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Competition Provisions in Trade Agreements

- Contribution from the World Bank –

The contribution is in the PDF attached.

CHAPTER 16

Competition Policy

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TABLE OF CONTENTS

1. INTRODUCTION: THE ROLE OF COMPETITION POLICY IN TRADE AGREEMENTS	3
2. PRIOR STUDIES MAPPING COMPETITION COMMITMENTS IN TRADE AGREEMENTS	5
3. METHODOLOGY	9
3.1 Economy-wide obligations	9
3.1 Economy-wide obligations	10
3.3 Enforceability	10
4. THE GROWING ROLE OF COMPETITION IN PTAS	11
4.1 Competition principles embedded in the general framework of PTAs	13
4.2 PTA obligations to foster effective competition law and antitrust enforcement	15
4.2.1 National competition requirements	15
4.2.2 Substantive provisions regulating competition policies	18
4.2.3 Procedural fairness commitments to support competition enforcement	22
4.2.4 Institutional arrangements	25
4.3 PTA obligations to foster competitive neutrality	27
4.4 PTA obligations to remove sector-specific anticompetitive regulations	30
4.4.1 Prohibitions on rules that reinforce dominance or limit entry	32
4.4.2 Prohibitions on rules that are conducive to collusive outcomes or increase the cost of competing in the market	35
4.4.3 Prohibitions on rules that discriminate or protect vested interests	36
4.5 Enforceability of provisions	38
4.6 Direct applicability	40
5. CONCLUSIONS	41
ACKNOWLEDGEMENTS	41
REFERENCES	42
ANNEXES	44
Annex 1: Economy-wide competition-related commitments in ptas	44
Annex 2: Sector-specific competition-related commitments in ptas	45
Annex 3: Annex III: Enforceability of economy-wide provisions in PTAs	46

1. INTRODUCTION: THE ROLE OF COMPETITION POLICY IN TRADE AGREEMENTS

Even though many countries have opened to trade, markets in developing economies often underperform due to restrictive regulatory frameworks and anticompetitive behavior by a few dominant players. Anticompetitive practices are often permitted, supported or even created by public bodies themselves. These conditions not only affect the dynamics of internal markets but also the ability of these countries to compete internationally and reap the benefits of enhanced economic integration. Empirical evidence shows that when firms agree to fix prices, consumers pay on average 49 percent more, and even 80 percent more when key industries are cartelized.¹ Competition is also impaired if regulations restrict the number of firms that may compete or limit private investment; or if they increase business risks, facilitate agreements among competitors or discriminate against certain competitors, thereby affecting competitive neutrality.

Effective competition policies, on the other hand, offer a tool to complement and support governments' efforts to reduce barriers to trade. Active competition among market players has the potential to mitigate vested interests and facilitate the opening of markets to trade and investment. Greater competition within national markets reinforces the international competitiveness of potential exporters through increased incentives to foster productivity, innovation and efficiency. Additionally, international trade reinforces competition in national markets by increasing contestability, entry and rivalry through increased presence of foreign products, services and investments. Empirical evidence suggests, for example, that (a) the elimination of entry barriers, increased rivalry and leveling the playing field in upstream sectors contribute to export competitiveness in downstream manufacturing sectors; (b) pro-competition market regulation that reduces restrictions and promotes competition is an important determinant of trade; (c) enforcement of competition laws can enhance export performance and is complementary to trade reforms; and (d) industries with more intense domestic competition will export more.²

An effective competition policy framework can help accomplish several objectives: It facilitates entry to markets;³ ensures that all businesses interact on a level playing field, and discourages and penalizes anticompetitive behavior. Three complementary pillars provide the basis for achieving an effective competition framework: (a) fostering pro-competition regulations and government interventions; (b) developing the necessary measures to guarantee competitive neutrality in markets; and (c) promoting economy-wide enforcement of competition laws. These pillars rely on an effective institutional framework that can foster and guarantee healthy market conduct (Figure 1).

¹ Conner 2014.

² Goodwin and Pierola 2015.

³ See, for example, Kee and Hoekman 2007.

Figure 1: A Comprehensive Competition Policy Framework

FOSTERING COMPETITION IN MARKETS		
PROCOMPETITION REGULATIONS AND GOVERNMENT INTERVENTIONS: OPENING MARKETS AND REMOVING ANTICOMPETITIVE SECTORAL REGULATION	COMPETITIVE NEUTRALITY AND NON-DISTORTIVE PUBLIC AID SUPPORT	EFFECTIVE COMPETITION LAW AND ANTITRUST ENFORCEMENT
Reform policies and regulations that strengthen dominance: restrictions to the number of firms, statutory monopolies, bans towards private investment, lack of access regulation for essential facilities.	Control state aid to avoid favoritism and minimize distortions on competition.	Tackle cartel agreements that raise the costs of key inputs and final products and reduce access to a broader variety of products.
Eliminate government interventions that are conducive to collusive outcomes or increase the costs of competing; controls on prices and other market variables that increase business risk.	Ensure competitive neutrality including vis-à-vis State Owned Entities (“SOEs”).	Prevent anticompetitive mergers.
Reform government interventions that discriminate and harm competition on the merits: frameworks that distort the level playing field or grant high levels of discretion.		Strengthen the general antitrust and institutional framework to combat anticompetitive conduct and abuse of dominance.

Source: WBG-OECD, 2017; adapted from Kitzmüller M. and M. Licetti, 2012.

Based on this evidence, pro-competition policy obligations are being included in an increasing number of trade agreements. A recent study found that as of 2015,⁴ more than 200 preferential trade agreements (PTAs) include some reference to competition policy. The recognition of competition as a fundamental tool for trade, which was already tacitly embedded under the World Trade Organization (WTO) agreements by the inclusion of the concepts of most-favored nation (MFN) treatment,⁵ national treatment⁶ and transparency⁷ is now explicitly incorporated in many PTAs. As tariffs have been progressively whittled away by trade agreements, the most important remaining barriers to integration are non-tariff—or behind-the-border—regulations. Countries that want to achieve greater economic integration have to go beyond trade in goods and make commitments in areas such as services, investment and intellectual property. The barriers to entry in these areas are linked to domestic regulations, subsidies provided to domestic industry, the presence of state-owned enterprises (SOEs), market power and anticompetitive practices by private enterprises. As

⁴ Hofmann, Osnago and Ruta 2017.

⁵ Article 1 of the GATT, Article II of the GATS, Article 4 of the Trade-Related Intellectual Property Rights (TRIPS) agreement.

⁶ Article III of the GATT, Article II of the GATS and Article 3 of the TRIPs.

⁷ Article X of the GATT, Article III of the GATS and Article 63 of the TRIPs.

many of these issues can be dealt with effectively only through the instrument of competition policy, parties wanting to achieve deeper integration may have no other recourse but to include competition policy in their agreements. While traditional PTAs have tended to tackle competition-related issues through shallow trade-related obligations such as a general reduction of non-tariff barriers and of discriminatory customs regulations,⁸ more recent PTAs have recognized the need for countries to promote domestic competition in order to achieve the benefits of opening markets through trade.⁹

2. PRIOR STUDIES MAPPING COMPETITION COMMITMENTS IN TRADE AGREEMENTS

During the past two decades, a number of international organizations have led the way in analyzing competition commitments in PTAs. An ECLAC study¹⁰ from 2014 reviewed 18 bilateral trade agreements with Latin America and Caribbean (LAC) countries that contain competition chapters promoting cooperation and coordination. The study found that such provisions especially benefit less developed economies paired with more developed partners. This confirmed the findings of a UNCTAD study¹¹ from 2005, which found that competition provisions adopted at the regional level enable developing economies to reap the benefits from trade agreements. The following year, an OECD review¹² of 86 regional trade agreements concluded that the main driver of competition provisions is the need to tackle anticompetitive practices that could otherwise undermine trade commitments.

Another study,¹³ however, criticized the OECD mapping exercise for having too narrow a definition of competition provisions, and for neglecting sector-specific provisions and horizontal principles related to competition that were equally important, especially in the context of services.

⁸ For example, under the Uruguay Round Agreements, several WTO agreements contain competition-related provisions but do not treat competition law in a comprehensive way. The importance of incorporating competition provisions to facilitate trade and reduce entry barriers is, in any case, strongly acknowledged in several WTO agreements. Examples include the General Agreement on Trade in Services (GATS), TRIPS, the Agreement on Trade-Related Investment Measures (TRIMs), the Anti-Dumping Agreement, the Agreement on Technical Barriers to Trade (TBT), and the Agreement on Safeguards. See Article 1 of the General Agreement on Tariffs and Trade (GATT); Article II of the GATS; Article 4 of the TRIPS on MNF treatment; Article X of the GATT; Article III of the GATS and Article 63 of the TRIPS on National Treatment; Article X of the GATT 1994; Article III of the GATS; and Article 63 of the TRIPS on the Principle of Transparency.

⁹ See Article 17.2.1 of EU-Canada Comprehensive Economic and Trade Agreement (CETA), available at: <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>. This same comprehensive treatment of competition policy is found in the European text for the Transatlantic Trade and Investment Partnership (EU Proposal TTIP), which includes both general competition law principles as well as a description of conduct that should be considered anti-competitive. See Article X.2.

¹⁰ Silva 2004.

¹¹ Brusick, Alvarez and Cernat 2005.

¹² Solano and Sennekamp 2006.

¹³ Anderson and Simon 2006.

That study emphasized the need to explore the treatment of monopolies, either public or private, as well as state aid as potential sources of distortion from government intervention in the markets. This inspired new research to address competition-related commitments from a broader perspective.

A 2009 study¹⁴ expanded the realm of economy-wide and sector specific-competition provisions in PTAs beyond those included in the competition chapters. The study showed that focusing only on the competition policy chapter of a PTA would leave out important competition-related disciplines found in other chapters dealing with such relevant areas as services, government procurement and intellectual property. The key provisions covered by that study (Box 1) form the basis of the mapping exercise in this chapter.

Box 1: Key competition-related provisions of PTAs

- (i) the overall objectives of the PTA;
- (ii) horizontal principles of non-discrimination, transparency and procedural fairness;
- (iii) sector-specific competition provisions involving investment, services, government procurement and intellectual property; and
- (iv) the competition policy chapter of the agreement, including provisions on state aid, government enterprises and other similar provisions, even though these may not appear in the competition chapter of the agreement.

Source: Teh 2009.

Further, in contrast with prior research, the 2009 study pointed towards a nuanced relationship between competition and trade. While competition principles are embedded in almost three-quarters or all trade agreements, they are not necessarily subordinated to trade objectives. Instead, parties appear to place an intrinsic value on the promotion of competition, as evidenced by the fact that nearly 46 percent of the sample of 74 PTAs include the promotion and advancement of market competition and cooperation in the field of competition as their main objectives. Horizontal principles such as transparency, non-discrimination and procedural fairness are covered at some level in 31 percent of multilateral agreements and 83 percent of bilateral agreements. On a more granular level, 56 percent of the bilateral PTAs account for at least two of the three principles, compared to only 4 percent of the multilateral PTAs; and sectoral competition is covered in almost 70 percent of the bilateral agreements but fewer than a quarter of multilateral agreements. The greater number of competition provisions in bilateral PTAs may be explained by close coordination between the two negotiating parties, whereas such coordination decreases when more parties are involved in a negotiation (Table 1).

This research showed that of the 40 percent of PTAs with specific anticompetitive provisions, most tend to focus on anticompetitive conduct rather than on merger control or state-related market distortions. Nearly three-quarters of the PTAs surveyed include provisions targeting

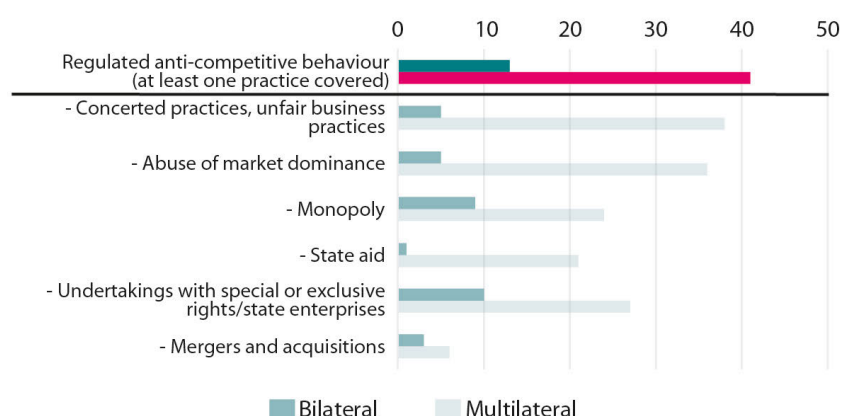
¹⁴ Teh 2009.

Table 1: General competition provisions embedded in PTAs signed by 2009

	Total agreements	Bilateral agreements	Multilateral agreements	Multilateral only	Multilateral group with an individual
Total agreements by 2009	100.0%	31.1%	68.9%	29.7%	39.2%
General objectives of RTA	45.9%	52.2%	43.1%	36.4%	48.3%
Horizontal principles	47.3%	82.6%	31.4%	40.9%	24.1%
Sectoral competition provisions	37.8%	69.6%	23.5%	36.4%	13.8%
Investment	20.3%	47.8%	7.8%	18.2%	0.0%
Government Procurement	23.0%	47.8%	11.8%	13.6%	10.3%
Intellectual Property	14.9%	26.1%	9.8%	22.7%	0.0%
Services	17.6%	21.7%	15.7%	18.2%	13.8%
Financial services	6.8%	4.3%	7.8%	9.1%	6.9%
Telecommunications	27.0%	56.5%	13.7%	18.2%	10.3%
Maritime transport	8.1%	0.0%	11.8%	13.6%	10.3%
Competition policy	74.3%	69.6%	76.5%	54.5%	93.1%

Source: World Bank Group 2017, adapted from Teh 2009.

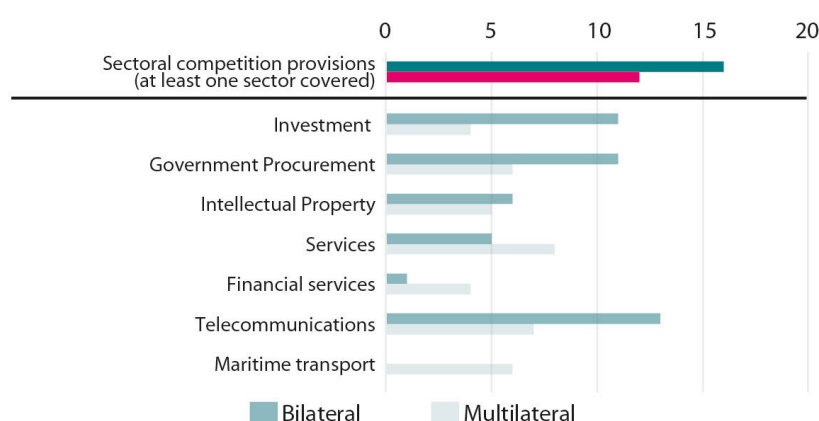
least one of the following six specific competition issues: (a) concerted practices (agreements between competitors); (b) abuse of dominance (unilateral anticompetitive conduct); (c) monopolies; (d) state aid (selective incentives granted to certain market participants); (e) SOEs and undertakings with exclusive rights; and (f) mergers and acquisitions. Of these, concerted practices and abuse of market dominance, by either public or private sector firms, are the most common. Most multilateral agreements refer to at least five of these six topics, but merger control is seldom included. Bilateral agreements are primarily concerned with the regulation of designated monopolies and SOEs (Figure 2).

Figure 2: PTAs and coverage of anticompetitive behavior

Source: World Bank Group 2017, adapted from Teh 2009.

Multilateral and bilateral PTAs also showed significant differences in terms of sectors covered (investment, government procurement, intellectual property and services). Almost half the bilateral PTAs address investment and government procurement, around a quarter address intellectual property and services, and 57 percent explicitly cover competition in the telecommunications sector. In contrast, multilateral agreements include more competition provisions related to the services and government procurement sectors (16 and 12 percent, respectively), particularly as they relate to the telecommunications and maritime transport industries (Figure 3).

