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LIST OF ABBREVIATIONS

AMC: Anti-Monopoly Commission
AML: Anti-Monopoly Law
AUCL: Anti-Unfair Competition Law
BRICS: Brazil, Russia, India, China and South Africa
BTS: Basic Telecommunication Services
DDA: Doha Development Agenda
DSB: Dispute Settlement Body
EU: European Union
FDI: Foreign Direct Investment
GATS: General Agreement on Trade in Services
GATT: General Agreement on Tariffs and Trade
GPA: Government Procurement Agreement
IP: Intellectual Property
ITO: International Trade Organization
M&A: Mergers and Acquisitions
MII: Ministry of Information Industry
MOFCOM: Ministry of Commerce
MPT: The Ministry of Posts and Telecommunications
MVNO: Mobile Virtual Network Operator
NDRC: National Development and Reform Commission
NTB: Non-Tariff Barriers
OECD: Organization for Economic Co-operation and Development
PTA: Preferential Trade Agreement
RBP: Restrictive Business Practice
SAIC: State Administration for Industry and Commerce
SASAC: State Asset Supervision and Administration Commission
SCM: Subsidies and Countervailing Measures
SEI: Strategic Emerging Industry
SOE: State-Owned Enterprise
STE: State-Trading Enterprise
TRIMS: Agreement on Trade-Related Investment Measures
TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights
US: United States of America
WTO: World Trade Organization

INTRODUCTION

“U.S. President Donald Trump's administration said (...) that it will take aggressive action to combat other countries' unfair trade practices and may defy World Trade Organization rulings that it views as interfering with U.S. sovereignty” (Lawder, 2017). This statement illustrates two important elements for international trade and relations. First of all, it indicates that differences in the definition and treatment of unfair trading practices across the globe represent a major issue in today's globalized economy. It seems that developed nations, that still struggle to recover economically since the 2008 crisis and suffer from the competition from emerging countries, will put increasing pressure on developing countries in this regard. Unless an agreement on what represents anticompetitive practices and what should be punished can be reached and respected, this may give rise to unilateral, protectionist, answers. At the moment, this is mainly reflected in Donald Trump's threats towards China but there is a risk of seeing similar reactions emerge elsewhere. Second, this statement signals that the authority of the WTO is threatened. The international organization, which is the most likely to intervene in order to avoid protectionist reactions in this context, is indeed undergoing a major crisis.

With that in mind, it seems interesting to study how China's current competition policy could impact future negotiations on an international framework for competition rules in the WTO. To this end, the different elements of the question are analyzed individually. The first part of the master thesis focuses on the WTO. It presents key elements to understand the functioning of the negotiations taking place in this framework as well as the current context. The second part presents the importance of competition policies for the WTO and explores the perspectives for the future. After that, some aspects of the Chinese economy are developed in order to better assess the position and power of the country in multilateral trade negotiations and understand the interests and rationale behind its competition policy. The fourth part examines China's competition policy, taking into account the concerns generated by the country's industrial and trade policy. The case of the telecommunications market is studied in order to observe concretely how Beijing enforces its recent competition law. Lastly, possible ways of response to the initial question are proposed based on the different elements gathered in the previous parts.

A number of limitations need to be mentioned. First of all, research on China is hindered by a lack of transparency. Even though progress has been made in this regard, some information remains difficult to find. Predictability is also an important obstacle: experience shows that official announcements always need to be taken with caution since it does not always lead to consistent action. Another major obstacle for this master thesis was my limited background in the topics covered. Given the large scope of the analysis and the time constraint, some elements and reasoning might, therefore, be missing.

PART 1: THE WTO

This first part focuses on the World Trade Organization (WTO). It presents key elements to understand the context of the negotiations taking place in this framework and the consequences that a country's position can have. First, the objectives and the functions of the WTO are examined. It is followed by the fundamental principles upon which the organization is based. The next section gives an overview of the WTO evolution, after which today's major challenges are identified. Lastly, the specific case of China as a member of this organization is looked at.

1. OBJECTIVES AND FUNCTIONS

The WTO is an international organization whose goal is, as stated on its website, to “ensure that trade flows as smoothly, predictably and freely as possible” (WTO, 2017h, para. 1). Pursuing this objective, it undertakes six functions. First of all, it is responsible for the *administering of the trade agreements* negotiated by its members (164 member states since July 2016). Today, it oversees three multilateral agreements: the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). However, the existing agreements evolve and new aspects can be included, which brings the WTO to also act as a *forum for trade negotiations*. Another main function of this international organization is to *settle trade disputes* when conflicts arise about the enforcement of the rules. In order to ensure proper implementation and improve transparency, it *reviews national trade policies* in parallel. Alongside these functions, the WTO has been paying increasing attention to the *developing countries*. Assisting them in their trade policy issues, through technical assistance and training programs, now represents one of its main roles as well. Lastly, the WTO ensures *cooperation with other international organizations* (WTO, 2017h).

The direct objective pursued is free trade. Since the creation of the WTO, world trade has enjoyed exceptional growth, in a more liberal multilateral trading system. Nevertheless, the organization has not been able to dismantle protectionism completely. Actually, free trade around the world seems unthinkable. But rather than being the WTO's ultimate goal, free trade is perceived as a tool that supports economic development and prevents political conflicts. The WTO is built on the belief that “open markets, transparency and nondiscriminatory trade policies are conducive to the national welfare of all countries” (Hoekman & Kostecki, 2009, p.1). In that case, why is protectionism so resilient? Trade restrictions arise for several reasons. One of them is the willingness to protect national industries, be it due to lobby pressure or national policies aiming at developing infant industries. Such policies were pursued by many developed countries in the past, in Japan (Sohn, 2005), the US (Irwin, 1996) and Europe (Roland, 2014) for instance. Yet, these countries now stand against the protection of infant

industries in developing countries (e.g. China). As it is later on elaborated, this represents a major source of disagreement in the WTO today. According to Hoekman and Kostecki (2009), the opposite forces driving trade multilateralism appear to be more influenced by power and foreign policy considerations than purely economic motives. We shall see later on to what extent this applies to China.

2. FUNDAMENTAL PRINCIPLES

The WTO intends to pursue its objective by working as a *rule-oriented* system. Agreements are not based on results that need to be achieved such as trade flows or international prices. It means that the effectiveness of the organization depends on the willingness of its members to comply with a number of rules and principles. Agreements are binding but it is relatively easy for its members to find a way around them (Hoekman & Kostecki, 2009).

First of all, the WTO is *member-driven*. In other words, the members run it themselves: decision-making – with regards to the agenda, the rules but also the sanctions – is the responsibility of the member states' governments, ambassadors or delegates. No power is delegated to a superior body, even though there have been some calls for a change in that regard. The top-level decision-making body is the Ministerial Conference that normally takes place every two years. In contrast with some other international organizations, the Secretariat can have an informal influence but its main tasks involve technical and logistical support. It is worth mentioning that becoming part of this powerful membership is a lengthy, complex and asymmetric process. All members can impose their own conditions bilaterally, and it is not rare to see them taking advantage of their bargaining power (Hoekman & Kostecki, 2009).

A second key principle is that decision-making is by *consensus*. It means that, unlike in the International Monetary Fund and the World Bank for example, in the WTO a member's objections cannot be ignored. However, participants in the negotiations usually represent less than half of the membership, because of national interests and lacks of resources (financial, human but also in terms of knowledge) but also because the first discussions only involve the main actors. Even though consensus has proved to be a complex and costly system sometimes, hindering changes, it ensures that decisions are given substantial legitimacy. It is particularly important for the WTO, as the organization's enforcement power remains limited, as later explained. However, the large number of members makes it inefficient to include them all in the negotiations and that is why some mechanisms are used to facilitate decision-making in some circumstances. The first and most common possibility is to limit the participation to "principals" only, in other words, members with a specific interest in the topic (with the EU and the US involved most of the time). The second possibility is to form coalitions, which can give more power to countries sharing common interests, emerging countries for instance. Then, neutral chairpersons can also be nominated to defend some countries' interests. At some point in the history of the WTO, informal meetings between a limited number of players, supported by the Secretariat, became common in order to reach

agreements that would then be submitted to all members. It led to many criticisms as it was considered by some members as an « exclusive and non-democratic negotiating structure ». Even though some efforts have been made towards more transparency and inclusiveness, this shows that consensus does not prevent the big trade players from enjoying increased bargaining power in the negotiations (Hoekman & Kostecki, 2009). Today, informal processes, deeply embedded in the organization's culture, still remain an important issue for developing countries as they generate a lack of transparency and predictability as well as power-based improvisation (Narlikar, 2005). However, it is worth noting that weaker countries, through coalitions, have been increasingly defending their interests in the negotiations since the mid-1990s (Hoekman & Kostecki, 2009).

The core principle for those negotiations is *reciprocity*. The WTO is a forum for multilateral trade negotiations. Put another way, it works as a marketplace for liberalization commitments. Governments bargain and negotiate the exchange of market access or other policy commitments, enabling them to overcome resistance and adopt more efficient trade policies. This “barter system” ensures that the externalities caused by trade policies are offset but makes negotiations particularly complex in the WTO (Hoekman & Kostecki, 2009).

A major rule for the agreements negotiated is the respect of *nondiscrimination*, encompassing the *most-favoured-nation* (MFN)¹ and *national treatment*² rules. The MFN principle prevents countries from discriminating between their trading partners. Bilateral or plurilateral concessions are automatically multilateralized. The only exceptions arise in the cases of free trade areas, customs unions, preferential treatment of developing countries and the nonapplication clause upon the accession of a new member. As for the national treatment rules, it states that imported goods should be treated the same way as locally-produced ones (Hoekman & Kostecki, 2009).

Transparency is another major aspect that needs to be taken into account. Access to the relevant information is required in order to check the respect of WTO commitments. Various mechanisms are used in order to foster communication (Hoekman & Kostecki, 2009). Then, because it is essential to ensure the enforcement of the negotiated agreements, *accountability* is a key principle in the WTO. The threat of retaliation is the basis of this system. Besides diplomacy, some mechanisms exist to enforce commitments in case conflicts arise. Consultation is first encouraged and happens to be sufficient in the majority of cases. However, to make this rules-based system more efficient, legally-binding dispute settlement procedures exist. Countries have the possibility to bring cases to the WTO's Dispute Settlement Body (DSB) in case they believe their rights are being infringed. It limits the use of retaliation and opportunism, supports countries whose threat of retaliation is not strong enough and also

¹ Article 1 of GATT, Article 2 of GATS and Article 4 of TRIPS.

² Article 3 of GATT, Article 17 of GATS and Article 3 of TRIPS.

compensates for the uncertainties that emerge from the agreements. Yet, even though the DSB is considered as a major success for the WTO today, limitations do arise. Criticisms include the length of the process, the role governments play as filters of the complaints, the weakness of the remedies and of the enforcement capacity, as well as the resource constraints (Hoekman & Kostecki, 2009).

A last essential rule governing the WTO agreements is *flexibility*. In some specific circumstances, commitments can be adapted. The so-called “safety valves” are threefold. First, they can be used to pursue noneconomic objectives, i.e. when public health or national security are threatened or when an industry is deeply affected by imports. Secondly, it is allowed to ensure fair competition when imports have been subsidized (using countervailing duties) or prices dumped (antidumping duties). The last possibility is economic reasons, such as balance-of-payments difficulties or protection of infant industries (Hoekman & Kostecki, 2009). Antidumping provisions, with the lowest requirements, are exploited particularly often by the members and are sometimes considered as being abused (Narlikar, 2005).

3. EVOLUTION

Taking into account the aforementioned principles is essential in order to understand the evolution of the organization and the situation today. The WTO was created in 1995 as the successor to GATT. Although the GATT was an inter-governmental treaty, it is now considered as an unofficial, de facto international organization (WTO, 2017i). Many principles governing the WTO today find their origins in it. It was created in 1947, in the aftermath of the Second World War, to deal mainly with tariffs. It emerged from negotiations between 23 countries, although the talks were initially launched to create an International Trade Organization (ITO) with a much wider coverage (Hoekman & Kostecki, 2009). As periodic rounds of GATT negotiations took place, despite the absence of major improvements before the fifth round, tariff levels fell (Winham, 2008). While the first five rounds of negotiations dealt with tariffs only, the focus then increasingly shifted towards nontariff barriers (NTB), also called nontariff measures, and domestic policies impacting trade (Hoekman & Kostecki, 2009). It was first discussed as part of the seventh round of negotiations, also called the Tokyo Round. Despite some initial opposition, frictions in the international monetary system in the early 1970s, combined with a growing use of NTBs as a reaction to the surge in exports from newly industrialized economies, demonstrated that an extension of the GATT coverage was needed (Winham, 2008). The inclusion of these new disciplines, such as environmental quality, product safety and antitrust policies, gave rise to deep disagreements between developing and developed countries. In the case of NTBs, negotiations are more complex than for tariffs. Agreeing on the concept of barriers to trade is the first difficulty. Then, achieving reciprocity for those issues is also less easy due to the qualitative and restricted properties of the possible commitments. In addition, the impact on welfare is less obvious and it is likely to end up

as a zero-sum game, while tariff reductions are always positive-sum games (Hoekman & Kostecki, 2009). As a result, NTBs were included on a voluntary basis only, taking the form of plurilateral codes between a subset of like-minded countries only (Narlikar, 2005).

The Uruguay Round that followed, launched in 1986, is the last round under GATT. Although the path to an agreement was particularly complex and lasted seven years, major results were achieved, with progress on the sensitive topics of agriculture and textile, the inclusion of the TRIPS and the GATS, and ultimately the creation of the WTO. As the global economy had evolved and the comparative advantage of the developed countries was changing gradually, the latter had started calling for a broader coverage of the agreements with services, intellectual property rights and investments. It had faced strong resistance from developing countries at first. Ultimately, however, the main blockage was between the US and the EU. By the end of the round, developing countries had indeed stopped opposing the new agreement. There were some benefits for them, such as the consensus rule and the better dispute settlement body (Winham, 2008). Yet, their “support” is mainly explained by the macroeconomic conditions in the 1980s and the resulting balance of power. At that time, developing countries were facing extremely high level of debts and benefitted from the – concessional – support from the developed nations (Boughton, 2000). In addition, the pressure from the US became even more intense when it enacted the Omnibus Foreign Trade and Competitiveness Act in 1988, according to which the US could unilaterally impose sanctions when it deemed that a trading partner engaged in unfair trading practices (King, 1991).

In the meantime, the number of participants had increased, to reach 128 countries in 1994, just before the establishment of the WTO in 1995 (Hoekman & Kostecki, 2009). The revised version of the GATT, together with the other agreements and rules that had emerged before the end of the Uruguay Round, became the basis of the new multilateral trading system governed by the WTO. The success of the formation of a multilateral trade organization after several failed attempts can be attributed to the new imperatives of the international trading system in the 1980s. It took various forms: discontent with the GATT, ineffectiveness of the voluntary codes negotiated in Tokyo to deal with the increased use of NTBs, need for a structure adapted to the extension of the areas covered by the agreements and strengthened interest from the developing countries in international negotiations in order to support their domestic growth. However, without the negotiation processes that had emerged, characterized by compromises and trade-offs and partly developed under GATT, it could have ended up being a failure as well (Narlikar, 2005).

Although the WTO is largely based on the same principles as the GATT (Narlikar, 2005), some differences should be highlighted. First, the WTO has a much *greater coverage*: it is not limited to trade in goods anymore. Then, while the GATT acted as a treaty between contracting parties, the WTO is an international organization with member states. In addition, membership was not binding under GATT.

Adoption of the rules was flexible; countries were free to stay out of certain negotiations. For the members of the WTO however, all rules are binding: the so-called *single undertaking principle* applies for most of the provisions. It represented a significant change for developing countries especially, that became subject to many more rules. This gave rise to issue linkage, in other words, the exchange of commitments across issues, facilitating reciprocity (Hoekman & Kostecki, 2009). Another difference is that inconsistencies with existent domestic legislation could lead to *exemptions* under GATT. The agreements were applied on a provisional basis, while this is not possible for WTO members (Narlikar, 2005). The *Dispute Settlement Body* became more sophisticated as well, with an Appellate Body. The same applies to the *Secretariat*. Lastly, the *Trade Policy Review Mechanism* ensured more transparency and surveillance than previously (Hoekman & Kostecki, 2009). In brief, the transition to the WTO can be seen as a formalization of GATT rules, which are also made more enforceable (Narlikar, 2005).

The first WTO ministerial meeting took place in Singapore in 1996. The objective was to establish an agenda for the new round. However, negotiations to establish a work program turned out to be really complex, once again highlighting the divergent views between developing and developed countries on the inclusion of new domains. More specifically, disagreements emerged on the issues of government procurement, trade facilitation, investment policy and competition policy. They became the so-called “Singapore issues” (Hoekman & Kostecki, 2009). An agreement on the agenda could still be reached during the fourth WTO Ministerial Conference in Doha in 2001, after failed attempts in Geneva and Seattle. Although it is sometimes claimed that public protest in Seattle played a key role, the main obstacles were the organizational weaknesses and internal conflicting views. Disagreements persisted between developing and developed countries, one example being the ongoing push by the EU for the inclusion of the Singapore issues, including competition policy, and among developed countries as well (Narlikar, 2005).

After that, driven by a willingness to find a fairer system (Hoekman & Kostecki, 2009) and cooperate after the last failed attempts, and in the context of the 9/11 attacks, supported by successful arrangements to defeat the opposition of developing countries and as a result of numerous efforts made to improve decision-making processes as well as transparency, the Doha Development Agenda (DDA) was accepted. However, this round was launched in a context of great disappointment about the organization among developing countries. Before expanding the current agreements, some problems needed to be solved (Narlikar, 2005). This is how development became the priority for this new round. China and Brazil started playing an important role. Developing countries, in general, were also more prepared than in the past and had formed strong coalitions (Hoekman & Kostecki, 2009). The new macroeconomic context was a determining factor in this evolution as it generated a change in power relationships in the WTO. Most developing countries were no longer dependent on the financial support from developed members and world prices for raw materials were rising, benefitting their economies.

The initial agenda presented back then is seen as extremely ambitious today, with more than twenty topics put on the bargaining table (Fontagné & Jean, 2013), such as agriculture, non-agricultural tariffs, trade and environment, anti-dumping rules and subsidies, investment policy, competition policy, trade facilitation, government procurement, intellectual property, as well as the difficulties faced by developing countries in implementing the present WTO agreements. This was not an easy task, as reflected by the next six unsuccessful Ministerial Conferences to date (Hoekman & Kostecki, 2009). All in all, the current round of multilateral trade negotiations, the 9th round since the creation of the GATT, is actually still the first one under the WTO. Even though it is officially still ongoing, it is generally considered as a failure with only insignificant commitments. However, it is important to note that it is the negotiation function of the organization that is blocked, while the other functions are seen as quite effective (Winham, 2008).

4. CURRENT SITUATION AND CHALLENGES

Understanding the evolution of the organization now allows for a better examination of the current state of world trade as such, as well as the related negotiations. In the last decades, the GATT and the WTO have contributed to the development of a more liberal world and multilateral cooperation survived despite periods of increased protectionism, following crises or pressures for structural adjustments (due to the developments in East Asia countries among others) (Hoekman & Kostecki, 2009). Yet, borders remain strong and the general trend since the 2008-2009 crisis even indicates a higher level of protectionism worldwide (Kommerskollegium, 2016). The major obstacles to international trade today are NTBs, as tariffs have been significantly reduced under GATT (Winham, 2008). Protectionism is not something new but unfortunately, history shows that it can have disastrous consequences, the extreme example being the worsening of the Great Depression worldwide after the American Smoot-Hawley Tariff Act of 1930 (Hoekman & Kostecki, 2009). In that context, the WTO still has an essential role to play but it faces major challenges. The Doha Round, launched in 2001 and prepared since 1997, was supposed to terminate in 2005 (Fontagné & Jean, 2013) but no major agreement has been reached so far and the perspectives for the near future are not more positive.

In general, the fundamental disagreements between developed and developing countries, as reflected in the talks about the Singapore issues for instance, are seen as the major source of the deadlock in the negotiations. It results directly from the creation of the WTO, an organization that radically contrasts with the GATT in terms of inclusion of the developing countries. Under GATT, developing countries and their trade policies did not get much attention. Despite theoretical fairness in decision-making, negotiations were characterized by significant power asymmetries and exclusion, as developing countries suffered from limited technical capacities. In addition, topics that were of major importance for developing countries, such as agriculture and textile, were largely avoided. Not only did it lead to a

feeling of marginalization but also to adverse outcomes for them. In contrast, their integration became a central topic in the WTO, as a result of the new macroeconomic context and changing power relationships. Developing countries can benefit a lot from this change. First, as a rule-based, authoritative international regime, the WTO provides them with some certainty in international relations and acts as a safeguard against abuses of power. Second, enabling them to build coalitions, the organization's institutional context improves their bargaining position (Narlikar, 2005). However, this shift makes negotiations in the WTO more complicated for two main reasons: reciprocity can hardly be used as most of the time those countries are of no interest to the bigger players, and harmonizing policies cannot be pursued considering the different situations and challenges (Hoekman & Kostecki, 2009).

What is more, even in the context of the WTO, major complaints from developing countries arise. An important issue is the so-called "Grand Bargain" of concessions that led to the creation of the WTO. During the negotiations, developing countries gave up on a significant number of questions, driven by the promise that their own concerns, about textile and agriculture for instance, would be taken into account. Yet, commitments have remained largely unfulfilled. These resentments are strengthened by the persistent "Rich Men's Club" organizational culture, still poorly adapted to their situation and needs despite some improvements, and the asymmetric accession process that some of them had to go through. With the DDA however, it was clearly suggested that developing countries' interests would be given considerable attention. Nevertheless, it is claimed that despite clear efforts, the processes followed the same asymmetric rules as previously (Narlikar, 2005). Seeing that over three-quarters of the WTO member states are developing or least-developed countries, this issue cannot be overlooked (WTO, 2017d).

At the same time, power relations have evolved and the development of a multi-polar system with new big players is actually at the heart of a major disagreement in the WTO today. Emerging countries have become key actors in international trade. The evolution of the Chinese economy more particularly gives rise to serious fears that it could leave little opportunity for domestic firms (Hufbauer, 2012). As a result, the US and then the EU started questioning the special and differential treatment that the emerging countries benefit from (Fontagné & Jean, 2013). It is argued that the latter should accept the responsibilities that go with their growing trade shares, which is not the case at the moment. The US clearly asks for full reciprocity instead of the special and differential treatment granted to emerging countries today. What is more, developed countries consider that because of the developing countries, it is impossible to move forward in areas they deem most important, such as investments, intellectual property or public procurement (Narlikar, 2005). Indeed, BICS countries are satisfied with the current agreements and do not want to commit to new rules (Narlikar, 2012). Developing countries exploit their growing power and are not willing to give up on their positions anymore. This could prevent the WTO members from reaching an agreement. Similarly, if developed countries do not manage to adapt to the economic expansion of emerging countries and consequently ask for too much from them, they could

also jeopardize the future of the WTO (Hoekman & Kostecki, 2009). Therefore, it seems that concessions from both sides are needed.

