

Chapter 6

PREPARING FOR THE FUTURE

As noted at the outset of this Report, the Advisory Committee was invited to think broadly and boldly about new tasks and concepts that the United States and the international community should consider in addressing competition issues that are emerging on the horizon of the globalizing world. This last chapter looks at four of these areas. First it examines the Advisory Committee's perceived need for additional multilateral initiatives to deal with competition policy matters that either transcend national boundaries or that would benefit from more international attention. Chapter 5 explained why this Advisory Committee does not see the World Trade Organization (WTO) as the natural home for international discourse on the full range of competition policy matters. Here, we propose an important additional approach, the "Global Competition Initiative," to create a home for addressing the entire global competition agenda. Second, and closely related to the proposal for a Global Competition Initiative, the chapter considers the need for an international mechanism that would allow countries to resolve disputes over competition policy short of entering into binding mediation.

Third, the chapter considers an emerging issue of growing importance, namely, the intersection of competition policy and electronic commerce. At the same time that the expansion of electronic commerce is creating competition in many new markets around the world, it may also be raising new problems of relevance to competition policy. This chapter considers the types of competition problems that might arise as a result of rapid technological change and cyberspace. This discussion is more advisory than conclusory. The discussion of e-commerce is raised not only for its singular features but also as an exemplar of developments on the horizon that implicate both competition policy and the global economy. A few years hence, the market may produce another innovation with global ramifications akin to the emergence of e-commerce.

Finally, the chapter considers the configuration of U.S. foreign economic policymaking itself and the role that competition policy perspectives can play in that process. This Advisory Committee believes that there is both a need and an opportunity for competition policy to play a greater role in U.S. foreign economic policy. To do that effectively, some adjustments in the current structure and approach are required.

EXPANDING THE DIALOGUE: A GLOBAL COMPETITION INITIATIVE

All of the Advisory Committee's work made clear that the global community is increasingly focusing on international global competition problems but is not yet locked into any particular or even any group of institutions for holding talks on competition policy matters. The Advisory Committee believes that

makes this an opportune time to consider the optimal approach for holding such consultations and moving ahead.

In the Advisory Committee's view, the United States and other nations should continue to use -- but not be limited to -- existing international organizations and venues such as the WTO, the Organization for Economic Cooperation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD), that have productive programs on competition policy under way. Indeed, the Advisory Committee recommends that the United States explore the scope for collaborations among interested governments and international organizations to create a *new* venue where government officials, as well as private firms, nongovernmental organizations (NGOs), and others can consult on matters of competition law and policy. The Advisory Committee calls this the "Global Competition Initiative."

As the Advisory Committee envisions it, the Global Competition Initiative should be inclusive in its membership, open to developed and developing nations, and comprehensive, or at least open to the possibility of breadth, in its coverage of issue areas; it should also allow room for the private sector, NGOs and other interested parties to play a role. The Initiative might take the form of a set of intergovernmental consultations akin to the meetings of the senior economics ministers of the Group of Seven nations, known as the G-7, but with less formality and perhaps more frequency of meetings. Annual or semi-annual meetings as part of the Global Competition Initiative could be devoted to opportunities for antitrust officials to exchange views and experiences on anticartel enforcement, merger review, enforcement cooperation, analytical tools, technical assistance and other issues related to antitrust enforcement. The G-7 is an attractive model in that it demonstrates that countries can create mechanisms to exchange views and attempt to develop consensus on economic issues without investing in a permanent staff (although support from international organizations and governments would be necessary). This concept is not intended to create a new and extensive bureaucracy. Instead, its central ambition is to permit interested nations to start a process that can build over time.

The important point is to provide a forum where governments that support such a Global Competition Initiative could meet to take up an agenda that covers the full range of competition policy matters of consequence to the global economy. A modest effort at creating a "virtual organization" with minimal dedicated staff, support by participating institutions and governments, and regular meetings can make a strong contribution to the development of a competition culture and sound antitrust enforcement. The following discussion elaborates further on the Advisory Committee's recommendation.

Why This Global Competition Initiative Is Needed and What It Would Do

All currently existing international forums that deal with competition policy matters have some inherent limitations. As discussed in Chapter 5, the WTO has an important role to play, but it also has limitations. Notably, the WTO is broadly inclusive in its membership, but it is centrally focused, and in the view of this Advisory Committee properly focused, on governmental restraints with trade effects. Yet not all competition policy problems are trade problems. Harmonization of procedural or substantive

features of merger notification and review and protocols to protect confidential information exchanged in the course of enforcement measures are broadly international, but they are not trade issues. Moreover, the traditional mandate of the WTO — negotiation of rules that are then subject to dispute settlement — may be inappropriate for competition issues, which instead need to be discussed broadly and in a consultative manner. Only a limited range of competition matters, if any, are likely to bear fruit in any organization that requires a binding commitment from nations. For all these reasons, it is not sufficient to consider new initiatives only at the WTO. Given the failure of the Seattle trade summit to reach agreement on an agenda for a new round of multilateral negotiations, it is also unclear how or whether competition policy will be considered by the WTO. Thus, for these and other reasons discussed in Chapter 5, adding the full competition policy agenda to the WTO may overburden it and, in the view of this Advisory Committee, is also seen as inappropriate.

The OECD for its part is a very important organization with respect to competition policy, but it too has limitations. The OECD has promoted international discussion of competition policy matters under its longstanding group, the Competition Law and Policy Committee (CLP,) as well as within a working group composed of members of this committee and the OECD's Trade Committee. These provide important venues for deliberations between competition authorities from the OECD's 29 member nations as well as between trade and competition authorities. The OECD has been the only international setting where governments have agreed on undertakings related to competition policy. It has also undertaken important analytical and policy-oriented studies of global competition problems. The CLP has worked particularly well as a forum for promoting soft convergence of competition policies among its members and for providing technical assistance to certain OECD observers and nonmembers. It has not, however, achieved much success in rulemaking or dispute settlement. Moreover, numerous jurisdictions that have competition laws or policies in place or that are considering the introduction of such policy measures are not members of the OECD. And the specialized needs of new competition regimes may not yet be fully integrated into the deliberations and analysis of the OECD.

To some extent, ad hoc initiatives of the sort envisioned by the Global Competition Initiative already do occur. For example, the U.S. Department of Justice recently hosted for the first time an international meeting of competition enforcement officials to discuss practical cartel enforcement matters, as discussed in Chapter 4. The German competition authority has also hosted several meetings of enforcement officials from around the world. Analogous initiatives are occurring in other areas. In 1998, for example, the OECD and the World Bank began a collaboration on corporate governance called the Global Corporate Governance Forum.¹ For its part the OECD developed a set of “best practices” principles on corporate governance, and now through the collaboration with the World Bank, the new initiative is sponsoring seminars, outreach, and many other consultative activities with governments and firms around the world.

