Citizen Fox: The Global Vision of Eleanor Fox

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Cosmopolitan

adj.

Pertinent or common to the whole world: an issue of cosmopolitan import.

Having constituent elements from all over the world or from many different parts of the world.

So sophisticated as to be at home in all parts of the world or conversant with many spheres of interest: a cosmopolitan traveler.[1]

This chapter will examine the growth of Professor Eleanor Fox's global and cosmopolitan vision for the future of competition policy. Over her illustrious career, Professor Fox's scholarship traces an arc that began with the battle for the soul of U.S. antitrust law as the Chicago School's influence began to dominate the discourse, enforcement policy, and eventually the case law. At the same time, Professor Fox also participated in the vigorous debate over the extraterritorial application of U.S. law to international cartels, monopolies, and mergers.

Perhaps as a result of the changes in U.S. antitrust law, Professor Fox became a prominent voice in analyzing EU competition law and explaining that system to U.S. and international audiences as the influence of the U.S. as the antitrust hegemon began to wane.

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[1] www.thefreedictionary.com/cosmopolitan. *See generally* KWAME ANTHONY APPIAH, COSMOPOLITAN: ETHICS IN A WORLD OF STRANGERS (2007).

EU competition law was a natural focus for her scholarship, given its more complete vision of competition law in numerous important ways that fascinated Professor Fox.

In more recent times, Professor Fox has also focused on the proper level of governance for competition policy in a globalized economy. She has focused on issues of gaps, legitimacy, and sufficiency to argue that global problems deserve, and require, global solutions. Depending on the specific issue, she has argued for the use of true international instruments and institutions ranging from international codes, WTO rules for competition policy, cooperation, harmonization, technical assistance, world restatements, as well as other hard law and soft law solutions, to solve the familiar problems of national competition law being used to regulate global markets.

What most distinguishes Professor Fox from most other scholars in the field is her cosmopolitanism, a willingness to look at competition issues through the lens of global welfare not tied to individual citizenship. While often controversial, this perspective has allowed Professor Fox to find creative solutions for historically intractable problems and maintain an unwavering moral compass in addressing competition policy as a means to address poverty, democracy, and economic justice for the have nots in the global economy. We salute these accomplishments and conclude by speculating on the future and the promise as well as the obstacles for the implementation of Professor Fox's global vision.

I. The Battle for the Soul of Antitrust

As Professor Fox entered academia in the 1970s, she confronted a narrowing United States antitrust law. The discourse of U.S. antitrust law began to elevate a particular type of

economic analysis associated with the so-called Chicago School of antitrust which focused a narrow definition of allocative efficiency as the sole goal for antitrust.[2] Over time, this goal gained primacy in the U.S. courts and enforcement agencies over a broader range of factors including history, precedent, fairness, equity, and the facts on the ground in specific cases.

Much of Professor Fox's early scholarship fought back against the assertion that antitrust, was, or should be, solely about consumer welfare as defined as wealth maximisation.[3] Her eloquent work on these issues was not opposed to economic analysis, but suspicious of a single strand of neo-classical economics as the master of, rather the servant, of competition policy.

II. The Broader Competition Law Vision of the European Union

Perhaps because of the changes and evolution in U.S. antitrust law, Professor Fox became an ambassador for U.S. and global audience for the broader vision of competition law embodied in the law of the European Union. That vision drew upon the ordoliberal tradition that existed in Germany at the time of the drafting the treaty establishing the European Economic Community (EEC) and the need for European competition law to promote the economic integration of the ever expanding number of member states.[4]

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[2] *See e.g.*, ROBERT A. BORK, THE ANTITRUST PARADOX (1978); RICHARD A. POSNER, ANTITRUST AN ECONOMIC APPROACH (1976); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1978).

[3] Eleanor M. Fox, *The Battle for the Soul of Antitrust,* 75 CAL. L. REV. 917 (1987*)*; Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981). *See generally* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK (Robert Pitofsky ed. 2008).

[4] DAVID GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS (1998); ANDRE FIEBIG & SPENCER WEBER WALLER, 2 ANTITRUST AND AMERICAN BUSINESS ABROAD Ch. 17 (4th ed. 2016).

