Recent Developments


In recent years, the United States has become a vocal opponent of the global sex trade and has taken active measures to curb human trafficking. This advocacy has manifested itself in speeches before the United Nations, direct diplomacy, and most curiously, in a provision of the 2003 Global AIDS Act requiring that organizations receiving AIDS funding from the U.S. government adopt a policy explicitly opposing prostitution and sex trafficking. On its face, this policy would seem unobjectionable. Yet it has drawn the ire of many groups opposed to the sex trade, resulting, most recently, in the filing of First Amendment challenges to the Act by two prominent development organizations: DKT International and the Alliance for an Open Society International (AOSI). This Recent Development unpacks these lawsuits and the motivations behind them, arguing that they reveal a fundamental flaw in U.S. policy: the legislative provision designed to address the AIDS/sex trafficking nexus alienates the very organizations that are natural and necessary allies in combating the ills of, and interactions between, the AIDS epidemic and the sex trade.

The Global AIDS Act and the Anti-Prostitution Pledge: In 2003, Congress passed the Global AIDS Act, legislation intended to signal U.S. support for stopping the worldwide spread of HIV and AIDS. To this end, the legislation authorizes the disbursement of federal funds for U.S. and foreign organizations committed to fighting the disease. As a caveat, however, the legislation includes a mandate that “no funds made available to carry out the Act . . . be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking.” This mandate has come to be known as the pledge requirement. Initially, the Department of Justice (DOJ) said that the pledge requirement could not be applied against U.S. organizations due to First Amendment concerns. However, in September 2004, the DOJ reversed its opinion, spurring the DKT and AOSI suits.

Pending Legal Challenges to the Pledge: On August 11, 2005, DKT International filed a lawsuit in the U.S. District Court for the District of

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2. 22 U.S.C.A. § 7631(f) (2003). The Act also includes a government funds restriction, stipulating that “[n]o funds made available to carry out the Act, or any amendment made by the Act, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.” 22 U.S.C.A. § 7631(e) (2003). Section 7631(e) also stipulates that the Act does not “prohibit the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.” Notably, however, the legislation is mute on whether interactions with sex workers that do not fall under these explicit exceptions might be construed as promoting or advocating prostitution.
Columbia challenging the constitutionality of the pledge requirement. The organization contends that the pledge requirement compels speech in contravention of the First Amendment. On September 23, 2005 a similar complaint was filed by AOSI and the Open Society Institute (OSI) in the U.S. District Court for the Southern District of New York.

The Plaintiffs have a sound basis for their First Amendment challenge, as a line of Supreme Court cases supports the contention that the government violates the First Amendment when it compels an organization to articulate a particular viewpoint as a condition of government funding. However, the compelled speech cases the plaintiffs rely upon offer more than a framework for analyzing the likelihood that their lawsuits will succeed on the merits, for the DKT and AOSI lawsuits differ from the compelled speech cases in a fundamental way.

In each of the cited compelled speech cases, the plaintiffs were ideologically opposed to the policy that they challenged. In contrast, DKT and AOSI are the government's natural allies in fighting the spread of HIV/AIDS and the exploitation of women. DKT International is a non-profit organization based in Washington, D.C., managing contraceptive social marketing programs for family planning and AIDS prevention in eleven countries in Africa, Asia, and Latin America. AOSI is a non-profit organization established by OSI, the principal U.S. foundation of the philanthropist George Soros. As part of their mission, both AOSI and OSI are "committed to using their private funding to facilitate discussion among public health experts, doctors, social service providers, advocates, government officials and others regarding the most effective ways to fight the spread of the [AIDS] epidemic in the populations at the highest risk for contracting HIV/AIDS." Thus, both DKT and AOSI/OSI share the government’s mission of fighting HIV/AIDS.

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5. See, e.g., Legal Serv. Corp. v. Velazquez, 531 U.S. 533 (2001) (challenging a policy denying funding to legal services organizations that represented clients who sought to change welfare policies; plaintiffs were lawyers employed by grantees wishing to represent such clients); Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000) (challenging a mandatory student activity fee; plaintiffs were students opposed to the policies of some of the funded groups); Rust v. Sullivan, 500 U.S. 173 (1991) (challenging a U.S. Department of Health and Human Services regulation denying Title X funds to programs that used abortion as a method of family planning; plaintiffs were Title X grantees and doctors desiring to counsel patients about abortion); Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1 (1986) (challenging an order by the Public Utilities Commission requiring utilities to place the newsletter of a third party in its billing envelopes; plaintiff was a utility who disagreed with the content of the newsletter); Wooley v. Maynard, 430 U.S. 705 (1977) (challenging a New Hampshire statute making it a crime to obscure the words live free or die on a license plate; plaintiffs had covered the motto because they found it repugnant to their moral and/or religious beliefs); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (challenging a West Virginia regulation requiring all students to salute the flag; plaintiffs were Jehovah's Witnesses whose religion compels them not to salute the flag).


