

GENERAL ELECTRIC/HONEYWELL MERGER: EUROPEAN COMMISSION ANTITRUST DECISION STRIKES A SOUR NOTE

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I. INTRODUCTION

Although antitrust regulation is justified on neutral grounds of economic efficiency and consumer protection, it appears from the international perspective that nations instead may make decisions concerning the application of their antitrust laws based on what is good for the nation at the expense of the global community. For example, the European Commission ("Commission"), for the first time in its history, disapproved a merger between two American companies citing their market dominance now and in the future and the impact of that dominance on competitors as prohibitive factors in granting approval. The disapproval by the Commission of the General Electric/Honeywell ("GE merger") merger hit a sour note with U.S. authorities because they had approved the merger prior to the Commission's decision.

The US and the Commission had earlier entered into a bilateral agreement emphasizing cooperation, coordination, consultation, and positive comity to avoid an occurrence of the inconsistent result that was to subsequently follow in the GE merger. Notwithstanding this agreement, however, the two authorities took very different positions. This paper examines why the United States and the Commission reached differing conclusions on the GE merger even though both were looking at the same set of data and had agreed to cooperate. The hypothesis suggested by the GE merger is that bilateral agreements on the application of antitrust laws (also known as competition policy) are ineffective when national interests are involved, and that harmonization of the world's antitrust laws will also likely prove ineffective unless an enforcement mechanism is developed.

II. COMPETING THEORIES USED TO EVALUATE THE GE MERGER

In May 2001, US and Canadian Antitrust authorities approved General Electric's \$42-billion purchase of Honeywell International after the companies agreed to sell a military helicopter engine unit and let a new company service some of Honeywell's small commercial jet engines.¹ On July 3, 2001, the European Commission issued its decision declaring the merger to be a concentration incompatible with the Common Market and the European Economic Area (EEA).²

There are fundamental differences between the United States and the European Union (EU) in the application of their respective antitrust rules to mergers. In America it is well settled that antitrust law promotes competition and the protection of consumers, not competitors.³ What this means is that in the US mergers are allowed to go forward if the likely effect is that there will be a reduction in price, or an increase in quality or innovation that will result in a benefit for the consumer and competition will not be substantially lessened.⁴ Both the United States and Canada concluded there was no likelihood of a substantial lessening of competition because General Electric and Honeywell were not and are not competitors.⁵ Under American antitrust law competitors do not have a cause of action against a merger on the grounds that it makes the merged firms more efficient, even if they fear they may as a result of the merger be forced from the market.⁶ Thus, United States and Canadian officials concluded the acquisition was likely to benefit, not harm, consumers.

1. George Priest & Franco Romani, *The GE/Honeywell Precedent*, Wall St. J., June 20, 2001, at A18.

2. *General Electric/Honeywell*, Commission Decision, Case COMP(2001)M.2220 at 128.

3. Aubry D. Smith, Note, *Bring Down Private Trade Barriers - An Assessment Of the United States Unilateral Options: Section 301 of the 1974 Trade Act and Extraterritorial Application of U.S. Antitrust Law*, 16 MICH. J. INT'L L. 241, 257 (1994).

4. Priest & Romani, *supra* note 1.

5. *Id.*

6. *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477 (1977). Competitors challenged Brunswick's acquisition of several bowling centers that otherwise would have closed, claiming that they were injured because the profits would have increased if the centers had closed instead. The Court held that the competitors lacked standing because they were not alleging antitrust injury. Quoting *Brown Shoe*, 370 U.S. 294, 320 (1962), the Court emphasized that "antitrust laws were enacted for the protection of competition not competitors," and stated it would be "inimical to the purpose of those laws" to award damages for injury resulting from enhanced competition. The Supreme Court extended this doctrine in *Cargill v. Monfort of Colorado*, 479 U.S. 104, 114-117 (1986) by holding that competitors do not have standing to challenge a merger on the grounds that the merger may enable the merged firm to realize efficiencies and thereby lower its prices to a level at or only slightly above its costs).

