

***ESSAY***

**Regional Competition Law Agreements:  
An Important Step for Antitrust Enforcement**

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Preliminary draft, comments most welcome

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TABLE OF CONTENTS

**INTRODUCTION** .....

**II. THE POTENTIAL BENEFITS RJCAS OFFER TO MEMBERS** .....

    A. OVERCOMING SHORTCOMINGS OF ATOMISTIC ENFORCEMENT .....

        1. ENFORCEMENT RESOURCE CONSTRAINTS

        2. ENFORCEMENT CAPABILITY CONSTRAINTS

        3. WEAKNESS OF COMPETITION CULTURE

        4. POLITICAL ECONOMY CONSTRAINTS

    B. ADDITIONAL BENEFITS OFFERED BY RJCAS .....

**II. COSTS AND LIMITATIONS ON MEMBER STATES**

**III. WELFARE EFFECTS ON NON-MEMBERS** .....

    A. EXTERNALITIES ON NON-MEMBERS .....

    B. EFFECTS ON INTERNATIONAL COORDINATION EFFORTS .....

**CONCLUSION** .....

## REGIONAL AGREEMENTS

1

## INTRODUCTION

The past two decades have witnessed an exponential growth in the adoption of competition laws: today more than a hundred jurisdictions have such laws.<sup>1</sup> 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 and to small jurisdictions.<sup>2</sup> Most developing jurisdictions suffer, *inter alia*, from financial and human resource scarcity, a lack of competition culture, and political economy constraints. Indeed, a World Bank study estimated that competition authorities in advanced countries are 40% more effective than their counterparts in developing ones.<sup>3</sup> Small economies usually suffer from financial resource constraints and a limited capability to create credible threats to multinational firms.<sup>4</sup>

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 can provide additional benefits that go beyond such solutions. Indeed, such agreements are becoming commonplace and cover quite a few regions around the world.<sup>5</sup> Although the most famous regional

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<sup>1</sup> Hylton and Deng list 102 jurisdictions with antitrust regimes. Keith N. Hylton & F. Deng, *Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects*, 74 ANTITRUST L.J. 271 (2007). See also [www.antitrustworldwiki.com](http://www.antitrustworldwiki.com).

<sup>2</sup> A small jurisdiction is defined as an independent, sovereign jurisdiction with a small population size. It differs from a "small economy" which is defined as "an independent, sovereign jurisdiction that can support only a limited number of firms in most of its industries" and in which population dispersion and openness to trade also affect the definition. See MICHAL S. GAL, *COMPETITION POLICY FOR SMALL MARKET ECONOMIES*, Ch. 1 (2003). The focus of this essay is on population size since it is the main driver of the extent of local demand, which is relevant to the current analysis. Developing countries are defined as low income ones with gross national income per capita of less than \$9,206, in accordance with World Bank definitions, available at

<http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20421402~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html>.

Many developing countries are also small and *vice versa*.

<sup>3</sup> WORLD BANK, *WORLD DEVELOPMENT REPORT: BUILDING INSTITUTIONS FOR MARKETS* (2002).

<sup>4</sup> Gal, *supra* note 2, Ch. 1 and 6.

<sup>5</sup> See, e.g., UNCTAD, *COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS* (Philippe Brusick, Ana María Alvarez & Lucian Cernat eds., 2005) ("UNCTAD"), available at [http://www.unctad.org/en/docs/ditcclp20051\\_en.pdf](http://www.unctad.org/en/docs/ditcclp20051_en.pdf); D. Daniel Sokol, *Order*

## REGIONAL AGREEMENTS

2

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 was termed the 'new wave of regionalism'.<sup>6</sup> Some examples of regional competition law 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 not only characterized by an increased dynamism but is also often characterized by more ambitious and deeper levels of integration, taking steps that go beyond information sharing and comity. Such agreements are often part of wider agreements, aimed at furthering integration by reducing trade barriers, and in some cases creating supranational economic governance. The inclusion of competition law provisions in such agreements is intended to prevent attempts to frustrate competition, which could diminish the benefits expected from liberalization and integration.<sup>7</sup>

This essay focuses on this growing phenomenon. In particular, it focuses on regional joint competition law enforcement and advocacy agreements (RJCA's).<sup>8</sup> Some RJCA's embrace complete joint enforcement under which only the joint authority can apply competition laws. The OECS (Organization of Eastern Caribbean States) exemplifies voluntary forbearance from individual enforcement while WAEMU exemplifies mandatory forbearance. Yet in most RJCA's 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

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*without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 CHICAGO-KENT L. REV. (forthcoming).

