



# RESEARCH BRIEF

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## Resetting Multilateralism: China's Globalism and Competition Policy

Dr Saeed Qadir, Central Asia Regional Economic Cooperation Institute  
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### Key Points:

- With increasing integration and complexity in the digital markets, the absence of multilateral competition law and regulations has, to some degree, contributed to rising trade tensions among major trade partners.
- China's globalism, characterized by the Belt and Road Initiative (BRI), is still evolving particularly in terms of its impact on competition law.
- While trade tensions offer challenges, they also present opportunities for resetting multilateralism and devising new modalities to transition to a highly networked and sustainable rule-based globalism based on the percepts of fair competition and a level playing field.

### Introduction: Competition Policy and Deeper Economic Integration

The phenomena of deglobalization, global value chain disintegration, and trade and technological

tensions especially between USA and China have puzzled many policy makers attempting to analyze the underlying causes and to suggest ways to reset multilateralism for a shared, sustainable and inclusive global order. The emergence of China as a leading player in the digital economic sphere has led many of the OECD countries to rethink, update and recast their competition policies in the wake of the digital economy. Deeper economic globalization, spurred by high-tech global firms, has blurred traditional market boundaries; and altered the business dynamics and competition across industries and countries. Network externalities enjoyed by large high-tech firms offer immense prospects ("extremely strong economies of scale and scope due to low marginal costs and the returns to data") and perils (entrenched market power via secured digital platforms) for individuals, businesses, and states. Business models and algorithms are set, altered, and augmented by technologies including Artificial Intelligence, big data analytics and machine decision making. Klaus Schwab has

<sup>1</sup> George J. Stigler Center for the Study of the Economy and the State and The University of Chicago, Committee for the Study of Digital Platforms Market Structure and Antitrust

Subcommittee Report (May 15, 2019), <https://www.judiciary.senate.gov/imo/media/doc/market-structure-report%20-15-may-2019.pdf>

called these transformations the “fourth industrial revolution.”<sup>2</sup>

These transformations raise the following questions: How would the Global Competition Agreement (GCA) respond to issues like: shared market jurisdictions; competitive neutrality for the state-owned or state-sponsored entities; unfair practices of networks or platforms powered by AI algorithms and big data analytics models; and systematic risks to privacy and the security and sustainability of individuals, systems and states in the digital economy? Should the multilateral competition law and policy be preemptive, reactive, or proactive in its approach to regulating a borderless digital domain? How would the dispute settlement or arbitration mechanisms be evolved, agreed and enforced in a market that transcends many national boundaries, legal frameworks and systems?

With increasing integration and complexity in digital markets, the absence of multilateral competition law and regulations has, to some degree, contributed to the rising trade and technological tensions among major trade partners especially the U.S. and China. The idea of *strategic rivalry*<sup>3</sup> explains the plethora of nationalistic<sup>4</sup> trade policies and “beggar thy neighbor” strategies pursued by major economies.

According to Professor Ngaire Woods, three elements of the strategic rivalry between big trading powers are i) control of resources and access to markets, ii) domination of technology of times, and iii) control of the rules of the game mainly driven by national strategic objectives. Such a global setting would repeal “the rules-based multilateral trading system and replace it with something more like a power-based system where countries are free to bargain in a way that is not constrained by any particular set of agreed-upon rules of behavior.”<sup>5</sup> Today, out of the top twenty internet leading firms, the share of China stands at nine registering astounding growth from merely two in 2013; the U.S. still ranks number 1 with 11 high-tech firms.<sup>6</sup> However, the competitor is catching up fast. The U.S. and other global competitors allege that the Chinese “government has erected a digital firewall to limit citizens’ access to digital content. This had the unintended consequence of protecting indigenous internet companies from external competition. Local firms, such as Alibaba and Baidu, were thus in a position to exploit the large domestic market and become the predominant platforms in e-commerce and search respectively.”<sup>7</sup>

<sup>2</sup> KLAUS SCHWAB, *THE FOURTH INDUSTRIAL REVOLUTION* (2017).

