Deep *versus* Shallow PTAs: Rules Affecting Competition Dynamics– Antitrust, Competitive Neutrality and Pro-Competition Economic Regulation

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This working paper has been written by Martha Martinez Licetti, PhD; Graciela Miralles Murciego, PhD; and Guilherme De Aguiar Falco with contributions from Tilsa Ore Monago, PhD; and Camila Ringeling. The paper builds on the general framework of the World Bank Group Markets and Competition Policy cluster as well as the findings of the research of Robert Teh (World Trade Organization) since the authors collaborated in developing an analytical framework to capture the recent trends on competition policy commitment within Preferential Trade Agreements as part of a joint research project between the WBG Equitable Growth, Finance and Institutions Vice Presidency and the WBG Development Economics Vice Presidency.

1. Competition policy as a tool to boost market outcomes of PTAs

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

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

From the World Bank Group's perspective, an effective competition policy framework can help accomplish several objectives: It facilitates entry to markets, it ensures that all businesses interact on a leveled playing field, and it discourages and penalizes anticompetitive behavior. Three complementary pillars provide the basis for achieving an effective competition framework: (1) fostering pro-competition regulations and government interventions; (2) developing the necessary measures to guarantee competitive neutrality in markets and (3) promoting economy wide enforcement of competition law. These pillars, summarized by Figure 2, rely on an effective institutional set up that is able to foster and guarantee healthy market conduct.

[1] See Connor, John M. (2010). Price Fixing Overcharges: Revised 2nd Edition; Ivaldi; Jenny, Khimich (2015). Cartel Damages to the Economy: An Assessment for Developing Countries. CEPR PEDL program.

[2] Goodwin, Tanja; Pierola, Martha Denisse (2015). *"Export Competitiveness. Why Domestic Market Competition Matters"*. Viewpoint, Public Policy for the Private Sector. The World Bank Group, Trade and competitiveness Global Practice, Note n. 348. Available at http://documents.worldbank.org/curated/en/432141468189538318/pdf/97914-REPLACEMENT-FILE-VP-348-Export-Competitiveness-WEB.pdf

Figure 1: A Comprehensive Competition Policy Framework

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

Source: WBG-OECD (2017). Adapted from Kitzmuller M. and M. Licetti, "Competition Policy: Encouraging Thriving Markets for Development" Viewpoint Note Number 331, World Bank Group, August 2012.

In this context, more than 200 multilateral trade agreements include some reference to competition policy as of 2015.[3] The recognition of competition as a fundamental tool for trade, which was already tacitly embedded under the World Trade Organization (WTO) agreements by the inclusion of the concepts of most favored-nation treatment ("MFN"),[4] national treatment,[5] and transparency[6] is now explicitly incorporated in a large number of Preferential Trade Agreements (PTAs). While traditional "shallow" PTAs tended to tackle competition-related issues through trade-related obligations such as general reduction of non-tariff barriers and discriminatory customs regulations in goods and services[7], more recent PTAs have increasingly recognized the need to account for competition promotion as a key tool to achieve the benefits of opening markets through trade.[8] The review of PTAs conducted by Teh 2009 divides

[3] Ruta et all (2016)
[4] Article 1 of the GATT, Article II of the GATS, Article 4 of the TRIPs.
[5] Article III of the GATT, Article II of the GATS and Article 3 of the TRIPs.
[6] Article X of the GATT, Article III of the GATS and Article 63 of the TRIPs.
[7] For example, under the Uruguay Round Agreements, whereas several WTO agreements contain competition related provisions, competition law was not treated in a comprehensive way. The importance of incorporating competition provisions to facilitate trade and reduce entry barriers was in any case greatly acknowledged by several WTO agreements. Examples can be found in GATS, TRIPs, the Agreement on Trade- Related Investment Measures ("TRIMs"), the Anti-Dumping Agreement, the Agreement on Technical Barriers to Trade ("TBT") and the Agreement on Safeguards ("Safeguards"). *See* Article 1 of the GATT, Article II of the GATS, Article 4 of the TRIPs on Most Favored Nation treatment, Article X of the GATT, Article III of the GATS and Article 63 of the TRIPs on National Treatment and Article X of the GATT 1994, Article III of the GATS and Article Sixty-three of TRIPs on the Principle of Transparency.
[8] CETA, for example, affirms that: *"the Parties recognize the importance of free and undistorted competition in their trade relations. The Parties acknowledge that anti-competitive business conduct has the potential to distort the proper functioning of markets and undermine the benefits of trade liberalization." See* Article 17.2.1, available at http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ This same comprehensive treatment of competition policy is found in the European text for the Transatlantic Trade and Investment Partnership ("EU Proposal TTIP") which includes both general competition law principles as well as a description of conducts that should be considered anticompetitive. *See* Article X.2

competition-related obligations between economy-wide and sector-specific provisions finding that 74% of all the PTAs include economy-wide competition policy provisions while sectoral competition provisions are covered in less than 40% of the PTAs.

Box 1: Competition Obligations in Trade Agreements (Teh 2009)

Based on the analysis conducted by Teh (2009), Table 1 summarizes competition policy provisions embedded in 74 PTAs. According to the report, 45.9% of all the PTAs signed by 2009 explicitly address competition promotion as a general objective, observed in higher proportion in bilateral than multilaterals agreements. Horizontal principles, such as transparency, non-discrimination and procedural fairness, are covered at some level in 47% of the PTAs; while only 31% of the multilateral agreements account for these principles, 83% of the bilateral agreements include at least one of these horizontal principles. Moreover, 56% of the bilateral PTAs account for at least two of the three principles, compared to only 4% of the multilateral PTAs.

It is worth highlighting that 74% of all the PTAs include competition policy provisions, a share particularly higher in the case of multilateral agreements (76.5%).[9] Sectoral competition provisions are covered in almost 70% of the bilateral agreements, but in less than a quarter of multilateral agreements. This may be explained by a close coordination between the two negotiating parties. Such coordination benefit decreases when more parties are involved in a negotiation.

From the sectoral competition provisions, 38% of the PTAs address at least one of the sectors (investment, government procurement, intellectual property and services). Almost 70% of the bilateral PTAs account for sectoral provisions compared to roughly 24% of the multilateral PTAs. Investment and government procurement are addressed in almost half of the bilateral PTAs, and around a quarter of them address Intellectual Property and Services competition related provisions, 57% of the bilateral agreements explicitly cover the telecommunications sector. In contrast, multilateral agreements seem to pay higher attention to sectoral competition provisions related to services (16%) and government procurement (12%) related issues, with special emphasis in Telecommunications and Maritime Transport industries.

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

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

Notes: 74 preferential trade agreements are analyzed. 30% of the bilateral agreements involve the USA, and 59% of the multilateral agreements involve the Europe Union.

Source: WBG elaboration on Teh (2009)

[9] It should be noted that 59% of the 49 multilateral agreements are comprised by agreements between the Europe Union and individual countries.

In general terms, the stronger the vocation to achieve economic integration, the more detailed the competition related provisions of trade agreements are.[10] Leaving aside unsuccessful efforts to develop a multilateral approach such as the Working Group on the interaction between Trade and Competition Policy ("WGTCP") established by the WTO,[11] competition-related obligations have been negotiated on a case by case basis.[12] The European Union, for instance, advanced its goal of regional integration by promoting the establishment and enforcement of national competition policies that run in harmony with the Union's objectives of reducing market distortions towards a more integrated economy.

