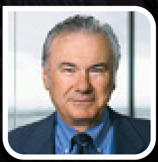
A WIDER-APERTURE LENS FOR COMPETITION POLICY: ANTITRUST IN THE CONTEXT OF SYSTEMIC COMPETITION FROM CHINA

BY DAVID J. TEECE[1]



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The growth of China and President Xi's policies have transformed the global economy in ways that competition policy and business strategies have yet to fully grasp. The global economy is increasingly bifurcated between a China-centered authoritarian system and a market-oriented democratic system, generating complications and perils largely unknown since the end of the Cold War. To properly analyze this reality, scholars and policy makers need to adopt a wider-aperture, systems-theoretic view that will lead to cross-fertilization of ideas and collaboration with others. Only by doing so can competition policy remain relevant. The competition environment in many industries today bears faint resemblance to existing models of competition.

I. INTRODUCTION

Since early 2020, businesses have had to cope with a pandemic, disrupted supply chains amplified by a land war in Europe and concomitant sanctions. The effects of these phenomena will gradually fade away; but these medium-term crises obscure a deeper challenge for competition policy, namely, the bifurcation of the world economy and the emergence of systemic competition with China.[2] A new paradigm of tangled global governance has emerged, but economic, business, and antitrust scholars have been slow to recognize it, leaving much recent scholarly research on competition policy lacking in perspective.

In the systemic competition that is emerging, the United States and Europe and an Indo Pacific group[3] will lead a liberal democratic bloc, favoring the rule of law, market-based competition, and democracy. China will lead an autocratic bloc, generating systemic competition, capricious and politically/economically, culturally motivated government "interference" with business, opaqueness, and authoritarianism along with targeted industrial and technology policy. In China, competition policy appears to be an adjunct to industrial policy, at least in the tech sector.[4]

This paper does not purport to show how to operationalize competition policy in the face of systemic competition from China. Rather, it lays out the global competitive landscape that has emerged. It outlines the contours of this landscape in order to challenge policy makers, practitioners, and scholars to refashion competition policy in a manner that is relevant to the new world order. It is not pro or anti enforcement. It is about enforcement that is cognizant of the new drivers of competition and marketplace outcomes in global and domestic economies.

In particular, this paper highlights a new form of competition mentioned above that has only very rarely touched the consciousness of scholars and policy makers: systemic competition. With systemic competition, the distinction between private and public is so blurred. As a result, the focal point of competition analysis when Chinese corporates are involved ought to be the system; not individual companies, not cartels, but a semi-coordinated Chinese economic system. Because the distinctions between the state and the enterprise are often immaterial, and competition policy in China is merely a tool of industrial policy, competition agencies around the world need to recalibrate in order to properly assess competitive situations at home and abroad.

Strategic rivalry between China, the U.S., Australia, and a few other nations have been highlighted by commercial conflict.[5] Trade, intellectual property, and national security issues have been implicated. The rule of law, human rights, and the territorial rights of other nations are also impacted. At the core are efforts by the two blocs to have global governance shaped by either liberal democracy[6] or autocracy. However, as in the Cold War with the Soviet Union, lines are blurred, as democracies may ally with autocracies when it seems to serve a larger purpose.

II. CHINA AND THE NEW GLOBAL COMPETITION

A. Introduction

The advance of globalization since 1945 eliminated many national/international distinctions, with few barriers to trade or investment amongst most developed nations. Enterprises headquartered abroad often provide stiff competition in home-country markets. Moreover, research and development ("R&D"), innovation, and even the development of new enterprises have all become enmeshed in a global system with deep interdependencies. Together with coauthors, I somewhat prematurely celebrated the arrival of "meta-multinationals." Meta-multinationals were (and remain) a U.S. and European organizational form when globalization could be assumed, and the logic of shareholder value maximization was dominant. In such a system, strategy and the choice of business models by management could remain relatively place-neutral.

With a wider-aperture systems view of competition policy, policy makers and antitrust enforcers can no longer relegate foreign investment and technology transfer to the sidelines and have even a semi coherent policy framework, particularly in the tech sector. China has clearly

2 Petricevic, O., & Teece, D. J. (2019). The structural reshaping of globalization: Implications for strategic sectors, profiting from innovation, and the multinational enterprise. *Journal of International Business Studies*, 50(9), 1487–1512.

3 India, Japan, South Korea, Australia, and New Zealand.

4 Measures of transparency (e.g. the Corruption Perceptions Index from Transparency International) and political freedom (e.g. the Democracy Index from the Economist Intelligence Unit) are strongly correlated. For the purposes of this paper, they will be treated as a single dimension.

5 Tariffs and export controls imposed by the Trump administration which have been carried on less vociferously under Biden

6 By liberal democracy, I mean liberal in the European sense. In the U.S. this is sometimes referred to as "classical liberalism."

delineated itself as a strategic rival to Western nations and has issued plans to lead in key technologies, and has no commitment to a "level playing field." Many executives and policy makers are now far more alert to the nature of the challenge from China, but few competition policy academics and professionals have recognized what economic historians call a climateric.

Some scholars had warned early on that offshore outsourcing arrangements made to boost short-term financial results could lead to a loss of capabilities and competitive decline.[7] Pisano and Shih among others, have argued that the shift of procurement and manufacturing overseas has caused the U.S., in particular, to lose capabilities required to compete.[8] Industrial "hollowing out" in the wake of offshore investment has also been documented in Japan.[9] The competitive effects of China's subsidized exports accelerated the loss of Western manufacturing capabilities and jobs.

