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Regulating Antitrust Through Trade Agreements

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Antitrust law is one of the most commonly deployed instruments of economic regulation around the world. To date, over 130 countries have adopted a domestic antitrust law. These countries comprise developed and developing nations alike, and combined produce over 95 percent of the world's GDP.\textsuperscript{1} Most of the countries that have adopted an antitrust law have done so since 1990.\textsuperscript{2} This period of significant proliferation of antitrust laws also coincides with a notable expansion of international trade agreements, including the creation of the World Trade Organization (WTO) in 1995 and the negotiation of numerous bilateral and multilateral trade agreements. These concurrent trends are consistent with the view that antitrust regulation and trade liberalization are complementary tools in governments' efforts to create and preserve open and competitive markets.\textsuperscript{3}

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\textsuperscript{2} Anu Bradford et al., Competition Law Gone Global: Introducing the Comparative Competition Law and Enforcement Datasets, 16 J. EMPIRICAL LEGAL STUD. 411 (2019).

\textsuperscript{3} Our own recent empirical research confirms this positive relationship between trade openness and adoption of domestic antitrust laws. See Anu Bradford & Adam S. Chilton, Trade Openness and Antitrust Law, 62 J.L. & ECON. 29 (2019).
However, the relationship between antitrust law and trade policy has been the subject of considerable academic and policy debate. In the academic debate on the topic, some scholars argue that free trade makes antitrust laws redundant because foreign entrants will destabilize cartels, constrain dominant companies, and undermine other anticompetitive practices. Other scholars argue that antitrust laws are still needed to ensure that firms in non-tradeable sectors do not engage in anticompetitive practices and to ensure that private anticompetitive practices do not compromise the gains from dismantling barriers to trade. For instance, open trade may invite more collusion as companies can extract larger rents and better avoid detection when they operate across the global marketplace. In addition, free trade is not sufficient to guarantee successful foreign entry if the market is foreclosed by exclusive distribution agreements. This was a major concern for American film and automobile companies seeking to enter the Japanese market in the 1980s. Even though trade barriers with Japan had been removed, American companies had a hard time penetrating the market as Japanese antitrust laws failed to condemn exclusive distribution agreements that tied local retailers and consumers to domestic distributors. These examples suggest that trade liberalization may need to be complemented with antitrust laws to be effective.

In policy debates on the topic, governments have advocated for, and adopted, different positions. Notably, the European Union has always perceived trade and antitrust as closely related policy instruments. Its own antitrust laws were initially enacted to complement the goal of establishing a single market. The European Union’s fear was that, without such laws, pri-

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7 See Bond, supra note 6, at 130.


9 Eleanor M. Fox, EU and US Competition Law: A Comparison, in Global Competition Policy 339, 340 (Edward M. Graham & J. David Richardson eds., 1997); Roger D. Blair & D.
Private companies could re-create trade barriers between Member States, such as by deploying vertical agreements to reserve exclusive territories for different distributors. For similar reasons, the European Union was a strong advocate for incorporating antitrust rules within the scope of the WTO in the early 2000s. In contrast, the United States has endorsed the separation of trade and antitrust law. For instance, the United States has expressed concerns that antitrust law would lose its exclusive focus on consumer welfare if it became enmeshed with trade policy considerations. This is one of the reasons that the United States systematically opposed embedding antitrust regulation in the WTO. The U.S. position ultimately prevailed in the WTO as antitrust law, as well as other proposed new areas of regulation such as government procurement and investment policy, were removed from the trade body’s negotiating agenda in 2004.

Despite the continuing debate over whether, and to what extent, antitrust law and trade policy should be directly connected, one area where they have been linked together in practice is the inclusion of antitrust provisions in Preferential Trade Agreements (PTAs). For example, even though the European Union’s efforts to tie antitrust law more closely within the multilateral trade regime failed, the European Union has been able to make antitrust provisions a common feature of its PTAs. By offering preferential access to its vast consumer market, the European Union has significant bargaining power over its trade partners and is therefore in a position to set conditions for signing a PTA. One of those conditions is typically the adoption of antitrust law. The


11 The United States argued that inclusion of antitrust within the WTO would risk politicizing antitrust law and compromise its economic rationality and legal neutrality, which are critical attributes of antitrust enforcement. See, e.g., Melamed, supra note 11; Mario Monti, European Comm’r for Competition Policy, Speech at European Competition Day: A Global Competition Policy? (Sept. 17, 2002), ec.europa.eu/commission/presscorner/detail/en/SPEECH_02_399.