¹ Details on this program are available at the Forum's website at: <www.gcgf.org>.

The logic behind this Advisory Committee's idea for a competition initiative stems in part from a recognition that countries may be prepared to cooperate in meaningful ways but are not necessarily prepared to be legally bound under international law. The Asia-Pacific Economic Cooperation forum (APEC) has been built on this recognition that "peer" pressure is capable of advancing some liberalization and harmonization of practices even without binding legal instruments. The proposed Global Competition Initiative is built on the premise that nations can usefully explore areas of cooperation in the field of competition policy and facilitate further convergence and harmonization. There may be areas where nations are prepared to develop binding agreements, and other areas where the development of nonbinding principles or consultations are more promising.

The reasons for undertaking such consultations will also differ from country to country. Officials from transition environments, for example, often remark that international agreements or consultations can be extremely important to "lock in" a reform agenda or secure added legitimacy for market-based reforms that face domestic opposition.² It is possible that an international initiative that explored the full range of competition law and policy matters could serve to reinforce the development of sound national competition regimes.

The Mission and Activities of the Initiative

The point of this proposed Global Competition Initiative would be to foster dialogue among officials along with broader communities to produce more convergence of law and analysis, common understandings and common culture. Areas for constructive dialogue might include further discussions among competition agencies to:

- C Multilateralize and deepen positive comity;
- C Agree upon the consensus disciplines identified in Chapter 2 regarding best practices for merger control laws and develop consensus principles akin to the recent OECD recommendation on hard-core cartels; consider and develop disciplines to define actions of governments; for example in areas with negative spillover potential such as export cartels, which require broader international cooperation and consultation;
- C Consider and review the scope of governmental exemptions and immunities that insulate markets from competition around the world (as discussed in Chapter 5);
- C Consider approaches to multinational merger control that aim to rationalize systems for antitrust merger notification and review (as discussed in Chapter 3);

² See e.g., Testimony of Anna Fornalczyk, President, Competition Development Center, Poland, ICPAC Hearings (Nov. 4, 1998), Hearings Transcript at 135-136; Testimony of Ana Julia Jatar, Senior Fellow, Inter-American Dialogue, ICPAC Hearings (Nov. 4, 1998), Hearings Transcript at 90.

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- C Consider frontier subjects that are quintessentially global such as e-commerce, which will create new challenges for policymakers around the world;
- C Undertake collaborative analysis of issues such as global cartels (discussed in Chapter 4) and market blocking private and government restraints (discussed in Chapter 5); and
- C Possibly undertake some dispute mediation and even technical assistance services.

As this list illustrates, the scope of the possible agenda for this Initiative is considerable; and the agenda would, of course, be driven by the interests of the participating governments. Some governments are likely to be interested in supporting the enforcement capabilities of national systems as well as fostering cooperation between authorities. Others may be interested in developing consensus on new areas where competition policy challenges are global and national responses are likely to be less than fully adequate.

Identification of this broad ambit of possible activities is not meant to suggest that such an Initiative needs to be born full blown with institutional features. Rather, it needs to grow naturally with the support of governments and international organizations, most critically, the WTO, the World Bank, the OECD and UNCTAD. Indeed, much of the analytical and deliberative dimensions outlined above build on approaches initiated at the OECD, which has established expertise and dedicated resources in many of the possible areas that could be considered by governments participating in the Initiative. As the corporate governance project described above indicates, such collaborations among government and international organizations do occur.

It is also important that a new international competition policy initiative not isolate competition officials from broader international trade and regulatory policy discussions. Indeed, the intended purpose here is to develop more coherence to competition policies around the world as well as to recognize even more fully the ways that private, governmental, and mixed governmental-private practices can affect national and international trade and economic well-being. Interaction with the WTO should be cooperative and reinforcing of shared objectives.³ In a word, these various activities under the rubric of a new Global Competition Initiative should be seen as an effort to help prepare the groundwork at the multilateral level for more effective national enforcement and greater international cooperation.

³ This proposal is not altogether the first of its kind. For example, a group of international competition experts argued for the establishment of a small autonomous international Competition Policy Unit, located near the WTO and interacting with it to promote contacts, monitor convergence, help formulate competition policies for countries that do not have them, provide ways and means to deal with global effects of anticompetitive practices of enterprises and, in due course, undertake active multilateral negotiations about possible convergence of international competition policy standards. See A. Jacquemin, P.J. Lloyd, P.K.M. Tharakan and J. Waelbroeck, *Competition Policy in an International Setting: The Way Ahead*, in 21 THE WORLD ECONOMY at 1179-1183 (1998).

INTERNATIONAL MEDIATION OF COMPETITION POLICY DISPUTES

In this Report, the Advisory Committee recommends against the development at this time of competition rules subject to dispute settlement procedures at the WTO. The Advisory Committee recognizes, however, that this position can leave some disputes, especially those surrounding perceived market access barriers stemming from some mix of private and governmental practices, without an established method of resolution. While extraterritorial antitrust enforcement can play a meaningful role to address some private anticompetitive practices abroad, litigating a particular case can often present insurmountable legal, practical, and political difficulties. Moreover, as described in Chapter 5, while bilateral agreements with positive comity are an important development, the use of this tool is still in its early stages. Even more complicated are those disputes that center on what the Advisory Committee has called mixed governmental-private practices and perceived nonenforcement of national competition laws. Thus, nations at odds about the spillover effects of practices occurring in one jurisdiction on others can be left without workable tools to address such problems. This is likely to be less true for powerful economies than for small ones, but to varying degrees it is still a problem for all nations.

Consequently, some consideration and experimentation with approaches is needed to provide options to resolve conflicts other than domestic litigation against a sovereign State, brinkmanship, or diplomatic negotiation. One possible approach is to create a mediation mechanism in which neutral parties can help the parties reach a settlement and where no party to a dispute enjoys any home-court advantage.⁴

Attempts thus far to develop a mediation or arbitration mechanism have been unsuccessful. A 1986 recommendation by the OECD Council attempted to establish procedural arrangements to avoid or minimize conflicts between trade and competition policies and provided an OECD consultation mechanism for parties in dispute. The Recommendation provides that “where the governments of the Member countries concerned agree, the consultations could be a matter for report and discussion within the Committee of Experts on Restrictive Business Practices, in close co-operation with the Trade Committee.”⁵ To date, however, the OECD mechanism has never been used. One potential stumbling block to its use may be the requirement that both parties to a dispute must agree to initiate the consultation process. There are a variety of reasons why either party to a dispute might wish to avoid mediation. The country where the problems are perceived to exist may not wish to submit itself to the judgment of a Committee of Experts. Similarly, the country that is making the complaint may be wary that the Committee of Experts might also consider the complainant’s domestic practices, perhaps at the instigation of the other party to

⁴ For a discussion of a similar concept, albeit with more legal formality than that envisioned by the Advisory Committee, see Andrea Giardina and Americo Beviglia Zampetti, *Settling Competition-Related Disputes: The Arbitration Alternative in the WTO Framework*, JOURNAL OF WORLD TRADE, December 1997.

