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Competition policy in the new wave of global protectionism. Prospects for preserving a fdi-friendly institutional environment

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Abstract
By its very nature, competition policy has a double face vis-à-vis foreign direct investment (FDI), as it can encourage inflows into the country by ensuring a level playing field for all investors (domestic and foreign), but also be captured and misused to discourage FDI in the name of superior national interests or under pressure from lobbying groups. The worldwide emergence of "global protectionism", in reaction to the inequalities and imbalances caused by globalization, and the impasse of supranational institutions in the governance of international relations have paved the way for the abuse of competition policy as a barrier to FDI. After giving evidence of these phenomena that threaten economic growth and welfare, the paper discusses prospects for preserving an institutional environment conducive to FDI. A desirable to-do list is outlined.

Keywords Competition policy · Foreign direct investment · Global protectionism · International relations · Populism · Regulatory authorities

JEL Classification F20 · F50 · F60 · L40 · L50

1 The double-faced national competition authorities

National competition authorities (NCAs) are inherently double-faced, as their competition policy (CP) can either promote or discourage foreign direct investment (FDI) in the country (Mariotti & Marzano, 2021).[1] In line with its origins and

[1] We use the term "competition policy" as a synonym of "antitrust policy" (Motta, 2004). The former is the most widely used internationally, while the latter is commonly in use in the United States.

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history, the mission of NCAs is to protect competition and establish a level playing field for all investors (domestic and foreign). This translates into a favorable environment for FDI. International Business (IB) studies recognize that non-discrimination is a key factor that promotes FDI localization by removing barriers to market entry and impediments to trade and investment (Caves, 1996; Rugman & Verbeke, 1998).

However, the "capture theory" (Carpenter & Moss, 2013) explains how many conditioning factors are at work that cause NCAs to deviate from their institutional role of defending free competition. They are exposed to "industry capture", through the lobbying of vested interests; "government capture", through the expropriation of their independence and the weakening of their functions in the name of a higher national interest (Gardbaum, 2020); "bureaucratic capture" (i.e., civil servants bias the investigation to pursue their own career goals; see Dewatripont & Tirole, 1999); and "cultural capture" (i.e., the regulator is swaned into thinking like - and doing the bidding of—the elite group that has gained dominance in promoting and controlling policy outcomes, thanks to common backgrounds, education, experience, and intermingling; see Kwak, 2013). As pointed out by the IB literature since the seminal work of Brewer (1993), competition law leaves room for enforcement discretion and may be abused as a barrier to investment and intentionally manipulated to prevent FDI (Büthe, 2014; Clougherty & Zhang, 2021; Tunali & Fidrmuc, 2015).

Because of this, over time IB studies have offered contradictory and inconclusive evidence. Focusing on the last two decades and making no claim to exhaustiveness, a number of studies find that CP fosters inward FDI, as its strengthening creates a non-discriminatory business climate towards foreign competitors (e.g., Golub et al., 2013; Oliveira et al., 2001; Parakkal, 2021; Seth & Moran, 2013). Other scholars propose an opposing view, mainly arguing that CP is protectionist in intentions and/or effects, discouraging foreign ownership of firms, especially through controlling mergers and acquisitions (e.g., Aktas et al., 2007; Clougherty & Zhang, 2021; Conybeare & Kim, 2010; Serdac Ding & Erel, 2013); Zhang & Clougherty, 2022).

Recent social and political trends make the contradictions associated with the two-faced nature of CP clearer and more jarring. Consider the emergence of populism as a reaction to the inequalities and imbalances caused by globalization (Rodrik, 2017; Stiglitz, 2017). When in power, populism has paved the way for the intensification of disguised protectionism. For example, Bernatt (2022) examines the relationship between populism and antitrust in Poland and Hungary. He observes that, despite being part of the European Union and thus subject to its jurisdiction in competition matters, the policies put in place have a strong nefarious impact on NCAs, especially: (i) the limitation (close to abolition) of their independence; (ii) the decrease in human and financial resources allocated to their operation; (iii) the overall reduction in the strength of enforcement, especially with regard to large domestic and state-owned firms; and (iv) the discretionary power of the government to exempt certain transactions from merger control for reasons of strategic importance to the national interest.

