

ESSAY

**International Antitrust Solutions:
Discrete Steps or Causally Linked?**

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INTRODUCTION

In the past two decades a growing number of jurisdictions explored and experienced with solutions to competition problems created by the internationalization of trade. The level of cooperation among jurisdictions has arisen in parallel with the realization that unilateral enforcement provides a limited solution to competition law challenges with an extra-territorial dimension. Indeed, increasing levels, or "steps", of international antitrust cooperation have been taken or have been suggested, ranging from unilateral extra-territorial enforcement of domestic laws to the yet theoretical possibility of a supra-national competition authority. The step analogy suggests that lower steps lead to higher ones. This article explores to what extent this is true: whether international competition law solutions based on lower levels of cooperation provide a catalyst and sometimes even a basis for higher ones, or whether cooperation levels are not causally linked to each other. It does so, inter alia, by focusing on one specific cooperative competition law solution: regional competition law agreements and exploring their effects on higher cooperative steps.

Accordingly, the first part of the paper identifies five different levels of international antitrust cooperation. The second part focuses on a specific example of such cooperation: regional competition law agreements. The proliferation of such agreements in recent years is so profound that it can be termed 'the new wave of regionalism.'¹ The third part ties the two previous ones together by exploring whether and to what extent regional competition law agreements might serve as a catalyst for higher levels of international cooperation on competition law.

PART I: LEVELS OF ANTITRUST COOPERATION

I.1 SETTING THE STAGE: INTERNATIONAL ANTITRUST CHALLENGES

Several high-profile antitrust cases, such as the vitamins cartel² and the Microsoft decisions³ serve as striking examples of the

¹ On regional competition law agreements see eg MS Gal, 'Regional Competition Law Agreements: An Important Step in International Antitrust', *forthcoming* (2010) UNIVERSITY OF TORONTO LAW JOURNAL.

² See eg JM Connor, *Global Price Fixing: Our Customers are the Enemy* (2nd ed, 2007).

complex and significant effects on one's jurisdiction that result from conduct that takes place elsewhere. These cases also exemplify the externalities imposed by the regulatory acts of one jurisdiction on another. As elaborated elsewhere, foreign regulation determines the ability of one's firms to enter or expand in foreign markets ("the access effect"). It can also affect the conduct of international firms in other markets in which they trade ("the conduct effect").⁴ Indeed, the vitamins case exemplifies the conduct effect: Prosecution of the vitamins cartel by several jurisdictions, which led to the cessation of its operations, created positive externalities on all the countries in which the cartel operated. The purpose of this section is to identify, using a very broad brush, the different competition law problems created by internationalization of trade. Such identification will serve as a basis for understanding and analyzing the effectiveness of the different regulatory tools developed to tackle such issues.

Seven main antitrust problems created by the internationalization of trade that exist in a system based on unilateral enforcement can be identified.⁵ Let us first assume that all countries have non-clashing regulatory incentives. Several regulatory challenges can still be identified. The first and most basic one involves a *lack of a legal basis* to reach conduct that takes place elsewhere. Many jurisdictions have overcome this problem by adopting the effects doctrine or a variation thereof.⁶ But even if this problem is overcome, others abound. The second is the *duplication of enforcement resources*. Under a unilateral enforcement system all jurisdictions affected by an anti-competitive conduct might need to invest parallel regulatory resources in order to prevent its continuation or to create deterrence of similar acts in the future. This can be exemplified by the costs of proving the existence of an international cartel which must be borne

³ U. S. v. Microsoft Corporation, 84 F. Supp. 2d 9 (D. D. C. 1999) (findings of fact); 87 F. Supp. 2d 30 (D. D. C. 2000) (conclusions of law); 97 F. Supp. 2d 59 (D. D. C. 2000) (final judgment); on appeal (D. C. Cir., 2001); *Microsoft* [2005] 4 CMLR 965; Case T-201/04 *Microsoft v Commission* [2007] 5 CMLR 11.

⁴ For a broader exposition of such externalities see MS Gal and AJ Padilla, 'The Follower Phenomenon: Implications for the Design of Monopolization Rules in a Global Economy' *forthcoming* (2010) 76 ANTITRUST LAW JOURNAL.

⁵ For exposition of some of these problems see generally INT'L COMPETITION POLICY ADVISORY COMM. (ICPAC), U.S. DEPT. OF JUSTICE, FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST (2000), available at <http://www.justice.gov/atricpac/finalreport.htm>. See also EM Fox, 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) 43 INTERNATIONAL LAW 151.

⁶ A Guzman (ed), *Competition, Comity and Cooperation* (2010).

by all countries prohibiting the cartel.⁷ The third, related problem involves *burdensome regulatory costs* borne by the regulated firms. This is especially problematic in the merger area, since international mergers might need to be approved in multiple jurisdictions. The regulatory costs involved might even result in the abandonment of pro-competitive transactions.⁸ *Information gathering* is also problematic when the anti-competitive conduct takes place elsewhere. If information cannot be reached, it might not be possible to prosecute the firm for its anti-competitive conduct.

The fifth problem involves *under-deterrence of international anti-competitive conduct*. Studies clearly indicate that only a handful of jurisdictions actually apply their competition laws to prohibit anti-competitive conduct of international firms.⁹ Limited enforcement provides firms with incentives to engage in global anti-competitive conduct. This is because the sanctions imposed by a handful of jurisdictions on cartel members are significantly disproportional to the profits to be gained. As the OECD observed with regard to international cartels, "unless a multinational cartel participant is prosecuted and fined in most or all of the countries in which the cartel had effects, the cartel still might have been profitable after paying fines in only some of the countries affected."¹⁰ Indeed, since the decision to join a cartel is primarily a financial one, if anti-cartel enforcement leaves significant profits in the hands of the cartelists, they have strong incentives to engage in such conduct.¹¹

⁷ For a suggested solution to this problem see, e.g. MS. Gal, *Free Movement of Judgments: Increasing Deterrence of International Cartels Through Jurisdictional Reliance* (N.Y. Univ. Law and Econ. Working Papers, Paper No. 154, 2008), available at <http://ssrn.com/abstract=1291844>.

