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Global Antitrust from the Global South: A Comparative Law Void

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GLOBAL ANTITRUST FROM THE GLOBAL SOUTH: A COMPARATIVE LAW VOID

Dina I. Waked*

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INTRODUCTION

By the late 1990s and early 2000s, the world community was very close to the creation of an international antitrust regime. International antitrust refers to attempts at harmonizing antitrust laws across countries aiming ultimately at creating one set of universal rules that are enforced by a world court and agency.¹ Many have called for the harmonization of the substantive content of antitrust laws.² The grounds for those calling for a harmonized set of competition laws are rooted in the reality of the functioning of world markets. Corporations span markets across borders and are multi-jurisdictional in nature. The worry was always that businesses that cross the globe would combine to rule markets and rise above the authority of nations—in a sense, the status that Google, Apple, Facebook, Amazon (GAFA), and other superstar firms have reached by the 2010s.³ Similarly,

* Associate Professor, Sciences Po Law School, Paris, France. I would like to thank Professor Jorge Esquirol for inviting me to participate to the American Society of Comparative Law annual meeting in Miami (October 2023), where I discussed this paper, and for contributing to this special review. I want to thank the participants of the conference as well as the editors of this special symposium for their feedback and review. All views, and any errors, remain my own.

¹ See Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 374 (1997); Michal S. Gal, *International Antitrust Solutions: Discrete Steps or Causally Linked?*, in MORE COMMON GROUND FOR INTERNATIONAL COMPETITION LAW (Josef Drexler et al. eds., 2011).

² See Sharon E. Foster, *While America Slept: The Harmonization of Competition Laws Based Upon the European Union Model*, 15 EMORY INT’L L. REV. 467, 467–68 (2001); Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT’L L. 1, 16 (1997); Eleanor M. Fox, *The End of Antitrust Isolationism: The Vision of One World*, 1992 U. CHI. LEGAL F. 221, 229 (1992); Waller, *supra* note 1, at 374.

³ Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT’L L. 911, 913 (2003).

concern surrounded the constant increase in cross-border economic activity that often slips regulation.⁴

At the same time, many others have opposed the attempt to create one set of substantive laws that govern competition concerns across nations.⁵ Their main argument concerned the undesirability of a “one-size-fits-all” model that ignores the idiosyncratic differences between nations, particularly with regards to the Global South.⁶

Although serious attempts at creating international antitrust, as well as a world enforcement system, in addition to a world court to judge antitrust cases have failed, the fact that international harmonization of competition laws had been in the air for decades is uncontested.⁷ It is also arguable that today’s diffused antitrust laws—spread across different countries—have achieved the goals desired with an international antitrust regime through convergence. Whether this convergence achieved through the spread of competition laws was the reason the calls for an international antitrust regime have been muted, or whether the differences across nations have made such a regime impossible, will remain a matter of debate.

In this paper, I argue that these attempts at harmonizing antitrust laws, and creating a singular unified and universal set of antitrust laws, offers an interesting case study from a comparative law perspective. This paper also sheds light onto the dominant forces at play in a series of power and resistance struggles within the world’s governing frameworks. It offers an alternative perspective into a landscape of legal diffusion and transplantation—and current enforcement differences—that unfolds complex North-South relationships.

The paper is organized as follows: Part I discusses the attempts at creating an international antitrust regime, the push and pull of forces, and ultimately, the total collapse of these attempts and abandonment of such a universalizing project. Part II focuses on countries in the Global South and the role they played in opposing the development of such an international system. Part III discusses the reality of a harmonized competition law today

⁴ Oliver Budzinski, *Towards an International Governance of Transborder Mergers? Competition Networks and Institutions Between Centralism and Decentralism*, 36 N.Y.U. J. INT’L. L. & POL. 1, 9 (2004).

⁵ See John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, 45 WM. & MARY L. REV. 549, 551 (2003); Diane P. Wood, *Cooperation and Convergence in International Antitrust: Why the Light Is Still Yellow*, in *COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY* 117, 185–86 (Richard A. Epstein & Michael Greve eds., 2004); Andrew T. Guzman, *Is International Antitrust Possible*, 73 N.Y.U. L. REV. 1501, 1539–41 (1998).