But we are only scratching the surface. The most striking signal about the possible welding of populism and antitrust abuse comes from the United States. The "populist antitrust" movement, which in its most solid conceptual guise has taken the name New Brandeisian movement, claims for CP a task that goes beyond the

consumer-welfare-standard to embrace a public-interest-standard that borders on the political domain. In the early twentieth century, the motto "big is bad" was coined to assert that competition law was designed to protect small businesses and prevent bigness, in accord with the influential thinking of Louis Brandeis.[2] The new movement, based on this original vocation, argues that to address the consequences caused by excessive concentration and bigness, the measures against monopoly platforms must be accompanied by social goals, such as redistribution, the environment, unemployment, wage growth, privacy and data security, and national strategic independence (Dorsey et al., 2019). This approach has been adopted by the Biden Administration. On July 9, 2021, the President issued a proclamation on CP, stating that there has been excessive consolidation in many economic sectors and that this consolidation has harmed workers, small businesses, and consumers and led to vast racial, income, and wealth inequality. The Executive Order stated that the central goal of the Biden Administration is to ensure that antitrust laws in the United States are vigorously enforced to address these social problems.[3] At the same time, Tim Wu and Lina Khan, two prominent New Brandesians, have taken leading roles as Special Assistant to the President for Technology and Competition Policy and as Chair of the United States Federal Trade Commission (FTC), respectively.

Beyond intentions, which we do not dispute here,[4] the promotion of "socially responsible" agencies and the creation of an antitrust position in the White House have a strong potential to undermine the independence and autonomous work of FTC. As Jean Tirole points out in a recent note, while governments are typically multi-mission actors, delegating specialized missions to independent agencies allows for greater effectiveness in pursuing targeted objectives, "[but] independence comes with duties. The agencies do not choose their mission and the broad lines of what is expected from them is clearly specified: independence requires limited and mandated powers. The expansion of missions to the political domain therefore exposes agencies to the loss of independence" (Tirole, 2022, p. 8).

In the international perspective, populist CP finds mutual reinforcement in the traditional skepticism exhibited by authoritarian and corporatist states toward the independence of NCAs, the latter often being bent to strategic political interests. In his recent book ("Chinese antitrust exceptionalism"), Zhang (2021) illustrates how China has turned competition law into a powerful economic weapon, and explains its strategic application during the Sino-American technology war through numerous case studies. Zhang also informs on the vast administrative discretion possessed

[2] Louis Brandeis served on the Supreme Court between 1916 and 1939. He was a strong proponent of a democratic distribution of power and opportunity.

[3] Executive Order on Promoting Competition in the American Economy No. 14,036, 86 FR 36,987. https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[4] However, note how bringing down the market power of the dominant oligopolies would imply giving up leveraging them to further American interests abroad, which does not seem to be part of the Biden Administration's agenda. In fact, the latter seems to share with populist governments the duplicity between demagogy in domestic affairs and expansionist realism in international affairs.

by the Chinese government, showing how agencies can even exploit the media to pursue hostile enforcement.

Going back to FDI, this orientation toward populist CP accentuates worldwide concern about biases in the selective enforcement of seemingly neutral antitrust laws in favor of national champions and other national firms, local employment and population groups. Indeed, it baits confirmation of what has already been documented in the first two decades of the new century about numerous cases of NCA capture around the world, resulting in opportunistic uses of control over mergers and acquisitions and abusive behavior by dominant firms against foreign firms (Mariniello et al., 2015).

As the adversarial behavior of NCAs has tightened, the uncertainty and risk perceived by international investors have increased, leading them to engage in more cautious investment behavior. Looking at the effects of populism, Liebmann and Kunczer (2022), using a sample of 525,688 FDI observations from 2007 to 2019, find that multinational enterprises are less likely to invest in a country the more populist its government is. More generally, if they perceive signs that there might be systematic bias against foreign firms in a country, they will either not invest or enter the local market with suboptimal choices but lower sunk costs (Zhang & Clougherty, 2022).

