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Competition Policy and Free Trade: Antitrust Provisions in PTAs

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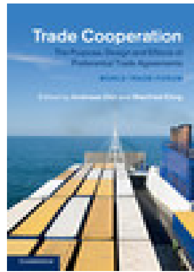

Trade Cooperation

The Purpose, Design and Effects of Preferential Trade Agreements

Edited by Andreas Dür, Manfred Elsig

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Competition policy and free trade

Antitrust provisions in PTAs

ANU BRADFORD AND TIM BÜTHE

A. Introduction

Trade agreements increasingly contain provisions concerning 'behind-the-border' barriers to trade, often beyond current World Trade Organization (WTO) commitments (Dür, Baccini and Elsig 2014). Today's preferential trade agreements (PTAs) may include, for instance, rules regarding 'technical' barriers to trade that go beyond the WTO's Agreement on Technical Barriers to Trade (TBT Agreement), accelerating the replacement of differing national product safety standards with common international standards and thus reducing the trade-inhibiting effect of regulatory measures (Büthe and Mattli 2011; World Trade Organization 2012). Today's PTAs may also go beyond WTO rules in prohibiting preferences for domestic producers in government procurement (Arrowsmith and Anderson 2011; Dawar and Evenett 2011), although here the effectiveness of the PTA provisions is in question (Rickard, Chapter 11 in this volume). PTA provisions concerning trade in services (Trebilcock and Howse 2005: 349ff.), restrictions on the use of trade remedies and anti-dumping (Bown 2011; Bown and Wu 2014) and provisions concerning the treatment of foreign investment (Büthe and Milner 2014;

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United Nations Conference on Trade and Development 2006) have similarly attracted substantial attention, as they often go beyond the rules in the multilateral trade regime. All of these measures involve governments committing to adopt – or to refrain from – particular policies. The stated objective of such commitments usually is to eliminate or at least reduce the trade-distorting effects of domestic policies (Bhagwati and Hudec 1996), though linking particular policy choices to trade might also serve other purposes. Linkage may, for instance, increase the bargaining space for 'getting to yes' on trade liberalisation (see Axelrod and Keohane 1986; Davis 2004) or reduce the bargaining space, arguably with the intent of retaining a higher level of protectionism (e.g. Salazar-Xirinachs 2000). PTA commitments on behind-the-border measures may also be adopted to 'lock in' policies by making it politically and economically more costly for the current government or its successors to depart from the policy choices specified in the trade agreement (Büthe and Milner 2008; Mansfield and Milner 2012; Moe 2005).

Competition policy – the enforcement of laws against various forms of anticompetitive behaviour, including cartels and the abuse of market power, as well as the regulation of mergers, acquisitions and joint ventures – has similarly been the focus of articles and even entire chapters of numerous international trade agreements.[1] Yet, these competition policy provisions in PTAs have only in recent years attracted the attention of scholars and practitioners, mostly after competition policy was removed from the negotiating agenda of the WTO Doha Round in 2004 (Anderson and Holmes 2002; Baldwin, Evenett and Low 2009: 94). Only since Solano and Sennekamp's (2006) study of the competition chapters of 86 PTAs for the Organisation for Economic Co-operation and Development (OECD) and Anderson and Evenett's (2006) critique have competition policy provisions been included among the behind-the-border issues regularly considered in analyses of the international trade regime (Baccini *et al.* 2011: 25–8; Teh 2009; World Trade Organization 2011: 142–5).

Competition policy is one of the most powerful policy instruments governments have to shape the structure and operation of market economies. Competition provisions in PTAs, however, present a puzzle because the literature on the political economy of trade has, since Smith and Ricardo, traditionally emphasised that trade openness inherently increases competition by lowering barriers to entry into previously closed markets (see,

[1] We will use 'competition policy' throughout this chapter for what in the United States is generally known as 'antitrust' law and policy.

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e.g., the Smith and Ricardo selections in Crane and Hovenkamp 2013: 5–40). Indeed, trade economists who advocate liberal foreign economic policies still regularly argue that one of the inherent benefits of free trade is that it drives out anticompetitive practices (Blackhurst 1991; Irwin 2009). The institutionalisation of more liberal trade policies in trade agreements should thus reduce the need for competition policy. What then is actually covered by these competition policy provisions in PTAs? And why do we find them in PTAs at all?

This chapter provides a first, preliminary answer to these questions, based on a major new and ongoing research project directed by the authors. We start with a review of the small existing literature on competition provisions in PTAs. We then examine how competition policy is covered in PTAs and how that coverage has changed over time based on detailed coding of a random sample of 182 PTAs from the Design of Trade Agreements (DESTA) Database.[2] We then turn to some possible explanations for the far more frequent inclusion of competition policy provisions in PTAs over the past two decades. Here, we first contemplate the possibility that the inclusion of competition provisions is simply part of a more general tendency to sign 'deeper' (more comprehensive) trade agreements (Dür and Elsig, Chapter 1 in this volume) but find this line of reasoning raises at least as many questions as it answers. We then consider the hypothesis that such provisions are attempts to forestall a strategic use of domestic competition policy for protectionist purposes. This would appear warranted if governments were above all concerned about discriminatory enforcement of competition law, as one prominent school of thought suggests. We challenge this account by offering an alternative rationale for the inclusion of competition provisions in PTAs, which suggests that such provisions reflect a genuine desire by governments – or at least by competition regulators – to safeguard market competition when the boundaries of markets no longer coincide with the borders of the polity. Our analysis of the specific competition policy provisions included in our sample of PTAs shows that provisions to promote transgovernmental regulatory cooperation and more generally effective competition law enforcement (consistent with our theoretical approach) are substantially more common than provisions aimed at constraining competition regulators (as should be expected by the conventional wisdom).

[2] This sample is substantially larger (and more clearly a probability sample) than the samples used in previous work. For more information about the DESTA data, see www.designoftradeagreements.org.

