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Michal S. Gal*

REGIONAL COMPETITION LAW
AGREEMENTS: AN IMPORTANT STEP FOR
ANTI-TRUST ENFORCEMENT†

This essay argues that regional competition law agreements on joint enforcement and advocacy (RJCLAs) hold an important potential to solve many of the enforcement problems that small and developing jurisdictions face and can provide additional benefits that go beyond such solutions. It also argues that the costs involved in such agreements are not prohibitive and that many of these costs can be overcome by structuring appropriate solutions. Accordingly, RJCLAs have the potential to create Pareto superior solutions to enforcement problems relative to unilateral enforcement. The essay then broadens the analysis to the potential effects of RJCLAs on non-member states. It is argued that such agreements create much lower negative externalities for non-member states and for international coordination efforts than do regional trade agreements. On the contrary, they often create positive externalities for non-member jurisdictions. Accordingly, they offer important potential for strengthening competition law enforcement and should generally be encouraged. In addition, as the article shows, RJCLAs can further international efforts for coordination and cooperation in competition law.

Keywords: anti-trust/competition law/regional agreements/small economies/developing jurisdictions

I Introduction

The past two decades have witnessed exponential growth in the adoption of competition laws: today more than 100 jurisdictions have such laws.¹ Competition law is recognized as an important part of the regulatory framework, to ensure that the benefits of competition are realized where possible. Yet its enforcement is sometimes fraught with problems. This is particularly true with regard to developing jurisdictions and

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1 Keith N. Hylton & F. Deng, 'Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects' (2007) 74 Antitrust L.J. 271, listed 102 jurisdictions with anti-trust regimes in 2007.

small ones.² Most developing jurisdictions suffer, *inter alia*, from financial and human resource scarcity, a lack of competition culture, and political economy constraints. Indeed, a 2002 World Bank study estimated that competition authorities in advanced countries are 40 per cent more effective than their counterparts in developing ones.³ Small economies usually suffer from financial resource constraints and a limited capability to create credible threats to multinational firms.⁴

This essay suggests that regional competition law agreements have an important potential for solving at least some of the enforcement problems that developing and small jurisdictions face and that such agreements can provide additional benefits that go beyond these solutions.

Indeed, such agreements are becoming commonplace and now cover quite a few regions around the world.⁵ Although the most famous regional competition agreement – the EU Treaty of Rome – was signed in 1957, most have been enacted since the mid-1990s. This trend is so significant that it can be termed the ‘new wave of regionalism.’ Some examples of such agreements include MERCOSUR (the Southern Common Market), COMESA (Common Market for Eastern and Southern African), WAEMU (West African Economic and Monetary Union), SEACF (Southern and Eastern Africa Competition Forum), and CARICOM (the Caribbean Community).

This new wave of regionalism is characterized not only by an increased dynamism but also often by more ambitious and deeper levels of integration, taking steps that go beyond information sharing and comity. Such agreements are generally part of wider agreements aimed at furthering integration by reducing trade barriers. The inclusion of competition law in such agreements is intended to prevent attempts to

2 A *small jurisdiction* is defined in this article as a jurisdiction with a small population size. This is because population size is the main driver of local demand, which is relevant to the current analysis. A *developing jurisdiction* is defined as a low-income jurisdiction, with gross national income per capita of less than \$9 206 (in accordance with World Bank definitions: see World Bank, ‘Data and Statistics: Country Groups’ (Washington, DC: World Bank, 2010), online: World Bank <<http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20421402~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html>>). Many developing jurisdictions are also small, and vice versa.

3 World Bank, *World Development Report: Building Institutions for Markets* (Washington, DC: World Bank, 2002) at 141 [*World Development Report*]. The study is based on surveys of top and middle management of firms in each country.

4 Michal S. Gal, *Competition Policy for Small Market Economies* (Cambridge, MA: Harvard University Press, 2003) at c. 1, 6 [Gal, *Small Economies*].

5 See, e.g., Philippe Brusick, Ana María Álvarez, & Lucian Cernat, eds., *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (Geneva: UNCTAD, 2005), online: UNCTAD <http://www.unctad.org/en/docs/ditclp20051_en.pdf>; D. Daniel Sokol, ‘Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements’ (2008) 83 Chi.-Kent L.Rev. 231 [Sokol, ‘Order without Law’].

frustrate competition, which could diminish the benefits expected from liberalization and integration.⁶

This essay focuses on this growing phenomenon, in particular regional joint competition law enforcement and advocacy agreements (RJCLAs). Some RJCLAs embrace complete joint enforcement under which only the joint authority can apply competition laws. The Organization of Eastern Caribbean States (OECS) exemplifies voluntary forbearance from individual enforcement, while WAEMU exemplifies mandatory forbearance. Yet in most RJCLAs, member states are allowed to apply their competition laws where such application does not clash with or frustrate the goals of the agreement. This is the model adopted, for example, in the CARICOM agreement.⁷ Notably, all the recent RJCLAs were signed among developing jurisdictions, some of which are also small. As I shall attempt to show here, this is not surprising.

The essay analyses the potential of RJCLAs to overcome the main competition law enforcement problems of developing and of small jurisdictions. Part II sets the stage by analysing the main obstacles to enforcement faced by developing and small jurisdictions and the ability of RJCLAs to overcome them; it also analyses the additional benefits that such agreements offer. The costs such agreements impose on their members are analysed in Part III. As I will show, RJCLAs have the potential to create Pareto superior solutions to enforcement problems relative to unilateral enforcement. For reasons of space, the essay does not elaborate the conditions necessary for RJCLAs to be effective; rather, it is assumed that they can be structured effectively to reach the stated goals.

Part IV then broadens the analysis by focusing on the potential effects of RJCLAs on non-member states. I argue that such agreements create much lower negative externalities for non-member states and for international coordination efforts than do regional trade agreements; on the contrary, they often create positive externalities for other jurisdictions. Accordingly, they offer an important potential for strengthening competition law enforcement at both the domestic and the international level and should generally be encouraged. Part V concludes.

II *The benefits RJCLAs can offer to members*

Competition law is like a flower: in order to bloom, it needs water and sun (efficient institutions), soil (a supportive socio-economic ideology), and

⁶ Sokol, 'Order without Law,' *ibid.*; S. Corawd, 'All set for launch of CARICOM Competition Commission' *Caribbean Press* (14 January 2008), online: Caribbean Press Releases <<http://www.caribbeanpressreleases.com/articles/2760/1/All-Set-for-Launch-of-Caricom-Competition-Commission/Seven-member-commission.html>>.

