Regional Agreements of Developing Jurisdictions: Unleashing the Potential

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Introduction

Regional competition agreements (RCAs) hold great potential for overcoming the major enforcement problems of developing jurisdictions. Indeed, it is no coincidence that the past two decades have seen an unprecedented upsurge in the number and scope of such agreements, especially in the developing world. Such agreements include, inter alia, in the Americas: MERCOSUR (the Southern Common Market); in the Caribbean: CARICOM (the Caribbean Community); in Africa: COMESA (Common Market for Eastern and Southern Africa), WAEMU (West African Economic and Monetary Union), ECOWAS (the Economic Community of West African States), SEACF (Southern and Eastern Africa Competition Forum), CEMAC (Economic and Monetary Community of Central Africa), SACU (Southern African Customs Union), EAC (the East African Community) and SADC (the Southern

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African Development Community); and in Asia: ASEAN (Association of South East Asian Nations). Most of these agreements are not specific to competition law, but involve other issues as well, mostly trade. In some, competition law issues play a central role[2] while in others competition law serves only as a supplement or a scaffolding to other goals.[3] Many try to imitate the most (if not the only) successful regional competition regime in the world, the EU.

Yet, as the experiences analyzed throughout this book clearly demonstrate, the accumulated experience of almost all of these newly sprung RCAs is that thus far they have not significantly enhanced competition law enforcement in their regions, or have encountered serious difficulties in doing so.[4] This empirical finding applies regardless of the region and the special characteristics of the jurisdictions within it. This creates a paradox: why do so many countries invest in adopting such agreements in the first place, if the obstacles to their successful operation are high.

This chapter attempts to offer some answers to this paradox by analyzing the obstacles that stand in the way of realizing the potential benefits of RCAs. Our purpose is to identify and analyze at least some of the variables that affect their adoption and operation in the real world. The fact that such obstacles are observed across RCAs strengthens the need to study the roots of such obstacles. Such an analysis can hopefully provide better tools to understand and predict when an RCA is likely to succeed or to fail, and what can be done to increase its chances of success. To do so, we combine the empirical observations on how RCAs operate in practice with theoretical analysis. The analysis builds, inter alia, on studies of the collective action problem, including studies of successful collaborations in environments which face relatively similar obstacles to a successful joint collaboration. Such an analysis can also assist us in determining whether the current failure is mainly rooted in the regional aspect of the RCAs or rather in the fact that they involve competition law, the application of which would have encountered serious difficulties in the relevant jurisdictions regardless. Should it be the latter, time might be an important factor in determining the course of such RCAs . Also, as elaborated below, the regional aspect might strengthen rather than weaken the process of adopting and applying a competition law, inter alia by strengthening competition advocacy efforts in member states.

Accordingly, the chapter is divided into three parts. The first explores the potential benefits that can accrue from a successful RCA. The second, which is the heart of this chapter, analyzes some of the obstacles to realizing such benefits that emerge from the case studies of

[2] See, e.g., Aide Memoire: Trade Capacity Building: Strengthening the COMESA trade region through a culture of competition (COMESA, 2008).

[3] For an overview of competition law provisions in regional agreements see, e.g. Philippe Brusick *et al.*, eds., *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (Geneva: UNCTAD, 2005). Online*: UNCTAD* <http://www.unctad.org/en/docs/ditcclp20051_en.pdf>; D. Daniel Sokol, 'Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements' 83 Chicago-Kent L. Rev.; Maher Dabbah, International Competition Law (Cambridge University Press, 2010), chapter 7.

[4] See the analysis of experiences with RCAs analyzed throughout this book.

the different RCAs and places them in a wider theoretical context. The third part offers some potential solutions for overcoming such problems.

Part I: Potential Benefits of RCAs

RCAs hold an important potential for overcoming some of the most significant problems that plague competition law enforcement in small and in developing jurisdictions. Since this claim was explored in length elsewhere, here we provide a broad-brush analysis.[5] Yet more real-world examples are integrated in the analysis below.

It should be noted from the outset that the benefits of RCAs are determined, inter alia, by the modalities of cooperation on which they are based. RCAs share two basic features, which are also reflected in their name: members are generally located within the same region and cooperate on competition law issues.[6] Yet the level of cooperation and the goal the agreement seeks to achieve differ significantly among RCAs. The most cooperative model focus on joint competition enforcement and education through a central competition law authority (RJCAs), whether in parallel (e.g. CARICOM) or not (e.g., WAEMU) to national competition law authorities in the member states. Such agreements hold the greatest potential to create benefits for their members. Other models adopt lower degrees of cooperation, from the joint creation of a competition culture to information sharing and enforcement by national competition authorities (e.g., MERCUSOR). Obviously, the lower the level of cooperation, the lower the potential benefits, but possibly also the lower the obstacles to its adoption and enforcement. For example, the SADC agreement, which concentrates almost solely on educational efforts, does not enjoy the benefits of joint enforcement but it is relatively easy to implement. The analysis below concentrates mainly on RJCAs, which hold the strongest potential to create benefits from cooperation.

Reducing enforcement resource constraints Possibly the main enforcement obstacle faced by developing and by small jurisdictions involves enforcement resource constraints- both financial and human.[7] RJCAs can significantly reduce such constraints by enabling jurisdictions to pool together scarce resources to reach economies of scale in enforcement activities (investigations, enforcement), as well as in competition advocacy and training.

In some situations RJCAs may provide the only viable solution for enforcement, given severe resource constraints. The Organization for Eastern Caribbean States (OECS) provides such as example: it is comprised of developing micro-economies, such as Montserrat with a population of about 5,000 and St. Kitts with a population of about 40,000. Each alone, cannot justify an investment in a competition law. Yet by pooling their resources they are able to create a joint competition authority that deals with competition law issues that affect them.

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[5] Michal S. Gal, 'Regional Agreements: An Important Step in International Antitrust' 60 *University of Toronto Law Journal* 239 (2010).

[6] Competition law need not be the only area on which states cooperate. Indeed, as noted above, many RCAs are parts of wider agreements on trade.

[7] Michal S. Gal, 'Antitrust in a Globalized Economy: The Unique Challenges of Small and Developing Economies', 33 *Fordham International Law Journal* 1 (2009); Michal S. Gal, When the Going Gets Tight: Institutional Solutions When Antitrust Enforcement Resources are Scarce, 41 Loyola University Chicago Law Journal (2010).

Reducing enforcement capability constraints Even when no significant enforcement resource constraints exist, countries might still be constrained in their capability to enforce their laws in practice, especially with regard to multinational issues.

