

2006

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### Recommended Citation

Andreas F. Lowenfeld, Harold Maier, Comity, and the Foreign Relations Restatement, 39 *Vanderbilt Law Review* 1415 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol39/iss5/6>

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# Harold Maier, Comity, and the Foreign Relations Restatement

Andreas F. Lowenfeld\*

Hal Maier's career and mine have interacted in several respects. We have both served in the Legal Adviser's Office of the State Department; we have both taught Conflict of Laws as well as International Law; and we have both tried to show—I believe successfully—that there is no sharp divide between “Public International Law” and “Private International Law.” In particular, we have both been interested in the reach and limits of economic regulation across international frontiers, initially in connection with antitrust and securities regulation, but also in connection with economic sanctions, pollution controls, and other interactions of governmental and private activity.

Generally, Professor Maier and I have come out in the same way on particular issues. We have both advocated reduced emphasis on power and sovereignty and greater emphasis on restraint and flexibility in application of the law of the forum to activity with links to more than one state. Yet there has been a fundamental difference between us which grew as what became the Restatement (Third) of Foreign Relations Law was being drafted, debated, and eventually accepted by the American Law Institute.

Though I was in the middle of the debate as a proponent of the Restatement, I am not sure that I ever completely understood the intensity of the controversy centered on § 403, *Limitations on Jurisdiction to Prescribe*. That Section, as all who participated in or observed the debate know, provides that even when one of the essential prerequisites to the exercise of prescriptive jurisdiction is present—i.e., a link of territoriality or nationality—a state may not exercise its jurisdiction if doing so would be unreasonable (Subsection (1)). The Section goes on to set out a list of criteria designed to give guidance in evaluating the reasonableness or unreasonableness of exercise of jurisdiction in a given situation (Subsection (2)). Finally Subsection (3) attempts to cope with the situation where it would not be unreasonable for either state A or state B to apply its law, but the two laws are in conflict.

Many persons criticized this approach. Some thought § 403 would legitimize excessive intervention by the United States in matters where it did not belong. Others thought the opposite, that

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§ 403, if it remained in the Restatement, would curb the activity of the U.S. government in exercise of its sovereignty. Professor Maier's complaints were different. On the one hand, if I understand him, § 403 and the Sections that elaborate on the basic approach in particular contexts, are insufficiently attentive to the needs of the international system as a whole, as contrasted with balancing the interests of only state A and state B. On the other hand, Maier thought that the approach of the Restatement was insufficiently conceptual, substituting pragmatism—reasonableness—for philosophical purity. As to balancing of interests, Maier, like many judges and commentators, distrusted the process but could not quite avoid it. And Maier never liked the use of “reasonableness” as the critical concept.

In a forty-page article in the *American Journal of International Law* shortly after publication of the first version of § 403,<sup>1</sup> Maier wrote:

Above all, it is essential that section 403 provide a general context in which the relevance of the various elements mentioned can be viewed. Reasonableness is a relative term. To be fully effective in accomplishing its purpose, section 403 must make it explicit that jurisdiction depends upon reasonableness measured not only in the light of the interests having direct connection with the case, but also measured in the light of the needs of the international system . . .

Tentative Draft No. 2 places . . . not nearly enough emphasis on the role of the court or other decision maker as a facilitator of transnational interaction whose task should be to decide so as to coordinate the exercise of national power to serve the needs of all states for an effectively functioning system.<sup>2</sup>

To the Reporters who were in any event accused of making up law—of *prestat*ing rather than *restat*ing—Maier's injunction seemed to go well beyond our mandate, even if we had known how to accomplish what Professor McDougal, as quoted by Maier, called “the final task.”<sup>3</sup>

In his next article relevant to the present discussion, Maier was more sympathetic to interest balancing, but not by courts:

The development of processes to resolve conflicting claims of authority to forbid or require conduct within a nation's borders, is most

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1. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, (1981) [hereinafter Tent. Draft No. 2].

2. Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 AM. J. INT'L L. 280, 303 (1982).

