oped the so-called fast-track procedure.[9] This mechanism assures the President that the agreement that results from the long and intricate negotiations he conducts will be considered quickly and will be voted upon in an "up or down" mode without giving members of Congress the chance to propose amendments that would obligate the President to renegotiate the document with his foreign counterparts. This fast-track arrangement is in effect a self-denying ordinance and could be repealed at any time by regular means. But in the meantime it stands as a commitment to deal with trade agreements in a specified way. From there the argument moves to the proposition that reasserting the Senate's prerogative at this time would be a breach of faith with the Executive and the House. It would badly damage the capacity of the United States to negotiate externally since it would sow uncertainty about our capacity to carry through with the agreements we get other states to agree on. The counterargument is that the new GATT agreement is qualitatively different from earlier trade agreements because of the scope that it gives international panels acting under the agreement to make final decisions on certain questions, when formerly the United States retained the option of defying the international working groups' recommendations on those matters. The contrast, however, is much less drastic if one takes into account the more recent Free Trade Agreement with Canada and the North American Free Trade Agreement with Canada and Mexico. Each of these arrangements shifts the power to resolve significant disputes to organizations not controlled by the United States. From there to the GATT/WTO arrangement is not so long a step, although many more foreign countries are involved than just our neighbors. This progression—all of it undertaken by House-Senate approval—argues strongly that it is appropriate to move ahead with the planned bicameral vote.

Afterword

The night before this Editorial Comment went to press, the Senate approved the GATT/WTO agreement by a vote of seventy-six to twenty-four, rendering academic the question whether a vote of sixty-seven to thirty-three was required. Nonetheless, I thought it useful to memorialize this controversy so that readers of the *Journal* will have something to refer to the next time that this issue is raised, perhaps a generation from now.

DETLEV F. VAGTS

CONFLICT, BALANCING OF INTERESTS, AND THE EXERCISE OF JURISDICTION TO PRESCRIBE: REFLECTIONS ON THE *INSURANCE ANTITRUST CASE*

Now that the dust has settled on the *Insurance Antitrust Case*,[1] decided by the U.S. Supreme Court on the last day of its 1992–1993 term, it may no longer be inappropriate for me to make some observations about the case in print. I have been reluctant to do so up to now, both because I was a member of the legal team

[9] See the review of the development of this legislation in Harold Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143 (1992).

[1] Hartford Fire Ins. Co. v. California, 113 S.Ct. 2891 (1993).

that prepared the petition for certiorari and the brief in chief to the Supreme Court on behalf of the foreign defendants, and because I am inevitably linked with the sections of the *Restatement (Third) of Foreign Relations Law* from which both the majority and the dissent in the Supreme Court drew support, with very different conclusions. But as time has passed and the underlying litigation has been settled,[2] there may be some value in sharing my views on an issue that has occupied me for many years.[3]

I. Two Views in the Lower Courts

The facts of the *Insurance Antitrust Case* are well-known to followers of the Supreme Court's ventures into the international arena, and indeed were the subject of a case note in this *Journal*.[4] The background of the case was a perception widely (but not universally) shared that there was an insurance crisis in the United States, compelling a variety of facilities to shut down because they could not obtain insurance;[5] the reason that they could not obtain insurance, so the theory went, was that potential insurers could not obtain adequate reinsurance. Plaintiffs in the action, brought in the federal district court in San Francisco in 1988, were the Attorneys General of nineteen states of the United States, plus a number of private plaintiffs, led by the Attorney General of California.[6] The basic charge was that the defendants had agreed—unlawfully agreed—(1) to eliminate occurrence-based or "long-tail" coverage in favor of exclusive issuance of claims-made policies, and (2) to eliminate "sudden and accidental" pollution from liability policies.[7] The defendants were four major domestic insurance companies, several domestic reinsurance companies, brokers and insurance associations—plus a number of foreign reinsurers and their principals, in particular several underwriting agencies at Lloyd's.

For students of international law, the significant claim was that the London defendants had violated United States antitrust law by refusing, in England, to offer reinsurance to American companies except on terms to which the London defendants had jointly agreed, thus harming parties for whom the state attorneys

[2] *See* Antitrust & Trade Reg. Rep. (BNA) No. 1684, at 434 (Oct. 13, 1994).

[3] Lest there be any misunderstanding, I want to make clear that this brief Editorial is written to the extent possible from the point of view of a scholar, not of an advocate. I speak neither for the American Law Institute and my fellow reporters of the *Restatement*, nor for the London underwriters and their permanent counsel.