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B. Prior studies of competition provisions in PTAs

Although the increase in competition policy provisions in PTAs had previously been noted,[3] Solano and Sennekamp's (2006) study for the OECD was, to the best of our knowledge, the first attempt to systematically take stock of competition provisions in a large sample of PTAs.[4] Solano and Sennekamp examine 86 PTAs, a sample that appears to have consisted of all PTAs that were notified to the WTO Secretariat between January 2001 and July 2005 and that contained a competition chapter. In addition, this sample includes an unspecified number of earlier PTAs as well as some unnotified agreements, chosen because of their 'importance to trade' (again conditional on having a competition policy chapter) or because of the special 'relevance of their competition provisions' (Solano and Sennekamp 2006: 6).[5]

Solano and Sennekamp record information about 24 aspects of each of those 86 PTAs. Most prominently, they record the type of competition issue or anticompetitive behaviour addressed (using five very broad categories); whether and to what extent the competition chapter included provisions for coordination and cooperation between national competition regulators; whether the PTA contains provisions on issues often seen as linked to competition policy, such as anti-dumping; and whether the PTA's dispute settlement mechanism (if any) is applicable to its competition policy provisions. Developing the first explicit coding scheme for PTA competition chapters was an important contribution, but the resulting data lack precision and detail. Solano and Sennekamp's coding, for instance, makes no distinction between a PTA that permanently exempts substantial portions of the economy from its competition provisions and a PTA whose competition provisions apply to the entire economy but only after a transition period (both are simply coded as 'flexible' commitments). It also does not allow us to differentiate between horizontal anticompetitive agreements (e.g. price-fixing agreements among competitors) and vertical anticompetitive agreements (e.g. agreements between a

[3] See, for example, Brusick, Alvarez and Cernat (2005) and Silva (2004).

[4] In addition, the question of whether the GATT/WTO needed an antitrust agreement had been extensively debated; see Bradford (2007), Clarke and Evenett (2003), Fox (1997), Guzman (2004), Marsden (2003) and Stephan (2004). See also the document collection of the WTO Working Group on the Interaction between Trade and Competition Policy at www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm.

[5] A substantial (though unspecified) portion of their sample thus appears to have been selected through nonprobabilistic methods, including selection on the dependent variable.

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firm and its distributors to deny competitors market access). Beyond their coding and its limitations, Solano and Sennekamp come to the overarching qualitative assessment that competition policy provisions in PTAs are generally intended to support trade liberalisation, as evidenced by an often explicit recognition that 'anti-competitive practices can undermine the trade objective' or an express objective 'to combat anti-competitive behavior [in order to] enhance the trade objectives of the agreement' (Solano and Sennekamp 2006: 9).

Anderson and Evenett (2006) build on Solano and Sennekamp's analysis, above all, to examine whether PTAs and competition policy provisions in PTAs affect the behaviour of the private sector, especially private-sector cross-border mergers and acquisitions (Anderson and Evenett 2006: esp. 29ff.).[6] Importantly, they also criticise Solano and Sennekamp's methodology, in particular, the exclusive focus on competition chapters. As Anderson and Evenett point out, sector-specific PTA chapters concerning industries such as financial services, telecommunications or transportation may contain competition policy provisions distinct from, and going beyond, the provisions in a PTA's competition policy chapter. In fact, a PTA may contain such substantial, albeit industry-specific competition provisions even if it does not have a chapter devoted to competition policy (Anderson and Evenett 2006: 21f.).

Anderson and Evenett's warning, based primarily on a close reading of a few PTAs, that important competition-related PTA provisions appear frequently outside a designated competition policy chapter, is confirmed by Teh's systematic analysis of 'all competition-related provisions' of 74 PTAs (Teh 2009: 418). Selected for geographical diversity, economic importance (presumably of the signatories to overall world trade) and representativeness over time (Teh 2009: 420f.), this sample of PTAs is intended to be better suited to generalisation than the Solano and Sennekamp sample is, although it remains somewhat unclear how the author implemented the

[6] Their analysis covers cross-border mergers and acquisitions (M&As) for 116 countries over 15 years (1989–2004). Controlling for the size of the M&A-receiving economy and standard economic covariates, they find that PTAs as such have no statistically significant effect (except when US and EU participation in the PTA is instrumented, in which case PTAs actually reduce inward M&A investment), whereas having a national competition policy law that includes merger regulation significantly reduces cross-border M&As (possibly because it simply reduces M&As in general). At the same time, PTA provisions that commit the parties to transparency in their application of competition policy significantly increase cross-border M&As, whereas other characteristics of PTA competition policy chapters (including whether the PTA competition chapter includes provisions regarding mergers) have no significant effect (Anderson and Evenett 2006: esp. 39ff.).

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selection criteria. Based on a very detailed coding of sectoral provisions for the telecommunications, financial and maritime transport services industries, as well as general substantive provisions for the treatment of investments, government procurement and intellectual property rights, Teh shows that competition-related rules can indeed be found in many different places in PTAs.

Finally, Sokol (2008) complements this research with an analysis of the 36 PTAs noted in the Organization of American States' trade database as having been signed between 1992 and 2006 and to which 'at least one Latin American country [was] a party' (Sokol 2008: 253). Focusing on this smaller Latin American sample enabled him to code each PTA in considerable depth and to examine its context, allowing for greater internal validity albeit at the recognised cost of reduced generalisability.[7] His key finding is that all 24 Latin American PTAs that include a competition policy chapter[8] exclude those chapters from their dispute settlement mechanism. He then discusses numerous possible reasons for the apparent hesitation to subject competition policy to external dispute settlement – an important issue (see also Teh 2009: 481f.), but beyond the scope of this chapter.

In sum, existing scholarship on competition policy provisions in PTAs yields a number of important findings, which are, however, more suggestive than conclusive as a result of small or nonprobability samples of PTAs and insufficiently fine-grained coding. Our current research, from which we here report initial, preliminary results, is the first attempt to code the comprehensive set of PTAs identified by the DESTA project at the level of detail needed to overcome these limitations of previous research and provide an accurate picture of competition policy provisions in PTAs.

C. Competition provisions in a sample of 182 PTAs

To overcome the problems that arise from the use of nonprobability samples of PTAs in most of the research reviewed earlier, we follow

[7] He finds, for instance, that the prior adoption of a competition law at the national level has been virtually a prerequisite for Latin American countries to be willing to include a competition chapter (found in 24 of the 36 PTAs) – a finding that does not hold true in other regions. Only the three plurilateral PTAs involving the group of 'Central American States' (Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua) with the Dominican Republic (1998), Chile (2002) and Panama (2002) contain a competition chapter without prior adoption of a national competition law by all signatories.

[8] Notwithstanding Anderson and Evenett's critique of the earlier work, Sokol (2008: 253) excludes from consideration 'provisions in other chapters that have competition impact'.

