

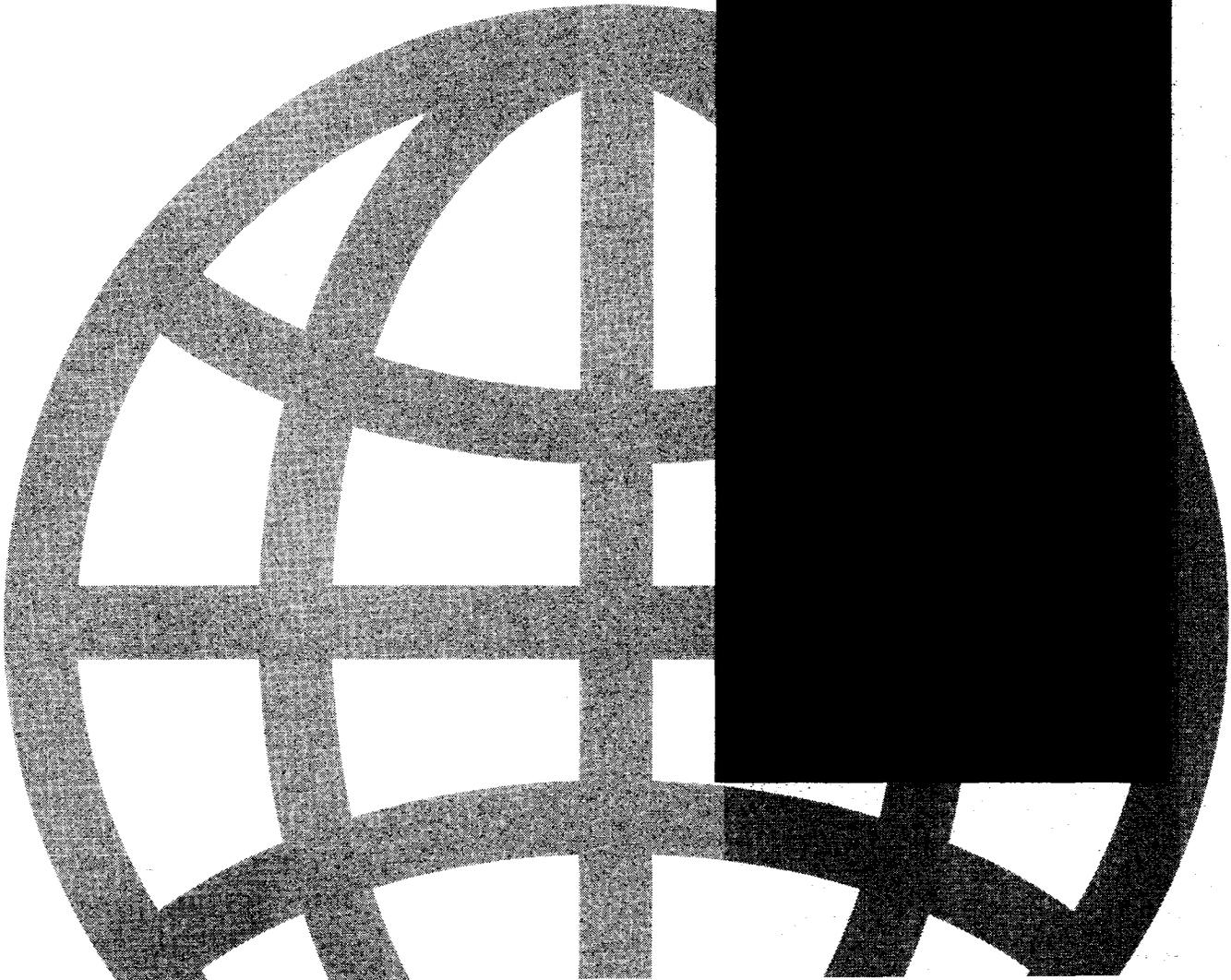
**Competition Policy
and Preferential
Trade Agreements**

Bernard Hoekman

18875
1998

**ECONOMIC
DEVELOPMENT
INSTITUTE**
of the World Bank

EDI Working Papers



Competition Policy and Preferential Trade Agreements*

Bernard Hoekman

World Bank and Center for Economic Policy Research

There are wide differences across regional agreements in terms of whether and how competition policy and antitrust issues are addressed. Most preferential trade agreements that have led to full free trade—including the elimination of contingent protection—go beyond the WTO in at least some important respects by including disciplines on the scope to pursue industrial policy and provisions to facilitate the movement of factors of production. Most of these agreements have also pursued some degree of “harmonization” of antitrust disciplines. The available evidence therefore cannot reject the hypothesis that achieving unconditional free trade requires the adoption of common antitrust disciplines.

JEL classification: F13

Keywords: trade policy, competition policy, antitrust, preferential trade agreements, regional integration

Correspondence: World Bank, 1818 H St. NW, Washington DC 20433; tel: 202 473 1185;
fax: 202 676 9810; e-mail: bhoekman@worldbank.org

*An earlier version of this paper was presented at the Brookings conference on Private Practices and Trade Policy. I am grateful to Pierre-Richard Agénor, Geza Feketekuty, Robert Lawrence, Russell Pittman, Pierre Sauvé, Raymond Vernon and conference participants for helpful comments and suggestions. The views expressed are personal and should not be attributed to the World Bank.

Copyright © 1998
The International Bank for Reconstruction
and Development/The World Bank
1818 H Street, N.W.
Washington, D.C. 20433, U.S.A.

The World Bank enjoys copyright under protocol 2 of the Universal Copyright Convention. This material may nonetheless be copied for research, educational, or scholarly purposes only in the member countries of The World Bank. Material in this series is subject to revision. The findings, interpretations, and conclusions expressed in this document are entirely those of the author(s) and should not be attributed in any manner to the World Bank, to its affiliated organizations, or the members of its Board of Executive Directors or the countries they represent.



400/153 E2000

EDI Working Papers are intended to provide an informal means for the preliminary dissemination of ideas with the World Bank and among EDI's partner institutions and others interested in development issues.