[4] 88 AJIL 109 (1994).

[5] For contrasting views on this point, see, e.g., *Symposium: Perspectives on the Insurance Crisis*, 5 Yale J. on Reg. 367 (1988); also George L. Priest, *The Current Insurance Issues and Modern Tort Law*, 96 Yale L.J. 1521 (1987).

[6] Interestingly, it was the attorneys general and not the insurance commissioners who filed the action; in many instances, the state insurance commissioners were opposed to bringing the suit. But since the action was brought under federal law and no allegations were made of violation of state law, the insurance commissioners were not responsible for the decisions to file or join the suit.

[7] An insurance policy based on occurrence during the effective period of the policy has the effect that the issuer cannot close its books on policies written for a given period until long after the end of the term of the policy. In the 1980s, insurers and reinsurers that had written occurrence-based policies for the United States found themselves confronted with massive claims arising out of the use of asbestos in the construction of buildings, and also with claims arising out of underground chemical pollution. Defendants in the *Insurance Antitrust Case* contended that whatever they had done was intended only to stanch the losses arising as a result of such claims. Plaintiffs asserted that, nevertheless, the agreements were unlawful under U.S. antitrust law.

general acted as *parentes patriae.* The English defendants did not deny that their actions had effects in the United States—indeed, direct and substantial effects. They argued, however, that their conduct was legal in the state where it took place; that they had operated in full compliance with a regime of regulation and self-regulation as prescribed by the British Parliament; and that under principles of international law and comity, as spelled out particularly in two major decisions of U.S. courts of appeals—*Timberlane Lumber Co. v. Bank of America*[8] and *Mannington Mills, Inc. v. Congoleum Corp.*[9]—as well as two generations of the *Restatement of the Foreign Relations Law of the United States,*[10] jurisdiction to apply U.S. law should not be exercised in this case.

In the much-discussed *Timberlane* case, it will be recalled, Judge Choy had written that the "effects doctrine" as formulated by Judge Learned Hand in *Alcoa*[11] is incomplete, because it fails to consider the interests of other nations in the application or nonapplication of United States law.[12] Judge Choy had proposed a three-part test: first, to see if the challenged conduct had had *some* effect on the commerce of the United States—the minimum contact to support application of U.S. law; second, to see if a greater showing could be made that the conduct in question imposed a burden or restraint on U.S. commerce—i.e., whether the complaint stated a claim under the antitrust laws; and third, to consider "the additional question which is unique to the international setting of whether the interests of, and links to, the United States . . . are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority."[13]

Judge Choy then proceeded to set out seven factors by which to judge the third or "ought to" question, based on a list of factors proposed some years earlier by Professor Kingman Brewster.[14] Other courts and the *Restatement (Third)* modified the criteria somewhat,[15] but for the most part adopted the approach of the *Timberlane* case.

In *Insurance Antitrust,* the federal district court in San Francisco and the U.S. Court of Appeals for the Ninth Circuit both considered the international aspect of the case in the light of *Timberlane,* and in particular in the light of the list of factors set out in that case by Judge Choy. Judge Schwarzer in the district court dismissed the action, on the basis that "the *conflict* with English law and policy which would result from the extra-territorial application of the [U.S.] antitrust laws in this case is not outweighed by other factors."[16] Judge Noonan, for the court of appeals, going through the same factors, acknowledged the "significant conflict" with English law and policy,[17] but held that the conflict was outweighed by the "significance of the effects on American commerce, their foreseeability and their purposefulness."[18] Accordingly, the court of appeals reinstated the ac-

[8] 549 F.2d 597 (9th Cir. 1976). [9] 595 F.2d 1287 (3d Cir. 1979).

[10] RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§18, 40 (1965); RESTATEMENT (THIRD) §§403, 415 (1987).

[11] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[12] *Timberlane,* 549 F.2d at 611–12. [13] *Id.* at 613.

[14] KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958), *quoted in Timberlane,* 549 F.2d at 614 n.31.

[15] *See, e.g., Mannington Mills,* 595 F.2d at 1297–98; RESTATEMENT (THIRD) §403(2).

[16] *In re* Insurance Antitrust Litigation, 723 F.Supp. 464, 490 (N.D. Cal. 1989) (emphasis added).

[17] *In re* Insurance Antitrust Litigation, 938 F.2d 919, 933 (9th Cir. 1991).

