



A message by

Dr. Carlos Correa
Executive Director

eTrade for all Leadership Dialogue

Connecting the Dots for More Inclusive Development

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Data for Development : How to legally characterize data?

Radical technological changes have always challenged pre-existing legal frameworks as demonstrated, for instance, by the commercialization of computer software independently from hardware and the use of genetic information to develop biotechnological innovations in various areas such as health and agriculture. The emergence of big data is a new and outstanding example of such situations. With the growing digitalization of multiple activities, ranging from education and health to 'smart farming' and the supply of the most diverse goods, the production and storage of data has exploded. Individuals, businesses and governments are generating an immense amount of data and this will only continue to grow in the future. Yet, the legal characterization of data is still a matter of considerable divergencies and debate. Policy makers and scholars are still searching for legal approaches suitable to address the complex relationships among producers, processors, controllers and users of data.

There are major asymmetries in the capacity to produce, process, storage, use and transmit data. These asymmetries underpin one of the major North-South contemporary divides. One dimension of this divide is the market dominance of a few digital companies and the barriers their behavior erects against the emergence of new players. What kind of rights such companies, the individuals/consumers and potential competitors may exercise in relation to data and the tools necessary to access and use them, are key to address such asymmetries.

A taxonomy is necessary to address the legal dimensions of data and to design legal regimes suitable to different categories thereof. The principles on which a legal regime for data is to be based and what rights are conferred may have significant socio-economic impacts. What is needed is a regime that allows the collection, processing and use of data for development.

A legal regime on data should take into account the context in which such a regime would apply and how to ensure that it supports the achievement of development objectives, including job creation and diversification of the economies. Such a regime should also ensure the realization of human rights in the digital context through the recognition of fundamental rights such as a universal right to digital connectivity, the right to privacy and to digital self-determination, including the right not to be profiled, to get information about one's data and to keep personal data protected.

Copyright legislation and case law have generally made it clear, with some qualifications, that the protection conferred under that regime does not extend to data as such, but only to an original intellectual creations. However, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) and some court decisions (e.g. relating to seismic data) have pointed to the availability of copyright protection for data. A careful delimitation of the scope of such protection is needed to avoid the creation of long lasting exclusive rights on data.

Other possible legal options exist in relation to rights over data as well in respect of who (natural and legal persons, or States) would be entitled to them. 'Data ownership' is one of the options that has attracted considerable attention, as it has a lot of intuitive power. This approach faces, however, significant challenges, notably with regard to the delineation of the set of rights conferred and the determination of who would be the 'data owner'. In one court case, for instance, it was found that medical data were 'owned' by the doctor and not the patient, although the latter may have a right to control them. In the context of 'smart farming', device producers and not farmers have typically appropriated data through contractual means. The concept of «data ownership» suggests an individualistic approach, although it has also been advocated as an entitlement of States. The implications of adopting this approach, which are far reaching not only for individuals but for national economies, need to be carefully examined.

Data can also be considered as subject to sovereign rights, like in the case of genetic resources under the Convention on Biological Diversity (article 3). The recognition of this principle would support the implementation of national policies on data flows adapted to local conditions and needs, including regarding requirements for data storage within a given jurisdiction and limitations on its transborder transmission (data localization). It would confirm countries' rights to legislate on the matter and to take measures, inter alia, to protect individual privacy and consumers, as well to create an environment in which new local digital businesses can emerge and contribute to socio-economic development.

Other options include the development of sui generis rights, including access rights, as an alternative to ownership. Data can also be considered as «global public goods» as suggested by the UN Secretary General High Level Panel on Digital Cooperation.

Of course, and as noted, the implications of adopting one of the above mentioned (or other) approaches will be significant for the management and governance of data and its impact on development. The design of a legal framework for data should not be seen as a purely legal endeavour, nor be made in isolation from other national policies. How such a framework is designed matters for what kind of insertion a society will have in the digital economy, and the extent to which a country will be able to benefit from the opportunities created by big data. The current policy space to devise legal regimes adapted to national circumstances allow, without prejudice to possible areas of regional and international cooperation, for searching new solutions that take into account differences in the type of data (e.g. personal v. non-personal, raw v. processed data) and legal systems, levels of economic and technological development and national objectives and priorities. Such policy space should be preserved in the negotiation of any international agreement on the matter.