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ONE LAW TO CONTROL THEM ALL: INTERNATIONAL MERGER ANALYSIS IN THE WAKE OF GE/HONEYWELL

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Abstract: The proposed merger of General Electric and Honeywell International, two U.S. owned and operated companies, was blocked on an international level by the European Commission even after its domestic approval. Despite the closeness of U.S. and EU antitrust laws, regulators in both countries reached opposite conclusions regarding the effects of the merger. This case highlights the complexities of international merger analysis in the absence of a global competition policy and the dangers that inherently exist in the current regulatory landscape. This has made it clear that countries with restrictive merger guidelines can become the gatekeepers for large scale international mergers. Specifically, China has recently enacted antitrust legislation that may grant them the power of ultimate decision in mergers that cross their boundaries, even if Chinese involvement is only a small component of the overall merger.

INTRODUCTION

On July 3, 2001, the European Commission (Commission) blocked a proposed merger between General Electric (GE) and Honeywell International, two U.S. owned and operated corporations.¹ GE/Honeywell was the first U.S. based merger cleared by the United States and prohibited by the European Union (EU).² Despite the striking similarities between U.S. and EU antitrust laws,³ the initial prohibition of the merger was upheld on appeal by the European Court of First Instance

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¹ See Case T-210/01, *Gen. Elec. Co. v. Comm'n*, 2005 ECR II-5575. The European Court of First Instance also announced a judgment in a separate Honeywell appeal (Case T-209/01), which was dismissed largely on technical grounds. George Stephanov Georgiev, *Bridging the Divide? The European Court of First Instance Judgment in GE/Honeywell*, 31 *YALE J. INT'L L.* 518, 518 (2006).

² Eleanor M. Fox, *The European Court's Judgment in GE/Honeywell—Not a Poster Child for Comity or Convergence*, 20 *SPG ANTITRUST* 77, 77 (2006).

³ See Hon. Pamela Jones Harbour, *Developments in Competition Law in the European Union and the United States: Harmony and Conflict*, 19 *SPG INT'L L. PRACTICUM* 3, 8 (2006).

(CFI).⁴ This decision was based on aspects of the merger that were considered potentially pro-competitive by U.S. authorities, but viewed as monopolistic by the European court.⁵ The net effect of the EU decision was that GE and Honeywell were prevented from merging in both the United States and in the European Union,⁶ highlighting the economic pitfalls that can result from even slight differences in States' competition policies.⁷

This Note provides an overview of the differing merger analyses performed within the United States and the European Union in regards to the *GE/Honeywell* case, with particular attention to how divergent findings can occur in states with such similar competition laws. It next considers how other major economic players, such as China, are currently developing their competition policies, and how such policies may affect U.S. corporations domestically and abroad. Lastly, this Note analyzes the hypothetical dangers that surround a State's ability to enact strict antitrust regulations in an effort to become the baseline regulator of international mergers. Given these concerns, the best solution to such a "hold-up" scenario may be extensive development of global competition policy facilitated through the World Trade Organization (WTO).

I. BACKGROUND

There is no global agreement on competition policy with regard to merger analysis, leaving states to regulate their own economies through individualized antitrust regulations.⁸ Because a multinational corporation is subject to the laws of every state in which it operates, a multinational merger is subject to an analysis by the regulating authorities in each state in which it will be conducted.⁹ These merger analyses are

⁴ See Fox, *supra* note 2. The appellate judgment upheld the prohibition of the merger in several respects, which brought EU competition analysis closer to that of the United States. See Georgiev, *supra* note 1, at 520.

⁵ See Fox, *supra* note 2. The merger of GE and Honeywell had the potential to allow for bundled combinations of their products, at potentially lowered prices. The U.S. approach viewed the merged entities' economic incentive to reduce prices as favorable and pro-competitive. Alternatively, the European Union took a different stance and determined that the lowered prices that may have resulted from strategic behavior were not considered efficiencies, but instead were anticompetitive. See Donna E. Patterson & Carl Shapiro, *Trans-Atlantic Divergence in GE/Honeywell: Causes and Lessons*, 1 (Nov. 12, 2001), <http://faculty.haas.berkeley.edu/shapiro/divergence.pdf>.

