

Collisions of Economic Regulations and the Need to Harmonise Prescriptive Jurisdiction Rules

Milena Sterio (*Cleveland-Marshall College of Law*) has posted “**Clash of the Titans: Collisions of Economic Regulations and the Need to Harmonize Prescriptive Jurisdiction Rules**” (to appear in the *UC Davis Journal of International Law and Policy*, 2007). Here’s the abstract:

The traditional field of conflict of laws involved clashes of private laws: what law should apply to a vehicular accident that took place in Canada, but involved a victim coming from New York? In the United States, as well as abroad, such clashes involved mostly private actors, and a specific set of rules was developed to address this area of law. More recently, however, a new paradigm has emerged, involving clashes of public laws and regulations, which I refer to as “titans” because they represent what is traditionally known as mandatory law and because they carry implications of state sovereignty and particular regulatory importance with them. Clashes of such titans are not easy to resolve, and often involve not merely economic operators, but also states or state agencies, causing diplomatic tension and foreign relations concerns.

Conflict-of-law rules seem ill-adapted for the resolution of this new regulatory puzzle. In the United States, for example, courts and scholars have advocated the need to resort to either territorial-based rules or substance-based rules to resolve clashes of public laws. Under the territorial approach, courts and scholars focus on when a given conduct causes effects or has other links with American territory that would warrant the application of American public laws. Under the substantive approach, courts and scholars determine, by looking at the content of applicable laws and regulations, whether it is reasonable to apply American public laws. However, the general approach followed domestically has been unilateral: the inquiry is to determine simply when American laws and regulations should apply to a given situation. Although the substance-oriented approach gives some thought to global considerations of overlapping regulatory

jurisdiction, economic inefficiency, and comity, little concern is raised about possibly harmonizing jurisdiction-allocating rules among multiple countries, so that the clashes themselves can be resolved with more uniformity across the globe.

This Article advocates the need to start contemplating the development of global jurisdiction-allocating rules, at least among some countries and at least in some important domains where regulatory clashes frequently occur, such as antitrust, securities and Internet commerce and publishing. Harmonized jurisdiction-allocating rules could decrease instances of overlapping regulatory jurisdiction, thereby increasing predictability of outcomes for economic operators and reducing diplomatic tension caused by some of the important clashes. While challenges to such harmonization seem overwhelming at first, this Article argues that it may be possible to achieve some degree of unification. Some developed countries already have similar jurisdiction-allocating rules, thereby facilitating harmonization among them. Moreover, some domains, such as Internet regulations, may lend themselves better to harmonization. It also may be easier to harmonize jurisdiction-allocating rules that are perceived essentially as procedural, rather than to seek to change substantive regulations themselves. Finally, harmonization may be more easily accomplished within specific fora, such as the World Trade Organization, the World Bank, or similar global bodies. This Article argues that harmonization would work toward the achievement of a global optimum, which would eventually benefit most states and most economic operators.

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