Executive Summary

CHAPTER 1
GLOBALIZATION AND ITS IMPLICATIONS FOR ANTITRUST COOPERATION AND ENFORCEMENT

In the last several decades, more and more nations have come to recognize the value of competition as a tool for spurring innovation, economic growth, and the economic well-being of countries around the world. This recognition is evident in the economic liberalization that is taking place and in the dynamic technological change that is not only made possible by liberalization, but is itself an engine for liberalization. Both of these phenomena -- economic liberalization and technological development -- are in turn driving economic integration.

Competition policy can help to facilitate economic liberalization. If working properly, competition policy can produce more goods and services from scarce resources and provide a set of rules and disciplines that are not based on privilege and that are conducive to and responsive to efficient marketplace behavior.

A century ago, only the United States had comprehensive antitrust laws in place. Today, more than 80 countries have adopted antitrust laws, most of which were introduced in the 1990s. Yet, the emergence of competition policy regimes has not meant a uniformity of substantive rules or institutional approaches around the world. Competition policies of nations differ within a range that is in keeping with differences in legal systems. Moreover, even within established antitrust jurisdictions such as the United States, antitrust law evolves and changes. Technological development, the drive for competitiveness in the world environment, and economic analysis all contribute to changes in competition policy.

The Mandate of the International Competition Policy Advisory Committee

What new tools, tasks, and concepts will be needed to address the competition issues that are emerging on the horizon of the global economy? To answer these questions, Attorney General Janet Reno and Assistant Attorney General for Antitrust Joel I. Klein formed the International Competition Policy Advisory Committee in November 1997. The Advisory Committee was asked specifically to give particular attention to three topics: multijurisdictional merger review; the interface of trade and competition issues; and future directions in enforcement cooperation between U.S. antitrust authorities and their counterparts around the world, particularly in their anticartel prosecution efforts. The reasons for these points of focus are quite clear. The large number of mergers being reviewed by a multitude of competition authorities, the international controversy over barriers to market access stemming from allegedly anticompetitive private barriers to trade, and the significant increase in the number of international cartel cases being prosecuted by the Antitrust Division have come to make these international matters of

mainstream significance to U.S. antitrust policy. At the same time, some issues were consciously excluded from the Advisory Committee's work. For example, the Advisory Committee did not review domestic trade remedies, such as antidumping measures. In addition, the Advisory Committee did not address a variety of practices that may be reprehensible, illegal, or offensive under U.S. or foreign law or policy that can affect the nature of competition within a market or internationally. These include matters such as substandard wage and employment standards, the use of child labor, and lax environmental regulations, among others.

For two years the Advisory Committee, seeking the views of antitrust officials, businesses, scholars, practitioners, and other interested parties, has tried to identify initiatives that the U.S. Department of Justice and the U.S. government could undertake over the short and medium term and that would contribute to achieving the integration of markets through:

- *Increased transparency and accountability of government actions.*
- *Expanded and deeper cooperation between U.S. and overseas competition enforcement authorities.*
- *Greater soft harmonization and convergence of systems.*

The Global Economy and Competition Policy

In considering competition policy and the international marketplace, a key challenge stems from the recognition that law is national but markets can extend beyond national boundaries. If markets are broader than national boundaries, are national laws and their enforcement sufficient to deal with the market problems of the new century? Further, is it possible to rely upon national law, yet at the same time work toward the development of a more seamless international system that facilitates the workings of global markets?

Of all these challenges, the international community has made the most headway in increasing cooperation and networking among the competition agencies of the world. International cartel enforcement and other forms of international enforcement cooperation in merger review are notable areas of success, particularly in recent years. Furthermore, both the number of bilateral antitrust cooperation agreements between the United States and other jurisdictions, and the number of new international initiatives have increased markedly. These cooperative solutions hold great potential, but, of course, it is predictably the case that they work well only when the cooperating agencies are jointly sympathetic to an approach regarding the particular antitrust enforcement matter.

A second challenge is now being observed: with more than 60 nations now having antitrust merger control laws that require (or provide for) antitrust notification, the overlapping regulations are at times unduly burdensome and costly to the merging parties and can cause unnecessary frictions between nations. The question arises whether the systems can be rationalized and still ensure that enforcers have the tools necessary to identify and remedy anticompetitive transactions.

A third challenge is linked to the world trading system itself and the promise of open markets: Nations may promise open markets as far as the state is concerned and undertake substantial liberalization commitments with respect to governmental practices, but at the same time allow, by action or inaction, blockage of their markets by firms' anticompetitive restraints. If there is an international interest in removing those restraints and thus freeing up the world markets, can this interest be fully satisfied by national antitrust law? Is a new approach needed that does not split the state role from the private role and that does not test the limits of national jurisdiction?

In addressing these challenges, the Advisory Committee has considered the role for competition policy in the global economy broadly and with a view to improving approaches not only within the United States but also around the world. This Report considers problems that transcend nations, problems within individual nations, and problems between particular systems. It is not possible to predict how the global economy will evolve, but this Report starts from the premise that the United States should try to provide an environment conducive to the further expansion of international commerce, tolerant of the diversity of nations with respect to their own evolving law, and hospitable to the enhancement of world welfare.

CHAPTERS 2 AND 3
MULTIJURISDICTIONAL MERGERS

Competition issues raised by the growth of cross-border trade and investment and the simultaneous proliferation of antitrust merger control laws are at the cutting edge of economic globalization. The world currently is experiencing an unprecedented level of merger activity. In 1999 global mergers and acquisitions were at an all-time high, with approximately $3.4 trillion in activity announced worldwide. As the volume of international merger activity has increased, so too has the number of jurisdictions around the world with antitrust merger control laws. Merging parties with international business operations potentially must review their sales, assets, subsidiaries and market shares in more than 60 jurisdictions to determine whether notifications to the competition authorities in those jurisdictions are necessary or advisable. These trends make it increasingly likely that mergers involving firms doing business in several jurisdictions will be reviewed by multiple competition authorities. It is not unheard of for merging parties to file antitrust notifications with a dozen or more jurisdictions.

The spread of merger control law has the potential to create significant benefits. Merger review regimes with notification requirements give competition authorities the ability to identify and remedy potentially problematic transactions, thereby benefiting consumers and competition. At the same time, the growing tendency of nations to apply their laws to offshore mergers and the sheer volume of law that firms undertaking mergers must now consider present challenges for the merging parties and for the reviewing authorities. These challenges range from dealing with heightened uncertainty and increased transaction costs to ensuring consistent outcomes and compatible remedies.

In Chapter 2 the Advisory Committee considers ways to bridge the differences between systems and minimize the risk that differing substantive standards will give rise to diverging evaluation on the merits of a transaction, incompatible or burdensome remedies, and international friction. The unifying theme of these recommendations is that cooperation among antitrust enforcement authorities is not only desirable, but necessary if the challenges in this arena are to be addressed effectively.

Chapter 3 examines those problematic features within merger review systems that give rise to uncertainty and unnecessary transaction costs. The Advisory Committee believes that an improved environment for mergers globally is where individual merger control regimes focus on those transactions that raise competitive concerns within their territory and refrain from unduly burdening transactions, particularly those that lack anticompetitive potential.

CHAPTER 2
STRATEGIES FOR FACILITATING SUBSTANTIVE CONVERGENCE AND MINIMIZING CONFLICT

Inconsistent outcomes and conflicting or burdensome remedies imposed by multiple jurisdictions may significantly increase transaction costs. In the worst-case scenario these burdens may result in the abandonment of transactions that are procompetitive. Although much attention has been focused on the potential for divergent outcomes when proposed transactions are reviewed by multiple agencies, multijurisdictional merger review for the most part has resulted in consistent outcomes and compatible remedies. The possibility of divergent outcomes will remain, however, as long as underlying substantive differences in merger control law exist and multiple agencies continue to review a single transaction.