European Union’s 1995 agreement to form a customs union with Turkey provides an illustrative example. In its Article 39, the agreement states that “Turkey shall ensure that its legislation in the field of competition rules is made compatible with that of the European Community . . . .” To comply with this provision, Turkey adopted an EU-style antitrust law in 1994, in the midst of its trade negotiations with the European Union.

But the European Union is not alone in thinking that antitrust and trade go hand in hand. Even a cursory overview of PTAs suggests that a wide range of governments from around the world—from Australia to Uzbekistan and from Armenia to Vietnam—have chosen to include a requirement that the trading partner must adopt or maintain domestic antitrust laws. While the precise reasons for these requirements likely vary, it suggests that many governments consider antitrust law to be necessary or beneficial for realizing the gains from the trade agreement.

Various scholars have acknowledged the presence of antitrust law in trade agreements, and have pursued research to examine the implications of this trend. Oliver Solano and Andreas Sennekamp’s research was one of the first attempts to quantitatively examine antitrust provisions in a large sample of PTAs. The authors focus on a sample of 86 PTAs, which were notified to the WTO Secretariat between January 2001 and July 2005 and which contained a specific chapter on antitrust. They collect information on the type of antitrust provisions included in the PTA, provisions on cooperation and coordination between parties on antitrust matters, as well as whether any such antitrust provision is subject to enforcement though a dispute settlement system speci-

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15 Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, 1996 O.J. (L 35) 1, art. 39 (Feb. 13, 1996).
17 See discussion infra Part II.A.
20 Id. In addition, the Solano & Sennekamp sample includes some unnotified agreements, which are included because of their “importance to trade” and the relevance of their antitrust provisions.
fied in the PTA. Their analysis suggests PTAs incorporate antitrust provisions primarily to support trade liberalization. The PTAs frequently include clauses such as “anti-competitive practices can undermine the trade objective” or emphasize how the goal of the PTA is “to combat anti-competitive behavior [in order to] enhance the trade objectives of the agreement.”

Several other projects have built on Solano and Sennekamp’s research by studying antitrust provisions in different samples of PTAs. For instance, Robert Anderson and Simon Evenett assessed whether antitrust provisions embedded in PTAs affect cross-border mergers and acquisitions. Their analysis is more extensive than that of Solano and Sennekamp as they also collect information on various sector-specific PTA chapters (such as chapters on financial services or telecommunications) that are not antitrust-specific but often contain additional antitrust provisions. In line with Anderson and Evenett, Robert Teh studied “all competition-related provisions” in 74 PTAs and also found that antitrust provisions often fall outside the PTAs’ antitrust chapters and are included in sector-specific chapters. D. Daniel Sokol complemented this research by focusing on the antitrust chapters in PTAs signed by Latin American countries. His sample consisted of 36 PTAs signed between 1992 and 2006 that are included in the Organization of American States’ trade database. Sokol’s primary finding is that all 24 Latin American PTAs with an antitrust chapter exclude those chapters from the PTAs’ dispute settlement mechanism, suggesting that antitrust commitments are weak due to their non-enforceability. Finally, Anu Bradford (one of the authors of this article) and Tim Büthe analyzed a random sample of 182 PTAs from a near comprehensive list of post-World War II PTAs compiled by Andreas Dür, Leonardo Baccini, and Manfred Elsig, and examined governments’ main motivations for including antitrust provisions in the PTAs. Their analysis suggests that antitrust provisions reflect governments’ attempts to promote effective anti-
trust law and trans-governmental regulatory cooperation, and that this concern seems to dominate any concerns of discriminatory enforcement of antitrust law.

This article builds on this empirical scholarship by introducing a novel dataset of antitrust provisions in 596 international trade agreements signed between 1945 and 2010. To build this dataset, we acquired a large sample of PTAs from a research group studying international trade agreements. We then worked with a group of law students to comprehensively document the provisions included in these agreements related to antitrust law. This article first explains the construction of this new dataset and then uses the data to provide what we believe to be the first systematic overview of the presence of antitrust provisions in international trade agreements.