Figure 3: PTAs and coverage of sectoral competition provisions



Source: World Bank Group 2017, adapted from Teh 2009.

Other studies since 2009 have continued to concentrate on the competition chapters of PTAs while ignoring their economy-wide and sector-specific competition provisions. For instance, a 2011 study¹⁵ examines the competition chapters of a set of “representative” PTAs but does not undertake a detailed examination of the provisions in those chapters. Instead, the study attempts to answer a number of broad questions such as the economic rationale for including competition provisions in PTAs, the benefits and costs of such agreements, whether competition policy in PTAs leads to third-party discrimination and trade diversion, and how to assess the implementation of the agreements. Further, the authors contend that PTAs can address market failures that national competition laws cannot because, in the absence of a multilateral competition framework, competition provisions in PTAs create an incentive for implementing and locking in national competition policy regimes, thereby promoting technical assistance and learning by doing. They argue that competition laws are unlikely to discriminate against third parties or to have any significant trade-diverting effects. They also claim that implementation is likely to be more successful in North-South than in South-South agreements, partly because of the ability of North countries to push South countries to create a more competitive playing field for its (North’s) firms.

A more recent study¹⁶ is significant for its substantial mapping of some 216 agreements notified to the WTO, and for its identification of distinct approaches to addressing competition-

¹⁵ Dawar and Holmes 2011.

¹⁶ Laprévotte et al. 2015.

related issues. The study calls these approaches the European, North America Free Trade Agreement (NAFTA), Oceania and hybrid approaches. The study also proposes a model competition chapter that could serve as a basis for such chapters in future PTAs. Finally, it proposes setting up a “comprehensive, user-friendly database” to provide policymakers and trade negotiators with necessary information on the competition provisions in PTAs. The World Bank is creating such a database with its Deep Integration project.

3. METHODOLOGY

This chapter reviews the competition provisions in more than 200 multilateral, regional and bilateral trade agreements, and captures new dimensions of those provisions, including their existence in sections other than the competition chapters. The study divides these competition provisions into economy-wide and sector-specific obligations, and assesses the level of enforceability of both types of provisions.

3.1 Economy-wide obligations

Economy-wide obligations are classified around four analytical categories: general objectives, horizontal principles, competition policy and general exceptions.

- (a) The general objectives category captures the specific inclusion of competition as an overall objective of the trade agreement. The objective of increasing competition is given equal weight with increasing trade and opening markets.
- (b) Horizontal principles accounts for commitments that inform or complement competition policy, most importantly, transparency, non-discrimination and procedural fairness.
- (c) Competition policy captures:
 - the objectives of the competition chapter itself, as oppose to the general objectives of the treaty;
 - the existence of other treaties that may apply to the parties and result in multi-layered obligations;
 - the existence of a competition law and an enforcing body. Most PTAs limit the application of the competition law and the scope of the enforcing body, as well as potential exclusions for operators such as state-owned enterprises or designated monopolies;
 - cooperation obligations, including obligations for coordination, exchange of information, notifications, and technical assistance in the areas of competition;
 - procedural fairness obligations, which typically strengthen antitrust enforcement and the institutional framework to combat anticompetitive conduct throughout all sectors of the economy;
 - other areas:
 - regulated anticompetitive behavior (collusion, abuse, mergers, state aid);
 - unfair commercial practices;
 - consumer protection;
 - nforceability of competition policy provisions by domestic bodies;
 - provisions subject to dispute settlement (DS);
 - direct applicability of provisions;
- (d) general exceptions covers exceptions to the agreement as well as specific exceptions related to national security and the competition commitments.

3.2 Sector-specific obligations

Sector-specific obligations follow the classification of the WBG Markets and Competition Policy Assessment Tool (MCPAT) to identify prohibitions against rules that (a) reinforce dominance or limit entry; (b) are conducive to collusive outcomes or increase the cost of competing in the market; and (c) discriminate or protect vested interests. The study captures these prohibitions against anticompetitive behavior in the investment, agribusiness, electronic commerce, government procurement and intellectual property sectors,¹⁷ and classifies them according to their effects.

- (a) Prohibitions against rules that reinforce dominance or limit entry encompass:
 - Monopoly or exclusive rights; absolute bans on entry; arbitrary refusals to grant concessions, licenses or permits to enter a market;
 - Relative bans on entry or expansion of activities in order to limit the number of market players; numerical quotas for foreign providers covered by the PTA;
 - Rules favoring or protecting incumbent firms;
 - Excessive requirements for registry;
 - Impediments to customers switching suppliers.
- (b) Prohibitions against rules conducive to collusion or that increase the cost of competing include:
 - Facilitating agreements among competitors; self-regulation practices that determine entry, exit, pricing conditions or industry standards;
 - Unreasonable restrictions on the locations and commercial activities of new businesses;
 - Price controls by government authorities.
- (c) Prohibitions against discrimination or the protection of vested interests encompass:
 - Discriminatory application of rules regarding entry, exit, pricing or marketing conditions;
 - Preferential treatment of certain operators, resulting in an uneven playing field;
 - State aid or incentives conferred on a selective basis to certain market players.

3.3 Enforceability

The competition provisions in PTAs have different levels of enforceability.¹⁸ These levels are (a) non-binding; (b) best effort; (c) binding with no dispute settlement mechanism; (d) binding with state-to-state DS; (e) binding with private-state DS; and (f) binding with both state-state and private-state DS. The weighted enforceability level (WEL) of a provision is the average of scores given to each of these enforceability categories: 0=non-binding, 1=best effort, 2=binding with no dispute settlement mechanism, 3=binding with state-state dispute settlement, 4=binding with private-state dispute settlement, and 5=binding with both private-state and state-state dispute settlement.

¹⁷ Competition obligations in the services sectors are covered in a separate chapter of this volume.

¹⁸ The analysis maps the level of enforceability of both economy-wide and sector-specific commitments based on the approaches developed in Horn, Mavroidis and Sapir 2010 and Hofmann, Osnago and Ruta 2017.

4. THE GROWING ROLE OF COMPETITION IN PTAS

The results of this analysis confirm the critical role of competition commitments as a tool to further trade objectives. More than four-fifths of the PTAs studied¹⁹ (239 of the 285 in the sample) have competition-related provisions, defined as any kind of national or regional competition requirement, whether regulatory or institutional.²⁰ PTAs with competition-related provisions are not a recent phenomenon; they have been in existence since the 1950s and have increased in proportion to the increase in the number of PTAs over the decades (Figure 4). Most of the 238 in-force PTAs with

Figure 4: Evolution of in-force PTAs with competition-related provisions, 1958-2016

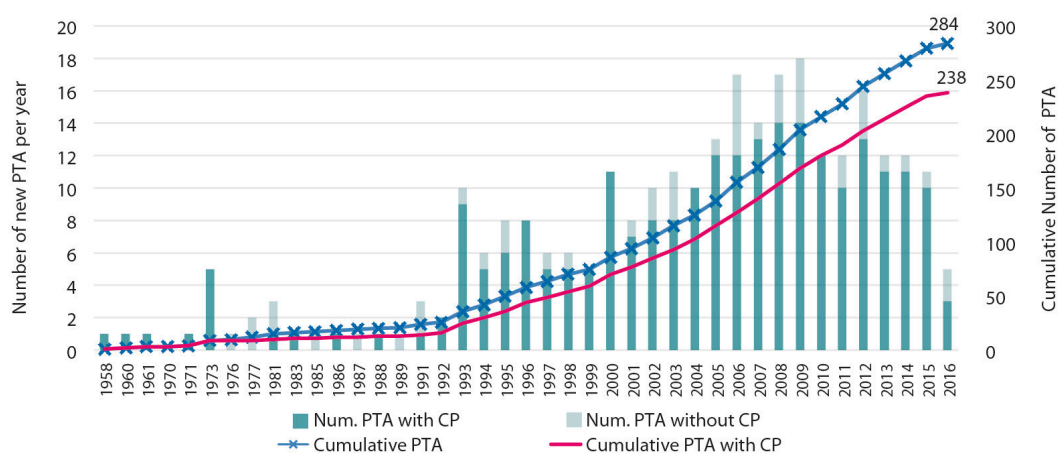
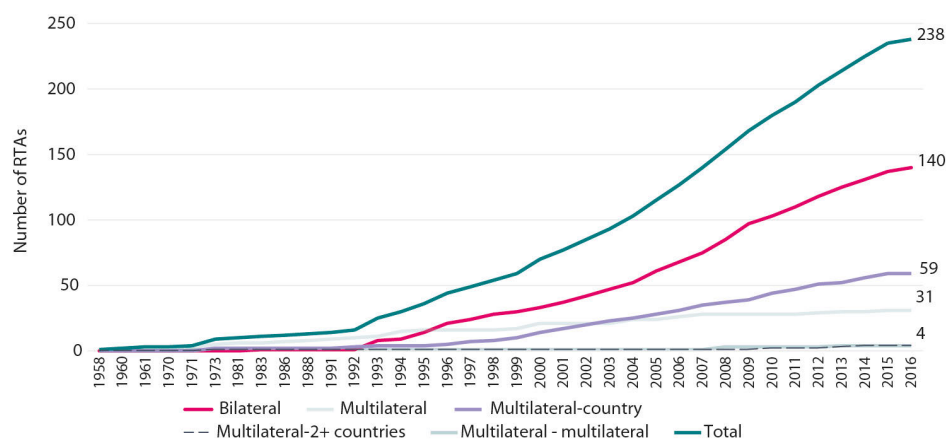


Figure 5: Evolution of in-force PTAs with competition-related provisions, by type of PTA



Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

¹⁹ The sample includes one multilateral agreement (Trans-Pacific Partnership, TPP) that was in negotiation at the date of the analysis. All others in the sample have been notified to the WTO and were in force at the date of the analysis. Of these, 59 percent are bilateral and 41 percent are multilateral agreements.

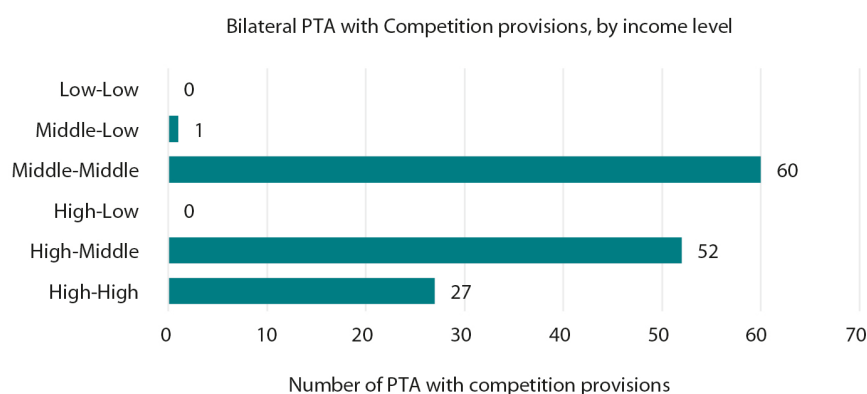
²⁰ There are three types of national competition requirements in PTAs: (a) the country must have or establish a competition law framework applicable to all economic agents sectors and exclusions; (b) the country must have a functional and independent competition authority; or (c) the country must have a broader competition law framework with principles that apply across the economy.

competition-related obligations are bilateral (Figure 5), followed by agreements between a group of countries (plurilateral/multilateral) and a single country (e.g., EU-Mexico), and to a lesser extent among countries in plurilateral agreements (e.g., the European Free Trade Area, EFTA).

Most signatories to PTAs with competition-related provisions are high or middle-income countries (Figure 6). In the case of bilateral PTAs with such provisions, slightly more than 40 percent are between middle-income countries; another 40 percent are between middle and high-income countries; and about 20 percent are between high-income countries. The same pattern obtains for multilateral agreements; more than 70 percent of PTAs with competition-related provisions are arrangements made up of middle-income countries. Another quarter involve high-income countries.

The bulk of bilateral PTAs with competition-related provisions are in East Asia and the Pacific (EAP), Europe and Central Asia (ECA) and Latin America and the Caribbean (LAC), which together account for 95 percent of all bilateral PTAs. Countries from EAP and LAC are more likely than countries from other regions to form PTAs with partners from other parts of the world (Table 2).

Figure 6: Bilateral PTA with competition-related provisions, by income level



Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

Low-income countries, by contrast, show a lack of systematic participation in PTAs with competition-related provisions. This might represent a lost opportunity for those countries, given that competition principles and rules are a critical complement to trade liberalization. This trend may be related to the perceived limited additionality of core competition provisions in PTAs (e.g., enacting a competition law or creating a competition authority) particularly if the country already has a competition framework. Even so, countries that include these types of commitments in their PTAs can expect to build and improve upon their existing competition frameworks,²¹ which tend to be weaker in lower-income economies.²²

²¹ The EC-Albania PTA of 2006, for example, provides for the establishment of a functional independent competition authority (Article 71.4). Albania had established a competition authority in 2004 (Law No. 9121 of 2003), but recommendations by the EU following signing of the 2006 PTA led to an increase in the budget and authority of the competition authority. http://www.caa.gov.al/uploads/publications/POLITIKA_eng%5B1%5D.pdf

²² Silva 2004.

Table 2: Bilateral PTAs with competition-related provisions, by geographical region

		EAP	ECA	LAC	MENA	NA	SA	SSA	Total
East Asia & Pacific	EAP	28	4	14	1	4	6	0	57
Europe & Central Asia	ECA		38	0	7	0	0	0	45
Latin America & Caribbean	LAC			18	1	10	1	0	30
Middle East & North Africa	MENA				0	4	0	0	4
North America	NA					0	0	0	0
South Asia	SA						3	1	4
Sub-Saharan Africa	SSA							0	0
Total		28	42	32	9	18	10	1	140

Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

In the absence of an international standard for competition-related obligations in trade agreements, these obligations vary by agreement.²³ The European Union, for instance, advanced its goal of regional integration by promoting the establishment and enforcement of national competition policies that were in harmony with the EU's overall objective of reducing market distortions towards a more integrated economy. Following the European example, the Caribbean Community and Common Market (CARICOM), the Eurasian Economic Union (EAEU), the West African Economic and Monetary Union (WAEMU), and Common Market for Eastern and Southern Africa (COMESA) incorporate more or less comprehensive competition frameworks as a tool for economic integration. The competition provisions included in these agreements serve the dual purpose of creating national and supranational competition legal/institutional frameworks, while harmonizing sector regulations and eliminating technical barriers to entry.

Building on these examples, the competition-related obligations included in PTAs can be classified around four conceptual blocks: the three pillars that form a comprehensive competition policy (pro-competition regulations and interventions, competitive neutrality and non-distortive state aid, effective competition law and antitrust enforcement, as shown in Figure 1), along with the competition principles embedded in the general reasoning or goals of the parties. To account for how different PTAs incorporate these dimensions, the analysis is divided into four sections: Competition principles embedded in the general framework of PTAs, Competition law and policy, Competitive neutrality, and Pro-competitive economic regulation.

4.1 Competition principles embedded in the general framework of PTAs

While the primary objective of trade agreements is to promote or expand trade, a surprisingly large number of PTAs also have the promotion of competition as a major goal. Out of the

²³ Matsushita 2004. Even in the WTO agreements, the treatment of competition policy is scattered and not comprehensive. The General Agreement on Trade in Services (GATS), and the agreements on Trade-Related Intellectual Property Rights (TRIPS), Trade-Related Investment Measures (TRIMs), Anti-Dumping, Technical Barriers to Trade (TBT) and Safeguards, all have different approaches to competition obligations.

