14

Platform Responsibility

An International Legal Synthesis

Joel P. Trachtman[*]

14.1 INTRODUCTION: COMPARATIVE REGULATION, CONFLICTS OF REGULATION, AND COOPERATION IN REGULATION

This chapter is intended to analyze the needs and possibility for international cooperation in regulation of platform responsibility for moderation of content. To do so, it was first necessary to survey some of the dimensions of difference among national platform regulation structures, by comparing selected legal systems. Earlier chapters in this volume survey relevant law in Brazil, China, the European Union, India, and the US. Based on the level of difference, and the apparent level of flexibility in accommodating difference as platforms operate across borders, it is possible to analyze the needs and possibility of international cooperation. Once these needs and possibilities are understood, a second step is to examine, inductively and deductively, possible mechanisms for international cooperation in this field. The generative chapters in this volume evaluate cooperation problems and responses from other fields of international interaction – international taxation, international infectious disease control, and international financial regulation – as sources of generative thinking.

It is difficult to propose a definition of "platform," but for present purposes, it is sufficient to say that platforms are hosting services that, at the request of a recipient of the service, store and disseminate information to the public.[1] Think Facebook, Twitter, Google, YouTube, WeChat, TikTok, Sina Weibo, etc. These platforms

[*] Thanks to Dominik Hofstetter and Arpitha Desai for excellent research assistance, and to Bhaskar Chakravorti, Ravi Chaturvedi, Anamitra Deb, Ellen Jacobs, and Gus Rossi, for advice on the issues addressed in this chapter, and to the Omidyar Network for financial support for this research.

[1] This definition borrows from that contained in art. 2(i) of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), http://data.europa.eu/eli/reg/2022/2065/oj (DSA).

perform complex integrated social functions. They themselves provide services, but they also are vehicles for communication and for commerce. Their primary distinction is in hosting user-generated content (UGC).

Platforms are a new medium or technology that greatly change the scale, pace, and pattern of communication and commerce. This medium has significant social consequences and governance consequences.[2] Physical distance makes little to no difference to platform-based interaction, and so the frequency and intensity of cross-territorial border interaction is increased dramatically. Gravity models of trade, focusing on pre-platform life, suggest that geographic distance significantly affects trade patterns.[3] The elimination of geographic distance as a source of cost will increase, redirect, and change the composition of trade in goods and services. The increase will be globalization on steroids.

This disruption involved in the move to platform-based commerce – perhaps extended in the future to metaverse activity[4] – will need to be reflected in domestic and international commercial law.[5] By "international commercial law," I mean both international trade law and private and public law applicable to international commerce, including especially the jurisdictional rules relating to applicable law, judicial jurisdiction, and jurisdiction to enforce that determine the formal effect of rules.

These jurisdictional rules are most often simply national rules relating to the scope of application of national law, but increasingly, to manage globalization, states must collectively address these rules of jurisdiction. Platforms challenge settled notions of prescriptive jurisdiction. This disruption is occasioned by the growing discontinuity between the territorial state structure of our political and legal relations, on the one hand, and the increasingly transnational structure of our commercial relations, on the other hand.

Elon Musk, in connection with his bid to purchase Twitter, said "by free speech, I simply mean that which matches the law. I am against censorship that goes far beyond the law."[6] As pointed out by Marietje Schaake,[7] he failed to recognize that

[2] *See* Orly Lobel, *The Law of the Platform*, 101 Minnesota Law Review 87, 91 (2016).

[3] For a recent review of the literature, *see* Luigi Capoani, *Review of the Gravity Model: Origins and Critical Analysis of Its Theoretical Development*, SSRN Electronic Journal (2021). Gravity models incorporate measures of non-physical distance, such as linguistic, cultural, and legal distance, but physical distance is a central component of these models that evaluate the effects of distance on trade relations.

[4] *See* Eric Ravenscraft, *What Is the Metaverse, Exactly?*, Wired (Apr. 25, 2022), https://www.wired.com/story/what-is-the-metaverse/ (last visited Aug. 21, 2022).

[5] *See* Anupam Chander, The Electronic Silk Road: How the Web Binds the World in Commerce (2013).

[6] Elon Musk (@elonmusk), Twitter (Apr. 26, 2022, 3:33 PM), https://twitter.com/elonmusk/status/1519036983137509376?s=20&t=g_iIfQtvnxbde2FfJVEL6A.

[7] Marietje Schaake, *If Elon Musk Does Buy Twitter, Free Speech Absolutism Will Not Be Enough*, Financial Times (May 18, 2022), https://www.ft.com/content/84ea07cc-d770-48c8-be94-56c1851a4afa (last visited Aug. 21, 2022).

different countries in which Twitter operates have different legal formulations of free speech. Multiple countries' laws can apply to the same platform, or the same platform transaction. Perhaps transactions divided in conduct or effect through platform-based dispersal can escape any regulation at all.

The trade-off between national regulatory autonomy and otherwise efficient commerce will change significantly as a result of the move to platforms.[8] As the costs of economic integration become lower, and as economies of scale and network externalities make technology more valuable as well as more indivisible, integration becomes more valuable. As integration becomes more valuable, the cost of regulatory diversity will rise, increasing the value of regulatory harmonization. This will not mean that regulatory diversity will be rejected – it will be more costly and therefore accepted less frequently.

Platform-based commerce also accentuates fragmentation. Increasingly, platform commerce replicates real commerce with its multiple and sometimes conflicting regulatory goals and mechanisms. But platform commerce is much more transnational, accentuating the need to deal with multiple and conflicting regulatory goals not just within a single polity but across multiple polities. This peculiarity will gradually necessitate the integration of multiple policies at the international level.

Legal analysts tend to think functionally about law, rather than to focus on specific subjects of law. So, we prefer to speak of human rights, election integrity, consumer protection, privacy, defamation, human trafficking, competition, tax, etc., in general, rather than how these functional subjects apply with respect to specific types of property or activities. We avoid discussion of "the law of the horse"[9] but instead discuss the general law of contract, tort, and property as it applies to horses.

Similarly, in theory, there should be little regulation that is particular to platforms – rather, platforms as a vehicle of communication might be understood to have little need for specialized substantive regulation, as opposed to regulation of the structure and procedures related to the platform. This indeed is the approach of the European Union in its Digital Services Act (DSA).[10]

But administration and enforcement of pre-platform legal rules present special challenges given the enhanced frequency and velocity of interaction that has otherwise challenged law enforcement on platforms, and special structural and procedural rules are required to meet these challenges. The US and other countries are experiencing the same set of challenges and are simultaneously considering revising their law relating to platform responsibilities for moderation of content.

[8] *See* Anupam Chander & Paul Schwartz, *Privacy and/or Trade*, 90 U. Chi. L. Rev. 50 (2023).

[9] *See* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. L. Forum 207 (1996).

[10] Reda Attarca, DSA, *The New Law That Will Shake Tech Giants*, UX Planet (Apr. 25, 2022) (quoting Ursula Von Der Leyen), https://uxplanet.org/dsa-the-new-law-that-will-shake-tech-giants-3d5cda90d5e7 (last visited Aug. 21, 2022); *see also* European Commission QANDA/20/2348, *Question and Answers: Digital Services Act* (Dec. 15, 2020).

Furthermore, and importantly, the medium is the message: within a novel medium, it may be appropriate to modify substantive regulation. For example, with faster and cheaper dissemination of user-generated content, it may be necessary to revisit free speech, privacy regulation, financial regulation, taxation, or competition regulation.

14.2 COMPARATIVE ANALYSIS OF LIABILITY/ MODERATION RESPONSIBILITIES

This comparative analysis will focus on comparative *platform* regulation, not comparative libel law, election integrity law, consumer protection law, protection of minors, privacy law, competition law, or other "substantive" law that might be applied to information disseminated through platforms or decisions to moderate. All these bodies of law are likely to be quite different from state to state. Notably, the DSA does nothing to harmonize substantive law. Nor does US Section 230 harmonize substantive law among US subnational states: by immunizing platforms from state law claims relating to UGC, Section 230 reduces the interstate (as opposed to international) choice of law problems that would arise from these differences of substantive law.