We identify five main obstacles. First, *evidence gathering* might be problematic if evidence is located elsewhere. Accordingly, information sharing is generally an integral part of RCAs. Second, small jurisdictions often cannot *create a credible threat* to prohibit the conduct of a foreign firm, given power asymmetries. If the foreign firm's gains from trade within it are limited, were the small jurisdiction to place significant restrictions on the foreign firm, it might choose to exit the jurisdiction. Interestingly, this problem sometimes also plagues large, developing jurisdictions as well, in specific product markets which do not carry high profits or when they are completely reliant on foreign firms to supply their markets.[8] By increasing leverage through the aggregation consumers across member states and creating a critical mass, RJCAs increase the ability to create a credible threat. In is noteworthy, however, that to achieve this goal member states might also need to overcome "divide and conquer" strategies of international entities which attempt to create different motivations for different member states.

This can be exemplified by tour operators in CARICOM countries. Foreign tour operators have taken over the tour markets in many Caribbean states, based on exclusive dealing and tying arrangements that block entry of others into the market, thereby significantly limiting the ability of the local residents to benefit from the industry. Given the multiple Caribbean destinations that compete with each other, each country, on its own, cannot create a credible threat to solve the problem. But by joining together, a solution can possibly be found**.** [9]

Third, deterrence might *require cumulative sanctions* that can be easier applied and enforced through an RJCA. Fourth, it is often difficult to *impose a penalty* on firms located elsewhere. Finally, the creation of a new authority- at the regional level- may be an efficient way to overcome deep rooted limitations of existing authorities, including corruption, inefficiency and bureaucratic obstacles. Indeed, starting afresh might also reduce human resource constraints, as skilled individuals may have stronger incentives to join.

Such benefits of RJCAs may accrue whether or not there are cross-border effects within member states. Interestingly, some RJCAs provide solutions to enforcement resource and capability constraints even in cases with no cross-border effects. For example, COMESA is empowered to deal with national competition law issues, if requested by a member state due to its limited capacity. Indeed, the EU has acted in a similar fashion with regard to small member states such as Luxemburg.

[8] For example, the Chairperson of the Competition Commission of India indicated the problems they experience in creating a credible threat to prohibit a possible cartel in the international Potash market without international cooperation from other competition authorities. This results, inter alia, from the great importance of Potash to the Indian agriculture industry, informational problems, and the fact that foreign governments in which some Potash producers are located seem to endorse the cartel.

[9] Taimoon Stewart, in this book. It should be noted, however, that such a solution might possibly need to use tools beyond competition law.

Reducing public choice limitations Political pressures from interest groups are especially significant for developing and for small jurisdictions, since economic power in such countries tends to be more concentrated in the hands of a few, whether private or state-owned enterprises. Such interests might trump pubic welfare considerations.

A joint authority can alter some of the effects of well-organized pressure groups on decision-makers in adopting a competition law, since a push towards regionalization creates internal and external pressures for adopting a competition law. This is especially true if competition law is part of a wider agreement on trade. Also, once created, the aggregation of different incentives in a regional authority, which is one step removed from each member state, reduces the ability of a domestic group to exert pressures on the legislator or regulator to change the regulatory environment. Finally- once the framework is agreed upon, it is much more difficult to change than a domestic law, even if it harms the interests of strong groups in some member states. The RJCA might therefore work as a commitment mechanism which allows members to create binding commitments of compliance that will be enforced beyond the term of the current government that signed the commitments.

Strengthening Competition Culture An additional factor that often plays a role in developing countries' low enforcement levels involves the weakness of their competition culture. Most consumers in WAEMU countries, for example, prefer similar prices for competing products, in order to make choices easier, over lower but different prices. An RCA can create economies of scale in educational and in advocacy activities. Furthermore, the fact that the jurisdictions chose to include competition law on the regional agenda might, in itself, serve as a signal its importance for the region.

RCAs have a potential to further the goal of a **common, integrated market**. As the European experience demonstrates, joint competition law enforcement can play an important role in supporting the creation of an integrated market. The reduction of entry barriers results in an increased ability of firms to operate in larger areas, thereby increasing their ability to enjoy economies of scale and scope, and increasing competition. This, in turn, might signal to the international community that the region can work together towards common goals, thereby strengthening the standing of both the regional authorities as well as its member states in international circles.

RCAs might also **increase certainty and compatibility** of competition law enforcement either by transferring enforcement powers to the regional authority (e.g. filing of a request to merger firms that operate at the regional level only to the regional authority) or by adopting tools to increase compatibility between national competition laws. This, in turn, maystrengthens incentives to enter and expand in regional markets.

If decision-makers ignore the impact of their decisions beyond their borders, their decisions might impose negative **externalities** on other jurisdictions. Externalities among member states can be overcome by an RJCA which is based on joint welfare considerations. Cross-border mergers provide a useful example. In the region covered by COMESA, Lafarge took over all cement companies and South African breweries took over almost all the breweries in the area. This, of course, reduced competition significantly within the region. An integrated merger policy would have been able to limit the negative welfare effects of some of these mergers on the region.

Interestingly, a successful RCA can also create positive externalities by itself. A positive cooperation experience may allow the agreement to extend to other areas of need of regional cooperation, such as environmental protection, water quality and dealing with region-wide natural disasters.

To sum up this part, RCAs have a potential to supply a collective good that may significantly enhance the welfare of all jurisdictions involved.

Part II: Obstacles to the successful realization of RCA benefits

Given the potential benefits RCAs can offer, it is not surprising that many regions adopted RCAs. Yet as the experiences outlined throughout this book indicate, most RCAs have not realized their potential. Rather, most do not justify their costs of creation and some even create negative welfare effects on their member states. The Senegalese experience provides an example. The Senegalese competition authority was operational. However, the WAEMU regional agreement, which Senegal joined, was interpreted by the Court of Justice of WAEMU as assigning the WAEMU Commission the sole responsibility of applying competition law, and assigning to national authorities the role of cooperating with the WAEMU Commission. This was understood as mandating that all competition law be centralized. Accordingly, the Senegalese authority ceased to operate several years ago, but WAEMU has not as of yet created a viable alternative, although some cases have been brought at a regional level. As a result, Senegal lost its ability to deal with most of its domestic anti-competitive conduct.[10]

What, then, are the obstacles to the successful realization of RCA's potential benefits and what can be learned from the experience of existing RCAs? This is the focus of this chapter. The first subchapter focuses on some preconditions for a successful agreement and illustrates the effects of their inexistence on some agreement. The second subchapter analyzes possible obstacles to an RCA's efficient operation. The analysis thus differentiates between two interconnected but separate stages: reaching an agreement and enforcing it in practice.