⁶ Yılmaz Akyüz et al., *Great Controversies: Developing Countries and the Collapse of the Doha Round: A Forum*, 49 CHALLENGE 6 (2006).

⁷ See McGinnis, *supra* note 5, at 551 (“International harmonization of competition laws is in the air.”).

that succeeded despite the failure of the international regime initially envisioned. And finally, Part IV offers a critical view of resistance from the South that is manifest in potential antitrust enforcement divergency.

I. ATTEMPTS TO CREATE GLOBAL ANTITRUST

The International Trade Organization (ITO), developed shortly after WWII, proposed a charter, the Havana Charter, aimed at, among other things, harmonizing competition rules.⁸ The charter never materialized due to a combination of issues—the Cold War, disagreement on the competition substance to include in the charter, and post-war restructuring and protectionism, among others.⁹ When the Havana Charter failed, it gave way to another attempt in the 1950s by the United Nations Economic and Social Council (ECOSOC) to try once again to unify global antitrust. Yet again, this attempt failed when it was again rejected by the United States.¹⁰

A further attempt at harmonization took place in the early 2000s, with the Ministerial Declaration at Doha, Qatar, in November 2001. The Doha Declaration (“Doha”) mandated clarification of world competition rules on “core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels.”¹¹ Doha also stressed the need to clarify “modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building.”¹²

The negotiations in Doha on the core principles for competition law, however, collapsed. There are multiple reasons why the negotiations have failed. Some have argued it may just be a question of timing.¹³ Yet, since there has not been another global attempt at creating an international competition law framework, other reasons might have been at stake. It was most likely a matter of coordination where countries were not in agreement on the format of the rules to adopt. It might also have been simply a matter of cost, where the benefits of international antitrust are small in relation to

⁸ Guzman, *supra* note 5, at 1535–36.

⁹ Douglas E. Rosenthal & Phedon Nicolaidis, *Harmonizing Antitrust: The Less Effective Way to Promote International Competition*, in GLOBAL COMPETITION POLICY 355, 358–59 (Edward M. Graham & David Richardson eds., 1997).

¹⁰ Guzman, *supra* note 5, at 1536.

¹¹ World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746, ¶ 25 (2002) [hereinafter Doha Declaration].

¹² *Id.* (“Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.”).

¹³ See EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 1242 (2d ed. 2011).

the costs of an international regime.¹⁴ Moreover, the creation of an independent antitrust agency or specialized court carried the risk of bias toward certain nations—particularly powerful nations—in a way that would be much harder to correct than under a decentralized regime.¹⁵ And finally, many have argued that the developing countries’ opposition to such an international antitrust regime was the main reason why the negotiations failed.¹⁶ The role played by the Global South is, according to many, paramount in the collapse of the attempt to create a global antitrust framework in Doha.¹⁷ Their role is further analyzed in detail under Part II below.

II. A VIEW FROM THE GLOBAL SOUTH

Countries in the Global South are often at a disadvantage with regards to application of the competition laws extraterritorially—which made a regime of international antitrust seem like it would improve some of these disadvantages. The national “effects doctrine,” which allows countries to implement their antitrust laws extraterritorially when the effect of the anticompetitive conduct affects their country or its citizens, is not enough to protect developing nations from restraints launched in another country, especially in the developed world.¹⁸ Applying laws extraterritorially depends on the willingness of the countries to cooperate, and in many instances, when the violation happens in a more powerful nation, they might not feel the need to share evidence and other necessary information to help prosecute their own companies abroad.

To effectively apply competition laws extraterritorially depends, thus, on comity and a series of power relations that often are prohibitive, arguably when the country seeking to gather the evidence is located in the Global South and the company it is seeking to prosecute is in the North. In yet other instances, using the effects doctrine to reach violations emanating in other countries is futile, as problems arise surrounding the practicality of gathering evidence that resides abroad.¹⁹

Eleanor Fox has highlighted another problem with the effects doctrine in antitrust enforcement, namely that “[t]he regulating nation is arbiter for the

¹⁴ *Id.* at 1243.