3. *Id.* at 301 (citing MYRES S. MCDUGAL, HAROLD D. LASSWELL & IVAN A. VLASIC, *LAW AND PUBLIC ORDER IN SPACE* 748 (1963)).

appropriately carried out by diplomatic exchange, not by judicial decisions.<sup>4</sup> . . .

In the diplomatic forum, the label “balancing of interests” merely characterize the ordinary international law formation process of demand, response and eventual accommodation in the light of reciprocal national needs and tolerances.<sup>5</sup>

To my surprise on reading this article two decades later, Maier used as his principal illustration the controversy over the attempt by the United States in 1982 to impede construction of a natural gas pipeline from Siberia to Western Europe to punish the Soviet Union for its crackdown on liberalization in Poland.<sup>6</sup> Maier tells the story as a conflict resolved, after some months, by diplomacy. My reading of that episode is quite different. I regard the assertion of jurisdiction to prescribe conduct by foreign firms in foreign countries based on an unprecedented and unpersuasive link to the United States (the use of technology licensed by private U.S. companies) as failure by the U.S. government and particularly by its legal advisers to heed the limits on the exercise of jurisdiction as set out in the Restatement. In fact in the summer of 1982, as the sanctions were still in force but subject to sharp controversy, the State Department’s Legal Adviser urged that § 403 (as well as the section concerning jurisdiction over foreign subsidiaries) be withdrawn, precisely because he thought that acceptance of the Restatement would curb the freedom of the U.S. government.<sup>7</sup> My conclusion is that the forced retreat of the U.S. government and the resignation of the Secretary of State were confirmation that the principles set out in the Restatement were correct. The action of the U.S. government was unreasonable, and therefore unlawful, and could not stand.<sup>8</sup>

I do not disagree with Maier over the outcome, and I do not disagree that the Pipeline case was not suitable for resolution by a national court. But I do not think looking to “comity,” which Maier defined as a blend of “legal policies” and “high international politics,”<sup>9</sup>

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4. Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 581 (1983).

5. *Id.* at 584.

6. *Id.* at 580–86.

7. Indeed, the European Community cited the draft Restatement in an Aide-Mémoire supporting the protests of the European governments. *Aide Mémoire of European Economic Community Concerning President Reagan’s Decision About the Pipeline* (July 14, 1982), 21 I.L.M. 891, reproduced in ANDREAS F. LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS DS-307 (2d ed. 1983).

8. For my treatment of the Pipeline case, see ANDREAS F. LOWENFELD, CONFLICT OF LAWS, FEDERAL, STATE AND INTERNATIONAL PERSPECTIVES 977–81 (2d rev. ed. 2002) and LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS, *supra* note 7, at 267–306. A brief account of the episode, with bibliography, appears in the final version of the Restatement. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 414 reporters’ note 8 (1987).

9. Maier, *supra* note 4, at 589.

is preferable to looking to limits on jurisdiction of states defined in terms of reasonableness, that is as law.

Maier entitled the third in this series of articles, "Resolving Extraterritorial Conflicts, or 'There and Back Again,'" <sup>10</sup> "The characterization 'comity,'" he wrote in criticism of the Restatement "is replaced by the characterization 'reasonableness' but, despite the difference in terminology, they serve precisely the same purpose."<sup>11</sup> If the issue were really one of terminology, one might wonder why Maier would be so upset, since he acknowledged that, compared to § 40 of the Second Restatement, the proposed Restatement (Revised) contains an appropriately expanded list of considerations to be taken into account by the decisionmaker.<sup>12</sup> But there *was* a change from the formulation in § 40, which read, in pertinent part:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law *to consider, in good faith, moderating the exercise of the enforcement jurisdiction in the light of [such factors as those listed].*<sup>13</sup>

In contrast, the formulation in § 403(3) to which Maier's 1984 article was addressed, read:

An exercise of jurisdiction which is not unreasonable according to the criteria indicated in Subsection (2) may nevertheless be unreasonable if it requires a person to take action that would violate a regulation of another state which is not unreasonable under those criteria. Preference between conflicting exercises of jurisdiction is determined by evaluating the respective interests of the regulating states in light of the factors listed in Subsection (2).<sup>14</sup>

Whereas the prior Restatement spoke in terms of good faith and moderation, the proposal for the new Restatement seemed to suggest (though it did not say so directly) that if the state with the lesser interest nevertheless applied its law, that might be unreasonable, and by the definition in Subsection (1), therefore unlawful. The justification for the changed approach was explained in a comment to

10. 25 VA. J. INT'L L. 7 (1984).

