MODERNIZATION OF EFFECTS JURISDICTION: FROM HANDS-OFF TO HANDS-LINKED

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I. INTRODUCTION

Professor Andreas Lowenfeld has pioneered the rules on jurisdiction in international settings, including jurisdiction to prescribe. Much of the case law in point has been antitrust case law, and this essay focuses on antitrust.

The essay will examine the Restatement (Third) of the Foreign Relations Law of the United States, Sections 402 (the basic principle for jurisdiction to prescribe), 403 (the exceptions), and 415 (application to antitrust law). It will take a fresh look at the text in view of the immense global economic and policy changes over the course of the last two decades, and will ask whether the text should be modernized and, if so, how. It argues that modernization is in order and suggests an approach. One of the principal points of conflict twenty years

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ago—jurisdiction based on effects—has substantially resolved itself. Nations largely agree that significant effects within a nation's borders that harm that nation's citizens justify its jurisdiction. In matters of competition and economic regulation, the more important question for this decade is not whether a legislature has jurisdiction to prescribe in particular circumstances, but how to resolve conflicts when they occur.

I will first describe the circumstances leading to the adoption of Restatement (Third) in the late 1980s and review the Restatement sections. I will then consider the world today, twenty-two years later, examining what has changed and how the changes make a difference. Finally, I will make suggestions for a Restatement (Fourth), tailored to a more open and cosmopolitan world.

II. The Economic and Legal Context of Restatement (Third): The World of Antitrust

In the 1940s and for forty years thereafter, conflicts of antitrust jurisdiction erupted. In 1945 in the famous *Alcoa* case,[1] the United States sued members of a world aluminum cartel. The actors resided abroad and the acts occurred abroad. Judge Learned Hand ruled that acts intended to affect and affecting U.S. commerce in a significant way (not mere repercussions) were subject to the reach of the Sherman Antitrust Act.[2] The ruling provoked protests by our trading partners, who maintained that the sovereignty of the home national shielded the conduct, regardless of its harmful effects abroad. In the late 1950s, the United States embarked on a criminal investigation of ocean liner rate fixing for international maritime traffic, resulting in settlement, but not before provoking more protests,[3] again based on sovereignty of the home nation. In the 1970s, the frequency of expansive exercises of jurisdiction increased. Americans sued firms from nine foreign nations, some state-owned, for a conspiracy to reduce the output of uranium and boycott big buyer Westinghouse (even though the United States had triggered a crisis of overproduc-

1. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).
2. *Id.* at 444.
3. Andreas F. Lowenfeld, *"To Have One's Cake . . ." —The Federal Maritime Commission and the Conferences*, 1 J. MAR. L. & COM. 21, 44-45 (1969).

tion by its own industrial policy).[4] And Laker Airways' bankruptcy trustee sued British Airways, British Caledonian, and others in the United States under the Sherman Act for a low-price conspiracy to knock Freddie Laker's no-frills flights out of the skies.[5] In the face of the crescendo of opposition to American "unilateralism" from our trading partners, a moderating effect crept into the law, at least in rhetoric, with the decision in *Timberlane*.[6] In *Timberlane*, Judge Choy admonished judges faced with issues of cross-boundary jurisdiction to weigh all of the interests on both sides—the U.S. interest in enforcing its law and the foreign nation's and actors' interests in being free of U.S. regulation.[7] (Even so, U.S. courts never found that the foreign interest outweighed the U.S. interest in any case in which the U.S. had a stake.) In 1980, the United Kingdom, seeing the long American reach as violative of international law, adopted blocking and clawback statutes to protect their firms from the "over-reaching" Americans. Other nations followed.[8]

Meanwhile, also in the 1980s, with the advent of the Reagan Administration, American companies themselves were rebelling against too much regulation, which they claimed was handicapping them in world markets.[9] They protested decisions holding that U.S. antitrust law followed them into foreign markets. They, along with foreign firms that sought clarification of the limits of U.S. jurisdiction, prevailed upon Congress to enact a statute that would put harms in solely foreign markets beyond the reach of the Sherman Act. This was the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA).[10]

In sum, three salient points dominated the landscape in 1980. First, the value placed on competition itself differed significantly among the trading partners of the world. The United States had adopted competition as the rule of trade

4. *In re* Uranium Antitrust Litig., 617 F.2d 1248, 1250 (7th Cir. 1980).

5. Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 917 (D.C. Cir. 1984).

6. Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 549 F.2d 597 (9th Cir. 1976).

7. *Id.* 613-15.

8. Eleanor M. Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is "Reasonableness" the Answer?*, 19 N.Y.U. J. INT'L L. & POL. 565, 577-78 (1987).

9. *Id.* at 578.

10. 15 U.S.C. §§ 6a, 45 (1982).

but much of the world had not. Second, in this context, the appropriateness of jurisdiction based solely on effects was hotly debated. Third, the old Westphalian notion of nearly impermeable state sovereignty still dominated international law.

Against this backdrop, in the early 1980s, the American Law Institute embarked on the Restatement (Third) project and enlisted Andy Lowenfeld to be an associate reporter. His responsibility was, among others, to address the knotty problems of jurisdiction, to prescribe rules and regulations that would govern foreign acts and actors, and of course to do so in a manner capable of garnering consensus at the Institute. Together with his distinguished chief reporter Louis Henkin and fellow associate reporters Detlev Vagts and Louis Sohn, Andy accomplished these goals with his usual excellence.

III. The Restatement (Third): Jurisdiction to Prescribe

The Restatement (Third), in Section 402, begins its treatment of jurisdiction to prescribe with a basic concept. The basic concept is that a nation has jurisdiction to prescribe where it has a legitimate stake in the matter, such as nationality, conduct on the territory (these being well recognized and uncontroverted bases for jurisdiction), or substantial effects in the territory.[11] The third basis, effects, became enshrined in the Restatement, but with limits.[12] The limiting principle takes on board the critics' principal ground of opposition to the effects doctrine: it could undermine the home nation's authority and create unfairness to actors who were abiding by the norms of their own state's regulatory system. The Restatement's comment to the black letter of Section 402 telescopes the limiting principle:[13]

> *d. Effects principle.* . . . The effects principle is not controversial with respect to acts such as shooting or even sending libelous publications across a boundary. . . . Controversy has arisen as a result of economic regulation by the United States and others, particularly through competition laws, on the basis of

11. Restatement (Third) of Foreign Relations Law § 402 (1987).
12. *Id.* § 402(1)(c).
13. *See id.* § 402 cmt. b (explaining that the standard of reasonableness set forth in § 403(3) should be used to evaluate the competing interests).

> economic effect in their territory, when the conduct was lawful where carried out. This Restatement takes the position that a state may exercise jurisdiction based on effects in the state, when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable under § 403.[14]

Section 403 states limitations on jurisdiction to prescribe. It provides that, even when a basis exists for jurisdiction under Section 402, a state may not exercise jurisdiction in two circumstances: 1) when the exercise of jurisdiction is unreasonable or 2) when there is direct conflict.[15] In the case of direct conflict, a state should defer to another state with a clearly greater interest. The inquiry of reasonableness under the first circumstance requires evaluating all relevant factors, including links, connections, character of the acts, expectations of the parties, importance of the regulation and its consistency with international traditions, and "likelihood of conflict with regulation by another state."

Section 415 applies these principles to antitrust law. According to Section 415, jurisdiction lies where the conduct or agreement is carried out on the territory asserting jurisdiction. Jurisdiction is also appropriate where the conduct occurs predominantly outside of the United States "*if a principal purpose is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce*," or "*the agreements or conduct have substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable.*" The italicized clause is the principal subject of this essay.

In the last two decades, the above rules and principles of Restatement (Third) have played an important role in anchoring effects jurisdiction in the law. They have done so successfully by qualifying the effects principle. The Restatement insists that states must have a legitimate purpose for regulating acts that transcend their boundaries, and they must exercise their powers proportionately. Reasonableness is the Restatement's legitimating principle.