The Advisory Committee believes that these challenges can best be addressed by facilitating, where possible, substantive harmonization and convergence among merger review regimes. Complete harmonization and convergence will be achieved only in the long run, if ever. This point should not, however, deter policymakers from taking steps to support and facilitate efforts at harmonization and convergence both in the short and medium term.

There are at least three concrete areas where nations can take steps to facilitate the convergence process and further minimize transaction costs and conflicts: Facilitating greater transparency; developing disciplines to guide the review of mergers with significant transnational or spillover effects; and continuing to enhance cross-border cooperation. In addition, the Advisory Committee recommends a number of approaches to *work sharing* to deepen cooperation further and to develop more seamless merger review systems internationally.

Facilitate Greater Transparency

One of the first steps toward facilitating greater substantive convergence is the development of a better understanding of each jurisdiction's framework for analyzing proposed mergers. This process would highlight differences in merger control laws and could stimulate international discussion and adjustments. The Advisory Committee discusses several steps to improve transparency:

1. Greater transparency in the application of each jurisdiction's merger review principles could be enhanced by the *publication of guidelines and notices* explaining the manner in which mergers will be analyzed; *annual reports* (including case examples), *statements, speeches, and articles* describing changes in relevant legislation, regulations, and policy approaches; and *case-specific decisions, releases, and press interviews*.

2. At a multinational level, greater transparency may be achieved by conducting a survey and compiling an explanatory report of all jurisdictions with merger regulations to identify the principles they employ.

3. Each jurisdiction also should facilitate achievement of greater transparency by articulating clearly its rationales for challenging, or refraining from challenging, *significant* transactions (that is, decisions that set precedent or otherwise indicate a shift in doctrine or policy).

Develop Disciplines for Merger Review

Nations should work together to develop what this Advisory Committee calls *disciplines* that nations could usefully agree upon to guide the review of mergers with significant transnational or spillover effects. The Advisory Committee outlines disciplines that are simple yet aspirational and may not be feasible to implement in many jurisdictions at this juncture. The Advisory Committee believes, however, that if disciplines are adopted, they should be set at a high standard. That is, these disciplines are designed to promote best practices under any system as opposed to creating rules that would bring about convergence to the "lowest common denominator." What follows are intended to be illustrative and applicable to all jurisdictions with competition regimes. Other principles of law as well as disciplines can and should be developed through international discourse.

1. Nations should apply their laws in a nondiscriminatory manner and without reference to firms' nationalities.

2. As a best practice or discipline, with limited exceptions (such as national security), noncompetition factors should not be applied in antitrust merger review. If a jurisdiction's law recognizes noncompetition factors (such as preservation of jobs, promotion of exports, or international

comparative advantage), such factors should be applied transparently and in a manner narrowly tailored to achieve their ends. Further, if a jurisdiction's merger regime explicitly permits noncompetition factors to trump traditional competition analysis, those noncompetition factors should be applied after the competition analysis has been completed.

3. Competition agencies do not operate in a political vacuum, but enforcement agencies must nonetheless establish their independence, and "parochial" political concerns should not play a role in the merger review process.

4. Nations should recognize that the interests of competitors to the merging parties are not necessarily aligned with consumers' interests. Accordingly, authorities should minimize the problems that may arise in competitor-driven processes, including the disruption of potentially procompetitive mergers.

5. When a transaction has a significant anticompetitive effect on the local economy in any given jurisdiction, the local antitrust authority has a legitimate interest in reviewing the transaction and imposing a remedy notwithstanding the fact that the transaction's "center of gravity" (whether determined by reference to the nationality of the parties, location of productive assets, or preponderance of sales) lies outside its national boundaries. At the same time, in the face of a clash between jurisdictions, remedies with extraterritorial effects should be tailored to cure the domestic problem. Further, when fashioning a remedy with extraterritorial effects, the agency should take into account local practices and procedures in the foreign jurisdiction.

Continue to Enhance Cross-Border Cooperation

To advance substantive convergence in the near term, and avoid or minimize divergent analyses and outcomes, it is important for the United States and other jurisdictions to encourage and further deepen cross-border cooperation in reviewing mergers. Cooperation among reviewing authorities could be enhanced if all jurisdictions were to establish a transparent legal framework for cooperation that contains appropriate safeguards to protect the privacy and fairness interests of private parties. This Advisory Committee has identified several key features of such a framework.

1. In the U.S. context, a framework for cooperation might entail the development of a *Protocol* with a combination of key features: a description of the way the federal antitrust enforcement agencies in the United States conduct cross-border coordinated merger investigations; model waivers permitting discussions otherwise prohibited by confidentiality laws and authorizing the exchange of statutorily protected information between competition authorities during a merger review; and a policy statement outlining safeguards established in a reviewing jurisdiction to protect confidential information. Other jurisdictions usefully could develop comparable protocols.

2. The idea behind the model waivers is that they would not impose on an agency any obligations beyond acting in accordance with its normal practices and confidentiality rules (as described in its policy statement). To instill further confidence, however, agencies using confidentiality waivers should affirm in the policy statement the agency's intention to refuse to disclose information except to the extent it is legally required to do so, to use best efforts to resist disclosure to third parties (including the assertion of any privilege claims or disclosure exemptions that may apply), and to provide such notice as is practicable before disclosing to a third party any confidential business information obtained pursuant to a waiver. The policy statement also should explain how concepts such as using best efforts to resist disclosure to third parties are implemented in the jurisdiction.

3. Jurisdictions also should consider adopting a policy to provide notice to a party -- either before or after the fact -- when they share documents of that party with another jurisdiction. The Advisory Committee can well understand why an enforcement agency would be unwilling to agree to a blanket commitment to provide notice. However, when an agency has the authority to exchange information and adverse enforcement consequences are not present, then notice to the parties seems reasonable and proper. Alternatively, parties could provide select documents directly to other reviewing jurisdictions and waive confidentiality with respect to those documents or identify beforehand which documents or categories of documents may and may not be shared, although in certain cases this approach might limit the benefits that potentially could be realized through the cooperative process.

Develop Work-Sharing Arrangements

Looking to the future, the Advisory Committee believes that the international community should be striving to develop more nearly seamless merger review systems internationally, and particularly with those jurisdictions that have mature merger review regimes. The most integrated approach the Advisory Committee envisions is *work sharing* in cases in which the enforcement efforts of one agency are likely to be sufficient to remedy the antitrust concerns of other jurisdictions. Work sharing may be accomplished in incremental steps with each step reflecting a different degree of cooperation and each step built upon successful approaches to cooperation and coordination that enforcement authorities have already implemented. An important objective is to reduce duplication, while preserving the right for the United States and other jurisdictions to take their own measures, as necessary.

Work sharing logically could begin between the United States and the European Union because of their record of cross-border cooperation and the amount of transatlantic merger activity occurring that has its main impact in the United States and Europe. Further, working toward a common position on merger review policy with the European Commission should be a priority. The Advisory Commission envisions the development of work-sharing arrangements along these lines:

1. *In a first step, each jurisdiction conducts its own review of the proposed transaction and participates in the formulation, if not the negotiation and implementation, of remedies.* Under this approach, some or all reviewing jurisdictions would jointly negotiate remedies with the merging parties, while each would implement its own consent decree that incorporates the jointly negotiated remedies. In some cases it may be feasible for one jurisdiction to negotiate remedies with the merging parties that will address concerns of both that jurisdiction and other interested jurisdictions. Such cooperation and coordination at the remedies phase has been successfully employed in several cases, and the Advisory Committee believes that these approaches should be emulated in future cases whenever the legal and factual situations indicate that such coordination and cooperation will be useful.