The new multi-polar system has another major implication. The US, the EU and China are the main players today, but in contrast with the clear leadership role the US took after the Second World War, none of them adopts a similar position today (Hoekman & Kostecki, 2009). Until the 1960s, the US had controlled the WTO almost alone, offering many concessions with few gains in return. This role was then increasingly shared with the EU. Agreements were agreed among them and then extended to the rest of the membership. After the major disagreements that appeared between them, then followed by the creation of the WTO, a system of rules replaced the previous system based on power (Winham, 2008). Since 2008, a clear shift in the trade politics of the US has been observed: the focus moved to bilateral trade agreements, as a means of dealing with the rising power of China (Hilpert, 2014). As a membership-driven organization, the WTO cannot play the leadership role itself. Therefore, the future of the organization will depend on the willingness of its members to make it work (Hoekman & Kostecki, 2009).

In this multi-polar context characterized by major disagreements among WTO members, some questions arise on the fundamental principles of the organization. Different views emerge in the debate but a recurring aspect is that the Single Undertaking principle should be adapted. Although it is regarded as an essential factor that made it possible to conclude the Uruguay Round and create the WTO, the “all or nothing” approach is said to bring inefficiencies contributing to the blockage in negotiations (European Parliament, 2012). In such circumstances, preferential trade agreements (PTA) can present a good alternative, enabling a subset of member states to agree to a set of rules. The WTO records more than 200 new PTAs covering goods and/or services since the launch of the Doha talks (Mendoza, 2016). This growing number, especially in Asia where it was not very common before 2000 (Hoekman & Kostecki, 2009), together with the depth of those agreements (Mendoza, 2016) indicate that they could become the norm for the future (Jean, 2014). It appears as a return to the process largely used during the Tokyo Round, and that which made GATT so successful in general (Fontagné & Jean, 2013). However, this approach brings some risks: multilateral negotiations could not survive without issue linkage (Narlikar, 2012) and it could result in a fragmented trading system, with variable-geometry rules leading to additional costs, less transparency, enforcement issues and difficulties for smaller countries (Jean, 2014).

In addition to the Single Undertaking principle, the decision-making method of the WTO is controversial. Working with consensus is indeed considered as another source of inefficiency. When GATT was dominated by the so-called Quad (Canada, US, EU and Japan), consensus did not represent an obstacle. Although the agenda mainly reflected those countries’ policy preferences, the great majority of contracting parties were willing to accept concessions as they could free ride on the

commitments exchanged. In contrast, as already mentioned, the DDA is characterized by a shift in power relations and a greater involvement of some members, the BICS especially, in order to defend their positions and represent their coalitions (Narlikar, 2012). This “more contestable and democratic landscape of multilateral diplomacy” (Sauvé, 2012, p. 15) complicates the use of consensus. As a result, some calls have been heard for an alternative such as a consultative board but it faced strong resistance from developing countries that value transparency and predictability (Narlikar, 2005).

Alongside those aspects, a major challenge for the WTO is the growing opposition from the civil society, standing against liberalization and globalization (Hilpert, 2014) and criticizing the lack of transparency, while more and more NGOs also call for a direct role in the negotiations instead of having the State as intermediary. Numerous efforts have been made since the Ministerial Conference in Seattle during which it was particularly strong but it remains a major issue (Hoekman & Kostecki, 2009).

The general view is that now, taking into account all those factors, the likelihood of reaching any major agreement is close to zero (Jean, 2014). Business leaders have stopped taking an interest in the negotiations, which they see as doomed to fail (Hufbauer, 2012). However, it is obvious that there is still a high demand for trade negotiations, as can be seen from the numerous negotiations going on outside the framework of the Doha Round. The direct impact of the deadlock in negotiations is the loss of the potential trade gains from a new agreement. More indirectly and on the long-term, that means loss of economic confidence, symbol of the decline of multilateralism, evidence of the organization’s incapacity to deal with development issues and declining WTO authority (Sauvé, 2012). In order to save the multilateral system, three elements should be considered according to Jean (2014). First, a basic compromise should be found, even though it could undermine the credibility to the negotiations function of the organization. It is important to avoid “over-assigning” tasks to the WTO as it would be impossible to find agreements between its 164 members on all topics brought to the table. Even a basic agreement would require adjusted expectations from key members, that so far have refused to adapt their position. In that sense, the current crisis is more political than institutional (European Parliament, 2012). Actually, a number of member states were reluctant to launch serious negotiations in the beginning. It already reflected the lack of willingness to reach an agreement (Hilpert, 2014). The second element consists in facilitating plurilateral agreements (Jean, 2014). Trying to compete with those deals would not be effective, as they offer a level of integration that the WTO cannot provide anymore. Instead, the organization could set rules for plurilateral agreements. Having a common dispute settlement system would also ensure that the general principles adhered to are respected (Chatham House, 2017). Lastly, the principles governing regional negotiations should be as similar to those of the WTO as possible. This way, the multilateral trading system could survive, even though ambitious multilateral negotiations seem unthinkable (Jean, 2014). Without major adaptations to the Doha Development Agenda, an agreement could not be reached and that could mean the end of the WTO (European Parliament, 2012).

5. CHINA IN THE WTO

The analysis of the current situation in the WTO and the challenges it faces have highlighted the importance of the emerging countries' position for the future of the organization. The specific case of China will now be further developed. Even though China was a founding member of the GATT and a signatory of the Uruguay Round Agreement, it was not a WTO member until 2001. Its accession process lasted 14 years, during which the country faced numerous obstacles. First of all, member states were reluctant to apply WTO rules to Chinese imports as those were perceived as a major threat to some of their domestic industries. Some members were also determined to use this accession as a means of applying pressure to make China become more market-based. Therefore, negotiations involved a broader scope of domains than just market access. Alongside these aspects, China also had its own conditions, a major one being to be granted the developing country status in order to benefit from the special provisions that apply in that case, such as longer implementation periods. Political motives, mainly from the US, also played a major role in those negotiations. In the end, far-reaching commitments were made by China (Hoekman & Kostecki, 2009), regarded as exceptional in the history of the GATT or the WTO and largely discriminatory (Hilpert, 2014). One specificity of this case was the inclusion of "WTO-minus" conditions in order to deal with the concerns about the disruptive potential of China's accession. While new members are often subject to "WTO-plus" conditions - i.e. non-reciprocal conditions that are not part of the WTO agreements - China also had to abstain from certain WTO rights. This way, countries were allowed to continue using safeguard measures against Chinese imports in a number of cases (Hoekman & Kostecki, 2009). When looking at the evolution since China's entry into the WTO, the progress made in terms of market-opening and liberalization are significant. Generally speaking, the country has adopted a position of established, "status quo", power supporting the multilateral system, demonstrating that the fears were not founded. Yet, in some instances, national interests seem to be the country's priority and there is still a number of commitments that are considered as not being implemented, particularly regarding key principles such as non-discrimination, transparency and rule of law. There are, however, significant differences of opinion on that topic. In China, it is claimed that all obligations have been met. Similarly, the general view in China is that WTO admission was too costly for the country while foreign businesses condemn the high level of discrimination they have to deal with (Hilpert, 2014).

China's accession to the WTO was a decisive driver for the country's integration into the world economy (Hilpert, 2014). Since then, as already identified, its rapid development and that of other emerging powers have changed the rules of the game in the organization. "Fear of China" has become an important factor in the negotiations. Seeing that the contributions to the WTO budget are essentially based on the shares in the total trade of the members (Hoekman & Kostecki, 2009), China is now a major funder. The question that arises is whether it has led the country to take on a similar role in the

negotiations. So far, China has acted as a passive actor in the WTO, neither particularly cooperative nor particularly confrontative (Hilpert, 2014).

Looking at the bigger picture, nowadays emerging countries are looking for greater representation and influence in international organizations. For the WTO, this is even more apparent. It can be explained by the institutional principles governing the organization, making power dependent on (pro)activity, but also by a stronger tradition of learning within the WTO (Narlikar, 2012). Their increasing participation takes different forms. First, the G20, of which China is a major actor, was formed as a result of the thorny agriculture issue and is now a highly resilient coalition of developing countries (Narlikar, 2005). Other coalitions appeared and they cannot be neglected in the talks anymore, in contrast with the situation under GATT (Narlikar, 2012). It is even more true for China, whose active policy in terms of bilateral trade agreements strengthens its status of central actor in Asia (Hilpert, 2014). In addition, emerging countries have become active users of the Dispute Settlement Mechanism (Narlikar, 2012). As China's trade share grew, the country became increasingly involved in the settlement of trade conflicts. While its participation was limited to the role of third party during the first five years after its accession, it then became defendant or complainant in the majority of trade disputes cases. Most cases against China are initiated by the US and, to a lesser extent, by the EU. Although it is clear that those actors are willing to take action against China, there also appears to be certain reluctance to create tensions with China due to the business interests resulting from the new global supply chain model. Similarly, the cases initiated by China so far target the US and the EU only (Oh, 2015). Even though after the first five years China switched from a conciliatory to a more assertive position (Grieger, 2016), it has always demonstrated exemplar compliance with adverse rulings. Nevertheless, at the same time, many critics are heard from governments and businesses revealing a heavy use by the Chinese authorities of WTO-inconsistent industrial policy measures. This combination of contradicting approaches has been described by Oh (2015) as convenient compliance: industrial policies are implemented despite their inconsistency with the WTO principles or agreements, and once they are brought in front of the Dispute Settlement Body, China faultlessly adapts its position because the goals pursued have already been achieved.

It is now interesting to examine how this greater involvement from China in the WTO translates in the multilateral negotiations. China did not participate in the preparation of the Doha Round, as it officially became a WTO member during the same Ministerial Conference (Hilpert, 2014). In the beginning, it asked that recently acceded members be granted special treatment and stood against the possibility of new concessions. Its behavior quickly revealed a strong support towards developing countries' interests (Grieger, 2016). Until the Geneva Ministerial Conference in 2008, China adopted a reserved and constructive stance. After that, it defended more actively its interests in the trade talks (Hilpert, 2014). Still, it did not seem willing to take the leadership, struggling to combine its roles of most important developing country and second largest economy. Although China's economic interests now diverge in

some ways from those of developing countries, Beijing wants to maintain political support from their side. But it still backed developed countries' initiatives that were in line with its interests as exporter. In the plurilateral negotiations taking place under the WTO framework, it played a minor role as well. A major change in China's attitude in the WTO then happened in 2016 due to the disagreements about its market economy status, which will be later developed. This controversial issue led them to adopt a strong revisionist power position. Now, the potential shift of the US trade policy towards protectionism under the Trump administration may also lead to a major revision of the Chinese position. In that context, the country could appear as an appealing regional leader. Without external pressure pushing for domestic economic reforms, Beijing could use its status to form agreements based on its own interests, excluding topic such as the Singapore issues, and ultimately shaping new global trade rules outside the WTO framework (Grieger, 2016).

China's posture in the WTO has given rise to criticism. First of all, the fact the country was busy implementing its new WTO commitments was not seen as a valid reason for not making new concessions, especially because of the country's positive economic situation. Then, as already mentioned, it is claimed that China should take on more responsibilities commensurate with its position in world trade today, especially since the WTO has largely contributed to it. Alongside those elements, Beijing is said to underestimate the costs of the current blockage. The deadlock in the negotiations of the Doha Round does not represent a problem for China per se but a failure would have major consequences for world trade, on which the country is highly dependent. However, in case of failure, the Chinese evolution itself could be considered as one of the main causes. Indeed, the number of trade conflicts has increased since it entered the WTO and member states have adapted negotiating calculations, while power relations have undergone major changes. Considering the threat that the Chinese imports represent, most countries have become reluctant to further open their borders, which was strengthened by the global financial crisis. At the same time, a general sense of mistrust in the Chinese authorities have also held up the negotiations as it jeopardizes the principle of reciprocity. Indeed, because of the discrimination that has already been experienced in China, there are serious doubts about the actual implementation of potential new measures, while the fear of currency devaluation is strong. Seeing that China fails to comply fully with its WTO obligations, its credibility as negotiating partner is questioned, which in the end affects the multilateral system as a whole since it is a predominant actor in world trade. As already stated, maintaining trade multilateralism is important. In the case of trade agreements with China more specifically, it has been argued that it should be preferred over bilateralism for a few reasons: multilateral pressure has proven more effective in the negotiations with Beijing, the WTO acts as a protection against its potential abuse of power against smaller trading nations, and the dispute settlement mechanism is more successful than diplomacy. In addition, it is claimed that discriminatory preferential agreements to isolate China should also be avoided as the country's reaction could be disastrous for the multilateral system (Hilpert, 2014).

This passivity in the Doha negotiations, that contrasts with its active stance in bilateral agreements, is explained by the lack of direct economic benefit from the negotiations. More broadly speaking, the contradiction between China's stance in the WTO and the country's extreme dependence on foreign markets is said to be due first to its still relatively new presence in this international institution, and second to the fact that its trade policy is not only based on economic rationality (Hilpert, 2014). Domestic factors, that will be later analyzed, need to be taken into account to better understand the country's trade policy and position in the WTO.

6. CONCLUSION

The WTO takes on a number of functions in order to regulate international trade. Among others, it provides a framework for negotiating trade agreements. Since 2001 however, its member states have not been able to find an agreement. The different crises the WTO has gone through so far have led to different questions about the organization and the key principles it is based on. The first one is the "how": Should the consensus and single-undertaking rules be maintained despite the inefficiencies they lead to? Then, the "what" is also controversial: Should the WTO agreements include new issues such as competition policies that are of major importance for developed countries and for some NGOs, in spite of the resistance of the developing countries that already struggle to implement their existing commitments? The efforts to expand the mandate of the WTO could lead to a dissolution of the organization. The heterogeneity of the membership and the lack of leadership in this member-driven organization since the decline of the US as economic and political superpower makes it difficult to determine the role of the organization. The last question concerns the "who": Should decision makers somehow be closer to civil society? Considering the stalemate in negotiations, the Chinese position is said to be of prime importance as it has become a predominant player in world trade. The results of the country's accession to the WTO are mixed: far-reaching commitments but without full compliance to date, active participation in the dispute settlement mechanism but passivity in the negotiations. However, the survival of the multilateral trade system is essential for China as it depends on external trade. Lastly, it is interesting to note that, initially, the Doha Round was based on the idea of supporting developing countries, whereas in the meantime the developed economies suffered greatly from the financial crisis while developing countries in general performed very well. What is more, China, a developing country, is now a major source of competitiveness concern for the rest of the membership (Mattoo, Ng, & Subramanian, 2011). Understanding this general context is necessary to analyze the specific case of international regulation regarding competition policy, and the impact of the Chinese position on this matter.

PART 2: COMPETITION POLICIES

The relationship between trade and competition policies has been discussed for a very long time (Evenett, 2010) and in various contexts. The WTO is no exception. In this part, competition policy is first of all briefly defined, followed by the reasons that justify the need to address the topic in the WTO. Subsequently, different aspects of competition policy in the WTO are discussed: the extent to which it is included in the agreements today, the past attempts to go further and the perspectives for the future.

1. DEFINITION

First of all, it is important to clarify the concept of competition policy.

The term competition policy is typically taken to include all government policies that influence the degree of competition in a nation's markets, including trade policy. Competition law³, in contrast, refers to a specific set of legal provisions concerning the manner in which firms collaborate and compete with one another. That set usually includes measures on cartels, other forms of interfirm collaboration (including so-called vertical restraints), mergers and acquisitions, and abuse of market power⁴. Competition law, therefore, is an element of competition policy but not vice versa. (Evenett, 2010, p.205)

In other words, competition policy is broader than competition law as it does not only cover private behaviors but also public policies. For instance, it includes governmental measures taken, and instruments used, with regard to state-owned enterprises, deregulation, subsidies and discrimination against foreign products or producers (Hoekman & Kostecki, 2009).

By ensuring a more efficient allocation of resources and economic efficiency, competition laws participate in the maximization of national welfare. Nevertheless, it is generally recognized that in some cases, anticompetitive practices can also contribute to improving welfare (Hoekman, 2009). The interaction between competition laws and innovation is a controversial question. "The debate of course traces back to arguments advanced by Joseph Schumpeter (1934, 1942) that large firms provide a more stable platform to invest in research and development and that perfect competition is not necessarily the most efficient market structure to promote R&D." (Gilbert, 2006, p.160). According to this approach, the Schumpeterian model promoting dynamic competition should be adopted in order to enhance economic welfare. The basic idea is that innovation can be fostered by anticompetitive behaviors such as monopolistic and dominant positions, whereas the neoclassical static approach

³ Even though it is also often referred to as anti-monopoly or antitrust law, for consistency purpose only the term competition law is used in this document.

⁴ More details about the business practices typically addressed by competition laws are given in appendix 1.

impedes technological progress and economic welfare (Sidak & Teece, 2009). This is not surprising then that views diverge significantly regarding competition policies, and that domestic competition laws are far from being uniform (Dawar & Holmes, 2012). Depending on the importance given to efficiency, social objectives and fairness, countries can adopt different positions (Hoekman, 2009). The dynamic approach argument, defended by the American competition authorities, is likely to be used by China in order to justify its competition policy (see *infra*).

2. LINKS WITH THE WTO

Now that the concept of competition policy is clarified, it is interesting to look at the links between competition policy, a purely domestic topic, and the WTO, an international organization. A first element is that domestic distortions undermine the positive consequences of trade liberalization, making trade multilateralism less valuable. Indeed, a number of conditions need to be fulfilled to ensure the benefits of trade liberalization can be realized, including the absence of domestic distortions that may hamper the adjustment and investment processes. Trade liberalization cannot support growth if the product, capital or labor market is distorted (Hoekman & Saggi, 2005).

Secondly, even though competition laws and WTO laws still appear as distinct, some targeting mainly private conduct at the domestic level while others focus on state conduct at the international level, they interact in some cases. If an anticompetitive behavior is somehow linked with state action, the two laws could conflict. Contradictions between the two laws were for example observed in a case opposing the US and China (Wang, 2012). State involvement is likely to arise seeing that anticompetitive behaviors can benefit the domestic economy (e.g. export cartels). According to Abbott and Singham (2013), actions from governments that aim at supporting private interests to obtain or retain artificial (foreign or domestic) competitive advantages is a major issue with which the WTO has not been able to cope so far. Hence, the need for international cooperation.

Thirdly, competition policies need to be considered by the WTO because they can give rise to various international external effects. It has largely been argued that competition laws were not needed if countries opened their borders, the reasoning being that when tariffs fall, incumbents' pricing power is undermined as foreign suppliers start offering their products at world prices. Nevertheless, other aspects make open borders and competition laws appear as complementary: "international trade policy and competition policy, properly applied, are mutually reinforcing methods for promoting welfare" (Abbott & Singham, 2013). First of all, domestic firms negatively affected by trade agreements are likely to try to hinder imports, which means that in the absence of an efficient competition policy, private barriers to trade can entail pecuniary externalities and nullify the fall of state barriers (Evenett, 2010). Market access arguments led some countries, mainly the US and the EU, to call for international cooperation on competition policy. These private barriers can take different forms, such as foreclosure and abuse of

dominance (Hoekman & Saggi, 2005). Taking the Japanese example in the 1980s and 1990s, reductions in import tariffs did not mean better access to that market because of agreements among domestic manufacturers, wholesalers and retailers, which made it impossible for foreign players to use the local distribution channels (Evenett, 2010).

Besides market access, international external effects also appear when mergers between foreign firms increase prices on export markets (Hoekman & Saggi, 2005) and when international cartels restrict output or raise prices (Evenett, 2010). Competition laws follow the “effect doctrine”. It means they apply to any action having an anticompetitive effect in the jurisdiction, even when that action is not carried out in the same jurisdiction (Herdegen, 2016). Theoretically, national competition authorities in territories affected by international anticompetitive practices such as export cartels could use their domestic antitrust law against these behaviors. However, the problem is that many developing countries face capability constraints to do so (Hoekman & Saggi, 2005). Research in the 1990s revealed the magnitude of the impact for developing countries (Evenett, 2010). Indeed, market conditions in developing countries are said to create favorable conditions for anticompetitive practices (Dawar & Holmes, 2012). In addition, as already mentioned, these anticompetitive practices can be facilitated by national trade laws in some cases.

Competition policies also influence international trade because of transactions costs. The lack of harmonization of mergers and acquisitions standards and requirements across jurisdictions gives rise to additional costs and can result in conflicts (Hoekman & Saggi, 2005). Regarding mergers and acquisitions, an additional issue is that the effects on competition are examined at the national level instead of taking into account all relevant cross-border spillovers (Evenett, 2010).

Considering all these elements, competition policies appear as an important issue for an organization whose goal is to promote international trade. It supports the calls for international cooperation on competition policy, calls that are in line with the developments observed in international trade agreements: even though the main focus is still on national trade policies that generate monetary spillovers, “behind the border” policies – legal and regulatory factors having indirect effects on trade – are increasingly prevalent in negotiations (Hoekman & Saggi, 2005). Ultimately, competition and trade policies have the same objective: ensuring the efficient operation of markets to create productivity gains and support economic growth (Gadbaw, 2016). However, it has been shown that today, competition authorities adopt a national perspective to evaluate anticompetitive practices with an international dimension. Consequently, this objective cannot be reached at the global level.

3. COMPETITION POLICY IN THE WTO

Taking into account the links between competition policies and the WTO, it is not surprising that the topic has been brought to the table by some members of the organization. Although some aspects have been included in agreements, competition policy is currently only vaguely addressed by the WTO. It was argued that “most of the provisions are weak, have seldom been used and even more seldom used with success, and are geared to serving specific narrow needs” (Woolcock, 2002, p.16). In a UN paper, it is stated that “WTO law as expressed in the Generally Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Service (GATS) does not establish general obligations for members to affirmatively create internally competitive markets, nor require them to take affirmative action or provide remedies against private operators engaging in restrictive practices that affect the trade of other Members. Only a few exceptions are noted ...” (UNCTAD, 2003, p. iii). The main references to competition policies in the WTO texts are hereunder gathered.

GATT

A major issue that appears in GATT is state-trading enterprises (STEs), which are not defined by their ownership but by the presence of exclusivity or special privileges. It is widely recognized that these are likely to distort competition. The GATT article is worded in such a way that it potentially applies to a wide range of activities. The basic principle is that member states are obliged to ensure that the principle of non-discrimination is not violated by STEs’ activities (see Appendix 2) (Hoekman & Kostecki, 2009). For instance, provisions limit the use of import monopolies (GATT 1947).

As important in terms of competition policy is the provisions on anti-dumping. Anti-dumping policies aim at reducing the effect of a specific type of anti-competitive practice. However, Hoekman and Kostecki (2009) claim that dumping is rarely an anticompetitive practice. Although this remains controversial (WTO, 2017b), the main issue appears to be that abuses of anti-dumping measures can distort competition, for which WTO rules have been developed. An article was included in the GATT (see Appendix 3), that was then completed by the Agreement on Implementation of Article VI. This highly technical and complex agreement results from a complicated process to find a consensus on the matter. The use of anti-dumping measures has significantly expanded compared to when the GATT article was negotiated, a disproportionate part of which targeting China. A number of member states are therefore willing to strengthen the rules in the context of the Doha Round (Hoekman & Kostecki, 2009). Currently, the basic idea is that anti-dumping measures are allowed when there is a genuine injury to the competing domestic industry. That means that member states need to prove that dumping is taking place, be able to calculate the extent of dumping and demonstrate that it causes injury or threatens to do so (WTO, 2017b).

The GATT also addresses the problem of cartels through its article on quantitative restrictions, since export cartels create a restriction on exportation. It could be argued that it also applies to cartels setting prices, as they limit the volumes sold. Still, for this article to apply, the government must be involved in the cartel. Although the level of involvement is not clearly stated, a passive behavior could be argued to be sufficient. This means that under the GATT agreement as it exists today, cartels could be attacked as long as there is a national enforcement capacity (Hoekman & Mavroidis, 2002) (see Appendix 4).