11. *Id.* at 10.

12. Throughout the first six drafts, the project was entitled "Foreign Relations Law of the United States (Revised)." In fact the Reporters decided early on not to work on a revision of the 1965 work, but to start afresh, with cross references where appropriate. Eventually we persuaded the American Law Institute to call the completed project "Restatement (Third) . . ."

13. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) (emphasis added).

14. It is worth noting that in the final published version, the term "preference" does not appear, nor does the statement that an exercise of jurisdiction by the state with the lesser interest "may nevertheless be unreasonable . . ." For the final version, see *infra* note 26.

§ 403 in the first published version,<sup>15</sup> and perhaps made somewhat clearer in the final version:

Some United States courts have applied the principle of reasonableness as a requirement of comity, that term being understood not merely as an act of discretion and courtesy but as reflecting a sense of obligation among states. This section states the principle of reasonableness as a rule of international law. The principle applies regardless of the status of relations between the state exercising jurisdiction and another state whose interests may be affected. While the term "comity" is sometimes understood to include a requirement of reciprocity, the rule of this section is not conditional on a finding that the state affected by a regulation would exercise or limit its jurisdiction in the same circumstances to the same extent.<sup>16</sup>

Maier certainly got the point:

The key concept added by section § 403 is the proposition that all jurisdictional determinations should be guided by the principle of reasonableness and that international law forbids a state to exercise jurisdiction when its exercise is unreasonable.<sup>17</sup>

But then he went one step further, reading into § 403 something that was not there but that stirred up many persons in and out of the U.S. government, including the State Department's Legal Adviser referred to at note 6 above. Referring to my 1979 Hague Lectures which anticipated the Restatement approach,<sup>18</sup> Maier wrote:

Professor Lowenfeld's lectures and, to an even greater extent, the original section 403, appear to convert international law as a limiting law, designed to describe the confines of national prescriptive authority, into a prescribing law, conferring jurisdiction to prescribe solely upon the state with the *most* reasonable connection with the transaction in situations where nations having concurrent jurisdiction have issued conflicting commands.

...

In other words . . . in every situation of concurrent jurisdiction it can only be reasonable for a *single nation* to have authority to apply its law to the events or persons in the case at issue.<sup>19</sup>

I suppose that if someone as bright and thoughtful as Professor Maier misunderstood, that is the fault of those who drafted and presented the critical text. But it *was* a misunderstanding. In rejecting comity as entailing too much politics and too much discretion, we did not reject the need to exercise judgment. Though

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15. Tent. Draft No. 2, *supra* note 1, at cmt. a.

16. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. a (1987).

17. Maier, *supra* note 10, at 17.

18. Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for their Interaction*, 63 RECUEIL DES COURS 31 (Hague Academy of Int'l L. 311 1979).

19. Maier, *supra* note 10, at 19.

the formulation of § 403(3) was changed several times in the course of arriving at a final text, it always contemplated the need to make choices when it would not be unreasonable for more than one state to exercise jurisdiction. The obligation stated in § 403(3) was to evaluate the interest of both states in light of the criteria of § 403(2). It did not follow, as Maier asserted, that it can only be reasonable for a single nation to have authority to apply its law.

While Maier was at work on this article, Judge Malcolm Wilkey of the Court of Appeals for the District of Columbia Circuit issued a long opinion in the U.S. phase of the famous *Laker* case, which pitted U.S. and English courts against one another. *Laker Airways*, an independent English airline, had brought an antitrust action in the United States alleging that it had been driven out of business by a cartel led by British Airways. British Airways had obtained an anti-suit injunction (later overturned) in the English court, and *Laker* had obtained an anti-anti-suit injunction from the federal district court in the District of Columbia.<sup>20</sup> Judge Wilkey, for the majority (with Judge Starr dissenting) upheld the anti-anti-suit injunction but took the occasion to criticize interest balancing and, in particular, the criteria set out in § 403(2) of the Restatement, then still in draft.<sup>21</sup> Maier felt vindicated:

Judge Wilkey's principal objection to the process proposed in section 403 went directly to the heart of the reasonableness standard. He read the section in the same way that it was interpreted by the Office of Legal Adviser and agreed that no rule of international law gave exclusive jurisdiction to the nation having the most reasonable connection with the situation."<sup>22</sup>

Maier wrote that

[t]he *Laker* opinion exerted a major influence on the current form and substance of section 403, not only because it was the principal judicial opinion interpreting the proposed original form of the section but also because it addressed a problem that had been raised by other commentators, including the Office of the Legal Adviser.<sup>23</sup>

That may well be right, though the Reporters did not think that a major substantive change was called for. As Maier reported in his article, Professor Henkin, the Chief Reporter of the Restatement, wrote to Davis Robinson, the Legal Adviser, and I wrote directly to Judge Wilkey, who in fact was an adviser to the Restatement. Both

20. *Laker Airways Ltd. v. Sabena, Belgium World Airlines*, 731 F.2d 909, 915 (D.C. Cir. 1984). For a detailed account of the *Laker* case in the United Kingdom and the United States, see ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* 121-36, 138-45 (3d ed. 2006).

21. 731 F.2d at 948-51.

22. Maier, *supra* note 10, at 34 (discussing 731 F.2d at 952). Professor Maier at the time was serving as Counselor on International Law in the State Department.

23. Maier, *supra* note 10, at 36.

Henkin and I objected to Wilkey's reading of § 403 as calling for jurisdiction of only one state, making essentially the same points made above. Maier quoted both from Henkin and me and from Judge Wilkey's reply. The outcome was that Judge Wilkey and Professor Maier persisted in asserting that we had drafted a rule calling for exclusive jurisdiction by the state with the greater interest, and the Reporters denied that that was their intent but agreed to change the text of § 403(3) in the direction urged by Wilkey and Maier. As Professor Henkin explained to the final Annual Meeting on the Restatement, "[i]n this final go-around we sort of split the difference, but not evenly."<sup>24</sup> Thus, the final version provides that while the call for evaluation of one's own as well as the other state's interest is stated to be mandatory ("each state has an obligation"), the call for deference to the other state if that state's interest was greater is stated to be merely hortatory—"a state *should*—not shall but should—defer given to the other state whose interest is clearly greater."<sup>25</sup> When a motion was made at the Annual Meeting of the Institute to add the words "as a matter of international law" in the Comment to § 403(3), the words were rejected. I did not think that this represented acceptance of what Maier called the "informing principle of international comity." For Maier, however, "[t]he journey there and back again was arduous but well worth it."<sup>26</sup>

Having, as he thought, won the battle, Maier might have rested his case. But though he did turn to other issues, his concern with comity and with the Restatement continued. Writing about the effect of the Hague Evidence Convention after the Supreme Court had granted review in the *Aérospatiale* case but before the Court had issued its opinion,<sup>27</sup> Maier urged a comity approach to application of the Convention. Accordingly, he urged rejection of the position of the Court of Appeals that the Convention had no application to

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24. See ALI Proceedings 1986, p. 94. The transcript of the debate at that meeting on § 403(3) runs from p. 93 to p. 107. Prof. Maier was present, but did not speak to that section. See Harold G. Maier, Book Review, 83 Am. J. Int'l L. 676, 676-79 (1989) (reviewing *THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS* (Dieter Lange & Gary Born eds., 1987) and providing Prof. Maier's summary of the debate).

25. In its final form, § 403(3) reads:

When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, including those set out in Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(3) (1987).