⁵ Recommendation of the Council for Cooperation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies, October 23, 1986, C(86)65.

the dispute. Either party may feel that the process of mediation can become highly politicized and therefore not facilitate actual resolution of the conflict. Adversarial dispute settlement is also a bit at odds with the consensus-building orientation of the OECD. Whatever the reasons, as currently structured the OECD consultation mechanism has not provided any incentives and perhaps has even offered disincentives for parties to utilize its procedures.

The Advisory Committee recommends that the U.S. government and other interested governments and international organizations consider developing a new mediation mechanism as well as some general principles that might govern how international disputes, at least sovereign competition policy disputes, might be evaluated under such a mechanism. This mechanism could be developed under the auspices of the proposed Global Competition Initiative or elsewhere. One possible format that might facilitate the use of such a mechanism is as follows: either party to a dispute could invoke an international panel of competition experts that would issue a report but would not require a co-equal examination of the petitioner's practices. The members of the panel would be drawn from a roster of internationally respected antitrust and competition experts.

Clearly such a mechanism would face many challenges. For example there would have to be agreement on the underlying problems that are reasonably before the expert panel or at least on an understood frame of reference. Other issues to be resolved include whether the mediation would encompass only governmental practices or some mix of governmental and private practices; how the panelists would obtain necessary evidence; and how timing issues might be addressed if disputes regarding mergers were involved. Despite these obvious complexities and there are doubtless others, the Advisory Committee believes that a report from an expert panel considering the facts of a dispute between nations might add a useful expert opinion for the affected parties and the global community. Much, of course, would hinge on the credibility of the expert panel and the availability of information sufficient to provide an informed basis for expert analysis.

ELECTRONIC COMMERCE AND COMPETITION POLICY: A NEW FRONTIER

One area where technology has sparked explosive potential growth is electronic commerce (e-commerce). E-commerce offers tremendous opportunities for cost savings, increased consumer choice, and improved consumer choice. Businesses in virtually every sector of the economy are using the Internet to cut the cost of purchasing, manage supplier relationships, streamline logistics and inventory, plan production, and reach new and existing customers more effectively.⁶ E-commerce can diminish the impediments associated with traditional geographic barriers and can provide consumers with an unprecedented ability to gather information, compare prices and satisfy individual preferences.

⁶ See U.S. DEPARTMENT OF COMMERCE, *THE EMERGING DIGITAL ECONOMY* (1998) at 5, available at www.ecommerce.gov.

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Competition policy can play an important role in ensuring that consumers gain the benefits of this new technology and protect against those who might seek to suppress the development of e-commerce to protect their traditional advantages or alternatively use this technology to engage in anticompetitive conduct. As Joel Klein, the Assistant Attorney General for Antitrust, has stated, “there is nothing so different about these new technology-based markets that could possibly support abandoning this Nation’s longstanding belief — a belief based on lots of experience — that competitive markets work best for consumers and [that] antitrust enforcement is essential for sustaining markets.”⁷

The growth of Internet-based electronic commerce is occurring so rapidly that the likely business and policy consequences are just beginning to be understood. Not surprisingly, scholarship is limited on the implications of e-commerce for competition policy. Many experts have predicted that e-commerce will alter the market structures of several industries over time. At the moment electronic commerce appears to be creating opportunities for increased competition in some markets previously insulated by private barriers or distribution barriers. Some have even argued that the need for antitrust law in the e-commerce field is reduced or even eliminated because cyberspace provides a model of perfect competition with its low barriers to entry.

While this expansion of electronic commerce can create many procompetitive effects, it also has raised issues as to whether existing antitrust law is adequate to meet the challenges of dynamic change occurring as a result of electronic commerce. Indeed, Federal Trade Commission Chairman Pitofsky has noted that some have questioned “whether antitrust principles, developed primarily in the context of smokestack industries, should apply comparably and with equal force to new problems that emerge in connection with high-tech industries.” However, Pitofsky cautions that, “abandoning antitrust principles in this growing and increasingly important sector of the economy seems like the wrong direction to go.”⁸

The Advisory Committee agrees that cyberspace will undoubtedly increase market-based competition. However, the need for antitrust enforcement will remain important as some firms may try to use anticompetitive practices to forestall competition from new e-commerce entrants or, alternatively, firms that use e-commerce may still have opportunities to exploit their market power and engage in anticompetitive activities.

⁷ Joel I. Klein, Assistant Attorney General for Antitrust, U.S. Department of Justice, *The Importance of Antitrust Enforcement in the New Economy*, Address before the New York State Bar Association, Antitrust Law Section Program (Jan. 29, 1998).

⁸ Robert Pitofsky, Chairman, Federal Trade Commission, *Antitrust Analysis in High-Tech Industries: A 19th Century Discipline Addresses 21st Century Problems*, Address before the American Bar Association Section of Antitrust Law’s Antitrust Issues in High-Tech Industries Workshop (Feb. 25-26, 1999). Additionally, in 1996, the Federal Trade Commission staff issued a report, “*Anticipating the 21st Century: Competition Policy in the High-Tech, Global Marketplace*,” which examined changes in business conduct and transactions in response to global and innovation competition. The report, based on two days of hearings in late 1995, argued that core aspects of antitrust continue to serve the United States well.

In thinking about the global challenges to competition policy in the next century, the Advisory Committee identified e-commerce as an important frontier issues. To identify aspects of e-commerce relevant to competition policy, the Advisory Committee formed an E-Commerce Subcommittee, which in turn organized a roundtable of leading executives and thinkers in electronic commerce and information technology. What follows is a brief recounting of the issues considered through this and other outreach activities. It does not purport to be a comprehensive treatment of the subject, but simply attempts to identify some issues that policymakers and the public will need to consider in the years ahead. Three areas may warrant particular attention: *Traditional antitrust problems*, such as cartels, price signaling, anticompetitive tying of sales and other violations of traditional antitrust law, that could in fact occur in an e-commerce–high technology environment and could involve firms across jurisdictions; *potential network effects* that could lead to a monopoly or concentrations on a global scale, with corresponding opportunities for abusive practices by a monopolist; and *hidden mercantilism*, in the form of new or increased interventions or restraints by governments or firms, that could potentially reduce competition in national or global markets and harm both consumers and producers. These three areas are briefly considered below.