Likewise, neither DKT nor AOSI/OSI advocates prostitution or sex trafficking. Instead, DKT and AOSI/OSI oppose the pledge requirement for more nuanced policy reasons.

DKT has no policy on prostitution and does not wish to adopt one. . . . [A]s an organization working to prevent the spread of HIV/AIDS, it strongly believes it can best do that in the many countries in which it works by maintaining neutrality on the controversial question of how to handle the complex problems that arise at the intersection of the HIV/AIDS epidemic and prostitution. 8

In contrast, AOSI and OSI openly acknowledge the “harms that sex work inflicts both on the individuals directly involved and to others in various ways.” 9 However, like DKT, they too wish to maintain an official position of neutrality. “Both AOSI and OSI have, as their principles of governance, an adherence to the principles of an open society, including opposition to adopting any policy positions that would lead to the stigmatization of socially marginalized groups. [They believe that] [a]dopting a policy opposing sex work violates this principle.” 10 Further, the organizations contend that “in order to stop the [AIDS] epidemic among sex workers it is necessary to approach sex workers and other people at high risk for becoming infected with HIV in a non-judgmental manner, in order to establish a trusting relationship with them and engage them in needed HIV prevention efforts.” 11 This approach, they argue, is incompatible with an explicit, categorical policy that they “oppose prostitution.” 12

It is evident, therefore, that DKT and AOSI/OSI are not opposed to the Act’s broad statutory purpose: fighting the spread of HIV/AIDS. Nor can they be called proponents of prostitution and sex trafficking. Indeed, their complaints evince a real concern for the ways that the AIDS epidemic may be exacerbated by these practices and a desire to combat the disease in a manner that recognizes the intersection between HIV/AIDS, the sex trade, and sex work. Instead, DKT and AOSI/OSI’s opposition to the Global AIDS Act lies exclusively with the pledge requirement.

What the DKT and AOSI/OSI lawsuits reveal, therefore, is not simply a government policy that may violate the Constitution, but also a policy that is arguably inimical to its own stated goals. The pledge requirement alienates the very organizations that would be the government’s natural partners in the fight against HIV/AIDS and, in particular, those organizations that may be best equipped to address the HIV/AIDS epidemic at the crossroads of the sex trade.

A Policy Critique of the Global AIDS Act: To date, critics of the Global AIDS Act have lodged two sorts of complaints: counter-productivity complaints and constitutional complaints.

9. AOSI Complaint, supra note 7, ¶ 34.
10. Id. ¶ 36.
11. Id. ¶ 42.
12. Id. ¶ 47-48.
On the one hand, public health experts who support the DKT and AOSI lawsuits have argued that the pledge requirement and the government funds restriction are counterproductive to the government’s goal of combating HIV/AIDS.13 These critics point to research indicating that: (1) rates of infection and transmission of HIV/AIDS are particularly high among sex workers and (2) curbing rates of infection and transmission is best accomplished by engaging with sex workers rather than condemning them. Thus, this critique contends that preventing government funds from being used to advocate for the legalization of prostitution and requiring organizations to pledge their opposition to prostitution undermines the fight against HIV/AIDS.

On the other hand, the legal academics behind the DKT and AOSI/OSI lawsuits have lodged constitutional complaints against the Act, claiming, as outlined above, that it violates the First Amendment. This critique strikes at the Act’s constitutionality, but not at its efficacy as means of fighting HIV/AIDS.

The first critique highlights the fact that, as a matter of methodology, the pledge requirement and government funds restriction may undermine the broad statutory purpose of the Act: fighting HIV/AIDS. The second highlights the fact that the pledge requirement may be unconstitutional. The critique I add is distinguishable from both and is one of political process: whether opposing prostitution is a best practice in the fight against AIDS, and whether the pledge requirement is constitutional, the mere existence of the pledge requirement alienates organizations that would otherwise be natural allies in the implementation of the Act.14 By foisting a policy position—opposition of prostitution—on groups that wish to remain neutral on the issue, the government takes groups that are not proponents of ideas that the government finds abhorrent—i.e., who do not themselves wish to promote prostitution—and turns them against a policy that they could be instrumental in enacting.