¹⁵ *Id.* at 1247.

¹⁶ *Id.* at 1242.

¹⁷ *Id.*

¹⁸ Fox, *supra* note 3, at 916.

¹⁹ *Id.*

world.”²⁰ Losing parties have nowhere to go to contest the decision.²¹ This is especially problematic when the country that successfully manages to apply its law extraterritorially is one of the more powerful nations that systemically makes its laws reach elsewhere—which is often the case with the United States and the EU.²² In the face of both these jurisdictions, smaller and less powerful nations might find it difficult to challenge or appeal their decisions. They might also find themselves not in agreement with the decision reached, given that it is very likely that exporting and importing nations might have different goals and policies. Jurisdictions with more producers than consumers (net exporters) have an incentive to engage in inwardly lenient competition policies to promote their domestic producers at the expense of foreign consumers. And, jurisdictions with a higher weight on consumers (net importers) will tend to over-regulate foreign enterprise conduct because they do not gain from increased profits abroad.²³

Another problem arguably affecting countries in the Global South in the absence of international antitrust is that national law does not prohibit residents and nationals from engaging in export cartels that may only hurt foreigners.²⁴ Those that are most hurt from global cartels are countries in the Global South, which do not have a system in place to prevent these harms from taking place.²⁵ These cartels are made up of producers in industrialized countries, where their members are large multinational corporations.²⁶ They also suffer the most from the United States and European Union’s unwillingness to police international cartels.²⁷ In a study on the effects of international cartels on developing countries, the authors calculated the imports of “cartel-affected” goods into the developing world.²⁸ They found that the developing countries in 1997 imported around \$51.1 billion in goods from industries that saw international cartel activity at some point during the

²⁰ *Id.* at 918.

²¹ *Id.*

²² *Id.* at 924 (“No one has elected the United States or the European Union to be enforcer for the world.”).

²³ Budzinski, *supra* note 4, at 1, 5 (“Without an international arrangement, the success of trade liberalization is endangered by strategic competition policy designed to create ‘national champions’ for global markets, to promote so-called key industries and technologies, and to defend domestic producers against competitors from abroad (e.g., by selective non-enforcement of merger control rules or other discretionary and discriminating merger control practices).” (footnote omitted)).

²⁴ Fox, *supra* note 3, at 918.

²⁵ Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801, 802 (2004).

²⁶ *Id.*

²⁷ ELHAUGE & GERADIN, *supra* note 13, at 1242.

²⁸ Levenstein & Suslow, *supra* note 25.

1990s.²⁹ Cartels can also harm developing countries' producers if the cartel members engage in activity that blocks or slows entry by developing countries' producers.³⁰ An argument for an international regime is that this may guarantee that these harms would be eliminated or at least reduced.

A further argument in favor of an international antitrust regime is that it would help merger filings be more efficient. Global mergers require a complex web of multi-jurisdictional merger filings, which would be more efficient in a harmonized system requiring only one centralized filing procedure. Moreover, many developing countries that are particularly harmed by this merger wave almost never oppose the merger filed for the lack of the appropriate legislations and resources.³¹ It is also a matter of power relations, where they find it difficult to oppose a merger already cleared in the more powerful jurisdictions. Empirical evidence supports this claim, where mergers are systematically approved—or simply rubber stamped—across developing countries.³² This illustrates once more that the more powerful jurisdictions are the arbiters of the world. Another argument for an international antitrust regime is that the interests of countries in the Global South could be better served when a global tribunal weighs all the anticompetitive and procompetitive effects of a merger before allowing it to take place.³³ It is, however, doubtful that under a global antitrust system the current framework, where the United States and the European Union (EU) are the world enforcers, would drastically change.

Furthermore, if one assumes that countries in the Global South prefer lax antitrust rules to govern their exports, the United States and European Union's extraterritorial antitrust enforcement, which allows them to enforce against conducts that affect their national consumers, deters such lax enforcement.³⁴ This is often an argument used to show that countries in the Global South are already constrained by the extraterritorial application of

²⁹ *Id.* at 813–16 (“To put this number into perspective, consider that official development assistance (i.e., foreign aid) in 1997 to all developing economies totaled \$39.4 billion. If the price of these imports increased an average of ten percent (the lowest reported price increase for this sample of cartels), then without adequate enforcement against international cartel, producers in industrialized, high income, countries could take from developing country consumers in higher prices approximately fifteen percent of what their governments dominate in foreign aid.”).