2. In appropriate cases, it may be feasible to take cooperation to the next level and *limit the number of jurisdictions conducting second-stage reviews* of a proposed transaction. For example, where the concerns of Country A are likely to be the same as and subsumed by the concerns of a more distinctly affected investigating jurisdiction, it may be appropriate for Country A to refrain from independent investigation. At present, such an arrangement may not always be feasible in an environment with statutorily mandated review periods if the agency could lose the right to review the transaction at all. This approach likely would preclude a jurisdiction from being able to negotiate its own remedies if it felt that the preceding jurisdiction did not adequately address its concerns or imposed a remedy that diverged from its approach. Such impediments would have to be resolved if this degree of cooperation were to become feasible in more than a handful of cases. In the meantime, this approach may be useful in situations in which there is no available remedy to the reviewing jurisdiction or there is a sufficient level of confidence in the reviewing jurisdiction.

3. One way to safeguard against this possibility is to ensure sufficient participation in the process by the other jurisdictions. One jurisdiction would *coordinate the investigation* of a proposed transaction, take into account the views of each interested jurisdiction, and recommend remedies to address the concerns of all interested jurisdictions. The assessment of the coordinating agency would be binding on the coordinating agency but either could serve as a recommendation to other interested jurisdictions (with a presumption in favor of accepting the coordinating jurisdiction's recommendation) or could be binding on those jurisdictions as well.

4. The Advisory Committee considered whether, given a sufficient amount of substantive and procedural convergence among merger review regimes, an even higher level of work sharing might be feasible someday. At this advanced level of work sharing, the coordinating agency would evaluate procompetitive and anticompetitive effects of a proposed transaction on a global scale, taking into account all of the merger's costs and benefits to competition, not only the net effects within its borders. The coordinating jurisdiction could then design remedies to address the concerns of all interested jurisdictions.

This advanced level of work sharing is a distant vision. At present, it is the view of this Advisory Committee that while no agency should be obligated to take into consideration competitive harm or benefits that may be achieved outside the reviewing jurisdiction, competition authorities should consider that the transactions they review also have the potential to generate spillover effects in other jurisdictions. As the level of convergence in antitrust enforcement increases, however, agencies should consider analyzing the benefits and anticompetitive effects of a proposed transaction on a global scale.

CHAPTER 3
RATIONALIZING THE MERGER REVIEW PROCESS THROUGH TARGETED REFORM

Many of the transaction costs imposed by merger regimes are rationally related to the efficient review of transactions that have the potential to create appreciable anticompetitive effects within the reviewing jurisdiction and therefore should be taken in stride by companies as a cost of doing business. At the same time, the Advisory Committee believes that while merger regimes have the potential to create benefits for society, those same review processes also impose significant transaction costs on international transactions. It is therefore important to focus on those *unnecessary* and *unduly burdensome* costs imposed by merger control regimes that have little or no relationship to antitrust enforcement goals.

This second category of proposed reform efforts seeks to reduce transaction costs by rationalizing the merger review process through targeted problem solving in individual merger regimes. Broadly speaking, the Advisory Committee identifies a number of best practices that fall within two major categories: ensuring that each jurisdiction's merger review regime examines only those mergers that have a nexus to and the potential to create appreciable anticompetitive effects within that jurisdiction; and ensuring that each jurisdiction refrains from unduly burdening those transactions during the course of the merger review process. At the same time, these reform efforts seek to ensure that the antitrust authorities have the tools needed to identify and remedy anticompetitive mergers.

Casting the Merger Review Net Appropriately: Notification Thresholds

The Advisory Committee has learned that one significant category of unnecessary transaction costs stems from the overly broad application of merger control law that relies on exceedingly low notification thresholds and that requires antitrust notification of transactions in the absence of any appreciable domestic effects. To complicate matters, many jurisdictions' filing requirements are vague, subjective, or difficult to interpret. The Advisory Committee recommends several *best practices* that jurisdictions can use, where necessary, to refine threshold tests for notification. These practices are designed to reduce unnecessary transactions costs without significantly reducing the public benefit from advance notification.

1. In establishing its premerger notification thresholds, each jurisdiction should seek to screen out mergers that are unlikely to generate appreciable anticompetitive effects within the reviewing jurisdiction.

   - This screening can be achieved, first, by implementing threshold tests that require an *appreciable nexus to the jurisdiction*, such as transaction-related sales or target assets in the jurisdiction.

   - Second, jurisdictions should set notification thresholds *only as broadly as necessary* to ensure the reporting of potentially problematic transactions. If an indexing mechanism is not employed, the Advisory Committee recommends that jurisdictions review their notification thresholds periodically (at least every four years) to determine whether they should be adjusted.

2. Additional steps that can be taken at this stage to reduce costs for international mergers include establishing objectively based notification thresholds and ensuring their transparency.

3. To better ensure that potentially anticompetitive transactions do not escape scrutiny under merger review systems, the Advisory Committee recommends that competition authorities be given the authority to pursue potentially anticompetitive transactions even if those transactions do not satisfy notification thresholds. Although the federal antitrust agencies in the United States already possess this authority, many existing merger regimes authorize regulators to review transactions only when notification requirements are satisfied.

4. Any efforts to revise notification thresholds also must consider filing fees, which currently constitute a significant source of revenue for numerous competition authorities, including the federal antitrust agencies in the United States. Ideally, no competition agency should be dependent on filing fees for its budget or staff salaries. To ensure that these competition authorities will be able to pursue their enforcement missions vigorously, it is imperative to provide agencies with alternative sources of funding to offset the loss of any funds that may result from revising notification thresholds or "delinking" filing fees from agency budgets.

Reducing Burdens on Transactions that Come within the Merger Review Net

Detailed filing requirements and long review periods may impose significant and sometimes unnecessary or unduly burdensome costs on proposed transactions, particularly those that pose no harm to competition. Further, lengthy or indefinite review periods coupled with differing events triggering when a filing may (or must) be made may complicate cooperation among reviewing authorities and heighten uncertainty with respect to transaction planning. To ensure that each jurisdiction refrains from unduly burdening transactions that trigger a notification obligation, merger review should be conducted in a two-

stage process designed to enable enforcement agencies to identify and focus on transactions that raise competitive issues while allowing those that present none to proceed expeditiously.

Review Periods and Timing

1. The first stage should be conducted within a maximum review period of one month. In many jurisdictions the initial review and waiting period generally runs for either 30 days or one month following notification. By contrast, the initial review period in several other jurisdictions substantially exceeds this base line or is undefined. ICPAC hearings testimony suggests that marginal differences in the initial review periods are inconsequential since they are manageable from a transaction planning standpoint. Reform efforts should focus, therefore, on jurisdictions in which the initial review period either is undefined or substantially exceeds the 30 day-one month baseline.

2. Jurisdictions that are unable to conclude investigations before the expiration of the initial or second-stage review periods also should be given authority to grant early termination (for example, for transactions that raise no substantive issues or in which the parties are willing to resolve concerns through consent decrees or undertakings).

3. To permit merging parties to coordinate multijurisdictional filings in the most efficient manner and to facilitate cooperation among reviewing authorities, the international community should promote harmonization of rules pertaining to when parties are permitted to file premerger notification. This harmonization can be achieved by targeting reform efforts in jurisdictions with definitive agreement requirements and postexecution filing deadlines so as to permit filings at any time after the execution of a letter of intent, contract, agreement in principle, or public bid.

4. For transactions that raise serious competitive issues and require a more in-depth review, the Advisory Committee concludes that merger review should not be an open-ended process and that companies derive value from certainty with respect to merger review periods. The Advisory Committee believes more deadlines should be employed to provide greater certainty and that jurisdictions with lengthy or open-ended review periods should adopt more expedited time frames for review. The Advisory Committee made a number of suggestions in the U.S. context to address these concerns. One possibility is nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction.

