

# Citizen Fox: The Global Antitrust Vision of Eleanor Fox

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# cos•mo•pol•i•tan (kŏz, mə-pŏl'ĭ-tn) ►

- 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.*

# Our Chapter Will Trace Professor Fox's Scholarly Agenda and Global Vision

- The Defense of a Centrist Vision for U.S. Antitrust Law
- A Growing Appreciation for the Broader Palate of EU Competition Law
- A Series of Routes and Road Maps for Competition Law in a Globalized Economy
  - Rules
  - Procedures
  - Institutions
- Unwavering Values of Addressing Power Imbalances, Poverty, Democracy, and Economic Justice
- Also an Appreciation for the Vast Majority of Everyone in the Room Who has Benefitted from Eleanor's Assistance, Mentoring, and Friendship

# The Battle for the Soul of U.S. Antitrust Law

- Beginning in the 1980s and Continuing to Today Opposed a Narrow Vision of U.S. Antitrust that Elevates a Single Particular Type of Economic Analysis to Primacy over History, Precedent, Fairness, Equity, and the Facts on the Ground When in Conflict with Chicago School Notion of Price Theory
- Not Opposed to Economics but Only a Single Strand of Economics as the Master Rather than the Servant of Competition Policy

# An Ambassador for EU Competition Law

- A Principal Voice for Introducing US and Global Audiences to the Very Different Vision of EU Competition
  - The Ordoliberal Tradition
  - The Integration Imperative
  - A More Expansive View of Dominance
  - The Inclusion of Public Restraints
  - State Aids as Competition Policy
  - The Inclusion of Dumping and Import Restraints as Competition Policy
  - A Multilateral and Network Approach to Competition Policy
  - The Notion of Subsidiarity

# The Limits of Local Law in a Global Economy

- An Appreciation for the Importance of Concepts like Extraterritoriality, Effects Based Jurisdiction, Comity, and Cooperation and Dispute Resolution Mechanisms in Specific Investigations and Enforcement Actions
- But Also a Recognition of the Greater Need to Develop a Global Response to Competition Policy in a Globalized Economy
  - Based on Elevation of Competition Policy in EU to Community Level
  - And Earlier Creation of National Antitrust Law in US in Response to Growth of National Economy in 19<sup>th</sup> Century

# What is the Proper Level of Governance for Competition Policy?

- Obviously Much of Competition Law is Inherently Local
- But World is Replete With Examples of Serious Competition Problems Which Transcend National Borders
  - Cartels
  - Abuse of Dominance
  - Mergers

# Truly Global Problems Deserve Global Solutions

- Highlighted Where National Enforcement Even With the Most Robust Cooperation Fails Because of:

- Gaps
- Legitimacy
- Sufficiency

# Potential Solutions

- International Codes
- International Principles
- WTO Rules and Dispute Resolution
- Harmonization
- Technical Assistance
- World Restatements
- Creative Combinations of Hard and Soft Law

# The Cosmopolitan Vision

- Draws on All Three Elements of Our Definition
- Pertinent or common to the whole world – A Willingness to Look at Competition Policy Through the Lens of Global Welfare Rather than any Single National Interest
- Having constituent elements from all over the world or from many different parts of the world – U.S., EU, and LDC elements in her toolkit
- So sophisticated as to be at home in all parts of the world or conversant with many spheres of interest – think about this gathering and the many stamps in her passport
- A Truly Cosmopolitan Vision Permeated by a Focus on How to Address Poverty, Democracy, and Economic Justice through Competition Policy

# Implementing the Vision

- Many Challenges to Implementing a Global Vision of What Remains Stubbornly National Law Outside of the EU and Other Tightly Integrated Regional Economies

# Fox: For Cosmopolitan principles

- *'If nations are not encouraged and enabled to take a global vision, the day of truly international antitrust will surely arrive with greater speed.'*
- Eg. Shadow of extra-territorial action or trade actions

# Fox: Toward World Antitrust and Market Access

Bottom-up agency cooperation is not enough

- It must be guided by a concept from the top
- *'A market access principle for the world'*
- TRAMS: Trade-Related Aspects of Antitrust Measures
  - ***'no substantial unjustified market blockage by public or private action'*** + international enforcement mechanism
- Global thinking; cosmopolitan approach to analysis

# Trade lawyers Cunningham and Wolff: Change antitrust to break open markets

- How to deal with vertical restraints in other countries that impede US exports? (including VRs that would be legal under US and EU law)
- *‘Does US competition policy in its current treatment of vertical restraints stand as a barrier to our finding a trade law approach?’*
- *‘urge attention to a market access code of some sort’*
- *‘Any substantive international competition policy negotiation might require some compromise of current US principles’*
- *‘[we] trade lawyers insist on a stronger identification of vertical arrangements as anticompetitive in themselves’ regardless of efficiencies*

# Fox, World Antitrust: cosmopolitan total international welfare standard

WTO Dispute Settlement Panel could be

*'charged to take a global rather than a nationalistic view of each problem, thus taking into account all harms and benefits, including aspects of efficiency and technological progress wherever they occur'*

- Rules of thumb to handle obvious measurement difficulties

WTO DDG Hoda: *'adapt rule of reason to make more international'*

WTO Secretariat: a domestic competition policy approach is out of touch with the world view

*'where the negative consequences for foreign interests exceeds the benefits to domestic agents ... the national competition policy gives rise to an inefficient allocation of resources from a global point of view.'*

# Fox: From Roots to Codes to Networks

- *‘International antitrust today is less ‘world antitrust’ and more ‘antitrust without borders’ ’*
- *‘The lack of traction thus far of world antitrust in the WTO, the rise of networking and the common sense attraction of subsidiarity have focused our thinking on lower-level solutions to world problems. Today we are searching for horizontal solutions.’*
- *‘One problem that horizontal solutions won’t solve: export/world cartels and trade-restrictive state action: need flanking principles in the WTO’*



## We 'Antitrust Marathoners' salute Eleanor Fox

- Champion of the cosmopolitan approach
- Tireless seeker of the common good
- Empath of foreign systems
- Promoter of equity and rivalry
- Relentless optimist