The risk of losing important partners in the fight against AIDS is real. In February 2005, thirteen charitable organizations—including such well-known groups as the International Rescue Committee, Save the Children, and Care—issued a critique of the pledge requirement, saying that it “greatly undermines” AIDS prevention efforts.15 In May 2005, Brazil turned down approximately $40 million in USAID funds because it refused to sign the anti-

13. See Brennan Center Pledge Website, supra note 4 (containing declarations in support of DKT and AOSI).
14. It is also noteworthy that each of these critiques is interrelated. DKT and AOSI/OSI know that reputable scientific evidence indicates that engaging with sex workers is essential to combating HIV/AIDS and that condemning prostitution may be counterproductive to a strategy of engagement. Indeed, their awareness of the counter-productivity critique informs and motivates their constitutional challenge, and this challenge is what turns them from being allies to enemies in the government’s fight against HIV/AIDS.
prostitution pledge.\textsuperscript{16} That one of the most influential states in the developing world and several of the world's most well-respected development organizations would turn against this policy is a clear indication that the pledge requirement threatens our nation's ability to retain allies in the war on AIDS.

\textbf{Policy Suggestions:} In order to respond to the criticisms outlined above, the United States must rethink its approach to dealing with the problems presented by sex trafficking and prostitution in the context of the AIDS epidemic. First, the pledge requirement should be excised from the Global AIDS Act regardless of whether it is found to be unconstitutional. While the current policy alienates ally organizations, allowing organizations to remain neutral on the issue of prostitution will help the United States retain critical allies in the fight against AIDS.

More broadly, the United States should adopt a policy that punishes those who promote prostitution and sex trafficking, rather than those who provide services to victims. In this vein, Congress should modify the Act so that it denies funding to the former type of organization, rather than the latter. Further, the government should increase the costs of participating in the sex trade, both by more actively enforcing U.S. statutes that criminalize sex trafficking and by assisting foreign governments in prosecuting sex traffickers on their own territory. Finally, the United States should more actively promote female education and empowerment abroad, as the ills of prostitution and sex trafficking will be eliminated not when all U.S.-funded aid groups sign an anti-prostitution pledge, but rather when the women of the developing world have viable options outside of the sex trade.

A policy along these lines will be punitive towards the true enemies of the U.S. government, not towards its crucial allies in the fight against prostitution, sex trafficking, and HIV/AIDS.

Bridging the Divide? The European Court of First Instance Judgment in GE/Honeywell. By George Stephanov Georgiev.

Commentators on both sides of the Atlantic were stunned when on July 3, 2001, the European Commission blocked the proposed merger between General Electric (GE) and Honeywell. The transaction—the largest industrial merger to date—had received speedy approval from the Antitrust Division of the U.S. Department of Justice (DOJ), and its rejection marked the first time the European regulatory body enjoined a U.S. merger despite U.S. approval. The GE/Honeywell case brought into sharp focus the differences between the antitrust laws of the two jurisdictions and called into question the effectiveness of the transatlantic coordination efforts of the 1990s.

Both companies filed an action for annulment of the Commission's decision before the European Court of First Instance (CFI). On December 14, 2005, it delivered a judgment upholding the prohibition of the merger, while also finding that parts of the Commission's analysis contained "manifest error[s] of assessment." This Recent Development examines the GE/Honeywell judgment and evaluates its impact on European competition law and on the alleged divide between U.S. and EU antitrust enforcement.

The 2001 Prohibition Decision: The Commission's reasoning was largely based on three types of anticompetitive effects of the proposed merger: horizontal, vertical, and conglomerate. A major concern was the combination of GE's financial strength and the vertical integration of its aircraft purchasing, financing, leasing, and engine production businesses with Honeywell's leading position as a producer of corporate jet engines, avionics, and non-avionics products.

After examining the horizontal overlaps, the Commission found that the merger would strengthen GE's dominant position in the market for jet engines for large commercial aircraft, and would lead to the creation of a dominant position in the markets for corporate jet aircraft engines and for small marine gas turbines. Furthermore, the Commission found that the merger would lead to vertical integration in a number of markets, including those for avionics and...

2. Other high-stakes transactions in which the European Commission intervened include the 2000 MCI-WorldCom/Sprint proposed merger (the Commission adopted a pro forma prohibition decision even though the companies had withdrawn their intention to merge; the DOJ also objected to the transaction) and the 1997 Boeing/McDonnell Douglas merger (approved by the Commission but only after the imposition of stringent behavioral remedies). See generally Barbara C. George et al., Increasing Extraterritorial Intrusion of European Union Authority into U.S. Business Mergers and Competition Practices, 19 CONN. J. INT'L L. 571 (2004).
3. Case T-210/01, Gen. Elec. v. Comm’n, available at http://curia.eu.int/ (case not yet reported) [hereinafter GE/Honeywell judgment]. The CFI also announced a judgment in the separate appeal launched by Honeywell (Case T-209/01), which was dismissed on largely technical grounds.
4. Id. ¶¶ 312, 364, 426, 473.
non-avionics products, engine starters, and power components, leading to anticompetitive exclusionary effects on other firms.\footnote{Id. \textsuperscript{347-48}, 419-27, 478-84.}