Traditional Antitrust Problems

The development of e-commerce may give rise to certain patterns of conduct that present traditional antitrust concerns and require antitrust enforcement to ensure that consumers reap the benefits of e-commerce. For example, traditional distributors could attempt to organize a horizontal boycott to stop dealing with Internet competitors who are more efficient and more aggressive in pricing. Competitor collaborations, exclusive dealing on the Internet, and manufacturer nonprice restrictions on Internet distribution are other traditional antitrust issues that might recur in the e-commerce context.⁹ Thus far, there has been no indication that the development and growth of electronic commerce will inhibit the ability of antitrust law and tools to protect consumers from these traditional antitrust problems. Indeed, the Department of Justice has brought several recent enforcement actions that aim to protect competition in the e-commerce marketplace.¹⁰

Emerging technologies may offer firms new mediums in which to attempt to engage in activities that amount to traditional antitrust violations; e.g., collusive agreements to restrict output or raise prices, price signaling, and anticompetitive tying of sales. For example, the heightened availability of electronic channels

⁹ See David A. Balto, Assistant Director, Office of Policy and Evaluation, Bureau of Competition, Federal Trade Commission, “Emerging Antitrust Issues in Electronic Commerce,” Before the 1999 Antitrust Institute, Distribution Practices: Antitrust Counseling in the New Millennium, Columbus, Ohio (Nov. 12, 1999) at 10, 11-12 [hereinafter Balto].

¹⁰ See e.g., U.S. Department of Justice Press Release 98-329, “Justice Department Clears Worldcom/MCI Merger After MCI Agrees to Sell its Internet Business,” (July 15, 1998); Justice Department Press Release 98-348, “Justice Department Sues to Block Citicorp’s Acquisition of Transactive Corporation Assets: Deal Would Eliminate Competition in Electronic Delivery of Welfare Benefits,” (July 27, 1998), U.S. Department of Justice Press Release 98-536, “Justice Department Sues Three Firms Over Auction Practices: Coded Bids Used to Signal Competitors,” (Nov. 10, 1998).

for communication between companies may increase the potential for conspiracies arising from illegal information exchanges between companies. Although these new technologies may pose new challenges to enforcement of competition policies, there is no reason to assume that traditional competition policy analysis is insufficient. Indeed, some cases have already surfaced. An allegation concerning use of electronic communications to facilitate collusion arose in the early 1990s, and the matter was handled with traditional antitrust tools.¹¹ More important, the detection and investigation of the issue was in fact aided by the electronic medium in which the communications occurred. Indeed, electronic commerce may make it easier to detect conspiracies executed through electronic means that can create records that are difficult to destroy.

Antitrust enforcement in electronic commerce markets may face difficult jurisdictional and definitional questions. Because e-commerce on the Internet is borderless in nature, jurisdictional questions regarding application of specific laws are inevitable.¹² Jurisdictional issues merit substantial debate and consideration as electronic commerce becomes an increasingly important component of cross-border commerce.¹³

Network Effects

Network effects can occur when products are more valuable to purchasers or consumers the widely they are used. Such effects can arise in two ways: in “real” networks such as telephones or the Internet, network effects come from interconnection or interoperability. For example, a single telephone is more valuable if everyone else has a phone that can be accessed by that phone. In “virtual” networks, network effects arise because, as the number of users of a product or service increases, there is an increase in the number of complements available in the market for that product or service.¹⁴ Thus, when a product achieves dominance, producers of complementary products (such as software firms that write programs

¹¹ See *United States v. Airline Tariff Publishing Co.*, Civ. No. 92-2854, 59 Fed. Reg. 15,225 (Mar. 31, 1994).

¹² Companies may hesitate to compete to the fullest extent by using electronic commerce because they are unsure which jurisdiction’s laws apply. For example, if information is created in one country, but accessed by consumers in another country, which laws apply? Few regulators have clarified whether and how their jurisdiction extends to the Internet. The EU, however, recently has begun discussions regarding possible modifications to international law agreements governing contract law and jurisdictional issues. Proposals have been submitted to alter the Brussels Convention to permit a consumer to sue a business in the consumer’s home country, regardless of where the business is actually located.

¹³ For an argument that the Internet is changing international law, see Henry H. Perritt, Jr., *The Internet is Changing International Law*, 73 CHI-KENT L. REV. 997 (1998).

¹⁴ See A. Douglas Melamed, Principal Deputy Assistant Attorney General for Antitrust, U.S. Department of Justice, Network Industries and Antitrust, Address before The Federalist Society Eighteenth Annual Symposium on Law and Public Policy: Competition, Free Markets and the Law (Apr. 10, 1999) at 1-2.

for a dominant operating system) overwhelmingly tailor their products so that they are usable only with the dominant system.

The Advisory Committee has discussed the possibility that high technology and e-commerce markets may encourage the development of network effects on a global scale that could then lead to monopoly and opportunities for abusive practices by a monopolist. Internet and e-commerce technologies may be susceptible to network effects to such an extent that the “winner takes all,” a situation in which the winner’s technology is the dominant technology, potentially even worldwide. Because the cost of switching to a different technology in e-commerce and high technology markets can be prohibitively high, monopolies can be difficult to displace. Competition agencies may need to pay particular attention to questions related to open architecture and contestability.¹⁵ The issue of network effects also raise questions regarding the application of antitrust laws to international mergers between high-tech companies.

In industries characterized by network effects, a dominant standard often emerges. From an antitrust perspective, this can be problematic because once a dominant standard has been created in these industries, it can be difficult to reestablish a competitive structure, without risking fragmentation of the standard and a potential reduction in consumer welfare. Given the relative infancy of high tech and e-commerce developments, however, this Advisory Committee is not offering any judgments as to the extent to which network effects will prove to be a problem.