The backlist of EDI training materials and publications is shown in the annual *Catalog of Learning Resources* which is available from:

Learning Resources Center, Room G C1-300
Economic Development Institute
The World Bank
1818 H Street NW
Washington, DC 20433, USA

Telephone: (202) 473-6351
Facsimile: (202) 522-3195

Or visit EDI's website at:

<http://www.worldbank.org/edi>

Contents

I. Introduction	<i>1</i>
II. The Regional Experience	<i>3</i>
European Community (EC)	<i>4</i>
The European Economic Area (EEA)	<i>6</i>
EU Agreements with Eastern European and Mediterranean Countries	<i>7</i>
Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)	<i>8</i>
MERCOSUR	<i>9</i>
Prospective Agreements: the FTAA and APEC	<i>11</i>
III. Feasibility: Lessons from the Regional Experience	<i>12</i>
1. Does diversity of current antitrust regimes imply agreement is not feasible?	<i>12</i>
2. Is supranational enforcement required for rules to be effective?	<i>13</i>
3. Does agreement on atitrust rules require more general competition policy disciplines?	<i>13</i>
4. Are antidumping-competition policy linkages infeasible?	<i>13</i>
IV. Concluding Remarks	<i>14</i>
References	<i>17</i>
Table 1: Summary Comparison of PTAs	<i>21</i>

I. Introduction

Partly as a result of efforts to reduce barriers to international trade under auspices of the General Agreement on Tariffs and Trade (GATT), average tariffs of industrialized countries have fallen to less than five percent and quantitative restrictions have mostly disappeared from the landscape. Currently, the major remaining trade policy instrument affecting trade in manufactures with high-income countries is contingent protection (safeguards, antidumping and countervailing duty mechanisms). Consequently, international negotiations have increasingly centered on such instruments, and on domestic policies (often regulatory in nature) that may impede the ability of foreign firms and products to contest a market. Examples of the latter include technical regulations that aim to safeguard public health or the environment; public procurement regimes; and licensing or certification requirements for service providers. The World Trade Organization (WTO) embodies rules and disciplines in many of these areas.

Proposals have also recently been made to extend the WTO rules to include multilateral disciplines on competition (antitrust) policies. These proposals are sometimes justified on grounds that private anticompetitive practices may restrict market access opportunities and effectively nullify or impair a country's trade liberalization commitments; that national antitrust regimes may impose negative spillovers on other countries (for example, tolerance of export cartels); or that effective antitrust enforcement against firms with global market power requires a certain degree of harmonization of rules and cooperation between national enforcement agencies, both to be effective and to reduce compliance costs and uncertainty for multinational businesses.

The possibility that multilateral negotiations on competition policy might be launched in the near future increased significantly in 1996 following the decision of the first Ministerial meeting of the WTO to create a working group to study the interaction between trade and competition policy. This recent initiative is not the first multilateral effort in this area. Competition policy was included in the draft charter of the still-born International Trade Organization (ITO) in 1948, and its provisions were incorporated into the GATT on a "best-endeavors" basis (in Art. XXIX GATT). The Organization for Cooperation and Development (OECD) has also played a prominent role in fostering communication and promoting cooperation, especially through the activities of its Competition Law and Policy Committee.¹ Thus far, however, most international cooperation in this area has been mainly issue-specific, and centered on bilateral agreements between national antitrust agencies to exchange information, establish comity and cooperate selectively on enforcement.

The likelihood of success in a WTO-based effort to agree to rules remains clouded as indicated by controversy over the terms of reference and work program for this group. There are several sources of disagreement regarding the need for multilateral competition policy rules. One important one for the WTO relates to the possible link with anti-dumping. For some, one of the attractions of an agreement on competition policies would be that it might permit the elimination

¹ See Davidow (1981) for a discussion of international developments in the area during the 1960s and 1970s; Lloyd and Sampson (1995) provide an overview of the various multilateral instruments and fora that have addressed competition issues. Information and documentation on OECD activities can be downloaded from the OECD home page (<http://www.oecd.org>).

of anti-dumping rules.² There is also a view that anti-dumping rules could be made more consistent with competition policy principles, perhaps as part of a transition to the eventual substitution of anti-dumping with competition policy rules.³ For others, who are eager to preserve the anti-dumping rules, these possibilities are an important reason to oppose such an agreement (Stewart, 1996).⁴ Given the lack of success associated with over two decades of vigorous opposition by international economists to antidumping and arguments in favor of relying on antitrust instead, many observers have concluded that attempting to link the two issues is unlikely to be feasible (Graham and Richardson, 1997).

In addition to the controversies over the antidumping-antitrust linkage issue, there are others who question the feasibility of negotiating a competition policy agreement at the WTO on its own merits. Some argue there is no need for this because cooperation between antitrust authorities can deal with most practical issues (Klein, 1998). Others argue that negotiating multilateral antitrust disciplines should not be a priority because further trade liberalization is a more powerful pro-competitive force than antitrust (Blackhurst, 1991). Agreement on antitrust in the WTO context has also been argued to be infeasible because the current domestic laws and enforcement mechanisms of WTO members are simply too diverse. Many WTO members have very little, if any, experience with national competition law; a significant number have no domestic antitrust laws on their books at all (Klein, 1998).⁵ A related concern is that because of the diversity and inexperience, an international agreement might be worse than no agreement because it could imply harmonization of antitrust rules to standards that are sub-optimal for developing economies. Another concern relates to sovereignty. Some argue that to be effective, competition rules require an international body with enforcement capabilities, something that many members of the WTO are unwilling to contemplate.⁶ Yet another obstacle is the view that anti-trust issues relate only to private behavior, and that constraints on government subsidies and other types of industrial policies need to be part of any agreement that deals adequately with the issue of competition policy. Proponents of this view perceive such government policies to be a more important source of distortions than differences in antitrust regimes.⁷

² This is an argument with a long pedigree, see e.g., Caine (1981) for a statement and references to the earlier literature. More recent discussions can be found in Hoekman and Mavroidis (1994) and Schöne (1996).

³ Messerlin (1994), Wood (1989; 1996), Hoekman and Mavroidis (1996).

⁴ The strength of the antidumping lobby was illustrated during the Singapore Ministerial meeting in a joint statement by United States and the EC “clarifying” that the working group on trade and competition policy “is specifically directed at a work plan addressing antitrust issues and will not affect domestic antidumping standards and provisions.” See Statement on Competition Policy, USTR press release 96-95, 13 December 1996. The business views are also expressed directly. Thus, a 1996 report on competition policy by a private sector group directed at the US government states that: “As long as exporters may engage in dumping, there will be a need for national antidumping laws” (www.ustr.gov/reports/actpn/policy.html).

⁵ For a summary table describing the status of antitrust legislation in developing countries, see Hoekman (1997).

⁶ This was argued by Ray Vernon at the conference.

⁷ See e.g., Hoekman and Mavroidis (1994). This line of argument has a long history—see for example Rahl (1981).

There are therefore many viewpoints and disagreements. It is noteworthy, however, that competition policy rules have been introduced in several preferential trade agreements (PTAs), particularly, but not exclusively, those associated with the European Community (EC).⁸ These agreements provide natural experiments or laboratories for the central goal of this paper: to evaluate the validity of some of the claims that are made about the feasibility of international competition policy agreements.⁹ To undertake this exercise, the paper is organized as follows. Section II reviews the evidence offered by the major PTAs that have been established in the post Second World War period that have included provisions relating to competition policies. Section III draws some lessons from the regional experience regarding the feasibility issue. Section IV concludes.