Some evidence exists that management's failure to foresee the industrial and social problems that offshoring would cause represents a "strategic failure."[10] The loss of capabilities from offshoring or outsourcing could have been mitigated by conscious management for the long term, as has been the case at Samsung,[11] or by supportive industrial policy, as in Germany.[12] The result of weakened capabilities is of course less vigorous competition by firms in the West. This is not due to a lack of desire to compete. Rather, it's due to a weakening of the capabilities needed to compete. This ought to be a competition policy concern; but in Europe and the U.S. it isn't.[13] The analytical lenses of mainstream competition analysis cannot stretch far enough to embrace such considerations, despite their obvious importance. The nature of the required changes has already been outlined, though not yet fully operationalized.[14]

B. China's "Dual Circulation" Strategy

In recent years, China has begun to implement a strategy of selective decoupling from the global economy. This axiomatically leads to tilting of the playing field, and has industrial policy and competition policy implications that do not seem to have caught the attention of either scholars or practitioners.

President Xi formally revealed this "dual circulation" strategy in May 2020.[15] The first "circulation" is global integration; the second is domestic self-sufficiency. The goal of this two-pronged approach is to adjust China's international economic exposure to make it more resilient to geopolitical disruptions, which has been characterized as "hedged integration."[16] China's leadership sees the need to insulate itself from growing geopolitical chaos in which a floundering U.S. lacks strategic intent but could still blunder into a war with a rising China. In fact, one analysis found that China has been reducing its relative exposure to the rest of the world in terms of trade, technology, and capital since about 2007, well before the dual circulation strategy became official.[17] This change is not the results of competitive market forces at work. It reflects government policy.

7 Bettis, R. A., Bradley, S.P., & Hamel, G. (1992). Outsourcing and industrial decline. Academy of Management Perspectives, 6(1), 7-22. https://journals.aom.org/doi/abs/10.5465/ame.1992.4274298; Lei, D., & Slocum Jr, J. W. (1992). Global strategy, competence-building and strategic alliances. *California Management Review*, 35(1), 81–97.

8 Pisano, G. P., & Shih, W. C. (2012). Does America really need manufacturing? *Harvard Business Review*, 90(3), 94–102.

9 Cowling, K., & Tomlinson, P. R. (2011). The Japanese model in retrospective: industrial strategies, corporate Japan and the "hollowing out" of Japanese industry. *Policy Studies*, 32(6), 569–583.

10 Bailey, D. (2003). Explaining Japan's Kūdōka [hollowing out]: a case of government and strategic failure? *Asia Pacific Business Review*, 10(1), 1–20. Balding, C., & Clarke, D. C. (2019). Who Owns Huawei? Available at SSRN: http://dx.doi.org/10.2139/ssrn.3372669.

11 Lee, K., & Jung, M. (2015). Overseas factories, domestic employment, and technological hollowing out: a case study of Samsung's mobile phone business. Review of World Economics, 151(3), 461–475.

12 Elliott, L. (2016). The UK could learn a lot from Germany's long-term industrial strategy. *The Guardian*. https://tinyurl.com/4nufseub.

13 There is a general problem in the field of economics that stems from a failure to study the capabilities of firms. This in turn stems from fundamental problems with the theory of the firm in modern economics. See Teece, DJ "The Foundations of Enterprise Performance: Dynamic and Ordinary Capabilities in an (Economic) Theory of Firms" *Academy of Management Perspectives* 8(4) (2014),328–352.

14 Petit, N, & Teece, D.J., Innovating Big Tech firms and competition policy: favoring dynamic over static competition, *Industrial and Corporate Change*, Volume 30, Issue 5, October 2021, Pages 1168–1198, https://doi.org/10.1093/icc/dtab049.

15 Lin, J. Y., & Wang, X. (2021). Dual Circulation: A New Structural Economics view of development. *Journal of Chinese Economic and Business Studies*, 1-20. DOI: 10.1080/14765284.2021.1929793.

16 China Power Team. (2021, updated 2022). Will the dual circulation strategy enable China to compete in a post-pandemic world? *China Power*. https://chinapower.csis.org/china-covid-dual-circulation-economic-strategy/.

17 Woetzel, J., Seong, J., Leung, N., Ngai, J., Manyika, J., Madgavkar, A., Lund, S., & Mironenko, A. (2019). China and the world: Inside the dynamics of a changing relationship. McKinsey Global Institute. https://tinyurl.com/5cpmumsj.

Under its dual circulation strategy, China aims to enhance domestic manufacturing so as to reduce its supply chain dependence on the West while still engaging with Western businesses and banks where it sees the potential for advantage. The domestic branch of this policy calls for efforts to upgrade the technological capabilities of Chinese enterprises, a process that is well underway in all key technology areas. International capital is being attracted to support this endeavor. Trade agreements such as the Regional Comprehensive Economic Partnership, which went into effect in 2022, are also part of the strategy.

