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Order Without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements

D. Daniel Sokol
University of Florida Levin College of Law, sokold@law.ufl.edu

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ORDER WITHOUT (ENFORCEABLE) LAW: WHY COUNTRIES ENTER INTO NON-ENFORCEABLE COMPETITION POLICY CHAPTERS IN FREE TRADE AGREEMENTS

D. DANIEL SOKOL*

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INTRODUCTION

Over the past ten to fifteen years, there has been an explosion of bilateral and regional free trade agreements in Latin America (together, these are called "preferential free trade agreements" or PTAs). The purpose of PTAs is to increase trade, regulatory, and investment liberalization. As effective trade liberalization requires more than just a reduction of tariffs, PTAs include "chapters" in a number of areas of domestic regulation. These chapters address domestic regulation and create binding commitments to liberalize domestic regulation that may impact foreign trade. Among chapters that address domestic regulation, many of the Latin American PTAs include a chapter on competition policy.[1] Conventional wisdom has been that such chapters play a critical role in trade agreements because they link antitrust with trade liberalization. My claim is that the conventional wisdom as to the effectiveness of these chapters has been overstated.

Until now, the effectiveness of antitrust and competition policy chapters has remained unanswered. This article undertakes the first empirical analysis of Latin American competition policy chapters in PTAs. The study of competition policy chapters within trade agreements is a highly specialized area of law and policy. To explain this phenomenon to a broader audience, this article begins with some context about both Latin America and the process of liberalization. Part I provides an overview of the history and process of liberalization in Latin America. Latin America serves as an interesting case study of developing world economic liberalization because of the significant structural macroeconomic reforms that it undertook in the 1980s and 1990s. In many cases, microeconomic reforms accompanied macroeconomic reforms. Many countries included antitrust law within domestic reforms to encourage liberalization.

Part II is the description and analysis of competition policy chapters within Latin American PTAs. The standard practice in PTAs is to create binding commitments that have third-party adjudication for potential disputes. The choice of international institutions, such as PTAs, is based on the perception of the relative strength of PTAs over purely domestic approaches. Antitrust agencies enforce antitrust law. However, these agencies interact in complex ways with other parts of government, including the

1. Though I use the terms somewhat interchangeably, antitrust addresses private restraints of trade whereas competition policy has a broader focus and includes public (government) and mixed restraints along with private restraints.

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legislature, judiciary and sector regulators. In a world of second best alternatives, there is a commonly held belief that international institutions may overcome some of the domestic weaknesses of antitrust while simultaneously not introducing more severe international weaknesses than domestic institutions.[2]

The common belief is that competition policy chapters are binding. However, a key finding from this article is that this perception is not born out by the facts. This article finds that antitrust chapters within PTAs go against the standard practice of binding commitments. Competition policy chapters lack binding dispute settlement. All Latin American PTAs lack dispute settlement for the core antitrust issues of mergers, collusive agreements, and monopolization within the competition policy chapters. This departure from the standard PTA practice is more striking given that other chapters in the same trade agreements have binding dispute resolution. These other chapters include some competition elements, such as services and intellectual property.

The remainder of Part II explores the findings. It begins with a discussion of the basis for the inclusion of competition policy chapters in PTAs. It answers whether or not such chapters create compliance and the mechanisms for doing so. This includes a discussion of how antitrust norms are shaped and diffused. Next, this Part provides an analysis of why PTAs treat antitrust differently from other areas of domestic regulation, and provides a number of hypotheses to explain this anomaly. This article looks to a number of other disciplines, including law and economics and organizational theory, to explain these various hypotheses. These frameworks help to understand the effectiveness of aspirational statements in international agreements and of "soft" law organizations that may create compliance without binding power by helping to shape and implement norms. This Part analogizes competition policy chapters to relational contracting. It explains how soft law international organizations serve as the equivalent of private ordering in contract relations. Thereafter, this Part explains the importance of symbolism and aspirational goals, as embodied in competition policy chap-

2. The term "institution" has multiple meanings. By an institution, I mean organizational structures and processes used to reduce transaction costs. These can be formal structures and rules or customs, norms, and habits. Douglass C. North, *Economic Performance Through Time*, 84 AMER. ECON. REV. 359, 360 (1994) ("Institutions are the humanly devised constraints that structure human interaction. They are made up of formal constraints (e.g. rules, laws, constitutions), informal constraints (e.g. norms of behavior, conventions, self-imposed codes of conduct), and their enforcement characteristics. Together, they define the incentive structure of societies and specifically economies."). In comparing institutions to each other, Williamson defines this comparative institutional analysis as "an examination of the comparative costs of planning, adapting, and monitoring task completion under alternative governance structures." OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 2 (1985).

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ters. The symbolic value has meaning to both foreign and domestic constituencies.

A discussion on the prevalence of cooperation provisions within competition policy chapters follows. This discussion offers a number of explanations for the frequency of such provisions. Subsequently, Part II examines why antitrust has not replaced anti-dumping agreements. This is a proposal that over the years has been advocated by a number of scholars. Finally, this Part explores why the various competition policy chapters look similar across PTAs.

In the conclusion, I argue that in spite of the non-binding nature of competition policy chapters in Latin American PTAs, these chapters may still have value. The value of such chapters is related to how these chapters may identify, shape, and implement norms of competition policy in Latin American countries. However, there are limits to these PTAs. Should expectations for PTAs be too high (given what they can deliver), and should negotiations over the inclusion of PTAs take up too many resources from other more pressing tasks that require staff from competition agencies, the value of their exclusion will exceed the value of their inclusion.

I. AN OVERVIEW OF LATIN AMERICAN POLITICAL ECONOMY

A. The Latin American Experience

To understand competition policy chapters within Latin American PTAs, one must first understand the larger political economic history of Latin America. This history has broader application. The Latin American development experience is one that can provide a glimpse of the broader process of economic liberalization and the challenges that it creates across regions. Latin America is a dynamic and diverse region, with countries of different sizes, levels of economic development, and histories. Any attempt to examine the entire region, as this article does, faces the problem of overgeneralization. With this caveat, one commonality in the region has been that Latin American countries have fallen well behind those of Western Europe and East Asia in their economic development.[3] This article examines one aspect of country competitiveness in Latin America and the development puzzle, antitrust/competition policy, and how antitrust interfaces

3. For accounts of Latin American economic development, see generally VICTOR BULMER-THOMAS, THE ECONOMIC HISTORY OF LATIN AMERICA SINCE INDEPENDENCE (2d ed. 2003); PATRICE FRANKO, THE PUZZLE OF LATIN AMERICAN ECONOMIC DEVELOPMENT 5–11 (2d ed. 2003); SEBASTIAN EDWARDS, CRISIS AND REFORM IN LATIN AMERICA: FROM DESPAIR TO HOPE (1995).

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with economic, trade, and regulatory liberalization to improve growth and development.[4]

The political economy of Latin America historically has been marked by political instability, ineffective institutions, low levels of the rule of law, corruption, and state intervention in the economy.[5] Adding to this mix of domestic malfunctions, Latin America has a long history of trade protectionism. During the period from the 1860s until 1914, Latin America had the highest tariff rates in the world.[6] After World War II, many Latin American countries adopted industrial policies, such as the creation of national champions or the development of "strategic" sectors, as a way to jump start modernization and economic growth.[7] Developing world leaders believed industrial policy would speed up the industrialization process to catch up with Western Europe and the United States.[8] During the post-WWII period, a common view that held sway in Latin America was that isolation from the world economy would lead to greater development through a process of import substitution.[9] This viewpoint was the combination of a reaction to the market integration of the 1920s and 1930s that had spread the effects of the global depression, a belief that governments could

4. A critique of trade liberalization and its limits in terms of distributional effects is beyond the scope of this article. For a general discussion based on theory and evidence, see, for example, Pinelopi Koujianou Goldberg & Nina Pavcnik, *Distribution Effects of Globalization in Developing Countries* (Bureau for Research and Econ. Analysis of Dev., Working Paper No. 133, 2006), *available at* http://www.cid.harvard.edu/bread/papers/working/133.pdf.

5. *See* Sebastian Edwards, Gerardo Esquivel & Graciela Márquez, *Introduction* to THE DECLINE OF LATIN AMERICAN ECONOMIES: GROWTH, INSTITUTIONS, AND CRISES 1–2 (Sebastian Edwards, Gerardo Esquivel & Graciela Márquez eds., 2007). Government intervention in the economy is not a concept limited to the developing world. This trend affected the developed world as well. Compare 1900 and 1980. In 1900 the state sector in the United States and Western Europe accounted for less than ten percent of a country's GDP. By 1980, the state sector consumed approximately fifty percent, with Sweden as high as seventy percent. Francis Fukuyama, *The Imperative of State-Building*, 15 J. DEMOCRACY 17, 19 (2004).

6. John H. Coatsworth & Jeffrey G. Williamson, *The Roots of Latin American Protectionism: Looking Before the Great Depression*, *in* INTEGRATING THE AMERICAS: FTAA AND BEYOND 37, 37, 45–46 (Antoni Estevadeordal, Dani Rodrik, Alan M. Taylor & Andrés Velasco eds., 2004) [hereinafter INTEGRATING THE AMERICAS]. High tariff rates impacted the ability of Latin America to benefit from the first wave of globalization that began in the 1890s. This affected Latin America's overall growth. During the period of 1875–1908, there was a negative net effect of tariffs upon growth for Latin America. Antoni Estevadeordal, Dani Rodrik, Alan M. Taylor & Andrés Velasco, *Introduction* to INTEGRATING THE AMERICAS, *supra*, at 7.

7. *See generally* FERNANDO HENRIQUE CARDOSO & ENZO FALETTO, DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA 149–71 (Marjory Mattingly Urquidi trans., University of California Press 1979) (1971); FRANKO, *supra* note 3, at 51–74, 223–58.

8. Kemal Dervis & John M. Page, Jr., *Industrial Policy in Developing Countries*, 8 J. COMP. ECON. 436, 436 (1984).

9. Hugo A. Hopenhayn & Pablo A. Neumeyer, *Latin America in the XXth Century: Stagnation, then Collapse* 1–2 (Econometric Soc'y, Latin Am. Meeting Paper No. 326, 2004), *available at* http://repec.org/esLATM04/up.28921.1082602077.pdf (arguing that import substitution led to the relative stagnation of Latin America).

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allocate resources more effectively than the market, and a belief that the legacy of colonialism created structural biases against developing world countries.[10]

In a departure from stateism and import substitution, Latin American countries undertook policies of economic liberalization during the 1980s and 1990s, sometimes through pressure from lending institutions and developed world countries.[11] This change had profound effects for the economic organization of Latin American countries. It also provides us with a critical understanding of why antitrust laws and agencies were created throughout the region during that period. Economic liberalization unleashed competitive forces through the market as the organizing force for daily interactions.[12] Liberalization in turn led to improved governance, accountability, and transparency.[13] The creation of appropriate, market supporting legal and regulatory institutions to produce economic growth takes on a new priority as a result of liberalization.[14] These supports include the rule of law,[15] effective institutions,[16] good governance,[17] low

10. *See* Robert Z. Lawrence, *Regionalism, Multilateralism and Deeper Integration: Changing Paradigms for Developing Countries*, *in* TRADE RULES IN THE MAKING: CHALLENGES IN REGIONAL AND MULTILATERAL NEGOTIATIONS 24 (Miguel Rodríguez Mendoza, Patrick Low & Barbara Kotschwar eds., 1999). What this development model overlooked was that government failure might be worse than market failure. Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291, 301–02 (1974).

11. Nevertheless, liberalization did not seem to overcome significant economic inequality in Latin America. Miguel Székely, *The 1990s in Latin America: Another Decade of Persistent Inequality, but with Somewhat Lower Poverty*, 6 J. APPLIED ECON. 317, 317 (2003) ("[T]here is no country in Latin American where inequality declined during the 1990s.").

12. Jakob de Haan, Susanna Lundström & Jan-Egbert Sturm, *Market-Oriented Institutions and Policies and Economic Growth: A Critical Survey*, 20 J. ECON. SURVEYS 157, 157–58 (2006) (surveying the literature on economic growth and liberalization).

13. WORLD BANK, WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD 61–75 (1997). This does not suggest that the market eliminates rent seeking. Rent seeking continued within Latin American during the period of liberalization. *See* Hector E. Shamis, *Distributional Coalitions and the Politics of Economic Reform in Latin America*, 51 WORLD POL. 236, 239–40 (1999). However, the negative impact on societal welfare of rent seeking under a market system may be lower than rent seeking under a market replacement role by government.

14. *See* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 9 (1990). Liberalization creates economic dislocation for privileged groups. Williamson notes that some groups, such as unions, would be surprised to think of themselves as privileged elites. *See* John Williamson, *What Should the World Bank Think About the Washington Consensus?*, 15 WORLD BANK RES. OBSERVER 251, 258 (2000).

15. Sergio Godoy & Joseph Stiglitz, *Growth, Initial Conditions, Law and Speed of Privatization in Transition Countries: 11 Years Later* 20 (Nat'l Bureau of Econ. Research, Working Paper No. 11992, 2006) (revising earlier literature on privatizations to suggest that legal institutions are very important and that other factors, such as quick privatization and liberalization, have only a modest marginal effect); Daniel Kaufmann, Aart Kraay & Pablo Zoido-Lobatón, *Governance Matters: From Measurement to Action*, FIN. & DEV., June 2000, at 10, *available at* http://www.imf.org/external/pubs/ft/fandd/2000/06/pdf/kauf.pdf. *But see* John K. M. Ohnesorge, *The Rule of Law, Economic Development, and the Developmental States of Northeast Asia*, in LAW AND DEVELOPMENT IN EAST AND SOUTHEAST

costs to doing business,[18] secure property rights,[19] and the ability to enforce agreements.[20]

One element of domestic economic reform is trade liberalization. Trade liberalization can increase competition and lower prices, which compliment antitrust law in improving consumer welfare.[21] When international firms enter (or threaten to enter) markets and offer their products and services at a lower price, this in turn forces domestic firms to lower their prices to the market equilibrium.[22] Increased trade liberalization occurs both as a unilateral policy response and through more formal trade agreements.[23] Countries undertake trade liberalization as a means to increase growth and development. Countries within Latin American have small economies with high levels of industry concentration. Higher concentration and a lack of effective entry by foreign goods may allow for monopoly profits by existing domestic firms.[24] Increased international trade has the

ASIA 91, 112 (Christoph Antons ed., 2003) (questioning some of these assumptions based on the East Asian development context).

16. *See* NORTH, *supra* note 14, at 7; Daron Acemoglu, Simon Johnson & James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369, 1395–96 (2001); Dani Rodrik, Arvind Subramanian & Francesco Trebbi, *Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development*, 9 J. ECON. GROWTH 131, 132, 135 (2004).

17. *See* Kaufman et al., *supra* note 15, at 1–2.

18. WORLD BANK, DOING BUSINESS IN 2007: HOW TO REFORM 43–47 (2006).

19. *See* YORAM BARZEL, A THEORY OF THE STATE: ECONOMIC RIGHTS, LEGAL RIGHTS, AND THE SCOPE OF THE STATE 157–58, 165–66 (2002); HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 47–57, 221–24 (2000); NORTH, *supra* note 14, at 52.

20. *See* Gillian K. Hadfield, *The Many Legal Institutions that Support Contractual Commitments*, *in* HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 175, 175–76 (Claude Menard & Mary M. Shirley eds., 2005) (surveying the literature); NORTH, *supra* note 14, at 54 ("[T]he inability of societies to develop effective, low-cost enforcement of contracts is the most important source of both historical stagnation and contemporary underdevelopment in the Third World.").

21. On the benefits of trade liberalization, see generally DOUGLAS A. IRWIN, FREE TRADE UNDER FIRE 22–24, 35–39 (2002); L. Alan Winters, *Trade Liberalisation and Economic Performance: An Overview*, 114 ECON. J. F4, F5–11 (2004). However, trade liberalization benefits developing world countries more than developed world countries. *See* Farhad Rassekh, *Is International Trade More Beneficial to Lower Income Economies? An Empirical Inquiry*, 11 REV. DEV. ECON. 159, 167 (2007).

22. Sometimes the mere threat of entry may be enough to lower prices. *See* William J. Baumol & Kyu Sik Lee, *Contestable Markets, Trade, and Development*, 6 WORLD BANK RESEARCH OBSERVER 1, 9, 13 (1991).

23. For an overview on the international trade system, see generally the excellent MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 20–25 (3d ed. 2005).

24. MICHAL S. GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES (2003). This is not to suggest that a high market share automatically means anticompetitive behavior. Indeed, the focus on market shares is a somewhat imprecise tool. Dennis W. Carlton, *Market Definition: Use and Abuse*, 3 COMPETITION POL'Y INT'L 3, 3–4 (2007).