The European antitrust law also promotes competition but for the protection of the competitors in the market.⁷ Thus, EU antitrust law is more concerned with protecting competitors as opposed to the American emphasis on consumer. EU antitrust law seeks to prohibit or restrain a firm(s) from creating or abusing their dominance in the market at the expense of other competitors in the market.⁸ Unlike United States regulators, the Commission allows competitors to provide input on the impact of a merger on the competitor's ability to compete in the market if the merger is approved.⁹ Under the Merger Regulation a proposed merger is reviewed using a three step process:¹⁰ (1) defining the relevant product and geographic markets; (2) determining whether the company in question has a dominant position; and (3) considering whether the dominant position, if any, presents a significant impediment to competition.

In the GE merger, the divergence between the American and European point of view on the substance related to their different interpretations of the meaning and impact of the basic theoretical concepts embodied in dominant position, "bundling" or "tying" of products, and the leverage that might be exerted through vertical integration.¹¹

In expressing their disagreement with the EU decision, U.S. antitrust authorities have pointed to the divergence in theories used to evaluate the impact of the merger as the reason for the differing results.¹² After the EU blocked the GE merger, the United States expressed its concern over the EU's use of the "portfolio power theory" (also known as the "range effects theory" and the "entrenchment doctrine") of competitive injury as the mechanism for making antitrust enforcement decisions.¹³ United States antitrust authorities

7. Eleanor Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1791 n. 42 (2000).

8. Priest & Romani, *supra* note 1.

9. *Id.* See also GE and Honeywell Fail to Tie the Knot, CNET News.com (July 8, 2001), <http://news.cnet.com/news/0-1007-201-6477632-0.html?tag=1h>. (July 8, 2001) (last visited Nov. 15, 2001).

10. Commission Regulation, 4064/89, 1990 O.J. (L 257) 16.

11. Georg Koopman, *Transatlantic Irritations in Competition and Trade Policy*, INTERECONOMICS, July-Aug., 2001, at 166 at www.hwwa.de/publikationen/Intereconomics/2001/ie-docs2001/ieol04-koopman.pdf. In the view of the Commission, combining Honeywell with GE would have created new dominant positions in some markets, increased dominance in others, and would have squeezed out competitors because GE would have been able to offer a bundle of products that no other competitor could match. The U.S. on the other hand disagreed with the Commission's theories concerning the economic implication of size, bundling and vertical integration.

12. Mergers, *The Range Effects: The United States Perspective*, DOJ Antitrust Division Submission for OECD Roundtable on Portfolio Effects in Conglomerate at <http://www.usdoj.gov/atr/public/international/9550.htm> (Oct. 12, 2001).

13. Charles A. James, *International Antitrust in the Bush Administration, An address before the Canadian Bar Association Annual Fall Conference on Competition Law, Ottawa, Canada*, (Sept. 21, 2001) <http://www.usdoj.gov/atr/public/speeches/9100.htm> (last visited Nov. 5, 2001).

have abandoned this theory or doctrine as a mechanism for challenging non-horizontal type conglomerate mergers such as the GE merger.¹⁴

Under the "entrenchment doctrine" as embodied in the Supreme Court's decision in *FTC v. Procter & Gamble*,¹⁵ mergers could be condemned if they strengthened an already dominant firm through greater efficiencies or gave the acquired firm access to a broader line of products or greater financial resources, thereby making life harder for smaller firms. In the 1980s the United States eliminated entrenchment as a basis for challenging non-horizontal mergers, such as the GE/Honeywell merger.¹⁶ The reason for eliminating the doctrine as a challenge to conglomerate mergers was that empirical evidence did not support the predicted competitive harms hypothesized.¹⁷ In fact, United States data shows there is no lessening of competition in the market by allowing mergers such as GE/Honeywell to go forward and that there were significant benefits and increased efficiencies to society.¹⁸ United States authorities have concluded from their 40 years of experience in evaluating the competitive effects of non-horizontal mergers such as GE's that efficiency and aggressive competition benefit consumers, even if rivals that fail to offer an equally good deal suffer loss of sales or market share.¹⁹

III. APPLICATION OF THE DIFFERENT THEORIES - GE/HONEYWELL

To determine whether the GE merger would strengthen GE's dominance in its markets and have an anti-competitive effect on competition, the Commission used three related theories of competitive harm to review the GE/Honeywell merger:²⁰ (1) that the merger would create economies of scale and scope that other firms would not be able to match; (2) that the merger firm would gain a decisive advantage over its competitors by virtue of its size and financial resources; and (3) that the merger would facilitate the tying or bundling of complimentary products, thereby, allowing the merged firm to drive its competitors from the market. Based on its review the Commission came to

14. Mergers, *supra* note 12.

15. *FTC v. Procter & Gamble*, 386 U.S. 568 (1967).

