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It is an honor and pleasure to be back here. Henry King was probably my most distinguished predecessor as Chairman of the ABA's International section. I have always enjoyed working with him, and I am delighted and honored to be back here with you all.

I was stirred by Father Drinan's excellent speech. I hate to bring you back to the grubby world of practicing law on a day-to-day basis, as opposed to what the law should be or might be in our lifetime. One of the themes I want to get across to you is, as it concerns antitrust law, that in our lifetime not much will change. That is probably a pessimistic viewpoint, but I will try to justify it. I have had the benefit of seeing Mr. Hunter's excellent paper, which he shared with me before. He makes a number of very good points that might be more optimistic, but I will let him speak for himself and then we can discuss it during the question time.

A little history is in order. I often used to ask my students when I was teaching, "When was the first antitrust law?" Some of you scholars will remember that there is a little bit of a debate about Canada versus the Sherman Act, and whether Canada's law was one year before the Sherman Act. But the real truth is that the first recorded antitrust law I know of was the Roman Corn Monopoly laws at the time of Christ. So antitrust, despite the theory that it is an American invention less than a hundred years old, has in fact been around in one form or another for a long time.

To leap decades in a single bound, after World War II, when there was the creation of the Bretton Woods System and United Nations and so forth, there was in fact a Draft International Law of Antitrust, because even by then, people understood that antitrust raised fundamental questions about an economy, how you organize it, what you want to do about monopolies, what you want to do about government ownership of business and so forth. They said, "Well, we will never be able to solve this problem other than having an international law of antitrust, a common set of principles, not unlike the Fundamental Declaration of Human Rights, so let us all agree on a fundamental set of principles about antitrust." They rounded up the usual of group of scholars and experts. They were able to produce a draft code that became known as

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the Havana Charter, all drafted and ready for adoption at the time that the GATT and the United Nations and Bretton Woods were all coming along in the late '40's. Except that they were stopped dead in their tracks by the effective veto of the United States, which said, "We are not prepared to cede any sovereignty on this issue at this time." That was the end of the Havana Charter and what was then going to be called the International Trade Organization (ITO), which bears a striking resemblance to what is going to be called the World Trade Organization (WTO) in a year or two.

So, one point is that this issue of antitrust and internationalization of antitrust has been around for a long time. The second point is, in the economic area, it was one of the first real flare points where you began to hear the cant of sovereignty. The Americans early on said "Well, we are not going to worry about just our internal markets and just anti-competitive activity inside the United States; we are always going to worry about anti-competitive activity outside the United States if it has a bad effect in the United States." This is what is usually called extra-territoriality. The almost universal response to American assertions of extra-territorial jurisdiction in the antitrust area, which began basically between the wars and really got going immediately after World War II, was, "You are infringing our sovereignty. You the United States, cannot assert jurisdiction over conduct here in Canada or Mexico by our nationals just because it causes some effect in the United States." There was a raging battle all through the '40's, '50's and '60's on the so-called Effects Doctrine of Jurisdiction. The major argument against it was that it cannot be justified under international law, because it is an infringement of the territorial sovereignty of the country that is being attacked.

When the economic trends in the world allowed America to be the only policeman on the beat immediately after the war, we were able to assert that notion in numerous international cartel cases in the '40's and '50's and '60's without very much opposition. We were still the only cop on the beat. We simply told people we were going to do it or they would not get their Marshall Plan funds or they would not get fighter cover or they would not get their ships in port.

Actually, other than writing diplomatic notes, no states objected very much. Some countries like Canada enacted what Americans like to call blocking statutes, that is statutes designed to impede or thwart or make it more difficult for Americans to assert jurisdiction. But they were seen primarily as defensive measures, that is, measures taken by the country being attacked to protect its interests.

But as the European Union (EU) came along and began to create what is the only existing truly international binding antitrust law, which is Articles 85 and 86 of the Treaty of Rome, and some later amendments like the merger regulation, and other countries like Japan

began to become economically strong again, countries began to stand up to the United States. By the '70's and '80's, you saw a whole series of cases that caused major international confrontations.