⁸ For analysis of the regulatory costs involved in approving international mergers see eg Notification and Procedures Subgroup, ICN, *Report on the Costs and Burdens of Multijurisdictional Merger Review* 4-9 (2004), available at http://www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_2002/costburd.pdf; William J. Rowley & A. Neil Campbell, *A Comment on the Estimated Costs of Multi-Jurisdictional Merger Reviews*, ANTITRUST SOURCE, Sept. 2003, available at <http://www.abanet.org/antitrust/at-source/03/09/comment.pdf>.

⁹ Such arguments were recognized by the U.S. Supreme Court in 1978. See *Pfizer v. India*, 434 U.S. 308, 315 (1978). See also OECD, *Hard Core Cartels- Recent Progress and Challenges Ahead* (2000) 38; They were also raised in the *Empagran* case. See Brief of Amici Curiae Economists Joseph E. Stiglitz and Peter R. Orszag in Support of Respondents, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724); Brief for Certain Professors of Economics as Amici Curiae in Support of Respondents, *Empagran*, 542 U.S. 155 (No. 03-724).

¹⁰ OECD, *Report On The Nature And Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws* (2002) 14.

¹¹ Other factors might also affect the motivation of cartelists to enter into anti-competitive agreements, such as the criminal sanctions imposed on individuals and

Let us now relax the assumption of non-clashing regulatory incentives of the different jurisdictions which are affected by the anti-competitive conduct. This raises an additional set of issues, the first of which arises from the *veto power* held by a handful of jurisdictions, which allows them to determine the outcome in many cases. If, for example, a merger is prohibited by a large jurisdiction, it would usually not take place, despite its potential pro-competitive effects elsewhere, and vice versa.

Finally, unilateral enforcement might lead to *clashing remedies* which might affect consumers and firms in all jurisdictions involved. The Microsoft case provides a good example, where the EU and the U.S. authorities analyzed some aspects of Microsoft's conduct differently. The European decision, which prohibited Microsoft from tying together the media player into its operating system, had a conduct effect: it prevented the tie in all other markets in which Microsoft sold similar products.¹² Such an effect might occur when two conditions are met:¹³ (1) the international firm sells the same product in several markets. This may be the case, for example, if it is too costly to design and market differentiated products in different jurisdictions; (2) the jurisdiction prohibiting the conduct is sufficiently large that it would not be profitable for the firm to simply exit it and only sell its products elsewhere. It is noteworthy that the clashing remedies problem also captures situations in which the clash of interests arises from the non-enforcement of competition law. For example, if a jurisdiction does not prohibit the abuse of dominance by its firms which prevents the access of foreign competitors into its markets, then a negative access effect is created on the foreign jurisdictions in which the foreign competitors domicile.

I.2 INTERNATIONAL ANTITRUST SOLUTIONS

The responses to the challenges of international competition law explored above have not been immediate. Rather, they developed in stages in parallel with the growth of international competition law challenges and the realization that traditional unilateral enforcement

the morality perceptions of such conduct. See, eg, ME Stucke, *Morality and Antitrust* (2006) 2006 COLUMBIA BUSINESS LAW REVIEW 443.

¹² Microsoft decisions (n 3 above); eg D Spluber, 'Competition Policy and the Incentive to Innovate: The Dynamic Effects of Microsoft v. Commission' (2008) 25 YALE J. ON REG. 247, 275.

¹³ See Follower Effect (n 4 above).

of competition law provides a meager solution to the challenges posed. Accordingly, this section introduces five discrete partial solutions taken or to be taken in international competition law.

Notably, not all jurisdictions have adopted all the new regulatory tools. Moreover, the order of their adoption has sometimes varied. Still, they exemplify a growing level of cooperation on international antitrust issues (and thus will be referred to as steps). Accordingly, their analysis enables us to put international antitrust developments in perspective.

Interestingly, the U.S. and the EU have been the first to adopt most of the new regulatory tools to deal with such challenges. This is not surprising: both jurisdictions have a strong interest in remedying international antitrust issues given the size of their markets and their levels of trade with other jurisdictions as well as their power to enforce the newly created regulatory tools. Many other jurisdictions followed suit, at least with regard to some of the regulatory tools adopted.

A. The five international antitrust regulatory tools

The development of international competition law can be illustrated graphically in accordance with the regulatory tools adopted or that might be adopted in the future, which are ordered in accordance with the level of cooperation needed in order to implement them. The relative size of the steps is discussed below.