16. Mergers, *supra* note 12.

17. *Id.* at 5. (discussion by Professors' Areeda and Turner in the presentation paper on the fallacy of prohibiting mergers on the basis of dominance).

18. *Id.* Areeda and Turner state in their research that increased dominance and tying would only bring competition to an end if the same opportunities were not available to rivals. A result seen in no conglomerate merger case of which they were aware. Second they postulated based on their research the public would realize the fruits of the more efficient firm because the other firms would be forced to improve their efficiency or quality or be forced out of the market thereby resulting in reduced use of scarce resources to the benefit of society.

19. *Id.* at 2.

20. *Id.*

the conclusion that the GE merger would create new dominant positions in avionics, and engines for business aircraft.²¹ The Commission also concluded that the merger would increase GE's dominance in engines for big commercial aircraft, and that it would also allow GE to bundle complementary products, thereby resulting in competitors being squeezed out of the markets.²²

The United States came to the conclusion that the first two theories of competitive harm are no different than those found in Procter and Gamble and should be rejected by the Commission as a mechanism for challenging mergers for the same reason the United States abandoned the practice two generations ago.²³ The United States admitted the third theory may harm competition but only if it were the type of bundling that forecloses rivals from the market without advancing any legitimate business purpose.²⁴

Since the Commission's decision not to approve the GE merger, the DOJ has conducted over 75 interviews of industry participants, deposed executives of the merging parties and reviewed the numerous responses requested from third parties to determine if there was a legitimate reason to challenge the merger under the EU theory.²⁵ Based on those discussions and responses, it concluded the merger should have been approved under EU law.²⁶ For example, DOJ concluded that it found little support for the EU's argument that GE was already dominant in the large aircraft market.²⁷ It pointed out that the market for large aircraft engines was a bid market with three strong competitors, GE, Rolls Royce, and Pratt & Whitney.²⁸ It noted that historic market shares are only weak indicators of future success, as illustrated by the recent contract awards almost evenly divided among the three firms.²⁹ The DOJ concluded this analysis by stating that all of the theories of competitive injury from the GE merger were dependent on the argument that the merger would ultimately drive competitors from the market or would reduce their shares to a point where they could no longer effectively constrain GE's competitive behavior.³⁰ The DOJ also found this argument lacking because it found most of GE's and Honeywell's competitors are large, financially healthy companies with large shares in many of the relevant markets and ready access to capital.³¹ The DOJ

21. Koopman, *supra* note 11, at 166.

22. *Id.*

23. *Id.*

24. *Mergers*, *supra* note 12 at 3.

25. *Id.* at 15.

26. *Id.* at 18.

27. *Id.* at 16.

28. *Id.*

29. *Mergers*, *supra* note 12.

30. *Id.* at 17.

31. *Id.*

concluded its analysis by stating that there is no historical evidence of aerospace firms exiting or withdrawing from the market because it could offer only a narrow range of products, other than through mergers which kept their productive assets in the market.³² The United States concluded the merged firm would have offered improved products at more attractive prices than either firm could offer on its own, and that the merged firm's competitors would then have a great incentive to improve their own product offerings.³³

The difference between the United States and the EU on the GE merger flowed from the substantive difference between the two on the proper scope of antitrust law enforcement. Under EU antitrust law the central purpose is to protect competitors. Under United States antitrust law the central purpose is not to protect business from the workings of the market; it is to protect the public from the failure of the market.

IV. UNITED STATES-EC COOPERATIVE BILATERAL AGREEMENTS FOR THE ENFORCEMENT OF THEIR COMPETITION LAWS

The United States and EU reached inconsistent decisions on the GE merger despite analyzing the same set of facts and data, and a bilateral agreement between them to cooperate.³⁴ Before the GE merger, it was believed that divergent positions on particular mergers could be avoided or at least mitigated through a series of bilateral agreements aimed at resolving frictions created by the unilateral application of the respective antitrust laws extraterritorially.³⁵ Why, then, did the cooperative bilateral agreements between the United States and the EU for the enforcement of their respective competition laws fail to mitigate the divergent decisions in the GE/Honeywell merger?