⁷ *Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy*, 5 July 2001, at c. 8.

pesticides (tools to limit political economy influences).⁸ Section II.A below provides a broad-brush overview of the main obstacles to achieving these conditions in developing and in small jurisdictions.⁹ Such obstacles may relate to the ability of the jurisdiction to deal with domestic competition law issues as well as to issues that also affect other jurisdictions ('multilateral issues'). I then indicate how RJCAS can reduce such enforcement problems. While large, developed jurisdictions may also face some of these enforcement constraints, the degree of such constraints affects the need for effective solutions. In section II.B I analyse the additional benefits that are offered by RJCAS.

A OVERCOMING OBSTACLES TO COMPETITION LAW ENFORCEMENT

The need to overcome the enforcement problems of small and developing jurisdictions has increased as a result of globalization. Such jurisdictions may be significantly affected by the monopoly power of international firms, exercised either unilaterally or collusively, if such power is not properly regulated. As research has shown, international cartels are more numerous and durable than in the past, and they can significantly impair the process of development.¹⁰ In addition, international mergers and internal expansions have sometimes created large, global firms that dominate world markets. Add to this that developing and small jurisdictions rely on imports in many markets, that their enforcement is often weak, and that many large jurisdictions exempt their export cartels from their competition laws, and the result is that developing and small jurisdictions are often an easy target for anti-competitive conduct. Accordingly, there is a strong case to be made for such jurisdictions to improve their enforcement tools. As this section shows, RJCAS, if structured efficiently, have important potential to overcome – at least partially – the

8 Michal S. Gal, 'The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries' in Philippe Brusick *et al.*, eds., *Competition, Competitiveness and Development: Lessons from Developing Countries* (Geneva: UNCTAD, 2004) 21 at 21 [Gal, 'Ecology of Antitrust'].

9 See, e.g., *ibid.*; APEC, *Competition Law for Developing Countries* by PriceWaterhouseCoopers (Singapore: APEC, 1999) [APEC, *Competition Law*]; Consumers Unity & Trust Society (CUTS), *Pulling Up Our Socks: A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7-Up Project* (New Delhi: CUTS, 2003) [CUTS, *Pulling Up Our Socks*]; William E. Kovacic, 'Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe' (1995) 44 DePaul L.Rev. 1197; *World Development Report*, *supra* note 3; Eleanor Fox & Daniel Sokol, eds., *Latin America Competition Law and Policy* (Oxford: Hart Publishing, 2009).

10 Margaret Levenstein & Valerie Suslow, 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy' (2003) 71 Antitrust L.J. 801.

most important enforcement obstacles faced by developing and small jurisdictions.

1 *Enforcement resource constraints*

Possibly the main enforcement obstacle faced by developing and small jurisdictions involves enforcement resource constraints.¹¹ Developing jurisdictions suffer from limited financial endowments as a result of their low level of development and the resultant financial limitations. They also often suffer from human resource constraints as a result of low levels of education. Small jurisdictions generally suffer from limited financial resources, since even if per capita investment in competition law enforcement is relatively large, the small size of the population necessarily means that the absolute size of the resource endowment is small. This financial constraint is further strengthened by the fact that the cost of conducting a competition law investigation is often not affected by size and that the highly concentrated nature of many of the industries in such jurisdictions raises a relatively high number of competition issues.¹² Thus, a smaller endowment naturally means that the authority is able to deal with fewer cases.

Resource constraints are often more severe in dealing with multilateral issues. Evidence may need to be gathered from foreign sources, a costly and time-consuming exercise. Further, a large international firm will often deploy quite a high level of legal defence; it may be difficult for a competition authority with a limited endowment to match such expertise and resources, even if it has a sound case.¹³

RJCS can significantly reduce such resource constraints by enabling jurisdictions to pool their scarce resources to reach economies of scale in enforcement activities as well as in competition advocacy and capacity building. RJCS also limit duplication of efforts. Such benefits are, of course, most pronounced in dealing with multilateral issues. Yet joint

11 See, e.g., William E. Kovacic & DeCoursey Eversley, 'An Assessment of Institutional Machinery: Methods Used in Competition Agencies and What Worked for Them' (Sixth Annual International Competition Network Conference, Moscow, 23 May 2007) at 22, online: International Competition Network <http://www.internationalcompetitionnetwork.org/media/library/conference_6th_moscow_2007/11ReportonanAssessmentofInstitutionalMachineryMethodsUsedinCompetitionAgencies.pdf>; APEC, *Competition Law*, supra note 9 at 2.9.4; CUTS, *Pulling up our Socks*, supra note 9 at 55; Taimoon Stewart, *Competition Issues in Selected CARICOM Countries: An Empirical Examination* (St. Augustine, Trinidad & Tobago: Sir Arthur Lewis Institute of Social and Economic Research, University of West Indies, 2004) at 27.

12 Gal, *Small Economies*, supra note 4.

13 Michal S. Gal, 'Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and by Developing Jurisdictions' *Fordham Int'l L.J.* [forthcoming in 2010] [Gal, 'Antitrust in a Globalized Economy'].

endeavours in training, capacity building, and competition advocacy can also ease resource constraints in purely domestic issues.¹⁴

In some situations RJCAS may provide the only viable solution for enforcement, given severe resource constraints. The OECS is a good example. Member states are all developing micro-economies, such as Montserrat (pop. about 5 000) and St. Kitts (pop. about 40 000).¹⁵ None of them, alone, can justify an investment in a competition authority; yet by pooling their resources, they are able to create a joint authority that deals with competition law issues arising within member states and to meet their commitment to other CARICOM countries to internally enforce their competition laws. Indeed, the COMESA agreement, which adopted joint enforcement only for multinational issues, has encountered problems based on the fact that some of its members, notably Malawi, cannot meet their domestic enforcement obligations.¹⁶

Additionally and relatedly, joint enforcement may also reduce firms' compliance costs where it offers one-stop shopping rather than parallel regulation. This, in turn, may encourage joint ventures, mergers and acquisitions, and even unilateral conduct that improves efficiencies, better allocates resources, and reduces consumer prices.