When Section 230 of the US Communications Decency Act was legislated in 1996, Facebook was seven years from introduction, and Twitter was ten years off. Social media was in its infancy, and election interference, fake news, fake science, and other modern concerns were not yet perceived as threats in this domain. The explicit purpose of Section 230 was "to promote the free development of the internet, while also 'remov[ing] disincentives' to implement 'blocking and filtering technologies' that restrict 'children's access to . . . inappropriate online material' and 'ensur[ing] vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.'"[11] The internet, and these platforms, have developed beyond 1996 legislative dreams.

Section 230 has two distinct, but mutually supportive, components:

(i) Immunization of platforms from liability as publishers of UGC (UGC liability protection), and
(ii) Immunization of platforms from liability for monitoring decisions (monitoring protection).

UGC liability protection allows user free speech in a way that exceeds the protections of the First Amendment, and monitoring protection allows platforms to avoid "speaking" or carrying UGC to which they object. Insulation from liability under Section 230 is broad, excluding only a few fields, such as federal crimes, sex trafficking and intellectual property. Thus, platforms are otherwise not required to

[11] Valerie C. Brannon & Eric N. Holmes, Cong. Rsch. Serv., R46751, Section 230: An Overview (2021) (citations omitted).

moderate in order to avoid liability. Nor does this change if platforms are apprised of information about harm or illegality: the immunity from liability applies regardless of state of mind.

India's 2021 Intermediary Guidelines, pursuant to its Information Technology Act of 2000 (IT Act),[12] provides a publisher safe harbor with apparent protection similar to Section 230's UGC liability protection. Platforms are required to remove illegal content only upon actual notice, which under the 2015 Shreya Singhal case[13] is only constituted by a court order. While this provides significant protection, Indian platforms are required to maintain terms of service that prohibit users from uploading or sharing a wide range of content, including content that is defamatory; harmful to children; obscene; infringes any trademark, patent, or copyright; threatens public order or the security of India; or violates any Indian law.[14] In addition, large platforms are required to "endeavor to deploy technology-based measures" to "proactively identify" content that (i) depicts rape or child sexual abuse material or (ii) is identical to content that either a court or government order directed be removed.[15] Finally, the Indian government has the power to block content under the IT Act for security or public order reasons. This is worth comparing to US First Amendment protections against government censorship, as well as with Brazilian and EU references to human rights.

Monitoring protection under Section 230 may be subject to incursions where monitoring may have a purpose that is otherwise illegal, such as an anti-competitive purpose.[16] Under Indian law, platforms have no liability for content moderation, although large platforms must provide due process in their moderation decisions.[17] Relevant Brazilian law, the Marco Civil, is silent on content moderation rights of platforms. However, one prosecutor has argued that Brazilian consumer protection law may require moderation to prevent dissemination of false information.[18]

UGC liability protection and monitoring protection are related. Obviously, users remain liable for their own illegal speech, but under the first component of Section 230, for most purposes, platforms have no responsibility. Yet, for public relations reasons, platform attractiveness reasons, and perhaps also reasons relating to forestalling greater regulatory intervention, platforms like Twitter and Facebook engage in monitoring and editing. In the US, monitoring protection makes monitoring less risky and costly. At the same time, this protection places monitoring decisions and

[12] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Part III.
[13] Shreya Singhal v. Union of India, (2015) 5 SCC 1 (India).
[14] The Information Technology Act, 2000, §69A(3).
[15] Information Technology Rules, *supra* note 13, Part III, Rule 4(4).
[16] *See* Jane Bambauer & Anupam Chander, *Bills Meant to Check Big Tech's Power Could Lead to More Disinformation*, Washington Post, June 6, 2022.
[17] *See* Chapter 5.
[18] *See* Chapter 6.

the discretion that comes with them squarely in the online platforms' area of responsibility.

As noted above, ordinary law and law enforcement, relating to users and their content, still applies, and it might be imagined that this is enough: what is sufficiently proscribed in the real world is sufficiently proscribed in the platform world. But in this high frequency and high velocity world of platforms, this does not seem sufficient.

As Marshall McLuhan said in 1964, "the medium is the message." "The 'message' of any medium or technology is the change of scale or pace or pattern that it introduces into human affairs." "The personal and social consequences of any medium – that is, of any extension of ourselves – result from the new scale that is introduced into our affairs by each extension of ourselves, or by any new technology."[19] The social consequences of platform technology are significant and constitute a shock to the world's commercial and legal equilibrium.

Administration and enforcement of pre-platform legal rules present special challenges given the enhanced frequency and velocity of interaction that has otherwise challenged law enforcement on platforms, and special structural and procedural rules are required to meet these challenges. The US and other countries are experiencing the same set of challenges and are simultaneously considering revising their law relating to platform responsibilities for moderation of content. Furthermore, and importantly, the medium is the message: within a novel medium, it may be appropriate to modify substantive regulation. For example, with faster and cheaper dissemination of UGC, it may be necessary to revisit free speech, privacy regulation, financial regulation, taxation, or competition regulation.

What is needed? Perhaps quicker identification of violations and quicker action to cease violation. New problems may also require new laws, such as relating to the way in which algorithms accentuate certain messages or the way in which platforms may insert false information into social activities such as elections. Of course, different politicians, and different countries, will have different perspectives on what indeed is false, and in some cases decisions will be required to avoid the consequences before the fallacy of a statement is fully adjudicated.

To some extent, China has solved the problem of managing information on platforms, because it subordinates free speech to party power and harnesses platforms to carry out the moderation, or control, desired by government and party. Government power is exercised through platforms, and China deputizes platforms to assist with surveillance. In order to assist in surveillance, under Chinese law, real user-names are required, real-time monitoring is required, platforms are required to cooperate with government user-monitoring websites, users are classified by risk presented, and foreign ownership of platforms is prohibited.[20]

[19] Marshall McLuhan, Understanding Media: The Extensions of Man (1st ed. 1964).
[20] *See* Chapter 4.

This type of extensive governmental control is possible in the context of an authoritarian state, by simply deputizing platforms and obliging them to follow, facilitate, and enforce the party line. Party values and power are prioritized over freedom of speech. This system seems to fit within a relatively totalitarian system, where party values, and power, are seen as paramount, and where nominally private members of society are required to cooperate in advancing them. But it would not be acceptable in a liberal society.

The EU has tried to square this circle in the DSA. First, the DSA is predicated on the concept that "what is illegal in the real world must also be illegal on platforms."[21] The DSA is focused on assigning to platforms responsibilities to assist in enforcement of existing law, given the enhanced frequency and velocity of interaction that has otherwise challenged law enforcement online.

But in addition to enforcement of existing law, the DSA enters a gray area of possible state action that may at times exceed the permissible powers of government, especially with respect to freedom of expression. It does so by assigning platforms due diligence responsibilities beyond enforcement of existing law. It also requires platforms to take due consideration of fundamental rights enshrined in the EU Charter of Fundamental Rights.[22] This is at least a start toward imposing fundamental rights–based duties on private persons. Note that Brazil seems to go further with this concept, imposing direct human rights–based duties on private persons.[23]

Article 34 of the DSA requires very large platforms to "diligently identify, analyze and assess any systemic risks in the Union stemming from the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services." These systemic risks include (i) dissemination of illegal content, (ii) negative effects for the exercise of certain fundamental rights, and (iii) actual or foreseeable negative effects on civic discourse, and electoral processes, and then to take "reasonable, proportionate, and effective measures" to mitigate the risks. The EU Commission and perhaps other regulators are assigned to supervise this process and may thereby implicitly exercise governmental authority through these platforms.