Extraterritorial application of one nation's law to conduct that occurs entirely within another nation violates the most fundamental tenet of territorial sovereignty.³⁶ Frictions arise when a foreign government entity usurps the power of the domestic regulatory agency to regulate activity within its own borders.³⁷ Yet both the United States and the European Community have not hesitated to unilaterally apply their antitrust laws extraterritorially.

32. *Id.* at 17-18.

33. Charles A. James, *International Antitrust in the 21st Century: Cooperation and Convergence*, Address Before the OECD Global Forum on Competition, Paris, France, (Oct. 4, 2001) at <http://www.usdoj.gov/atr/public/speeches/9330.htm>. (last visited Nov. 5, 2001).

34. *Id.*

35. *Id.*

36. Michael G. McKinnon, *Federal Judicial and Legislative Jurisdiction Over Entities Abroad: The Long-Arm of U.S. Antitrust Law and Viable Solutions Beyond the Timberlane/Restatement Comity Approach*, 21 PEPP. L. REV. 1219, 1224 (1994).

37. *Id.*

Recognizing the need to use more congenial methods of achieving their antitrust policies, the US and the EU entered into bilateral agreements with each other in 1991³⁸ and 1998.³⁹ The main objective of the agreements was to promote cooperation, and coordination, and to lessen the possibility of differences between the parties' competition laws through notification, exchange of information, consultation, and comity in the application and enforcement of the parties' respective competition laws.⁴⁰ Under the doctrine of positive comity set forth in Article V of the agreement, either party can request the other to initiate appropriate enforcement activities, if the requesting party believes anti-competitive practices are being carried out in the other's territory that are adversely affecting the requesting party's important interest.⁴¹ Article VI of the agreement requires the parties to take into account the important interests of the other party and their reasonable suggestions during its investigation and enforcement proceedings.⁴²

In 1998, the European Commission and the United States signed a supplemental agreement to the 1991 agreement.⁴³ The new agreement elaborated on the positive comity set forth in Article V of the 1991 agreement and provided details about each party's responsibilities.⁴⁴ Article VI of the new agreement stated that the new agreement was a supplement to the 1991 agreement, and to be interpreted consistent with the 1991 agreement.⁴⁵

Notwithstanding this goal, the agreements have structural problems that lessen their ability to mitigate divergent views between the parties. First, the 1998 agreement specifically stated that it did not apply to merger enforcement because statutory deadlines in the United States and EU make the suspension or deferral of investigations inappropriate.⁴⁶ However, the agreements call for each authority to take into account not only the interests of the other party but also their reasonable suggestions. The fact that the United States and Canada approved the merger indicates that they had an interest in seeing the merger

38. Agreement Between The Government of the United States of America and The Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, 30 I.L.M. 1487 (1991).

39. Agreement Between the Government of the United States of America and The European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, (June 4, 1998) at www.ftc.gov/bc/us-ec-pc.htm (last visited Oct. 16, 2001).

40. Agreement, *supra* note 38 at 1491.

41. *Id.* at 1498.

42. *Id.*

43. Agreement, *supra* note 39.

44. Press Release, DOJ, U.S. and European Communities Sign Antitrust Cooperation Agreement, (June 4, 1998).

45. *Id.*

46. *Id.*

completed.⁴⁷ The United States and Canada have an interest in getting the best quality for its consumers at the lowest price.⁴⁸ The United States is the world's largest market for aircraft purchases⁴⁹ and therefore would be sensitive to any merger in the aerospace industry that would harm consumers or substantially lessen competition. The United States and Canada both concluded that the GE merger would deliver the best quality at the lowest price to the consumer without substantially lessening competition.⁵⁰ Thus, it is highly unlikely in this case that the United States and Canada⁵¹ would have approved a merger that would result in higher cost to the consumer or substantially lessen competition.

Additionally, even though Article VI of the 1991 agreement requires each party to take into consideration the other party's important interests in all stages of the enforcement activities, it only requires this consideration to the extent compatible with the reviewing authority's own important interests.⁵² Thus, there is no mechanism for resolving competing interests.