[18] *Id.* at 934.

tion. Thus, when the Supreme Court granted review, much of the argument on the international aspect of the case focused on the relative importance under *Timberlane* of *conduct*—clearly in England—versus *effect*—largely in the United States. Since both lower courts had accepted that there was a conflict between U.S. and English law, not much argument focused on defining the conflict.[19] In the Supreme Court, however, it was precisely the existence or nonexistence of conflict that divided the majority and the dissent, and that I want to focus on here.

II. Two Views in the Supreme Court

When the Supreme Court granted certiorari, and particularly when the Court allocated more than the usual time for argument in order that the domestic and the international issues could be separately addressed,[20] there was high expectation that the Court would use the opportunity to spell out its views on the reach of U.S. regulatory jurisdiction, on the *Timberlane* factors or some alternative version, on the relation of international law to domestic law in this area, and possibly on a definition of "comity" going beyond what the Court had said in *Hilton v. Guyot* a century ago.[21] Nothing like that came out in the prevailing opinion. Justice David Souter, for the majority of five, wrote: "The only substantial question in this case is whether 'there is in fact a true conflict between domestic and foreign law.' "[22]

Justice Souter went on to acknowledge the argument of the London reinsurers, supported by the British Government, that applying the Sherman Act to their

[19] The U.S. Government, which had declined to become involved in the case earlier, submitted a brief amicus curiae on behalf of the plaintiffs, primarily devoted to the domestic aspects of the case. The brief of the Solicitor General also argued, however, that application of U.S. law should be stayed only in case of a direct conflict, defined as existing only if (1) the foreign government has directed the defendants to engage in the challenged conduct, or (2) the defendants would have frustrated clearly articulated policies of the foreign government if they had not engaged in the disputed conduct. Brief for the United States as Amicus Curiae at 28, Hartford Fire Ins. Co. v. California (Nos. 91-1111, 91-1128).

[20] The domestic issues turned on the scope of the McCarran-Ferguson Act, 15 U.S.C. §§1011–1015 (1988), which essentially exempts insurance companies from the operation of the federal antitrust laws if they come under state insurance regulation meeting certain minimum criteria, but provides that the exemption is not applicable in respect of agreements to boycott, coerce or intimidate. Plaintiffs charged that the defendants had engaged in unlawful boycotts, thus losing their exemption. The district court had dismissed, and the court of appeals, reversing the lower court, had reinstated, the complaint on this ground against Hartford and the other domestic defendants. The court of appeals also held that the domestic defendants had lost their immunity by conspiring with foreign nonexempt parties. 938 F.2d at 928. The Supreme Court unanimously reversed this holding.

[21] 159 U.S. 113 (1895). As in *Insurance Antitrust*, the Court in *Hilton* split five to four, with a result that declined to give effect to the foreign interest. The statement by the Court about comity, however, has far outlived the holding of the case denying recognition to the judgment of a French court on the basis of lack of reciprocity:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Id. at 163–64.

[22] 113 S.Ct. at 2910. The phrase in quotation marks refers to the opinion of Justice Blackmun in Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522, 555 (1987).

conduct would conflict significantly with British law. But British law did not *require* the agreements that were the basis of the challenge under the Sherman Act. All that British law did was to establish a regulatory—and largely self-regulatory—regime with which the challenged conduct was consistent. "[T]his," said Justice Souter, citing the *Restatement,*[23] "is not to state a conflict. . . . No conflict exists, for these purposes, 'where a person subject to regulation by two states can comply with the laws of both.' "[24]

I will come back to the *Restatement* in the next-to-last section of this essay. For the moment, I want to point out only that Justice Souter's opinion seems to equate "conflict" with "foreign compulsion." For conflict, that is for inconsistent interests of states, *Timberlane* taught that one should evaluate or balance; for foreign compulsion, in contrast, we had understood since the *Nylon* and *Light Bulb* cartel cases of the early 1950s that no person would be required to do an act in another state that is prohibited by the law of that state or would be prohibited from doing an act in another state that is required by the law of that state;[25] in other words, that the territorial preference would make balancing unnecessary. But Justice Souter said nothing about the controversial subject of balancing—either for or against—and barely mentioned *Timberlane.* "We have no need in this case," he concluded, "to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity."[26]