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potential to transform this situation. Trade openness allows for lower prices through greater access to the tradable sector.[25]

The biggest barriers to trade in the Western Hemisphere remain tariff barriers.[26] Nevertheless, increasingly there has been a recognition that for trade agreements to be effective, trade liberalization must include provisions for domestic regulatory liberalization.[27] Trade agreements thus have been used to as a lever to push for domestic economic liberalization in regulatory areas, and to reduce the role of the state.[28] However, many of these changes have been incomplete, particularly those requiring "second generation" institutional reforms of market facilitating institutions to increase domestic institutional capacity, the better to preserve "first generation" reforms in fiscal matters and labor markets.[29] To ensure that the process of liberalization leads to a more pro-competitive economic environment, rather than a perpetuation of inefficient systems that privilege elite interests, many Latin American countries have created antitrust laws and agencies to enforce them.[30] Hence, there is a link between both trade and economic liberalization. Not surprisingly, it was during the period of increased liberalization in the 1980s and 1990s that most countries enacted competition laws.[31]

25. Trade increases the total pie, but some may lose as a result of the distribution of that increased pie. *See* DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? 8 (1997). There has been a backlash from the movement to free markets domestically within Latin America. From 1998–2002, the percentage of people in Latin America that believed that privatization had benefited their country dropped from forty-six to twenty-eight percent. Sunita Kikeri & Aishetu Fatima Kolo, *Privatization: Trends and Recent Developments* 22–23 (World Bank Policy Research Working Paper, Paper No. 3765, 2006).

26. *See* Mario Berrios, Jaime Granados, Marcos S. Jank, Josefina Monteagudo & Masakazu Watanuki, *Prospects and Challenges for the Liberalization of Agricultural Trade in the Western Hemisphere*, *in* INTEGRATING THE AMERICAS, *supra* note 6, at 282–83; *see also* JAMES R. MARKUSEN, JAMES R. MELVIN, WILLIAM M. KAEMPFER & KEITH E. MASKUS, INTERNATIONAL TRADE: THEORY AND EVIDENCE 273–76 (1995) (discussing tariff problems generally).

27. WORLD BANK, TRADE BLOCS 1–3 (2000).

28. Investments are yet another area of importance for liberalized markets, but are beyond the scope of this article. *See generally* Raghuram G. Rajan & Luigi Zingales, *The Great Reversals: The Politics of Financial Development in the Twentieth Century*, 69 J. FIN. ECON. 5, 6, 19 (2003); René M. Stulz, *The Limits of Financial Globalization*, 60 J. FIN. 1595 (2005).

29. John Williamson, *Overview: An Agenda for Restarting Growth and Reform*, *in* AFTER THE WASHINGTON CONSENSUS: RESTARTING GROWTH AND REFORM IN LATIN AMERICA 1, 5–6 (Pedro-Pablo Kuczynski & John Williamson eds., 2003). On the importance of macroeconomic stability, see generally Stanley Fischer, *The Role of Macroeconomic Factors in Growth* (Nat'l Bureau of Econ. Research, Working Paper No. 4565, 1993).

30. A.E. Rodriguez & Lesley DeNardis, *Examining the Performance of Competition Policy Enforcement Agencies: A Cross-Country Comparison*, 13. J. BUS. & ECON. STUD. 1, 14–16 (2007). Further research is needed to explain this process. Public choice suggests it would be difficult to undercut or threaten the status quo where the strong interests of the few manifest more readily in policy decisions than do the interests of the dispersed majority. Yet, antitrust laws and their establishment seem contrary to the typical public choice story.

31. Eleanor M. Fox, *Antitrust Law on a Global Scale: Races Up, Down, and Sideways*, *in* REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES 349 (Daniel

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B. *Antitrust and Its Role in Economic Development*

Antitrust is a regulatory tool to improve societal well-being. Antitrust is a regulatory response to a market-based organization of the economy.[32] As such, antitrust law is the backstop to correct market malfunctions. The market malfunction central to antitrust is the exercise of monopoly power.[33] Antitrust and competition policy work within the larger development context to create a more competitive environment and to encourage growth and productivity.[34] Antitrust law combats anticompetitive practices such as collusion between competitors, anticompetitive mergers, or an abuse of a dominant position or monopolization.

Antitrust has the potential to play an important role in greater economic development through the creation of a competitive market in Latin America.[35] Antitrust enforcement encourages higher economic growth. As antitrust reduces entry barriers, incumbent firms can no longer be supported through monopoly rents.[36] As a result of competition, firms become more efficient.[37] As trade and regulatory liberalization reduce some of the most obvious government barriers such as tariffs, the remaining government barriers—mixed government and private anticompetitive behavior—become more important concerns. These factors have made the implementation of effective antitrust more pressing. However, antitrust does not operate within a vacuum. Antitrust enforcement is a function of the prevailing economics and politics of any country at any given time.[38] In the United

C. Esty & Damien Geradin eds., 2001) ("More than half of [competition] laws were adopted in the last decade."); Joel Davidow & Hal Shapiro, *The Feasibility and Worth of a World Trade Organization Competition Agreement*, 37 J. WORLD TRADE 49, 53 (2003).

32. Trade and antitrust have become increasingly linked as they both address issues of market liberalization. Trade openness reduces public (government) restraints, whereas antitrust addresses issues of private, mixed, and in some cases, public restraints.

33. This article does not engage in the debate on consumer welfare versus total welfare standards for antitrust.

34. Michael E. Porter, *Building the Microeconomic Foundations of Prosperity: Findings from the Business Competitiveness Index*, *in* WORLD ECONOMIC FORUM, GLOBAL COMPETITIVENESS REPORT 2003–2004, at 29, 31 (2004).

35. Some argue that the role of antitrust in economic liberalization is rather limited. *See, e.g.*, A. E. Rodriguez & Malcolm B. Coate, *Limits to Antitrust Policy for Reforming Economies*, 18 HOUS. J. INT'L L. 311, 317, 327, 358 (1996). Because of data limitations, there is no way to quantitatively test this hypothesis. However, anecdotally, even if one were to accept that antitrust enforcement may be of limited value, antitrust can play a critical role in economic development in the area of competition advocacy.

36. *See generally* WORLD BANK, GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES 97–125 (2002) (discussing reducing barriers to trade through transport costs).

37. Mark A. Dutz & Maria Vagliasindi, *Competition Policy Implementation in Transition Economies: An Empirical Assessment*, 44 EURO. ECON. REV. 762, 771 (2000).

38. William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSPECTIVES 43, 58 (2000) (discussing the American experience).

States, the law and economics of antitrust is at its basis a "Chicago school" focus on price and quantity.[39] Current antitrust policy and court rulings have further refined the Chicago school approach to correct some of its limitations based on real-world experiences.[40] In Latin America, antitrust policy is mixed. A number of agencies have adopted an approach based on the U.S. model. In other cases, Latin American competition policy follows more along the lines of an EU-based approach.[41] In addition to substantive differences in the law and economics of antitrust between the U.S. and EU approaches, the EU has a more comprehensive goal of political and economic integration, which the U.S. antitrust approach lacks.[42] The varying approaches to antitrust in Latin America reflect the types of cases that arise, differing enforcement priorities, and the capacities of Latin American agencies to intervene to assist the market.

II. ADDRESSING INTERNATIONAL ISSUES IN COMPETITION POLICY

The role of antitrust and markets are questions of institutional choice as to the best way to organize society.[43] In choosing the most appropriate institution to govern behavior, one must examine each of the institutional alternatives to determine which institution vis-à-vis other institutional choices is best placed to improve societal welfare.[44] When institutions confront both domestic and global issues, such as in antitrust, any inquiry must include an examination of both domestic and international institutions. The study of institutions is dynamic rather than static. Institutions shift when institutional actors calculate that the benefits of such a shift outweigh the

39. Fred. S. McChesney, *Talking 'Bout My Antitrust Generation: Competition for and in the Field of Competition Law*, 52 EMORY L.J. 1401, 1407 (2003).

40. HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 37–38 (2005). Hovenkamp refers to this as the "new Harvard" position. William Kovacic refers to U.S. antitrust law as a double helix of intertwined Harvard and Chicago strands. William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 13–14.

41. Eleanor Fox explains the U.S. and EU conceptual antitrust paradigms in Eleanor M. Fox, *What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 ANTITRUST L.J. 371, 372, 392 (2002). *See generally* Karl Aiginger, Mark McCabe, Dennis C. Mueller & Christoph Weiss, *Do American and European Industrial Organization Economists Differ?*, 19 REV. INDUS. ORG. 383 (2001).

42. DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS, at vii, 1 (1998).

43. On institutional analysis, see THRÁINN EGGERTSSON, IMPERFECT INSTITUTIONS: POSSIBILITIES & LIMITS OF REFORM 1 (2005). *See generally* NORTH, *supra* note 14; THE NEW INSTITUTIONALISM IN SOCIOLOGY, at xi–xiii (Mary C. Brinton & Victor Nee eds., 1998).

44. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY, at ix (1994); NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS, at x (2001).

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costs.[45] With a new period of increased globalization and the proliferation of international trade agreements with antitrust provisions, an examination of Latin American antitrust institutions is particularly salient.

As a result of the institutional, financial, and human capacity constraints of domestic antitrust agencies, countries may prefer to utilize international institutions to protect the competitive process and to augment and strengthen domestic institutions. This section analyses the strengths and weaknesses of these international institutions by means of their domestic and international alternatives. One prevalent international response to domestic institutional malfunction has been the creation of more formal, treaty-like instruments that are "hard law." At the global level, this is the realm of the World Trade Organization (WTO). In the Latin American context, hard law institutions are PTAs. There has been an increasing shift in recent years to enter into PTAs.[46] Many agreements within the recent wave of PTAs have included competition policy chapters.

Some Latin American PTAs are deeper in scope. They create market integration, regulatory convergence, and customs unions among their members. In Latin America, three such supra-national institutions exist that contain provisions regarding competition policy—CARICOM, the Andean Community, and Mercosur. Because of the infrequent use of deeper integration customs unions or formal cooperation agreements across antitrust agencies, these are beyond the scope of this article.[47]

Hard law is an international institutional response based on binding commitments to create domestic compliance.[48] These commitments have

45. *See generally* NORTH, *supra* note 14.

46. *See generally* Jo-Ann Crawford & Roberto V. Fiorentino, *The Changing Landscape of Regional Trade Agreements* (World Trade Org. Discussion Paper, Paper No. 8, 2005), *available at* http://www.wto.org/english/res_e/booksp_e/discussion_papers8_e.pdf.

47. For an overview of the competition policy implications of these regional trade agreements see, for example, José Tavares de Araujo Jr., *Política de Concorrência no Mercosul: Uma Agenda Mínima* [Competition Policy in MERCOSUR: A Minimum Agenda], *in* EL DESAFÍO DE INTEGRARSE PARA CRECER: BALANCE Y PERSPECTIVAS DEL MERCOSUR EN SU PRIMERA DÉCADA 154 (Daniel Chudnovsky & José María Fanelli eds., 2001); André Filipe Zago de Azevedo, *Mercosur Agreement on Competition Policy—How Effective Has It Been and How to Promote Further Cooperation?* (Competition Policy Foundations for Trade Reform, Regulatory Reform and Sustainable Development, Work Package No. 4, Deliverable 23, 2005), *available at* http://www.cpftr.org/cpftr/deliverables/Deliverable 23.pdf; André Filipe Zago de Azevedo, *Mercosur: Ambitious Policies, Poor Practices*, 24 BRAZILIAN J. POL. ECON. 584 (2004), *available at* http://www.rep.org.br/pdf/96-8.pdf; Ramón García-Gallardo & María Dolores Domínguez Pérez, *La reforma de la norma de competencia en la Comunidad Andina*, 20 BOLETÍN LATINOAMERICANO DE COMPETENCIA 44 (2005); A. Vindelyn Smith-Hillman, *First a Glimmer, Now a . . .? The Prospect of a Caribbean Competition Policy*, 40 J. WORLD TRADE 405, 407 (2006); Taimoon Stewart, *Is Flexibility Needed When Designing Competition Law for Small Open Economies? A View from the Caribbean*, 38 J. WORLD TRADE 725 (2004).

48. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421 (2000).

third-party adjudication requirements to ensure compliance. Binding international commitments may solve problems of compliance by non-executive parts of government to policy positions by creating pre-commitments in policy.[49] International agreements thus lock in domestic policy choices.[50] Because Latin American countries are in need of foreign investment, binding commitments may be the impetus necessary to create more attractive investment conditions.

Domestic liberalization and regulatory reform efforts may face pushback from entrenched interests.[51] This makes liberalization more difficult if a well-developed antitrust agency is not in place to safeguard the competitive process. Given the capacity constraints of many of Latin America's antitrust agencies, there are significant limits on the ability of these agencies to serve as guardians of the competitive process.[52] Binding commitments may keep liberalization efforts in place beyond the current government that signed such commitments. This may help to overcome public choice concerns over the retrenchment of these policies due to interest group pressures. As Bidsall and Lawrence observe:

> When developing countries enter into modern trade agreements, they often make certain commitments to particular domestic policies—for example, to antitrust or other competition policy. Agreeing to such policies can be in the interests of developing countries (beyond the trade benefits directly obtained) because the commitment can reinforce the internal reform process. Indeed, participation in an international agreement can make feasible internal reforms that are beneficial for the country as a whole that might otherwise be successfully resisted by interest groups.[53]

49. *See id.* at 430.

50. Jonathan R. Macey, *Regulatory Globalization as a Response to Regulatory Competition*, 52 EMORY L.J. 1353, 1373 (2003) ("Thus, regulatory globalization can be used by (relatively) weak regulatory agencies as a strategy to accomplish objectives that they are unable to accomplish domestically. It is in this sense that regulatory globalization can be used as a policy lever."). This is not to suggest that hard law does not have disadvantages. It is less flexible than non-binding international commitments in reacting to different circumstances and levels of development. An international binding set of rules might impose standards that do not fit within the particular context of individual countries' legal and economic traditions.

51. The speed of regulatory liberalization matters. Sometimes reforms are both gradual in effect and in scope. This means that the liberalization process may be only piecemeal and only loosely coordinated. As North suggests, the vast majority of change is incremental rather than episodic. NORTH, *supra* note 14, at 89.

52. See, for example, the relatively weak ranking regarding competition policy in WORLD ECONOMIC FORUM, THE GLOBAL COMPETITIVENESS REPORT 2005–2006: POLICIES UNDERPINNING RISING PROSPERITY (2006).

53. Nancy Birdsall & Robert Z. Lawrence, *Deep Integration and Trade Agreements: Good for Developing Countries?*, *in* GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 136–37 (Inge Kaul, Isabelle Grunberg & Marc A. Stern eds., 1999).

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Without binding international commitments, such reforms may never become firmly embedded. What makes competition law different from many other areas of law covered by PTAs is that competition law has general application. There are no natural constituent groups for competition law. Conventional wisdom suggests that competition policy chapters in PTAs serve to strengthen domestic antitrust systems by creating an international lever to push reforms and commitments that domestic interest groups otherwise might resist.

An alternative institutional structure to hard law is "soft law," or commitments that are not formally binding. Soft law may lead to increased compliance through norm creation. Soft law organizations in antitrust have been effective in addressing coordination and procedural harmonization. Soft law has been less effective on issues of substantive disagreement in antitrust.[54] There are a number of rationales for the choice of soft law over hard law. Soft law is different from hard law across three different areas: obligation, precision, and delegation. In contrast to hard law, soft law obligations are not formally binding. Soft law's lack of precision makes it more malleable than hard law. Moreover, unlike hard law, soft law has non-binding delegation. When an executive has time constraints on reaching an agreement or legislative support is uncertain, non-binding agreements may be a way to reach agreement to address international issues.[55]

Both hard and soft laws require norm diffusion to create credible commitments. Norms impact the ability of domestic and international institutions to implement best practices and improve the competitive environment of an economy. Norm diffusion in antitrust creates a continuous adjustment to market and political conditions. At the domestic level, collective economic thinking, experimentation in case selection and enforcement actions, and the capacity of agencies improve over time. This holds as much for the U.S. as for younger antitrust agencies.[56] Hard law and soft law can facilitate this process by identifying norms and assisting domestic antitrust agencies to successfully adopt and implement them.[57]

54. For an overview of the effectiveness of soft law antitrust organizations, see generally D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 97–116 (2007).

55. *See* Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 592 (2005). This article will explore the choice of soft law versus hard law in the discussion section of Part II(D), which analyses data from coding Latin American competition policy chapters within PTAs.

56. William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 477 (2003) ("The story of modern U.S. federal enforcement has far more to do with the progressive, cumulative development of policy than with abrupt, discontinuous adjustments in shaping the content of federal agency activity over time.").

57. On the relationship generally between international and domestic institutions, see generally LOCATING THE PROPER AUTHORITIES: THE INTERACTION OF DOMESTIC AND INTERNATIONAL

A. Preferential Trade Agreements

A preferential trade agreement (PTA) is a choice of hard law at the sub-global level. At the global level, hard law in an antitrust context would mean coverage under the WTO. However, there is no antitrust-specific binding WTO commitment. Indeed, countries removed antitrust from the topics for discussion among the current round of WTO negotiations in 2003. A PTA involves the choice of a third-party adjudicator to interpret and implement commitments at the international level, rather than legislators or agencies at the domestic level.[58] Built into this choice is the assumption that binding commitments can help overcome domestic issues of regulatory capture by interest groups.[59]

PTAs may have additional benefits, such as reducing time inconsistency, allowing for signaling among parties, providing insurance, and increasing coordination.[60] Under the time inconsistency problem, a government may be tempted to undertake certain trade-reducing policies when superior policy options are not available.[61] By binding themselves to agreements, countries provide insurance that they will comply with these commitments. It also provides insurance that the other signatory will follow its own policies. Through the PTA process and the provisions included therein, countries may establish relationships to increase their coordination on substantive and procedural issues, thereby reducing transaction costs.