<sup>3</sup> Ngaire Woods, *Strategic Rivalry and the Future of the World Bank*, talk at the Annual Bank Conference on Development Economics 2019 Multilateralism: Past, Present, and Future (June 2019) <https://live.worldbank.org/annual-bank-conference-development-economics-2019-multilateralism-past-present-and-future>

<sup>4</sup> WTO, *TRADE POLICY REVIEW: CHINA* WT/TPR/S/375/Rev.1, 32 (2018), available at [https://www.wto.org/english/tratop\\_e/tpr\\_e/s375\\_e.pdf](https://www.wto.org/english/tratop_e/tpr_e/s375_e.pdf)

<sup>5</sup> Aaditya Mattoo and Robert W. Staiger, *Trade Wars: What do they mean? Why are they happening now? What are the*

*costs?*, World Bank Policy Research Working Paper No. 8829, Apr. 22, 2019, available at

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3376278](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376278)

<sup>6</sup> KLEINER PERKINS, *INTERNET TRENDS REPORT 2018*, 217-218 (May 2018),

[https://www.kleinerperkins.com/files/INTERNET\\_TRENDS\\_REPORT\\_2018.pdf](https://www.kleinerperkins.com/files/INTERNET_TRENDS_REPORT_2018.pdf)

<sup>7</sup> Carl Dahlman, Sam Mealy and Martin Wermelinger, *Harnessing the Digital Economy for Developing Countries*, OECD Development Centre Working Papers 334 (2016), <https://doi.org/10.1787/4adffb24-en>.

## Competition Policy - An Unfinished Agenda of WTO

Competition policy was viewed by many negotiators as a domestic issue mainly because of its application and impact especially during the cold war era. Neither the General Agreement on Tariffs and Trade (GATT) of 1947 nor the World Trade Organization (WTO) featured a “comprehensive set of binding rules addressing anti-competitive business practices”<sup>8</sup> or a multilateral competition policy agreement per se. Despite the failure to agree to a full-fledged multilateral compact on competition policy, the text of GATT 1947 embedded the core principles of non-discrimination: Most Favored Nation (MFN) and national treatment (NT), transparency (i.e., governmental regulations) and due process of law (i.e., dispute settlement procedures). Similarly, the WTO, which subsumed GATT 1947, incorporated these core principles in various agreements including the General Agreement on Trade in Services, the Agreement on Trade-Related Intellectual Property Rights, the Agreement on Trade-Related Investment Measures, the Anti-Dumping Agreement, the Agreement on Technical Barriers to Trade and the Agreement on Safeguards, the Trade Policy Review Mechanism, Dispute Settlement and other instruments like WTO Accession Protocols to name the most important ones.<sup>9</sup> The need for a fully-fledged multilateral agreement on Competition Policy was

realized at the 1996 Ministerial Conference in Singapore.<sup>10</sup> However, the WTO members failed to agree on these so-called new issues and the work on the Competition Policy was dropped from the Doha Development Agenda. To date, the Competition Policy has remained an un-finished agenda item for the WTO.

Recent trade tensions, especially between the U.S. and China, can also be attributed to the institutional failure of the WTO. Both the EU and U.S. have complained about the non-compliance of China's obligations under the WTO Accession Protocol.<sup>11</sup> The European Parliament resolution 2018/2084(INI) acknowledges “on the whole China's accession to the WTO in 2001 has increased access to its domestic market. China does not apply the spirit and principles of the WTO's tenets of national treatment.”<sup>12</sup> The European Parliament resolution on China's market economy status [2016/2667(RSP)] urges the “Commission to ensure that all provisions of Section 15 of China's Accession Protocol to the WTO that remain in force after 2016 are given full legal meaning under their domestic procedures, and to oppose any unilateral granting of Market Economy Status (MES) to China.” The U. S. similarly vehemently complained of the non-compliance of the China's obligations under the Accession Protocol. The U.S. Trade Representative

<sup>8</sup> Robert D. Anderson, William E. Kovacic, Anna Caroline Müller and Nadezhda Sporysheva, *Competition Policy, Trade and The Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection*, WTO Staff Working paper ERSD-2018-12 (2018), available at [https://www.wto.org/english/res\\_e/reser\\_e/ersd201812\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201812_e.pdf)

<sup>9</sup> Mitsuo Matsushita, *Basic Principles of the WTO and the Role of Competition Policy*, Wash. U. Global Stud. L. Rev. 363 (2004).