II. The Regional Experience

Before discussing individual agreements, it is useful to distinguish competition *policies* in general from antitrust or competition *law*. Antitrust law involves instruments that control or regulate the permissible behavior of private firms or natural persons. Generally antitrust laws prohibit anticompetitive practices such as price fixing, collusion between firms to restrict output, or the abuse of a dominant position. Competition *policy* spans the much broader set of measures and instruments that may be pursued by governments to enhance the contestability of markets. Antitrust is a subset of competition policy. The latter also includes actions such as efforts to privatize state-owned enterprises, deregulate activities, cut firm-specific subsidy programs, and reduce the extent of policies that discriminate against foreign products or producers. A key distinction in this connection is that competition policy disciplines constrain both private and government actions, whereas antitrust rules pertain to the behavior of private entities (firms). Issues relating to competition policy in general have been on the agenda of the GATT for many decades. The particular question currently confronting members of the WTO on which this paper will concentrate is whether to extend the rules to antitrust. Achieving agreement in this area may be more difficult than agreements which limit governmental discrimination against foreign firms.

Competition policy in general and antitrust in particular has played an important role in only few of the many preferential trade agreements which have been negotiated. Nonetheless, a number of the more recent agreements have pursued common antitrust disciplines and thus suggest that claims that such agreements are not feasible need to be evaluated critically. In this section I will consider a number of these cases in which PTAs have sought to incorporate agreements on antitrust. Given that the issue of a possible linkage between antitrust disciplines and trade policy has figured prominently in WTO discussions, in each case I will also discuss if

⁸ For convenience, the acronym EC will be used throughout this paper, even in instances where formally the term should be European Union.

⁹ As noted above, there are other dimensions or criteria that are of interest, including an assessment of the need for common rules, the impact of alternative types of rules or agreements on individual countries, the implications for the trading system, etc. The focus of this paper is only on the feasibility issue. See Hoekman (1997) for a general survey of the literature and an assessment of the various types of multilateral agreements using alternative criteria.

and how antitrust rules were linked to the elimination of trade policy (including antidumping) on internal trade flows.

European Community (EC)

The EC is unique in that it aims to integrate member countries into a single “internal” market, defined as an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured” (Article 8a of the European Community Treaty (ECT)). It is also unique in the extent and reach of the constraints that are imposed on member states regarding regulatory policies that may act to impede the realization of a single market. Art.85 of the ECT prohibits agreements and concerted practices that restrict or distort competition in the common market and affect intra-EU trade, although exemptions may be granted. Article 86 prohibits abuse of a dominant position. Dominance is determined on the basis of the relevant product and geographic markets; abuse may involve unfair trading, price discrimination, tie-ins, bundling, or restricting output or access to markets. Public undertakings and entities granted special or exclusive rights are subject to the competition principles and rules of the ECT as long as this does not impede the realization of their assigned tasks (Article 90).¹⁰ State-aids are considered to be incompatible with the common market if they affect trade flows (Art. 92), although generally available subsidies are permitted in principle, as is aid targeted at disadvantaged regions (Article 92.3a).

In short, common disciplines are imposed on Member states with respect to state aids (subsidies), monopolies, government procurement practices, and antitrust. These are complemented by detailed European legislation relating to the achievement of the Internal Market. These disciplines have direct effect (supercede national law) and are enforced by supranational bodies (the Commission and the European Court of Justice) as well as by national courts. The various competition provisions were considered necessary in order to achieve the objective of creating an integrated European market. As has been emphasized many times by the European institutions and numerous commentators, the goal is to ensure a “level playing field” or “equal competitive opportunities” on European markets for suppliers originating in member states.¹¹ This “trade effects” focus has implied that in the enforcement of EC antitrust rules (Arts. 85-86) the Commission and Court may pursue a more “interventionist” policy stance than national antitrust authorities. The latter will generally be concerned with national welfare, and will balance the various economic effects of potential anticompetitive measures. In the EC context, the application of Arts. 85 and 86 is concerned as well with whether specific actions by entities are consistent with the objective of market integration (i.e., do not restrain intra-EC trade).¹²

¹⁰ State monopolies of a commercial character must also ensure nondiscrimination regarding the conditions under which goods are procured and marketed between EC nationals (Article 37 ECT).

¹¹ For more comprehensive discussions of the EC, see e.g., Bourgeois (1992), Brittan (1990) and Ehlermann (1992).

¹² This may lead to findings by the EC institutions that are inappropriate from a “pure” economic efficiency viewpoint. Treatment of vertical agreements provides an example. Exclusive distribution agreements between a producer in one country and a distributor in another may fall foul of EC law even if vigorous interbrand competition

A noteworthy feature of the EC regime is that no efforts were made to harmonize national antitrust regimes, which differed very substantially across countries. Indeed, some member states did not even have antitrust legislation; Italy adopted a comprehensive antitrust statute only in 1990 (Siragusa and Scassellati-Sforzolini, 1992). Particularly for smaller states this implied that EC rules had little impact, as the affected markets could easily be too small to satisfy the “trade effects test”. In such cases effective enforcement requires that national authorities take the lead. If for whatever reason this does not occur, EC competition rules may be largely irrelevant.¹³ If a similar “trade effects test” were to be adopted internationally, it might similarly limit the impact of an international agreement on smaller nations.

Over time, however, greater attention has come to be centered on the adoption of more effective national antitrust legislation in many countries. For example, in 1983 Portugal drafted and adopted its antitrust legislation in part with a view to its future accession to the EC (Barros and Mata, 1996), and a number of member states have amended their statutes to conform more closely to the letter and spirit of EC rules. To some extent this has been driven by the EC Merger Regulation, which requires that national bodies exist to review mergers or acquisitions if these are referred to them by the European Commission, and by a more general concern to implement the principle of subsidiarity (in the process reducing somewhat the burden of enforcement that is carried by the Commission and the Court).¹⁴

As mentioned, the primary focus of the European Commission and the Court of Justice has been on contesting measures (public and private) that segment national markets. Facilitation of intra-European arbitrage has therefore been an important objective. This is perhaps best illustrated in the extensive case law pertaining to Article 30 (prohibiting the use of quantitative restrictions and measures with equivalent effect) and the *Cassis de Dijon* decision which led to adoption of the principle of mutual recognition for standards (Weatherill and Beaumont, 1993, Chapter 15). But it is also reflected in the vigorous enforcement of competition provisions on the behavior of private agents and States that prevent arbitrage across markets. An example is the ban on restrictions on parallel imports—preventing distributors of a product from selling to entities that have the intention of re-selling the products in other member states.