2 *Enforcement capability constraints*

Even when a jurisdiction has no significant enforcement resource constraints, it may still be constrained in its capability to enforce its laws in practice, especially in addressing multinational issues. First, it may encounter evidence-gathering problems, if evidence is located elsewhere. This may happen, for example, when cartel members meet in another jurisdiction in order to avoid getting caught.

Second, small jurisdictions often cannot make a credible threat to prohibit the conduct of a foreign firm. Consider an international merger that has no negative welfare effects on large jurisdictions.¹⁷ If trade in the small jurisdiction is only a small part of the foreign firm's total world revenue,

14 See, e.g., Taimoon Stewart, 'Special Cooperation Provisions on Competition Law and Policy: The Case of Small Economies (CARICOM)' in Philippe Brusick *et al.*, eds., *Competition, Competitiveness and Development: Lessons from Developing Countries* (Geneva: UNCTAD, 2004) 329.

15 Organization of Eastern Caribbean States, 'Member States' (OECS, 2010), online: OECS <<http://www.oecs.org/about-the-oecs/member-states>>.

16 See, e.g., George K. Lipimile & Elizabeth Gachuiru, 'Allocation of Competences between National and Regional Competition Authorities: The Case of COMESA' in Philippe Brusick *et al.*, eds., *Competition, Competitiveness and Development: Lessons from Developing Countries* (Geneva: UNCTAD, 2004) 361.

17 This section is based in part on Gal, *Small Economies*, supra note 4 at c. 6. See also Alejandro Prada, 'Competition Policy of the Free Trade Area of the Americas – Preliminary Comments on the Draft Agreement' (2002) 33 *Int'l Rev. Ind. Prop & C'right L.* 790 at 807–8.

and thus the gains from trade within it are limited, were the small jurisdiction to place significant restrictions on the foreign firm that firm would most likely choose to exit the jurisdiction and trade only elsewhere. This might diminish competition in the market even more than if the merger took place. Enforcement may therefore be self-defeating. The small jurisdiction, recognizing this problem, will most likely not prohibit the merger.¹⁸ Similar problems may arise in cartel and abuse of dominance cases.

Developing jurisdictions may also suffer from a similar constraint, although to a more limited extent. The fact that developing economies often represent a large number of consumers increases their ability to create a credible threat of enforcement; yet this obstacle may arise in specific product markets that are small or do not generate high profits because of a low level of development. To the extent that the development of domestic industries depends on importing raw materials, intermediate components, and capital goods from foreign firms, such obstacles can have a significant negative effect on welfare in these jurisdictions.¹⁹

Third, it may be difficult to impose penalties on firms located elsewhere. A final enforcement capability constraint is based on the fact that in multilateral cases deterrence may require cumulative sanctions.²⁰ This is because most jurisdictions impose monetary sanctions that are based on the harm to their own jurisdictions. An example is the vitamins cartel, which affected all countries worldwide and imposed billions of dollars in damages, yet only five jurisdictions brought it to trial and imposed fines based on damages incurred in their own jurisdictions. All other countries chose not to bring suit, given that the cartelistic conduct was brought to an end and that prosecuting the cartel would have entailed high enforcement costs.²¹ However, this meant that most of the cartel's profits were never confiscated, and thus there still exist strong motivations for future cartelists. The same is true for monopolization conduct that takes place across several jurisdictions.

RJCAs can potentially reduce all four enforcement capability constraints enumerated above, especially where the conduct has cross-border effects.

18 Gal, 'Antitrust in a Globalized Economy,' supra note 13. Sometimes local behavioural or structural remedies can limit this effect: *ibid.*

19 *Ibid.*

20 See, e.g., OECD Competition Committee, *Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation* (Paris: OECD, 2005) at 25; papers by John Connor, online: Social Science Research Network <http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=25684>. Criminal sanctions may significantly increase deterrence; however, such sanctions are often not available in developing and small jurisdictions.

21 John M. Connor, *Global Price Fixing: Our Customers Are the Enemy*, 2d ed. (Dordrecht, Netherlands: Kluwer, 2007).

RJCAS increase the ability of jurisdictions to reach evidence located in other member states, since information sharing is generally an integral part of the agreement and the potential benefits of the agreement create stronger incentives to divulge information. In addition, RJCAS can significantly increase the ability to create a credible threat and to impose sanctions, since the aggregation of consumers provides stronger leverage against international firms. Finally, joint enforcement also increases deterrence: the agreement increases the incentives to enforce the law, since the costs of enforcement are now lower relative to the benefits due to their aggregation across member states, and the remedy is stronger, since it is based on the harm suffered by all member states.

3 *Public choice limitations*

Competition law impairs the ability of firms to profit from anti-competitive conduct. Decision makers may thus be susceptible to pressure from interest groups, aimed at limiting such effects, in return for political support or other benefits.²² These concerns are especially significant for developing or small jurisdictions, since economic power within such jurisdictions tends to be more concentrated in the hands of a few. Moreover, the economic and governmental elites are often intertwined, which increases the probability of lobbying, rent-seeking behaviour, and political influence aimed at the pursuit of private objectives. This problem is exacerbated in developing jurisdictions by the fact that many consumers cannot be easily educated on the benefits of competition law enforcement and will rarely join forces to vie for it.²³ It is further reinforced by the fact that the political influence of large firms often cannot be countered by relatively weak anti-trust authorities.²⁴

A joint authority can alter some of the considerations of decision makers as to whether or not to adopt a competition law. Most importantly, a push toward regionalization creates internal and external pressures to adopt a competition law that may overcome political pressure to adopt sub-optimal laws.²⁵ This is especially true if competition law is part of a wider agreement on trade, since trade benefits are generally more understandable to the general public.

22 See, e.g., John Wiley, Jr., 'A Capture Theory of Antitrust Federalism' (1986) 99 Harv.L.Rev. 713; Louis Kaplow, 'Transition Policy: A Conceptual Framework' (2003) 13 J.Contemp.Legal Issues 161.

23 Gal, 'Ecology of Antitrust,' supra note 8.

24 Ibid. at 22.

25 See, e.g., Nancy Birdsall & 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 134 [Birdsall & Lawrence, 'Deep Integration'].