As a result, there developed a sophisticated body of EU (and EU member state) [5] competition law that diverged significantly from the narrow vision of the Chicago School in the United States. Prior to the modernization, most agreements had to be notified to the European Commission or carefully drafted to fit within an existing block exemption. In addition, restrictive agreements potentially qualified for exemptions that could be interpreted to permit agreements which harmed competition but promoted other worthy goals of the EU. Vertical agreements were strictly condemned if they included resale price maintenance provisions or absolute territorial allocations.[6]

While the EU interpretation of hard core cartel agreements has somewhat converged with that in the U.S., many other areas have not. The EU has always had a more expansive view of abuse of dominance including a special responsibility of dominant firms not to harm competitive market conditions.[7] Thus, practices such as predatory pricing, margin squeezes, tying, loyalty rebates, unilateral refusals to deal, and violations of the essential facilities doctrine, which are either lawful, or extremely difficult to prove, in the United States, remain a fertile source of investigation, litigation, and liability in the EU. A wide variety of public restraints of competition by the member states as well as regional and local governments are expressly unlawful in the EU, but typically immune from liability in the US under the state action doctrine.[8] States aids are also expressly included as part of EU competition law,[9] while at most

[5] *See generally* ANDRE FIEBIG, EU BUSINESS LAW 127-291(2015); ARIEL EZRACHI, EU COMPETITION LAW: AN ANALYTICAL GUIDE TO THE LEADING CASES (4th Ed. 2014).
[6] *See* EZRACHI *supra* note 7, at 162-180 (summarizing key cases).
[7] *See e.g.*, Slovak Telecom, Case COMP/AT.39523 (Oct. 15, 2014), 5 C.M.L.R. 3 [2016].
[8] Spencer Weber Waller*, Bringing Globalism Home: Lessons from Antitrust and Beyond*, 32 LOY. U. CHI. L.J. 113 (2000).
[9] JUAN JORGE PIERNAS LÓPEZ, THE CONCEPT OF STATE AID UNDER EU LAW: FROM INTERNAL MARKET TO COMPETITION AND BEYOND (2015); ALBERTO SANTA MARIA, COMPETITION AND STATE AID: AN ANALYSIS OF THE EU PRACTICE (2d ed. 2015).

weakly constrained by the commerce clause of the U.S. Constitution. Similarly, antidumping and other import restraints are part of the competition portfolio, rather than work in tension with the antitrust laws, as is the case in the United States.[10]

On the procedural side, EU competition diverges significantly from the United States. Until modernization, EU competition law was enforced exclusively by the European Commission. Following modernization, EU competition law is enforced by both the European Commission, the National Competition Agencies, and the member state courts through a multilateral and networked approach embodied in the European Competition Network including a notion of subsidiarity.[11] This notion of a coordinated networked approach is unknown in the United States, which relies more heavy on private litigation and an ad hoc allocation of authority between the twin competition agencies of the federal government and the Attorneys General of the fifty states plus territories.[12]

Professor Fox became over time the explainer in chief for these differences and persistent divergence between the two systems. She was the co-author of the first casebook on European Community law for U.S. audiences with her chapters on competition law later expanded into a standalone casebook on EU competition law.[13] Subsequently, she co-authored a separate casebook on global issues in antitrust and competition law which included

[10] JEFFERY L. KESSLER & SPENCER WEBER WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW (2d ed. 2016).
[11] CHARIKLEIA VLACHOU, THE EUROPEAN COMPETITION NETWORK - CHALLENGES AND PERSPECTIVES (2010).
[12] *See* Richard Wolfram & Spencer Weber Waller, *Contemporary Antitrust Federalism: Cluster Bombs or Rough Justice?*, in ANTITRUST LAW IN NEW YORK STATE 3 (2d ed. Robert L. Hubbard & Pamela Jones Harbour eds. 2002).
[13] GEORGE A. BERMANN, ROGER J. GOEBEL, WILLIAM J. DAVEY & ELEANOR M. FOX, CASES AND MATERIALS ON EUROPEAN UNION LAW (3d ed. 2010); ELEANOR M. FOX, THE COMPETITION LAW OF THE EUROPEAN UNION IN COMPARATIVE PERSPECTIVE: CASES AND MATERIALS (2009).

substantial EU materials.[14] Even her U.S. antitrust law casebook designed for U.S. students included a comparative perspective often drawing on the EU's experience to highlight U.S. antitrust law's failures and successes.[15]