Following the European example, the Eurasian Economic Union ("ECU")[13], the West African Economic and Monetary Union ("WAEMU")[14] and the Common Market for Eastern and Southern Africa ("COMESA")[15] PTAs incorporated comprehensive competition provisions as a tool for the creation of a common market. The competition law provisions included in these agreements serve a double purpose of creating national and supranational competition law frameworks and harmonizing sectoral regulations and eliminating technical barriers to entry.[16]

Recent deep integration agreements such as the Trans-Pacific Partnership (TPP), constitute an explicit recognition that effective implementation of trade related commitments demands a pro-competitive

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[10] *See* for reference art. 41(i) of the ASEAN Economic Blueprint which requires members to endeavor to introduce competition policy by 2015, while art. 1501 of NAFTA requires parties to adopt or maintain measures to proscribe anticompetitive business conduct. Furthermore, art. 170(2) of the CARICOM treaty requires member states to establish and maintain national competition authorities. Lastly, art. 170(3)(c) of the CARICOM treaty obligates national competition authorities to cooperate on enforcement and exchange information for such purposes. Consequently, the TPP's competition provisions contain obligations which are stronger than traditional free trade agreements, merely requiring the adoption of competition laws, but weaker than customs unions, which require the close coordination of competition policies. An example of the later is the Protocol for the Defense of Competition of MERCOSUR signed in 1996 which covers substantive and procedural issues and has direct applicability for member states. Unfortunately, this instrument has hardly ever been applied due to the particular reasons surrounding the institutional evolution of MERCOSUR in the past few years.

[11] *See* World Trade Organization (2004*): "Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement"*: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round." Doha Work Programme. Decision Adopted by the General Council, WT/L/579, page 4, available at https://www.wto.org/english/tratop_e/dda_e/ddadraft_31jul04_e.pdf.

[12] Mitsuo Matsushita, *Basic Principles of the WTO and the Role of Competition Policy*, Washington University Global Studies Law Review Volume 3, Issue 2 Chinese Anti-Monopoly Law. While competition provisions were incorporated into several of the WTO's agreements, the treatment of competition policy within these instruments remained scattered and was not handled in a comprehensive way. In any case, incorporating competition provisions has been crucial to facilitated trade and reduce barriers. Examples from this approach can be found in GATS, TRIPs, the Agreement on Trade- Related Investment Measures ("TRIMs"), the Anti-Dumping Agreement, the Agreement on Technical Barriers to Trade ("TBT") and the Agreement on Safeguards ("Safeguards").

[13] Available at: https://docs.eaeunion.org/en-us/pages/displaydocument.aspx?s=bef9c798-3978-42f3-9ef2-d0fb3d53b75f&w=632c7868-4ee2-4b21-bc64-1995328e6ef3&l=540294ae-c3c9-4511-9bf8-aaf5d6e0d169&entityid=3610

[14] Available at http://www.uemoa.int/ Text of the Treaty available in French http://www.uemoa.int/fr/system/files/fichier_article/traitreviseuemoa.pdf

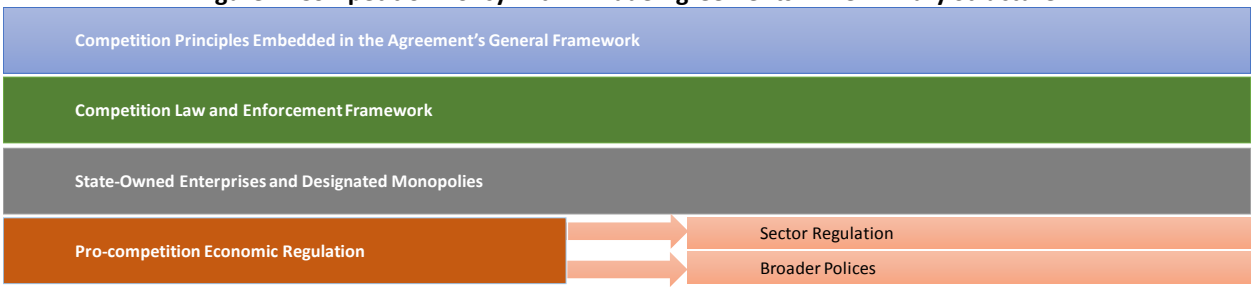
[15] Available at http://www.comesa.int/ Treaty available at http://www.comesa.int/summit2016/wp-content/uploads/2016/09/160920_Latest_Comesa_Treaty.pdf

[16] For ECU *See* Article 74 establishing general competition law principles, scope and objectives and Article 75, 76 and 77 establishing competition obligations for Member States.
For WAEMU *See* Article 4 establishing as an objective of the Treaty achieving an open competitive market and a harmonized legal framework and Article 88 under Section II defining and prohibiting anticompetitive conducts.
For COMESA *See* Article 55 establishing general competition law objectives, defining anticompetitive conducts and establishing competition related obligations for Member States.

environment that fosters open markets and penalizes anticompetitive behavior. The TPP requires parties not only to establish and enforce a procedurally fair and transparent competition law framework (Chapter 16) but also to level the playing field between public and private operators (Chapter 17), advising for measures able to implement competition throughout all economic sectors. At the same time, the TPP requires parties to promote pro-competitive regulatory environments in key sectors for the economy such as telecommunications (Chapter 13), financial services (Chapter 11) and public procurement (Chapter 15). In this sense, the TPP presents itself as an opportunity to foster effective national competition policies covering both horizontal and vertical perspectives.

Building upon these experiences, the competition-related obligations included in PTAs can be classified around four conceptual blocks (Figure 2): the presence of competition principles embedded in the general reasoning, justification or ultimate goals of the parties to the agreement, together with the three pillars that form a comprehensive competition policy (Figure 1). The presence of competition principles in the general objectives of PTAs is particularly relevant in shallow agreements in which the promotion of competition might be limited to generic and potentially non-enforceable mandates. In order to account for how different PTAs have considered the various dimensions of Figure 2, particularly focusing on how deeper agreements have implement pro-competition commitments, the remainder of the analysis is divided in three sections: Competition law and policy, State-Owned Enterprises and Delegated Monopolies and Pro-Competitive Economic Regulation.

Figure 2. Competition Policy within Trade Agreements – Preliminary Structure



Source: Elaborated by the authors.

2. The elusive convergence of competition law obligations in Trade Agreements

Competition policy provisions in PTAs vary in terms of content and structure. In terms of content, competition related provisions cover wide a range of issues and may include measures to (i) promote competition; (ii) adopt or maintain competition laws; (iii) regulate designated monopolies, SOEs, and enterprises entrusted with special or exclusive rights; (iv) regulate state aid and subsidies to provisions; (v) lay down competition-specific exemptions; (vi) abolish trade defenses; (vii) adopt competition enforcement principles; (viii) introduce cooperation and coordination mechanisms; and (ix) adopt principles governing the settlement of competition-related disputes.[17] In terms of structure, they may be separated into two broad categories: those that include a specific chapter on competition policy, and those that include general competition criteria and competition related provisions including principles such as transparency, non-discrimination and due process throughout the different topics covered by the PTA, i.e. within the chapters related to public procurement, State-Owned Enterprises (SOEs), investment, or intellectual property.

A large share of recent PTAs explicitly includes competition policy provisions. This is more common in multilateral agreements, where competition policy provisions are covered in almost all agreements between a multilateral group and an individual country (usually a jurisdiction with a developed competition law framework). Table 2 shows the share of PTAs that contain specific competition policy provisions. Promoting fair competition by preventing anticompetitive practices is the objective adopted by almost 30% of the agreements, followed by the objective of increasing cooperation on competition issues. Cooperation objectives are made explicit in half of the bilateral agreements. In terms of national competition requirements, only a quarter of the PTAs include such requirements, mostly aimed at complying with established competition laws.