Next, GATT article covering non-violation cases⁵ could be used for competition issues as well, for instance in case the absence of competition nullifies the benefits from market access commitments. This article, however, does not appear as a solid alternative to an agreement on competition policy for two main reasons. The first one is that in practice it is particularly complicated to prove nullification. Second, seeing that no rules have been agreed on regarding national competitions laws, rulings would be based on WTO jurisprudence. That means competition policy issues would be analyzed according to market access considerations instead of competition criteria (Woolcock, 2002) (see Appendix 5).

Lastly, the article on national treatment, prohibiting discriminatory taxation, could be mentioned as well (Abbott & Singham, 2013) since it ensures fair competition to importers.

AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES (SCM)

Competition policies refer to private but also public action. Interactions between subsidies and competition appear mostly when subsidies are used to engage in predatory pricing, but also when it is used as a tool to deter international mergers (OECD, 2010). The SCM agreement covers two dimensions: the use of subsidies and of countervailing measures (i.e. actions taken to counter the effects of subsidies granted in other countries). Under the agreement, members have the possibility to resort to both the WTO's DSB and countervailing measures when subsidized imports injure domestic industries. Most forms of subsidies are allowed under the Agreement (see Appendix 6) and developing countries benefit from special provisions that are considered as the most far-reaching of all WTO provisions of this form (WTO, n.d.). With its narrow definition of subsidies and its application to goods only, the Agreement is then considered as relatively permissive (Hoekman & Kostecki, 2009), with limited effects (OECD, 2010). This explains why the topic was included in the DDA again (WTO, 2017f).

Note that subsidies and countervailing measures were already a key issue in the first round of negotiations. An article in GATT 1947 was dedicated to the topic. Yet, the original rules were quite general and this is why it was brought back to the table of negotiation as part of the Tokyo Round. It

⁵ Situations when a member considers that some measures nullify or alter the benefits of an agreements even though they do not violate WTO rules

led to the creation of the so-called "Tokyo Round Subsidies Code", or "Subsidies Code", a plurilateral agreement on the implementation and application of the GATT articles on subsidies. Given its limited success, it was put again on the negotiating agenda of the Uruguay Round, which resulted in the SCM Agreement (WTO, n.d.).

GATS

Taking into account that services often go together with measures to address market failures or achieve social objectives (e.g. transport, energy, telecoms), competition policies seem particularly critical there. But even though the importance of dealing with anticompetitive practices is recognized in the GATS, no obligation is included except taking part in consultations upon request (see Appendix 7). It is however completed by an article aiming at ensuring that monopolies (defined in a restrictive way) do not undermine the benefits of the agreement (see Appendix 8). In practice, the effect of these two articles appears as very limited (Hoekman & Mavroidis, 2002). In contrast, some WTO sector agreements involve specific obligations regarding competition policies. For instance, the Understanding on Commitments in Financial Services deals more strongly with monopolies (Woolcock, 2002). Similarly, the agreement on basic telecommunications includes concrete provisions in order to avoid that anticompetitive behaviors nullify the benefits of the negotiated market access commitments, as such practices are particularly likely to appear in the telecoms market (see Appendix 9). However, it is important to keep in mind that the sector-specific agreements are only binding for the subset of member states that voluntarily decided to make commitments for these activities, and that uncertainties remain as to the interpretation (Hoekman & Mavroidis, 2002).

TRIMS

A reference to competition policies was included in the agreement on Trade-Related Investment Measures (TRIMS), but only stating that the need for it should be studied in a future review of the agreement (see Appendix 10). No consensus could be found so in 2006 it was decided that, upon request, the topic could be brought back to the table during a subsequent meeting (WTO, 2017a).

TRIPS

The WTO agreement on the trade-related aspects of intellectual property rights does not only aim at protecting property rights. It also includes measures to prevent their abuse, given that it could negatively affect trade and dissemination of the technology. It states that member states can take measures to prevent anticompetitive situations from emerging (see Appendix 11). Since opinions diverged between develop and developing countries as to the rule that should be used in order to identify anticompetitive practices, ambiguous language was used. It means that WTO members are free to determine their own methodology in their national laws, according to their national interests (Scherer & Watal, 2014).

Other WTO agreements include elements of competition. For example, according to the Agreement on Technical Barriers to Trade, standards cannot be more restrictive on trade than is necessary (Woolcock, 2002). Similarly, the agreement on Sanitary and Phytosanitary Measures requires member states to adopt the least trade restrictive measures. Nevertheless, it is worth noting that these provisions can easily be circumvented as the restrictive dimension of the measures needs to be proved (Hoekman & Mavroidis, 2002). Lastly, provisions in the plurilateral Government Purchasing Agreement can be mentioned, as they can be applied against bid rigging (Woolcock, 2002).

4. GOING FURTHER?

BEFORE THE WTO WORKING GROUP

There has been much discussion on competition policy in international forums since the late 1990s. However, the topic of international cooperation in competition policy is a long-standing one and it is worth looking a little further in the past first. It is interesting to note that actually, discussions about international competition laws took place before most countries adopted domestic competition laws (Dawar & Holmes, 2012). In 1927, during the Geneva International Economic Conference that represents the first attempt to create an international economic framework, competition appeared as a major aspect to consider (Gerber, 2007). Then, the draft of the charter that was supposed to serve as basis for the establishment of the ITO in the late 1940s also included a number of articles on competition. It reflected concerns, driven by the development of German cartels and Japanese zaibatsu in the pre-war period, that international cartels and restrictive business practices (RBPs) could hinder market access (Hoekman & Saggi, 2005). Nevertheless, the chapter on RBPs was rejected by the US Congress (Evenett, 2010). In the 1960s, after the ITO project fell apart and was replaced by the GATT, discussions took place as to whether provisions on RBPs should be included. No consensus was found on the substance that they could take and it was abandoned, partly explained by the reluctance to lose autonomy on this matter but also because concerns about cartels had been alleviated (Woolcock, 2002).

Nonetheless, in 1980, after almost 10 years of negotiations, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was adopted as part of the United Nations Conference on Trade and Development (UNCTAD) to deal with RBPs by multinational enterprises (Dawar and Holmes, 2012). It mainly reflected the desire of developing countries to be better protected against RBPs of multinationals. Provisions, among which only a few were concrete, were not binding. Consequently, its scope was limited, especially when considering the provisions that were included in regional and bilateral agreements afterwards. However, the model for competition policies that was proposed, together with the technical assistance and support offered, helped a number of developing countries with their national competition laws (Woolcock, 2002).

The development of the international economy quickly drew attention to the topic again. In the 1980s, the US became particularly concerned about competition policy issues because of the Japanese keiretsu threatening to nullify the benefits of WTO negotiations. Generally, during the 1980s and 1990s, in the context of market globalization characterized by a growing number of cross-border mergers and acquisitions, and possibly anticompetitive effects and abuses of dominance, national competition authorities increasingly showed an interest in international cooperation as they feared it could give rise to conflicts (Hoekman & Mavroidis, 2002). Cooperation was achieved at different levels: regionally, bilaterally, plurilaterally or multilaterally.

At the same time, it became clear that competition policies played an important role for market access as well. There were concerns that the public restraints on trade that had been lowered with the GATT could be replaced by private restraints. These fears stemmed from the wave of privatization and deregulation in many economies, leaving space for private monopolies and market dominance. It led some countries to propose to develop an international regime for competition policy within the WTO (Woolcock, 2002), to deal with private behaviors (Papadopoulos, 2010). This suggestion was not supported by the whole membership. While the EU was pushing for negotiations, driven by cases of mega-mergers and cartels, it faced resistance from the US, reluctant to be subordinated to an international regime on the one hand and to change existing laws on the other hand (Hoekman & Kostecki, 2009), and from a large group of developing countries (Gerber, 2007). The predominant motivation in favor at that point was market access (Hoekman & Kostecki, 2009) and the main arguments against were the diversity of existing national competition policies, and even the absence of it for many small or developing members, the fact that a problem of lack of resources would arise for implementation, that it would not be in many developing countries' interests to make it a priority anyway (Woolcock, 2002), and that competition rules could be politicized given the complexity of the evidence for the dispute resolution system (Papadopoulos, 2010). Although small developing countries recognized their need for assistance to deal with anticompetitive behaviors by multinationals (Hoekman & Kostecki, 2009), in general developing countries expressed concerns that their interests would not be included in an agreement and that instead it would be used to ensure better market access for firms from developed countries (Gerber, 2007). This reflects the general distrust in the WTO that was mentioned previously. For Asian countries, mostly Japan and Hong Kong, competition policy was not a main issue for the WTO. They gave the priority to traditional measures of contingent protection restricting market access such as antidumping (Hoekman & Kostecki, 2009).

Competition policy was one of the four so-called Singapore issues that were suggested for negotiations at the 1996 WTO ministerial meeting. By way of reminder, the Singapore issues cover four areas where there have been significant disagreements between developing and developed countries on their inclusion in the WTO agenda: government procurement, trade facilitation, investment policy and

competition policy. The question was first raised in Singapore but remained predominant in the subsequent negotiations and is said to reflect the North-South dissensions in the WTO (Narlikar, 2005).

WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY

Although the proposition to add competition policy on the WTO agenda was rejected, in 1996 it was agreed that a Working Group should be established to analyze the relationship between trade and competition policies. All WTO members were to participate (WTO, 2017e). In 1998, a first report was issued but it only recommended that discussions should be continued (Hoekman & Kostecki, 2009). Then, in 2001, during the WTO ministerial meeting in Doha, it was agreed that negotiations on the Singapore issues were to be launched at the next ministerial conference, in 2003 in Cancun, on the basis of modalities to be agreed by explicit consensus. The inclusion of the Singapore issues into the DDA was made possible by skillful last-minute negotiations and the use of ambitious language, which in the end led to different interpretations within the membership. While developing countries assumed it implied that consensus was necessary in order to start any negotiation on this matter, for developed countries it meant that the decision was made to start the negotiations and that only modalities would be negotiated (Narlikar, 2005).

Inevitably, it generated complications in Cancun. A coalition of developing countries, the so-called “Core Group” stood against the interpretation of the developed countries. It also brought other countries to form a coalition: the African group together with the African, Caribbean and Pacific (ACP) countries and the least-developed countries (LDCs) created the G90. Their first objective was to resist the inclusion of the Singapore issues. The Chair of the General Council managed to use his influence to integrate Singapore issues in the draft text of the Ministerial Conference. With bilateral discussions, the Quad could break the opposition: African countries accepted the negotiations against some concessions. A revised text, the Derbez draft, was then issued. While it was supposed to act as a compromise text, it represented a failure for developing countries since a major step forward was made regarding the inclusion of government procurement, trade facilitation and investment policies. No such progress was however made with regard to competition policies: it remained quite vague, without immediate binding commitment, leaving this topic to the clarification stage. Eventually, the Derbez draft led to the breakdown of the negotiations in Cancun. Together with agriculture and cotton, the Singapore issues are considered as one of the major factors that led to the impasse the WTO encountered at the Ministerial Conference (Narlikar, 2005).

Eventually, in 2004, as part of the July Package, it was decided that competition policy would be removed from the DDA, even though negotiations could be reopened in the next round. It is worth having a closer look at the different positions on this matter. The main proponent was still the EU, with the objective of having all WTO members commit to a competition law. Interestingly, the EU was

however reluctant to make concessions on the help it could provide to deal with anticompetitive behaviors from its firms in developing countries. The proposals faced the opposition of the US and a majority of developing countries. In the case of the US, the main motives were a general satisfaction with the current application of its antitrust law and its extraterritorial effects, and a willingness to keep an influence by providing its own assistance. Even though developing countries recognized the negative effects of international cartels, considering their level of development, they showed little interest in the topic. In addition, they lacked confidence in the genuine agenda of developed countries, perceiving mainly market access motives, and expected an agreement adapted to their specific situation (Dawar & Holmes, 2012). This is consistent with the different positions adopted by these countries when the idea of cooperation on competition policies in the WTO framework was first brought to the table. In the end, from the four Singapore issues, only trade facilitation was kept on the agenda (Narlikar, 2005). The other three areas, a major source of tension with developing countries, were abandoned (Fontagné & Jean, 2013).

The fact that no consensus could be found despite seven years of work reflects the complexity of the question, especially when we consider that major adaptations to the initial expectations were made. In 2001, it had been decided that the Working Group would focus on four aspects: the core principles (i.e. transparency, non-discrimination and procedural fairness), provisions on hardcore cartels, modalities for voluntary cooperation and support for progressive reinforcement of competition institutions in developing countries through capacity building (WTO, 2017e). Between 1996 and 2003, the scope of the discussions had evolved as the areas in which an agreement could be reached were better identified (Woolcock, 2002). While international spillovers were a major reason to strengthen cooperation initially, the focus had shifted to the national benefits of competition laws and the positive effects it has for the global trading system. Although at first there had been calls for the creation of a supranational body to address international competition issues by harmonizing competition laws, the idea had been abandoned during the discussions as competition authorities and governments were not willing to lose their discretionary power. Market access is also a major element that had been largely abandoned, as export objectives were not consistent with the main focus of competition laws, namely national welfare. Important elements were barely discussed, such as the right to ask for investigations in other countries or measures to deal in developed countries with anticompetitive behaviors taking place in developing countries, some possibilities were not even mentioned, such as issue linkage between measures against export cartels and market access commitments, while lobby groups managed to shatter the proposition of using competition policy regulation to deal with abuses of anti-dumping measures (Hoekman & Saggi, 2005). Even what had been maintained, the provisions on core principles, would have been difficult to apply to de facto implementation (Woolcock, 2002). Consequently, just before Cancun, the scope of the proposals was narrow. It focused on national enforcement of competition laws and assistance, both technical and financial. The only exception was the provision on hard core cartels but

it was unlikely to explicitly include export cartels. The payoff then appeared as very limited for many member states. It is interesting to note that the discussions centered almost solely on private practices and their regulation, without paying much attention to governmental policies with potential anticompetitive effects and international negative spillovers (Hoekman & Saggi, 2005).

VOLUNTARY COOPERATION

In the course of the discussions in the Working Group, a number of member states emphasized the importance of voluntary cooperation. Some fora for cooperation were established and others were strengthened. This happened outside the WTO, without any binding commitments (Hoekman & Saggi, 2005).

At the multilateral level, the International Competition Network (ICN) was established in 2001 so that regulators, government officials and private actors could share information. It aimed at improving national policies without adopting a top-down rule making approach and developing good practices that could result in voluntary convergence of standards. Today, with its unlimited membership and the results achieved to bring consensus on substantive rules, the ICN appears as the most powerful initiative in the matter. However, even though this innovative form of collaboration is successful, the actual impact in terms of adoption of common practices is unclear (Gadbaw, 2016). Interestingly, it works as an inter-agency entity and not an inter-governmental body, reflecting the competition authorities' willingness to remain independent from trade negotiations (Hoekman & Saggi, 2005).

At the plurilateral level, in the OECD framework, guidelines for cooperation were developed and considerable work was done on substantive policy matters. Already in 1967, the OECD had started to tackle competition policies after GATT contracting parties failed to find an agreement on this topic (Woolcock, 2002). Since then, a number of non-binding Recommendations on competition law and policy were adopted and Best Practices were developed (see Appendix 12) (OECD, 2017). For example, when a stronger need for international cooperation on competition policy arised in the 1990s driven by cases of mega-mergers and the desire to fight cartels, the Recommendation on Hard Core Cartels was adopted (Hoekman & Saggi, 2005). Interesting concepts that emerged under this framework are the negative and positive comities, with which members commit to taking each other's interests into account. In the case of the positive comity, a Member affected by an anticompetitive behavior (e.g. cartels) originating in another jurisdiction may request that jurisdiction's competition authority to take action against this behavior, as long as both members are affected. As for the negative comity, it applies when a Member refrains from applying its competition law in a specific situation because it goes against another member's policy (e.g. international mergers). Even though the results are limited so far, that indicates a willingness to go further on this matter (Dawar & Holmes, 2012).

Since 1994, the APEC (Asia-Pacific Economic Cooperation) is also considering non-binding provisions on the topic (Dawar & Holmes, 2012). As of 2010, binding provisions on competition law were included in more than 80 free trade agreements (Evenett, 2010). Chapters on competition policies are included in one third of the free trade agreements involving the US (Gadbaw, 2016). Even though the impact has not been demonstrated, this indicates the importance of competition issues for the international community (Evenett, 2010). Besides, although the regional and bilateral agreements are mainly between countries with advanced domestic competition policies, developing countries are increasingly involved as well. If no multilateral approach is agreed in the DDA, this trend is likely to continue (Woolcock, 2002). It is interesting to note the evolution of the developing countries' positions on the topic: while they stood against the inclusion of provisions on competition law in the WTO, they have agreed to integrate some, even though rarely binding, provisions in their bilateral and regional trade agreements (Dawar & Holmes, 2012).

According to Hoekman and Saggi (2005), the trend towards deeper voluntary cooperation does not mean that the discussions that took place in the WTO to develop binding rules on competition law were a failure. Those discussions fostered stronger cooperation and even though it is taking place outside the WTO framework in a non-binding form, this is positive. Indeed, it can reveal possibilities for binding cooperations and emphasize its potential benefits.

5. FUTURE PERSPECTIVES

The Working Group experience indicated that there was little support for negotiations on a harmonization of competition norms, and even less for the creation of a global competition authority. In this context, what are the perspectives for the future of this question in the WTO framework?

NEW NEGOTIATIONS ON COMPETITION POLICY COULD TAKE PLACE IN THE WTO

Besides the general reasons for international cooperation on competition policy that were previously elaborated, a number of developments since the failure of the Working Group reinforce the rationale for WTO negotiations on this matter.

First of all, trade has evolved considerably. Markets are now largely globalized, with a significant number of cross-border mergers and acquisitions, generating a higher number of anticompetitive practices involving different states and also more international spillovers from the enforcement of national competition laws (Herdegen, 2016). In this context, the scope of action of competition authorities, limited to their own jurisdiction, does not seem adapted to the new needs. A more globalized world also means that there is a risk that competition policies are used strategically by authorities, as it was the case in the US in the 20th century when the absence of harmonization of merger standards

between States led to a race to the bottom in order to attract businesses (Hoekman & Kostecki, 2009). In this new economy highly dependent on international trade, cases of countries such as China, where private anticompetitive conduct is mixed with state conduct and gives rise to significant spillovers, could encourage some powerful WTO members to bring back this topic to the table.

In the past decade, the world has also evolved towards more multipolarity. As new countries have started challenging the US economic and political power, they have also started challenging the superiority of the American antitrust law and according to Gadbow (2016), this leads to increasing efforts to collaborate.

Then, in the first part, the increased use of anti-dumping measures was mentioned. Several countries, mainly from East-Asia, have argued that an agreement on competition policy would set competition law criteria that could be used as a tool to investigate competition-reducing trade and investment policies such as anti-dumping (Hoekman & Saggi, 2005). A number of trade agreements go in that direction, but the use of competition policies to address the abuse of anti-dumping sanctions remains controversial (Dawar & Holmes, 2012).

Another major development is in terms of knowledge and experience with competition laws. Hoekman and Saggi (2005) claim that in order to agree on binding commitments, countries need to have a minimum level of knowledge and experience about the topic. This was not the case for an important fraction of the WTO membership during the last negotiations. However, since then, more and more developing countries have started dealing with competition issues (Woolcock, 2002). Besides, as described above, voluntary mechanisms of international cooperation were created and/or strengthened. Not only does it mean that WTO members would now be more inclined to improve their competition policies but also that they benefit from a clearer picture of the situation. The latter is important as countries are then able to objectively evaluate the costs of not having a binding framework, and can also better assess the implications of an agreement (Hoekman & Saggi, 2005). The work that has been done could also form a good basis for a future WTO negotiations, as it was the case for some provisions in the Trans-Pacific Partnership (Gadbow, 2016). Nevertheless, the development of new agreements on competition policy also means there is now a multiplicity of provisions on the matter, coming from multilateral, plurilateral and bilateral sources. Without multilateral norms that ensure all those provisions – sometimes with an extraterritorial reach – are compatible, it could result in conflicts between national policies, extra difficulties for third countries to deal with international RBPs and significant costs of compliance for private actors (Woolcock, 2002).

Some changes within the WTO need to be taken into account as well. The majority of public restraints on trade, such as measures at the border, have been removed through WTO commitments. However, as already mentioned, it was noticed that this progress could be nullified by other barriers to trade. This is the case when private actors, supported by the government or not, engage in anticompetitive behaviors.

Therefore, it seems natural that WTO members now ask for commitments of a new nature. Competition provisions are needed to help facilitate market access and potentially to replace trade remedies for anticompetitive practices such as dumping (Woolcock, 2002).

Besides, the question of competition policies could open the door to renewed negotiations in the WTO. The obstacles that the organization is facing have been described in the first part. In the current circumstances, the likelihood of making significant progress on market access liberalization commitments and gaining more reciprocity from developing countries appears as very low. Negotiations on competition policy could help in that regard. Indeed, developing countries can be reluctant to further open their borders because they could be subject to increased foreign anticompetitive behaviors. In the absence of an effective competition authority, trade policy may be the only tool they have to protect against those (Hoekman & Saggi, 2005). As mentioned earlier, developing countries have recognized the importance of an effective competition policy and law and could, therefore, support an agreement that could help them in that regard.

The previous arguments indicate a stronger need for international cooperation in the future, but not especially in the WTO context. Woolcock (2002) argues that the WTO would be the right institution to tackle it, first of all, because trade and competition are increasingly connected. In addition, it offers a binding rules-based system that would be more efficient than the soft approach used in other contexts. Woolcock also mentions the benefits for small and or developing countries. Taking into account WTO rules and the voting system, the interests of these nations could be better protected than in regional or bilateral agreements. Lastly, the WTO could provide a multilateral framework for bilateral agreements as well.

MAJOR OBSTACLES TO NEGOTIATIONS ON COMPETITION POLICY PERSIST

In spite of the aforementioned arguments, some argue that a binding international framework for competition policy seems unrealistic today (Herdegen, 2016) and that voluntary cooperation and bilateral or regional agreements would be best (Woolcock, 2002). A number of elements can support this position. First of all, it is important to emphasize the complexity of negotiations on this topic, as demonstrated by the seven years of discussions with the Working Group, which did not lead to any consensus, and similarly to many other cases now that most tariffs have been lowered. The first major obstacle is that there are important national interests at play (Hoekman & Kostecki, 2009). Naturally, authorities are willing to protect their national champions and to prevent foreign takeovers. According to Dawar and Holmes (2012), the differences in domestic competition laws are explained by the distinctive political and economic pressures in each country. Woolcock (2002) claims that developing countries are particularly reluctant to make binding commitments given that promoting domestic industries is even more important for them. Besides, exchanging concessions is complex since, unlike

tariffs, there are no clear incremental changes. Reciprocity in this matter is also more difficult to achieve. The fact that competition law is originally purely national does not make negotiations easier either (Hoekman, 2009).

In addition, a harmonization of competition provisions seems complicated because the definition of RBPs differs across countries and is even interpreted on a case-by-case basis within countries (Dawar & Holmes, 2012). Woolcock (2002) also argues that a “one size fits all” approach would not be appropriate considering the different situations and needs of WTO members as far as competition policies are concerned. According to Abbott and Singham (2013), national competition laws are based on assumptions and perceptions that are so different that it would be impossible to reach a consensus. Therefore, voluntary cooperation is essential in order to gradually converge towards shared best practices.