Equally importantly, Professor Fox has been a strong advocate in the U.S. and abroad for the view that the United States was not the sole legitimate voice how to approach competition law and policy. The mere fact that the U.S. had been one of the first important enforcers of competition law did not grant it a monopoly on wisdom or the correct way to approach a particular issue or controversy. Throughout her work, Professor Fox advocated that differing outcomes outside the U.S. should be judged in terms of the laws, procedures, institutions, history, and legal tradition of that jurisdiction, and not merely on whether the case came out differently than it would have in the U.S. Whether the issue was a different approach to merger law as in Boeing/McDonnell Douglas, monopolization/abuse of dominance in Microsoft, and the more recent high tech investigations of Google and Facebook, Professor Fox was more likely to explain and analyze difference, rather than criticize it.[16]

III. The Limits of Local Law in a Global Economy

The natural evolution for Professor Fox's scholarship led to a keen interest in the limits of local and national competition law in a global economy. The experience of the United States in competition law began after the Civil War with state common law and later state antitrust

[14] ELEANOR FOX & DANIEL CRANE, GLOBAL ISSUES IN ANTITRUST AND COMPETITION LAW (2010).
[15] ELEANOR FOX, CASES AND MATERIALS ON U.S. ANTITRUST IN GLOBAL CONTEXT (3d ed. 2012).
[16] *See, e.g.*, Eleanor M. Fox*, Monopolization and Abuse of Dominance: Why Europe is Different*, 59 ANTITRUST BULL. 129 (2014); Eleanor M. Fox, *Microsoft (EC) and Duty to Deal: Exceptionality and the Transatlantic Divide*, 4 COMP. POL'Y INT'L 25 (Spring 2008); Eleanor M. Fox, *GE/Honeywell: The U.S. Merger that European Stopped – A Story of the Politics of Convergence* in ANTITRUST STORIES 331 (Eleanor M. Fox & Daniel A. Crane eds. 2007).

statutes, both of which proved to be ineffective in regulating anticompetitive conduct for the rapidly emerging national economy.[17] It was only with the passage of the Sherman Act, and the later Clayton and FTC Acts, that there was an effective national system for regulating competition by law in a truly national economy that transcended the formal jurisdiction and effective control of any one state.

The EU also needed competition law to maintain competition in the growing common market (later the single market) in order to maintain the free movement of goods, services, persons, and capital within the EU, but also to help achieve the single market in the first place. Like the United States, an EU wide market required an EU wide competition law and could not be left to the member states, few of which had any extensive experience with competition law prior to the formation of the EEC in 1957. But EU level competition law was also a tool to achieve the common market in the first place, in contrast to the United States where a national economy with free movement and few state imposed barriers to internal trade was already largely a reality when U.S. federal antitrust law was enacted.[18]

The EU wrestled for decades with the issue of what was the proper level for competition law and enforcement as between the EU in Brussels and the growing number of Member States until it settled into its present form following the modernization of competition law in 2004.[19] Now, most notifications to the European Commission outside the merger area are a thing of the

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[17] James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495 (1987).

[18] Spencer Weber Waller, *Understanding and Appreciating EC Competition Law*, 61 ANTITRUST L.J. 55, 56 (1992).

[19] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, available at http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32003R0001.

past. The Commission continues to set a consistent competition policy, develop block exemptions, as well as challenge significant EU and international cartels, important abuse of dominance cases affecting the EU as a whole, and mergers of a Community Dimension within the meaning of the EU Merger Regulation. National Competition Authorities now enforce both Community and their own Member State competition laws and coordinate their investigations and enforcement actions with each other and the European Commission through the European Competition Network.[20]

The issue of what is the proper level to enforce also has a global dimension. Like the early history of the US and the EU, there are often situations where national (or regional bodies like the EU) must use national (or regional) competition law to seek to regulate anticompetitive conduct that is global in nature in terms of the markets, undertakings, and effects involved.[21] The past forty years are a testament to the importance of concepts like extraterritoriality, effects-based jurisdiction, comity, positive comity, cooperation agreements, mutual legal assistance treaties, and dispute resolution mechanisms in helping achieve a measure of success in specific investigations and enforcement actions involving global markets and multinational actors.[22] But it has also led to the recognition of the need to consider a global response to competition policy in a globalized economy.