Nowadays, more than one hundred and fifty countries have CPs and NCAs. Despite the convergence of principles and legislation, NCAs still differ in their independence and accountability, scope of action, powers of investigation and sanction, and resource allocation (Clougherty, 2005; Ginsburg, 2005; OECD, 2014). Because of this chaotic inconsistency and the environmental uncertainty it generates, the liabilities of foreignness and outsidership suffered by international investors (Johanson & Vahlne, 2015) are exacerbated in their effects. Therefore, MNEs become highly sensitive to loud and clear signals that NCAs will deliver on their promise to promote a ubiquitous level playing field. In their study of a sample of 63 countries over the period 1980–2017, Mariotti and Marzano (2021) find that signals of CP effectiveness, such as pro-enforcement CP reforms, are crucial to attracting FDI. However, they also stress that this is a necessary but not sufficient condition. Especially in countries with a lower level of "generalized trust" (i.e., trust in others, corporations, and political institutions; see Aghion et al., 2010), good quality complementary institutions pertaining to the regulatory environment[5] are necessary to make CP effective in attracting FDI. These results are in accordance with a stream of literature recognizing that a country's high-quality institutions are meaningful in executing a legitimate and credible CP and making its enforcement more effective. Econometric studies give evidence of this (Ait Soussane & Mansouri, 2022; Borrell & Jiménez, 2008; Buccirossi et al., 2013; Krakowski, 2005; Voigt, 2009).

Together, these considerations form the prelude to the issues that will be addressed in the next sections. NCAs do not operate in a vacuum, but are embedded in a national and international fabric of economic, institutional and social relations that influences their policies and practices along several dimensions (Motta,

[5] Primarily, regulation of public services, property rights, labor market regulation, credit market regulation, environmental regulation, trade and investment regulation.

2004). We must analyze the changes in this intricate fabric if we want to understand whether and how the institutional role of NCAs is changing relative to its founding goals, namely the efficient allocation of resources and the promotion of competition; to answer key questions such as the one suggestively formulated by Murray (2019, p. 117)—"is antitrust law the last hope for preserving a free global economy or another nail in free trade's coffin?"; and finally to discuss the research question we put forward in the title, namely what policies should be prioritized so that CP can continue to promote worldwide a FDI-friendly institutional environment[6].

Our discussion will be carried by focusing on a macro-trend that we believe will heavily impact the world economy, namely the new wave of "global protectionism".

2 The rise of global protectionism and the abuse of competition policy

2.1 Global protectionism

After decades of integration and globalization, the 2008 financial crisis lifted the veil off the paradigm of the so-called "globalized free market economy", which, among its many benefits, also brought with it rampant income inequality between and within countries, unfair competition as social dumping, impoverishment or destruction of nascent industries in developing countries, unemployment and discontent with globalization (Rodrik, 2017; Stiglitz, 2017). Indeed, unrestricted free trade can be harmful to all countries, and in response to it, a certain amount of economic protectionism is not necessarily bad economics (Rodrik, 2018). To some extent, protectionism can be good if it is aimed at preserving the free movement of goods and capital in the long run, preventing the contingent difficulties of countries from festering and feeding vicious circles that lead to retaliatory wars and greater instability in the world economy.

However, today we are seeing a different economic protectionism from the one we knew from postwar history. The 2008 crisis triggered a protectionist movement whose scope goes far beyond traditions. In accordance with Enderwick (2011) and Mariotti (2022), the features of "global protectionism" can be summarized as follows:

[6] We are aware that the results of the empirical literature on the effects of FDI on growth and welfare have been mixed enough that whether FDI is good or bad for host countries is a question open to contingencies related to investors' strategies and the specific characteristics of the institutional, economic, and business environment of host countries (Alfaro & Charlton, 2013; Carbonell & Werner, 2018; Cicea & Marinescu, 2021; Narula & Pineli, 2019). In recent decades, a conventional wisdom has emerged among economists, policymakers, and practitioners claiming a positive balance between the pros and cons of FDI (as documented in research and publications by well-known international organizations, such as IMF, OECD, United Nations, World Bank). However, this paper is not intended to be a commentary on whether FDI is good or bad, or how to make FDI good, but rather whether and how CP can and will be wielded by countries to encourage/discourage FDI.