Obstacles to the provision and operation of an RCA can arise both on the supply side or on the demand side, or both. Supply-side obstacles relate to the ability to reach an agreement and maintain its benefits over time, which are inter-connected: the ability to enforce the agreement, once created, will affect the incentives to commit to it in the first place. The fact that the agreement involves a long-term commitment in a changing environment rather than a one-shot game, increases the difficulties, since commitment should be continuous.[11]

Demand-side obstacles relate to the ability of potential member states to overcome internal obstacles to committing to an RCA that can increase their social welfare and to enforcing it. Such obstacles might be legal, political or economic. They might result from real threats to welfare (e.g., political economy constraints of interest groups), or from perceived threats

[10] See, e.g., Daniel P. Weik, 'Competition law and policy in Senegal: A Cautionary Tale for Regional Integration?' 33(3) World Competition 521 (2010).

[11] Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990), p. 45.

(e.g., misconceptions of the effects of competition). They might be specific to competition law, or general (e.g., a high hurdle on the ability to commit to any international or regional agreement).

I. Preconditions for adoption of an RCA

A. The Overarching Precondition: Pareto Optimality for each Member State

The overarching precondition to an RCA is that it creates a Pareto-superior situation to each and every member. Otherwise, why join? Benefits might differ from one jurisdiction to another, but all members must be better off than without the agreement. This precondition determines, inter alia, the limits of how far members would be willing to cede their sovereign powers in order to further other national interests.

More specifically, the greater the ability of a country to solve its anti-competitive issues on its own, the lower its incentive to cede sovereignty.[12] South Africa and the SADC agreement provide such an example. South Africa is unlikely to cede its sovereignty and join an RJCA or provide information on infringements of its national firms in foreign markets, given that it is not Pareto-superior to the current situation. This is because currently South Africa can generally deal with anti-competitive externalities from other member states and its firms are likely to benefit from engaging in anti-competitive practices elsewhere, given their dominant position in many markets in the region. Accordingly, even if the other members of the SADC agreement are likely to benefit from increased informational sharing and from joint enforcement, it is not likely that such an agreement could be reached, at least not under the current situation. Indeed, the SADC agreement mostly focuses on creating a competition culture in member states.

The boundaries of the RCA also depend on the relative situation in the different member states. In COMESA, for example, some member states are plagued by political and financial instability, a fact which reduces their realistic commitment levels. This, in turn, reduces the benefits that other members can gain from the RCA. Indeed, some members left COMESA to join smaller but more stable RCAs. Given that political and financial constrains are common to in many developing countries, we might observe such switching in other regions in the future.

The temporal element may also affect the analysis. Several RCA representatives, including those from CARICOM and ASEAN, indicated that joining an agreement with countries with no competition law or competition culture might be more costly than strengthening one's competition law internally. Of course, the scales may tip in the other direction once others apply a competition law, or when the competition culture is strengthened so that lessresources must be spent on its creation.

In short, there should be at least some degree of **commonality of interests**, which creates a **Pareto-superior situation for each and every member state**, to create the RCA. Such benefits should be analyzed against the backdrop of current and alternative solutions to competition law problems of member states. If the RCA is part of a wider agreement, the cost-benefit analysis may be calculated overall. Indeed, national trade interests often lead

[12] Andrew Guzman, 'Is International Antitrust Possible?' (1998) 73 N.Y.U.L. Rev. 1501.

jurisdictions to adopt a competition law or to join an RCA, especially if they are a precondition for joining the trade agreement.[13]

Yet benefits must not always relate (only) to the competition law sphere. Rather, if the RCA is part of a wider agreement such as a trade agreement, costs and benefits to each member state should be analyzed overall. Similarly, joining an RCA may be part of the "price" paid by a jurisdiction to international bodies that assist it in times of need. These facts, by themselves, do not necessarily imply that the RCA is not beneficial for the jurisdiction adopting it, but a more careful analysis is needed. In addition, such factors might reduce the motivation of the jurisdiction to invest efforts in making the RCA work, once adopted.

Given this Pareto-optimality precondition, we explore the costs involved in creating the RCA, both direct and indirect, that need to be balanced against the benefits that were explored above. It is noteworthy that while at least some of the costs are immediate and relatively easily quantified, most of the benefits are not, and they depend upon the successful operation of the RCA. This risk factor must also be taken into account when the balance is calculated.

Costs of RCAs[14]

Creating an RCA and especially setting up a joint authority involves **direct costs** of building a new institution and resourcing its operation, including enforcement and monitoring compliance activities. Following Buchanan and Tullock, we can differentiate between up-front transformation costs and second-stage enforcement costs. [15]

Transformation costs are the costs involved in the process of considering and (possibly) changing the rule. Such costs are affected, inter alia, by the number of stake holders making institutional choices, the heterogeneity of interests at stake, and the mode of negotiations. Enforcement costs involve both monitoring and actual enforcement of laws. They are affected, inter alia, by the rules adopted, by the institutional arrangements made, and by the legitimacy of the rule in the eye of the potential enforcer.[16] Such costs can be significant, especially where human and financial resources are scarce. If the RCA is inefficient, its costs may create an additional burden on already limited resources. Furthermore, an RCA might increase states' internal costs. For example, complying with a requirement to adopt a competition law and enforce it domestically can be very costly for some jurisdictions, due to their inadequate institutional and regulatory capacity or the small size of their markets relative to the costs of enforcement. Such a commitment can also make them vulnerable to sanctions imposed if they do not comply with such requirements, therefore further increasing

[13] For example, the CARICOM trade agreements have led OES countries to attempt to create a regional RJCA, in order to meet the requirements agreed upon in the CARICOM agreement.

[14] Based on Gal, Regional Agreements, supra note 4 .

[15] Ostrom, p. 198; James Buchanan and Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy (University of Michigan Press, 1962).

[16] Ostrom, p. 203-5.

their costs.[17] Even a relatively simple requirement of sharing information can impose high costs.

Indirect costs in an RJCA arise from the fact that some or all competition law decisions are made by an external entity. This can be split into two main concerns: First, harm to sovereignty. Second, the decision of the joint entity might harm the domestic interests of the jurisdiction.

Joint enforcement **limits the sovereignty** of member states to decide all competition law cases surfacing at their shores. Yet harm to sovereignty is generally not prohibitive. First, entering into an RJCA is voluntary: each jurisdiction exercises its discretion and decision-making power in deciding whether and under which conditions to enter the agreement. Second, sovereignty –in its embodiment as unilateral enforcement- has proven to be a highly problematic tool, especially with regard to multinational issues.[18] It should thus be weighed against other tools which allow the jurisdiction to further its domestic policy of deterrence of anti-competitive conduct by overcoming its existing enforcement problems. Finally, an intermediate solution can be applied to reduce sovereignty concerns, in which member states are part of an advisory committee to the regional authority, like in the EU. This leads to the second concern.