Another problem with the agreements is that the doctrine of positive comity and the comity considerations of the other party's interest, which the agreements are premised on, have been eroded in the United States by the Supreme Court's decision in *Hartford Fire Insurance Co. v. California*,⁵³ and in the EU by the ECJ's decision in *Wood Pulp*.⁵⁴ Both Courts have rejected comity considerations absent what they have characterized as "true conflict."⁵⁵ They have both defined conflict to mean that a company could not obey the law of one nation without violating the law of the other nation. At least from the American perspective, it was assumed that the bilateral agreement would create a comity in which even the most serious areas of antitrust divergence would be mutually resolved.⁵⁶

47. GE and Honeywell Fail to tie the Knot, *supra* note 9; see also James, *supra* note 13.

48. James, *supra* note 13.

49. GE and Honeywell Fail to tie the Knot, *supra* note 9.

50. *Id.*

51. Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1539 (1998). Guzman points out that Canadian antitrust policy explicitly seeks not only to promote efficiency, but also to protect small and medium size businesses. Thus it would appear that Canada should have had the same concerns as the EU and prohibited the merger if it there was danger of GE dominance substantially lessen competition.

52. William K. Walker, *Extraterritorial Application of U.S. Antitrust Laws: The Effect of the European Community-United States Antitrust Agreement*, 33 HARV. INT'L L.J. 583, 590 (1992).

53. *Hartford*, 113 S.Ct. 2891 (1993).

54. Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on Hartford Fire Insurance Co. v. California*, 34 VA. J. INT'L L. 213, 228-29 (1993).

55. Robert D. Shank, *The Justice Department's Recent Antitrust Enforcement Policy: Toward a "Positive Comity" Solution to International Competition Problems?*, 29 VAND. J. TRANSNAT'L L. 155, 174 (1996).

56. James, *supra* note 33.

And finally, an inherent weakness of the bilateral agreement is that it does not oblige the parties to make enforcement decisions based on comity or to comply with cooperation request.⁵⁷ However, even if it did, there again is no mechanism for resolving disputes over enforcement. As a result of the GE merger failure, the current Assistant Attorney General for the Antitrust Division concluded that there is a limit to the effectiveness of bilateral cooperation.⁵⁸

Based on these observations, the Assistant Attorney General is correct in his assessment that there are limitations to bilateral agreements. Although there are limitations in the substantive content of the United States and EU agreements, without an enforcement mechanism, even if the limitations in the agreements were corrected, the result reached by the EU in the GE merger would be the same because the national interests of the EU were embodied in their decision.⁵⁹

The bilateral agreement between the United States and the EU has worked extremely well when the sovereignties' national interests have not been implicated. Both the European Commissioner and the Assistant Attorney General for Antitrust pointed to the Sprint/MCI and MCI/Worldcom merger reviews as examples of their close coordination, cooperation, and consultation on their respective approaches to the merger reviews so as to avoid inconsistent results.⁶⁰ However, close cooperation on common interests ignores the strong temptation nations have to make decisions concerning the application of their antitrust laws based on what is good for the national interest at the expense of the global community.⁶¹ The EU has a strong national interest in protecting its aerospace industry.⁶² Thus, the United States should have been on notice that bilateral cooperation is ineffective when Europe perceives its strong national interests at risk,⁶³ and therefore, should not have been surprised at the European Community decision to block the GE merger.

57. Brian Peck, *Extraterritorial Application of Antitrust laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution*, 35 SAN DIEGO L. REV. 1163, 1207 (1998).

58. James, *supra* note 33.

59. Priest & Romani, *supra* note 1; see also, Paul Erdman, *Europe, U.S. on a Collision Course*, CBS Marketwatch, July 3, 2001, explaining that Europe has an interest in protecting its aerospace industry, in particular Airbus, which he claims would not have survived competition with Boeing without the government subsidies.

60. Mario Monti, *EU-US Cooperation in the Control of International Mergers: Recent Examples and Trends*, Address Before the Institute for International Economics (Mar. 30, 2001) at <http://www.eurunion.org/news/speeches/2001/010330mm2.htm> (last visited Oct. 19, 2001); see also, James, *supra* note 13.

61. Fox, *supra* note 7.

62. Priest & Romani, *supra* note 1.

63. It is interesting to note that since the bilateral agreement the only two mergers that have caused friction between the U.S. and the EU have been in the aerospace industry.