285 agreements analyzed for this study, 132 (46.3 percent) include among their objectives the promotion of (a) competition between the parties, and (b) cooperation on competition-related issues, as well as (c) open markets, both sector specific and economy wide.²⁴ Bilateral agreements tend to include these objectives more often.²⁵ Typically, the language of these provisions includes broad statements acknowledging the potential of anticompetitive practices to restrict trade and investment, and the importance of cooperating on competition enforcement.²⁶

Specific objectives related to competition are included in 69.5 percent of PTAs.²⁷ Most of these are included along with broader competition commitments that emphasize the role of the agreement in preventing gains in market access from being eroded by anticompetitive behavior.²⁸ To a lesser extent, PTAs also include the objective of promoting consumer welfare or economic efficiency. For instance, CARICOM expressly refers to enhancing economic efficiency and protecting consumer welfare and consumers' interests.²⁹

The broad and specific commitments are often linked: PTAs that include competition as a general objective tend to deepen that goal through competition-specific objectives. Of the 238 PTAs that include the general objective of promoting competition conditions, 188 also include the specific objectives of promoting fair competition and curbing anticompetitive practices. Further, 32.5 percent of these 188 PTAs also include the objective of promoting consumer welfare or economic efficiency (Figure 7).

Finally, most agreements with competition-related commitments include the horizontal principles of transparency, non-discrimination and procedural fairness. These principles, critical for promoting competition by ensuring the even-handed treatment of economic actors, are often found in the administrative, institutional or final provisions of the agreement rather than the competition chapter.³⁰ For example, Chapter 16 of the US-Korea (KORUS) PTA on

²⁴ PTAs including only one or two of these objectives are less prevalent: 58 agreements include the first and third broad objectives (promote competition and open markets) and only 13 only include the first objective (promote the conditions for competition).

²⁵ Out of all 163 bilateral agreements, 47.2 percent (77 PTAs) include all three broad objectives, while out of the 122 multilateral agreements, 45.1 percent (55 PTAs) include all three objectives.

²⁶ See for example, Chile–Australia, Article 14.2; Canada–Colombia, Article 1301..

²⁷ There are 198 PTAs that cover at least one of the two specific objectives related to competition, and 61 PTAs that cover both objectives: promoting fair competition and curbing anti-competitive practices, and promoting consumer welfare or economic efficiency.

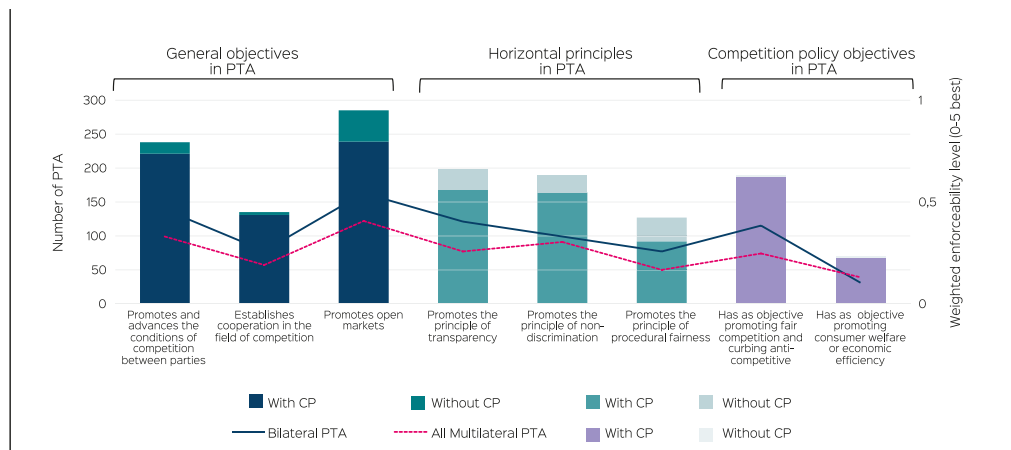
²⁸ For example, the PTAs signed between the Europe Union or EFTA and individual countries; or all but one of the PTAs signed with Japan (Japan–ASEAN is the exception).

²⁹ CARICOM Article 30.

³⁰ Of the 239 PTAs with competition provisions, 90.1 percent include at least one of these horizontal principles, and 30 percent include all three horizontal principles.

competition-related matters contains specific obligations focusing both on transparency (the obligation to share all public information on competition law enforcement activities) and on procedural fairness (the obligation to provide final decisions on violations of competition law in writing, including findings of fact and the legal reasoning on which the decision is based).³¹

Figure 7: General objectives and horizontal principles of PTA, including or not competition provisions



Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

Note: The numbers displayed in the figure correspond to the number of PTAs with such specific requirement. The figure shows all combinations observed in the PTAs.

4.2 PTA obligations to foster effective competition law and antitrust enforcement

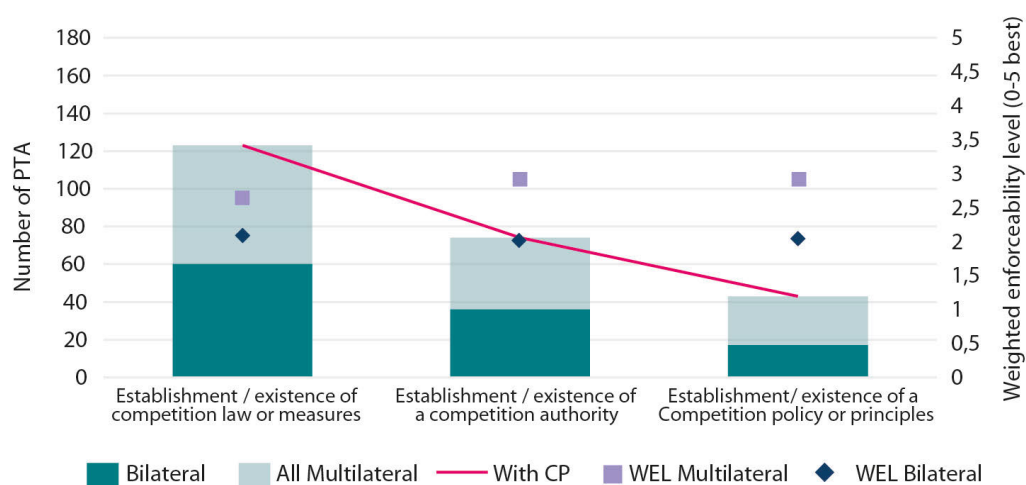
4.2.1 National competition requirements

Among the most significant competition-related commitments of PTAs are the obligation to establish or maintain competition laws and to create an institution to enforce them. Out of the 239 PTAs with competition provisions, 123 require each of the parties to adopt a competition law, and 74 require the parties to create a competition authority (Figure 8). These commitments are telling indicators of the agreement's vocation to curtail domestic anticompetitive behavior. A third type of national commitment—the establishment of a competition policy or principles—is observed in fewer PTAs.³²

Many PTAs that require a national competition law offer little guidance as to its content, so its commitments might be somewhat shallow. The EU-Canada (CETA) agreement, for example, says only that rules tackling anticompetitive conduct “shall be consistent with the principles

³¹ Article 16, sections 5.1. and 5.3, respectively.

³² Seventy-two PTAs require both the adoption of a competition law and establishment of a competition authority, while only 33 require all three commitments—competition law, authority and policy.

Figure 8: Distribution of PTAs by specific stipulation within each competition national requirement

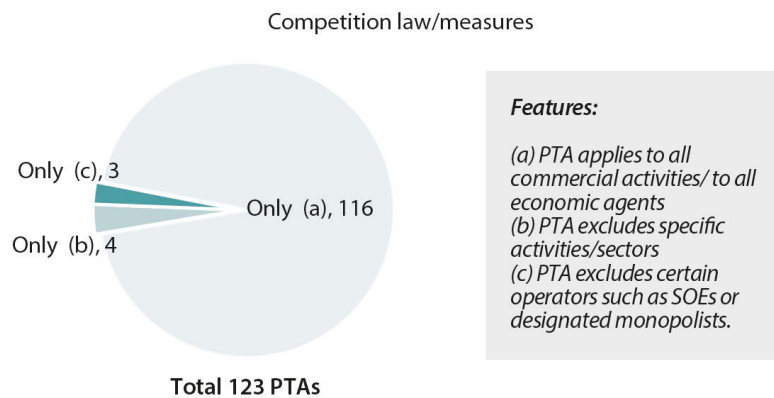
Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

of transparency, non-discrimination and procedural fairness, exclusions from the application of competition law shall be transparent, and each Party shall make available to the other Party public information concerning such exclusions provided under its competition laws.”³³ To determine the effectiveness of these commitments, therefore, it is important to look at the scope of the law and at the independence, functionality and resources of the competition authority.

The data show that a significant number (43.2 percent) of the treaties that include a competition law require that the law applies to all sectors and economic agents (Figure 9). These obligations are often weakened, however, through the ability of parties to introduce or maintain exclusions as long as they are transparent, non-discriminatory and/or taken on the grounds of public policy or public interest (e.g., Chile–Australia, Canada–Colombia). Among the agreements with exclusions, six apply to specific economic activities or sectors. The Trans-Pacific Strategic Economic Partnership (TPSEP), for example, excludes export arrangements as well as the meat industry for New Zealand, and also expressly excludes certain operators such as agricultural producer boards and Pharmac, an SOE. The TPSEP also excludes certain services, including some postal services and types of public transport, for Singapore.³⁴ The East African Community (EAC) excludes acts by consumers, collective industrial bargaining and “specific sectors or industries to the extent that the anticompetitive conduct is required by such regulation within their own Jurisdictions.” CARICOM excludes collective bargaining and approved professional standards. Some association agreements with the EU and EFTA (e.g., EC–Macedonia) allow a transition period for full application of the competition law across activities and sectors. Finally, the Eurasian Economic Union (EAEU) establishes specific rules on the application of antitrust and the regulation of natural monopolies.

³³ See CETA, Articles 17.1 and 17.2.4, available at: <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/.s2xvscv1>

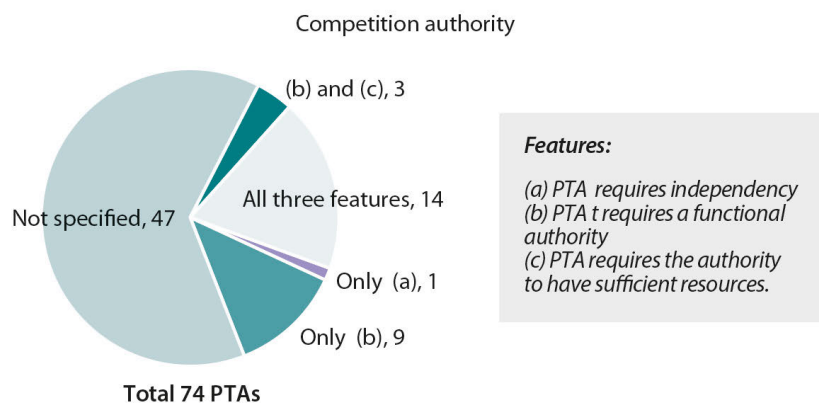
³⁴ Annex 9.A of the TPSEP agreement lists exemptions from the application of Article 9.2 on Competition Law and Enforcement. The exclusions apply to a wide variety of commercial activities in New Zealand and Singapore.

Figure 9: Distribution of PTA with requirement of competition law, by features of the law

Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

Note: The numbers displayed in the figure correspond to the number of PTAs with such specific requirement. The figure shows all combinations observed in the PTAs.

In terms of institutional obligations, 64 percent of the PTAs that require a competition authority give more attention to the need for a functional institution than to independence or sufficient resources. Nine PTAs require only functionality,³⁵ while one (Canada–Costa Rica) requires only independence. None of the PTAs requires only a sufficiently resourced competition agency. Three PTAs, all involving the East African Community (EAC), require both functionality and sufficient resources (Figure 10), but none of the three requires an independent competition authority. The 14 PTAs that include both independence and functionality, or all three characteristics, are association agreements with the EU.

Figure 10: Distribution of PTAs requiring a competition authority, and which features they require

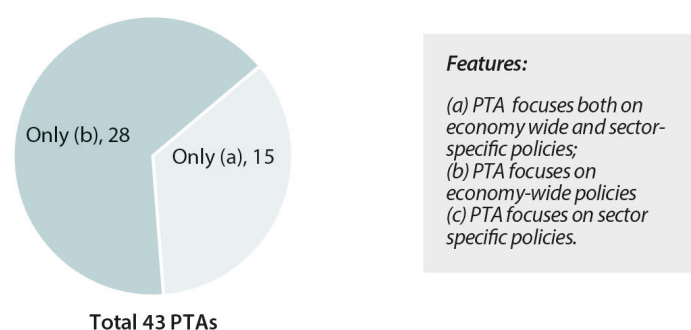
Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

Notes: The numbers displayed in the figure correspond to the number of PTAs with the specific requirement. The figure shows all combinations observed in the PTAs.

³⁵ These agreements are the EAEU treaty; PTAs of the EAEU with Armenia and with Kyrgyz Republic; the Europe Union's PTAs with Central America, the overseas territories and Georgia; the European Economic Area (EEA) PTA; and the agreements signed by South Korea with Turkey and Australia.

The third aspect of national competition commitments relates to the promotion of competition and the principles that guide the implementation of competition law. Competition policy provisions range from a broad acknowledgement of the importance of undistorted competition for trade relationships (e.g., EU-Moldova) to more concrete obligations to promote competition under the principles of transparency, enhancement of economic efficiency and/or cooperation (e.g., Hong Kong, China-Chile, Canada-Honduras). Further, some PTAs (e.g., Andean Community) expressly include the obligation to apply competition policy principles to the adoption and application of market policies and regulatory measures (Figure 11).

Figure 11: Distribution of PTAs with requirement for competition policy/principles, by features of the policy
Competition policy/principles



Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.
 Note: The numbers displayed in the figure correspond at the number of PTAs with the specific requirement. The figure shows all combinations observed in the PTAs.

It is notable that competition requirements are more common in multiparty PTAs than in bilateral agreements. Multilateral PTAs also have a higher level of enforceability than bilateral PTAs; more than 40 percent require state-to-state dispute settlement and significant share also require private dispute settlement. By contrast, more than 90 percent of bilateral agreements require the agreement to be binding but do not have dispute settlement.

4.2.2 Substantive provisions regulating competition policies

The requirement to have a competition law and/or an enforcing institution does not necessary imply that the PTA takes a position on how competition should be regulated or what situations the national law should cover. Therefore, to identify how PTAs tackle anticompetitive behavior through substantive commitments, the analysis differentiates between (a) those agreements that refer to other international instruments; and (b) those that include substantive provisions within the text of the PTA itself.³⁶ Of the 126 PTAs covering at least one of the national competition requirements, 114 include substantive commitments; while 44 out of those 126 PTAs refer to

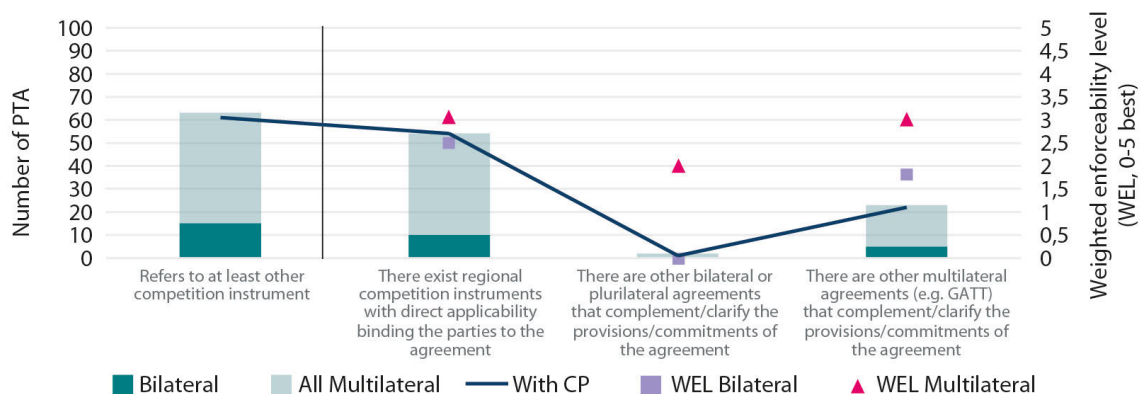
³⁶ Substantive commitments are defined as those that (a) prohibit or regulate cartels or concerted practices; (b) prohibit or regulate abuse of market dominance; (c) regulate undertakings with exclusive rights; (d) regulate monopolies; (e) regulate anti-competitive behavior of SOEs; (f) regulate state aid; and (g) regulate mergers and acquisitions.

other instruments.³⁷ Interestingly, 19 PTAs which lack any national competition requirement refer nonetheless to other instruments that have competition commitments.³⁸

4.2.2.1 PTAs connected to other treaties regulating competition

Other competition provisions that have not drawn the attention of earlier studies are those that either (a) make reference to the competition policy provisions in other international agreements (such as the GATT); or (b) acknowledge the competition obligations of other plurilateral and bilateral agreements (TFEU; Commonwealth of Independent States Free Trade Area, CISFTA); or (c) call for the enactment of a separate set of regional competition rules such as those adopted in the framework of ECOWAS (Figure 12). References to other international agreements are often used to (a) add another level of commitment to the competition-related provisions of the PTA; (b) further clarify the PTA obligations; or, in some cases, (c) fill a transitory void of competition rules. In the latter case, these international agreements can be sources of rules or disciplines on competition while parties to the PTA are in the process of implementing their competition commitments.³⁹

Figure 12: References to other international agreements in PTAs, by type of PTA



Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System

³⁷ Of these 44 PTAs, 43 PTAs have at least one national competition requirement, at least mention other instrument, and at least include a substantive provision (those that regulate anticompetitive behavior); and only one PTA (Japan-Indonesia) does not include substantive provisions.

