There is general agreement that competition among firms enables consumers to enjoy freedom of choice, low prices, and good value for money, while at the same time promoting innovation and higher standards. On the national level, the need for regulation to prevent anticompetitive practices is, accordingly, widely accepted.

On the plane of international trade, the competition policy issues are more complex. Abuse of market power can span markets and national boundaries, and many countries lack a competition policy framework that would facilitate cooperation with other countries.

The inclusion of competition provisions in trade agreements is potentially beneficial—particularly for developing countries, which suffer disproportionately from cross-border anticompetitive practices. Competition law and policy inherently contribute to better balance between the rights of producers and protection for consumers and other members of society. A well-administered competition law will have positive spillover effects on the economy at large, not just the particular firms or groups that bring complaints.

The extent to which regional competition provisions in trade agreements can promote regional public goods and deal with market failures depends on the nature of the provisions and on their implementation and enforcement. A small group of countries has begun to develop cooperative practices and appears to be active in initiating such agreements. These are primarily developed countries with established national competition law, existing agencies, and a strong competition culture. In other regional competition regimes, such provisions are the beginnings of state-to-state practices that are likely to develop over time. The development and effective implementation of national law and policy regarding competition and consumer protection are essential complements to regional competition policy.

This chapter first discusses the economic case for including competition provisions in preferential trade agreements (PTAs) and the costs and benefits involved. It then surveys representative arrangements between countries in the global North and the global South and at differing stages of development. Finally, it analyzes the strengths and shortcomings of the several regional competition policy models and of specific agreements, explores questions of third-party discrimination and trade diversion, and looks at the practical implementation of the agreements.

The discussion leads to the conclusion that regional competition provisions can create an incentive for implementing national competition policy regimes, with a view toward locking in such policies, increasing foreign direct investment (FDI), and, in the case of North-South agreements, promoting technical assistance and learning by doing. All these interactions have the potential to generate beneficial regional public goods.

Competition Policy and Development: A Survey of the Literature

It is argued here that, in principle, PTAs can address market failures that national competition laws cannot and that they can offset, to some degree, the absence of an international regime. This conclusion is not self-evident. Even if it can be shown that optimal competition provisions in PTAs are beneficial, it does not follow that what has actually been negotiated is ideal. Nevertheless, the contention in this chapter is that existing competition provisions do have a potential for positive effects.

The desirability of competition is (mostly) taken for granted in advanced industrial economies. Some consensus exists that competition is good for economic development and that the natural selection process of the market cannot be entirely relied on to ensure that firms can enter and exit as freely as possible.

In developing countries, there are doubts about the ability of markets to function so as to deliver the gains from
competition. There is suspicion of strong competition, on the grounds that it will merely ensure the "survival of the fittest" and lead to dominance by large firms. Some developing countries, in their early period of industrialization, tried to limit the severity of competition, especially from imports, to protect their own enterprises. Only the most dogmatic market fundamentalist could deny that there are models in which monopoly capitalism emerges and circumstances in which it might prove beneficial. Examples can always be selected in which intensified competition went wrong, and economists need to be modest in urging the gains for development to be had from strong competition.

In fact, however, recent research does support the thesis that competition is good for development, both stimulating new business and benefiting consumers. Dutz and Hayri (1999), after surveying the existing empirical evidence and conducting a major cross-country study, found a strong correlation between long-run growth and effective enforcement of antitrust and competition policy. A recent study by the United Nations Conference on Trade and Development (UNCTAD) reviewed the literature and commissioned case studies around the world. The results (Brusick et al. 2004) broadly support the view that competition is good for development, and the authors argue that competition policy is very much complementary to other instruments for encouraging enterprise development.

Skeptics argue that although competition is desirable, the difficulties, expense, and skilled-staff requirements involved in making competition policy work effectively render it unlikely that developing countries will see much benefit from it. At best, the effort will be an expensive waste; at worst, it will present a further opportunity for regulatory capture, as incumbents or other potential losers use competition policy to frustrate rather than foster competition. We cannot rule out this result a priori. There is, however, considerable evidence that if governments are willing to let their competition agencies act, these bodies can be effective. Extensive case studies that are reported in CUTS (2003) and Brusick et al. (2004) corroborate the findings of Dutz and Hayri’s (1999) cross-sectional statistical analysis. The case studies suggest that competition policy can be made to work in developing countries to the benefit of both development and the consumer, at costs that, although not trivial, are modest in relation to the consumer savings from successful interventions. Dutz and Vagliasindi (2002) also find that effective enforcement of competition policy in transition economies is associated with more rapid entry of new firms. Competition policy offers more than just static gains from lower prices.

The international dimension of competition policy is clearly important to developing countries that are adversely affected by foreign firms’ anticompetitive behavior. Evenett, Levenstein, and Suslow (2001) show that even in globalized markets, cartels do not necessarily collapse rapidly of their own accord. Many cartels are based in developed countries, where their activities are legal under the laws of the exporting countries, as long as the effects are confined to foreign markets. Competition authorities in developed countries are largely forbidden to provide confidential information on cartel activity conducted abroad, without specific legal authority. U.S. and European Union (EU) authorities have traditionally considered themselves capable of addressing foreign anticompetitive practices that affect their own interests, through appeal to the effects doctrine. In practice, however, the difficulty and cost of obtaining evidence on the behavior of firms located in foreign jurisdictions can make it difficult to bring cases. As Philips (1998) has argued, without clear evidence of motivation and collusion, the burden of proof in cases based on overseas evidence can be very hard to sustain. An example is the 1988 case in which the European Court of Justice rejected, on appeal, the European Commission’s attempt to fine a cartel of foreign wood pulp producers for price-fixing (Vedder 1990). In the 1986 Matsushita v. Zenith case, the U.S. Supreme Court found cooperative conduct illegal under antitrust law, although the actions did violate antidumping rules (Belderbo and Holmes 1995).

In fact, the absence of international rules on mandating cooperation on competition policy enforcement increases the temptation to resort to antidumping rules. An international agreement on competition policy would not mean, however, that antidumping rules would be superseded. These rules are designed to cover far more types of behavior than does competition policy (see Bourgeois and Messerlin 1999; Sykes 1999) and have overtly protectionist motives.

The case for some form of international cooperation on competition policy is very strong unless one is skeptical of antitrust policy as such. The EU’s experience with international restrictive business practices has contributed to the belief that reduction of trade barriers alone is inadequate. It became clear that oligopolistic firms were able to divide EU markets after border barriers were lifted and that anticompetitive price discrimination could occur. Given the propensity of member states to protect their own national champions, the EU’s founders early on deemed a supranational competition policy necessary. Anderson and Jenny (2005, 67) observe,

In the 1990s, extensive evidence surfaced that international cartels are alive and flourishing in the “globalising” economic environment. Investigations conducted by the US Department of Justice, the European Commission, the
Canadian Competition Bureau and authorities in other jurisdictions revealed the existence of major cartels in (to cite but a few of many examples) the following industries: graphite electrodes (an essential input to steel mini-mill production); bromine (a flame retardant and fumigant); citric acid (a major industrial food additive); lysine (an agricultural feed additive); seamless steel pipes (an input to oil production); and vitamins.

Levenstein and Suslow (2001) argue that reductions of 20–30 percent in the prices of developing-country imports of products known to be affected by cartels would yield benefits greater than those from a 50 percent cut in agricultural tariffs. Utton (2008) finds that a large share of the competition problems of most developing countries emanates from the international sector, from such sources as import distribution monopolies and cartels; the influence of dominant firms based in other countries, including neighbors; overseas export cartels; and regional market sharing. These market failures can be difficult to deal with unilaterally, depending on where the unlawful conduct takes place and where the evidence is located. If the conduct takes place abroad, prosecution becomes problematic. Export cartels are notoriously hard to chase because they deliberately collude outside the jurisdiction of the importing country, and the same goes for regional market sharing. Where, however, an abuse of dominant position extends beyond a national market, there is a clear administrative case for regional cooperation, as in the EU.