China is, in effect, continuing to benefit from globalization while protecting its economy to the extent possible from any further pullback by the West. In effect, while Western media and scholars debate the extent to which the West can (or should) decouple from China, China is already partially decoupling in a way that maintains the dependence of (i.e. Chinese leverage over) the West.[18] It has, for example, been gradually expanding a parallel international payments system denominated in its own currency that may eventually reduce its vulnerability to U.S. sanctions of the type that have frozen the Russian economy.[19]

Neither government nor private enterprises in the West have a unified strategy for countering these moves. Only occasionally do U.S. technology export controls stand in the way of further technology transfer, and Europe and Japan seem to have even fewer qualms. That said, the Netherlands has stood fast since 2019 against Chinese pressure to grant an export license for a specialized piece of equipment made only by a Dutch company (ASML), without which China will not be able to manufacture the most advanced semiconductors.[20] And, citing human rights concerns, the European Parliament froze a major investment deal with China that had been on the cusp of ratification.[21]

Western countries and companies are just waking up to the downside of the extent to which they have been relying on illiberal economies to provide critical goods. Scholarly research has done little to assist in this process. Competition policy ignores the issue entirely. The Covid pandemic shone a harsh light on this vulnerability when China was temporarily unable to satisfy the sudden increase in demand for the protective masks, gowns, and goggles it had been supplying around the world. Clearly there were price and output implications: the very stuff that competition policy focuses on; yet competition policy academics and professionals had nothing to say.

And Germany believed it was engaging Russia in oil diplomacy by becoming a key customer while eschewing infrastructure to enable alternative suppliers, only to discover during the Ukraine invasion that President Putin was willing to leverage this dependence. In short, Europe and in particular Germany created an uncompetitive situation, all aided by using regulation to force open access to the European pipeline network. In short, regulatory and competition policy aided the development of today's uncompetitive outcomes for the supply of gas to Europe, with monumentally negative consequences. This catastrophe was partially engineered by competition authorities in Germany and elsewhere in the EU. To my knowledge there were only two scholars in the debate who were deeply concerned about long term supply reliability issues.[22] Led by competition agencies, short term consumer welfare won the day both in Europe and the US.

In China, meanwhile, the national strategy of dual circulation binds official institutions, state-owned firms, and private enterprises behind a coherent unitary policy. While China's industrial and competition policies often fall short of their stated goals (e.g. the decades-long effort to build a semiconductor industry), the government has the ability to mobilize productive resources in the desired direction on a massive scale. Authoritarian command-and-control is highly effective, but it puts a premium on the industrial strategy being correct, and competition policy falling into line.

In the West, government policy is fragmented across nations and relies on incentives, consultation, and regulation, leaving private firms largely to their own devices with respect to strategy. Competition policy, industrial policy, and science and technology policy are in their own largely hermetically sealed silos. Short-termism has led firms to pursue cost reduction and/or market access in China, leading to the erosion of important capabilities. Western policy has been at best reactive. There have been few, if any, efforts to encourage, let alone assist, firms to upgrade home-country or regional capabilities so as to reduce dependence on China. No pressure is coming from shareholders, either — especially with many large investors just now getting access to China's financial markets. Furthermore, antitrust prohibitions make

18 Economist, The. (2020). China's "dual-circulation" strategy means relying less on foreigners. https://tinyurl.com/bdfubf3r.

19 Jin, E. (2022). Why China's CIPS matters (and not for the reasons you think). *Lawfare*. https://www.lawfareblog.com/why-chinas-cips-matters-and-not-reasons-you-think.

20 Woo, S., & Jie, Y. (2021). China wants a chip machine from the Dutch. The U.S. said no. *Wall Street Journal*. https://www.wsj.com/articles/china-wants-a-chip-machine-from-the-dutch-the-u-s-said-no-11626514513.

21 Liboreiro, J. (2021). MEPs vote to freeze controversial EU-China investment deal. *EuroNews*. https://tinyurl.com/3hm7htjb.

22 See Teece, DJ and Dirrheimer, M. "Struktur und Organisation der Deutschen und der US-Gaswirtschaft im Vergleich: Folgerungen für den Status der Gasversorgungsunternehmen" *Zeitschrift für Energiewirtschaft* 1 (1989), 36–50; and Teece DJ "Structure and Organization of the National Gas Industry: Differences between the United States and the Federal Republic of Germany and Implications for the Carrier Status of Pipelines" Energy Journal 11.3. July 1990 p4-35.

it nearly impossible for firms in the West to coordinate decoupling strategies, or even to reduce dependence on China, should they wish to do so.

China's dual circulation strategy is an extension of its ongoing industrial development efforts. It clearly shapes market structure and global competition. It is powered by tools that include direct funding for industry, government procurement, government R&D support, development of China-specific standards, recruitment of overseas talent, and the legal and extralegal acquisition of foreign technology.[23] National strategies are announced through China's Five-Year Plans and supplementary policies, such as "Made in China 2025" (released in 2015) and "China Standards 2035" (released in 2020), in terms that make clear China's expectations that it will dominate the growth industries of the near future.[24]

China's strategy places heavy reliance on innovation. President Xi has emphasized the need for "indigenous innovation" to increase China's self-reliance, and to this end China has been relentlessly closing its gap in R&D spending with the U.S.[25]

U.S. sanctions to slow China's technological development make little sense unless coupled with a domestic technology development plan to stay ahead in the key technologies of the future. Achieving targeted development goals may require Europe, Japan, and other allies to work together. The welfare of the consumer, while relevant, is hardly the organizing framework best suited to deal with such uncompetitive policies.

As executives in Europe were just beginning to understand that the autocratic regimes in Russia and China have every intention of leveraging supply chain dependencies in rare-earth minerals and other commodities for geopolitical advantage, Russia's invasion of Ukraine in 2022 showed the risk of sleepwalking through these supply chain dependencies. Germany insisted for years that the Russia-led Nord Stream 2 pipeline project, which would allow Russia to send more of its gas west without transiting Ukraine (depriving Ukraine of significant fees and, potentially, natural gas supplies), was purely a commercial project backed by private investors, even as outsiders worried the pipeline would strengthen Russia's leverage over the supply chain of German industry.[26] Supply reliability should have been a goal of competition policy.