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14. *Id.* § 402 cmt. d.

15. Direct conflict, under the Restatement (Third), contemplates that one nation orders a firm to do what the other orders it not to do. *Id.* § 403(3), § 403 cmt. e.

The Restatement (Third)'s formulation has served well. But it is time to ask: Is it the best formulation for the 21st century? I will argue that it is not. There have been considerable changes in the last twenty-two years. The principal problems that we face today differ from the problems of a quarter century before. The changed context calls for a different emphasis on purpose, place of acts or agreement, and locus of effects.

IV. Twenty-Two Years Later: What Has Changed?

The Restatement (Third) was published in 1987. Two and a half years later the Berlin Wall fell. Russia and its former satellites embraced democracy and market systems. Command-and-control, as well as Communism, had failed. To regulate market power abuses, the nations adopted antitrust laws. In one country after another—and in South America, too, in different political contexts—competition became the rule of trade.

In 1986 a new trade round was launched at Punta del Este, Uruguay. The Uruguay Round agenda was the most ambitious yet, including mandates to lower tariff barriers and non-tariff barriers, to deal with trade-related aspects of a variety of specified subjects including intellectual property and investment, and to strengthen dispute resolution. The round was concluded in 1993 with agreements that would considerably lower barriers and open markets, and with the establishment of the World Trade Organization in 1994.[16] Also since the publication of Restatement (Third), trading nations began to adopt bilateral antitrust cooperation agreements, particularly in the 1990s. They agreed to notify one another of antitrust actions that might affect the important interests of the other, and eventually they constructed the idea of positive comity—deferring to the better-placed jurisdiction while it faithfully pursued restraints that harmed the interests of both jurisdictions.

In the 1990s the need for common, or at least highly compatible, competition laws became more apparent. In response to the felt need, nations adopted a recommendation in the OECD to have and enforce laws against hardcore cartels. In

16. Andreas Lowenfeld, International Economic Law 64-71 (2d ed. 2008).

the WTO, they formed the Working Group on the Interaction between Trade and Competition Policy with a view to exploring the possibility of an antitrust competence in the WTO. In 2001 the competition authorities of 14 nations formed a network, the International Competition Network (ICN), to explore and implement common solutions to common problems. Today, the ICN has more than 100 members.

Judiciaries also responded to the increasingly global dimension of markets. Three important cases mark the terrain. In the late 1980s, Europe was faced with an alleged off-shore wood pulp cartel. Europe imported most of its wood pulp, and prices had risen. Many of the suppliers had no links to Europe except that they sold there. The European Commission detected a cartel and brought proceedings against the suppliers. The suppliers denied a cartel and responded also that the European courts had no jurisdiction over them. The American defendants pleaded also that the U.S. Webb Pomerene Act, which allows export associations if they are notified, shielded them from the EU suit. In 1988, the European Court of Justice decided that the European Commission and Courts did have jurisdiction over the offshore wood pulp suppliers.[17] The Court adopted a European formulation of the effects doctrine: jurisdiction exists where the challenged conduct is *implemented* in the EU. Moreover, the European Court rejected the Americans' additional argument based on state action, noting that the Webb Pomerene Act merely exempts export cartels from U.S. law and does not require the adoption of such cartels, thereby creating no conflict between U.S. and EU law.

In 1993 the U.S. Supreme Court decided *Hartford Fire*.[18] London underwriters, among others, were accused of boycotting U.S. insurers, refusing to supply sudden pollution coverage and long-tail coverage (payment for harms occurring after the policy expired if the covered act occurred within the term of the policy). The London underwriters moved to dismiss on grounds of comity, citing British legislation that delegated to the industry (Lloyds of London) the privilege of self-regulation. The Supreme Court rejected the comity and jurisdic-

17. Joined Cases C-89/85, 104/85, 114/85, 116/85, 117/85, 125/85 and 129/85, Ahlström Osakeyhtiö and Others v. Commission (Wood pulp), 1988 E.C.R. 5193.