<sup>6</sup> [Cite].

<sup>7</sup> Sokol, *supra* note 5; Caribbean Press, All Set For Launch of CARICOM Competition Commission (January 14, 2008), available at <http://www.caribbeanpressreleases.com/articles/2760/1/All-Set-for-Launch-of-Caricom-Competition-Commission/Seven-member-commission.html>

<sup>8</sup> Examples include the Caribbean Community Revised Treaty of Chaguaramas 2001, which creates a joint Competition Commission that is empowered to investigate competition law issues with cross-border effects and oversee the enforcement of the competition regime at the community level; The COMESA agreement (2004) creates a joint Competition Commission which is empowered to deal with cross-border anti-competitive matters. The agreement is available at <http://actrav.itcilo.org/actravenglish/telearn/global/ilo/blokit/comesa.htm#COMESA%20institutions>.

CARICOM agreement.<sup>9</sup> Notably, all the recent RJCAs were signed among developing jurisdictions, some of which are also small. As this article attempts to show, this is not surprising.

The essay analyzes the potential of RJCAs to overcome the main competition law enforcement problems of developing and of small jurisdictions.<sup>10</sup> Chapter I sets the stage by analyzing the main obstacles to enforcement faced by developing and by small jurisdictions and the ability of RJCAs to solve them. It also analyzes the additional benefits such agreements offer. The costs such agreements impose on their members are analyzed in Chapter II. As will be shown, RJCAs hold the potential to create pareto-superior solutions to enforcement problems relative to unilateral enforcement. Due to space limitations the article does not focus on the conditions necessary for such RJCA to be effective, unless such conditions are relevant to the analysis. Rather, it assumes that the RJCA can be structured effectively to reach its stated goals.

Chapter III then broadens the analysis and focuses on the potential effects of RJCAs on non-member states. It is argued that such agreements create much lower negative externalities on non-member states and on international coordination efforts than do regional trade agreements. On the contrary- they often create positive externalities on other jurisdictions. Accordingly, they offer an important potential for strengthening competition law enforcement and should generally be encouraged.

## I. THE BENEFITS RJCAs 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 pesticides (tools to limit political economy

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<sup>9</sup> CARICOM Revised Treaty of Chaguaramas, Ch. 8.

<sup>10</sup> For analysis of the MERCUSOR agreement *see, e.g.*, André Filipe Zago de Azevedo, *Mercosur Agreement on Competition Policy—How Effective Has It Been and How to Promote Further Cooperation?* (Competition Policy Foundations for Trade Reform, Regulatory Reform and Sustainable Development, Work Package No. 4, Deliverable 23, 2005), available at <http://www.cpftr.org/cpftr/deliverables/Deliverable23.pdf>; André Filipe Zago de Azevedo, *Mercosur: Ambitious Policies, Poor Practices*, 24 BRAZILIAN J. POL. ECON. 584 (2004), available at <http://www.rep.org.br/pdf/96-8.pdf>. For an analysis of the CARICOM agreement *see, e.g.*, Taimoon Stewart, *Special Cooperation Provisions on Competition Law and Policy: The Case of Small Economies*, in *COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS* (Brusick, Alvarez & Cernat ed., 2005), 329.

## REGIONAL AGREEMENTS

4

influences).<sup>11</sup> The first part of this chapter provides a broad-brush overview of the main obstacles to achieving these conditions in developing and in small jurisdictions.<sup>12</sup> Such obstacles may relate to the ability of the jurisdiction to deal with domestic competition law issues as well as to issues with a foreign dimension, that is, issues which affect other jurisdictions as well ("multilateral issues"). It then indicates how RJCAs can reduce such competition law 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. The second part of the chapter elaborates on additional benefits that are offered by RJCAs.