⁶ William Drozdiak, *European Union Kills GE Deal*, WASH. POST, Jul. 4, 2001, at A1.

⁷ See Fox, *supra* note 2; Drozdiak, *supra* note 6.

⁸ See Harbour, *supra* note 3, at 4.

⁹ See Drozdiak, *supra* note 6.

conducted independently within each state, in accordance with their own unique concerns, policies, and laws.¹⁰ There is no obligation of deference to the antitrust decision of another state regarding the same merger, even if that State is the home of one or both corporations.¹¹ When one state determines that the proposed merger would be anti-competitive and potentially pose an economic detriment to its own market, the effect of this decision stretches beyond its jurisdiction and will preclude the merger globally.¹²

A. *Transatlantic Divergence: GE/Honeywell*

The proposed merger between GE and Honeywell is a prominent example of the divergent routes a merger analysis may take in different states.¹³ Despite numerous cases of transatlantic cooperation during merger analyses, the United States and the European Union rendered contradictory evaluations.¹⁴ The facts surrounding the corporations' roles in their respective markets led the United States and the European Union to differing interpretations in their competition analyses.¹⁵ GE was the primary manufacturer of engines for large commercial aircraft, and Honeywell was a leading supplier of certain equipment used in jet aircraft.¹⁶ One of the products Honeywell supplied was jet engine starters, a necessary component for commercial jet engine manufacturers such as GE.¹⁷ Furthermore, GE Capital's leasing subsidiary was the world's largest purchaser of airplanes.¹⁸ This subsidiary had a policy of buying only airplanes that were fitted with GE engines.¹⁹

The U.S. Department of Justice (DOJ) looked at these facts and found none of the problems that the CFI considered serious enough to prohibit the merger.²⁰ The CFI upheld the prohibition in part by considering its potential to facilitate leveraging and package discount-

¹⁰ See Harbour, *supra* note 3, at 4.

¹¹ See Fox, *supra* note 2, at 80.

¹² See Drozdiak, *supra* note 6.

¹³ See Georgiev, *supra* note 1.

¹⁴ See *id.*

¹⁵ See Fox, *supra* note 2, at 78.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ William Kolasky, GE/Honeywell: *Narrowing, but Not Closing, the Gap*, 20 SPG ANTI-TRUST 69, 71 (2006).

ing.²¹ The DOJ approved the GE/Honeywell merger, dismissing fears of competitive harm that would form the basis of the EU decision.²² In fact, the DOJ viewed these effects of package discounting and reduced pricing to be efficient and competitive.²³ In a major divergence, the facts concerning GE's classification as "market dominant" in the European Union did not support a similar finding in the United States.²⁴ Although the statutory language for classification as "market dominant" is strikingly similar between these states,²⁵ the differing interpretations and applications highlight the separation between regulation in theory and in practice.²⁶ The EU decision prohibited the GE/Honeywell merger both in the European Union and in the United States, which is particularly disturbing when considering the closeness of their antitrust regulations in an international context.²⁷

B. *Developing Antitrust Regulations Worldwide*

Despite the absence of definitive international antitrust regulations, there exists a network of cooperative agreements that touch on important aspects of competition policy.²⁸ These agreements tend to focus on restrictive business practices that are considered harmful to international trade.²⁹ Some WTO agreements, in particular the General Agreement on Tariffs and Trade (GATT), have possible applications to anti-competitive business practices.³⁰ Unfortunately, significant drawbacks in using these provisions as an alternative to a framework agreement by the WTO have limited their applicability as a

²¹ See Case T-210/01, *Gen. Elec. Co. v. Comm'n*, 2005 ECR II-5575, 342-58; Fox, *supra* note 2, at 78; Georgiev, *supra* note 1.

²² See Fox, *supra* note 2, at 78.

²³ See *id.*; Georgiev, *supra* note 1, at 519.

²⁴ See Fox, *supra* note 2, at 79.

²⁵ See *infra* Part II.A.

²⁶ See Kolasky, *supra* note 20, at 72; Patterson & Shaprio, *supra* note 5, at 7; *infra* Part II.A.