Instead, competition policy experts argued that one more competitor (Gazprom) would improve competition in European markets. But in February 2022, as Russia began its attempt to eradicate Ukrainian sovereignty (still unresolved as of this writing), Germany was forced to halt the pipeline approval process and began looking for alternate sources of energy supply.[27]

The actions and policies of China and Russia impact competition at its core… and they need to be as seen as lying with the confines of competition policy. Put differently, if competition agencies cannot open the aperture of the analytical lenses used to assess competition, their chances of harming competition and the economy and the institutions of democracy are likely quite high.

III. SYSTEMIC COMPETITON FROM CHINA: WHAT IS IT?

The German industry board refers to China as delivering "systemic competition" because the firm and the nation–state often are integrated in ways that are uncommon in the West.[28] This is indeed a good way to summarize the nature of competition with China. where industry, government, and society are fused together when it comes to competing with foreign firms. Competition policy agencies in the U.S., the EU, and elsewhere have barely begun to consider the implications for competition policy, be it M&A activity, predatory pricing, or collusion.

23 Koleski, K., & Salidjanova, N. (2018). China's Technonationalism Toolbox: A Primer. U.S.–China Economic and Security Review Commission Issue Brief. https://www.uscc.gov/sites/default/files/Research/China%27s%20Technonationalism.pdf.

24 Gargeyas, A. (2021). China's "Standards 2035" project could result in a technological Cold War. *The Diplomat*. https://tinyurl.com/kvbmef7r.

25 In a 2018 speech on innovation, Xi Jinping said, "Self-reliance is the foundation of the struggle for the Chinese nation to stand on its own among the nations of the world, and indigenous innovation is the only way for us to climb the world's technological peaks." (cited in China Power Team, 2021/2022).

26 Steinhauser, G. (2015). Germany's Merkel defends Russian gas pipeline plan. *Wall Street Journal*. https://www.wsj.com/articles/germanys-merkel-defends-russian-gas-pipeline-plan-1450447499.

27 Oltermann, P. (2022). Germany halts Nord Stream 2 approval over Russian recognition of Ukraine "republics." *The Guardian*. https://tinyurl.com/2p8nnb2d.

28 Federation of German Industries. (2019). "China — Partner and Systemic Competitor: How Do We Deal with China's State-Controlled Economy?" BDI document number: D 1009. https://english.bdi.eu/publication/news/china-partner-and-systemic-competitor/.

The scholarly literature in competition policy and antitrust has been embarrassingly slow to recognize that China has a very different business system of organization from those of most of the world's democracies. Moreover, standard models of competition and enterprise development do not properly characterize business in China. Rather, they lure us into complacency. Moreover, business firms and banks from the West have made many strategic blunders with respect to their engagement with China. Competition policy officials have been caught flatfooted (e.g. the Alstom/Siemens merger).

Multiple aspects of how China's government and industry participate in markets are distinct from — and potentially incompatible with… Western models. In light of China's rise, the rapid changes in its economy, and its continued attractiveness as a market, strategy scholars, and policy makers need a much deeper understanding of China's business institutions and entrepreneurial management styles. The subject has received lengthy treatments, so I sketch here only some key points, but not necessarily in order of importance.

A. Competition Policy a Tool to Assist Industrial Strategy

Public policies in China are adapted and implemented by thousands of local governments; but the design and implementation of industrial policy is centralized and promulgated through a relatively compliant hierarchy.[29] This allows major policies to be consistent through time. It can be argued that China's remarkable growth resulted from the long-term vision of 1980s-era leaders who saw the opportunity to leverage what the West had to offer as a springboard to economic growth.

China's own R&D spending has grown tremendously over the past 30 years, to the point that it is fast approaching the same level as U.S. R&D in nominal terms. As in most other countries, roughly one fifth of the spending is government financed, with the rest primarily spent by the business sector.[30] Properly resourced industrial policy in China is a fairly recent phenomenon, dating from about 2006.[31] Many reports summarize China's rapid progress in various technological fields, challenging America's leadership in science and engineering.[32]

The Chinese government exerts more influence over R&D spending and market outcomes than most Western governments. In 2010, for example, the government, after consulting with scientists, engineers, and entrepreneurs, identified 20 strategic emerging industries, from recycling to commercial aircraft .[33] The government sets targets and provides incentives; individual firms are then expected and incented to step up to the challenge.

The ultimate effectiveness of this system has yet to be proved,[34] but it shapes how China interacts with foreign firms, since investment in targeted industries receives special attention. It is also, arguably, influencing the revival of elements of industrial policy in the U.S., which only recently upgraded the level of scrutiny it applies to foreign investments in innovative U.S. businesses.[35]

When China targets an area of technology for development by Chinese firms, it has no qualms about tilting the playing field. For example, it often introduces steep tariffs on imports and subsidies for domestic suppliers [36] and protective regulatory barriers. Pfizer, for example, faced 15 years of litigation before it could introduce Viagra in China, by which time it faced competition from counterfeiters and a Chinese producer of a generic equivalent.[37] In the data realm, China's "Great Firewall" censorship effectively blocked its citizens from accessing major foreign social media sources, including Facebook, Twitter, and YouTube, starting in the late 2000s.[38]

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29 Naughton, B. (2021). *The Rise of China's Industrial Policy*, 1978 to 2020. Ciudad Universitaria, México: Universidad Nacional Autónomica de México, Facultad de Economía.

30 China Power Team. (2018, updated 2022). *Is China a global leader in research and development?* China Power. https://chinapower.csis.org/china-research-and-development-rnd/.