I can tick off the litany that ought to be fondly remembered by all of you, the *Uranium Cartel* case, the *Laker Airplane* case, the John Brown fight about export controls, *North Atlantic Shipping, South Pacific Shipping*, and so forth. In the series of cases in the '70's and '80's our allies did more than write diplomatic notes. They passed more of these blocking statutes, and they took aggressive action of one kind or another to thwart or impede U.S. assertions of extraterritorial jurisdictions.

It probably reached its high water mark in the early '80's, when the United States had convened a Grand Jury to investigate allegations that international air lines had driven the Laker Airline out of business, and Prime Minister Thatcher called President Reagan and said "kill the Grand Jury or I will kill your Sinai Peace Initiative," and Reagan killed the Grand Jury.

A similar case had happened with Saudi Oil, where the Justice Department was investigating price fixing among the OPEC countries. We had a Grand Jury going on, and demanded documents from the Saudis. The Saudis called up one day and said "you either get the documents or you get oil, but you do not get both." And we decided that going forth with the Grand Jury was not a good idea.

So by the early '80's the Americans had begun to understand that it was not such a good idea to aggressively enforce extra-territoriality without consultation, cooperation, negotiation and so forth. You began to see a fundamental shift in how we went about doing our business, from simply "You do what we tell you because we are Americans," to "Well, let us come and reason together; let us have a notification, consultation agreement of one kind or another; let us consult formally or informally, and see if we cannot find a mechanism to work through this."

At the same time, we amended our antitrust law in 1982 to try to clarify what the effects test was, because one of the interesting points was that no two courts were describing it the same way. So you began to see courts using all sorts of formulas of words to describe the effect. It was a "substantial effect," a "direct effect," "a major effect," on and on, causing chaos.

In 1982, Congress passed a statute that said let us at least get the terminology right, and so let us use the terminology "direct, substantial, and reasonably foreseeable effect." That was the statutory test, and is still the test today.

As our Chairman noted, what has happened since 1982 on the statutory front is that in 1992, the Justice Department announced that in case anybody was concerned and had read their guidelines that had

been written under the Reagan Administration, they were rescinding a footnote in the guidelines because they wanted to take the position now that the American Government would attack conduct entirely outside the United States, if it harmed U.S. exports. So even if there was no harm at all to U.S. consumers, and the only harm was to the export of American products, that was sufficient ground for an attack under our theories of jurisdiction. That in fact was not a change in the law. The law had been, in fact, that way since the '40's. What had changed was that under the Reagan Administration, they said they would not attack that kind of conduct unless there was consumer injury. So it was the Bush Administration, at the time of the election, deciding that was not the right way to go, because by then it was much more fashionable to worry about Keiretsu, so the target of that change in policy was clearly the Japanese Keiretsu.

About the same time, the U.S. Government, in looking at other ways to attack Japan, said, "There is this other theory that goes back to a number of older cases, which really says, if foreign conduct entirely outside the United States harms things outside the United States which are U.S. Government financed, or funded, that is a basis for jurisdiction."

There were two cases, both strangely enough involving Japan, both within the last couple of years, where the facts involved bid rigging cartels that had, in one case built housing for the Navy in Japan, and in the other case had sold telecommunication products to the Navy in Japan. Now think about that: you had conduct in Japan, aimed at customers in Japan, with price fixing in Japan. What does that have to do with the United States? Where is the direct, substantial and reasonably foreseeable effect on the United States? There is no export from the United States; there is no import to the United States; where is the requisite effect? Answer: The Justice Department's enforcement policy is that if it is U.S. funded, you are injuring U.S. taxpayers, and that is sufficient for jurisdiction.

Those cases in Japan were not litigated, but there is a 1968 case — if you want see how far back this goes — *The Pacific Seafarers* case. This was an interesting case where the issue was price fixing shipping going from Taiwan to South Vietnam, at the time of the Vietnam war. The cargo was bought in Taiwan and shipped to South Vietnam on foreign shipping. What has that got to do with the United States? Answer: The cargo was financed by the U.S. Government, and the court held that that was a sufficient nexus with U.S. Commerce to justify an assertion of jurisdiction. That is still the law today.