The compliance costs that an agreement would generate represent a major obstacle as well (Woolcock, 2002). This is the case for developing but also for large developed countries. Not only would new binding provisions imply direct costs (e.g. implementation of enforcement measures), but that would also involve indirect costs due to the possible negative impact on national welfare (e.g. ban of export cartels). In order to overcome the reluctance that it would generate, developing countries might have to make commitments in other areas than competition (Hoekman & Saggi, 2005).

Actually, Gal (2003) argues that a competition regime cannot be successfully implemented in developing countries with low levels of economic development. There is a number of examples of countries that have adopted competition laws which remain unenforced because of institutional, regulatory and bureaucratic obstacles. Dawar and Holmes (2012) note that, taking into account the specific environment of developing countries, one that is poorly adapted to a competition law, sufficient domestic competition in small economies at an early stage of development could be ensured through open trade and FDI policies.

At the same time, it can be argued that competition policy, as a non-trade issue, should not be the priority in the WTO. Not all public barriers to trade, such as agriculture, have been abolished. member states should focus on these issues instead of trying to expand the scope of the WTO. What is more, it would eventually lead to more contestable markets and less risk of anticompetitive behaviors (Woolcock, 2002). Especially in the current circumstances of the Doha Round, it seems that other issues need to be dealt with in priority. This argument is even more valid when taking into account past analyses showing that in some cases cooperation in this field could have worse consequences than the status quo (Hoekman, 2002).

According to Gerber (2007), a major factor that explains the failed inclusion of competition law in the past is the lack of confidence in the WTO as an organization that acts for the whole membership. Unless

confidence in the importance given to the “community” in the WTO is boosted, it means an agreement could hardly be found. That includes demonstrating that the interests of all members are respected, overcoming long-lasting conflicts, particularly between developed and developing countries, to develop a perception that their interests are aligned, and spreading the idea that they all share common interests, for example the effectiveness of WTO procedures or the economic development of developing countries. The current deadlock of the negotiations clearly indicates that this remains a major obstacle today.

A NEW AGREEMENT ON COMPETITION POLICY

Assuming that resistance is overcome and that, driven by all the aforementioned reasons, WTO members decide to start again negotiations on the topic, a number of questions arise as to the form an agreement could take. Since 1944, the US antitrust law has played a predominant role for competition matters globally. But today the US regulatory hegemony is challenged, by the EU but also increasingly emerging markets and mainly China (Gadbaw, 2016). It means that the US model could not serve as basis for a WTO competition law, as it could have been the case in the past, and that something new and independent needs to be negotiated.

A first aspect to consider is the harmonization of competition regimes. In the past, proposals focused on improving national policies and their enforcement. According to Hoekman and Saggi (2005), the WTO is not the right context to deal with that. Woolcock (2002) goes further and claims that harmonization is not necessary as such. The first reason is that national competition authorities could deal with international spillovers of RBPs, especially if they cooperate. The second reason is that domestic policies diverge and evolve, making international harmonized rules ineffective and rigid. According to Dawar & Holmes (2012), the progressive erosion of the differences in domestic competition laws over time is not strong enough to enable countries to agree on an international framework. However, in the long term, the voluntary cooperation mechanisms implemented as well as the bilateral and regional agreements could help reach an agreement.

The question that then arises is whether all members should be required to have a national competition authority. Even though it is more and more common, it may not appear as a priority for many countries, and even useless to some others. Yet, according to Dawar and Holmes (2012), competition laws are less relevant in developing countries that cannot rely on an effective competition regime and where their economy is dominated by small- and medium-sized enterprises, most of them doing business informally. In the absence of a competition authority in a number of countries, it could be more difficult to find an agreement (Woolcock, 2002).

Another major point to decide on would be whether there should be binding commitments, enforced through the usual WTO tools, or rather a voluntary framework of cooperation with technical assistance

and capacity building similar to the outcome of the Working Group's discussions. This depends on the costs and benefits of not having binding provisions. As already mentioned, voluntary cooperation enables countries to have a clearer view on this. A voluntary approach could help gain the support of all WTO members and at the same time lead to the development of commonly agreed good practices (Hoekman & Saggi, 2005). Nevertheless, Woolcock (2002) argues that voluntary cooperation has proven unsuitable for competition policy issues. It is interesting to note that in the context of the Trans-Pacific Partnership, the parties agreed on a combination of soft and hard laws, the second approach being applied for provisions on SOEs (Gadbaw, 2016). Such a mix could be beneficial for the WTO case as well: binding provisions could be limited to the priority matters in the first place, and be later on expanded to secondary or more sensitive topics. Even though there would probably be little discussion on this, in any event, technical assistance and capacity building should be provided. According to Dawar and Holmes (2012), experience with agreements between parties with different levels of development indicates these mechanisms help achieve better results. Commitments should then only be implemented once a certain level of expertise and cooperation is reached.

The question of enforcement is also an important one. Indeed, experience shows that the *de jure* competition policy itself is not a guarantee, and therefore that *de facto* implementation should be regulated even though it is much more difficult to address (Woolcock, 2002). If a multilateral agreement was to be adopted, a number of countries would face implementation difficulties as it would not be adapted to their national ideological environment. External supervision and pressure for enforcement then seem essential. Examples of failures when no enforcement mechanism was foreseen speak for themselves. The competition provisions on competition policy adopted by the Mercosur group is one of those cases: in this context, similar to that of the WTO as it is characterized by significant differences in the level of economic development of the countries, competition provisions have not been implemented effectively because of the sometimes inadequate national structural and behavioral environment (Dawar & Holmes, 2012). The "state of competition" is extremely difficult to quantify but supervision is said to be feasible. It is important to note however that in the absence of any international negative spillovers, the risk is that provisions are not enforced because WTO members have no incentives to bring cases to the DSB. In that case, domestic enforcement mechanisms should be part of the agreement (Hoekman & Saggi, 2005).

In addition to this, a controversial question would be that of the support to developing countries. The questions of a special and differential treatment (e.g. schedules, exemptions) and technical assistance have been raised. Developing countries ask for it. For instance, they want to be able to impede foreign acquisitions and support the development of "national champions" to boost their national competitiveness (Woolcock, 2002). In the previous proposals, even though assistance was foreseen, the burden of enforcement was put on developing countries. Alternatively, developed countries could regulate anticompetitive behaviors from their firms having an effect in developing countries (Hoekman

& Saggi, 2005). In the last WTO discussions on the topic, there seemed to be general acceptance that developing countries should benefit from a special and differential treatment in order to limit compliance costs and adapt to their needs (Woodcock, 2002). Since then, as explained earlier, developed countries have increasingly asked for reciprocity. Consequently, negotiations on the exclusion of some sectors for instance can be expected to be particularly sensitive.

The core principles that would govern an agreement should also be raised. It appears difficult to include some of the WTO principles. According to the UN, “it is recognized that competition laws tend to be inherently compatible with the elements of non-discrimination and most do not appear to have difficulty in meeting transparency and due process concerns” (UNCTAD, 2003, p.1). This is nuanced by Woolcock (2002). For instance, he states that transparency is feasible to respect *de jure* but the *de facto* application would be more complex because each case is different but important. Similarly, in the case of non-discrimination, the question is about the MFN application to bilateral or regional provisions.

Moving on to the substantive provisions that could be included, a number of categories can be distinguished. During the Working Group’s discussions, there seemed to be a consensus about hard core cartels, in other words, cartels that do not have any beneficial effects in terms of welfare. The current loophole (i.e. cartels with no effect on their domestic market are not regulated by their jurisdiction’s competition authority) can indeed distort trade. The need to include vertical agreements is more controversial and establishing the modalities would be particularly challenging. The topic of mergers and acquisitions is also a very sensitive one seeing the predominance of national interests. A last category of provisions could touch on public distortions to competition, for example, subsidies or exclusive rights and privileges. Even though this is already included in agreements between developed countries and provisions already exist in the GATT and GATS (see *supra*), it seems that there is a need to go further (Woolcock, 2002). Deepening rules governing STEs is of high importance to the US especially (Hoekman & Kostecki, 2009). As for procedural provisions, several elements would need to be discussed, such as the creation of a committee for cooperation despite the fact that it already exists in other frameworks, cooperation on the implementation of laws and due process (Woolcock, 2002).

6. CONCLUSION

Although competition policy is originally a purely domestic topic, it is closely interlinked with international trade: the benefits of trade multilateralism cannot be reaped when domestic markets are distorted, competition and WTO laws can conflict in some cases and competition laws can give rise to numerous international external effects such as the emergence of private barriers to trade, anticompetitive practices by merged firms or cartels, and transaction costs. However, despite numerous initiatives in the past, not much is done currently to address competition issues at international scale. Few provisions on the matter are included in the WTO agreements, whether it is to regulate private or

public anticompetitive practices, domestically or abroad. STEs, anti-dumping measures, cartels, subsidies, monopolies and abuses of property rights are examples of topics that appear in the texts. Yet, they remain vague, limited and rarely used.

Hence the calls from some countries in the past, especially the EU, to introduce binding competition law disciplines into the WTO. A working group on the topic could be established but due to strong resistance from the US and a number of developing countries, it was abandoned. While the US was willing to maintain its influence, developing countries did not see it as a priority and were skeptical about the genuine agenda of developed countries. Yet, the discussions that took place emphasized the need for voluntary cooperation and progress was made in that regard. This does not mean that there is no scope for more cooperation on competition policy in the WTO framework. Some developments could trigger new negotiations: markets are more and more globalized, the US hegemony is increasingly challenged, anti-dumping measures are misused, knowledge and experience in this field are now stronger, business practices undermine efforts made to lower barriers to trade and investment, and negotiations need to be unblocked. What is more, the developing countries' position, characterized by a strong reluctance to include Singapore issues, seems to have evolved as well, since they have entered into bilateral and regional agreement including competition provisions in the meantime.

Many complicated questions would however arise. Should all competition regimes be harmonized? Should all member states be required to have a competition authority? Should commitments be binding or should policy convergence be sought through strengthened voluntary cooperation? Should the agreement focus on enforcement? How should developing countries be treated? What topics should be addressed? Opinions differ on all these questions. Still, many obstacles remain before agreeing on even launching negotiations. It is sometimes claimed that the WTO is not the right context to tackle competition issues and that countries should stick to voluntary cooperation, because of the complexity of the negotiations on the topic, the variety of competition laws, high compliance costs, differences in development levels, and fundamental problems that the WTO need to tackle beforehand. Interestingly, the questions that arise in this debate reflect fundamental challenges that the organization is facing today: handling the interests and situations of very different members, defining the role of the organization and dealing with the absence of leader.

PART 3: CHINESE ECONOMY

This part aims at presenting some aspects of the Chinese economy that need to be considered to better assess the position and power of the country in international trade negotiations, and to understand the interests and rationale behind its competition policy. First of all, Chinese industrial policies with the concept of national champions are examined, before focusing on the state sector. Next, some aspects of the country's trade policy are explored. This part is concluded with perspectives for the future.

1. INDUSTRIAL POLICIES AND NATIONAL CHAMPIONS

Industrial policies in China play a major role in the country's economy. The tools used to reach the government's objectives take different forms. For instance, certain firms automatically benefit from public procurement contracts, industries are subject to specific regulation acting as technical barriers, international competitiveness is fostered with an undervaluation of the renminbi, factor costs are subsidized to support capital-intensive industrial production and export restrictions (Hilpert, 2014). It aims at developing national champions, firms that possess the intangible (e.g. innovation capacities, international management, branding know-how) and tangible (e.g. through the development of Chinese international production networks) assets necessary to resist global competition, which simultaneously reinforces national cohesion (Defraigne, 2014).

The current industrial policy is part of a long-term strategy that started in the 1970s after China emerged from its international isolation (Defraigne, 2014). In the late 1990s, a key policy was launched. The objective was to foster national champions and independent core technologies. In these strategic industries, the state would exercise absolute control or strong influence. The industries were selected based on four criteria: defense and national security, job creation, technology and skill acquisition, and competitive advantage. Behind this strategy lied a willingness to switch from a foreign direct investment (FDI) policy based on "growth-at-all-costs" to a more "qualitative" approach characterized by advanced technology or research and development. National champions should enable the country to develop independent productive and technological capabilities that would be valuable both for the domestic economy and for the position of China in international trade. The idea is that catching up in technology would ensure a more sustainable growth and improved social conditions (Poon, 2009). In 2010, this strategy was given a new boost. More focus had to be placed on the growth of the so-called "strategic emerging industries" (SEIs), in order to make the country's industrial base more competitive in international advanced technologies markets. In the same vein, the "Made in China 2025" plan was launched in 2015, with the objective of improving industrial productivity with the development of advanced manufacturing technologies. However, it is said that it represents a step backward in terms of liberalization since, for example, it sets production targets. Given the coexistence with policies that

limit competition and impose excessive regulation, experts consider that the goal of the plan is not likely to be reached (United States Trade Representative, 2017).

China has managed to create national champions, leaders on the Chinese domestic market and competitive abroad. This is the case in sectors such as appliances, IT and telecoms. Whether directly or indirectly, their activities are controlled by the state (Lemoine, 2006). According to Naughton (2015), state-run national champions can be considered as “defensive”, actually acting as a support for private, “offensive”, champions. They ensure the latter have access to energy, industrial materials, communication and transports services. In the current circumstances, national champions still need the support from the government to survive in international markets. They remain close from the party leadership (Defraigne, 2014).

Implementing this national champions strategy inevitably gives rise to challenges. First of all, contradictions appear between the industrial policies developed at the central and the local level. In addition, the measures taken can generate tension with trading partners. Consequently, compared to Japan and South Korea where similar strategies were implemented, China has to be more open to foreign competitors (Defraigne, 2012). Still, it is highly unlikely that China renounces to use industry policy tools to favor its domestic industry, given the significant role it plays in its national development and growth strategy (Hilpert, 2014).

2. STATE SECTOR

Although the era of a state-led economy organized through central planning in China is now over, it continues to influence the economy today (Defraigne, 2014), and in this “socialist market economy”, the boundaries between the state and the private sector are still blurred. Private firms drive the Chinese economic growth today (Lardy, 2014). Yet, state-owned enterprises (SOEs) represent about a fifth of economic output (Wildau, 2016) and according to Defraigne (2008), the Chinese State plays a more important role in the internationalization process of its firms than was the case when Japan and South Korea went through a similar transformation. Given the influence the state sector still has on the economy, it is worth taking a brief look back in time to better understand what appears as a major issue today. Between 1993 and 2003, China underwent a period of great change characterized by market-oriented reforms. The restructuring of the country’s SOEs was central in this process. Large-scale privatization of SOEs was organized and a number of key monopolies were liquidated. The purpose was to create a diversified ownership structure in the Chinese industrial sectors, except in strategic heavy industry sectors, and get rid of SMEs (Lin, 2001). The importance of the state sector in the economy was dramatically reduced until 2003 when it started to stabilize. The State Asset Supervision and Administration Commission (SASAC) was established at that point to exercise the government’s ownership rights over a range of state firms. The objective was twofold: improving corporate

governance and proceeding to a restructuring that would ensure SOEs were limited to sectors in which they have a comparative advantage and where public ownership was justified. Corporatization was soon added to the agency's agenda. SASAC is a key actor to take into account when analyzing the Chinese economy, and even more when focusing on competition policy since the firms it controls enjoy special rights and privileges today (Naughton, 2015). Starting in 2005, a new phase of economic reforms was implemented though, characterized by a slowdown of the privatization process and increased subsidies for remaining SOEs (Scissors, 2009).

Almost 15 years after the creation of SASAC, it is possible to evaluate the results achieved. First, regarding corporate governance, while it succeeded to transform a part of its firms into market-oriented firms, the "top-level" group remains largely influenced by the old bureaucratic system and resists market discipline. These firms benefit from near-monopolies, operating in markets where the state ensures competition is limited. These SOEs are not monopolies per se since two or three firms are present in each market but they enjoy monopoly privileges and substantial market power. Most of the time, it is in practice impossible for new firms to enter the market. This is the case for mobile phone services for example. Moving on to the second objective, limiting state intervention to a number of strategic sectors, the results are mixed as well. The "top-level" firms are indeed limited to a few key sectors, but their subsidiaries remain present in most parts of the economy. Interestingly, about a half of the total profit generated by SASAC firms comes from three oil companies and China Mobile. The other major firms are Shenhua Coal, China Aluminium and the State Grid for electricity. In other words, it is mainly resource and energy companies which benefit from protected markets. SASAC firms also own most of the transportation infrastructures. However, all these firms are not advanced in terms of technology⁶ and do not represent an important part of the export economy, which is actually dominated by foreign-invested firms. Actually, Chinese most successful and promising companies are independent from the state (Naughton, 2015). In terms of profitability, SOEs lag far behind private firms. Yet, the government injects a lot of money in SOEs, compensating for the reduction of investments in private companies (Wildau, 2016). It is worth mentioning that a state venture capital fund has been set to boost innovation in SOEs (Hsu, 2016). If SOEs' profitability is not improved, these firms may become the burden they represented before the reforms, when the state sector was in profound crisis, although since then they have become valuable tools for the government to achieve its trade and industrial policy objectives as seen with national champions (Naughton, 2015). As for corporatization, the last key objective of the SASAC, the process turned out to be particularly difficult. About a quarter of SASAC firms has still not been converted and this number is even higher when considering the most important firms only (Naughton, 2015).

⁶ Only a minor proportion of Huawei's and Haier's ownership is in the hands of a local government.

In 2013, as part of the Third Plenum, far-reaching economic reforms had been announced, with the objective of letting resources be allocated according to market forces, reducing state intervention in the economy, accelerating the country's opening up to foreign goods and services, and allowing fair competition by improving transparency and the rule of law (United States Trade Representative, 2017). The reform on SOEs announced in 2016 was considered as the most significant one under current President Xi Jinping. It was triggered by the decreasing returns on assets over the past few years, threatening the country's growth prospects (Garcia-Herrero, 2016). No significant change in the SOEs system was however observed. Although it aims at making SOEs commercially-driven, it excludes a whole number of firms that contribute to trade policy objectives, for instance if they participate in the development of strategic emerging industries, provide public services, safeguard national security or implement major "go-global" programs. In that context, it seems difficult to ensure fair competition. Besides, according to Garcia-Herrero (2016), while the reduction in the size of the SOEs is essential, this element was not considered as a key objective of the reform. Indeed, there has always been pressure on SASAC firms to increase their size, leading to numerous mergers and acquisitions (Naughton, 2015). Since the 2008 crisis, central government level SOEs have been even more aggressive in acquiring or merging with other central and local state-owned firms, and even private enterprises (United States Trade Representative, 2017). The Chinese government does not seem willing to break this trend, as indicated by the recent rumors of a merger between the coal mining firm Shenhua Group and power generator China Datang that would give rise to an energy giant (Competition Policy International, 2017), and the merger between two steel companies completed last November, making it the world's second-biggest steelmaker. By 2025, Beijing intends to have sixty percent of the Chinese steel capacity controlled by its ten largest firms (Lin & Stanway, 2016). The big industrial groups that have been created and that enjoy near-monopolies can be compared to the Japanese keiretsu and South-Korea chaebols (Lemoine, 2006). The megamergers promoted by the state are expected, among others, to improve competitiveness through economies of scale. Sometimes, the reason is rather to save firms in difficulty. In these circumstances, it appears difficult to deal with profitability issues and overcapacity (see *infra*) (Wildau, 2016).

3. TRADE POLICY

Since 1978, liberalization reforms have transformed the Chinese economy. Expectations on market opening measures upon WTO accession were exceeded⁷, leading to a remarkable expansion in trade

⁷ China's commitments to enter the WTO included various dimensions of market-oriented economies. "It agreed to let the forces of supply and demand set the prices of most goods and services, to allow companies, whether foreign or domestic, to import and export, and to allow state-owned enterprises to make their own commercial decisions. In particular, China agreed to eliminate duties on exports of goods that were not on a specific list of mostly raw materials" (Wang, 2012, p.1109). For an

and investment among China and its trading partners (United States Trade Representative, 2017). As already mentioned, after 2004, trade policy has however generally been marked by a rebound of protectionism in the form of “behind the border” barriers and state intervention. Foreign investors and importers are said to face new barriers to market entry, whereas national firms benefit from state support (Hilpert, 2014). It includes “mandatory approvals for direct investments, restrictions on company acquisitions, restrictive licensing in the service sector, discrimination against foreign investors through special provisions on establishing a corporation, test procedures, environmental regulations, minimum local content requirements (for value added in China) and public procurement, and complex conformity and certification requirements, which are generally also a source of technology leakage” (Hilpert, 2014, p.18). Access to service sectors is especially still highly restricted (Plasschaert, 2016).

Since 2013, the new (and current) leadership has shown more interest in focusing on the development of a market economy. However, that remains largely unrealized, given strong domestic resistance (United States Trade Representative, 2017). Even though progress has been observed recently as to barriers to entry for foreign firms and fierce competition by firms of different sorts (especially in the consumer goods sector) indicates “a genuine market economy” (Plasschaert, 2016), the American view is that interventionist policies and practices are still too important and SOEs and national champions generate trade distortions (United States Trade Representative, 2017). Between 2001 and 2003, few complaints from American companies regarding WTO compliance problems on state intervention were expressed. It changes with the creation of the SASAC, which formalized the government’s willingness to intervene heavily in the state sector (United States Trade Representative, 2017).

Globally, all WTO commitments have not been implemented yet. As it is now clear, key principles of the organization are not applied, such as market access, non-discrimination and transparency, and what is more the rule of law has not been completely adopted (United States Trade Representative, 2017). Actually, the commitments specifically made for the accession were implemented much better than the general WTO rules (Hilpert, 2014). In addition, the WTO Agreement on Government Procurement (GPA) has not yet been signed, and intellectual property rights are still largely infringed. In that context, and considering the exceptional growth of Chinese exports that contrasts with the situation in developed countries, it is not surprising to see a significant number of anti-dumping measures by the EU and the US⁸ against China. The durability of this strategy is however questioned, seeing the polemics about the Chinese market economy status. Besides, China has started using this tool more and more as well (Plasschaert, 2016). But as stated in the first part, the view of the US is clear on the matter: China must

economy that used to be dominated by central planning, that was very ambitious. The general interpretation now is that it was used by the Chinese central authority to bind the country to the economic reforms desired (Wang, 2012).

⁸ The US has brought 20 cases against China to the DSB since the country’s accession, more than twice as many as any other country (United States Trade Representative, 2017).

adhere to all WTO rules and is accountable as a mature participant in the global trading system (United States Trade Representative, 2017).

While international trade is essential for China's growth, the government adopts industrial and trade policies that risk creating trade conflicts and protectionist reactions. There is a number of reasons behind this paradox, but internal relations need to be considered to understand some of the contradictions and the unpredictability of the Chinese trade policy. Trade policy and its implementation is the result of a complex multi-level game in China. Not only negotiations but also implementation is shaped by a variety of actors, both external and internal. In other words, trade policy is not only determined by the central government and its agencies, but also by local governments, SOEs, industry associations, think-tanks and indirectly even media. It is actually driven "more by hard calculation or crude economic interest than by paradigms or grand strategies" (Hilpert, 2014, p.6). Even though binding decisions are made by the Politburo, their implementation can be in the hands of other actors, and unless trade policy is of high importance to the central authority, as it was before WTO accession, local authorities and directors of SOEs for example enjoy much power. This explains why the market opening process by the central state was not extended to localities. Therefore, it is impossible to characterize the Chinese economy as liberal or mercantilist, and as compatible or incompatible with WTO rules (Hilpert, 2014).