31 *Ibid.*

32 Allison, G., Klyman, K., Barbesino, K., & Yen, H. (2021). *The Great Tech Rivalry: China vs the US.* Cambridge, MA: Belfer Center for Science and International Affairs. https://www.belfercenter.org/sites/default/files/GreatTechRivalry_ChinavsUS_211207.pdf

33 *Ibid.*

34 *Ibid.*

35 Ferek, K. S. (2020). Treasury Department unveils new rules for foreign investors in U.S. businesses. *Wall Street Journal*. https://tinyurl.com/38h3yxxn.

36 Howell, S., Lee, H., & Heal, A. (2014). Leapfrogging or Stalling Out? Electric Vehicles in China. HKS Working Paper No. RWP14-035. Available at https://ssrn.com/abstract=2493131.

37 Schotter, A., & Teagarden, M. (2014). Protecting intellectual property in China. *MIT Sloan Management Review*, 55(4), 41–48.

38 TechCrunch. (2009). China blocks access to Twitter, Facebook after riots. https://techcrunch.com/2009/07/07/china-blocks-access-to-twitter-facebook-after-riots/.

Competition policy is merely a tool to achieve broader industrial policy and political goals. In particular, foreign firms are often targeted by enforcement agencies so as to extract concessions… usually of a technological kind… that benefit their Chinese competitors or other companies in China's innovation ecosystem.

B. Selective Intellectual Property Rights Enforcement

Many Chinese firms routinely infringe patents and misappropriate trade secrets, and the courts are poor at providing redress,[39] especially in areas of technological importance to China. Moreover, China repeatedly has been accused of engaging in outright industrial espionage.[40] The techniques employed include trespass, trade secret theft, theft of samples, cyber intrusion, bribery, and electronic eavesdropping.

Few CEOs have risked the consequences of making an issue of IP theft. President Xi has been clear that he believes that obtaining market access (leveraging the "gravitational pull of the large, dynamic Chinese market") is adequate to ensure continued acquiescence from Western investors. U.S. executives and boards have been slow to recognize and devise strategies to address the risks. As one IP strategy expert recently wrote:

> *"…corporations line up like lemmings to do business in China because of the market size and the potential of nearly 2 billion Chinese. But the loss of intellectual property isn't just lost once, or over a day, it is lost in perpetuity and compounded. The cost of what is lost is never considered against any alleged "savings" corporations show on their books and convince themselves they have made. But ultimately, they just wind up competing against themselves in the global marketplace with their own technologies."*[41]

The naivety of U.S. and many other executives amplified by the short-term incentive structure they face (with stock options vesting short of the likely period of negative impact from technology transfers) coupled with uninformed corporate boards, many have led to the recent too polite rebuke to management and boards by U.S. Secretary of State, Antony J. Blinken:

> *"We believe – and we expect the business community to understand – that the price of admission to China's market must not be the sacrifice of our core values or long-term competitive and technological advantages. We're counting on businesses to pursue growth responsibly, assess risk soberly, and work with us not only to protect but to strengthen our national security."*[42]

For Western governments, the old "engagement" — the naïve idea that, if the U.S. and others tolerated transgressive behavior by China, then capitalism would take root and the rule of law, if not democracy *per se*, would follow — has started to be abandoned. The U.S. government has made clear that engagement is no longer the main goal. The Trump administration piled tariffs on Chinese imports, and sanctions caused Huawei's top-ranked smartphone business to evaporate in the course of a year.[43] Multinational corporations have been slow to react because individual action brings severe short-term penalties and collective action is illegal under the antitrust laws of most advanced countries.

A new twist to intellectual property disputes is Anti-Suit Injunctions ("ASIs") around which there is considerable opaqueness.[44] These prohibit a patent owner from seeking judicial relief from outside of China if a proceeding in the same matter is ongoing in China.[45] He has classified these as *"the newest of several Chinese tools to undermine foreign parallel intellectual property litigations."* They are intended to: *"build the main battlefield for foreign-related dispute resolution."*[46]

39 Brander, J. A., Cui, V., & Vertinsky, I. (2017). China and intellectual property rights: A challenge to the rule of law. *Journal of International Business Studies*, 48(7), 908–921.

40 Hannas, W. C., Mulvenon, J., & Puglisi, A. B. (2013). *Chinese Industrial Espionage: Technology Acquisition and Military Modernisation*. London: Routledge.

41 Quinn, G. (2022). Russia's invasion of Ukraine reiterates why companies must rethink their China IP strategies. *IPWatchdog*. https://www.ipwatchdog.com/2022/04/07/russias-invasion-ukraine-reiterates-companies-must-rethink-china-ip-strategies/id=148226/.

42 Antony J. Blinken, George Washington University, May 26, 2022

43 Strumpf, D. (2021). China's Huawei reports 38% revenue drop as U.S. sanctions bite. *Wall Street Journal*. August 6. https://www.wsj.com/articles/chinas-huawei-reports-38-revenue-drop-as-u-s-sanctions-bite-11628237938.

44 Cohen, M. A. "China's Practice of Anti-Suit Injunctions in SEP Litigation: Transplant or False Friend?" University of California, Berkeley, June 2022.

45 In February 2022, the EU filed "a request for consultation" with the World Trade Organization concerning ASIs by Chinese courts.

46 Zhu, Z. (2020). Interpreting China's "Wolf-Warrior Diplomacy." *The Diplomat*, 15, 648–658. https://thediplomat.com/2020/05/interpreting-chinas-wolf-warrior-diplomacy/.