³⁸ Of these 19 PTAs, 3 do not cover any substantive anti-competitive provisions, while the other 16 do not have a national competition requirement per se, but nevertheless include substantive provisions and refer to other international instruments.

³⁹ For example, in the case of the agreement between Ukraine and Tajikistan, the PTA includes provisions laying the foundation for the application of other regional competition instruments, see Article 6. This provision is complemented by Article 17(a) of the CISFTA.

Of the 63 PTAs that refer to international instruments, 62 percent involve a European multilateral party.⁴⁰ In agreements involving the EU, competition articles either directly reference (EU-Moldova) or mirror (EC-Faroe Islands, EU-Norway) the text of EU agreement's competition rules. In the case of the Common Market of South America (MERCOSUR), a protocol to the PTA deals with harmonization of competition policy within the region, as well as with the attributes of MERCOSUR's Commerce Commission and Committee for the Defense of Competition. In the Economic Community of West African States (ECOWAS), regional competition rules were enacted based on the provisions of the earlier regional treaty for harmonization and coordination of national policies in trade, as well as measures for maintaining and enhancing economic stability in the region.⁴¹ The treaty for the East African Community included a framework for the future enactment of regional competition rules and harmonization of national rules and policies, which led to the enactment of the East African Community Competition Act.⁴²

4.2.2.2 PTAs regulating substantive antitrust obligations and merger control

A significant number of the PTAs with competition provisions include substantive commitments related to antitrust enforcement and merger control. Out of the 138 PTAs with core antitrust provisions, 113 cover cartels and abuse of dominance, 28 include only merger control provisions, and 24 PTAs cover all three types of anticompetitive conduct. Cartels, abuse of dominance and anticompetitive mergers are typically prohibited as business or commercial conduct incompatible with the purposes of the PTA and tend to be bundled together.⁴³ Anticompetitive practices are prohibited in 20 multilateral instruments, which include mainly EU/EC enlargement agreements, regional agreements (COMESA), country accession instruments to regional PTAs (EAEU Accession-Armenia). They are also prohibited in four bilateral agreements (Singapore-Taipei, China, Singapore-Costa Rica, Singapore-South Korea, and Canada-Costa Rica).

Multilateral agreements are typically characterized by a leading economic party that incorporates essential aspects of its competition regulatory framework into the agreement. For example, agreements subscribed by the EU tend to replicate, in general terms, definitions of anticompetitive conduct included in the Treaty on the Functioning of the European Union (TFEU), particularly

⁴⁰ This number includes PTAs with regional competition instruments that directly bind the parties to the agreement, as well as other bilateral and multilateral agreements (such as GATT) that complement or clarify the commitments of the agreement.

⁴¹ The ECOWAS treaty adopts regional competition rules, and provides for the harmonization and coordination of national trade policies as a means of maintaining and enhancing economic stability in the region.

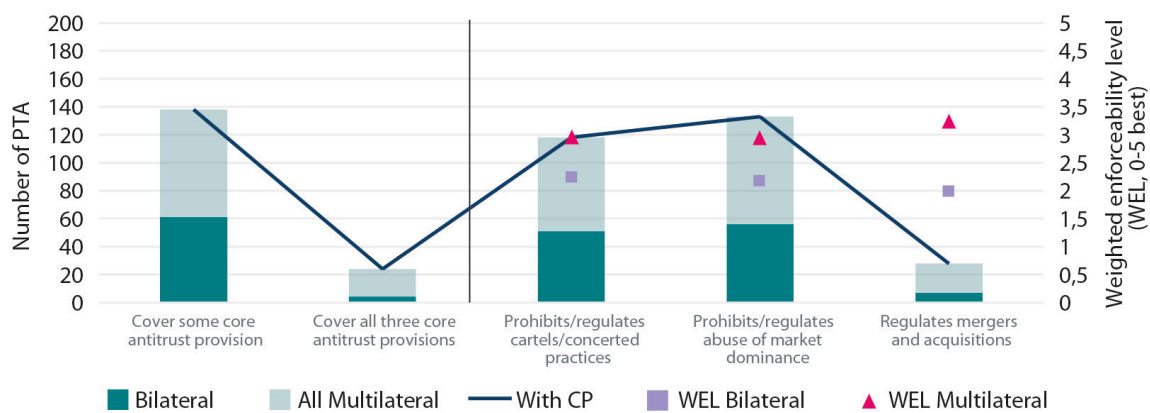
⁴² EAC also establishes a customs union and lists competition as one of the aspects to be included in the customs union protocol on monetary and fiscal policy harmonization.

⁴³ Some PTAs, such as EFTA-Mexico, list anti-competitive conduct as incompatible with the objectives of the agreement without providing definitions.

when dealing with less- developed competition law jurisdictions. Agreements between jurisdictions which have a similar degree of development will strive to achieve convergence in specific areas of enforcement or recognize each other's definitions; for example, the mutual recognition of competition definitions and the application of competition policy to enterprises in the CETA PTA.

The higher enforceability of multilateral agreements even more pronounced in the case of merger control obligations, while bilateral PTAs tend to put more emphasis on enforceability of provisions regarding dominance, collusion and cartels (Figure 13).

Figure 13: Regulated anticompetitive behavior in PTAs, by type of PTA



Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

Provisions against collusion generally consist of a standard prohibition against concerted practices that have the object or the effect of preventing competition.⁴⁴ Abuses of dominance are either prohibited through general effects-based clauses (Georgia-Ukraine, Kyrgyz Republic-Armenia) or by providing specific examples of abusive conduct (CARICOM, EEA, Thailand-Australia).

Merger control provisions are present in agreements among jurisdictions with well-established competition frameworks, as in the EU Proposal for the Transatlantic Trade and Investment Partnership (TTIP) between the EU and US.⁴⁵ Merger control provisions are also present in agreements aimed at creating supranational instruments to complement or clarify existing competition provisions (e.g., COMESA). Merger control obligations vary

⁴⁴ PTAs with object and effect provisions include Turkey-Macedonia, EU-Central America and CIS. PTAs with provisions on competition in entrepreneurial activity include Armenia-Turkmenistan.

⁴⁵ The TTIP contains a general description of the EU treatment of anti-competitive conduct, including (a) horizontal and vertical agreements which have as their object or effect the prevention, restriction or distortion of competition; (b) abuses of dominance by one or more enterprises; and (c) concentrations between enterprises which significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position.

from a short reference to anticompetitive mergers in a list of anticompetitive behaviors (Costa Rica-Singapore, Singapore-Australia) to more detailed language linking the need for effective merger control with the prevention of abuse of dominance (EU-Georgia, EU-Republic of Moldova).

4.2.3 Procedural fairness commitments to support competition enforcement

Instead of, or in addition to, focusing on substantive competition-related commitments, some PTAs emphasize commitments on procedural fairness, transparency and collaboration among authorities, as minimum common denominators for a workable competition policy framework. The value of this approach is confirmed by the significant efforts of the International Competition Network (ICN) to embed and promote procedural fairness in antitrust investigations.⁴⁶ Effective cooperation between two competition authorities within the framework of an international antitrust investigation would not be possible without minimum standards that ensure similar treatment of procedural parties or confidential information.⁴⁷ The proposed Trans-Pacific Partnership (TPP) puts particular emphasis on procedural fairness, as do KORUS and the EU proposal for TTIP.

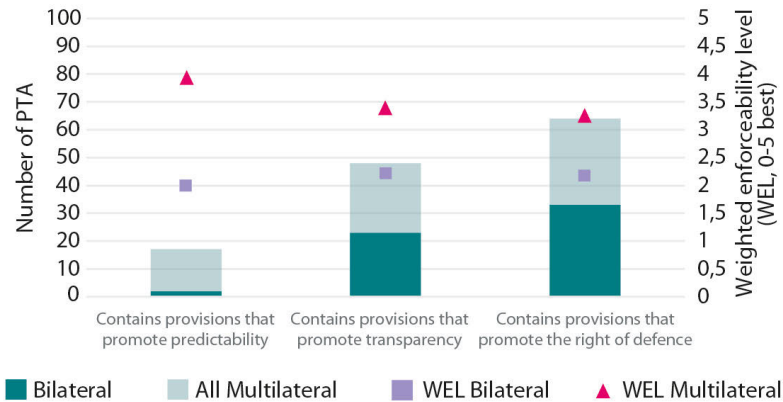
There are 80 PTAs that include at least one procedural fairness provision, of which 55 percent are bilateral PTAs. Only 13 PTAs, all multilateral (involving the EU, EAEU and COMESA) cover all three types of procedural fairness provisions (collusion, abuse of dominant position and merger control). The enforceability of these provisions is significantly higher in PTAs with multilateral signatories. There are 20 PTAs that include at least one procedural fairness provision and also cover the three core substantive conducts,⁴⁸ while only four PTAs with no substantive competition provisions include procedural fairness obligations (Peru-Singapore, Peru-Japan, South Korea-New Zealand, Chile-Hong Kong, China). The most frequent commitments are, in descending order, the right to defense, transparency, the right counsel, and predictability in proceedings (figures 14 and 15).

For obligations supporting the right of defense, the critical commitment seems to be the protection of confidential information, with less importance given to other core aspects of procedural fairness, such as ensuring that parties can be represented by counsel (Figure 15).

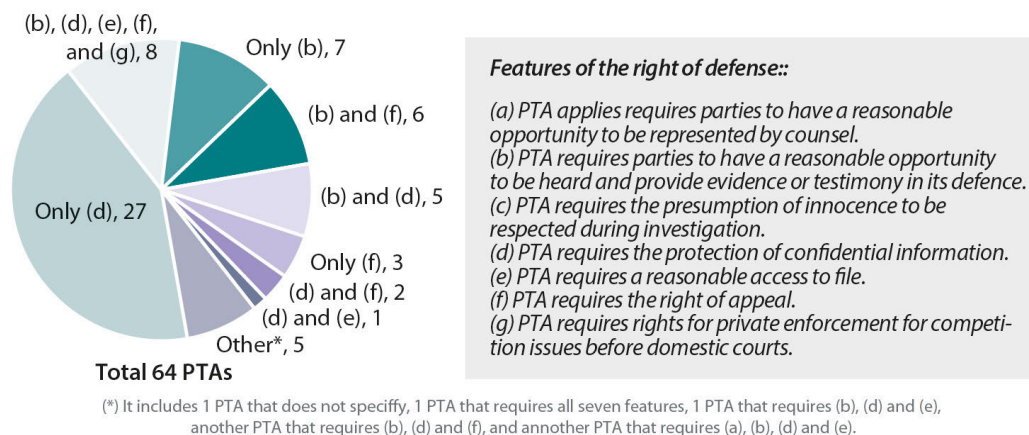
⁴⁶ See the introductory statement of the ICN Guidance on Investigative Process, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf>.

⁴⁷ On the importance of setting common rules on the exchange of confidential information to foster cooperation among antitrust enforcement agencies, see OECD (2014), Recommendation of the OECD Council Concerning International Co-operation on Competition Investigations and Proceedings, available at <http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf>.

⁴⁸ These include 11 PTAs with the EU, 3 with the East African Community, 3 with EAEU, 1 with COMESA, and the PTAs of Costa Rica-Canada and of Singapore-Taipei, China.

Figure 14: Procedural fairness in PTAs, by type of PTA

Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

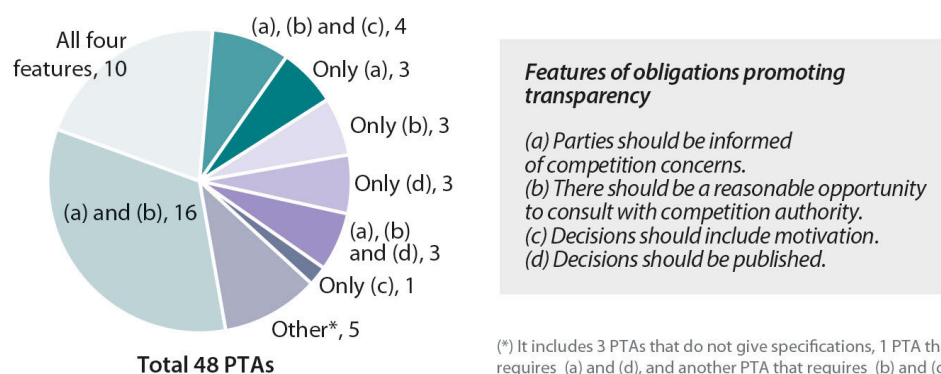
Figure 15: Distribution of PTAs with provisions that promote the right of defense, by the scope of such right

Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

Note: The numbers displayed in the figure correspond to the number of PTAs with such specific requirement. The figure shows all combinations observed in the PTAs.

Transparency provisions tend to emphasize consultation among competition authorities, or the obligation to inform the parties of competition concerns or decisions (Peru–Singapore, Korea–Vietnam, Japan–Peru). Some PTAs also include obligations to avoid enforcement conflicts (Japan–Mongolia). However, the obligation to publish decisions, a central element of ensuring transparency, remains less common and tends to be found in combination with other transparency commitments (Figure 16). This is the case with the Chile–Australia and Korea–Vietnam PTAs as well as a number of association agreements with the EU.

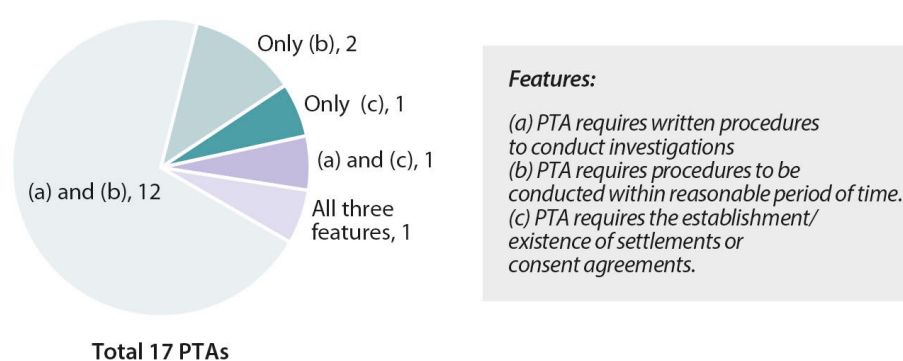
Figure 16: Distribution of PTAs with provisions that promote transparency, by specific obligations



Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.
 Note: The numbers displayed in the figure correspond at the number of PTAs with such specific requirements. The figure shows all combinations observed in the PTAs.