On the one hand, a number of trade agreements covering competition law and policy *sensu stricto* require the adoption of an antitrust regime, without much guidance or specific demands. The Canada-European Union Comprehensive Economic and Trade Agreement (CETA), for example, affirms that rules tackling anti-competitive business conducts[18] "shall be consistent with the principles of transparency, non-discrimination and procedural fairness, exclusions from the application of competition law shall be transparent and each Party shall make available to the other Party public information concerning such exclusions provided under its competition laws."[19] Transparency and coordination among parties as also a common trait in PTAs covering competition concerns. As shown in Table 2, 30% of the PTAs include at least one of the three principles (transparency, non-discrimination and procedural fairness), while bilateral agreements emphasize more the non-discrimination principle, multilateral agreements emphasize the transparency principle. For example, the United States–Korea Free Trade Agreement

[18] For CETA, anticompetitive business conducts mean *"anti-competitive agreements, concerted practices or arrangements by competitors, anti-competitive practices by an enterprise that is dominant in a market, and mergers with substantial anti-competitive effects"*.

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See Article 17.1, available at: http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/

[19] *See* CETA, Article 17.2.4. available at: http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/

(KORUS) contains numerous provisions and specific obligations focused on transparency,[20] cooperation,[21] and procedural fairness[22], while the Pacific Alliance makes reference to more general principles of transparency and equal treatment.[23]

Table 2: Specific competition policy provisions in trade agreements

	Total agreements	Bilateral agreements	Multilateral agreements	Multilateral only	Multilateral group with an individual country
Competition policy	74.3%	69.6%	76.5%	54.5%	93.1%
Objectives (at least one objective covered)	29.7%	56.5%	17.6%	27.3%	10.3%
Fulfil objectives of agreement by promoting fair competition and curbing anti-competitive practices	27.0%	52.2%	15.7%	22.7%	10.3%
Consumer welfare or economic efficiency	6.8%	13.0%	3.9%	9.1%	0.0%
Increase cooperation on issues of competition	10.8%	21.7%	5.9%	4.5%	6.9%
National competition requirements	25.7%	52.2%	13.7%	18.2%	10.3%
Competition law/measures	24.3%	52.2%	11.8%	18.2%	6.9%
Competition authority	9.5%	17.4%	5.9%	4.5%	6.9%
Regulated anti-competitive behaviour (at least one practice covered)	73.0%	56.5%	80.4%	63.6%	93.1%
Concerted practices, unfair business practices	58.1%	21.7%	74.5%	50.0%	93.1%
Abuse of market dominance	55.4%	21.7%	70.6%	40.9%	93.1%
Monopoly	44.6%	39.1%	47.1%	27.3%	62.1%
State aid	29.7%	4.3%	41.2%	22.7%	55.2%
Undertakings with special or exclusive rights/state enterprises	50.0%	43.5%	52.9%	22.7%	75.9%
Mergers and acquisitions	12.2%	13.0%	11.8%	13.6%	10.3%
Forms of cooperation	60.8%	69.6%	56.9%	40.9%	69.0%
Coordination / Exchange of information	48.6%	60.9%	43.1%	22.7%	58.6%
Notification	28.4%	47.8%	19.6%	13.6%	24.1%
Consultation	50.0%	65.2%	43.1%	18.2%	62.1%
Regional competition authority	9.5%	0.0%	13.7%	31.8%	0.0%
Principles	28.4%	34.8%	25.5%	9.1%	37.9%
Transparency	27.0%	30.4%	25.5%	9.1%	37.9%
Non-discrimination	14.9%	34.8%	5.9%	9.1%	3.4%
Procedural fairness	13.5%	30.4%	5.9%	9.1%	3.4%

Source: WBG elaboration on Teh (2009)

[20] Article 16.5.1. allow for greater transparency by prescribing that upon request the parties will make available to each other public information concerning: competition law enforcement activities, SOEs and exemptions and immunities to their competition laws. Article 16.5.3 ensures that all final administrative decisions finding a violation of competition laws will be in writing and contain the relevant findings in fact and legal reasoning on which they are based.

[21] Article 16.1.7 provides for cooperation among competition authorities including mutual assistance, notification, consultation and exchange of information.

[22] Article 16.1.2 provides equal treatment to persons from the other country by the government in competition law enforcement. Article 16.1.3 providing for an administrative hearing (opportunity to be heard, review and controvert evidence and cross examine witnesses). Article 15.1.4 which provides for judicial review of sanctions and remedies.
Article 16.1.5 which deals with consent decrees.

[23] For example Article 14.19 in connection with telecommunication services.

On the other hand, those agreements that tackle specific anticompetitive behavior tend to focus on anticompetitive conducts rather than merger control or state-related market-distortions. 73% of the PTAs surveyed include at least one of six types topics identified in table 2--concerted practices, abuse of dominance, scrutiny of monopolies, state aid, SOEs and undertakings with exclusive rights and mergers and acquisitions-- of which concerted practices and abuse of market dominance either by private or public are the most common. While most multilateral agreements make reference to at least 5 of those topics, merger control is seldom included. Bilateral agreements reflect a stronger concern for the regulation of designated monopolies and SOEs. Figures 3 and 4 summarize the number of PTAs that account for specific anticompetitive practices, as well as the number of PTAs that include one or more of such practices in the agreement.

Accordingly, the most common definitions of anticompetitive conduct included in an PTA include anticompetitive agreements and abuse of dominance. In general, merger control articles are only provided for in agreements between highly developed competition law jurisdictions, as is the case for the EU Proposal for the Transatlantic Trade and Investment Partnership (TTIP)[24] between the EU and US (where there is already a high degree of convergence) and those aimed at creating a supranational merger control regime, such as WAEMU.

Figure 3: PTAs and coverage of anticompetitive behavior

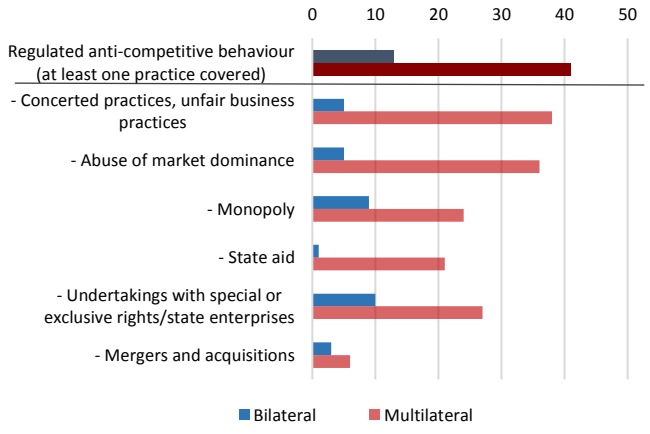
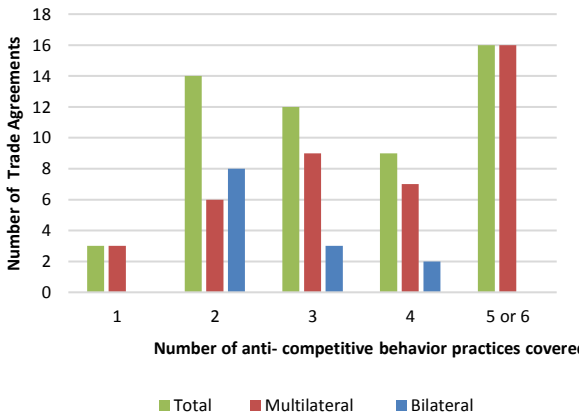


Figure 4: PTAs and coverage of anticompetitive behavior



Source: WBG elaboration on Teh (2009)

Multilateral agreements characterized by a leading economic party tend to incorporate to a large extent this party's competition regulatory framework. For example, agreements subscribed by the EU tend to replicate, in general terms, definitions of anticompetitive conducts included in the Treaty on the Functioning of the European Union ("TFEU") when dealing with least developed competition law jurisdictions. Agreements between jurisdictions which have a similar degree of development will strive to achieve convergence in specific areas of enforcement or recognize each other's definitions. An example

