ANNEX 1-A
SEPARATE STATEMENT OF ADVISORY COMMITTEE MEMBER ELEANOR M. FOX

The challenge of globalization is an internationalist challenge. Markets are integrating far beyond national lines. Firms are larger than nations, and obviously more far flung. Across many fields of economic regulation, policymakers have been observing spillovers, crossovers, and synergies, and have proposed bridges, networks and links for the common good of the world community.[1] It is time for the internationalist insights to be applied to competition policy.[2]

The Advisory Committee's Report, in my view, contains many progressive proposals for coordinating antitrust law regimes in the new global economy. With a focus on U.S. law and tools, and U.S. opportunities for seeking cooperation of neighbors, it pushes from "below" to achieve more robust national antitrust enforcement. It suggests, more tentatively, global cooperation. I would go further than most of my fellow Advisory Committee members, looking from the "top down" in an attempt to understand what is feasible in facilitating markets and easing systems clashes; and I would use the view from the top to inform the solutions from the bottom.

Believing that nationalism and systems clash are not exceptional, that convergence of law will and should occur only to a point,[3] and that some global integrative or communal solutions are necessary, I embrace but go beyond the Advisory Committee recommendations.

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[1] *See* Sol Picciotto, *The Regulatory Criss-Cross: Interaction between Jurisdictions and The Construction of Global Regulatory Networks*, in INTERNATIONAL REGULATORY COMPETITION AND COORDINATION: PERSPECTIVES IN ECONOMIC REGULATION IN EUROPE AND THE UNITED STATES, (W. Bratton, ed., 1996); Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFFAIRS 183 (1997); Anne-Marie Slaughter, *Governing the Global Economy through Government Networks*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS (in publication); Joel Trachtman, *L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity*, 33 HARVARD INT'L L. J. 459 (1992). See also THOMAS FRIEDMAN, THE LEXUS AND THE OLIVE TREE (1999).

[2] *See*, *e.g.,* Ernst-Ulrich Petersmann, *Legal, Economic and Political Objectives of National and International Competition Policies: Constitutional Functions of WTO "Linking Principles" for Trade and Competition*, 34 N. ENG. L. REV. 145 (1999); Karel van Miert, *International Cooperation in the Field of Competition: A View From the EC*, in 1998 FORDHAM CORP. L. INST., Ch. 2 (B. Hawk ed. 1999); Mitsuo Matsushita, *Reflections on Competition Policy/Law in the Framework of the WTO*, in 1998 FORDHAM CORP. L. INST., Ch. 4 (B. Hawk ed. 1999); Report (1999) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council of the World Trade Organization, WT/WGTCP/3; Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council of the World Trade Organization, WT/WGTCP/2.

[3] *See* AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW AND PRACTICE, REPORT CONCERNING INTERNATIONALIZATION OF COMPETITION LAW RULES: COORDINATION AND CONVERGENCE (January 2000).

Overregulation: Globalization has put pressure on our system in which the laws of numerous nations[4] apply to the same conduct or transaction. The pressure comes especially at the point at which competition law is regulatory rather than liberalizing; paradigmatically, premerger notification filing-and-waiting regimes. In this area, sound regulation requires coordination, and modes adopted by the European Union for its internal market are often instructive. I would go further than the Advisory Committee to propose an opportunity for mutual recognition of premerger notification filings when the market of a would-be regulating nation is subsumed by the broader global market.[5]

Systems clashes: We must find international solutions for systems clashes, probably with international dispute resolution. Actual cases provide helpful laboratories. Boeing's acquisition of McDonnell Douglas — which the U.S. cleared and the EU threatened to enjoin — is such a case. Both the United States and the EU assert the right to enjoin offshore mergers of firms that sell in their markets. Other jurisdictions are likely to follow suit. Therefore overlaps and clashes are more and more likely to occur.

There are various possible agreements that nations might consider that would keep an international merger on track as a competition case and prevent diversion into a trade war. The Advisory Committee has proposed several progressive measures, on the order of transparency.

I believe that we must move further, in view of the need for a world view and in view of the fact that conflicts will otherwise always be resolved in favor of the nation that imposes the most aggressive remedies. In the absence of international rules and dispute resolution, we may eventually find it necessary to give the nation at the center of gravity a trumping right to enjoin or allow the merger (while other interested nations might retain the right to implement more modest, tightly tailored relief). But if any nation is, legitimately, to wear the mantle of *parens patriae* for the world, it would be obliged to count all costs of the merger, even those outside of its borders, as if they fell within its borders.[6] Indeed, we may reach the point — not just in merger law — at which counting all costs is an important obligation of all competition authorities vetting international transactions.

If national authorities do not broaden their perspectives to count all costs of conduct or transactions by their firms, we will probably move to international antitrust sooner rather than later, for these problems are world problems.[7]

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[4] I use the word "nation" to include regional polities; thus, the European Union.

[5] *See* Advisory Committee Report, Chapter 3, fn. 24, sketching an opt-in clearing house system.

[6] *See* Advisory Committee Report, Chapter 2, fn. 72.

[7] One appropriate "higher" solution would provide for international dispute resolution. The panel would begin to resolve the dispute by choice of law based on center of gravity. Thus, in Boeing/McDonnell Douglas, the panel would apply the U.S. rule to the true market.

Market access: Globalization has spotlighted loopholes in the world trading system; notably, loopholes that shelter foreign market-blocking conduct. This is a world trade problem, and it can be nicely informed by sympathetic concepts drawn from competition law.[8]

The Advisory Committee Report sets forth the problems but stops short of a meaningful solution. One problem is, simply, that a nation can allow its market to be closed by private restraints without breaching its GATT/WTO obligations. A second problem is that government measures that set the stage for private closure may escape condemnation because, in the abstract, they appear harmless; or because they existed at the time lower trade barriers were negotiated; or because the measures are not antiforeigner on their face.[9] Moreover, government restraints get vetted in the WTO; private restraints get peeled away for competition agency attention. The synergies are never observed. Serious restraints are quite unlikely to get caught.[10]

Clearly, this problem should be remedied, and, in my view, it should be remedied in the WTO in a manner consistent with the principles of the world trading system. One solution is: Nations could seek amendments to the GATT/WTO that 1) close the Fuji-Kodak loophole;[11] 2) put the burden on nations to assure that their markets are open (free from artificial private as well as public restraints), and 3) hold nations accountable for the totality of market-blocking restraints. An obvious way for nations to fulfill the obligation to prevent private access restraints is to maintain and enforce competition laws that prohibit unreasonable market blockage.[12]

The Advisory Committee worries about the weaknesses of the WTO, and it prefers unilateral solutions. I believe that solutions, to be legitimate, inclusive, and complete, must be multilateral, and that we must devote more energies to strengthening and constitutionalizing the WTO.[13]

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[8] *See* AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW AND PRACTICE, REPORT ON PRIVATE ANTICOMPETITIVE PRACTICES AS MARKET ACCESS BARRIERS (January 2000).

[9] Japan — Measures Affecting Consumer Photographic Film and Paper, Report of the WTO Panel (Fuji-Kodak), WT//DS44/R ¶ 2.2 (Mar. 31, 1998).

[10] *See* Patricia Isela Hansen, *Antitrust in the Global Market: Rethinking "Reasonable Expectations,"* 73 SO. CAL. L. REV. 1601 (1999).

[11] That is, states should be responsible for their serious governmental restraints even if the restraints existed at the time of tariff negotiations and even if they are not facially discriminatory.

[12] *See* Advisory Committee Report, Chapter 5, fn. 231.

[13] *See* Petersmann, *supra* note 2.