Among the commitments focusing on enhanced predictability (Figure 17), the most common, typically found in a bundle, pertain to conducting procedures within reasonable period of time and using written procedures to carry investigations, followed by the requirement to establish and maintain settlements or consent agreements.⁴⁹

Figure 17: Distribution of PTAs with provisions that promote predictability, by specific requirements



Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.
 Note: The numbers displayed in the figure correspond to the number of PTAs with such specific requirements. The figure shows all combinations observed in the PTAs.

⁴⁹ These include a majority of EU accession agreements. Other agreements that also expressly refer to written procedures are EAEU, CARICOM and TPP.

Among all PTAs reviewed, only the TPP, which has not entered into force, covers all procedural fairness obligations identified in this analysis (Box 2). Interestingly this instrument does not focus on promoting substantive convergence among the content of provisions.⁵⁰

Box 2: The Trans-Pacific Partnership: procedural fairness obligations under the competition chapter

- > General approach to competition law and policy
 - TPP parties shall adopt or maintain national competition laws that proscribe anticompetitive business conduct, with the objective of promoting economic efficiency and consumer welfare; and shall take appropriate action with respect to that conduct.
 - Each party shall endeavor to apply its national competition laws to all commercial activities in its territory.
 - Each party shall maintain an authority or authorities responsible for the enforcement of its national competition law.
 - Competition authorities shall act in accordance with the objectives of promoting economic efficiency and consumer welfare, and not discriminate on the basis of nationality.
- > Procedural fairness obligations
 - TPP parties shall observe procedural fairness in the enforcement of competition laws.
 - Each party shall adopt written procedures for conducting investigations, which shall be concluded within a reasonable period of time.
 - Before receiving a penalty, the party under investigation shall:
 - (a) be informed by the authority of the competition concern;
 - (b) have a reasonable opportunity to be represented by counsel, be heard and present evidence or testimony in their defense. In particular, this includes testimony of experts, cross-examination of testifying witness, and review and rebuttal of any evidence in the proceeding;
 - (c) have the right of appeal, including review of alleged substantive or procedural errors, in a court or other independent tribunal, as well as the option to settle with the competition authority, which settlement can subject to independent or judicial review;
 - Competition authorities shall:
 - (a) bear the burden of proof for establishing anticompetitive conduct;
 - (b) respect the presumption of innocence in public notices of ongoing investigations;
 - (c) protect confidential information;
 - (d) provide the party under investigation with a reasonable opportunity to view the evidence against him or her;
 - (e) provide the person under investigation with a reasonable opportunity to consult with the competition authority.
- > Enforceability
 - From an institutional perspective, the competition chapter of the TPP offers limited means of direct enforcement, since it is explicitly excluded from the mechanisms in the dispute settlement chapter. In addition, unlike other chapters that create ad hoc committees to oversee the implementation of commitments, the competition chapter only establishes the right to enter into consultations at request of another party but it fails to articulate the procedure.

4.2.4 Institutional arrangements

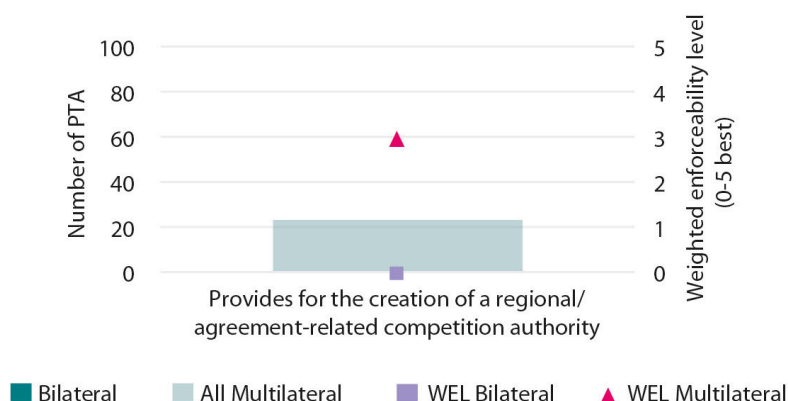
4.2.4.1 Institutional setup

To better understand the potential impact of competition provisions in PTAs, it is important to consider the institutional arrangements under which they are to be implemented.

⁵⁰ Regarding rules that promote predictability, the TPP requires procedural fairness, including the obligation to provide the investigated party with information regarding the competition concerns, a reasonable opportunity to be represented by counsel, and a reasonable opportunity to be heard and present evidence in the party's defense (Article 16.2). The TPP also requires transparency (Article 16.7) and consultations (Article 16.8).

Only 23 PTAs call for the creation of supranational competition frameworks, and all involve a multilateral party. These types of frameworks are useful for overcoming domestic constraints to institutionalizing competition policy.

Figure 18: Institutional arrangement in PTAs, by type of PTA



Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

The most prominent examples of supranational competition frameworks are regional PTAs. The process of enabling a CARICOM Single Market and Economy (CSME) included, for example, the creation of a regional competition authority, the CARICOM Competition Commission in 2008. Since then, several CARICOM members have begun a gradual process of drafting and implementing national or supranational competition laws⁵¹ and setting up competition authorities. The same is true for COMESA, which is actively seeking to deepen collaboration with Member States and provide assistance in creating domestic competition institutions.⁵² Along the same lines, the WAEMU PTA has led to the creation of a regional legal framework and the WAEMU Competition Commission.

⁵¹ The Organization of Eastern Caribbean States (OECS) has agreed to establish a supranational competition agency to handle competition matters within its single market (Antigua and Barbuda, Dominica, Granada, Montserrat Saint Lucia, Saint Kitts and Nevis, Saint Vincent and the Grenadines). The Bahamas has a joint utilities and competition regulator, the Utilities Regulation and Competition Authority (URCA), acting under the Regulation and Competition Authority Act of 2009. In Barbados, the new competition authority in Barbados, established in 2001, evolved from the Public Utilities Board, which was responsible for regulating public utilities such as electricity and telephone services; the new authority is responsible for implementing the Fair Competition Act. Belize is in the process of establishing a national competition authority and has drafted a Fair Competition Bill. In Guyana, the Competition and Consumer Affairs Commission (CCAC) was established under the Competition and Fair-Trading Act of 2006, and is charged with administering and enforcing the Competition and Fair-Trading Act of 2006 and the Consumer Affairs Act of 2011. Suriname has drafted a competition bill and undertaken a series of stakeholder consultations to finalize the bill before presenting it to the Parliament. Trinidad and Tobago have established the Fair Trading Commission under its competition law, the Fair-Trading Act of 2006.

⁵² The COMESA Competition Commission was created in 2004 as part of the COMESA Treaty, and became operational in 2013. The Commission is responsible for investigating and sanctioning cases where the anti-competitive behavior of one member state affects another member state.

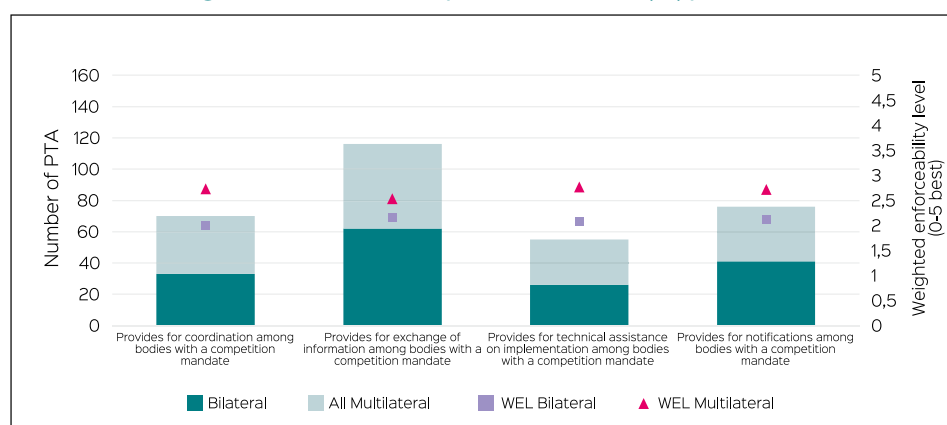
4.2.4.2 Cooperation among competition authorities

Another important element of procedural fairness is the commitment to cooperate. Given the prevalence of multi-jurisdictional anticompetitive behavior, the degree of cooperation among competition authorities will have an important bearing on the efficacy of any investigation or enforcement action. This study analyzes the existence of four types of cooperation: (a) coordination among bodies with a competition mandate (e.g., Japan–Mongolia); (b) exchange of information among bodies with a competition mandate (China–Korea); (c) notifications among bodies with a competition mandate (Trans-Pacific Strategic Economic Partnership, TPSEP); and (d) technical assistance on implementation among bodies with a competition mandate.⁵³

Of the 239 PTAs with competition provisions, 131 agreements include at least one of these forms of cooperation, and 99 of them explicitly establish cooperation as a general objective. However, only 31 PTAs, mostly multilateral, include all four forms of cooperation.

The main forms of cooperation among competition authorities are exchange of information, followed closely by notification, coordination and technical assistance. The latter has the highest enforceability level, followed by coordination among competition bodies (Figure 19).

Figure 19: Forms of cooperation in PTAs, by type of PTA



Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

Notes: All the PTAs in the figure have competition provisions.

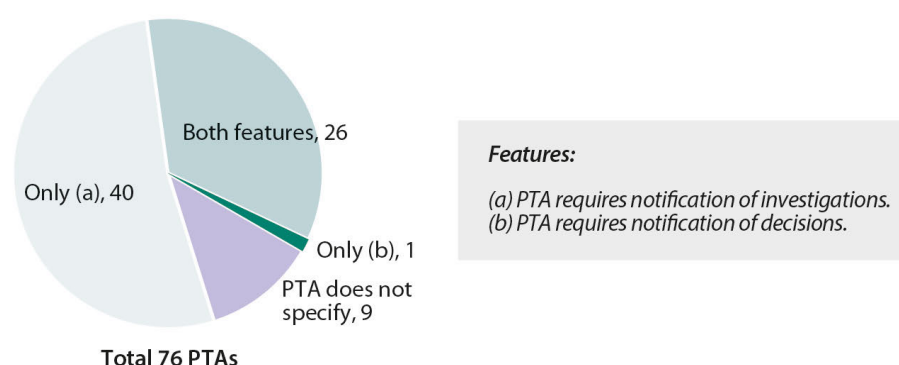
Obligations to coordinate, exchange information and notify are usually found together, either in general terms (e.g., New Zealand–Singapore) or in the context of communicating and cooperating in enforcement activities that may be of interest to the other party due to cross-border effects (e.g., Korea–Vietnam).

⁵³ Some PTAs that expressly mention technical assistance are Chile–Australia (strengthening systems); Korea–Vietnam (various areas of technical assistance); New Zealand–Taipei, China (implementation of competition policy); Peru–Korea (exchange of experience and capacity building); Thailand–New Zealand (various areas); Turkey–Jordan (technical assistance in the understanding of each other's systems).

In the case of technical assistance, most clauses tend to list the scope or types of technical assistance that parties may undertake (e.g., Korea–Vietnam; EU–Columbia–Peru). A few PTAs refer to the possibility of parties entering into additional cooperation and mutual assistance agreements (e.g., Canada–Costa Rica).

The obligation to notify (Figure 20) is mostly related to investigations, sometimes in combination with the notification of decisions (EC–Mexico).

Figure 20: Distribution of PTAs with notification requirements, by scope of such notifications



Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.
Note: The numbers displayed in the figure correspond to the number of PTAs with such specific requirements. The figure shows all combinations observed in the PTAs.

4.3 PTA obligations to foster competitive neutrality

Any sorts of measures that insulate firms from competition, whether in the form of regulation, state aid or incentives, can have a significant impact on market outcomes. However, most governments often provide such treatment to SOEs and designated monopolies as well as to targeted private operators. This raises concerns as State assistance to specific firms can distort the normal competitive process, increase the likelihood of anticompetitive practices by enterprises that receive the favored treatment, and deter investments by non-favored enterprises. The risks of such policies grow exponentially when they target SOEs and firms that already enjoy a privileged position vis-à-vis less connected private operators. If state support target sectors with low levels of market competition, the effects in the markets are more pervasive.

The Uruguay Round agreements initially disciplined SOEs and designated monopolies by submitting them to the non-discrimination obligations prescribed for state measures that affect imports or exports by private traders. This approach, based on the GATT, requires parties to ensure that in purchases or sales involving imports and exports, SOEs and designated monopolies should behave in accordance with commercial considerations, including price, quality, availability, marketability and transportation. In addition, the SOEs and designated

monopolies should afford the other party's enterprises adequate opportunity to compete for participation in such purchases or sales. This approach has been captured by PTAs that specifically refer to GATT commitments (ASEAN-New Zealand, Canada-Panama, EFTA-Egypt, EFTA-Mexico, EFTA-Ukraine) or follow a similar approach. For example, CARICOM prescribes the elimination of discriminatory measures enacted by SOEs and designated monopolies that limit market access or "distort competition or fair trade."

A comprehensive approach to leveling the playing field regarding SOEs is a rather recent trend in PTAs. The TPP is the first agreement that seeks to comprehensively address the commercial activities of SOEs competing with private companies in international trade and investment. Even though the commitments in the TPP's competition chapter build on WTO principles and previous U.S. PTAs (notably CETA), the TPP significantly expands the scope of commercial consideration and non-discrimination commitments by advancing the control of distortive public support and subsidies. In other words, the TPP works to promote competitive neutrality⁵⁴ and non-distortive public aid support.⁵⁵ More specifically, SOEs and designated monopolies should be bound to compete on quality and price rather than benefitting from discriminatory regulation and distortive subsidies. These obligations build on three main commitments by TPP parties: (a) parties must avoid discrimination and apply commercial considerations to SOEs, and limit the scope for designated monopolies to engage in anticompetitive practices; (b) parties must not provide non-commercial assistance⁵⁶ capable of causing adverse effects or injury to the interests of another party; (c) and parties must offer an impartial regulatory and institutional framework for SOEs, and make them accountable for their actions in other TPP countries.

⁵⁴ See OECD 2015, Roundtable on Competition Neutrality, Issues Paper by the Secretariat, referring to competitive neutrality as a principle according to which all enterprises, public or private, domestic or foreign, face the same set of rules, and where government's contact, ownership or involvement in the marketplace, in fact or in law, does not confer an undue competitive advantage on any actual or potential market participant. See also Roundtable on Competitive Neutrality, Note by the European Union, stating that while there is no universal definition of competitive neutrality, there are accepted interpretations of this principle. For instance, according to the European Union, competitive neutrality should be "broadly defined and cover all forms of direct and indirect public interventions of whatever nature, which may provide public or private undertakings with undue advantages over their actual or potential competitors, thereby distorting the competitive process."

⁵⁵ Other PTAs that provide comprehensive treatment of SOEs are KORUS and the EU Proposal for TTIP, both of which hold that while parties are free to create monopolies and SOEs, their conduct in the market should be carried out in accordance with competition rules and in a non-discriminatory manner.

KORUS allows the parties to establish SOEs, subject to the following obligations: Each Party shall ensure that any state enterprise that it establishes or maintains (a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges; and (b) accords non-discriminatory treatment in the sale of its goods or services to covered investments.

Along the same lines, the EU Proposal for TTIP authorizes parties to establish or maintain state enterprises and monopolies and to grant these enterprises special or exclusive rights. However, where an enterprise falls within the scope of this provision, the parties shall not require or encourage such an enterprise to act in a manner that is inconsistent with the PTA, and shall observe the principle of non-discrimination for covered investment.