Through this analysis, we document several important new facts about the presence of antitrust provisions in trade agreements. First, we investigate how many PTAs in the dataset have provisions that directly address antitrust law. We find that roughly 51 percent of the PTAs have either a chapter or an article devoted to antitrust. Second, for these PTAs that have an antitrust chapter or article, we examine the specific areas of antitrust law that those agreements cover. We find that while over 75 percent of these PTAs address antitrust issues related to dominance, cartels, and vertical agreements, only a small fraction (i.e., 9 percent) specifically address mergers. Third, we show that antitrust provisions tend to be more enforceable than often expected, with 71 percent of PTAs containing an antitrust chapter or article extending the PTA’s dispute settlement mechanism to those provisions. Fourth, our analysis shows that while non-discrimination of foreign companies in antitrust matters is sometimes addressed in the PTAs, it is more common for the parties to promote regulatory cooperation through PTAs. More specifically, 35 percent of PTAs with an antitrust chapter or article call for non-discriminatory treatment in antitrust matters while 94 percent of such PTAs commit the parties to some form of regulatory cooperation in antitrust matters. Finally, we document differences in how the European Union and the United States have used PTAs to export antitrust law around the world. We find that the European Union signed dramatically more PTAs with antitrust chapters or articles as compared to the United States, but also that 63 percent of PTAs with antitrust chapters or articles include language that is distinctive of EU laws. In contrast, only less than 1 percent of PTAs with antitrust chapters or articles include language that is distinctive of U.S. laws. This suggests that, unlike the United States, the European Union frequently deploys PTAs as a tool to export its antitrust laws.

28 See Dür et al., supra note 26.
The article proceeds as follows. Part I describes the universe of PTAs included in our dataset and our method for documenting the antitrust provisions in those agreements. Part II analyzes these data to illustrate several trends in the way PTAs have incorporated antitrust law. This includes examining the number of PTAs that have incorporated antitrust concerns into trade agreements and exploring the areas of antitrust law that are covered in those agreements. This Part also discusses the extent to which PTAs have been deployed as vehicles to export antitrust laws by the European Union and the United States, thereby contributing to the diffusion of antitrust laws around the world. Part III concludes with an invitation for other researchers to build on the analysis in this article by using these new data for their own research.

I. THE DATASET

We begin by introducing the dataset we created to examine antitrust provisions embedded in PTAs signed from 1945 to 2010. For our sample of PTAs, we relied on what we believe to be the most comprehensive database of trade agreements: the Design of Trade Agreements (DESTA) database. Our analysis includes 596 PTAs that were in the DESTA database at the time we launched our project. (Since we commenced our project, however, the DESTA database has expanded to include over 700 PTAs.) The post-World War II period saw a great expansion in regulating global trade, beginning with the signing of the General Agreement on Tariffs and Trade (GATT) by 23 countries in 1947. This sample allows us to capture 65 years of international trade treaties, from before the signing of the GATT in 1947 to after the entry into force of the WTO in 1995.

To illustrate the data, Figure 1 graphs the number of PTAs signed from 1945 to 2010. Figure 1 depicts both the total number of PTAs in the updated DESTA dataset and also the 596 PTAs in our sample. As Figure 1 shows, there is a sharp increase in the number of PTAs that were signed after 1990. This is not only the same time period during which there were major changes in international trade law—most notably, the creation of the WTO—but also a time that saw a dramatic increase in the number of antitrust regimes adopted around the world.

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29 Id. More information is available at www.designoftradeagreements.org/.
30 We are grateful to the leaders of the DESTA project for sharing the texts of the PTAs with us.
31 See Bradford et al., supra note 2.
Figure 2 further illustrates the data by depicting the number of PTAs signed by country by 2010. For Figure 2, we code a country as having signed a PTA if it either signed a PTA directly or if it was a member of a regional organization that signed a PTA on behalf of the members. Figure 2 shows that the European Union has signed a large number of PTAs, but that several countries around the world have also been active signers of PTAs. The phenomenon of signing PTAs is thus not concentrated in just one jurisdiction or region.
We developed a survey instrument with a series of detailed questions to gather information on each of those PTAs, extending a sample of 186 PTAs analyzed earlier based on the same survey. The survey asked a range of questions on the extent of antitrust obligations that the PTA imposes on the parties to the agreement. For example, the survey asked whether the PTA has a chapter, article, or other provisions containing antitrust obligations. The survey also asked whether those antitrust chapters or articles specifically require the parties to adopt or maintain an antitrust law or an antitrust enforcement agency. It further asked whether the PTA includes various antitrust obligations (e.g., provisions on cartels, vertical agreements, monopolization, and mergers). Additionally, it asked whether any antitrust provisions are subject to the dispute settlement mechanism established by the PTA.