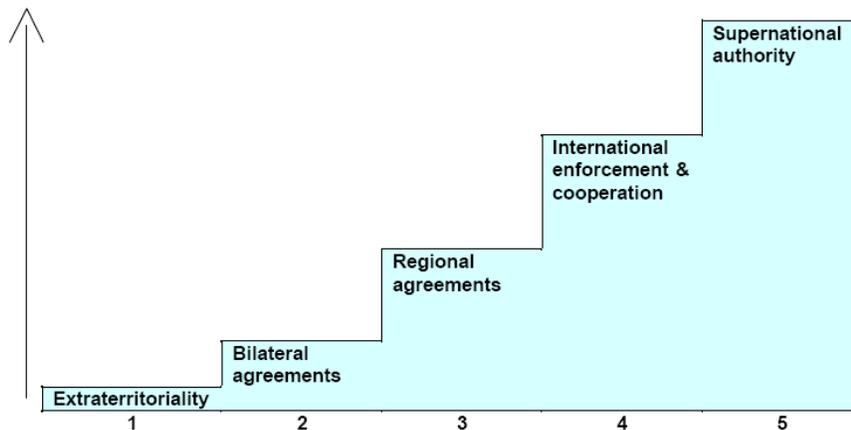


Diagram 1: International competition law regulatory tools in order of level of cooperation

The starting point (not exhibited in the diagram) is unilateral application of domestic competition law to firms operating within domestic borders. Despite the fact that countries have always traded with each other and that international cartels are not a new phenomenon, international antitrust tools are relatively recent. In the mid-20th century courts still rejected the extra-territorial application of competition law. This is illustrated in the famous U.S. case of *American Banana*,¹⁴ in which the court, rejecting an application of U.S. antitrust law to a cartel that was created outside U.S. borders but affected U.S. markets, stated that: "[t]he general and almost universal rule [is] that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." This ruling comported with then-established doctrines of public international law under which objective territoriality was the main basis for the application of domestic law. The limited ability to deal effectively with competition law issues with an international aspect, as well as the increase in international trade levels, have served as an important catalysts in the development of the regulatory tools of international competition law elaborated below.

The first step taken was unilateral enforcement coupled with extra-territoriality. Each jurisdiction still applies its competition laws by itself, but now the scope of cases which come under its jurisdiction is extended. Doctrines of extra-territoriality differ somewhat from one another, but their core is the extension of jurisdiction to capture conduct which affects one's jurisdiction or is implemented in it, even if the parties to the anti-competitive conduct are located elsewhere or the conduct was agreed upon outside one's borders.¹⁵ This subjective territoriality basis for international competition law can be exemplified by the first case in which it was adopted, the U.S. case of *ALCOA*.¹⁶ Alcoa involved agreements among the Canadian subsidiary of a U.S. firm and several European firms to limit production of aluminum ingot in the U.S. No U.S.-domiciled company was found to have participated in the agreement. The court found that the agreements nonetheless violated U.S. competition law despite the fact that there was no basis for application under the objective territoriality

¹⁴ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 53 L. Ed. 826, 29 S. Ct. 511 (1909).

¹⁵ Guzman (n 6 above).

¹⁶ *United States v. Aluminum Co. of America*, 148 F.2d 416 (CA2 1945).

principle. The ruling extended the application of U.S. law to conduct that affects domestic commerce so long as the conduct was meant to produce and did in fact produce direct, substantial, and reasonably foreseeable effect on U.S. commerce. This test, which has come to be known as the "effects doctrine",¹⁷ was later applied in many other cases both in the U.S. and elsewhere.

Extra-territorial application of one's laws is, however, fraught with problems. Small and developing jurisdictions can rarely apply their laws to prohibit the conduct of large, international firms that takes places outside their borders due to their limited ability to create a credible threat of enforcement and their limited enforcement resources.¹⁸ Even large, established jurisdictions face significant obstacles to extra-territorial application of their laws. For example, they may face obstacles to obtaining information and enforcing remedies to firms located elsewhere.¹⁹ In addition, firms trading within their markets might face clashing remedies that create negative externalities on their markets. This has been the main catalyst for the adoption of more cooperative regulatory tools.

The second step is bilateral or multilateral agreements. Indeed, many jurisdictions are currently party to such agreements which include some antitrust-related provisions.²⁰ Such agreements are, however, often quite limited in the extent of cooperation they create. Most include provisions for notification and exchange of information and some include traditional or positive comity. Positive comity provisions require jurisdictions in essence to apply their laws in a non-discriminatory fashion. Accordingly, they do not change the

¹⁷ *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962); Foreign Trade Antitrust Improvements Act 1982. The effects doctrine has been tempered by a jurisdictional rule of reason, which takes into account some comity considerations. See eg *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 611-12 (9th Cir. 1976). For the EU test see eg *Case C-89/85 A. Ahlström Osakeyhtiö and others v. Commission*, 1988 ECR 5193; *Gencor v. Commission Case T-102/96* 4 CMLR 971 [1999]. For its application in other jurisdictions see Guzman (n 6 above).

¹⁸ See MS Gal, 'Antitrust in a Globalized Economy: The Unique Challenges of Small and of Developed Economies', forthcoming (2009) 102 *FORDHAM INTERNATIONAL LAW JOURNAL*.

¹⁹ ICPAC (n 5 above).

²⁰ Guzman (n 6 above).

substance of foreign laws, although they might sometimes change enforcement priorities.²¹

Interestingly, some bilateral agreements affected the existence and content of competition laws in other jurisdictions. Agreements which require all parties to adopt and apply some form of a competition law often act as a catalyst for jurisdictions which have not adopted or applied such a law to do so. Such requirements are most commonplace in trade agreements between a large, developed jurisdiction such as the EU and the U.S. and small or developing jurisdictions. Singapore, for example, adopted a competition law as a result of trade pressures from the U.S. Malaysia is currently experiencing similar requirements.