Now remember that the genius of our American system is that only about 10% of the antitrust litigation is initiated by the government. All the rest is so-called private litigation, initiated by private parties, often against the government's wishes, often in cases the govern-

ment has declined to prosecute, or against mergers the government has approved. But under the genius of our system, that should not deter a private attorney general from proceeding anyway.

The courts had been reading the papers, and reading about *Uranium* and *Laker* and other cases. And by the late '70's the courts had begun to say, "Well maybe we ought to somehow be moderating these extra-territorial assertions of jurisdiction. Maybe we ought to be thinking about some theory of moderation and restraint." They looked back at scholarly writing by Kingman Brewster and others and came up with what is now usually called the "Jurisdictional Rule of Reason" or "International Comity." The theory here is that even though we have jurisdiction as a matter of our law, and we could exercise that jurisdiction, in the exercise of comity, discretion, we will choose not to exercise it, because in the greater scheme of things it would not be reasonable to do so.

You saw in the '70's and '80's a whole series of courts in the United States, most famously the 9th Circuit in the *Timberlane* cases, but there are a couple of cases involving Canada. The 10th Circuit had the *Montreal Trading* Case, involving banks, but several courts developed different versions of the comity/rule of reason test.

The American Restatement of Foreign Relations Law, came up with basically the same concept with yet a different formula of words. In fact at the time of the 1982 statute, Congress thought about this issue but decided not to decide on a test. The legislative history of the 1982 statute says, "We make no statement about whether or not if you have jurisdiction you may nevertheless choose not to exercise it," and they just said, "See *Timberlane*" without any further elaboration.

All of that leads up to the most important case in the Supreme Court on this issue in the last 30 years, which was decided last year and is in the book of materials, the *Hartford Fire Insurance* case. I will spend a minute or two on the background. It is a very complicated case and most of the opinion is irrelevant to what you are interested in, so you should turn to part 3 of the majority opinion which is what I will be talking about. The rest is irrelevant for our purposes. In *Hartford Fire*, the setting is important to understand for jurisdictional purposes.

The basic allegations were that insurance companies had been losing a lot of money as a result of pollution coverage and environmental coverage and jury awards in the United States. So the American domestic insurance industry got together and said, "How can we keep from losing our shirts?" And in consultation with state insurance regulators and so forth, they decided not to write coverage for certain kinds of policies, certain kinds of risks. That was the domestic aspect of the case, and it turned on an antitrust insurance exemption in the law called the *McCarran-Ferguson Act*. Most of this opinion talks about that and whether this was in fact exempt conduct or not, but a second

part of the case had to do with the English re-insurance market. It was a very common practice that the American insurance companies would re-insure their risks in the Lloyd's market in London, with English re-insurance companies.

So about the same time, that is about the early '80's, most of English re-insurance companies got together in London and talked about the same set of issues. They said, "we are losing our shirt because of this American jury verdict system, is there some way we can limit our liability" and so forth. And they decided they would not issue certain kinds of re-insurance coverage.

Now, that conduct was — and again I am passing over a lot of facts here — lawful in England. That is, their agreement, their meetings to do that, according to English law, was lawful in England. So you had a situation where British citizens acting in London engaged in conduct that was entirely lawful in England. When the insurance coverage dried up, 19 state's attorneys general in the United States brought antitrust litigation against the entire insurance industry, both domestic and foreign, claiming boycott. They said the insurance companies got together and agreed to boycott certain kinds of coverage, particularly the kind that is of interest to state governments. This was a violation of antitrust laws, so they were going to sue the companies.

The domestic defense was that it is exempt conduct under *McCarran-Ferguson*, and that is the first part of the decision. The second part of the case was in the lower court at the trial level, and the British defended by saying there was no jurisdiction: "Look at all these factors, look at the *Timberlane* rule of reasoning test; you should choose, as a matter of comity, not to go forward here, because all of the factors would favor not going forward with jurisdiction." The trial court accepted that argument, and dismissed the British Defendants.