The survey also asked questions relevant to the relationship between antitrust and trade, as well as any provisions on regulatory cooperation in antitrust matters between parties. In particular, we sought to capture if treaty parties explicitly identify anticompetitive practices as a non-trade barrier or, alternatively, identify discriminatory antitrust enforcement as a concern that can impede trade. As part of these questions, we inquired about whether the countries impose classic trade obligations relating to non-discrimination—namely a “national treatment” or a “most favored nation” obligation—to govern their respective antitrust enforcement regimes. The questions we asked on regulatory cooperation examined if the parties undertook commitments relating to, for example, consultation, exchange of information, transparency, or establishment of joint working groups, or a common authority to resolve any antitrust issues that arise between parties. Finally, in order to study whether PTAs are used as tools to export antitrust laws by leading jurisdictions, we also asked about the language used to describe antitrust provisions in antitrust chapters and articles by considering whether any such provisions resemble antitrust laws of the United States or the European Union.

To complete the analysis of the PTAs using this survey, we recruited and trained a team of students who reviewed the PTAs and answered the detailed questions in our survey. Each PTA was assigned to two researchers who independently answered all the survey questions, and any discrepancies were resolved by a third researcher consulting us in all instances where there was doubt on the correct interpretation. The output of this discrepancy review produced a final, “consensus” response to every field for every PTA.

32 Bradford & Büthe, supra note 27.

33 Such provisions would be aimed at curtailing any efforts to deploy antitrust laws unevenly to favor either a government’s own companies (which is prohibited by a “national treatment” requirement) or to favor the companies of certain trading partners (which is prohibited by a “most favored nation” requirement). See discussion infra Part II.B.
To facilitate additional research by other authors, the complete dataset and the accompanying codebook are freely available for download at www.comparativecompetitionlaw.org. We should also note that our unit of analysis for these data is at the individual PTA level, but the dataset can easily be converted to a country-year format. This allows identification of all PTA obligations that are valid for each country in each year. This way of deploying the data can be helpful for many research applications, including our earlier work that used this dataset while examining whether countries use trade liberalization and antitrust regulation as substitutes or complements.

II. RESULTS

We now use this dataset to explore the inclusion of antitrust law in PTAs. We specifically use the dataset to explore three topics. First, we examine how many PTAs in the dataset have provisions that directly address antitrust law. Second, for the PTAs that do address antitrust law, we examine the specific areas of antitrust law that those agreements cover. We also report the different ways these PTAs seek to curtail antitrust protectionism or promote regulatory cooperation between parties. Third, we document differences in how the European Union and the United States have used PTAs to export antitrust law around the world.

A. PTAs That Address Antitrust Law

We begin by exploring whether the PTAs in our sample address antitrust law. Our dataset specifically documents whether each PTA includes a chapter on antitrust law or an article on antitrust law: an antitrust chapter typically contains multiple articles and hence indicates a more extensive discussion of antitrust law in the PTA, whereas an antitrust article indicates a more abbreviated consideration of antitrust. The first PTA with an antitrust law chapter was the European Coal and Steel Community in 1951, and the first PTAs with antitrust law articles were the European Free Trade Agreement and the Central American Common Market Treaty in 1960.

Figure 3 graphs the cumulative share of PTAs signed by a given year between 1945 and 2010 that include either a separate antitrust law chapter or a separate antitrust law article. The results show that roughly 51 percent of PTAs in the dataset (302 of 596) have a section—either a chapter or article—directly addressing antitrust law. More specifically, by 2010, 19 percent of PTAs included a separate antitrust law chapter (110 in total) and 32 percent of

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34 See Bradford & Chilton, supra note 3.
35 Id.
36 These are mutually exclusive variables: PTAs may either have an antitrust chapter or antitrust article, but not both.
PTAs included a separate antitrust law article (192 in total). An additional 16 percent of PTAs (95 in total) contain some discussion of antitrust issues without dedicating a separate chapter or article to the topic. However, as these provisions vary in content, and can be very trivial in the extent to which they address antitrust law, the discussion below focuses on PTAs that dedicate either a chapter or an article to antitrust law.