Notification Forms and Information Requests

1. While the Advisory Committee acknowledges that agencies have a legitimate interest in requiring the submission of information sufficient to ensure that they are able to identify potentially anticompetitive transactions, some jurisdictions impose very substantial and unnecessary burdens

through the use of very detailed filing forms. In these jurisdictions, voluminous filings are required for all transactions, including those that pose no harm to competition. To ensure that transactions that trigger notification obligations are not burdened with excessive information requirements, while at the same time giving competition authorities enough information to identify competitively sensitive transactions, the Advisory Committee recommends that initial notification require the minimum amount of information necessary to make a preliminary determination of whether a transaction raises competition issues sufficient to warrant further review.

2. Recognizing that there is a trade-off between the amount of information initially provided and the time frame in which clearance is to be granted, mechanisms also should be established to narrow the legal and factual issues presented by mergers as early in the review process as possible. One way to accomplish this goal would be to provide a short form-long form option, leaving it to the notifying parties to choose in the first instance which form to use. Alternatively, reviewing authorities may encourage merging parties to provide additional information voluntarily, allowing the authorities to resolve any potential antitrust issues quickly or conduct a focused second-stage inquiry that narrowly targets the antitrust issues.

3. Initial filing requirements in many jurisdictions may be statutorily imposed, and revising these requirements through legislative action may be time consuming. Until reform efforts can be achieved, the Advisory Committee recommends that jurisdictions consider permitting parties to submit an affidavit or letter (in lieu of a notification) alleging brief facts explaining why the transaction does not raise competitive concerns.

4. To facilitate quick resolution of potentially problematic transactions deemed worthy of further investigations and focus the issues as soon as possible, there is no substitute for frank information exchange between competition authorities and the parties to a proposed transaction. To that end, each reviewing authority should articulate to the merging parties at the beginning of a second-stage inquiry the competitive concerns that are driving the investigation. This summary could be conveyed orally or in writing.

5. Competition authorities around the world could assess their own performance with respect to those transactions they challenge. One way to do this is to conduct an *after-the-fact audit* of merger challenges to examine in great detail decisions to prosecute, or to refrain from prosecuting, specific matters. The audit also could examine the types of information collected during each investigation. The aim of these audits lies in obtaining an objective and frank assessment of performance in previous investigations, thereby laying the groundwork for improvement in future cases. Audits could be conducted internally in more mature merger regimes or by a group of outside observers in newer regimes.

6. A great deal also can be gained from multilateral efforts to achieve soft procedural harmonization of the type undertaken by the Organization for Economic Cooperation and Development (OECD).

The United States should continue to support OECD efforts to further develop a common framework for merger notification, including the development of common definitions. In addition, the OECD should continue to focus its efforts on identifying the minimum information necessary to identify whether mergers raise competitive issues as well as to specify categories of data that may be useful to narrow or resolve potential issues early in the process. As part of this effort, consideration also should be given to ways to reduce unnecessary burden, including translation costs, overly burdensome certification, and other procedural requirements.

Targeted Reform Efforts in the United States

In Chapter 3 the Advisory Committee recommends a number of practices designed to rationalize the application of merger review procedures. The Advisory Committee believes that the United States should play a leading role in the effort to implement these proposed reforms in the international arena. Perhaps one of the most effective ways in which the United States can stimulate global reform is leading by example. It is therefore important that the United States examine its own merger review system in an attempt to identify and correct those aspects of the system that create uncertainty and unnecessary transaction costs. The applicability of the practices recommended in Chapter 3 to the United States is discussed below.

Targeted Reform in the United States: Notification Thresholds

The Hart-Scott-Rodino Act (HSR) and implementing regulations that spell out the U.S. merger review process already use exemptions from HSR reporting requirements for certain transactions involving non-U.S. companies (foreign person exemptions) to ensure that the U.S. authorities are notified only of transactions with a nexus to the jurisdiction. In addition, the notification thresholds are objectively based. Finally, the U.S. antitrust agencies ensure the transparency of these thresholds and their application by offering guidance to practitioners and businesses through published rules and regulations, guides, speeches, and press releases, and through the Federal Trade Commission (FTC) Premerger Office's provision of advice.

The foreign person exemptions, however, have not been adjusted for many years. Thus, the Advisory Committee recommends that the FTC review the scope and level of the HSR exemptions for transactions involving foreign persons to ensure that the U.S. authorities are notified only of transactions with an appreciable nexus to the United States. A final area that deserves attention concerns ensuring that the notification thresholds are only as broad as necessary to identify transactions that have the potential to generate appreciable anticompetitive effects within the United States.

1. The thresholds currently employed by the premerger notification system in the U.S. deserve careful review. While recognizing that small transactions are not necessarily competitively benign, the

Advisory Committee finds that the notification thresholds currently employed in the United States are too low and capture too many lawful transactions.

2. The most straightforward way to decrease the number of required filings while not materially compromising the agencies' enforcement mission is to increase the size-of-transaction threshold for acquisitions of both voting securities and assets. One method for raising the threshold lies in adjusting for inflation, with periodic future adjustments for inflation. Depending on the base year and deflator used, increasing the size-of-transaction threshold commensurate with inflation would mean increasing the threshold in the $33 million to $43 million range when measured in 1998 dollars. The majority of the Advisory Committee recommends raising the thresholds within this range, although three members advocate raising the size of the transaction threshold even higher, to $50 million.

3. An indexing mechanism has many benefits, but an *automatic* indexing mechanism also may produce arbitrary results. If an automatic indexing mechanism is not employed, the Advisory Committee recommends that the notification thresholds be reviewed periodically to determine whether they should be adjusted.

4. The Advisory Committee believes that, ideally, filing fees should be delinked from funding for the agencies. A linkage of this nature may skew incentives to revise notification thresholds because of collateral fiscal effects. Another risk is that the ability of the agencies to fund their law enforcement activities may be compromised when the current merger wave subsides. However, because filing fees currently provide 100 percent of the U.S. agencies' enforcement budgets, sufficient funds must be available from other sources before any effort to delink filing fees or raise thresholds occurs. It is critical to the agencies' enforcement mission that resources are not reduced. The antitrust agencies' enforcement efforts could be directly funded from general revenue or indirectly in a variety of ways including increasing the filing fee, creating a sliding scale fee, or assessing a fee based on the amount of work performed by the agencies (although these latter alternatives would not accomplish delinking the budget from fees).

Targeted Reform in the United States: Review Periods and Timing

The Advisory Committee commends the flexibility of the U.S. premerger notification system, which permits filing at any time after the execution of a letter of intent, contract, agreement in principle, or public bid. In addition, the Advisory Committee commends the fact that the U.S. competition authorities resolve approximately 97 percent of all notified transactions within the initial 30-day review period. Thus, no reform of the U.S. triggering event or initial review period is needed. The second-stage review process can, however, be improved.

1. A consensus exists among Advisory Committee members on the need for certainty in merger review periods and that merger review should be conducted within reasonable time frames. Advisory Committee members are not of a shared view on the appropriate mechanisms for addressing these concerns, however. Some members of the Advisory Committee believe that fixed maximum review periods are necessary to provide certainty and discipline in the merger review process. Most members of the Advisory Committee feel this would be extremely difficult to achieve under the U.S. system and might result in enforcement errors. There also is concern that maximum time periods would effectively turn into standard or minimum review periods. A majority of Advisory Committee members therefore eschew strict time periods but recommend that alternative steps be taken to provide the greater certainty required for effective transaction planning. For example, the agencies could employ nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction.

Targeted Reform in the United States: Notification Forms and Information Requests

The Advisory Committee believes that with modest exceptions, the HSR notification form requests only the information required by the agencies to identify competitively sensitive transactions. In other instances, however, it appears that revisions to the HSR form could enhance the agencies' ability to identify potentially problematic transactions. The Advisory Committee also believes that it is important for the U.S. agencies to implement measures to address some of the problems perceived by the business community and the private bar with respect to the second-request process.