To Justice Scalia and the four-person minority, the case looked entirely different. Justice Scalia started with two presumptions: first, that legislation of Congress, unless a contrary intent appears, "is meant to apply only within the territorial jurisdiction of the United States"; and second, that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains," a quotation going back to Chief Justice Marshall,[27] and that customary international law includes limitations on a nation's exercise of its jurisdiction to prescribe.[28] The first point, of course, begs the question about whether one looks at conduct—here in London—or effect—here in the United States. If one looks at effect, then application of the Sherman Act would not be extraterritorial.[29] In any event, Justice Scalia conceded that there were numerous precedents for application of the Sherman Act to conduct outside the United States. The second point, about customary international law, led Justice Scalia right to the series of court of appeals decisions from *Alcoa*[30] to *Timberlane*[31] and *Mannington Mills,*[32] plus decisions by the U.S. Supreme Court in a series of seamen's

[23] RESTATEMENT (THIRD) §415 comment *j*.

[24] 113 S.Ct. at 2910 (quoting RESTATEMENT (THIRD) §403 comment *e*).

[25] See the decree in United States v. Imperial Chemical Industries, 105 F.Supp. 215 (S.D.N.Y. 1952), *as quoted in* British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd., [1953] Ch. 19, 28 (UK Ct. App.), [1955] 1 Ch. 37, 53 (Chancery Ct.); United States v. General Electric Co., 115 F.Supp. 835, 878 (D.N.J. 1953). *See also* RESTATEMENT (THIRD) §441.

[26] 113 S.Ct. at 2911.

[27] *Id.* at 2918–19 (quoting Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)).

[28] *Id.*

[29] The RESTATEMENT (THIRD) §402(1)(c), for instance, looks at jurisdiction based on effect in the territory of the state exercising jurisdiction as an aspect of territorial jurisdiction, subject, like other exercises of jurisdiction, to the requirement of reasonableness as set forth in §403.

[30] 148 F.2d 416 (2d Cir. 1945).

[31] 549 F.2d 597 (9th Cir. 1976).

[32] 595 F.2d 1287 (3d Cir. 1979).

cases cited to the Court by the English defendants,[33] as well as the *Restatement.* "Whether the Restatement precisely reflects international law in every detail matters little here," he wrote, "as I believe this case would be resolved the same way under virtually any conceivable test that takes account of foreign regulatory interests."[34] Justice Scalia went through the approach of the *Restatement,* including the factors set out in section 403(2). "Rarely," he concluded, perhaps exaggerating in order to emphasize his difference from the majority, "would these factors point more clearly against application of United States law."[35]

Further, on the conclusion by the majority that a true conflict would exist only if compliance with U.S. law would constitute violation of the other state's law, Justice Scalia wrote: "That breathtakingly broad proposition, which contradicts the many cases discussed earlier, will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries—particularly our closest trading partners."[36]

III. Some Observations

Without here writing a treatise,[37] I want to make three sets of observations: *first,* on the state of American law; *second,* on the status and usefulness of the *Restatement,* which both the majority and the dissent claimed to rely on but interpreted so differently; and *finally,* on the concept of conflict, which I believe needs more exploration.

The Status of United States Law

1. I think it is now clear beyond doubt that the Supreme Court—majority and minority—understands that the reach of a nation's law is a subject of *international law*—public customary international law.

2. In contrast to the European Court of Justice, which is still reluctant to pronounce the *E* word,[38] the U.S. Supreme Court takes the *effects doctrine* for granted. It has no doubt that a state may apply its law—i.e., exercise its jurisdiction to prescribe—on the basis of effects caused by the challenged activity in its territory, even when no part of the activity was carried out in its territory. Perhaps if the effect in the United States is slight, unintended and not foreseeable—say, in the case of a securities fraud centered on the Frankfurt Stock Exchange which had an adverse impact on an American bank that had lent money to the victim of the fraud—the Supreme Court might regard the effect as too remote to support application of U.S. law. But certainly direct, substantial and foreseeable effect coupled with intent or presumed intent is no longer contestable in the United States as a basis for jurisdiction, and was in fact not contested in the *Insurance Antitrust Case.*

[33] 113 S.Ct. at 2919–20, citing Lauritzen v. Larsen, 345 U.S. 571 (1953); Romero v. International Terminal Operating Co., 358 U.S. 354 (1959); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963), all emphasizing the traditional international law looking to the national law of an ocean-going ship's flag or registry.

[34] *Id.* at 2920–21.

[35] *Id.* at 2921.

[36] *Id.* at 2922.