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

tional claim five to four, noting that defendants' agreements affected and inferentially meant to affect U.S. commerce, and holding that the conflict was not a cognizable one under law because the London firms could obey the proscriptive U.S. law and the permissive British law at the same time.[19] (Both the majority and dissenting opinions cited Restatement (Third) regarding whether there was a conflict requiring or warranting deference, creating what one might call a conflict on conflict.)

The year 2001 was not only the year in which the ICN was formed but also the year of the WTO ministerial meeting in Doha, Qatar, opening the new trade round. The agenda included antitrust: provisionally, nations would negotiate for a WTO agreement with a hardcore cartel prohibition and provisions requiring non-discrimination, due process, and technical assistance. The round got off to a bad start. At the Cancun meeting in 2003, there was a near stalemate on the central issue of reducing agricultural subsidies. The antitrust agenda and other issues were jettisoned, and shortly thereafter the Working Group on Trade and Competition was closed down.[20]

Nonetheless, commonalities and community in antitrust continued to build. Class action lawsuits were, and are, common; and in connection with the notorious world vitamin cartel, plaintiffs' lawyers sought certification not only of domestic purchasers but also of foreign victims who had bought their over-priced vitamins abroad. The latter action culminated in the next major U.S. Supreme Court decision—*F. Hoffmann-La-Roche v. Empagran.*[21] In *Empagran,* defendants had moved to dismiss the foreign plaintiffs' claims on grounds of lack of jurisdiction. They cited, among other things, the FTAIA, which, they argued, made jurisdiction over foreign commerce issues exceptional.[22] Moreover, they asserted "conflict." If the U.S. would host the (treble) damage lawsuits of every victim of a world cartel, this would frustrate the progress of our trading partners in trying to establish their own chosen systems of regulation, which incidentally did not include treble damages.[23]

19. *Id.* at 796-99.

20. Eleanor M. Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network,* 43 INT'L LAW. 151, 157 (2009).

21. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

22. *Id.* at 160.

23. *Id.* at 168.

Moreover, the defendants argued, the success of the U.S. government's program granting leniency to cartel members in return for disclosure of the details of their crime hung in a delicate balance. If would-be whistle-blowers must put into their calculus the near-certainty that they would be liable for crushing treble damages for worldwide victims, this added cost would deter them from coming forward to reveal their cartel.[24]

The Supreme Court accepted defendants' construction of the FTAIA, largely on policy grounds that a broader construction would interfere unnecessarily with the regulatory choices of our trading partners.[25] The Court construed the FTAIA to disallow foreign purchasers' suits unless the plaintiffs were injured by the effect of the cartel in the United States – which is almost never the case. In general, the Court said, by Justice Breyer, U.S. courts' jurisdiction over claims by foreign plaintiffs who bought price-fixed goods abroad was "unreasonable" unless the overcharge in the U.S. caused the foreigners' harm.[26]

In view of the decisions in *Wood pulp*, *Hartford* and *Empagran*, the lowered trade barriers, the adoption of antitrust laws by scores of nations, the birth of the ICN, and the increasing collaboration of nations to reach sympathetic solutions, we can make four observations:

1. More markets are world markets and regimes increasingly overlap.
2. More jurisdictions understand the cosmopolitan nature of competition law; officials and the law itself are normally against protectionism; business firms are no longer regarded as "belonging" to their country; and regulation of a transaction or practice by all nations that suffer harm is generally respected.
3. Effects jurisdiction in general is no longer controversial.
4. There is less chance of fundamental conflict, such as there was in the days of *Alcoa*, because most of the world has adopted competition as the rule of trade.

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24. *Id.*
25. *Id.* at 175.
26. *Id.* at 166.

The divergences experienced today largely emerge as the result of conflicting appreciations of what is "anticompetitive." They emerge in the course of applying fundamentally similar law, as seen in the cases of *GE/Honeywell*[27] and *Microsoft*.[28] These perturbations were minor as compared to the systemic clashes in the time of *Alcoa*.