1. The Advisory Committee encourages the FTC to implement changes that better focus the HSR form. In addition, the Advisory Committee recommends that the agencies formalize their current practices that encourage merging parties voluntarily to provide additional information at the initial filing stage in an effort to resolve potential issues without the issuance of a second request. One way to formalize the process is to create an optional long form. Another way lies in creating a model voluntary submission list that identifies the categories of data that merging parties usefully may submit in facially problematic cases.

2. Another useful practice that should be formalized is that of permitting the merging parties voluntarily to withdraw and refile within 48 hours the acquiring person's HSR form (without having to pay another filing fee) in order to give the agencies additional time to resolve the matter without having to issue a second request. In appropriate cases of this nature, the agencies should alert parties to the option of withdrawing and refiling the HSR notification. Publishing statistics on the number of successful (and unsuccessful) attempts to avoid a second request by withdrawing and refiling a notification would demonstrate the viability of this option.

3. When they issue a second request, the agencies should provide the merging parties (either orally or in writing) with their reasons for not clearing the transaction within the initial review period. An

explanation of the substantive concerns prompting the second request will facilitate transparency in the merger review process and will expedite the process by further enabling the merging parties to focus on and respond to the agencies' concerns. Further, it will assist parties in understanding that the second request rests on genuine substantive concerns. In designing second requests, moreover, the agencies should avoid overly broad requests and instead tailor their requests for additional information to the issues prompting the need for further review.

4. In 1995 the agencies announced that they had addressed concerns about the second-request process by adopting a model second request. The predominant view of ICPAC hearing participants, among others, however, is that this reform helped reduce burdens only marginally. In attempting to identify the appropriate components of an effective model second request, one useful project might be an internal after-the-fact audit of select merger challenges. Such an audit could consider whether the agencies are requesting the right types of information and whether this information was subsequently used at trial (and whether discovery tools were sufficient). Perhaps the answers to these questions would enable the agencies to revise their model second request to reduce compliance burdens on businesses.

5. Merging parties and agency staff frequently are able to negotiate modifications to the scope of second requests. The level of willingness to engage in productive negotiations of this nature appears to vary among staff members and counsel for merging parties, and modification requests are sometimes not resolved in a timely fashion. In an attempt to institutionalize productive modification negotiations, the Advisory Committee recommends that the agencies impress on staff the importance of being open to negotiating modifications to the scope of second requests and to do so in a timely fashion. Success in this endeavor also requires merging parties and their advisors to cooperate.

6. When modification negotiations break down, parties should be encouraged to use the appeals process, which currently is used hardly at all. To this end, the Advisory Committee recommends that the agencies implement measures to make the appeals procedure more attractive to merging parties by making the process more expeditious, making its outcome more transparent, and actively encouraging merging parties to use the process. Agencies and parties also should involve direct supervisory officials in the modification negotiation process, when necessary.

7. The Advisory Committee also considered ways to reduce foreign productions and translation requirements. The agencies should continue their current practice of permitting parties, in appropriate cases, to provide summaries of documents and produce full translations of only those documents the agencies deem particulary relevant to the inquiry. However, the parties should not as a matter of course be required to forgo a defensible market definition in order to take advantage of this practice. The Advisory Committee recommends that in appropriate cases, the agencies consider whether the selection of the specifications that apply to foreign offices could be limited to

those that are directly relevant to the geographic market or that seek documents that pertain to the specific competitive concerns at issue.

Targeted Reform in the United States: Multiple Review of Mergers

The Advisory Committee has identified overlapping responsibilities for review of mergers in the United States as an area warranting consideration in its examination of international competition policy. In the United States, a decision by the DOJ or FTC in a specific transaction does not preclude subsequent or parallel competition reviews, nor does it determine the outcome of such proceedings. Federal and state legislatures and judicial decisions have empowered a wide array of public and private parties to challenge mergers, acquisitions, and joint ventures on competition grounds.

Concurrent jurisdiction among multiple domestic agencies has the potential to generate inconsistent policy approaches within a single jurisdiction. As a result, it can make global harmonization efforts and cross-border cooperation more difficult. In addition, it imposes heightened uncertainty as to timing and outcome and further increases transaction costs. In its deliberations, the Advisory Committee identified a number of possible policy approaches to address these issues. These proposals ranged from granting exclusive federal jurisdiction to determine competitive consequences of mergers to the DOJ and FTC, to clarifying the roles of the DOJ, the FTC, state, and federal sectoral regulators, to imposing timetables and deadlines on the merger review process, to nonlegislated convergence strategies.

1. The Advisory Committee believes that the federal antitrust authorities are better positioned to conduct antitrust merger review than federal sectoral regulators. *The majority of Advisory Committee members recommend* removing the competition policy oversight duty from the sectoral regulators and vesting such power exclusively in the federal antitrust agencies. Under such a regime, the findings of the federal antitrust agency on the competition issues would be reported to, and binding upon, the specialized agencies. At this juncture, however, *some members recommend* instead creating a presumption in favor of the analyses undertaken by the federal antitrust enforcement agencies in parallel or subsequent proceedings. Additional approaches advocated in the short run consist of soft convergence strategies between agencies exercising concurrent jurisdiction to encourage the adoption of common analytical methods and enhanced cooperation.

2. With respect to overlapping state review, the Advisory Committee encourages the state attorneys general to resist using antitrust laws to pursue noncompetition objectives. Further, the Advisory Committee recommends that the federal antitrust enforcement agencies file an amicus curiae brief in state courts in select private suits challenging international transactions. For example, appropriate cases may be where the DOJ or FTC has either cleared or settled a transaction where there has been significant cross-border cooperation or the parties agreed to waive confidentiality.

3. All members agree that several issues relating to overlapping agency review deserve further study. These studies should include analyzing the relationship among the DOJ, the FTC, and other federal and state regulators; identifying the differences in review processes with respect to both substantive approaches and procedure; assessing the expertise of the federal antitrust agencies to undertake merger analyses in regulated industries on the one hand and the capacity of federal sectoral and state regulators to conduct antitrust analyses on the other; assessing the ramifications of a change in the status quo; and gathering the views of the reviewing agencies.

CHAPTER 4
INTERNATIONAL CARTEL ENFORCEMENT AND INTERAGENCY ENFORCEMENT COOPERATION

In the last decade, the U.S. Department of Justice Antitrust Division has aggressively and successfully prosecuted nearly 20 international cartels, filing charges against more than 80 corporate and 60 individual defendants -- both domestic and foreign -- in cases involving price fixing; volume, customer, and market allocation agreements; and bid-rigging -- among other things. These high-visibility prosecutions have involved complex, globally extensive, and sometime long-lived conspiracies and have resulted in the imposition of record-breaking penalties against domestic and foreign defendants alike. Corporate fines in the tens of millions of dollars have become almost commonplace as have significant fines and, increasingly, prison terms for individual defendants.

Several changes in U.S. enforcement efforts have contributed to the detection and successful prosecution of these cartels. In addition to making enforcement efforts against cartels a top priority, the Antitrust Division has instituted a series of incentives for cartel participants to come forward and cooperate with authorities. Moreover, the recent U.S. enforcement successes appear to be occurring amidst a heightened degree of international consensus that cartels should be detected and prosecuted. Some other jurisdictions have followed the U.S. example and are increasing their anticartel enforcement programs, including their focus on international cartels, and their commitment to cooperating more fully with the United States in its anticartel efforts. Yet there is room for even greater international cooperation.

Improving Knowledge about International Cartels

Whether the surge in U.S. prosecutions means that there are more international cartels in operation than ever before is unclear. What is clear is that international cartels present a serious problem with adverse effects on U.S. and foreign consumers, businesses, and governments. With U.S. anticartel enforcement actions generating considerable interest around the world, the time is opportune for U.S. antitrust agencies not only to expand cooperation with antitrust authorities in other jurisdictions, but also to increase public awareness about the detrimental effects of international cartels.

