Max Planck Institute
for Intellectual Property and Competition Law

A CONFLICT-OF-LAWS APPROACH TO COMPETING RATIONALITIES IN INTERNATIONAL LAW

The Case of Plain Packaging between IP, Trade, Investment and Health

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Outline

- The **Plain Packaging Dispute** as Case Study for Competing Rationalities in Int. Law
- Limits of Traditional **Conflict-of-Norm Approaches**
- **Conflict-of-Laws** Rules as a viable Alternative?
  - Characterisation, Dépeçage and Governmental Interest Analysis
  - Comity and a Conflict-Rule of Integration
  - Public Policy and Mandatory Rules
  - Pleading and Proving Foreign Law
- Preliminary **Conclusions**

International Disputes over Tobacco Packaging

Plain Packaging in Australia

Measures in Uruguay

- **single presentation requirement**: prohibition to sell more than one pack variation per cigarette brand (to respond to 'colour-coding' of brand lines)
- **Mandatory health warnings:** covering up to 80% of the front and back panels of cigarette packages; and
- **Requirement for pictograms:** as part of the health warnings on cigarette packaging

Tobacco Packaging in the EU

Tobacco Packaging under new EU Dir:

Art.10 *requires that combined health warnings for tobacco products "cover* ***65 %*** *of both the external front and back surface of the unit packet and any outside packaging"*

*"****Brand names or logos*** *shall not be positioned above the health warnings"*

Art.23 *allows EU Members, subject to proportional limits on free movement, to introduce stricter rules, incl.* ***plain packaging***

Apparently, Ireland and ***France*** *are considering to introduce plain packaging…*

Tobacco Packaging in the EU

*"Some provisions in the Commission's proposal also raise serious doubts as to their **conformity with fundamental rights** such as the **right to property**, the right to **freedom of expression** and information and the **freedom to conduct business**. These rights are enshrined in the Charter of Fundamental Rights of the European Union ("the Charter") and may only be limited pursuant to Article 52(1) of the Charter if the limitation is necessary, genuinely meets objectives of general interest and is proportional.*

*Certain of the proposed measures, especially regarding the packaging, do not meet these requirements. One example is the proposed **increase in size of the health warnings to 75 %** of both the front and back surface of the packs (Article 9(1)(c)). This would severely reduce the space available for trademarks and product description. (…)*

***Intellectual property rights** such as trademarks are explicitly covered by the right to property in **Article 17** of the Charter. The CJEU held that warnings on the unit packages are admissible "in a proportion which leaves sufficient space for the manufacturers of those products to be able to affix other material, in particular concerning their trade-marks". **Reducing the space available on the front and back surfaces to less than 25%** would, however, make it **difficult to sufficiently distinguish** the products of one producer from those of others, thereby **depriving the trade marks** of one of their **main functions**. (…) This would also **not be in accordance** with national constitutional law as well as international treaties such as the **TRIPS** Agreement." (Legal Affairs Com)*

The Australian Plain Packaging Case

Areas of international Law (**Rule Systems**) affected:

1. International **Health** Law (Framework Convention on Tobacco Control, Implementing Guidelines)
2. International **IP** Law (the Paris Convention, WTO/TRIPS Agreement)
3. International **Investment** Law (HK – AUS BIT)
4. International **Trade** Law (GATT 1994, WTO Agreement on Technical Barriers to Trade)

The Australian Plain Packaging Case

Venues for Dispute Settlement

- **WTO dispute settlement proceedings** initiated by Ukraine, Honduras, the Dominican Republic, Indonesia and Cuba against Australia – all alleging violations of the WTO / **TRIPS** Agreement (incorporating Artt.1-12, 19 PC); disputes (including those on incorporated PC obligations) must be settled under the **WTO DSU** (Art.64 TRIPS, Art.23 DSU)
- **Investor – state arbitration** initiated by Philip Morris Asia against Australia under the HK-AUS BIT – alleging that PP amounts to **unlawful expropriation** of TMs; and claiming that inconsistency with PC, TRIPS breaches investment standards (**FET**, **umbrella clause**)

Limits of Traditional Conflict-of-Norm Approaches

Legal Tools discussed in the **ILC Fragmentation Report** (2006)

- **Harmonious Interpretation** (Unity of IL); **Systemic Integration** (Art.31 (3) c) VCLT)

→ 1st choice to mitigate conflicts, but limited operation & effect

→ Interpretation does not equal **application**

- ***Lex Posterior*** and ***Lex Specialis***

→In the Plain Packaging Dispute, why should it matter (and how to determine) which treaty pre-dates the other?