The ECT is noteworthy in that it embodies an explicit determination that instruments of contingent protection such as antidumping actions do not have a place in a common market. Article 91 ECT allowed for the imposition of antidumping measures on internal trade only during the twelve-year transition period leading up to full implementation of the Treaty. No linkage was established between the application of antitrust and elimination of antidumping; instead the presumption appears to have been that once trade barriers had been removed (zero duties across the board), there was no justification for maintaining antidumping. This link between market segmenting trade barriers and the need for antidumping is implied in Article

(including from imports) exists on all EC markets because the agreement implies market partitioning. See Weatherill and Beaumont (1993, Chapter 22) for an extensive discussion.

¹³ For an example, see Fingleton (1996), who argues that this was the case in Ireland until passage of new legislation in 1991.

¹⁴ See Neven, Nuttall and Seabright (1993) for an analysis of the EC’s Merger Regulation.

91:2, which requires that as of the entry into force of the Treaty, products originating in one Member state and exported to another be free of duties, quotas and measures with similar effect if they are re-imported. That is, during the transitional period governments were required to ensure that arbitrage between markets was not impeded by trade barriers, thus reducing the scope for dumping.¹⁵

The European Economic Area (EEA)

The EEA was negotiated between the European Free Trade Association (EFTA) states (minus Switzerland) and the EC in 1992. It involves the former adopting much of the EC's *acquis communautaire*, including not only its competition policies but also some 1,600 pieces of EC legislation (Norberg, 1992). Thus, as in the ECT, the EEA involves the adoption of common competition rules for activities that affect intra-area trade. These rules apply to both firms and governments, i.e., they cover not just antitrust but also state aids and the activities of firms granted exclusive rights. The main difference with the ECT is that the EC's Common Policies (such as agriculture and external trade) are not adopted by the EFTA states. As a *quid pro quo* the EC extended full free trade in goods, services and factors to the EFTA countries, including the abolition of antidumping.¹⁶

The EEA built upon free trade agreements negotiated between the EC and the EFTA states in the early 1970s. These already contained disciplines on the application of (national) competition policy but did not involve supranational enforcement. These earlier EC-EFTA agreements did not eliminate antidumping on intra-area trade flows. Under the EEA, enforcement of the disciplines of Arts. 85-92 is the responsibility of both the EC Commission and an EFTA counterpart body, the Surveillance Authority. The jurisdiction of each body is defined in the EEA Treaty, and detailed procedural rules aimed at ensuring cooperation and consultation between the two bodies are laid out. In the event, little experience was obtained with these institutions, as three EEA signatories (Austria, Finland and Sweden) acceded to the EC in 1995.¹⁷

¹⁵ Note that the focus of this "arbitrage condition" is on consumers in the *exporting* country (as these have the incentive to haul back the dumped goods. Antidumping is an instrument used by firms in the *importing* country — a very different constituency.

¹⁶ Article 26 EEA states: "Anti-dumping measures, countervailing duties and measures against illicit commercial practices attributable to third countries shall not be applied in relations between the Contracting Parties, unless otherwise specified in this agreement." The exceptions are listed in a protocol. This states that it only applies to the areas covered by the provisions of the EEA in which the Community *acquis* is fully integrated (thus excluding agriculture); and that it is without prejudice to any measures which may be introduced to avoid circumvention of anti-dumping or similar measures by third countries.

¹⁷ Only Liechtenstein, Iceland and Norway remain members of the EEA.

EU Agreements with Eastern European and Mediterranean Countries

Starting in the early 1990s, the EC initiated a process of negotiating Association Agreements with Central and East European and Mediterranean countries.¹⁸ These commit signatories to eliminate trade barriers on a reciprocal basis, usually over a transition period ranging from 10 to 12 years. As in the EEA, in the so-called Europe Agreements, Central and East European (CEE) countries committed themselves to adopt the EC's rules relating to agreements between firms restricting competition, abuse of dominant position, the behavior of public undertakings (state-owned firms) and competition-distorting state aids that have an effect on trade between the EC and each signatory (Articles 85, 86, 90 and 92 ECT). Public undertakings and undertakings with exclusive rights become subject to the principles of Article 90 ECT three years after the entry into force of the agreement. State monopolies of a commercial character must abide by the Art. 37 nondiscrimination rule within five years. State-aid, compatible with EC rules for disadvantaged regions (Article 92.3a ECT), may be applied to the entire territories of the associated states during the first five years. The low level of per capita incomes in the CEE countries in comparison to those of EC states should ensure that non-industry-specific state aids will remain unconstrained for some time thereafter.

In addition to agreeing to EC competition disciplines analogous to those found in the ECT, the Europe Agreements embody provisions requiring signatories to adopt national competition legislation that is consistent with EC rules. Enforcement of the various disciplines is left to national entities and the EC Commission. The Association Council (responsible for overseeing implementation) was given the mandate to adopt by decision the necessary rules for implementation; there is no analogue to the EFTA Surveillance Authority. There are provisions setting out procedures and requirements for the exchange of information and consultations, but no binding dispute settlement procedures. Until implementing procedures were adopted, cooperation between the EC and CEE antitrust authorities followed the 1986 OECD Council Recommendation dealing with cooperation on restrictive business practices affecting international trade, and Article V of the agreement between the EC and the U.S. regarding the application of their competition laws (positive comity).¹⁹ The 1986 OECD Recommendation, which replaced the 1979 Recommendation and purports to strengthen international cooperation in this field, encourages OECD members to give effect to the principle of traditional comity.²⁰

Notwithstanding the agreement to adopt EC-compatible competition disciplines, and despite the fact that free trade and freedom of investment in both goods and services is to be achieved within ten years, there is no provision in the Europe Agreements specifying that antidumping will be phased out or eliminated. There is no analogue to Article 91 of the ECT. This situation has been justified by the Commission on the basis that antidumping and similar

¹⁸ Formally, the EEA is also an Association Agreement under Art. 238 ECT.

¹⁹ According to the traditional comity principle, sovereign states will consider important interests of other states when exercising their own jurisdiction.

²⁰ Positive comity shifts the initiative to the state whose interests are affected, which is given the legal option of requesting another state to initiate appropriate enforcement proceedings if this could address the complaining country's concerns.

instruments must remain applicable to trade flows until partner countries have completed the transition to a market economy. Subsequent to the negotiation of the Europe Agreements the EC clarified its stance on this issue. At the December 1994 Essen Summit, the European Council declared that the Union “should be ready to consider refraining from using commercial defense instruments for industrial products” conditional upon the “satisfactory implementation of competition policy and control of state aids ... together with the wider application of other parts Community law linked to the internal market, providing a guarantee against unfair competition comparable to that existing inside the internal market.” Clearly there is no firm commitment here to eliminate antidumping. Note that the EC insists that application of competition laws and principles are not enough; what is necessary (but not sufficient!) is that all of the Single Market directives are applied as well.²¹ If nothing else this provides a clear illustration of the strength of the antidumping lobby.