²⁷ See *infra* Part II.A. The standards of merger review in the European Union were changed after the decision in *GE/Honeywell* to bring them in line with the merger review standards in the U.S. Clayton Act. Harbour, *supra* note 3, at 8.

²⁸ Stephen Woolcock, *International Competition Policy and the World Trade Organization*, Paper for the London School of Economics Commonwealth Business Council Trade Forum in South Africa, 5-6, <http://www.lse.ac.uk/collections/internationalTradePolicyUnit/pdf/internationalCompetitionPolicyAndTheWorldTradeOrganization.pdf> (last visited Jan. 25, 2008).

²⁹ *Id.*

³⁰ *Id.*

global competition policy.³¹ Most notably, attempts to apply the GATT in such a manner have forced the WTO to judge the acceptability of states' individual competition laws, ultimately leading to failed applications.³² Further, none of these agreements offer guidelines or procedures for analyzing a merger or its effects on competition.³³ Therefore, the responsibility for regulation of competition policy has ultimately been left to individual states.³⁴

Unlike the United States and the European Union, which have established antitrust regimes, many states lack full-scale competition policies.³⁵ Often, these states rely on scattered laws, regulations, and provisional rules to provide interim antitrust regulation.³⁶ China is one such state that employed provisional measures while attempting to bring its full-scale Anti-Monopoly Law³⁷ into effect.³⁸ China's interim framework for antitrust regulation, known as the Provisional Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (Provisional Rules), added important sections as recently as 2003.³⁹ The full-scale Anti-Monopoly Law entered the drafting stages in 1994, with the hope of becoming the official competition policy of China by the end of 2006.⁴⁰ The Anti-Monopoly Law came into effect in September of 2006, but has yet to be thoroughly tested as compared to the Provisional Rules.⁴¹

³¹ *Id.*

³² *Id.*

³³ See Woolcook, *supra* note 32, § 3.0.

³⁴ See Harbour, *supra* note 3, at 4.

³⁵ See generally Fiona A. Schaeffer et al., *International Legal Development in Review: 2005 Business Regulation*, 40 INT'L LAW. 159 (2006) (discussing recent legal developments in individual countries antitrust laws).

³⁶ See *id.*

³⁷ Freshfields Bruckhaus Deringer, *New Chinese Merger Control Rules* 1, Apr. 2003, <http://www.freshfields.com/publications/pdfs/practices/5356.pdf> [hereinafter *New Chinese Merger*].

³⁸ Schaeffer et al., *supra* note 35, at 166.

³⁹ Patrick M. Norton & Howard Chao, *Mergers and Acquisitions in China* 1, 2 (2003) (on file with author).

⁴⁰ Schaeffer et al., *supra* note 35, at 167.

⁴¹ Morrison Foerster, *China Private Equity/Venture Capital Update*, Aug. 2006, <http://www.mofo.com/news/updates/files/update02236.html> (last visited Jan. 25, 2008).

II. DISCUSSION

A. U.S. and EU Domestic Antitrust Policies

In the absence of a global competition policy, individual states set their own standards for merger review.⁴² In the United States, the primary statutory basis for antitrust regulation is the Sherman Antitrust Act.⁴³ Since its inception, U.S. courts have routinely interpreted and applied the Act, resulting in settled applications of its principles.⁴⁴ Under U.S. law, monopoly power is defined as “the power to control prices or exclude competition.”⁴⁵ In applying this definition, case law indicates that although a ninety percent market share is sufficient to give a firm monopoly power, “[I]t is doubtful whether sixty or sixty-four percent would be enough.”⁴⁶

In analyzing a prospective merger, the U.S. process focuses on law enforcement and emphasizes “such concepts as independence of the decision maker from the investigative process, knowledge of and an opportunity to rebut the evidence arrayed against the transaction, burdens of proof, and the weight to be given to specific types of evidence and economic theories.”⁴⁷ The DOJ enters into a dialogue with the merging entities during the investigative process, giving them opportunities to respond to concerns and allegations.⁴⁸ Finally, the DOJ must obtain an order from an independent judicial authority prior to blocking a transaction.⁴⁹

The European Union has developed a similar definition of “market dominance” under its relevant antitrust regulation, article 82.⁵⁰ EU law defines dominance as “a position of economic strength which enables [an undertaking] to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers, and, ultimately, consumers.”⁵¹ EU case law applies a less stringent require-

⁴² See Harbour, *supra* note 3, at 4.