4. FUTURE PERSPECTIVES

GROWTH SUSTAINABILITY

For more than thirty years now, China has experienced a remarkably high level of growth. Yet, more and more concerns are expressed as to its sustainability. The reasons are manifold and go beyond the scope of this thesis. However, a number of elements should be mentioned. Until now, the growth has been driven by the high level of capital investment. It has led to several issues: the decreasing capital marginal productivity requires even higher amounts of investments, leading to worrying levels of corporate debt, domestic consumption is extremely low, and the country is dependant on foreign markets (Defraigne, 2012). The latter can be very problematic, as the global crisis revealed (Ash, Porter, & Summers, 2012). The strategy used by the Chinese government to counteract the negative impact of the crisis has entailed another major problem: overcapacity (Plasschaert, 2016). Not only does it have a negative impact on the Chinese economy, but it also generates global trade frictions and affects international relations, with an increasing number of anti-dumping cases (European Union Chamber of Commerce in China, 2016). Yet, it seems short-term growth remains the government's priority, as it keeps promoting consolidation and injecting money when needed (Garcia-Herrero, 2016). This dependence on foreign markets also means the new protectionist threats by the US cannot be overlooked.

Experience also shows that a precondition for sustainable growth is technological innovation capabilities. Yet, the Chinese economy is characterized by limited and uneven technological progress. Combined with gaps in international management know-how, that means Chinese firms are lagging behind their peers from developed countries. In the past, China has relied a lot on foreign firms coming to China to catch up on technology (Defraigne, 2012). It was also done through cross-border “mega” mergers and acquisitions but the longevity of this strategy is questioned now that buyers are increasingly concerned about the ability of Chinese firms to complete the deals (Weinland, Massoudi, & Fontanella-Khan, 2016). According to Le Corre & Backaler (2016), this is likely to slow down for three main reasons: foreign firms want more transparency, national security concerns are increasing, and the corporate debt problem is getting bigger. In these circumstances, the country’s national champions strategy appears as very important. Plasschaert (2016) claims that Chinese firms are not likely to be capable of outcompeting foreign private firms in international markets, except when lower production costs generate a competitive advantage. All in all, developing a sustainable and inclusive growth appears as essential for China. Given the importance of capitals outflows, it seems however that there are serious concerns about the feasibility of doing so (Donnan, 2016).

POWER IN MULTILATERAL TRADE NEGOTIATIONS

China’s position in WTO negotiations cannot be overlooked anymore. In less than thirty years, China has moved from being a marginal player in world trade to the leading trading nation (Hilpert, 2014). Since 2009, it is the world’s largest exporter. In the last world trade ranking, China appears as the largest exporter for merchandises and the third biggest for commercial services, representing in total 14 percent of world total exports (WTO, 2017c). It means the country’s industrial policy directions are of high importance for the rest of the world’s import-competing industries, which find themselves under great adjustment pressure. China’s trade and industrial policy are also critical to WTO members because the majority of exporters from China are actually subsidiaries of foreign companies. After the country’s accession to the WTO, China indeed became the first place for global investments. This is where a key part of the global value chain takes place today (Hilpert, 2014). Now, as far as imports are concerned, China is the third largest importer with 10 percent of world total imports when considering the EU as a single entity (WTO, 2017c). This reinforces the importance of the decisions made by Beijing. Therefore, the Chinese industrial and trade policies, which are likely to be maintained in the near future, could significantly influence future negotiations in the WTO.

Despite the challenges the country faces and will continue facing to ensure a sustainable growth, China is expected to dominate international trade in the future, as the US did until the 1970s. The question that arises then is whether the country will take the political leadership as well. China has actively sought bilateral deals, which reinforces its status as a major power and positions the country as the center of gravity of regional trade. By fostering regional trade, Beijing also insures itself against

potential protectionist behaviors (Hilpert, 2014). Initiatives such as the Asian Infrastructure Investment Bank (AIIB) and the One Belt, One Road (OBOR) strategy confirm a willingness to become a regional leader. According to Pitti (2009), outside Asia, China is trying to increase its influence in the poorest countries, in Africa and Latin America. This ensures raw materials supply and support in international organizations. Overall, the Chinese strategy seems to exclude the Western world while gaining more influence at the global level. According to Javaid and Sharreh Qazi (2016), “the only barrier imposed upon China in successfully taking over global political throne and assuming role of principal economic hegemon is its domestic rural and urban situation and ever increasing population as well the demand structure of accommodating such a huge population”.

5. CONCLUSION

Since the liberalization reforms which started in 1978, industrial policies have had a significant impact on the Chinese economy. The main objectives pursued are to control strategic industries and develop national champions able to compete in global markets. The state sector is still significant in China, even though it does not drive the economy. The most important SOEs are consolidated resource and energy companies, that benefit from state protection and privileges. SOEs are mainly used as tools used by the government to realize policy objectives. Chinese SOEs face profitability issues and could become the burden they were before the big liberalization reforms. Despite announced major reforms for the state sector since 2013, no significant change is observed so far. Regarding trade policy, although China has exceeded expectations in terms of market liberalization measures upon its WTO accession, a rebound of protectionism has been noticed since 2004. Foreign companies complain about the importance of interventionist policies and practices, and the trade distortions generated by SOEs and national champions. The new leadership appeared willing to change this, but progress so far is very limited. The basic WTO principles are still not applied.

In the near future, Beijing will have to demonstrate that the country’s growth becomes sustainable and inclusive, overcoming difficulties such as overcapacity, high corporate debt, low domestic consumption, dependence on foreign markets and technology gap. Still, China’s rise as a leading trading nation is not questionable. Consequently, the country benefits from great power in multilateral trade negotiations. But it also means that industrial and trade policy have a significant impact for all WTO members. Considering the current situation, the risk is that major trade conflicts prevent WTO members from agreeing on a new agreement. With a strategy that excludes the Western block, China seems to reinforce its position as regional leader and on the long term as global leader.

PART 4: THE CHINESE COMPETITION POLICY

The industrial and trade policies pursued by Beijing, explored in the previous part, generate concerns with regard to competition policy. In this context, the objective of this part is to examine the country's competition law⁹ and its enforcement. First, an overview of the legislation is provided, before its actual enforcement is looked at. The main criticisms generated by the Chinese competition policy are subsequently summarized. Then, implications for foreign investors are presented, with a focus on the telecommunications industry. The last aspect that is considered in this part is the Chinese position in international discussions on competition policy.

1. LEGISLATION

BEFORE THE ANTI-MONOPOLY LAW

Before the Anti-Monopoly Law (AML) took effect in 2008, with a comprehensive set of competition policy norms, competition issues were addressed by unsystematic and incomplete regulations (Ling, 2011) developed gradually. “The results was a society filled with anti-competitive practices of business and government. Further, government businesses such as public utilities have maintained monopoly power in various industries and have increased prices with reasonable justification, enforced arbitrary charges on consumers, and engaged in exclusionary conduct, foreclosure, and anti-competitive bundling” (Li, 2009, p. 363). The first move was the 1980 “Promotion and Protection of Competition in the Socialist Economy”, that aimed at breaking down regional barriers. Then, in 1993, the “Anti-Unfair Competition Law” (AUCL) was enacted to promote and protect fair competition. It targeted various practices such as bribery, bid-rigging, predatory below-cost sales, misleading advertising (Mariniello, 2013), defamation, local restrictions on the entry or exit of merchandises and restrictions on purchases imposed by firms enjoying legal monopolies (Country Commerce, 2017). Less than five years later, exploitative abuse or excessive pricing and price-fixing were addressed by the new “Price Law”. Finally, measures were taken to regulate acquisitions by foreign companies in 2003, before being reviewed in 2006. In these different cases, it seems that legislation on competition policy was shaped according to concerns for the domestic economy rather than the primary objective of competition laws (Mariniello, 2013). In 2016, while the AML hereafter presented was already in effect, an amendment process was initiated for the AUCL. The actions targeted by the law are expanded to unfair competitive practices on the internet and abuses of comparatively advantageous positions (Country Commerce,

⁹ All references to “China” hereafter refer to the People's Republic of China, excluding the Hong Kong Special Administrative Region, the Macau Special Administrative Region and Taiwan

2017), which would prevent firms from taking advantage of their superior position to impose unreasonable terms for instance. It also aims at better aligning this law with the AML. These important changes still need to be approved by the National People's Congress (Evrard, 2017).

THE ANTI-MONOPOLY LAW

The AML took effect in 2008 to complement the laws that have just been mentioned. It represents a major step in the development of the country towards a market-economy. It defines monopolistic arrangements and monopolistic behavior, bans a number of practices (e.g. cartels, price fixing) and restricts monopolies to a number of situations (see *infra*) (Country Commerce, 2017). Besides, it introduces legislation on administrative power, punishing abuses of power by public administrations that result in an alteration or elimination of competition. While the language and structure used in the AML indicate strong commonalities with the developed countries' competition laws, the fact that it is not limited to anti-competitive practices of private actors is a major difference (Fels, 2012). This aimed at tackling artificial internal market segmentation and preventing local authorities from using administrative burdens against external competition (Mariniello, 2013). Yet, Li (2009, p.364) argues that "it was written in a typical Chinese fashion, with plenty of ideological imperatives but littered with ambiguous provisions that could lead to confusion. The provisions are broad, lacking in details of enforceability". The AML also determines investigation procedures and, for the first time, an enforcement system for competition law is established. A specific agency was created, while competition laws enforcement used to be in the hands of different sectorial regulatory agencies (Ling, 2011).

It is important to say that the AML contains elements from foreign competition laws (particularly from the EU) but also aspects which are specific to the country. Besides, competition law in China may be enforced in a way that is not aligned with typical expectations based on the principles applied in other jurisdictions. This can be explained by the fact that the country's economic, legal, and cultural conditions can greatly differ from other jurisdictions (Jones Day, 2012).

One example of an aspect specific to China is the importance given to industrial policy considerations, which are reflected in the exceptions to the AML. The law states that its provisions do not apply when the following three conditions are fulfilled: "The agreement has one of several enumerated beneficial purposes, namely to improve technology or R&D for new products; upgrade product quality, reduce costs, or improve efficiency; unify product specifications and standards, or implement production specialization; improve efficiencies or the competitiveness of small and medium enterprises; or save energy or protect the environment; The agreement will not substantially restrict competition; and Consumers will share the benefits" (Wang & Zhang, 2016, p.1). Since little guidance is provided on how to use this framework and its actual implementation is not transparent, it could limit the effect of

the AML. However, in 2015, a change was noticed: guidance has been published by the antitrust agencies, that once finalized will become binding (Wang & Zhang, 2016). As developed in the next section, this increased guidance is not limited to this aspect. Indeed, 2016 is marked by the publication of a number of draft guidelines by the regulators, which shed light on important aspects of antitrust enforcement (e.g. leniency in cartel investigations, fines calculations, IP rights). Numerous should enter into force in 2017 (Evrard, 2017). It should also be noted that such exemptions are also foreseen in “advanced” competition laws, such as in the US and in the EU, so the main problem in this case is the vagueness of the provisions.

The effects doctrine principle is included in the Chinese competition law, as it is usually the case, which means it applies to any anticompetitive behavior having an effect on the Chinese market, regardless of the place of origin, nationality or country of residence of the firm. However, its application in China is said to be too vague and lack important elements. Note that the comity principle presented earlier is not explicitly adopted by China. In case of conflicts, it refers to international law principles and international treaties and acts on a case-by-case basis (Ling, 2011).

In the following sections, concerns and criticisms on the enforcement of the AML are presented. China seems to take them into consideration. Indeed, significant progress has been made in recent years. In the legislative work plan for 2016, a possible amendment process of the AML was included (Toft, 2016). Nevertheless, since then, the documents available in English do not mention moves in that direction, and it does not appear on the 2017 work plan anymore. Even so, further developing the competition policy is expected to remain a key element on the Chinese agenda in the next years. The Third Plenum indeed stated that “the underlying issue is how to strike a balance between the role of the government and that of the market, and let the market play the decisive role in allocating resources” and that “state-owned enterprises will adhere to modern corporate practices, supporting healthy development in the non-public economy” (Toft, 2016, p.12).

2. ENFORCEMENT

OVERVIEW

As mentioned earlier, a central agency was created to enforce the AML, namely the State Council's Anti-Monopoly Commission (AMC). It is “responsible for developing competition policy, conducting market investigations, publishing guidelines and coordinating the competition administrative enforcement work” (Slaughter and May, 2016, p.2). Yet, the three agencies previously in charge of competition law enforcement maintained their competence together with their local equivalents, under the authority of the Anti-Monopoly Enforcement Authority (AMEA) (Slaughter and May, 2016). The Minister of Commerce (MOFCOM) through the Anti-Monopoly Bureau, the National Development

and Reform Commission (NDRC) with its Bureau of Price Supervision and Anti-Monopoly, and the State Administration for Industry and Commerce (SAIC) with its Anti-unfair Competition Bureau are thus responsible for enforcement (Country Commerce, 2017). As will be developed later on, this tripartite enforcement system is criticized.

Before jumping into the responsibilities and development of the three agencies individually, a common evolution needs to be mentioned. After the AML was enacted, there has been a constant expansion of the enforcement activity, closing the gap with the situation in the EU (Mariniello, 2013) (see Appendix 13). The scope of the actions targeted was expanded, with more complex anticompetitive practices such as abuses of dominance (as compared to price-fixing for instance). The intensity of the enforcement activities was also increased. For example, the MOFCOM not only controls mergers that have been notified but now also examines cases that were not notified (Evrard, 2017). Non-compliance with filing obligations used to be a key issue (Mariniello, 2013). Similarly, whereas fines were mainly symbolic in the first years, they can now amount to tens of millions of dollars (Evrard, 2017). In recent years, more rapid development was observed. The agencies have been particularly active, which was translated in the number of cases handled, the rate of fines imposed, and the varied grounds for investigations (Gu, 2016). They have also appeared more willing to refine enforcement of the AML, both in substance through increased guidance and procedure with enhanced transparency. A number of the new guidelines are based on principles borrowed from western competition laws, while others remain specific to the Chinese case (Zhou, Cheng & Ingen-Housz, 2016). This general trend towards improved AML enforcement is expected to continue (Evrard, 2017). The high-profile cases handled also increasingly turn China into an emerging center for competition law enforcement (Gu, 2016).

MOFCOM

MOFCOM is responsible for “carrying out antimonopoly review against concentration between undertakings according to law” (Tianling, 2008 cited by Ling, 2011, p.122). In addition, it is in charge of international cooperation on competition policies and supports Chinese firms targeted by antimonopoly charges abroad (Ling, 2011).

MOFCOM may approve mergers with or without conditions. In the first case, unlike the general approach adopted by competition authorities around the world (Musgrove & MacNeil, 2014), MOFCOM has largely used behavioral remedies. In contrast with structural remedies, which require the divestiture of an asset to maintain the same level of competitive pressure, behavioral remedies are characterized by an obligation to engage in or refrain from a certain conduct (e.g. non-discriminatory provisions between the acquired firm and its competitors and price caps). According to Mariniello (2013), behavioral remedies are less effective in terms of social welfare: it requires ex-post monitoring (while MOFCOM already lacks resources) and could distort incentives to compete or to fully exploit

the efficiency gains of mergers. Still, Beijing sees some benefits there. First, behavioral remedies are easier to impose but demonstrate that the relatively new competition authority is active. Second, it can be used as a tool to control markets and protect some firms (Mariniello, 2013).

Regarding the recent developments and trends, in recent years MOFCOM has been increasing its enforcement capacity. It has also sent clear signals that global transactions involving China, including when business in the country is limited, must be reviewed by the MOFCOM. It led to a surge in the number of cases handled (Ashton, 2017), which resulted in the development of simplified procedures for merger reviews (Zhou, Cheng & Ingen-Housz, 2016). In the near future, the new guidelines should enhance legal certainty on merger review enforcement. As for the enforcement itself, MOFCOM is expected to sanction even harder failures to notify, further strengthen its requirements in terms of quality and formality of the notification documents, and be more cautious about the abuses of simplified procedures (Ren & Wang, 2017).

Considering the current state of the Chinese economy, it seems that reducing monopolies is crucial for further development. Hence the importance of the AML's enforcement by the MOFCOM. Nevertheless, Duan & Saich (2014) claim it is a difficult process because it is grounded in the country's history and culture. That implies that major legislative, administrative, personnel management, and ideological adjustments are made. Apparently, this is not yet the case.

NDRC & SAIC

The responsibilities of the two other competition law enforcement agencies are very similar. The difference lies in the role played by the price. While the NDRC mainly “manages enforcement against price-related conduct by companies, including price-related aspects of monopoly agreements, and abuse of market dominance to set or control prices” (Deng, 2017, p.5), SAIC is in charge of “antimonopoly law enforcement works including monopoly agreements, abuse of dominant market position, abuse of administrative powers to eliminate or restrict competition (with exception for monopolistic pricing behaviors)” (Tianling, 2008 cited by Ling, 2011, p.122). Until 2012, their activity was very limited but since then it has intensified significantly and their scope of action has expanded (Zhou, Cheng & Ingen-Housz, 2016).

As already mentioned, the AML goes beyond private behavior; it also applies to public anticompetitive actions. Provisions on the abuse of administrative power are implemented both by the NDRC and the SAIC. The last few years have seen an increasing number of actions in this field. In 2016, the State Council introduced a “Fair Competition Review System” in order to prevent public authorities from restricting competition by using regulations and measures when it is excessive or inappropriate (United States Trade Representative, 2017). According to Zhang (2017), it represents a key development for the country's competition policy enforcement and on its path towards a market economy. Indeed, it

addresses the fact that some local authorities do not give up on protectionism and keep industry barriers in place. The previous part has highlighted the magnitude of the state intervention problem in China. The new mechanism can be described as three combinations: regulating new policies and screening existing ones, self-review by policy-making authorities and scrutiny by the public and accountability, and prohibitions but with exceptions. Indeed, exceptions are foreseen when state intervention restricting competition protects national security, China's interests and public interests (Zhang, 2017). The interpretation of this last point will determine the impact of the system. Indeed, the previous part showed that despite efforts to reshape the relationship between government and markets, this process turns out to be particularly complicated given the high reliance on industrial policies, the interconnected sector interests and local protectionism in China. The Fair Competition Review System is a new attempt in that direction.

According to Huang and Wu (2017), a number of challenges arise in the implementation of the new mechanism. Firstly, the way competition policy is currently formulated does not imply that it will naturally be one of China's basic economic policies, so there is a risk that it is not considered as a priority. Secondly, implementation is likely to be hindered by the uneven regional economic development and the local officials' own political agenda. Thirdly, it could conflict with the tools used by localities to reach economic objectives. Fourthly, because independent third parties are not likely to voluntarily get involved, self-review will be dominant in spite of the lack of experience and independence. Fifthly, due process is missing for external monitoring. Lastly, the review system has not been included in the budget supervision process, which means it will be more costly and difficult to correct the anticompetitive policies (Huang & Wu, 2017). Future developments will be interesting to observe since it shall indicate the importance given to fairer competition in China.

3. CRITICISMS

Since its enactment, the AML and its enforcement have attracted significant attention all over the world. Because of its impact on the activity of foreign businesses, the developments are closely monitored by foreign authorities. Different views, criticisms and concerns were put forward, mostly regarding procedures and protectionism. In this section, a number of them are presented. However, it is important to nuance these views with two elements. First of all, competition law enforcement needs to comply with the country's administrative enforcement system¹⁰. It explains that in some cases, differences appear with the procedures usually applied in developed countries. A second element to keep in mind is that the AML is still in its infancy, while most criticisms come from countries where competition

¹⁰ It includes Administrative Penalty Law, Administrative Permission Law, Administrative Reconsideration Law, Administrative Litigation Law and Administrative Procedures Law (Toft, 2016).

laws have been evolving for a hundred years (Deng, 2017). Even though the AML is young, Toft (2016) claims that developments have been rapid and significant. Numerous implementing rules were created and a high number of enforcement decisions were made. Compared to competition policy enforcement in the EU and the US, it is said that China hardly is behind (Jones Day, 2012). The US seems to be particularly involved in the improvement process of the AML's enforcement. It continuously ensures new commitments are made from China in order to deal with the complaints it receives from domestic firms, for example on the independence of decision-making, transparency and fair defense. It also "obtained China's recognition that the objective of competition policy is to promote consumer welfare and economic efficiency, rather than promote individual competitors or industries, and that enforcement of China's competition laws should be fair, objective, transparent and non-discriminatory" (United States Trade Representative, 2017, p.171).

CONFLICTING OBJECTIVES OF THE INDUSTRIAL AND COMPETITION POLICIES

The Chinese economy is characterized by interventionist policies and practices and an important role given to the state sector. This is no surprise then that tensions between the country's industrial and competition policy appear. Article 1 of AML states: "This Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy development of the socialist market economy." (Anti-monopoly Law of the People's Republic of China, 2007). At first sight, it seems aligned with western competition laws. Nevertheless, the notions of "public interests" and "healthy development of the socialist market economy", which are not competition objectives, are said to be relatively ambiguous. Consequently, it brings uncertainty as to the implementation of the law. The interests of SOEs could for example be considered as public interests. Moreover, the fact that multiple objectives are pursued without clear guidance means it is the responsibility of the competition authorities or courts to find the right balance between different and sometimes contradictory economic, social and political goals in order to avoid potential conflict (Jiang, 2015).

The possibility to use competition policy to achieve industrial policy objectives is the main difference between the AML and its equivalents in western economies. Usually, public interests come into play only in specific and exceptional cases. In the EU for instance, provisions exist (e.g. in case mergers might affect public security) but remain exceptional and need to be applied following clear and transparent procedures. In contrast, in the AML, national interests are treated as a major element to take into consideration in competition cases. Technically speaking, the law can be interpreted in such a way that it can be used to pursue industrial policy objectives. In other words, the alignment of the Chinese competition law with that of other jurisdictions depends on its actual implementation (Mariniello, 2013). In practice, it seems that national interests were predominant in the first years, but that it has

then evolved. For instance, in 2009, the acquisition of the Chinese Huiyuan Juice Group by Coca Cola was rejected, while the control by the American giant would have accounted for less than 20 percent of the Chinese juice market. In the US, this would be unthinkable. It appears that the merger review here was used as a protectionist tool instead of promoting the general competition objectives, namely consumer welfare and economic efficiency (Hemphill & White, 2013). This is consistent with the AML provisions on merger reviews, according to which it “will include protection of existing competitors and the effect on the national economy in addition to the effect on competition as such” (Ross, 2008 cited by Hemphill & White, 2013, p.198). Besides, there have been complains that investigations were misused to protect and foster national champions and domestic industries (United States Trade Representative, 2017).

A major aspect of the Chinese industrial policy is the importance given to the state sector. The way the AML is applied to SOEs is, therefore, an important element to look at. Article 7 states that “With respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or the industries implementing exclusive operation and sales according to law, the state protects the lawful business operations conducted by the business operators therein.” (Anti-monopoly Law of the People's Republic of China, 2007). In other words, a special treatment is granted to SOEs and state monopolies in industries deemed nationally important. The actual meaning and objective behind this provision remain unclear. On the one hand, concerns have been expressed on the actual enforcement of the law against SOEs, based on a number of facts indicating that SOEs and firms in strategic sectors are protected by the competition authorities. As of 2013, the wave of consolidation in the state sector and the creation of big national champions was not hindered by the Chinese competition law enforcement authorities (Mariniello, 2013). On the other hand, the AML has been used against some SOEs and Beijing confirmed that the law equally applies to them (United States Trade Representative, 2017).