This gray area regulation may be prompted by the difficulty of regulating platforms extraterritorially, as well as the frequency and velocity of platform interaction, combining to render traditional regulatory methods inadequate. Yet it raises interesting questions on the extent to which platform due diligence actions, when mandated by governments, amount to state action and when they violate fundamental rights by constraining speech. For example, to the extent that the DSA requires greater moderation than a US platform would otherwise carry out, DSA-based takedowns that would otherwise violate US First Amendment freedoms might result.

[21] Attarca, *supra* note 10 quoting Ursula Von der Leyen.
[22] *See* Chapter 5.
[23] *See* Chapter 2.

In addition, under the DSA, liability would be based on a knowledge standard, so platforms would be required to maintain a mechanism for notice and takedown and provide due process to complainants.

14.3 JURISDICTION AND CONFLICT

Thus, platforms increase *both* collision among national rules (jurisdictional collision) and collision at the international level among functional rules (fragmentation). Revised normative and organizational tools will be needed to manage the increased globalization and fragmentation resulting from the rise of platform commerce. These tools may include rules of harmonization and rules of recognition (acceptance of home state regulation as satisfying regulatory requirements in host state).

Throughout history, human interaction has occurred in geographic space: land, sea, and air. Geographic space, imposing natural costs for communication and transportation across distance, served as a useful proxy for the scope of political concern and power. States were concerned about the people within their territory and action within their territory.

To be sure, there were overlaps in which a person within one state's territory, or with the nationality of one state, caused adverse effects to persons within another state's territory. In international trade law, informally and to a significant extent formally, jurisdiction is divided with respect to imported goods. The exporting state ordinarily has jurisdiction over the production of the good, while the importing state ordinarily has jurisdiction over its consumption: this allocation of jurisdiction is based on territoriality.[24] For some goods and for many services, production and consumption cannot be neatly divided. However, platform markets are divorced from territory, and their production and consumption externalities are highly dispersed.

For example, a good entails both production externalities and consumption externalities. In traditional commerce, and traditional approaches to jurisdiction, the producing state is largely concerned with the production externalities, while the

[24] This jurisdictional allocation is implicit in much state behavior and in one position on the debate regarding the application of WTO anti-discrimination law to PPMs – processes and production methods. To the extent that the PPM is not reflected in the product itself, as consumed in the destination state, some argue, the products may be "like" despite the difference that triggers a distinct regulatory outcome. Thus, destination state regulation of the PPM would generally be seen as treating like products less favorably, subject to possible defenses under GATT exceptions or in the WTO Technical Barriers to Trade Agreement. *See, e.g.*, Joel P. Trachtman, Regulatory Jurisdiction and the WTO, 10 J. Int'l Econ. L. 631 (2007); Steve Charnovitz, *The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality*, 27 Yale J. Int'l L. 59 (2002); Robert Howse & Donald Regan, *The Product/Process Distinction – An Illusory Basis for Disciplining Unilateralism in Trade Policy*, 11 Eur. J. Int'l L. 249 (2000); and the cogent response to the Howse and Regan article in John H. Jackson, *Comments on Shrimp/Turtle and the product/process distinction*, 11 Eur. J. Int'l L. 303 (2000).

importing state focuses on regulating the consumption externalities.[25] Where production and consumption are no longer territorially cabined, and where it makes increasing sense for people around the world to consume the same product produced in the same way, platforms implicate every regulatory concern of every state. Even more importantly, the effects of regulatory action or inaction are more dispersed around the world.

Platforms tend to be relatively indivisible, although they will increasingly challenge attempts by states to impose their preferred regulatory formula at the cost of splintering the platform. This splintering approach will be unstable because, to a significant extent, platforms are valuable precisely because they are global, establishing a global common communications space and providing generous economies of scale and scope. This very global nature makes platforms vulnerable to divergent national regulation. States set rules focused on their own territory, but these rules inevitably have effects beyond their territories. On the other side, states that wish to have different rules may be unable to effectuate their policies, especially if they are not the home state of the platform.

Different states' regulation may contradict that of other states: one state's regulation may require platforms to allow certain types of speech, while another's may prohibit platforms from allowing such speech. As Daphne Keller has pointed out, some countries' "must carry" requirements – requiring platforms to carry certain types of posts – may well conflict with other countries' "take down" requirements – where those countries prohibit certain types of posts.[26] A slightly less explicit form of this type of conflict is where one state permits what another prohibits – in that case, the prohibition may conflict with a permissive policy in the first state, but it may be that the permissive policy is not too strongly held.[27]

Where these conflicts occur, one state must defer to the other, either unilaterally or in accordance with an agreed jurisdiction-allocation rule, or, alternatively, the relevant platform must use technological means to limit access to the prohibited posts in the prohibiting state, assuming that the prohibiting state (a) does not intend to act extraterritorially and (b) is satisfied that the limits will be effective.[28]

[25] One of the important themes of modern regulatory diplomacy is increasing concern in importing states regarding production externalities, such as greenhouse gas emissions or labor conditions, that present either physical externalities, in the case of greenhouse gas, or pecuniary externalities and possibly political externalities, in the case of labor conditions.

[26] Daphne Keller, *Why D.C. Pundits' Must-Carry Claims Are Relevant to Global Censorship*, The Center for Internet and Society (2018), http://cyberlaw.stanford.edu/blog/2018/09/why-dc-pundits-must-carry-claims-are-relevant-global-censorship (last visited Aug. 21, 2022).

[27] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

[28] These issues have arisen in the Google "right to be forgotten" cases. In Case C-507/17, Google Inc, v Commision nationale de l'informatique et des libertés (CNIL), ECLI:EU:C:2019:772 ¶¶ 72-73 (Sept. 24, 2019), the Court of Justice of the European Union determined that the full right to be forgotten does not extend outside the EU.

14.3.1 *Gaming Jurisdiction by Replicating Territorial Borders Online*

Online platforms routinely make use of certain technical capabilities to tailor the content available to audiences, that is, users, across the globe based on their territorial location, more specifically that of their IP address. The use of these capabilities is akin to replicating national, territorial borders online. A fragmentation of platform regulatory approaches may lead to platforms' increased reliance on these technical means, in order to remain compliant with globally divergent regulatory regimes, while still hosting most content, even if some of it is impermissible in certain jurisdictions.

The most common tool to territorially police the availability of content on online platforms involves geo-blocking specific content. Geo-blocking (also commonly known as, "Geo-IP-blocking," "geo-filtering," and "geo-locking," less accurately likened to "geo-fencing") is the process of blockading portions of the web to restrict access to websites by location. Geo-blocking renders portions of the web regional rather than global.[29] This involves restricting access to certain content on the internet, based on the location from which the content is being accessed. Geo-blocking blocks both outgoing and incoming connections to and from a platform.[30]

Previously, geo-blocking had been the tool of choice for platforms that deal in licensed content. For licensed content such as streamed video, this tool helps prevent content from being accessed from regions outside of those permitted by the distributor. Geo-blocking has also been used to segment markets. In doing so, geo-blocking does not lead to an outright website access restriction. Instead, the geo-block may simply affect the content that may be viewed depending on the location of the user or its IP address. This allows companies that operate globally to treat and, as a result, price geographical regions differently, rather than treating the entire internet as one single market.

The most relevant use-case to the present study of online platform regulation and content moderation allows online platforms to comply with diverging sets of laws as to permissible online content through geo-blocking. For instance, anti-gambling legislation may compel platforms to reject access and traffic to offshore online casinos, betting sites, or to restrict access to domestic sites from certain locations.[31] In doing so, platforms may, prima facie, be able to comply with differing approaches to content moderation globally without sacrificing an outright exit from a certain market. What may be prohibited content in country A, could still be hosted on

[29] Romj Amon, *What Is Geo Blocking and How Does It Work?*, TECHJURY (2022), https://techjury.net/blog/what-is-geo-blocking/ (last visited Aug. 21, 2022).

[30] *What Is Geoblocking?*, TECHOPEDIA.COM, http://www.techopedia.com/definition/32362/geoblocking (last visited Aug. 21, 2022).