As shown by Guzman, joint enforcement might not always lead to decisions that benefit all member states.[19] Assume, for example, that a merger or a joint venture benefits consumers in some states, since their markets are less concentrated, and harms consumers in others. Any joint standard set for review of such conduct will harm some states and benefit others. If it is based on total welfare- counting benefits and harms by their absolute size, then the outcome will generally be driven by the effects of the conduct on the larger jurisdictions. If it is based on a calculation of effects in each jurisdiction in relative terms, then the outcome might be driven by the effects on a small number of consumers in micro-states. Accordingly, setting such a standard is highly contentious. Thus, if the optimal policies for different members clash, regionalization will require that some measure of domestic welfare be sacrificed, at least in some cases. Such sacrifice might be especially costly for those potential members which can create a stronger credible threat to prevent the anti-competitive conduct than others and to those whose interests are most harmed by the common standard. The lack of substantive convergence in some areas of competition law, most notably monopolization, may further increase the problems involved in reaching a common standard.[20]

Such costs, while important, can be reduced in several ways. One solution is to jointly enforce only those cases which further the interests of all countries involved, such as the pursuit of regional or international cartels, and leave others outside the scope of the

[17] Nancy Birdsall and Robert Z. Lawrence, 'Deep Integration and Trade Agreements: Good for Developing Countries?', in Inge Kaul, Isabelle Grunberg & Marc A. Stern, eds*., Global Public Good- International Cooperation In The 21st Century* (Oxford: Oxford University Press, 1999) 126, at 141.

[18] Gal, Unique Challenges, supra, note 6.

[19] Guzman, supra note 9.

[20] Sokol, supra note 3.

agreement. Indeed, some RCAs limit their scope to such conduct. This case-by-case Pareto-optimality standard, however, reduces the benefits from the agreement for all involved. A more effective although less simple way of tackling such issues is by ensuring that an overall balance of social welfare exists. While, for example, a merger might not be blocked if it benefits most jurisdictions, those jurisdictions which are harmed might be otherwise compensated, whether by transfer-payments as Guzman suggested, or by giving their interests priority in other enforcement decisions.[21] While Pareto-optimality might not be reached in each case, it might be reached overall.

An additional tool involves the recognition of the special interests and special needs of member states in specific markets, such as strengthening an export joint venture in a currently weak industry that allows domestic firms to reach scale economies in marketing. One possible tool, which follows regional trade agreements, involves the inclusion of special treatment provisions for specific industries in order to ensure their reasonable adjustment to the full impact of competition. This has been done in ANDEAN and in ASEAN, for example, where exemptions are determined by each member state and are not subject to overall limiting principles like in the EU. Yet since one member's export joint venture might be another's import cartel, such exemptions might significantly limit opportunities to achieve the RCA's benefits and should be significantly limited. Otherwise, competition might be limited in many important regional markets. As long as exemptions are the exception rather than the rule, the overall benefits of the RJCA can still be achieved.

The ability to reach such solutions might be reduced, however, by power dynamics: by the fact that negotiations might sometimes tilt towards the interests of jurisdictions with stronger power due, for example, to their relative size or contribution to the agreement or the fact that the RCA skilled officials might come mainly from them. Such jurisdictions might be able to alter the choices of other jurisdictions and coerce them to adopt a joint standard which serves their domestic interests, in order to reduce possible negative effects on their consumers.[22] The less homogenous the member states, the higher such potential costs, ceteris paribus. While such costs are undoubtedly important, they should still be checked against the existing situation. The most important question that each jurisdiction should ask is whether the standard likely to emerge has the potential to further its domestic interests relative to the existing situation. If the agreement makes the signatories better off than the lack thereof, there is a rationale for committing to it. This issue is further explored below.

It should also be noted that enforcement at a regional level might also reduce the accessibility of the authority to small, local firms.

[21] Guzman, supra note 9. Of course, attempts should be made, before reaching this stage, to limit the harm to all member states, either by structural or conduct remedies.

[22] Beth A. Simmons, 'The International Politics of Harmonization: The Case of Capital Market Regulation' (2001) 55 Int'l Org. 589 at 591; David Vogel, Trading Up: Consumer And Environmental Regulation In a Global Economy (Boston: Harvard University Press, 1995) at 5–6.

Finally, an RJCA might **reduce the comparative advantage** of some countries relative to their neighbors, given their different unilateral enforcement capabilities.[23] Once again, the loss of such an advantage must be balanced against benefits from a coordinated and stronger regional competition policy.

Let us now explore more subtle preconditions and their effect on the adoption and the scope of an RCA.

B. Equal Distribution of benefits as a precondition?

An RCA might create real or perceived unequal distribution of benefits among member states, which might result from trade patterns, legal regimes or geographic, economic and cultural differences. The question arises whether such distributive effects would or should inhibit the creation of an RCA.

This issue is most relevant, as most RCAs are composed of members with different conditions. Indeed, many are characterized by significant economic or legal superiority by one or more member (e.g. Singapore in ASEAN, South Africa in SADC, Trinidad and Tobago in CARICOM, Nigeria in ECOWAS, Brazil in MERCOSUR). This might lead to an unequal distribution of benefits from the agreement.

The distribution of costs and benefits depends on the model of cooperation adopted. For example, where the agreement is reliant on information sharing and unilateral enforcement, it will benefit those members who can actually apply their competition laws and create a credible threat of enforcement to firms operating within their borders. Alternatively, if the model chosen is one of joint enforcement, the weakest states might be the greatest benefiters from a regional agreement, given that otherwise they might not be able to apply a competition law. At the same time, large members with a strong competition regime might be the biggest contributors (resource-wise and also due to the fact that their national firms might now be subject to more stringent limitations in the region) but not necessarily the biggest gainers. This can be exemplified by the CARICOM agreement, which will enable micro-states that could not have applied their competition laws on their own, to benefit from joint enforcement, even against firms from Trinidad and Tobago, which dominate some of the regional markets.

Yet, interestingly, an unbalanced distribution of costs and benefits among member states does not necessarily create an obstacle to the creation of an RCA. Rather, in some situations it might be a necessary condition for its creation. This results from the first condition observed above, that the RCA be Pareto-optimal for all member states. If some members incur higher costs, or they can apply alternative solutions for solving their competition law issues, it might be necessary for them to enjoy higher gains in order to join.

[23] Each jurisdiction has incentives to improve its own position relative to other jurisdictions in order to create local comparative advantages that would enable it to benefit relative to others. For example, a country that can credibly commit to legal stability and enforcement will generally create a stronger motivation for investors to invest in it relative to other jurisdictions with a lower level of commitment, ceteris paribus. For such arguments in the federalism context see, *e.g.*, Susan Rose-Ackerman, 'Does Federalism Matter? Political Choice in a Federal Republic' (1981) 89 J. Pol. Econ. 152.