³⁰ *Id.* at 822. For example, cartel members may use tariff barriers and antidumping duties to prevent entry by developing country participants. They can also construct private barriers to prevent entry, such as the threat of retaliatory or predatory price wars, use of a common sales or distribution agency, and patent pooling. *Id.* at 821.

³¹ Dina I. Waked, *Competition Law and Policy in the Global South: Power, Coercion and Distribution*, 76 CURRENT LEGAL PROBS. 375, 383 (2023).

³² *Id.*

³³ This assumes that this global tribunal would look out for the developed countries, which might be an unrealistic assumption.

³⁴ ELHAUGE & GERADIN, *supra* note 13, at 1242.

competition rules from more powerful nations, and thus would not be more constrained under international antitrust—a deduction that might seem slightly far-reaching.³⁵

Despite these arguments of the possible benefits to be drawn from a global antitrust framework, there are many arguments and reasons that dampen the enthusiasm for subscribing to such a universal framework from the perspective of the Global South. Competition goals and policies in many of the countries around the world are different—some countries seek to open their markets further while others seek more protectionism to allow them to pursue active industrial policy.³⁶ These goals and different pursuits are not necessarily divided across North-South boundaries, as is often claimed.

Today's industrial policy pursuits in the United States and China are evidence that these goals change over time and that competition laws are malleable enough to accommodate them at different moments across countries. It is often argued that countries in the Global South fear that a global antitrust regime would be a model of free-market antitrust that would endanger protectionist trade.³⁷ I argue that, although true, what is quite troublesome is that an international antitrust regime might make countries in the Global South unable to carry out protectionist trade whereas countries in the Global North continue to do so. This has more to do with a country's power than with an international antitrust framing.

A further reason that countries in the Global South might be weary of a global antitrust is that the calls for unifying standards on antitrust policy might in effect translate to efforts by transnational corporations to gain developing country market access.³⁸ The problems would be that the advanced world's manufacturers, bankers, insurance companies and the like will get better access to the markets in the developed world. This might lock them in a low-growth trajectory by making them continue to produce and export agriculture and textile without having the chance to industrialize and develop their financial sectors as well.³⁹

Similarly, another argument against a global antitrust regime from the perspective of the Global South is that maybe they did not want to jeopardize their preferences towards lax antitrust enforcement to maintain concentrated

³⁵ *Id.*

³⁶ Dina I. Waked, *Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices*, 38 SEATTLE U. L. REV. 945, 951 (2015).

³⁷ See Fox, *supra* note 3, at 931.

³⁸ Akyüz et al., *supra* note 6, at 13.

³⁹ *Id.* at 15–16 (“Good empirical evidence suggests that (a) diversification rather than specialization of production is the central process of economic development . . . and (b) the rate of increase of productivity in both manufacturing and nonmanufacturing (agriculture, services) is a function of the rate of increase of manufacturing output.”).

markets that help them generate economies of scale.⁴⁰ Also, it is arguable that incumbent producers in the Global South lobbied to oppose an international framework so that they could keep new entrants out of the market as well as maintain their generated surplus from being shared with consumers or society as a whole. They are also, as a group, more inclined to benefit from the operations of international cartels that allow them to sell under the umbrella prices of these cartels.⁴¹

More generally, one could argue that antitrust policies that are optimal for developed nations might differ from those that are optimal for developing nations so that the latter would suffer from the adoption of international antitrust rules that are designed to benefit more developed economies.⁴² A further fear of the countries of the Global South might have been that the technical assistance promised them as part of a global antitrust regime would not materialize.⁴³ More so, a further fear was that the international system, focused initially on cartel enforcement, might quickly expand to cover other competition law issues. This would prove to be too costly and would deprive countries in the Global South of equal influence on policy decisions on the global scale.⁴⁴