## A. OVERCOMING OBSTACLES TO COMPETITION LAW ENFORCEMENT

The need to overcome the enforcement problems of developing and of small jurisdictions has increased due to globalization. Such countries might 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.<sup>13</sup> Additionally, international mergers and internal expansions have sometimes created large, global firms that dominate world markets. Add to this the facts that developing as well small jurisdictions rely on import in many markets and that enforcement is often weak, with the result that such jurisdictions are often an easy target for anti-competitive conduct.

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<sup>11</sup> Michal S. Gal, *The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries*, in COMPETITION, COMPETITIVENESS AND DEVELOPMENT: LESSONS FROM DEVELOPING COUNTRIES 20 (Phillip Brunsick *et al.* eds., 2004).

<sup>12</sup> There is a large and growing literature on this subject. See, e.g., *see, e.g.*, Asia-Pacific Economic Cooperation, *Competition Law for Developing Countries*, study prepared by PriceWaterhouse-Coopers (1999) ("APEC"); 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*, (2003); CUTS, *Friends of Competition: How to Build an Effective Competition Regime in Developing and Transition Countries* (2003); William E. Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 DEPAUL L. REV. 1197 (1995); WORLD BANK, *WORLD DEVELOPMENT REPORT: BUILDING INSTITUTIONS FOR MARKETS* (2002).

<sup>13</sup> Margaret Levenstein and Valerie Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L. J. 801 (2003).

Accordingly, there is a strong case to be made for such jurisdictions to improve their enforcement tools. As this sub-chapter shows, RJCAs hold an important potential to overcome, at least partially, the most important enforcement obstacles faced by developing and by small jurisdictions, if structured efficiently.

### 1. Enforcement Resource Constraints

Possibly the main enforcement obstacle faced by developing and by small jurisdictions involves enforcement resource constraints.<sup>14</sup> Developing jurisdictions suffer from limited financial endowments which result from their low level of development and the resultant financial limitations. They also generally suffer from human resource constraints, resulting from low levels of education. Small jurisdictions generally suffer from limited financial resources which result from the fact that even if per capita investment in competition law enforcement is relatively large, the small size of the population necessarily implies 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 their industries raises relatively many competition issues.<sup>15</sup> Thus, a smaller endowment naturally enables the authority to deal with fewer cases.

Resource endowment constraints are oftentimes more severe in multilateral issues. Evidence might need to be gathered from foreign sources, an exercise which is cost and time consuming. Also, challenging a large, international firm often implies that the level of legal defense that the firm will employ would be quite high. It might be difficult for a competition authority with a limited endowment to

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<sup>14</sup> See, e.g., William E. Kovacic & DeCoursey Eversley, *An Assessment of Institutional Machinery: Methods Used in Competition Agencies and What Worked for Them*, (ICN, 2007), available at [http://www.internationalcompetitionnetwork.org/media/library/conference\\_6th\\_moscow\\_2007/11ReportonanAssessmentofInstitutionalMachineryMethodsUsedinCompetitionAgencies.pdf](http://www.internationalcompetitionnetwork.org/media/library/conference_6th_moscow_2007/11ReportonanAssessmentofInstitutionalMachineryMethodsUsedinCompetitionAgencies.pdf) 22 (noting that "the extreme limitations imposed by budgets of new agencies – often located in countries with relatively small public resources – are a leading and virtually unanimous complaint"); APEC, *supra* note 13, 2.9.4; CUTS, *Pulling our Socks*, *supra* note 13, 55; Taimoon Stewart, *Competition Issues in Selected CARICOM Countries: An Empirical Examination*, Sir Arthur Lewis Institute of Social and Economic Research, University of West Indies, St. Augustine 184 (2004).

<sup>15</sup> See SMALL ECONOMIES, *supra* note 2.