Hidden Mercantilism

Despite the many pro-competitive effects of electronic commerce, the Advisory Committee believes that the potential for market insulation may inhibit the ability of both foreign and domestic companies to do business on the Internet and may impede competition and entry into foreign markets. Such constraints could take the form of hidden mercantilism — overly broad government-initiated regulation or industry standard setting that could produce the hybrid-type restraints previously discussed within this report. In addition, significant regulatory differences among countries could deter e-commerce firms from entering some markets. Competition enforcement authorities and consumer protection regulators must communicate and cooperate to ensure that the natural tension between appropriate economic regulation and consumer protection regulations do not harm competition. Such discussions could take place on a bilateral or multilateral level. Already, the WTO, the OECD and other intergovernmental organizations

¹⁵ Open architecture refers to the freedom of potential competitors to utilize the dominant network or standard. Similarly, a “contestable” market is one that is characterized by very low barriers to entry by new sellers. See Edward M. Graham and Robert Z. Lawrence, *Measuring the International Contestability of Markets*, 30 JOURNAL OF WORLD TRADE 5 (Oct. 1996).

have formed working groups on e-commerce.¹⁶ A number of international business discussions of e-commerce are also underway.¹⁷

Market insulation could potentially take a variety of forms. It could, for example, result from restrictive regulation of advertising on the Internet. Laws that prohibit certain competitive practices, such as comparative or price advertising, could be used to ban websites that would compete with local businesses. In short, countries must take care in their regulation of electronic commerce.¹⁸ And while governments have many legitimate areas of concern, it is also important that protectionist regulation not be introduced in the guise of sound public policy.¹⁹

Alternative Approaches for Policymakers to Consider

The Advisory Committee does not feel it is appropriate to offer specific recommendations at this time. However, at Committee meetings a number of approaches were recommended that the United States could take on its own or in collaboration with foreign governments and international organizations. These

¹⁶ In September 1998, the WTO established a work program to examine all trade-related issues relating to global electronic commerce and asked several WTO bodies to offer input including the Council for Trade in Services, the Council for Trade in Goods, the Council for TRIPS, and the Committee for Trade and Development. Work Programme on Electronic Commerce, WTO, WT/L/274, September 30, 1998. The OECD's objectives in electronic commerce revolve around four themes: building trust in the new electronic environment among service providers, users and consumers in electronic systems and transactions; minimizing regulatory uncertainty; ensuring access to the information infrastructure, and easing logistical problems for payment and delivery. OECD Electronic Commerce Objectives available at <http://www.oecd.org/dsti/sti/it/ec/index.htm>.

¹⁷ Business groups such as the Transatlantic Business Dialogue (TABD) and the Global Business Dialogue on Electronic Commerce have also formed e-commerce working groups. The TABD Working Group on E-Commerce has recommended that all players in e-commerce embrace new approaches to: regulation, intellectual property and liability, taxation, consumer conduct and competitiveness. See TABD, 1999 Berlin Communique at 50-58. The Global Business Dialogue on Electronic Commerce (GBDe) was formed in 1998 to address electronic commerce issues of common concern to the business community including taxation, tariffs, intellectual property rights, encryption, authentication, data protection and liability. See GBDe Outreach letter from Thomas Middelhof, August 28, 1998 available at <http://www.gbde.org/gbde.html>.

¹⁸ Advisory Committee Co-Chair James F. Rill believes e-commerce has broad dimensions and significant importance to global competition. The growth of e-commerce virtually defies quantification. The threat of seriatim balkanization of e-commerce by multiple, inconsistent, and uncoordinated national regulators threatens economic growth and can be used to impair competitive entry and expansion. The OECD Council recently approved consumer protection guidelines for e-commerce. One need not endorse all elements of the guidelines to acknowledge and exhort efforts be taken to achieve rational convergence of regulatory policies affecting e-commerce.

¹⁹ Some members of the Advisory Committee have suggested that one possible model for handling the differences between disparate regulatory regimes and approaches may be the safe harbor negotiations between the United States and the EU over privacy. Under this proposed approach, the parties agree that if producers or service providers in the United States meet specific industry standards, a safe harbor is created so that the EU regulations will not create an impediment to U.S. companies operating freely in the EU market place.

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approaches are not mutually exclusive. One possible approach is to *do nothing*. Advocates of this perspective might argue that because the e-commerce/high technology sector is contributing so greatly to increased market-based competition around the world and markets are changing so very rapidly, government antitrust interventions could be erroneous and are likely to be slow-moving. By this logic, government action may offer little to and could detract from the development of e-commerce–high-tech markets. Another approach would *adopt an international rule or principle* against excessive government restraints and government toleration of private restraints that chill e-commerce competition. This approach would at least ensure that government actions are open to challenge. The United States could also *open conversations* (but not negotiations) with other nations to deepen our mutual understanding of the evolving problems with e-commerce. Discussions could cover whether a more elastic, dynamic understanding of antitrust harm is needed and whether firms should be obliged to ensure open architectures. A more ambitious approach would be to *negotiate an international agreement* to address potential competition problems in e-commerce.

U.S. policymakers might also consider whether new domestic policy approaches are necessary. At some point, it may be necessary to examine whether it is worthwhile to *introduce new legislation* to address the new problems. Antitrust enforcers could adopt *policy guidelines* that take account of the issues identified above. Alternatively, existing guidelines on mergers, international operations, and technology licensing, as well as the pending draft FTC joint venture guidelines, might be amended and extended to those sectors.

In summary, electronic commerce offers great potential for increased domestic and international competition. At the same time, firms and governments will have opportunities to use these new mediums to engage in anticompetitive practices that limit choice and hurt consumers. While traditional antitrust tools appear fully adequate to address “e-collusion” such as online cartels, price signaling, and other traditional antitrust concerns, the application of antitrust tools to network effects in this medium deserves review and scrutiny as these markets develop. While nations have legitimate regulatory concerns in the development of electronic commerce, it is important that governments tailor their regulations in a manner that does not stifle innovation, favor domestic firms or disadvantage consumers. As this discussion has illustrated, few issues in e-commerce are likely to be resolved satisfactorily through national initiatives alone, and many matters require international discourse and cooperation. This Advisory Committee encourages the U.S. government to lead in this effort by developing new channels of communication with governments, such as in the context of the proposed Global Competition Initiative, as well as using existing international forums, such as the OECD and the WTO, among others. Clearly, this area of economic activity will require ongoing attention in the years ahead.

THE ROLE OF COMPETITION POLICY IN U.S. FOREIGN ECONOMIC POLICY

Throughout this report, the Advisory Committee has recommended steps that the United States might take to improve its own antitrust policy and encourage international coordination and cooperation on competition policy issues. Here, the Advisory Committee examines the role of the Justice Department, Antitrust Division, in shaping U.S. foreign economic policy.

Competition policy can be a force for open and competitive markets. The United States is properly proud of being the leading advocate and exemplar of economic policies that promote consumer welfare with minimal state interference. Yet, for a variety of reasons, the Antitrust Division of the Department of Justice has not traditionally played a central role in deliberations on U.S. foreign economic policy nor seen its role as broadly international in nature. Globalization is changing the economic reality if not the existing bureaucratic structures.

The role of U.S. antitrust authorities in the current economic policymaking structure appears ad hoc, the result of the interests and initiative of energetic individuals rather than an approach to policy making that integrates antitrust into all relevant deliberations on matters of foreign economic policy. For example, no antitrust official is a permanent participant in the subcabinet level deliberations on foreign economic policy or in the deliberations that occur, as currently configured, at the National Economic Council (NEC).²⁰ Antitrust authorities have been involved on occasion in deliberations involving competition policy concerns, but it appears that the antitrust agencies are more on the periphery of interagency policy making than at its core.