As a result, Professor Fox has devoted a significant portion of her scholarly agenda to the question of what is the proper level of governance for competition policy in the modern

[20] Commission Notice on cooperation within the Network of Competition Authorities (Text with EEA relevance) OJ C 101, 27.4.2004*, available at* http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52004XC0427(02).
[21] Regional authorities also exist in Africa, the Caribbean, and elsewhere to address the separate issue of pooling resources among smaller and developing jurisdictions.
[22] FIEBIG & WALLER, *supra,* note 7, at chs. 7 and 15.

global economy. Obviously much of competition law is, and will remain, inherently local in nature. But at the same time, the world is replete with examples of serious competition problems which transcend national borders including cartels in world markets, export cartels, monopolization/abuse of dominance issues in hi-tech markets across the globe, and mergers which affect multiple markets and jurisdictions.

It is a basic tenet of the work of Eleanor Fox that truly global problems deserve global solutions. She has highlighted where national competition law fails even with the most robust cooperation because of issues of gaps, legitimacy, and sufficiency.[23] In articles and speeches too numerous to discuss in detail, she has examined the promise and pitfalls of

- international codes[24]
- international principles[25]
- WTO rules and dispute resolution proceedings[26]
- increased use of cooperation and networks[27]
- technical assistance[28]
- world restatements of the law of competition[29] and

[23] Eleanor M. Fox, *Can We Solve the Antitrust Problems of Globalization by Extraterritoriality and Cooperation? Sufficiency and Legitimacy*, 48 ANTITRUST BULL. 355 (2003).
[24] Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement (International Antitrust Code Working Group Proposed Draft 1993), published and released July 10, 1993, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1628 (Aug. 19, 1993) (Special Supp.).
[25] Eleanor M. Fox, *Against Minimum Rules, for Cosmopolitan Principles*, 43 ANTITRUST BULL. 5 (1998); Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1 (1997)
[26] Fox, *Toward World Antitrust*, *supra,* note 27, Eleanor M. Fox, *The WTO's First Antitrust Case – Mexican Telecoms: A Sleeping Victory for Trade and Competition*, 9 J. INT'L ECON. L. 271 (2006).
[27] Eleanor M. Fox, *Antitrust Without Borders: From Roots to Codes to Networks*, in COOPERATION, COMITY, AND COMPETITION POLICY (Andrew Guzman ed. 2010); Eleanor M. Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 INT'L LAW. 151 (2009).
[28] Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways,* 75 N.Y.U. L. REV. 1781 (2000).
[29] Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 J. INT'L ECON. L. 665 (1999)

- other combinations of hard and soft law.

She explores all of these themes with a true cosmopolitan vision that draws on all three elements of our working definition of that term. First, she approaches competition policy in a manner that is pertinent or common to the whole world. Professor Fox often advocates for a competition policy based on true global welfare rather than any single national interest. Second, she uses constituent elements from all over the world drawing on U.S., EU, and many other national and regional competition systems as part of her toolkit.

Finally, she is truly at home in all parts of the world and conversant with many spheres of interest- just consider the many voices in this volume and the enormous number of jurisdictions she has assisted over the years. This cosmopolitan competition law vision is permeated with a focus on how to address poverty, democracy, and economic justice in order to convince jurisdictions and international organizations of the value of robust markets carefully tailored to the history, culture, and legal system of each jurisdiction.

IV. Implementing the (Cosmopolitan) Vision

Since the early 1990s, Professor Fox has been working tirelessly to convince antitrust and trade officials that they are taking a parochial view of what are actually global problems, and to address this she has been arguing for cosmopolitan solutions. Professor Fox suggested that all countries – but particularly WTO Members - ensure that their competition authorities consider the effects that business arrangements in their markets have on foreign competitors. To this end, she proposed a 'market access' principle that complements liberal trade, but which is not a trade norm. As this section will display, her conception is

drawn from antitrust's own populist roots, which have long evinced a concern about market foreclosure. Professor Fox argued that not remembering and recognising this itself contributes to the difficulty in moving forward in a constructive trade and competition work programme. What is needed, she argued, is a deeper recognition of what she had long seen as antitrust law's evolving flaw.