A joint authority can also reduce political influence on the enforcement of competition law, once adopted. Most importantly, it may be more difficult to create political favours for decision makers, especially if the decision-making body comprises representatives from different jurisdictions.²⁶ This effect can be strengthened by ensuring the independence of the joint authority and by securing long-term commitments from decision makers to serve on it. Joint enforcement has an added advantage: 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.

4 *Weakness of competition culture*

An additional factor that often plays a role in developing countries' low enforcement levels involves the weakness of their competition culture. A competition law that does not enjoy full and consistent government support can lead to the primacy of short-term industrial policy considerations over competitive concerns. Here the RJCA can play an important role in the educational efforts necessary to create a competition culture. Workshops, press releases, and seminars, as well as joint efforts of competition advocacy, can all benefit from the pooling of scarce resources and from the experience of seasoned RJCA member jurisdictions with stronger competition cultures. The RJCA can also help to accelerate internal legal and economic reforms.²⁷

A related problem, which is a serious obstacle to investment and competition in many developing jurisdictions, involves their limited ability to create long-term commitments to support investments. The main problem relates to governmental changes in the regulatory framework or in market conditions that alter the assumptions on which investors base their financial calculations. Such changes, in turn, reduce incentives to invest in such jurisdictions, despite their economic potential.

An RJCA can reduce this effect by aggregating different incentives in an authority that is one step removed from each member state and that reduces the ability of any domestic group to exert pressure to change the regulatory environment. The RJCA might therefore work as a commitment mechanism that allows members to create binding commitments of compliance that will be enforced beyond the term of the current

26 Of course, a joint authority may not limit the ability to grant other favours, such as bribes. Also, in some situations concentrating regional decision-making authority in one body may make decisions easier to influence.

27 Birdsall & Lawrence, 'Deep Integration,' supra note 25 at 135–6; Ana María Álvarez, Julian Clarke, & Verónica Silva, 'Lessons from the Negotiation and Enforcement of Competition Provisions in South–South and North–South RTAs' in Philippe Brusick *et al.*, eds., *Competition, Competitiveness and Development: Lessons from Developing Countries* (Geneva: UNCTAD, 2004) 123 at 143.

government that signed the commitments.²⁸ Of course, overcoming commitment problems requires giving the joint authority powers of enforcement to override local decisions. The European Commission, for example, can overrule some protectionist policies by member states that clash with its competition law. Sanctions can also strengthen commitments, as might reputational effects.²⁹

Interestingly, the model of full joint enforcement, adopted for example by WAEMU, may be partly explained by a wish to create a credible commitment to regulation. The aggregation of enforcement may constrain short-sighted and group-specific interests for the sake of long-term domestic self-interest.

The cumulative effect of reducing the enforcement constraints above creates an additional benefit: once the possibility of enforcement increases, the risk infringers face that their conduct will be found to be anti-competitive grows. As Gary Becker has shown, this increased risk implies that fewer people will be willing to engage in such conduct, and thus deterrence will increase even if the number of cases actually brought does not.³⁰ This, in turn, will reduce enforcement costs even further.

B ADDITIONAL BENEFITS FROM REGIONALIZATION

RJCS not only have the potential to reduce some of the most significant obstacles to competition law enforcement in developing and in small jurisdictions but often offer added benefits.

1 *Common market*

A joint competition policy has the potential to further the goal of a common, integrated market. As Robert Lawrence and Robert Litan observe, regional agreements may assist regions in achieving a deeper degree of economic integration than an international system could achieve.³¹ This is because negotiations generally involve a smaller number of like nations, and thus countries are more likely to cede the kind of political sovereignty to central institutions that is required for

28 Sokol, 'Order without Law,' supra note 5 at 113; Birdsall & Lawrence, 'Deep Integration,' supra note 25 at 136–7; Robert W. Staiger, 'International Rules and Institutions for Cooperative Trade Policy' in Gene M. Grossman & Kenneth Rogoff, eds., *Handbook of International Economics*, vol. 3 (New York: Elsevier Science, 1995) 1495.

29 Sokol, *ibid.* at 130. For a different conclusion see, e.g., Andrew K. Rose, 'Do We Really Know That the WTO Increases Trade?' (2004) 94 *Am.Econ.Rev.* 98 at 98.

30 Gary S. Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 *J.Pol.Econ.* 169. See also George J. Stigler, 'The Optimum Enforcement of Laws' (1970) 78 *J.Pol.Econ.* 526.

31 Robert Z. Lawrence & Robert E. Litan, *Saving Free Trade: A Pragmatic Approach* (Washington, DC: Brookings Institution Press, 1986).

deeper economic integration. As the European experience demonstrates, joint enforcement can play an important role in creating an integrated market that will curb internal and external, collective and unilateral abuses of market power.

2 *Reducing entry barriers to neighbouring markets*

A more modest benefit involves the opening up of at least some neighbouring markets. Most regional competition agreements include a commitment by members to enforce their national competition laws,³² to ensure that access of firms from other members is not blocked by privately erected barriers to trade.

As is widely recognized, openness to trade is often one of the most effective tools available to small and developing economies to deal with the limitations of many of their markets. Accessibility to export markets enlarges their scope and encourages the creation of plants and product runs of larger size, or more efficient technology choices, and the achievement of lower production costs by domestic firms. Imports may also significantly affect domestic welfare, as they create an upper limit on domestic firms' prices and may require domestic firms to produce at efficient scales.³³

3 *Certainty and compatibility*

Decentralized implementation increases the risks of inconsistent application of competition rules. In the absence of cooperation, each jurisdiction may apply its own rules and outcomes may differ as a result of, for example, differences in technical standards. This incompatibility may impose high costs on firms and even prevent them from engaging in welfare-enhancing projects. Again, joint enforcement can overcome such problems.³⁴

4 *Externalities*

If decision makers ignore impacts beyond their borders, their decisions may impose negative externalities on other jurisdictions.³⁵ Such externalities among member states can be overcome by a joint competition law

³² See, e.g., Revised Treaty of Chaguaramas establishing the Caribbean Community, *supra* note 7 at art. 169(1).

³³ Gal, *Small Economies*, *supra* note 4 at c. 2.

³⁴ For a similar proposition in the trade context see, e.g., Florence Jaumotte, 'Foreign Direct Investment and Regional Trade Agreements: The Market Size Effect Revisited' (IMF Working Paper No. 04/206, November 2004), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=879031>.