The wariness of Western firms toward China must extend beyond developing the right relationships and keeping certain IP assets isolated from any China operations. Managers must also develop a deeper appreciation for the reality that any engagement at least indirectly involves the state and, potentially, the military. This should weigh in all decisions related to technology, materials, and data that may have values unrelated to their roles in the firm's business model. Competition policy must be cognizant of these issues too.

C. Weak Rule of Law and General Lack of Transparency

By "rule of law," I mean equal treatment of all firms (foreign and domestic) and separation of the state and the courts (i.e. independence of the judiciary), along with rights of appeal to a higher (independent) court. In China, large Chinese SOEs and "private" enterprises with opaque ties to the state are assisted against foreign rivals by government regulators.[47] They also receive loans and cash infusions from government-linked banks and from a weakly regulated "shadow" finance sector. The "rules" are politically derived, ambiguous, and rarely subject to appeal.

Moreover, there is nothing close to a free press anymore, leaving companies vulnerable to whatever line, positive or critical, that state media adopts, and that China's rapid-fire social media censorship allows. China's internet censorship, known popularly as the Great Firewall (and more officially as the Golden Shield Project), has been implemented and refined since 2008, effectively blocking any sources of outside information the government deems undesirable, including most Western news and social media sites.[48]

Other sources of information also should be viewed with skepticism. Government data on the economy have long been suspect, although the situation is improving gradually.[49] The dividing line between public and private ownership can be blurry, which has contributed to the tension over the activities of telecom supplier Huawei.[50] In China, all economic interactions are in some sense interactions with the state.

Perhaps of most concern to many firms is that the lines surrounding what information is construed to be sensitive are not clearly drawn. In 2010, for example, an American geologist working for IHS, a market research firm, was sentenced to eight years in prison for collecting standard information, such as the location of oil wells, that the government determined was a state secret.[51] The blurriness of China's red lines was not improved a decade later when China enacted a Data Security Law. The law identified, without defining, categories of "important data" and "national core data" that carried penalties for their mishandling, whether it occurred in China or elsewhere (Wang, et al., 2021).[52]

D. Government Control of Business

While state-owned firms are directly under government control, the Chinese Communist Party recently has been asserting dominance over the private economy. It has also been "convincing" many of the country's most prominent entrepreneurs that they would be better off not running their large, successful companies, starting with Jack Ma's exit from Alibaba.[53] China has also been saddling its tech firms with new regulations clearly designed to limit their scale and growth, even more or less outlawing the large private-tutoring sector.[54]

This bears some superficial resemblance to Western economies, where for the most part, the government sets rules and firms are allowed to compete within prescribed boundaries. However, all private firms in China, whether foreign-owned or domestic, are required to allow the creation of Chinese Communist Party cells on company premises, effectively reducing the distinction between private and state ownership

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47 Milhaupt, C. J. & Zheng, W. (2015). *Beyond ownership: State capitalism and the Chinese firm. Georgetown Law Journal*, 103, 665–722. http://scholarship.law.ufl.edu/facultypub/696.

48 Chandel, S., Jingji, Z., Yunnan, Y., Jingyao, S., & Zhipeng, Z. (2019). The golden shield project of China: A decade later—an in-depth study of the Great Firewall. In *2019 International Conference on Cyber-Enabled Distributed Computing and Knowledge Discovery (CyberC)*. IEEE, pp. 111–119.

49 Ip, G., & Davis, B. (2015). *For all its heft, China's economy is a black box*. Wall Street Journal. https://www.wsj.com/articles/for-all-its-heft-chinas-economy-is-a-black-box-1440467253.

50 Balding, C., & Clarke, D. C. (2019). Who Owns Huawei? Available at SSRN: http://dx.doi.org/10.2139/ssrn.3372669.

51 Areddy, J. T. (2010). Geologist sought oil-industry data. *Wall Street Journal*. https://www.wsj.com/articles/SB10001424052748704178004575350751232321946.

52 Wang, X., Swaminathan, A., Sussman, H., Hu, M., & McKenney, R. (2021). China's New Data Security Law: What International Companies Need to Know. *Orrick*. https://www.orrick.com/en/Insights/2021/09/Chinas-New-Data-Security-Law-What-International-Companies-Need-to-Know.

53 Zhai, K., Wei, L., & Yang, J. (2021). Jack Ma's costliest business lesson: China has only one leader. *Wall Street Journal*. https://www.wsj.com/articles/jack-mas-costliest-business-lesson-china-has-only-one-leader-11629473637.

54 Wong, J. (2021). Beijing goes full nanny state on Internet tech. *Wall Street Journal*. https://www.wsj.com/articles/beijing-goes-full-nanny-state-on-internet-tech-11638353061.

and control .[55] By 2018, nearly half of all private firms in China had internal Party organizations .[56] Most large firms, including most of China's listed internet firms, have these Party committees.[57] While the cells are supposed to facilitate productive activities and ensure workers' welfare, they are nonetheless directly linked to the country's political organization[58] and work to obtain full alignment of corporate decisions between the company and the state.