FIGURE 3:
CUMULATIVE SHARE OF PTAS THAT HAVE AN ANTITRUST CHAPTER OR ARTICLE

Many of the PTAs that include a separate antitrust chapter or antitrust article also include a requirement that the parties take certain steps to regulate antitrust. Figure 4 graphs the cumulative share of PTAs signed by a given year between 1945 and 2010 that include a requirement for each party to maintain, or adopt, a domestic antitrust law. It shows that these requirements began to appear in 1957 with the treaty establishing the European Community. These requirements became even more common starting in 1990. By 2010, nearly 30 percent of PTAs included an antitrust law requirement. Additionally, Figure 4 graphs the cumulative share of PTAs that include a requirement for each party to establish or maintain a distinct antitrust agency. These requirements became more common in the 1990s. By 2010, 10 percent of PTAs included a requirement for the parties to the agreement to establish, or maintain, an agency dedicated to antitrust law.
FIGURE 4:
CUMULATIVE SHARE OF PTAS THAT HAVE AN ANTITRUST LAW OR AGENCY REQUIREMENT

YEAR
Share of PTAs
0.0 0.1 0.15 0.2 0.25 0.3 0.35 0.4 0.45 0.5
Law requirement Agency requirement

B. COVERAGE OF ANTITRUST LAW CHAPTERS AND ARTICLES

We next examine the specific substance covered in the antitrust law chapters and articles included in PTAs. Of the PTAs in our sample with an antitrust chapter or antitrust article, Figure 5 graphs the share that contain antitrust law provisions concerning four areas of antitrust law: dominant companies or monopolies (“dominance”); cartels or cartel-like agreements (“cartels”); anticompetitive vertical agreements (“vertical agreements”); or mergers and acquisitions (“mergers”). As Figure 5 shows, the share of agreements that include provisions on dominance, cartels, and vertical agreements has remained consistently high. Cumulatively by 2010, of the PTAs with antitrust law chapters or articles, 89 percent address dominance, 78 percent address cartels, and 75 percent address vertical agreements while 74 percent address all three of these topics. Mergers, however, are less frequently covered in PTAs; merely 9 percent of PTAs include provisions that specifically address mergers. The paucity of merger provisions is likely explained, in part, by the late adoption of merger control by the European Union. The absence of merger regulation in the European Union prior to 1990 makes it unlikely that such provisions were deployed by the European Union (or jurisdictions emulating the European Union) in their PTAs. Finally, only 7 percent of PTAs
address all four of these areas—dominance, cartels, mergers, and vertical agreements—of antitrust law.

FIGURE 5:
TOPICS COVERED IN PTAS: AREAS OF ANTITRUST LAW

In addition to including provisions about the substantive areas of antitrust law, many PTAs also include provisions stipulating how foreign firms should be treated by domestic antitrust authorities. In trade agreements, such obligations relate to non-discrimination of foreign companies as compared to domestic companies ("national treatment" obligation) or non-discrimination of some foreign companies as compared to other foreign companies ("most favored nation" obligation). Of the PTAs in our sample with an antitrust chapter or antitrust article, Figure 6 graphs the number of PTAs that include national treatment provisions and the number of PTAs that include most favored nation provisions for the enforcement of antitrust law. As Figure 6 shows, the inclusion of these kind of provisions in PTAs has been fairly stable over time. Cumulatively, national treatment provisions related to antitrust law are found in 35 percent of PTAs and most favored nation provisions related to antitrust

37 Figure 6 graphs the “national treatment” and “most favored nation” clauses that are specifically about antitrust law; the PTAs may also include these clauses about other topics, such as the treatment of foreign goods or investments.
law are found in 27 percent of PTAs. These provisions often, but not always, go hand-in-hand: 65 percent of PTAs contain neither of these provisions, 27 percent of PTAs contain both of these provisions, and just 8 percent of PTAs contain one of the two provisions. The share of PTAs that include these provisions has been fairly stable over time, and these provisions are still included in only roughly a third of the PTAs that regulate antitrust law.