[37] See my forthcoming General Course on Private International Law at the Hague Academy of International Law: *International Litigation and the Quest for Reasonableness,* 245 Recueil des Cours (1994 I).

[38] *See* Case 89/85, Wood Pulp Case (Dec. of Sept. 27, 1988), 1988 ECR 5193.

3. The *foreign compulsion defense* seems to be recognized by the Supreme Court, and even expanded somewhat. A mandatory law at the place of conduct will, I think, trump the law at the place of effect.[39] In the case of true compulsion, the territorial still prevails over the extraterritorial.

4. The previous "leading cases," notably *Timberlane* and *Mannington Mills* and also some of the securities cases,[40] seem to have lost some of their significance. While the lower courts in *Insurance Antitrust,* like the litigants in most recent cases raising the issue of the reach of United States economic regulation, sought to place the case before them within the *Timberlane* factors, the text on which the Supreme Court focused—and split—was the *Restatement,* as discussed below.

5. Does the Supreme Court now reject *balancing*? Justice Souter did not say so explicitly, though perhaps one can infer that meaning from his statement that the *only* substantial question is whether there is a true conflict. But if that question were to be answered yes—that is, if in a future instance a true conflict were found to exist—there would still need to be a way to resolve the conflict. I suspect that some form of evaluation of the respective interests of the concerned states could not be avoided. I would predict that an expressed interest by the United States Government in law enforcement would weigh more heavily than the U.S. interest asserted in a private action, though I would hope it would not be conclusive.[41] In the actual case, we saw an intermediate group of plaintiffs—officials of some, but not all (or even a majority), of the states of the United States acting as *parentes patriae.* But it must be said that my belief in the future of balancing is only a prediction, and has no direct textual support in the majority's opinion.[42]

The Split over the Restatement

Not for the first time—see, for instance, the two opinions in *Aérospatiale*[43]—both the majority and the dissent in the Supreme Court used the *Restatement (Third) of Foreign Relations Law* as a principal source of support, and reached quite different conclusions. I suppose in some sense this suggests a failing on the part of the authors of the *Restatement,* though it is a failing shared with Aristotle, the Bible, the Koran, the American Constitution, and other authorities with much longer life expectancies than a *Restatement* of the law of international relations. I do think, however, that the effort on the part of the reporters to distinguish between overlap of jurisdiction and clash of prescriptions, which went through many drafts and several votes, did not emerge as clearly as we might have liked. I trust that a small effort here at clarification will not be regarded as out of order.

The scheme of the *Restatement* with respect to jurisdiction to prescribe has several stages. *First,* section 402 sets out the basic foundations of jurisdiction—territoriality and nationality—but states that jurisdiction on either basis is subject

[39] I do not here address law related to litigation activity, such as banking secrecy, requirements of nondisclosure of economic information, and the like, which are subject to somewhat different evaluation.

[40] *E.g.,* Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); also Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975), *cert. denied,* 423 U.S. 1018 (1979); IIT v. Vencap, 519 F.2d 1001 (2d Cir. 1975).

[41] See the discussion in the last paragraph of this Editorial.

[42] Of course, the several citations to the *Restatement* could be marshaled in support of a contention that the Court agrees with that work's basic approach, but I think the evidence supports only a prediction, not a conclusion in this direction.

[43] Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987).

to section 403, that is, the condition that the exercise of jurisdiction not be unreasonable.

Second, section 403(2) sets out a series of factors to be evaluated in determining whether or not exercise of jurisdiction over a person or activity would be unreasonable. Among these factors are: "(g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state." Both of these factors call for at least a yellow light in the decision process of the first state, whether undertaken by a legislature, a regulatory agency or a court. To put the point another way, the more strongly these factors are present in the second state, the greater is the need to justify the exercise of jurisdiction by the first state on the basis of its strong interest, as measured against the other factors set out, particularly in paragraphs (a), (b) and (c) of section 403(2).[44] The fact that another state has an interest in regulating the activity in question is relevant, even when the objectives of the regulation are entirely consistent (para. (g)); the likelihood of conflict (para. (h)), that is, a difference in values, objectives or regulatory techniques of the two states, weighs more heavily in questioning the reasonableness of exercise of jurisdiction by the first state, but as comment *d* states, neither paragraph (g) nor paragraph (h) is conclusive that it is unreasonable for the first state to exercise jurisdiction. "Nor," to quote further from comment *d*, "is it conclusive that one state has a strong policy to permit or encourage an activity which the other state wishes to prohibit." But though not *conclusive,* these factors are not insignificant or irrelevant to consideration of the reasonableness of the exercise of jurisdiction. Justice Scalia understood this; Justice Souter apparently did not.

