source of concern throughout the negotiation process. In December 2007, before formal negotiations began, the United States government asked other participating countries to agree to a confidentiality agreement. The agreement classified all correspondence between ACTA parties as "national security" information on the grounds that it is confidential "foreign government information."[80]

The lack of transparency throughout the ACTA process eroded public confidence in the entire agreement. While ACTA supporters pointed to secret releases to European Parliament committees, the exclusion of the public from the consultation process bred enormous distrust in the entire agreement.[81] The lack of transparency highlights one of the major problems with negotiating in secret trade agreements that have broad-based implications. The failure to include experts throughout the negotiation process caused significant damage to the substance of the agreement, with numerous legal concerns as a result. The prospect of replicating similar oversights due to the lack of public and expert consultation and participation with emerging agreements such as TiSA could lead to unintended consequences for sharing economy regulations caught within the ambit of the agreement.

From a substantive perspective, ACTA raised several concerns with respect to the expansion of international intellectual property laws as it applies to the Internet. For example, the emphasis on secondary liability, which potentially holds third parties liable for the infringing actions of others, represented a significant shift in international intellectual property law.

While many countries have codified secondary liability principles within their domestic laws, there are relatively few provisions aimed at secondary liability in international law. Within ACTA, Article 8 on Injunctions applied to both infringers and third parties as did Article 12 on Provisional Measures, which can be applied to third parties. Both Article 8 and Article 12 apply in a civil enforcement context.

The Internet provisions within ACTA also target third parties. Article 27(2) provided that "each Party's enforcement procedures shall apply to infringement of copyright or related rights over digital networks, which may include the unlawful use of means of widespread distribution for infringing purposes."[82] In other words, the potential liability extends beyond those infringing to those who are seen to facilitate infringing activity. In fact, the provision could be applied to peer-to-peer networks, blogging platforms, and other technologies that facilitate the dissemination of content.

The ACTA also sought to establish universal rules for the response of Internet service providers to allegations of infringement on their networks. Article 27(4) on Enforcement in the Digital Environment, stated that parties "may provide, in accordance with its laws and regulations, its competent authorities with the authority to order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement." The article on the disclosure of subscriber information is broader than the equivalent provision in Article 47 of the *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS).[83]

ACTA sparked a global discussion on intellectual property issues and the optimal balance between privacy and intellectual property rights in the digital environment. Its defeat—only Japan has ratified the agreement—highlights the risk associated with using international trade and treaty negotiations to address complex public policy issues in relative secret without public consultation and transparency. This is particularly true for issues that touch directly on individuals in tangible ways. The risk for sharing economy regulation with services that are both provided and used by millions is heightened where rules are established behind closed doors without adequate public participation. That approach has been typified by agreements such as the TPP, which is further discussed in section IV, on future trade agreements and the sharing economy.

IV. Future Trade Agreements and the Sharing Economy

As the sharing economy continues to grow, it is likely to attract increased attention from local, regional, and national regulators. While individual communities and countries are free to regulate as they see fit, the steady expansion of trade agreements may have a significant impact on domestic regulation. The intersection between local regulations and trade agreements is best illustrated by two trade agreements, each with membership that represents a sizable portion of the global economy: the TPP and the TSA. This part also briefly discusses NAFTA, which is likely to turn to these issues during a forthcoming renegotiation.

i. Trans-Pacific Partnership

The Trans-Pacific Partnership (TPP), a massive trade agreement that covers nearly 40 per cent of world GDP, wrapped up years of negotiation in 2015. The agreement involves twelve countries, the United States, Canada, Australia, Mexico, Malaysia, Singapore, New Zealand, Vietnam, Brunei, Japan, Peru, and Chile.[84]

Donald Trump's surprise victory in the United States presidential election resulted in an overhaul of its trade policy, including the immediate end of support for the TPP and a renewed focus on NAFTA. While President Barack Obama held out hope that the TPP could be salvaged during the lame-duck session of Congress that occurs immediately after the election, his administration was quickly forced to concede that the deal had become politically toxic and stood no chance of passage. Since United States ratification was required for it to take effect, the original TPP is effectively dead. In its place, Japan has led an effort to create TPP11, a slightly modified version of the agreement featuring new implementation rules, minus the United States. As of November 2017, a final agreement on TPP11 had eluded the remaining countries, with Canada leveraging its position as the second-largest economy left in the TPP to extract significant concessions on intellectual property, culture, and the auto sector. The original digital economy provisions remain largely unchanged in the TPP11.