[24] Article X.2 provides for a legislative framework under contains a general description of the EU treatment of anticompetitive conducts. Including horizontal and vertical agreements which have as their object or effect the prevention, restriction or distortion of competition, abuses of dominance by one or more enterprises, and concentrations between enterprises which significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position.

of this mutual recognition is present in the CETA PTA.[25] While competition provisions have been used by developed countries such EU and the US to advance their trade objectives, the inclusion of such commitments have further benefited developing countries by helping them fight intra-regional anticompetitive practices, such as international cartels.[26]

Rather than promoting substantive convergence by defining the notion of anticompetitive practices,[27] other deep PTAs have focused on formal commitments necessary to ensure procedural fairness thereby further supporting transparency and enhancing collaboration among authorities. What some may consider a missed opportunity to foster a (somewhat utopic) substantive convergence might become the source of success of these instruments, led by recent examples such as the TPP. The focus on procedural convergence may be instrumental to emphasize the importance of procedural fairness as a minimum common denominator for workable competition policy frameworks not only among PTA parties but within affected regions and trade partners. This approach is confirmed by the significant efforts of the International Competition Network (ICN) to encapsulate and promote procedural fairness in antitrust investigations.[28] Effective cooperation between two competition authorities in the framework of an international antitrust investigation will hardly be possible absent minimum standards that ensure a similar treatment of procedural parties or confidential information.[29] Beyond the TPP, other examples of PTAs placing particular emphasis on procedural fairness are KORUS and the EU Proposal for TTIP[30],

Therefore, when it comes to assessing the promotion of antitrust though trade agreements there are five main topics of interest, summarized in the following questions and illustrated by Figure 5:

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[25] See for example Article 17. 1 on competition definitions and Article 17.3 on the application of competition policy to enterprises.

[26] Laprévote François-Charles, Sven Frisch, and Burcu Can (2015), Competition Policy within the Context of Free Trade Agreements, E15 Initiative, Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

[27] For instance, Article X-01.5 of CETA, an instrument that has significantly influenced the drafting of Chapter 17 of the TPP does provide guidance in terms of substance by defining "anti-competitive business conduct" as means anti-competitive agreements, concerted practices or arrangements by competitors; anti-competitive practices by an enterprise that is dominant in a market; and mergers with substantial anti-competitive effects.

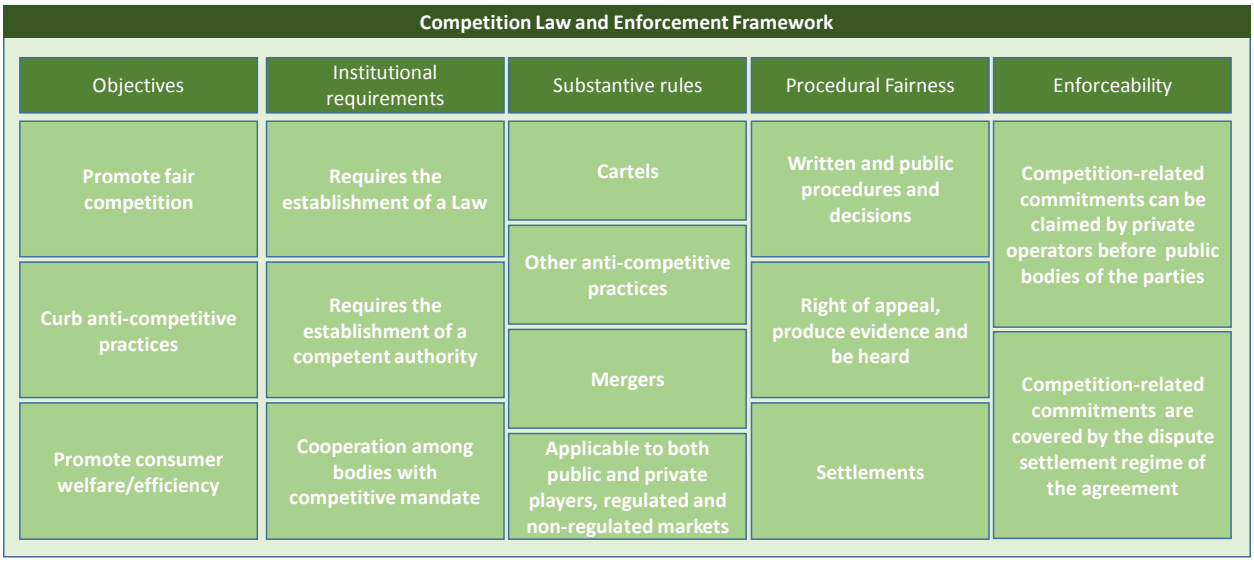
[28] *See* the introductory statement of the *ICN Guidance on Investigative Process*: "Fair and effective investigative process is essential to sound competition law enforcement; this includes availability and use of effective agency investigative tools, transparency and engagement with the parties during an investigation, and protection of confidential information. Effective enforcement tools, procedural safeguards, and consistency of process and procedures within an agency contribute to efficient, effective, accurate and predictable enforcement by competition agencies. Cooperation and engagement from parties and third parties are key contributing factors to an agency's ability to pursue fair and effective investigations. The credibility of a competition agency and, more broadly, of the overall mission of competition enforcement are closely tied to the integrity of the agency's investigative process and public understanding of such process." Text available at http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf

[29] On the importance to settle common rules about the exchange of confidential information in order to foster cooperation among Antitrust enforcement agencies, see OECD (2014), *"Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings",* [C(2014)108], pages 6-10, available at http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf.

[30] Article X.3 of the proposed text contains the framework for implementation of the specific competition rules and is focused on transparency and procedural fairness. It contains the following obligations: (i) Maintain an operationally independent authority responsible for and appropriately equipped for the effective enforcement of the competition legislation referred in Article X.2; and (ii) Apply their respective competition legislation in a transparent and non-discriminatory manner, respecting the principles of procedural fairness and the rights of defense of the enterprises concerned, irrespective of their nationality or ownership status. Cooperation is contained in Article X.5 including provisions of exchange of information (subject to procedures that ensure non breach of confidentiality obligations under Article X.6); cooperation shall be in line with the existing EU-USA Cooperation Agreements. Article X.7 provides for review every 5 years by an appellate body to be determined. Article X.8 provides that dispute settlement shall not be applicable to the competition provisions.

- Has the agreement defined what should be the objectives of the competition law?
- Does the agreement require parties to adopt laws and create/maintain institutions?
- Does the agreement expand on substantive antitrust rules?
- Does the agreement require the implementation of fair procedural rules for antitrust enforcement?
- Do the competition rules set out in the agreement directly enforceable?

Figure 5. Competition Law and Enforcement in Trade Agreements



Source: WBG elaboration

The Chapter 16 of the TPP on Competition Policy commitments (Chapter 16) is a significant example of how these dimensions can become part of a trade agreement. Its main obligations can be grouped around three pillars:

(A) **Competition Policy as an overarching tool to promote economic efficiency and consumer welfare**. The TPP requires parties to adopt the basic building blocks for antitrust enforcement including national competition laws that promote economic efficiency and consumer welfare, an authority entrusted with its enforcement and a number of specific obligations to ensure due process.[31] In particular, before imposing sanctions or remedies, the affected (legal/natural) person shall be duly informed about the authority's competition concerns and have a reasonable opportunity to speak and be represented by counsel.[32] Affected persons shall also have the right of appeal, the option to settle with the competition authority and the ability to seek private damage compensation.[33] Competition authorities bear the burden of proof of anticompetitive conducts.[34] They shall protect confidential information and endeavor to apply its national competition laws to all commercial activities in their territory.[35] In

[31] *See* article 16.1.1, Chapter 16, TPP: *"Each Party shall adopt or maintain national competition laws that proscribe anticompetitive business conduct, with the objective of promoting economic efficiency and consumer welfare, and shall take appropriate action with respect to that conduct*".
[32] *See* article 16.2.1, Chapter 16, TPP.
[33] *See* articles 16.2.4; 16.2.5 and 16.3, Chapter 16, TPP.
[34] *See* article 16.2.7, Chapter 16, TPP.
[35] *See* articles 16.2.8 and 16.1.2, Chapter 16, TPP.

practice, these obligations strengthen the antitrust enforcement and institutional framework to combat anticompetitive conduct throughout all sectors of the economy.