- in addition to trade, the economic scope of protectionism includes FDI, capital movements, offshoring and migration;
- the geographic scope of protectionism extends to all countries, developed and emerging;
- protection uses traditional instruments of restriction—tariffs, quotas, non-tariff barriers—but also subsidies, government procurement, industrial policies (e.g., creation of national champions and promotion of state-owned enterprises), financial measures, health and safety;
- the sentiment of protectionism is based on economic weakness and social backwardness (as in the past), but also on economic strength (e.g., protecting the economic rent generated by commodity exporting to benefit the national economy—Russia *docet*);
- pressures come from negatively affected industries or local producers (as in the past), but also from national leaders, consumer groups, industry and labor unions;
- opportunistic duplicity is adopted, aimed at maximizing the benefit-minus-cost balance of globalization even through inconsistent approaches (e.g., by implementing restrictive policies focused on individual firms or operations, but without affecting the target sector, if the latter promotes endogenous economic growth).

Global protectionism spread rapidly in a mutually reinforcing relationship with the rise of populist ideology in many countries. This intertwining shows as wishful thinking that Rodrik (2018, p. 199) hypothesis that the adoption of protectionist economic measures "might in fact be the only way to prevent its far more dangerous cousin, political populism".

Overt manifestations of the involution of international relations have been, among many others, the escalation of the US-China trade war since 2018, Brexit, and the WTO crisis under the attacks of the Trump administration, in nothing remedied by President Biden. Evenett and Fritz's (2020, 2021) reports, based on the Global Trade Alert (GTA) database, give evidence of the booming of protectionist and discriminatory measures taken around the world since 2008. G20 countries count more than 28,500 such interventions by the end of 2021, compared to less than 5500 liberalization measures. The behavior of the US and China: consistent with their economic weight, their share of total protectionist and discriminatory measures is 25.8% and 20.6%, compared to shares of liberalization measures of 7.6% and 8.2%.

A central issue endangering global peace and prosperity is the threat of downsizing/breaking down of the multilateral institutions that underpinned post-World War II global economic cooperation (Bowen & Broz, 2022). The WTO is in danger of losing legitimacy as its dispute settlement system no longer works, mainly due to the United States challenge to its rules and regulations during the Trump Administration, and the subsequent turn toward unilateralism and economic nationalism by other member countries. The International Monetary Fund and World Bank have been undermined by divisions among members over governance and conditionality, prompting China to promote its own global institutions (e.g., the Asian

Infrastructure Investment Bank). Scholars and politicians rack their brains analyzing facts and trends and proposing solutions, but no consensus has been reached on the response to the crisis of the multilateral economic order (e.g., Gruszczynski, 2023; Jones, 2023; Petersmann, 2019).

An important example that combines many of the economic, political, and ideological ideas that global protectionism is inspired by is the emerging of "techno-nationalism", defined as a "strain of geopolitical thinking and actions that link technological capabilities directly to a country's national security and geopolitical benefits, and involves legal and regulatory restrictions or sanctions against selected foreign investors or foreign companies" (Luo, 2022, p. 551).

The term originated in the 1980s and was referred by Reich (1987) to describe the policies of nationalistic protection of technology ("the goal is to keep technological knowledge here"), proposed by the US government because of new concerns about losing its technological leadership, particularly to Japan.[7] To techno-nationalism Reich contrasted "techno-globalism", according to which it made no sense to speak of America's technological breakthroughs over those of other countries, "because there was no way to separate 'our' technological advances from 'theirs.' Technological development is a joint product of multinational institutions—universities, research laboratories, corporations, even defense programs—that link talented people from all corners of the globe" (Reich, 1987, p. 63).

The resurgence of this debate is sparked by the trend of developed economies and their emerging competitors toward a techno-nationalism that combines political, economic, and security considerations that echo the characteristics of global protectionism (Luo, 2022; Mariotti, 2022), namely: (i) globalization is seen not as a means to strengthen national economies, but as an arena in which nation-states struggle to impose their own hegemony; (ii) the dominant rationale shifts from developmental to national security purposes, aimed at weakening the competitiveness of others rather than improving one's own, through restrictions on transnational flows of technology and constraints on the business activities of third-country firms; (iii) technological competition is conceived as win-loss, thus excluding the opportunity for win-win outcomes through technological interconnectivity and resource complementarity between countries.