## REGIONAL AGREEMENTS

6

match such expertise and resources, even if it has a sound case against a foreign firm.<sup>16</sup>

RJCA's can significantly reduce such enforcement capacity constraints by enabling jurisdictions to pool together scarce resources to reach economies of scale in enforcement activities, including training, capacity building, investigations, and bringing cases, as well as in competition advocacy efforts. It also allows jurisdictions to make better use of scarce resources by limiting duplication of efforts on multilateral issues.<sup>17</sup> Such benefits are, of course, most pronounced in multilateral issues. Yet joint endeavors on training, capacity building and competition advocacy can also assist in reducing resource constraints in purely domestic issues.<sup>18</sup>

In some situations RJCA's may provide the only viable solution for enforcement, given severe resource capacity constraints. The OECS serves as a good example. The member states are all developing micro-economies, such as Montserrat with a population of about 5,000 and St. Kitts with a population of about 40,000.<sup>19</sup> Each of them, alone, cannot justify an investment in a competition law enforcement system. Yet by pooling their resources they are able to create a joint competition authority that deals with competition law issues arising within them and meet their commitment to other CARICOM countries to internally enforce their competition laws. Indeed, the COMESA agreement, which has adopted a more limited model for joint enforcement only for multinational issues has encountered problems based on the fact that some of its members, most notably Malawi, cannot meet their obligations of enforcement.<sup>20</sup>

Additionally and relatedly, joint enforcement may also reduce firms' compliance costs where it offers a one-stop-shop rather than parallel regulation. This, in turn, may encourage joint ventures,

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<sup>16</sup> Michal S. Gal, *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and by Developing Jurisdictions*, *FORDHAM J. OF INT. L.* (forthcoming).

<sup>17</sup> Socks, *supra* note 13, 61.

<sup>18</sup> See, e.g., Taimoon Stewart, *Special cooperation provisions on competition law and policy: The case of small economies*, in UNCTAD, *supra* note 5, 329.

<sup>19</sup> <http://www.oecs.org/site/index.php/about-the-oecs/member-states>

<sup>20</sup> George K Lipimile and Elizabeth Gachuiiri, Allocation of Competences Between National and Regional Competition Authorities: The Case of COMESA in UNCTAD, *id.*, 361; Contribution by Malawi, The Analysis of Cooperation and Dispute Settlement Mechanism Relating to Competition Policy in Regional Free Trade Agreements, Taking Into Account Issues of Particular Concern to Small and Developing Countries: The Case of COMESA and Malawi, 5-6, available at [http://www.unctad.org/sections/wcmu/docs/c2clp\\_ige7p36\\_en.pdf](http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p36_en.pdf).

mergers and acquisitions and even unilateral conduct that improve efficiencies, better allocate resources and reduce consumer prices.

## 2. Enforcement capability constraints

Even when a jurisdiction has no significant enforcement resource constraints, it might still be constrained in its capability to enforce its laws in practice, especially in multinational issues. For one, it might encounter problems of evidence gathering if evidence can be found outside the jurisdiction. This might happen, for example, when parties to a cartel meet elsewhere 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.<sup>21</sup> If trade in the small jurisdiction is only a small part of the foreign firm's total world operation and thus the gains from trade within it are limited, were the small jurisdiction to place significant restrictions on the foreign firm it would most likely choose to exit the small jurisdiction and trade only in other jurisdictions. This might diminish competition in that market even more than if the merger took place. Enforcement might therefore be self-defeating. The small jurisdiction, recognizing this problem, will most likely not prohibit the merger.<sup>22</sup> Similar problems might arise in cartel and abuse of dominance cases.

Developing jurisdictions might also suffer from a similar inability, 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 might arise in specific product markets which are small or do not carry high profits due to a low level of development. To the extent that the development of their industries depends upon the importation of raw materials, intermediate components and capital goods from foreign firms, such obstacles can have a significant negative effect on welfare.<sup>23</sup>

Third, it might be difficult to impose a penalty on firms located elsewhere. A final enforcement capability constraint is based on the fact that in multilateral cases deterrence might require cumulative

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<sup>21</sup> This part is based, in part, on Small Economies, *supra* note 2, Ch. 6. See also Alejandro Prada, *Competition Policy of the Free Trade Area of the Americas – Preliminary Comments on the Draft Agreement*, 33(7) IIC 790 (2002).