V. A Revised Restatement for the 21st Century?

The 21st century needs a revised Restatement. In matters of economic regulation, the permissibility of effects jurisdiction is no longer the question. Jurisdictions recognize that multinational mergers and transnational conduct call for responses by injured nations. Firms do not "belong" to the country wherein they are established, and indeed their establishments are often far flung around the world. Moreover, intent has diminished importance except as a proxy for predicting effects. Conflicts of a more subtle sort need to be addressed, such as those presented in merger and monopoly cases wherein two jurisdictions may make different assessments of anti-competitiveness and of appropriate relief.

Taking account of these changes, a revised Restatement, in its application to economic regulation, might provide:

> **1. A state has jurisdiction to prescribe with respect to conduct or transactions that directly, substantially, and foreseeably harm its domestic or international commerce, or are perpetrated by its nationals,**[29] **except that, in the case of direct conflict, the requirements of the jurisdiction that has the principal contacts and suffers the principal effects should be respected. When the negative effects are principally external to the place of the conduct, effects should be the weightiest factor.**[30]

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27. Case T-210/01, Gen. Elec. v. Comm'n, 2005 E.C.R. II-5575.

28. *See* Microsoft Corp. v. U.S., 253 F.3d 34, 34 (D.C. Cir. 2001) (affirming in part and reversing in part the District Court's legal conclusions that Microsoft violated federal and state antitrust statutes), *cert. denied*, 534 U.S. 952 (2001); Case T- 201/04, Microsoft Corp. v. Comm'n (interoperability), 2007 E.C.R. II-1491.

29. The latter clause recognizes that a nation may prohibit export cartels.

30. This clause would help to protect a nation from an export cartel targeted at it.

The exception clause is particularly applicable in the case of direct conflict. But what of indirect conflict, as in the *Boeing/McDonnell Douglas* and *GE/Honeywell* merger cases[31] and the *Microsoft* monopolization case?[32] In all of these cases U.S. law was, as applied, more permissive than EU law, and the companies were American.

Here is a blueprint: Beginning at the point at which the matter arises at agency level, the officials of the interested jurisdictions should consult and collaborate. They should focus on the combined overall welfare of the communities affected, and should consider whether the conflict can be solved in the common economic good, in terms of both substance and remedies. This means, for example, that a merger that hurts EU consumers by creating market power of US producers, where the principal market is Europe, should not be allowed. Agencies and courts should do what is possible to achieve common economic welfare to the extent that they are able to do so, given their law. In this respect (as well as all others), the authorities and jurists should be reasonable.

The Revised Restatement might provide:

> **2. Where more than one nation has jurisdiction over conduct or transactions with transnational effects, each should exercise its jurisdiction with reasonable regard to all others. In the event of conflict or foreseeable conflict, broadly construed, jurisdictions have a duty to confer, pinpoint points of difference, and render reasoned opinions, decisions, or analyses. They have a duty to take into account decisions, including remedies, rendered by other jurisdictions, working towards compatibility to the extent allowed**

31. Case T-210/01, Gen. Elec. v. Comm'n, 2005 E.C.R. II-5575. *See* Eleanor M. Fox, *Antitrust Regulation across National Borders: The United States of Boeing versus the European Union of Airbus,* 16 BROOKINGS REV. 30 (1998) (describing the conflict of U.S. and EU jurisdictions and noting that Americans thought Europe, in conditioning and nearly condemning the merger, was protecting Airbus, while Europeans thought that America, in blessing the merger, was immunizing a national champion).