The most controversial aspect of the Commission's decision was its extensive reliance on conglomerate effects theories, which generally posit that a merger between firms that are not direct competitors and do not have customer-supplier relationships could still be anticompetitive. The Commission alleged that GE could leverage the strong supplier and buyer relationships of its subsidiaries, GE Capital and GE Capital Aviation Services, to attain a dominant position in the markets for avionics and non-avionics products manufactured by Honeywell. Furthermore, the Commission alleged that the combined entity would engage in bundling, offering lower prices for bundled products and higher prices for stand-alone products, and would thereby extend its dominant position across new markets and force out competitors.\footnote{Id. \textsuperscript{342-458.}} The Commission's analysis of these points was detailed and highly technical, but it generated much criticism because Chicago School economic analysis has called into question the validity of conglomerate theories and led to much disagreement among scholars.\footnote{Eleanor Fox, \textit{U.S. and European Merger Policy---Fault Lines and Bridges: Mergers That Create Incentives for Exclusionary Practices}, 10 GEO. MASON L. REV. 471, 475 n.23 (2002).}


The Commission's analysis in \textit{GE/Honeywell} and the outcome of the case illuminated many of the differences between U.S. and EU antitrust laws that had previously been underappreciated. As presciently noted by Professor Eleanor Fox, the differences in the relevant statutes and the development of the case law have led to four broad "fault lines" between Washington and Brussels: (1) different notions of what constitutes "harm to competition," (2) different burdens of proof in making or defending a case, (3) different triggering points for government intervention in markets, and (4) different presumptions about firm behavior.\footnote{Fox, supra note 9, at 474-75.} Each of these "fault lines" was exposed in this merger review. While the DOJ approved the merger largely because of its promise to deliver lower prices to consumers in the short run, the European Commission feared the "distortion of competition," whereby a dominant firm might use market power to harm consumers in the long run. Moreover, once the Commission showed that a distortion of competition could result, the burden of justification fell upon GE and Honeywell. After they failed to offer sufficient divestiture commitments, the Commission was able to enjoin the
merger without seeking court approval. In contrast, if the DOJ had wanted to block the merger, it would have had to persuade a court that the transaction would be anticompetitive.

Indicative of the different standards of proof, the Commission blocked the merger because it concluded, on examining a "balance of probabilities," that it was more likely than not to be anticompetitive.\textsuperscript{14} The U.S. analysis, on the other hand, was restrained by the American preference for non-intervention in markets and the general assumption that when a merger itself is not price-raising, its prohibition will be.\textsuperscript{15} Finally, U.S. regulators concluded that the efficiencies realized through the vertical integration of GE and Honeywell would cause their competitors to become more efficient in turn (or be replaced by new market entrants), while the Commission’s analysis of vertical effects expressed a concern about competitors being driven out of markets, to the detriment of competition.

\textbf{The CFI Judgment:} The appellate judgment, delivered on December 14, 2005, upheld the prohibition decision, but disagreed with the Commission’s analysis in several respects, and, incidentally, moved EU merger law somewhat closer to that of the United States. The lengthy ruling consisted of 735 numbered paragraphs and was issued by an extended five-judge panel.\textsuperscript{16} The court agreed with the Commission’s analysis of the merger’s anticompetitive horizontal effects on the three markets discussed above\textsuperscript{17} and concluded under the “independent pillars” theory that this was sufficient for upholding the prohibition decision.\textsuperscript{18} Significant for EU competition law, the CFI held that the analysis of the competitive landscape in markets, and hence the finding of firm dominance, is “part of a complex economic assessment” to be performed by the Commission and is entitled to deference.\textsuperscript{19}

The CFI delivered a mixed verdict on the Commission’s analysis of vertical effects. Many findings were endorsed, but the Commission was admonished for not considering the deterrent effect of Article 82 EC, concerning abuse of dominant position. The CFI noted that because foreclosure through vertical integration could amount to an illegal abuse of dominance, the new entity would have a strong disincentive to engage in it,

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\textsuperscript{14} In the aftermath of Tetra Laval, discussed infra, this standard of proof is hotly debated. The Commission has maintained, and the European Court of Justice (ECJ) appears to have agreed, that there is a symmetry between the standards for prohibiting and clearing a merger so that there is no presumption that a given merger is or is not anti-competitive; and that consequently there is not a presumption in favor of a “right to merge.” See Götz Drauz, Conglomerate and Vertical Mergers in Light of the Tetra Judgment, EC COMPETITION POL’Y NEWSL., Summer 2005, at 35; see also Peter Oliver, The Standard of Review of Commission Merger Decisions: Life After Tetra Laval, in LIBER AMICORUM IN HONOUR OF SVEN NORBERG (Martin Johansson et al. eds., forthcoming 2006).