Another aspect of the Chinese economy that could conflict with the competition policy is trade associations. Most of them happen to be closely linked to the government. When price controls were abolished in China, the intensity of the price competition among producers led them to form industrial associations (Zheng, 2010), actually cartels acting as quasi-governmental entities (Wang 2012). According to the US perspective, new measures should be taken with regard to trade associations (United States Trade Representative, 2017). Yet, the majority of enforcement decisions by the NDRC in 2016 targeted domestic cartels (e.g. in the pharmaceutical industry) (Evrard, 2017), which indicates a positive evolution in that sense.

A last element that is worth mentioning regarding potential conflicts between competition and industrial policies is state aid. Beijing is said to keep providing significant subsidies to its domestic industries, even though some are prohibited under WTO rules and in spite of the pressure from its trading partners.

This seems to go against the objective pursued by the competition law. So far, China has not fulfilled its notification obligation to the WTO (United States Trade Representative, 2017). The Fair Competition Review System mentioned earlier could, however, bring progress in this issue. Hilpert (2014) notes that the Chinese industrial policy has a negative effect on competition but that most accusations that are made, unlike this case of subsidies, do not fall within the scope of WTO regulations.

ATTITUDE TOWARDS FOREIGN COMPANIES

Since the AML was introduced, there have been concerns about unfair treatment towards foreign companies compared to domestic ones. This is not surprising in view of the importance given to industrial policy objectives in competition policy. Ashton (2017) explains that these concerns are fueled by the extensive media coverage given to investigations of foreign companies, both abroad and in China.

Here again, things seem to change. Analyses conducted with data until 2012 indicate indeed that, unlike NDRC and SAIC, MOFCOM's activity seemed to have targeted asymmetrically foreign firms and favored domestic firms (Mariniello, 2013; Tan, Sun & Evrard, 2014). Nevertheless, in recent years MOFCOM has ensured increased domestic compliance with notification requirements (through fines) and has lowered its number of rejected or conditional transactions involving foreign firms (United States Trade Representative, 2017). Besides a concrete development in MOFCOM's enforcement actions, Chinese leaders have made clear in public statements during international forums that the AML treats foreign and domestic companies, including SOEs, equally (Deng, 2017). The last survey conducted by the European Union Chamber of Commerce in China (2017) still indicates that the positive developments remain too limited according to European firms, especially in view of the reform agenda presented in the 2013 Plenum. Half of the European companies surveyed state they feel less welcome now than when they first entered China and more than fifty percent have consistently reported that foreign and domestic companies have not been treated equally over the last four years. The spokesman of the Ministry of Commerce reacted to this as follows: "China always welcomes EU investment. However, China and EU differ in development stage and industrial structure. In terms of opening up, they are varied on key areas, intensity and pace. It is unadvisable to make simple comparisons and demand reciprocal access. It is important to make balanced interests" (China Daily, 2017).

LACK OF PREDICTABILITY, TRANSPARENCY AND FAIRNESS

The vagueness of the AML, resulting in unpredictable enforcement, has already been mentioned. The way the law is formulated, with few details and guidelines, prevents direct application. For example, for IP rights abuses, the AML only states that it should comply with the law (Ling, 2011). This is no

surprise that, together with the lack of transparency and procedural fairness, it generates many criticisms abroad. Recent investigations (e.g. automotive sector) have further raised concerns about transparency and due process (Deng, 2017), an example being NDRC's pressure to "cooperate" and limitations on the ability of foreign companies to be advised during meetings. Another element is that MOFCOM only publishes its decisions when the case is rejected or approved with conditions (Evrard, 2017). Although it is not aligned with western best practices, it complies with the Chinese law. Article 44 indeed states: "Where after investigation into and verification of the suspected monopolistic conduct, the authority for enforcement of the Anti-monopoly Law concludes that it constitutes a monopolistic conduct, the said authority shall make a decision on how to deal with it in accordance with law and may make the matter known to the public." (Anti-monopoly Law of the People's Republic of China, 2007). This lack of transparency can give rise to a perception that Chinese decisions are unfair.

Yet, the recent developments on this matter need to be highlighted. As already mentioned, numerous guidelines are or have already been published, increasingly detailed and sophisticated. It enhances transparency and predictability in enforcement (Toft, 2016). Enforcement authorities have been showing a great willingness to enhance the procedural fairness in their enforcement activities (Deng, 2017). MOFCOM now communicates more details about its merger decisions, in response to the criticisms about the lack of adequate bases to evaluate the impact on competition. In 2014, under the pressure from the US, China committed to addressing other aspects. However, some concerns persist and commitments still need to be fully implemented (United States Trade Representative, 2017).

ABSENCE OF A UNIFIED ENFORCEMENT AGENCY

As presented before, AML enforcement is not in the hands of a unique state agency. Instead, a tripartite system is used. When it was decided, the rationale was that keeping the different authorities involved in competition law enforcement before the AML would prevent power struggles, and allow for a smooth and quick implementation (Jiang, 2015). Indeed, it is argued that the main reason explaining the unusually long process to enact the AML (13 years) was the competition and tension among the MOFCOM, NDRC and SAIC. They all wanted to lead the drafting process, assuming they would then become the regulatory body (Li, 2009). This system can however give rise to a number of issues. A Chinese expert interviewed by the China Daily argued that "No country in the world appoints so many administrative departments to enforce a law to protect market competition. (...). Without a unified and authoritative law enforcement organization (...) the anti-monopoly law will be difficult to enforce." (Li, 2006, para. 5). First, it is argued that this system brings inefficiencies, potentially with duplication of the efforts. Then, conflicts between NDRC and SAIC may arise. Indeed, they both deal with restrictive agreements and abuses of market dominance but the only difference is the price dimension, which is not easily identified. There is also a risk of having fragmented, incoherent or even inconsistent decisions (Deng, 2017). It could also result in a lack of authority (Bush, 2009). What is more, the

collaboration with other sector regulatory agencies and its power of authority are not clear (Ling, 2011). Lastly, the different enforcement authorities may develop at different paces, depending on their individual resources and interests, which could lead to conflicts as well (Jiang, 2015).

NEED TO GO FURTHER ON THE INTELLECTUAL PROPERTY RIGHTS MATTER

Since the AML was enacted, the application to IP rights has been a controversial issue (Evrard, 2017). SAIC first published guidelines on this matter in 2015 to fill the gap in the legislation, soon followed by the other agencies (Gu, 2016). This year, the AMC released a (much-awaited) draft on “the Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights”, that aims at creating a unique text based on the different guidelines already published by the different agencies. Important recommendations are included but Wong-Ervin (2017) outlines a number of problematic elements. The first is the application of the “essential facilities doctrine”, according to which firms are required to share their facility when it is considered as essential to other competitors. According to him, it leads to less innovation. Then, he also considers that the special rules for standard-essential patents are not justified in terms of competition policy and are likely to discourage participation in standard setting. A third aspect is that it prohibits “unfairly high” pricing for IP rights, which again impairs innovation. Lastly, transparency and guidance are missing, leaving much discretion in enforcement decision-making.

4. IMPLICATIONS FOR FOREIGN COMPANIES

ADAPTING TO THE (CONSTANTLY EVOLVING) LAW ENFORCEMENT

“Since the enactment of the Anti-Monopoly Law (“AML”) in 2008, China’s AML enforcement has gained momentum, especially over the past three years. This development makes China one of the most important jurisdictions to which companies need to pay close attention” (Gao, Gong, Ning & Peng, 2017, p.45). Not only has enforcement been strengthened but the scope of practices targeted was also widened. The fines that have been imposed confirm the importance of complying with the AML today. In 2014, it amounted to 810 million euros for Qualcomm, a US chipmaker that was found to charge Chinese firms excessive royalty fees and in 2016, to almost 90 million euros for Tetra Pak accused of abusing its dominant position for instance by imposing exclusivity restrictions (Slaughter and May, 2016). What is more, in recent years, enforcement authorities have been more inclined to initiate investigations based on complaints that are made. That means anticompetitive behaviors are more likely to be sanctioned (Deng, 2017). Private action, allowed by the AML, is increasingly used in China

(Slaughter and May, 2016)¹¹. In this context, understanding the different aspects of AML and its enforcement appears as a prerequisite for firms doing business in China or willing to do so, whether their own behavior may be deemed anticompetitive, or that of (potential) competitors.

A number of measures need to be taken to ensure compliance with the AML. First, written contracts need to be reviewed and potential risky clauses amended (e.g. resale price maintenance in distribution agreements). But since it is the effect of the conduct that matters, other measures may be required, depending on the firm's needs, culture and risk appetite. Internal audits may be carried out to ensure competition law compliance from all or "at-risk" employees, and training as well as written guidance may be provided. Firms may also simulate "dawn raids" (i.e. unannounced inspections) to make sure they react in the best way (Emch, 2017).

The provisions in the AML are manifold and the objective here is not to cover them all, but it is worth mentioning a number of important elements that foreign companies need to consider. Among the three types of anticompetitive conducts targeted by the AML, merger¹² control is by far the most developed (Slaughter and May, 2016). Beyond certain thresholds of concentration, transactions need to be notified and accepted by the agency (Mayer Brown, 2017). Yet, the law states that MOFCOM can also conduct investigations when the threshold is not reached but there is a risk for competition (Ning & Yin, 2016). The actual enforcement of this provision remains unclear, even though some guidelines have been published. It is argued that the MOFCOM would be likely to do it only when there are significant concerns for competition or in high-profile product markets (Slaughter and May, 2016). The factors used to assess the effects on competition of transactions are set down in the AML, which was supplemented by guidelines in 2011. Market share and market concentration levels appear to be the key elements considered by MOFCOM (Ning & Yin, 2016). Recent merger cases indicate that MOFCOM's decisions are still unpredictable and uncertain, included in cases of low market shares, and sometimes inconsistent with the decisions made by foreign jurisdictions (Slaughter and May, 2016). Besides that, a governmental approval is needed when transactions, involving a foreign investor, can affect "national security". The Chinese national security review regime was established in 2011 and reviewed in 2015. The consequences for national security but also defense, economy and public interest are assessed. 57 industries that are likely to be targeted have been listed by MOFCOM. It includes military or military-related products or services, national defense-related products or services, agricultural products, energy, resources, infrastructure, significant transportation services, key technology and heavy equipment

¹¹ Judicial review of administrative enforcement decisions, however, still needs to be developed (Toft, 2016).

¹² Note that it also applies to joint ventures, without any distinction between full-function and non-full-function joint ventures as in the EU (Slaughter and May, 2016).

manufacturing. The actual enforcement of these provisions is still unclear, which means foreign investors need to be cautious and keep abreast of applications and guidelines (Zhang & Tan, 2016).

The second category of practices targeted by the AML is monopoly agreements. The basic principles are similar to the European law (Slaughter and May, 2016). It prohibits agreements which restrain competition, horizontally with competitors (e.g. fixing prices, limiting volumes, sharing markets, restricting technology purchases or development, boycotting competitors or customers), or vertically with partners (e.g. fixing resale prices or minimal resale prices). Since not all types of prohibited conducts are stated, foreign firms need to be cautious when engaging in business practices that could be considered as anti-competitive, for instance exclusive dealing and distributorships (Mayer Brown, 2017). Indeed, except for price fixing or hardcore cartels which are illegal per se, decisions may be hard to predict because many vertical and horizontal agreements have both procompetitive and anticompetitive effects. But draft guidelines have been published, that should help foreign firms self-assess the legality of an agreement (Jones Day, 2016). A number of exceptions are however provided by the AML, namely agreements that “improve technology, improve product quality or production efficiency, enhance the competitiveness of small or medium-sized companies, protect the parties from economic downturns, protect “legitimate interests” relating to foreign trade and economic cooperation, or achieve “social public interests” such as energy conservation or environmental protection¹³” (Mayer Brown, 2017, para. 6). Still, there is no certainty about the difficulty to benefit from these exemptions (Mayer Brown, 2017). According to Wang and Zhang (2016), the risk of being sanctioned for other types of agreements than price fixing or other collusion and resale price maintenance is low when there is no dominant market position.

The third category consists of abuses of a dominant market position. The AML determines market share thresholds, including when combined with one or two other firm(s), which generate a presumption of dominance. Evidence to the contrary needs to be provided to rebut this presumption (Slaughter and May, 2016). Note that relying uniquely on market shares to handle collective dominance cases is not common in competition laws (Slaughter and May, 2016). A dominant market position is presumed when a firm has a market share of more than 50 percent, when two firms have a combined share of more than 66 percent, or three firms have a combined share of more than 75 percent. This principle of combined market shares has important implications. Indeed, firms with very small market shares will be presumed dominant if they compete with another firm with a large market share (e.g. 10 percent and 55 percent). When competing in concentrated markets, small firms need to be particularly cautious.

¹³ The three conditions mentioned earlier need to be fulfilled: “The agreement has one of several enumerated beneficial purposes, namely to improve technology or R&D for new products; upgrade product quality, reduce costs, or improve efficiency; unify product specifications and standards, or implement production specialization; improve efficiencies or the competitiveness of small and medium enterprises; or save energy or protect the environment; The agreement will not substantially restrict competition; and Consumers will share the benefits” (Wang & Zhang, 2016, p.1)

“Abuses” of a dominant market position may for instance take the form of “unfairly high prices”, below cost selling and “unreasonable” conditions (Mayer Brown, 2017). Past cases suggest that the “burden of proof is one of the key factors in winning a case of abuse of dominant market position” and that “plaintiffs bear a relatively heavier burden of proof” (Ren, 2017, para. 12).

An important point that emerges is that the AML enforcement remains highly unclear and uncertain. China has shown a great willingness to provide guidance. Once enacted, all the guidelines act as a valuable analytical framework for self-assessment. In this dynamic context, it is of high importance for firms operating in (and with) China to constantly follow the developments and ensure compliance, and not focus solely on the AML itself.

DEALING WITH THE COMPLEXITY OF THE INSTITUTIONAL SETTING

The complexity of the institutional setting described earlier, with different enforcement agencies, has implications for foreign investors. Without a good understanding of the administrative structure and enforcement regime in China, they are likely to be confounded (Deng, 2017). Because it is complicated to identify decision-makers, the possibility to anticipate probable outcomes is also limited (Mariniello, 2013). Besides, inconsistency is observed between the enforcement and judicial authorities. For instance, in the past resale price maintenance has been handled by Chinese courts using the “rule of reason” approach (i.e. “a legal approach by competition authorities or the courts where an attempt is made to evaluate the pro-competitive features of a restrictive business practice against its anticompetitive effects in order to decide whether or not the practice should be prohibited” (OECD, 2002, para. 1)), while it has been considered as illegal per se by the NDRC (Emch, 2017; Ren, 2017). In this context, it seems highly important for foreign investors to be familiar with the institutional setting and be advised when required.

AN IMPROVED MARKET ACCESS? - TELECOMMUNICATIONS CASE STUDY

When considering the different implications of the AML enactment and its enforcement for foreign investors, a question that arises is naturally whether it has led to an easier access to the Chinese market in practice. The different elements mentioned so far indicate mixed results as to fair competition in the Chinese economy. The situation can actually vary significantly across industries, which means that besides a good understanding of the Chinese competition law, foreign investors need to develop a clear picture of the situation in the sector of interest. In this section, the case of the telecommunications market is analyzed. The objective is to evaluate the possibility of market entry, considering the AML enforcement and level of protectionism in this industry.

First of all, it is important to highlight the attractiveness of the Chinese telecommunications market for investors, both domestic and foreign. The telecommunications industry is one of the world’s most

globalized (Hsueh, 2015) and the Chinese market is among the largest (Kanungo, 2013). In 2016, revenues amounted to around \$195 billions, with a CAGR of 6.5 percent during the 2012-2016 period. The consumption volume is expected to have increased with a CAGR of 3.1 percent since 2012. Even though the market growth is forecasted to decelerate, with an anticipated CAGR of 3.8 percent between 2016 and 2021, it remains highly attractive (Marketline, 2017).

Then, the importance given to fair competition in this market needs to be emphasized as well. The telecommunications sector has undergone major changes in the last twenty years, with significant implications for investors. While it used to be largely dominated by monopolies worldwide, it was gradually opened in most countries. This evolution was supported by WTO commitments, first as part of the Uruguay Round mostly for value-added services, then on basic telecommunications services in the negotiations following the round (i.e. between 1994 and 1997), before being further negotiated in the service negotiations which started in 2000. As part of the current DDA, many WTO members are asking for new commitments in this field, with additional market opening and the binding of recent reforms (WTO, 2017g). Yet, according to the last OECD index (2013), the Chinese telecommunications industry had the highest level of public ownership and barriers to entry among the 34 countries analyzed, both OECD and non-OECD (Rutkowski, 2015). Even though telecommunications remain highly regulated all over the world (as the recent end of roaming fees in EU has demonstrated), the situation in China is worth being explored since it is a highly attractive market that is still characterized by significant barriers to entry, generating complaints all over the world.

Given the broad scope of the telecommunications industry, the present case study focuses on basic telecom services (BTS) only (i.e. telephony, data and satellite services). In China, it is particularly important to make the distinction between the different subcategories as they differ in their strategic importance and, consequently, in the openness of the market. The telecommunications industry in China is still greatly influenced by political objectives. It is considered as particularly important in terms of national security (broadly defined) and a tool for the development of the national technology base and competitiveness. BTS are perceived as the most strategic subcategory so BTS firms are still state-owned, whereas value-added services providers face limited barriers to entry (Hsueh, 2015).

THE BTS MARKET TODAY

The major part of the BTS market is still shared between three state-owned operators acting as oligopolists: China Mobile, China Telecom and China Unicom. China Mobile¹⁴ is the leading player with 47 percent of market shares, while China Telecom and China Unicom both account for 23.7 percent

¹⁴ Until recently, China Mobile's scope of activities excluded fixed line services but it now allowed to compete with the two other firms on this segment.

of the market. Considering their scale and the state support they benefit from, the market already appears difficult to enter, and this is without mentioning other barriers to entry (see *infra*) (Marketline, 2017). Still, a portion of the market is now held by MVNOs¹⁵. Since 2013, it is indeed possible for private firms to enter the market as reseller (Wu, 2015).

AN HISTORICAL PERSPECTIVE

In order to better understand the current situation, it is essential to look at the past evolution. Ever since China entered the WTO, the question of foreign direct investments (FDIs) in the BTS sector has been critical. As already mentioned, political forces have been playing a key role because telecommunications are considered as closely linked to security and sovereignty. Yet, it has become clear for the Chinese authorities that the efficiency brought by competition is essential for the country's economic development. Keeping this tradeoff in mind is important when looking at the past evolution of the market (Kanungo, 2013).

1994 – CREATION OF UNICOM

Before 1994, the Chinese telecom market was governed by a monopoly, which now operates as China Telecom. Significant progress was made since the 1980s, after the leadership changed its perception on this industry. While it was mainly used for semi-military and administrative purpose before, it then appeared as an essential tool for the country's economic development. Various measures were thus put in place by the authorities to facilitate the development of the industry. The Ministry of Posts and Telecommunications (MPT) acted both as industry regulator and exclusive operator, offering low-quality and expensive services (Yeo, 2008). At some point, it promoted private network development to address the lack of investment, but then restricted it again to maintain its monopoly. The situation changed in 1994, as new perspectives of profitability in the industry emerged. The booming economy was generating an increasing demand for telecom services and favorable economic reforms had been implemented. This context attracted the interest of other ministries. However, the MPT prevented them from using their already existing capabilities to tap into this market and even created barriers to entry with standards and equipment. Despite the MPT's strong opposition, the Ministry of Electronic Industry, together with the Ministries of Electronic Power and Railways that had already developed private networks, eventually received the State's approval to establish a new telecommunications company, China Unicom. The MPT's view was that telecommunications should be centrally managed because it is a natural monopoly and a tool for national economic development, as well as a critical element for national sovereignty and security. The creation of China Unicom was still accepted by the

¹⁵ Mobile Virtual Network Operators provide BTS but do not possess their own network infrastructures. Instead, they act as wholesalers of access to another mobile network operator's facilities, in this case the "big three".

authorities because of the positive effect on the digitalization of the economy. This is important as it shows Beijing is aware of the importance of introducing competition in the market. From then, the telecommunications market was shared between China Telecom and China Unicom. This represents the starting point of a slow evolution towards competition in the Chinese telecommunications industry (Sheng, Nong & Yang, 2015). With the move from monopoly to duopoly, the MPT could not continue to act as operator so China Telecom was separated from the ministry. The two firms were still state-owned, even though private investment in China Unicom was allowed to some extent. The new situation led to efficiency gains, but much was still untapped because China Unicom's activity remained restricted. It was indeed limited to the areas where China Telecom needed support. During this period, it is claimed that the MPT engaged in anticompetitive behaviors in favor of China Telecom (Sheng, Nong & Yang, 2015).

Between 1993 and 1997, the ministries previously opposed to the monopoly tried to develop FDIs without central intervention, since it was officially prohibited. China Unicom worked together with local authorities¹⁶ and foreign investors to establish special joint ventures and circumvent the ban (Hsueh, 2015). However, this modest liberal evolution was interrupted “when imperatives to control network development, manage bureaucratic infighting, and retain infrastructural assets in state hands prompted central leadership to merge the equipment and service ministries” (Hsueh, 2015, p.636). It led to the divestment of FDIs in the market. Interestingly, a manager that had been involved in one of these special joint ventures reported that it “was not an anti-foreign game. Rather, the government did not want to introduce competition that it could not ultimately control” (Hsueh, 2015, p.636). Quite surprisingly foreign investors did not resist the government's decision, which would have been possible, as they feared it could impact future prospects in China and were not supported by their home countries (Hsueh, 2015).

1998 – INDUSTRY REORGANIZATION

A major reform took place in 1998. The Ministry of the Information Industry (MII) was created, merging the previously rival MPT and of Ministry of Electronic Industry (Sheng, Nong & Yang, 2015). With this government body, a transparent regulatory regime would be provided (Kanungo, 2013), while government and firms were officially separated (Han & Wang, 2014). The industry, that until then consisted of carriers managed by rival authorities¹⁷, was reorganized for different reasons. Internally,

¹⁶ The decision-making for telecom regulation was organized in three levels: the MPT supervised the industry centrally, local units of the Ministry (the Post and Telecommunications Administrations) regulated the market at the provincial/municipal level, and Post and Telecom Bureaus were established at the prefectural level (Yeo, 2008).

¹⁷ China Telecom was managed by the MPT, whereas China Unicom and Jitong were sponsored by the MEI. With the reform, they were all put under the authority of the new regulatory body, the MII (Li, 2009).

there was pressure for change. But, in the context of regulatory reforms worldwide, the main driver was the external pressure, particularly due to the WTO accession process (see *infra*) (Yeo, 2008). It was restructured according to business types on the one hand, and regions on the other hand. The market was eventually¹⁸ reshuffled among six telecom operators (Sheng, Nong & Yang, 2015). This new situation led to a price reduction (Tan, 2006). Although that could be interpreted as the end of the monopoly, the firms were still all state-owned and highly controlled by the government, and each one had a clearly limited scope of services (Sheng, Nong & Yang, 2015).

BEFORE AND AFTER 2001 – WTO COMMITMENTS

The excessive control of the State in the Chinese telecommunications market, with no possibility for foreign investors to enter the market, raised concerns and complains abroad. Inevitably, it was included in the commitments China had to make upon accession to the WTO. Actually the China-US WTO Agreement signed in 1999 was decisive for China's entry: it was considered as the most important obstacle (Kanungo, 2013). First of all, foreign firms were allowed to provide a broad range of telecommunications services through joint ventures with domestic firms. The maximum equity stake by private investors permitted was planned to be gradually increased according to the region, ultimately reaching 49 percent for BTS (US Trade Representative, 2017). That means the Chinese authorities still kept control of the industry: because all potential partners are state-owned, they eventually determine which foreign supplier is allowed to enter the market (Kanungo, 2013). Besides this, China also committed to implementing key principles from the WTO Reference Paper on regulatory principles, which led to the previously mentioned separation of China Telecom from the Ministry that acted as regulator. Beijing adopted pro-competitive regulatory principles (i.e. cost-based pricing, right of interconnection) in order to enable new joint ventures to compete with the three large incumbents (US Trade Representative, 2017).