Third, section 403(3) addresses the situation when, under the criteria of section 403(2), it would not be unreasonable for each of two states to exercise jurisdiction, both have done so, and their prescriptions clash. Thus, the situation contemplated by section 403(3) cannot arise until both states have passed the threshold imposed by section 403(2). In the critical passage in the majority's opinion in *Insurance Antitrust* previously quoted, Justice Souter wrote: "*No conflict exists, for these purposes,* 'where a person subject to regulation by two states can comply with the laws of both.' "[45] The words in quotation marks, as Justice Souter indicated, come from comment *e* to section 403, addressed to subsection (3). The illustration there given is of a multinational corporation required by one state to keep its books on a cash basis, and by the other state on an accrual basis. The situation to which subsection (3) is directed does not apply because, while it may be a nuisance, keeping two sets of books is not impossible, and therefore neither state is obligated to evaluate the other's interest with a view to yielding its jurisdiction to the other. But the *Restatement* does not say that no conflict exists as long as a

[44] These read, respectively:

> (a) the link of the activity to the territory of the regulating state, *i.e.,* the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted.

RESTATEMENT (THIRD) §403(2).

[45] 113 S.Ct. at 2910 (emphasis added).

person can comply with the law of both states. In place of the words that I have italicized, the sentence quoted by Justice Souter begins, "It [i.e., subsection (3)] does not apply . . ."

The misquotation, thus, is not just a matter of a few words, but of approach. In the *Restatement*'s scheme, there may well be conflict between the values and objectives of the two states without presenting the intolerable situation of the person caught between incompatible commands—conflict between state interests defined in section 403(2), paragraphs (g) and (h). However one appraises the conflict present in *Insurance Antitrust,* to which I turn in the next section, it is clear to me that Justice Scalia understood, and Justice Souter misunderstood, the approach of the *Restatement.*

Just a few words more are in order about the majority's reliance on the *Restatement.* In addition to the basic scheme set out in sections 402 and 403, the *Restatement* contains a series of sections illustrating the exercise of jurisdiction to prescribe in particular areas—tax, securities regulation, multinational corporations and, in section 415, competition law. The majority opinion in *Insurance Antitrust,* just before the quotation reproduced above, quotes from comment *j* to section 415 as follows:

> [T]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws.[46]

Here (except for omission of the introductory word "Ordinarily") the quotation is complete. But the key is the phrase "of itself." One cannot tell, merely from the fact that state *B* does not prohibit or punish a given activity, whether it has a strong interest in continuance of the activity, or in noninterference in the activity by state *A*. But unless foreign compulsion is the only criterion,[47] one cannot draw the opposite inference either. I would now add:

> The fact that a state does not require a given conduct or activity does not, of itself, demonstrate that the state has no interest in continuance of the conduct or activity.

The question remains whether there is a conflict—a conflict of state interests—which under international law needs to be evaluated. While I am not as certain as Justice Scalia how such an evaluation comes out, I am clear that to say that the *Insurance Antitrust Case* presented no conflict at all is quite mistaken, and certainly at odds with the scheme of the *Restatement.*

Evaluating Conflict of Jurisdictions

It seems clear that if the British Government had *ordered* the London underwriters to stop selling long-tail policies and to exclude sudden and accidental pollution from liability policies that they reinsured, Justice Souter would have viewed the case as presenting a "true conflict." Though one cannot be sure, there is good reason to believe that he, or at least some of his colleagues in the narrow majority, would have come around to the position of the dissenters that the United States should defer to Great Britain's strongly expressed interest, and accordingly should decline to uphold exercise of jurisdiction to apply United States law to the challenged activity. The question that I want to raise here is what

[46] *Id.*
[47] *Compare* United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968).

lesser expression of interest on the part of the British Government would or should tip the balance against application of U.S. law, assuming that one accepts the argument that it is error to confuse the foreign compulsion defense with the question of conflict of jurisdiction.