1. A complete assessment of the incidence of private international cartels is beyond the capabilities of the Advisory Committee. Nonetheless, the Advisory Committee believes that the scope and incidence of international cartels are important matters for further examination and recommends that governments and other experts take up this issue.

2. The Advisory Committee also recommends that the United States expand its efforts to increase public knowledge and awareness at home and abroad of the deleterious effects of cartels for consumers, businesses, and governments.

3. To take advantage of the improved environment for international cooperation on rooting out and prosecuting international cartels, the Advisory Committee hopes that the United States will use all opportunities, both formal and informal, to share its recent experiences with foreign enforcement authorities. Actions to ensure that U.S. anticartel enforcement policies are well understood abroad will enhance the credibility of U.S. enforcement efforts and promote interagency cooperation at the same time.

Increasing Transparency in Handling Confidential Business Information

The exchange of confidential information between competition authorities is an important feature of deepening cooperation. The United States and international business communities have expressed concerns about agency accountability and transparency in connection with such information exchanges, particularly with respect to cross-border joint investigations into cartel activities (similar concerns in the context of multijurisdictional merger reviews have also been pressed, and they are addressed in Chapter 3). Another recurring concern from some members of the business community and the private bar is that competition authorities do not provide *notice* when they transfer confidential information or other protected information in their agency files to another enforcement agency. In the view of the Advisory Committee:

1. Cooperation between competition authorities should feature appropriate safeguards for confidential information. Competition authorities should ensure the transparency of standards applied in their

enforcement efforts. Continuing efforts are necessary to instill greater business confidence that exchanges will not result in adverse commercial consequences.

2. U.S. antitrust authorities should consider providing notice -- either before or after the fact -- of their intent to disclose information to antitrust authorities in other jurisdictions unless such notice would violate a treaty obligation of the United States or a court order or jeopardize the integrity of any U.S., state, or foreign investigation.

3. The U.S. antitrust agencies should assess requests from other competition authorities to share confidential information by taking into consideration, among other things, their history of enforcement cooperation with the requesting jurisdiction as well as whether they are confident that the jurisdiction is able to and does protect confidential information under its own laws.

The Importance of Positive Incentives

The United States should attempt to identify positive incentives that can deepen cooperation between U.S. antitrust agencies and competition authorities in other jurisdictions, instill greater public confidence in the value of such cooperation, reduce tensions associated with U.S. enforcement, and further develop a shared culture of sound competition policy around the world. To this end, the Advisory Committee recommends that:

1. The U.S. government should expand its ability to provide technical assistance, both bilaterally and in coordination with international organizations, to develop traditional core areas such as anticartel enforcement activities and premerger reviews as well as new initiatives (such as those discussed in Chapters 5 and 6) to support the operating needs and capabilities of authorities that are beginning to introduce or to enhance competition law and policy regimes.

2. U.S. antitrust authorities are encouraged to expand the jurisdictions with which they have modern antitrust cooperation agreements, including those that feature more detailed provisions regarding positive comity. The U.S. authorities should seek cooperative arrangements with qualified jurisdictions that have newer competition systems as well as with those with more established competition laws.

CHAPTER 5
WHERE TRADE AND COMPETITION INTERSECT

In this chapter, the Advisory Committee considers the intersection of trade and competition policy. Notably, the Advisory Committee focuses on anticompetitive or exclusionary restraints on trade and investment that are implemented by firms, governments, or some combination of the two, and that hamper

the ability of firms to gain access to or compete in a foreign market. Traditionally, such problems have been considered primarily the responsibility of national competition authorities concerned about anticompetitive effects to markets and consumers on their soil. Some countries, notably the United States, have at times applied their law extraterritorially in an attempt to remedy such practices. As formal governmental barriers to international trade and investment are reduced or eliminated, international attention is turning more to anticompetitive practices occurring within nations that affect trade and investment flows from other nations. As a result, perceived restrictions emanating from exclusionary or anticompetitive practices have generated economic and political tensions between nations and firms.

This chapter reviews the landscape of global problems that implicate both international trade concerns about access to markets and competition policy concerns about anticompetitive practices that block the operation of markets. Many international competition problems are not seen by this Advisory Committee as matters of relevance to international trade policy. As discussed in Chapters 2 and 3, the proliferation of merger control regimes is raising transaction costs and introducing new frictions. As discussed in Chapter 4, international cartels appear to be a serious problem for the U.S. and the global economy. These matters are global competition problems but they are not trade and competition policy issues. Yet, there is an important global competition agenda that needs greater attention by the appropriate policymakers at home and abroad. This is considered most directly in Chapter 6.

Chapter 5 considers a variety of acts of governments and firms that can restrict international trade. Around the world, formal governmental actions immunize some firm conduct. Governments also may take measures that are excessively trade-restricting and anticompetitive. Anticompetitive private arrangements also can have adverse effects on international trade and access to markets. And, in some instances such arrangements occur against a background of governmental restraints that are supportive of private restraints. In this way, practices that may be anticompetitive or exclusionary may not fall neatly into a category of either purely private restraints or governmental practices.

Trade and competition policies are two methods of addressing such problems. Trade law and policy are centrally focused on the actions of governments. Competition or antitrust laws are principally focused on firm conduct. In this way, trade and competition policies are designed to look at restraints that come from different sources. As this chapter discusses, aspects of these policies' tools can be mutually supportive. At the same time, overlapping policy concerns can lead to different conclusions regarding the effects of a particular restraint. For example, examination of a vertical distribution practice under U.S. antitrust law might find that the restraint is efficiency-enhancing and beneficial to consumers or merely neutral to consumer welfare, while the same restraint might be seen from a trade policy perspective as exclusionary and adversely affecting access to markets.

Neither trade nor antitrust policy tools provide complete solutions to the problems that emanate from this mix of governmental and private restraints. And at present, no international set of rules directly addresses business practices, although some experts are of the view that such disciplines should be developed at the international level.

This chapter considers and evaluates the utility of both old and new approaches to such problems. It starts by defining the scope of the problem internationally, then reviews cases that have animated international attention, and finally considers alternative policy approaches, including bilateral cooperative solutions, U.S. enforcement responses, and expanded international initiatives, at the World Trade Organization (WTO) and elsewhere.

Defining the Problem

Much of the international discussion on the effect of anticompetitive practices has focused on the impact of *private restraints* on international trade. The Advisory Committee believes that U.S. policy should look beyond purely private business practices, because *governmental practices* and *restraints of a mixed private and public nature* also can have significant trade-distorting consequences. The Advisory Committee therefore considers policy recommendations for the broad ambit of practices that can have an anticompetitive impact on trade and investment.

Evaluating the Evidence

As a first step in considering appropriate policy responses for addressing exclusionary or anticompetitive practices abroad, the Advisory Committee considers the current record of cases and disputes that have both competition and trade or market access features. *In the view of this Advisory Committee, this record, while uneven, is sufficient to show that private and governmental restraints that inhibit market access are a problem.* While the problems recur as a source of international tension between certain countries, private anticompetitive restraints are *not* geographically limited. The Advisory Committee believes that the current record is sufficient for the U.S. government to make some policy judgments about the nature of the global trade and competition problems.

Policy Approaches

Through its outreach efforts and public hearings, the Advisory Committee has solicited input from various enforcement officials, business groups, economists, organized labor, lawyers, and other interested parties regarding potential policy options for addressing anticompetitive and exclusionary practices that restrain exports. In general, alternative approaches considered by this Advisory Committee fall into several broad categories:

1. The United States should encourage the development and expansion of bilateral agreements including positive comity provisions. The development of positive comity can be used to address anticompetitive restraints occurring in foreign markets that result in foreclosure. It is a tool to encourage other nations to enforce their competition laws regarding anticompetitive conduct that occurs on their territory and has adverse effects abroad.