The commitments on telecommunications made by China for its WTO accession largely impacted the industry. When it became a member in 2001, the industry had significantly opened up. At the same time, the market exploded. By 2002, the country's network had become the world's largest, both in terms of size and number of subscribers. Six years after China's accession, most of the restrictions for foreign investors had been phased out. Yet, some barriers to entry persisted (e.g. excessive capitalization requirements). Even though Beijing was aware of the benefits for its economy, it remained extremely cautious in opening up its telecommunications market to foreign players. The remaining restrictions were maintained because Beijing wanted to assess the impact of the industry liberalization, but also because it wanted – and was pressured – to protect the interests of the domestic operators. As far as

¹⁸ The reorganization was done in two phases: the first one took place in 2000 and the second in 2002 (Han & Wang, 2014).

infrastructures, innovation and service are concerned, the three big players were indeed lagging behind, and opening up the market represented a major threat to them (Kanungo, 2013).

2008 – NEW RESTRUCTURATION: THE “BIG THREE”

In 2008¹⁹, a new market reform took place, considered as the largest industrial reorganization in China's history, even though it was not reflected in the way Beijing announced it (The Economist, 2008). The six operators were reshuffled to three: China Mobile, China Telecom and China Unicom. The objective was to “restrain the leading position of China Mobile in the market structure, to balance the interests of all parties, and to make the three telecom enterprises relatively balanced in the market for 3G services” (Sheng, Nong & Yang, 2015, p.150). From then on, the three operators were allowed to operate all BTS services (Li, 2009). That means private domestic firms had the possibility to enter the wireless market, which was seen as a good opportunity for foreign telecom actors. A number of firms, such as the South-Korean company SK Telecom and Telefonica, the second largest European phone, had already secured substantial stakes in the fixed-line segment. With this new move, they were willing to expand their activity in China to the profitable mobile business. This strategy was actually supported by Beijing. The government cut by 50 percent the minimum investment requirements for telecommunications for foreign investors. Besides, in 2009, the government was allowed to start granting licenses for 3G mobile services (Kanungo, 2013). This had been delayed for years as China wanted to use the domestically developed standard (TD-SCDMA), in spite of its immaturity and limited use in terms of available handsets and equipment (see *infra*) (The Economist, 2008). The rollout of the Chinese technology was imposed to China Mobile, the most competitive and largest carrier, while the two others could use the international standard (Hsueh, 2015). Given the magnitude of the profitability expected in this segment, this was greatly welcomed by foreign firms (Kanungo, 2013).

Nevertheless, Sheng, Nong and Yang (2015) claim that the reform did not result in effective competition. The industry was reorganized by the government and not by the market. Besides, they state that in practice the “big 3” only compete in the 3G segment. Consequently, the monopoly did not change in nature: it remained an administrative monopoly. Yet, the author of an article in The Economist (2008, para 6) argued when commenting on this reform that “Each time the government has arranged things to mirror the outcome produced by market forces in the West. The process has worked well in many ways: fees are low, access is broad and growth is strong”.

A last aspect of the reform is the change in regulatory body. The MII was superseded by the Ministry of Industry and Information Technology (MIIT), which merged different ministries. According to

¹⁹ Note that the AML was enacted the same year, indicating that this move was part of larger efforts to enhance competition in the Chinese market.

Hsueh (2015), this restructuring involving strategic sectors was driven by policy objectives, not by performance motives. Besides, Han and Wang (2014, p. 70) argued that “MIIT still has close ties with the industry, making it difficult to materialize the target of ensuring fair competition in the industry”.

POST-RESTRUCTURATION ERA

After 2008, the “big three” have started competing with each other in all segments of the market, even though their current market shares still indicate a strong influence from the time when their activities were clearly limited (e.g. China Telecom for fixed-line services and China Mobile for mobile services) (Marketline, 2017). A number of new elements since the reform should be mentioned. Even though their positive effect on competition always needs to be nuanced, it indicates some commitment to bring change to the Chinese BTS industry.

First of all, a major development is the opening up of the market to MVNOs. Since 2013, private firms can enter the BTS market as MVNO. The main challenge for these firms is to offer value-added services that could attract customers away from the large operators. Even though reports from 2015 indicate that it is difficult for MVNOs to compete on prices due to the interconnection terms imposed by the three operators (Wu, 2015), this is perceived as an important evolution for competition in the Chinese telecom market. As of September 2016, the MIIT had awarded trial licenses to 50 private companies (Wang, 2016). The MVNO segment is expected to grow at a CAGR of 65.1 percent between 2016 and 2021 (ReportLinker, 2017). Besides, it is claimed that MVNOs represent a good opportunity for foreign firms. This move was indeed welcomed by European firms, even though they insist on the fact that domestic and foreign are still treated unequally (Information & Communication Technology Working Group, 2016). Given the special treatment of foreign firms, the US remains particularly skeptical. It even claims China might back off completely from this initiative (US Trade Representative, 2017).

Besides that, since 2015 the fixed broadband market is open to private companies in a number of cities. During the three-year trial period, the firms that receive the MIIT’s approval can either build their own network or use that of the incumbents (BMI Research, 2017). Until February 2016, licenses were awarded to 148 private companies (Wan & Ko, 2017). According to BMI Research (2017), similarly to what happened with the MVNO trial, there will be a high number of applicants for licenses but most of them are expected to leave the market in the short term. This is due to the current market structure which is still dominated by incumbents.

Another notable change is the BTS license granted to China Broadcasting Network Ltd in 2016. The Ministry announced that this aimed, among other things, at promoting competition (Feifei, 2016). Even though the emergence of a new player in the BTS market is positive, two elements need to be highlighted. First the firm is, just as the other players, state-owned. Second, “analysts (...) see little

impact to China's three major telecom operators in the near term due to China's limited growth potential for handset supply and China Broadcasting Network's capital constraints.” (Reuters, 2016).

It is important to note that state intervention in the BTS market is still significant today. The three state-owned operators are treated as tools that the government can use to achieve its policy objectives (Wu, 2015). A clear example was seen this year. When the Government Work Report was presented to the National People's Congress, it was asked that the operators “remove all domestic long-distance and mobile roaming fees by the end of this year, significantly cut internet connection and leased line charges for small and medium-sized enterprises (SMEs), and reduce international long-distance tariffs” (Perez, 2017, para. 3). The three operators immediately committed to adapt accordingly, despite the negative impact on their financial performance. It confirms that they keep putting Beijing's development objectives ahead of their market interests (Perez, 2017). Also, it demonstrates that the measures taken by the government should always be interpreted with caution. Indeed, in 2014, the government allowed telecoms operators to set their retail prices independently. Until then, they needed the approval from the authorities, although there existed different situations (i.e. market-oriented prices, government-guided prices or government-set prices) (Wang, 2016). Besides, although the MIIT does not directly control telecom operators, it is said to retain considerable influence over the whole industry. In practice, the sector is micro-managed by the government, which means that the scope for competition is very limited²⁰. Yet, this seems to evolve (BMI, 2017).

Regarding private investment in the “big three”, it still appears to be particularly restrained, even though they are now all listed. As of December 31, 2016, the State still owned 73 percent of China Mobile (China Mobile, 2017), 71 percent of China Telecom (China Telecom, 2017) and 74 percent of China Unicom (China Unicom, 2017). Besides the shares available on the stock exchange, no private investor is involved. As for foreign investments, this is also highly limited. In 2015, foreign equity in the market was under 10 percent (Hsueh, 2015). So far, no foreign firm has entered the BTS market as joint venture. According to Han and Wang (2014), even though the relaxed government policies following China's WTO accession give rise to a general perception that the market is now relatively open and competitive, the actual level of openness was not reduced significantly. Non-policy factors need to be considered, such as the high costs, high risks, lack of legislation and the powerful “49 percent limit” preventing any foreign firm from exercising management control.

Although no joint venture was formed, two of the three operators have at some point sold stakes to foreign investors (Yam, 2017). Telefonica, one of the largest telecommunications firm in the world, used to have a strategic alliance with China Unicom (China Unicom, 2017). Their collaboration started in 2009 and was strengthened 2 years later when Telefonica increased its stake up to 9.6 percent (China

²⁰ Anecdotally, the executive management apparently rotates among the three firms (Hsueh, 2015).

Unicom, 2011). However, Telefonica then gradually sold its stake until 2016 (Asia Pacific Telecom, 2016), even though they keep working together in a number of ways (Telefonica, 2016)²¹. Given the difficult financial position of the firm, it seemed natural to do so since the long-term benefits appeared limited. It has indeed been claimed that “there is no long term strategy for Telefónica in China. It has no hope of buying China Unicom outright – politically, it would never be allowed to claim full ownership, and financially, it would not be able to afford it.” (Sahota, 2012, para.10). In 2010, Vodafone made the same decision with its 3.2 percent stake in China Mobile (Sahota, 2012). Similarly, SK Telecom once controlled 6.6 percent of China Unicom. The foreign firms also had board seats but since the telecom operators did not become market-driven, all foreign investors sold their stakes, driven by financial motives (Yam, 2017).

ANTICOMPETITIVE PRACTICES?

Considering the current situation of the Chinese BTS market and its past evolution, a natural question is: To what extent do the authorities and the three carriers engage in anticompetitive behaviors, and how is the AML enforced? For years, criticisms have been voiced about monopolistic practices (China Telecom, 2016). The government has reacted by launching a number of investigations, which are presented in this section. Actually, so far the telecom sector is SAIC’s first target (Han & Boyle, 2016).

MERGERS AND MONOPOLIES

Regarding monopolies, the situation has evolved over time but the level of competition remains extremely low given the size of the market (United States Trade Representative, 2017). A number of characteristics of administrative monopoly conducts have been observed in the past²². When China Telecom’s monopoly was broken with the establishment of China Unicom, the ministry in charge was strongly opposed to the creation of this duopoly and used its administrative power to complicate Unicom’s operations (e.g. delayed approvals, discriminatory pricing policies) (Sheng, Nong & Yang, 2015). Later, when the industry was reshuffled in 2008, the scope of the mergers made it compulsory to notify them to MOFCOM. Yet, it was not done and the MOFCOM did not sanction it (Sheng, Nong & Yang, 2015). One example is the merger between China Unicom and China Netcom, which exceeded the threshold for notification according to the AML. No notification was made, although the merger was finalized after AML enactment. The firms then justified it by arguing the merger was part of a reform approved by the State Council. However, a notable development took place afterwards.

²¹ For instance, in 2016, the two firms announced they would create a joint venture for value-added services (Telefonica, 2016).

²² Administrative monopolies differ from market and natural monopolies in that they are established by the government through regulatory policies and satisfy the state and the SOEs’ interests.

MOFCOM took measures to raise awareness about AML requirements among SOEs managers and governmental authorities. This resulted in less and less unnotified mergers (Weinreich-Zhao, 2015). It seems however unlikely that, today, another merger of this scope takes place in the market. The three firms will surely continue collaborating, possibly leading to anticompetitive situations, but according to an article in *The Economist* (2016) covering a recent collaboration project²³, the firms' executives said that a full merger was not planned because "a duopoly in the telecommunication industry would conflict with the government's competition-focused agenda" (*The Economist*, 2016, para. 4).

Nevertheless, as previously explained, today most of the market is still held by SOEs that are tightly controlled by the ministry and Beijing remains reluctant to significantly opening it. Even though positive moves have been done, particularly for MVNOs, it seems highly complicated for new players to compete with the three incumbents. The telecom giants are still used as tools to pursue policy goals and consequently benefit from the state's support. Taking this into account, it would not be surprising to see the current telecom industry being qualified as anti-competitive administrative monopoly. It is then interesting to look at the legislation to see to what extent it complies with it. Article 28 of the AML states: "Where a concentration has or may have effect of eliminating or restricting competition, the Anti-monopoly Authority under the State Council shall make a decision to prohibit the concentration. However, if the business operators concerned can prove that the concentration will bring more positive impact than negative impact on competition, or the concentration is pursuant to public interests, the Anti-monopoly Authority under the State Council may decide not to prohibit the concentration." (Anti-monopoly Law of the People's Republic of China, 2007). It means that as long as Beijing perceives – or pretends – that the current market structure is positive for public interests, it is aligned with the AML.

If external pressure becomes too strong however, China could be forced to significantly open up its telecom market. In its report on China's WTO compliance, the US openly blames the MIIT for many of the difficulties faced by foreign suppliers when trying to access the market, claiming that it keeps not only controlling and influencing extensively the firms, but also using its regulatory power against foreign firms. It is argued that barriers to entry are raised for foreign investors, effectively preventing them from entering the Chinese BTS market. In spite of the positive moves by the Chinese government and the perception that WTO commitments have been implemented, the report states that no meaningful progress has been made in opening up the market (US Trade Representative, 2017).

It is then interesting to have an overview of the current legislation, which is perceived as a barrier to entry used by the government to keep its "monopoly". First of all, as already said, a BTS license is

²³ Besides the network tower already shared by the three operators, China Unicom and China Telecom decided to collaborate on the expansion of the 4G network in rural zones.

required to operate in that market. It further specifies the subcategories it allows, as well as the geographical areas covered (Wang, 2016). Then, there are conditions on capital and equity ownership. All firms are required to have at least 51 percent of their ownership owned by the Chinese State. In addition, the minimum registered capital is 100 million RMB for firms wishing to operate in a restricted province, autonomous region or municipality, and 1 billion RMB in order to operate across provinces (Sheng, Nong & Yang, 2015), which is considered as exceedingly high (US Trade Representative, 2017). Besides, the telecommunication industry is included in the list of industries potentially subject to national security review (see *supra*), adding on an additional constraint for foreign firms²⁴ (Baker & McKenzie, 2011). Lastly, the multiple legislations and different authorities responsible for the telecommunications market can confuse foreign firms (see Appendix 14) (Wang, 2016). According to BMI Research (2017), although MIIT's high level of interventionism has been positive for the development of the industry, it restrains the possibilities for private firms.

Lastly, the Chinese standards can also be perceived as a barrier to entry set by the government, since operators need to adapt their services. While China used to depend exclusively on international standards, it started developing its own standard when the 3G was launched. By then, it had reached a development level that enabled it to develop its own 3G standard. The government supported telecom companies to develop the TD-SCDMA standard, in order to minimize dependence on western technology. As already mentioned, the TDS-CDMA technology was assigned to China Mobile by the MIIT, while the two other carriers were allowed to use the international standards. Although the Chinese standard was successful within the country, this was not the case abroad. In 2005, the industry, still greatly supported by the government both with favorable policies and financially, started developing another domestic standard for the 4G. Yet, that does not mean that it prohibits the use of international standards in China. On the long term, the Chinese own-developed standards are expected to gain a significant market share within the country (van de Kaa & Greven, 2017). The fact that China is determined to develop its own national standards in spite of established international standards is subject to criticism from the US. This is observed in other industries as well, and is said to be used as a tool to protect domestic firms since it generates high compliance costs (US Trade Representative, 2017).

²⁴ Note also that China's new Cybersecurity Law, which entered into force on 1 June 2017, may significantly affect foreign firms with activities dependent on telecommunications networks. As in other cases, it will actually depend on its (unpredictable) enforcement (Wu, Ruan, Leugh, Sbuttoni & Lim, 2016). Under this new law, "any company using a telecommunications network to operate or provide services in China would be required to store data in mainland China, possibly even affecting those that store data to clouds with servers located outside mainland China" (Keally, 2017, para. 3).

ABUSES OF DOMINANT POSITION

Given the structure of the market, it could be claimed that the three firms enjoy a dominant position. The question that would then arise is whether they use it in an anticompetitive way. A number of cases of abuses of dominant position have been carried out against the three telecom SOEs under the AML. In 2011, the NDRC started investigating China Telecom and China Unicom for abuse of dominance, suspected of price discrimination in the broadband internet market. This happened at a time when there was a general feeling that broadband development in China had stalled, characterized by low speed and high prices. Both firms committed to rectifying their anticompetitive conduct (Wu, 2015). Then, from 2013 to 2016, the SAIC investigated the “big three” for bundling broadband with landline and mobile phone services in two provinces (US-China Business Council, 2017). In all cases, the telecom operators committed to correct the distortion to competition. After one year, SAIC had to evaluate whether all commitments were fulfilled (Fels, Wang, Ng & Emch, 2017). It was also the case when China Mobile was investigated for monthly expiration of data packages. Despite the fact that the telecom operators were not sanctioned financially, it still represents a big development by showing that SOEs need to comply with the AML as well (Han & Boyle, 2016).

Lastly, it is interesting to see that private action was also used against abuses of dominance by the telecom giants. Yang Zhiyong sued China Mobile for “unfairly high prices”, in accordance with the AML. However, the Shanghai Intellectual Property Court ruled against Zhiyong. This case highlighted the importance of the burden of proof for Chinese courts. For instance, one issue was the lack of proof for the dominant position (Ren, 2017).

MONOPOLISTIC AGREEMENTS

Besides abuses of dominance, the competition law enforcement authorities have also investigated monopolistic agreements. First of all, the NDRC investigated and sanctioned (\$2 million fine) a cartel among the “big three” and another state-owned telecom firm (China Tietong) in a Chinese province. The provincial industry regulator had actually organized the cartel, which aimed at restricting promotion actions (Han & Boyle, 2016). One of China Unicom’s branches was also sanctioned by NDRC for monopolistic agreement, which consisted in price fixing with another local player. Lastly, another of the firm’s local branches was sanctioned for resale price maintenance, in the cable broadband services segment (Fels, Wang, Ng & Emch, 2017).

FUTURE PERSPECTIVES

It is now clear that the high level of interventionism in the past keeps shaping the Chinese telecommunications industry, even though “China has been making significant progress towards a pro-

competitive, independent, and transparent regulatory mechanism for the telecoms sector” (Wang, 2016, p. 53). This actually reflects the complex shift of the whole economy, from a centrally planned model to competitive markets. The case study has shown however that the state’s intervention is particularly strong in the telecom market, as the industry is perceived as a key support for the national economy. The risk is that, in the absence of new measures to open up the market, WTO members put an increasing pressure on China. The US more specifically is likely to fight interventionism in the telecom market, considering the numerous concerns it raised (e.g. foreign equity cap, limited access to MVNO market) and its efforts to obtain commitments from China on this matter (US Trade Representative, 2017). The current barriers to entry also seem to be perceived as an important issue by the EU. In 2013, Chinese officials have indeed claimed that the European trade commissioner tried to negotiate market shares for its firms, in exchange to which it would drop an investigation into illegal subsidies (Chaffin, 2013).

According to Perez (2017), in the near future the three operators are expected to continue being used as a policy tool by the Chinese government. Telecommunications are included in the current Five-Year Plan (2016-2020), so the three SOEs will surely follow the State’s direction and keep benefitting from a special treatment in exchange (Perez, 2017). Besides price levels and speed, targets have also been set by the government with respect to coverage, for instance increasing broadband access from 40% in 2015 to 70% in 2020 (BMI, 2017). Consequently, priority will be given to the government’s development goals.

A number of elements need to be mentioned when predicting the future development of the BTS market. First of all, the Chinese government has announced that greater participation from private investors would be promoted. The mixed-ownership reform (see *supra*), characterized by a reduction in state ownership in favor of private investment and increasing management autonomy, should be implemented on telecommunications firms. China Unicom should act as the pilot firm for this reform, with apparently strategic involvement from key domestic, private, firms (Perez, 2017). This happens at a time when China Unicom is facing financial difficulties (Perez & Li, 2017). This move towards a more market-driven model seems positive. However, Yam (2017) claims that in practice, this change is insignificant given the shareholding structure of China Unicom. Indeed, while the presented change concerns 20 percent of China United Network Communications Ltd, an indirect holding of Unicom, eventually it only represents 5 percent of China Unicom. She claims that this would not provide much influence to the private player, especially since the state is supposed to defend the rights of minority shareholders, whereas it also acts as the main shareholder. Consequently, this move should unfortunately rather be seen as something symbolic without a significant impact in practice (Yam, 2017). Now, regarding MVNOs, BMI Research (2017) claims that in the next five years the positive effect on competition will be limited because of the three incumbents’ position and the opposition between the government’s goals and profit-driven business objectives. Only firms offering

differentiated offerings are expected to survive (BMI, 2017). A last element that should impact the BTS market in the next years is the strengthened collaboration between China Mobile, China Telecom and China Unicom, the first step of which was the creation of the “China Tower Corp” in 2014, an infrastructure-sharing joint venture (Perez, 2017). The risk is then that the three giants become even stronger compared to (potential) competitors.

Considering that the market growth is expected to decrease in the near future (see *supra*), the important question that arises is the following: Will the Chinese government try to protect even more its three SOEs from competition, or instead will it be willing to make it more market-based to stimulate growth? Given the numerous concerns that are already expressed abroad on this matter, the first possibility could give rise to major conflicts. Besides, Li (2009) argues that if China does not address its administrative monopoly in the telecom market, the effectiveness of its AML could be impacted. Indeed, it would set a precedent or exception for other monopolistic situations, in the railway, aviation, and electricity industries for instance. This could only increase its trading partners’ discontent.

5. INTERNATIONAL COOPERATION

With the AML, China has created similarities with competition laws in developed countries, which opened the door to cooperation. Actually, international cooperation was already at the heart of the drafting process. Foreign experts and competition authorities were greatly involved. Not only was it positive for Beijing as it could benefit from the experience that has been developed abroad, but it also ensured consistency with other competition laws. International cooperation efforts by China continued after the enactment of its competition law. In 2003, it signed an agreement with the EU for cooperation (Ling, 2011), while a technical assistance program with the US was launched in 2008 (United States Trade Representative, 2017). Furthermore, numerous provisions were included in the trade agreements by China. But Ling (2011) nuances this by saying that Beijing remains cautious: cooperation mechanisms are mainly limited to capacity build-up and information exchange. Besides, only the MOFCOM is involved in international cooperation. Without a unified agency, issues of authority and independence can arise. Alongside these elements, China has still not joined the ICN (Abbott, 2017), whereas it appears as a key actor for future international convergence on competition policy today.

Regarding the multilateral negotiations on the matter, China does not categorically reject a harmonization of competition laws, unlike other developing countries. “Rather, it believes that it is unwise to ignore the rapid progress of economic globalization and that more pragmatic methods may be used with respect to specific implementation” (Ling, 2011, p.138). Beijing supports that it would be best done in the WTO framework, given the successful integration of other trade-related legal affairs in the past (e.g. intellectual property rights) and the organization’s experience in tackling trade-related

competition issues. Among the different forms it could take, it however supports voluntary cooperation, a key reason being the absence of competition law in some countries. It would then include elements such as mutual notification, information exchange, active comity and support to developing countries. It claims that the last proposal that was made during the negotiations, that was mainly limited to the application of WTO principles to competition policies, did not go far enough. Addressing the issue of hardcore cartels, as it was the case in the last proposal, is something that China would support for sure. It stems from the fact that whereas some aspects cannot be unified because it should take into account the differences in development levels, hardcore cartels are definitely harmful, especially for developing countries. A consensus on this could easily be reached. A key element for Beijing would be the inclusion of exceptions, especially special treatment for developing countries. For example, domestic mergers in these countries, which are driven by international competition, should be allowed. So it seems that the economic and legal gaps between developed and developing countries are a major aspect to consider for China. Lastly, it does not approve issue linkage with trade aspects. In brief, China can be expected to support international cooperation based on a voluntary basis and special treatment for developing countries, as a first step towards a comprehensive and unified competition policy (Ling, 2011).