Yet such agreements generally provide poor tools for solving most international competition law challenges. While they reduce information gathering problems, most other problems of international antitrust identified above abound. This results, to a large extent, from the fact that the model on which such agreements are based is unilateral enforcement: each jurisdiction continues to apply its own laws, in its own territory. Accordingly, the problem of clashing remedies is not solved but might even be aggravated if more jurisdictions are required to apply their laws. For the same reason the duplication of resources, both of the competition authorities and of private parties subject to regulation, is generally aggravated, although positive comity can sometimes reduce such duplication. While gathering information might be made easier due to cooperation and coordination between jurisdictions, bilateral agreements generally also prove a poor solution to the issue of under-deterrence that result from limited resources or a limited ability to create a credible threat of enforcement.

The third step, which exhibits a higher level of cooperation, involves regional agreements. Regional agreements differ from bilateral agreements explored above in two related aspects. First, they are, as their name indicates, regional in scope. This fact implies that parties will often have a larger cadre of cases with cross-border effects, given that business does not follow national borders but rather

²¹ On positive comity see eg Committee on Competition Law & Policy, OECD, *Report: Making International Markets More Efficient Through 'Positive Comity' in Competition Law Enforcement*, at 2, EC Reference No. SPEECH/01/147 (1999) available at <http://www.oecd.org/dataoecd/40/3/2752161.pdf>; ICPAC (n 4 above) 235.

demand patterns and trade barriers. Indeed, geographic proximity often strengthens the benefits to be had from joint enforcement and competition advocacy. This leads to their second characteristic, which is that they often exhibit a higher level of cooperation on antitrust enforcement. Indeed, this article uses this characteristic as their defining feature in order to differentiate them from bilateral agreements among neighboring states. While in many regional agreements the parties retain the discretion and ability to apply their laws unilaterally, a growing number of regional agreements involve some form of joint enforcement as well (such agreements will be termed "Regional Competition Law Agreements" or "RCAs"). Such regional agreements are, in essence, a microcosm of a supra-national authority. Their ability to provide a viable solution to international antitrust problems faced by their members will be elaborated in the second part of this article.

The fourth step involves international cooperation and harmonization efforts. It includes both current efforts, most notably through the International Competition Network (ICN) and the Organization for Economic Cooperation and Development (OECD) and past efforts, most notably through the World Trade Organization (WTO). It comes after RCAs because of its global scope of cooperation and the potential it has for reducing international antitrust problems.

So far, however, such international efforts have not succeeded in significantly solving the problems of international antitrust. This is because, once again, current solutions are based on unilateral enforcement. Nonetheless, they reduce, to some extent, clashing remedies and reduce the problem of under-deterrence as they serve, to a large degree, as international institutions for technical assistance and harmonization, which often strengthen and streamline unilateral enforcement by their members. The OECD, for example, has been one of the first to create proposals for harmonized antitrust rules and has long pointed out some of the obstacles to efficient deterrence of international cartels in an effort to increase overall deterrence.²² The OECD, however, is quite limited in its membership and has not applied any mandatory antitrust rules upon its members. The ICN is an important platform, especially for competition law harmonization, yet it is a mechanism for soft convergence with no enforcement powers.²³

²² See www.oecd.org.

²³ See eg Fox (n 5 above).

The most important step which was seriously discussed involves the inclusion of a mandatory requirement to prohibit hard-core cartels in the WTO agreement.²⁴ This would have enabled jurisdictions to apply trade sanctions through the WTO mechanism to other jurisdictions which did not prevent the existence of cartels in their jurisdiction. The possibility that some form of competition law requirements would be included in the WTO was seriously discussed, but was taken off the table several years later due, *inter alia*, to the opposition of developing countries which were concerned that they would be sanctioned through the suggested WTO mechanism for their low levels of unilateral enforcement.²⁵

The final step is, as of yet, a virtual one. It involves the establishment of a supra-national antitrust authority: A global enforcement authority that will have powers to collect evidence, conduct interviews, and then compute the global gains from cartelization and levy the appropriate fines.²⁶ This idea, which was raised by many scholars,²⁷ involves a great leap from all other steps, since it would require all jurisdictions to give up some of their sovereignty to deal unilaterally with their competition law problems and transfer some of the regulatory powers to an international body. This options holds promise to solve many of the problems of international antitrust, at least on a global-welfare basis. However, it is fraught with problems which have so far prevented its adoption. Most importantly, jurisdictions will not easily concede their decision-making power to an international body and give up sovereignty.²⁸ It also limits the veto power that some jurisdictions currently have.

²⁴ See eg SJ Evenett, MC Levenstein & VY Suslow, 'International Cartel Enforcement: Lessons from the 1990s' (2001) 24 *WORLD ECONOMY* 1221, 1243.

²⁵ The issue was placed on the agenda in 2001:WTO, Ministerial Declaration, WT/MIN(01)/DEC/1 Doha (2001), para. 1, 3, 23-5. It was taken off the agenda in 2004: Doha Work Program – Decision Adopted by the General Council, 1 August 2004, WT/L/579, para 1(g). For analysis on why WTO negotiations have failed see eg A Bradford, 'International Antitrust Negotiations and the False Hope of the WTO' (2007) 48 *HARVARD JOURNAL OF INTERNATIONAL LAW* 383.

²⁶ Evenett et al, *ibid.*, 1241.

²⁷ For a discussion of such proposals see, eg, Evenett et al (n 13 above); A Bhattacharjea, 'The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective' (2006) 9(2) *J. INT'L ECON. L.* 293; R Anderson and F Jenny, 'Competition Policy, Economic Development and the Possible Role of a Multilateral Framework on Competition Policy: Insights from the WTO Working Group on Trade and Competition Policy,' in Erlinda Medalla (ed), *Comp. Policy in East Asia* (2008).