The situation is similar in the Euro-Mediterranean Partnership agreements that have been (are being) concluded by the EC. Under these agreements Mediterranean countries commit to abolish barriers to EC imports over a 12 year period and to abide by the principles of Articles 85, 86, and 92 of the ECT. For the first five years (as opposed to three for the CEE countries), Mediterranean nations will be regarded as disadvantaged regions for the purposes of the rules on subsidies (Art. 92). Rules to enforce the provisions of Arts. 85-86 and 92 are to be adopted by the Association Council after an initial five year period. The agreement does not require nondiscrimination in government procurement, and does not impose any requirements with respect to the liberalization of trade and investment in services. The Euro-Med agreements are therefore less far-reaching than the Europe Agreements. Mediterranean countries also have less comprehensive competition regimes than CEE countries; indeed, some do not have antitrust legislation. It should come as no surprise that instruments of contingent protection remain applicable to intra-area trade flows.²²

Summing up, the FTAs involving the EC as a partner illustrate that a commitment to apply common disciplines in areas such as antitrust, state aids, and state monopolies is sought. Indeed, increasingly what appears to be required is the full adoption of the EC’s internal market rules and the adoption of *national* legislation that is consistent with EC norms (independent of any “trade” effects considerations). Enforcement of competition rules is largely left to national bodies. Dispute settlement provisions are largely political in nature. Association Councils may make recommendations in instances where disputes arise, but these are not binding. There is no presumption that adoption of the EC *acquis* in the competition area will lead to the elimination of trade policy on intra-regional trade. Indeed, the EC illustrates that antidumping can co-exist with a customs union. Thus, in the customs union with Turkey, European firms may continue to petition for antidumping actions to be imposed on Turkish exports.²³

²¹ Indeed, as noted by Holmes (1996, p.5), in practice the EC is requiring its partners (future members) to adapt national competition rules to the EC’s standards in a much more rigorous fashion than has been done by existing member states. A recent survey by Pittman (1997) documents that the CEE countries have already gone far down the harmonization road.

²² See Galal and Hoekman (1997) for assessments of the content and economic effects of the Euro-Med agreements.

²³ See Togan (1997) for a description and analysis of the customs union agreement with Turkey.

Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)

ANZCERTA (or CER) is a free trade agreement between Australia and New Zealand established in 1983. Article 12:1(a) of the ANZCERTA requires the two countries to: “examine the scope for taking action to harmonize requirements relating to ...restrictive trade practices.” Competition regimes in the two countries differed significantly in 1983. Australian antitrust laws followed the US model, whereas New Zealand’s legislation was much more modeled on that of the UK. In 1986, New Zealand's Parliament enacted new competition legislation which was much more similar to the Australian system.²⁴ Although this was largely motivated by a desire to enhance competition in the economy, it also facilitated discussions between the two countries to eliminate antidumping on bilateral trade flows.

In a review of ANZCERTA in 1988 a Protocol on Acceleration of Free Trade on Goods was appended to the Agreement. The Preamble to this Protocol states that : “...the maintenance of anti-dumping provisions in respect of goods originating in other Member States ceases to be appropriate as the Member States move towards the achievement of full trade in goods between them.” Article 4 of the ANZCERTA was modified to read: “The member States agree that anti-dumping measures in respect of goods originating in the territory of the other Member States are not appropriate from time of achievement of both free trade in goods between the Member States on 1 July 1990, and the application of their competition laws to relevant anti-competitive conduct affecting trans-Tasman trade in goods”... and “Each Member State shall take such actions as are appropriate to achieve the application of its competition law by 1 July 1990 to [anticompetitive conduct affecting trans-Tasman trade] in a manner consistent with the principles and objectives of the Agreement.” With this amendment the CER achieved unconditional free trade. Since the amended antitrust legislation came into effect, no cases have been brought alleging abuse of a dominant position that deters intra-Tasman competition.

Ahdar (1991) argues that in the ANZCERTA context full trade liberalization was judged necessary but not sufficient to eliminate the need for antidumping. Such elimination required active enforcement of *similar* competition laws and agreement that the jurisdiction of competition agencies extend to matters affecting trade between New Zealand and Australia. In this connection it was agreed that nationals of one state could be made the subject of an enquiry by the competition authorities of the other state and be required to respond to requests for information. Australian (New Zealand) antitrust legislation was amended to extend its scope to the behavior Australian and/or New Zealand firms with market power on either one of the national markets or the combined Australia/New Zealand market; Courts were empowered to sit in the other country; orders may be served in the other country; and judgements of Courts or authorities of one country are enforceable in the other country. In 1994 the competition authorities of the two countries concluded a bilateral Cooperation and Coordination Agreement to reduce the possibility for inconsistencies in the application of legislation in instances where this is not required by statutory provisions (WTO 1996).

²⁴ Ahdar (1991, p. 332).

As in the EC, elimination of antidumping was (implicitly) linked to the transition path for the realization of free trade (July 1990). There was no effort to gradually increase the “competition-consistency” of antidumping.²⁵ The elimination was accompanied by action by one member of the PTA to move towards the adoption of antitrust legislation that conformed relatively closely with that enforced by the partner country. In contrast to the EC, the application of antitrust remedies remains strictly national. CER also includes disciplines on subsidies that are stronger than those contained in the WTO. The 1988 Protocol states that “bounties and subsidies providing long term support can no longer be regarded as a viable instrument of industry policy” (Lloyd, 1991, p. 24). Thus, industry-specific subsidies are banned. The agreement already prohibited export subsidies, which were eliminated by 1987. Although investment (capital flows) are not covered by CER, Australia and New Zealand maintain liberal investment regimes, and significant cross-investment flows have occurred.²⁶ ANZCERTA also unifies the labor market of the two countries (there is free mobility of labor), and contains relatively far-reaching commitments to liberalize trade in services. It therefore goes much beyond the adoption of common antitrust legislation.

MERCOSUR

The Southern Cone Common Market (Mercado Commun del Sur—MERCOSUR) was established in 1991.²⁷ A common external tariff was implemented in 1995. The MERCOSUR treaty was amended in December 1994 to include a variety of institutional provisions, including on dispute settlement. In contrast to the EC—also a common market—there are no provisions for supranational enforcement of the agreement; disputes tend to be settled through negotiation.

While GATT Article XIX type safeguard actions (“emergency protection”) on intra-MERCOSUR trade were prohibited as of the beginning of 1995, antidumping actions remain possible on internal trade.²⁸ However, this possibility is intended to be temporary. The elimination of antidumping is to be considered once a set of “Common Rules on the Defense of

²⁵ A facilitating factor could be that antidumping had become increasingly difficult to obtain. Between 1983 and 1988, New Zealand initiated 39 dumping investigations against Australia. Of these only two led to an affirmative finding. Similarly, Australia imposed duties in only 3 of 34 cases during this period (Ahdar, 1991).