⁴³ Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2000).

⁴⁴ See generally United States v. Grinnell Corp., 384 U.S. 563 (1966) (applying Sherman Antitrust Act); United States v. Aluminum Co. of Am. (ALCOA), 148 F.2d 416 (2d Cir. 1945) (same).

⁴⁵ Grinnell, 384 U.S. at 571.

⁴⁶ ALCOA, 148 F.2d at 424; Kolasky, *supra* note 20, at 72.

⁴⁷ Patterson & Shapiro, *supra* note 5, at 9.

⁴⁸ See *id.*

⁴⁹ *Id.* at 11.

⁵⁰ See Kolasky, *supra* note 20, at 71–72.

⁵¹ *Id.*

ment for percentage share of the market to classify as dominant, with a 52 percent share, as held by GE, being considered enough to behave “independently of its competitors, customers, and ultimately, consumers.”⁵²

The EU procedure for evaluating a merger focuses on regulation and, in theory, includes some of the same checks and balances as the U.S. system.⁵³ The standard of proof is, however, much lower in practice.⁵⁴ This allowed the Commission to block the merger because, on examining a “balance of probabilities,” it was more likely than not to be anti-competitive.⁵⁵ In such situations, the Commission is able to enjoin the merger without seeking court approval or bearing the burden of convincing an independent judiciary that the transaction would in fact be anticompetitive.⁵⁶ The Commission’s centralized power to investigate and adjudicate is, in application, quite different from the distributed nature of duties in the U.S. system.⁵⁷

B. *Similar Theories Can Yield Dissimilar Applications*

At its core, the divergence exposed in the GE/Honeywell merger appears to be rooted in fundamental substantive and economic doctrinal differences.⁵⁸ These differences surfaced in the interpretations extracted from very similar regulatory language.⁵⁹ In particular, *GE/Honeywell* makes clear that EU regulators will invoke “portfolio effects theory”⁶⁰ to block deals that they fear will cause leading firms to become even more effective competitors. In contrast, in the United

⁵² *Id.* at 72.

⁵³ Patterson & Shapiro, *supra* note 5, at 9.

⁵⁴ See Georgiev, *supra* note 1, at 519.

⁵⁵ *Id.* at 520.

⁵⁶ See *id.* at 519–20.

⁵⁷ See *id.* at 520.

⁵⁸ Patterson & Shapiro, *supra* note 5, at 1.

⁵⁹ See Kolasky, *supra* note 20, at 71.

⁶⁰ The “portfolio effects” theory, also known as the “portfolio power” or “range effects” theory, was first introduced by the Commission in 1996–97. By this time, authorities in the United States had already rejected this theory as economically unsound. The anti-competitive likelihood of portfolio effects is based on the assumption that the combined portfolio of products enjoyed by a merged entity allows them to impose exclusive contracts on retailers or to force retailers to buy complete lines of products. This portfolio could be used to impose brands that a retailer would otherwise not be willing to buy, or allow a complete range of products to take up more space on retail shelves in order to limit space available to competitors. See Thibaud Verge, *Portfolio Effects and Merger Control: Full-line Forcing as an Entry-Deterrence Strategy 2* (Univ. of Southampton CMPO Working Paper, No. 02/046, Oct. 2003), available at <http://www.bris.ac.uk/cmpo/workingpapers/wp46.pdf> (last visited Jan. 25, 2008).