²⁸ Evenett et al, *ibid.*

The five steps described above may represent an increase in several different values (on the vertical axis in diagram 1). One option, suggested above, is the level of cooperation among jurisdictions: the higher the step, the stronger the cooperation. Cooperation might be measured by the number of jurisdictions which cooperate or the strength of the cooperation among them- the steps can apply to both.

Alternatively, they may represent potential increases in global welfare- the higher the step, generally the higher the positive impact on global welfare. To illustrate, unilateral enforcement creates under-deterrence of international cartels. Empirical studies indicate that most jurisdictions do not bring cases against such cartels but rather rely on the enforcement activities of a small number of large, developed jurisdictions to stop their operation.²⁹ While such enforcement decisions are generally rational on the part of each jurisdiction, they create negative spillover effects on other jurisdictions, since the fines imposed on such cartels are extremely low relative to their profits. Bilateral agreements on information sharing can increase the number of jurisdictions which bring such cartels to trial, although marginally. RCAs have a stronger potential to increase the practical ability of jurisdictions to adopt regulatory measures, given that they join forces in enforcement. Finally, if such cartels were prosecuted by a supra-national antitrust authority, they would have been fined based on the overall damage that they created world-wide and deterrence would have been much closer to the optimum. Likewise, if mergers were decided by a supra-national authority, the decision would have maximized total global welfare, since it would have balanced the harm to some jurisdictions with the benefits to others, thus solving the veto problem created by merger decisions of large jurisdictions. It would also have solved the problem of duplication of resources and of burdensome parallel notifications currently faced by merging parties, thereby further increasing total welfare.

An interesting question is whether the regulatory tools explored also represent increases in domestic welfare. The short answer is no, although it might differ among jurisdictions and much depends on the rules that will emerge at each stage. Increased cooperation and coordination of enforcement is likely to increase the domestic welfare of small and developing jurisdictions, since it would overcome their enforcement problems and would take into account their interests in

²⁹ Unique challenges (n 18 above).

cases in which they were unlikely to enforce their laws unilaterally.³⁰ For large jurisdictions with a strong veto power and enforcement resources, domestic welfare will not always be increased by higher levels of cooperation. The last step in particular, the creation of a supra-national competition authority, might not increase their domestic welfare. This is because their interests would then be balanced against those of small and developing jurisdictions, which generally do not apply their laws to prohibit international conduct which affects their jurisdictions. This effect might be especially problematic in merger cases. In contrast, a joint enforcement against international cartels would generally increase both global and national welfare, since it would significantly amplify the deterrence of such cartels. One conclusion that emerges from the above is that the creation of a supra-national authority to prohibit international cartels has the strongest potential given that it has the potential to increase the domestic welfare of all jurisdictions.

The values we choose the diagram to represent also affect the relative size of each step. For example, extra-territorial application of competition laws, can significantly increase the domestic welfare of those jurisdictions which apply it in practice. Its effects on global welfare are, however, often minimal, with the exception of cases in which the incentives of all jurisdictions are aligned, such as those involving international cartels or mergers of firms which operate in international markets that increase market power without offsetting efficiency benefits. The effects of the existing bilateral and multilateral agreements on domestic and global welfare are generally considered to be quite minimal.³¹ The effects of the current international cooperation on domestic and global welfare are also relatively small. In contrast, the possible effects of regional agreements and of a supra-national antitrust authority on global welfare are quite significant.

B. Inter-relation between the regulatory tools

When climbing stairs, one must generally step on a lower step in order to reach a higher one. As elaborated above, this analogy fits well when each step represents a potential growth in the level of international cooperation relative to a previous one. Yet it does not apply with regard to the international antitrust steps adopted by specific jurisdictions. While some jurisdictions have experienced a

³⁰ Unique challenges (n 18 above).

³¹ See, eg, Guzman (n 6 above); ICPAC (n 5 above).

gradualization in competition law tools that paralleled the level of international cooperation, most jurisdictions have not adopted the full menu of regulatory tools currently available. Furthermore, some jurisdictions have adopted regulatory tools that require a higher degree of cooperation before lower ones. This can be illustrated by the EU Member States, which entered into a regional agreement for competition law enforcement well before adopting other tools, such as extra-territoriality and bilateral agreements. Likewise, many west African countries have recently entered into a regional agreement for joint enforcement even before most had a competition law regime. These facts illustrate the flexibility of international competition law responses given that the diverse characteristics of different jurisdictions might require them to take different routes to solve their international antitrust problems. Furthermore, they illustrate the possibility that jurisdictions can avoid the adoption of some regulatory tools if they observe their limits as experienced by other jurisdictions.

An interesting question is whether one step leads to another- that is, whether a lower step can (rather than must) serve as a catalyst for a higher one. The answer is a qualified yes. Both the success and the limitations of a lower step may lead to the adoption of a higher one. Let us explore both possibilities. A successful relationship based on a bilateral or multilateral agreement, for example, can lead jurisdictions to seek a deeper level of cooperation and thus take a higher step. Likewise, a successful regional agreement, such as the EU, might increase incentives for international cooperation based on an expanded model of regional cooperation.

Yet in most cases it is the experienced or perceived limitations of previous steps which served as a catalyst to the adoption of more cooperative ones. The limited promise that extra-territorial application brought to the U.S. has, indeed, led to the creation of the ICN and to the strengthening of bilateral agreements for sharing of information.³² Likewise, the limited ability of small and developing jurisdictions to use in practice extra-territoriality to tackle international competition law problems they face and the limited refuge provided by bilateral agreements has led to the growing phenomenon of regional competition law agreements.

³² ICPAC, *ibid.*

These causal connections are explored in more detail in the next chapters, which focus on regional agreements and their ability to serve as catalysts for higher levels of international cooperation.