To Professor Fox, competition authorities have developed an inappropriately narrow focus on the effects that business arrangements have on competition in their own jurisdiction. Such a 'parochial' focus results in 'blindered national vision' where governments are unable or are unwilling to consider effects on foreign interests.[30] Fox is also troubled by the fact that economic 'effects'-based analysis itself can mean that antitrust law, particularly in the United States, ignores potential harms to economic freedom and opportunity. She describes a rule of law that is 'weak' — not in terms of allowing capricious or lax enforcement of robust law -- but in setting a higher probative standard, which thereby also means that remedial measures are less likely to be imposed. As she noted:

> In the 1960s, US law was construed to prohibit restraints that foreclosed less well-situated firms from a significant share of the market, even if the exclusion resulted from strong preferences for dealing with one's friends (reciprocity). The United States has abandoned this construction of law in favour of permissive legal principles that value the freedom of firms to impose vertical restraints unilaterally. Plaintiffs challenging vertical restraints under US law today must normally prove the restraint will limit output and harm

[30] Fox, *For Cosmopolitan Principles*, *supra* note 27, at 11-12.

consumers; it is not enough to show that the restraint merely blocks competitors 'unreasonably'. …Thus, the problems faced by firms and nations that believe themselves excluded from foreign markets by vertical restraints include, in some nations such as the United States, a 'weak' rule of law, in addition to … lack of enforcement.[31]

To Professor Fox, the solution is obvious. In both domestic enforcement and international engagement, governments must take more interest in both the unfairness of the exclusion and the effects it has on competitors from other markets. Convincing WTO Members to take that kind of interest does not require a global harmonisation project, Professor Fox argued:

[a] world competition system does not require a compendium of world rules for antitrust law. Nor does it require investigation into the minute differences between the antitrust laws of nations or a determination to harmonize the laws or converge them towards any existing model. Rather, it requires a guiding standard (world welfare), and an understanding of how transactions and action — government and private — may have an impact on world trade and competition in welfare reducing ways.[32]

To do this, Fox argues that more attention needs to be paid to the inherent complementarity among the goals of trade policy, competition policy and the WTO:

…in matters of artificial restraints that block markets, trade and competition are two sides of one coin. Market-opening competition law is the virtual twin of liberal trade law. It is a

[31] *Id*. at 22-23.
[32] Eleanor M. Fox and Janucz A. Ordover, *Internationalzsing Competition Law to Limit Parochial State and Private Action: Moving Towards a Vision of World Welfare*, 24 INT'L BUS. LAWYER 458 (1996).

complement of liberal trade law. A system facilitating trade may be put into place; nations may be required to keep open their doors to trade; but if commercial restraints can nonetheless block the market because they are not caught by the discipline of the world trading system, the open-market promise fails. Thus, market access competition issues belong in the WTO.[33]

A. Market-opening competition law

Understanding market access is critical to appreciating Professor Fox's early global vision for competition law. Professor Fox argues that:

> [s]ince market access is the trade/antitrust issue of most interest to the world trading systems today, I focus … on a market access principle for the world. Such a principle, focused on the trade and competition intersection, would be an especially fitting subject for a WTO agreement, which might naturally be called the Agreement on Trade- Related Aspects of Antitrust Measures, or TRAMs.[34]

Such an agreement would be feasible because:

> [n]ations with antitrust systems already have market access principles embedded in their law. The principles usually address … cartels, vertical exclusionary restraints and monopolistic exclusions. Nations differ, sometimes significantly, as to what is the best formulation of the market access principle… It is not the difference in the law that

[33] Eleanor M. Fox, *Competition Law and the Millennium Round*, *supra,* note 31, at 666.
[34] Fox, *Towards World Antitrust*, *supra,* note 27, at 3.

> produces frictions and trade disputes, [however] it is the perception that a country does not enforce its own law.[35]

Professor Fox points to Europe as the precedent for a TRAMs from learning from *'Europe's Comparative Advantage':*[36]

> [T]he European Economic Community faced the same challenge, among others, in the mid-1950s. It addressed, as its most important goal, the task of taking the parochialism out of trade and competition in the internal European market. In the internal market of the European Union, much parochialism has been removed with respect to both public and private restraints.[37]

Professor Fox explained: "The brilliant basic concept was to lift the frontiers that stood as barriers around each of the nation-states, and to assure that neither governments nor private firms could replace them with border restraints, discriminatory measures, or measures of equivalent effect."[38] and that: "Most basic to the competition law of the European Union is the principle prohibiting private restraints that barricade national markets.[39]"

Professor Fox recognised that the trade-related aspirations of WTO Members are more modest than the European goal of market integration with its supranational legal mechanisms and institutions. She argues, however, that "this is a difference of no importance to the point that *we need to embrace global thinking*".[40] To do that, we should search for the political philosophy deep within antitrust itself.