Notwithstanding its political difficulties, the agreement's provisions provide a roadmap for future efforts to merge trade policy with the digital economy, including sharing economy businesses. The TPP's impact would be felt in two ways: regulatory pre-emption, which would restrict the ability for regulators to implement their own laws or regulations; and regulatory mandates, which would prescribe specific requirements within domestic rules.

The potential for regulatory pre-emption is best illustrated by the complex array of regulations for service industries in the TPP. Many trade agreements feature obligations to specific service sectors based on commitments from negotiating parties. These are relatively clear and make it easy for businesses to understand the new rules and for governments to identify their regulatory requirements.

The TPP adopts a much different approach, featuring a series of generally applicable restrictions or requirements for services. These include national treatment, most favoured nation status, market access requirements, and restrictions on local presence requirements. These generally applicable conditions apply to all services, unless specifically excluded in the agreement or within annexes applicable to individual countries.[85]

Article 10.3 of the TPP on national treatment provides:[86] "Each Party shall accord to services and service suppliers of another Party treatment no less favourable than that it accords, in like circumstances, to its own services and service suppliers." As noted above, the services chapter also includes a most favoured nation requirement in Article 10.4:[87] "Each Party shall accord to services and service suppliers of another Party treatment no less favourable than that it accords, in like circumstances, to services and service suppliers of any other Party or a non-Party."

The effect of these provisions is that countries are required to treat service providers—regardless of which country they come from—in an equal manner. When combined with a restriction on local presence requirements, regulatory measures for services such as Uber already found in some jurisdictions that target foreign operators would run afoul of the TPP.

These rules are particularly noteworthy within the context of local regulations. The TPP excludes existing local government regulation from the scope of the service requirements in Article 10.7 (1)(a)(iii).[88] This also applies to renewals of existing rules and amendments "to the extent that the amendment does not decrease the conformity of the measure."[89]

While that may grandfather existing rules, local municipalities would face restrictions on future sharing economy regulations should they further decrease conformity with the obligations. For example, if a municipality does not currently feature a local presence requirement in taxi regulations, instituting a new presence requirement for TNCs could violate the TPP. Similarly, establishing new expensive licensing requirements that restrict the likelihood of Uber drivers entering the market might violate Article 10.8(5) which stipulates that "[e]ach Party shall ensure that any authorisation fee charged by any of its competent authorities is reasonable, transparent and does not, in itself, restrict the supply of the relevant service."[90]

The issue may be even more pronounced where ride-sharing services are also regulated at the provincial, state, or national level. For example, the Province of British Columbia has the power to regulate Uber[91] and similar services through the *Passenger Transportation Act*.[92] The province has thus far resisted mounting calls for it to act.[93] The provincial regulations establish requirements related to licensing, safety, inspections, and insurance, and establish the rates that may be charged by anyone operating a vehicle who charges or collects compensation for transporting passengers.[94] Without a broad provincial government exclusion, these rules would presumably be caught by the TPP. The province has identified why it believes it needs to regulate the sector and announced plans for updating the regulatory environment, but should the TPP apply, it could pre-empt the provincial regulatory power given the absence of an exclusion and the difficulty in relying on public policy grounds for non-compliant regulations.[95]

Pre-emption of local regulations is only part of the TPP's potential impact on sharing services. Services such as Uber and Airbnb rely upon a business model that depends upon open data transfers, with personal data frequently stored or processed offshore. As noted above, some jurisdictions have begun to consider regulations that would require local storage of data or local presence requirements for sharing economy companies. The TPP seeks to address the issue by mandating open data transfers and restricting the potential use of data localization requirements. These rules benefit cloud-based sharing services but run the risk of restricting the ability of countries (or local and regional governments) from establishing regulations to address consumer concerns regarding their personal information.