PART II: REGIONAL ANTITRUST AGREEMENTS

Regional competition law agreements hold an important key for solving some of the most significant problems of competition law enforcement for their parties. Indeed, the past two decades have witnessed the proliferation of RCAs. Examples include COMESA (Common Market for Eastern and Southern Africa), WAEMU (West Africa Economic and Monetary Union) and the CARICOM (the Caribbean Community). This trend is so significant that it can be termed the ‘new wave of regionalism’. This new wave is not only characterized by an increased dynamism but also by more ambitious and deeper levels of integration, taking steps that go beyond tariffs or non-tariff border measures.

This new wave of competition law regionalism raises the question of the motivations for their creation. Nonetheless, to meet their promise, RCAs need to be structured efficiently. This part explores the potential held by such agreements, as well as their possible limitations.³³

A. Types of Regional Competition Law Agreements

There are many types of RCAs. Such agreements differ along important dimensions, including the breadth of their membership; the institutional arrangements they create (supranational institutions, joint committees, etc.); trade-related objectives (elimination of tariffs on goods, liberalization of trade in services, or even creation of a customs union and a joint market); and the types of competition provisions they include (notification, formal cooperation, comity, establishment of supranational competition rules, harmonization, dispute settlement, etc.).

The diagram below focuses on the latter dimension and illustrates some possible types of cooperation on competition issues that might

³³ On regional competition law agreements see, eg, Regional Agreements (n 1 above); P Brusick et al. (eds), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005).

be included in a regional agreement, which are arranged in accordance with the level of cooperation involved. Agreements may include some or (almost) all of these mechanisms.

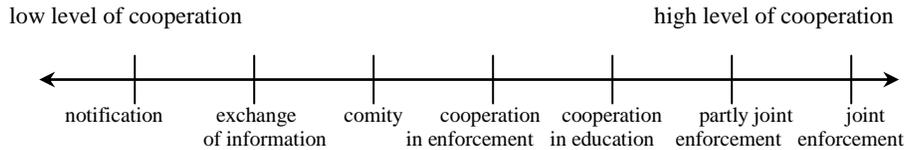


Diagram 2: Types of Cooperation in Regional Agreements

The first two - notification and information sharing- are low-level forms of cooperation, since they do not require the notifying jurisdiction to change its decisions. Nonetheless, information sharing might carry an important potential for increased enforcement in the requesting jurisdiction, if it provides access to information that is necessary in order to prove anti-competitive conduct. Information sharing is often, however, plagued with practical and legal issues, especially if it enables a foreign jurisdiction to take one's domestic firms to court. The third type of cooperation, comity, also does not require significant changes in one's conduct, although positive comity may require a change in enforcement priorities and might serve to overcome discrimination against one's firms. The next two represent joint efforts. Cooperation in enforcement allows jurisdictions, for example, to coordinate dawn raids and investigations. Cooperation in educatory measures allows jurisdictions to pool together their resources in order to create a competition culture, which is an essential element for a successful competition law.³⁴ Other elements, such as technical assistance, might also be included in the agreement.

The most interesting forms of cooperation are the last two: partly joint enforcement and complete joint enforcement, which create a much deeper level of integration. The first one pertains to a situation where a joint enforcement agency is created but member states can also apply their competition laws where no joint action is taken. This is the model adopted, for example, in the EU and in the CARICOM. Complete joint enforcement is much less common and applies where a joint enforcement authority is formed and member states do not have or might even be prohibited from having their individual

³⁴ See eg MS Gal, 'The Ecology of Antitrust: Preconditions for Antitrust Enforcement in Developing Countries' in P Brunswick et al (eds) *Competition, Competitiveness and Development: Lessons from Developing Countries* (2004) 22.

competition laws. The Organization of Eastern Caribbean States' proposed agreement exemplifies voluntary forbearance, while the WAEMU regional agreement exemplifies mandatory forbearance. We shall focus on these two forms of agreements, which differentiate regional from bilateral or multilateral agreements and which generally include all or almost all other less-cooperative types of agreements.

B. Potential Benefits of Joint Enforcement Agreements

RCAs for joint enforcement can potentially create strong benefits to their members. There are several different reasons for this effect. The most important one involves *scale economies in enforcement*, which allow its members to significantly reduce their enforcement costs by pooling their enforcement budgets on issues of mutual interest. This is especially important for small and developing economies which usually have limited budgets to monitor and limit anti-competitive conduct.³⁵ Such scale economy effects can be broken down into several sub-categories: six Es.

Expertise: Competition law enforcement is not easy. Rather, since it combines law and economics, its efficient enforcement requires expertise. RCAs might overcome this problem, as they enable countries to pool their limited expert human resources.³⁶

Evidence: oftentimes evidence of anti-competitive conduct might be spread in different jurisdictions. For example, foreign firms might divide the regional markets among them. If they do so, joint efforts to seek evidence might strengthen the case for anti-competitive conduct or enable it to be proven. Also, evidence necessary in order to prove anti-competitive conduct might be found in a country other than the one in which the anti-competitive conduct occurred. This may happen, for example, when the parties meet outside the jurisdiction in order to avoid getting caught. Information-sharing agreements can overcome this obstacle to enforcement. The agreement will increase

³⁵ See eg M Gal, 'When the Going gets Tight: Institutional Solutions when Antitrust Enforcement Resources are Scarce' (2010) Loyola University at Chicago; WE Kovacic and D Eversley, 'An Assessment of Institutional Machinery: Methods Used in Competition Agencies and What Worked for Them,' (2007), available at http://www.internationalcompetitionnetwork.org/media/library/conference_6th_moscow_2007/11ReportonanAssessmentofInstitutionalMachineryMethodsUsedinCompetitionAgencies.pdf.