It should be noted, however, that fairness perceptions with regard to such unbalances might sometimes create obstacles to the adoption of RCAs. Indeed, fairness has a comparative element- studies have shown that often people prefer that their relevant group face similar conditions even if at a higher price, over a situation in which all are better off but some members in their relevant group are much better off. These considerations should thus also enter into the Pareto-optimality analysis of joining the RCA.

C. Competition culture as a precondition?

An interesting question is whether a basic understanding and national application of competition law is a prerequisite for a successful RCA. The answer is negative. In most RCAs not all member states have a competition law and even when they have one, the competition culture is often not developed. For example, in CEMAC only Cameroon and Gabon have a competition law and in CARICOM only Jamaica and Barbados have such a law. Indeed, one of the most important goals of an RCA is the proliferation of a competition culture, as exemplified by both the experiences of SADC and the EU. A top-down approach can serve to limit political economy obstacles to the adoption of domestic competition laws.[24] Moreover, such an approach can overcome obstacles to RCAs that result from demands to adopt domestic competition laws, which might instead create a backlash to regional efforts.

Yet a successful competition law regime, at least in some member states, can act as a catalyst to the adoption of an RCA and its successful operation. For one, the positive experience of some member states can serve as a basis for competition law advocacy. Absent such an experience, members might be reluctant to leave issues that affect their jurisdiction or their domestic firms to a regional body.[25] Second, the accumulated knowledge can be built upon in setting up and operating the RCA. In the CARICOM, for example, many of the Competition Commission's officials come from Jamaica, which has an operational competition law.

D. Differences in competition law cultures

Differences in competition law cultures can also create obstacles to an RCA In some situations an entrenched competition culture might create an obstacle to the setting up of the RCA, especially if it involves joint enforcement. This might accrue when the national competition culture is quite different from the one which the RCA attempts to create. For example, WAEMU member states use different definitions of dominance, a fact which made it more difficult to reach a consensus. The SADC agreement provides an additional example: members follow different competition law models, mostly based on models in their donor countries or on their members' unique goals. South Africa, for example, includes a public interest goal of strengthening previously weakened groups of society. Such a goal is less relevant to other member states. Moreover, an existing competition law which is applied inefficiently can create a vicious circle. This is the situation in some ANDEAN countries: the fact that several countries have competition laws that have not brought benefits to consumers, created skepticism with regard to the benefits that an RCA can bring.

[24] On such obstacles see, e.g. Michal S. Gal, 'The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries' in Phillip Brunsick *et al*., eds, *Competition, Competitiveness and Development: Lessons from Developing Countries* (Geneva: UNCTAD, 2004).

[25] For a more skeptical view on this point see Dabbah, supra note 3, p. 303.

Yet such differences should not necessarily inhibit an RCA. For one, most competition laws are based on core principles which are common to all models. Prohibition of cartels that limit competition without offsetting benefits to society is but one example. Second, differences in goals or tools can affect the boundaries of the RCA, but do not necessarily prevent its operation. Rather, in the long run convergence might be enhanced by mutual learning and sensitivity to differences.

E. Sufficient Resources

Sufficient resources (both financial and human) are an important precondition for an operational RCA. Indeed, resource deficiency has plagued many RCAs. For example, although COMESA has a Competition Commission, it cannot make decisions because of insufficient funding needed in order to employ the necessary staff. Additional examples involves SADC, in which only one official is designated to deal with competition law issues, CEMAC in which the number rises to two, and WAEMU in which the number is three despite the large numbers of member states. The effectiveness of the RCA thus depends on the commitment of all or at least most of its member states to provide sufficient resources to its operation.[26]

Insufficient resources often result from wider macro-economic conditions in RCA member states. Members of many RCAs are plagued by issues of deep poverty, regional conflicts or natural disasters. In such circumstances competition law often is not a priority. This fact strengthens the need to determine, from the outset, whether indeed it is in a country's or a region's interest to invest in an RCA. It might well be that setting up an RCA with insufficient resources for its successful operation might be worse than no investment at all. This is because such investments are wasteful and they might also create long-term harm to competition advocacy efforts as well as to the RCA. Yet, as studies have shown, there is often an economic justification for investing in competition law enforcement in order to increase total welfare, and thus the question becomes one of sequencing and of governmental preferences of what to do first.[27]

F. The ability to cede powers to the RCA

An important precondition involves the ability- both legal and practical- to cede legislative and enforcement powers to an external body, especially if an RJCA is created. Uganda and Kenya exemplify this point. In both countries a political referendum to change their constitution is a precondition to committing to regional enforcement.

[26] This can be partly solved by reputational effects and tit-for-tat retaliation strategies in a multi-period game. Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, 2nd ed (1999) at 130.

[27] See, e.g., Clarke and Evenett (2003) who find that taking into account the savings an authority cam make by stopping anticompetitive practices, the benefit of having a competition authority are significant, and justify the initial set-up costs and regular maintenance charges. Julian Clarke and Simon Evenett, "A Multilateral Framework for Competition Policy" in Callenges to Globalization (Baldwin and Winters eds, Chicago University Press, 2003), 411.

G. Differences in market underpinnings

A serious problem, faced by many RCAs in developing countries, is the fact that large sectors of their economies are informal or state controlled. As Bakhoum observes, this leaves little room for competition law to apply[28] and reduces the benefits that other states can achieve from entering into an RCA with such jurisdictions.

In addition, it might be difficult to agree on a joint policy, if significant differences exist in the role of the government in regulating markets. This is exemplified in the case of ECOWAS, in which a complexity of market regulation patterns creates significant obstacles to reaching a consensus.

H. Political economy obstacles

Another important set of obstacles involves political economy influences, both from private parties and from regulators. While an RCA can be Pareto-optimal to a country, it might not necessarily be adopted. Private actors might use their influence in a potential member state in order to create obstacles to the adoption and enforcement of RCAs which would upset the status quo from which they benefit. Political economy obstacles can also arise from existing regulators, unwilling to cede their powers to a regional authority. Indeed, where national competition authorities already exist, favoring their participation in the decision making process at the central level may make an RCA more politically acceptable.[29] Tools for overcoming such influences are explored elsewhere.[30]

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To conclude this part, significant obstacles exist to the adoption of RCAs. One may ask, however, whether the fact that RCAs have been erected all over the world does not serve as an indication that such obstacles are not high. The answer is negative. The mere fact that RCAs have been adopted, in itself, does not serve as such an indication. This is because what matters is not the creation of the RCA itself (which might simply be an indication of external pressures for its adoption). The right question to ask is thus what was the mode of cooperation adopted and what were the institutional settings agreed upon to allow its operation in practice (e.g. whether an RJCA was adopted or not).