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Koremenos's (2005, 2007) random sampling approach to the analysis of international treaties. Specifically, we used a random number generator to select a random sample of 182 PTAs from the maximally comprehensive list of post–World War II PTAs compiled by Baccini, Dür, Elsig and Milewicz (see Dür, Baccini and Elsig 2014).[9]

The following process was used to generate the data reported here. Each PTA in our sample was independently coded by at least two students at the University of Chicago or Columbia Law Schools under the guidance and supervision of the authors.[10] For each PTA, coders recorded basic information, such as the parties to the treaty and when the agreement was signed. Coders then undertook a thorough content analysis of the treaty text, including preambles, annexes, appendices and linked implementation agreements, if any. Specifically, coders were asked to answer numerous questions about each PTA, through which they generated more than 100 variables per PTA, assisted by survey software that ensured coders would be asked only the questions that were pertinent, given their prior answers and known contextual information. The coders thus recorded a wealth of information about each PTA's competition chapter (if any), competition articles (if any) and other competition-related provisions (discussed later), including the specific kinds of competition policy issues covered by the PTA (unilateral anticompetitive behaviour, anticompetitive behaviour by two or more firms, mergers, government subsidies ('state aid'). The goals of competition policy as well as any permissible exemptions from the PTA's competition policy rules were also coded, as well as the nature and scope of commitments for cooperation among competition enforcement agencies. Coders further recorded information about related aspects of each PTA, such as whether the PTA includes a dispute settlement mechanism (DSM), whether the DSM applies to the competition provisions and whether the PTA includes provisions

[9] At the time of the sample selection, the collection contained the texts of 395 PTAs. It now contains 587, and our ultimate goal is to code all of them. The initial sample consisted of 200 PTAs, of which, however, 2 were not in fact double-coded as a result of coder error; 16 were omitted as a result of lack of an English-language text. Translations or foreign language coding and supplemental coding work to complete the sample of 200 are under way.

[10] Most of the coders had prior academic training in antitrust law, international trade law or both; many of the LLM student coders had practised antitrust law prior to embarking on an LLM. All of the coders received extensive training, including the test coding of multiple full-length PTAs. Moreover, all coding was conducted using plain-text online surveys (with quantification automated using the Qualtrics survey software) – a methodological innovation for content analysis described in greater detail elsewhere.

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concerning intellectual property rights, anti-dumping, government procurement or nontariff barriers (NTBs). Upon completion of the coding, we conducted an analysis of intercoder reliability and closely re-reviewed, with a team of coders, every aspect of every PTA where the original coders had differed to arrive at a final consensus data set.[11]

I. The form of competition policy provisions across 182 PTAs

To what extent is competition policy covered across the 182 PTAs in our sample? We take Anderson and Evenett's critique of Solano and Sennekamp's work into account and therefore allow for the possibility of competition policy provisions occurring in any part of the PTAs we code. To do so, we asked, first: 'Does the PTA have a separate chapter devoted to competition law/policy?' To qualify, a chapter (or cohesive group of articles) did not have to have the word 'competition' in the title but had to be substantively about competition law or policy, possibly in conjunction with closely related issues (such as in a chapter on 'Business Practices'). For 50 of the PTAs in our sample, the answer was yes (27.5 per cent of our sample). If the PTA did not contain such a chapter, coders were asked: 'Does the PTA have a separate article or articles devoted to competition law/policy?' Here, too, we counted any article specifically devoted to business practices that restrain competition, as well as articles using the language of 'antitrust' or referring to merger review, control or regulation.[12] The answer was yes for 78 of the PTAs in our sample (42.9 per cent). Across the full sample of the 182 PTAs, we thus find at least one article, and often several articles or an entire chapter, devoted to competition policy in 128 PTAs (just over 70 per cent of our sample), as shown in Figure 10.1.

Anderson, Evenett and Teh advocate an even more inclusive approach. We allow for such inclusiveness but caution that Teh's analysis in fact shows that 'competition-related' provisions vary tremendously in how closely they are related to what might legitimately be considered competition *law* or *policy*. Article 39(1)b of the 1997 EC–Jordan PTA, for instance, states that: 'The Parties affirm their commitment to a freely competitive environment as being an essential feature of the dry and liquid bulk

[11] Such meticulous review of discrepancies is extremely time consuming. We are therefore only able to draw on fully reliable final data for a subset of the variables so far, making the empirical analysis consciously preliminary.

[12] Articles solely concerned with government subsidies or other forms of 'state aid' did not count.

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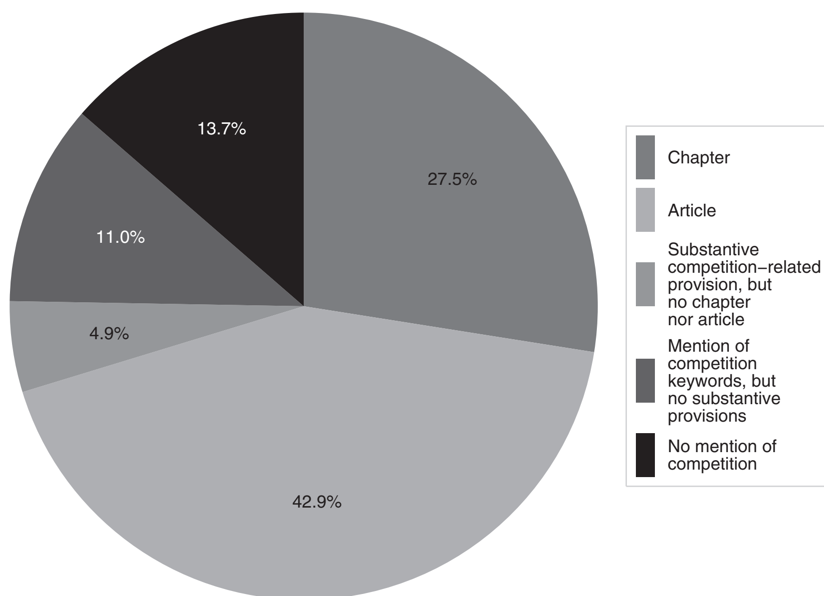

Figure 10.1 How competition policy is addressed

trade.' This part of Article 39 (an article devoted to the 'Cross-Border Supply of Services') is highlighted by Teh as an example of competition provisions outside competition chapters. And the article certainly may be interpreted as a commitment, in principle, to take action against anticompetitive practices in the transport industry. It is qualitatively different, however, from PTAs in which a competition policy chapter includes, for instance, commitments to adopt or maintain a competition law[13] (which makes the prohibition of anticompetitive conduct enforceable by domestic agencies and courts) or maybe even to have or maintain an independent competition law enforcement agency.[14]

[13] As stipulated, for instance, in Articles 14.3(1) and 14.3(2) of the 2008 Australia–Chile PTA, according to which: 'Each Party shall maintain or adopt measures consistent with its domestic law to proscribe anticompetitive activities and take appropriate action with respect thereto, recognising that such measures will help realise the objectives of this Agreement. [. . .] Each Party shall ensure that all businesses operating in its territory are subject to its competition laws.'

[14] As stipulated, for instance, in Article XI.2.5 of the 2002 Canada–Costa Rica PTA, according to which: 'Each Party shall establish or maintain an impartial competition authority that is: (a) authorized to advocate pro-competitive solutions in the design, development and implementation of government policy and legislation; and (b) independent from political interference in carrying out enforcement actions and advocacy activities.'

