(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.

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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).

analytical framework that is a model for future courts to apply, integrating international and domestic law.[4] It is also a welcome acknowledgment of the potential status of customary international law in American jurisprudence.

Justice Scalia went straight to international law in analyzing the question of prescriptive jurisdiction. In determining whether Congress had exercised its unquestioned constitutional authority to regulate the foreign conduct in question, he invoked the canon of statutory construction from *The Charming Betsy*: "[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains."[5] Justice Scalia then opined that " 'the law of nations,' or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe."[6] Consequently, "statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law."[7] Justice Scalia then discussed three cases in which U.S. statutes were construed in light of international maritime law, and he added that "the principle that the scope of generally worded statutes must be construed in light of international law [applies] in other areas as well," citing the *Sale* case.[8] An international law professor could not ask for a better framework in which to demonstrate the practical importance of international law.

Unfortunately, Justice Scalia's opinion was endorsed by only three other Justices and, unhappily, he got the law wrong. He did not actually examine the relevant state practice to determine whether customary international law limited U.S. prescriptive jurisdiction in this situation. Instead, he relied on section 403 of the *Restatement (Third) of U.S. Foreign Relations Law*.[9] He added: "Whether the Restatement precisely reflects international law in every detail matters little here, as I believe this case would be resolved the same way under virtually any conceivable test that takes account of foreign regulatory interests."[10] That statement, of course, is at least inadvertently ironic since five of his colleagues in that very case applied a "test that takes account of foreign regulatory interests"; indeed, they applied precedent and came to a different result.

Had Justice Scalia employed elementary customary law analysis, he would have found ample evidence that U.S. prescriptive jurisdiction has never been as sharply limited as suggested by section 403. Following the *Alcoa* case,[11] Justice Scalia as well as the majority recognized that in previous decades the Court had clearly established that the antitrust laws covered conduct abroad if there was a substan-

[4] Justice Scalia was joined by Justices O'Connor, Kennedy and Thomas. 113 S.Ct. at 2917. The dissent also articulated a clear analytical distinction between the questions (1) whether the courts have subject matter jurisdiction (because the claim arises under federal law), and (2) whether the Sherman Act applies. Scalia concluded that the courts have subject matter jurisdiction even if the Sherman Act, properly construed, does not apply (so that the federal law supporting subject matter jurisdiction in the first place disappears). The practical consequence of this analytical distinction is that the case would be dismissed on the merits and not for lack of subject matter jurisdiction. Hence, the decision would presumptively be *res judicata* throughout the world, although it could always be rendered ineffective by measures like the UK clawback statute, which provides, inter alia, that antitrust damage awards are unenforceable in the United Kingdom. *See* Lawrence Collins, *Blocking and Clawback Statutes: The United Kingdom Approach—II*, 1986 J. BUS. L. 452.

[5] 113 S.Ct. at 2919 (quoting Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.)).

[6] *Id.*

[7] *Id.*

[8] *Id.* at 2919–20 (citing *Sale*, 113 S.Ct. at 2562 n.35).

[9] *See* note 3 *supra*.

[10] *Id.* at 2920–21.

[11] 148 F.2d 416 (2d Cir. 1945).

tial effect in the United States.[12] These cases establish precedents as to the proper interpretation of the antitrust laws, as well as implicitly reaffirming the established U.S. view of customary international law.

Of course, it could be argued that the Court's task was to find the "objectively correct" rule of customary international law, and not just to apply the U.S. view of the correct rule. Such an approach would entail judicial review of the political branches in much the same manner as in constitutional litigation, i.e., the Court could limit the scope of an act of Congress despite the political branches' contrary wishes. I have argued elsewhere that such judicial activism would be illegitimate in terms of democratic values and that, in fact, courts have rarely used customary international law in this manner unless the political branches have somehow indicated that they should do so.[13] In addition to those objections, I would also argue that an "objective" view of customary international law would reflect no general state practice limiting the effects doctrine. As the *Lotus* case[14] established, the proponent of a limitation of extraterritorial jurisdiction is required to carry the burden of proof showing the existence of customary international law that supports such a limitation. In this case that proponent must show a general state practice, followed out of a sense of legal obligation, that the effects doctrine is barred. In light of the post–World War II U.S. position, in recent years joined by Germany and the European Commission,[15] there is no such general practice and hence no customary international law like that advanced in section 403.[16] Even if the strict territorial limitations advocated by the United Kingdom represented customary international law in the *American Banana*[17] era, the law has long since changed the only way that customary international law can change—by one state's violating the old norm and other states' acquiescing in the violation.

Moreover, in 1982 Congress declined to endorse (or reject) the *Timberlane* case[18] (which followed the section 403 approach), leaving U.S. state practice as it had been following *Alcoa*.[19] In the course of explaining the 1982 legislation, the House Report stated:

> If a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the courts' ability to employ notions

[12] Both opinions cited Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962); and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 n.6 (1986) ("The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce.").

[13] Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986).

[14] S.S. Lotus (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10.

[15] *See* Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, U.S.-Ger., Art. 2(2), 27 UST 1956, 15 ILM 1282 (1976) (covering "restrictive business practices which, regardless of origin, have a substantial effect on the domestic or international trade of [the] other party"); and Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 28–29 (1992) (pointing out that the European Commission accepted the effects doctrine, while the European Court of Justice achieved the same result by expanding the "objective territoriality" principle).