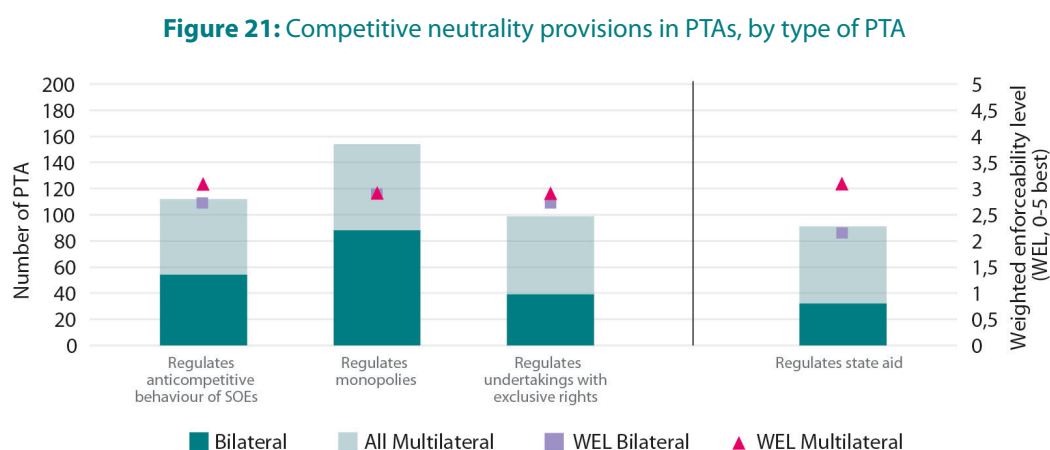
⁵⁶ Non-commercial assistance includes (a) direct transfers of funds, or potential direct transfers of funds or liabilities; and (b) goods or services other than general infrastructure on terms more favorable than those commercially available to that enterprise. The TPP excludes non-commercial assistance measures taken prior to the TPP entering into force and/or enacted within three years of it entering into force if based on a decision taken prior to that date.

Although less systematized, a number of PTAs include provisions on SOEs to ensure non-discriminatory treatment (Korea-US, NAFTA), the applicability of competition law to SOEs (Korea-Vietnam, CAFTA- DR-US, MERCOSUR), and obligations to restrain parties from granting competitive advantages to SOEs (Chile-Australia, Korea-Australia). Some PTAs (Korea-Singapore) go even further and expressly mention competitive neutrality in connection with the treatment of SOEs.

The regulation of SOEs is often coupled with the regulation of statutory monopolies and/or firms with exclusive rights. Most provisions dealing with statutory monopolies also focus on non-discrimination obligations (Turkey-Jordan, Ukraine-Former Yugoslav Republic of Macedonia) and on the importance of treating statutory monopolies in accordance with the parties' obligations under the agreement (NAFTA, New Zealand-Taipei, China, ASEAN-Australia-New Zealand, Panama-El Salvador, Panama-Honduras). This is the same approach adopted towards firms with exclusive rights (New Zealand-China, Pakistan, Malaysia, Ukraine-Montenegro, China-Switzerland).

Competitive neutrality also covers state aid provisions, which typically aim at limiting any negative effects of state aid on the economic conditions of the other party (Kyrgyz Republic-Armenia, Russian Federation-Tajikistan). Other commitments include transparency in the granting of state aid (Turkey-Albania, Turkey-Bosnia and Herzegovina), and the requirement that state aid not affect trade between parties (EC accession treaties, TFEU, EEA) or threaten to distort competition (EC-Faroe Islands, Turkey-Montenegro).

PTAs with provisions to foster competitive neutrality tend to involve a multilateral party, except that statutory monopolies remain more prominent in bilateral agreements. Multilateral PTAs have higher levels of enforceability, in particular regarding the anticompetitive behavior of SOEs (Figure 21).



Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

4.4 PTA obligations to remove sector-specific anticompetitive regulations

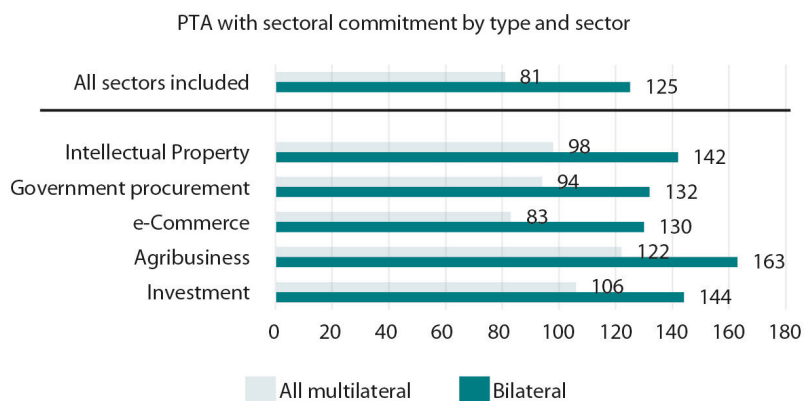
Even though market regulation is a legitimate and necessary way to accomplish various policy objectives, in some cases it has the potential to negatively affect both trade and competition, harming market dynamics in an unintended and sometimes avoidable manner.

Sector-specific obligations in trade agreements have typically focused on minimizing anticompetitive restrictions as an instrument to embed competition principles in markets open to trade and investment. Obligations for key industries are included to reduce technical barriers to trade (TBTs) and promote entry. However, this research also considers these sector-specific commitments from a competition angle.

The sectors examined are agriculture, e-commerce, government procurement, intellectual property and investments. Competition-related commitments affecting services are dealt with in separate chapters. All PTAs in the database consider competition commitments in at least one of these five sectors; 72 percent (206 agreements) include specific commitments in all five sectors, of which 96 percent (197 agreements) also include economy-wide competition policy provisions.

Bilateral agreements include more sectoral-specific commitments than do multilateral PTAs, and also include more commitments in all five sectors—77 percent, compared to 66 percent of multilateral PTAs. More bilateral PTAs account for sectoral commitments specific to agribusiness, followed by business investment, intellectual property, government procurement and e-commerce. Multilateral PTAs follow the same order of coverage.

Figure 22: PTAs and coverage of sector-specific competition provisions by type of PTA



Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

These obligations closely follow the Market and Competition Policy Assessment Toolkit (MCPAT) to identify rules that (a) reinforce dominance or limit entry—absolute entry restrictions, incumbents’ involvement in entry decisions; (b) facilitate collusive outcomes—regulations facilitating price fixing, self-regulation or information exchange; (c) discriminate and protect vested interests—explicit discriminatory rules without justification, selective subsidies and incentives which distort the level playing field, explicit lack of competitive neutrality (Table 3).

Table 3: PTA distribution according to provisions against anticompetitive behavior identified by (MCPAT)

Sectors	Number of PTA with sectoral commitments	PTA that include provisions against specific rules as a share of total PTA with sectoral commitment (percent)			
		Rules that reinforce dominance or limit entry	Rules that are conducive to collusive outcomes costs to compete in the market	Rules that discriminate or protect vested interests	At least one of these rules
Investment	250	81.2	10.8	66.4	86.8
Agribusiness	285	92.6	4.2	93.3	99.3
e-commerce	213	30.5	0.9	22.5	33.3
Government procurement	226	53.5	4.4	57.5	69.5
Intellectual property	240	66.7	2.5	50.0	77.1
All five sectors included	206	21.8	0.5	8.7	22.8

Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

PTAs with sector-specific commitments tend to focus more on rules that reinforce dominance or limit entry, followed by rules that discriminate or protect vested interests. Except for investment-related commitments, few of the sectoral commitments in PTAs prohibit or limit rules that are conducive to collusive outcomes or increase costs to compete in the market.

Many of the PTAs that include sectoral commitments also have economy-wide competition provisions. However, there are 46 PTAs with sectoral commitments that do not also have economy-wide competition provisions. These are mostly regional agreements, including the Pacific Alliance, the ASEAN Free Trade Area and the Asia-Pacific Trade Agreement (APTA); agreements between regional blocks and specific countries such as the EU with Andorra, Cote d’Ivoire or Syria; and bilateral agreements such as Chile-Colombia, Chile-Turkey, Chile-China, the US-Bahrain and US-Israel.

4.4.1 Prohibitions on rules that reinforce dominance or limit entry

Rules that reinforce dominance or limit entry are undesirable because dominant market players can set prices above the competitive level, produce lower-quality products, or reduce the rate of innovation below what would exist in a competitive market. Provisions in the sectoral chapters that prohibit or try to limit these effects can be classified as those

that consider (a) monopoly rights and absolute bans on entry; (b) relative bans on entry or on expansion of activities; (c) incumbents' rights regarding entry decisions; (d) registry requirements, including licenses and permits; and (e) impediments to switching providers.

In general, sector-specific commitments against rules that reinforce dominance or limit entry have been included in PTAs since the 1970s, but it was not until the 1990s (Figure 23) that they became more prominent, especially in the agriculture and investment chapters (Figure 24).

Figure 23: Evolution of PTAs in force with sector-specific provisions against rules that reinforce dominance or limit entry, by sector

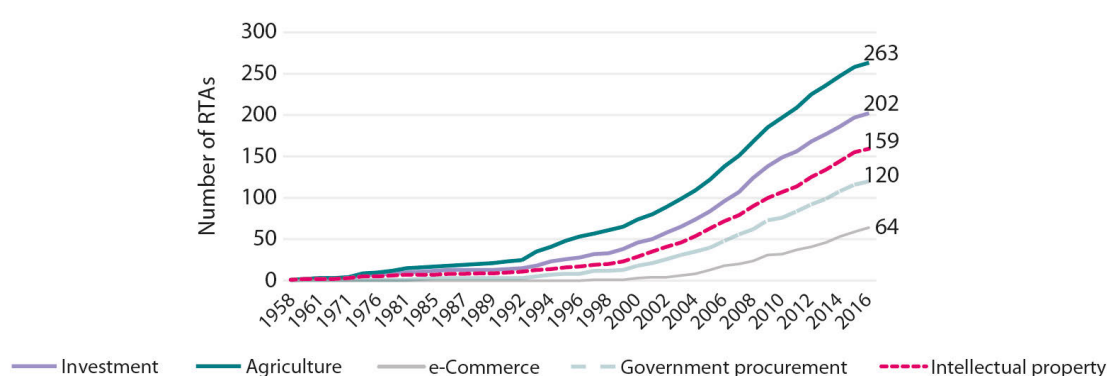
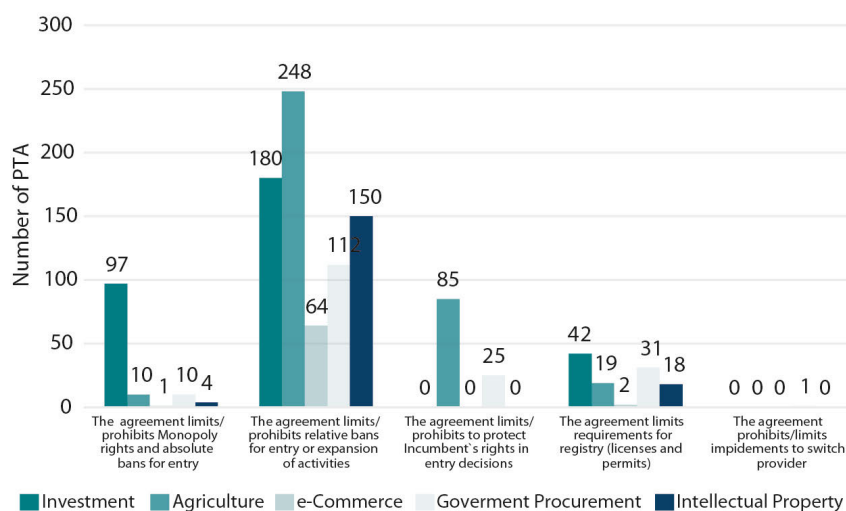


Figure 24: Sector-specific provisions against rules that reinforce dominance or limit entry



Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

4.4.1.1 Provisions that limit or prohibit monopoly rights and absolute bans on entry

Monopoly rights and absolute bans on entry occur when a regulatory instrument either limits or enables another body to limit the number of concessions, licenses or permits to enter a market; when certain providers are prohibited from entering without justification;

when regulation forbids the granting of permits or authorizations to enter a given market; or allows for the granting of exclusive rights.

In investment chapters, competition provisions include prohibitions on establishment or residence obligations for service suppliers (Japan–Australia), as well as obligations to allow all transfers related to a covered investment to take place freely and without delay (Chile–Australia, Japan–Singapore). In agriculture, provisions include obligations to eliminate monopoly import arrangements (Australia–New Zealand). In the case of e-commerce, some general provisions are included in those chapters which provide for the elimination of barriers to e-commerce and the creation of an environment of trust and confidence for its use (Japan–Switzerland). Finally, in public procurement, provisions tend to focus on preventing those requirements that would restrict a public tender only to certain participants by, for example, requiring unnecessary technical specifications or specific trademarks (Chile–Australia).

4.4.1.2 Provisions that limit or prohibit relative bans on entry or expansion of activities

Relative bans on entry and expansion of activities are a less restrictive or more indirect way of limiting entry, and generally occur when regulation enables another body to set the number of permits, licenses or fees to enter the market. Potential negative effects from these types of restrictions may include lower incentives to enter the market, lower quality or higher prices for consumers, slower sector development and less innovation in the market.

Provisions against relative bans on entry and expansion of activities are the most common in all five sectors. In the investment chapter they typically relate to freedom of movement and establishment of persons (Canada–Honduras, Australia–China), free movement of capital (EFTA–Egypt, EC–Mexico), and creating a predictable framework for investment (Turkey–Palestinian Authority, COMESA, ASEAN–China, EFTA–Mexico). In the agriculture chapter, clauses falling into this category are focused on prohibiting restrictions on import/export (Korea–US, Panama–El Salvador), ensuring that sanitary and phytosanitary measures do not constitute a means of arbitrary or unjustifiable discrimination (Taipei, China–Singapore, Turkey–Serbia) and are duly notified to promote transparency (Panama–Taipei, China, Singapore–Australia). Similarly, in the case of e-commerce, provisions are aimed at achieving transparency regarding regulation and measures affecting e-commerce (ASEAN–Australia–New Zealand), adopting internationally approved standards for the industry (EC–CARIFORUM, EU–Georgia), and supporting cooperation to promote market access and reduce regulatory barriers (CEFTA). In the case of government procurement, these types of measures seek to achieve a better understanding of their respective government procurement systems (Singapore–Australia, Thailand–Australia, EFTA–Central America) and reduce barriers to procurement markets (Thailand–New Zealand). Finally, measures included in the intellectual property chapters focus on ensuring an adequate and effective

protection of intellectual, industrial and commercial property rights, clear rules governing these industries (Korea-US, Nicaragua-Taipei, China) and effective means to enforce those rights (EC-Mexico, Malaysia-Australia).

4.4.1.3 Provisions that limit or prohibit incumbents from participating in entry decisions

These provisions are aimed at limiting measures that allow incumbents to participate in entry decisions by providing for equal and transparent conditions to access the market. Most of the provisions in this category are linked to government procurement and include prohibitions on offsets (EFTA-Mexico, Dominican Republic-Central America, EFTA-Ukraine), as well as clauses promoting open and transparent procurement procedures (Colombia-Korea, EU-Colombia-Peru) and clear, non-exclusionary technical specifications (Dominican Republic-Central America, Korea-New Zealand).

Some agriculture chapters contain provisions ensuring that fees and charges related to import/export do not represent an indirect protection of domestic goods to the detriment of entrants, or a tax on imports/exports for fiscal purposes (US-Chile).

4.4.1.4 Provisions that limit or prohibit registry requirements, including licenses and permits

Excessive or unjustified requirements for registry may restrict competition by creating unnecessary entry barriers. Relevant considerations include whether authorizations must be provided by different administrative authorities; conditions for granting authorizations, licenses and permits; and conditions for their renewal.

These obligations are especially common in investment chapters that provide for open and non-discriminatory special formalities and information requirements (India-Japan, US-Peru, ASEAN-India, Chile-Australia). In procurement, these obligations aim at ensuring open and equal conditions for participation and qualification (Canada-Honduras, EFTA-Central America, Israel-Mexico). In e-commerce, they prohibit parties from adopting or maintaining regulations for electronic signature that would limit or impede the determination of the electronic signature method for a transaction (Japan-Switzerland). Finally, in the case of IP rights, these provisions focus on establishing reasonable and publicly available protection and registration of trademarks (Japan-Australia, CARICOM).