B. Competition Policy Chapters in PTAs—Trade Agreements as Contracts

1. Background and Objectives

The rationale to sign a PTA is that the agreement makes the signatories to such agreements better off than the lack thereof.[62] This occurs

INSTITUTIONS (Daniel W. Drezner ed., 2003); HELEN V. MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS 3–5 (1997); Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-level Games*, 42 INT'L ORG. 427, 433–35 (1988).

58. *See* Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 641 (2005).

59. *See* Andrew Moravcsik, *A New Statecraft? Supranational Entrepreneurs and International Cooperation*, 53 INT'L ORG. 267, 284, 301 (1999).

60. Raquel Fernández & Jonathan Portes, *Returns to Regionalism: An Analysis of Nontraditional Gains from Regional Trade Agreements*, 12 WORLD BANK ECON. REV. 197, 200 (1998).

61. Robert W. Staiger, *International Rules and Institutions for Cooperative Trade Policy*, *in* 3 HANDBOOK OF INTERNATIONAL ECONOMICS 1497–547 (Gene M. Grossman & Kenneth Rogoff eds., 1995).

62. Punishment also may be easier in a PTA than in the WTO. Fernandez & Portes, *supra* note 60, at 205. New PTAs have increased foreign direct investment in PTA signatories. One recent study by

through a reduction of tariff and regulatory barriers on the goods and services of PTA signatories for fellow signatories.[63] This section examines competition policy chapters in PTAs and the provisions within these chapters. Competition policy chapters are chapters within binding trade agreements between the signatory countries. NAFTA was among the first of what has become a rapid explosion of Latin American PTAs in the past ten to fifteen years.[64] These PTAs have allowed for experimentation across a number of areas, since some provisions include commitments in addition to those found at the WTO level. This experimentation includes the use of competition policy chapters in PTAs. The lack of WTO commitments in competition policy makes the study of competition policy chapters in Latin American PTAs critical to understanding what a future WTO competition policy may resemble. It also provides a glimpse into the types of limitations that WTO antitrust rules may have. Because of the lack of a WTO-level antitrust agreement, PTAs identify the upper limits of the types of commitments that countries are willing to place upon themselves.

The conventional wisdom about competition policy PTAs is that such chapters can serve as a template for a WTO-level competition policy

Medvedev suggests that PTA membership seems to have two important effects. The first effect is the increase in foreign direct investment resulting from signing the agreement. The second effect is based on the market size of the PTA. The larger and faster-growing the market, the greater the impact of net foreign direct investment inflows. Denis Medvedev, *Beyond Trade: The Impact of Preferential Trade Agreements on Foreign Direct Investment Inflows* 1, 7–8 (World Bank Pol'y Research Working Paper, Paper No. 4065, 2006). However, countries signed many of the Latin American regional trade agreements (RTAs) during a period of reduced foreign direct investment, which declined fifty-three percent between 1999 and 2003 in Latin America and the Caribbean. This trend reversed in 2004, when foreign direct investment inflows to the region increased by thirty-seven percent to sixty-nine billion dollars. OFFICE OF TRADE, GROWTH AND COMPETITIVENESS, ORGANIZATION OF AMERICAN STATES [OAS], TRADE ISSUES OF CONCERN TO CIVIL SOCIETY 3 (2005).

63. Yet, PTAs come at a cost. A plethora of overlapping PTAs across countries creates increased information and transaction costs. Doing business in multiple countries leads to increased complexity. In a dispute settlement context, different conclusions may be reached under different PTA dispute settlement adjudications, or within the same agreement across different chapters. *See* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1521–22 (2005).

64. JOSÉ M. SALAZAR-XIRINACHS, IMPLICATIONS OF PROLIFERATING SUB-REGIONAL TRADE AGREEMENTS: LESSONS FROM THE LATIN AMERICAN EXPERIENCE 3 (2001), *available at* http://www.pecc.org/publications/trade-papers.htm. While this current wave of PTAs is important, it is not the first wave of trade agreements and regionalism in Latin America. The current wave of regionalism in Latin America has a different structure to it than the "old" regionalism of the 1960s and 1970s. The premise behind old regionalism was import substitution, the promotion of trade diversion, the placing of limits on foreign direct investment, a focus on South-South agreements, and a lack of dispute settlement and industrial policy. Robert Devlin & Paolo Giordano, *The Old and New Regionalism: Benefits, Costs, and Implications for the FTAA*, *in* INTEGRATING THE AMERICAS, *supra* note 6, at 145–47. New regionalism, which includes the current wave of agreements, can be characterized by its three central tenants: trade openness, structural economic reforms, and compatibility with the international system. *Id.* at 143.

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agreement.[65] PTAs may create advocates of a robust competition policy at the global level, and through the development of PTA case law, may serve as laboratories of experimentation for how competition policy at a global level could play out.[66] Countries join PTAs in part to increase their bargaining power with third countries. This may improve the possibility that these agreements can help set standards above those currently in the WTO. PTAs may shape future WTO negotiations specific to competition policy.[67] Indeed, during the period during which many of the PTAs were negotiated and signed, the WTO had a working group on the interface of international trade and competition policy to discuss potential inclusion of competition policy issues within the WTO.[68]

Though these assumptions are often repeated at both the hemispheric level (such as in the Free Trade Area of the Americans, or FTAA) and at the global level (as in the WTO), no empirical analysis has been undertaken to see if the PTA competition policy chapters back up this conventional wisdom. This void in empirical scholarship has profound policy consequences,[69] and this article seeks to fill the void specific to competition policy chapters. The findings of such an analysis will help to provide greater certainty to policy makers when they consider how to augment domestic antitrust institutions, whether their focus is to pursue competition policy objectives through Latin American PTAs or, alternatively, to focus efforts on soft law international organizations. These findings also have implications for donor institutions, specifically whether scarce resources for antitrust capacity building should be spent on trade agreement compliance or in

65. *See, e.g.*, Peter Holmes et al., *Trade and Competition in RTAs: A Missed Opportunity?*, *in* U.N. Conf. on Trade & Dev. [UNCTAD], *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*, 65–89, U.N. Doc. UNCTAD/DITC/CLP/2005/1 (2005) (*prepared by* Philippe Brusick, Ana María Alvarez & Lucian Cernat), *available at* http://www.unctad.org/en/docs/ditcclp20051_en.pdf.

66. However, overlapping PTAs may create additional transaction costs. For example, country *A* may bring suit against countries *B* and *C* for non-discrimination violations arising from a designated monopoly. However, even though the type of anticompetitive behavior may be the same and the same parent company may be the source of that behavior in both countries *B* and *C*, each instance of conduct will be subject to a different dispute settlement under different PTAs. Parties cannot be joined across PTAs. Outcomes of claims over the same facts may also be inconsistent as different panels under different PTAs may rule in contradictory ways regarding similar provisions. This increases costs, as the same issues need to be litigated in two different fora.

67. WILLIAM R. CLINE, TRADE POLICY AND GLOBAL POVERTY 291–92 (2004). Some argue that PTAs hurt rather than help multilateral trade negotiations. *See, e.g.*, Phillip I. Levy, *A Political-Economic Analysis of Free-Trade Agreements*, 87 AMER. ECON. REV. 506 (1997).

68. PHILIP MARSDEN, A COMPETITION POLICY FOR THE WTO 132–37 (2003).

69. *See* Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 820–21; David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 656 (2006).

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other areas.[70] This article makes the theoretical claim that PTA competition policy chapters and their provisions serve as a checklist of issues that countries have identified as needing increased capacity-building in related domestic institutions, and for which international institutions can also play a role.

2. PTAs as Contracts Between Countries

Recent empirical contract law scholarship has enriched the understanding of contracts and the terms and meanings of contractual obligations.[71] The purpose of a formal contract is to create a set of rights and obligations between the contracting parties; to reduce opportunism, imperfect information, and economic friction; and to create mechanisms to address issues of potential breach.[72] By formalizing an agreement, the contract creates mechanisms to encourage investment.[73] To reduce the strategic opportunism that might arise from contracts, parties choose an institutional governance structure to enforce contractual rights.[74] Opportunism functions to increase transaction costs.[75] "As transactions become more complex and the environment more uncertain, the limitations of contracting as a safeguard against opportunism grow, increasing the attraction of other

70. Communicating the importance of empirical findings has been a difficult task for empirical legal scholarship. Lee Epstein, Andrew D. Martin & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811, 1813–14 (2006).

71. *See generally* Lucian Arye Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887 (2002) (discussing the key role that staggered boards play in U.S. antitakeover protections); Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929, 929–38 (2004) (discussing sovereign bond contracts); Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581, 1582–86 (2006) (discussing branding effects of deals involving Google, Ben & Jerry's, and Apple); George S. Geis, *Business Outsourcing and the Agency Cost Problem*, 82 NOTRE DAME L. REV. 955, 961–63 (2007) (discussing the effects of outsourcing on costs); D. Gordon Smith, *The Exit Structure of Venture Capital*, 53 UCLA L. REV. 315 (2005) (discussing venture-backed company data in analyzing the way venture capitalists mitigate conflicts in exit strategies).

72. *See generally* VICTOR GOLDBERG, FRAMING CONTRACT LAW: AN ECONOMIC PERSPECTIVE (2006); Steven Shavell, *Contracts*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 436–44 (Peter Newman ed., 1998); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 842–43 (2003) (discussing the potential for breach between parties with unequal bargaining positions).

73. *See* PATRICK BOLTON & MATHIAS DEWATRIPONT, CONTRACT THEORY (2005); Oliver Hart & John Moore, *Contracts as Reference Points* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 12706, 2006).

74. *See generally* Juliet P. Kostritsky, *Taxonomy for Justifying Legal Intervention in an Imperfect World: What To Do When Parties Have Not Achieved Bargains or Have Drafted Incomplete Contracts*, 2004 WIS. L. REV. 323, 327–28 (generally discussing opportunism in contracts); Louis Makowski & Joseph M. Ostroy, *Perfect Competition and the Creativity of the Market*, 39 J. ECON. LITERATURE 479, 481, 491 (2001) (same).

75. *See* Claire A. Hill & Christopher King, *How Do German Contracts Do as Much with Fewer Words?*, 79 CHI.-KENT. L. REV. 889, 897–98 (2004).

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institutional arrangements that better support adaptive, sequential decision making while circumscribing or redirecting opportunistic tendencies."[76] This opportunism replicates itself in the trade agreement context.

A trade agreement has important similarities to a contract as a means to combat opportunism through a binding agreement. As the WTO appellate body explained in *Japan—Taxes on Alcoholic Beverages*:

> The *WTO Agreement* is a treaty—the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the *WTO Agreement*.[77]

As the WTO itself has suggested, there is a strong link between trade agreements and contracts. Contract theory therefore can provide insights into the meaning of trade agreements.

Transaction cost economics provides one mode of analysis to understand contracts and trade agreement provisions. Transaction cost economics "pairs the assumption of bounded rationality with a self-interest-seeking assumption that makes allowance for guile."[78] Transaction costs exist because it is difficult to plan for all possible future contingencies. Even if such planning were possible, it is difficult to draft language that would incorporate such contingencies. An additional factor that creates contractual transaction costs is that even with a fully contingent contract, a third-party adjudicator would need to make sense of such an agreement.[79] All of these factors make contracts incomplete.[80]

76. Scott E. Masten, *About Oliver E. Williamson*, *in* FIRMS, MARKETS AND HIERARCHIES: THE TRANSACTIONAL COST ECONOMICS PERSPECTIVE 41 (Glenn R. Carroll & David J. Teece eds., 1999).

77. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 13–14, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996).

78. Oliver E. Williamson, *Transaction Cost Economics*, *in* 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 139 (Robert Schmalensee & Robert Willig eds., 1989).

79. For literature reviews on transaction cost economics, see generally Howard A. Shelanski & Peter G. Klein, *Empirical Research in Transaction Cost Economics: A Review and Assessment*, 11 J. L. ECON. & ORG. 335, 336–38 (1995); Jeffrey T. Macher & Barak D. Richman, *Transaction Cost Economics: An Assessment of Empirical Research in the Social Sciences* 1–2 (Duke Law Sch. Legal Studies Research Paper Series, Paper No. 115, 2006).

80. *See* OLIVER D. HART, FIRMS, CONTRACTS, AND FINANCIAL STRUCTURES 1–2, 72–82 (1995); Steven Shavell, *On the Writing and the Interpretation of Contracts*, 22 J.L. ECON. & ORG. 289, 289 (2006). A second element that makes contracts incomplete is that parties may behave strategically and breach the contract at a level below that in which the other party may pursue formal legal remedies. *See* George L. Priest, *Breach and Remedy for the Tender of Nonconforming Goods Under the Uniform Commercial Code: An Economic Approach*, 91 HARV. L. REV. 960, 963–68 (1978).

Like a contract, a trade agreement is an incomplete agreement.[81] However, there are some crucial differences. Countries cannot write binding contracts in the same manner as private parties to a transaction.[82] Unlike certain types of contracts in which the initial contract may be renegotiated, it is rare for trade agreements to be renegotiated. The mechanisms of trade agreements and their sanctioning effects for non-compliance are different from those found in contracts. For example, damages for contractual breach are to compensate the non-breaching party.[83] In a trade agreement, a violation by one party does not lead to an outcome that makes both parties whole.[84] Instead, one party must "cease and desist." A country is not punished for past violations. Rather, a country in breach can have its trade concessions suspended in an amount equal to the amount of the ongoing violation. When the violation ends, so do the sanctions.[85] This form of remedy is analogous to liquidated damages in contracts.[86]

81. *See* Ernst-Ulrich Petersmann, *Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO*, 7 J. INT'L ECON. L. 585, 593 (2004).

82. Andrew T. Guzman, *The Design of International Agreements*, 16 EURO. J. INT'L L. 579, 580–81 (2005).

83. Some would argue that this encourages "efficient" breach, where the parties and society overall are better off than if there were no breach. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 133 (5th ed. 1998); Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 558–63 (1977) (discussing the theory of "efficient breach," noting that "[g]enerally, breach will occur where the breaching party anticipates that paying compensation and allocating his resources to alternative uses will make him 'better off' than performing his obligation."). Efficient breach remains for the most part a theoretical approach without any real world results to substantiate it—"[w]hile some of the early literature attempted to identify the legal remedy that would satisfy the 'efficient breach' condition with the lowest possible transaction costs, empirical evidence on actual transaction costs is largely nonexistent, and that literature is best described as inconclusive." Benjamin E. Hermalin, Avery W. Katz & Richard Craswell, *Contract Law*, *in* 1 HANDBOOK OF LAW AND ECONOMICS 99 (A. Mitchell Polinsky & Steven Shavell eds., forthcoming 2007) (internal citations omitted), *available at* http://faculty.haas.berkeley.edu/hermalin/chapter_draft_v16.pdf.

84. Guzman, *supra* note 82, at 604 ("The non-zero-sum nature of sanctions in the international arena is a fundamental difference between international agreements and private contracts . . . .").

85. There may be reasons to prefer this system in the trade context. A sanction regime rather than a monetary damages regime may work better to achieve compliance by selectively targeting sanctions against politically powerful exporters of a violating country. Similarly, the beneficiary will be the country that brings the claim rather than specific exporters in the aggrieved country. This will reduce incentive for any exporter to push for sanctions. *But see* Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism*, 6 THEORETICAL INQUIRES L. 215, 216–17 (2005) (arguing that a "retaliation" or "negative reciprocity" model is the optimal enforcement strategy for trade liberalization); Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631, 631–33 (2005) (questioning these assumptions and arguing instead that lack of monetary remedies can allow for the political process between countries to reach superior outcomes).

86. Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255, 285 (1991). Not all parties may operate within a rational choice framework based on complete information. A party may react differently when it is not sophisticated, an approach explained in the behavioral law and economics literature. *See, e.g.*,

The purpose of trade institutions is to reduce information costs and make commitments more credible.[87] In the trade context, the choice of binding adjudication is the way to address opportunism by making a credible commitment that each side must follow.[88] A binding third-party enforcer reduces the reluctance of parties to agree participate in a contract or trade agreement.[89] The role of an adjudicator could be to determine the outcome to which the parties would have agreed had they explicitly provided for the situation—thereby reducing the transaction costs based on uncertainty.[90] Under this conceptualization, a trade agreement's effectiveness is a function of how it can reduce transaction costs and increase trade liberalization and investment.[91]

One area in which contracts and trade agreements both rely upon similar mechanisms is in adjudication in situations of breach. In cases of breach, a party to the agreement may bring a claim of breach to third-party adjudication.[92] Dispute resolution may serve as a clearing-house of information.[93] When countries bring a case, dispute resolution serves to monitor potential violations. It then sorts through disputes between those that are valid and invalid, the better to use bilateral reputational mechanisms to create enforcement.[94] Agreements that involve more than two countries can

Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1070–83 (2000).

87. ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 214 (1984).

88. Like contracts, trade agreements are incomplete. Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. S179, S184 (2002) ("[T]he parties to trade agreements, like the parties to private contracts, enter the bargain under conditions of uncertainty."); *see also* Kyle Bagwell & Robert W. Staiger, *Domestic Policies, National Sovereignty, and International Economic Institutions*, 116 Q.J. ECON. 519 (2001); Henrik Horn, *National Treatment in the GATT*, 96 AM. ECON. REV. 394 (2006).

89. *See* OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 332 (1996).

90. Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993) (noting that adjudicators provide "the rules the parties themselves would have chosen in a transaction-cost-free world").