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We therefore ask two questions that allow us to differentiate between various references to competition and related issues in PTAs that do not contain designated articles or chapters on competition policy. First, we ask: 'Does the PTA contain any mention of competition, any mention of antitrust or any mention of the regulation of cartels, monopolies or mergers/acquisitions?' If the answer is yes (as it is for 29 of the PTAs without competition article or chapter), we then ask: 'Is antitrust/competition *policy* recognized anywhere in the PTA as a (trade-related but) distinct issue, that is, not just competition as a characteristic of trade in the sense that trade inherently entails foreign goods competing with domestic ones?' In our assessment, only PTAs that warrant an affirmative answer to the second question (9 PTAs, accounting for 4.9 per cent of our sample) may be said to contain a substantive discussion of competition policy even when they contain neither a chapter nor an article devoted to competition policy. Figure 10.1 summarises this information about the ways competition policy is addressed in our sample of PTAs.

Anderson and Evenett also note that general 'national treatment' or nondiscrimination clauses, which are found in many PTAs as well as in the General Agreement on Tariffs and Trade (GATT) and the 1994 WTO treaties, may be read as already prohibiting discriminatory enforcement of competition laws.[15] This point is underscored in the section on competition policy in the 2011 *World Trade Report*, which is devoted to the relationship between PTAs and the multilateral trade regime (World Trade Organization 2011). Teh (2009: esp. 464–6) goes further in his interpretation of commitments to the 'horizontal principles' of nondiscrimination (rare), procedural fairness (moderately common) and transparency (widespread) among the general principles or in the general administrative provisions of PTAs. Teh attributes to such commitments an effect on competition (maybe even intentional) that has a similar thrust to competition policy provisions so that 'these general horizontal principles may represent significant competition-related elements of [P]TAs' (Teh 2009: 464). We reject this interpretation as it risks going too far in broadening the notion of 'competition[-related] provisions' to the point where the concept of competition policy loses its analytical usefulness.

[15] They give Article 2 of the 2002 Chile–EU Interim Agreement as an example (emphasis added by Anderson and Evenett): 'Imported products of the territory of the other Party shall be accorded treatment no less favourable than that accorded to domestic products in respect of *all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use*.'

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Although it is technically correct that general PTA provisions for transparency, procedural fairness and national treatment *might* be applicable to the enforcement of domestic competition laws and might even be read to articulate *some* of the core principles of competition policy, this potentially vast reinterpretation of general PTA provisions remains at best untested. To avoid problems of overinclusion, we therefore focus on the first three categories identified previously, and in particular on the 128 PTAs with at least one article devoted specifically to competition policy. In the many analyses where it makes virtually no difference to the results, we also consider the 9 additional PTAs that contain substantive provisions concerning competition policy without devoting a distinct article to the topic (for a total of 137 PTAs).

II. Competition policy provisions in PTAs over time

The distribution of our sample of PTAs over time is highly uneven, reflecting in part the explosive increase in PTA formation over the past 20 years but also an inherent limitation of random sampling from a highly unevenly distributed population: only 26 of our 182 PTAs were signed before 1991. We therefore hesitate to draw strong inferences about trends over time prior to 1991, but regressing the share of a year's PTAs with either a competition article or chapter on a simple trend term (using logit) shows a clearly statistically significant increase over time. In fact, before 1991, both competition articles and chapters were very rare, each found in just 3 of the 26 PTAs. By contrast, during the period of the most intensive institutionalisation of free trade during the last two decades, competition provisions in PTAs have generally become more detailed, warranting in many cases the inclusion of not just a separate article but even an entire chapter. Figure 10.2 captures this pattern over time by showing the percentage of newly signed PTAs with at least a distinct article devoted to competition policy (solid line, left-hand scale), as well as the number of PTAs signed in a given year.[16]

[16] Given the small number of observations per year, we use a five-year moving average for Figure 10.2 to focus on the overall pattern rather than year-to-year variability. In order not to show the effect of a new PTA before it is signed, the moving five-year window consists of the current year and the immediately preceding four years. We start the time series displayed in 1958 since it is the first year for which there are continuously at least 2 PTAs in the five-year window (with the exception of 1990, where the moving average is based on a single PTA (the 1988 Canada–US PTA), which accounts for the spike).

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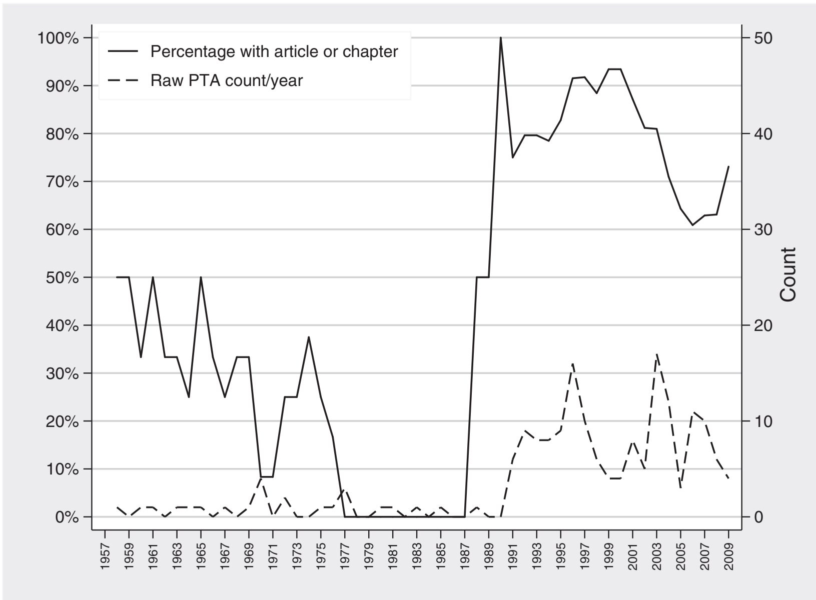

Figure 10.2 Percentage of PTAs with a competition article or chapter, five-year moving average

D. Explaining the pattern of competition policy articles and chapters in PTAs

Before turning to the variation in substantive provisions contained in the competition policy articles and chapters of PTAs, we take up one of the issues raised by Dür and Elsig (Chapter 1 in this volume) about the increasing scope and depth of PTAs in recent decades. Based on previous work with Baccini, Dür and Elsig show that the 'depth' of PTAs has generally increased over time, which may account for much of the increasing formalisation, length and detail of PTA provisions in any particular issue area without the need to resort to issue area–specific explanations. To be sure, a general trend is inherently dissatisfying as an 'explanation'. Similarly to explanations of institutional change that invoke institutional isomorphism as an explanation, it raises the questions of where the trend comes from, what sustains it and why we should expect it to affect a diverse set of issue areas covered in PTAs. It is also not clear whether PTA competition provisions, even when we focus simply on their presence or absence or on their form as captured by Figure 10.2 (chapter vs. article