On appeal — and this was in the 9th Circuit, the court that had created *Timberlane* — the 9th Circuit Court reversed and said, "No, we balance and come out differently. We will not dismiss; the case should go forward." The British, Canadian, and U.S. governments appeared as *amici* in the case, and so it was nicely set up as a test case in the Supreme Court, on the issue of comity and what is the proper test.

This is an interesting set of facts here with lawful conduct abroad for legitimate business purposes, which is what the trial court had found. So the trial court had found conduct entirely abroad by foreign citizens lawful in their country for a legitimate business purpose. Now, despite all of those facts, should we nevertheless sue them, because that conduct may be a violation of American law, and is not protected by this insurance exemption because the insurance exemption does not apply to foreign companies, it only applies to domestic firms? That was the issue for the Supreme Court, which is in part 3 of the *Hartford Fire* opinion.

There was a five to four split among the Justices. Among the majority were Justices White and Blackmun, retired and about to retire, so you can speculate about how it would be different now. But there was a five to four split on the fundamental issue. What did the five say? They began by saying well let us get the procedural setting here very clear, because we are the Supreme Court and we do not volunteer much, so let us understand precisely where we are. This is a motion to dismiss on jurisdictional grounds, so all the allegations in the pleading must be taken as true. That is the way we see the record. The allegations in the record are that the English companies intentionally jointly refused to issue certain kinds of reinsurance in the United States, and the allegation is that that is a restraint on U.S. imports, the import of reinsurance into the United States. That is the allegation before us. We have a brief from the British government telling us that the conduct was lawful in England, and we have an *amicus* brief from the Canadian government telling us that they are offended if this assertion of jurisdiction goes forward because they believe it will be a breach of international law. We have a brief from the American government which says they are not offended if this goes forward under comity principles.

So that was the setting. And Justice Souter, who wrote the majority opinion, begins his opinion by saying, "Well, it is well established that the *Sherman Act* applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." That is the quote, "it was meant to produce and did produce some substantial effect in the United States." Then he says, "Well, the British government has argued that there is a conflict here in the comity sense, because the conduct being attacked was lawful under English law and unlawful under American law, so there is a conflict." And Justice Souter continues, "but it is not the right kind of conflict for this case to be dismissed." And he uses the words, this is not a "true conflict." Well, what do you mean by "true conflict?" Justice Souter goes on to say, "Well, a true conflict arises in one of two situations. Either the foreign government requires the defendant to do something, or it is simply impossible to comply with both U.S. and foreign law. In those two circumstances there would be a "true conflict." And if there was a true conflict, then yes, you should do a comity analysis. But since there is no "true conflict" here, we will not tell you how to do it, and we will not tell you how it should come out." So what the majority opinion ends up saying is that there is no "true conflict," therefore, no dismissal, and therefore the case proceeds.

The dissent, written by Justice Scalia, says this is shocking, breathtakingly broad, will lead to lots of new litigation, etc. . . Since then, it is interesting that an official from the British Embassy, said: "One perverse result of the [*Hartford Fire*] judgment may be to reduce

the incentive of other foreign states to cooperate with the U.S. regulatory authorities, and in certain circumstances, to give them no option but to invoke their blocking statutes."

What this gentleman was saying, I think correctly, is: all right, if you say you do not have a comity analysis without a "true conflict," then give them a "true conflict." By creating the "true conflict" by invoking blocking statutes, we are invoking the Doctrine of Sovereignty, or otherwise meeting the definition of "true conflict."

Now technically the Court did not rule on the issue of whether if you take "true conflict" out of the case entirely, are there any other circumstances in which dismissal on the grounds of comity would be proper? They simply said, "We do not need to reach that question; we are not going to give you any guidance on it." So the state of play today is that the split in the circuits on that question remains a split in the circuits. The only guidance that has been given by the five person majority is the guidance that, if there is a true conflict we ought to weigh some unnamed list of factors, and we are not going to tell you how the weighing should come out.