32. *See* Microsoft Corp. v. United States, 253 F.3d 34 (D.C. Cir. 2001) (affirming in part and reversing in part the District Court's legal conclusions that Microsoft violated federal and state antitrust statutes), *cert. denied,* 534 U.S. 952 (2001); Case T- 201/04, Microsoft Corp. v. Comm'n (interoperability), 2007 E.C.R. II-1491.

by their law. World welfare and cross-border coherence, not simply national welfare, should be a guide.[33]

The list of "reasonableness" factors (in Section 403) need not be included in the black letter of Restatement (Fourth). The factors must be adapted to the particular facts; they make a cumbersome list in the text and not all are material in a particular case. Reasonableness factors might be usefully included in a comment, which should stress the special weight to be accorded to the place of the effects. The comment might acknowledge the main conflict likely to occur: conflict between a jurisdiction in which significant effects are felt (e.g., consumers are hurt by a conspiratorial price-rise), where the law of that jurisdiction condemns the conduct, and at the home of the actor and site of the acts the conduct may be legal or even encouraged. If the conduct significantly harms consumers and the consumer harm occurs principally beyond the borders of the actors' state, the place of the conduct should have little weight. Note that whether the conduct is pro-competitive or anti-competitive and thus legal or illegal may be a difficult question that cannot be decided without development of the facts. In that case it would be inappropriate for a court to dismiss the case for lack of jurisdiction at an early jurisdictional stage.

VI. Solving Problems under the Revised Restatement

A. *Wood pulp*

Under the suggested revision, the *Wood pulp* case would be resolved as it was resolved. There was no conflict between European law against cartels and the U.S. Webb Pomerene Act authorizing export associations. The Webb Pomerene Act was not designed to give shelter from foreign laws; the claim that it did was merely a litigator's argument.

33. *See* Anne-Marie Slaughter, A New World Order 170-83, 244-60 (2004) (suggesting global norms for government networks including sharing perspectives and providing reasoned opinions to enhance knowledge and convergence, deflect conflict, and inform divergence); Fox, *supra* note 20 (adapting Slaughter's norms to the International Competition Network).

B. *Hartford*

Under the suggested revision, *Hartford*, too, would be resolved as it was. There was no essential conflict between U.S. jurisdiction to hear the case of an alleged cartel and boycott against Americans, and the UK statutorily authorized self-regulation by the London underwriters.

The *Hartford* case was settled before discovery and trial, but had it been litigated there would have been real potential for subtle conflicts and disharmonies. Under the McCarran–Ferguson Act,[34] the American reinsurance defendants, named as co-conspirators, were immune from antitrust suit for *cartel* conduct (e.g., collaborations on terms of coverage) because they were regulated by states of the United States. But the London firms were not so regulated and were not immune. All defendants were subject to suit for boycotts; McCarran-Ferguson gave no immunity for boycotts. Characterization of defendants' conduct was therefore critical. The defendants had agreed, for example, not to give coverage to American insurers for sudden pollution harm and to cover only those American insurers whose policies shortened the time period within which claims could be made. Were the defendants' collaborations boycotts, or were they joint ventures to share risks and determine what products they would offer? Defendants *had* to collaborate to share risks; the economics of reinsurance and re-reinsurance (retrocession) is based on collective underwriting of packages of risks. If a U.S. court had held the London defendants liable and their American "co-conspirators" immune, this holding would have created a real conflict, and would have been a discriminatory application of law. The guidance suggested above for conflicts, including the Lowenfeld notion of reasonableness, is precisely what a Restatement principle can offer; discrimination would have been unreasonable also. It would have been unreasonable for a court to decline to listen to defendants' story of the economics of reinsurance and the prudential reasons behind the UK law conferring rights and duties of self-regulation in determining whether the conduct was legal.[35]

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34. McCarran-Ferguson Act, 15 U.S.C.A. §§ 1011-1015 (1945).