91. CHRISTINA L. DAVIS, FOOD FIGHTS OVER FREE TRADE: HOW INTERNATIONAL INSTITUTIONS PROMOTE AGRICULTURAL TRADE LIBERALIZATION 26 (2003).

92. Most cases will not reach adjudication and will be settled in the shadow of the law. *See* Robert Cooter & Stephen Marks with Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 228–29 (1982); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 63 (1963); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950, 956 (1979).

93. Adjudication also may have information finding and self-enforcement purposes, rather than simply coercing compliance. Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551, 592. When international adjudication is the function of confidential dispute settlement, there are limitations to the clearing-house function.

94. Dan Kovenock & Marie Thursby, *GATT, Dispute Settlement and Cooperation*, 4 ECON. & POL. 151 (1992). *See generally* Dan Kovenock & Marie Thursby, *GATT, Dispute Settlement and Cooperation: A Reply*, 9 ECON. & POL. 95 (1997).

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use dispute settlement to verify violations and inform third countries.[95] By making findings, a trade panel provides for a declaration of whether or not a party has followed through on its commitments. A trade panel cannot force behavior. Rather, it is up to the country in violation to comply.

Dispute resolution in trade agreements creates a mechanism to facilitate compliance with such agreements. In the WTO context, one recent article analyzed data from the General Agreement on Tariffs and Trade (GATT) and WTO disputes between 1973 and 1998 and determined that possible retaliation has a strong influence on the credibility of the defendant country's commitment to liberalize.[96] The purpose of binding regulatory commitments is to make credible commitments for foreign investors.[97] The reason that parties commit to binding contractual commitments internationally can be classified based on four factors: where the probability of shirking a commitment is high, where there are significant information costs due to the cost of detection, where the agreement creates a coalition of like-minded countries, and where a country's executive branch uses the agreement to commit other branches of government.[98] These rationales at the WTO level have direct impact for PTA competition policy chapters.

However, the use of PTAs comes with certain adjudication costs. Complaints are, for the most part, limited to those between states.[99] This feature enables governments to act as gatekeepers to bringing a case. A private party must first convince its government to bring a claim on its behalf. To bring a claim, a country must be willing to expend political and financial capital. It needs to have a sense that it has an above-average chance of winning such a case, and that by bringing that case, it will not harm itself in the future with any precedent that it sets. Because of the power dynamics of PTAs, the costs of adjudicating potential claims benefit developed world countries and developed world business interests.

95. Giovanni Maggi, *The Role of Multilateral Institutions in International Trade Cooperation*, 89 AM. ECON. REV. 190, 191 (1999). However, verification of contracts may have significant costs. *See* Robert M. Townsend, *Optimal Contracts and Competitive Markets with Costly State Verification*, 21 J. ECON. THEORY 265, 266 (1979).

96. *See* Chad P. Brown, *On the Economic Success of GATT/WTO Dispute Settlement*, 86 REV. ECON. & STAT. 811, 812–13 (2004). This may not be the same in other areas of economic law, such as investment arbitration confidentiality.

97. *See* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 549 (2003) ("[C]ommercial parties' first-order preference [is] to have the state enforce contracts in order to protect relation-specific investments and to guard against especially disruptive market movements."). There may be limits to the information-finding function in situations in which agreements allow for arbitrational awards that are not made public to non-parties.

98. *See* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 429–30 (2000).

99. Exceptions would be agreements like NAFTA, which allow for private rights of action.

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C. Data Set

Previous academic work has examined competition policy PTAs. One Organisation for Economic Co-operation and Development (OECD) paper reviews the competition policy provisions in forty-seven trade agreements. Most of those agreements studied were from the period 2001–2004. The OECD paper categorizes them across eight different variables.[100] Another OECD study undertakes a qualitative assessment of competition policy provisions of PTAs.[101] Similarly, the United Nations Conference on Trade and Development (UNCTAD) has produced a qualitative study of the provisions within PTA competition policy chapters.[102]

The present article is both an extension of and a departure from the previous literature on PTA competition policy chapters, and focuses specifically on Latin American PTAs. Unlike previous work, the present article examines all Latin American PTAs to gauge how competition policy chapters have been crafted, and what provisions they include for an entire region during the period of the PTA "explosion." It extends previous works by expanding the population of agreements to include all agreements with a competition policy chapter in which at least one Latin American country is a party. It also includes all Latin American PTAs in which there is no competition policy chapter, and considers a number of additional provisions and other classifications to be coded. For the purposes of this article, Latin America includes all western hemisphere countries south of the U.S., including the Caribbean.

Previous scholarship by others contained a number of incorrect designations for some of the Latin American PTAs (in cases where such PTAs were included in their analysis). I have therefore recoded these studies to reflect accurate designations. Further, in coding the provisions, I have limited my analysis to those agreements that have specific competition policy chapters, rather than including provisions in other chapters that have competition impacts. This affected the coding of the previous OECD analysis. One could include all provisions that implicate competition policy in trade

100. *See* Oliver Solano & Andreas Sennekamp, *Competition Provisions in Regional Trade Agreements* 7–9 (Org. for Econ. Co-operation and Dev. [OECD] Joint Group on Trade and Competition, OECD Trade Policy Working Paper Series, Paper No. 31, 2006), *available at* http://webdomino1.oecd.org/olis/2005doc.nsf/Linkto/com-daf-td(2005)3-final.

101. *See generally* OECD, *The Relationship Between Regional Trade Agreements and the Multilateral Trading System: Competition*, OECD Doc. TD/TC/WP(2002)19/FINAL (May 7, 2002) (*prepared by* Hunter Nottage).

102. *See generally* The UNCTAD Secretariat, *A Presentation of Types of Common Provisions to be Found in International, Particularly Bilateral and Regional, Cooperation Agreements on Competition Policy and their Application*, U.N. Doc. TD/RBP/CONF.6/3 (Sept. 6, 2005).

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agreements. However, such inclusion would implicate much of any trade agreement, because much of trade is about increasing competition and the competitive process. For example, at the WTO level, almost sixty provisions address competition-related issues.[103] As one of the leading scholars on international trade, John Jackson, summarizes, "In short, as to competition policy being dealt with by the WTO Agreements, there is already a substantial position for the WTO (those who resist are too late!)."[104] Similarly, at the PTA level, many provisions address competition issues that are more broadly defined, such as services, intellectual property, telecommunications, and subsidies.

This article is a departure from previous work examining PTAs in competition policy. It examines twenty-four agreements with competition policy chapters that have been signed by the parties, and includes those agreements that have been signed but have not yet entered into effect from the period 1992–2006.[105] The PTAs include both North-South and South-South agreements.[106] Of the twenty-four agreements with competition policy chapters, fifteen are North-South agreements. Of the twelve agreements that lack competition policy chapters, four are North-South agreements. The source for data on the PTAs is the Organization of American States (OAS) trade database.[107] The total number of agreements is too small for quantitative analysis, as changes to only a few agreements could significantly alter the total outcome. To provide a contrast with those agreements with competition policy chapters, this article provides additional insights by examining the twelve Latin American PTAs without competition policy chapters. Together, these thirty-six agreements comprise the entire population of Latin American PTAs since the inclusion of the first competition policy chapter of a PTA in NAFTA. None of the previous studies focus upon the key finding of any analysis of these provisions—the lack of binding dispute settlement for substantive provisions. This finding is in sharp contrast to empirical work on the use of dispute settlement in international

103. John H. Jackson, *Afterword: The Linkage Problem—Comments on Five Texts*, 96 AM. J. INT'L L. 118, 124 (2002).

104. *Id.*

105. The basis for the start date is the year in which NAFTA entered into effect. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993). NAFTA was the first Latin American PTA to include a competition policy chapter. However, the regional integration agreements of CARICOM and the Andean Community (which are beyond the scope of study of this article) had competition policy chapters though neither functioned particularly well.

106. I define a country as a "northern" country if it is a member of the OECD. This includes countries such as Mexico and Korea.

107. OAS, SICE: Trade Agreements, http://www.sice.oas.org/agreements_e.asp (last visited Oct. 31, 2007). Interestingly, among the regional and international organizations, OAS lacks a focus on antitrust.

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agreements. Generally, the more complex a problem, the more likely it is that an agreement covering it will include dispute settlement.[108] In a departure from the previous literature, the current article discusses why these chapters exist at all, given the lack of dispute settlement.

Competition policy chapters have been coded across twenty-four types in which at least one competition policy chapter has such provisions. All results are based on bimodal variables. The taxonomy of provisions appears in Appendix I to this article. Provisions that appear in three-quarters or more of PTAs include those describing competition laws at the time of the agreement; those to adopt, maintain, and apply competition measures; and those of general cooperation. Provisions that appear in more than half but fewer than three-quarters of all agreements include those concerning notification, evidence and information exchange, consultations, state enterprises or state monopolies, and non-discrimination. Provisions that appear in greater than one-fourth but fewer than half of all agreements include anti-competitive agreements and those concerning abuse of dominance or monopolization, trade consultations, and binding dispute settlement. Provisions that appear in less than a quarter of all agreements include those discussing negative comity, positive comity, state aid and subsidies, mergers, non-discrimination for state enterprises or state monopolies, due process, transparency, elimination of anti-dumping, dispute settlement for substantive antitrust issues, technical assistance and capacity building, and antitrust immunities.

This article's most important finding is that the number of agreements that have dispute settlement, particularly for "pure" antitrust related provisions, is non-existent.[109] For example, the U.S.-Chile Free Trade Agreement (FTA), building upon a similar NAFTA provision, includes language that "[n]othing in this Chapter shall be construed to infringe each Party's autonomy in developing its competition policies or in deciding how to enforce its competition laws."[110] Binding dispute settlement does not cover those actions that an antitrust agency could enforce on its own. This fore-

108. Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?*, 36 J. LEGAL STUD. 189, 189, 209 (2007).

109. Indeed, the only agreement that has the possibility of dispute resolution, that between Mexico and Israel, has a high threshold of there being no domestic recourse. Decreto promulgatorio del Tratado de Libre Comercio entre los Estados Unidos Mexicanos el Estado de Israel, Mex.-Isr., Apr. 10, 2000, Diario Oficial de la Federación [D.O.] 28 de Junio de 2000 (Mex.), *available at* http://www.sice.oas.org/Trade/meis_e/isr_mexind_e.asp. For cartels, monopolization and mergers to ever meet this threshold is virtually impossible since this is the primary work of any antitrust agency and of antitrust law.

110. Free Trade Agreement, U.S.-Chile, art. 16.1, June 6, 2003, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.

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closes cases from PTA adjudication, in which an agency can exercise prosecutorial discretion. In effect, the lack of dispute settlement has created soft law within the guise of a hard law agreement. This is the institutional choice of a preference of domestic antitrust, working in concert with soft law organizations—primarily antitrust agencies—over international trade law agreements and international adjudication. This result is explored in more detail in section II(D)(3) below.

Next, in order to contrast competition policy chapters, this article compares Latin American PTAs agreements with competition policy chapters to those without them. While there are twenty-four total agreements that contain competition policy chapters, twelve lack such chapters. The lack of competition policy chapters in these agreements occurs throughout the timeline of the PTA explosion (1992 to the present). The most likely determining factor for whether or not such chapters are included in the PTAs seems to be whether or not all parties had antitrust laws at the time they signed the agreement. This pattern occurred in eight of the eleven agreements. When combined with the agreements that contained competition policy chapters, only six out of thirty-three agreements in which all parties had antitrust laws at the time of agreement lacked competition policy chapters.

Solely examining competition policy chapters overlooks other possible explanations for the inclusion of such chapters or for particular types of provisions. Too much faith may be put into the words of the contract as an explanation for the underlying situation that requires contractual dealings. Perhaps the assumption is that most problems can be solved ex ante, so that dispute settlement will not be needed. To provide a comparison to the findings related to competition policy, I test this hypothesis with an examination of other chapters in the PTAs. I compare all thirty-six Latin America PTAs (both including and excluding competition policy chapters) and compare the findings against two other types of chapters found in the same PTAs. The other chapters examined for comparative purposes are services and intellectual property (IP). Both of these chapters have competition-like rationales.[111] Both address issues of non-discrimination in domestic regulation. In many cases, both also address issues of anticompetitive practices, such as monopolization in IP licensing or in the provision of services. If competition policy chapters are like other regulatory chapters in PTAs, it

111. Other chapters could be explored as well. I exclude investments because in addition to trade agreements, investment protection may be covered under bilateral investment treaties, thereby adding to the complexity of the comparative analysis.

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would follow that the other regulatory chapters should also lack dispute settlement.

In terms of coverage, of the thirty-six agreements, only three lack dispute settlement in IP, and none lack dispute settlement in services. In twelve of the agreements, there are no IP chapters, whereas only four of the thirty-six agreements did not include service chapters. Thus, competition policy seems to be treated differently than other areas of domestic regulation, even those that have competition-like provisions. One critical difference between competition policy and these other areas is that the WTO covers these other issues under the General Agreement for Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights.[112] Thus, even if a PTA does not cover IP and services, there is the backstop of WTO-level commitments and dispute resolution in both of these areas. As such, the lack of dispute resolution or even a stand-alone chapter in a PTA does not mean there is no recourse for these issues at the international level. Rather, lack of inclusion of coverage in PTAs for these issues suggests no additional coverage beyond that already offered by the WTO. The WTO therefore serves as a "floor" for coverage: a PTA may include more coverage in these provisions, but cannot reduce it below what countries have agreed to in the WTO. Without any direct competition policy provisions in the WTO agreements, there is no similar floor guaranteeing that an international recourse in antitrust will be pursued for a violation of PTA provisions.

D. Analysis

1. The Basis for Including Competition Policy Chapters

The first question that negotiators consider is whether or not to include competition policy as a chapter in the proposed PTA.[113] There has not been a consistent response to this by parties to PTAs. The dataset assembled demonstrates that not all Latin American PTAs have competition policy chapters. This is the case even for countries that have competition policy chapters in some agreements but not others (including some countries that

112. General Agreement on Trade in Services annex 1B, Apr. 15, 1994, 33 I.L.M. 1167; Agreement on Trade-Related Aspects of Intellectual Property Rights annex 1C, Apr. 15, 1994, 33 I.L.M. 1197.

113. To aid in the analysis of competition policy chapters, I have discussed these chapters and their meanings with former and current antitrust and trade officials in over half of the countries that have signed PTAs. The rationale provided for such agreements varies across those discussions, such that no single explanation on its own provides sufficient rationalization for why these agreements exist as they do.

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had them in earlier agreements but not later ones, and vice versa). The decision to include such a chapter may come down to the priorities and desires of potential signatories and how these desires play out within a larger political economy context in trade negotiations. Discussions with trade and antitrust negotiators involved in a number of these PTAs support a more ad hoc, situational explanation to the inclusion of competition policy chapters.

Trade negotiators may have different objectives than competition agencies. The initial template of potential commitments in competition policy chapters may be different depending on whether trade or competition negotiators take the lead in drafting these provisions. Provisions included within PTAs may be more or less effective depending on whether or not there is antitrust agency support for these commitments. Pressure may exist to reach an agreement among trade negotiators. The inclusion of provisions that may create contention in what is a second order chapter (as opposed to first order chapters such as market access, agriculture, or services) may not be a priority for the trade negotiators. This may explain the form that certain agreements take. It may also implicate the decision not to include these chapters in certain agreements. The overall trade deal embodied in a PTA must appeal to a number of different domestic constituencies. These constituencies may be more willing to trade off antitrust for other areas specifically of interest to them within a PTA. As antitrust agencies do not supervise the overall trade negotiation, but merely the antitrust discussions, the relatively small role that many antitrust agencies play in overall trade discussions supports a more eclectic outcome as to which agreements may include competition policy chapters.

The decision to include a competition policy chapter is not merely one of power relationships. If power dynamics were the primary explanation for the inclusion of a competition policy chapter, all U.S. agreements would include (or lack) such chapters, as the United States holds asymmetric bargaining power in its trade agreements, especially on issues in which the other country does not have concentrated interests. Instead, a substantial number of U.S. PTAs lack such provisions (Thailand, Israel, CAFTA-DR, Bahrain, Morocco, and Jordan). If the United States thought that competition policy was a priority within the trade context, it would push for these chapters in all the agreements; if competition policy was not a priority, the U.S. would then not include them in any of the agreements. Given the hostility of United States antitrust agencies to a binding WTO competition policy framework, there may be other factors at play that would allow the U.S. to include competition policy chapters in some of its PTAs. The United States position may be best described as one that does not oppose

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competition policy chapters so long as the chapters remain non-binding and the PTA counter-party finds the inclusion of such a chapter to be important.[114]

Other countries may have a number of reasons to include competition policy chapters. The inclusion of competition policy chapters may create opportunities for direct contact between antitrust agency staff counterparts, and to develop personal and institutional ties. When antitrust agencies participate in the trade negotiations, there may be an increased buy-in for the provisions of a competition policy chapter by the antitrust agencies. It may offer a roadmap of what issues young antitrust agencies might want to emphasize for existing or perceived future needs. This tailoring may ensure that the chapter will be responsive to the concerns of the agency and localize the chapter within a country's political economy situation so that implementation even without dispute settlement may be possible.