<sup>10</sup> WTO, *Investment and Competition: What Role for the WTO?*

[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey3\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm) (last visited Aug. 13, 2019).

<sup>11</sup> WTO, *WTO Successfully Concludes Negotiations on China's Entry* (Sept. 17, 2001),

[https://www.wto.org/english/news\\_e/preso1\\_e/pr243\\_e.htm](https://www.wto.org/english/news_e/preso1_e/pr243_e.htm)

<sup>12</sup> European Parliament, *WTO: The Way Forward*, (Nov. 29, 2018), [http://www.europarl.europa.eu/doceo/document/TA-8-2018-0477\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-8-2018-0477_EN.html).

2018 report<sup>13</sup> identified “four categories of reported Chinese government conduct that would be the subject of its inquiry, including but not limited to: (1) the use of a variety of tools to require or pressure the transfer of technologies and intellectual property to Chinese companies, (2) depriving U.S. companies of the ability to set market-based terms in licensing negotiations with Chinese companies, (3) intervention in markets by directing or unfairly facilitating the acquisition of U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property, and (4) conducting or supporting unauthorized intrusions into U.S. commercial computer networks or cyber enabled theft for commercial gains.”<sup>14</sup> The report also laments that “China has used the imprimatur of WTO membership to become a dominant player in international trade.”<sup>15</sup> Under the Protocol of Accession, China agreed to pursue open, market-oriented economic reforms compliant with the fundamental principles of multilateralism, namely, non-discrimination (MFN & NT); market access, reciprocity, fairness, and transparency. A Trade Policy Review<sup>16</sup> (TPR) document issued by the WTO secretariat presents a mixed bag of achievements and steps being taken by the PRC government to fulfil its WTO obligations. The TPR report says that “under the 13th Five-Year Plan (2016-2020), the [Chinese] authorities intend to continue the process of structural economic reform, which includes the promotion of private sector participation in the economy, as well as the

reform of State-Owned Enterprises (SOE), while keeping the preponderance of public ownership. Similarly, “China’s main laws concerning intellectual property rights (IPRs) have remained largely unchanged since its previous Review in 2016. Enforcement of IPRs continues to be a major challenge for China.”<sup>17</sup> On the domestic front, the TPR states that “[S]ome academics are of the view that the current institutional framework of competition policy enforcement in China is not fully able to ensure the full functioning of competition policy”<sup>18</sup> and the WTO has remained ineffective in monitoring the commitment and obligations of its members.

### Resetting Competition Policy amid Trade Tensions

Sustainable, secure, and inclusive digital economies will bring a more transparent, open, and level playing field for market opportunities and growth prospects. Resetting multilateralism will bring a level playing field for business without jeopardizing consumer sanctity or national sovereignty. However, the challenge for a multilateral framework on competition policy in the digital domain seems more complex as many of the developed countries, trading blocs and global institutions are still grappling with the ever-evolving dynamics of competition regulations in their host economies. Recognizing this fact, the G20/OECD notes that “countries should develop mechanisms to periodically review their legal frameworks and update them to ensure that they are well-suited to the increasingly digital world.”<sup>19</sup>

<sup>13</sup> USTR, 2018 REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE (Feb. 2019) at 11.

<sup>14</sup> *Id.* at 29.

<sup>15</sup> USTR, 2017 REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE, Jan. 2018, at 2.

<sup>16</sup> WTO, *supra* note 4

<sup>17</sup> *Id.* at para. 26.