The anticompetitive practices of multinational corporations are disadvantageous to developing countries and have particularly detrimental consequences in a context of economic scarcity. Levenstein and Suslow (2001) examined 16 products that were cartelized during the 1990s and for which reasonably reliable trade data were available. They estimated that the total value of such “cartel-affected” goods imported to developing countries was US$81.1 billion, a sum equivalent to 6.7 percent of all imports to these countries and 1.2 percent of their combined gross domestic product (GDP).5

This evidence suggests that developing countries should actively work for international cooperation on competition policy. Interestingly, they did just that before the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). Officials in India, to take one instance, have frequently expressed their support for UNCTAD’s principles and rules for the control of restrictive business practices (UNCTAD 2000).6 It is therefore surprising that so much controversy surrounds the link between trade policy and competition policy.

Many authors have, however, argued that free trade is itself the best competition policy and have, in particular, opposed attempts to use trade agreements to press developing countries to adopt competition laws. Hoekman and Holmes (1999) contend that a major flaw in the EU proposals for a World Trade Organization (WTO) multilateral competition policy agreement was that the scheme would have imposed burdensome administrative requirements that were not worth the benefits, since the proposals on the table did not include any obligations by developed countries to provide assistance in cases against export cartels that affect developing countries. Nevertheless, Hoekman and Saggi (2004) argue that developing countries may be able to profit from bilateral deals in which they agree to the adoption of a competition regime in exchange for market access in the partner country. It should be evident that the most attractive deal is one in which a developed country agrees to make real cooperation available to a developing-country partner.

All in all, there is little doubt that global competition problems exist, and it is generally accepted that international cooperation is desirable. What is less clear is what shape such cooperation should take. What works and what does not is essentially an empirical matter. It is therefore necessary to identify and examine the form and history of competition provisions in PTAs.

**Economics of Competition Provisions**

Competition law and policy designed to regulate and curb anticompetitive practices are now common at the national level. Anticompetitive practices include abuse of market dominance, collusion between firms, mergers and acquisitions that secure a dominant market position, artificially restricted output that leads to artificially high prices, predatory pricing, and price fixing.

Competition policy issues are more complex under globalization because abuse of market power can occur unevenly across several markets and beyond the jurisdiction of a national authority. Restrictive business practices may be carried out by domestic producers on foreign markets, or by foreign producers on domestic markets. The effectiveness of the prohibition of these anticompetitive practices will depend on the engagement of the various competition agencies, on whether competition law embodies the extraterritoriality principle, and on the degree to which agencies cooperate in addressing behavior that only one jurisdiction may view as harmful.

The lack of a comprehensive and coherent approach toward cross-border competition issues has led to proposals for a binding multilateral competition regime. Such a framework is currently rejected within the WTO. Meanwhile, competition provisions are increasingly being
incorporated in regional trading agreements and bilateral competition arrangements, as a halfway house or stepping-stone toward agreement on the international level. This development has not been unanimously welcomed, partly because any form of regionalism creates trade diversion and preferentialism, and partly because of the costs of negotiating and implementing regional competition provisions, at a time when experience with the economic and welfare effects of such regimes is as yet inconclusive.

Some analysts favor the narrower but stronger option of negotiating a mutual legal assistance treaty (MLAT) that specifies how competition authorities may assist one another in securing and sharing evidence that is not readily obtainable. Under the MLAT between Canada and the United States, for example, Canada has requested that U.S. authorities obtain documentary evidence and testimony from U.S. corporate offices, using compulsory procedures. Canada has also assisted in the execution of search warrants at the premises of a firm in Canada that was allegedly party to felony violations of U.S. antitrust laws. The documentary and other evidence Canada provided to U.S. authorities contributed to the initiation of grand jury investigations in the United States.

Clearly, improvement of interagency relationships and cooperation mechanisms will facilitate coordination of competition investigations and prosecutions. But MLATs are not a complete solution; they cannot be applied in jurisdictions that lack competition agencies, and they are less effective where national agencies are unequal in expertise, resources, and enforcement mechanisms. More comprehensive regional competition regimes can potentially overcome some of these challenges and discrepancies, and to them we next turn.

Benefits of Various Types of Agreement

In principle, the economic rationale for including competition law and provisions in PTAs is to prevent liberalization from being undermined by anticompetitive business practices within the region, to the disadvantage of consumers and firms. Competition policy provisions in PTAs therefore have two aims: to ensure that the partner’s enforcement (or nonenforcement) of competition policy does not undermine the market access preferences granted in the agreements, and to guarantee that cross-border competition policy issues are dealt with adequately through regulatory cooperation. Beyond this rule of thumb, there is little evidence to support definitive conclusions about the economic benefits of the different types of competition-related provisions found in PTAs. Although not enough is yet known about the relative merits of different measures for promoting competition in regional trade agreements, some relevant issues can be raised.

Institutional and behavioral shortcomings—lack of the requisite competition culture or of the political will to promote domestic implementation—contribute to poor implementation of regional competition provisions. A well-designed regional competition agreement needs to take account of these local realities and to foster the national structural and behavioral environment necessary to draw benefits from the regional competition provisions.

In regional groupings where individual members are at very different stages of economic development, where some lack a competition law or functioning enforcement agency, and where approaches to sovereignty pooling differ, establishment of a strong regional enforcement mechanism can be beneficial. Examples of groups in this category are the Andean Pact, the Common Market for Eastern and Southern Africa (COMESA), and the Southern Cone Common Market (Mercosur, Mercado Común del Sur).

The case of Mercosur is instructive because its intergovernmental ministerial approach to regional competition law has not been implemented effectively. This kind of failure is usually attributed to the unwillingness of some members to enact national laws or to set up domestic regimes that can give effect to external regional obligations. De Araújo (2001) notes that the Mercosur competition policy agreement, the Fortaleza Protocol, requires member states to have a national competition law but creates no collective agency; Paraguay and Uruguay chose to ignore the protocol. The lack of effective regional competition remedies may have undermined some of the benefits expected from the free trade schedules for this common market. Some Mercosur members have developed competition law and policy, but unless all members of an agreement have an effective domestic law, there can be no legal basis for action by a member against practices organized in another member state.

North-North competition agreements are more conducive to cooperation and coordination of activities than other types of PTA and may generate more benefits, but there are gains to be had from North-South regional competition regimes, as well. Developing countries in these arrangements will tend to benefit from such competition provisions as cooperation in enforcement activities and technical assistance. The benefits have been notable in the case of the Brazil–U.S. competition cooperation agreement, which, among other things, provides for U.S. technical assistance that has helped improve Brazil’s expertise in the field of competition law and policy. This has enabled Brazil to communicate and cooperate with the United States in confronting anticompetitive practices. In cases like this,
consultations between the competition agencies provide an opportunity for one agency to offer its support, advice, and experience to its counterpart. Notification of enforcement actions enables authorities to compare information about particular cases, and the provisions for technical assistance can be very helpful in building up capacity and expertise in the field. A notable example was the extensive cooperation the South African competition authorities received from the EU regarding the international merger of SmithKline Beecham PLC and Glaxo Wellcome PLC. The South African Competition Tribunal explicitly noted that its decision against the merger proposal was largely based on the EU’s stand, and both South Africa’s Competition Commission and the EU found that the merger would significantly affect competition in similar markets. The merger was eventually approved subject to the merging parties’ outlicensing some products in specific areas in order to reduce their post-merger market share (CUTS 2003).

North-South PTAs will yield greater development benefits and will have better implementation records when (a) the more developed party offers appropriate technical and capacity-building assistance to the less developed one, and (b) the less developed regional partner is able to benefit from the assistance. For those members with nascent or nonexistent competition regimes, technical assistance should aim to impart the required expertise and experience over the long term, so as to promote the generational behavioral changes necessary for a competition culture.

Constructing Effective Enforcement Mechanisms

PTAs that have a goal of deepening integration between the members through a customs union or common market may find it economically advantageous to design effective regional competition enforcement mechanisms. This will be in addition to efforts to promote competition on a national level in PTA members that are in the early stages of implementing competition. When, in highly centralized arrangements, a regional authority is established to assist implementation, it must be given (if it is not to be a paper tiger) strong investigative powers, adequate resources and expertise, and the ability to issue cease-and-desist orders and collect fines. Transition economies in deep integration PTAs facing a strong legacy of statist economics may find it economically useful to include, as well, effective regulations on state aid and antidumping policy. Even in those countries with experience of competition, implementation of regional competition law will be more successful if the provisions explicitly promote partners’ existing domestic policy priorities, such as support for small businesses or disadvantaged communities.