Some former U.S. officials have expressed the view that this state of affairs is just as it should be. They argue that the central role of the Department of Justice, Antitrust Division, is that of a law enforcement agency and that more risks than rewards are associated with being part of interagency deliberations on broad economic policy matters. By this logic, involving the Antitrust Division in broader economic policy deliberations runs the risk of distorting the its law enforcement role with other policy considerations.²¹ Put differently, antitrust policy has worked hard to achieve a degree of independence from the interagency process; more active participation in that process increases the risks of politicization without a guarantee of commensurate benefits.

²⁰ Douglas Rosenthal, former Chief of the Antitrust Division's Foreign Commerce Section, has written critically of the lack of a competition perspective in the development of foreign economic policy. See Douglas Rosenthal, *Equipping the Multilateral Trading System with a Style and Principles to Increase Market Access*, 6 GEO. MASON L. REV. 543 (1998).

²¹ Daniel Tarullo, a former NEC official with responsibility for international economic affairs, made this point at the American Bar Association Section of Antitrust Law Advanced International Antitrust Workshop, January 14, 1999. Advisory Committee Member Thomas Donilon and Advisory Committee Co-Chair Paula Stern agree with this perspective.

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Some members of this Advisory Committee are also concerned that the participation of antitrust officials in deliberations on matters broader than antitrust enforcement runs a risk of politicizing antitrust decision making which can erode the independence of the enforcement agencies and undermine the integrity and the neutrality of U.S. antitrust law and policy. To minimize the opportunities for such interventions to occur, antitrust officials should surely refrain from intervening in international economic policy matters that do not directly implicate competition policy. Indeed, comity can be important even in domestic interagency matters.

It is probably also true that the trade agencies and indeed most regulatory agencies have better developed constituencies on Capitol Hill and in U.S. corporate boardrooms than does the Antitrust Division or the Department of Justice. Support for antitrust in the United States is broad but shallow. In times of economic uncertainty, protecting domestic players is likely to be a more popular and reassuring response than an approach that promotes competition. The United States has a good record of mostly choosing the latter approach.

This Advisory Committee agrees strongly with the premise that the law enforcement dimension of antitrust must properly remain outside of the deliberative interagency process. It is important to the integrity of U.S. antitrust enforcement that this remain the case. Some distance from the political process is necessary if antitrust officials are to argue that they are focusing on competitive outcomes and consumer welfare interests rather than domestic firms or any particular outcome.

At the same time, some members of this Advisory Committee believe that the segregation of functions should not preclude the Department of Justice, Antitrust Division, from having a voice in economic decisionmaking, both domestic and international, of relevance to competition policy. Competition policy advocacy does not have to be public or even contentious. It should be (mostly) achievable outside the glare of publicity and within the councils of the Executive Branch. Hence, the challenge is to ensure that U.S. economic policymaking structures assure the means for developing a sound, consistent competition policy but avoid distorting the law enforcement role of the Antitrust Division.

This balance of engagement on broad economic policy matters on the one hand, and separation of its specific enforcement agenda on the other, has been struck at various points in the past. A notable example where competition policy has been integrated into U.S. foreign economic policy occurred during the U.S.-Japan Structural Impediments Initiative (SII) that operated between 1989 and 1992. During that period, the Antitrust Division was a full member of the subcabinet level group of senior officials in both the United States and Japan who participated in the process. This collaboration helped to foster not only productive interaction between the Department of Justice and the U.S. trade agencies (notably USTR and the Department of Commerce), but it also demonstrated that the Justice Department's agenda had the full support of the U.S. government, thus enhancing the credibility of the initiative in the eyes of the international community.

Several members of the Advisory Committee believe that it is important that senior officials from the Antitrust Division participate in all domestic and foreign economic policy deliberations that implicate competition policy. In the current administration, many of the key interagency deliberations over foreign economic policy appear to occur at the National Economic Council and at the subcabinet level. The chief antitrust enforcer in the Department of Justice is at the level of an assistant attorney general, however, and because of the imbalance in rank may not automatically be included in those deliberations.²²

In the context of international negotiations or consultations, a further constructive step that could be taken is to ensure that the Antitrust Division, working in close consultation with the Federal Trade Commission, is the lead negotiator on any international discussions on competition policy, be they multilateral, bilateral, or regional. This approach has successfully been applied in other international negotiations, such as those involving financial services and securities, among others. This proposal is not, however, intended to suggest that by virtue of such participation or responsibility that the antitrust agencies should have any added authority with respect to non-competition matters in interagency deliberations of broad policy matters.

Expanding the U.S. Profile in International Competition Policy

The Advisory Committee has also considered affirmative steps the United States could undertake to enhance its role in providing technical assistance to other jurisdictions. Chapter 4 discusses some approaches to technical assistance that may offer positive incentives to cooperate on antitrust enforcement, rationalization of law, and resolution of problems, among other matters, and the Advisory Committee recommended that some funding derived from fines in cartel prosecutions be devoted to international initiatives.

The Advisory Committee recommends further that the U.S. government extend and deepen its technical assistance programs directed at supporting the sound development of competition policy regimes around the world. Accordingly, the Advisory Committee urges the U.S. government to undertake new initiatives bilaterally, consider new forms of outreach, and consider new or expanded collaborations between U.S. agencies and other bilateral agencies or multilateral organizations, such as the OECD.

One way to do this would be to allocate additional resources to support capacity building in competition policy in transition and developing environments. Support for technical assistance programs has been a small but important component of the U.S. antitrust authorities' enforcement cooperation work

²² Advisory Committee Co-Chair James Rill believes that elevation of the Assistant Attorney General for Antitrust would be a constructive step to enhance the likelihood of full and effective participation in deliberations of foreign economic policy of relevance to competition policy.