³⁶ *ibid.*

the chances that the investigation will be successfully concluded and that the costs for the parties and for the competition authorities in the countries involved are reduced.

Enforcement: If the anti-competitive conduct takes place in several jurisdictions, fines imposed in one jurisdiction might not be a sufficient deterrent for such conduct. Joining forces, and thereby multiplying the penalties for anti-competitive conduct, create a much more forceful deterrent. Take, for example, the Vitamins cartel, which was found to affect all countries worldwide. The cartel imposed billions of dollars in damages. However, only six jurisdictions brought it to trial and imposed fines which were based on the damages incurred to their own citizens. All other countries chose not to bring suit, given that the cartelistic agreement was brought to an end and that prosecuting the cartel would have entailed high enforcement costs. However, this meant that most of the profits of the cartel were never confiscated, and thus there still exist strong motivations for future cartels.³⁷ The same is true for abuse of a dominant position that takes place in several jurisdictions. Joint enforcement can help increase enforcement, thereby increasing domestic as well as global welfare.

Empowerment A joint competition authority is better suited to deal with large multinational companies. Where a domestic competition authority could not easily take-on such cases, this task could more easily be tackled by a joint authority, as its members can create a joint credible threat to the foreign company. This is especially important for small or developing jurisdiction, given their limited ability to create a credible threat of enforcement.³⁸

Externalities If regulators ignore impacts beyond their own jurisdictions, the standards they set will be systematically suboptimal on a regional basis. This implies that each jurisdiction might suffer from the decision of its neighboring jurisdictions. This may create a snow-ball effect whereas jurisdictions attempt to 'punish' their neighbors by imposing negative externalities upon them. Such externalities might be overcome by joint competition law enforcement.

³⁷ eg J Connor and G Helmers, 'Statistics on Modern Private International Cartels' (2007) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=944039.

³⁸ MS Gal, *Competition Policy in Small Market Economies* (2003) ch. 6.

Educational efforts necessary to create a competition culture, such as workshops, press releases, seminars – might all benefit from the pooling of scarce resources.

In addition, to these benefits from scale economies, RCAs create additional benefits (4 Cs). *Common market* A joint competition agency has the potential to further the goal of creation of a common, single market, as in the case of the EU market.

Certainty and compatibility Decentralized implementation increases the risks of inconsistent application of competition rules. Without cooperation, each jurisdiction might apply its own rules and outcomes might differ due, for example, to differences in technical standards. This creates, of course, incompatibility of outcomes, which may impose high costs on firms operating in the market and even prevent them from engaging in welfare-enhancing projects. Again, a joint competition law can overcome such problems.

Costs are reduced Joint enforcement avoids duplication of efforts, while increasing enforcement chances. Additionally, companies operating within a region that applies joint enforcement may enjoy lower costs of compliance. For instance, joint mergers and acquisition procedures might significantly reduce costs and time required for an approval of a merger. Such reduced costs may encourage mergers and acquisitions that improve efficiencies, better allocate resources and reduce consumer prices.

Credible commitments One of the main obstacles to incentives to invest and compete in developing jurisdictions involves their inability to create credible commitment to support such investments in the long run. Changes in commitments may take many forms such as changes in the regulatory framework which alter the business assumptions on which investors based their predictions or the erection of artificial barriers in the market based on protectionism or favoritism. This creates a strong risk for potential investors that might significantly reduce their incentives to invest in such jurisdictions, despite their economic potential. An RCA might create a stronger commitment that will increase incentives to invest. Once again the reason is the aggregation of different incentives, which reduces the ability of a domestic group to exert pressures on the regulator. Of course, overcoming commitment problems requires that the joint authority have powers of enforcement to override local decisions.

Given all these benefits, joint enforcement through regional competition law agreements is becoming increasingly popular.

B. Costs and limitations

Are the benefits of such regional agreements costless? Of course not. Creating a joint authority involves direct costs of building a new institution and funding its operation. Moreover, it requires allocating appropriate staff. This is possibly the highest cost for developing countries, as human and financial resources are normally scarce therein.

The indirect cost involves some harm to the sovereignty of the parties to the regional agreement. Indeed, once enforcement is implemented by a joint authority, generally the parties will not be able to apply their own laws to the same conduct. But harm to sovereignty may extend further, given the possible conflicting interests joint enforcement might create. Assume, for example, that a merger benefits consumers in some member states, since their markets are less concentrated, and harms consumers in others. Any standard set for review of such a merger will harm some members and benefit others. Setting a joint standard for review in such cases is highly problematic. There are several ways to overcome such problems. One solution is to jointly enforce only those cases which further the interests of all countries involved, and leave others outside the scope of the agreement. However, this solution reduces the benefits from the agreement. A more effective although not 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 or by other enforcement decisions in which their interests are given priority.³⁹

Accordingly, the costs of entering into regional agreements are undeniably high. Yet, such costs might be justified if they enable a more efficient implementation and enforcement of competition laws.

PART III. REGIONAL COMPETITION LAW AGREEMENTS: CATALYSTS FOR A SUPRA-NATIONAL AUTHORITY?⁴⁰

³⁹ Guzman (n 6 above).

⁴⁰ This section builds upon Regional Agreements (n 1 above).

This part ties the two previous ones together and focuses on whether RCAs carry the potential to move international competition law beyond the level that it currently reached, that is towards the creation of some sort of a supra-national competition authority. As elaborated below, the answer is a cautious yes.