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[35] *Id*. at 23.
[36] *Id*. at 7.
[37] *Id*. at 1-2.
[38] *Id*. at 5.
[39] *Id*. at 7.
[40] *Id*. at 8.

In seeking a vision of liberal antitrust to fit the world view of liberal trade, Professor Fox again turned to the very foundations of antitrust.[41] Professor Fox's international market access principle is designed to modernise and internationalise antitrust by reminding it of its equity based original position. She argues: "Antitrust should serve consumers' interests and should also serve other, established, non-conflicting objectives ...[including the] dispersion of economic power [and] freedom and opportunity to compete on the merits."[42] For Professor Fox these are the "traditional antitrust values that protect access to markets."[43]

B. The Details of the Market Access Principle: no substantial unjustified market blockage

While deep-rooted in traditional values, Professor Fox's proposal itself was direct and detailed: "Nations should have and enforce laws prohibiting commercial conduct that unreasonably impairs market access."[44] At the same time, she views this obligation as a flexible one: "[T]hey might agree to the general principle that *there should be no substantial unjustified market blockage by public or private action* (as well as no transactional cartels). Each nation would then be responsible for implementing this principle in its national law."[45]

Along with the responsibility for implementation, Professor Fox also gives jurisdictions the freedom to define their commitment:

[41] *Id*. at 3
[42] on Fox, *Modernization*, *supra,* note 5, at 1182.
[43] *Id*. at 1189.
[44] Fox*, Competition Law*, *supra,* note 33, at 672.
[45] Fox, *Towards World Antitrust*, *supra*, note 25, at 23.

> Opponents of a world system argue that nations would find it impossible to agree on a market access principle. This is not a problem under this proposal. Each nation would define for itself what it means by an 'unjustifiable' market access restraint. Simply, it must formulate its law in a credible, non-discriminatory, clear and understandable way.[46]

She suggests three priority trade-competition areas:

> Access to markets may be impaired by conduct in one of three categories: (1) abuse of dominance: exclusions by monopoly or dominant firms, (2) cartels with boycotts, and (3) vertical restraints such as exclusive dealing by the few leading firms in high barrier, concentrated markets wherein entry by outsiders is difficult. The laws of virtually all nations that have competition laws cover such restraints'.[47]

She notes that her proposal "does not require that all countries adopt full-blown competition laws. Merely they must not allow unreasonable restraints on market access. [However the] most obvious but not only way to do so is by adoption of competition law at least in the three identified areas."[48]

To this end, Fox has recommended that governments make an international commitment to a cosmopolitan approach. As she explained in the American Journal of International Law:

> [C]osmopolitanism is the converse of parochialism. It connotes concern for the interests of the entire community without regard to nationality, while recognising the legitimate role for national and provincial governments to act in the interests of their citizens.[49]

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[46] *Id*. at 24.
[47] Fox, *Competition Law*, *supra*, note 35, at 671.
[48] *Id*. at 671, n.16.
[49] Fox, *Towards World Antitrust*, *supra*, note 27, at 2, n.4.

Elsewhere she has stated: "The national-only concern of national law is out of step with the reality that even local transactions have global impacts,"[50] and that: "National law enforcement should account for global impacts, not just national impacts."[51]

That would mean we had to have some idea of how trade actions should be decided. Here Professor Fox has argued for a cosmopolitan international welfare standard. A national authority, and if needed, a WTO Panel could be "*charged to take a global rather than a national view of each problem, taking into account all harms and benefits wherever they occur*".[52]

In this regard, the WTO Secretariat developed a simple formula to decide when a domestic competition policy decision is out of touch with the world-view. Such actions would be unlawful if: "*the negative consequences for foreign interests … exceed the benefits to domestic agents*. Only then does the national competition policy give rise to an inefficient allocation of resources from a global point of view.[53]

Accepting that accounting for all the global costs and benefits would be difficult, if not impossible, proponents of a global welfare standard have recognized that rules of thumb and presumptions would be needed. One example came from the WTO Secretariat proposing that: "a domestic competition policy approach is out of touch with the world view where the negative consequences for foreign interests exceed the benefits to domestic agents".[54]

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[50] Fox*, For Cosmopolitan Principles*, *supra,* note 35, at 12.
[51] *Id*. at 8.
[52] Fox, *Towards World Antitrust*, *supra*, note 27, at 855-856.
[53] WTO, Annual Report 1997, 1 SPECIAL TOPIC: TRADE AND COMPETITION 55 (1997).
[54] *Id*.