4.4.1.5 Provisions that limit or prohibit impediments to switching providers

Provisions that limit or prohibit impediments to switching providers are aimed at removing barriers to competition within a market. These provisions are usually present in telecommunications chapters (Trans-Pacific Partnership), but none were found in the sectors analyzed in this study.

4.4.2 Prohibitions on rules that are conducive to collusive outcomes or increase the cost of competing in the market

Provisions limiting or prohibiting rules that are conducive to collusion or increase the cost of competing are aimed at preventing three types of anticompetitive effects: (a) facilitation of agreements among competitors; (b) restriction of the types and locations of products or services; and (c) establishment of price controls. Of all the competition-related sectoral commitments in PTAs, these are the least common (figures 25 and 26).

Figure 25: Evolution of PTAs with sector-specific provisions against rules that are conducive to collusion or increase the cost of competing in the market, by sector

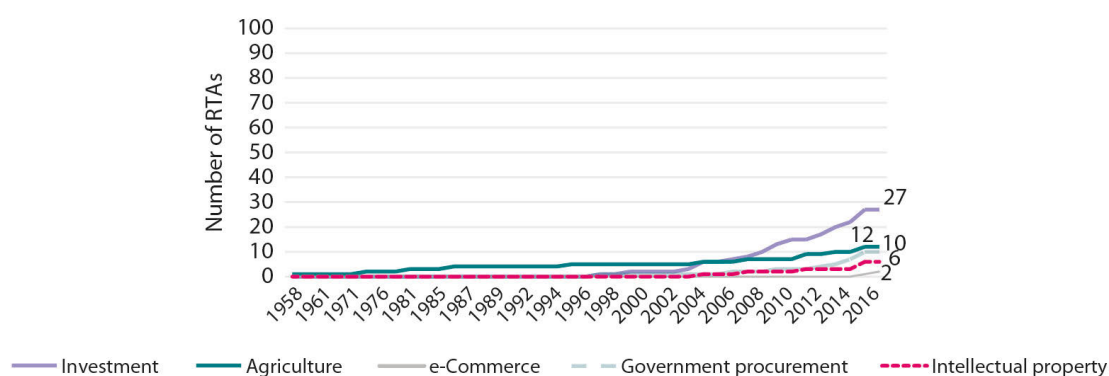
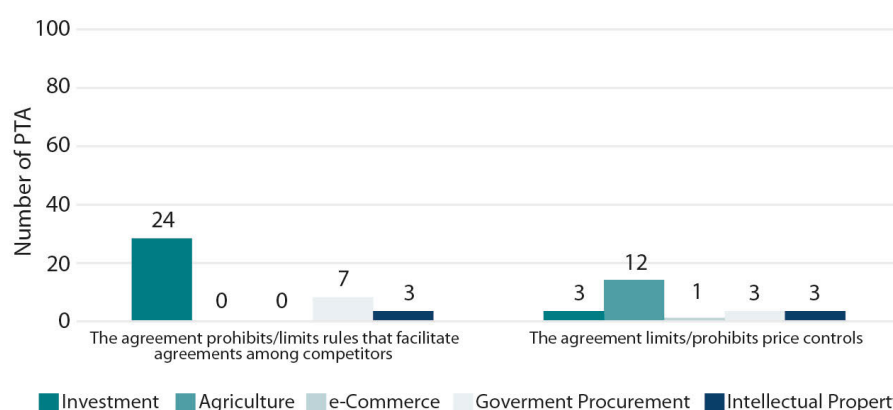


Figure 26: Sector-specific provisions against rules that are conducive to collusion or increase the cost of competing in the market



Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.
 Note: Information displayed for in-force PTAs

4.4.2.1 Provisions that limit or prohibit rules that facilitate agreements among competitors

Rules that facilitate agreements among competitors are those that allow them to agree on key aspects that could restrict competition, such as prices of products and services offered

in the market, supply restrictions, dividing customers or territories, or coordinating their participation in public tenders.

In investment chapters, these commitments limit excessive information requirements that would affect investors' legitimate interests or otherwise distort competition (Chile–Australia, Chile–Japan, ASEAN–Australia–New Zealand). The treatment of information is also covered in government procurement provisions, with the objective of preventing anticompetitive conduct (Japan–Peru, Panama–Singapore).

4.4.2.12 Provisions that limit or prohibit restrictions on types and location of products or services

Restrictions on types of products and services may occur when a regulatory instrument imposes unreasonable burdens or obstructs the activities of business in a way that may distort or prevent competition. Under this category, only one PTA has an e-commerce provision prohibiting limitations on the location of computing facilities (Japan–Mongolia).

4.4.2.3 Provisions that limit or prohibit rules establishing price controls

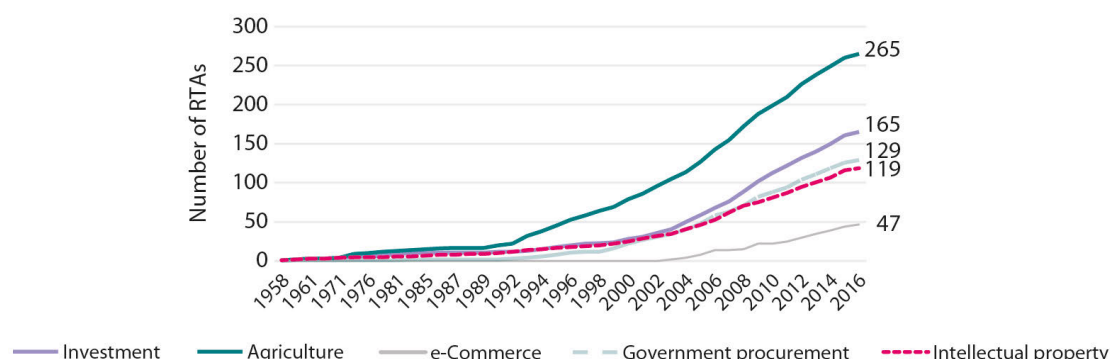
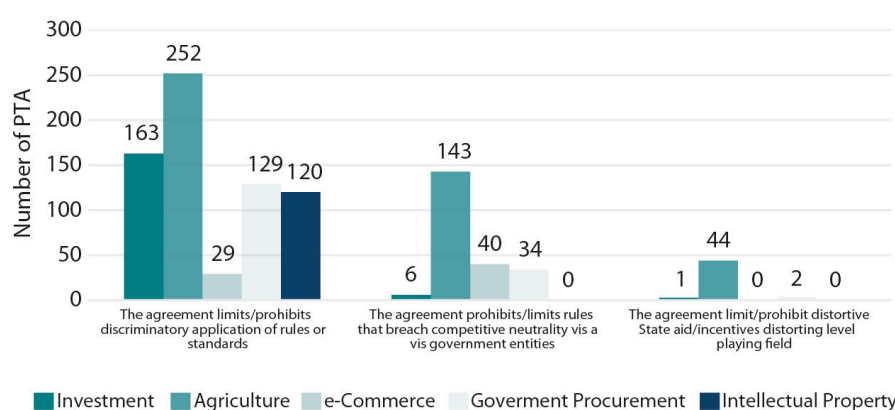
Few PTAs include provisions that limit or prohibit price controls. When such provisions exist, they are as a general rule accompanied by a list of exceptions. However, some treaties include detailed regulations of price control methodologies for monopolies in all five sectors (EAEU–Accession of Kyrgyz Republic).

In agriculture, price control provisions are more common. Some provisions regulate price measures at the community level (TFEU), and others regulate price band systems for agriculture (Canada–Colombia, Turkey–Chile).

4.4.3 Prohibitions on rules that discriminate or protect vested interests

Discriminatory and protective rules favor firms that are already present in the market, either by granting them privileges or benefits that give them an advantage over their competitors, or by creating adverse or discriminatory conditions for non-favored entities. Prohibitions on these practices aim at limiting three types of market effects: (a) discriminatory application of rules or standards; (b) breach of competitive neutrality; and (c) distortive state aid or incentives.

These types of provisions are most prevalent in agriculture chapters (265 PTAs), followed by investment chapters (165 PTAs). The latter have been on a rising trend since the early 2000s (Figure 27), with a stronger focus on the elimination of discriminatory application of rules and standards (Figure 28).

Figure 27: Evolution of PTAs with sector-specific provisions against rules that discriminate or protect vested interests, by sector**Figure 28: Sector-specific provisions against rules that discriminate or protect vested interests**

Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

Note: Information displayed for in-force PTAs

4.4.3.1 Provisions that limit or prohibit rules that allow for discriminatory application of rules or standards

Provisions that limit discriminatory application of rules and standards are among the most prominent in all sectoral chapters, generally in the form of most-favored nation or MFN (EFTA-Albania), national treatment or NT (EFTA-Albania), or other provisions prohibiting discriminatory treatment (TFEU and EC accession agreements) or providing for the adoption of non-discriminatory standards (Japan-Mongolia).

4.4.3.2 Provisions that limit or prohibit rules that breach competitive neutrality

Breach of competitive neutrality occurs when a regulatory instrument allows another body to grant preferential treatment to public market players vis-a-vis private ones or to certain private operators. PTA provisions that limit this practice aim at leveling the playing field between foreign and domestic firms of the parties. These provisions appear across all sectoral chapters except for IP, and are prevalent in the agriculture sector.

In agriculture and e-commerce, competition neutrality commitments focus on reducing or eliminating customs duties and tariffs on imports of the other parties' goods (Armenia-Ukraine for agriculture, Peru-Korea for e-commerce, US-Australia for customs duties). Clauses in investment chapters tend to provide for stable and transparent investment conditions (EFTA-Albania, EC-Mexico, EFTA-Bosnia and Herzegovina), no expropriation without due compensation (Japan-Mongolia), and rules extending the applicability of competition rules to government entities when they are competing in the market (Singapore-Taipei, China). Finally, regarding government procurement, provisions are aimed at ensuring a fair and impartial review of tender procedures (US-Panama, Japan-Peru).

4.4.3.3 Provisions that limit or prohibit rules that create distortive state aid or incentives

State support measures and incentives may create an uneven playing field when they benefit selected market players. These incentives may be explicit, in the form of direct subsidies, or implicit. Implicit incentives could be given through the provision of loans for capital expenditure or for operating costs at interest rates that are below market rates, or even interest-free as well as through tax exemptions. State aid clauses are typically found in agriculture and deal with domestic support measures and state subsidies (Canada-Colombia, Armenia-Russian Federation, Singapore-Australia).

4.5 Enforceability of provisions

A key question about competition-related provisions in PTAs is the extent to which they are enforceable. Previous research on enforceability has failed to examine this question in terms of dispute settlement; that is, whether PTAs include or exclude competition provisions from dispute settlement processes. Based on the approach developed in two previous studies⁵⁷ for judging the enforceability of competition-related provisions using the language of dispute settlement, we classify the provisions according to whether they are:

- non-binding (level 0);
- best effort (level 1);
- binding but not subject to dispute settlement (level 2);
- binding with state-to-state dispute settlement (level 3);
- binding with private-state dispute settlement (level 4);
- binding with both private-state and state-to-state dispute settlement (level 5).

The levels of enforceability of each of the identified obligations in a PTA are averaged to obtain an enforceability score for the PTA, and these scores are then averaged to obtain some insights about commonalities within groups of PTAs. The particular focus is on degree of enforceability within the group of PTAs that include competition provisions. The results

⁵⁷ Horn, Mavroidis and Sapir 2010; Hofmann, Osnago and Ruta 2017.

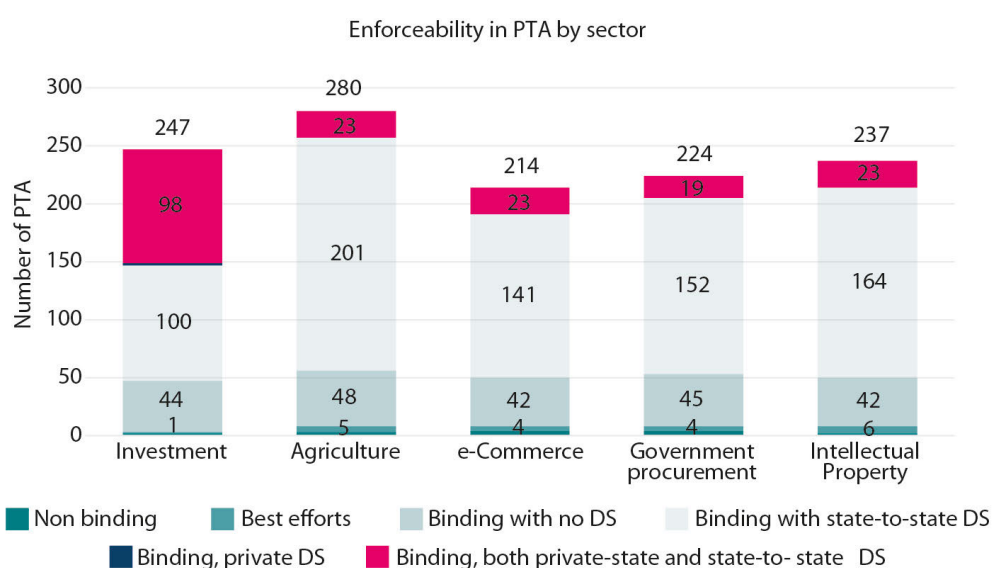
of this exercise show a high degree of enforceability for the more substantive competition commitments (Annex 3 offers additional details on the degree of enforceability of specific obligations). To illustrate:

- 154 PTAs (64.4 percent of all PTAs with competition-related provisions) have binding commitments regulating monopolies;
- 131 PTAs (54.8 percent) have binding commitments prohibiting or regulating abuse of dominant position;
- 117 PTAs (49 percent) have binding commitments regulating cartels and concerted practices; and
- 112 PTAs (46.9 percent) have binding commitments regulating anticompetitive behavior of SOEs.

Given that many PTAs also consider specific exceptions to each identified obligation, we constrained our analysis to this group of PTAs. Once again, the degree of enforceability was shown to be high in relation to substantive competition commitments, and very high in relation to the economy-wide provisions regarding institutional arrangements, direct applicability, and procedural fairness (Annex 4 shows the enforceability level of PTAs with specific exemptions).

The degree of enforceability is also very high with regard to sectoral commitments, with more than 95 percent of the PTAs in the sample using binding language for the five sectors. Except for the provisions specific to investment, around 90 percent of the PTAs establish binding commitments with state-to-state dispute settlement. PTAs with provisions specific to investment tend to establish highly enforceable provisions, with 40 percent of PTAs establishing commitments with both private-state and state-to-state dispute settlement (Figure 29).

Figure 29: Enforceability in PTA with sectoral commitments



Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

Sector commitments appear to be a major source of competition-enabling content in PTAs, since even PTAs without economy-wide commitments have a high level of enforceability (Table 4). However, it is possible that these findings may understate the competition-enhancing effects of sectoral commitments, since the analysis has not considered the services sectors.