Based on the conflict between the United States and the EU on the GE merger it seems clear that there is a need for an organizational mechanism that eliminates national interests from the equation in international antitrust decisions. The GE merger spotlights the need for an international agreement on a core set of values for enforcing antitrust law, and the creation of a supranational entity with the power to enforce its decisions through a binding dispute resolution mechanism. Ironically, it is the EU that has been a staunch advocate of adopting such a system.⁶⁴ The question, then, is how can one take divergent theories and national interest out of the equation in the application of antitrust law to international problems?

V. HARMONIZATION AND ENFORCEMENT: THE ANSWER TO COMPETING MODELS?

There is competition between the United States and the EU to expand the geographic scope of their antitrust law.⁶⁵ The EU and the United States use several techniques one of which is common and two of which are unique in competing for this hegemony. The common technique is that both the United States and the EU advocate for their system in the form of advice and technical assistance to countries on how to implement their competition laws.⁶⁶ The two divergent techniques are unilateral application of their antitrust laws and bilateral agreements.⁶⁷ There are buyers in this market.⁶⁸ Some 100 countries in the World Trade Organization (WTO) do not have competition laws, and the International Monetary Fund, the World Bank, the EU, and the United States are priming these countries to develop them.⁶⁹

Until the GE merger divergence, the United States had increasingly turned to bilateral agreements to promote its brand of antitrust legislation.⁷⁰ Although the bilateral approach is less controversial than the unilateral approach it will always be limited in terms of cooperation and avoidance of conflict as long as the two most influential antitrust entities, the United States and the EU, are in

64. Fox, *supra* note 7.

65. Il Hyung Jung, *A Comparative Study on the Question of Extraterritorial Application of the Competition Law*, 18 DICK. J. INT'L L. 305, 340 (2000).

66. Fox, *supra* note 7; see International Competition Policy Advisory Comm., U.S. Dep't of Justice, Final Report Ch. 6, at 15 (2000).

67. Fox, *supra* note 7. The United States uses the unilateral approach significantly more than the EU. The EU follows the route of Bilateral agreements and free trade agreements. It requires all the Eastern European countries that hope/want to join the EU to adopt EU competition laws into their national law before they can even be considered for European Community status.

68. *Id.*

69. *Id.* at 1784, 1799. In 1999, the International Monetary Fund required Indonesia to adopt a competition law as part of the economic reforms on which rescue funds were conditioned.

70. James, *supra* note 33.

competition to gain hegemony over the competition laws.⁷¹ Thus, the United States began to look for a more inclusive solution to bilateral agreements. While not dropping its opposition to the WTO as a forum for harmonizing competition laws and as a source for binding dispute resolution for antitrust disputes,⁷² the United States has taken the lead in pushing for a forum outside the WTO to address solely antitrust issues, with the ultimate goal of harmonizing the world's antitrust laws.⁷³ The weaknesses of the United States approach is that the forum it has chosen does not contemplate a binding dispute resolution mechanism for the enforcement of international antitrust law.⁷⁴ Also, it is questionable whether the forum being pushed by the United States would avoid a situation such as the GE merger without a binding dispute resolution mechanism.

Europe also has expanded its antitrust law through bilateral agreements, in particular with the Eastern European nations by requiring that they harmonize their antitrust laws with the Community if they wish to join the European Community.⁷⁵ The U.S. has not advocated its competition model as forcefully as the EU has advocated its vision of its competition model.⁷⁶ As a result more nations have been adopting the EU competition model than the United States model.⁷⁷

Nonetheless, unlike the United States, Europe has been willing to accept the WTO as the mechanism for harmonizing the world's competition laws and enforcing them.⁷⁸ It appears that there are more countries in the WTO that have adopted the EU model as opposed to the United States model.⁷⁹ Therefore, if the WTO is chosen as the forum for international antitrust harmonization and enforcement, it is very likely that the EU model of competition will be the model adopted rather than the American model because of the potential support of other countries already within the organization and because of the EU's strong advocacy of the WTO as the forum for antitrust policy and enforcement.⁸⁰

Recognizing that the EU is advocating the WTO as the forum for the harmonization and enforcement of international antitrust law, the newly appointed antitrust chief for the DOJ has attempted to minimize the WTO as a

71. Jung, *supra* note 65, at 326.

72. See International Competition Policy Advisory Comm. U.S. Dept of Justice, Final Report Chapter 6 at 6 (2000), at <http://www.usdoj.gov/atr/icpac/icpac.htm> (last visited Nov. 16, 2001).