Positive Spillovers

National competition law and policy constitute public goods. Notably, competition provisions respond to market failures such as cartel creation or abuse of dominant market position. The provisions are designed to ensure that the benefits of liberalization are not undermined by private restrictive business practices and to promote more efficient, fairer markets. This is in the interests of both businesses and consumers. Competition law and policy inherently help balance the rights of producers and the protection accorded to consumers and other members of society.

Strictly speaking, competition law is not a pure public good, in the sense that the use of competition agency resources to pursue a case brought by one set of interests occurs at the expense of those whose cases cannot be heard, and certain types of firm can be denied standing on the basis of nationality. There is no doubt, however, that a well-administered competition law will have positive spillover effects on the economy at large, and not just on those firms or groups whose cases are adjudicated.

At a regional level, competition provisions can produce regional public goods by regulating cross-border trade, as well as mergers and acquisitions. There is a growing need for regional cooperation to address cross-border anticompetitive practices. Unilateral competition measures undertaken by national governments will not yield the same magnitude of regional public goods. Cooperation and coordination will require an agreement between the parties and may lead to complementary regional institutional arrangements or mechanisms. The institutions that monitor and enforce regional competition rules and regimes will be shared among countries, as will the ensuing benefits. Countries, by working together, will induce beneficial cross-border spillover, through, for example, information provision or cooperation in enforcing competition law in the region. In addition, regional agencies are able to realize economies of scale: even if a competition agency with twice the economic or geographic reach as another costs more than the narrower one, the cost increase is less than proportionate.

PTA competition provisions, where they have been negotiated, generally insist on core principles that include nondiscrimination, due process, and transparency. Although these commitments are made regionally, there is a positive spillover, and their effect is multilateral (Kulaksizoglou 2004). For example, Turkey’s competition policy was established as a result of a bilateral agreement with the EU, but a U.S. or Japanese firm operating in Turkey will benefit from it as much as will a Turkish or European firm.
The extent to which a regional competition regime can deal with market failures depends on the comprehensiveness of the provisions and the will to enforce them. Regional competition provisions that address cartels collectively will yield regional public goods. Those that do not explicitly prohibit such restrictive business practices will not produce any such benefits. Where the agreement deals with cartels, the publication and notification of cartel enforcement actions in one country will generally stimulate enforcement efforts in other countries—a form of competition advocacy. This effect is particularly germane where a formal framework exists that establishes a relationship between competition authorities. Cross-jurisdictional and multijurisdictional information exchange also promotes the investigation and successful prosecution of cross-border restrictive business arrangements such as international cartels.

**Consumer Protection**

Lack of adequate, comprehensive consumer protection is a detriment to the achievement of healthy, competitive markets, as well as of healthy consumers. If explicit consumer protection provisions are included in the regional competition regime, there is potential for realizing greater regional public goods. Such provisions can help preserve the dynamic potential of consumers, while ensuring that consumer protection measures do not become unnecessary barriers to trade. A regional arrangement to protect consumer welfare will prevent cross-border firms from locating in a jurisdiction with relatively lax consumer policy, which would make cross-border consumer complaints and redress difficult to enforce. A regional regime is also better able to cope with information asymmetries in such areas as registries of licensed businesses, e-commerce regulations, and so on.

Regional consumer policy can address the negative spillover effects of cross-border anticompetitive business practices and can also deliver economies of scale. In order to deal fully with regional market failures, however, complementary regional consumer policy that focuses directly on the cross-border demand side is needed. It must be geared toward collecting information and evidence about practices that may be particularly injurious to consumers, in a situation in which competitors can avoid harm because they are able to pass on the costs of restrictions to the ultimate consumers.

Domestic consumer agencies increasingly acknowledge their inability to identify legislative and enforcement gaps in cross-border consumer protection—particularly in e-commerce, but also with respect to other deceptive practices, scams, and spam. These domestic agencies have little or no basis for acting against domestic entities that are causing market injury to consumers outside the country (although domestic consumers may have effective recourse against the same practice). Similarly, the agencies may have no clear authority or capacity to take action against entities that are located, or conducting business from, outside the domestic territory and that are targeting or entering into transactions with domestic consumers. At the national level, the ability to enforce injunctions or cease-and-desist orders to protect consumers across national borders is very limited, leading to lack of consumer confidence in cross-border transactions.

**Implementation Costs**

The costs of implementing the competition provisions of PTAs will depend on their nature and objectives and on the existing domestic competition framework and level of competition culture. The challenge for negotiators and policy makers is to craft the competition provisions so that the accruing benefits are seen to exceed the implementation costs. Regional competition laws and provisions for cooperation between competition enforcement agencies can increase the success and efficiency of the parties’ efforts to reduce the negative impact of restrictive business practices.

Those decentralized agreements which require the existence of local competition law and the authority to apply the law nationally, such as the North American Free Trade Agreement (NAFTA) and the U.S.–Chile agreement, will not be as economically demanding as a regime that establishes a fully centralized law with a supporting regional authority, as in the EU or COMESA. The provisions in customs union agreements are, in general, more specific and demand higher commitments from the parties because their goal is regional integration.

In North-South competition agreements in which cooperation is limited to the exchange of specified information and nonmandatory notification, the costs involved are those associated with human resources (technical assistance, capacity building, and so on), communication, and travel. These economic burdens will be offset if the parties are able to exchange information effectively (thus contributing, for example, to the successful conclusion of an investigation) and avoid duplication and conflicting decisions.

For developing countries, the preconditions for successfully implementing even the most minimal cooperation provisions come at a price. For example, a qualified
staff supplied with adequate resources is needed; it has been estimated that if a country were to report every single investigation that might have an impact in a counter-part’s jurisdiction, at least five staff members would be required (Rosenberg and de Araújo 2005). Even if developed countries entering into North-South agreements have well-established domestic competition frameworks, implementation of competition provisions still entails costs—both the costs related to human capacity and administration, and the political costs of alienating potential business support or releasing confidential or agency information.

The provisions of the Revised Treaty of Chaguaramas, which established the Caribbean Community (CARICOM), indicate the potential economies of scale offered by regional cooperation, by allowing for resource pooling among neighboring countries when national capacity is not adequate for implementing and enforcing the regional framework. These provisions have been imported into other arrangements negotiated by CARICOM, such as the competition chapter in the economic partnership agreement (EPA) between the EU and the Caribbean Forum of African, Caribbean, and Pacific States (CARIFORUM) (Dawar and Evenett 2008).

Many North-South regional competition regimes specify that the developed parties will provide technical assistance. The cooperation provisions tend to be used primarily as capacity-building tools, whereby the more mature agency helps develop the expertise of the newly established one, rather than as a way of effectively coordinating enforcement activities. Capacity-building activities involve monitoring, communication, travel, and staff costs, which are borne only by the northern parties to the agreements.

In North-North and South-South PTA competition chapters, the parties are generally at similar levels of institutional development. Such arrangements will not necessarily lead to the transfer of capacity-building activities, with their associated costs. If, however, a central authority is mandated, it may undertake internal capacity building. In 2005, the European Commission’s Directorate General for Competition managed a program to train national judges in European Commission competition law. That initiative, which costs 800,000 euros annually, is perceived to be an important element in the promotion of a common competition culture in the EU.

Cost-Benefit Analyses

In agreements between parties at similar levels of institutional development, the costs of negotiating and implementing competition provisions will be seen as justified only if the agreement produces substantial and beneficial multijurisdictional cooperation between the parties. It has been reported, for example, that the notification procedure specified in the competition cooperation agreement between Argentina and Brazil is burdensome for both countries and that its application is not systematic (Botta 2009). In a context of scarce human and material resources, such a provision cannot be routinely carried out because its immediate costs exceed its perceived benefits.

In general, the costs should be proportionate to the benefits that can reasonably be expected. The provisions negotiated should be as simple as possible, focusing primarily on information exchange, technical assistance, and capacity building. Subsequently, the commitments can be expanded to include, for instance, provisions on mandatory notification and comity. Where developing countries with less well established domestic competition frameworks are parties to regional competition provisions, notification provisions should be mandatory only for the most important cases for both jurisdictions. More general commitments should be implemented only after the necessary expertise and cooperation mechanisms have been developed.