States, lower prices resulting from mergers are welcome, even when they are predicted to cause leading firms to gain market share.⁶¹ Although the substantive basis for the analysis of the merger was similar, the procedures in place in the EU greatly contributed to the ability of the Commission to block the merger on the grounds of dubious economic theory and a weak evidentiary basis.⁶²

The theoretical differences underlying U.S. and EU antitrust regimes percolated to the surface through the procedures used in the *GE/Honeywell* analysis.⁶³ The EU decision rested firmly on the belief that GE enjoyed a dominant position in the market for jet engines, and the European Union used a very different mode of analysis than the United States in reaching this conclusion.⁶⁴ In the United States, the DOJ and the Federal Trade Commission followed a generally accepted set of economic inquiries⁶⁵ in assessing a firm's competitive strength in a market.⁶⁶ Instead of following such a procedural analysis, the European Union assessed GE as dominant due to GE's recent acquisition of more bidding orders than its competitors, despite the aggressiveness of bidding in the market.⁶⁷ This ad hoc analysis of GE's market strength allowed the European Union to find dominance in a bidding market that necessitated such aggressive bidding.⁶⁸ "In contrast, in the United States, dominance would be found in bidding markets when rivals were unable to offer credible, attractive alternatives so that the firm in question was *not* forced to compete aggres-

⁶¹ Patterson & Shapiro, *supra* note 5, at 1.

⁶² *Id.* at 2.

⁶³ *See id.* at 9.

⁶⁴ *Id.* at 5.

⁶⁵ This economic inquiry depends greatly on the frequency of bidding events in the market, as evaluation of competition in a market with dozens of bidding events per year is quite different from evaluation in a market with one major event every few years. To determine if a supplier has a clear advantage in a bidding market, economists ask a series of questions. The typical questions posed are:

- (1) Do multiple suppliers typically enter the bidding competition?
- (2) Do customers consider these suppliers capable of offering good alternatives?
- (3) Have suppliers historically preserved their strengths and capabilities despite setbacks?
- (4) Is bidding vigorous? Are there multiple rounds of bidding in which the bids move significantly? Do suppliers offer major concessions to win the bidding?
- (5) Have multiple suppliers shown the ability actually to win bids with regularity?
- (6) Are multiple suppliers positioned technically to remain capable and attractive for upcoming bidding events?

Id. at 3.

⁶⁶ *See* Patterson & Shapiro, *supra* note 5, at 6.

⁶⁷ *Id.*

⁶⁸ *See id.* at 7.

sively to win.”⁶⁹ Of these differing approaches to evaluating GE’s market dominance, it is the U.S. approach that is considered to be grounded in solid economics.⁷⁰ Thus, despite theoretical similarities, “[I]n practice [the Commission] was able unilaterally to block the GE/Honeywell merger based on dubious and controversial policy grounds, demonstrably erroneous economic theory, and speculation contrary to the weight of the evidence.”⁷¹

C. Chinese Antitrust Regulations: Concerns Regarding Mergers

Even established antitrust regimes can have difficulty in consistently analyzing mergers, and the consistency of application is only worsened under more primitive competition policies.⁷² The practice of antitrust merger review in China under the Provisional Rules, and potentially under its successor Anti-Monopoly Law, is generally perceived as rudimentary.⁷³ A particularly important section of the Provisional Rules extended the Chinese government’s power to regulate not only domestic mergers, but also proposed offshore mergers subject to specific conditions.⁷⁴ The term “offshore merger” is left undefined in the Provisional Rules, as are many other important aspects, theoretically expanding China’s jurisdiction to include offshore transactions where the merger itself bears no relation to China.⁷⁵

Additionally, the definition of market dominance, a key concept in the GE/Honeywell merger, was also left undefined in the Provisional Rules.⁷⁶ Theoretically, the inference of market dominance should be determined by an economic analysis, including market share in the relevant market, substitutionability of relevant products, and applicable barriers to entry into that specific market.⁷⁷ Yet, the Provisional Rules merely stipulate that mergers and acquisitions may not “result in excessive concentration and exclusion or restriction of competition and may not disturb the social or economic order or

⁶⁹ *Id.*

⁷⁰ *Id.*; see Kolasky, *supra* note 20, at 72.

⁷¹ Patterson & Shapiro, *supra* note 5, at 9.

⁷² *See id.*

⁷³ Schaeffer et al., *supra* note 35, at 166.

⁷⁴ *Id.* at 166–67.