[31] *See, e.g.*, Simon Planzer, *The Gambling Law Review: Switzerland*, THE LAW REVIEWS (2022), https://thelawreviews.co.uk/title/the-gambling-law-review/switzerland (last visited Aug. 21, 2022).

Platform X and disseminated to all other countries where the content is not prohibited, so long as Platform X ensures that access to such content is geo-blocked for users attempting to access the content from within country A or with an IP address assigned to country A.

Beyond mere geo-blocking, the "Great Firewall of China," officially known as the "Golden Shield Project," is likely the most prominent internet censorship operation in the world. The technical capabilities include IP blocking, which denies the IP addresses of specific domains, and packet filtering, which scans packets of data for controversial keywords, credit records, and speech and facial recognition.[32]

This "firewall" thus combines a host of different technical means to limit accessible content on platforms from within China. Though these are measures taken by the Chinese state, an example of action taken by a platform to territorially fragment its operations is of particular relevance to the study at hand: namely, Google's adaptation of its offerings in the Chinese market prior to its exit in 2010. When Google launched Google.cn, a platform that censored content that was deemed objectionable by the Chinese government, it was accused of supporting the Chinese government's censorship efforts. This episode seemingly laid bare an online platform's willingness to censor material that a government deems objectionable, in order to maintain operations in that jurisdiction.[33]

Far from erecting firewalls or creating regional iterations of their services, reliance on geo-blocking to offer different content in different jurisdictions still begs the question of whether such efforts to replicate national borders in the online space will suffice to comply with diverging platform responsibility and content moderation approaches around the globe.

Two issues arise in this regard: First, mere geo-blocking measures do not ensure a total exclusion of access to the restricted content given that users in a restrictive jurisdiction can employ easily accessible means to circumvent geo-blocks, such as VPN or proxy servers, as well as Tor networks.[34] Given the widespread use of such means to circumvent geo-blocks, which have been erected for other purposes, for example, to enforce licensing agreements for online content, it is likely that geo-blocks on the basis of content moderation rules would simply not be effective enough a measure to ensure that users are unable to access the restricted content in question.

[32] *China's Great Firewall*, Free speech vs Maintaining Social Cohesion (2011), https://cs.stanford.edu/people/eroberts/cs181/projects/2010-11/FreeExpressionVsSocialCohesion/china_policy.html (last visited Aug. 21, 2022).

[33] On the ethical implications of Google's local platform adaption, *see*, *e.g*, Sung Wook Kim & Aziz Douai, *Google vs. China's "Great Firewall": Ethical Implications for Free Speech and Sovereignty*, 34 Technology in Society 174 (2012).

[34] Kearns, *Why Geo-Blocking Fails and What Service Providers Can Do About It*, Cartesian (2020), https://www.cartesian.com/why-geo-blocking-fails-and-what-service-providers-can-do-about-it/ (last visited Aug. 21, 2022).

Second, it is unclear whether the mere exclusion of access to users from a certain geographical space can satisfy the legal threshold to be compliant with platform regulation on content moderation. Notably, the Delhi High Court in 2019 ordered the global removal of defamatory content by social media platforms and ruled that simply geo-blocking the content, so that it would no longer be accessible in India, was not a valid alternative.[35] Similarly, the European Court of Justice held that national courts across the EU could order the global removal of defamatory content, provided such possibility exists under their own private international laws.[36] In sum, the possibility of courts and legislatures recognizing a right or duty for "global content removal" will render geo-blocking as a means for platform regulatory compliance mute. Moreover, the extraterritorial application of removal orders would equally call into question the viability of a fragmented, regional, geo-blocked internet.

While jurisdictional fragmentation poses a significant business and existential risk to globally operating online platforms, geo-blocking may initially appear as a means for platforms to remain global while regionally or territorially restricting access to certain content. Through geo-blocking, an online platform such as Facebook could potentially continue to provide access to content in the United States, which it has been ordered to take down or moderate in the European Union, on the basis of the DSA. Technically, a platform could remain compliant, provided that access to the restricted content is denied to users from the jurisdiction in question. However, given the system's easy circumvention as well as an increased trend toward global content removal orders, the viability of technical means, such as geo-blocking, to replicate national borders online is subject to debate.

Ultimately, a globally fragmented platform, catering to different regulatory strait-jackets by geo-blocking its content, runs the risk of losing the inherent characteristics that make such a platform attractive to users globally, and, perpetuating illiberal content moderation practices, in order to remain active in every market.

14.4 JURISDICTIONAL ALLOCATION IN THE ABSENCE OF BORDERS

Accentuating the fact that multiple national regulatory regimes may apply in each functional area is the fact that the relevant rules regarding applicable law – choice of law in private law and prescriptive jurisdiction in public law – vary depending on

[35] *See* Mathangi Kumaresan, *Delhi High Court Orders Global Removal of Defamatory Content on Consideration of Inappropriateness of Sole Geo-blocking*, 15 JOURNAL OF INTELLECTUAL PROPERTY LAW & PRACTICE 90 (2020). The Court differentiates between the place of origin of the content: "in cases where defamatory content has been uploaded from India, then the removal of such content shall be worldwide and not just restricted to India. However, for uploads of defamatory content from outside India, the Defendants [online platforms] would have to use adequate geo-blocking measures, so that Indian users, i.e. IP addresses from India, could no longer access the contents."

[36] Case C-18/18, *Glawischnig-Piesczek*, ECLI:EU:C:2019:821 (Oct. 3, 2019).

which regulatory regime is being applied by which state. This is a veritable kaleidoscope of law, with multiple prisms changing the configuration of relevant law as the viewer's perspective changes: allocation of jurisdiction depends on the field of law and the state purporting to apply its law. For example, privacy law, tax law, defamation law, intellectual property law, and consumer protection law, to name but a few, each has a different rule regarding applicable law. Furthermore, each state has its own rules regarding the circumstances under which its law applies. To summarize: multiple states, multiple (fragmented) bodies of law, and multiple and overlapping and underlapping rules regarding applicable law.

This kaleidoscope of law existed before platforms were developed, but its complexity, velocity, and frequency are heightened by platforms. The medium is the message. Nor is it possible to develop a single clear, formally realizable rule for allocation of jurisdiction over platforms. The obvious one would be nationality of incorporation, but this is easily manipulable and would deprive affected states of important regulatory power over activities that affect their citizens. Alternatively, location of consumer would be considered, but this results in dispersal of jurisdiction for a transnational platform, and even a particular transaction might involve multiple consumers of platform services located in multiple jurisdictions.

Uncoordinated national regulation of platforms can splinter – destroy – global commerce. To the extent that foreign producers are unable to comply, or find it too costly to comply, with importing state regulation, in areas such as cybersecurity,[37] privacy,[38] monitoring,[39] free speech, libel, taxation, or competition – commerce will be impossible or impeded. The social problem is one of multiple goals – fragmentation – in which the best solutions maximize a combination of values: the value of liberalized commerce and the value of regulation, including regulatory autonomy. There is a trade-off between these values, and different societies may set the trade-off at different points.

The international law of trade does not yet provide for integrated negotiation and management of these trade-offs. Trade law focuses on liberalization: addressing barriers to commerce. Barriers that are intended to serve as barriers, and that serve no non-trade purpose, are easier to address than barriers that have a regulatory, or "prudential," purpose: reductions can simply be negotiated on a reciprocal and aggregate welfare-increasing basis. In the context of prudential regulation, the welfare effects of reduction are ambiguous and must be evaluated by each state on a case-by-case basis: harmonization or mutual recognition, or deregulation, may reduce welfare in an amount greater than the benefits of trade. And, especially in

[37] *See* Joel P. Trachtman, *Cybersecurity versus Trade in Internet of Things Products*, 16 Manchester J. Int'l Econ. L. (2020).

[38] *See* Anupam Chander & Paul Schwartz, *Privacy and/or Trade*, 90 U. Chicago L. Rev. 50 (2023).