\textsuperscript{15} Fox, supra note 9, at 475.

\textsuperscript{16} The CFI judgment would be final in this case, since neither party exercised the right to lodge an appeal before the ECJ within sixty days.


\textsuperscript{18} Id. ¶ 42-43. Under this theory, the appellant cannot prevail unless it brings an effective challenge against each of the grounds for the Commission’s decision.

\textsuperscript{19} Id. ¶ 253.
and this should have been considered. In so holding, the CFI echoed its 2002 judgment in the consequential Tetra Laval case.

The rejection of conglomerate effects theories dealt the most serious blow to the Commission’s analysis and will mark GE/Honeywell’s significance for EU competition law. Again relying in part on Tetra Laval, the CFI held that the Commission had not established through “convincing evidence” that the new entity would engage in exclusionary “bundling” and “leveraging,” or even that it would have an economic incentive to do so. The court added that past commercial strategies cannot serve as the sole evidence of prospective intent and that the Commission could have supported its claim by finding internal documents “attesting to the settled intention” of GE to engage in anticompetitive practices post-merger, or an economic assessment showing that such behavior would have been in the company’s commercial interests. This new standard does not preclude future reliance on conglomerate effects, but the strength of the evidence now required to prove such effects makes it less likely that the theory could be employed and defended.

A Look to the Future: Even though the CFI upheld the Commission’s decision and reconfirmed that EU and U.S. antitrust laws can lead to conflicting outcomes in large merger cases, GE/Honeywell might nevertheless remain the sole instance of transatlantic antitrust divergence for some time to come. Developments since 2001, some political but most institutional, have made it unlikely that a similar case will follow in the near future. On the political front, vocal criticisms of the decision have had a sobering effect on officials in both jurisdictions and have led them to intensify coordination efforts and place greater emphasis on negative comity. For example, in 2004 the Commission exercised strong restraint and did not enjoin Oracle’s

20. Id. ¶ 302-14.
21. Case T-5/02, Tetra Laval v. Comm’n, 2002 E.C.R. II-4381. The CFI found that the Commission had erroneously enjoined the merger between Tetra Laval and Sidel because it had not proven that the new entity would in fact act in an anticompetitive manner, even if it had the ability to do so. The Commission cleared the merger and simultaneously appealed to the ECJ, which in 2005 affirmed the CFI’s judgment. See Case C-12/03P, Comm’n v. Tetra Laval (Feb. 15, 2005) (not yet reported).
23. Id. ¶ 333.
26. In this context, the principle of negative comity usually requires one party to refrain from enforcing its competition laws where such enforcement would unduly interfere with the legitimate sovereign interests of another party. (It differs from positive comity which allows one jurisdiction to request enforcement by the authorities of another.) The notion of negative comity is codified in Article VI of the EC-U.S. Agreement on the Application of Their Competition Laws, 30 I.L.M. 1487, 1498-1500 (1991).
acquisition of PeopleSoft, even though the DOJ had concluded that the merger was anticompetitive and had tried (unsuccessfully) to block it in a U.S. district court.

More important, however, a number of judicial and institutional changes have occurred since the Commission’s decision in GE/Honeywell. The 2002 CFI judgments against the Commission in Airtours, Schneider, and Tetra Laval substantially raised the evidentiary standards for enjoining a merger. The Commission has also completed the long-planned “modernization” of its antitrust enforcement, aimed at introducing stronger procedural guarantees and legal certainty. The modernization program included a New Merger Regulation, an accompanying Implementing Regulation, the Commission’s first Horizontal Merger Guidelines (akin to U.S. Guidelines in existence since 1982), and a document on Best Practices in the Conduct of Merger Control Proceedings. Guidelines for vertical mergers are currently under preparation, and comments are being solicited on a Staff Discussion Paper on the application of Article 82, with a view towards placing greater emphasis on economic effects in the assessment of anticompetitive behavior.

Furthermore, the recent reorganization of the Competition Directorate has introduced several internal check mechanisms. Special “scrutiny panels” now vet all sensitive merger cases and a newly-appointed Chief Economist, with a dedicated and independent team, consults on all cases. The specialized Merger Taskforce of the GE/Honeywell era has been disbanded and integrated into industry-specific directorates, and the role of the Hearing Officers, charged with guaranteeing the procedural rights of parties under investigation, has been strengthened. Each of these developments contributes to greater certainty and, for the most part, greater convergence with U.S. antitrust enforcement practices.