⁷⁵ *Id.* at 167.

⁷⁶ *Id.*

⁷⁷ *See id.*

harm public interests.”⁷⁸ The current Anti-Monopoly Law does not clarify these ambiguities surrounding merger review.⁷⁹

Another problem results from the Anti-Monopoly Law’s absence of any details outlining procedures for competition review, including a lack of information on how foreign corporations may answer the concerns of Chinese regulators.⁸⁰ Chinese markets have experienced dramatic growth recently, making them a hot target for potential acquisitions.⁸¹ Although the market seems welcoming to mergers and restructuring, the legal implications are significant.⁸² State ownership and control of many large sectors of the economy inject both political and social issues into transactions.⁸³ Many of the Anti-Monopoly Law’s interpretations and subsequent applications remain untested, making China a continually challenging and unpredictable market for merger analysis.⁸⁴ Such ambiguities in the Anti-Monopoly Law allow for the defining of market aspects by regulators, giving rise to the potential for “undesirable and excessive government intervention on antitrust grounds, even where no genuine competitive issue exists.”⁸⁵ The fundamental concern emanating from developing antitrust regimes such as China is underscored by *GE/Honeywell*: if two statutorily similar antitrust regimes can reach diametrically opposed conclusions based on theoretically similar underpinnings, what is to be inferred from an antitrust regime that leaves defining core competition terms to the whim of the government’s statutory interpretation?⁸⁶

D. A Global “Hold-Up” Situation

A multinational corporation is subject to the laws of every state in which it operates.⁸⁷ Thus, particularly troublesome situations may arise in the event of international mergers.⁸⁸ When individual states analyze mergers subject only to their own policies and regulations, and the prohibition of a merger by any one state can block the transaction globally, corporations become effectively bound by the strictest anti-

⁷⁸ *New Chinese Merger*, *supra* note 37, at 1.

⁷⁹ See Schaeffer et al., *supra* note 35.

⁸⁰ See *New Chinese Merger*, *supra* note 37, at 2.

⁸¹ See Norton & Chao, *supra* note 39, at 1.

⁸² See *id.*

⁸³ *Id.*

⁸⁴ See *id.*

⁸⁵ Schaeffer et al., *supra* note 35, at 167.

⁸⁶ See Fox, *supra* note 2, at 80; Harbour, *supra* note 3, at 4.

⁸⁷ See Drozdiak, *supra* note 6.

⁸⁸ See *id.*

trust regime to which they are subject.⁸⁹ In recognizing this, a state could theoretically obtain exclusive power over regulating international mergers by enacting unnecessarily restrictive or artificially ambiguous competition policies regarding merger analysis.⁹⁰ This possibility would create, in effect, a “hold-up” situation forcing a corporation to choose between forsaking a merger, paying a potentially extortionate fine, or ceasing operation within the state altogether.⁹¹

The possibility of such a scenario could create large incentives for states to artificially interpret their antitrust regulations or to enact ever more restrictive competition policies.⁹² This incentive is derived from the ability to control the global arena for mergers, the ability to generate revenue from merger prohibiting fines, and the ability to protect a state’s own businesses via regulatory attacks on foreign corporations operating domestically.⁹³ This ability to regulate international mergers may grant a state the ability to dictate the growth strategies of U.S. corporations both at home and abroad.⁹⁴ The real dangers posed by this problem are exemplified by *GE/Honeywell*, which painfully demonstrated the potential problems that can occur with even the most similar of competition policies and cooperating regulatory authorities.⁹⁵

III. ANALYSIS

It is generally in the best interest of all states that restrictions on global mergers not become yet another tool of international economic diplomacy.⁹⁶ If there were no costs, there would likely be unwavering support for WTO-sponsored antitrust policies, especially in light of such an international merger bottleneck.⁹⁷ Unfortunately, the costs of an international competition policy are not negligible: concerns exist regarding a bevy of issues such as transparency, existing regimes, and developing nations.⁹⁸ Even given these costs, “It is not so much a question of whether but what type of coverage there should be of competition in the WTO.”⁹⁹ With this in mind, support for fur-

⁸⁹ *See id.*

⁹⁰ *See Woolcock, supra* note 28, at 9.