And finally, some may have noticed the elephant in the room—namely the Organization of Petroleum-Exporting Countries (OPEC). OPEC is the world's largest organization between oil producing countries that collaborate on output of crude oil to maximize their profits, affecting global oil prices.⁴⁵ It is comprised of countries in the Global South, initially founded by: Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela in the 1960s—and now expanded to include: Algeria, Angola, the Republic of the Congo, Equatorial Guinea, Gabon, Libya, Nigeria, and the United Arab Emirates.⁴⁶ It is a plausible assumption that these countries feared that a global antitrust regime would immediately seek to prohibit their oil cartel—a move they would surely suffer greatly from. It would have also been a strategic move to push for a global antitrust, now from the perspective of the Global North, which have failed in their numerous attempts to sue OPEC.⁴⁷

⁴⁰ ELHAUGE & GERADIN, *supra* note 13, at 1243.

⁴¹ Levenstein & Suslow, *supra* note 25, at 820.

⁴² See Waked, *supra* note 36, at 984 (discussing alternative goals for developing countries).

⁴³ ELHAUGE & GERADIN, *supra* note 13, at 1243.

⁴⁴ *Id.*

⁴⁵ See Spencer Weber Waller, *Suing OPEC*, 64 U. PITT. L. REV. 105, 106 (2002).

⁴⁶ *Member Countries*, ORG. OF THE PETROL. EXP. COUNTRIES (2024), https://www.opec.org/opec_web/en/about_us/25.htm.

⁴⁷ See Waller, *supra* note 45, at 107.

Nations that have the ability to prosecute against the violations of OPEC refrain from doing so out of respect for other nation's sovereignty.⁴⁸ Comity and fear of retaliation have so far kept OPEC's blatant cartelization out of reach.⁴⁹ A global antitrust regime would not have been constrained by such issues; it would have certainly attempted to sue and stop the OPEC's cartel. Whether opposition from OPEC was the reason developing countries objected to a regime of global antitrust will never be known. However, what is plausible is to assume that in fear of losing the OPEC cartel activities, the Global South might have sought to maintain what Samir Amin called an "offensive" tactic to challenge global domination of Western institutions by the Third World.⁵⁰

Eleanor Fox has argued that "[t]he whole is not the sum of the national-interest parts. Optimizing two, three, four or five national interests does not add up to world welfare."⁵¹ Putting an international antitrust framework in place would have necessitated a comparative account of these different nations in terms of their existing laws, political economies, national interests, development policies, etc. None of these issues were ever on the discussion table—a one-size-fits-all model was simply proposed, and imposed, onto the world arena with no consideration for differences. It is not a surprise then that the attempts at a universal international antitrust regime fell apart. What is, however, surprising, is that a harmonized antitrust law still managed to emerge, which is discussed next.

III. REALITY: TODAY'S HARMONIZED ANTITRUST LAWS

The presumption is that, since the failure of Doha and the other attempts at the creation of a global antitrust regime, no international antitrust system has been put in place. The reality is quite different. I argue that the spread of antitrust laws across the Global South, particularly through treaty conditionality, loan arrangements, and structural adjustment programs by international financial institutions and development banks, has led to an extremely high level of convergence of antitrust laws. Today's antitrust laws across the world, particularly in the Global South, are uncannily like those developed in countries in the North⁵²—especially the EU.⁵³

⁴⁸ Fox, *supra* note 3, at 923.

⁴⁹ Waller, *supra* note 45, at 134.

⁵⁰ SAMIR AMIN, *GLOBAL HISTORY: A VIEW FROM THE SOUTH* 106 (2011).

⁵¹ Fox, *supra* note 3, at 924.

⁵² Dina I. Waked, *Adoption of Antitrust Laws in Developing Countries: Reasons and Challenges*, 12 J.L. ECON. & POL'Y 193, 221 (2016).

⁵³ A.E. Rodriguez & Malcolm B. Coate, *Limits to Antitrust Policy for Reforming Economies*, 18 HOUS. J. INT'L L. 311, 312, 318 (1996).