[16] The U.S. Court of Appeals for the District of Columbia Circuit recently dealt with a similar clash of antitrust policy between the United States and the United Kingdom, and concluded that "there is no evidence that interest balancing represents a rule of international law." Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 950 (D.C. Cir. 1984).

[17] American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

[18] Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).

[19] Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. §6a (1988).

> of comity, *see*, e.g., *Timberlane Lumber Co.* v. *Bank of America*, [549 F.2d 597 (9th Cir. 1976)], or otherwise to take account of the international character of the transaction. Similarly, the bill is not intended to restrict the application of American laws to extraterritorial conduct where the requisite effects exist . . . .[20]

Most recently, the Bush and Clinton administrations have taken extremely expansive views regarding extraterritorial application of the Sherman Act, beyond what section 403 would permit.[21] Consequently, an examination of U.S. state practice would reveal the weakness of the foundation of section 403. In addition, even if there were a generally applicable customary international law rule like section 403, the United States would long ago have opted out, a possibility to which Justice Scalia did not advert. In the end, his analytical framework is elegant and correct, but his research deficient.

The majority of the Court, however, got the international law right. It additionally offered the prospect of curtailing permissible prescriptive jurisdiction through the exercise of international comity, if necessary to relieve the litigant of the dilemma presented by conflicting sovereign commands. Perhaps unfortunately, Justice Souter did not analyze the customary international law involved, but he followed precedent and adopted the approach that in fact reflects existing international law, *viz.*, that if foreign conduct is intended to produce and in fact does produce some substantial effect in the United States, the statute applies.[22] He added that, in some circumstances, principles of "international comity" could lead the Court to restrict the scope of the statute. However, the Court would invoke comity only if there were a true conflict of the Sherman Act with British law, in the sense that British law required the defendants to act in a fashion prohibited by the Sherman Act or in situations where compliance with both laws was impossible.[23]

In this case there undoubtedly was a conflict in policy—British law permitted the conduct, while U.S. law prohibited it. But the reinsurance companies were not forced into an impossible dilemma. They could comply with U.S. law and still not violate British law. The Souter view would employ international comity to relieve hardship suffered by private persons subject to contradictory sovereign commands, but would not attempt to resolve conflicting governmental policies in the absence of such hardship.

This result seems correct and not disrespectful of international law. The Souter majority did not refuse to apply international law. It simply declined to apply section 403.

The opinions of Justices Souter and Scalia present neatly contrasting views of the circumstances under which a court should refuse to apply an act of Congress in the face of claims that to do so would violate customary international law. Justice Scalia would adopt the mantle of judicial activist, ready to restrain the power of Congress through customary international law that Congress itself had expressly declined to endorse. Following section 403, he would balance national interests and have the courts resolve conflicting governmental claims of sovereign right to regulate. Justice Souter, on the other hand, would defer to Congress and not judge whether the United States or the United Kingdom had the stronger

[20] H.R. REP. NO. 686, 97th Cong., 2d Sess. 13 (1982).

[21] *See U.S. Sues British in Antitrust Case*, N.Y. TIMES, May 27, 1994, at A1.

[22] 113 S.Ct. at 2909.

[23] *Id.* at 2910–11.

"national interest" in applying its policy. He would not use litigation to resolve governmental or sovereign claims but, instead, would employ international comity to relieve an individual litigant of the burden of facing directly inconsistent sovereign commands, a situation not actually present in the *Hartford Fire Insurance Co.* case.

The Court's opinion represents an important development in the customary international law of prescriptive jurisdiction. The decision itself, like the acts of Congress and the executive branch, becomes part of U.S. state practice for this purpose. This resulting authoritative statement of customary international law reaffirms the traditional, unqualified "effects" doctrine, and rejects section 403.

The result is a triumph for governmental regulation of anticompetitive behavior. Extraterritorial application of competition law has been legitimated. Domestic courts will not play the role of diplomats or international arbitrators. The unquestionable significant conflicts of policy must be worked out by legislators and diplomats, in the overall public interest.

In fact, the diplomats have worked out procedures and even standards to guide governmental prosecutions.[24] If they decide to extend their view of comity to private litigation, the appropriate procedure would be by treaty or congressional-executive agreement. Such a process would assure that diplomatically sensitive lawmaking is rooted in the legislature where it belongs. Recent experience does not suggest that Congress would be willing to adopt the section 403 approach in statutory form. To the contrary, on several occasions Congress has overturned judicial decisions that declined to apply law extraterritorially. It seems that Congress prefers an expansive interpretation of its prerogative, tempered by executive discretion in enforcement. Against this background, it seems especially unseemly for the courts to introduce new restrictions as Justice Scalia and section 403 would require.

The consequence for multinational business is not excessively harsh. Indeed, the Souter approach points the way to a further development in the customary international law of prescriptive jurisdiction: it would be entirely appropriate, and consistent with existing state practice, to curtail the extraterritorial application of law in particular cases to parties who are truly subject to conflicting commands. That result is undoubtedly not everyone's preferred outcome, but, in a world compressed by technology, the imperative of effective governmental regulation of private behavior is increasingly paramount.

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[24] *E.g.*, Agreement Regarding the Application of Competition Laws, Sept. 23, 1991, U.S.-Eur. Comm'n, 30 ILM 1487 (1991). The United States also has relevant agreements with Germany, Canada and Australia.