26. Maier, *supra* note 10, at 41.

27. See Maier, *Extraterritorial Discovery: Cooperation, Coercion and the Hague Evidence Convention*, 19 VAND. J. TRANSNAT'L L. 239 (1986).



production of evidence in possession of a party over whom the court had personal jurisdiction.<sup>28</sup> But whereas he had previously argued that in rejecting the term comity and stressing reasonableness the drafters of the Restatement had paid insufficient attention to diplomacy and political considerations, he now criticized the lower courts, as well as the U.S. government's amicus brief, for treating comity as too much informed by political considerations:

Both the Fifth Circuit's opinion in *Anschuetz* and the Eighth Circuit's opinion in *Aérospatiale* are fundamentally in error to the extent that they treat comity as a principle emphasizing primarily political considerations—namely, avoiding insults to foreign governments—in decisions determining whether the Hague Evidence Convention should be given priority in cases of this type. Rather, comity is a concept whose application is informed by principles of national self-interest in maintaining a climate of reciprocal tolerance and goodwill. A decision based on considerations of comity may, as a by-product, avoid annoying a foreign nation, but preventing international tension is not the comity principle's main juridical role.<sup>29</sup>

One might say that Maier's criteria of what he called in the next paragraph "this fundamental misunderstanding" of comity by U.S. courts justified the reluctance of the drafters of the Restatement to base their approach on the term comity. But of course that was not Maier's point. On the contrary, he was prepared to invoke the Restatement's provision on disclosure of evidence located abroad (§ 437 in the tentative final draft of 1986, § 442 in the permanent published version) in support of his argument in *Aérospatiale*. He wrote, "Although the Reporters refused to use the term 'comity' to describe the interest analysis required by section 403, . . . it is quite clear that that section's final form is more directly informed by the comity principle than by the international law-formation process."<sup>30</sup>

When the *Aérospatiale* case reached the Supreme Court, the Justices were unanimous in rejecting the holding of the lower courts that the Evidence Convention had no application to requests for discovery from parties over which the court had personal jurisdiction.<sup>31</sup> But on the issue of whether or when the trial court should order first resort to the Convention, the Court split 5-4. The majority, per Justice Stevens, held that resort to the Convention was simply one of the options open to the trial court, with no general presumption in favor of resort to the Convention mechanism in preference to the discovery provisions of the Federal Rules of Civil

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28. *In re Société Nationale Industrielle Aérospatiale*, 782 F.2d 120 (8th Cir. 1986), *vacated and remanded*, *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1987); *see also In re Anschuetz & Co.*, 754 F.2d 602 (5th Cir. 1985), *vacated*, 483 U.S. 1002 (1987).

29. Maier, *supra* note 27, at 252-53.

30. *Id.* at 259.

31. *Aérospatiale*, 482 U.S. at 522.

Procedure. Referring to the Restatement section dedicated to discovery, the majority wrote that “the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation than petitioners’ proposed general rule would generate.”<sup>32</sup>

The dissenters, in a long opinion by Justice Blackmun, rejected the case-by-case approach advocated by the U.S. government and accepted by the majority. In support of a first resort prescription, Justice Blackmun wrote:

The principle of comity leads to more definite rules than the ad hoc approach endorsed by the majority....Comity is not just a vague political concern favoring international cooperation when it is in our interest to do so. Rather it is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill. See Maier, *Extrajudicial Jurisdiction at a Crossroads*.<sup>33</sup>

Six years later, in the international phase of the Insurance Antitrust Case,<sup>34</sup> the Supreme Court again faced the issue of the reach of U.S. law in the face of inconsistent or conflicting foreign law. The issue was whether U.S. antitrust law could or should be applied to challenge an agreement, made in London by English reinsurers consistently with English law and policy, to limit the available coverage of certain risks in the United States. Judge Schwarzer in the federal district court in San Francisco had dismissed the action on the basis that “the conflict with English law and policy which would result from the extraterritorial application of the [U.S.] antitrust laws in this cases is not outweighed by other factors.”<sup>35</sup> The Court of Appeals for the Ninth Circuit had reversed and reinstated the action on the ground that the conflict was outweighed by the “significance of the effects on American commerce, their foreseeability and their purposefulness.”<sup>36</sup> Once again the Supreme Court split 5-4. This time, neither side cited Maier, but each side relied on the Restatement for its conclusion.