Suppose that British law had provided that any agreements among underwriters concerning the terms and conditions of reinsurance policies had to be submitted to the Minister of Trade for approval, and that the agreements here challenged had been submitted and approved. That would not rise to the level of compulsion, but it would be unequivocal evidence of the British Government's exercise of jurisdiction to prescribe. I am not sure that this would meet Justice Souter's threshold of conflict, but it would make more convincing Justice Scalia's conclusion that Great Britain had established "a comprehensive regulatory scheme governing the London reinsurance markets," which conflicted with the application of U.S. antitrust law.

Suppose, alternatively, a statutory scheme according to which agreements among underwriters had to be submitted to the Minister and would go into effect thirty days after submission unless *dis*approved, and that the agreements in question had been so submitted and not disapproved. This, too, would be an exercise of jurisdiction to prescribe, and an expression of the values and priorities of Great Britain, but with somewhat less involvement of the Government.

What about a scheme providing for approval (or non-disapproval) by an industry committee serving under delegation from the Government?

I am not ready to propose an answer to each of these questions, or to other possible variations. My point is that there is a significant space between such indifference of state *B* to a given activity carried on in its territory as to remove all doubt about the reasonableness of the exercise of jurisdiction by state *A*, and such compulsion by state *B* as would be required to create a "true conflict" as defined by the majority in *Insurance Antitrust*. Moreover, while I have long been skeptical about assertions by governments of state *B*—including statements in amicus curiae briefs—that they have "a strong interest in the above-entitled case," I am also skeptical about someone in state *A*—typically the United States—passing judgment on the manner in which economic regulation or administrative law is practiced in other states, whether by compulsion, "administrative guidance," industry committees, or whatever.

In determining whether state *A* should exercise jurisdiction over an activity significantly linked to state *B*, one important question, in my submission, is whether *B* has a demonstrable system of values and priorities different from those of state *A* that would be impaired by the application of the law of *A*. I am not suggesting that, if the answer to this question is yes, *A* must stay its hand. The magnitude of *A*'s interest, the effect of the challenged activity within *A*, the intention of the actors, and the other factors that I hope will not disappear from view remain important. But conflict is not just about commands: it is also about interests, values and competing priorities. All of these need to be taken into account in arriving at a rational allocation of jurisdiction in a world of nation-states.

IV. Beyond *Insurance Antitrust*

For more than a year, the U.S. Department of Justice has been considering a suit in the United States under the Sherman Act against Japanese manufacturers, based on the allegation that they restrict export sales of American manufacturers by threatening to cut off all supplies to their Japanese customers if these cus-

tomers make any purchases from the American manufacturers.[48] Even assuming that the principal defendants do sufficient business in the United States so that the problem of judicial jurisdiction can be overcome,[49] there are evidently problems with such an action. Though it might well be possible to show direct and substantial effect on U.S. commerce (i.e., the denial of export opportunities to American manufacturers), and it might be possible to demonstrate (or infer) intent to cause such effect, the proposed action would go a major step beyond *Insurance Antitrust,* in that both the challenged conduct and the ultimate consumers are outside the United States.

I do not here want to pass judgment on an action that has not yet been brought, and may in fact never be brought. But to suggest that an action along the lines proposed would not involve conflict—international legal conflict—because the Government of Japan has not *ordered* the Japanese manufacturers in question to engage in the challenged conduct, seems to me to reflect a major, even dangerous misunderstanding of conflict in the international arena. I hope that in considering such an action the decision makers think hard about the *Restatement* factors—not only about paragraphs (g) and (h) of section 403(2) discussed earlier, but about paragraphs (a) (the territorial link), (b) (the link of nationality or residence), and (d) (justified expectations).

Furthermore, by decision makers I mean both the executive branch and, if the action is brought, the courts. No court in the United States ought to wash its hands of the issue of jurisdiction to prescribe (the "comity issue" in the phrase I try to avoid[50]) as if it were like a challenge to a determination by the President as commander in chief by a soldier resisting an overseas assignment.[51] The Justice Department has long taken the position, stated in the 1988 international antitrust guidelines[52] and reiterated in the Solicitor General's brief in *Insurance Antitrust*[53]

[48] See, e.g., *Commerce Cops,* BUS. WK., Dec. 13, 1993, at 69, based largely on an interview with Diane P. Wood, Deputy Assistant Attorney General for Antitrust, U.S. Department of Justice. The example given by Ms. Wood and Assistant Attorney General Anne K. Bingaman concerns glass, but other products are also mentioned. The proposed new Antitrust Enforcement Guidelines for International Operations, released by the Department of Justice in October 1994, generalize the proposed enforcement action in Illustrative Examples C and F to countries Epsilon and Alpha, 59 Fed. Reg. 52,810, 52,816, 52,817 (1994) [hereinafter Proposed Guidelines].