³⁵ For the effects one jurisdiction can impose on another see, e.g., Michal S. Gal & Jorge Padilla, 'The Follower Effect: Implications for Monopolization' *Antitrust L.J.* [forthcoming in 2010].

that is based on joint welfare considerations. Furthermore, RJCAS can reduce the ability of other jurisdictions to disregard the externalities they impose on RJCA members. Instead, such members can become actors in the world scene, if they create a combined voice.³⁶

5 *Broadening the point of view*

If regional interests are taken into account, local firms may be allowed to grow to more efficient sizes. In addition, welfare-reducing conduct can more easily be detected. The takeover of Pan African Cement (PAC) by Lafarge SA of France provides an interesting example of the benefits of focusing on regional interests rather than on narrow domestic ones. PAC owned cement plants in Zambia, Malawi, and Tanzania; Lafarge had no presence in these three countries but did have cement plants in South Africa, Zimbabwe, Uganda, and Kenya. Although the takeover did not directly change the level of market concentration in any of these countries individually, it clearly consolidated Lafarge's regional position. It was therefore difficult to regulate the takeover effectively in the absence of a regional competition authority.³⁷

6 *Informal ties*

Of no less importance are the informal ties created between members' agencies as a result of a coordinated competition policy, which may further lower enforcement costs through informal sharing of experience.

It is noteworthy that geographic proximity often strengthens the benefits of joint competition enforcement and advocacy, elaborated above, for several reasons. First, socio-economic culture is often relatively similar across regions; while geographic proximity does not ensure similarity of economic or cultural orientation, ideological patterns often have geographical connections. Second, neighbouring states often deal with similar issues and with relatively similar market players, since business does not comply with national borders but, rather, follows demand patterns and entry barriers. When trade barriers are not prohibitively high, firms often trade in regions that allow them to take advantage of scale and scope economies in marketing, transport, storage, and so on. Demand patterns may also be quite similar across relatively homogenous regions. Third, for similar reasons, joint solutions to common problems can often be more easily devised across regions. Finally, the creation of a competition culture is also assisted by geographic proximity. Beyond issues of language and transportation costs, often what happens

³⁶ Birdsall & Lawrence, 'Deep Integration,' *supra* note 25 at 139.

³⁷ Although the cement industry is generally quite limited in its geographic scope, given the weight-to-value ratio of the product, the merger had effects that went beyond the borders of each country. See CUTS, *Pulling up our Socks*, *supra* note 9 at 61.

to your neighbour is much more relevant and interesting than what happens halfway around the world.

It should also be noted that international endeavours have so far not succeeded in significantly reducing the enforcement limitations of small and developing jurisdictions resulting from the current system of unilateral enforcement, whereby each jurisdiction enforces its laws with respect to issues that affect its jurisdiction. International bodies such as the Organization for Economic Cooperation and Development (OECD), the UN Committee on Trade and Development (UNCTAD), and the International Competition Network (ICN) have all created important venues for voluntary coordination and cooperation. As D. Daniel Sokol argues, they create 'soft law,' that is, commitments that are not formally binding. Soft law organizations have been effective in addressing coordination and procedural harmonization, but they have been less effective on issues of substantive disagreement in competition law,³⁸ nor have they succeeded in overcoming the main obstacles to enforcement elaborated above.³⁹ Other solutions, such as RJCAS, thus become more important.

In sum, RJCAS have important potential to overcome the main obstacles to competition law adoption and enforcement faced by developing as well as small jurisdictions, and to create additional benefits to member states. Let me rephrase this conclusion in a somewhat provocative manner: many developing countries are allocating scarce financial and human resources to setting up competition law regimes, yet they often lack the ability to pursue the anti-competitive conduct of firms, especially international ones. Joining forces in order to limit such conduct might thus be an important tool.

It is noteworthy that the above analysis of the costs and benefits of RJCAS also applies, to a great extent, to large, developed jurisdictions. Indeed, the most famous and successful RJCA is the EU Treaty of Rome.⁴⁰ Yet small size or a low level of development strengthens the level of benefits relative to the costs. For example, large, developed jurisdictions can generally create a credible threat of enforcement and enjoy internal

38 D. Daniel Sokol, 'Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age' (2007) 4 Berkeley Bus.L.J. 37 at 97–116.

39 For the benefits of such endeavours, as well as their limited ability to significantly overcome unilateral enforcement problems, see, *e.g.*, Andrew T. Guzman, 'Antitrust and International Regulatory Federalism' (2001) 76 N.Y.U.L.Rev. 1142; Andrew T. Guzman, 'Is International Antitrust Possible?' (1998) 73 N.Y.U.L.Rev. 1501 [Guzman, 'Is International Antitrust Possible']; Gal, 'Antitrust in a Globalized Economy,' *supra* note 13.

40 EC, Consolidated Version of the Treaty Establishing the European Community, [2002] O.J. C 325/33, arts. 81–2.

economies of scale in enforcement and advocacy, even without an RJCA. This is not to say that an RJCA cannot benefit them; but the benefits are likely to be smaller relative to those realized by small and developing jurisdictions. Instead, large, developed jurisdictions often enter into bilateral agreements with much lower commitment levels.⁴¹

III *Costs and limitations on member states*

RJCA's are not costless. Part III analyses the potential costs to and objections of potential member states in relation to such agreements and suggests solutions to minimize these where possible. Indeed, the extent of the costs relative to the potential benefits will determine the attractiveness of RJCA's.

Creating a joint authority involves direct costs of building a new institution and resourcing its operation. Such costs can be significant, especially where human and financial resources are scarce. Indeed, much thought should be given to structuring the institution so as to ensure that joint resources are put to good use and that the institution creates incentives to attract the best people available. CARICOM provides an illuminating example. The joint institutions were located in Surinam, where the quality of life is much lower than in most other Caribbean countries; while this decision advanced the development of Surinam, it created a serious practical problem in terms of attracting the best people to serve on the CARICOM Competition Commission and to commit for long terms. Thus, if joint enforcement is inefficient, its costs may create an additional burden on already limited resources. Furthermore, meeting some of the requirements of the agreement – for example, a requirement to adopt a competition law and enforce it domestically – can be very costly for some jurisdictions, because of their inadequate institutional and regulatory capacity, unless full joint enforcement is adopted. These increased requirements can make some members of such regional agreements more vulnerable to sanctions, and thus can further increase their costs.⁴²

Indirect costs arise from the fact that some or all competition law decisions are made by an external entity. This concern can be split into two main categories: first, harm to sovereignty; second, the risk that decisions by the joint entity may harm the domestic interests of the jurisdiction. Let me contend with each in turn.