[39] *See* Susan Ariel Aaronson, *Can Trade Agreements Help Solve the Wicked Problem of Disinformation?*, SSRN Electronic Journal (2021).

trade in goods, many of them have been addressed over the GATT/WTO period, although they have resurged in important sectors more recently. Many of the barriers to trade in services have a prudential purpose. Even data localization requirements may be intended to ensure that the host state will have the jurisdiction necessary to regulate for prudential purposes.

Yet it is apparent that diversity of regulation of platforms – for privacy, taxation, competition, political integrity, free speech, defamation, and other purposes – while not novel per se, presents novel types of prudential barriers. These prudential barriers loom especially large in a field where there are no natural barriers of distance or transport cost and no legacy non-prudential barriers. So, this diversity of regulation is the main type of barrier to trade, given the durability so far of a moratorium on customs duties applied to e-commerce, and it can be significant. The WTO Joint Statement Initiative negotiations on digital commerce, preferential trade agreement provisions on digital commerce, and the US-EU Trade and Technology Council have begun to address some of these issues but in modest and superficial ways that provide a basis for free commerce in platform services.

Fragmentation is not new, but it is especially challenging in the platform context, which seems to implicate many policies at once. There may be conflicts among prudential policies: defamation policy or political integrity policy versus free speech policy, competition policy versus industrial policy, etc.

But all of these prudential policies conflict with liberalization – with market access – insofar as they pose barriers to certain national markets. For example, a digital service tax may present obstacles that were unexpected or that are not normal for other types of business. Variations in competition, defamation, or privacy law can require inefficient variation in platform structure in different markets or keep some platforms out of certain markets altogether. These are questions of interoperability: to what extent will platforms be required to be splintered, utilizing geo-blocking or other technical means and custom-designed for specific jurisdictions? There are important economic incentives to avoid the costs of separation and customization.

Trade law has traditionally emphasized market access, while seeking to avoid unnecessary constraints on states' "right to regulate." Early multilateral trade law – GATT 1947 – merely prohibited discrimination and even allowed discrimination where it was justified by prudential or security concerns expressed in Articles XX and XXI of GATT. The WTO, which was established in 1995, added limited requirements of proportionality, and of compliance with international standards, for goods, in the Technical Barriers to Trade Agreement and in the Sanitary and Phytosanitary Measures Agreement. In connection with services, the WTO has added requirements of proportionality in very limited areas. But it has been recognized, in connection with the European Union project, and in connection with deeper non-EU integration proposals such as the Trans-Atlantic Trade and Investment Partnership, that deeper integration requires more attention to prudential

regulation. The EU model of regulatory integration is one of essential harmonization as a condition for mutual recognition.

The world has muddled through these questions of allocation of regulatory authority over transnational commerce, in part because in the past the natural borders between states were more congruent with the international structure of commerce. Digital commerce has the potential to be more transnational and to integrate across borders more deeply. In some sense, platform commerce on a global scale may be comparable to the EU phenomenon within Europe: there are important incentives for deeper integration, but the deeper integration requires greater management of differences, and overlaps, in prudential regulation of the types discussed above.

14.5 GENERATIVE ANALYSIS

Cooperation between people, or between social groups, occurs in different ways in different contexts. The distribution of resources, the distribution of preferences, the strategic structure of the cooperation problem, path dependence, and other factors affect whether and how states cooperate in the international system. Of course, cooperation need not be only among states – private actors are an increasingly important part of international cooperation, especially in the information technology field.

Furthermore, we must begin with a unit of analysis, both in terms of the number of states involved, and in terms of the number of issues addressed together, or in linked negotiations or rules. To begin to imagine how cooperation in the area of platform responsibility and moderation might evolve, we might derive ideas from some areas that may display similar cooperation problems or structures. Here, we begin with informed conjecture to suggest a few areas to examine: international bank regulation, international taxation, and the international infectious disease control.

In the area of international bank regulation, there are several bases for analogy with international platform regulation, as suggested by Federico Lupo Pasini (Chapter 8): First, platforms and international banking both operate in transnational markets. Second, both lack a transnational regulatory power, although in international banking, the Basel Committee and the IMF play limited regulatory roles. Third, both involve cross-border externalities, with the possibility of contagion in the banking field. Finally, there are substantial benefits from cross-border activity, including economies of scale, network effects, increased innovation, and more efficient capital flows. In the banking area, cooperation has been possible, despite different national regulatory preferences and market structures, through rules formulated by the Basel Committee on a nonbinding basis. Basel Committee rules are then made more binding through adoption as part of IMF or World Bank conditionality and "reviews of standards and rules." Interestingly, national rules of recognition,

conditioned on compliance with Basel Committee rules, link commerce to regulation and establish an informal and expanding "club" of states in which cross-border commerce is permitted. There is a trade-off between breadth of membership in this club and depth of regulatory cooperation. This type of cooperation may provide some basis for proposals regarding international platform regulation.

In international taxation, Carlo Garbarino compares a globally distributed and manipulable tax base to the problem of globally distributed information (Chapter 9). The problem of international cooperation can be understood as a "race to the bottom," as experienced in the tax context where states reduce their taxes in order to attract investment. In the platform regulation context, to the extent that states have the ability to block platform access or hold platforms to account, it is also possible that the result would be a "race to the top," in which states agree together on a higher standard and avoid a race to the bottom. The goals and methods, for example, of China as compared to the US, however, suggests that states may have strongly differing goals, leading more to a "club" structure in which states join with those holding comparable regulatory preferences and exclude others from their markets. This is a type of "minilateralism," in which breadth of membership is traded for depth and consistency with regulatory preferences.

Infectious disease, as addressed by Mark Jit and Dominik Hofstetter (Chapter 7), also contains some analogies of interest. The global internet can be understood as a space for transmission of global infection. However, information is more normatively ambivalent than disease, although there are variations in concern about various diseases. Diverging agendas may limit cooperation. Some areas of concern may be "low-hanging fruit" for which there is wide agreement among many governments. Material regarding child pornography or sex trafficking may fall into this category. Governments can work together to reduce transmission and may work together with private sector partners. For example, transmission of virulent material may be reduced by control over algorithmic amplification.

In sum, an observation of the strides accomplished in some fields, and the careful treading on display in others as it relates to solving transnational cooperation problems, offers valuable suggestions for any attempt at achieving a transnational consensus on the regulation of online platforms. The feature in both international banking regulation as well as international taxation, where the creation of groups of like-minded regulatory polities form clubs and thus enable further harmonization, has been reflected in work on content moderation relating to election interference and national security.[40]

[40] David L. Sloss, Tyrants on Twitter: Protecting Democracies from Information Warfare 6 (2022) (proposing a "new alliance of democratic states," an "Alliance for Democracy," to shield themselves from "Russian and Chinese information warfare" while ensuring robust speech and informational privacy protections).

14.6 EVALUATING THE NORMATIVE AND ORGANIZATIONAL TOOLBOX

Considering the potential for conflicts between different countries' laws in this area, and the impediment to interaction, including commerce, that these conflicts may cause, states have already begun to act to cooperate on these issues. The chosen forum and vehicle for harmonization varies from inclusion in trade agreements to less binding principles and guidelines.

14.7 PRIOR ACTIVITY: EXISTING EFFORTS AT HARMONIZATION

There has already been much preliminary international discussion and normative activity with respect to platform responsibility. We have already mentioned the EU's Digital Services Act, which is an intensive international effort to harmonize and engage in mutual recognition of platform responsibility regulation. Note, importantly, that the DSA does not harmonize substantive law of EU member states, but the EU benefits from broad informal consensus and substantial formal agreement on many important areas of law.