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Table 10.1 *All good things go together? Format of competition provisions as a function of PTA depth*

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
Baccini *et al.* Depth Index	0.542*** (0.142)	0.889*** (0.126)	0.899*** (0.125)			
Rasch Depth Index				1.27*** (0.240)	1.71*** (0.217)	1.70*** (0.209)
Constant	–0.275 (0.321)			0.595*** (0.185)		
Estimation	logit	ordered logit	ordered logit	logit	ordered logit	ordered logit
N	180	180	180	180	180	180
Pseudo-R^2	0.0897	0.1724	0.1633	0.1711	0.2130	0.1974

Note: Dependent variable differs for models 1 and 4 vs. 2 and 5 vs. 3 and 6; see text for details. All estimates in Stata 12.1.
* $p < 0.1$, $^{**}p < 0.05$, $^{***}p < 0.01$

vs. no/indirect coverage), are well captured by any single global trend. At the same time, trends can cause inferential problems even when they are unexplained, so we briefly explore the issue in this section.

In Table 10.1, we report 3×2 sets of bivariate logistic regressions, conducted as very basic, preliminary tests of the hypothesis, given the absence of an established econometric model that would provide a proper benchmark. The dependent variable for models 1 and 4 is a dichotomous variable coded 1 if the PTA contains either an article or a chapter and coded 0 otherwise. Since that measure ignores the potentially important difference between chapters and articles, we use a second dependent variable (models 2 and 5). It is an ordinal measure coded 2 for PTAs with a competition policy chapter; 1 for PTAs with a competition policy article; 0 for all other PTAs. Finally, a third dependent variable (models 3 and 6) takes into account the PTAs with a substantive discussion of competition issues yet no article or chapter by assigning a 1 to such PTAs, a 2 to PTAs with a competition article and a 3 to PTAs with a competition chapter. The independent variable for the first three models is the basic depth index of Dür, Baccini and Elsig (2014), which, for the 180 PTAs covered here, ranges from 0 to 6 with a mean of 2.5 and a standard deviation of

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1.6.[17] For the second three models, we consider the Rasch depth measure, which for the 180 PTAs ranges from −1.03 to 2.31 with a mean of 0.443 and a standard deviation of 0.918; all else remains the same.[18]

The estimated coefficients, which are strongly statistically significant for either of the measures of depth and all three of the dependent variables, support the hypothesis that the format of competition provisions might be a function of the general depth of PTAs, though the finding is tentative given the caveats noted previously. At the same time the pseudo-R^2 – an imperfect approximation of model fit for logistic models – suggests that there is much variance left to be explained. Moreover, we observe tremendous variation in the particular elements of competition policy that are covered, even just within the subset of PTAs with a competition chapter. We turn to some of that interesting variation in the next section.

E. Explaining the presence and specific content of competition provisions in trade agreements

A comprehensive account of the variation in competition provisions is beyond the scope of this chapter, but we observe much, often striking, variation among the PTAs with substantive competition policy provisions (the 137 PTAs in the first three pie chart segments in Figure 10.1). The coverage of the traditional core antitrust concerns illustrates this well: 69 per cent of these 137 PTAs contain provisions concerning cartels or similar horizontal anticompetitive agreements or practices (between ostensibly competing firms in the same market). Sixty-three per cent contain provisions concerning anticompetitive vertical agreements or vertical cooperation (between a firm and its suppliers or its immediate customers/distributors). And yet, a striking 89 per cent contain provisions against unilateral anticompetitive conduct (monopolisation or abuse of dominance by a single firm).[19] This variation is puzzling, at a minimum insofar as the prohibition of cartels is usually considered far more widely

[17] Dür *et al.* excluded accession agreements from their index calculation. Hence, we lose from our sample of 182 PTAs the CEFTA–Croatia accession treaty and the 2003–4 EU enlargement treaty, which increased the number of EU members from 15 to 25.

[18] For details about both measures, see Dür, Baccini and Elsig (2014). We thank Andreas Dür for recalculating the two indices without consideration of competition provisions (so as to safeguard against rendering the hypothesis true by definition) and for making the measures available to us.

[19] If the sample is restricted to the PTAs with a competition article or chapter, the percentages rise to 73 per cent, 66 per cent and 94 per cent, respectively.

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accepted than regulatory intervention against anticompetitive behaviour by a single firm.

In an attempt to explain this variation, we turn to two general schools of thought regarding the relationship between trade openness and competition policy. These theoretical approaches provide possible explanations for the prevalence of competition provisions in PTAs, which traditional trade economics – positing trade liberalisation and competition policy as substitutes in their capacity to enhance market competition – would not expect. Although both theoretical perspectives we discuss see trade and competition law and enforcement as complements, they yield distinctive observable implications regarding the content of competition provisions in PTAs, which makes it worthwhile to derive those hypotheses explicitly. Deductively, the difference between the two approaches turns in large part on how governments view the relationship between trade and competition policy and their respective roles in generating and preserving market competition. We submit that PTAs offer distinctly good and direct insights into this question.

I. Competition policy as protectionism

The first theoretical perspective sees competition policy as a substitute for trade restrictions. It assumes that governments want to protect domestic producers (and that they suspect each other of wanting to do so). It further assumes that competition law can be selectively enforced to the benefit of domestic firms and the detriment of their foreign competitors. There are two variants of this 'competition-policy-as-protectionism' perspective.

What may be called the aggregate national welfare variant, with strong affinities to statist theories of international relations, treats governments as unitary actors and assumes that each government seeks to maximise the country's aggregate (consumer + producer) welfare. Under this assumption, (net) imports create an incentive for excessively stringent competition laws and enforcement (relative to what would maximise global economic welfare), because such an 'oversupply' of competition policy creates benefits for domestic consumers, whereas the costs are borne disproportionately by foreign producers. By contrast, (net) exports create an incentive for excessively lax competition law and enforcement because the gains from tolerated anticompetitive behaviour are disproportionately enjoyed by domestic producers, whereas the costs are disproportionately borne by foreign consumers (Guzman 1998, 2004; Horn and Levinsohn 2001; Iacobucci 1997; Richardson 1999; Williams and Rodriguez 1995).

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Such selective enforcement is particularly attractive for economically large countries, that is, countries whose markets are sufficiently large that enforcement-induced changes in their production or consumption affect the world price and hence the country's terms of trade. Strategic enforcement is attractive for them because it can yield a gain in aggregate welfare rather than just redistribution among domestic consumers and producers.