73. James, *supra* note 33.

74. *Id.*

75. Fox, *supra* note 7.

76. *Id.* at 1799.

77. *Id.*

78. Monti, *supra* note 60.

79. Fox, *supra* note 7.

80. *Id.*

forum for antitrust policy by recommending the newly, United States-initiated, Global Competition Initiative (GCI) as the forum for international antitrust policy.⁸¹ The focus of the GCI will be on the substantive and procedural issues surrounding the harmonization of international antitrust law harmonization.⁸² The U.S. position is that the broad mandate of the WTO makes it unsuitable to deal adequately with the practical law enforcement issues raised by the internationalization of antitrust law.⁸³ The United States has set June 2002, as the target date for the implementation of the GCI.⁸⁴ It remains to be seen if the rest of the world will embrace the GCI initiative.

However, there are other significant nations that share America's aversion to the WTO as a body making competition policy.⁸⁵ Japan and Great Britain, two countries with substantial international trade but little historical competition policy, are equally as weary as the United States at having the WTO setting and enforcing global competition policy.⁸⁶ If the United States is successful at getting the GCI initiative moving it is likely to mute the movement to the WTO as the forum for international antitrust policy. The reason why the GCI is likely to prevail is because it will be focused exclusively on international antitrust issues⁸⁷ as opposed to the WTO which is primarily focused on trade issues and a broad range of other issues not related to antitrust issues.⁸⁸

The United States may be right about excluding antitrust policy from the WTO. Professor Fox, the most prominent critic of the inclusion of antitrust within the WTO, has argued that international antitrust should be addressed in an independent forum, apart from the WTO.⁸⁹ Fox has concluded that antitrust harmonization would be impeded in the WTO because it would have to include both trade and competition representatives who have differing goals.⁹⁰ It is also Fox's opinion that because the WTO agreements typically include dispute resolution, some countries will be unwillingly to participate if the dispute

81. James, *supra* note 13.

82. *Id.* James says because the ultimate goal of the GCI is to converge the antitrust laws of the world, the GCI forum will concentrate on encouraging both the developed and developing countries to formulate and develop consensus on proposals for procedural and substantive convergence in antitrust enforcement. He further emphasized that the GCI would not deal with trade issues, that it "would be all antitrust, all the time."

83. *Id.*

84. *Id.*

85. Spencer Webber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U.L. REV. 343, 384-85, (1997). Waller says the Soviet Union and the nations that were a part of the Soviet empire are unlikely to accept the prospects of competition policy being regulated by a single global body.

86. *Id.* at 384.

87. James, *supra* note 13.

88. Fox, *supra* note 7.

89. *Id.* at 665.

90. *Id.* at 677.

resolution is part of the agreement.⁹¹ However, even Fox agrees that there is a need for some type of protocol to deal with the problem of one nation prohibiting a merger and another nation approving the same merger.⁹² Probably Fox's strongest argument for leaving antitrust issues outside the WTO, is that the WTO does not have the ability to handle antitrust and other trade issues that require its immediate attention.⁹³ Other interested parties have also argued that the WTO lacks institutional experience in antitrust and therefore should not be used for settling disputes over anti-competitive practices.⁹⁴

However, Professor Guzman, argues that the WTO is precisely the place where international antitrust policy ought to lie.⁹⁵ He argues that the history of the WTO's experience with intellectual property (IP) demonstrates that it is the best place for international antitrust policy development and implementation.⁹⁶ He notes that international cooperation on intellectual property was not achieved until the negotiations were incorporated in the WTO.⁹⁷ However, as Guzman himself points out, before IP was incorporated into the WTO, most countries had already agreed upon the minimum standards of IP protection, harmonized the registering process of IP, and incorporated laws prohibiting discrimination against foreign holders of IP rights.⁹⁸ International antitrust policy is nowhere near the level of harmonization that was reached by IP before its incorporation into the WTO.⁹⁹ Therefore it is unlikely that antitrust policy can be replicated in the WTO in the same manner in which IP was successfully incorporated in the WTO until significant progress occurs on international antitrust harmonization and enforcement.¹⁰⁰

Among government, business, and academia the only consensus that has emerged over international antitrust policy is that there should be a

91. *Id.*

92. Eleanor M. Fox, *Extraterritoriality, and the Merger Law: Can All Nations Rule the World?*, Antitrust Report 2, Dec. 1999, at 7. Fox says that in the absence of a formal protocol for resolving clashes over the approval by one nation of a merger and the prohibition by another, the more restrictive nation will always win. She suggests development of rules of priority in deciding to enjoin or not to enjoin an international merger based on the net benefits to world wide competition as opposed to the benefits within the borders of a country.