2. Do competition policy chapters create compliance?

a. Creating Compliance

A critical question to the analysis of provisions within PTAs is the larger question of whether or not a PTA generally, and a competition policy chapter specifically, creates compliance. The effectiveness of each institution must be based on its ability to obtain credible commitments from countries.[115] Credible international commitments in turn create domestic compliance. Scholarship supports the claim that PTAs work as a commitment mechanism in their implementation.[116] Trade openness affects the political balance of interest groups in a country. Competition from increased imports mobilizes local firms to push for regulatory change in bottlenecks in the economy that affect all businesses, such as telecommunications, electricity, or financial institutions. Competition also increases the power of exporters and of industries that benefit from foreign inputs of production. In a given country, over time interests that support existing trade agreements increase significantly.[117] The binding effect of

114. The EU's position on competition policy chapters seems to have been to mirror EU attempts to include competition policy at the WTO for non-binding core issues of increased transparency, non-discrimination, procedural fairness, voluntary cooperation, capacity building, and cartels. *See* Ignacio Garcia Bercero & Stefan D. Amarasinha, *Moving the Trade and Competition Debate Forward*, 4 J. INT'L ECON. L. 481, 485–87 (2001).

115. *See* Daron Acemoglu, *Why Not a Political Coase Theorem?: Social Conflict, Commitment, and Politics*, 31 J. COMP. ECON. 620 (2003).

116. *See* WORLD BANK, *supra* note 27, at xi.

117. Schwartz & Sykes, *supra* note 88, at S195.

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trade agreements may create domestic compliance with them. As interest groups benefit from trade agreements, affected groups create political pressure for compliance. This in turn may provide for increased domestic reform based on international commitments.

There are reputational effects for parties that do not comply. Lack of compliance in one area may make other countries less likely to enter into future agreements with a non-compliant country.[118] The general perception of adjudication is that it creates compliance merely because of the threat of potential use. Weiler argues that "when governments are pulled into court and required to explain, justify, and defend their decision, they are in a forum where diplomatic license is far more restricted, where good faith is a presumptive principle, and where states are meant to live by their statements."[119] The more legitimate an international adjudicator, the greater the reputational cost of non-compliance. The opportunity to bring a case does not mean that many cases will actually be brought. Indeed, most violations of trade agreements, whether PTAs or the WTO agreement itself, do not result in cases being brought. However, many countries settle their disagreements in the shadow if the law. Outside of this formal legal process, countries can engage in state-to-state bargaining to overcome disputes. Non-binding agreements make state-to-state bargaining (or agency-to-agency bargaining) the only way to settle such disputes, though there may be reputational effects for non-compliance in this area as well.

Compliance is more likely where there is the intent and capacity to comply.[120] This holds for PTAs generally, assuming that there are credible commitments based on binding adjudication. The case of antitrust is different in that the lack of credible commitments for implementation would not necessarily lead to such results. A second difference is that unlike issues such as IP, services, or telecommunications, antitrust lacks specific coverage at the WTO that provides dispute settlement. Because there are no minimum international obligations in antitrust, countries may be less will-

118. *See* Guzman, *supra* note 82, at 604 ("[T]he parties must balance a desire to include the efficient terms against a desire to avoid the consequences of a violation. This may lead them to enter into an agreement with weaker substantive terms."). Theoretically this may be true. Empirical work on WTO commitments and compliance suggests that this may not hold generally in the international trade realm in practice. *See* Andrew K. Rose, *Does the WTO Make Trade More Stable?*, 16 OPEN ECON. REV. 7, 18 (2005); Andrew K. Rose, *Do We Really Know That The WTO Increases Trade?*, 94 AM. ECON. REV. 98, 98 (2004); Andrew K. Rose, *Do WTO Members Have More Liberal Trade Policy?*, 63 J. INT'L ECON. 209, 209–10 (2004).

119. J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, 26 COMP. POL. STUD. 510, 519 (1994).

120. Edith Brown Weiss, *Conclusions: Understanding Compliance with Soft Law*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 543 (Dinah Shelton ed., 2000).

ing to give up sovereignty in this area, as they have not done so previously.[121]

b. *Shaping Norms and Norm Diffusion*

A PTA's competition policy chapter may encourage compliance through norm creation. International organizations serve as "conveyer belts for the transmission of norms and models of 'good' political behavior."[122] These norms help to facilitate domestic compliance. Norm creation works through the construction and acceptance of social conventions. As an enforcement mechanism, norms may operate as alternative to formal law as a means of social control.[123] A norm-based system may be preferred if it lowers enforcement costs below that of formal dispute resolution through adjudication.[124] In other situations, norms may work in conjunction with formal law. Law may serve the function of establishing or altering an existing norm.[125] This occurs as law alters the social meaning of behavior.[126]

Antitrust norm creation requires effective leadership for the norm to become accepted across countries. Countries with greater power will want the international standard to move closer to their domestic laws, in order to reduce the transition costs to the new system. Harmonization of regulatory systems may come about because great powers can coerce others to adopt their policy preferences.[127] Similarly, when a single market is large enough, a state can use its power to change the regulatory policy preferences of other states.[128] Because of power dynamics, the United States and the EU are able to alter the preferences of other states towards their own policy preferences, assuming that the two have similar preferences.[129] As

121. Florian Becker, *The Case of Export Cartel Exemptions: Between Competition and Protectionism*, 3 J. COMPETITION L. & ECON. 97, 100 (2007).

122. Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699, 712–13 (1999).

123. *See* Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 672–75 (1986).

124. *See* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1795, 1820–21 (1996).

125. Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 564–65 (2001); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1996).

126. In one such example, Lawrence Lessig argues that by formalizing through law a prohibition on dueling, the norm of dueling changed from defending one's honor and towards legal compliance. Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2186–87 (1996).

127. *See generally* Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 INT'L ORG. 589, 591 (2001).

128. *See* DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 5–6 (1995).

129. *See* Daniel W. Drezner, *Globalization, Harmonization, and Competition: The Different Pathways to Policy Convergence*, 12 J. EUR. PUB. POL'Y 841, 843–46 (2005). On great powers framing norms and institutions, see generally STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY

theory would suggest, the great powers (the U.S. and the EU) have framed the norms and institutional choices in international antitrust, including in PTAs, to reflect their interests.

As younger antitrust agencies interact more with established agencies, a form of regulatory export occurs.[130] Under regulatory export, younger agencies adopt the norms of more established and powerful agencies. This leads to increased policy convergence, primarily along a developed world model. Yet, the ability to reach increased implementation of shared antitrust norms does not suggest that harmonization means regulatory conformity in approach and implementation.[131] Differences in what constitutes, for example, monopolization outweigh similarities across jurisdictions.[132] Regulatory power is asymmetric in this area, but not so much so that one country can dictate the regulatory system of other countries.[133] PTAs may be a way for the United States and the EU to shape the nature of antitrust harmonization and norm diffusion across countries through the regulatory export of certain ideas and enforcement priorities, as embodied in PTA competition policy chapter provisions.

3. Explanations for the Lack of Dispute Settlement

The empirical study's most interesting finding is that competition policy chapters lack dispute settlement, while other similar chapters have them. Why create an agreement that lacks a way to punish shirking? How do we explain the lack of dispute settlement in competition policy chapters where countries enter into an agreement or formal contract? Finally, why is antitrust different from other areas of regulation in a trade context?[134] In effect, the lack of dispute settlement is a choice for continued domestic

(1999); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1174–75 (1999).

130. *See* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 7 (2002).

131. Alan O. Sykes, *Regulatory Competition or Regulatory Harmonization? A Silly Question?*, 3 J. INT'L ECON. L. 257, 262–63 (2000).

132. *See* Michal S. Gal, *Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief About Monopoly?*, 49 ANTITRUST BULL. 343, 344–46 (2004); Keith N. Hylton, *Section 2 and Article 82: A Comparison of American and European Approaches to Monopolization Law* 1–2, 7–9 (Boston Univ. Sch. of Law, Working Paper Series, Law & Econ., Working Paper No. 06-11, 2006), *available at* http://www.bu.edu/law/faculty/scholarship/workingpapers/abstracts/2006/pdf_files/HyltonK051606.pdf.

133. *See* LLOYD GRUBER, RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS 6–9 (2000).

134. There must be an explanation of the nature of this organizational arrangement. This is, after all, the basis of the inquiry of New Institutional Economics. NORTH, *supra* note 14, at 89; WILLIAMSON, *supra* note 2; Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI 739, 772–73 (1984).

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antitrust enforcement with soft law organizations assisting to improve domestic capacity and reduce transaction costs across jurisdictions over the traditional binding adjudication of trade law.

a. Antitrust is substantively different from other areas of law.

Antitrust may be different from other substantive regulatory fields. The transaction costs for dispute settlement in antitrust may be higher than in IP, services, or regulatory areas. A violation in IP may be an issue of the level of enforcement. It may be easier to detect non-enforcement in IP (such as the extent of counterfeit goods) than in antitrust, where the violation of a provision against monopolization may be more difficult to detect or prove.[135] One limit to this explanation is that certain areas covered under both IP and services provisions, such as monopolistic practices of services or anticompetitive licensing practices in intellectual property, have antitrust-like problems of detection.

There may be different ways of viewing antitrust enforcement and the competitive process, as opposed to the enforcement of IP or services, which may have greater international norms (as established through the WTO). In contrast to IP and services, there are no binding international antitrust agreements that would allow for adjudication in a trade context.[136] There may be strong explanatory power for substantive disagreements in antitrust preventing the inclusion of dispute settlement. On a number of antitrust issues, there is significant disagreement between countries, including between the United States and the European Union and Latin American countries; these disagreements for the most part fall within a continuum between U.S. and EU frameworks. The lack of substantive convergence in some areas of antitrust across jurisdictions (particularly but not exclusively in the area of monopolization) may suggest high costs for a binding commitment. This concern addresses how the United States, the EU, and others approach antitrust law issues.

The U.S. approach is more minimalist in its interventions. Its default presumption is that the market works effectively. This presumption limits the need for possible regulatory intervention.[137] The effect of this approach

135. *See* Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 ANTITRUST L.J. 693, 713–15 (2000).

136. *But see* Ioannis Lianos, *The Contribution of the United Nations to the Emergence of Global Antitrust Law*, 15 TUL. J. INT'L & COMP. L. 415, 415, 418, 455 (2007) (arguing that UNCTAD has helped to set up some customary international antitrust norms).

137. Eleanor M. Fox, *What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 ANTITRUST L.J. 371, 372 (2002). Richard Posner expresses this viewpoint in the context of U.S. antitrust in the preface to RICHARD A. POSNER, ANTITRUST LAW, at viii (2d ed. 2001) ("Much of antitrust law in 1976 was an intellectual disgrace. Today, antitrust law is a body of economically ra-

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is that it yields fewer "false positives" of errant enforcement than other enforcement approaches. In particular, this view is suspicious of the claims of anticompetitive effects of monopolization cases or vertical restraints. The EU approach takes a broader view of the meaning of efficiency and anticompetitive harm. This approach requires greater justification for firms to undertake exclusionary conduct.[138] This view is also more suspicious of dominance and vertical restraints, and under this view thresholds on dominant behavior tend to be lower.[139]

In particular, monopolization and vertical restraints generally are significant points of disagreement between U.S. and EU approaches to antitrust.[140] These differences have an important impact in debates on the appropriate role for competition policy in its interface with international trade. Vertical restraints implicate market access concerns that are at the heart of international trade law.[141] The differences between antitrust notions of barriers to entry and how they interface with trade's regime of nondiscrimination for market access was a leading area of contention in the WTO debates on the inclusion of competition policy at the global level

tional principles largely though not entirely congruent with the principles set forth in the first edition. The chief worry at present is not doctrine or direction, but implementation."). Economists debate whether there should be a consumer welfare or total welfare standard to promote greater economic efficiency. Within the EU, the standard is consumer welfare. ROBERT O'DONOGHUE & A. JORGE PADILLA, THE LAW AND ECONOMICS OF ARTICLE 82 EC, at 4 (2006). The U.S. also bases its standard on consumer welfare. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979). There is some debate as to whether or not consumer welfare really refers to consumer welfare or total welfare. *See Merger Enforcement, Panel II: Treatment for Efficiencies in Merger Enforcement: Statement for the Hearing of the Antitrust Modernization Comm'n* 1 (2005) (statement of Charles F. Rule, Former Assistant Att'y Gen., Antitrust Division, U.S. Department of Justice, 1986–1989), *available at* http://www.amc.gov/commission_hearings/pdf/Statement-Rule.pdf.

138. *See* Fox, *supra* note 137, at 373.

139. *See* Gunnar Niels & Adriaan ten Kate, *Introduction: Antitrust in the U.S. and the EU—Converging or Diverging Paths?*, 49 ANTITRUST BULL. 1, 12–15 (2004).

140. *See* Robert W. Hahn, *Introduction* to ANTITRUST POLICY AND VERTICAL RESTRAINTS 1–6 (Robert W. Hahn ed., 2006). *See generally* OFFICE OF FAIR TRADING, VERTICAL AGREEMENTS: UNDERSTANDING COMPETITION LAW 2–3 (2004), *available at* http://www.oft.gov.uk/advice_and_resources/publications/guidance/competition-act/oft419; James C. Cooper, Luke M. Froeb, Daniel P. O'Brien & Michael G. Vita, *A Comparative Study of United States and European Union Approaches to Vertical Policy*, 13 GEO. MASON L. REV. 289, 289–90 (200); Ekaterina Rousseva, *Modernizing by Eradicating: How the Commission's New Approach to Article 81 EC Dispenses with the Need to Apply Article 82 EC to Vertical Restraints*, 42 COMMON MARKET L. REV. 587 (2005); Toshiaki Takigawa, *A Comparative Analysis of U.S., EU, and Japanese Microsoft Cases: How to Regulate Exclusionary Conduct by a Dominant Firm in a Network Industry*, 50 ANTITRUST BULL. 237, 248–51 (2005); and sources cited *supra* note 132.

141. *See* KYLE BAGWELL & ROBERT W. STAIGER, THE ECONOMICS OF THE WORLD TRADING SYSTEM 29–30 (2002).

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within a trade regime.[142] These fundamental disagreements may be the reason for the lack of binding provisions in Latin American PTAs.

Who decides potential disputes under PTAs may explain the lack of binding dispute resolution or even binding consultations within competition policy chapters. Because trade panels and trade lawyers participate in PTA adjudication, antitrust agencies may be reluctant to let trade experts weigh in on antitrust matters. Trade experts may have a different substantive approach based on their anti-dumping experience ("unfair" competition) and different goals based on market access and non-discrimination concerns. In either case, trade experts may focus more on producer welfare rather than efficiency concerns.[143] Put differently, antitrust and international trade have overlapping but distinct concerns. Antitrust looks at competitive effects, whereas trade examines whether there has been discriminatory regulation.

b. Antitrust agency cooperation has similarities to relational contracting.

There may be no need for formal adjudication when there is a strong relationship between parties. The inclusion of non-binding provisions may have the purpose of facilitating enforcement outside of formal contracting. Formal contracting will not be needed when more informal mechanisms are adequate to provide sanctions against non-compliant behavior.[144] From an antitrust agency perspective, cross-border antitrust disputes may be better resolved through bilateral discussions at the inter-agency level than through a trade remedy. In such a setting, agencies that speak a similar economic language of efficiency and have similar policy worldviews as to enforcement may be better able to make progress over disputes than a mix of trade and antitrust officials with different approaches and goals.

The negotiations of competition policy chapters may add to the creation of rituals of behavior for increased cooperation among antitrust enforcers.[145] Formal contracts with adjudication for disputes may not be necessary when the purpose of the contract is to create repeat interactions among those parties bound by the contract.[146] Having a competition policy chapter in a PTA may make antitrust agency officials more likely to inter-

142. *See generally* MARSDEN, *supra* note 68, at 45–64 (discussing the history of competition policy in international trade commitments and the WTO Working Group debates on the interaction between trade and competition policy).

143. Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 483 (2000).

144. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 63 (1963).

145. *See generally* Mark C. Suchman, *The Contract as Social Artifact*, 37 LAW & SOC'Y REV. 91 (2003).

146. Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 467.

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act because the chapter creates legitimacy for the ritual of interaction. Merely having antitrust enforcers meet on a regular basis may be a way to increase institutional ties, improve cooperation and coordination between the parties, and resolve potential disputes. Frequent interactions may make it easier to communicate on a regular basis via phone or the internet, and to spend time together to discuss issues while at conferences. Most problems can be solved in this way. The daily antitrust problems that agencies will need greater cooperation on are ones of coordination, such as mergers and cartels.[147]

Reputational effects and social pressure may create credible commitments that do not require formal contracting.[148] In these situations, relational contracting may be preferred because reputation comes at a lower cost than formal adjudication.[149] These situations of private ordering require trust and repeat players to facilitate such transactions.[150] In a game theory model, Axelrod uses a classic prisoner's dilemma to articulate that when there is a repeat game in which the number of repetitions is unknown and the discount rate is low, the optimal strategy that will result is that of cooperation.[151] In a departure from the game theory cooperation strategy, contracts may be required when the contract is the end-game and there is no intended repeat relationship. A formal contract with adjudication serves as a backstop only when the relationship sours.[152]

c. *Soft Law Organizations as the Equivalent of Private Ordering in Contract Law*

Private ordering in the contract realm of transaction cost economics suggests a similar type of situation within PTAs. Soft law antitrust institutions take the role of informal contracting. The preference for non-binding chapters may be a preference for soft law. The effect of a choice of soft law is to create a lower level of commitment based on better practices by agen-

147. *See generally* Sokol, *supra* note 54, at 97–116.