Joint enforcement undoubtedly limits the sovereignty of member states to decide all competition law cases surfacing on their shores. Yet

41 See, e.g., Andrew Guzman, ed., *Regulation and Competition in the Global Economy: Cooperation, Comity, and Competition Policy* (Oxford: Oxford University Press, 2010).

42 Birdsall & Lawrence, 'Deep Integration,' *supra* note 25 at 141.

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 what conditions to enter into the agreement. Second, and more importantly, sovereignty – in its embodiment as unilateral enforcement – has proved a highly problematic tool, especially with respect to multinational issues. It should thus be weighed against other tools that allow a jurisdiction to further its domestic policy of deterring anti-competitive conduct by overcoming its existing enforcement problems. This leads us to the second concern.

As shown by Andrew Guzman, joint enforcement under an RCJA may not always lead to decisions that benefit all member states.⁴³ Assume, for example, that a merger or a joint venture benefits consumers in some states, since their markets are less concentrated, but harms consumers in others. Any joint standard set for review of such conduct will harm some states and benefit others. If the decision 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 may be driven by the effects on a small number of consumers in micro-states. Accordingly, the setting of such standards 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 may be especially costly for those potential members that can create the strongest credible threat to prevent anti-competitive conduct and for 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.⁴⁴

Such costs, while important, can be reduced in several ways, some of which are available thanks to the RJCA framework. One solution is joint enforcement only in those cases that further the interests of all countries involved, such as the pursuit of regional or international cartels, leaving other cases outside the scope of the agreement. This case-by-case Pareto optimality standard, however, reduces the benefits of 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 that are harmed might be otherwise compensated, whether by transfer payments, as Guzman suggests, or by prioritizing their interests in other enforcement decisions.⁴⁵ While

43 Guzman, 'Is International Antitrust Possible?' supra note 39.

44 Sokol, 'Order without Law,' supra note 5.

45 Guzman, 'Is International Antitrust Possible?' supra note 39.

Pareto optimality may not be reached in each case, it may nevertheless be reached overall.

An additional tool involves recognizing the special interests 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.⁴⁶ One possible tool that follows regional trade agreements involves including special treatment provisions for specific industries in order to ensure their reasonable adjustment to the full impact of competition. Yet since one member's export joint venture may be another's import cartel, such exemptions should be limited. 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, however, may be reduced by power dynamics – by the fact that negotiations may sometimes tilt toward the interests of jurisdictions with stronger power because of, for example, their relative size or their relative contribution to the agreement. Such a jurisdiction may be able to alter the choices of other jurisdictions and coerce them to adopt a joint standard that serves its own domestic interests, in order to reduce possible negative effects on its consumers.⁴⁷ 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 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.

Finally, an RJCA may reduce the comparative advantage of some countries relative to their neighbours, given their different unilateral enforcement capabilities.⁴⁸ Once again, the loss of such an advantage must be balanced against benefits from a coordinated and stronger regional competition policy.

46 For an example of such a joint venture see Gal, *Small Economies*, supra note 4 at c. 3.

47 Sokol, 'Order without Law,' supra note 5, citing 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* (Cambridge, MA: Harvard University Press, 1995) at 5–6.

48 Each jurisdiction has incentives to improve its own position relative to other jurisdictions in order to create local comparative advantages that will 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 federalist context see, e.g., Susan Rose-Ackerman, 'Does Federalism Matter? Political Choice in a Federal Republic' (1981) 89 *J.Pol.Econ.* 152.

In sum, the desirability of rjcas derives from the shortcomings of the current unilateral enforcement system and alternative solutions, the benefits of rjcas, and their costs. As I have shown above, the costs to member states of rjcas are not prohibitive, and many can be avoided by applying corrective solutions. Their potential benefits, on the other hand, are significant. Accordingly, it may well be in the self-interest of developing and small jurisdictions to enter into rjcas.

If, indeed, the potential benefits from an rjca are so significant, and if they seem to outweigh the costs, why do all developing and small countries not enter into such agreements?⁴⁹ One of the main reasons may be the institutional limitations of a joint competition authority. My analysis here is based on the assumption that the joint authority can be workable. But this may not be easily achieved: the effectiveness of the authority depends on the commitment of all, or at least most, of its member states to its successful operation; if some members, for example, do not provide funding or do not abide by the decisions imposed by the authority, the joint endeavour may fall apart.⁵⁰ In addition, as Michael Trebilcock and Robert Howse observe in the context of trade agreements, one should not underestimate the sequencing problem in committing to an rjca.⁵¹ First movers face considerable uncertainty in their investment and commitment, which may be eroded by other members if they do not meet their commitments. This, in turn, creates a significant risk at the formative stages that may make jurisdictions more reluctant to create a joint authority in the first place. An additional factor is that most developing jurisdictions have adopted competition laws relatively recently, and their competition culture is often quite weak. Generally, it is only after a jurisdiction is committed to competition law enforcement that it will voluntarily enter into an agreement that imposes on it more demanding commitments to such enforcement. The potential positive experience of such agreements, the general change in socio-economic ideologies toward more pro-market orientations, and external pressure from international bodies may nonetheless enable jurisdictions to overcome these obstacles.

IV *Welfare effects on non-members*

So far we have focused on the effects of rjcas on member states. Part IV broadens the analysis to include their possible effects on non-members,

49 See, e.g., Sokol, 'Order without Law,' *supra* note 5 at Appendix A.

50 This problem can be partly solved by reputational effects and tit-for-tat retaliation strategies in a multi-period game: Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade*, 3d ed. (London: Routledge, 2005) at 194.

51 *Ibid.* at 198.

focusing on two interrelated issues: RJCAS' externalities for non-member jurisdictions and their effects on coordination and cooperation efforts at the international level, which include both member and non-member states. Adding these effects to the analysis enables us to analyse the desirability of RJCAS from an international welfare point of view.