Many members of regional agreements are small economies with insufficient resources to fund national competition agencies. In some of the developing countries that have created a national competition law, the law is not always well understood or adequately enforced. Given the competing short-term pressures on scarce resources, national governments do not always look favorably on regional competition provisions that would yield benefits only in the longer term. It is for this reason that advocacy and promotion of a competition culture are so important in the early stages of implementation, when the economic costs are presumed to outweigh the gains.

Cost-benefit analyses are invaluable in persuading government officials of the long-term benefits to be had from competitive markets. Evidence is growing that the benefits of enforcing competition provisions against cartels go beyond increased economic efficiency and consumer welfare. In 2005 the EU adopted five decisions against cartels, and the fines imposed totaled 683 million euros. In 2006 the European Commission issued seven final decisions in which 41 undertakings were fined a total of 1.85 billion euros (European Commission 2007). This activity has resulted in substantial savings for EU consumers, since overcharges stemming from cartels are estimated to be typically about 20–30 percent of prices (Connor 2004). Heimler and Anderson (2007) note that the EU antitrust authorities’ successes with anticartel enforcement suffice alone to justify the investment in the relevant institutions.
Evenett (2004) estimates the annual deterrent effect of antitrust laws in the EU prior to enlargement at 96 percent of enforcement outlays, in just one sector (see table 16.1). To date, very few cost-benefit analyses of the impact of competition law enforcement in cases other than antitrust enforcement (such as abuse of dominance) are available.

The economic and human resources necessary to implement even a minimal decentralized competition regime are significant for developed and developing countries alike. Nevertheless, the emerging evidence on the economic and welfare costs associated with cross-border anticompetitive practices shows that those costs are undoubtedly higher than the costs of competition enforcement. Short-term political costs should be weighed against the understanding that the long-term and sustainable benefits of a strongly enforced regional competition regime will almost always outweigh its costs.

Implications for Open Regionalism

There are reasons for believing that the inclusion of competition and consumer provisions in PTAs will benefit rather than hinder open regionalism—regional arrangements that do not discriminate against outside countries. This is particularly the case if the provisions are designed to harmonize national laws, rather than maintain separate and differentiated national laws. A properly written competition law is inherently neutral and nondiscriminatory, and so competition policy should always increase the free flow of trade and investment. If a regional member enhances its competition law as a result of a PTA provision, this change will have effects beyond the other regional members. Regional competition provisions monitor business behavior and evaluate the economic role of large foreign companies on a regional basis, without contradicting the principle of open regionalism.

A regional competition law may strengthen regional economic integration by prohibiting or controlling agreements restricting competition or by restraining abuse of dominant market positions across borders. Once internal tariff barriers are removed, firms should not be allowed to distort regional or member markets through cross-border anticompetitive practices. It is possible for competition laws to be operated in a distortionary way—for example, by ruling out perfectly normal vertical arrangements commonly employed by importers or by exempting certain practices used by local firms. Some critics of the trade and competition proposals at the WTO argue, however, that the converse can apply; competition provisions of PTAs may be specifically intended to enhance market access for foreign firms at the expense of local interests. Some competition officials, too, express concern that their offices may become antidumping agencies if they are given inappropriate rules on predatory pricing. These fears seem to be less problematic in practice than had been anticipated. India, for example, as far as we can tell, did not raise any formal objection to the inclusion of competition issues in the EU–India negotiations. Regional arrangements, anyway, are less subject to capture and distortion than purely national ones. Although one may have sympathy for the argument that competition rules in PTAs should not focus solely on market access, that focus is not unreasonable in a trade-related regime.

Again, although the empirical evidence is limited, we believe the inclusion of competition provisions at the regional level could offer an opportunity to promote open regionalism by addressing the negative impact of cross-border trade distortions. Effectively enforced regional competition provisions may be able to lock in reforms that are politically difficult to sustain because of strong domestic lobbying by interests that do not benefit immediately from competition law. Regional agreements can pioneer or test-run provisions and so facilitate their negotiation at a multilateral level at a later date. Finally, regional competition regimes can offer a demonstration effect of the positive gains to be had from effective enforcement.

<table>
<thead>
<tr>
<th>Country or group</th>
<th>Overcharges on vitamin imports, 1990–99 (millions of U.S. dollars)</th>
<th>Deterrent effect of antitrust laws (millions of U.S. dollars)</th>
<th>Annual average deterrent as a share of enforcement outlays (percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>EC-10</td>
<td>660.19</td>
<td>1,220.78</td>
<td>96</td>
</tr>
<tr>
<td>Brazil</td>
<td>183.37</td>
<td>72.09</td>
<td>65</td>
</tr>
<tr>
<td>Mexico</td>
<td>151.98</td>
<td>44.59</td>
<td>46</td>
</tr>
<tr>
<td>Peru</td>
<td>18.91</td>
<td>6.98</td>
<td>7</td>
</tr>
</tbody>
</table>


Note: EC-10 refers to the 10 members of the European Community (now the EU) before the 1986 enlargement: Belgium, Denmark, France, Ireland, Italy, Germany, Greece, Luxembourg, the Netherlands, and the United Kingdom.
effects on third parties

As noted above, in practice, competition laws are unlikely to discriminate against third parties. Cooperation provisions and agreements could be viewed as excluding third parties, but in fact, they are unlikely to have any significant trade-diverting effects. Indeed, Brusick et al. (2004) have argued that a PTA which provides for members to adopt national competition laws and apply them in a nondiscriminatory manner vis-à-vis national, intra-PTA, and third-party firms will, other things being equal, have trade-creating effects.

In the case of regional competition provisions, the impact on third parties will depend on a large extent on the nature of the competition regime and is contingent on the character and existence of preexisting national competition laws and enforcement institutions. In many cases, as noted in the section on spillovers, regional competition laws can have a positive impact on third parties, as measures implemented to protect competition and consumers in one market will also benefit consumers elsewhere. Regional competition regimes increase the efficiency and quality of markets, while lowering prices for goods and services. Not only is the competition regime generally advantageous for markets and consumers; it can also provide information, demonstration effects, and cooperation to third-party agencies.

Nevertheless, a PTA designed to confront anticompetitive practices only insofar as they may affect trade between PTA members could in theory have a de jure discriminatory effect on non-PTA firms. At the national level, the remedies and institutional provisions included in the regional agreement will be made available only to member states, which may induce trade diversion against competitive third-party producers. Agreements that create common laws and policies with direct effect could theoretically treat third parties differently from those agreements which only commit members to ensure national treatment in competition rules. It is difficult to see, however, how discrimination could apply in practice in these agreements, since third-country firms that are established in one party are usually treated like any other firm in competition law, except sometimes with respect to mergers and takeovers.

Different approaches to the assessment of liability and, in particular, the imposition of different remedies can cause negative spillovers to third parties in the sense that measures adopted in one jurisdiction can affect commercial decisions and the welfare of consumers in another. Heimler and Anderson (2007) note this potential in their discussion of the various jurisdictions that were involved in assessing the anticompetitive practices of the Microsoft Corporation. The breakup in one jurisdiction of a large international corporation as a result of a finding of abuse of dominant position might be seen as a negative development in another jurisdiction where behavioral remedies are viewed as adequate for handling cases of obstructive or distorting competition in a market. Yet, if a firm is broken up by the judgment of one jurisdiction, that could, in practice, lead to its dismantling elsewhere.

Another potentially negative effect on third parties is that if there is no law in the third-party jurisdiction prohibiting cartels, the third party may unknowingly serve as a safe haven for international cartels which collude to restrict the market in order to protect or increase their profit margins. Firms and consumers located in a jurisdiction with lax competition provisions will, nevertheless, benefit from the existence of a region with strong competition law enforcement that is able to successfully prosecute the cartel.

Some PTAs have addressed the discriminatory effects of regional competition regimes. The Canada–Costa Rica PTA provides that measures taken to proscribe anticompetitive activities are to be applied on a nondiscriminatory basis. The free trade agreement between Colombia, Mexico, and the República Bolivariana de Venezuela requires state-owned monopolies to act on the basis of commercial considerations in operations in their own territories and not to use their monopoly positions to engage in anticompetitive practices in a nonmonopolized market in such a way as to affect enterprises in other member states.