²⁶ As of the mid 1990s, Australian FDI stocks in New Zealand equaled US \$8 billion, equivalent to 25 percent of the stock of inward FDI. The comparable figure for New Zealand FDI in Australia was US \$5 billion, or 5 percent of the total stock. Kahler (1996, p.110) notes that a factor constraining extension of CER to cover investment is the Treaty of Nara between Australia and Japan, which would require that Australia extend any benefits granted New Zealand in this area to Japan.

²⁷ The agreement was notified to the WTO under the Tokyo Round Enabling Clause, which exempts developing countries from establishing full conformity of the agreement with the WTO rules on economic integration (Art. XXIV GATT and Art. V GATS) (Laird, 1997, p. 3). Laird (1997) provides a detailed description of the provisions and implementation of MERCOSUR.

²⁸ Antidumping has been used actively by some members. For example, Argentina initiated 33 antidumping cases on imports from Brazil during the 1992-96 period, making Brazil the number one target for such actions (Tavares and Tineo, 1997).

Internal Competition” have been implemented. MERCOSUR members have initiated a process to harmonize national competition laws and create a mechanism for coordinated action to prevent anticompetitive practices from affecting intra-area trade (Rowat, Lubrano and Porrata 1997).²⁹ In December 1996 a Protocol for the Defense of Competition within MERCOSUR was adopted. This establishes a prohibition on concerted practices that restrict or distort competition and affect trade between member states, and gives MERCOSUR institutions the power to enforce these rules, although implementation remains the responsibility of national competition agencies.³⁰

In sum, it appears that Mercosur is following an approach that resembles ANZCERTA. The reach of common competition policy disciplines is conditional upon a trade effects test, and there are ongoing efforts to ensure that national antitrust regimes are similar. MERCOSUR competition rules will be enforced by national bodies. There is no explicit requirement or commitment that antidumping on intra-area trade will be eliminated, but this is on the agenda: members are committed to review the need to maintain antidumping on internal trade by the end of 2000.

Prospective Agreements: the FTAA and APEC

Given their prominence it is perhaps useful to discuss briefly the two major regional initiatives that are under construction in the Asia-Pacific region and the Americas: the Asia Pacific Economic Cooperation (APEC) initiative and the Free Trade Area of the Americas (FTAA). Both have antitrust on the agenda. Under APEC, high income (developing) member countries have agreed to achieve free trade and investment within the region by 2010 (2020). A large number of bodies have been created by APEC that are responsible for exploring possible “collective actions” in issue areas that are relevant in helping to attain and maintain the free trade goal. Competition policy is one of these topics, although contingent protection is not. APEC’s objectives in this area are to introduce and maintain “effective or adequate competition policy and/or laws and associated enforcement policies, ensuring the transparency of the above, and promoting cooperation among APEC economies, thereby maximizing, *inter alia*, the efficient operation of markets, competition among producers and traders, and consumer benefits” (PECC, 1997, p.2). The main focus of work in this area has been on information gathering and sharing and on the provision of technical assistance. The end result may be the development of non-binding principles on competition law and policy in APEC.

There appears to have been little effort to link the antidumping and antitrust issue areas. The implications of a “competition framework” for various regulatory areas is one of the dimensions of the competition policy work program, and trade remedies are part of this agenda. However, given the US antipathy to address this issue, the limited attention that seems to have been given to antidumping as an “anticompetitive” practice is not surprising. Given that any

²⁹ Decision 21/94, “Basic Elements of the Defense of Competition in MERCOSUR,” December 14, 1996.

³⁰ As MERCOSUR institutions operate by consensus, a national competition authority will have the option of refusing to implement a decision. The Protocol must be ratified by parliaments of members states before it becomes effective. Some countries have yet to create the necessary institutions (e.g., Uruguay and Paraguay).

principles that may be agreed upon in the competition area will be non-binding, it appears likely that antidumping will continue to figure in APEC trade relations for some time to come.

Similar to the APEC process, in the FTAA context efforts are also being devoted in a working group on competition policy to exploring possible modalities for cooperation. The terms of reference of the relevant working group are to compile a database/inventory of national legislation and practices, exchange views on the application/operation of competition policy regimes and their relationship to trade in a free trade area, and make specific recommendations on how to proceed in the construction of the FTAA in this area (OAS, 1997). Between May 1996 and July 1997 the working group met four times. A working group on subsidies, antidumping and countervailing duties was also created. This group has mostly engaged in a process of information collection and exchange, with a particular emphasis placed on eliminating remaining agricultural export subsidies and other trade distorting measures affecting agriculture. The terms of reference of the group do not make any mention of developing recommendations for disciplining the use of contingent protection.

III. Feasibility: Lessons from the Regional Experience

The regional experience is summarized in Table 1. It illustrates that PTAs vary on many dimensions, suggesting that many forms of international agreement on antitrust rules and competition policies are possible. What do the agreements suggest regarding the various feasibility-related arguments summarized in the Introduction?

1. Does diversity of current antitrust regimes imply agreement is not feasible?

The argument here is that the harmonization that is required to reduce existing diversity cannot be achieved. Such diversity is great--even OECD countries often differ significantly in both the formal rules and in their interpretation of similar rules in different situations (Boner and Krueger, 1991). Many developing countries have no effective antitrust regime at all. The regional experience suggests that diversity need not constrain an agreement. This is amply illustrated by the agreement of Central and Eastern European and Mediterranean countries to adopt and apply EC competition norms to business practices affecting intra-area trade (Table 1). In both these cases the EC's partner countries were basically starting from scratch. As such it is perhaps not too surprising that governments chose to accept EC norms (and Central and East European countries seeking eventual accession had very little choice in any event). ANZCERTA provides an illustration of an agreement between two high-income countries. In this case initial differences in competition regimes were reduced through significant convergence in national antitrust legislation. Although diversity therefore need not be a binding constraint, this is not to say that achieving agreement will always be feasible. There are examples of PTAs between countries that have much more similar competition regimes than was the case in EC-based PTAs, but where no attempts were made to agree to common antitrust rules pertaining to practices affecting intra-area trade. The Canada-US FTA and the NAFTA which

superseded it provide an illustration. NAFTA only requires signatories to have antitrust legislation and consult periodically on the impact of national procedures.³¹

Mention should also be made of a common element found in all PTAs with area-wide competition rules. A key dimension of the EC, EEA, CER, the EC's bilaterals with its neighbors, and also MERCOSUR is the reliance on a "trade effects" test to determine which practices are in principle subject to the common rules and which are not. This limits the extent to which the PTA attenuates the reach of national sovereignty in the antitrust area as it allows for continued diversity in domestic antitrust regimes.