⁹¹ *See id.*

⁹² *See id.*

⁹³ *See id.*

⁹⁴ *See id.*

⁹⁵ *See Harbour, supra* note 3, at 8.

⁹⁶ *See Georgiev, supra* note 1, at 523.

⁹⁷ *See Woolcock, supra* note 28.

⁹⁸ *See id.*

⁹⁹ *Id.*

thering the regulatory strength of the WTO in regard to international mergers must be weighed against the drawbacks.¹⁰⁰

Although *GE/Honeywell* illustrated the potential threat of global merger restriction, there is no concrete evidence that national competition policies or pre-existing agreements, such as the GATT, cannot cope with international markets and mergers.¹⁰¹ Additionally, different states have differing needs, depending on their level of development and particular idiosyncrasies.¹⁰² Countries that have already developed their antitrust policies will also be unlikely to simply cede their sovereignty to an international entity.¹⁰³ Finally, a strong rationale underlies claims that the WTO should cover trade issues only, and that merger regulation may fall outside its purview.¹⁰⁴ Given these substantial criticisms, it seems that a comprehensive antitrust framework inside the WTO would face a long and potentially futile battle.¹⁰⁵

In light of these concerns, perhaps a thorough competition policy is outside the reach of the WTO, at least in the foreseeable future.¹⁰⁶ As more states finalize their antitrust regulations, they become less amenable to ceding power to an international regulator.¹⁰⁷ Given the only worsening problem of inconsistent merger review between states and the efficiencies gained through formulating international antitrust policies before each state finalizes their own regimes, it behooves the WTO to take immediate action.¹⁰⁸ The WTO should attempt to overcome the criticisms blocking international merger regulation; this would grant corporations, and thereby consumers, the benefits resulting from an environment of global economic stability and uniformity.¹⁰⁹

The solution to *GE/Honeywell* and the global “hold-up” situation of merger preclusion may not be found in developing substantive antitrust regulations at all.¹¹⁰ At the core of *GE/Honeywell*, despite all of the similarities, lay theoretical differences on how to promote economic

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

¹⁰² *See Woolcock, supra note 28, at 6.*

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *See id.*

¹⁰⁶ *See id.*

¹⁰⁷ *See Woolcock, supra note 28, at 6.*

¹⁰⁸ *See id.*

¹⁰⁹ *See id.*

¹¹⁰ *See Patterson & Shapiro, supra note 5, at 10.*

efficiency.¹¹¹ It seems unlikely that a large majority of states could agree on the theoretical basis for such regulation, let alone the actual language of the policies themselves.¹¹² What then is left for an international antitrust framework when the criticisms against such regulations seem so valid?¹¹³ An approach focusing simply on the procedural analysis of mergers, while eschewing any global substantive requirements, is one possibility.¹¹⁴

Differences in procedure, ranging from corporate-regulator interaction to the application of market dominance theories, were a key source of the differences in *GE/Honeywell*.¹¹⁵ Further, despite strong attempts between U.S. and EU regulators, voluntary cooperation has been shown to be inadequate in dealing with policy differences in merger analysis.¹¹⁶ To solve these inadequacies, the procedural analysis of corporate mergers might best be facilitated via a WTO-regulation committee.¹¹⁷ Such a committee would ideally consist of representatives from each state directly impacted by the proposed merger, chaired by a permanently appointed official.¹¹⁸ This procedural framework could be adapted from states with settled antitrust regimes, hopefully blending the most desirable aspects from each.¹¹⁹ To hasten the development and implementation of such a procedural review committee, no attempt at developing a substantive body of antitrust law should be made.¹²⁰ Instead, the substantive regulations to be applied could be analogized to a traditional conflict of laws problem, substituting the applicable states for adversarial parties.¹²¹

The importance of procedure was immediately recognized following *GE/Honeywell*, as the European Union pushed through changes to their merger analysis procedure in an attempt to bring it

¹¹¹ See *id.*

¹¹² See Woolcock, *supra* note 28, at 9.