(B) **International cooperation and Transparency as the backbone for regional implementation of competition-related obligations**. The Chapter 16 provides for cooperation and coordination among competition authorities on the development of competition policy and enforcement, including notifications, consultations and information exchanges as testament of the increasing importance of cross-border cases.[36] The TPP parties are also encouraged to enhance technical cooperation among authorities as means to promote dynamic communication and awareness among them. This type of cooperation might be enacted through the exchange of officials (twinnings), sharing experiences on competition advocacy and assisting other parties to implement their competition laws.[37] As a necessary complement to the cooperation objective, the Parties also recognize the value of making their competition enforcement policies as transparent as possible, especially by making available information concerning its competition law enforcement policies and practices, exemptions and immunities.[38] Parties shall also ensure that final decisions finding a violation of their national competition law are made in writing and set out, in non-criminal matters, findings of fact as well as the reasoning, including the legal and, if applicable, the economic analysis, on which the decision is based.[39]

(C) **Consumer protection as a necessary complement of antitrust policies to regulate firm behavior.** The inclusion of consumer protection obligations within the competition policy chapter constitutes a recognition of the role of consumer protection policy and enforcement as a key complementary tool to create efficient and competitive markets and enhance consumer welfare.[40] In this sense, the TPP parties have committed to adopt the necessary laws to prosecute fraudulent and deceptive commercial activities.[41] These practices are specifically defined in the text of the TPP as commercial practices that cause actual or imminent harm to consumers, including (i) misrepresentation of material fact, (ii) failure to deliver products or provide services after consumers are charged and (iii) charge or debit consumers' accounts without authorization.[42]

However, even in the ambitious framework of the TPP, the Competition policy chapter itself offers limited mechanisms of direct enforcement. The Chapter 16 is excluded from the Dispute Settlement mechanism established by the TPP (Chapter 28) and also fails to create an *ad hoc* committee to oversee the implementation of commitments. Instead, Chapter 16 only establishes the right to enter into consultations at the request of another party. Therefore, enforcement will be based on the institutional tools established to oversee the implementation of domestic competition policies. Finally, parties may exclude some activities from the competition law provided that these exclusions are transparent and based on public policy or public interest grounds.[43]

[36] *See* article 16.4.1 Chapter 16, TPP.
[37] *See* article 16.5, Chapter 16, TPP.
[38] *See* articles 16.7.1 and 16.7.3, Chapter 16, TPP.
[39] *See* article 16.7.4, Chapter 16, TPP.
[40] *See* article 16.6.1, Chapter 16, TPP.
[41] *See* article 16.6.3, Chapter 16, TPP.
[42] *See* article 16.6.2, Chapter 16, TPP.
[43] Brunei, that by 2015 did not have a competition law, will not be subject to the obligations under the competition policy chapter until it establishes a competition authority or for a maximum period of 10 years after the entering into force of the TPP.

3. Leveling the playing field and ensuring market access by disciplining State-Owned Enterprises

Most governments provide state aid and incentives to both SOEs as well as private firms in order to correct market failures. However, targeted aid toward specific firms can negatively impact market competition. While incentives may attract productive investments and contribute to growth, they can also entail negative effects, such as creating artificial advantages that distort the normal competitive process by altering the level of the playing field, increasing the likelihood of anticompetitive practices by the enterprises that receive the subsidy, as well as deterring new investments given the preferential treatment granted to specific enterprises through incentives and subsidies. The risks of such policies grow exponentially when they target SOEs and designated monopolies, since these typically enjoy a privileged position *vis-a-vis* private operators. If state support measures target sectors with low levels of market competition, the effects in the markets are more pervasive.

The Uruguay round agreements initially disciplined SOEs and designated monopolies by submitting them to the non-discriminatory treatment prescribed for governmental measures affecting imports or exports by private traders. This approach is based in the GATT that required parties to ensure that, in the purchases or sales involving either imports or exports, SOEs and designated monopolies should not only behave in accordance with commercial considerations, including price, quality, availability, marketability, transportation but also afford the enterprises of the other contracting parties adequate opportunity to compete for participation in such purchases or sales.[44] This approach was captured by other PTAs and Free Trade Agreements (FTAs) that specifically refer to GATT commitments such as Association of Southeast Asian Nations (ASEAN) or follow a similar approach such as Caribbean Community and Common Market (CARICOM) or The Central European Free Trade Agreement (CEFTA). For example, the CARICOM prescribes the elimination of discriminatory measures enacted by SOEs and designated monopolies that limit market access or "distort competition or fair trade".[45]

However, a comprehensive approach towards leveling the playing field regarding SOEs is a rather recent trend within PTAs. The TPP is the first FTA that seeks to address comprehensively the commercial activities of SOEs competing with private companies in international trade and investment. Even though the chapter's commitments build on principles from the WTO and previous U.S. FTAs, notably CETA, [46] the TPP significantly expanded the scope of commercial consideration and non-discrimination commitments as it advances on the control of distortive public support and subsidies through non-commercial assistance obligations. In other words, the Chapter works to promote competitive neutrality and non-distortive public aid support. Other PTA's which provide a comprehensive treatment of SOEs are KORUS and the EU Proposal for TTIP. Whereas parties are free to create monopolies and SOEs their conduct in the market should be carried out in accordance with competition rules and in a non-discriminatory manner.[47]

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[44] Article 17.1 of the GATT on State Trading Enterprises

[45] Article 94.1 of CARICOM.

[46] *See* CETA Chapter 18, available at http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/

[47] For example, Article 16.3 of KORUS deals with State Enterprises and contains the following obligations: 1. Each Party shall ensure that any state enterprise that it establishes or maintains: (a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges; and (b) accords non-discriminatory treatment in the sale of its goods or services to

More specifically, under Chapter 17 of the TPP, SOEs and designated monopolies should be bound to compete on the basis of quality and price rather than benefitting from discriminatory regulation and distortive subsidies. Basically, the obligations established by the Chapter on SOE and designated monopolies tap on three main commitments by TPP parties: (i) avoiding discrimination and applying commercial considerations by SOEs, including a limitation for designated monopolies to engage on anticompetitive practices; (ii) parties must NOT concede non-commercial assistance[48] capable of causing adverse effects or injury to the interests of another Party, meaning to economically support SOEs in terms more favorable than those commercially available[49]; (iii) parties must offer an impartial regulatory and institutional framework for SOEs, yet making them accountable for their actions in other TPP countries.

The TPP experience can become a standard to influence and be replicated across international trade agreements currently under negotiation. TPP obligations crystalize basic concerns of its parties regarding the threat and potential market distortions that heavily subsidized national public champions may bring about when competing internationally. To that end, these obligations shall be read in a broader regional and international framework that the TPP itself since they will affect other trading partners having a significant number of SOEs competing in the markets of TPP parties, examples of Brazil, a China, India or Russia. This influence can already be seen in the talks on the EU-US TTIP (Transatlantic Trade and Investment partnership)[50] as well as the EU-China BIT (Bilateral Investment Treaty) with similar demands expressed by the EU in relation to the need to curb non-commercial benefits for SOEs.[51] While direct claims on non-discrimination and commercial considerations can only be made by TPP parties, the other two Chapter obligations (non-commercial assistance and impartial regulator) will indirectly benefit any (private/public) firm from a non-TPP party competing in a market covered by TPP obligations.