<sup>18</sup> *Id.* at para. 3.146.

<sup>19</sup> OECD, KEY ISSUES FOR DIGITAL TRANSFORMATION IN THE G20 (Jan. 12, 2017), available at <https://www.oecd.org/g20/key-issues-for-digital-transformation-in-the-g20.pdf>.

Scaling up multilateral cooperation especially under the WTO or G20 framework to reform multilateral governance on competition policy seems more pragmatic as the WTO negotiation process is tepid and tedious. It would also be an enormous challenge for the G20 negotiators to synchronize the various streams of multilateralism or global governance mechanisms espoused by the main players.

China's globalism, characterized by the BRI, aims to establish alternative ways to access global markets. The modalities of China's globalism are still evolving. Apparently, some elements of this globalism need deeper analysis for their smooth integration into a multilateral world system. Chinese policy makers need to allay the fears of skeptics regarding the BRI's objectives, and demonstrate how the avowed principles of market economies, including transparency, openness, market access, open procurement (market-based value and price setting) standards and practices, accountability and fair business practices, would be embedded into Chinese globalism without undermining the global compact for a sustainable and inclusive world order.

Another pertinent challenge would be to integrate the BRI into the existing, multilateral rules-based order, allowing global firms to participate in BRI cooperation. Furthermore, participant countries face issues of debt trap diplomacy, lack of transparent governance systems in the awarding of contracts, issues related to the implementation and monitoring of BRI projects, and macroeconomic instability. The SOE's role in the BRI and leverage enjoyed by the Chinese financial

institutions might mar the competition environs for other participating firms.

### **Conclusion: From Strategic Rivalry to Cooperation**

To date, global efforts to have a full-fledged multilateral competition agreement (MCA) remain a distant dream. GATT 1947 and WTO both incorporated the core principles and elements of competition policy including transparency, non-discrimination, and a fair procedural regulatory framework on anti-competitive practices. Since the digital economy transcends national boundaries and is organically linked to host economies having the potential to impact every aspect of social, political and economic institutional structures, experts therefore argue that pursuing the "social and human rights objectives can be compatible with competition law."<sup>20</sup> The principle "competition law is applied where it has its effects, not where the investigated businesses are located"<sup>21</sup> would be no more feasible in a digital economy characterized by borderless markets. Similarly, the competitive neutrality among the state-owned, sponsored or privately-operated firms must be advocated to isolate states' power and prevent regulatory capture. Shared transparent reporting, monitoring, and redress mechanisms should therefore be developed. In the wake of stalled multilateralism and recent trade tensions, the G20 efforts to promote international policy discussions and rule-making on digital economy and data flow for Trade-Related Aspects of Electronic Commerce under the WTO framework seems to be a more plausible mechanism to promote agreement on the competition rules for the digital globalized economy. The purported logic for an

<sup>21</sup> WORLD ECONOMIC FORUM, COMPETITION (June 2018), available at

[http://www3.weforum.org/docs/WP\\_Global\\_Value\\_Chain\\_Policy\\_Series\\_Competition\\_report\\_2018.pdf](http://www3.weforum.org/docs/WP_Global_Value_Chain_Policy_Series_Competition_report_2018.pdf)

MCA seems convincing: if an economy “hopes to enjoy equal access to this new economic community, its own economic and regulatory frameworks must meet the same standards. The combined gravitational pull of this community would”<sup>22</sup> deter free-riding and induce compliance of the multilateral rule-based order.

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Dr Saeed Qadir  
Central Asia Regional Economic Cooperation (CAREC)  
Institute, China

[saeed.qadir@alumni.cgu.edu](mailto:saeed.qadir@alumni.cgu.edu)

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<sup>22</sup> Kurt M. Campbell and Jake Sullivan, *Competition Without Catastrophe: How America Can Both Challenge and Coexist With China*, FOREIGN AFFAIRS (Sept./Oct. 2019)

<https://www.foreignaffairs.com/articles/china/competition-with-china-without-catastrophe>