RCAs allow jurisdictions to escape the dilemma of choosing between extreme decentralism (unilateral enforcement) and extreme centralism (global enforcement): They allow jurisdictions to explore an intermediate solution to the many competition law problems created by the internationalization of trade by creating a form of participatory and cooperative governance on competition issues. Accordingly, they enable countries to experience and refine different joint endeavors for solving competition issues that extend beyond their borders. Furthermore, regional agreements are based on different degrees of coherence and diversity. Most agreements attempt to provide joint solutions for internationalized markets without eroding the diversity of players, institutions and responsibilities. The experience gained in RCAs might thus serve as an important building block for developing a more centralized solution to joint competition problems. Indeed, it may come as no surprise that the EU was the main torch bearer for the inclusion of some competition law provisions in the WTO.⁴¹

A necessary condition for the strengthening of motivations for the creation of an international authority which result from an RCA is a positive experience in a regional agreement or, at least, an observation that a successful joint authority may increase the welfare of its parties. This is a necessary but not a sufficient condition.

An additional condition requires that the experience in the agreement can be carried over to a larger scale of cooperation. This condition is much less trivial than the previous one. For one, the RCA must not be too successful in solving all or almost all the problems of its members, as otherwise they will have limited incentives to take another step, especially if it involves placing additional limits on one's sovereignty.

Furthermore, geographic proximity might play an important role in the success of a regional agreement, due to several reasons. First, the socio-economic culture is often relatively similar. While

⁴¹ See eg Fox (n 5 above).

geographic proximity does not ensure socio-economic similarity, ideological patterns often follow geographical locations. Second, and more importantly, neighboring jurisdictions oftentimes deal with relatively similar market players. Business does not comply with national borders but rather with demand patterns and entry barriers. Accordingly, when trade barriers are not prohibitively high, firms often trade in regions which allow them to take advantage of scale and scope economies in marketing, transport, technical service, etc. Accordingly, similar conduct may take place in several neighboring countries and similar solutions may be effective. The higher the similarity of trade patterns between different jurisdictions, the higher the incentives to give up some degree of sovereignty in order to reach joint solutions, and vice versa.

These observations strengthen our above conclusion that an international anti-cartel authority is the most likely type of international authority to emerge, if at all. This observation comports with the conditions elaborated above. First, anti-cartel prohibitions worldwide are based on relatively similar socio-economic ideologies. While there is some confusion with regard to the definition of abuse of dominance, and merger review often poses issues of clashing interests, there is a consensus that international cartels generally harm all countries involved. If an agreement can be reached with regard to export cartels, then a good case for international cooperation can be made. Second, in such cases geographic proximity is not a necessary condition for economic incentives to be intertwined. Rather, global cartels might harm jurisdictions which are far apart. Furthermore, the enforcement actions of one jurisdiction in which the cartel operates affect others. This is because the aggregation of under-enforcement at the domestic level has global implications. Accordingly, the motivation to cooperate in prosecuting international cartels extends beyond one's region.

RCAs might provide a further catalyst for stronger cooperation on international competition law issues, resulting from the aggregate bargaining power they provide their members in the inter-governmental arena. The same forces that enable members to create a stronger opposition to anti-competitive conduct relative to each member's unilateral enforcement also allow them to present a stronger and more credible joint position in international negotiations. This, in turn, might increase their willingness to take the more cooperative steps in international competition law since their position will be given more weight. It might also strengthen the motivation of other jurisdictions to enter into global enforcement agreements, given that the agreement might provide a higher degree of information sharing and of credible enforcement which might be necessary for global enforcement.

Indeed, RCAs might overcome the main obstacle to the inclusion of competition law provisions in the WTO. Attempts to use the WTO as a vehicle for increasing anti-cartel enforcement have so far failed due, in part, to the concern of developing jurisdictions that their special concerns will not be addressed.⁴² In particular, two issues arose. First, developing countries were concerned that a WTO rule that would mandate them to apply their competition laws to prohibit cartels might aggravate their problems, given that their limited resources might not enable them to prohibit all cartels that affect other jurisdictions as well, and they might then be subject to international sanctions for their limited enforcement. A successful regional agreement can reduce such concerns, as it can increase enforcement against cartels and thus reduce the concern for sanctions. Second, developing countries were concerned that a global anti-cartel policy would interfere with their industrial policy and would not enable domestic firms to grow to efficient sizes. RCAs can weaken this concern by enabling their members to come to the international negotiation table with a stronger, unified position that would enable them to strike a better balance between competing considerations.

Conclusion

The internationalization of trade has created a cadre of new competition law issues with an international dimension. To deal with these issues, jurisdictions have developed and adopted a set of new regulatory tools that go beyond the traditional model of unilateral enforcement of competition laws to conduct that takes place within one's borders. The level of cooperation between jurisdictions is growing in parallel with the growth in international trade levels and the realization that traditional regulatory tools are sometimes ineffective in dealing with such issues.

This paper explored the main challenges to competition law created by the internationalization of trade. It then examined five different solutions adopted or suggested as partial solutions to such challenges, with rising levels of cooperation. The question was then posed- whether regulatory tools characterized by a lower degree of cooperation led to higher ones. In particular, the potential of RCAs to increase international cooperation was analyzed. This example is timely, given that in the past few years a new wave of RCAs has taken place. As elaborated, RCAs have much to offer. They allow for

⁴² See eg E Elhauge and D Geradin, *Global Competition Law and Economics* (2007) 1108.

a better utilization of meager resources in the quest for effective and efficient enforcement of competition law. Interestingly, they might also create a stronger motivation for increasing the level of cooperation in international competition law- the creation of a supra-national competition agency.