The EU has played a fundamental role in the spread of its version of competition laws across the Global South. The European Accession Agreements (EAA) and the Euro-Mediterranean Agreements (EUROMED) obliged countries to model their competition laws on the competition provisions in the Treaty on the Functioning of the European Union (TFEU) in order to join the EU or become a member in a free trade area with the EU.⁵⁴ These agreements call for the adoption of the basic competition rules of the EU, especially with regard to collusive behavior, abuse of dominant position, and competition-distorting state aid.⁵⁵ This is done to facilitate trade between the EU and the respective partner country.⁵⁶ In many of these EUROMED Agreements, signed between the European Union and its Mediterranean trading partners, the treaties state that any application of competition rules must be in conformity with the European Union's secondary legislation: decisions of the Commission, Court of First Instance, and European Court of Justice.⁵⁷ Aid and other benefits were offered as enticement, alongside the benefits accruing from joining the EU or its trade zones, to encourage countries to model their laws on the European versions.⁵⁸ This is a clear manifestation of the process of legal diffusion of a particular version of competition law and policy; here, one based on the EU standards.

The United States followed a similar approach towards the spread of its version of competition law through the North American Free Trade Agreement (NAFTA), where signatories, notably Mexico, were asked to follow the US model.⁵⁹ Given the scope of NAFTA, it was less impactful

⁵⁴ See Mark A. Dutz & Maria Vagliasindi, *Competition Policy Implementation in Transition Economies: An Empirical Assessment*, 44 EUR. ECON. REV. 762, 764 (2000). The authors have argued that the main positive amendments in central and eastern Europe and the Former Soviet Union countries' competition laws have been made around the conclusion of EU Agreements on competition policy. *Id.* A "common feature of the[se] amendments is compliance [with] the most relevant provisions of EU competition law." *Id.*

⁵⁵ See Bernard Hoekman, *From Euro-Med Partnership to European Neighborhood: Deeper Integration À La Carte and Economic Development* 6 (Egyptian Ctr. for Econ. Stud., Working Paper No. 103, 2005).

⁵⁶ See generally SAMIR AMIN & ALI EL KENZ, EUROPE AND THE ARAB WORLD: PATTERNS AND PROSPECTS FOR THE NEW RELATIONSHIP (2005).

⁵⁷ Damien Geradin, *Competition Law and Regional Economic Integration: An Analysis of the Southern Mediterranean Countries* 1, 36 (World Bank, Working Paper No. 35, 2004).

⁵⁸ See *Euro-Mediterranean Partnership (EUROMED)*, EUR. COMM'N, https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/euro-mediterranean-partnership_en (last visited Jan. 19, 2024); see, e.g., Council Decision 2004/635, art. 72, Concerning the Conclusion of a Euro-Mediterranean Agreement, 2004 O.J. (L. 304) 1, 30 (EC) (stating that a "financial cooperation package shall be made available to Egypt" focused among others on "the accompanying measures for the establishment and implementation of competition legislation"); Council Decision 2004/635, Concerning the Conclusion of a Euro-Mediterranean Agreement, Joint Declaration on Article 34 of the Agreement, 2004 O.J. (L. 304) 38, 205 ("While drafting its law, Egypt will take into account the competition rules developed within the European Union.").

⁵⁹ See Rosenthal & Nicolaidis, *supra* note 9, at 356.

than the various European agreements in diffusing US antitrust. Europe's fierce push to diffuse its version of competition laws might be interpreted to stem from its own desire to win a "convergence race" with the United States, which could push the balance in its favor when negotiations on harmonized rules are underway.⁶⁰

This spread of competition laws, especially those modeled on the EU version, led to a high level of diffusion that,⁶¹ I argue, replaced the need for a global antitrust framework. Although there is no global enforcer or a world court specialized in competition laws, the reality is that given this level of convergence, the EU model might have simply become the global version of antitrust. It could be considered an attempt at universalizing the provisions of the European competition law and making it of a global nature.