2. Is supranational enforcement required for rules to be effective?

The EC is the only PTA that relies on supranational enforcement (complemented by the principle of direct effect) in the application of its competition rules. To some extent this can be argued to be a reflection of the significant differences in national antitrust regimes that prevailed prior to the formation of the EC (some member states had no legislation at all). Direct effect and supranational enforcement allowed the EC to avoid a process of harmonization of national legislation — instead, common rules for practices affecting intra-area trade (the common market) were agreed to. But PTAs such as CER and MERCOSUR that rely on convergence in national antitrust regimes illustrate that enforcement can be left to national bodies. CER members have concluded explicit agreements to allow enforcement of national law in the other nation's jurisdiction.

3. Does agreement on antitrust rules require more general competition policy disciplines?

Here again the answer is: not necessarily. Table 1 suggests there is a positive correlation between achieving agreement in the area of antitrust and agreeing to competition policy disciplines more broadly defined (i.e., EC, EEA, the Europe Agreements, CER). One can also point to negative supporting evidence for this hypothesis—NAFTA does not go as far as do the EC and EC-based agreements or the CER in disciplining government policies such as subsidies and does not have common antitrust rules. But the Euro-Med agreements and MERCOSUR are examples of agreements where countries are adopting common antitrust rules for intra-area transactions, without adopting strong disciplines on industrial policy.

4. Are antidumping-competition policy linkages infeasible?

³¹ Although no attempt was made in NAFTA to move towards harmonization of competition regimes, the potential gains from cooperation in this area is recognized. Parties have agreed to apply the positive comity principle in the enforcement of antitrust law and engaged in a process of discussing the interface between trade and competition policy. Article 1504 of the NAFTA called for the establishment of a working group on trade and competition. The focus of the working group's activities has been limited to the application and possible trade effects of competition law enforcement (conform to its mandate and the thrust of NAFTA Art. 1501) and on the strengthening of bilateral cooperation between the antitrust authorities of members. In 1995, Canada and the US concluded an agreement (which builds on an earlier Memorandum of Understanding) that provides for exchange of information and cooperation/consultations on the basis of negative and positive comity (WTO, 1996).

In general, the PTAs reveal that it is possible to eliminate anti-dumping. This has taken place in the EC, EEA, and could occur in MERCOSUR, if members decide to abolish antidumping in the review of this issue in 2000. In most cases, PTAs that have abolished antidumping have also adopted common antitrust rules. Independent of whether or not common competition disciplines were adopted, these PTAs illustrate that governments can be convinced that enforcement of domestic antitrust can be used to deal with dumping that is injurious to competition. That being said, agreement on common antitrust disciplines are neither necessary nor sufficient for the abolition of antidumping. In the absence of a clear objective to establish a “single” market, the elimination of antidumping remains a political issue independent of whatever is agreed in the area of antitrust. The examples of the EuroMed, the Europe Agreements and the earlier agreements between EFTA and the EC illustrate that agreement on antitrust is not a sufficient condition for the abolition of antidumping, while the fact that some PTAs have abolished antidumping without adopting common antitrust disciplines reveals that the latter is not a necessary condition. An interesting recent example is a 1996 bilateral FTA between Canada and Chile which goes beyond NAFTA by eliminating antidumping,³² but is similar to NAFTA in only requiring each party to adopt or maintain measures to proscribe anticompetitive business conditions and to take appropriate action where necessary.³³ More generally, the NAFTA illustrates how difficult it can be to remove antidumping. Despite the Canadian government's interest in obtaining agreement that antitrust enforcement could address issues related to dumping, negotiators were unable to move far down this path. The major factor underlying this failure appears to have been the strength of the US lobby that strongly supports the continued existence of antidumping.

IV. Concluding Remarks

The regional integration experience demonstrates that international agreements on antitrust are feasible, even between countries with initially quite different domestic antitrust policies (or no such policies at all). It also shows that there are wide differences across agreements in terms of whether and how competition policy and antitrust issues are addressed. The extent of “harmonization” of competition regimes that is required depends greatly on the concerns and preferences of the parties to each agreement, suggesting a wide range of choice for multilateral agreements. Most of the PTAs that have eliminated contingent protection—or are moving in that direction—also go beyond the WTO in some important respects by including disciplines on the scope to pursue industrial policy and provisions to facilitate the movement of factors of production (Table 1). Most of these PTAs have also pursued some degree of

³² It also requires competition authorities to consult and cooperate, including via the exchange of information. The full text of the agreement can be found at <http://www.sice.oas.org>. As in the EC, elimination is conditional upon the abolition of tariffs and nontariff barriers: antidumping on specific products ceases to be applicable on intra-FTA trade on the date that tariffs on that product are eliminated (defined at the 8-digit level). In no case is this period to extend beyond January 1, 2003.

³³ Parties are prohibited from invocation of dispute settlement procedures on the basis of the competition policy article. There is no reference to the principle of positive comity, nor are there restrictions on the right of parties to maintain monopolies or state enterprises.

“harmonization” of antitrust. The available evidence therefore suggests that eliminating contingent protection may involve the adoption of common antitrust and competition policy disciplines. However, given the small sample of PTAs that have moved down this path, this should be regarded as no more than suggestive. The Canada-Chile FTA illustrates that abolition of antidumping can be achieved without adoption of common antitrust rules.

References

Ahdar, Rex. 1991. "The Role of Antitrust Policy in the Development of Australian - New Zealand Free Trade," *Northwestern Journal of International Law & Business*, 12:317-334.

Barros, Pedro and Jose Mata. 1996. "Competition Policy in Portugal," presented at the CEPR/European University Institute workshop on Recent Developments in the Design and Implementation of Competition Policy, Florence, 29-30 November.

Blackhurst, Richard. 1991. "Trade Policy is Competition Policy," in *Competition and Economic Development*. Paris: OECD.

Caine, Wesley K. 1981. "A Case for Repealing the Antidumping Provisions of the Tariff Act of 1930," *Law and Policy in International Business*, 13, 681.

Boner, Roger and Reinald Krueger. 1991. *The Basics of Antitrust Policy: A Review of Ten Nations and the European Communities*. Washington D.C.: World Bank Technical Working Paper No. 160.

Bourgeois, Jacques. 1993. "Competition Policy and Commercial Policy," in M. Maresceau (ed.), *The European Community's Commercial Policy after 1992: The Legal Dimension*. Leiden: Kluwer.

Commission of the European Communities. 1995. "Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules," Report by the Group of Experts (DG-IV, July)

Davidow, Joel. 1981. "The Seeking of a World Competition Code: Quixotic Quest?," in O. Schachter and R. Hellawell (eds.), *Competition in International Business: Law and Policy in Restrictive Practices*. New York: Columbia University Press.