Conclusion: The main significance of the CFI’s judgment in GE/Honeywell is its simultaneous affirmation of the Commission’s prohibition decision and its clarification of the treatment of conglomerate mergers. By ruling that the Commission must prove through “convincing evidence” that the new entity would engage in exclusionary practices due to conglomerate effects, the CFI made it extremely difficult for such mergers to

28. United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004). The U.S. district court’s ruling against the DOJ was probably one significant factor in the Commission’s decision not to enjoin the transaction in the EU. In global merger cases, therefore, it might be preferable to have two effective antitrust agencies seeking enforcement independently, rather than sharing the burden informally. For one commentator’s analysis, see Eleanor M. Fox, Remedies and the Courage of Convictions in a Globalized World: How Globalization Corrupts Relief, 80 Tul. L. Rev. 571 (2005).
32. For speculation about the impact of procedures at the Competition Directorate in 2001 on the outcome of GE/Honeywell, see Donna E. Patterson & Carl Shapiro, Transatlantic Divergence in GE/Honeywell: Causes and Lessons, ANTITRUST, Fall 2001, at 18.
be blocked in the future. To the extent that conglomerate mergers are generally not considered in violation of U.S. antitrust laws, this leads to substantive convergence and helps to bridge the EU-U.S. antitrust divide.

Although convergence is helpful, harmonization should not become an end in itself and should not occur at the expense of effective antitrust enforcement in difficult cases. Transactions should be evaluated according to the applicable antitrust laws, and merger clearance should not become yet another tool of transatlantic economic diplomacy. The four underlying differences between the competition laws of the two jurisdictions, discussed above, remain largely in force. Recent decisions outside the merger area confirm that different outcomes, whether or not acknowledged, will continue to occur. In view of the politically charged nature of transnational antitrust enforcement, the bigger lesson of GE/Honeywell is that future clashes should be managed so that the discussion focuses on substance and moves beyond unhelpful and oversimplified characterizations painting U.S. law as protecting consumers and EU law as protecting only competitors.

33. For example, in the area of incentive agreements and fidelity rebates, compare the Second Circuit's opinion in Virgin Atlantic v. British Airways, 257 F.3d 256 (2d Cir. 2001) (finding no antitrust violation), with the CFI's judgment in British Airways v. Comm'n, Case T-219/99, 2003 E.C.R. II-5917 (holding that the same fidelity rebates are illegal). The ongoing EU case against Microsoft, Case COMP/37.792, is another example.
Israel's Legal Obligations to Gaza After the Pullout. By Nicholas Stephanopoulous.

The weeks leading up to September 12, 2005 were among the most dramatic in the history of the Israeli-Palestinian conflict. After thirty-eight years of occupation, thousands of Israeli settlers vacated the Gaza Strip, some of them forcibly. Israel also withdrew all troops from Gaza, prompting a “carnival of celebration” among the Palestinians who now would be responsible for governing the territory.¹

But while Israel is no longer responsible for the day-to-day administration of Gaza, it retains a good deal of control over the territory. The flow of people and goods into and out of Gaza is supervised by Israel, even along the Gaza-Egypt border.² Israel also controls the airspace above the territory, patrols Gaza’s coastline, bans the building of an airport or seaport, collects customs for the territory, and maintains a population registry for all of Gaza’s residents.³ Most intrusively, the Israeli military creates sonic booms in the skies above Gaza, fires artillery at targets in northern Gaza, and carries out targeted assassinations throughout the territory.⁴

This set of facts—with no Israeli soldiers on Gaza soil but other means of control remaining in place—generates an interesting and important legal question: What exactly are Israel’s obligations to Gaza in the wake of the withdrawal of all Israeli settlers and troops? Israel has argued that thanks to its pullout, it is no longer the occupying power in Gaza and thus has no legal duties whatever.⁵ This Recent Development contends, to the contrary, that Israel still occupies Gaza for two reasons: first, because it retains effective control over the territory, and second, because agreements between Israel and the Palestinian Authority (PA) prohibit unilateral changes to the legal status of Gaza and the West Bank. Moreover, even if Gaza is no longer considered to be occupied, Israel continues to bear legal obligations to the territory under both international law and the Israel-PA accords.