Based on these considerations, Figure 6 illustrates a basic framework that accounts for the promotion of competitive neutrality through trade agreements.

covered investments. 2. Allows parties to establish and maintain state enterprises. Along the same lines, Article 3 of the EU Proposal for TTIP, authorizes parties to establish or maintain state enterprises or designating or maintaining monopolies and granting enterprises special or exclusive rights. However, where an enterprise falls within the scope of this provision, the parties shall not require or encourage such an enterprise to act in a manner that is inconsistent with the PTA. Article 4 further elaborates on the principle of non-discrimination to a covered investment, to a good of the other party and/or to a service or a service supplier of the other Party in its purchase or sale of a good or a service

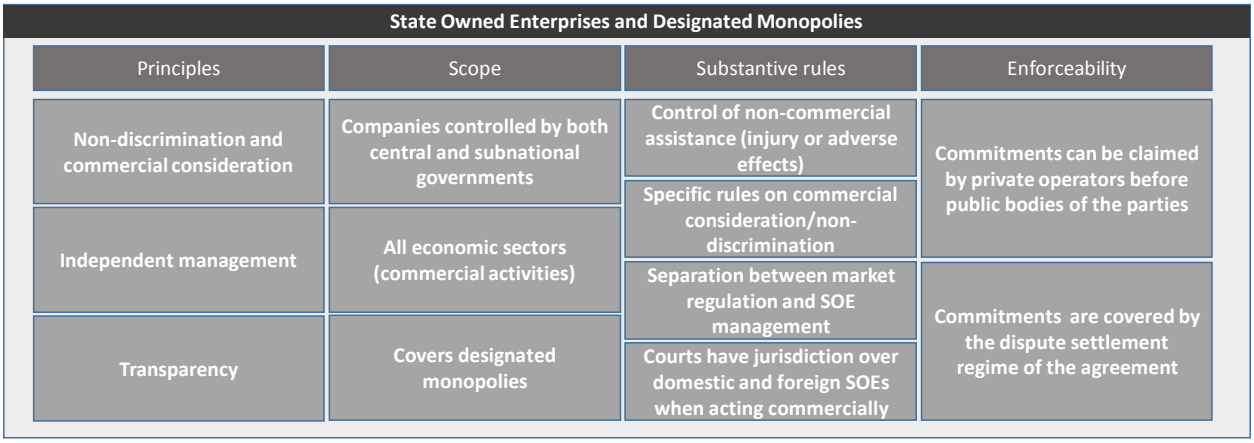
[48] Assistance meaning *"direct transfers of funds or potential direct transfers of funds or liabilities, such as: grants or debt forgiveness; loans, loan guarantees or other types of financing on terms more favorable than those commercially available to that enterprise; equity capital inconsistent with the usual investment practice (including for the provision of risk capital) of private investors; goods or services other than general infrastructure on terms more favorable than those commercially available to that enterprise."* (Article 17.1)

[49] Non-commercial assistance includes (1) direct transfers of funds or potential direct transfers of funds or liabilities and (2) goods or services other than general infrastructure on terms more favorable than those commercially available to that enterprise (definitions p. 17-2). The TPP excludes non-commercial assistance measures taken prior to the TPP entering into force and/or enacted within three years of it, if based upon a decision taken prior to its entering into force (Article 17.7.5).

[50] *See* information about the EU-US T-TIP negotiations (summary of U.S objectives, negotiating round and public forum information, fact sheets and reports) made available by the Office of the United States Trade Representative official website, available at https://ustr.gov/ttip

[51] About Chinese SOEs and the lack of a level playing-field for prospective and existing European investors in China and concerns regarding the level of Chinese Investment in the EU, see European Parliament's Committee on International Trade, Ex-Ante Impact Assessment Unit (2013), "European Commission proposal on EU-China Investment Relations. Initial appraisal of a European Commission Impact Assessment", Impact Assessment (SWD (2013) 185, SWD (2013), available at http://www.europarl.europa.eu/RegData/etudes/note/join/2013/514077/IPOL-JOIN_NT(2013)514077_EN.pdf

Figure 6. Competitive Neutrality in International Trade Agreements



Source: Elaborated by the authors.

4. Embedding competition principles in sectoral policies and broad government interventions through Regulation

Even though market regulation is a legitimate and necessary way to accomplish various policy objectives, in some cases it has the potential to negatively affect both trade and competition, harming market dynamics in unintended and in several cases avoidable manner. The most appropriate solution is to design regulatory alternatives that – among those that address the underlying policy objective – minimizes competitive restraints. This effort includes identifying and suppressing rules that (i) reinforce dominance or limit entry (absolute entry restrictions, Incumbents involvement in entry decision), (ii) facilitate to collusive outcomes (regulations facilitating price fixing e.g. self/co regulation or information exchange), (iii) discriminate and protect vested interests (explicit discriminatory rules without justification, selective subsidies and incentives which distort the level playing field, explicit lack of competitive neutrality).

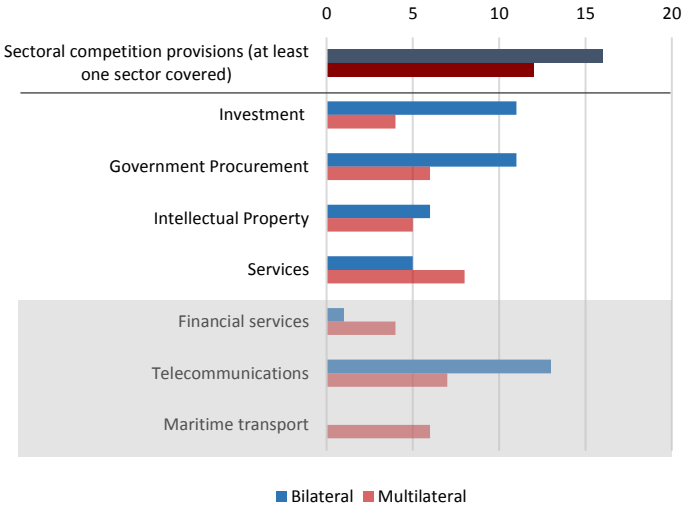
In this sense, sector specific obligations within trade agreements have typically focused on minimizing anticompetitive restrictions as an instrument to embed competition principles in markets open to trade and investment. Sectoral obligations are included for key industries with the objective of reducing Tariff Barriers to Trade (TBTs) and promoting entrance. The most common include telecommunications, general services, financial services, investment, government procurement, intellectual property and maritime transport. In general terms, PTA's sectoral provisions aimed at harmonizing and/or recognizing technical standards and promoting cooperation and communication between sectoral regulators.[52] Common principles may be observed also regarding specific industries, for example, articles regulating telecommunications usually include obligations related to access to public telecommunication networks and other essential facilities, interconnection, universal service and number portability.[53]

[52] See for example, Pacific Alliance Chapter 7 and Part 2 of the EU Proposal for TTIP dealing with Cooperation and Technical barriers to trade.

[53] See for example CET Chapter 15 and Pacific Alliance Chapter 14.

Multilateral and bilateral agreements differ in their approach to sectoral competition commitments with bilateralism taking the lead in the coverage of such provisions. Almost 70% of bilateral agreements include sector-specific competition commitments versus only 23.5% of multilateral instruments. While bilateral agreements focus on telecommunications, investment and public procurement, in multilateral agreements the interest varies across different sectors with services playing a bigger role in relative terms. Figure 7 captures sectoral obligations accounted in PTAs within their competition policy provisions.