Certainly the United States is paradigmatic as many in its security establishments fear the erosion of America's power and status by other countries, particularly China. And conversely, on China, scholars state: "the rise of China is shaking the world. President Xi Jinping has made clear that the 'Great Rejuvenation of the Chinese Nation' must involve indigenous technological upgrading. His 'Made in China 2025' (MIC 2025) plan, announced in 2015, constitutes a challenge to the world's current technological champions: the gauntlet has been thrown down, the contest has begun" (Starrs & Germanns, 2021, pp. 1122–1123).

Most important to the aim of this paper, techno-nationalism and its "close cousins"—national security and strategic protectionism of key sectors of the domestic economy—have triggered a global rush to screen inward FDI by national and

[7] The article drew on the announcement that Japan's Fujitsu intended to buy California's Fairchild Semiconductor Corporation.

regional authorities,[8] whose measures reveal a common trend (Napolitano, 2019): (i) expanding the number of critical and strategic sectors in which investments require prior government ballot; (ii) lowering the investment thresholds that trigger notification obligation; (iii) expanding the list of public interests protected (from purely national security concerns to economic, technological, and data protection issues); (iv) lengthening the time limits of administrative inquiry; and (v) strengthening the special prescription and inhibition powers of public authorities. These regulatory changes have been followed globally by a significant increase in both the number of notified transactions and the number of transactions prohibited or subject to requirements and conditions.

The political debate is ongoing and oscillates between the choice of limiting to a narrow scope, explicitly circumscribing FDI screening mechanisms to "public security", or taking a broader scope, endorsing an approach that includes the general and ambiguous category of "strategic assets". The latter choice would pave the way for the intensification of disguised protectionism.

In any case, ambiguity and obscurity have become common features of policies towards FDI in the name of national security. Some scholars argue that ambiguity in FDI policy is intentionally aimed at making room for politicians and business actors to engage in FDI securitization to support their political and trade agendas (Lai, 2021). Moreover, since 2008, countries' policies towards FDI have gradually shifted towards discriminatory measures. According to Evenett and Fritz (2020), out of the total interventions taken in the G20 countries, the share of those in favor of FDI decreased from about 60% in 2009 to about 40% in the early 2020s. The new technonationalism has amplified uncertainty and complexity in international markets and caused disruption in global value chains through negative reciprocity policies that include funding for reshoring strategic production, export controls, blacklisting, blocked acquisitions, and sanctions (Graham & Marchik, 2006; Legrain, 2020; Sacks, 2020), all of which are responsible for the current discrimination against FDI.

2.2 Abuse of competition policy

In light of what has been outlined, we claim that NCAs and their policy can become (and in part already are) a strategic weapon of national governments in the battle of global protectionism.

In a protectionist perspective, governments have many policies—not just CPs—at their disposal to disincentivize inward FDI, e.g., monetary, labor, stability, and many other regulatory policies. In addition, a super-additive effect occurs when the same protectionist goals are pursued simultaneously through coordinating the actions of different regulatory institutions (Mariotti & Marzano, 2021). However, there are important reasons why CP can be a key pillar of protectionist policies. First, while regulation is predominantly sectoral, CP serves as a tool that applies to all sectors of the economy. Second, while regulators act through the adoption of "rules" to

[8] For example, the Foreign Investment Risk Review Modernization Act of 2018 in the United States; the Foreign Investment Law of 2019 in China; and the framework Regulation 2019/452 in the European Union.

remedy market failures, NCAs act on the basis of "standards". Whether legal commands should be promulgated as rules or standards is a crucial question concerning ex-ante or ex-post attribution of content to the law (Kaplow, 1992).[9] Rose (1988) uses effective expressions to distinguish between the two modes: "hard-edged, yes-or-no crystalline rules" versus "discretion-laden, post hoc muddy rules [standards]". In other words, CP leaves a wide margin of discretion to the judge, who uses the rule of reason rather than the rule of law, i.e., acts through selective case-by-case practices. A flexible tool, then, but one that leaves room for various forms of NCA capture and strategic operations to discriminate against particular industries, firms and individuals.