For example, data transfer restrictions are a key element of the European approach to privacy, which restricts data transfers to those countries with laws that meet the "adequacy" standard for protection. That approach is becoming increasingly popular, particularly in light of the Snowden revelations about governmental surveillance practices. Several TPP countries, including Malaysia, Singapore, and Chile,[96] are moving toward data transfer restrictions, as are countries such as Brazil and Hong Kong.[97]

Yet the TPP included a restriction on data transfer limitations. Article 14.11 (2) states:[98] "Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person." There are similar restrictions with respect to data localization. Data localization has emerged as an increasingly popular legal method for providing some additional assurances about the privacy protection for personal information. Although heavily criticized by those who fear that it harms the free flow of information, requirements that personal information be stored within the local jurisdiction is an unsurprising reaction to concerns about the lost privacy protections if the data is stored elsewhere. Data localization requirements[99] are popping up around the world[100] with European requirements in countries such as Germany,[101] Russia, and Greece; Asian requirements in Taiwan, Vietnam, and Malaysia;[102] Australian requirements for health records, and Latin America requirements in Brazil.[103] Canada has not been immune to the rules either, with both British Columbia and Nova Scotia creating localization requirements for government data.[104]

Despite the momentum toward data localization as a privacy protection measure, Article 14.13 of the TPP establishes a restriction on legal requirements to do so:[105] "No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory." This general provision is subject to at least three exceptions. First, government services are excluded. Second, there is an exception for financial services, which has sparked protest from some members of the United States Congress.[106] The exclusion is reportedly due to demands from the United States Treasury, which wanted to retain the right to establish restrictions on financial data flows.[107]

The third exception is cited by supporters of the TPP as evidence that privacy protections are still a possibility. The exception states:[108]

> Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:
> (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
> (b) does not impose restrictions on the use or location of computing facilities greater than are required to achieve the objective.

When combined with a 1999 World Trade Organization reference to privacy,[109] the argument is that privacy could be viewed as a legitimate public policy objective and therefore qualify for an exception.

The problem is that the historical record overwhelmingly suggests that reliance on this exception is unlikely to succeed. As the advocacy group Public Citizen noted in a study on the general exception language:[110]

> the exceptions language being negotiated for the TPP is based on the same construct used in Article XX of the World Trade Organization's (WTO) General Agreement on Tariffs and Trade (GATT) and Article XIV of the General Agreement on Trade in Services (GATS). This is alarming, as the GATT and GATS exceptions have only ever been successfully employed to actually defend a challenged measure in one of 44 attempts. That is, the exceptions being negotiated in the TPP would, in fact, not provide effective safeguards for domestic policies.

In other words, the exception is illusory since the requirements are so complex (each aspect must be met) that countries relying on the exception have failed in forty-three out of forty-four cases. For countries concerned about the weakened privacy protections, the TPP restricts the use of data localization requirements as a remedy just as more and more countries are exploring such rules.

The data transfer and data localization regulations function much like the WIPO Internet treaty approach to anti-circumvention with the establishment of rules that are likely to have long-term consequences for businesses and business models that are at the early stage of development. By subscribing to a specific set of legal requirements, governments may be eliminating the ability to implement new regulations that respond to public concerns. Indeed, some early regulatory responses to sharing services such as Uber and Airbnb have sought to implement data localization or residency requirements.

A similar concern arises with respect to the TPP's restriction on the ability to require companies to supply access to source code. Article 14.17 (1) states:[111] "No Party shall require the transfer of, or access to, source code of software owned by a person of another Party, as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory." While much of the concern associated with the source code regulation has focused on its security implications, it is conceivable that countries could introduce source code disclosure requirements on sharing economy companies as a mechanism to introduce algorithmic transparency. For example, concerns about discriminatory practices for ride-sharing or accommodation rental services that avoid servicing some neighbourhoods might be addressed through mandated disclosures of the underlying code used to operate the service. The TPP would prohibit such provisions.