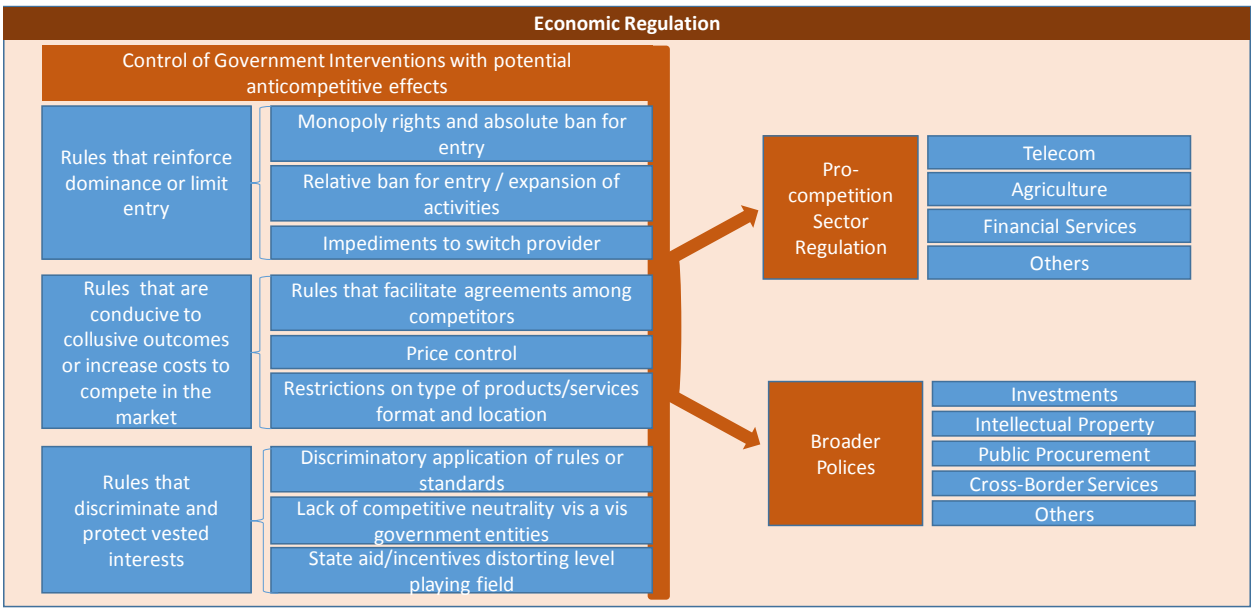
Figure 7: PTAs and coverage of sectoral competition provisions



Source: WBG elaboration on Teh (2009)

Building upon this framework, Figure 8 illustrates the main issues to be considered when assessing the promotion of pro-competition government regulation through trade agreements:

Figure 8. Economic Regulation in Trade Agreements



Source: Elaborated by the authors.

Along these lines, the TPP constitutes an interesting example of how a pro-competition approach can permeate extensive portions of a PTA – new agreements can go further and expand both sector-specific and economy-wide regulations benefiting from competition principles. The TPP specifically promotes pro-competitive regulatory environments in key economic regulations, among others, investment (Chapter 9), cross-border services (Chapter 10), financial services (Chapter 11); telecommunications

(Chapter 13); and government procurement (15). These vertical obligations are essential to guarantee a comprehensive competition approach to trade in the context of significant carve outs in horizontal commitments exemplified by the extensive exceptions applied to the SOE Chapter and some strategic activities eventually exempted from the scrutiny of national competition laws. Therefore, even those firms escaping the scrutiny of the SOE or the Competition Policy Chapters might have to abide by the obligations established under the sector-specific or broader policies chapters.

For example, the Financial Service Chapter of the TPP peruses the facilitation of cross-border services through the implementation of market access rules[54] and classic international trade principles of most favored nations[55] and national treatment.[56] The Chapter particularly limits regulatory barriers to entry of foreigner companies – article 11.5, Chapter 11 of the TPP states that no Party shall adopt or maintain with respect to financial institutions of another Party or investors of another Party limitations on:

(i) the number of financial institutions whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test;
(ii) the total value of financial service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
(iii) the total number of financial service operations or the total quantity of financial services output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; or
(iv) the total number of natural persons that may be employed in a particular financial service sector or that a financial institution may employ and who are necessary for, and directly related to, the supply of a specific financial service in the form of numerical quotas or the requirement of an economic needs test.

The telecommunication commitments of Chapter 13 are also intended to guarantee a pro-competitive framework able of enhancing sector performance and consumer welfare by eliminating policies and regulations that strengthen dominance through statutory monopolies, limited access to essential facilities and discriminatory behavior by incumbent companies. Key obligations of the telecommunication Chapter are based on: (i) competition for the supply of services and equipment, (ii) non-discriminatory market conditions and (iii) market-oriented regulatory solutions. The goal is to create positive externalities in sectors that depend on telecommunication services by addressing issues such as fair access to government resources, transparency in rule making, fair procedures and the rule of law. The same type of principles and obligations are included in other PTAs that deal extensively with telecommunications, such as CETA and the Pacific Alliance.

General principles and rules on accessibility and non-discrimination within the telecom Chapter ensure the right to access networks on reasonable and non-discriminatory basis, establishing portability, number portability and fair international roaming rules for firms from other TPP parties. The Chapter expands on accessibility and non-discrimination rules when it comes to dealing with entities with market power, establishing obligations for interconnection, non-discrimination, unbundling requirements, co-

[54] *See* article 11.5, Chapter 11, TPP.
[55] *See* article 11.4, Chapter 11, TPP.
[56] *See* article 11.3, Chapter 11, TPP.

location and access to poles, ducts, conduits, international submarine cable systems and rights-of-way owned or controlled by major suppliers.