The US has sought to require certain trade partners to adhere to the US Section 230 approach to platform responsibility. In 2019, the US and Japan signed the US–Japan Trade Agreement and the US–Japan Digital Trade Agreement. While the former deals with tariffs on agricultural products, the latter includes provisions on data localization, cross-border data flows, and online intermediary liability.[41]

Article 18 (Interactive Computer Services) of the Digital Trade Agreement is similar to Section 230, stipulating that "neither Party shall adopt or maintain measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created or developed the information."[42] The provision also protects online platforms from liability arising from content removal by dint of language directly mimicking Section 230.[43] And, much like Section 230, the Digital Trade Agreement contains exceptions for IP law and criminal law.[44]

Several months after the Digital Trade Agreement was signed between the US and Japan, the United States-Mexico-Canada Agreement (USMCA) was ratified to replace the North American Free Trade Agreement (NAFTA). The USMCA went into effect on July 1, 2020, requiring that US trade partners adopt provisions modeled

[41] Trade Agreement US–Japan, October 7, 2019, T.I.A.S. no. 20-101.2; Digital Trade Agreement, US–Japan, October 7, 2019, T.I.A.S. no. 20-101.1 [US–Japan Digital Trade Agreement].
[42] US–Japan Digital Trade Agreement, art. 18(2).
[43] *Id.*, art. 18(3).
[44] *Id.*, art. 18(4).

on Section 230. The online liability provisions of the USMCA largely contained in Chapter 19 are aligned with Section 230.[45] The purpose of these provisions, too, is to ensure that interactive computer service providers are not held liable for third-party content published on their platforms.

The rationale for the inclusion of such provisions in trade agreements has been said to stem from the international nature of the internet.[46] The USTR Factsheet frames the Interactive Computer Services provision from a "recognition" standpoint.[47] While much literature has focused on the exporting of Section 230 to advance the commercial interests of US-based social media companies,[48] a closer examination of relevant arrangements indicates a more nuanced observation.[49] For instance, while Canada has accepted the digital trade provisions of the USMCA without qualification, Article 19.17.5 has subjected the online liability clause to Annex 19-A, which essentially exempts Mexico from compliance for the first three years after the USMCA becomes effective and later provides that Mexico shall comply "in a manner that is both effective and consistent with Mexico's Constitution."[50]

Similarly, the signing of the US–Japan Digital Trade Agreement was accompanied by a Side Letter on Interactive Computer Services in which both parties to the Agreement recognize that Japan's law on online platforms is inconsistent with Article 18 of the US–Japan Digital Trade Agreement. However, the letter reads that in spite of this, "based on a review of information on the operation of Japan's legal system and discussion between the Parties, the Parties agree that Japan need not change its existing legal system, including laws, regulations, and judicial decisions, governing the liability of interactive computer services suppliers, to comply with

[45] USMCA, Chapter 19, art. 19.17.

[46] Ashley Johnson & Daniel Castro, *How Other Countries Have Dealt with Intermediary Liability | ITIF*, ITIF (2021), https://itif.org/publications/2021/02/22/how-other-countries-have-dealt-intermediary-liability (last visited Aug. 21, 2022) (arguing that it is "beneficial for these online services and businesses, and for their users and customers, to have a similar set of rules that apply across borders").

[47] "The United States-Japan Digital Trade Agreement parallels the United States-Mexico-Canada Agreement (USMCA) as the most comprehensive and high-standard trade agreement addressing digital trade barriers ever negotiated. This agreement will help drive economic prosperity, promote fairer and more balanced trade, and help ensure that shared rules support businesses in key sectors where both countries lead the world in innovation." *See* USTR, *Fact Sheet on US–Japan Digital Trade Agreement*, https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2019/october/fact-sheet-us-japan-digital-trade-agreement (last visited Aug. 21, 2022).

[48] Vivek Krishnamurthy & Jessica Fjeld, *CDA 230 Goes North American? Examining the Impacts of the USMCA's Intermediary Liability Provisions in Canada and the United States*, SSRN Electronic Journal (2020); Joshua P Meltzer, *The United-Mexico-Canada: Developing Trade Policy for Digital Trade*, 11 Trade, L., & Dev't 239 (2019).

[49] For a detailed account of the carve-outs, *see* Han-Wei Liu, *Exporting the First Amendment through Trade: The Global "Constitutional Moment" for Online Platform Liability*, 53 Georgetown Journal of International Law (2022).

[50] USMCA, Chapter 19, Annex 19-A.1-3.

Article 18."[51] This Side Letter suggests that Japan has also managed to essentially contract out of any potential effects of Article 18.

Despite the obvious qualifications and carve-outs, which challenge the economic rationale of including Section 230 language in trade agreements, this development in US trade negotiation policy has garnered a substantial share of criticism from different circles.[52] Notably, a coalition of internet accountability groups asked the Biden administration to eschew Section 230 language in future trade deals.[53] In the US Congress, too, calls to refrain from including Section 230 language in trade agreements is accumulating bipartisan support.[54] While some voices fear that this practice helps shield "tech giants" from foreign regulators and further entrenches their ability to make content moderation decisions void of government oversight,[55] others point to a more fundamental misconception. Namely, exporting Section 230 language through trade agreements is contentious when the receiving jurisdictions lack the constitutional and public law context that gave rise to this provision in the US.[56]

On the face of it, the inclusion of Section 230 language in US trade agreements may precipitate a bargained-for harmonization of platform responsibility regulation. As trade agreements of the future may routinely include digital trade provisions, they may provide a suitable vehicle for harmonization. However, the carve-outs negotiated by Mexico and Japan suggest that, while Section 230 language may be included in the agreements, individual countries seek to maintain their regulatory autonomy over platform responsibility and content moderation. Given the public law and constitutional nuances of online platform responsibility regulation, imposing one country's regulatory standard by trade fiat may prove significantly more challenging than "simple" tariff negotiations.

[51] US–Japan Digital Trade Agreement, Side Letter on Interactive Computer Services, October 7, 2019, https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations/us-japan-digital-trade-agreement-text (last visited Aug. 21, 2022).

[52] *See e.g.*, Anna Edgerton, *Tech Liability Shield Has No Place in Trade Deals, Groups Say* (2021), https://news.bloomberglaw.com/tech-and-telecom-law/tech-liability-shield-has-no-place-in-trade-deals-groups-say (last visited Aug. 21, 2022).

[53] *See* Press Release, American Economic Liberties Project, *16 National Orgs Urge Biden to Keep Section 230 Out of Trade Agreements* (May 27, 2021), https://www.economicliberties.us/press-release/15-national-orgs-urge-biden-to-keep-section-230-out-of-trade-agreements/ (last visited Aug. 21, 2022).

[54] *See* Letter from Richard Blumenthal, Charles E. Grassley, Rob Portman & Mark R. Warner, US Senate, to Robert E. Lighthizer, USTR (Dec. 18, 2020), https://www.warner.senate.gov/public/_cache/files/8/7/873e5ca4-6959-4ec8-ac01-62b78bc909d4/06A4505EDD4B887956702C3A8091DCD3.uk-230-letter-final.pdf (last visited Aug. 21, 2022).

[55] David McCabe & Ana Swanson, *U.S. Using Trade Deals to Shield Tech Giants From Foreign Regulators*, New York Times, Oct. 7, 2019, https://www.nytimes.com/2019/10/07/business/tech-shield-trade-deals.html (last visited Sept. 4, 2022).

[56] Liu, *supra* note 49, at 56–58.

14.8 PRIOR ACTIVITY: DEVELOPMENT OF PRINCIPLES

Apart from attempts at harmonization through the inclusion of platform liability provisions in international trade agreements, most of the discussions and movements have culminated in sets of principles and guidelines published by international organizations, NGOs, and internet governance organizations.

The Communiqué attached to the 2011 OECD "Recommendation of the Council on Principles for Internet Policy Making"[57] took a pragmatic approach to platform responsibility for user behavior by noting that appropriate limitations of liability for intermediaries play a fundamental role in promoting innovation and creativity, the free flow of information, incentives for cooperation among stakeholders, and economic growth. The Communiqué, however, also stressed that intermediaries play a vital role in addressing and deterring illegal activity, fraud, and misinformation on their platforms. Moreover, the Communiqué mentions that proportionality and respect for the protection of fundamental rights are important considerations for such intermediaries in addressing such content.