The majority, per Justice Souter, held that there was no true conflict at all, because English law permitted but did not require the conduct challenged under U.S. law.<sup>37</sup> Thus, as the majority saw it, § 403(3) of the Restatement, the Section that had been the major source of controversy between Professor Maier and the Reporters of the Restatement—did not apply. Justice Souter quoted from Comment *e* to § 403, which states that Subsection (3) does not apply

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32. *Id.* at 543–44.

33. *Id.* at 554, 555 (Blackmun, J., dissenting).

34. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

35. *In re Ins. Antitrust Litig.*, 723 F. Supp. 464, 490 (N.D. Cal. 1989).

36. *In re Ins. Antitrust Litig.*, 938 F.2d 919, 934 (9th Cir. 1991).

37. *Hartford*, 509 U.S. at 765.

where a person subject to regulation by two states can comply with the laws of both.<sup>38</sup>

Justice Scalia for the dissenters, wrote:

. . . the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence . . . Whether the Restatement precisely reflects international law in every detail matters little here, as I believe this litigation would be resolved the same way under virtually any conceivable test that takes account of foreign regulatory interests.<sup>39</sup>

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Literally, the only support that the Court adduces for its position is § 403 of the Restatement (Third)—or more precisely Comment *e* to that provision. . . . The Court has completely misinterpreted this provision. Subsection (3) of § 403 (requiring one State to defer to another [if that State's interest is clearly greater]) comes into play only after subsection (1) of § 403 has been complied with—i.e. after it has been determined that the exercise of jurisdiction by both of the two states is not “unreasonable.” That prior question is answered by applying the factors set forth in subsection (2) of § 403, that is, precisely the factors . . . that the Court rejects.<sup>40</sup>

I was pleased (and somewhat surprised) by the first quoted sentence in Justice's Scalia's opinion and by his willingness to accept the Restatement as his guide to international law—at least in this context.<sup>41</sup> I also agree with his statement that § 403(3) comes into play only after Subsection (1) of § 403 has been complied with, that is that exercise of jurisdiction by either state would not be unreasonable. I would not have said, and did not say, that exercise of jurisdiction by the United States, the place of the intended effect of the challenged agreement, would be unreasonable. But under a broader understanding of conflict than Justice Souter allowed, if it would be reasonable (or as the Restatement preferred “not unreasonable”) for each state to assert its jurisdiction over the challenged agreement, § 403(3) would call for comparison of the relative interests of the two states “in light of all the relevant factors, including those set out in § 403(2).” Though both the majority and the dissenters in the Supreme Court invoked the Restatement, neither side undertook that comparison.

With benefit of hindsight, I would have liked to make clearer that the likelihood of conflict (§ 402(2)(h)) is applicable both in determining reasonableness in the first place and as one of the criteria for making the evaluations under § 403(3). I would not have

38. *Id.* at 799.

39. *Id.* at 818 (Scalia, J., dissenting).

40. *Id.* at 821.

41. I should mention that I was of counsel to the English insurers in *Hartford*. After a sufficient pause, however, I have tried to write about this case in several places as objectively as I could. See *infra* note 42.

attempted one more draft of § 403, but Comment *e* might have used some more work.

I do not know how Professor Maier would have come out in *Insurance Antitrust*. Maier might well have concluded that § 403(3) was applicable, on the ground that it *would be* impossible for the English reinsurers to comply both with English law and policy and with U.S. antitrust law, i.e., that Justice Souter's definition of "conflict" was too narrow.<sup>42</sup> In that scenario, Maier would be faced with the questions (a) which state's interest was "clearly greater," and (b) if the answer was England's, whether the U.S. court *should* or *should not* defer. The Restatement, thanks in part to Professor Maier's continual watchfulness, would give him substantial latitude, whether in the name of comity or in the name of reasonableness.

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42. For development of the argument that Justice Souter and the majority should not have equated conflict with compulsion, see Andreas F. Lowenfeld, *Conflict, Balancing of Interests and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 Am. J. Int'l L. 42 (1995) (arguing that the majority confused conflict with foreign compulsion). Note also that the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) contains a separate section, § 441, on Foreign Government Compulsion, which generally looks to the territory where an act is required or prohibited, and recognizes the defense of compulsion in some instances even if the command or prohibition would be unreasonable under the criteria of § 403. See § 441 cmts a, e.

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