2. Where countries are unwilling or unable to address such anticompetitive behavior within their own borders, the harmed nation should, if feasible, use its own laws to reach the offending conduct, if feasible.

3. New or more robust multilateral initiatives could be explored through existing international organizations such as the OECD or the WTO. Alternatively, a new multilateral agreement could develop international rules or initiatives to address such complaints.

The Advisory Committee believes that there is no single approach that responds to all aspects of competition problems facing the global economy and U.S. firms. Several different approaches may be promising. Bilateral agreements with positive comity offer a potentially useful instrument for addressing private restraints. The extraterritorial enforcement of U.S. antitrust laws can be necessary and prove effective under some circumstances. Importantly, in the view of this Advisory Committee, economic globalization requires the further development of international competition policy initiatives. Through certain adjustments in each of these approaches, U.S. policy can improve upon its approach to problems that intersect both trade and competition policy concerns.

Bilateral Agreements with Positive Comity

The Advisory Committee believes that positive comity remains a useful first step in addressing anticompetitive restraints affecting trade where the territorial party has the authority and the willingness to take effective action. The benefits associated with the positive comity process hold substantial potential for enhanced cooperation and minimization of conflicts that can arise during cross-border investigations of conduct affecting market access. In market access cases, jurisdictional issues and even the theoretical threat of extraterritorial enforcement of antitrust laws have engendered significant levels of tension between governments. The application of positive comity principles can greatly reduce these frictions. However, positive comity is not a replacement for the option to pursue extraterritorial enforcement; it is but one tool within the entire framework of options available to antitrust enforcement officials.

While enhanced cooperation and use of the positive comity instrument can clearly produce benefits, the Advisory Committee recognizes that several shortcomings need to be addressed if positive comity is to become an effective element of international cooperative efforts. The historic enforcement record of antitrust agencies around the world does not instill confidence in those agencies' willingness to pursue antitrust actions against domestic firms in instances where the practices of those firms have allegedly impaired the ability of foreign firms to compete effectively. In the absence of a nation's serious commitment to undertake such actions, where legally warranted, the benefits of positive comity may remain modest or illusory. Moreover, to be truly effective, positive comity requires correspondence between the parties' antitrust laws and enforcement commitment. Confidence in positive comity can be weakened if the process is delayed and not transparent. And, of course, it remains a relatively new and untested approach.

Recommendations for addressing concerns about positive comity and improving the process include:

1. The U.S. Department of Justice should build on the U.S.-EC positive comity agreement as a model for future agreements and should continue to expand the jurisdictions with which it enters into bilateral cooperation agreements.

2. It may be possible to improve upon the structure of positive comity provisions still further. The Advisory Committee proposes several specific recommendations to increase communication and transparency in the positive comity process.

3. In addition to visible support for positive comity by competition enforcement agencies, international organizations that address trade and competition issues also should endorse the benefits associated with positive comity in their mission. By advertising the advantages reaped from effective positive comity cooperation, international organizations hold the potential to expand such cooperation to nations or jurisdictions that have similar antitrust laws and enforcement policies.

4. As a means to ensure that aggrieved U.S. firms view positive comity tool as a serious policy option for addressing anticompetitive practices in foreign markets, the Department of Justice should make a conscientious effort to implement and test recent bilateral agreements with positive comity provisions as a first response to solve real problems, when meritorious cases arise.

U.S. Enforcement to Gain Market Access

The record of U.S. government antitrust enforcement actions against foreign restraints that bar access to markets abroad by U.S. firms is limited. The reasons for this are diverse but suggest that significant legal, evidentiary, and other obstacles are likely to make extraterritorial enforcement, particularly with respect to foreign anticompetitive restraints that limit U.S. exports, only infrequently available as a viable policy response. At the same time, unilateral remedies must remain a part of U.S. antitrust policies, particularly when foreign governments are unwilling or unable to undertake their own enforcement actions. U.S. policymakers should make clear that the United States remains committed to using such instruments when necessary and possible.

1. Although the Advisory Committee believes that it is important for the United States to develop incentives to obtain foreign authorities cooperation, U.S. antitrust laws should not be weakened in an effort to obtain such assistance. For example, the Advisory Committee believes in maintaining treble damage liability in cases where the only antitrust violation alleged is harm to U.S. export commerce.

2. Private and governmental litigation can raise traditional comity concerns on the part of foreign governments. Improvements should be sought in the process and standards by which competing interests are balanced for comity purposes. To that end, the Advisory Committee recommends that federal, state, and local judges hearing private disputes that raise claims or defenses based on considerations of governmental policy invite concerned governments, including the U.S. Department of Justice, to submit their views at an early stage in the litigation. Such "airing of views" commonly takes the form of amicus curiae submissions.

3. The Advisory Committee recognizes that U.S. extraterritorial antitrust enforcement against foreign market-blocking restraints is a sensitive issue for foreign governments that can affect antitrust enforcement cooperation efforts in particular and law enforcement cooperation more broadly. Because of these concerns and the potential obstacles discussed above, the expected results of extraterritorial enforcement against offshore restraints on U.S. exports should not be overestimated. *Indeed, it is for such reasons that the Advisory Committee recommends that a first step in attempting to address these restraints should be to consider whether it is realistic to approach the foreign nation where the practices occur and seek its cooperation.* Where such cooperation is not forthcoming, a willingness to use U.S. antitrust enforcement tools may have the salutary effect of acting as a lever to encourage excluding nations to pursue their own enforcement actions. A tenable U.S. antitrust enforcement effort against market-blocking restraints may contribute to a greater culture of cooperation and enforcement. *It is also essential to the credibility of U.S. antitrust enforcement that the business community have confidence that the Antitrust Division will vigorously pursue cases, including export restraint cases, wherever possible and when no superior alternatives such as positive comity are available.* Further, the Advisory Committee recommends that the U.S. antitrust agencies continue to have responsibility vis-à-vis trade agencies over legal determinations of the anticompetitive conduct of private firms, at home or abroad.

4. One of the most challenging aspects of U.S. enforcement against market-blocking restraints is developing adequate evidence of anticompetitive conduct. In any case that could result in an enforcement action, that information and analysis will be highly fact specific. Nonetheless, considerable disagreement remains about the merits of particular disputes and the extent to which private, governmental, and mixed public-private restraints inhibit trade. It therefore may be useful to undertake some broader empirical analysis such as a study of the magnitude of global trade problems that stem from private or governmental restraints abroad or an analytical effort to evaluate the effects of recent transnational cases such as in the cartel area. Such inquiries would not establish definitive estimates, but could provide a foundation of evidence or analysis for informed national decisionmaking and international discourse that could be updated, as needed.

The Role of International Organizations

The Advisory Committee believes that in addition to pursuing bilateral cooperation with positive comity, the United States should continue to develop its broader multilateral engagement on competition policy matters. These efforts should encompass a variety of forums and should be aimed at seizing opportunities for developing more seamless markets and expanding meaningful cooperation on practical enforcement problems. The goals for enhanced international engagement should include: (1) developing a more broadly international perspective on competition policy, with the goals of reducing parochial actions by firms and governments; (2) fostering soft harmonization of competition policy systems; (3) developing improved ways of resolving conflicts; and (4) developing a degree of consensus on what constitutes best practices in competition policy and its enforcement.

The World Trade Organization is the multilateral organization most often mentioned in connection with an international effort to develop competition rules. The WTO has a unique place among international organizations and rulemaking bodies by virtue of its inclusiveness (with more than 135 members from developed and developing economies) and its centrality as a forum for negotiating binding rules governing the economic conduct of nations. The WTO's central focus has been on the trade-distorting conduct of governments. With the exception of antidumping and countervailing duty laws, the WTO has not focused on firm conduct. However, while several WTO agreements have elements that implicate competition policy, and while many WTO principles are supportive of competition policy objectives (such as transparency, nondiscrimination, and national treatment), the treatment of competition policy as such in WTO agreements has been only fragmentary.