The role played by the International Competition Network (ICN) in the spread and harmonization of competition laws across countries is also noteworthy. Many have studied its effect on the creation of a global system, where convergence is the rule rather than the exception.⁶² Today, two models stand out, the American and the European ones—where arguably, the European model is today more diffused than its American counterpart given the European tactics discussed. Whether the European diffusion and harmonization towards its model competition law have muted calls towards an international regime is plausible. It is also plausible to consider that, given the proliferation of alternatives to international antitrust, attempting to harmonize competition laws is no longer a necessity. These alternatives are nation-to-nation cooperation agreements, bilateral agreements on competition issues, regional competition regimes, etc.⁶³ Given these developments alongside the competition rules already in force under the WTO agreement,⁶⁴ it might be confidently argued, that there is no longer a need for a global antitrust regime—one that was aimed at with the Havana Charter and later the Doha Declaration. What is in force today, is plausibly more of a global regime than any of these initiatives attempted to create.

⁶⁰ Waked, *supra* note 52, at 203.

⁶¹ See, e.g., Mathias Dewatripont & Patrick Legros, *EU Competition Policy in a Global World*, in *THE EUROPEAN UNION AND GLOBAL GOVERNANCE* 87, 87–103 (Mario Teldò ed., 2009).

⁶² See CHRISTOPHER TOWNLEY ET AL., *THE LAW AND POLITICS OF GLOBAL COMPETITION: INFLUENCE AND LEGITIMACY IN THE INTERNATIONAL COMPETITION NETWORK* 137 (2022).

⁶³ Fox, *supra* note 3, at 914; Gal, *supra* note 1, at 8–9.

⁶⁴ See Damjan Kukovec, *International Antitrust—What Law in Action?*, 15 *IND. INT'L & COMPAR. L. REV.* 1, 1 (2004).

IV. CRITIQUE—WAY FORWARD AND RESISTANCE FROM THE SOUTH

Given the state of the convergence that has led to a harmonized global antitrust regime, countries in the Global South have arguably little leeway to follow a different route to antitrust law and policy. They are not only bound by the substantive provisions of their adopted competition laws, but to a larger extent, are bound by the desirable outcome of competition enforcement, namely the pursuit of consumer welfare. The EU competition goal is clearly to maximize consumer welfare and the American approach is not much different.

Although there is a plethora of alternative policies and goals with regards to antitrust enforcement, from economic efficiency to poverty eradication and distributive justice (among many others), the current framework imposes a consumer welfare goal following the EU-US model.⁶⁵ Pursuing consumer welfare is a static goal, that is only concerned with market prices and the share of these prices that generate a consumer surplus value. It is a standard that turns a blind eye to how the production process took place, including its environmental or labor impact, to focus solely on current market prices. Accordingly, not only is this goal highly controversial, but it has also fallen from grace in the last decade or so.⁶⁶

Recent literature, particularly by a group of scholars referred to as the neo-Brandasians, have shown that with the pursuit of consumer welfare, competitive markets have become more concentrated.⁶⁷ They urge policy makers and antitrust enforcers to focus on the competitive market structure instead of consumer welfare.⁶⁸ Many others have critiqued consumer welfare for a variety of reasons, particularly its neglect to account for environmental degradation or labor abuses.⁶⁹ Yet, consumer welfare has by now managed to infiltrate the policy and enforcement spheres of most countries across the

⁶⁵ See Waked, *supra* note 36, at 945; Dina I. Waked, *Antitrust as Public Interest Law: Redistribution, Equity, and Social Justice*, 65 ANTITRUST BULL. 87, 88 (2020).

⁶⁶ For a critique of consumer welfare, see Waked, *supra* note 31, at 386.

⁶⁷ See, e.g., Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017); TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018); MATT STOLLER, *GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY* (2019); JONATHAN TEPPER & DENISE HEARN, *THE MYTH OF CAPITALISM: MONOPOLIES AND THE DEATH OF COMPETITION* (2018); ZEPHYR TEACHOUT, *BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY* (2020); BARRY C. LYNN, *CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION* (2009); SALLY HUBBARD, *MONOPOLIES SUCK: 7 WAYS BIG CORPORATIONS RULE YOUR LIFE AND HOW TO TAKE BACK CONTROL* (2020).

⁶⁸ See, e.g., WU, *supra* note 67.