FIGURE 6:
TOPICS COVERED IN PTAS: MOST FAVORED NATION AND NATIONAL TREATMENT

Many PTAs also stipulate how the parties to the agreement should cooperate in their enforcement of antitrust law. Because anticompetitive conduct can cross national boundaries and is often subject to enforcement in multiple jurisdictions, cooperation among antitrust agencies has become a key feature in antitrust enforcement. In the absence of a supranational antitrust law or a joint enforcement institution, regulatory cooperation offers a way to preempt

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enforcement conflicts and facilitate cooperation and convergence on a volun-
tary basis.

Antitrust cooperation comes in many forms. Parties may, for example, agree to notify the firm’s home government once an enforcement action has been launched, or they may commit to exchanging information on cases with a cross-border element or on enforcement more generally. Parties may also agree to undertake “negative comity” or “positive comity” obligations—“negative comity” refers to parties agreeing to take the interests of the other parties into consideration before taking action that might affect those other parties and “positive comity” refers to parties agreeing that they can request the other party to take affirmative action to help the requesting party enforce its laws. Parties may also agree to extend technical assistance to help the other party to finance antitrust enforcement activity or build regulatory capacity. Other provisions include parties agreeing to consult one another on antitrust law matters or to establish working groups, study groups, or committees to discuss antitrust matters. More extensive commitments include establishing a common authority to handle antitrust enforcement or the pursuit of voluntary convergence, harmonization, or uniformity in their antitrust policies.

Figure 7 reports the cumulative share of PTAs in the sample with antitrust chapters or articles that mentioned any of these nine common forms of cooperation: Negative Comity, Technical Assistance, Convergence, Positive Comity, Notification, Common Authority, Information Exchange, Consultation, and Working Group. As Figure 7 shows, there is considerable variance in the extent to which these different forms of cooperation are addressed in PTAs. Negative Comity requirements are present in the antitrust law chapters or articles of only 4 percent of PTAs. Technical Assistance requirements are also relatively uncommon in that they are present in 8 percent of PTAs with antitrust law chapters or articles. Convergence requirements are present in 9 percent of PTAs with antitrust law chapters or articles.

Other obligations relating to antitrust cooperation are more common. Positive Comity provisions are present in 25 percent of PTAs with antitrust law chapters or articles. Notification provisions are present in 26 percent of PTAs with antitrust law chapters or articles. Common Authority provisions are pre-

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39 Common authority refers to an agency or some other type of institution, organization, or a joint body that has the authority to make decisions on antitrust matters arising under the PTA. For example, Article 171 of the 2001 revised Caribbean Community (CARICOM) treaty called for the creation of a competition commission (“For the purposes of implementation of the Community Competition Policy, there is hereby established a Competition Commission (hereinafter called “the Commission”) having the composition, functions and powers hereinafter set forth.”). See, e.g., Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the Caricom Single Market and Economy, July 4, 1973, caricom.org/documents/4906-revised_treaty-text.pdf.
sent in 29 percent of PTAs with antitrust law chapters or articles. Information Exchange and Consultation provisions are present in 40 percent of PTAs with antitrust law chapters or articles. And provisions establishing Working Groups are found in 88 percent of PTAs with antitrust law chapters or articles. Overall, among the PTAs with an antitrust chapter or antitrust article, 94 percent contain a reference to at least one form of such cooperation. While there is heterogeneity in the specific forms of cooperation that the PTAs promote, these data suggests that regulatory cooperation may be a key motivation for governments to address antitrust through trade instruments.

FIGURE 7:
COOPERATION ON THE ENFORCEMENT OF ANTITRUST LAW

Many scholars have argued that international treaties are often weak or soft instruments. Similarly, some existing studies suggest that antitrust provisions in PTAs manifest this weakness due to their non-enforceability via dispute settlement. We therefore examined whether this is true with respect to our sample of PTAs. We find that many PTAs that regulate antitrust law also specify that antitrust law issues can be raised through the agreements’ dispute

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41 See Sokol, supra note 24.
settlement mechanisms. Figure 8 graphs the share of PTAs with antitrust law articles or chapters that extend the PTA’s dispute settlement mechanism to the conflicts related to the regulation and enforcement of antitrust law arising under the agreement. Cumulatively, these provisions were found in 71 percent of the PTAs that address antitrust law. While we do not analyze whether a particular PTA’s dispute settlement mechanism is strong or effective, our analysis suggests that the parties often treat any antitrust provisions they negotiate within the trade agreement as serious and enforceable commitments.