In thinking about the role that the WTO or another international organization might play with respect to competition policy in the future, the following approaches are *not* endorsed by the Advisory Committee.

- Specifically, this Advisory Committee sees efforts at developing a harmonized and comprehensive multilateral antitrust code administered by a new supranational competition authority or the WTO as both unrealistic and unwise. This is not an argument against efforts at promoting soft convergence; indeed the Advisory Committee advances several proposals that it believes would be useful along those lines. However, deliberations and consultations on substantive as well as procedural features of competition policy regimes are not the same as negotiating a comprehensive international antitrust code.

- Also unrealistic is the proposition that purely national approaches are sufficient and broader international engagement is unnecessary. This viewpoint ignores both the costs of the current sources of disharmony among nations and equally important, the opportunities that now appear to exist for productive collaboration among competition authorities as well as trade and competition authorities, including at the WTO.

The Advisory Committee believes that attention should be focused on the substantial middle ground between these two extremes. It is here that the WTO can play a constructive role in developing a common understanding of the issues surrounding the intersection of trade and competition policy. However, not all competition problems are trade problems, and hence not all competition problems that are *global* will find a natural home at the WTO.

1. The Advisory Committee therefore recommends that the primary focus of the WTO and its area of core competence remain as an intergovernmental trade forum focusing on governmental restraints. There is a great deal of further liberalization of trade to achieve and that agenda can itself have a positive impact on the environment for competition policy around the world.

2. The Advisory Committee also recommends that the U.S. government support and pursue additional incremental steps at the WTO to deepen the work already under way on the intersection of trade and competition policy. The WTO Working Group on the Interaction Between Trade and Competition Policy is a productive intergovernmental initiative engaging trade and competition officials from both developed and developing economies. To foster the work of this group, the Advisory Committee recommends the WTO undertake these illustrative and largely educative steps to make the WTO a more "competition policy friendly" environment.

   - The most obvious move in this direction would be the continuation of the deliberations of the Working Group, which has had a productive start but is still in the early stages of deliberations.

   - The WTO should increase the competition policy expertise at the WTO Secretariat and in the country missions, wherever possible.

   - The WTO should continue to conduct regular summary reports or review of those countries that have competition laws or policies in place, possibly including such reports in the Trade Policy Review Mechanism (TPRM).

3. At this juncture, the majority of the Advisory Committee believes that the WTO as a forum for review of private restraints is not appropriate. Given the possible risks, and the lack of international consensus on the content or appropriateness of rules or dispute settlement in this area, this Advisory Committee believes that the WTO should not develop new competition rules under its umbrella. Various concerns animate the Advisory Committee's skepticism toward competition rules at the WTO, including the possible distortion of competition standards through the quid pro quo nature of WTO negotiations; the potential intrusion of WTO dispute settlement panels into domestic regulatory practices; and the inappropriateness of obliging countries to adopt competition laws. While recognizing that in some instances it may not be a fully satisfactory result, the Advisory Committee believes that national authorities are best suited to address anticompetitive practices of private firms that are occurring on their territory.

4. If anticompetitive practices and market-blocking restraints are occurring in a jurisdiction that does not have a competition authority or that authority is unable or unwilling to remedy the problem, then the harmed nation may be able to apply its own laws effectively in an extraterritorial fashion. If relief is not practicable (because of an inability to obtain necessary evidence or other means), then it may be the case that the harmed nation simply has limited relief available to it under the current system. This may appropriately be a subject of international consultation. However, it seems less appropriately a matter for WTO dispute settlement.

5. Over the longer term, the WTO may be called upon to resolve disputes between nations that hinge on whether private practices that foreclose access to markets are ultimately attributable to governmental practices. The ability of the WTO to resolve such disputes is not fully tested under the WTO's existing rules or jurisprudence and is an area that this Advisory Committee believes needs particular study and consideration by trade and competition policymakers in the years ahead. As the world moves into the next century, and as new countries join the WTO, the problems of market access will surely deepen, and the line between public and private restraints will become increasingly opaque. Hence, it is a particularly important area of attention by trade and competition policymakers.

CHAPTER 6
PREPARING FOR THE FUTURE

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 emerging competition issues. This chapter looks at four such areas. First, it examines the possible need for additional multilateral initiatives to deal with competition policy matters that either transcend national boundaries or that would benefit from more international attention. A key recommendation is the proposed "Global Competition Initiative," which is designed to address differences in national approaches to competition that have international consequences. Second, and closely related, the chapter considers the need for an international mechanism that will allow countries to resolve disputes over competition policy. Third, the chapter considers an emerging issue of growing importance, namely, the intersection of competition policy and electronic 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.

Global Competition Initiative

Many competition issues are not trade issues but are nevertheless broadly international. Such issues include harmonization of procedural or substantive features of merger notification and review and protocols to protect confidential information exchanged in the course of enforcement measures, among others. 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. 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 exchange ideas and work toward common solutions of competition law and policy problems. The Advisory Committee calls this the "Global Competition Initiative."

1. A Global Competition Initiative should be inclusive and 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:

   - Multilateralize and deepen positive comity;

   - 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;

   - Consider and review the scope of governmental exemptions and immunities that insulate markets from competition around the world (as discussed in Chapter 5);

   - Consider approaches to multinational merger control that aim to rationalize systems for antitrust merger notification and review (as discussed in Chapter 3;

   - Consider frontier subjects that are quintessentially global such as e-commerce, which will create new challenges for policymakers around the world;

   - 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

   - Possibly undertake some dispute mediation and even technical assistance services.

2. A Global Competition Initiative does not require a new international bureaucracy or substantial funding. The Group of Seven (G-7) 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

The Advisory Committee recognizes that existing multilateral organizations are not equipped to handle some competition conflicts between nations. The only options currently available in those conflicts are domestic litigation against a sovereign state, brinkmanship, or diplomatic negotiation. Consequently, some consideration and experimentation with approaches is needed to provide alternative options for resolving these conflicts. One possible approach is to create a mediation mechanism in which neutral but expert parties can help the parties reach a settlement and where no party to a dispute enjoys any home-court advantage.

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 to 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.

2. The members of the mediation 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.

Electronic Commerce and Competition Policy

In thinking about the global challenges to competition policy in the next century, the Advisory Committee identified e-commerce and the application of competition policy to high technology industries as important frontier issues. Accordingly, in Chapter 6 the Report considers some of the competition policy dimensions raised by e-commerce.

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

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 this reality if not the existing structures. The Report considers whether and how the role of the Antitrust Division should be included in U.S. Government discussions concerning 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. One potentially constructive step would be 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 parallels in other international negotiations, such as those involving financial services and securities.

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

The Advisory Committee has considered additional affirmative steps the United States might undertake to expand technical assistance to overseas competition agencies. Technical assistance programs may provide the United States with a voice to support the adoption of sound competition principles and promote the rule of law, especially by transition economies. Further, in light of the proliferation of new antitrust authorities, technical assistance can be used to convey practical experience and advice to emerging antitrust regimes, as well as guidance on the formulation of domestic competition policies that make sense in the globalized economy. U.S. support of new competition policy regimes also creates an opportunity for the United States to share its perspective. This can be important as a means of influencing the legal environment in which U.S. exporters and businesses operate.

U.S. government support for technical assistance programs to support competition policy regimes around the world has been a small but important component of its enforcement cooperation work over the past decade. U.S. antitrust authorities have provided technical assistance under programs characterized by modest funding, geographical limitations, and varying duration or scope. The Advisory Committee advocates application of a broader view of U.S. priorities in this regard, and recommends the following:

1. The United States and indeed the world community should devote more technical assistance 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 support 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 or international organizations such as the OECD, the World Bank, the International Monetary Fund, and the WTO.