The 2014 OECD "Principles for Internet Policy Making"[58] consequently builds upon the 2011 Communiqué and supports a flexible, multistakeholder approach to internet policy-making and strengthened international cooperation. In particular, Principle No. 12 "Limit Internet Intermediary Liability" reflects the notions outlined in the 2011 Communiqué.

The Manila Principles on Intermediary Liability, published in March 2015, provide best practices guidelines for limiting intermediary liability for content to promote freedom of expression and innovation. The principles are the result of deliberations between various internet governance organizations and civil society groups.[59] The Manila Principles are among the few available guideline formulations addressing intermediary liability and platform responsibility as it relates to content. A similar attempt at formulating best practices specifically centered around content moderation can be found in the Santa Clara Principles, which provide recommendations for platforms engaging in content moderation. The second iteration of these Principles, published in 2021, is divided into Foundational and Operational Principles. Foundational Principles are overarching and cross-cutting principles that should be taken into account by all companies, while Operational Principles set out

[57] OECD, *Recommendation of the Council on Principles for Internet Policy Making* (Dec. 13, 2011) https://www.oecd.org/digital/ieconomy/49258588.pdf (last visited Aug. 21, 2022).

[58] OECD, *Principles for Internet Policy Making* (2014) https://www.oecd.org/digital/ieconomy/oecd-principles-for-internet-policy-making.pdf (last visited Aug. 21, 2022).

[59] *See Manila Principles on Intermediary Liability, Best Practices Guidelines for Limiting Intermediary Liability for Content to Promote Freedom of Expression and Innovation* (Mar. 14, 2015) https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf (last visited Aug. 21, 2022).

more granular expectations for the largest companies.[60] This distinction reflects the regulatory differentiation included in the DSA. Notably, however, the Santa Clara Principles explicitly state that they are not designed to provide a template for regulation.

The 2016 "One Internet" report,[61] published by the Global Commission on Internet Governance (GCIG) on the eve of the OECD's third internet-related Ministerial Meeting in 2016, addresses several issues relating to platform responsibility. In its chapter on "Corporations as Digital Gatekeepers," the report outlines various approaches to intermediary liability and content moderation by platforms. It highlights jurisdictions with "safe harbor" rules and presents the Manila Principles on Intermediary Liability, which the GCIG "fully supports."[62] These principles include shielding intermediaries from liability for third-party content, the requirement of judicial authority for content takedowns, necessity and proportionality, clarity and due process, and transparency and accountability. The GCIG believes that intermediaries "should not be required to perform the functions of law enforcement, except as required by the appropriate judicial order."

The Global Network Initiative (GNI) was launched in 2008 to address the question of private tech companies balancing freedom of expression, privacy, and other interests in deciding whether to censor content. GNI is a unique multistakeholder platform that came out of deliberations by information and communications technology (ICT) companies, human rights and press freedom organizations, academics, and investors. Among other issues, GNI also addresses intermediary liability and content regulation.[63] In 2020, GNI published a policy brief analyzing twenty legislative initiatives around the world that claim to address various forms of digital harm.[64] The report concludes by formulating recommendations on how to legislate to adequately account for fundamental rights as well as moderation concerns.[65] GNI has also published the "GNI Principles on Freedom of Expression and Privacy,"[66] which is largely based on internationally recognized laws and standards for human rights, including the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, as well as the UN Guiding Principles on

[60] *Santa Clara Principles on Transparency and Accountability in Content Moderation*, Santa Clara Principles, https://santaclaraprinciples.org/images/santa-clara-OG.png (last visited Aug. 21, 2022).

[61] GCIG, *One Internet*, Report (2016), https://www.cigionline.org/sites/default/files/gcig_final_report_-_with_cover.pdf (last visited Aug. 21, 2022).

[62] *Id.* at 45–46.

[63] GNI, *Intermediary Liability & Content Regulation*, Global Network Initiative, https://globalnetworkinitiative.org/policy-issues/intermediary-liability-content-regulation/ (last visited Aug. 21, 2022).

[64] GNI, Content Regulation and Human Rights. Analysis and Recommendations (2020).

[65] *Id.*, Appendix A.

[66] GNI, Principles on Freedom of Expression and Privacy (as updated May 2017).

Business and Human Rights, the "Protect, Respect, and Remedy" Framework, and the OECD Guidelines for Multinational Enterprises. The GNI principles stipulate rather vague aspirations as to the responsibilities of companies, largely in favor of ensuring freedom of speech and prevention of censorship.

On a more supranational level, the UN Office for the High Commissioner for Human Rights (UN OHCHR) has expressed its concerns over the introduction of various content moderation laws across the globe.[67] As a result, UN OHCHR has proposed five actions for States and platforms to consider when engaging in content moderation: First, UN OHCHR urges that the focus of regulation should be on improving content moderation processes, rather than adding content-specific restrictions. Second, restrictions imposed by States should be based on laws, should be clear, and should be necessary, proportionate, and nondiscriminatory. Third, companies need to be transparent about how they curate and moderate content and how they share information, and States need to be transparent about their requests to restrict content or access users' data. Fourth, users should have effective opportunities to appeal against decisions they consider to be unfair, and independent courts should have the final say over lawfulness of content. Finally, civil society and experts should be involved in the design and evaluation of regulations.[68] UN OHCHR also invokes the UN Guiding Principles on Business and Human Rights[69], reiterating that business should respect fundamental rights and also provide appropriate means for appeals and decision review. On November 1, 2020, UN OHCHR also published an explainer, "Regulating online content – the way forward,"[70] with seven key stipulations for businesses and government.

Discussions on platform responsibility and content moderation practices are being led in various international fora, engaging stakeholders from across the board. While the 2014 OECD Principles and 2015 Manila Principles on Intermediary Liability form the most prominent attempts at formulating common principles, their success remains isolated to the supranational discursive sphere. At the moment, there are no sufficiently concrete regulation-like documents that could form the basis for transnational negotiations and rule-making. That being said, the vast and diverse expertise and bodies engaged in the discussion on platform responsibility and content moderation may serve as fruitful grounds for transnational attempts at regulation.

[67] UN OHCHR, *Moderating Online Content: Fighting Harm or Silencing Dissent?*, Latest Stories (July 23, 2021), https://www.ohchr.org/en/stories/2021/07/moderating-online-content-fighting-harm-or-silencing-dissent (last visited Aug. 21, 2022).

[68] *Id.*

[69] UN OHCHR, Guiding Principles on Business and Human Rights, HR/PUB/11/04 (2011).

[70] Press Release, UN OHCHR , *Regulating Online Content – The Way Forward* (Nov. 1, 2020), https://www.ohchr.org/sites/default/files/Documents/Press/Regulating-online-content-the-way-forward.pdf (last visited Aug. 21, 2022).

14.9 TOWARD A ROADMAP TO NEGOTIATING INTERNATIONAL RULES FOR PLATFORM REGULATION

The problem of platform regulation will require significant diplomatic, legal, and industry attention in coming years. This attention will not be confined to procedure but will extend to substance. However, the initial issues required to be addressed will entail the general issue of responsibility of platforms for UGC and the scope of freedom platforms have to moderate UGC.

To maximize the joint benefits of liberalization and regulation in the platform context, and to distribute those joint benefits in a politically sustainable manner, norms and organizations are required. This is true in all areas of commerce and especially true in the context of platform "globalization on steroids."

Rules of national treatment or most-favored-nation treatment prohibiting discrimination are necessary, but not sufficient, as they would leave in place divergent national regulation, and so would likely fail to achieve the optimal level of commerce. Rules of proportionality might allow greater commerce but would require that national measures be structured in the least restrictive manner necessary to achieve their objectives. However, proportionality might also fall short in achieving optimal levels of commerce. In addition, it is difficult for tribunals to measure proportionality, and the results may be unpredictable.