A EXTERNALITIES FOR NON-MEMBER JURISDICTIONS

Not much has been written about the effects of RJCAS on non-members. Yet much has been written about such effects of regional trade agreements, which are also designed to increase trade within the region. It is thus interesting to ask whether RJCAS deserve the same criticism as regional trading blocs.

As Trebilcock and Howse note in their illuminating analysis, at the political level a regional trade agreement entails playing favourites and risks reducing international relations to mutually destructive factionalism. At an economic level, it almost necessarily entails some measure of trade diversion, thus distorting the efficient global allocation of resources.⁵² Discrimination against non-member states can be formal, by setting different rules for products in accordance with the origin of a product; it can also be informal, resulting, for example, from the elastic and selective nature of trade remedies, whereby actions are more frequently taken against non-members.⁵³

A quick look might lead to the conclusion that RJCAS pose an even greater risk than regional trade agreements, since they are not limited by an international framework of compulsory rules (*e.g.*, the GATT), meaning that member states can potentially strengthen their comparative advantage by discriminating against non-member states.

A more thorough analysis, however, reveals that the application of the above criticism may well be much weaker in RJCAS. This is because a large proportion of competition law cases with cross-border effects, which will often be the only or the main type of case dealt with by the joint competition authority, create similar effects across regions, and thus enforcement within the region will generally not clash with the interests of non-members. Most importantly, cartel cases, which are the 'hard core' of competition law and constitute the bulk of cases brought, generally create negative effects on all jurisdictions in which the cartel operates; thus, decisions of different RJCAS to prohibit such cartels will most likely not clash – on the contrary, enforcement by additional regions will

⁵² *Ibid.* at 195.

⁵³ Robert Teh, Thomas J. Prusa, & Michelle Budetta, 'Trade Remedy Provisions in Regional Trade Agreements' (WTO Staff Working Paper No. ERSD-2007-03, September 2007), online: SSRN <<http://ssrn.com/abstract=1019414>>.

benefit all by increasing overall deterrence of such cartels.⁵⁴ The same is generally true, though to a lesser extent, of abuse of dominance by international firms.⁵⁵ Protectionism and the resulting harm to competitiveness – one of the great fears with respect to regional trading blocs – is thus much less potent in many competition law cases.

In some cases, however, the interests of members and of non-member states may indeed clash. International mergers and joint ventures are the most likely to create different effects in different jurisdictions or regions; for example, a merger might have negative welfare effects in a jurisdiction with highly concentrated markets and neutral or positive effects in another jurisdiction in which many competitors operate. As elaborated above, the RJCA increases the weight given by firms to the effects of their conduct on RJCA members. While this will serve the interests of non-members with comparable welfare effects, it will clash with the interests of non-members with different welfare effects.

Yet the total welfare effects created by the RJCA in such cases may still be better than without it, so long as the competition law is indeed applied to lower privately erected trade barriers rather than to further other goals. As Trebilcock and Howse rightly argue, when evaluating the effects of regional agreements, we must ask the question, ‘Compared to what?’⁵⁶ Compared to the prevailing situation, the case against RJCAs is not clear. On the contrary: RJCAs enable jurisdictions that did not previously have a voice in the decision to join forces in order to create such a voice. While this might not benefit jurisdictions that previously determined whether the merger or joint venture could go through, it might well create an outcome that is closer to the total welfare optimum, given that a wider array of welfare implications is now taken into account. Moreover, joint enforcement may reduce costs and bureaucratic complications rather than creating a ‘spaghetti bowl’ of regulations, to borrow Jagdish Bhagwati’s term.⁵⁷ Finally, the fact that the RJCA may require balancing the different interests of its members might reduce the clash of interests with at least some non-member states as well.

Furthermore, opening up new markets by reducing privately erected trade barriers and strengthening commitments to an investment-supporting regulatory framework through RJCAs increases the welfare not only of member jurisdictions but also of foreign importers and investors. Of

54 Michal S. Gal, ‘Free Movement of Judgments’ [unpublished, on file with author]. An exception arises in the case of an export cartel.

55 This conclusion is based on the assumption that the prohibitions are similarly defined across the affected jurisdictions.

56 Trebilcock & Howse, *Regulation of International Trade*, supra note 50 at 195.

57 Jagdish Bhagwati, ‘U.S. Trade Policy: The Infatuation with Free Trade Agreements’ in Jagdish Bhagwati & Anne O. Krueger, eds., *The Dangerous Drift to Preferential Trade Agreements* (Washington, DC: AEI, 1995).

course, there is always a fear that the RJCA will apply the laws discriminatorily, hearing cases that harm firms from member states and not cases that harm foreign ones. However, such a policy would often not be rational from the point of view of member states, since their consumers can be harmed by limits on the entry of foreign exporters into their markets. Furthermore, given that competition law constitutes a generally known set of rules that apply to all or most industries in an equal fashion, rather than a set of industry- or product-specific rules, it is less susceptible than trade agreements to strategic exploitation.

B EFFECTS ON EFFORTS FOR INTERNATIONAL COOPERATION

An interesting and related question focuses on the effects of RJCAs on international efforts for cooperation and coordination of competition laws and, in particular, on the ability to create an international joint competition authority on at least some matters in the future.

The past decade has seen an upsurge in attempts to reach international cooperative solutions. Globalization has created new and complex patterns of overlap and spillover effects, which have brought many jurisdictions to the realization that some form of coordination and harmonization is required on a global level.⁵⁸ As noted above, current efforts focus mainly on increasing enforcement and reducing its negative spillovers through better understanding of competition laws and coordination of unilateral enforcement.⁵⁹ These actions, while commendable, are relatively limited in their ability to solve international competition law problems, because unilateral action still remains the main tool for enforcement.⁶⁰

There have been several attempts to increase cooperation by creating some forum for enforcement coordination, especially with respect to hard-core cartels.⁶¹ Most importantly, the World Trade Organization has considered the inclusion of some competition law prohibitions in its provisions.⁶² This option is currently off the table,⁶³ but it is likely to be raised

58 For a historical survey of such efforts see, e.g., Trebilcock & Howse, *Regulation of International Trade*, supra note 50 at 592–5; Eleanor M. Fox, 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) 43 Int'l Law. 151 [Fox, 'Linked-In'].