148. *See* Peter H. Huang, *International Environmental Law and Emotional Rational Choice*, 31 J. LEGAL STUD. S237, S239–40 (2002).

149. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 247 (1991); Macaulay, *supra* note 146, at 62–63.

150. *See* AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE 8 (2006); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 116 (1992); Janet T. Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, 10 J. LEGAL STUD. 349, 350 (1981); Paul J. Zak & Stephen Knack, *Trust and Growth*, 111 ECON. J. 295, 296 (2001).

151. This is based on a tit-for-tat game theory strategy, reacting to the previous move of the other player. *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 36–39 (1984).

152. *See* Bernstein, *supra* note 150, at 124.

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cies that can change over time, as economic thinking at the domestic antitrust agency level changes more easily over time than the alternative—the competency of international adjudicators to understand complex issues of economic regulation in competition matters where such interactions are episodic and repeat interactions of adjudicators in this area are unlikely to lead to the development of specific knowledge on these issues. Moreover, the choice of non-binding commitments that favor soft law allows for greater agency discretion in case selection. A binding international agreement may be necessary if it would be more effective than the domestic or soft law alternatives. The lack of a binding agreement may suggest trust in the domestic capacity of antitrust agencies and that domestic reform is preferable to supra-national adjudication. Soft law can assist in improving the capacity of domestic antitrust institutions. Overall, soft law organizations provide an opportunity for cooperation, discussion, norm diffusion and assistance in domestic antitrust enforcement, capacity building, and expertise.[153]

Latin American countries participate in norm creation and antitrust soft law through a number of soft law international institutions. Compliance helps to allow norms to take root within an organization (in our case, domestic antitrust agencies through soft law organizations).[154] The most important of these soft law institutions are UNCTAD, the International Competition Network (ICN), the OECD/Inter-American Development Bank Latin-American Competition Forum, and the Ibero-American Competition Forum (Foro Iberoamericano de Competencia). Though the effectiveness of each of these soft law institutions may be different, all share important similarities. These organizations hold conferences at the agency level that discuss enforcement priorities and approaches on topic themes, and that identify better practices, create personal relationships among enforcers, and identify and diffuse antitrust norms based on "better" practices.[155] Among other work products, the institutions provide background

153. In a private firm context, firms that are able to innovate in their organizational structure and behavior are the ones that have the best networks to learn about better practices. *See generally* Lisa M. Lynch, *The Adoption and Diffusion of Organizational Innovation: Evidence for the U.S. Economy* (National Bureau of Econ. Research, Working Paper No. 13156, 2007), *available at* http://www.nber.org/papers/w13156.

154. Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479 (1997).

155. Even in soft law there is a reduction in domestic sovereignty. Some advocates of networks want it both ways. They argue that networks are effective. They also suggest that such effective networks do not impact a country's sovereignty. However, by being effective, such networks do cut into decision-making at the national level as networks push countries to adopt best practices. *See* Joshua Cohen & Charles F. Sabel, *Global Democracy?*, 37 N.Y.U. J. INT'L L. & POL. 763, 764 (2005). This is a form of soft coercion by pushing domestic practices in a new direction. Because of decisions being

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papers, presentations by speakers, reports, analyses and other documents that expand upon issues discussed at the conferences and workshops.[156]

However, there are limits to soft law's effectiveness. The ability of soft law to improve domestic level antitrust systems does not happen on its own. Soft law organizations require agency level implementation of its better practices. Domestic capacity constraints and limitations based on the effectiveness of each of the soft law organizations suggests that while these organizations are a net benefit, they still leave significant gaps in terms of enforcement capacity for Latin American antitrust agencies, particularly on substantive rather than procedural issues.

UNCTAD has played a role in competition policy since the 1970s. In this early period, UNCTAD created a non-binding set of principles on competition policy in 1980. This set was the first modern attempt to provide structure to competition policy around the world.[157] Since the promulgation of the UNCTAD principles, UNCTAD has been active in Latin America, providing technical assistance to antitrust authorities in both the drafting and implementation of competition laws. It also hosts conferences of antitrust agencies. Recent Latin American efforts involve the implementation of competition-related provisions in FTAs and the COMPAL project for Latin American countries to improve capacity building through technical assistance and inter-agency exchanges.[158]

For many years, UNCTAD had been the only soft law organization for Latin American-wide antitrust discussions. This changed starting in 2001, when a number of other organizations were established. These new organizations allowed Latin American antitrust agencies to participate in regional or global antitrust discussions that had greater involvement from the senior officials of developed world antitrust agencies. Though the OECD Competition Law and Policy Committee (CLPC) limits its membership to OECD

made in international organizations, "the decisions of domestic administrators are increasingly constrained by substantive and procedural norms established at the global level." Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 26 (2005). Legislatures remain uninvolved in this process. Strong results and positive outcomes facilitated by the institutional choice of soft law antitrust organizations may outweigh concerns about a democracy deficit. Increased harmonization may be likely over time when the social benefits outweigh the costs. *See also* Julie Roin, *Taxation Without Coordination*, 31 J. LEGAL STUD. S61, S62–64 (2002).

156. *See* Sokol, *supra* note 54, at 69, 97–116.

157. *See generally* UNCTAD, *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, U.N. Doc. TD/RBP/CONF/10/REV.2 (2000). Earlier efforts go back to the League of Nations and the Havana Charter. *See* Sokol, *supra* note 54, at 44–45.

158. *See generally* UNCTAD, *Implementing Competition-Related Provisions in Regional Trade Agreements: Is it Possible to Obtain Development Gains?*, U.N. Doc. UNCTAD/DITC/CLP/2006/4 (2007) (*prepared by* Ana María Alvarez & Laurence Wilse-Samson), *available at* http://www.unctad.org/en/docs/ditcclp20064_en.pdf.

members,[159] since 2002 the OECD has hosted an annual Latin American Competition Forum in conjunction with the Inter-American Development Bank. This annual meeting is similar to CLPC meetings, except that the topics addressed speak to the Latin American development experience. Recent conferences have focused on issues such as interactions between antitrust and sector regulators, cartels, competition advocacy, and mergers. The Ibero-American Competition Forum is a trans-Atlantic initiative on competition policy spearheaded by the Latin countries of the European Union, the Portuguese Autoridade da Concorrência and the Spanish Tribunal de Defensa de la Competencia, with the Spanish- and Portuguese-speaking countries of Latin America. Since 2002, Ibero-American Competition Forum holds an annual meeting of agency heads and other senior officials to discuss trends in antitrust and enforcement strategies as part of discussions of case studies on issues such as abuse of dominance and mergers. It also holds an annual Ibero-American School for Competition Defense to improve agency level capacities.

The ICN is a global forum of antitrust agencies and non-governmental advisors founded in 2001. It has significant developing world participation. In addition to conferences and workshops, it prepares training manuals and templates to assist in the implementation of antitrust better practices. A number of Latin American countries have been active in ICN leadership. Mexico's agency chief is the former head of the ICN, and Mexico remains a member of the ICN steering committee. Mexico, Brazil, Jamaica, and Chile head a number of subgroups within various working groups such as cartels and competition policy implementation. ICN work has focused on mergers, cartels, competition policy implementation, sector regulation, and unilateral conduct. Thus far, the ICN has had success in shaping and implementing antitrust norms in mergers and cartels.

In some circumstances, such as in the day-to-day increase in cooperation, norm creation, and learning, it is difficult to quantify how much soft law organizations have aided norm diffusion to Latin American agencies. Moreover, it may be difficult to resolve some of the causation or endogeneity issues inherent in a claim about the strength of soft law organizations in implementing norms that lead to higher quality enforcement efforts. Anecdotally, all antitrust officials to whom I spoke suggested that the soft law interaction has increased the quality of their knowledge, the agency's decision-making, and the prioritization of enforcement and non-enforcement work. In some cases, we can point to specific public successes of soft law

159. In recent years, Mexico has become a full OECD member, and for purposes of competition policy issues, Argentina and Brazil have observer status.

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organizations. The ICN Recommended Practices for Merger Notification and Review Procedures were highly influential in the Brazilian agencies' redesign of their merger review system to standards in line with these recommended practices.[160] These recommended practices also shaped some of the proposed legislative changes in Brazilian merger control, as did the OECD peer review of Brazilian antitrust in 2005.[161] Similarly, ICN work in cartel leniency helped shape Brazilian regulations in this area.[162] In Chile, ICN work has helped to build support for an amendment to Chile's competition law to expand the investigatory power of the antitrust agency.[163] In El Salvador, the ICN has helped to partner the new Salvadorian antitrust agency with the Brazilian agencies to help the Salvadorian agency with mentoring. Among countries in the region, many have undertaken reviews of their merger control procedures based on ICN recommended practices.[164]

d. The symbolic value of chapters explains their inclusion.

An understanding of a contract as a ceremonial tool suggests that the importance of the competition policy chapter is in its form.[165] Even if there is no formal enforcement of PTA competition policy chapters through adjudication, these chapters may have power through symbolic meaning. This symbolism signals a certain reputational and branding effect about the importance of competition policy to a country's economy.[166] Symbolism may help to shape norms of competition within a country.[167] Many of the PTAs

160. Int'l Competition Network [ICN], *Implementation of the ICN Recommended Practices for Merger Notification and Review Procedures* 9 (Apr. 2005), *available at* http://www.internationalcompetitionnetwork.org/media/archive0611/050505Merger_NP_ImplementationRpt.pdf.

161. The review can be found at OECD and Inter-American Development Bank [IDB], *Competition Law and Policy in Brazil: A Peer Review* (2005) (*prepared by* Jay Shaffer), *available at* http://www.oecd.org/dataoecd/12/45/35445196.pdf.

162. Maria Coppola Tineo, *The International Competition Network: An Update for the Americas*, 2008 GLOBAL COMPETITION REV. (SPECIAL REPORT: THE ANTITRUST REVIEW OF THE AMERICAS) 5, *available at* http://www.globalcompetitionreview.com/ara/02_icn.cfm.

163. *Id.*

164. J. William Rowley & A. Neil Campbell, *Implementation of the ICN's Recommended Merger Practices: A Work-in-(Early)-Progress*, ANTITRUST SOURCE, July 2005, *available at* http://www.abanet.org/antitrust/at-source/05/07/Jul05-Rowley7=28f.pdf.

165. Roger Friedland & Robert R. Alford, *Bringing Society Back In: Symbols, Practices, and Institutional Contradictions*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 242–47 (Walter W. Powell & Paul J. DiMaggio eds., 1991). *See generally* Barry M. Staw & Lisa D. Epstein, *What Bandwagons Bring: Effects of Popular Management Techniques on Corporate Performance, Reputation, and CEO Pay*, 45 ADMIN. SCI. Q. 523 (2000).

166. On branding, see generally Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981).

167. On symbolism and norms, see generally John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 341, 344 (1977); James D. Westphal, Ranjay Gulati & Stephen M. Shortell, *Customization or Conformity? An Institutional and*

between purely Latin American countries have similar commitments to those found in PTAs between Latin Americans countries and the United States or the EU. An agreement takes on the legitimacy of ritual as a signal to other countries that a country plays by similar rules—rules based on norms of competition.[168]

i. Symbolism to Foreign Investors

Regulation such as antitrust may be a signal to foreign investors. A potential foreign investor would prefer a competitively neutral business environment with easy entry and exit and consistency in regulation. To create this regulatory consistency, antitrust must create a credible commitment to ensure enforcement against anticompetitive behavior.[169] Competition policy chapters may be a signal of a credible commitment to potential foreign investors that a country is market-oriented and pro-investment.[170] A comparison with another area of regulatory liberalization explains how international commitments may send a signal to investors of credible enforcement within a country. In the investment treaty context, empirical work suggests that developing world countries sign bilateral investment treaties (BITs) because of the competition with other developing world countries for foreign direct investment. Countries are more likely to sign such agreements when their competitors have done so.[171] This may also occur in the competition policy context. If one goal of a trade agreement is to encourage foreign direct investment, a country may be more willing to add a competition policy chapter to its PTAs if rival countries for investment are doing so.

There are differences between BITs and competition policy chapters in PTAs. The first is that BITs are binding. The second is that anecdotal evidence suggests that competition policy chapters do not seem to drive country behavior, nor even antitrust agency behavior. However, even with only symbolic value, competition policy chapters may be enough to signal

Network Perspective on the Content and Consequences of TQM Adoption, 42 ADMIN. SCI. Q. 366 (1997).

168. This relationship involving trade agreements is similar to isomorphism in contractual language. *See* D. Gordon Smith & Brayden G. King, *Contracts as Organizations* 37–40 (Univ. of Wis. Legal Studies Research Paper Series, Paper No. 1037, 2007).

169. *See* Brian Levy & Pablo T. Spiller, *The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation*, 10 J.L. ECON. & ORG. 201, 201 (1994).

170. On the ability to signal behavior, see generally Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983); David S. Scharfstein & Jeremy C. Stein, *Herd Behavior and Investment*, 80 AM. ECON. REV. 465 (1990).

171. *See* Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 INT'L ORG. 811, 811, 817 (2006).

a credible commitment to uphold antitrust in a way that is both substantively predictable and economically sound for foreign firms. How much this symbolism explains foreign investment behavior remains unknown. Sophisticated multinational firms will hire counsel to explain the PTAs to them. The first thing that counsel would tell their clients is that there is no binding effect to competition policy chapters. However, the mere existence of the chapter may provide firms with leverage in negotiations with governments as a symbol of a commitment to economic liberalization.

ii. Symbolism to Domestic Constituencies

Symbolism may be the appropriate explanation for the power of PTA competition policy chapters, but the symbolism may not be meant for foreign investors; rather, the symbolism may be meant for domestic consumption. Symbolic competition policy chapters may have an impact if they signal to domestic legislators and the population as a whole the importance of regulatory liberalization and country competitiveness. That is, competition policy PTAs may have a signaling effect within government, telling the public at large that the government views such policies as important.[172] In this manner, PTAs support domestic changes and institutions,[173] and may be doing so in the competition policy context.[174] If so, the inclusion of non-binding competition policy provisions may be an attempt on the part of the executive branch that leads trade agreement negotiations to instill a competition culture within the other branches of government and non-government stakeholders in antitrust.

172. *See* EDITH BROWN WEISS, STEPHEN C. MCCAFFREY, DANIEL BARSTOW MAGRAW, PAUL C. SZASZ & ROBERT E. LUTZ, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 190 (1998) (Compliance with non-binding agreements may "be due to a mere expectation of compliance expressed by other states and by the general public (including their own citizens) with respect to precepts that a government has helped to negotiate and include in an instrument adopted with the concurrence of its representatives in an international organ.").

173. *See* Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 244 (2000).

174. This assumes that a credible signal is being sent. Take the example of NAFTA. NAFTA played a critical role in fomenting increased foreign direct investment into Mexico and exports from Mexico to other NAFTA members. Juan Carlos Moreno-Brid, Pablo Ruiz Nápoles & Juan Carlos Rivas Valdivia, *NAFTA and the Mexican Economy: A Look Back on a Ten-Year Relationship*, 30 N.C. J. INT'L L. & COM. REG. 997, 998 (2005). The Mexican antitrust agency, the Comisión Federal de Competencia (CFC) took shape at the same time as NAFTA and barely preceded the signing of NAFTA (in part so that Mexico could claim that the agency preceded the agreement). The CFC has been relatively successful in creating a more competitive business environment in Mexico. OECD, *Regulatory Reform in Mexico: Enhancing Market Openness Through Regulatory Reform* 6 (1999) (*prepared by* Denis Audet).

The legitimacy of international agreements helps interest groups pursue their policy goals domestically.[175] Antitrust is a law of general applicability. In the case of competition policy chapters, interests that would support such chapters are diffuse. Consumers (whether firms or individuals) throughout the economy benefit from the enforcement of competition policy. However, interests that might oppose competition policy (monopolists and cartel members) are more concentrated and have fewer coordination problems.[176] The symbolic inclusion of competition policy within PTAs may create domestic legitimacy and assist antitrust agencies to pursue their competition-enhancing mission. It also provides an excuse to push for reform in a domestic context.

Non-binding provisions provide a general means for domestic constituencies to view their own antitrust agencies and their capacities on their own as regulators. It also allows domestic audiences to think about the relative strengths of antitrust enforcement vis-à-vis other forms of regulation. For example, there may be a sense that antitrust agencies are better equipped than sector regulators (IP, telecom, energy) to avoid political capture by interest groups.[177] This could explain why sector regulation has dispute settlement, but not antitrust. A second rationale may be that antitrust is more transparent and is based more on economic reasoning than other areas of economic regulation.[178] As such, antitrust regulation is more predictable (and potentially neutral) for foreign investors. This suggests that public choice concerns of capture within antitrust may be less severe than that in other domestic institutions. Countries may choose domestic antitrust in conjunction with soft law organizations over hard law, the better to preserve prosecutorial discretion and to limit public choice concerns at the international level. Antitrust agencies have better information than trade ministries on whether or not to bring cases through PTA adjudication that may be manipulated by interest groups that want to overrule domestic antitrust.[179] A third element to the public choice view of the need for bind-

175. *See* Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 510–11 (2004).

176. On rent seeking and collective action problems generally, see MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

177. *See* Dennis W. Carlton & Randal C. Picker, *Antitrust and Regulation* 2 (Univ. of Chi., John M. Olin Law & Econ. Working Paper, Paper No. 312, 2006).