There is considerable merit to anti-discrimination provisions that ensure that all businesses are treated equally with respect to regulatory requirements. These provisions could prove enormously important for the purposes of sharing economy regulation given the likelihood that many service providers will be foreign owned and therefore face the prospect of heightened regulation simply by virtue of their ownership or residency status. However, the TPP provisions extend far beyond ensuring equal treatment. The rules within the trade agreement may pre-empt regulation altogether or establish restrictions on regulations that are otherwise preferred by local, regional, or national governments. This points to a likely future clash between trade agreements and sharing economy regulations.

ii. Trade in Services Agreement (TiSA)

The Trade in Services Agreement (TiSA) is a trade agreement currently being negotiated by many of the world's largest economies, accounting for approximately 70 per cent of the global trade in services. Launched in March 2013, participants include the United States, European Union, Japan, Canada, and many other developed economies. The future of TiSA shares some of the same uncertainties as the TPP in light of the change in the United States administration. As of November 2017, there had been twenty-one rounds of negotiations, with further negotiations on hold. Unlike the TPP, which is now public, the draft text of TiSA remains secret. The only sources of the TiSA text come from several leaks posted on Wikileaks.

Given the lack of official text, it is difficult to fully assess the impact of TiSA provisions. However, the leaked documents published to date point to the prospect of a similar impact as found in the TPP. For example, the International Trade Union Confederation (ITUC) published a detailed analysis of leaked negotiating texts of TiSA on October 20, 2016. According to these documents, "TiSA would legally fortify and economically facilitate the operation of the 'platform economy'—a term (also known as the 'gig economy' or 'sharing economy') describing the online, on-demand business model of international companies like Uber."[112]

The leaked version of TiSA also includes data localization and data transfer provisions that are similar to those found in the TPP. The draft article on data transfer provides:

> [CA/TW/CO/JP/MX/US propose: No Party may prevent a service supplier of another Party [CO/JP propose: or consumers of those suppliers,] [CA/CO/JP/TW/US propose: from transferring, [accessing, processing or storing] information, including personal information, within or outside the Party's territory, where such activity is carried out in connection with the conduct of the service supplier's business.[113]

The U.S. has also proposed restrictions on data localization requirements. Article 9 states:

No Party may require a service supplier, as a condition for supplying a service or investing in its territory, to:

a) use computing facilities located in the Party's territory;

b) use computer processing or storage services supplied from within the Party's territory; or
c) otherwise store or process data in its territory.[114]

The data localization provision would severely restrict regulatory efforts on sharing economy companies to retain data within the local jurisdiction.

Concern regarding the TiSA provisions prompted the European Parliament to adopt a resolution in February 2016 containing its recommendations to the European Commission on the TiSA negotiations. The recommendations included

- ensuring that European citizens personal data flow globally in full compliance with the data protection and security rules in force in Europe;
- immediately and formally opposing the US proposals on movement of information;
- ensuring that national security clauses are grounded in appropriate necessity;
- comprehensively prohibiting forced data localisation requirements in order to prevent geoblocking practices and to uphold the principle of open governance of the internet.[115]

The Parliament's emphasis on data flows in compliance with European data protection rules points to a likely source of conflict with TiSA rules aimed at eliminating restrictions on data transfers and national data protection rules that depend upon some limitations in order to safeguard user privacy.

As an agreement dedicated to increasing trade in services, TiSA unsurprisingly features provisions aimed at fostering market access, reducing regulatory requirements, and eliminating discriminatory domestic provisions. These are laudable goals, yet the implications of a broad-based trade services agreement on Internet-based companies would be particularly pronounced given the ability to service a global market from a single jurisdiction. For sharing economy businesses, TiSA could usher in an era of limited regulations and requirements for uniform regulatory models across member countries. Such an outcome might enhance the commercial potential of those businesses, but would also necessarily restrict the ability of local jurisdictions to implement their own regulatory solutions.

iii. NAFTA

The election of Donald Trump has placed renewed focus on NAFTA, with the United States having filed a notice of renegotiation, paving the way for talks that commenced in the summer of 2017. The renegotiation involves much more than just a few tweaks, as the Trump administration has emphasized that new NAFTA chapters should be crafted to reflect the digital economy. The emphasis on digital policies foreshadows a new battleground that will have enormous implications for the sharing economy, as NAFTA rules are likely to have a direct impact on how those entities are regulated.