Ehlermann, Claus-Dieter. 1992. "The Contribution of EC Competition Policy to the Single Market," *Common Market Law Review*, 29, 257-82.

Fingleton, John. 1996. "Competition Policy in Ireland," presented at the CEPR/European University Institute workshop on Recent Developments in the Design and Implementation of Competition Policy, Florence, 29-30 November.

Galal, Ahmed and Bernard Hoekman (eds.) 1997. *Regional Partners in Global Markets: Limits and Possibilities of the Euro-Med Agreements*. London: CEPR.

Graham, E. and David Richardson. 1997. *Global Competition Policies for the World Economy*. Washington DC: Institute for International Economics.

- Hoekman, Bernard. 1997. "Competition Policy and the Global Trading System," *The World Economy*, 20: 383-406.
- Hoekman, Bernard and Petros C. Mavroidis. 1994. "Competition, Competition Policy and the GATT," *The World Economy*, 17:121-150.
- Hoekman, Bernard and Petros C. Mavroidis. 1996. "Dumping, Antidumping and Antitrust," *Journal of World Trade*, 30:27-52.
- Holmes, Peter. 1996. "Competition Policy and Integration: Levelling or Tilting the Playing Field," Global Economic Institutions Working Paper Series No. 21.
- Kahler, Miles. 1995. *International Institutions and the Political Economy of Integration*. Washington DC: Brookings Institution.
- Klein, Joel. 1998. "No Monopoly on Antitrust," *Financial Times*, February 13, p. 24.
- Laird, Sam. 1997. "Mercosur: Objectives and Achievements," WTO, mimeo.
- Lloyd, Peter. 1991. "The Future of CER: A Single Market for Australia and New Zealand," Committee for Economic Development of Australia. Monograph No. 96. Wellington: Victoria University Press.
- Lloyd, Peter and Gary Sampson. 1995. "Competition and Trade Policy: Identifying the Issues After the Uruguay Round," *The World Economy*, 18:681-705.
- Messierlin, Patrick. 1994. "Should Antidumping Rules be Replaced by National or International Competition Rules?," *Aussenwirtschaft*, 49:351-74.
- Neven, David, Robin Nuttall and Paul Seabright. 1993. *Merger in Daylight: The Economics and Politics of European Merger Control*. London: CEPR.
- Norberg, Sven. 1992. "The Agreement on the European Economic Area," *Common Market Law Review*, 29:1171-98.
- Organization of American States (OAS). 1997. "FTAA Working Groups: Competition Policy," <http://www.alca-ftaa.oas.org>.
- Pacific Economic Cooperation Council (PECC). 1997. "Competition Principles Project," September 25.
- Pittman, Russell. 1997. "Competition Law in Central and Eastern Europe: Five Years Later," *The Antitrust Bulletin*, forthcoming.
- Rahl, James. 1981. "International Cartels and Their Regulation," in O. Schachter and R. Hellawell (eds.), *Competition in International Business*. New York: Columbia University Press.

-
- Rosenthal, Paul and Craig Silliman. 1996. "The Limits of Competition Law in the Current WTO Context," presented at a conference Antidumping and Competition Policy: Complements or Substitutes?, Center for Applied Studies in International Negotiations, Geneva, July 11-12.
- Rowat, Malcolm, Michele Lubrano and Rafael Porrata Jr. 1997. "Competition Policy and Mercosur," World Bank, mimeo.
- Siragusa, Mario and Giuseppe Scassellati-Sforzolini. 1992. "Italian and EC Competition Law: A New Relationship," *Common Market Law Review*, 29:93-131.
- Schöne, Rainer. 1996. *Alternatives to Antidumping from an Antitrust Perspective*. Dissertation No. 1830, University of St. Gallen.
- Stewart, Terrence. 1996. "Why Antidumping Laws Need Not Be Cloned After Competition Laws Nor Replaced By Such Laws," presented at a conference Antidumping and Competition Policy: Complements or Substitutes?, Center for Applied Studies in International Negotiations, Geneva, July 11-12.
- Tavares de Araujo, José and Luis Tineo. 1997. "The Harmonization of Competition Policies Among Mercosur Countries," Organization of American States, mimeo.
- Togan, Subidey. 1997. "Opening Up the Turkish Economy in the Context of the Customs Union with EU," *Journal of Economic Integration*, 12:157-179.
- Weatherill, Stephen and Paul Beaumont. 1993. *EC Law*. London: Penguin.
- Wood, Diane. 1989. "'Unfair' Trade Injury: A Competition-based Approach," *Stanford Law Review*, 41:1153-80.
- Wood, Diane. 1996. "How To Make Antidumping Laws More Competition-Friendly," presented at a conference Antidumping and Competition Policy: Complements or Substitutes?, Center for Applied Studies in International Negotiations, Geneva, July 11-12.
- World Trade Organization. 1996. *Trade Policy Review*. Various issues (Canada, New Zealand and United States). Geneva: WTO.

Table 1. Summary Comparison of PTAs

	EC	EEA	Europe Agreements	Euro- Med	NAFTA	CER	MERCO- SUR	Canada- Chile
Free labor mobility	Yes	Yes	No	No	No	Yes	No	No
Free capital flows	Yes	Yes	Yes	No	Yes	No	No	Yes
Free services trade	Yes	Yes	Yes	No	Signi- ficant	Signi- ficant	No	In part
Strong competition policy rules*	Yes	Yes	Yes	No	No	Yes	No	No
Ex ante harmonization of national antitrust	No	No	Yes	No	No	Yes	t.b.d.	No
Area-wide antitrust rules conditional on "trade effects" test	Yes	Yes	Yes	Yes	No	Yes	Yes	No
Formal cooperation agreements between antitrust authorities	n.a.	Yes	Yes	No	Yes	Yes	t.b.d.	Yes
Supranational enforcement of antitrust	Yes	Yes	No	No	No	No	No	No
Binding dispute settlement on antitrust	No	No	No	No	No	No	t.b.d.	No
Elimination of contingent protection	Yes	Yes	No	No	No	Yes	t.b.d.	Yes

* Defined as significant disciplines on industrial policies (e.g., subsidies, discriminatory procurement)

t.b.d.: to be determined.

The Economic Development Institute (EDI) was established by the World Bank in 1955 to help promote international development. EDI conducts learning programs for officials from developing countries to assist them in planning and managing their investments more productively. The Institute produces and disseminates publications and electronic information products that support these objectives.

For information on EDI publications write to:

EDI Learning Resources Center

Economic Development Institute

The World Bank
1818 H Street, N.W.
Washington, D.C. 20433
Tel: (202) 473-6351
Fax: (202) 676-1184

Visit EDI's home page on the World Wide Web at:

<http://www.worldbank.org/html/edi/home.html>