Another area with potential for trade distortions is the use of competition measures in place of antidumping measures in intraregional trade, in cases where the parties employ different criteria and conditions and where antidumping measures would still apply to third parties. In fact, however, PTAs rarely abolish antidumping provisions.

regional competition policy in practice

From a trade perspective, promoting competitive markets helps ensure access to those markets by foreign firms. The lack of a comprehensive multilateral competition agreement has drawn attention to regional provisions as a potential tool for controlling cross-border restrictive business practices. Because of the principles of nondiscrimination and national treatment, trade agreements can include competition objectives even without the negotiation of a competition chapter, but they will then not have a coherent, independent regime for directly tackling harmful, restrictive business practices (see box 16.1).
Regional Competition Models

A comparative survey of competition provisions at the regional level indicates great diversity. The overview in this section focuses on describing the legal obligations set out in the provisions of each agreement (see table 16.2); it does not attempt to assess the successfulness of implementation. Within each regime, associations are classified as North-North, South-South, and North-South.

Centralized regimes. The most comprehensive regional competition regime is the fully centralized system with supporting regional institutions. A supranational law addresses anticompetitive practices that affect trade between the members or that distort competition within the region and establishes a distinct regional jurisdiction. Regional and domestic laws may overlap, but only the regional laws can adequately address anticompetitive practices that affect trade between treaty members or anticompetitive practices that take place in the regional territory beyond the jurisdictional boundaries of any one member of the PTA. Without regional law, political entities may use the effects doctrine, as the EU and the United States have done, to respond to anticompetitive practices beyond their borders, but decisions against firms located elsewhere may be unenforceable.

Competition laws in the fully centralized model are directly applicable within the territory of a member and are superior to any national law or judgment that is inconsistent with the regional law. Regional competition laws may also have direct effect in members’ jurisdictions, giving firms or citizens the right to invoke the regional law in the domestic courts of the member countries. Fully centralizing the regional competition law requires creation of a complementary regional institutional mechanism to conduct investigations, enforce actions, and assess and levy penalties. In addition, the uniformity of court rulings needs to be guaranteed, through a superior regional court, a process of binding preliminary opinions, or both.

The Treaty on the Functioning of the European Union (TFEU) is the leading example of a centralized regime among northern or developed-country partners. The competition provisions cover, among other things, agreements or concerted practices between enterprises (Article 101) and abuses of dominance by enterprises (Article 102). Article 107 prohibits state aid that distorts competition. Since 1989, the EU has had associated rules concerning concentra- tions that may affect trade between members. Parties do maintain separate and distinct national competition laws, as well as national competition authorities that may differ substantially from one another, but from the creation of the association, regional competition law has promoted a soft harmonization of member states’ competition laws. The European Commission’s Directorate General for Competi- tion has primary competence for applying EU competition laws. The European Court of Justice has reaffirmed, through case law, the direct effect of European law and its superiority to national law.7

The Andean Pact; the West African Economic and Monetary Union (WAEMU; in French, UEMOA, Union Économique et Monétaire Ouest-Africaine); and COMESA are centralized South-South competition regimes. The Andean Pact system is based on supranational rules enforced by community bodies. Decision 608 empowers
the General Secretariat to tackle cross-border anticompetitive practices more effectively by imposing sanctions. WAEMU competition law applies to practices that have an intraregional effect; countries that do not have national competition laws may apply regional competition law within their own boundaries.

COMESA's competition regulations and rules are derived from Article 55 of its association treaty. As in the EU, agreements or concerted practices between enterprises that restrict or are designed to restrict competition in the COMESA common market are generally prohibited. Members may not grant, in the form of subsidies, state aid that restricts or threatens to distort competition between member states (Article 52). Article 49 mandates the elimination of quantitative and other restrictions between members. The regulation concerning abuse of dominant position requires the COMESA Competition Commission to assess vertical restraints on a rule-of-reason basis, and horizontal agreements are illegal. The regulations provide for a premerger notification system under which the commission scrutinizes larger mergers, above certain turnover thresholds. The cooperation provisions for the COMESA Competition Commission and for member states specify the application and enforcement of the competition regulations and rules. Where there is concurrent jurisdiction of the commission and national courts, consistency in the application of competition law must be ensured. These regional regulations are directly, fully, and uniformly effective in all member states.

**Partially centralized regimes.** The second competition model establishes regional competition law but supports it with an only partially centralized agency. As with the fully centralized regime, the independent regional law has direct applicability and takes precedence over national laws and judgments that are inconsistent with it. Although the central agency has a mandate to receive complaints and initiate independent investigations, it must work with the member states’ competition agencies and national courts to process case actions leading to enforcement and remedies.

In deep integration North-North arrangements such as the Australia–New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), the main objective is to expand free trade by eliminating barriers to trade and promoting fair competition. In addition to coordinating bilateral trade in goods and services, ANZCERTA promotes integration in such areas as quarantine, customs, transport, standards, and business law. Antidumping measures have been removed, and the parties’ competition authorities and courts have concurrent or overlapping jurisdiction. This enables either competition authority to control the misuse of market power in the trans-Tasman market without a need for independent supranational institutions. Complaints relating to the abuse of dominant market position can be filed and heard in either jurisdiction, and valid and enforceable subpoenas and remedial orders can be issued in the partner country. To underpin this arrangement, the parties have signed a separate bilateral

**Table 16.2. Models of Regional Competition Regimes**

<table>
<thead>
<tr>
<th>Model</th>
<th>North-North</th>
<th>South-South</th>
<th>North-South</th>
<th>Key characteristics</th>
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<tbody>
<tr>
<td>Centralized</td>
<td>EU</td>
<td>COMESA</td>
<td>Regional authority</td>
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<td>WAEMU/UEMOA</td>
<td>Regional law</td>
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<td></td>
<td></td>
<td>Andean Pact</td>
<td>Regional enforcement</td>
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</tr>
<tr>
<td>Partially centralized</td>
<td>ANZCERTA</td>
<td>CARICOM</td>
<td>Regional authority</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>U.S.–Brazil</td>
<td>Regional law</td>
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<tr>
<td></td>
<td></td>
<td>EU–Jordan</td>
<td>Domestic enforcement</td>
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<tr>
<td>Partially decentralized</td>
<td>Mercosur</td>
<td></td>
<td>No regional authority</td>
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<td></td>
<td></td>
<td>NAFTA</td>
<td>No regional law</td>
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<td></td>
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<td>Canada–Chile</td>
<td>Domestic law subject to</td>
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<td></td>
<td></td>
<td>Canada–Costa Rica</td>
<td>harmonization criteria</td>
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<tr>
<td>Decentralized</td>
<td>SACU</td>
<td>NAFTA</td>
<td>No regional authority</td>
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<td>harmonization criteria</td>
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Source: Authors' compilation.

*Note: ANZCERTA, Australia–New Zealand Closer Economic Relations Trade Agreement; CARICOM, Caribbean Community; COMESA, Common Market for Eastern and Southern Africa; EU, European Union; Mercosur, Southern Cone Common Market (Mercado Común del Sur); NAFTA, North American Free Trade Agreement; SACU, Southern African Customs Union; WAEMU/UEMOA, West African Economic and Monetary Union/Union Économique et Monétaire Ouest-Africaine.*
enforcement agreement that provides for extensive investigatory assistance, the exchange of confidential information, and coordinated enforcement.

The rules governing competition policy within CARICOM, a South-South agreement, are contained in Chapter 8 of the Revised Treaty of Chaguaramas. That chapter establishes a Community Competition Commission (CCC) with jurisdiction over all cases of cross-border anticompetitive conduct. Article 30(b) obligates members to enact competition policy legislation and establish competition enforcement bodies. Chapter 8 requires members to cooperate in the determination of competition legislation; to take the necessary legislative measures to ensure consistency and compliance with the rules of competition; and to set penalties for anticompetitive business conduct. Provisions are made for cooperation between national authorities in member states and within the CCC so as to achieve compliance with the rules of competition. Under Article 173(c–d), it is the responsibility of the CCC to cooperate with national authorities, provide support, and facilitate exchange of information and expertise. The CCC is responsible for taking effective measures to ensure that nationals of other member states have access to competent enforcement authorities, including the courts, on an equitable, transparent, and nondiscriminatory basis.

Partially decentralized regimes. Further down the scale of decentralization are regimes that have a regional law but no independent regional body with powers of investigation and enforcement. Thus, the application of the law is left entirely to the members. National competition authorities have the jurisdiction to bring cases, and they are also the recipients of complaints of any violation of the regional competition law.