If you want to see the practical import of that, particularly as it relates to Canada, you might look at footnote 18 in my paper in the Conference Materials. There is a case called *Rivendell*, which is a case about Canadian companies exporting to America. Let me tell you a little bit about that, and try to show you what *Hartford Fire* does. *Rivendell* was decided after the 9th Circuit decided *Hartford Fire*, but before the Supreme Court decided *Hartford Fire*. The judge in *Rivendell* talks about the 9th Circuit's opinion. Again, over-simplifying, the facts in *Rivendell* involve American purchasers of Canadian lumber who got together and brought an antitrust case, and said look, all these lumber sales from Canada have the price fixed. They have a price fixing mechanism of phantom freight charges and other ways of calculating freight charges from point of origin to sale in the United States. That is a classic price fixing conspiracy, and we want to sue all the Canadians. That was basically the complaint.

The Canadians responded by saying, "Wait a minute, we operate in close connection with the Canadian government and although the Canadian government does not mandate the system of setting freight rates, it certainly is well aware them, and it certainly is well aware of what we are doing and how we set the rates, and the Canadian government has not objected." So *Rivendell* was a case of no "true conflict."

The Canadian government knew of and approved of the conduct which was lawful in Canada, but there was no compulsion, and it was possible to comply with both American law and Canadian law, so there was no "true conflict." But not having the benefit of Justice Souter, because he had not spoken yet, the trial judge reaches exactly the opposite result. And let me read you a couple of passages from what he

says, and think about whether you would get the same result today - post *Hartford Fire*. The trial judge says, "The very essence of the Plaintiff's complaint arises from freight charges made by railroads operating under policies established by the Canadian government, concerning rates, rebates, exchange of rate charges, etc. . . . The official position of the United States government has been and continues to be that the Canadian government has provided subsidies for the functional equivalent to these Canadian producers; thus there is an international trade dispute, involving this issue between Canada and the United States, which is unresolved. But we can find nothing in the record of any explicit purpose to harm, or affect consumers in the United States. If this Court would enter an order against the defendant companies, it would require them to change established practices in Canada, which may conflict with policies of the Canadian Federal and Provincial governments, therefore I will dismiss." I would submit that you would get exactly the opposite result today - post *Hartford Fire*. There is no "true conflict" here. All this judge is talking about is a possible policy dispute, certainly not a "true conflict." So you get an opposite result.

I will end by referring you to the other topics in my papers. In my second paper I talk about some of the other issues that often come up here: foreign sovereignty, immunity, acts of state, compulsion, etc. . . and I will let you read those. The last part of my outline talks about the discovery issue. That is, what do you do in a situation where an American court orders discovery and a foreign government, usually pursuant to a blocking statute, tries to prevent discovery? What mechanisms might be used to work through that? And what I have quoted there at the end of my paper, is the typical formula, or the road map, suggested by the Restatement of Foreign Relations Law on how a U.S. judge might work through a situation where documents are sought abroad and a blocking order is invoked. There is a formula of things for the judge to consider, which in fact has found favor among most of the U.S. judges who have considered the issue. And you are beginning to see this section of the restatement cited and quoted now by judges, not universally, but most of the opinions would seem to generally follow the formula set out in the restatement.

I want to end with a little bit of personal bias: full disclosure. I represented the British government in *Hartford Fire*. I do not know if you detected that, but I will disclose it anyway. I think the point for this seminar is, if you think about NAFTA and you think about the other views we talked about this morning, NAFTA and the earlier Canadian/U.S. agreement thought about competition, and very quickly threw up their hands and said even we the Canadians and the Americans and Mexicans cannot agree about substantive rules of antitrust. Let us focus on cooperation, notification, consultation, but let us give up on any substantive harmonization of the law. That is the situation in

North America, let alone with 200 other governments around the world.

That is not going to change. My prediction is that, at least in my lifetime, there is not going to be any significant change. That is not to say there are not a lot of efforts out there by people trying the draft codes, trying to get.WTO to take over this issue and so forth. I think they will all fail certainly in the near term, and you are going to be stuck with the *Hartford Fire* kind of approach, which harkins back to immediate post World War II America — You know, "I am a federal judge. I can do anything I want. It is only when I decide that there is something I do not want to do, that I will stay my hand," I think that is Justice Souter's message.

Thank you.