Also, internationally, CP offers the opportunity to circumvent the constraints and protracted litigation that, despite the aforementioned crisis, multilateral institutions (starting from the WTO) and the existing network of international agreements on trade and investment still manage to impose on individual countries, making it difficult for them to act protectionist. The absence of supranational jurisdictional bodies with the power to introduce binding global rules on CP and the power to prevent and sanction is the key explanation. Murray (2019) summarizes the failed attempts to establish such an institution due to conflicts of interest among major developed countries and between them and developing countries. He concludes, "Despite the strong propensity towards the adoption of antitrust laws at the national level, countries appear to have generally abandoned all hope for an international body of antitrust enforcement" (Murray, 2019, p. 136). Confirming this judgment was the announcement made by the WTO itself in July 2004 that the interaction between trade and CP would no longer be part of the work program established in the Doha Ministerial Declaration (Bhattacharjea, 2006).

Indeed, efforts to informally harmonize international competition laws have continued by OECD and UNCTAD. The International Competition Network (ICN) has also been established to encourage cooperative action on CP principles. However, these institutions provide recommendations on best practices and exert peer pressure on deviant regimes, but can do nothing to curb countries' protectionist behavior.

The lack of international enforcement of competition law means that NCAs are subject only to national jurisdiction. Even when regional jurisdictional bodies are in place, there remains a robust autonomy of individual NCAs. In the European Union, a decentralized enforcement system obliges NCAs in member states to apply European antitrust law but, at the same time, leaves them a degree of freedom to devise the best enforcement procedures according to the specific characteristics of their jurisdictions (Cengiz, 2016). These procedures derive from a set of informal rules rooted in the cultures and traditions of the countries that shape each institutional framework. Bernatt and Zoboli (2023) analyze various aspects of the constructive complexity of the relationship between the central level of enforcement (by the EU

[9] As Kaplow (1992, p. 560) suggests, a rule prohibits "driving faster than 55 mph on freeways," while a rule prohibits "driving at excessive speeds on freeways," i.e., the rule may leave it to the court to determine both the specification of what conduct is permissible and the factual issues.

Commission) and the decentralized level (by NCAs), explaining why building effective integration is a complex task.

Thus, if national jurisdictional autonomy is added to the dual-faced prerogatives of CP, it follows that NCAs are an instrument of economic and political power most easily abused by national governments to promote protectionist policies and deter inward FDI in the name of the (alleged) ordinary people's will. Easy to say, the antidote to remedy this negative complementarity is the establishment of supranational competition authority endowed with effective enforcement power: "We need a bold multilateral reform agenda in order to make world antitrust and world trade agreements functioning in symbiosis so that both competition can be maximized and free trade can be further liberalized" Portuese 2022a, p. 239). Unfortunately, many weaknesses do not create a force. In-depth reflection must be conducted to define a set of reforms capable of promoting a FDI-friendly institutional environment, coupled with a not-at-all granted willingness of major countries to take loyally agreed and coordinated initiatives in this regard.[10]

3 Prospects for preserving a FDI-friendly institutional environment

At the very beginning of the paper, we highlighted the double-faced nature of CP, i.e., how its application could encourage FDI (as well as free trade and capital movement), but also be manipulated to hinder it. The subsequent unfolding shows how the current international landscape is characterized by the emergence of powerful economic and political forces that are likely to prevail in the misuse of CP to protect national interests at the expense of foreign investors. In the belief that this is a detrimental obstacle to international economic growth and prosperity, a discussion on how to prevent this from happening, or rather, from becoming an irreversible phenomenon, cannot be missed.

Two premises are in order. First, in the face of the complexities and uncertainties we have described, scholars must exercise modesty and take comfort in the fact that their small contribution feeds a stream of knowledge that as a whole will help to better address the challenges of globalization and its imbalances/instabilities. Second, we are aware that this short paper is problem-setting rather than problem-solving. However, we outline possible prospects for preserving an FDI-friendly institutional environment by discussing ways to address the negative policy developments we have described.

Favorable prospects depend on two sets of factors: (i) the worldwide cooling down of global protectionism and the general improvement in the quality of national

[10] The divergent assessments among scholars on the prospects opened up by international agreements such as the 2020 Phase One Trade Deal between the United States and China highlight how difficult it is to understand "what's cooking" in international relations and what the countries' actual willingness is to improve the political climate through genuine cooperation. Some scholars hail it as a turning point in economic relations between the two countries, a truce in the trade war, and above all a positive sign for the future of the multilateral trading system (Lowe, 2022). But other scholars point out that the agreement was handled in a discriminatory way, as it binds both countries to trade quotas in violation of WTO rules. In doing so, it would have further weakened the world trading system (Jones, 2023).

and international market regulatory institutions;[11] (ii) the implementation by governments of reforms to eliminate or drastically limit the capture of NCAs aimed at diverting them from their role to safeguard competition, as well as measures to improve the effectiveness and credibility with international investors of CP enforcement. Below we focus on the second point.