An example is Mercosur, whose competition protocol provides for a regional competition framework without any central agency. This partly decentralized arrangement has had significant implications for the enforcement of the provisions. An intergovernmental committee assists cooperation and the allocation of investigations and cases among the members. To ensure some harmonization among the parties, Mercosur’s competition provisions set out common principles to establish the minimum requirements for its members’ domestic laws and procedures.

Decentralized regimes. In the least centralized regional competition regime, members do not create a regional law; instead, they agree to cooperation principles and criteria for national laws addressing anticompetitive practices that are detrimental to the functioning of the PTA.

NAFTA, a North-South arrangement that includes Canada, Mexico, and the United States, does not rely on any institutions for enforcement, nor are there detailed procedures for cooperation or for recourse to dispute settlement. NAFTA’s Chapter 15, covering competition policy, monopolies, and state enterprises, requires members to adopt or maintain measures proscribing anticompetitive business conduct and to take appropriate action, but it does not set out any more specific competition rules. The provisions formalize existing consultations and cooperation between the parties on the effectiveness of their national competition laws, as well as cooperation on the enforcement of those laws via mutual legal assistance, notification, consultation, and exchange of information. The parties’ rights to apply antidumping or countervailing measures are preserved (Article 1902).

Another North-South arrangement, the Canada–Costa Rica Free Trade Agreement, includes provisions that specify the substantive requirements of a satisfactory domestic law, along with matters of due process and transparency. Although a cooperation mechanism is not created, there is some potential for competition authorities to cooperate informally. Timelines are set for the establishment of national laws to address certain anticompetitive practices.

The treaty of the Southern African Customs Union (SACU), a South-South agreement, commits members to establish competition policies and to cooperate in the enforcement of competition laws and regulations (Article 40). Remedies relating to unfair trading practices are also provided for. Article 41 states that the SACU council shall develop, within the context of the larger customs union, policies and instruments to address unfair trade practices between member states, on the advice of the regional commission.

Scope

In addition to representing differing degrees of centralization, PTA competition provisions have substantive and procedural requirements that vary depending on how comprehensive the competition regime is. A full taxonomy of provisions, as outlined by Solano and Sennekamp (2006), could consist of measures and provisions on the following issues:

1. Adoption, maintenance, and application of competition law
2. Establishment of bodies for cooperation and coordination and for enforcing competition law
3. Anticompetitive acts, and measures to be taken against them
4. Nondiscrimination, due process, and transparency in the application of competition law
5. Prohibition of the use of antidumping measures against signatories’ commerce
6. Permitted forms of recourse to trade remedies (e.g., antidumping measures, countervailing duties, and safeguards)
7. Application of dispute settlement procedures in competition matters
8. Flexibility and progressivity, or “special and differential” treatment.

For the purposes of this section, it is useful to identify two sets of competition provisions in PTAs: those that envisage harmonization of the competition rules of the contracting parties, and those that provide for cooperation on competition-related issues (Holmes et al. 2005). The main families of provisions can be divided according to representative parties—the EU, the United States, and Canada.

The EU has tended to negotiate PTAs that employ language similar to Articles 101, 102, and 106 of the TFEU, which implicitly promotes harmonization of dynamics even where no approximation is mandated (as in the EU–Jordan PTA). The PTA provisions generally prohibit anticompetitive agreements and abuse of dominant position that affect trade, but they do not provide commensurately robust provisions to ensure coordination and cooperation among the parties. The Euro-Mediterranean agreements are of this type, except for the one with Algeria, which has stronger provisions. Other, more elaborate EU agreements, such as that with Chile, include provisions that allow trade measures such as safeguards but prohibit the use of anticompetitive state assistance, require nondiscrimination on the part of state monopolies, and mandate notification of state aid.

The U.S. and Canadian PTAs with competition provisions prohibit anticompetitive behavior. The agreements can be divided into PTAs that establish commitments to create or enforce competition laws and agencies and PTAs that focus on cooperation and coordination between the parties, on notifications, and on the behavior of state enterprises and state monopolies. There are notable exceptions to these broad models; for example, the Canada–Costa Rica PTA is more comprehensive and more procedurally demanding than other Canadian PTAs.

**Consumer Policy**

Most of the competition regimes in the PTAs surveyed focus on the supply-side behavior of firms and aim to identify and remove barriers (such as cartels, monopolies, and other restrictive business practices) to a firm’s entry into a market. Such provisions can help protect both consumers and firms, but they do not directly address demand-side market imperfections stemming from lack of consumer information or inability to switch suppliers. Although this supply-side type of regulation traditionally falls within the scope of consumer law, there are PTAs that mainstream their consumer law provisions within or alongside the competition regimes to address the legislative and enforcement gaps in cross-border trade relating to consumer protection. Enhanced notification, information sharing, and investigative assistance among member states can work to protect foreign consumers from domestic anticompetitive business practices and to shield domestic consumers from parallel foreign practices.

Australian regional competition agreements are notable in their inclusion of consumer protection provisions. In the Australia–U.S. agreement, Article 14.6 of the chapter on competition-related issues is dedicated to cross-border consumer protection. The parties, under this article, are to further strengthen cooperation and coordination among their respective agencies, including the U.S. Federal Trade Commission (FTC) and the Australian Competition and Consumer Commission (ACCC), in areas of mutual concern. Such areas include (a) assistance with enforcement and investigations and (b) consultation and coordination on enforcement actions against violations of consumer protection law that have a significant cross-border dimension. Unlike the Australia–Papua New Guinea and Australia–Republic of Korea PTAs, Australia’s agreement with the United States includes separate agency-to-agency agreements in the fields of competition and consumer protection. Another difference is that the notification provisions are stronger, in that notifications are to take place without the necessity of requests by the other country. The Australia–U.S. PTA also contains a reciprocal agreement to provide relevant evidence in cases where national consumer protection laws have been violated (Article II.C).

The Australia–Korea PTA contains provisions on the application of the parties’ competition and consumer protection laws; the notification provisions are weaker than in the PTA with the United States. The agreement with Papua New Guinea has an objective of promoting cooperation and coordination in the application of the countries’ competition and consumer protection laws. In these cases, the parties have, at the national level, joint competition and consumer protection agencies.

An example of a South-South PTA that addresses the consumer welfare aspect of regional competition frameworks is the COMESA treaty. The COMESA Competition
Commission has powers and duties to enforce the consumer protection provisions of the competition regulations and to provide support to member states in promoting and protecting consumer welfare (Articles 6 and 7).

Hard versus Soft Law

Little evidence is available for making strong recommendations regarding the design of appropriate dispute settlement mechanisms covering competition provisions. It can be noted, however, that when PTAs contain few binding competition provisions, there is less reason for a binding dispute settlement system. There is not much to be gained by arbitrating “best endeavor” principles that merely encourage the application of effective domestic competition laws or cooperation principles.

A halfway house toward incorporating a dispute settlement mechanism is a PTA that allows parties to subject disputes arising from the application of the competition provisions to specific consultation procedures, short of dispute settlement procedures. This is the case in the Canada–Costa Rica PTA, discussed above.

Under a partially centralized competition regime such as CARICOM’s, an intergovernmental committee, rather than a specially created independent authority, implements the agreement. It is not clear whether such bodies can exert enough influence to ensure that a member state complies with certain treaty obligations relating to competition law. In the absence of a central authority, treaty objectives can easily be undermined by differences in domestic laws and judgments.

There are further challenges to overcome where regional competition provisions include binding commitments to set up domestic competition laws or to provide for domestic procedures such as positive comity, which implies that each country will consider the other’s national interest when enforcing its own competition laws. Not only may individual members be inexperienced in implementing competition law, but there may also be political reasons, related to preservation of sovereignty, for deciding to exclude these obligations from the general dispute settlement mechanism. The parties may want to avoid having rulings or decisions of national competition authorities and courts overturned by supranational dispute settlement proceedings. It may be that the negotiators were only able to agree to language that ultimately was too vague to be subject to formal legalistic dispute settlement proceedings. There are also unwanted consequences attached to enforcing another party’s competition obligations, as it may lead to tit-for-tat retaliation whereby a party seeks to ensure that the complaining party enforces all its obligations, as well.