178. *See generally* McChesney, *supra* note 39, at 1407 (arguing that the Chicago School won the antitrust debate).

179. This is not to suggest that antitrust is the best institution. Rather, it is better than the other institutional alternatives. Even with its economics-based reasoning, antitrust operates within a world of uncertainty. *See* Ken Heyer, *A World of Uncertainty: Economics and the Globalization of Antitrust*, 72 ANTITRUST L.J. 375, 379 (2005) ("In dealing with antitrust issues, even economic theory does not have all the answers and probably never will.").

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ing adjudication for sector regulation may be that sector regulation may be inadequate, but antitrust may not be able to reach anticompetitive conduct in the regulated sector because of explicit or implied immunities to antitrust.

e. *Fear of an Adverse Outcome*

One hypothesis for the lack of dispute settlement in more recent agreements may be that a consequence of the use of dispute settlement in past competition policy led to bad outcomes. This could explain a reluctance to include the provisions in other agreements. Thus far, there has been only one fully litigated competition policy case under a PTA that is publicly available. The recently decided *United Parcel Service v. Canada* involved an arbitration claim against the government of Canada by UPS for violations of the competition policy provisions of NAFTA. *United Parcel Service* limited the potential applicability of competition policy regarding state monopolies and state enterprises provisions that are included in competition policy chapters. The *United Parcel Service* decision addressed in part whether NAFTA's competition policy chapter imposed an obligation on the parties to limit anticompetitive behavior due to the state designation of Canada Post as a monopoly. The Tribunal found that no such obligation existed. Under a trade law analysis, the use of Canada Post's infrastructure for its competition services (such as express delivery where it competed with UPS) were not made in the exercise of Canada's government authority and had no basis in customary international law.[180]

4. Cooperation Provisions

One important question to an analysis of competition policy chapter provisions is whether PTAs create cooperation between antitrust agencies.[181] In countries in which information sharing is not permitted under domestic laws, PTAs do not provide a formal mechanism to create domestic legislative change to allow for this type of closer cooperation. When

180. *United Parcel Serv. of Am., Inc. v. Canada*, 19 WORLD TRADE & ARB. MAT'LS. 107, 148 (ISCID Arb. 2007), *available at* http://investmentclaims.com/decisions/UPSMeritsAward24May2007.pdf.

181. The EU competition chapters of PTAs focus on cooperation. In the context of the WTO negotiations, the EU took the view that WTO dispute settlement should only apply to the issue of whether or not domestic competition legislation complied with a number of multilaterally agreed core principles. *See* Ignacio Garcia Bercero & Stefan D. Amarasinha, *Moving the Trade and Competition Debate Forward*, 4 J. INT'L ECON. L. 481, 492 (2001). Cooperation provisions were considered to be voluntary in nature and not subject to dispute settlement. Other countries that included PTAs and who supported the EU position at the WTO may have wanted to include cooperation provisions for similar reasons.

PTAs include cooperation provisions, as nearly all do, what purpose does this serve? It may institutionalize greater cooperation where no such cooperation existed prior to the PTA.[182] What remains unclear is how much agency-to-agency cooperation needs to be formalized in a PTA. This is particularly true when the PTA does not provide mechanisms to force compliance. If the PTA serves an impetus to increase cooperation informally between agencies, it may be worth the cost of including such provisions even if there is no binding dispute settlement. Many agencies have specialized competition agreements for cooperation, which flesh out more general provisions within PTAs. Perhaps some of these provisions may have a greater effect than do the more general PTA provisions. However, these specialized agreements have high transaction costs in terms of time and staff resources.

PTA cooperation provisions may be viewed as norm-creating provisions to support a legal framework. Without these PTAs, some other countries, especially those in the civil law tradition, feel they would not have a proper basis to cooperate. Additionally, it plays an intangible role as a catalyst. Because the agreement exists, agencies might be more willing to enforce their laws, cooperate with each other, and permit their officials to speak with each other at conferences. Agencies may want closer cooperation and information sharing with sister agencies in situations in which there are cross-border effects, or even to gain insights for handling similar types of cases.

Agency level cooperation may be formalized, but at a sub-state level between antitrust agencies.[183] A number of agencies have signed bilateral cooperation agreements with each other. These agreements may include notification, comity, and information exchange provisions. Such agreements also may contain consultation provisions to resolve enforcement issues and to cooperate where feasible in both policy and legal matters. A bureaucratic politics model may explain why there has been relatively more action in antitrust cooperation agreements than in competition chapters in PTAs. The cooperation agreements achieve everything the agencies need to better do their jobs. Such agreements will tend to operate below the political radar, both in terms of inter-agency conflict over negotiating priorities and in terms of eliminating the need for legislative approval afterwards. This reduces the transaction costs across jurisdictions, and would require

182. This may particularly be the case for informal contacts and cooperation between the agencies. *See* Peter Holmes, Anna Sydorak, Anestis Papadopoulos & Bahri Özgür Kayali, *Trade and Competition in RTAs: A Missed Opportunity?*, *in* UNCTAD, *supra* note 65, at 66–78.

183. The idea of formalized cooperation agreements is itself the product of soft law harmonization. The OECD first recommended competition policy cooperation agreements in 1967.

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that an agency talk to a sister agency that shares similar values rather than attempt to increase cooperation through third parties such as trade ministries.

Some of the closest cooperation may result not from any formal agreement, but from relationships that are built up among enforcers who interact at international meetings. Such informal cooperation relationships also may exist when there is significant interaction due to the amount of merger or cartel activity between two jurisdictions. All of these things may lead to deeper cooperation. Moreover, the network of agreements together contributes to creating international norms that also influence how agencies without agreements can interact. For example, they create a culture of cooperation and ensconce the principle of comity. Increased ties allow for a long-term institutional memory that facilitates cooperation as staffs and agency leadership change over time.

One hypothesis may be that the push for cooperation provisions in PTAs comes from international business, particularly in the areas of merger control and cartel investigation. From a risk management perspective, potentially merging firms want increased business certainty about whether and when to file merger filings and about the dynamics of coordinating merger review across countries. Merger control across jurisdictions leads to transaction costs and uncertainty for the merging firms.[184] International business wants increased agency cooperation to streamline and harmonize procedures and operational matters for mergers. Coordinating remedies for mergers also provides impetus on the part of agencies to increase cooperation. To a lesser extent, the same can be said about cartels. Potential violators and their counsel may want better coordination among agencies so that the deal they reach can be global. As agencies may offer leniency to different parties across jurisdictions, a first-to-file for leniency across jurisdictions may encourage firms to be the first to ask for leniency, the better to reduce their total criminal and civil liabilities throughout Latin America.

5. Antitrust to Replace Anti-dumping

For many years there have been calls to replace anti-dumping with antitrust. Given the increasing proliferation of anti-dumping around the world, often these solutions suggest that the WTO should ban anti-dumping. The more countries that eliminate anti-dumping in their PTAs, the more pressure is created at the WTO level for the global elimination of

184. KY P. EWING, JR., COMPETITION RULES FOR THE 21ST CENTURY: PRINCIPLES FROM AMERICA'S EXPERIENCE 38, 40–45 (2d ed. 2006); *see* F.M. SCHERER, COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY 7, 102–05 (1994).

anti-dumping. PTA elimination might serve as a model for the elimination of anti-dumping at the WTO. If one purpose of a PTA is to suggest an aspiration of where law and policy should be as a form of agenda setting (rather than an agreement of the status quo), the finding that only one competition policy chapter eliminates the use of anti-dumping suggests that at the global level, the abolition of anti-dumping is unlikely.

Anti-dumping is in tension with antitrust and international trade liberalization.[185] Anti-dumping statutes promote competitor welfare rather than consumer welfare.[186] The effect of anti-dumping may be to facilitate collusion between domestic and foreign firms.[187] Another use of anti-dumping is by domestic cartels to shield them from foreign competitors.[188] Antitrust applies a more economically rigorous analysis to claims of predation than anti-dumping.[189] Replacing an anti-dumping regime with one of antitrust can ensure effective remedies against true cases of anti-dumping predation.[190]

Only one PTA, Canada-Chile, addresses anti-dumping concerns in its competition policy chapter. This provision involves western hemispheric countries with different sizes of economies and levels of economic development. Interestingly, this provision affects two countries with very little bilateral trade. It has not been replicated in any subsequent free trade agreements in the region, including other Canadian and Chilean PTAs. Discussions with some of the negotiators of the agreement from both Can-

185. Aditya Bhattacharjea, *The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective*, 9 J. INT'L ECON. L. 293, 300 (2006).

186. Alan O. Sykes, *Antidumping and Antitrust: What Problems Does Each Address?*, *in* BROOKINGS TRADE FORUM 1998, at 29–30 (Robert Z. Lawrence ed., 1998); N. Gregory Mankiw & Phillip L. Swagel, *Antidumping: The Third Rail of Trade Policy*, 84 FOREIGN AFF. 107, 111 (2005) ("Since the Antidumping Act of 1921, there has been no requirement to show that dumping is predatory; one need only prove that prices are either below cost or below the price charged for a similar item in a firm's home market.").

187. *See* Thomas J. Prusa, *Why Are So Many Antidumping Petitions Withdrawn?*, 33 J. INT'L ECON. 1, 2–3 (1992). *See generally* Robert W. Staiger & Frank A. Wolak, *Measuring Industry Specific Protection: Antidumping in the United States*, BROOKINGS PAPERS ON ECON. ACTIVITY: MICROECONOMICS, 1994, at 51–118; James E. Anderson, *Domino Dumping II: Anti-dumping*, 35 J. INT'L ECON. 133 (1993).

188. *See* ULRIKE SCHAEDE, COOPERATIVE CAPITALISM: SELF-REGULATION, TRADE ASSOCIATIONS, AND THE ANTIMONOPOLY LAW IN JAPAN 85–86 (2000). *See generally* Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801, 816–18, 822 (2004).

189. *See, e.g.*, Einer Elhauge, *Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory—and the Implications for Defining Costs and Market Power*, 112 YALE L.J. 681, 684 (2003); Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 YALE L.J. 941 (2002).

190. Bernard M. Hoekman & Petros C. Mavroidis, *Dumping, Antidumping and Antitrust*, 30 J. WORLD TRADE 27, 28–30 (1996); Bernard Hoekman, *Free Trade and Deep Integration: Antidumping and Antitrust in Regional Agreements* 1 (World Bank Policy Research Working Paper, Paper No. 1950, 1998), *available at* http://ssrn.com/abstract=620582.

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ada and Chile suggest an interesting backstory. Canada first made the suggestion to remove anti-dumping. Chile did not foresee using anti-dumping against Canada. Consequently, Chilean negotiators did not mind giving up such provisions. There was no strong business lobby in either country to keep anti-dumping in the agreement.

Canada, try as hard as it might, could never successfully convince another country to give up its anti-dumping. For example, it floated the idea to abolish anti-dumping to the United States during negotiations over the U.S.-Canada FTA. The United States quickly dismissed the idea. A second hypothesis (one that has received less support in my discussions with negotiators) is that at the time of the Canada-Chile FTA, it was thought that Chile would eventually join NAFTA. The elimination of anti-dumping between Canada and Chile would create facts on the ground, the better to try for a three-to-one negotiating position against U.S. support of anti-dumping in an enlarged NAFTA. Some within Canada's Department of Foreign Affairs and International Trade thought such an approach would work. However, Mexico was resistant during post-NAFTA talks at the NAFTA 1504 Working Group in 1995 and 1996. Mexico hinted to Canada rather directly that such a strategy would never work, even if Mexico came on board as to the elimination of anti-dumping.

The small number of PTAs with such provisions makes an approach to reduce anti-dumping with competition policy a long term proposition at best, as elimination of anti-dumping by the WTO is not a politically viable strategy.[191] There can be no global agreement without the United States on anti-dumping. However, the United States has legislation in place that requires the President to report to Congress within one hundred eighty days before acceptance of any potential trade agreement, if such an agreement could impact existing anti-dumping laws.[192] Because of the political influence of interest groups in the United States that use anti-dumping for rent seeking purposes, it remains unlikely that proposals for the elimination of anti-dumping will come from the U.S. As other countries embrace anti-dumping, eliminating anti-dumping will become more difficult.[193] The embrace in recent years by Latin American countries of anti-dumping may explain why no other Latin American PTA replaces anti-dumping with

191. Indeed, anti-dumping might be a necessary part of the political tradeoff that generally allows for the creation of trade agreements. Without anti-dumping, certain key sectors might not support trade deals that benefit the economy overall. J. MICHAEL FINGER & JULIO J. NOGUÉS, SAFEGUARDS & ANTIDUMPING IN LATIN AMERICAN TRADE LIBERALIZATION: FIGHTING FIRE WITH FIRE (2006).

192. 19 U.S.C. § 3804(d)(3)(A) (2000 & Supp. III 2003).

193. *See* Sykes, *supra* note 186, at 2 (describing the public choice issues behind the use of anti-dumping).

antitrust. The Chile-Canada PTA was a failed experiment, as evidenced by the fact that no subsequent PTAs within Latin America include such provisions.

6. Why do chapters look the same across agreements?

An important finding from the data is that most agreements mirror each other in what they include and do not include. Of twenty-three substantive provisions coded (dropping the "year" category), sixteen of twenty-four agreements were in the same quartile for either inclusion or exclusion of the same provisions. Overall, agreements tend to look similar across countries, even when one subset of countries involved do not have agreements with other subsets. This helps to explain why most PTAs lack provisions for transparency or due process—even though these are subjects are so non-objectionable that every country generally pushes for their inclusion in trade agreements in other chapters.[194] Both economic and organizational theory literatures provide potential explanations for this pattern.

Within the business organization literature, DiMaggio and Powell describe this process of imitation as one of institutional isomorphism.[195] They identify three primary types of isomorphism: coercive, mimetic, and normative.[196] In coercive isomorphism, an organization creates structures or procedures based on coercive factors, such as legal requirements. The creation of competition policy at the domestic level may have such a coercive element.[197] External pressure may create conditions that impose policies on countries that might otherwise not want them.[198] In some cases, for example, loan conditionality from multilateral lending institutions required the implementation of a competition law. A similar phenomenon may be in place to the extent that competition policy chapters in PTAs require that domestic agencies be created or take on certain forms or functions.[199]

194. If there is consensus on any issue of government policy, it is fair to say that consensus exists that transparency and due process are worthwhile goals.

195. *See generally* DiMaggio & Powell, *supra* note 170.

196. In addition to institutional isomorphism, the process of competitive isomorphism leads to greater homogeneity. Competitive isomorphism posits that the competitive process will lead to the most efficient solution. *See generally* Michael T. Hannan & John Freeman, *The Population Ecology of Organizations*, 82 AM. J. SOC. 929, 939–46 (1977).

197. David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 25 (2005) ("Top-down explanations discuss the advance of regulatory reforms as a response of national policy makers to exogenous (and often common) pressures from various international sources on national political communities.").

198. *See generally* David P. Dolowitz & David Marsh, *Learning from Abroad: the Role of Policy Transfer in Contemporary Policy-Making*, 13 GOVERNANCE 5, 6–7 (2000).

199. The U.S.-Singapore FTA set out a requirement that Singapore adopt a competition law. In a footnote, the chapter states, "Singapore shall enact general competition legislation by January 2005, and shall not exclude enterprises from that legislation on the basis of their status as government enter-

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Overall, the number of agreements in which there are such commitments in trade agreements for the creation of competition laws is rather small. Most of antitrust laws predate the PTAs in which there are competition policy chapters.

Mimetic isomorphism suggests that organizations mimic other organizations because of uncertainty. Mimetic isomorphism may be a function of incomplete information. Those organizations mimicked are ones viewed as more successful or legitimate.[200] The more frequent the practice, the more likely such a practice will be imitated by others.[201] For example, the contracts setting work by Suchman explores how over time venture capital contracts in Silicon Valley began to look similar to one another.[202] Applying mimetic isomorphism to trade agreements, the purpose of the inclusion of a competition policy chapter may serve as a way to model agreements based on those of the United States or the EU. Once the United States and the EU began to include non-binding competition policy chapters in their PTAs, other countries may have taken on the same form of agreement because of the belief that U.S. and EU views on inclusion signaled legitimacy for competition policy chapters. NAFTA was the first of the current wave of PTAs to include a non-binding competition policy chapter, and the EU soon followed by including competition policy chapters in its association agreements. Other countries may have followed the U.S. or EU model of including such chapters.

Under normative isomorphism, an organization adopts structures or procedures because such structures or approaches are assumed to be superior based on prevailing thought. The better the idea, the greater the likelihood that it will be adopted and win out over alternative ideas.[203] The weakness of this approach is that as norms take hold, policies or organizational structures follow the norm, even though the norm may no longer be

prises." Free Trade Agreement, U.S.-Sing., art. 12.2.1, n.12-1, May 6, 2003, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf.

200. *See* Scharfstein & Stein, *supra* note 170.

201. *See* Pamela R. Haunschild & Anne S. Miner, *Modes of Interorganizational Imitation: The Effects of Outcome Salience and Uncertainty*, 42 ADMIN. SCI. Q. 472, 474–75 (1997) (providing a literature review on the empirical studies in frequency-based imitation). *See generally* Joseph Galaskiewicz & Stanley Wasserman, *Mimetic Processes within an Interorganizational Field: An Empirical Test*, 34 ADMIN. SCI. Q. 454, 454–56 (1989).