The risk of capture would be reduced if national governments acted to bring CP back to its core aims. First, the explicit abandonment of all non-competition goals introduced over time through both legislative measures and practice is a crucial step in preventing the misuse of CP to favor domestic lobbying interests.[12] Second, some improvements would be welcome to reorient the rule of reason closer to rule-of-law ideal principles. These principles can be summarized as follows (Stucke, 2009): (i) prospectivity, accessibility and clarity, to prevent NCAs from arbitrarily exercising their power; (ii) equal protection for all without discrimination; (iii) predictability so that regulated actors can reasonably anticipate what actions would be prosecuted and shape their behavior accordingly; and (iv) general application and consistent implementation (laws must be able to be complied with). In addition, governments should strengthen the powers conferred to NCAs (investigations and sanctions) by increasing the resources available to them and encouraging the use of tools that facilitate their action, such as private enforcement, leniency programs, commitments, and settlements.

All these measures are in sole and final discretion of national governments and authorities, and their implementation would help increase the credibility of CP and the confidence of foreign investors in the lasting establishment of a non-discriminatory business climate.

Needless to say, achieving these results also depends on the symmetry of behavior among countries, so that the limitation of interventionist policies by one government is matched by a similar commitment by other governments. To avoid the prisoner's dilemma in an uncooperative environment such as current international relations, governments should be aware of the domestic costs of strategic use of CP, i.e., the risks to their own economies of a generalized application of distorted competition laws. Furthermore, mutual commitments are rather ineffective when behaviors are difficult to observe, due to the complexity of situations and policies brought to bear (Mariniello et al., 2015).

The answer to these difficulties lies in identifying a credible international forum for policy coordination among countries. Ideally there should be a supranational jurisdictional body with the power to introduce binding global rules on competition and antitrust laws and to prevent and sanction, so as to guarantee individual countries from other countries' opportunistic resort to disguised

[11] In agreement with Mariotti and Marzano (2021), the quality of the institutional regulatory system generates positive externalities for NCA, with the establishment of mutually reinforcing mechanisms.

[12] This is a point on which FTC chairwoman Lina Khan would seem to agree, who in 2018 on accusations against the New Brandesian movement stated that "this new school of thought does not promote using antitrust law to achieve a different set of social goals—like more jobs or less inequality" and that refocusing antitrust on structures and a broader set of measures to assess market power can return the law to focusing on the competitive process" (Khan, 2018, p. 131). However, beyond our reservations about his structuralism (which would merit a discussion in its own right; see Portuese 2022b), the contradiction with the approach of Biden's Executive Order seems clear.

protectionism. Realistically, this model is currently unworkable. Alternatively, soft coordination, such as that of ICN, OECD and UNCTAD, may help, but moral suasion against deviation is not enough. And, given the failure of previous attempts, negotiating competition enforcement under the WTO umbrella also appears to be ineffective.

To overcome the impasse, some scholars point to bilateral and regional free trade agreements (FTAs) as a promising way to try to bridge the gap (Choi & Heinemann, 2020; Mariniello et al., 2015). Choi and Heinemann (2020) and Laprévote, (2019) note that the number of FTAs containing chapters on competition law, or at least competition-related rules, has increased significantly, although the dispute settlement mechanisms implemented have hardly ever addressed competition provisions. In particular, Choi and Heinemann (2020) discuss the extent to which FTAs contribute to the convergence of competition law. They point to "localized harmonization", which takes advantage of the greater affinity and shared background among bilateral and regional partners, as an important way to mitigate the problem of clashes in competition law and to achieve levels of convergence that would create the conditions for a future revival of international efforts for a multilateral competition agreement.

In conclusion, the to-do list we propose challenges the reform capabilities of national and international institutions. We do not know if and to what extent its content will be implemented. Surely, CP is an issue that will have a significant impact on international economic and political communities in the years to come. We hope that an academic debate will be opened on the CP-FDI relationship, to make up for the scant attention given so far.

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