II. Obstacles to the successful operation of an RCA

Should the above preconditions be met, there is a stronger probability that the RCA can be adopted. Yet its effectiveness in practice is determined by its ability to deal effectively with practical obstacles. The main obstacles that arise from the case studies explored throughout this book are analyzed in this sub-chapter.[31]

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[28] Mor Bakhoum, in this book.

[29] Ibid.

[30] Gal, Ecology of Antitrust, supra note 19.

[31] Some of these obstacles were also explored in Gal, Regional Agreements, supra note 4.

Some of these obstacles can be understood as collective action problems, which relate to the difficulty of getting individuals to pursue their joint welfare, even when such pursuit is Pareto-optimal for all involved. Indeed, creating a new collective legal regime is the equivalent of providing any other public good. The collective action literature, first modeled by Mancur Olson[32] and further developed by many others, challenges the presumption that the possibility of joint benefit would be sufficient to generate collective action to achieve that benefit. Olson's argument largely rests on a free riding argument: if those who will ultimately enjoy the fruits of the collective action once the good is produced cannot be excluded, then each would have little incentive to contribute voluntarily to the provision of that good. If all actors choose to free ride, the collective good will not be produced. Alternatively, some will contribute and others will free ride, often leading to a lower-than-optimal provision of the collective good. Importantly, these outcomes may be rational from the point of view of the individual actors, at least in the short-run or when a presumption of action by others holds true.

Accordingly, when potential members have little trust in each other that they will be bound by their agreements, or have little capacity to create monitoring and enforcement mechanisms, collective action problems will most likely lead to a sub-optimal outcome: either the jointly beneficial RCA will not be adopted, or it will not achieve its goals.

Yet collective action problem can be significantly reduced. Internal or external pressures and sanctions may be used to coerce members into action.[33] But more importantly, ways can be found to enhance the capabilities and incentives of those involved to overcome their unilateral constraints in order to work towards Pareto-optimal joint outcomes. Such solutions are especially promising where a small number of players repeatedly communicate and interact with each other and have strong ties in several areas.[34] Such tools will be elaborated in this chapter, alongside the obstacles they seek to remedy, as well as in Part III below.

A. Sequencing and monitoring

Committing to an RCA often creates a sequencing problem of supply of the goods promised (funding, changing one's laws, supplying information, enforcing, etc.). First-movers face considerable uncertainty in their investment and commitment, which might be eroded by other members if they do not meet their commitments. This, in turn, creates a significant risk at the formative stages of the RCA that might lead jurisdictions to be more reluctant to commit to an RCA Accordingly, establishing trust that others will also follow and meet their commitments is an important element in setting up a successful RCA.

Several tools can be used to mitigate the commitment problem. Olson recognized that the number of actors involved and the noticability of their actions may affect their incentives to

[32] Mancur Olson, THe Logic of Collective Action: Public Goods and the Theory of Goods (HArvard Univ. Press, 1965).

[33] For coercive solutions to the collective action problem see, e.g, Hardin, 'Political Requirements for Preserving our Common Heritage' in *Wildlife and America* (H.P. Bokaw ed, Council on Envoronmental Quality, 1978) 310, at 314.

[34] Ostrom, 7 and 183-4.

contribute to the creation of a joint good.[35] This is especially true since the RCA is not a one-shot game, but rather involves a long-term repeated sequence of cases which may affect member states.

Another solution, elaborated below, involves monitoring and imposing sanctions on member states that do not comply. Such monitoring can be formal (e.g., through the RCA authorities) or informal (e.g., an informal application of one member state to another). Such sanctions might apply in the competition law area, or to other areas connected to the regional agreement (such as trade).

A more preferred solution, in our view, involves the strengthening of external and internal pressures to create incentives to comply. A general change in socio-economic ideologies towards more pro-market orientations and creating knowledge of the potential benefits of the RCA, as well as external pressures by international, regional or national bodies. might motivate jurisdictions to overcome sequencing obstacles. By altering the structure of incentives member states face, members might have a stronger willingness to commit themselves to following rules and monitor their own conformance to their agreements.[36]

B. Inefficient Institutional design

Inefficient institutional design is one of the major problems that plagues RCAs. As this issue was elaborated elsewhere, it will not be explored here in detail.[37] Unfortunately, there is no shortage of examples of how institutional design can limit the effectiveness of cooperation. Almost every regional agreement can provide at least one example for such obstacle. Interestingly, the examples vary tremendously between the regions. CARICOM provides one illuminating example regarding the geographic locus of the RCA. Good intentions to strengthen the weakest part of the region led to choosing Surinam as a basis for the joint commission. Yet this created significant difficulties in convincing professionals to move there in order to serve on the Commission. Funding issues, elaborated above, also create institutional limitations. In CEMAC institutional limitations arise, inter alia, from the fact that the competition council is a temporary rather than permanent body. This, in turn, creates instability and lack of confidence in the new regional institutions.

C. National-Regional Relationship[38]

A related issue involves the national-regional competition authority institutional relationship, which is also crucial for effective operation. As Heimler and Jenny argue, the goal should be to form synergies between the RCA and national competition authorities, by creating an

[35] Ibid.

[36] Ostrom, p. 45.

[37] Gal, Ecology of Antitrust, supra note 19.

[38] Interestingly, in some areas regional-regional relationships might also require clear rules. This may be the case when a jurisdiction belongs to two or more RCAs.

efficient and effective system of education, idea sharing and case allocation and encouraging cooperation in the enforcement of competition law by all institutions concerned.[39]

Not all RCAs follow this principle, however. In CARICOM, for example, the Commission must first request the national competition authority to undertake a preliminary investigation of an alleged anti-competitive conduct. Only if dissatisfied with the outcome, the Commission may initiate its own investigation. Yet, should a dispute arise between a domestic authority and the Commission as to whether a particular conduct is anticompetitive, the Commission must refer the issue to the CARICOM Council for Trade and Economic Development.[40] Because the Council is a political body, this may create opportunities for politically based decision-making that might prevent prosecution of politically sensitive cases. Moreover, domestic competition authorities could significantly limit the practical ability of the Commission to deal with disputed practices.[41]

The MERCOSUR agreement provides another example. There, competition law proceedings must be first initiated before the competition authority of each Member State. The national authority can then submit the case to the MERCOSUR institutions, if it affects regional trade. Since only Argentina and Brazil have adopted a competition law, they are the only ones who can currently initiate such proceedings. Were the regional institutions empowered to deal with regional competition law issues on their own initiative, it could have created a regional competition culture and overcome some of the competition law problems that plague countries in the region.