202. Mark C. Suchman, On Advice of Counsel: Law Firms and Venture Capital Funds as Information Intermediaries in the Structuration of Silicon Valley (1994) (unpublished Ph.D. dissertation) (on file with Crown Library, Stanford University).

203. *See* Hannan & Freeman, *supra* note 196, at 933.

the most efficient solution as economic thinking changes.[204] Antitrust norms do not require dispute settlement because those established norms focus on the harmonization of best practices on cartels and mergers. In the areas of cartels and mergers, the primary issue is one of private restraints rather than government restraints. Because trade law is based on government restraints, it is not an effective tool to address the primary areas in which cooperation and coordination between agencies would be beneficial. Antitrust norms do not seem to be diffused primarily from existing formal agreements. Rather, norm diffusion based on repeat iterations seems to be occurring through soft law antitrust institutions and informal agency-to-agency cooperation. More formalized institutions with trade remedies might create the possibility of formal legal battles in which agencies would have to side with their countries. This could create ill will between agencies and hamper what has become a golden age of increased cooperation, coordination, and norm diffusion in antitrust.

The economics literature also suggests that over a given time period, competitors will imitate successful strategies.[205] This is a process of firm evolution, where firms will evolve towards the perceived best strategies.[206] Often, this is a process that occurs through routines.[207] Contractual provisions may take on imitation strategies similar to those of an organizational structure. If competition policy chapters in PTAs are perceived to be successful because of what they cover and how they are used, the chapters and provisions therein will be imitated in other agreements and by other parties. The routine negotiation of agreements and the easy access to copies of existing agreements help to create the notion of what makes for the most effective agreements. As "successful" competition policy chapters emerge, this increases the likelihood that other chapters will them as a template. The

204. *See* MICHAEL T. HANNAN & GLENN R. CARROLL, DYNAMICS OF ORGANIZATIONAL POPULATIONS: DENSITY, LEGITIMATION, AND COMPETITION (1992); MICHAEL L. TUSHMAN & CHARLES A. O'REILLY III, WINNING THROUGH INNOVATION: A PRACTICAL GUIDE TO LEADING ORGANIZATIONAL CHANGE AND RENEWAL 29–35 (rev. ed. 2002).

205. *See, e.g.*, Oliver E. Williamson, *The Economics and Sociology of Organization: Promoting a Dialogue*, *in* INDUSTRIES, FIRMS, AND JOBS: SOCIOLOGICAL AND ECONOMIC APPROACHES 182–83 (George Farkas & Paula England eds., 1988); Armen A. Alchian, *Biological Analogies in the Theory of the Firm: Comment*, 43 AM. ECON. REV. 600 (1953); Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211 (1950); Douglas Gale & Robert W. Rosenthal, *Experimentation, Imitation, and Stochastic Stability*, 84 J. ECON. THEORY 1 (1999); Michael C. Jensen & William H. Meckling, *Rights and Production Functions: An Application to Labor-Managed Firms and Codetermination*, 52 J. BUS. 469 (1979).

206. There is related literature in how technological innovation impacts diffusion. *See, e.g.*, EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS 12–17, 138–48 (3rd ed. 1983); Zvi Griliches, *Hybrid Corn: An Exploration in the Economics of Technological Change*, 25 ECONOMETRICA 501 (1957).

207. *See* RICHARD R. NELSON & SIDNEY G. WINTER, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE 14–19 (1982).

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imitation approach leads to certain potential weaknesses, however, as organizations may not implement chapters effectively and may become locked into an inefficient approach because of path dependence.[208] If, at a future point in time, it turns out that such an evolutionary change towards a particular agreement structure may no longer be the most efficient, the imitation approach may limit the opportunity to correct the structure in place without a new agreement or revisions to the competition policy chapters.

CONCLUSION

This article analyzes how Latin American countries have sought to address issues of law and development within one particular regulatory field that supports a market-based economic system—antitrust. In an increasingly global market, given various domestic institutional malfunctions based on capacity constraints, Latin American countries have increasingly pushed for international solutions to strengthen their domestic institutions. An emphasis in recent years has been on the inclusion of competition policy chapters in free trade agreements. In analyzing Latin American free trade agreements from 1992–2006 across twenty-four types of provisions in competition policy chapters, the main finding of this article is that unlike other areas of law covered by international trade agreements, antitrust chapters are non-binding, specifically in relation to the traditional core of antitrust activities such as mergers, monopolization/dominance, and cartels.

A number of factors may explain why, given this non-binding nature, countries include such chapters in their PTAs, even if competition policy chapters have only symbolic value. These factors include the potential symbolic value of such agreements, the ability of these agreements to facilitate relationships across antitrust agencies, the signal that the agreements may send to domestic constituencies, and the belief that antitrust agencies need less international intervention than other substantive areas of law because of the strength of soft law international antitrust institutions. These findings and conclusions suggest a need for additional scholarship to flesh out the various rationales for these agreements. As a policy matter, if creating these agreements comes at a low cost, their symbolic value in promoting pro-competitive reform and a competition culture at the domestic level outweighs the costs of negotiating such agreements. If, on the other hand, agencies spend significant resources on negotiating these provi-

208. Richard N. Langlois, *Economic Change and the Boundaries of the Firm*, 144 J. INST. & THEORETICAL ECON. 635, 650–55 (1988).

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sions—resources that they might otherwise spend on improving agency capacities, cooperating with sister agencies directly or through soft law organizations, or in identifying and bringing good cases—the costs of competition policy chapters outweigh any benefits that these symbolic chapters may provide.

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APPENDIX I. CODING OF PROVISIONS TO PTAS

Some provisions are general in their application. "Year" means the year in which the parties signed the trade agreement. "Competition laws at time of agreement" refers to whether, at the time of the signing of the PTA, all signatories had a competition law. "Adopt, maintain, apply competition measures" broadly refers to provisions that require parties to have a structure in place to adopt, maintain, and apply competition measures domestically.

A number of the provisions refer to cooperation-related issues. "General cooperation" is a broad requirement that parties cooperate with each other. "Notification" provisions create a requirement for the parties to notify one another of enforcement that affects both parties. "Evidence and/or information exchange" relates to provisions that facilitate a cooperative exchange of information between antitrust agencies. "Consultations" apply to cooperation provisions and provide for the parties to consult with each other on matters which arise under the PTA. "Negative comity" provisions refer to situations in which one country's antitrust agency considers the interests of the other party in making an enforcement decision. "Positive comity" provisions permit for one party's antitrust enforcer to have the other take action against conduct that affects the interests of the requesting party.[1]

Some provisions refer to specific forms of anticompetitive conduct that competition policy chapters may cover. "Anticompetitive agreements" are agreements among competitor firms which may result in harm to competition. "Abuse of dominance/monopolization" addresses behavior by firms that can use their dominant/monopoly position to monopolize a given market. "State aid/subsidies" refer to provisions that address issues of grants of public subsidies or aids that may negatively affect competition. "Mergers" are provisions that address anticompetitive mergers of firms. "State enterprises/state monopolies" provisions address those situations in which the government has designated monopolies in certain industries or sectors. It also reflects situations in which provisions exist for state enter-

1. In theory, positive comity agreements reduce incidents in which one jurisdiction seeks extraterritorial application of its antitrust law. They also increase enforcement efficiency by reducing agency duplication. Positive comity also may be utilized to reduce inconsistent remedies. Without positive comity, complainants may engage in forum shopping to look for the strictest jurisdiction. When this jurisdiction is not one in which there is a strong jurisdictional nexus to the underlying conduct, this may lead to inconsistent or inappropriate remedies.

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prises. The provisions within this category include mention of state monopolies and state enterprises, but do not distinguish between coverage and exemption from the agreement. These designations have their basis in trade law in GATT Article XVII, rather than antitrust law.

A number of provisions have a direct import from trade law. "Non-discrimination" includes most favored nation and national treatment principles of trade law. "Non-discrimination only for state enterprises/state monopolies" refers to those provisions that limit non-discrimination to specific provisions addressing state enterprises and/or state monopolies. "Due process" refers to provisions that address due process concerns such as fair, prompt, and effective resolution of disputes. "Transparency" provisions address concerns of openness and predictability. "Elimination of anti-dumping" provisions involve provisions that eliminate anti-dumping remedies between the parties and replace them with antitrust remedies that are based on harm to competition rather than harm to competitors. "Trade consultations" provide for consultations between the governments concerned in a potential dispute. "Binding dispute settlement" refers to an agreement's inclusion of third-party adjudication for disputes arising from potential violations of provisions under the competition policy chapter. "Dispute settlement outside of state enterprises/designated monopolies" examines whether agreements that have dispute settlement provisions cover antitrust violations (for example, mergers, unilateral conduct, and coordinated conduct) rather than competition policy provisions relating to state enterprises/designated monopolies.

Other provisions that appear at least once include "technical assistance/capacity building." These provisions articulate a need for increasing the capacity and effectiveness of the antitrust agencies covered under the agreement. "Antitrust immunities" refer to provisions that address exemptions or exceptions from antitrust for a particular sector, firm, or type of conduct. It does not distinguish between provisions that create immunities and those that limit immunities.

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APPENDIX II. LATIN AMERICAN PTA COMPETITION POLICY CHAPTER PROVISIONS

Agreement	Year	Competition laws at time of agreement	Adopt, maintain, apply competition measures	General cooperation	Notification	Evidence and/or information exchange	Consultations
Canada – Chile	1996	x	x	x	x	x	x
Canada – Costa Rica	2001	x	x	x	x	x	x
CARICOM – Costa Rica	2004	x		x			
Central America – Chile	2002			x			
Central America – Dominican Republic	1998		x	x			
Central America – Panama	2002		x	x			
Chile – EFTA	2003	x	x	x	x	x	x
Chile – Brunei – New Zealand – Singapore	2005	x	x	x	x	x	x
Chile – EU	2002	x	x	x	x	x	x
Chile – MERCOSUR	1996	x	x	x			
Chile – Mexico	1998	x	x	x	x	x	x
Chile – Peru	2006	x	x	x	x	x	x
Chile – South Korea	2003	x	x	x	x	x	x
Chile – U.S.	2003	x	x	x	x	x	x
Colombia – Mexico – Venezuela	1994	x	x	x			
EU – Mexico	2000	x	x	x	x	x	x
EFTA – Mexico	2000	x	x	x	x	x	x
Japan – Mexico	2004	x	x	x	x	x	x
Mexico – Israel	2000	x	x	x	x	x	x
Mexico – Uruguay	2003	x	x	x	x	x	x
NAFTA	1992	x	x	x	x	x	x
Panama – Taiwan	2003	x	x	x	x	x	x
Panama – Singapore	2006	x	x	x		x	x
Peru – MERCOSUR	2005	x	x				
Total	24	21	22	23	16	17	18

Agreement	Negative comity	Positive comity	Anticompetitive agreements	Abuse of dominance / monopolization	State aid / subsidies	Mergers	State enterprises / state monopolies
Canada – Chile				x	x		x
Canada – Costa Rica			x	x		x	x
CARICOM – Costa Rica							
Central America – Chile							x
Central America – Dominican Republic							x
Central America – Panama							x
Chile – EFTA			x	x			x
Chile – Brunei – New Zealand – Singapore			x	x			x
Chile – EU	x		x				x
Chile – MERCOSUR							
Chile – Mexico			x	x			x
Chile – Peru							x
Chile – South Korea	x			x			x
Chile – U.S.				x			x
Colombia – Mexico – Venezuela							x
EU – Mexico	x		x	x		x	
EFTA – Mexico		x	x	x		x	
Japan – Mexico	x	x					
Mexico – Israel							x
Mexico – Uruguay							x
NAFTA				x			x
Panama – Taiwan							x
Panama – Singapore			x	x		x	
Peru – MERCOSUR							
Total	4	2	8	11	1	4	17

Agreement	Non-discrimination	Non-discrimination only for state enterprises / state monopolies	Due process	Transparency	Elimination of anti-dumping	Trade consultations
Canada – Chile	x	x			x	
Canada – Costa Rica	x	x	x			x
CARICOM – Costa Rica						
Central America – Chile	x	x	x			x
Central America – Dominican Republic	x					x
Central America – Panama						
Chile – EFTA	x		x	x		
Chile – Brunei – New Zealand – Singapore	x					
Chile – EU	x			x		
Chile – MERCOSUR	x					
Chile – Mexico	x					
Chile – Peru						
Chile – South Korea				x		
Chile – U.S.			x	x		x
Colombia – Mexico – Venezuela						x
EU – Mexico						x
EFTA – Mexico						x
Japan – Mexico	x		x	x		
Mexico – Israel	x					
Mexico – Uruguay	x	x				
NAFTA	x	x				
Panama – Taiwan	x	x				
Panama – Singapore	x		x	x		x
Total	15	6	5	6	1	8

Agreement	Binding dispute settlement	Dispute settlement for substantive antitrust issues (mergers, monopolization, anticompetitive agreements)	Technical assistance / capacity building	Antitrust immunities
Canada – Chile				
Canada – Costa Rica	x[1]		x	
CARICOM – Costa Rica				
Central America – Chile	x			
Central America – Dominican Republic	x			
Central America – Panama	x			
Chile – EFTA				
Chile – Brunei – New Zealand – Singapore				x
Chile – EU			x	
Chile – MERCOSUR	x			
Chile – Mexico				
Chile – Peru			x	
Chile – South Korea			x	
Chile – U.S.	x			
Colombia – Mexico – Venezuela	x			
EU – Mexico	x[2]		x	
EFTA – Mexico				
Japan – Mexico			x	
Mexico – Israel	x[3]	x[3]		x
Mexico – Uruguay				
NAFTA	x			
Panama – Taiwan				
Panama – Singapore				
Peru – MERCOSUR	x			
Total	11	1	6	2

1. Only applicable on whether the parties fulfill agreement to consult once every two years.
2. For the cooperation mechanism only.
3. Only when there is no domestic recourse.

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APPENDIX III. LATIN AMERICAN PTAS THAT LACK COMPETITION POLICY CHAPTERS

Agreement	Year	Competition laws at time of agreement
Bolivia – MERCOSUR	1996	No
Bolivia – Mexico	1994	No
Chile – China	2005	No
Chile – Panama	2006	Yes
Costa Rica – Mexico	1994	Yes
Guatemala – Taiwan	2005	No
Mexico – Nicaragua	1997	No
Mexico – Northern Triangle (El Salvador, Guatemala, Honduras)	2000	No
Peru – Thailand	2005	Yes
U.S. – CAFTA-DR (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Dominican Republic)	2004	No
CARICOM – Dominican Republic	1998[1]	No
Colombia – Panama	1993	No

1. But sets up a Committee on Anti-Competitive Business Practices for which there is dispute settlement for a failure of the Committee to do its work.

APPENDIX IV. LATIN AMERICAN PTAS AND A COMPARATIVE ANALYSIS OF COMPETITION POLICY CHAPTERS WITH INTELLECTUAL PROPERTY AND SERVICES CHAPTERS

Agreement	IP dispute settlement	Services dispute settlement	Competition policy dispute settlement of any sort	Competition policy dispute settlement specific to core anti-trust issues
Canada – Chile	No chapter – IP not covered	x		
Canada – Costa Rica	No chapter – IP not covered	x	x[1]	
CARICOM – Costa Rica	No chapter – IP not covered	x		
Central America – Chile	No chapter – IP not covered	x	x	
Central America – Dominican Republic	x	x	x	
Central America – Panama	x	x	x	
Chile – EFTA	x	x		
Chile – Brunei – New Zealand – Singapore	x	x		
Chile – EU	x	x		
Chile – MERCOSUR	No chapter – use WTO coverage	No chapter – use WTO coverage	x	
Chile – Mexico	x	x		
Chile – Peru	No chapter – IP not covered	x		
Chile – South Korea	x	x		
Chile – U.S.	x	x	x	
Colombia – Mexico – Venezuela	x	x	x	
EU – Mexico		x	x	x[2]
EFTA – Mexico		x		
Japan – Mexico	No chapter – IP not covered	x		
Mexico – Israel	No chapter – use WTO coverage	No chapter – use WTO coverage	x	x[3]
Mexico – Uruguay	x	x		
NAFTA	x	x	x	

1. Only applicable on whether the parties fulfill agreement to consult once every two years.
2. For the cooperation mechanism only.
3. Only when there is no domestic recourse.

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Agreement (cont.)	IP dispute settlement	Services dispute settlement	Competition policy dispute settlement of any sort	Competition policy dispute settlement specific to core antitrust issues
Panama – Taiwan	x	x		
Panama – Singapore	No chapter – IP not covered	x		
CARICOM – Dominican Republic	x	x		
Bolivia – Mexico	x	x		
Chile – China	No chapter – IP not covered	No chapter – services not covered		
Chile – Panama		x		
Costa Rica – Mexico	x	x		
Guatemala – Taiwan	x	x		
Mexico – Nicaragua	x	x		
Mexico – Northern Triangle (El Salvador, Guatemala, Honduras)	x	x		
Peru – Thailand	No chapter – IP not covered	No chapter – services not covered		
U.S. – CAFTA-DR (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Dominican Republic)	x	x		
Colombia – Panama	No chapter – IP not covered	No chapter – services not covered		
Bolivia – MERCOSUR	No chapter – IP not covered	x		
Chile – MERCOSUR	x	x		
Peru – MERCOSUR	x	x	x	