In the key area of data ownership, China, invoking cybersecurity concerns, enacted a law in 2016 requiring companies to store all China-related data within China's borders in order to pass security reviews and to standardize the collection of personal information, "effectively giving the government access to vast amounts of private data."[59] Moreover, China's cybersecurity regulations are vague and have caused widespread worries among technology firms as they place new requirements and restrictions on data storage and data flows.[60] In 2018, pressure was ratcheted up further by new rules allowing police officers to access corporate networks remotely to check for potential security loopholes .[61]

Nor have domestic firms been spared scrutiny. As part of a wider crackdown on its big internet firms, China has been conducting firm-level data security reviews. The government had apparently become worried about the troves of potentially sensitive data amassed by firms such as ride-hailing leader Didi Chuxing.[62]

The conduct and activities of firms are permitted only to the extent that they support, or at least do not harm, economic development, social stability, and the dominance of the Party. It is becoming increasingly difficult for foreign companies to continue operating in China without compromising their business models, intellectual property ("IP"), and corporate values. All of these special rules impact competition. Special rules and regulations in the West have impact too. The main difference is the scale and magnitude of the impact.

E. Cavalier Attitude to International Commitments

China has stretched the limits of what global regulators such as the World Trade Organization ("WTO") can handle. Contrary to WTO rules, Chinese firms have flooded world markets[63] with subsidized production in one industry after another.[64] Yet, since 2016, China has claimed that it is automatically entitled to "market economy" status that would limit the anti-dumping leverage of other countries against it.[65] Meanwhile, the U.S. has pushed back with tariffs and other ad hoc measures initiated by the Trump administration and largely continued under Biden.

Technology extraction has been a particular source of contention. When China joined the WTO, it committed not to condition the approval of investment or market access on technology transfer.[66] Yet there have been numerous reports by foreign firms of being pressured to transfer proprietary technology "voluntarily" to Chinese partners as a condition for access and/or for less punitive regulatory oversight. Many firms are reluctant to telegraph such manipulation for fear of subtle and not so subtle commercial retaliation.

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55 Wong, C., & Dou, E. (2017). Foreign companies in China get a new partner: The Communist Party. *Wall Street Journal*. https://tinyurl.com/329mm2y9.

56 Borst, N. (2021). Party committees in Chinese companies, *Seafarer Capital Partners*. https://www.seafarerfunds.com/prevailing-winds/party-committees-in-chinese-companies/.

57 Lin, Z. (2018). Chinese Communist Party needs to curtail its presence in private businesses. South China Morning Post. https://tinyurl.com/794p248w.

58 Yan, X., & Huang, J. (2017). Navigating unknown waters: The Chinese Communist Party's new presence in the private sector. *China Review*, 17(2), 37–63.

59 Lund, S., & Tyson, L. (2018). Globalization is not in retreat: Digital technology and the future of trade. *Foreign Affairs*, 97, 130–140.

60 Lin, L., & Kubota, Y. (2017). U.S. tech firms spooked by China's arcane cybersecurity law. *Wall Street Journal*. https://tinyurl.com/zz5d3dww.

61 Li, S. (2018). China expands its cybersecurity rulebook, heightening foreign corporate concerns. *Wall Street Journal*. https://tinyurl.com/ys8rcdds.

62 Bloomberg. (2020). Why China is cracking down on its technology giants: QuickTake." *Bloomberg News*. https://tinyurl.com/mu2dfw6s.

63 Badkar, M. (2013). China stimulated its economy like crazy after the financial crisis ... and now the nightmare is beginning. *Business Insider*. https://www.businessinsider.com/chinas-excess-capacity-problem-2013-6.

64 DiPippo, G., Mazzocco, I., & Kennedy, S. (2022). Red ink: Estimating Chinese industrial policy spending in comparative perspective, *Center for Strategic and International Studies*. https://tinyurl.com/2cep9a8d.

65 Bulloch, D. (2017). China is not a market economy, and the WTO won't survive recognizing it as such, *Forbes*, December 8. https://tinyurl.com/56awtu99.

66 WTO (World Trade Organization). (2001). *Accession of the People's Republic of China*, WT/L/432. https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/432.pdf&Open=True.

The growth of China's economy has given it even more leverage to bend and shape the rules of the global economy in this and similar ways. The latest five-year plan touts the "powerful gravitational field" of the Chinese market to continue attracting global resources.[67] There are many ways in which China is trying to establish global norms and standards to its benefit. China's legal system lacks transparency, as discussed below. In this regard, multiple courts in China have asserted extraterritorial powers by setting royalty rates that purport to apply on a global basis.

F. Military/Civilian Fusion

Another distinctive aspect of China's governance is the close connection between its military and civilian sectors. "Military-civilian fusion" ("MCF") in China embraces broad coordination and planning of economic development and national security.[68] This allows every commercial issue to become a matter of national security, a linkage that is invoked less in the U.S. and rarely in the EU and Japan.

While the commerce/security linkage is not unknown in the West, in China — ruled by a single party committed to its self-preservation in power — all economic activity is seen through a strategic political lens.[69] Yet Western executives seem unaware, or at least unconcerned. Consider China State Shipbuilding Corporation ("CSSC"), which accounts for about one-fifth of the world's shipbuilding market.[70] Shippers based in France, Japan, and Taiwan number among CSSC's key customers, and so does the People's Liberation Army Navy, the world's largest in terms of number of vessels.[71] While it is not unusual for other major shipbuilders to undertake both civilian and military work, it is unusual for companies from strategic rival nations to fill up their order book.

IV. A WIDER-APERTURE LENS FOR COMPETITION POLICY

Walter Russell Mead described how the international institutions of the twentieth century were designed for a world in which economic and political systems converged as they developed.[72] That remained a good approximation for many decades, but "the international order will increasingly be shaped by states that are on diverging paths."[73] For firms, this means unlevel playing fields and at a minimum existing dispute resolution mechanisms that will become less predictable as global institutions become more politicized.