Finally, incentives should be created for efficient cooperation between potential enforcers. WAEMU is an illuminating example. As noted above, the WAEMU Court of Justice has ruled that the only role of national competition law authorities is to assist the WAEMU Commission. However, as Heimler and Jenny note, rarely will an institution acts efficiently when it is only feeding into the decision making process of another one. Indeed, domestic authorities have almost no role in the WAEMU commission enforcement record.[42]

In contrast, as Heimler and Jenny observe,[43] the EU system is based on a workable institutional design that can limit some of the problems noted above. The EU case allocation principles are based on parallel enforcement of the law by national authorities combined with the principle of supremacy of community law and institutions.[44] The EU system allows each national authority to bring cases that affect its national market, maintaining for each the incentive for action, thereby strengthening the competition culture and increasing

[39] Alberto Heimler and Frederic Jenny, "Competition law and policy in developing countries: national and regional enforcement" (on file with author) .

[40] Article 176 of the Revised Treaty of the Chaguaramas, 2001.

[41] see Smith-Hillman, 'First a glimmer, now a ...? The prospect of a Caribbean competition policy' (2006) *Journal of World Trade* 405.

[42] Heimler and Jenny, supra, note 26.

[43] Ibid.

[44] European Commission (2004), Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03).

enforcement. The principle of superiority ensures that all national decisions comply with EU competition law principles and that the Commission can deal with those cases that have a strong regional dimension. Yet in exceptional circumstances the Commission may deal with national cases as well. For example, when the case addresses a new competition issue or when the Commission may ensure more effective enforcement. To limit overlaps, informational exchanges between national authorities are facilitated. Of course, the EU system cannot always be applied elsewhere. Especially where differences in national competition laws are significant, adopting one set of joint rules to be applied through a regional competition law, might be problematic. Yet finding solutions to the obstacles created by case allocations and governing law are crucial for an effective application of an RCA. It is noteworthy that the COMESA agreement also grants supremacy to regional institutions and rules in dealing with issues with a cross-border dimension and mandates member states not to undermine or jeopardize such supremacy, much alike the EU model. Many other RCAs, however, chose not to grant the regional institutions supremacy. It will be interesting to analyze the respective success and stability of the two different models in the future.

D. Unclarity

Unclarity in the RCA can also create obstacles to its efficient application. Once again, the CARICOM agreement provides a useful example. The Treaty creates a dispute resolution system that is applicable to disputes among member states. It is not clear whether a firm can appeal a decision by the CARICOM Competition Commission.

Another example involves the WAEMU agreement. Uncertainties exist with regard to the respective scope of community and national competition laws. The WAEMU Commission has exclusive competence over anticompetitive practices (agreements, abuse of dominant positions and States aids) in the WAEMU territory. Member states are authorized to deal with individual restrictions of competition in a form of abuse of economic dependence. This creates uncertainty, since individual restriction of competition can also sometimes be analyzed under the abuse of dominant position prohibition which is under the exclusive competence of the Commission.

Part III: Ten suggestions for a successful RCA

The experiences outlined throughout this book, as well as the analysis above, serve as a basis for the following set of recommendations to enable RCAs to unleash their potential, which are additional to the ones explored above. Many of the recommendations result from the fact that while RCAs create collective action benefits, they also suffer from second-order collective action problems, such as free riding.[45] All the recommendations are relevant to new RCAs, but most are also applicable to existing ones, whether by way of reconstructing and strengthening their existing framework of operation or by way of adding to it.

First, member states must be **clear about the objectives** that they would like to achieve and their relative importance. For example, is the goal economic development of RCA members by removal of trade and investment barriers or is it integration and the creation of a common

[45] Bates, 'Contra Contractarianism: Some reflections on the new Institutionalism' 16 *Politics and Society* 387 (1988).

market?[46] Is the focus on strengthening capacity building at the national level by sharing of information and experience, or is it on capacity building at the regional level? Some goals can be sought in parallel, but even so priorities must be determined, as an RCA is not value-free. Goals should be set in relation to the conditions of countries in the region, the special competition law issues facing them, and the tools at their disposal to deal with such issues. Interestingly, not all members must seek to achieve the same goal- it might be that some members will seek to mainly strengthen their own capacity, while others seek to strengthen regional capacity. This is possible, so long as these goals do not clash.

Second, it is important **to acknowledge and resolve the difficulties of collective action**. Such difficulties might include, inter alia, lack of predictability, information, and trust, and high levels of complexity and transactional difficulties.[47] In some cases such difficulties may lead to the conclusion that an RCA has better chances if it is part of a wider trade agreement or that external pressure might be needed for its creation and operation. In others self-imposed enforcement mechanisms may be needed, as explored below. Some difficulties might be easier to deal with than others. For example, where potential members lack information regarding the potential benefits and costs of the RCA, their incentives to enter an RCA will be significantly reduced. This informational obstacle might be overcome by discussions that analyze the conditions and point to successful relatively similar agreements elsewhere. International institutions such as UNCTAD, OECD and the World Bank can also play a role in providing such information and in suggesting ways to overcome perceived obstacles.

The above two considerations should determine the next three recommendations. The third involves **membership of the RCA**. It is not axiomatic that it is always preferable that all countries in the region become members of the RCA. Rather, the degree of commonality of interests and the ability to take active steps to further joint objectives is a better yardstick for membership. Accordingly, in regions where there are significant differences in legal culture, economic development, or political and economic stability, bridging over such differences may not always be worthwhile. For example, where the majority of countries in a region would significantly benefit from an RJCA, it might sometimes to better to not include those countries that do not agree to take part in the RJCA.[48] Yet when doing so, member states must take account of the costs that such exclusion might create. An alternative solution may involve a two-tiered membership in the RCA: `full membership` and an `observer` status, which will be granted to states that are not yet able to comply with the RCA requirement of membership.

Fourth, is determining the **mode of cooperation among agencies.** Cooperation can be set at different degrees of cooperation- from a low level (information sharing, technical assistance) to a high one (RJCA). The level and mode of cooperation should be based on the question of

[46] For an interesting and thought-provoking analysis of such goals see Eleanor Fox, 'Competition, Development, and Regional Integration: In Search of a Competition Law Fit for Developing Countries', in this book.

[47] Ostrom, supra, p. 25-6.

[48] A partial solution to this problem involves creation of an RJCA in a sub-region of the RCA, as the OECS countries, which are part of the CARICOM agreement, seek to do.

which cases are better tackled at a regional level, and by what means. Whatever the mode chosen, it is important to ensure Pareto optimality for all member states. Importantly, the mode of cooperation should be determined with regard to the realistic capabilities of member states, including institutional weaknesses.