The domestic political economy variant of the competition-policy-as-protectionism perspective, with strong affinities to the public choice perspective on regulation, starts from the assumption that firms will seek alternative ways to protect their market share or profits when faced with increased foreign competition resulting from trade liberalisation. Firms' 'actions aimed at effectively locking competing imports or foreign investors out of their domestic market' (Trebilcock and Howse 2005: 591) can include the 'use of antitrust to subvert competition' (Baumol and Ordover 1985: 247).[20] This argument lacks an explicit theory of politics or policymaking but implicitly usually assumes a pluralistic responsiveness of policymakers to political lobbying (e.g. Shughart, Silverman and Tollison 1995). Consequently, it yields similar observable implications to those noted for the aggregate national welfare variant but for all countries (rather than primarily for economically large countries) because there is no assumption that policymakers seek to maximise aggregate welfare and therefore may readily engage in selective enforcement that is 'inefficient' for the national economy.

Both variants of the competition-policy-as-protectionism perspective remain empirically largely untested.[21] We have discussed them together because they have similar implications for the kind of competition

[20] This starting point is consistent with Bhagwati's (1988) 'law of constant protection', according to which firms will always find a way to replace a barrier to trade that has been negotiated away with a new one.

[21] Limited anecdotal evidence exists, suggesting that both US and European competition regulators have in some cases enforced competition laws in ways that discriminated against foreign stakeholders (e.g. Guzman 1998: esp. 1532f.), and China's 2007 antimonopoly law has, almost from the beginning, prompted vocal concerns about selective and discriminatory enforcement (Huang 2008, but cf. Faure and Zhang 2013). Shughart, Silverman and Tollison (1995) present a statistical analysis of antitrust enforcement budgets for the US Department of Justice and the Federal Trade Commission, in which the US enforcement agencies' resources are significantly correlated with the US trade deficit, suggesting more vigorous antitrust enforcement at times when the United States in the aggregate was a net importer. Ecological inference and other methodological problems, however, raise questions about these findings, which we have also been unable to replicate with their aggregate data.

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provisions we should expect to find in PTAs. This yields our first hypothesis, which we will further operationalise in the next section:[22]

> H_1: *To the extent that trade agreements contain competition provisions, they should reflect concern about selective enforcement and contain measures to prevent or discipline such enforcement against firms from the other Parties.*

II. Free trade and competition policy as complements

Dissatisfied with the theoretical approach sketched previously, we have developed an alternative theoretical account, which views trade openness and competition policy as genuine complements. We start from the observation that the progressively denser web of PTAs and the shift from the GATT to the more legalised WTO have institutionalised trade liberalisation in such a way that governments' ability to protect domestic producers through traditional trade barriers has been severely compromised (Bagwell and Staiger 1999). Domestic producers – now exposed to increased foreign competition – might, of course, still turn to their governments to clamour for protection, and governments might yet find new covert means of protecting domestic firms from foreign competitors (e.g. Kono 2006). If the governments' hands, however, truly are increasingly tied by trade agreements, firms have an incentive to pursue what has become known as 'private protection' (Ludema 2001; Trebilcock 1996; Williams and Rodriguez 1995): protecting themselves from the consequences of market competition through collusion with their ostensible competitors or other anticompetitive practices. In fact, trade liberalisation creates opportunities and incentives for engaging in anticompetitive practices transnationally for at least two reasons. First, the integration of product markets creates opportunities for gain from collusion *across borders*, which did not exist when the boundaries of states and markets largely coincided. Second, integration creates additional incentives for such anticompetitive behaviour by lowering the risk of getting caught. International cartels, for instance, may be harder to detect or prosecute because antitrust agencies may find it more difficult to monitor global markets and pursue enforcement against them as most of the evidence can be kept out of reach of any one enforcement agency (e.g. Connor 2007).

[22] Elsewhere (e.g. Bradford 2007; Büthe 2014), we critique the deductive logic of these arguments. Here, we simply focus on the empirical implications.

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Assessing this argument is made more difficult by the fact that such private protection is illegal in many countries. Consequently, changing patterns of anticompetitive behaviour are virtually impossible for scholars to observe directly. The argument, however, also has observable implications for what governments should write into PTAs, provided that we are able to assume that governments generally:

1. understand the international political economy of market competition and anticompetitive behaviour in open economies at least sufficiently well to recognise that trade openness creates opportunities and incentives for private protection and
2. in fact, seek to safeguard market competition against the accumulation and abuse of market power (at least in countries with an independent enforcement agency).[23]

Under these assumptions, governments should see trade openness and the *need for* vigorous competition policy as complements.[24] Governments can attempt to increase enforcement unilaterally, for example, through intensified monitoring. Alternatively, or in addition, they should be expected to counteract transnational collusion through corresponding transgovernmental collaboration. Such regulatory cooperation may and does take place informally, but we would also expect to find evidence of a trade-related increase in substantively meaningful antitrust provisions in trade agreements or in separate antitrust enforcement agreements.

In sum, this alternative theoretical perspective implies for PTAs:

> H_2: *If trade agreements contain competition provisions, they will focus on enhancing the capacity and procedures for detecting transnational anticompetitive behaviour and strengthening transgovernmental enforcement cooperation.*

[23] The argument does not depend on any particular assumption about the goals of competition policy. We merely allow for the possibility that competition regulators mean it when they claim that safeguarding market competition is their primary goal. The effectiveness of such normative commitment is at least a real possibility since antitrust regulators form a tight transnational peer network, which provides mechanisms for reenforcing shared professional norms through the reputational and social dynamics identified by Sabel and Zeitlin's (2010) notion of 'experimentalist' governance (see also Ansell 2011).

[24] Strictly speaking, the logic of our argument requires governments or national regulators only to *observe* (rather than anticipate) increased anticompetitive activity and attribute it to trade openness.

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F. Empirical analysis, part 2: PTA competition provisions, 1945–2010

In this overview of the specific content of PTAs, we focus on those competition provisions that allow us to distinguish between the two theoretical approaches discussed in Section E. Some common competition policy provisions, however, are worth noting even though they do not allow us to assess the relative explanatory power of the two theoretical approaches. Specifically, of the 137 PTAs that contain any substantive competition provisions, 40 PTAs (29.2 per cent) contain an obligation to have or adopt a competition law – or other obligations that are predicated upon having or maintaining a competition law.[25] A considerably smaller number, 24 PTAs (17.5 per cent), contain an obligation for 'transparency' in the implementation of the national competition law's enforcement policies and practices.[26]

Very common, by contrast, are provisions that commit the signatories to establishing a working group, study group or committee of representatives of parties' governments (or competition authorities) to discuss competition policy issues. PTAs may include such a commitment in one of two ways:

1. The PTA may establish such a committee or working group for the PTA as a whole and include competition policy within its purview, usually in this case along with most or all other subjects covered in the PTA.
2. The PTA may establish a separate working group specifically for competition policy discussion.