Some of the digital economy policies, including online contract enforcement and consumer protection, should be relatively uncontroversial. More contentious, however, will be rules similar to those found in the TPP regarding data localization and data transfers, the lifeblood of digital sharing economy companies. Data localization has become an increasingly popular policy measure as countries respond to concerns about United States–based surveillance and the subordination of privacy protections for non–United States citizens and residents.

In response to the mounting public concerns, leading technology companies such as Microsoft, Amazon, and Google have established or committed to establish Canadian-based computer server facilities that can offer localization of information. These moves follow on the federal government's 2016 cloud computing strategy that prioritizes privacy and security concerns by mandating that certain data be stored in Canada. The TPP included restrictions on data localization requirements at the insistence of United States negotiators. Those provisions are likely to resurface during the NAFTA talks and could have an impact on how companies such as Uber and Airbnb conduct their business. For Canadian regulators of sharing economy companies, attempts to establish a domestic presence for regulatory purposes could face restrictions from NAFTA provisions prohibiting data localization requirements.

So too will potential limitations on data transfer restrictions, which mandate the free flow of information on networks across borders. United States Internet companies have been particularly vocal about the need to restrict such rules. Those rules are important to preserve online freedoms in countries that have a history of cracking down on Internet speech but, in the Canadian context, could restrict the ability to establish privacy safeguards. In fact, should the

European Union mandate data transfer restrictions, as many experts expect, Canada could find itself between a proverbial privacy rock and a hard place, with the European Union requiring restrictions and NAFTA prohibiting them. These rules could have a significant impact on domestic regulations on the sharing economy that may restrict data transfers for reasons of privacy or workplace conditions.

V. Conclusion

As the sharing economy continues to grow, the prospect of local, regional, and national regulation is likely to grow. Companies such as Uber and Airbnb have quickly become multi-billion dollar global entities that simultaneously offer new commercial opportunities, consumer choice, and market competition. Sharing economy services are not without their negative impacts, however, leading to controversy and calls for regulation.

Those regulations include fundamental questions of how best to characterize sharing economy businesses such as Uber, the introduction of safety and licensing requirements designed to create a level playing field with incumbent providers, and newly crafted regulations specifically targeting services such as Airbnb.

Individual communities and countries are typically free to regulate as they see fit, yet the steady expansion of trade agreements may have a significant impact on domestic regulation. There is considerable merit to agreements that open markets. Moreover, anti-discrimination provisions that ensure that all businesses are treated equally with respect to regulatory requirements facilitate global commerce on a level playing field. These provisions could prove enormously important for the purposes of sharing economy regulation given the likelihood that many service providers will be foreign owned and therefore face the prospect of heightened regulation simply by virtue of their ownership or residency status. However, trade agreement rules now extend far beyond ensuring equal treatment, potentially pre-empting regulation altogether or establishing restrictions on regulations that are otherwise preferred by local, regional, or national governments. This points to a likely future clash between trade agreements and sharing economy regulations.

This chapter does not advocate for specific regulations for the sharing economy. Rather, it maintains that regulators should be free to act in the public interest, consistent with local values and policies. There is a need to consider the long-term implications of trade agreements that undermine the regulatory role of local officials by establishing restrictions on future regulatory measures. Public debate and comprehensive analysis is particularly challenging given the secrecy and lack of transparency associated with many current trade negotiations. Looking ahead—whether to TPP11, TiSA, NAFTA, or the myriad of regional trade agreements currently under consideration—greater transparency and inclusion of officials from all levels of government could help avoid the unintended consequences that may come from treaty provisions that lack insight into future directions of the digital economy.

Notes

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