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over the past decade.²³ To date, U.S. antitrust authorities have provided technical assistance under programs characterized by modest funding support, geographical limitations, and varying duration or scope.²⁴ U.S. antitrust technical assistance funding levels reflect several factors, including the prioritization of competition law programming by the U.S. Agency for International Development (USAID) and Congress, the pace of requests for assistance from foreign governments, and the antitrust agencies' capacities to staff technical assistance missions.²⁵ Support peaked in connection with the congressionally mandated and funded program created to assist Central and Eastern European countries;²⁶ it is currently being increased to expand technical assistance to countries in Latin America in conjunction with broader U.S. government goals in the context of the Free Trade Area of the Americas.²⁷

The Advisory Committee advocates application of an even broader view of U.S. priorities. Technical assistance to foreign competition agencies provides the United States with an opportunity to promote the adoption of sound competition principles and the rule of law. Technical assistance can be used to convey practical experience and advice to dozens of emerging antitrust regimes, as well as to provide guidance on formulating domestic competition policies that make sense in the globalized economy. Support of new competition policy regimes also gives the United States an opportunity to share its perspectives and

²³ See Annex 6-A hereto. There are other sources of technical assistance globally. The Advisory Committee conducted an outreach effort through which it received submissions with information on a number of technical assistance programs organized over the past decade that were undertaken by or, in some instances, benefitted: Australia (funded by AusAID); Germany; the European Commission (through TACIS and Phare programs); Japan; Korea; Mexico; Poland; Spain; the United Kingdom (funded through their Know-How Fund); the United States (through the Department of Justice and FTC programs, among others, and funded by U.S. Agency for International Development); Venezuela; APEC; the Organization for American States; UNCTAD; the World Bank; and the WTO. Additionally, the Advisory Committee received submissions discussing OECD programs; the OECD provides technical assistance through a collaborative effort staffed by enforcement officials from the United States and many of the other OECD jurisdictions just mentioned.

²⁴ From fiscal year 1990 through fiscal year 1998, the Antitrust Division provided technical assistance to over 30 competition offices and the Federal Trade Commission (FTC) engaged in technical assistance to 20 countries, primarily in Central and Eastern Europe, the New Independent States, Latin America and the Caribbean. See Annex 6-A hereto.

²⁵ Aside from funding DOJ and FTC technical assistance programs, USAID reports that it has provided funding for competition policy and related assistance to the U.S. Department of Commerce as well as to private institutional contractors, such as the Institutional Reform and the Informal Sector (IRIS) at the University of Maryland, the Harvard Institute for International Development (HIID), and the Carana Corporation, among others. Submission by Emmy B. Simmons, Deputy Assistant Administrator, Center for Economic Growth and Agricultural Development, U.S. Agency for International Development, in response to Advisory Committee Technical Assistance Outreach (Sept. 15, 1999).

²⁶ The 1989 Support for East European Democracy (SEED) Act., P.L. 101-179, Nov. 28, 1989. This act provides, among other things, for country-specific assistance to take place within the framework of common, region-wide strategic goals of economic restructuring, democratic transition, and social stability. Development of a market economy and a strong private sector are two of SEED's principle points of concentration.

²⁷ Most significant among these goals is the development of more predictable business law regimes, and hence a more favorable atmosphere for trade and investment within the Americas.

thus the legal environment in which U.S. exporters and business concerns operate.²⁸

U.S. agencies do not appear to advocate the nation's consumer welfare model as forcefully as the EU has advocated its vision of competition policy. The EU often requires that countries with whom it enters into trade agreements also adopt its competition law as a model. Although the EU is contemplating significant reforms to its competition policy, in general its approach has tended to be more regulatory than the U.S. approach. Moreover, the EU approach is more commonly replicated around the world than is the U.S. approach. Not only is the EU a regional entity to which many new market economies are seeking membership, but certain substantive features of EU law may be seen as more congenial to transition nations.

U.S. antitrust authorities do not base their technical assistance efforts on advocacy of a U.S. model; a posture that this Advisory Committee views as fully appropriate. Countries will select those approaches most suitable to their development and policy needs.²⁹ The United States should thus use the opportunities afforded by its technical assistance programs not only to advance its perspective about sound competition policies but also to promote a more balanced understanding of the U.S. approach to competition.

In technical assistance activities organized by the OECD, U.S. antitrust authorities work together in case study seminars with competition authorities from other OECD countries. These seminars focus participants on practical enforcement issues, particularly on the correct application of competition principles in the analysis of cases and strategies for achieving effective results in enforcement actions. Some common enforcement issues addressed during these seminars include:

- C The application of incorrect analysis in antitrust cases and investigations (such as, the lack of attention to important threshold issues like market definition and entry conditions and an inadequate understanding of the competitive effects of the conduct at issue);
- C The establishment of merger notification regimes that are overly-inclusive resulting in the diversion of scarce resources to the review of large numbers of merger notifications;

²⁸ See Submission by Donald I. Baker, Baker & Miller PLLC, in response to Advisory Committee Technical Assistance Outreach (Aug. 13, 1999), enclosing Donald I. Baker, Practical Risks and Opportunities for Countries Creating New Competition Laws and Enforcement Agencies, presented at The COMESA Conference on Competition Law and Policy, Sponsored by COMESA, UNCTAD, and the Zambian Competition Commission (June 3-4, 1999).

²⁹ For example, the Israel Antitrust Authority recently promulgating a Corporate Compliance Program, about which the General Director explained, “[t]he roots of our compliance methodology can be easily identified as American, Canadian and European. We did not reinvent the wheel, yet took much care and invested significant efforts to adapt foreign compliance programs to the circumstances and needs of our local economy.” *Forward* by Dr. David Tadmor, General Director, Israel Antitrust Authority, THE CORPORATE COMPLIANCE PROJECT: HOW TO CREATE AND MAINTAIN AN EFFECTIVE COMPLIANCE PROGRAM RECOGNIZED BY THE ISRAEL ANTITRUST AUTHORITY at 1 (unofficial translation).

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- C The application of incorrect standards to abuse of dominance or monopolization cases (for example, focusing on exploitative conduct such as monopolistic pricing or unjustified reduction of output as opposed to exclusionary conduct; and imposing unnecessarily rigorous standards of “fair play” on firms with market power); and
- C The use of ineffective or unnecessarily regulatory remedies in cases where violations are found.³⁰

The Advisory Committee believes that such seminars are useful in conveying best practices in antitrust analysis to nascent competition authorities. Moreover, the benefits of this type of work are not limited to the officials of these new enforcement regimes. The experience of having U.S. enforcement officials working side by side with officials from other OECD member jurisdictions helps to deepen mutual understanding, trust, and a sense of shared mission among developed country officials. In practical ways, the goals of soft harmonization and convergence are advanced through such activities.

New competition regimes face many daunting obstacles to their success. How is a new agency to recruit experienced personnel effectively? How can such an agency achieve a degree of political independence? How is it to develop the requisite analytical capabilities to identify, investigate, and analyze cases rigorously? Many jurisdictions lack a comprehensive legal framework or the procedural remedial tools needed for effective enforcement. In jurisdictions where enforcement is ultimately entrusted to the judiciary, judges are often untrained in competition policy. These are serious challenges for any jurisdiction and take many years of commitment and hard work to implement effectively.³¹

Support to new regimes should be included among U.S. funding priorities and the U.S. government should more vigorously pursue a variety of ways of offering such support. Distance learning seminars,³²

³⁰ Submission by OECD, Competition Law and Policy Division, in response to Advisory Committee Technical Assistance Outreach (Aug. 5, 1999) at 5.