FIGURE 8
DISPUTE SETTLEMENT PROVISIONS THAT APPLY TO ANTITRUST LAW PROVISIONS

C. COMPARING THE EUROPEAN UNION AND THE UNITED STATES

The European Union and the United States have been the most important regulators of antitrust law around the world. However, recent research suggests that a majority of countries that have adopted antitrust regimes have more closely emulated EU antitrust law than U.S. antitrust law. Although

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42 We also counted the PTA’s dispute settlement system as applying to antitrust law provisions in instances where the dispute settlement applied to the entire agreement or in instances when antitrust provisions were not exempted from the dispute settlement mechanism’s scope.

there are several factors that have contributed to this development, one of those factors is likely the European Union’s common practice of deploying trade agreements to promote antitrust policy. As noted earlier, the United States has historically resisted linking trade and antitrust policies.

To illustrate, Figure 9 reports the share of PTAs that included either the European Union or the United States as a party to the agreement. The first PTA in our dataset that includes the European Union is the Treaty Establishing the European Community of 1957, and the first PTA that includes the United States is the Canada-United States Automotive Products Trade Agreement of 1965. As Figure 9 reveals, the European Union has been a more active signatory of PTAs. The European Union is a party to 12 percent of the PTAs in the dataset (91 in total). In contrast, the United States is a party to only 2 percent of the PTAs in the dataset (18 in total).

FIGURE 9:
PTAS THAT INCLUDE THE EUROPEAN UNION AND THE UNITED STATES

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44 There are two PTAs signed by EU members prior to the establishment of the European Union that we counted as “EU PTAs”: the Treaty Establishing the Benelux Economic Union of 1958 (involving Belgium, Luxembourg, and the Netherlands) and the France-Monaco Agreement of 1963. The other 89 PTAs we count as “EU PTAs” include all countries that were EU members at the time of the agreement. There are no other PTAs in the dataset that were signed by just a subset of EU members.
The gap is even wider, however, among the PTAs that include antitrust law chapters or articles. The treaty establishing the European Community of 1957 included an antitrust chapter, but the United States did not include antitrust law in its PTAs until much later: the United States-Canada Free Trade Agreement of 1988 was the first U.S. PTA to include an antitrust law article and the North American Free Trade Agreement of 1994 was the first U.S. PTA to include an antitrust law chapter. Of the PTAs in our sample that include antitrust law chapters or articles, the European Union is a party to 18 percent of the PTAs (55 in total), but the United States is party to just 3 percent of the PTAs (10 in total). Figure 9 thus illustrates how the European Union has been more likely to use PTAs to promote adoption of antitrust law around the world.

In addition to examining whether the European Union or United States is a party to a PTA, our dataset allows us to examine whether the antitrust provisions in PTAs include language that is distinctive of either EU antitrust law or U.S. antitrust law. We collected this information because distinctive language may be a proxy for whether the PTA is likely to promote the emulation of either EU-style or U.S.-style antitrust law within the trading partner's jurisdiction. Similarity in language is a method that has previously been used to document the diffusion of laws in other contexts, such as how new forms of regulations spread across U.S. states or how ideas and rights spread across the world's constitutions.

Specifically, we considered PTAs as including distinctively European language if they contained the following phrases that are derived from Articles 101 and 102 of the Treaty of the Functioning of the European Union or the European Merger Control Regulation (EMCR):

- "[agreements that have as their] object or effect the prevention, restriction or distortion of competition"
- "abuse by one or more undertakings of a dominant position"
- "concentration is incompatible"
- "significantly impede effective competition"
- "creation or strengthening of a dominant position"

45 For a discussion of why these phrases are distinctive to each of these two jurisdictions' regimes, see Bradford et al., supra note 43.

Additionally, we considered PTAs as including distinctively American language if they contained any of the following phrases derived from Sherman Act Sections 1 and 2, as well as Section 7 of the Clayton Act:

- "substantially lessen competition"
- "every contract, combination"
- "every person who shall monopolize"

We considered PTAs as including this distinctive language if they included either the exact or a close approximation of these phrases. For example, we considered a PTA as including distinctively European language if the phrase "significantly impede effective competition" appeared in the PTA in a different tense (e.g., "impeded"), or if it appeared as "significantly impede competition," or "impede effective competition."