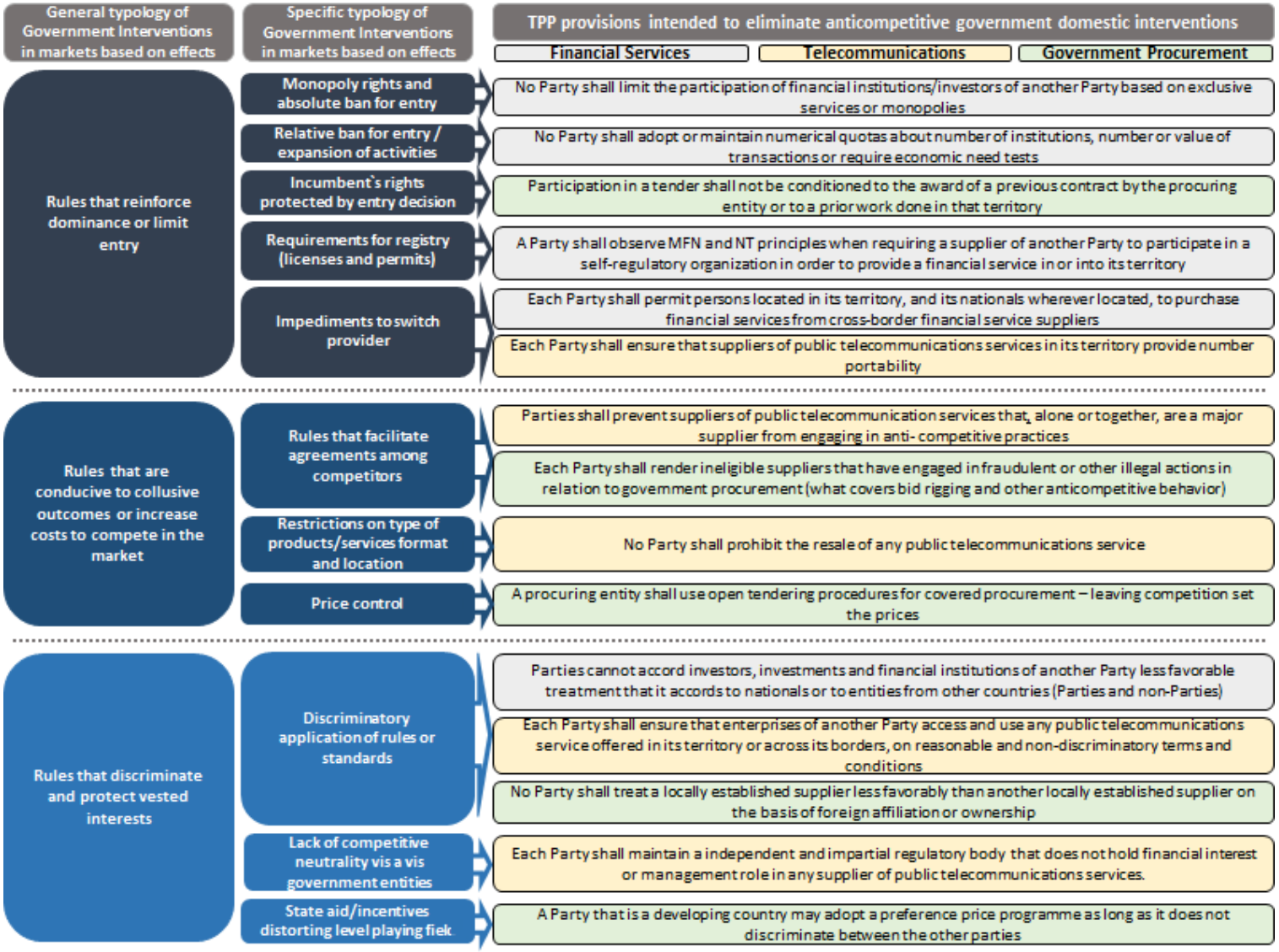
Finally, public procurement commitments in the TPP, are set to foster more open and competitive public procurement markets. According to the World Bank "the public procurement market is massive. In developing countries, governments spend an estimated USD 820 billion a year, about 50% of their budgets, on procuring goods and services. Public procurement is large in high-income countries as well, reaching about 29% of total general government expenditure. In the past decade, public procurement has increased 10-fold. And this growth trajectory is expected to continue."[57] TPP Parties share an interest in accessing each other's large government procurement through transparent, predictable, and non-discriminatory rules. In the Government Procurement chapter, TPP Parties commit to core disciplines of national treatment and non-discrimination, to treat tenders fairly and impartially, to award contracts based solely on the evaluation criteria specified in the notices and tender documentation, and to establish due process procedures to question or review complaints about an award.

Using the WBG's Market and Competition Policy Assessment Toolkit (MCPAT) framework, Figure 9 shows how sectoral commitments on the financial services, telecommunications and procurement sectors have been designed to eliminate rules that: (i) reinforce dominance or limit entry, (ii) are conducive to collusive outcomes or increase costs to compete in the market and (iii) discriminate and protect vested interests. From a general perspective, the TPP captures the key elements of effective competition policy frameworks by connecting economy-wide (horizontal) and sectoral (vertical) obligations affecting both public and private firms. In this sense, it offers a platform that could be used to elevate competition to a national policy as some of the TPP parties have done in the past, notably Australia. However, further developing this notion would require a much larger engagement of TPP members.

The following Annex contains a consolidated version of the framework and template tables with detailed questionnaires in order to account for all dimensions discussed above.

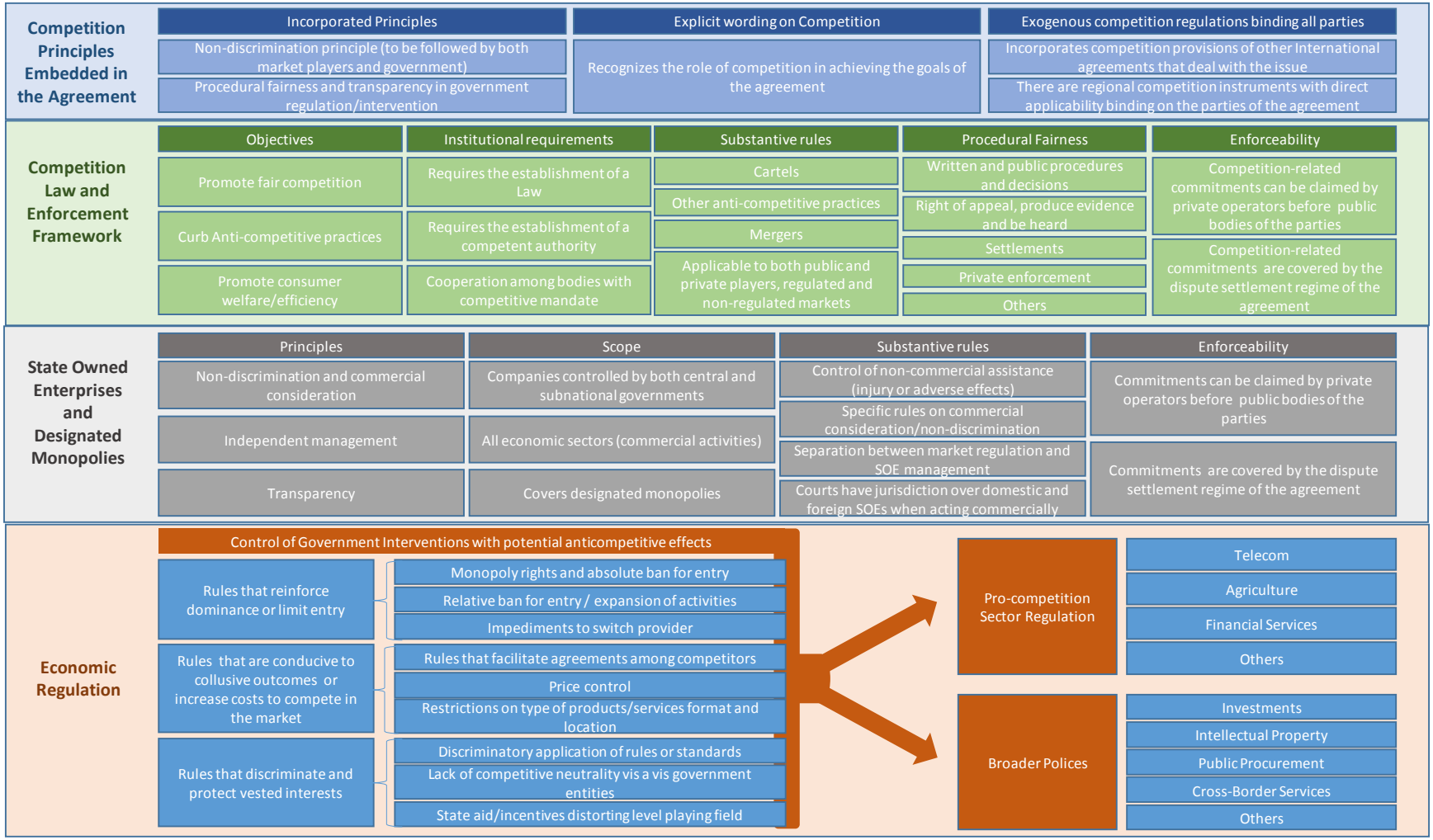
[57] *See* WBG (2016), *"Benchmarking Public Procurement 2016: Assessing Public Procurement Systems in 77 Economies"*, page iv, available at http://bpp.worldbank.org/~/media/WBG/BPP/Documents/Reports/Benchmarking-Public-Procurement-2016.pdf.

Figure 9. **How TPP sector specific obligations foster the removal of government interventions that harm competition**



Source: M. Licetti, G. Murciego, G. Falco, "Implications of the Trans-Pacific Partnership for Competition Policy", in P. Silveira (ed), Competition Law and Policy in Latin America: Recent Development. Wolters Kluwer, 2017.

Annex I: Competition Policy within Trade Agreements – Preliminary Framework



Source: Elaborated by the authors