The divergent global order also means that competition policy must become more holistic. The spread of illiberal and autocratic values in countries with strong trading economies poses a collective, systemic risk to the liberal democracies that policy makers should not ignore. Financier George Soros, for example, has written that U.S. investment firms are deceiving themselves by accepting China's invitation to enter the market. He sees such investment as inconsistent not only with the interests of clients but also with "the national security of the U.S. and other democracies."[74] All industries engaged in potential dual-use technologies must begin making similar wide-angle assessments.

The job of scholars and practitioners is to take a broader, systems-theoretic view and guide policy makers as they navigate a bifurcated economy of a type that is now qualitatively different from what existed just a decade ago. President Xi's rise to power is the single most salient event producing what economic historians call a "climacteric," beyond which stretches a new historical epoch. Too many policy makers are naïve about the geostrategic ramifications of China's policies. An entirely new paradigm of competition has emerged in China. Market rules are subverted to national strategic goals, leaving companies competing directly or indirectly with China with few degrees of freedom along with competitive vulnerable.

67 Xinhua. (2021). Outline of the People's Republic of China 14th Five-Year Plan for National Economic and Social Development and Long-Range Objectives for 2035, translated by the Center for Security and Emerging Technology. https://cset.georgetown.edu/wp-content/uploads/t0284_14th_Five_Year_Plan_EN.pdf.

68 Xinhua. (2017). Xi urges efforts to boost integrated military and civilian development. *China Daily*. http://www.chinadaily.com.cn/china/2017-06/20/content_29820237.htm.

69 Yuan, L. (2021). An insider details the "black box" of money and power in China. *New York Times*. https://www.nytimes.com/2021/09/24/business/china-business-memoir.html.

70 Si, K. (2022). China claims world leading shipbuilding nation in 2021. *Seatrade Maritime News*. https://tinyurl.com/mvzn25s.

71 Funaiole, M. P., Hart, B., & Bermudez, J. S., Jr. (2022). In the shadow of warships, *Center for Strategic and International Studies*. https://features.csis.org/china-shadow-warships/.

72 Mead, W. R. (2021). The end of the Wilsonian era: Why liberal internationalism failed. *Foreign Affairs*, 100(1), 123–137.

73 *Ibid*.

74 Soros, G. (2021). BlackRock's China blunder. *Wall Street Journal*. https://tinyurl.com/mr6dszj8.

Clearly, not all sectors are equally subject to these concerns. In October 2021, the acting director of the National Counterintelligence and Security Center in the U.S. identified five key technologies — semiconductors, biotechnology, artificial intelligence, quantum computing, and autonomous systems — that will be prioritized for preventing theft or transfer from U.S.-based firms and research units[75] It is with respect to such strategic industries that competition policy in China is most distortionary, and where public policy (including competition policy) needs to adopt a very different posture. Some industries, such as retail, are unlikely to be thought of as strategic caught up in the potential conflicts, but what constitutes "dual-use" technology will change over time.[76] And certain industries not directly involved with the strategic technologies, such as finance, still have some tough choices to make about helping China meet its goals.

V. CONCLUSION

The competitive business environment of the twenty-first century is dramatically different from what it was in the post-World War II Pax Americana epoch. As Jannace & Tiffany note, the global commons is no longer governed by a rule of law that provides stability and predictability.[77] It has been disrupted by the "rule of rulers," as autocratic regimes in China and elsewhere seek geopolitical and economic advantage from the activities of MNEs. Existing competition policy research inadequately reflects this system-to-system competition.[78]

Those seeking to build models and create frameworks to assist competition policy will need to immerse themselves in the nature of the linkages and cleavages that matter in the bifurcated global economy that now exists and defines the competitive landscape. Building a better understanding of the current business environment necessitates multidisciplinary research.

Few scholars are recognizing the new reality of systemic competition. Frameworks in business and antitrust economics have been slow to encompass new institutional arrangements and variables that reflect the broader forces driving the global economy.

The rise of China and the impact that Chinese firms operating from China or in foreign markets is palpable, and much of it is very positive. However, one must understand that China is challenging the democracies with a very different form of competition… systemic competition in which the enterprise and the state are effectively one. China is establishing different rules of the game. The goal of competition policy in China is not in the main to help the consumer, or to aid the competitive process as that is commonly understood in the West. Rather, it is to support China's technology policy and industrial policy and thereby aid the competitiveness and advancement of business in China. The advancement of Chinese national interests vis a vis their foreign rivals is paramount.

Competition agencies in the democracies must respond by (1) recognizing that China represents systemic competition and (2) adopting an integrated "whole of government" approach. Technology policy, industrial policy, and competition policy can no longer live in hermetically sealed silos. As analytically convenient and delightful as that might be to the professionals responsible for shaping and enforcing competition policy, it is no longer viable and will undermine consumer welfare, economic welfare, national security, and democracy itself. The siloed approach is what China would wish; but it is not what is required for the democracies to combat and survive the existential threats they now face.

75 O'Keeffe, K. (2021b). Counterintelligence head narrows focus to five technologies critical to U.S. dominance. *Wall Street Journal*. https://tinyurl.com/yc4t2kj4.

76 Forge, J. (2010). A note on the definition of "dual use." *Science and Engineering Ethics*, 16(1), 111–118.

77 Jannace, W., & Tiffany, P. (2019). A new world order: The rule of law, or the law of rulers? *Fordham International Law Journal*, 42(5), 1379-1417.

78 China's system is coordinated and completely aligned with the Chinese Communist Party. The Western system is decentralized, driven more by market realities than by particular leaders.