6. CONCLUSION

The analysis of the Chinese economy presented in the previous part inevitably leads to questioning the level of competition in its markets. An analysis of the country's competition law and its enforcement was therefore conducted. Before the Anti-Monopoly Law (AML) was enacted in 2008, with its comprehensive set of competition policy norms, competition issues were addressed by unsystematic and incomplete regulations. In terms of language and structure, the AML is relatively similar to developed countries' competition laws. However, it mainly differs in two aspects. First, it also targets abuses of power by public administrations and second, it gives a prominent role to industrial policy considerations. As it is the case for the AML as a whole, a major issue for this second element is the vagueness of the provisions, making it difficult to predict its effects. Yet, China is now making progress on this matter. It increasingly provides guidance, which sheds light on important aspects of AML enforcement. What is more, the AML enforcement authorities have been significantly expanding and intensifying their activities in recent years, which they now also conduct in a more transparent way. While they used to focus on merger control in the first years, an increasing number of investigations for anti-competitive behaviors are now tackled. This trend is expected to be sustained since awareness about the AML and its enforcement is increasing, leading to more willingness and confidence to take legal actions. These developments are important as they address the largely criticized lack of transparency and predictability.

Other criticisms are expressed about the Chinese competition policy. A key element is the conflicting objectives of the AML with the country's industrial policy. The competition law may be interpreted in such a way that it can be used to pursue industrial policy objectives. In practice, it seems that national interests were predominant in the first years but that it has evolved since then. Yet, many concerns remain as to the special treatment granted to SOEs and state monopolies in industries deemed nationally important. Similarly, foreign firms still complain about the asymmetric enforcement of the AML compared to domestic firms, even though progress has been observed. However, it is important to take into account the fact that the Chinese competition law is still in its infancy. In view of this, the progress that has already been made is considered to be substantial. And Beijing seems willing to continue improving its competition law's enforcement as it was a key aspect presented by the Third Plenum. Besides, it is essential to remind that the country's economic, legal, and cultural conditions remain different from western jurisdictions.

Given the increasing AML enforcement, understanding the different aspects of the law and its enforcement appears as a prerequisite for firms doing business in China or willing to do so, whether their own behavior may be deemed anticompetitive, or that of (potential) competitors. Because AML enforcement remains highly unclear and uncertain, it is also highly important for firms operating in (and with) China to constantly follow the developments (i.e. new guidelines and enforcement cases).

The case of the telecommunications industry was studied to evaluate whether the AML has led to an easier access to the Chinese market in practice, even though it greatly differs across sectors. The level of interventionism is particularly strong in the industry, as it is perceived as a key support for the national economy. It is still largely dominated by three SOEs operators which are used as a policy tool by the Chinese government. Since China's accession to the WTO, positive moves have been made in terms of policies and AML enforcement. Nevertheless, it does not seem to significantly change the nature of the market structure. The industry remains largely closed to competition, with high barriers to entry for both domestic and foreign private investors. It seems that, in the absence of new measures to open up the market, WTO members will put an increasing pressure on China.

Because of the importance of the Chinese economy today and the increasing enforcement of its competition law, the international community is paying significant attention to what is done in that regard. To what extent would China be willing to cooperate to address the different elements which raise concerns abroad? The country seems to take into consideration some of the criticisms that are made and adapt accordingly. Besides, Beijing has been working with international players to draft and enforce its competition law, even though it chiefly consists in capacity build-up and information exchange. According to the available information, China can be expected to support international cooperation on competition laws in the WTO provided that, in the first place, it is based on a voluntary basis and a special treatment is granted to developing countries.

PART 5: HOW COULD CHINA'S COMPETITION POLICY IMPACT NEGOTIATIONS ON AN INTERNATIONAL FRAMEWORK FOR COMPETITION RULES IN THE WTO?

The previous part highlighted the importance of the Chinese competition policy for the international community. Given China's position in international trade today, its highly interventionist industrial policy and increasing competition law enforcement, foreign firms and their governments pay significant attention to the evolution of AML enforcement. In case the numerous concerns in that regard persist, WTO members may want to bring this topic to the WTO. In other words, China's current competition policy could significantly influence the future of WTO negotiations on increased cooperation in competition policy issues. However, since China's power and influence in international negotiations have been increasing during the last decade, and the WTO is still based on consensus, the country's position will also be decisive. The objective of this part is to use all the elements presented so far to answer the following questions: Considering China's competition policy, are negotiations in the WTO on an international framework for competition rules likely to be relaunched? In cases it is, would it then be possible to reach an agreement? It is important to note that the conclusions which are drawn in this part are purely personal.

1. CONSIDERING CHINA'S COMPETITION POLICY, ARE NEGOTIATIONS IN THE WTO ON INCREASED COOPERATION IN COMPETITION LAWS LIKELY TO BE RELAUNCHED?

There has always been strong disagreement between developing and developed countries on the inclusion of the Singapore issues, including competition policy. Consequently, negotiations are unlikely to be relaunched unless there are large benefits for WTO members, including China. The assumption is made here that the deadlock of the negotiations can be overcome, even though it is far from being guaranteed due mainly to the deep disagreements between developed and developing/emerging members.

COSTS AND BENEFITS FOR CHINA

A WTO agreement on competition rules would have a number of advantages for China. First of all, it is important to note that the trade policy directions adopted by China are not solely based on economic rationality. Indeed, the impact on the country's position and image on the international stage also play a key role. New WTO commitments with respect to competition would improve China's image as a market economy and benefit the country in two respects. First, it would strengthen its position as major actor in international trade but also increasingly in international politics. Second, it would create conditions that enhance investors' confidence. There have been important outflows of capital, and

China needs to prove it can ensure a sustainable and inclusive growth to attract investments again. This explains why significant efforts have been made by China in order to adapt its policies to complains from trading partners.

A second aspect that could be seen as positive for China is that it could reduce protectionist behaviors from its trading partners. Protectionist measures have been increasingly taken by WTO members to resist the competition from Chinese firms, for instance with abuses of anti-dumping measures. This context is not favorable for China since it is highly dependent on international trade. If the country shows progress in terms of fair competition, WTO members may be less likely to act in a protectionist manner. Besides, China could benefit from an agreement with stricter provisions on anti-dumping measures, as these can be perceived as anti-competitive practices.

Reaching an agreement in the WTO framework could also be positive for China in that it could act as a safeguard against abuses of power from trading partners. Powerful countries such as the US could otherwise impose unfair conditions in plurilateral agreements. The WTO also enables Beijing to enjoy stronger bargaining power by forming a coalition.

A last potential benefit is the possibility to use WTO commitments in order to overcome internal opposition and non-compliance. When provisions are binding internationally, the central authority can better ensure compliance from local authorities, ministries or SOEs' executives. One observation was indeed that Beijing was, in some cases, unable to overcome domestic resistance and control the implementation of its policies. Besides, in case the WTO agreement requires the existence of a central enforcement authority, China could get rid of the problematic tripartite system. As a reminder, no unified agency was created to enforce the AML because of the pressure from the three already existing enforcement authorities.

However, an important aspect would probably dissuade Beijing from seeking increased international cooperation on competition policies. It is obvious today that the Chinese authorities intend to protect a number of domestic industries from competition. This appears to be the priority above all others, including fair competition. Indeed, the AML provides a number of cases when its provisions do not apply because of the benefits for the domestic economy. WTO provisions on this topic would probably require adaptations in that regard. For instance, the large scale mergers and acquisitions promoted by the Chinese government could be sanctioned. In addition, in the Doha Round, China and other emerging countries have shown a certain reluctance to commit to new rules, including on competition policy.

COSTS AND BENEFITS FOR WTO MEMBERS

It seems that, considering China's current competition policy, WTO members would have much to gain from increased international cooperation on this topic. The Chinese interventionism is contradictory with the mission of the WTO, namely ensuring "that trade flows as smoothly, predictably and freely as possible". Today, international trade is mainly hindered by NTBs. Even though these are more difficult to negotiate, it is thus essential to address them. WTO members would mainly push for an agreement because the Chinese State's intervention in order to achieve its industry policy goals hinders market access. In the absence of an efficient competition policy, NTBs can nullify the fall of tariffs. The telecommunications case study, indicating the presence of administrative monopolies, illustrated this situation. For the BTS industry, foreign firms are - according to China's WTO commitments - allowed to hold a 49 percent stake. However, because of other barriers to entry and unfavorable conditions, no foreign firm is currently operating on the market and the few which took a stake stepped back. Strengthening the provisions on monopolies for example would then be beneficial for WTO members in order to ensure foreign firms can enter the Chinese markets. A general observation is that China seems to "theoretically" open up its economy and implement WTO commitments, whereas in practice it keeps putting up protectionist barriers as it is the case for telecommunications. Hence, the importance of going further in terms of competition rules in the WTO. The "convenient compliance" described earlier²⁵ is consistent with this observation. Similarly, it is not rare to see the Chinese authorities announce positive changes, among others aiming at promoting competition, which are not implemented. The major reform of SOEs is one example. This has probably generated a sense of mistrust, which also supports the need for new commitments.

The GATT articles on STEs also seem too limited considering the importance of the Chinese state sector and the likelihood of anti-competitive practices. Similarly, the provisions on subsidies are considered as quite permissive, even though it was revised several times. Even so, the US claims China does not comply with them. New provisions with regard to M&As also appear to be valuable for WTO members because China's active policy in terms of domestic large-scale M&As may have international external effects. Although the effects doctrine is applied, many developing countries still face capability constraints to sanction anti-competitive practices with effect in their jurisdiction. Besides, Chinese firms are also increasingly involved in large-scale international M&As. Given the complexity of the AML enforcement and institutional setting, this gives rise to high compliance costs for foreign firms. In that sense, common competition rules could be advantageous.

²⁵ China implements industrial policies despite their inconsistency with the WTO principles or agreements, and once they are brought in front of the Dispute Settlement Body, it faultlessly adapts its position because the goals pursued have already been achieved.

Many concerns are expressed with regard to the competition law enforcement, such as the priority given to industrial policies, the unequal treatment of foreign firms but also domestic private firms (cf. telecommunications case study), and the lack of predictability, fairness and transparency. Currently, these aspects are not covered by the WTO agreements. In addition, even though the competition law enforcement is increasingly aligned with western practices, this evolution is not binding. Indeed, the AML can still be applied in such a way that it gives rise to anti-competitive situations. Therefore, just as it was done for tariffs in the past, a WTO agreement could be used to make sure China does not go backwards in its competition law enforcement. This is even more important when taking into account the changes in policy that can occur according to the presidency. It should also be noted that in China, the State is involved in anticompetitive behaviors. Consequently, the WTO law could conflict with domestic competition laws.

Besides these elements, an international framework for competition rules could help overcome a major source of blocage in the WTO today, namely the rapid development of emerging countries and more particularly China. The “fear of China”, which initially led to a discriminatory accession process, keeps influencing the negotiations and the majority of cases brought to the DSB involve the country. In this context, an agreement on competition law would be highly valuable as it could address many concerns expressed by developed countries.

Lastly, it is important to emphasize the progress made in competition policies worldwide thanks to voluntary cooperation. During the last negotiations on the topic, the diversity and sometimes absence of competition laws was a major problem raised. Since then, domestic competition laws converged in some ways and important support was provided to developing countries to enable them to create or improve their competition policy. Given this positive evolution, WTO members are more likely to agree on a number of aspects and may therefore be more willing to start negotiations.

Nevertheless, just as for China, a WTO agreement on competition policy would not only bring benefits for its members. This would indeed also imply high compliance costs, for developing but also for developed countries. Even though developing countries have agreed to integrate some - although rarely binding - provisions on competition in their bilateral and regional trade agreements, they would probably be reluctant to commit to new rules, especially because they would perceive the benefits as more limited compared to the US and the EU for instance. Just as in the previous discussions, developing countries may be expected to argue it is not their priority. Besides, their distrust towards richer members is obviously persisting. Although small developing countries would probably continue to recognize their need for assistance to deal with anticompetitive behaviors by multinationals, their concerns about the other members’ genuine agenda would presumably remain strong. In addition, some countries are now largely influenced by China since it strives to extend its leadership in the world.

Developed countries could be hesitant as well. Indeed, it is generally recognized that China has made significant progress in its competition policy (e.g. transparency, guidance, increased activity and scope, new Fair Competition Review System for abuses of administrative power, investigations of SOEs). China has showed a willingness to cooperate on a voluntary basis and this had led to significant progress. Voluntary cooperation with the US and the EU has resulted in an improvement of some aspects raised. The EU would probably keep its previous position, pushing for an agreement on competition policy, but the US might be less supportive. Indeed, in the past, it was reluctant to be subordinated to a supranational body and President Trump's negative attitude towards international organizations could strengthen this.

CONCLUSION

Taking all these elements together, it seems that Beijing seeks to balance its AML enforcement between national industrial interests and the desire to attract FDI and appear as a market economy. Industrial policies remain at the heart of the Chinese economy. Even though positive moves are made, most of them seem to be symbolic, potentially partly explained by domestic opposition. Therefore a possible scenario would be that China agrees to relaunch negotiations as this would be positive for its image but that in the negotiations it would try to make the agreement the least obstructionist possible. A major element that could influence China's position on this matter is actually the direction it will take in order to address its growth problem: Will China protect even more its domestic industries or open them completely to stimulate growth?

As for the rest of the WTO membership, there seems to be powerful reasons to relaunch the negotiations. Indeed, the Chinese interventionist industrial policies give rise to a number of anti-competitive practices. The deficiencies in China's competition policy seem however to matter more for developed countries than developing countries. For the latter, the compliance costs would probably be perceived as too high compared to the potential benefits. Developed countries on the other hand would see major benefits, particularly in terms of market access. The topic of international cooperation in competition policy is a long-standing one, so there is clearly a willingness to go further on this topic. Yet, negotiations were previously more dominated by developed countries. In the current circumstances, the developing countries' resistance could prevent other members to bring the topic back to the table of negotiations, unless they benefit from concessions in other areas.

In the past, discussions were relaunched when the global economy was affected by the lack of cooperation, for example when there was a surge in international M&As. The current context, with developed countries suffering from the economic slowdown whereas the Chinese economy develops at a rapid pace but keeps protecting its market, may lead to a relaunch of the discussions. However, China would probably be reluctant to agree on far-reaching commitments given the importance it still gives

to industrial policies, and developing countries may ask for other concessions from WTO members in return. In case the deadlock in the WTO cannot be overcome, or if members prefer to address competition issues in another framework (probably the ICN), China's competition policy could lead countries to look for increased cooperation outside the WTO.

2. WOULD IT BE POSSIBLE TO REACH CONSENSUS ON THIS MATTER?

The fact that no consensus could be found despite seven years of work in the organization reflects the complexity of the negotiations on this topic. Major divergences of opinions are expected between developing and developed countries. China now actively defends its interests in WTO negotiations. It is also willing to maintain political support from developing countries and is therefore likely to defend their interests. However, at the same time, developed countries are now determined to avoid granting special treatment to emerging countries. It is also important to note that developed countries would probably be chiefly driven by market access motives, which turned out to be problematic during the previous attempt to reach an agreement. In addition, there are obviously economic, legal and cultural differences influencing competition policies that cannot be overcome, in the short term at least. In the case of China, this takes various forms such as protectionist measures in sectors considered as strategic, interventionism from local authorities with their SOEs, or the general administrative enforcement system that needs to be respected in AML enforcement. Another aspect that is likely to be problematic is the model used for international competition rules. Both the EU and the US would want to have its model serve as basis and conflicts could then arise between these two players.

Consequently, except for a few elements such as hard core cartels, WTO members are likely to disagree on numerous aspects. For instance, Beijing would insist that developing countries benefit from a special and differential treatment but developed countries seem less and less likely to accept it. Then, developed country may ask for mechanisms ensuring external pressure. Indeed, the AML analysis has shown that, besides de jure competition policy, what really matters is de facto implementation. China and other members would probably not support it. Considering China's current industrial policies, it would also oppose binding provisions on M&As and subsidies. More generally speaking, China can be expected to be reluctant to any form of binding agreement. It would rather support voluntary cooperation in the WTO framework, whereas other members are expected to defend far-reaching commitments. Another key aspect that could generate conflicting views is issue linkage. Despite the historical importance of this mechanism in the WTO, some members could oppose its use in the current context. In brief, it seems that in the short term a consensus could be reached on limited aspects only. Since a number of WTO members would want more from the negotiations, there could be a combination of binding and not binding provisions. Voluntary cooperation would be strengthened, while plurilateral agreements could go further. In the long-term, they could become binding for all WTO members.

CONCLUSION

The objective of this master thesis was to understand how China's current competition policy could impact future negotiations on an international framework for competition rules in the WTO. To this end, the different elements of the question were analyzed individually. The role and the functioning of the WTO were first explored. The importance of the organization in our globalized economy was highlighted. So was the crisis it is undergoing. In the current context, it seems highly unlikely to see negotiations on a new important topic being launched in the short term. A major obstacle is the consensus rule. While there used to be a balance of power clearly in favor of developed members under GATT, under the WTO developing countries have increasingly made use of the power it gives them. Because there are deep disagreements with developed countries, partly driven by the rise of China, this contributes to the deadlock in negotiations. Yet, even though China's position in the WTO remains unclear, the survival of the multilateral trade system is essential for the country as it depends on external trade.

The second part focused on competition policy. It appears to be an important element to address in the WTO given its link with international trade. However, not much is done currently to address competition issues at international scale. Hence the calls from some countries in the past, especially the EU, to introduce binding competition law disciplines into the WTO. Some developments since the failed negotiations on this matter could trigger new negotiations: markets are more and more globalized, the US hegemony is increasingly challenged, anti-dumping measures are misused, knowledge and experience in this field are now stronger, business practices undermine efforts made to lower barriers to trade and investment, developing countries have entered into PTAs including competition provisions since then and negotiations need to be unblocked. Yet, many opinions going in the other direction are expressed and a number of aspects would be highly controversial.

The objective of the third part was to present some elements related to the Chinese economy, which need to be considered to understand the Chinese competition policy. Industrial policies, aiming at controlling strategic industries and developing national champions able to compete in global markets, have a significant influence on China's economy. The state sector is still particularly important in the country, even though it does not drive the economy anymore. SOEs are mainly used as tools used by the government to realize policy objectives. Regarding trade policy, although China exceeded expectations in terms of market liberalization measures upon its WTO accession, a rebound of protectionism has been noticed since 2004. Foreign companies complain about interventionist policies and practices and the trade distortions generated by SOEs and national champions. The current leadership appears willing to change this, but progress so far is very limited.

Given China's rise as a leading trading nation, its industrial and trade policies have a significant impact on all WTO members. It raises concerns for its competition policy. This aspect was explored in the fourth part. China's Anti-Monopoly Law (AML), enacted in 2008, represents a major step towards a more competitive economy. In terms of language and structure, the AML is relatively similar to developed countries' competition laws. However, concerns are raised because it offers the possibility to give a prominent role to industrial policy considerations, which conflict with the competition law's objectives. In practice, it seems that national interests were predominant in the first years but that it has evolved positively since then. Numerous criticisms are still expressed as to the special treatment granted to SOEs and state monopolies in industries deemed nationally important, the lack of transparency and predictability, and the asymmetric enforcement of the AML towards foreign firms compared to domestic firms. Significant progress has been noticed regarding these different elements, especially when taking into account that the Chinese competition law is still in its infancy. Yet, the telecommunications case study highlighted that in spite of the positive moves, some sectors are still dominated by anticompetitive practices. It indicates that, in the absence of new measures to open up the market, WTO members may put an increasing pressure on China. According to the available information, China can be expected to support international cooperation on competition laws in the WTO provided that it is first subject to voluntary implementation and a special treatment is granted to developing countries.

All the elements gathered in the different parts were then taken into consideration to suggest a personal answer to the initial question. Considering China's power in international trade today, its position shall be decisive in the relaunch of the negotiations on competition policy in the WTO. It seems Beijing seeks to balance its AML enforcement between national industrial interests and the desire to attract FDI and appear as a market economy. Even though positive moves are made, it seems to remain chiefly symbolic. Therefore, I think a possible scenario is that China agrees to relaunch negotiations as this would be positive for its image but that during the negotiations it strives to make the agreement the least obstructionist possible. A major element that could influence China's position on this matter is actually the direction it will take in order to address its growth problem (i.e. more or less market intervention). As for the other members' position regarding the creation of an international framework for competition rules in the WTO, there seem to be strong reasons to support new negotiations. Indeed, China's interventionist industrial policies give rise to a number of anti-competitive practices. The deficiencies in China's competition policy seem however to matter more for developed countries than for developing countries. For the latter especially, the compliance costs would probably be perceived as too high compared to the potential benefits. Besides, some of them are now largely influenced by China since it strives to extend its leadership in the world. Developed countries, on the other hand, would see major benefits, particularly in terms of market access. The topic of international cooperation in competition policy is a long-standing one, so there is clearly a willingness to go further on this topic. Yet,

negotiations were previously more dominated by developed countries. In the current circumstances, the resistance from developing countries could prevent other members to bring the topic back to the table of negotiations, unless they benefit from concessions in other areas. The current context, with developed countries suffering from the economic slowdown whereas the Chinese economy develops at a rapid pace but keeps protecting its market, may lead to a relaunch of the discussions. However, China would probably be reluctant to agree on far-reaching commitments given the importance it still gives to industrial policies, and developing countries may ask for other concessions from WTO members in return. In case the deadlock in the WTO cannot be overcome, or if members prefer to address competition issues in another framework (probably the ICN), China's competition policy could lead countries to look for increased cooperation outside the WTO.

So in brief, it seems that in the short term a consensus on cooperation on competition policies in the WTO could be reached on limited aspects only. Since a number of WTO members would want more from the negotiations, there could be a combination of binding and not binding provisions. Voluntary cooperation would be strengthened, while plurilateral agreements could go further. In the long-term, the provisions could become binding for all WTO members.

Even though the conclusions of this master thesis are personal predictions, there is no doubt that the question of more international coordination on competition policy will be more and more discussed in the coming years. In our increasingly globalized economy, anticompetitive practices by foreign firms will be more common. In such circumstances, the heterogeneity of national competition policies is likely to become a greater challenge. The rise of emerging countries will also continue to represent a major issue for developed economies. Consequently, a number of WTO members may be expected to focus more on other countries' competition policies. It was highlighted in this thesis that the developments of the Chinese AML enforcement are closely followed abroad. So whether in the WTO framework or not, with binding commitments for all countries or not, the need for more cooperation on competition policies will probably be growing in the future in order to avoid protectionist behaviors. The evolution of China's economic policies will be of high importance since it triggers the biggest concerns. China's next leadership's vision will consequently play a key role. Beijing's position on this specific topic will actually send a clear signal on the direction it will take regarding its economy.

As mentioned in the introduction, it is important to take into account some limitations to the research conducted for this master thesis. Even though I believe international negotiations and the questions related to emerging countries are highly valuable for a student in international management, it was only rarely discussed in the classes I followed. My limited expertise on the different topics covered was a major challenge. The lack of transparency that needs to be dealt with when studying China was also an obstacle. Similarly, I faced difficulties because of the lack of predictability and the inconsistencies due, among other things, to internal dissension in China.

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