The international law of occupation is set out in the 1907 Hague Convention on the Laws of War (Hague Convention) and the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War

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³ See id.
⁴ See, e.g., Greg Myre, Israelis’ Airstrikes Hit Gaza After Hamas Fires Rockets, N.Y. TIMES, Sept. 25, 2005, at § 1, 8.
⁵ See Ariel Sharon, Address to United Nations General Assembly (Sept. 15, 2005), available at http://www.mfa.gov.il/MFA/Peace+Process/Key+Speeches/PM+Sharon+addresses+the+UN+General+Assembly+15-Sep-2005.htm (referring to “[t]he end of Israeli control over and responsibility for the Gaza Strip”); Greg Myre, As Israelis Pull Out, the Question Lingers: Who’ll Control Gaza?, N.Y. TIMES, Sept. 11, 2005, at § 1, 8 (quoting Daniel Taub, deputy legal adviser in Israel’s Foreign Ministry) (“The dismantling of the Israeli military government brings to an end Israeli authority over the area and transfers its responsibility to the Palestinians.”).

By “legal duties” I am referring only to the customary responsibilities of a government for the territory it administers. Even after the withdrawal, Israel does not argue that it is immune from all legal actions initiated by Palestinians (e.g. tort or contract claims).
(Fourth Geneva Convention). According to the Hague Convention, "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army," and "[t]he occupation extends only to the territory where such authority has been established and can be exercised." According to the Fourth Geneva Convention, occupation is linked "to the extent that [a] Power exercises the functions of government in [the allegedly occupied] territory." If a territory is found to be occupied, then a host of responsibilities accrue to the occupying power, for instance, running schools, providing food and medical supplies, and "ensur[ing], as far as possible, public order and safety."

The status of Gaza after the Israeli withdrawal is open to some debate under the Hague Convention's definition of occupation. On the one hand, the lack of Israeli ground troops in Gaza suggests that the territory is no longer "under the authority of the hostile army." More persuasively, however, Israel's continuing military incursions and control of Gaza's borders indicate that Israel is still exerting authority over the territory. Boots on the ground are often a reasonable proxy for authority over a territory, but nothing in the Hague Convention makes them a prerequisite for a finding of occupation.

The legal relationship under the Fourth Geneva Convention is clearer still. Israel continues to carry out several core functions of government in Gaza—for example, managing internal and external security, regulating the flow of people and goods, collecting customs, etc.—and is to that extent still an occupying power. Israel may have fewer obligations to Gaza now that its troops and settlers have withdrawn, but it will not be completely free of responsibilities until it allows the PA to exercise full control over the territory.

Putting aside international law for the moment, there is a second reason why Gaza must still be regarded as occupied territory even after the Israeli pullout: the repeated pledges of both Israel and the PA not to alter unilaterally the legal status of Gaza or the West Bank. Several interim agreements

6. The Hague Convention is generally considered to have become customary international law. Israel is a signatory to the Fourth Geneva Convention, but there is some controversy over whether the treaty applies to the Israeli-Palestinian conflict. Israel claims that it does not, but the majority view is that it does. See David John Ball, *Toss the Travaux: Application of the Fourth Geneva Convention to the Middle East Conflict—A Modern (Re)assessment*, 79 N.Y.U. L. REV. 990, 1009 (2004).


11. The Nuremberg Tribunal after World War II notably took this position as well. See United States v. Wilhelm, in 11 *TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL ORDER NO. 10*, at 1230, 1243 (holding that Greece and Yugoslavia were occupied even though "the partisans were able to control sections of these countries at various times" because "it is established that the Germans could at any time they desired assume physical control of any part of the country").

12. Occupation is thus a binary concept under the Hague Convention, but a more multifaceted one under the Fourth Geneva Convention. Under the Hague Convention, a territory either is or is not occupied, while under the Fourth Convention, degrees of occupation exist depending on the extent to which the occupying power exercises functions of government.
between Israel and the PA contain the following language or a close variant: "Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations." Before Israel's withdrawal, there was little dispute that Gaza was occupied; a 2004 International Court of Justice advisory opinion even stated that Gaza and the West Bank "were occupied by Israel in 1967 during the armed conflict between Israel and Jordan," and that "[s]ubsequent events in these territories . . . have done nothing to alter the situation." Now that Israel has pulled out of Gaza, the territory must still be considered to be occupied or else Israel will have effected the unilateral change in status prohibited by the Israel-PA interim agreements. The Palestinians, of course, have not consented to any alteration of Gaza's legal status, and oppose any modifications to the status quo to which both sides have not agreed.