**FIGURE 10:**
PTAS WITH DISTINCTIVELY EUROPEAN AND DISTINCTIVELY AMERICAN LANGUAGE

Figure 10 reports the share of PTAs with antitrust law chapters or articles that included distinctive language from either EU antitrust law or U.S. antitrust law. As Figure 10 shows, phrases that are distinctive of EU antitrust law are common across the PTAs in our sample. Cumulatively, by 2010, 63 percent of the PTAs that include antitrust chapters or articles include at least one of the five phrases
that are distinctive of EU laws. The phrases that are distinctive of U.S. laws, however, are almost entirely absent from PTAs. In fact, only less than 1 percent of PTAs with antitrust law chapters or articles include any of the distinctive phrases from U.S. antitrust law.

To further explore this trend, Figure 11 and Figure 12 break out the data based on whether the European Union and United States were, or were not, parties to the PTAs containing the relevant distinctive language from their law. Figure 11 shows that the distinctively European phrases are, unsurprisingly, common in PTAs to which the European Union was a party. Notably, of the PTAs where the European Union was a party, 82 percent include distinctively European phrases. But, importantly, these phrases are common even in agreements where the European Union is not a party. In fact, these distinctively European phrases still appear in 59 percent of PTAs with an antitrust chapter or agreement where the European Union is not a party. This illustrates how the European antitrust model has spread around the world. For instance, language that is distinctive of the European Union is included in the following PTAs: the Baltic Free Trade Area (1993), the Free Trade Agreement Between the Czech Republic and the Republic of Lithuania (1995), and the Association Agreement Establishing a Free Trade Area Between the Syrian Arab Republic and the Republic of Turkey (2004).

FIGURE 11:
PTAS WITH DISTINCTIVELY EUROPEAN LANGUAGE BROKEN OUT BY EUROPEAN UNION PARTICIPATION
The patterns in Figure 12, however, are dramatically different. Distinctively American language only appears in 10 percent of PTAs to which the United States is a party, and appears in 1 PTA (or 0.3 percent of PTAs) to which the United States is not a party.\(^4\) In other words, not only have other countries not spread these distinctively U.S. articulations of antitrust law, but the United States itself has also hardly done so. These results thus can be interpreted as illustrating how the European Union has more commonly used trade agreements to export antitrust law principles.

**FIGURE 12:**
PTAS WITH DISTINCTIVELY AMERICAN LANGUAGE BROKEN OUT BY UNITED STATES PARTICIPATION

\(^4\) The one PTA that includes distinctively American language that the United States is not a part of is the Economic Partnership Agreement between the CARIFORUM States and the European Community (2008), which refers to “substantially lessening competition” in the antitrust chapter of the agreement. Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, 2008 O.J. (L 289) 3, 43 (art. 126), eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=oj:L:2008:289:0003:1955:EN; (the CARIFORUM states include Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago).
III. CONCLUSION

This article introduced a new dataset on antitrust provisions in 596 PTAs signed between 1945 and 2010. While this dataset could be deployed to answer myriad questions, this article has focused on providing a general overview of the extent to which antitrust law is addressed in trade agreements, examining the types of antitrust provisions that are found in these agreements, and reporting whether parties make those provisions enforceable by subjecting them to dispute settlement. It also has examined the extent to which governments use trade agreements to curtail discrimination of foreign companies and to engage in regulatory cooperation in the enforcement of their domestic antitrust regimes. Finally, it has documented the striking difference in the European Union’s frequent use of PTAs to export its antitrust laws to its trading partners and the United States’ reluctance, or failure, to do the same. This finding may partially explain why the EU-style antitrust laws have diffused across the world, while the international influence of the U.S. antitrust laws has dwindled over time.48

These results are consistent with the view that governments consider antitrust and trade liberalization to be closely interrelated policy areas and frequently seek to deploy PTAs to address a diverse array of antitrust concerns. However, this brief analysis only scratches the surface of what can be learned using our new dataset about the global diffusion of antitrust law and about the antitrust-trade intersection. We hope that future researchers will accept our invitation to download the data and further study the ways that antitrust law has been developed and exported through international trade agreements.