35. *See In re* Uranium Antitrust Litig., 617 F.2d 1248 (7th Cir. 1980), where the court refused to accord any deference to amici briefs by defend-

C. *GE/Honeywell*[36]

GE/Honeywell was a (U.S.) merger that the U.S. cleared, and the European Commission prohibited. The Commission decision was affirmed by the European Court of First Instance. If this merger caused competitive harm, it caused harm worldwide. The United States deemed the merger benign or efficient, and cleared the merger in a time of relatively lax enforcement. The European Commission condemned the merger as anticompetitive at a time when in some respects the Commission's economic analysis was less than rigorous. Since the rendering of the *GE/Honeywell* European judgment, the U.S. and the EU systems, their analytical methodologies, and their enforcement perspectives have moved into greater harmony.[37]

There was no jurisdictional problem in *GE/Honeywell.* The conflict entailed how to assess possible anticompetitive aspects of the merger, including presumptions and burdens. For example, how likely was the merged firm to offer products of the two merger partners (e.g., jet engines and jet navigating equipment) to its customers as a bundle, and if so how likely was the bundling to create market power? The best possible solution to such differences in analysis and perspective may be found in admonitions of a revised Restatement to the authorities of the various nations assessing the same conduct or transaction to confer, confer and confer; to pinpoint differences in analysis and assumptions; to explain the reasoning especially at the points of difference; and to be reasonable in challenges, decisions, and relief. Another *GE/Honeywell* is less likely to occur in the wake of such intensive and sympathetic interactions, and when conflicts occur nonetheless, the divergence will be informed and respected.

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ants' home governments asserting that they had strong policies in favor of the cartel.

36. Case T-210/01, Gen. Elec. v. Comm'n, 2005 E.C.R. II-5575.

37. Eleanor M. Fox, *GE/Honeywell: The U.S. Merger that Europe Stopped—A Story of the Politics of Convergence*, *in* ANTITRUST STORIES 331, 359 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

D. *Microsoft*[38]

The United States sued Microsoft Corporation for predatory practices. The United States won virtually its entire case in the district court. The appellate court upheld the judgment with respect to the most clearly unjustified acts, such as programming the operating system to break down if the hardware manufacturer or user tried to delete Microsoft's browser (which would typically be done in order to install a competing browser). The European Union, Japan, Korea and other Asian countries condemned additional conduct such as bundling the media player with the operating system or charging excessive prices for the operating system and imposed much additional regulatory relief. U.S. law probably would not have condemned much of what the EU and Asian authorities condemned, and may have classified acts successfully challenged abroad as good, hard competition, rather than anticompetitive.

As in *GE/Honeywell*, in the absence of international law, inconsistencies were bound to occur, and some will recur. To the extent that inconsistencies derive from incomplete knowledge and experience in assessing competitive effects, the constant dialogue across borders among antitrust authorities and jurists will tend to minimize them. But even in a world of full knowledge and skilled analysis, assessments of conduct or mergers will sometimes differ. One nation may be operating in a more aggressive mode, and another may be operating in a more market-trusting mode, yielding divergence.

The solution to the *Microsoft* divergences is largely the same as that in the case of *GE/Honeywell*: confer, pinpoint differences, explain, and be reasonable. Reasonableness includes sensitivity at the stage of remedies. A jurisdiction that is second to act in challenging the trans-border conduct of a multinational firm should take account of remedies already in place, and, in fashioning its own remedies to cure a specific violation, should craft them in a way that is harmonious with, and not at war with, the remedies already in place. If, contrari-

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38. *See* Microsoft Corp. v. United States, 253 F.3d 34 (D.C. Cir. 2001) (affirming in part and reversing in part the District Court's legal conclusions that Microsoft violated federal and state antitrust statutes), *cert. denied*, 534 U.S. 952 (2001); Case T- 201/04, Microsoft Corp. v. Comm'n (interoperability), 2007 E.C.R. II-1491.

wise, each successive jurisdiction should fashion relief through its own idiosyncratic lens and without regard to the juridical or regulatory context, the combined antitrust authorities may succeed in shackling inventive firms and depriving the world of their benefits.

VII. Conclusion

Professor Lowenfeld has been the mastermind of the law of jurisdiction, bringing us to the threshold of the twenty-first century. Effects jurisdiction is now well established, thanks in significant part to Andy. More subtle conflict problems now occupy center stage. Their resolution needs the Lowenfeld touch of regard and reason.