Where dispute settlement mechanisms are made available for the competition provisions, the complaints tend to be limited to those between states. A private party wishing to bring a complaint must first persuade a government to submit a claim on its behalf. Governments tend to bring claims only after a cost-benefit analysis has been conducted, in view of the political and economic resources required. Clearly, a country complainant needs to believe that it has some chance of winning the dispute. Furthermore, it must have determined that winning will not set a precedent which will not be in its longer-term self-interest.

In the competition provisions found in regimes such as COMESA, the EU, and NAFTA, this area of private action is seen as an effective setting for addressing, for example, exclusionary practices and abuses of dominance in supply chains. It is there that private complainants can more easily identify the contractual practice that is affecting their commerce and bring that practice before a court or authority for legal assessment and action. A system of private rights is arguably more effective at catching minor actions that may go undetected by competition authorities. Private rights of action can promote the competition rules and principles that aim to create a level playing field and harness the beneficial economic effects of liberalization.

Nevertheless, private rights of action are not in themselves sufficient to effectively address cross-border competition issues relating to implementation and enforcement. Individual consumers or firms cannot obtain the necessary information to assess anticompetitive practices or do not have the expertise to determine their full effect. This is particularly the case for such restrictive business practices as cross-border hard-core cartels and vertical restraints. Collusive activity is generally conducted with great secrecy. Information relating to cartel activities tends to be obtained through investigations, from whistle-blowers who seek formal amnesty in exchange for incriminating information, or through other actions that require resources and powers not available to individual actors. Without this information, it is rare for a cartel to face charges and for remedies to be identified and imposed. In supply chains where anticompetitive behavior leads to high prices, costs can be passed to the end user without being identified along the way. Consequently, the likelihood that a private actor will be able to bring complaints about such practices before a national court is not great. Although private rights of action are important as rights and serve as an effective monitoring and enforcement mechanism, there are cases where they are neither sufficient nor appropriate and therefore require support through active governmental intervention.
Implementation Issues

It is difficult to assess the implementation of competition provisions. Some regional regimes commit the parties to establish national competition laws and policies that, in fact, were already in place prior to the agreement and therefore cannot be attributed to the PTA—although the PTA may have a reinforcing effect. If regional competition provisions are excluded from dispute settlement provisions, there will not be any disputes or case law to indicate nonimplementation. Finally, it is difficult to attribute evidence of interagency cooperation solely to the provisions of a PTA, rather than to interagency contacts through, for example, the International Competition Network.

Where assessment is possible, most existing research suggests that the level of implementation of regional competition provisions tends to be low, particularly in developing countries. This has led to questioning of the value of incorporating such provisions into PTAs, in view of the burdens of negotiating them and building institutions. But the research has also generated analyses that seek to identify and solve implementation challenges in order to harness the regional public goods that such provisions can potentially provide.

To some extent, domestic implementation is hampered because, in most regions, competition policy is a relatively new area of regulation. Time is required to build the necessary expertise and competition culture to establish the law and enforce it effectively on the domestic level, before an agency is able to take advantage of the benefits of interagency cooperation. It is apparent that in some cases competition culture is lacking at the national level, and consequently there is not sufficient political will to provide the necessary resources, and not enough institutional authority to push competition reform measures through.

In South-South arrangements, implementation tends to be particularly poor in countries in which national competition laws and authorities were underdeveloped prior to signature of the agreement. In the absence of the requisite laws, institutions, and expertise, the country cannot absorb or take advantage of the benefits offered by the provisions. Indeed, if there is no national competition regime, it is clear that the fundamental economic benefits of prohibiting restrictive business practices within the national economy have not in fact been realized. Without national institutional structures, implementation of regional laws to address cross-border anticompetitive practices will be seen to create more costs than benefits. Even where regional regimes establish measures such as cooperation, notification, consultations, and so on, they are of no use without the human resources and expertise to request information or utilize it properly, or to engage in case coordination. Where national laws and agencies already existed prior to the regional agreement, there is more likelihood that the provisions will be implemented and that benefits will be realized.

Poor implementation performance based on lack of structural preconditions on the domestic front can to some extent be addressed through the negotiation of more appropriate competition provisions in the PTA. These regional laws can prioritize the development of competition regimes at the national level and, in so doing, address behavioral issues by offering the legislative impetus and policy lock-in necessary for sustained reform. Regional policy can be used as an exogenous force to overcome domestic inertia or vested interests that are obstacles to implementation. A regional law can compensate for an absence of national laws, and this has been an important feature of COMESA-type centralized arrangements.

In a fully centralized competition regime such as COMESA, the competition laws are underpinned by institutions and dispute settlement mechanisms that have been empowered to investigate, prosecute, and remedy anti-competitive practices. Where the agreement is between southern parties, some without any national competition regimes, the acknowledged first challenge is to harmonize national competition laws and regional competition. This dynamic is seriously constrained by the differing capacities of individual national competition authorities, which limit the usefulness of regional law and reduce political support for the competition authority among members. The structural and behavioral factors reinforce each other because implementing such a fully centralized model of regional competition policy requires ongoing advocacy and capacity building, in addition to legislative development to ensure that the regional law is appropriate for national conditions and needs. The focus on both structural and behavioral variables involved in implementing the EU competition regime evolved over the course of 50 years, with several modernizing phases to increase efficiency, reduce the costs of implementation, and foster buy-in by member states.

Reliance on bottom-up implementation initiatives will be less successful where a competition culture and buttressing regional laws and institutions are lacking. Mercosur is a South-South PTA that differs from COMESA in having only a loose intergovernmental framework, with little supranational power to promote competition at the national level. In the absence of national competition regimes, there is no regional authority with the mandate to promote and advocate implementation. The competition regime under Mercosur is often described as moribund.
In North-South agreements, the implementation record is clearly better, although the motivation to include competition law in PTAs is usually driven by the more developed party. The effectiveness of implementation is partly a function of the ability of the northern party to push its interest in ensuring a competitive playing field for its firms in the less developed parties, through national laws and authorities. Although this transfer of competition law does not bode well for implementation, particularly if the provisions negotiated are based on a model exported from a developed region, there are also positive factors. To counterbalance the challenges that arise from transplanting a competition regime, the more developed party can offer technical assistance, capacity building, and information, increasing the chances that the less developed regional partner will achieve a positive implementation record.

If the southern parties to a North-South agreement do not possess the characteristics necessary to absorb the benefits from exchange of information, the full potential of the benefits to be gained from the northern party’s experiences and know-how cannot be realized. If, however, the agreement prioritizes the provision of technical assistance and capacity building, the parties will be more likely to cooperate effectively in the long run, to the benefit of both the northern and the southern parties. It is then that positive results emerge from the avoidance of duplication of research and other activities, and of conflicts in judgments and legal interpretations. When the advantages of regional competition provisions are tangible and significant, as manifested in lower prices, better quality, and more efficient regional markets, the economic and political costs of implementation are more likely to be perceived as justified in light of the economic and consumer welfare gains.

The Brazil–U.S., NAFTA, Canada–Costa Rica, EU–Jordan, and EU–South Africa competition regimes have had some success in advocating a competition culture and in promoting cooperation between competition authorities through learning by doing. In these decentralized North-South regional competition regimes, the commitments are confined to national implementation and cooperation buttressed by technical assistance. Although there is no explicit reference to special and differential treatment for the southern party, flexibility in implementation can be built into the competition provisions. For example, the EU–Jordan treaty states that Jordan is to have five years to implement the provisions regulating unfair competition, and further flexibility is offered with respect to the removal of competition-distorting state aid (Article 53.3).

In North-North PTAs with fully centralized competition regimes, the implementation record is better. The EU, for example, is regularly ranked by the Global Competition Review as having one of the world’s three best competition authorities. In the EU treaty, which establishes an independent law and competition authority with the resources and independence to implement the competition commitments, there have been notable successes in tackling cartels and other restrictive cross-border business practices. The binding nature of the provisions, with supporting monitoring and enforcement agencies, is clearly much more likely to meet with success than when agreements have loose, non-binding clauses that are not subject to dispute settlement. Furthermore, the regime has had several decades to create the structural and behavioral qualities needed for success in investigating, prosecuting, and remediying regional anti-competitive practices.