When he was WTO Deputy Director General, Anwarul Hoda recognised that:

> use of a rule of reason approach at the multilateral level would involve considerations quite different from those arising in national jurisdictions, for example on standards, enforcement and remedies. Thus, if it were decided to employ a rule of reason in any multilateral competition rules, considerable work would be required to adapt this approach to that particular context.[55]

In terms of detail and in substance, the proposals of Professor Fox - and the related suggestions of the WTO Secretariat - proved ahead of their time. They drew some external criticism,[56] but that was not why their further consideration did not advance. The overall pursuit of competition rules in global trade fora was derailed more generally, through the failure of the Doha Round and the decision of governments not to pursue the multilateral competition agenda further through the WTO. That agenda did continue however, namely through the International Competition Network,[57] and again, Professor Fox was influential at its inception and with respect to its work programme.

In one of her more recent articles, *Antitrust without Borders: From Roots to Codes to Networks*, Professor Fox reflects on the journey. She notes that: "The lack of traction of

[55] Comments by A Hoda, *Trade, Competition Policy and the World Trade Organisation*, Global Forum on Competition and Trade Policy Conference, New Delhi, 17-19 March 1997 at 8. (on file with author).
[56] Critiques of the detailed Fox and WTO proposals can be found in PHILIP MARSDEN, A COMPETITION POLICY FOR THE WTO (2003); Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J INTL LAW 478 (2000). *See also* American Bar Association, *Using Antitrust Laws to Enhance Access of U.S. Firms to Foreign Markets*, 29 INT'L LAW 945 (1995).
[57] International Competition Network, http://www.internationalcompetitionnetwork.org/.

world antitrust in the WTO and the rise of networking have focused our thinking on horizontal solutions to world problems."[58]

The focus on a horizontal solution naturally leads one to the work of the International Competition Network as the largest forum for regular horizontal contact between enforcers. At the International Competition Network, front-line officials swap lessons from their enforcement work, and agree on best practices.[59] These are products that are tangible and worthwhile and have benefits in the near-term. In contrast to trade meetings about competition policy, particularly at the WTO, these meetings are demand-led, by competition officials, and thus discussions are focused and pragmatic. It helps that participants aren't sitting behind a particular flag, but instead meet as colleagues, in a shared battle against anticompetitive activity. …and in that way, they are far more cosmopolitan form of competition law than ever before.

But Professor Fox has always wanted more, and she is right to focus on *the: "One problem that horizontal solutions won't solve: export and world cartels and trade-restrictive state action".*[60] Here clearly more work is needed; where these restraints depend on state exemption, it's appropriate that state action – WTO or otherwise - be focused to resolve these problems. Of necessity, that work will require the type of cosmopolitan approach that Professor Fox has embodied throughout her distinguished career.

[58] Eleanor M. Fox, Fox, *Antitrust without Borders: From Roots to Codes to Networks*,(November 2015) available at http://e15initiative.org/wp-content/uploads/2015/09/E15-Competition-Fox-FINAL.pdf at 8.
[59] *See* THE INTERNATIONAL COMPETITION NETWORK AT 10: ORIGINS, ACCOMPLISHMENTS AND ASPIRATIONS (Paul Lugard ed. 2011).
[60] *Fox, Antitrust Without Borders, supra,* note *60,* at 5.

V. Conclusion

We salute Professor Fox for leading us on such an incredible journey, with such a truly global vision. Professor Fox is renowned as the champion of the cosmopolitan approach, and empath of foreign legal systems. The journey along such a path will be a long one but all the more needed in these times of rising economic nationalism, protectionism, and xenophobia. She is a promoter of equity and rivalry and a relentless optimist – and as such we are honored to honor her with this chapter as a small contribution to her accomplishments and inspiration to us all.