

Digital Governance, Regimes Theory and Private International Law. A tech diplomacy perspective

By Juliano Alves Pinto, Brazilian tech diplomat; former Deputy Consul of Brazil in San Francisco (2013-2016); State Undersecretary of Science, Technology, and Innovation (2019-2021); HCCH expert on digital economy (2023-2024); and Government Affairs Director at the Digital Cooperation Organization (DCO) (2024-2025)

Could Private International Law be an answer to digital governance? Though this idea has already been debated among PIL scholars, it must be said that it has not yet broken the bubble of the PIL niche. Diplomats usually overlook PIL as a small part of the larger International Law realm, which embraces Public International Law as the standard bearer of the multilateral framework that has been established ever since the Westphalia Peace in 1648.

However, the uniqueness of digital platforms architecture and its asymmetric relationship with individuals all around the world has made PIL emerge as a relevant normative toolbox to tackle the numerous situations in which the user needs to protect themselves from the leonine contracts and the frequent algorithmic abuses on data extraction, data privacy and, even more often, IA misleading guidance.

A digital platform is usually comprised of a number of layers, which may reflect different jurisdictions according to the territory in which a specific component of the platform architecture is localized. That said, an individual can access a platform in a country A and the platform could be hosted in a country B. Their personal data -collected by the platform- could be stored on a cloud-based server in a country C, not to mention third-party applications used by the platform that could be placed in different jurisdictions. If a lawsuit is set, which law is applicable? Is it the place of business the usual connecting factor?

Instead of long-lasting negotiations to approve an international treaty on a specific emerging technology governance, which usually turns out to be time and resource consuming, a simplified PIL convention that offers an applicable law

methodology, defining connecting factors in typical conflict of law situations, as well as the ubiquity of specific platform layers, might be more effective. The current world order on digital governance is a highly fragmented reality, with a number of multilateral initiatives being launched within or without the UN System, from the traditional International Telecommunications Union to the emerging Digital Cooperation Organization, sponsored by Saudi Arabia.

Domestic regulatory frameworks on new technologies are becoming the standard approach in an array of jurisdictions. An example is the digital tokens realm, which has already been regulated in different countries, from Switzerland (2018) to Brazil (2022) and the EU (2023). Even though it might be difficult for lawmakers to cope with technology change, even a provisional regulation is better than self-regulation alone.

From an International Relations perspective, the International Regimes Theory is often regarded as the go-to approach among diplomats and multilateralism experts, as it deals with the idea that cooperation among countries, regardless of self-interest, should be done by a minimal normative system, not necessarily formalized by treaties or an international organization framework. Stephen Krasner defined international regimes in 1982 as sets of “*principles, norms, rules, and decision making procedures around which actors converge in a given issue-area of the international relations.*” [1] Normally these principles, norms, and rules are established by the actors themselves to make sure goals through cooperation are achieved. From a digital multilateralism point of view, it is no wonder that the very definition of internet governance included in the WSIS Tunis Agenda in 2005 coincides with Krasner’s classic approach:

*34. A working definition of Internet governance is the development and application by governments, the private sector and civil society, in their respective roles, of **shared principles, norms, rules, decision-making procedures**, and programmes that shape the evolution and use of the Internet.[2]*

It is worth noting that the WSIS approach embraces multiple actors, beyond the typical state-centered approach, as innovation requires a triple-helix perspective, alongside the private sector and Academia. Still, governance itself cannot be achieved without a minimal rule-based system. The main difficulty of

multilateralism and Public International Law is the time needed to reach the necessary consensus to build up international rules by which countries need to abide.

Technology develops in a much faster pace, which means that the already-late-coming domestic norms are often approved quicker than any multilateral framework. In this sense, treaty-based multilateralism might not be the only solution to provide the necessary protection to individuals and digital platforms all around the world.

The other side of the coin is that domestic frameworks alone fail to provide individual protection when cross-border relationships are established through digital platforms and their multiple layers localized in different jurisdictions. PIL in this sense could be the right answer to law efficacy, not only from a multilateral perspective but also from a domestic regulatory system approach.

Interestingly, flexibility and adaptation became one of the main features of International Regimes Theory, not only by embracing new actors but also through the construction of unorthodox multilateral arrangements.[3] That said, PIL institutes, such as applicable law, jurisdiction and judgment recognition, could be included as components of any regime building methodology, whereas domestic regulatory frameworks could become the main normative sources of newly PIL-based regimes of digital governance. The Hague Conference on Private International Law (HCCH) has been tackling this issue since 2022, having successfully established two groups of experts on digital tokens and CBDC's. Though unfamiliar to most tech diplomats and multilateralism specialists, both initiatives might be fundamental to change the current fragile digital governance landscape, as the definition of the law applicable to platforms might shed some light onto a rather obscure international reality.

Hence, it is about time for tech diplomats, scholars, and policy makers to embrace PIL as a relevant digital governance mechanism. At the end of the day, we just need to make sure individuals receive the necessary protection across the globe, regardless of the jurisdiction concerning the multiple layers of a platform's architecture.

—

This contribution is a summarized version of a PhD thesis originally written in

Portuguese that will soon be included on:
<https://www3.ufmg.br/pesquisa-e-inovacao/teses-e-dissertacoes>

[1] KRASNER, Stephen (1982) Structural Causes and Regime Consequences: Regimes as Intervening Variables

[2] WSIS: Tunis Agenda for the Information Society (2005)

[3] SNIDAL, ABBOTT (2009) The governance triangle: Regulatory standards institutions and the shadow of the state