93. *Id.* at 677.

94. Barbara Casassus, *The Interface Between Trade and Competition Policy*, April 22, 1998, at 3.

95. Andrew T. Guzman, *International Antitrust and WTO: The Lesson from Intellectual Property*, April 22, 1998, at 3.

96. *Id.* at 30.

97. *Id.* at 31.

98. *Id.* at 18-19.

99. James, *supra* note 13 at 6.

100. Joseph P. Griffin, *What Business People Want From A World Antitrust Code*, 34 NEW ENG. L.J. 1-40 (1999).

harmonization of the world's competition policy.¹⁰¹ Business leaders have also expressed the importance of legal certainty, speed in approving transactions, and the need for some kind of international mechanism to control discretionary application of the antitrust policies.¹⁰² Thus, it does not seem farfetched that someday multinational firms will eventually find it in their best interest to have one set of antitrust polices internationally, and one body in which to litigate and settle disputes.¹⁰³

As seen in the GE merger, it would have been desirable to have a Supranational body to mitigate a decision based on national interest.¹⁰⁴ The assumption by proponents of a Supranational body for the harmonization and enforcement of international antitrust laws is that it will make decisions and enforce those decisions based on the law and not national interest.¹⁰⁵ Thus, it would seem incumbent upon America to use the new forum she has initiated to not only harmonize the antitrust competition rules but to develop a mechanism for a binding dispute resolution system within the GCI.

The United States GCI antitrust initiative should prevail over the WTO alternative because the GCI forum can devote its energy exclusively to antitrust and therefore should be better at dealing with antitrust problems than the WTO forum which by definition must view antitrust as a secondary issue within its primary focus of trade issues. The single focus of the GCI should allow the nations of the world to more effectively work toward harmonization, and to work on a binding dispute resolution system that is acceptable to all, because the participants attention will not be distracted by other issues as it would be in the WTO. At present, the United States only plans to use the GCI to harmonize international antitrust policy, but an international antitrust body that is successful at harmonizing international antitrust policy would still be ineffective without a binding dispute resolution mechanism.¹⁰⁶ At some point, the GCI will work toward incorporating a binding dispute resolution system into the forum if the GCI is to be fully successful.

If the United States is successful at implementing the GCI forum, it has the potential to mitigate the momentum already built by the EU to have the WTO designated as the body for the harmonization and enforcement of international antitrust policy. As well as placing America squarely in the forefront of shaping, and determining who and where that international antitrust body will be.

101. Casassus, *supra* note 94 at 1.

102. *Id.*

103. Griffin, *supra* note 100.

104. Peck, *supra* note 57.

105. Ernst-Ulrich Petersmann, INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 64-65 (1997).

106. *Id.*; see also Fox, *supra* note 7 and Peck, *supra* note 104.

VI. CONCLUSION

The GE merger shows that bilateral agreements do not work when national interests are involved. There is a need to develop internationally a core set of antitrust codes, and to develop a binding dispute resolution system to enforce those codes and to mitigate the impact of national interest on antitrust decisions. America has the opportunity to develop its GCI initiative as the international forum through which harmonization and enforcement can occur. However, America must not only take up the harmonization of antitrust policy in the GCI forum but must also be willing to develop a binding dispute resolution system within the GCI forum for it to be an effective instrument of international antitrust policy.

Business wants one stop shopping when it comes to international antitrust policy. Thus, it seems a certainty that sometime in the future multinational firms will begin to push for the implementation of a supranational body where they can litigate and settle antitrust disputes crossing national boundaries. Therefore, it seems only prudent for the United States to have an alternative developed and modeled along lines it can accept. The GCI forum can be that alternative.