By contrast, the Australia–New Zealand deep integration PTA does not include a regional competition agency and is not subject to a binding formal dispute settlement mechanism. Both countries’ courts do, however, have jurisdiction throughout the region, and the PTA has a good implementation record. Here, as with the EU, the countries have the added advantage of a close geographic, historical, and cultural relationship. Although their national competition laws were initially based on different models, they were at relatively similar stages of institutional development, which promoted harmonization. In situations such as this, and where competition agencies already exist, the main focus of the provisions is on enhancing cooperation and coherence among the parties on the basis of comity rules—positive, negative, or both. A well-designed regime of cooperation mechanisms can facilitate the implementation of measures to tackle hard-core cartels, just as legislative shortcomings inhibit cooperation (Alvarez and Wilse-Samson 2007).

It is evident and significant that the implementation of competition provisions at a regional level depends on adequate enforcement of competition policies at the national level (Alvarez and Wilse-Samson 2007; Alvarez and Horna 2008). Enforcement will be improved if, in addition to focusing on the necessary structural changes, behavioral changes are effected. Where competition is a new phenomenon, the inclusion of competition provisions in regional agreements will merely signal the importance of regulating the restrictive practices of businesses, rather than provide substantive means of regulating anticompetitive practices. That is, regional competition provisions will be a first step in the long process of competition advocacy aimed at creating a competition culture.

To increase the advocacy of competition, PTAs should emphasize cooperation on competition provisions. Some areas for cooperation are case investigations, legal treaties,
exchange of staff, exchange of experience, and peer reviews, in addition to compliance with regional competition rules. Strengthening of implementation capacity in developing PTA members must be accompanied by a reinforced commitment on the part of developed countries to effectively address the main competition policy concerns of their trading partners. This is particularly important where regional competition provisions were negotiated as a small part of a much broader trade agreement and were pushed by more developed parties with an interest in opening up developing-country markets to foreign trade and business activity.

Implementation will be more successful where the provisions reflect the diversity of social policy objectives within the regional framework. A PTA can explicitly promote the existing domestic policy priorities of the parties, such as support for small and medium-size enterprises or for disadvantaged groups. The domestic policy space for fostering marginalized communities, consumer welfare, or small businesses through exclusions from competition regulations, as well as for promoting market efficiency and market access, will make the agreement more appropriate to local needs and increase the chances of successful implementation. If the regional competition provisions are viewed in the light of the existing trade policies operating in the parties to the PTA, they are more likely to be implemented.

Levels of implementation will also relate to the ability of the parties to enforce the competition provisions effectively. Because most of the provisions are excluded from the dispute settlement mechanism covering the general trade provisions, only consultation mechanisms are available for discussing issues related to implementation. These, however, are unlikely to provide the same incentives to implement as would binding provisions covered by binding dispute settlement mechanisms that provide legal certainty and remedies.

Although competition provisions are generally not subject to dispute settlement processes and procedures, enforcement mechanisms can nevertheless be incorporated within the provisions themselves. For example, the inclusion of private rights of action will enable individuals harmed by anticompetitive practices to seek redress in local courts.

Finally, implementation will be facilitated if regional authorities are endowed with strong investigative powers, adequate resources and expertise, and the ability to issue cease-and-desist orders and collect fines. The greater the independent powers, budgets, and resources of the competition agencies, the greater the chances of satisfactory implementation will be. Such powers will only be bestowed on competition agencies where there exists a competition culture to demand them and to allow the competition authority to implement its decisions without undue interference from lobbying groups.

Conclusions

Despite limited evidence about the impact of the regional competition regimes, it is clear that lack of regional competition can undermine the benefits from liberalization of regional markets. Implementation of effective regional competition law and policy can help address cross-border restrictions or regional market failures and generate positive spillovers, such as more efficient markets that offer better-quality goods for lower prices, further encouraging investment. Additional benefits may be derived by mainstreaming consumer policy into regional competition laws, given that the option of cooperation in dealing with cross-border consumer protection issues complements both economic and social development objectives.

Although the number and variety of North-South and South-South PTAs with some element of competition law is increasing, implementation records have been poor. This is particularly the case for PTA members that did not possess a national competition law prior to accepting regional commitments and for PTAs whose members are at very different stages of competition regime development. A regional competition regime in which effective national laws are lacking offers no legal basis for a member to take action against anticompetitive practices organized in another member state on the basis of the effects on its own territory. Even where regional regimes establish mechanisms such as cooperation, notification, and consultations to generate regional benefits, these are of no use nationally without the human resources and expertise to absorb or respond to the information.

Implementation is more successful in North-South agreements, partly because of the ability of the northern party to push its interests in ensuring that the less developed parties provide a competitive playing field for its firms through national law and authority. The more developed party will be able to offer technical assistance, capacity building, and information that can increase the less developed regional partner's potential to achieve a positive implementation record.

By crafting appropriate regional competition provisions, PTAs can serve as vehicles for addressing both the structural and the behavioral challenges obstructing successful implementation. In countries with little or no experience with competition policy, regional laws can act, even if temporarily, as an alternative to the expense of establishing and implementing domestic competition laws. For members
States. These were unsuccessfully invoked in the national and legislative revisions at the national and international economic and consumer welfare gains alone. Identification of competition policy obligations, and, ultimately, convergence or harmonization.

If competition policies are at an early stage of implementation, nonjudicial mechanisms such as voluntary peer review, consultations on implementation issues, and informal diplomatic methods may be more appropriate. These can subsequently be complemented by a nonbinding mechanism for review of competition policy and by nonbinding consultations, promotion of voluntary implementation of competition policy obligations, and, ultimately, convergence or harmonization.

If highly centralized regimes are to function adequately, the regional monitoring and enforcement body must be endowed with strong investigative powers, adequate resources and expertise, and the ability to issue cease-and-desist orders and collect fines. When the advantages of regional competition provisions are tangible and significant, the resource requirements and political costs of implementation will be perceived as being justified by the economic and consumer welfare gains alone. Identification of these gains will require further empirical research and cost-benefit analyses, along with the necessary advocacy and legislative revisions at the national and international levels to build an economic and social environment that is better able both to demand competitive markets and to supply them.

Notes

1. Some provisions of U.S. law may allow litigation in the United States. These were unsuccessfully invoked in the Empagran case concerning alleged price fixing for vitamins; see Popofsky (2005).

2. This prohibition can be reversed in specific cases, for example, when authorized by the U.S. International Antitrust Enforcement Assistance Act of 1994.

3. According to the effects doctrine, domestic competition laws are applicable to foreign firms, but also to domestic firms located outside the state’s territory, when their behavior or transactions produce an “effect” within the domestic territory. The “nationality” of firms is irrelevant for the purposes of antitrust enforcement, and the effects doctrine covers all firms irrespective of their nationality (Institute of Competition Law database, http://www.concurrences.com/article.php?pid-article=123748&lang=en).

4. Some authors believe all competition and antitrust policy is captured by “losers”—that is, inefficient firms that lose market share when faced with competition from stronger firms (see McChesney and Shughart 1995)—but there is no convincing evidence for this view.

5. A billion is a thousand million.

6. For a description of Indian interest in this area, see Shruff (2005).


8. Exceptions to this rule must meet four requirements. The two positive requirements are that the agreement, decision, or concerted practice contribute to the improvement of the production or distribution of goods or the promotion of technical or economic progress and that it allow consumers a fair share of the resulting benefit. The two negative requirements are that the agreement not impose restrictions unnecessary to the attainment of the positive objectives stated and that it not afford the firms concerned the possibility of eliminating competition in a substantial part of the market in question.


10. For example, the European Commission’s report on the application of the EU–U.S. agreement states, “In all cases of mutual interest it has become the norm to establish contacts at the outset in order to exchange views and, when appropriate, to coordinate enforcement activities. The two sides, where appropriate, seek to coordinate their respective approaches on the definition of relevant markets, on possible remedies in order to ensure that they do not conflict, as well as on points of foreign law relevant to the interpretation of an agreement or to the effectiveness of a remedy. Cooperation under this heading has involved the synchronization of investigations and searches. This is designed to make fact-finding action more effective and helps prevent companies suspected of cartel activity from destroying evidence located in the territory of the agency investigating the same conduct after its counterpart on the other side of the Atlantic has acted.” (European Commission 1999, 313)

11. Brazil and the United States have a competition cooperation agreement (rather than an free trade agreement).

Selected Bibliography