[49] Remember that since the proposed actions would not "arise out of" the defendants' activities in the United States, the lower threshold of "transacting business" would not be applicable.

[50] The *Restatement* avoids the word "comity" except for cross-references, because the reporters believed that comity carries too much of the idea of discretion or even political judgment, as contrasted with the principle of reasonableness, which is conceived of in terms of legal obligation. If agreement can be reached or approached on content, it may not be worthwhile continuing to debate the terminology. See, however, the point made in text at note 55 *infra.*

[51] *See, e.g.,* Mora v. McNamara, 387 F.2d 862 (D.C. Cir. 1967), *cert. denied,* 389 U.S. 934 (1967); DaCosta v. Laird, 448 F.2d 1368 (2d Cir. 1971), *cert. denied,* 405 U.S. 879 (1972), and the many other "Vietnam cases." One U.S. district judge hearing an antitrust case brought by the Government did, in a footnote, adopt the position advocated by the Justice Department that "it is not the Court's role to second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances," but then denied the Government's motion to enjoin the merger of two foreign companies, so that when the decision was appealed, there was no occasion for the appellate court to consider the issue. *See* United States v. Baker Hughes, Inc., 731 F.Supp. 3, 6 n.5 (D.D.C.), *aff'd,* 908 F.2d 981 (D.C. Cir. 1990).

[52] U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS §6 (1988), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,109, and 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391 (Nov. 17, 1988).

[53] Brief for the United States, *supra* note 19, at 27.

(as well as in the proposed new guidelines[54]), that it "considers the legitimate interests of other nations," but that once it has made its determination on that issue the courts should defer to the Department. That position seems to me thoroughly unsound, because it treats an issue of law as if it were an issue of politics.[55] I am glad to see that nothing in the Supreme Court's opinion in *Insurance Antitrust* supports that position. The issues here addressed remain real, and neither redefining the word "conflict" nor asserting a preemptive right of self-judging can make them go away.

ANDREAS F. LOWENFELD*

THE SUPREME COURT AND INTERNATIONAL LAW: THE DEMISE OF *RESTATEMENT* SECTION 403

Recently, the Supreme Court has been much criticized for its disregard or misinterpretation of international law, especially in the *Alvarez-Machain*[1] and *Sale*[2] cases. Its decision in *Hartford Fire Insurance Co. v. California*,[3] however, is a significant counterexample. In that case the Court applied international law (and got the law right), while even Justice Scalia's dissenting opinion provided an exemplary demonstration of how a court should apply customary international law in the construction of a domestic statute. These two aspects of the decision deserve amplification.

The case involved a conspiracy by a group of London coinsurance companies to limit the kinds of insurance offered in the United States. The London coinsurance companies wanted, inter alia, to limit coverage of various pollution damage claims. The conspiracy allegedly violated the Sherman Act, but the London coinsurance companies argued that the statute should not apply to their conduct because of considerations of international comity. They argued that the United Kingdom had adopted a comprehensive regulatory system that permitted the conspiracy, thereby creating a conflict in law and policy between the United Kingdom and the United States. Under the circumstances, in their view, UK interests outweighed those of the United States, so that in accordance with principles of comity the suit should be dismissed. It is not clear why counsel did not couch their argument in terms of international law, rather than comity, but perhaps they doubted that the Court would apply customary international law after *Alvarez-Machain*.

They were wrong. The Court correctly applied the customary international law of prescriptive jurisdiction, while Justice Scalia's dissenting opinion articulated an

[54] Proposed Guidelines, note 48 *supra*, §3.2.

[55] *See* note 50 *supra*.

* An earlier version of this paper was presented at the Conference on Extraterritorial Jurisdiction held under the auspices of the International Law Association in Dresden, Germany, in October 1993.

[1] United States v. Alvarez-Machain, 112 S.Ct. 2188 (1992).

[2] Sale v. Haitian Centers Council, Inc., 113 S.Ct. 2549 (1993).

[3] 113 S.Ct. 2891 (1993). The case was noted and criticized in this *Journal* for having failed to apply the "reasonableness" test of RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §403 (1987), and for having failed to consider the possible difference in analysis required because plaintiffs were private parties, not the U.S. Government. David G. Gill, Case Note, 88 AJIL 109 (1994).