Table 3: PTA distribution according to provisions against anticompetitive behavior identified by (MCPAT)

Enforceability level									
		Low	▶ High					Total PTAs	
Economic sector	Non-binding	Best effort	Binding, with no DS	Binding, with state-to-state DS	Binding, with private DS	Binding, both private-state and state-to-state DS			
With competition provisions								(%)	Number
Investment	0.9%	0.4%	17.8%	39.6%	0.9%	40.4%	100%	225	
Agriculture	1.3%	1.7%	17.0%	70.2%	0.0%	9.8%	100%	235	
e-commerce	2.0%	2.0%	20.2%	64.5%	0.0%	11.3%	100%	203	
Government procurement	1.9%	1.9%	20.9%	66.4%	0.0%	9.0%	100%	211	
Intellectual property	0.9%	2.8%	18.5%	67.1%	0.0%	10.6%	100%	216	
Without competition provisions									
Investment	0.0%	0.0%	18.2%	50.0%	0.0%	31.8%	100%	22	
Agriculture	0.0%	2.2%	17.8%	80.0%	0.0%	0.0%	100%	45	
e-commerce	0.0%	0.0%	9.1%	90.9%	0.0%	0.0%	100%	11	
Government procurement	0.0%	0.0%	7.7%	92.3%	0.0%	0.0%	100%	13	
Intellectual property	0.0%	0.0%	9.5%	90.5%	0.0%	0.0%	100%	21	

Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

4.6 Direct applicability

Direct applicability of competition-related provisions—i.e., whether private firms can claim the application of competition provisions before the public bodies of the parties—increases the level of enforcement of competition related provisions. Direct applicability is more commonly included in multilateral PTAs than in bilateral ones. Moreover, enforceability does not seem to increase with direct applicability.

The nine PTAs that expressly provide for direct applicability also include competition-related provisions. Out of these, seven are multilateral agreements or involve a multilateral party (COMESA, CARICOM, MERCOSUR, TPP, EAC, EAC-Burundi, EAC-Rwanda); and two are bilateral agreements (New Zealand-Taipei, China and Canada-Costa Rica).

5. CONCLUSIONS

A few core conclusions are apparent from the analysis.

First, rules on competition are a prominent feature of the architecture of PTAs; they are found in four out of every five PTAs currently in force. Many PTAs also include the promotion of conditions for competition as a principal objective of the agreement.

Second, the near absence of low-income countries in PTAs with strong competition provisions may be an important missed opportunity for making trade liberalization more effective and beneficial.

Third, there appears to be a remarkable degree of enforceability in these provisions, based on the legal language used (in some cases including direct applicability), the applicability of the dispute settlement mechanism, and the possibility of bringing private claims to national bodies. Previous research on competition provisions in PTAs has not systematically examined the use of dispute settlement in competition-related provisions, so this result brings a new understanding to competition commitments in trade agreements.

Fourth, the findings underline the importance of going beyond economy-wide competition obligations and examining competition-related commitments in the sectoral chapters of the agreement as a major source of the competition discipline in trade agreements.

Finally, the dataset and mappings assembled for this study represent a valuable resource for researchers interested in measuring the effects of competition-related provisions on trade flows and other market outcomes.

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ANNEXES

Annex 1: Economy-wide competition-related commitments in PTAs

AREA	SUB-AREA	QUESTION
General objectives of the treaty	Objectives	Does the agreement promote and advance the conditions of competition between parties?
		Does the agreement establish cooperation in the field of competition?
		Does the agreement promote open markets either (1) economy wide, (2) in specific sectors, or (3) both?
Horizontal principles		Does the agreement promote the principle of transparency?
		Does the agreement promote the principle of non-discrimination?
		Does the agreement promote the principle of procedural fairness?
Competition policy	Treaties regulating competition	Does the agreement have as objective promoting fair competition and curbing anticompetitive practices?
		Does the agreement have as an objective promoting consumer welfare or economic efficiency?
		Are there existing regional competition instruments (e.g., TFEU, WAEMU) binding the parties to the agreement?
	National competition requirements	Are there other bilateral or multilateral agreements that complement/clarify the provisions/commitments of the agreement?
		Are there other multilateral agreements (e.g., GATT) that complement/clarify the provisions/commitments of the agreement?
		Does the agreement require the establishment/existence of competition law/measures? (if yes, (1) it applies to all commercial activities/to all economic agents; (2) it excludes specific activities/sectors; (c) it excludes certain operators such as SOEs or designated monopolists.
	Regulated anticompetitive behavior	Does the agreement require the establishment/existence of a competition authority? (if yes, (1) does it establish the need for the authority to be independent? (2) does it establish the need for the authority to be functional? (c) does it establish the need for the authority to have sufficient resources?
		Does the agreement require the establishment/existence of competition policy/principles? (if yes, (1) it focuses both on economy-wide and sector-specific policies; (2) it focuses on economy-wide policies; (3) it focuses on sector-specific policies.
		Does the agreement prohibit/regulate cartels/concerted practices?
		Does the agreement prohibit/regulate abuse of market dominance?
		Does the agreement regulate undertakings with exclusive rights?
		Does the agreement regulate monopolies?
Competition policy	Procedural fairness	Does the agreement regulate anticompetitive behavior of SOEs?
		Does the agreement regulate state aid?
		Does the agreement regulate mergers and acquisitions?
	Other substantive aspects	Does the agreement contain provisions that promote predictability? (if yes, (1) it requires written procedures to conduct investigations; (2) it requires procedures to be conducted within a reasonable period of time; (3) it requires the establishment/existence of settlements or consent agreements).
		Does the agreement contain provisions that promote transparency? (if yes, (1) parties should be informed of competition concerns; (2) there should be a reasonable opportunity to consult with the competition authority; (3) decisions should include legal reasoning; (4) decisions should be published.
		Does the agreement contain provisions that promote the right of defense? (If yes, (1) it requires parties to have a reasonable opportunity to be represented by counsel; (2) it requires parties to have a reasonable opportunity to be heard and provide evidence or testimony in their defense. This includes testimony of experts, cross-examination of testifying witnesses, and access to review and opportunity to rebut any evidence in the proceeding; (3) it requires the presumption of innocence to be respected during investigation; (4) it requires the protection of confidential information; (5) it requires reasonable access to the case file; (6) it requires the right of appeal; (7) it requires the right to private enforcement for competition issues before domestic courts.
	Forms of cooperation	Does the agreement regulate unfair commercial practices?
		Does the agreement regulate consumer protection?
		Does the agreement provide for coordination among bodies with a competition mandate?
	Institutional arrangements	Does the agreement provide for exchange of information among bodies with a competition mandate?
		Does the agreement provide for notifications among bodies with a competition mandate? (if yes, (1) investigations; (2) decisions.
		Does the agreement provide for technical assistance on implementation among bodies with a competition mandate?
General exceptions	Direct applicability	Does the agreement provide for the creation of a regional/agreement-related competition authority?
		Do the competition-related provisions of the agreement have direct applicability in the sense that application can be claimed by private operators before the public bodies of the parties?
		What general exceptions are included in the agreement? (GATS Article XIV list)
General exceptions		Does the agreement allow for security exceptions?
		Do other exceptions apply to competition-related provisions?

Annex 2: Sector-specific competition-related commitments in PTAs

1	Does the specific chapter include the submission to competition law/prohibition against anticompetitive behavior for covered parties? (if yes, (1) this applies to SOEs; (2) this applies to designated monopolies; or (3) both)
2	Rules that reinforce dominance or limit entry
2.1	Does the agreement limit/prohibit monopoly rights and absolute bans on entry?
2.2	Does the agreement limit/prohibit relative bans on entry or expansion of activities?
2.3	Does the agreement limit/prohibit entry to protect Incumbent's rights?
2.4	Does the agreement limit requirements for registry (licenses and permits)?
2.5	Does the agreement prohibit/limit impediments to switching providers?
3	Rules that are conducive to collusive outcomes or increase costs to compete in the market
3.1	Does the agreement prohibit/limit rules that facilitate agreements among competitors?
3.2	Does the agreement limit/prohibit restrictions on types of products or services and location?
3.3	Does the agreement limit/prohibit price controls?
4	Rules that discriminate or protect vested interests
4.1	Does the agreement limit/prohibit discriminatory application of rules or standards?
4.2	Does the agreement prohibit/limit rules that breach competitive neutrality?
4.3	Does the agreement limit/prohibit distortive state aid/incentives that distort a level playing field?
5	Enforceability (non-binding (0); best efforts (1); binding with no DS; (2), binding with state-to-state D/S; (3) binding with private DS; (4) binding with both state-to-state and private D/S.
6	Are there exemptions?

Annex 3: Enforceability of economy-wide provisions in PTAs, with competition provisions

Features of PTA		Number of PTAs that answered yes	Total 239 PTAs with competition provisions			
			Best efforts	Binding with no DS	Binding with state-to-state DS	Binding, both private-state and state-to-state DS
General objectives of PTA	Promotes and advances the conditions of competition between parties	221	2.7%	52.5%	34.8%	10.0%
	Establishes cooperation in the field of competition	130	3.1%	65.4%	6.2%	5.4%
	Promotes open market	231	2.6%	19.9%	66.2%	11.3%
Horizontal principles	Promotes the principle of transparency	163	1.8%	21.5%	63.2%	13.5%
	Promotes the principle of non-discrimination	161	1.2%	35.0%	54.7%	8.1%
	Promotes the principle of procedural fairness	87	0.0%	34.5%	39.1%	26.4%
Objectives	Has as objective promoting fair competition and curbing anti-competitive practices	187	2.1%	56.7%	29.9%	11.2%
	Has as objective promoting consumer welfare or economic efficiency	68	2.9%	48.5%	35.3%	13.2%
Treaties regulating competition	There exist regional competition instruments which direct applicability binding the parties to the agreement	51	0.0%	23.5%	58.8%	17.6%
	There are other multilateral agreements (e.g. GATT) that complement / clarify the provisions / commitments of the agreement	21	0.0%	23.8%	71.4%	4.8%
National competition requirements	Requires the establishment / existence of competition law / measures	122	4.1%	69.7%	17.2%	9.0%
	Requires the establishment / existence of competition authority	74	2.7%	68.9%	17.6%	10.8%
	Requires the establishment / existence of competition policy / principles	43	7.0%	65.1%	9.3%	18.6%
Regulated anti-competitive behaviour	Prohibits / regulates cartels / concerted practices	117	0.9%	47.0%	43.6%	8.5%
	Prohibits / regulates abuse of market dominance	131	0.8%	48.1%	43.5%	7.6%
	Regulates undertakings with exclusive rights	97	0.0%	28.9%	61.9%	9.3%
	Regulates monopolies	154	1.9%	31.8%	53.6%	10.3%
	Regulates anticompetitive behaviour of SOEs	112	0.0%	34.8%	51.8%	13.4%
	Regulates state aid	87	1.1%	29.9%	58.6%	10.3%
	Regulates mergers and acquisitions	28	10.7%	42.9%	17.9%	28.6%
Procedural fairness	Contains provisions that promote predictability	17	5.9%	23.5%	17.6%	52.9%
	Contains provisions that promote transparency	48	2.1%	54.2%	22.9%	20.8%
	Contains provisions that promote the right of defence	63	1.6%	50.8%	33.3%	14.3%
Other substantive aspects	Regulates unfair commercial practices	54	1.9%	50.0%	48.1%	0.0%
	Regulates consumer protection	60	1.7%	30.0%	51.7%	16.7%
Forms of cooperation	Provides for coordination among bodies with a competition mandate	69	7.2%	66.7%	14.5%	11.6%
	Provides for exchange of information among bodies with a competition mandate	115	5.2%	67.0%	20.9%	7.0%
	Provides for notifications among bodies with a competition mandate	76	5.3%	71.1%	13.2%	10.5%
	Provides for technical assistance on implementation among bodies with a competition mandate	55	5.5%	74.5%	5.5%	14.5%
Institutional arrangement	Provides for the creation of a regional / agreement - related competition authority	20	15.0%	20.0%	20.0%	45.0%
Direct applicability	Competition - related provisions of the agreement have direct applicability in the sense that application can be claimed by private operators before the public bodies of the parties	9	0.0%	55.6%	44.4%	0.0%
General exceptions	There are general exceptions included in the agreement	195	0.5%	13.3%	73.8%	12.3%
	Allows for security exceptions	217	0.5%	19.8%	68.2%	11.5%

Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.

Annex 4: Enforceability of economy-wide provisions in PTAs, with specific exceptions

Features of PTA			With specific provision exemptions				
			Non binding	Best efforts	Binding with no DS	Binding with state-to-state DS	Binding, both private-state and state-to-state DS
General objectives of RTA	Promotes and advances the conditions of competition between parties	238	0,0%	2,5%	49,6%	38,7%	9,2%
	Establishes cooperation in the field of competition	135	0,7%	3,0%	64,4%	17,0%	14,8%
	Promotes open markets	285	2,8%	2,1%	18,9%	67,0%	9,1%
Horizontal principles	Promotes the principle of transparency	197	2,5%	1,5%	18,8%	66,0%	11,2%
	Promotes the principle of non-discrimination	190	2,1%	1,1%	33,2%	56,8%	6,8%
	Promotes the principle of procedural fairness	127	4,7%	0,0%	26,8%	50,4%	18,1%
Objectives	Has as objective promoting fair competition and curbing anti-competitive practices	189	0,0%	2,1%	56,6%	30,2%	11,1%
	Has as objective promoting consumer welfare or economic efficiency	70	0,0%	2,9%	47,1%	37,1%	12,9%
National competition requirements	There exist regional competition instruments with direct applicability binding the parties to the agreement	50	0,0%	0,0%	24,0%	60,0%	16,0%
	There are other bilateral or plurilateral agreements that complement/clarify the provisions / commitments of the agreement	2	0,0%	0,0%	100,0%	0,0%	0,0%
	There are other multilateral agreements (e.g. GATT) that complement/clarify the provisions/commitments of the agreement	22	0,0%	0,0%	22,7%	72,7%	4,5%
Treaties regulating competition	Requires the establishment/existence of competition law/measures	123	0,8%	4,1%	69,1%	17,1%	8,9%
	Requires the establishment/existence of a competition authority	74	0,0%	2,7%	68,9%	17,6%	10,8%
	Requires the establishment/existence of a Competition policy/principles	43	0,0%	7,0%	65,1%	9,3%	18,6%
Competition policy	Prohibits/regulates cartels/concerted practices	117	0,0%	0,9%	47,0%	43,6%	8,5%
	Prohibits/regulates abuse of market dominance	132	0,8%	0,8%	47,7%	43,2%	7,6%
	Regulates undertakings with exclusive rights	99	2,0%	0,0%	28,3%	60,6%	9,1%
	Regulates monopolies ¹⁵⁴	0,0%	1,9%	31,8%	53,9%	12,3%	
	Regulates anticompetitive behaviour of SOEs	112	0,0%	0,0%	34,8%	51,8%	13,4%
	Regulates state aid	91	4,4%	1,1%	28,6%	56,0%	9,9%
	Regulates mergers and acquisitions	28	0,0%	10,7%	42,9%	17,9%	28,6%
	Contains provisions that promote predictability	17	0,0%	5,9%	23,5%	17,6%	52,9%
	Contains provisions that promote transparency	48	0,0%	2,1%	54,2%	22,9%	20,8%
	Contains provisions that promote the right of defence	64	1,6%	1,6%	50,0%	32,8%	14,1%
Other substantive aspects	Regulates unfair commercial practices	59	0,0%	1,7%	45,8%	52,5%	0,0%
	Regulates consumer protection	65	3,1%	1,5%	27,7%	52,3%	15,4%
Forms of cooperation	Provides for coordination among bodies with a competition mandate	70	1,4%	7,1%	65,7%	14,3%	11,4%
	Provides for exchange of information among bodies with a competition mandate	116	0,9%	5,2%	66,4%	20,7%	6,9%
	Provides for notifications among bodies with a competition mandate	76	0,0%	5,3%	71,1%	13,2%	10,5%
	Provides for technical assistance on implementation among bodies with a competition mandate	55	0,0%	5,5%	74,5%	5,5%	14,5%
Institutional arrangement	Provides for the creation of a regional / agreement - related competition authority	22	9,1%	13,6%	18,2%	18,2%	40,9%
Direct applicability	Competition-related provisions of the agreement have direct applicability in the sense that application can be claimed by private operators before the public bodies of the parties	9	0,0%	0,0%	55,6%	44,4%	0,0%
General exceptions	There are general exceptions included in the agreement	236	1,7%	0,4%	13,6%	74,2%	10,2%
	Allows for security exceptions	255	0,8%	0,4%	18,8%	70,2%	9,8%

Source: WBG dataset on competition policy provisions in PTAs; WTO Regional Trade Agreements Information System.