Israel might respond that the term "status" in the interim agreements does not refer to whether a territory is occupied under international humanitarian law, but rather only to whether a territory is formally under Israeli or Palestinian sovereignty. Alternatively, Israel might claim that the interim agreements sought only to ban self-serving unilateral shifts in status, i.e., the annexation of land by Israel or a declaration of independence by the PA. Both of these arguments are belied by the plain text of the agreements. On its face, "status" includes within its scope whether a territory is occupied, and does not hint at any asymmetry whereby certain changes in status would be acceptable but others would not be. Moreover, turning to the drafting history of the agreements, there is no evidence that Israel and the PA wished to exclude international humanitarian law from the definition of "status," or to establish an asymmetric policy on status change. As the weaker of the two parties, the PA in particular might have been expected to oppose any such asymmetry, in order to prevent precisely the situation that is now unfolding in Gaza—the unilateral imposition of terms by Israel.

Therefore, under both international law and the Israel-PA interim agreements, Gaza remains occupied territory in the wake of the Israeli withdrawal. But even if Gaza is not considered to be occupied, Israel continues to bear obligations to the territory pursuant to the same legal documents that support Gaza's post-pullout occupied status. First, the Fourth Geneva Convention imposes duties not only on occupying powers, but also on treaty signatories whenever they are involved in armed conflict. Article 2 states that "the present Convention shall apply to all cases of . . . armed conflict which may arise between two or more of the High Contracting Parties," and that even if "one of the Powers in conflict may not be a party to


14. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131, ¶ 78 (July 9) (hereinafter Wall Advisory Opinion). Israel, it should be noted, sometimes argues that Gaza and the West Bank are not occupied but rather disputed territories.
the present Convention, the Powers who are parties thereto shall “be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”

Both of these clauses indicate that Israel’s relations with Gaza are still governed by the Fourth Geneva Convention. “Armed conflict” continues in Gaza in the form of Israeli military incursions and Palestinian rocket attacks and suicide bombings. It is true that the PA is not—and, as an entity other than a sovereign state, could not be—a “High Contracting Party” to the Convention, but the Gaza conflict arose as a result of the 1967 war between Israel and Egypt, both of which are signatories. In addition, the PA officially “accepts and applies” the Fourth Geneva Convention, meaning that the treaty is applicable even if one ignores Egypt’s role in the hostilities. The obligations specified in the Convention for belligerents (as distinct from occupying powers) are laid out in Articles 13-46, and include allowing the free passage of food and medicine, permitting civilians to leave the zone of conflict, and avoiding unnecessary physical suffering among civilians.

Israel also retains legal duties to Gaza, even if the territory is no longer occupied, under the Israel-PA interim agreements. In those agreements, Israel vowed, inter alia, to facilitate the “normal and smooth movement of people, vehicles, and goods . . . between the West Bank and Gaza Strip,” to exercise its powers “with due regard to internationally-accepted norms and principles of human rights and the rule of law,” and to cooperate with the PA in dealing with areas such as agriculture, commerce, education, and employment. Crucially, none of these obligations hinges on whether Gaza is occupied. The assumption of both Israel and the PA in drafting the agreements was that “the West Bank and the Gaza Strip [are] a single territorial unit, the integrity and status of which will be preserved during the interim period.” The Israeli obligations denoted in the agreements will therefore remain in place until a permanent settlement regarding both Gaza and the West Bank is achieved. Nothing in the agreements’ texts suggests that the duties expire as soon as Israel withdraws its settlers and troops from a particular parcel of land.

To conclude, Israel has not yet succeeded in washing its hands of Gaza. Whether or not Gaza is regarded as occupied in the wake of the Israeli pullout, Israel continues to bear obligations to the territory under both international humanitarian law and the Israel-PA interim agreements.

Israelis may consider this situation to be a bit unfair. After all, the decision to withdraw from Gaza was a wrenching one for the country, and may have been expected to shift the legal landscape at least a little. But there is a common—and quite equitable—theme that underlies both the

15. Fourth Geneva Convention, supra note 8, art. 2.
18. Interim Agreement, supra note 13, art. 19.
20. Interim Agreement, supra note 13, art. 11.
international law of occupation and the Israel-PA accords: the notion that no party should profit from unilateral changes to the status quo. Under the Hague Convention and the Fourth Geneva Convention, nations incur the obligations of occupation whenever they engage in warfare beyond their borders, and can only shed these obligations if they halt the conflict, terminate military control over the conquered territory, and stop carrying out the functions of government in that zone. Under the Israel-PA interim agreements, similarly, both sides agreed to treat Gaza and the West Bank as a unified entity, and to make changes to the territories’ status only by mutual consent. Israel’s position that it no longer owes anything to Gaza, then, squarely violates this principle of not rewarding those who unilaterally shift the status quo. Politically, the withdrawal may yet prove to be a masterstroke. Legally, however, it has changed nothing.