While the trade system has begun to address explicitly in plurilateral agreements a limited set of issues relating to data, such as customs duties, data localization, source code disclosure, privacy, and access to networks, it has not addressed a number of other issues, including political interference, free expression, libel, moderation, taxation, competition, and other issues. Of course, these issues predated platforms. However, these issues did not present the relative magnitude of potential barriers to commerce that they do in the context of the technological integration presented by platforms. As the barriers of distance have declined, the barriers of legal difference have increased in relative and absolute terms.

As discussed above, the world has muddled through with limited and ambiguous understandings of the scope of national jurisdiction in several private and public law areas. To reduce the barriers of legal difference, states may begin by reducing areas of overlapping application of law, by agreeing on rules of exclusive jurisdiction. This has been difficult and is especially challenging given the dispersed effects of platform operations. It is difficult for any state to give up jurisdictional authority with respect to an issue that has effects on its citizens. In some areas, such as taxation, the need to have a principle of single taxation – one, and only one, tax applies to all income, is more obvious. In some other areas, states may be more willing to allow overlap where the worst outcome is a race to the top. However, one state's race to the top is another's race to the bottom: states determine their own optimal level of regulation, and regulation at a more stringent level is often suboptimal.

A second step that states might take to reduce the barriers of legal difference is to eliminate differences by harmonizing rules. Indeed, in areas such as those covered by the GDPR, the DSA, and the Digital Markets Act (DMA), the rationales presented for harmonization of rules within the EU in terms of subsidiarity may be lightly edited to refer to the multilateral system instead of the EU context and would be equally accurate. For example, the 2020 memorandum accompanying the then proposed DSA includes the following statement:

> Taking into account that the Internet is by its nature cross-border, the legislative efforts at national level referred to above hamper the provision and reception of services throughout the Union and are ineffective in ensuring the safety and uniform protection of the rights of Union citizens and businesses online. Harmonizing the conditions for innovative cross-border digital services to develop in the Union, while maintaining a safe online environment, can only be served at Union level.[71]

The DMA contains the following notable language in its 6th recital:

> Gatekeepers have a significant impact on the internal market, providing gateways for a large number of business users to reach end users everywhere in the Union and on different markets. The adverse impact of unfair practices on the internal market and the particularly weak contestability of core platform services, including the negative societal and economic implications of such unfair practices, have led national legislators and sectoral regulators to act. A number of regulatory solutions have already been adopted at national level or proposed to address unfair practices and the contestability of digital services or at least with regard to some of them. This has created divergent regulatory solutions which results in the fragmentation of the internal market, thus raising the risk of increased compliance costs due to different sets of national regulatory requirements.[72]

The same reasons given for harmonizing competition regulation of platforms within the EU also apply in the broader global setting. Of course, the economic and social similarity of states and regulatory perspectives within the EU makes harmonization easier in that context than in the multilateral context. Subsidiarity demands harmonization within the EU, but it may to some extent also demand harmonization globally. However, the optimal approach is not necessarily harmonization:

[71] DSA, *supra* note 1, at 6. *See also* the Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L. 119) [hereinafter *GDPR*] recital 170; Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) 2020/0374 (COD) final (May 11, 2022) recitals 7–10.

[72] Regulation (EU) 2022/1925 of the European Parliament and the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (DMA).

optimality depends on the value to states of diversity and the costs of legal integration. This will be different within the EU than in the multilateral system.

This type of harmonization could take place within one or more specialized international bodies, or within a trade agreement. If developed in specialized bodies, the resulting rules could be incorporated by reference into trade law through a reference arrangement in the WTO treaty or in preferential trade agreements, along the lines of the incorporation of intellectual property rights in the TRIPS (Trade Related Intellectual Property Rights) agreement or the incorporation of product standards in the TBT (Technical Barriers to Trade) or SPS (Sanitary and Phytosanitary Measures) Agreements within the WTO.

Because each area of law has its own rationale, and the intensity and combination of rationales will differ in each state, fragmentation means that the optimal legal and institutional response to platforms will differ depending on the area of law involved. In addition, multiple international organizations or other fora take responsibility for different fields of law, and indeed, within national governments, multiple ministries or other agencies take responsibility for different fields of law. The result of this institutional fragmentation can be to impede integrated management of different but overlapping areas of regulation. We have seen this in the relationship between the trade system, in particular the WTO, and other areas of international law, such as environmental protection, labor rights, taxation, competition, etc.

Similarly, because different states and groups of states have different preferences, capabilities, and perspectives in these different fields of law, we can expect that there may be some degree of plurilateral action in particular areas. So, for example, we might see multilateral action regarding competition on platforms but plurilateral action regarding responsibilities of platforms for moderation.

It is not clear how this organizational fragmentation should be bridged, or whether the WTO or another organization should serve as a cross-functional clearinghouse. But it has become clear that no organization can achieve its mandate effectively or legitimately while ignoring the concerns associated with functions assigned to other organizations, so bridges will be necessary.

What diplomatic or international relations techniques could be used to achieve harmonization and/or recognition? As suggested in the generative analysis above, it may be useful to begin with lowest-common denominators, or low-hanging fruit, in the form of certain types of pornographic or trafficking content, terrorist content, or intellectual property violations. Some of these areas are already exceptions from the US Section 230 limits on platform responsibility. Beginning with low-hanging fruit will allow the development of diplomatic expertise and experience, and institutional structures, to address further issues of cooperation.

Market access conditionality may be a unilateral method to promote cooperation, and it could be structured through an initial club of states with relatively homogeneous preferences and resources that may establish agreed rules and then require moderation arrangements consistent with those rules as a condition for market

access.[73] For example, liberal states might be able to agree on monitoring substance and process in many areas, while authoritarian states may group together in a system of state-controlled platforms. In a sense, the US approaches in the USMCA and in the US–Japan Digital Trade Agreement may be viewed as initial attempts along these lines. This approach could splinter platforms, or require costly geo-blocking fragmentation of platform activity, but may begin to precipitate negotiation toward international cooperation in this area. Cooperation among groups of states along these lines might be based on a transnational regulatory network, like the Basel Committee in bank regulation, with nonbinding standards that then become the basis for unilateral market access conditions.

Where state preferences are not excessively divergent, but state resources are, one result might be to negotiate arrangements for wealthier countries to provide technical or financial assistance in order to ensure that resources to fund moderation are available to less wealthy states. This might follow the model of international vaccine policy, especially if moderation in developing countries can stop the spread of undesirable content to wealthier countries. Indeed, as in the vaccine space, there may be private charitable foundations concerned with the growth and coherence of platforms that would be willing to provide funding for moderation in developing countries.

It may be possible for private actors – platforms – to utilize a "highest common denominator" strategy: complying with the most stringent national regulation to which they are subject on a worldwide basis, on the assumption that this level of regulation will also include compliance with each other national regulatory regime to which they are subject. There are two problems with this approach, which is sometimes called the California Effect or Brussels Effect.[74]

First, it is not necessarily true that more stringent regulation encompasses all other regulation. Regulation has varying concerns, varying exceptions, and varying administrative features. So, the relationship between different jurisdictions' regulation may well be nonlinear. Second, the highest common denominator strategy may be excessively costly. For example, if the highest common denominator requires a high level of human moderation, this may stifle competition and utilization in the market, in a way that is inconsistent with the policies of states with less stringent regulation. The optimal level of moderation for poor countries might be different from the optimal level for wealthy countries. Private actors could act to promote this type of result or, alternatively, to preempt greater state regulation, through private codes of conduct in this area.

[73] *See* Sloss, *supra* note 40.

[74] Anu Bradford, *The Brussels Effect Comes for Big Tech*, Project Syndicate (2020), https://www.project-syndicate.org/commentary/eu-digital-services-and-markets-regulations-on-big-tech-by-anu-bradford-2020-12 (last visited Aug. 21, 2022).

There is much work to be done by diplomats and international lawyers to negotiate and articulate useful arrangements to optimize the combination of benefits from intensified platform-based commerce and regulatory action to reduce the social costs of that commerce. In the words of Marshall McLuhan, a "new scale [has been] introduced into our affairs by [this] new technology," and it is incumbent upon us to manage its social consequences.