³¹ See, e.g., Submission by James C. Hamill, Executive Assistant to the Chairman, FTC, in response to Advisory Committee Technical Assistance Outreach (Sept. 2, 1999) at 4.

³² This suggestion was made by Malcolm B. Coate, an economist with FTC. As background, he explains that numerous antitrust agencies maintain websites that disclose information on their focus and enforcement efforts, and that there are also antitrust discussion groups on the Internet, at least one of which resulted in the creation of a traditional journal dedicated to the discussion of competition policy: the *Journal of Latin American Competition Policy*, which is now merging with a related publication. He proposes that, “if necessary, the discussion site could be open to the public, but a quasi-private discussion site would probably be more helpful. Possibly two sites could be maintained initially, and thus competition between sites would identify the more popular approach.” Submission by Malcolm B. Coate, Bureau of Economics, U.S. Federal Trade Commission, in response to Advisory Committee Technical Assistance Outreach, (July 29, 1999).

Internet discussion sites,³³ and development of a repository of resource information³⁴ are but a few examples of the ways to take advantage of new technology and reach interested governments and experts around the world. Additionally, there may be some value in deepening consultation and cooperation between those major jurisdictions that are providing such technical assistance (for example, between the United States and the EU) as well as further cooperation through existing programs organized by international organizations. In this regard, the OECD's program of technical assistance provides one particularly useful example. The OECD through its competition policy staff has developed ongoing relationships with competition officials in many transition and developing countries and is experienced in organizing and running effective competition seminars and events.³⁵ Further, cooperation and consultation with other international organizations such as the World Bank should also be developed still further. All the same, duplication of effort is not necessarily bad. In some circumstances the benefits to overlapping programming (or "multiplicity") override the drawbacks because the higher level of funded programming ultimately results in more comprehensive assistance.³⁶

SUMMARY OF RECOMMENDATIONS

Global Competition Initiative

1. The Advisory Committee recommends that the United States explore the scope for collaborations among interested governments and international organizations to create a *new* venue where government officials, as well as private firms, nongovernmental organizations (NGOs) and others can exchange ideas and work towards common solutions of competition law and policy problems. The Advisory Committee calls this the "Global Competition Initiative."

³³ See Submission by Ignacio de Leon, Superintendent, ProCompetencia, Venezuela, in response to Advisory Committee Technical Assistance Outreach (Aug. 9, 1999).

³⁴ See, e.g., Submission by Anna Fornalczyk, President, Competition Development Center (COMPER), Poland, in response to Advisory Committee Technical Assistance Outreach (Aug. 17, 1999) (recommending consideration be given to making materials developed for technical assistance programs more widely available and translated).

³⁵ Submission by the OECD Competition Law and Policy Division, in response to Advisory Committee Technical Assistance Outreach (Aug. 5, 1999).

³⁶ See, e.g., William E. Kovacic, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 AM. U. J. INT'L. L. & POL'Y. 437, 448-451 (describing benefits of multiplicity as increasing the total pool of resources available for new antimonopoly agencies and providing a budget for professional development of new agency staff, among other things. Costs may involve: single donors supporting duplicative projects; different donors rivaling to provide technical assistance to the same new agency; and expending resources to protect turf and aggrandize influence at the expense of focusing on development of sound antitrust policy).

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2. A Global Competition Initiative should be inclusive and would foster dialogue directed toward greater convergence of competition law and analysis, common understandings, and common culture. Such a gathering also could serve as an information center, offer technical expertise to transition economies, and perhaps offer mediation and other dispute resolution capabilities. Areas for constructive dialogue might include further discussions among competition agencies to:
 - C Multilateralize and deepen positive comity;
 - C Agree upon the consensus disciplines identified in Chapter 2 regarding best practices for merger control laws and develop consensus principles akin to the recent OECD recommendation on hard-core cartels; consider and develop disciplines to define actions of governments; for example in areas with negative spillover potential such as export cartels, which require broader international cooperation and consultation;
 - C Consider and review the scope of governmental exemptions and immunities that insulate markets from competition around the world (as discussed in Chapter 5);
 - C Consider approaches to multinational merger control that aim to rationalize systems for antitrust merger notification and review (as discussed in Chapter 3);
 - C Consider frontier subjects that are quintessentially global such as e-commerce, which will create new challenges for policymakers around the world;
 - C Undertake collaborative analysis of issues such as global cartels (discussed in Chapter 4) and market blocking private and government restraints (discussed in Chapter 5); and
 - C Possibly undertake some dispute mediation and even technical assistance services.
3. A Global Competition Initiative does not require a new international bureaucracy or substantial funding. The Group of Seven (G-7) nations summit is an attractive model, in that it demonstrates that countries can create mechanisms to exchange views and attempt to develop consensus on economic issues without an investment in a secretariat or permanent staff. This proposed initiative would benefit from support from international organizations such as the WTO, OECD, the World Bank and UNCTAD.

International Mediation of Competition Disputes
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1. The Advisory Committee recommends that the U.S. Government and other interested governments and international organizations consider developing a new mediation mechanism as well as some general principles that might govern how international disputes, at least sovereign competition policy

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disputes, might be evaluated under such a mechanism. This mechanism could be developed under the auspices of the proposed Global Competition Initiative or elsewhere.

2. The members of the panel would be drawn from a roster of internationally respected antitrust and competition experts. An examination of a competition policy conflict by an expert panel will face many challenges. However, in some circumstances it could prove useful to clarify the competition policy characteristics of the problem at hand.

The Role of the Department of Justice in U.S. Foreign Economic Policy

1. The Advisory Committee believes that the law enforcement dimensions of antitrust must remain outside of the deliberative interagency process. Some members are concerned that the participation of antitrust officials in senior interagency deliberations broader than antitrust enforcement runs the risk of politicizing antitrust decisionmaking; others are more of the view that it is important to have such participation in all domestic and foreign policy deliberations that implicate competition policy.
2. The Antitrust Division, working in close consultation with the Federal Trade Commission, should be the lead negotiator on any international discussions on competition policy, be they multilateral, bilateral, or regional. This approach has parallels in other international negotiations, such as those involving financial services and securities.

Expanding U.S. Technical Assistance in Competition Law and Policy

1. The United States needs to devote more of its limited technical assistance budget to the development of competition policy structures abroad.
2. Support to transition and developing antitrust regimes should be included among U.S. funding priorities, and the U.S. government should more vigorously pursue a variety of ways of offering such support.
3. The United States should create and seek opportunities for deepening consultation and cooperation with other countries and organizations providing technical assistance including those major jurisdictions that are engaged in providing structured technical assistance, and multilateral organizations such as the World Bank, the International Monetary Fund, the OECD, and the WTO.