¹¹³ See *id.*

¹¹⁴ See Fox, *supra* note 2, at 77; Patterson & Shapiro, *supra* note 5, at 10.

¹¹⁵ See Patterson & Shapiro, *supra* note 5, at 2.

¹¹⁶ See Woolcock, *supra* note 28, at 9.

¹¹⁷ See *id.*

¹¹⁸ See generally Understanding the WTO: Settling Disputes, http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited Jan. 25, 2008) (discussing principles and procedures for dispute resolution) [hereinafter Understanding the WTO].

¹¹⁹ See Woolcock, *supra* note 28, at 9. See generally Understanding the WTO, *supra* note 118 (discussing the WTO's principles and procedures for dispute resolution).

¹²⁰ See Woolcock, *supra* note 28, at 9. See generally Understanding the WTO, *supra* note 118 (discussing the WTO's principles and procedures for dispute resolution).

¹²¹ See generally David J. Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 AM. J. INT'L L. 756, 763 (2006) (discussing the potentially "only reasonable basis for a conflict-of-laws principle in international antitrust law").

into conformity with U.S. practices.¹²² Such advancements included alterations to the evidentiary standards necessary for determining the market dominance of a corporation, modernizing the actual enforcement of EU antitrust regulations and introducing stronger procedural guarantees and legal certainty.¹²³

Similar gains in legal certainty and global uniformity can be gained through basic procedural developments by the WTO.¹²⁴ Such a procedural framework would side-step many of the strong criticisms facing substantive antitrust policies, and could remedy the difficulties arising from the patchwork of multi-lateral agreements that include elements of competition policy.¹²⁵ Continued usage of such multi-party agreements does not alleviate the problems raised through the development of state-centric competition policies.¹²⁶ Instead, filling the vacuum left in the absence of a WTO competition policy with multi-party agreements only bolsters conflict between national policies and competing multi-party agreements.¹²⁷ The effect of these conflicts is exhibited by the mounting costs of compliance for multinational corporations.¹²⁸

Most importantly, procedural regulations for merger analysis are an obtainable goal for the WTO, whereas substantive regulatory measures seem much less likely to succeed.¹²⁹ There is a growing variance in national policies regarding merger analysis, with many states using merger policy as an instrument in national economic strategy.¹³⁰ States, such as China, may develop competition policies that allow for strategic blocking of foreign mergers in order to protect governmental interests in certain sensitive or strategic sectors populated by State-controlled enterprises.¹³¹ Procedural regulations will, at a minimum, prevent the dangers resulting from such a “hold-up” scenario.¹³² Ideally, results from such a procedural framework would allow for global legal certainty regarding merger analysis, ease tensions related to globalization, increase corporate planning, and eventually promote

¹²² See Georgiev, *supra* note 1, at 522.

¹²³ *Id.*

¹²⁴ See *id.*; Woolcock, *supra* note 28, at 6.

¹²⁵ See Woolcock, *supra* note 28, at 6.

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ *Id.*

¹²⁹ See *id.*

¹³⁰ See Woolcock, *supra* note 28, at 9.

¹³¹ See *id.*

¹³² See Patterson & Shapiro, *supra* note 5, at 2.

efficient and lively competition within markets, passing along savings to consumers.¹³³ That is, after all, the main goal sought by both substantive and procedural competition policies.¹³⁴

CONCLUSION

This analysis of the economically and politically damaging results of individualized state merger regulation illustrates the necessity of global antitrust regulations. The differing interpretations of the highly similar U.S. and EU antitrust regulations, as applied in the *GE/Honeywell* case, serve to highlight the dangers that exist in the absence of a global competition policy. The potential for enterprising states to take advantage of potential “hold-up” situations in key markets through cleverly crafted laws and restrictive merger regulation should signal a wake-up call to those resisting attempts at antitrust regulation by the WTO. Procedural regulations should be enacted that give certainty to corporations regarding mergers and efficient business structuring to ultimately benefit consumers in today’s global marketplace.

¹³³ See Georgiev, *supra* note 1, at 522; Woolcock, *supra* note 28, at 9.

¹³⁴ See Woolcock, *supra* note 28, at 7.