59 Robert B. Ahdieh, 'From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction' (2007) 57 Emory L.J. 1 at 5.

60 Gal, 'Antitrust in a Globalized Economy,' supra note 13.

61 See, e.g., Trebilcock & Howse, *Regulation of International Trade*, supra note 50; Fox, 'Linked-In,' supra note 58.

62 WTO, *Doha WTO Ministerial Declaration*, WTO Doc. WT/MIN(01)/DEC/1 (adopted 14 November 2001). This declaration suggested the start of negotiations on modalities of cooperation toward the creation of a multilateral framework on anti-trust issues.

63 The issue was dropped from the WTO agenda in 2004: WTO, *Decision Adopted by the General Council of the WTO on 1 August 2004*, WTO Dec. WT/L/579.

again, given the existing problems in international competition law. Section IV.B attempts to determine whether RJCAS can benefit or harm efforts to increase international cooperation.

Let us first ask how RJCAS affect current coordination efforts. RJCAS may further such efforts in several ways. First, they may encourage domestic compliance through the creation of norms:⁶⁴ if the RJCA is successful in achieving its goals, this may strengthen the social acceptance of competition law in jurisdictions that previously had a weak competition culture. Moreover, RJCAS can ensure that laws are relatively similar across a region. In addition, as Sokol argues, regional competition law agreements serve as a checklist of issues that countries have identified as requiring increased capacity building in related domestic institutions and in which international institutions can play a role.⁶⁵

Yet especially where a competition law norm is not settled, RJCAS can reduce coordination, if each region creates a set of idiosyncratic rules. In particular, RJCAS might make newcomers more reluctant to follow the norms of established jurisdictions⁶⁶ or, alternatively, might strengthen their ability and motivation to adopt norms that better fit their special conditions. Yet this effect would not necessarily reduce total welfare, if the gains from fitting the rules to the special characteristics of the region are higher than the costs from reduced coordination.

Let us now turn to the question of whether the rise of RJCAS carries the potential to move international competition law toward the creation of some sort of joint international competition authority.⁶⁷ As Trebilcock and Howse observe, it is not clear that simply because jurisdictions are amenable to regional enforcement, they will as readily perceive the virtue of pushing on to create an inter-regional enforcement body.⁶⁸ Yet at least some of the features of RJCAS might strengthen the ability to reach such a solution in the future.

Regional agreements allow jurisdictions to explore, experience, and refine solutions to their competition law enforcement problems that are based on some form of participatory and cooperative governance. Through their experience, RJCAS may serve as mini-laboratories to explore how at least some aspects of competition law at a global level

64 Robert C. Ellickson, 'Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County' (1986) 38 *Stan.L.Rev.* 623.

65 Sokol, 'Order without Law,' *supra* note 5 at 118.

66 For analysis of the motivations of small jurisdictions to follow the laws of large, established ones see Michal S. Gal, 'The "Cut and Paste" of Article 82 of the EU Treaty in Israel: Conditions for a Successful Transplant' (2007) 9 *Eur.J.L.Ref.* 467.

67 My analysis of this question here is based partly on Michal S. Gal, 'A Step Theory of International Antitrust' in Josef Drexler, ed., *International Antitrust* (Cheltenham, UK: Edward Elgar, 2010) [Gal, 'Step Theory'].

68 Trebilcock & Howse, *Regulation of International Trade*, *supra* note 50 at 197–8.

could play out.⁶⁹ For example, they exemplify the effects of different standards and which areas can most benefit from joint enforcement. The experience gained in RJCAS might thus serve as an important building block in the development of a more centralized solution to joint competition problems.

Yet a necessary condition for strengthening motivations to create an international authority is a positive experience in a regional agreement – or, at least, observing that a successful joint authority can increase the welfare of its parties.

An additional condition requires that the RJCA experience be carried over to a large scale of cooperation. This condition is much less trivial than the previous one. First, the RJCA 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 that involves placing additional limits on their sovereignty. Second, the geographic factor – which, as noted above, increases the benefits from joint cooperation – must not dominate the analysis of the possible benefits. In global cartel cases, for example, geographic proximity is not a necessary condition for economic incentives to be intertwined; rather, such cartels can harm jurisdictions that are far apart. Accordingly, the motivation to cooperate in prosecuting them extends beyond any individual region.

RJCAS might provide a further catalyst for stronger cooperation on international anti-trust issues, thanks to the aggregate bargaining power it offers its members in the intergovernmental arena. The same forces that enable RJCA 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, may increase their willingness to take the next steps in international anti-trust, since their position will be given more weight. It may also strengthen the motivation of other jurisdictions to enter into global enforcement agreements, since members can now commit to a higher degree of credible enforcement.

Indeed, RJCAS 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, in part because of developing jurisdictions' concern that their special concerns will not be addressed. In particular, two issues arose. First, developing countries were concerned that a WTO rule mandating the prohibition of 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

69 Sokol, 'Order without Law,' *supra* note 5 at n. 66.

for their limited enforcement. A successful RJCA can reduce such concerns by increasing enforcement against cartels and thus reducing the fear of sanctions. Second, developing countries were concerned that a global anti-cartel policy would interfere with their industrial policy and would prevent domestic firms from growing to efficient sizes. RJCAS can reduce this concern by enabling their members to come to the international negotiating table with a stronger, unified position that will allow them to strike a better balance between competing considerations.⁷⁰

V Conclusion

Competition law is experiencing a 'new wave of regionalism.' Parties to regional agreements experiment with different degrees of coherence and diversity, from agreements still focused mainly on unilateral enforcement to more centralized models. Interestingly, some of the recent agreements among developing or small jurisdictions have adopted more centralized models that include some form of joint enforcement. Such agreements are the focus of this essay.

RJCAS carry an important potential to overcome some of the most significant obstacles to competition law enforcement in many developing and small jurisdictions. As I have argued above, by joining forces to create some form of participatory governance, jurisdictions can reduce, *inter alia*, limitations resulting from scarce enforcement resources, political economy constraints, and limited ability to create credible enforcement threats. They can reach Pareto superior solutions to their most burning enforcement and advocacy problems. It is thus not surprising that RJCAS are a growing phenomenon.

The growing prevalence of such agreements creates what institutional economists would call a 'critical juncture' – that is, the choices that are made now will set the stage for years to come. They will serve as the foundation for relationships among members, as well as between members and non-members. Accordingly, analysing the effects of such agreements on both members and non-members, including their effects on international efforts of competition law coordination, is a timely undertaking.

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