→Is Health more specific than IP, investment or trade law?

For inter-systemic conflicts, IL tools do not work well!

Conflict-of-Laws Rules as a viable Alternative?

- Can **CoL Principles** guide the design of IL tools to deal with **inter-systemic conflicts**?
- Is there a conceptual similarity between **territorial** and **sectoral** conflicts?

While CoL rules decide on the application of **comprehensive nat. legal systems**, inter-systemic conflicts involve s**pecific, sectoral rule-systems**… Hence:

→CoL Guidance hence should not lead to an **all-or-nothing decision** in favour of one rule system since it is *"virtually impossible to apportion the legal issue in question to one or another legal order"* (Teubner)

→ CoL principles should primarily guide **states** in designing specific conflict rules; but may also help **adjudicators** to decide on the application of rules ‚foreign' to their own system

Conflict-of-Laws Rules as a viable Alternative?

Ways to avoid all-or-nothing decisions:

1. Dividing a case into seperable issues (***dépeçage***): → **TRIPS** decides if TM-rights are affected; **FCTC** decides on health justification
2. (Autonomous) **characterisation** of all seperable issues as primarily belonging to one specific rule-system: → exclusion of logos a **TM issue**; (uncertain) impact on smoking a **public health** matter
3. **Focus on rules, not facts**: Rationalities of the competing rule-systems determine which rules shall govern a seperable issue (**Governmental Interest Analysis**): → focus on rules that give effect to TRIPS, TBT, BIT, FCTC rationales

But: **structural bias** inherent in each system will often lead a **forum to favor its own rules**…

Conflict-of-Laws Rules as a viable Alternative?

Comity and a **Conflict-Rule of Integration**

→*When two or more valid and applicable rules point to incompatible decisions so that a choice must be made between them, the rule-system which is **more able to integrate the other** system's rules applies.*

→In the **Plain Packaging** case, a WTO panel would examine the potential of TRIPS / TBT rules to integrate the public health concerns expressed in the FCTC. It would equally listen to how FCTC experts explain the ability of the FCTC to take the interests of trade mark holders and importers of tobacco products into account.

Conflict-of-Laws Rules as a viable Alternative?

Limits to- & Corrections of the application of foreign law:
Mandatory Rules and Public Policy of the *lex fori*

- **Public policy** (*ordre public*) of the forum ensures that the result of applying foreign rules does not contradict the main rationality of the forum‘s system: → see e.g. Art.22 CBD
- **Mandatory rules** of a rule-system are those whose application must be ensured even in cases where the rules of another, “foreign” system would otherwise apply: → binding character not decisive – focus on rules that give effect to the system’s core rationality

But: What about **legal certainty**? Do these corrective devices not encourage **judicial activism** and **lack legitimacy**?

Conflict-of-Laws Rules as a viable Alternative?

Pleading and Proving Foreign Law:

- Attempts for including external norms in IL (e.g. HR in the WTO) if often critiqued as **reconstructing** these norms into norms of the forum: *"The norms to be applied by the WTO can only be WTO norms."* (Beckett) → as belonging to the epistemic community of trade lawyer's a WTO Panel cannot but apply trade rules…
- CoL allows to treat **foreign rules as facts** which need to be proven, may be constested and can be subject to expert evidence: → If a WTO Panel is willing to apply FCTC rules as foreign law, it should listen to FCTC experts to explain their (potentially contested) meaning and application

(Preliminary) Conclusions

- On a conceptual level, **CoL principles do better than traditional IL tools** to deal with inter-systemic conflicts (as opposed to intra-systemic ones). They can offer solutions **beyond an all-or-nothing decision** for one rule-system.

- In practice, CoL tools appear to add **legal uncertainty** to a forum deciding a case simply based on its lex fori. This however simply reflects the **legal pluralism** we face in IL.

- The main policy question is: Should it be **states or adjudicators** who decide on whether and how to apply foreign law? → I would argue that states are primarily asked to design conflict rules, guided also by CoL principles.

Thank you for your attention!

Questions and Comments to

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Full Paper at

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