⁶⁹ See, e.g., Roman Inderst & Stefan Thomas, *Competition Policy and the Environment*, 15 ANN. REV. RES. ECON. 199–211 (2023).

globe. Today, it is the most cited goal of competition law in developing countries.⁷⁰

Despite consumer welfare being one of the dominating terms in antitrust discourse, there is no clear consensus as to what it actually means.⁷¹ It is considered to some extent “the most abused term in modern antitrust analysis.”⁷² This is particularly true due to the confusion created by Robert Bork when he used the term to describe economic efficiency, or total welfare.⁷³ An illustration of the lack of consensus in reference to the term is found in an International Competition Network (ICN) survey of fifty-seven authorities, which found that only seven authorities agreed with the provided definition of consumer welfare; namely, consumer welfare as it relates only to consumer surplus and excludes noneconomic considerations.⁷⁴

Given this confusion and indeterminacy, one way that countries in the Global South could resist the harmonized versions of competition laws is through differentiated and selective enforcement. What I mean by differentiated and selective enforcement is the choice to enforce the antitrust laws selectively against industries, sectors, or firms according to a different choice of outcome than that proposed in the adopted law. In a sense, the resistance would be from each country using its competition law to achieve alternative goals and policies it deems most suitable to its own national and public interests.

For example, a country could use its competition law to break up incumbent firms that have either managed to become concentrated thanks to nepotism, or to diffuse ownership amongst its population. In yet another setting, incumbent firms’ concentration might be protected—by guiding enforcement away from these firms—to promote a national champion or encourage an active industrialization plan. Many other selective

⁷⁰ Waked, *supra* note 31, app. at 1002–06.

⁷¹ Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1020 (1987).

⁷² *Id.* at 1032.

⁷³ ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 107–15 (1978). For a reference to this confusion, see Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 473 (2012) (“[T]he ambiguity arose as a result of Bork’s use of the term ‘consumer welfare’ when he meant total welfare.”); Brodley, *supra* note 71, at 1032; Albert A. Foer, *The Goals of Antitrust: Thoughts on Consumer Welfare in the U.S.* 6 (Am. Antitrust Inst., Working Paper No. 05-09, 2005), <http://ssrn.com/abstract=1103510> (“[B]ut what does [Bork] mean by consumer welfare? His answer constitutes one of the great acts of academic legerdemain”); Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CAL. L. REV. 917, 918–19 (1987) (“Chicagoans assert an ahistorical view of antitrust. They rationalize the history of antitrust to fit their economic model. They declare that the only significant goal of the Congress that passed the Sherman Act was to enhance consumer welfare (a term that they then misdefine). . . . Chicagoans define ‘consumer welfare’ as the sum of producers’ and consumers’ welfare, on the theory that consumers will be better off if producers make more money because producers will invest that money in things consumer want.”).

⁷⁴ Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 B.C. L. REV. 551, 571 (2012).

enforcements could take place—banking on the indeterminacy of the sought outcomes—to resist a harmonized system that does not address local needs.

My argument is that the local needs should be put first, and the competition laws should then be used to accommodate these needs. In a sense, today's global antitrust should not prohibit the Global South from desiring outcomes that put their national interest first. Although the project to globalize antitrust law is far too advanced to be stopped, it shall not be the reason countries in the Global South are locked into a system that does not ascribe to their desired outcomes. This could be their attempt to undo the comparative law void imposed onto them when this harmonization project was carried through—when it ignored that different countries might desire different goals and policies that are more suitable to the development state they are at and the outcomes they wish to generate.

CONCLUSION

Although attempts at the creation of an international antitrust regime have failed repeatedly, a global antitrust, nonetheless, emerged. This global antitrust was pushed through the diffusion processes of developed countries that insisted on the spread of their version of competition laws. In the face of this harmonization of a global antitrust framework, countries in the Global South could not resist. Despite their earlier resistance to the attempts at creating an international antitrust, particularly at the Doha Round, they failed to stop the emergence of a harmonized global antitrust regime. In the face of this global setup, countries in the Global South could only resist by selectively enforcing their antitrust laws in a way that corresponds to their local needs, public interest, and overall desirable outcomes. In doing that, they might fight off the comparative law void this harmonization process pursued and forced onto them.