Figure 10.3 shows the distribution of these options (vis-à-vis each other and vis-à-vis having no such provision in the PTA at all), illustrating the overwhelming prevalence of the first option. The near-universal inclusion of provisions for the institutionalisation of inter- or transgovernmental dialogue is certainly interesting. However, since such a working group may be used not only to coordinate policies or cooperate in enforcement (consistent with H_2) but also to address accusations of selective,

[25] For PTAs in which one party did not previously have a competition law (a piece of information that we are still gathering), such a provision might be considered evidence against H_1, since a government that is concerned about selective enforcement should hardly want to commit other governments to having such laws.

[26] Here, we specifically coded for whether the word *transparency* appeared in the PTA provision given its prominence in the literature.

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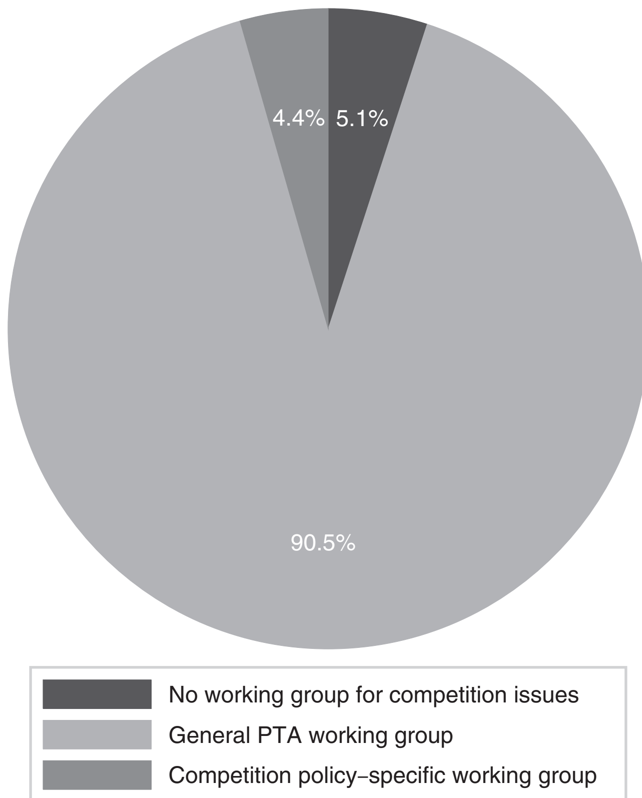

Figure 10.3 PTA-established working groups for the discussion of competition policy

discriminatory enforcement (consistent with H_1), the presence or absence of these provisions does not allow us to distinguish between the two theoretical positions.

I. Testing H_1

If governments include competition policy provisions in PTAs primarily out of a concern that other governments may enforce their competition laws selectively and for protectionist purposes, we would expect to find – frequently and prominently – provisions that seek to safeguard against such discrimination. The risk of selective enforcement might be reduced, for instance, through mutual commitments that competition regulators and courts must provide full legal reasoning to those against

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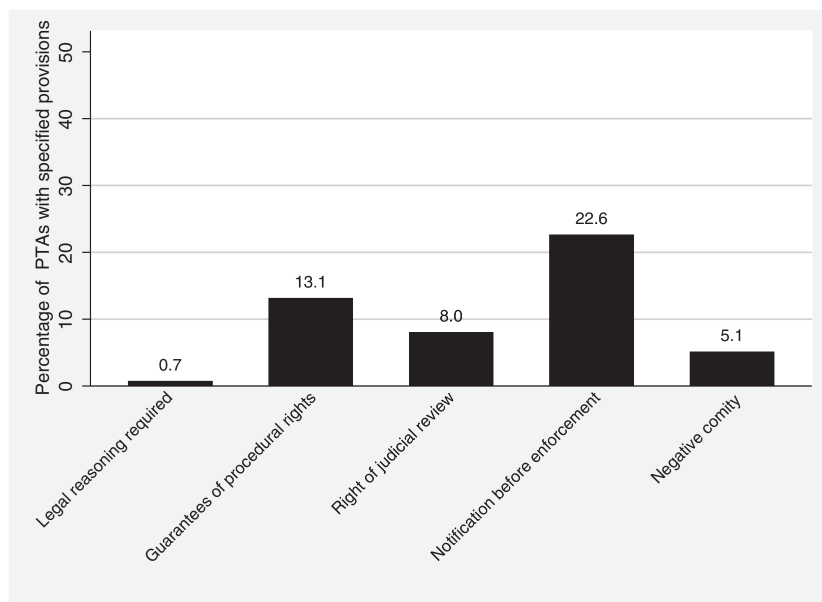

Figure 10.4 Provisions indicating concerns about selective enforcement

whom they bring competition policy enforcement actions. H_1 would also lead us to expect committing the parties to provide various procedural rights in competition law enforcement cases or to guarantee the right to judicial review or appeal following initial (often administrative) decisions in competition enforcement cases or merger review.[27] We therefore asked coders to record for each PTA whether it included such provisions. As shown by the first three bars in Figure 10.4, they are quite rare. An obligation to provide legal reasoning is found in only one of the 137 PTAs with substantive competition provisions. The other commitments are found in 18 and 11 PTAs, respectively.

[27] The coding question and response options were:

> Does the PTA establish any of the following obligations for the governments of the member countries in the implementation of their antitrust/competition law? Please check all that apply.
>
> ☐ to provide the legal reasoning behind any decisions;
> ☐ to provide for procedural rights for the defendant in antitrust proceedings, such as opportunities to present evidence, to be heard, to cross-examine witnesses;
> ☐ to provide for judicial review (appeal) of an antitrust enforcement or merger review decision.

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An even stronger safeguard against selective enforcement with protectionist intent might be created by a requirement to notify the other party before an enforcement action is taken against one of its firms or citizens.[28] Finally, a 'negative comity' provision would have the same thrust – and arguably provides the strongest safeguard. Negative comity, as Dabbah (2011: 288) puts it well, seeks to 'prevent jurisdictional conflict'. Such a provision in a PTA would entail each party committing to take the actions and important interests of the other parties into consideration before taking any actions that may affect the interests of those other parties. As shown by the last two bars in Figure 10.4, a commitment to alert the other party *before* taking enforcement actions against one of its firms or citizens is relatively common, found in 22.6 per cent of the 137 PTAs. By contrast, and very surprisingly, negative comity provisions – which we would have expected to be quite common – are very rare in our sample, found in just over 5 per cent of the PTAs.