A related issue involves the **kind of cases that should be put on the agenda of the regional agreement**: Should the RCA deal with all competition law matters or with only some of them (e.g. mergers are not dealt with in ANDEAN and in CARICOM); Should it deal with external firms only, or also with local ones; Should the RCA deal with easy cases, where all members agree on the outcome or also with more difficult ones, where there is a clash of interests among different members. Possibly, RCAs might expand their case selection in stages: first deal with the easy cases and only when the benefits of the RCA are apparent, deal with more difficult ones.

The sixth issue involves the **order of steps**. An important question to consider is whether national law must precede regional law, as some RCAs require. The answer depends, in part, on the mode of cooperation chosen. If the mode is based on joint enforcement, through an RJCA, then it is not necessary that all member states first adopt a competition law. Rather, the RJCA can serve at least as a partial cure to the domestic inability to set up an operational competition law and as a catalyst to its adoption elsewhwere. But even if the model chosen involves a much lower degree of cooperation, it can sometimes function without competition laws in all members. Information about cartel activity which is sought by another member, for example, can be gathered by other governmental bodies. In addition, RCAs might expand their case selection in stages: first deal with the easy cases and only when the benefits of the RCA are apparent, deal with more difficult ones.

Seventh, following Ostrom, tools for **monitoring and enforcing compliance** with collective decisions should be created.[49] Committing to an RCA ex ante might be relatively easy, as the experience of many RCAs indicate. Such commitments may reduce internal or external pressures to join the RCA. Yet following such rules in practice is oftentimes much more difficult. Even in repeated games where reputation for compliance is important, if deviations are not readily identifiable or if sanctions for noncompliance are not high, members will have incentives to deviate. For example, members might prefer not to spend resources on information sharing that may harm their domestic firms, even if they committed to it in the RCA. This is why monitoring and enforcing compliance are important. A causal circle can be identified here: the ability to perform such tasks rests, in part, on the existing competition culture and the perceived need for the RCA.

Monitoring and enforcing compliance are also important to solve the sequencing problem: if each member state is concerned that it will be the only one complying, its incentives to comply will be significantly reduced. Yet if assurances are created that others will comply as well, the sequencing problem is significantly reduced. To ensure that a fear of sanctions does not prevent members from entering into beneficial RCAs, it might be better to set stages of compliance. Only if all or most members comply with the current stage, will the RCA advance to the next one. Such sequencing may also enable members to learn how to organize themselves, to develop shared norms and patterns of reciprocity and solve collective action

[49] Ostrom, ibid p. 92-6.

dilemmas.[50] Sequencing might also enable RCAs to build on social capital created in relatively non-controversial issues (e.g. an international cartel that affects all members negatively) in order to solve more complex problems and create more complex institutional arrangements.[51] Finally, enforcing the agreement though monitoring and compliance reduce the ex ante risk involved in entering the RCA in the first place.

Eighth, also following Ostrom, low-cost and readily available **conflict-resolution mechanisms** should be created to mediate conflicts among members and between the members and the regional authority.[52] If members are to abide by the RCA, there must be a mechanism to discuss and resolve disputed issues. It is worth considering whether the use of such a mechanism would be available to market players and not only to the member states themselves.

Ninth are **institutional design issues.** As elaborated above, creating bodies that have capabilities that fit agreed-upon functionalities is an extremely important condition for a successful RCA. Indeed, the inability to meet this condition has plagued many RCAs. Institutional design should include, inter alia, clear and detailed rules regarding the relationship between regional and national institutions as well as about the modus operandi and financing. An interesting idea in this regard, which might serve at least as a short-term solution in very poor regions, is setting a rotation system whereas competition authorities in member states will carry the responsibility of applying the RCA for a set period of time, and carrying out such responsibility will be funded by other member states. This suggestion carries, of course, its own limitations.

Last is a **mechanism to change the rules** of the RCA to incorporate hard-learnt lessons from experience about how to organize the agreement in order to gain benefits and avoid harm or to overcome obstacles not perceived ex ante. Designing such rues involves a basic tension. On the one hand, flexible rules introduce a level of uncertainty into the system, given that rules could be changed. The possibility of change might also reintroduce a power struggle among member states, thereby upsetting the equilibrium reached. On the other hand, rigid rules would not be able to provide solution to changing environments. A middle ground must therefore be found, depending, inter alia, on the specific conditions of the RCA and the type of rules to be changed. Changing an operational rule, for example, should be easier than changing a rule with regard to the parameters of the decisions to be taken.

Conclusion

Regional agreements hold an important potential to overcome the main obstacles that plague small and developing jurisdictions in the enforcement of their competition laws, thereby furthering the goal of economic development. They also hold promise for developed jurisdictions in strengthening their ability to deal effectively with anti-competitive issues, both domestic and regional. Whether developing or developed, by joining forces in an RCA member states can strengthen their voice and create credible threats to sanction anti-

[50] It should be noted, however, that such sequencing does not come without a cost. It might be that the creation of the RCA was a formative moment, in which political economy pressures and other elements created a window of opportunity to adopt the RCA. Such a window might not open again for some time.

[51] Ostrom, 190.

[52] Ostrom, p. 100.

competitive conduct that harms their economies. RCAS can also strengthen their voice in international settings.[53] It is thus not surprising that many RCAs have sprung out around the world.

Unfortunately, however, experience has shown that most RCAs so far were unable to unleash their potential. This chapter built upon the experiences analyzed throughout this book to reach more general conclusions regarding the preconditions to a successful RCA, the common obstacles faced by many, and finally to suggest some guidelines to overcome such obstacles. As observed, some of the obstacles relate to the fact that the agreement involves competition law, especially where a competition culture does not exist. Others result from collective action problems among member states.

The analysis creates a basis for some optimism: if structured efficiently to overcome foreseen obstacles, including the lack of a competition culture, collective action problems, legal obstacles and political economy issues, RCAs may increase the welfare of their members. If hard-learnt lessons from existing RCAs, such as those elaborated throughout this book, as well as lessons from other agreements that face relatively similar problems, are acknowledged and applied to avoid similar obstacles, at least some RCAs may be able to develop rules and institutions that would enable their members to achieve some of the perceived benefits. It might be a long way forward, one which involves high and hard-earned learning costs; It might require a careful in-depth on-going analysis of conditions and solutions that necessitates a high degree of artisanship and innovation to create institutions that are carefully calibrated to create incentives for mutual commitment; it might not be applicable in every situation, given the existing conditions- but it may well promise significant benefits to those who succeed in overcoming the obstacles.

[53] See Gal, Regional Agreements, supra note 4.