II. Testing H_2

What would we expect instead if hypothesis 2 were borne out? If the inclusion of competition policy provision in PTAs were largely or predominantly motivated by a desire to improve the efficiency and effectiveness of competition law enforcement in the face of increasingly internationally integrated markets, we would expect a very different emphasis in the specific provision. In our theoretical discussion in Section E.II, we focused on transgovernmental cooperation among competition regulators to facilitate the detection of increasingly transnational anticompetitive practices and possible cooperation in enforcement. But such transgovernmental cooperation presupposes not just the existence but also substantial capacity on the part of the competition regulator. We would therefore expect, first, provisions that ensure or increase regulatory capacity at the national level through commitments to

- devote resources to enforcement,
- establish and maintain an independent enforcement agency and
- provide reciprocal or (in North–South PTAs) unilateral technical capacity-building assistance.[29]

[28] We note as a caveat that such an obligation impinges on the other country's sovereignty and might therefore be resisted.

[29] The exact question and response option wording here was: 'Does the PTA establish an obligation to cooperate on antitrust or competition matters in any of the following

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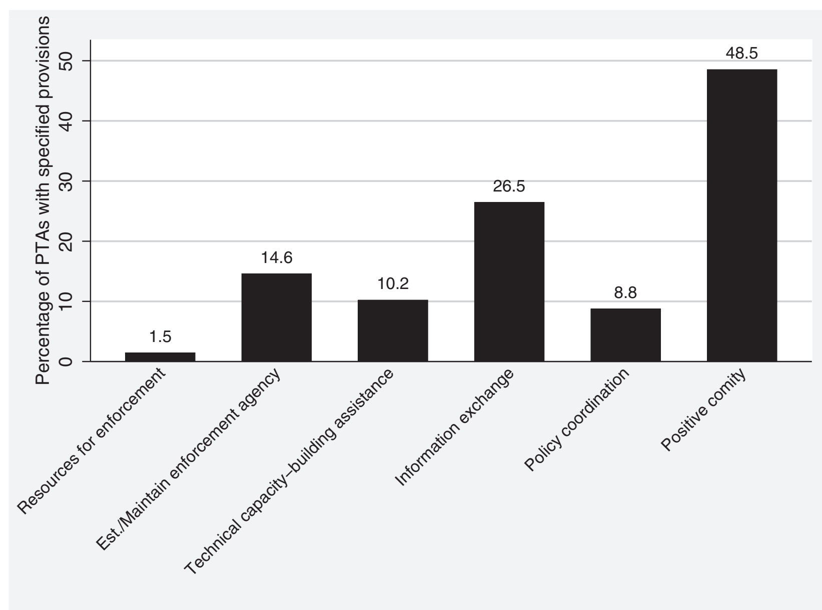

Figure 10.5 Provisions indicating desire to enhance enforcement

As shown by the first three bars in Figure 10.5, provisions that commit the parties to devote ancillary resources to enforcement are quite rare, found in only 2 of the 137 PTAs (possibly because such provisions impinge upon the sovereignty over budgetary matters of the parties' legislatures), but the other types of provisions are more common, found in 20 (14.6 per cent) and 14 (10.2 per cent) of the PTAs, respectively.

Given the existence, or at least the promise, of capable enforcement agencies, we would then expect an emphasis on information exchange, possibly policy coordination (subject to a caveat similar to the caveat that applied to the funding commitment earlier) and, especially, 'positive comity' provisions, under which each party, acting at that moment as the so-called requesting party, 'can ask the other party (known as the requested party) to address anticompetitive behavior within the latter's boundaries [based solely on the claim that the behavior] has a [detrimental] effect on the interest of the former' (Dabbah 2011:

ways? . . . For one or more of the Parties to provide technical assistance or resource transfer to another Party to help it finance its enforcement activity or build its competition-regulatory capacity.'

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288). Such a positive comity provision constitutes the clearest and most far-reaching commitment to assist each other in competition law enforcement.

As shown by the last three columns in Figure 10.5, information exchange provisions (about both enforcement actions and merger reviews) are quite common, found in 26.5 per cent of PTAs. Commitments to policy coordination are less common, found in 8.8 per cent of PTAs (though they are still more common than what should have been the theoretically strongest type of provisions for H_1). Most strikingly, positive comity – considered a very demanding commitment from a legal point of view – is more common than any other commitments, as it is found in almost half (48.5 per cent) of the PTAs.

G. Conclusion

In this chapter, we have examined competition policy provisions in PTAs. Such provisions are a puzzle from a traditional trade economics perspective and have only recently begun to attract systematic scholarly attention. We have sought to provide an initial sketch of some of the key variation in competition policy provisions in PTAs – including the form such provisions take and how their role has changed over time – based on a large random sample of 182 PTAs drawn from the DESTA Database. We have also briefly explored the extent to which the increased formalisation of the treatment of competition issues in PTAs might be merely a reflection of a general trend towards deeper PTAs and found this to be only modestly so and with several caveats. Most importantly, we introduced two alternative and quite general theoretical approaches for thinking about the relationship between trade openness and competition policy, from which we have derived two rather different hypotheses about the kinds of competition policy provision we should expect to find in PTAs. Our final (though still explicitly preliminary) empirical analysis has yielded some support for both, although on balance we observe with greater frequency provisions that suggest a deep concern with and interest in enhanced enforcement cooperation rather than concern about the protectionist selective enforcement by the other side in the PTA.[30]

[30] Numerous further provisions are yet to be examined in future work when the content analysis is fully completed. Dispute settlement mechanisms of the PTAs, for example, should be very telling, since subjecting competition policy to a DSM should be very important if governments are concerned about selective, discriminatory enforcement.

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The research presented is drawn from work in progress, which itself is part of a larger research agenda that also entails collecting and coding in detail all national competition laws since the first such law for each country. This will allow us to examine, for instance, whether PTAs create new obligations or simply codify what countries are already doing. As part of that larger project, we are also collecting and coding bilateral competition enforcement agreements (a potential substitute for competition provisions in PTAs, which could be a source of omitted variable bias for the analysis of PTAs). And we are collecting enforcement data to allow us to test whether countries only commit to competition provisions in PTAs if they are undertaking serious enforcement already.

Beyond this work in progress, the research presented here suggests several promising avenues for future research. In particular, we know little about the details of the treaty-writing process. Who actually writes PTAs? Who exerts influence over what competition provisions get written into a PTA – and who is unsuccessful when they attempt to influence such content of PTAs? We should also want to know more about the consequences of these provisions, including whether they are enforced in practice, and what their effects are on actual competition law and enforcement, as well as on the behaviour of private economic actors.

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