<sup>22</sup> Unique challenges, *supra* note 17. Sometimes local behavioral or structural remedies can limit this effect. *Id.*

<sup>23</sup> *Id.*

sanctions.<sup>24</sup> If anti-competitive conduct takes place in several jurisdictions, creating sufficient financial deterrents might require that all or most jurisdictions impose sanctions upon it.<sup>25</sup> This results from the fact that most jurisdictions impose monetary sanctions that are based on the harm to their own jurisdictions. Take, for example, the Vitamins cartel, which was found to affect all countries worldwide. The cartel imposed billions of dollars in damages. However, only five 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.<sup>26</sup> However, this meant that most of the profits of the cartel were never confiscated, and thus there still exist strong motivations for future cartelists. The same is true for abuse of a dominant position that takes place in several jurisdictions.

RJCA's can potentially reduce all four enforcement capability constraints enumerated above, especially where the conduct has cross-border effects. RJCA's increase the ability of jurisdictions to reach evidence of anti-competitive conduct that is located in another member state, given that information sharing is generally an integral part of the agreement and that the potential benefits of the agreement create stronger incentives to divulge information.

Additionally, RJCA's can significantly increase the ability to create a credible threat, since the aggregation of consumers provides stronger leverage against an international firm. For the same reason, the agreement also improves their ability to impose remedies. Finally, joint enforcement also increases deterrence. For one, the agreement increases the incentives to enforce the law in joint cases since the costs of enforcement are now lower relative to the benefits due to their aggregation across member states. Also, the remedy is based on the harm suffered by all member states and thus monetary sanctions are higher.

### 3. Public Choice Limitations

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<sup>24</sup> See, e.g., OECD, *Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation* (2005), 25; papers by Prof. John Connor, available at [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=25684](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=25684).

<sup>25</sup> *Id.* Criminal Sanctions imposed in some jurisdictions may significantly increase deterrence. However, such sanctions are often not available in developing jurisdictions, and thus they are usually not relevant in local or regional cartels.

<sup>26</sup> John M. CONNOR, *GLOBAL PRICE FIXING: OUR CUSTOMERS ARE THE ENEMY* (2<sup>nd</sup> ed., 2007).

## REGIONAL AGREEMENTS

9

Competition law places limitations on the conduct of firms, which impairs their ability 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.<sup>27</sup> These concerns are especially significant for developing and for small jurisdictions. The reason is that economic power in such countries tends to be more concentrated in the hands of a few rather than dispersed amongst many small competitors. Moreover, often the economic and governmental elites are intertwined. This reality increases the probability of lobbying, rent seeking behavior, and political influences aimed at the pursuit of private objectives. This problem is exacerbated in developing jurisdictions by the fact that many consumers- who are the main beneficiaries of competition law enforcement- cannot be easily educated with the benefits of competition law enforcement, and will rarely join forces to vie for it.<sup>28</sup> It is further reinforced by the fact that political influences of large foreign firms often cannot be countered by relatively weak antitrust authorities.<sup>29</sup>

A joint authority can alter some of the considerations of the decision-makers of whether or not to adopt a competition law. Most importantly, a push towards regionalization creates internal and external pressures for adopting a competition law that might overcome internal political obstacles and allow countries to overcome the pressures to adopt sub-optimal laws.<sup>30</sup> 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.

A joint authority can also reduce political influences on the enforcement of the competition law, once adopted. Most importantly, it might be more difficult to create political favors for decision-makers in return for decisions that favor a certain group, especially if the decision-making body is comprised of representatives from different jurisdictions.<sup>31</sup> This can be strengthened by ensuring the independence of the joint authority and by securing long-term commitments of decision-makers to serve on it. Joint enforcement has an added advantage: once the framework is agreed upon, it is much

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<sup>27</sup> See, e.g., John Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARVARD L. REV. 713 (1986); Louis Kaplow, *Transition Policy: A Conceptual Framework* 13 J. CONTEMPORARY LEGAL ISSUES 161 (2003).

<sup>28</sup> Ecology of Antitrust, *supra* note 12.

<sup>29</sup> *Id.*, 22.

<sup>30</sup> See, e.g., Nancy Birdsall and Robert Z. Lawrence, *Deep Integration and Trade Agreements: Good for Developing Countries?*, in GLOBAL PUBLIC GOOD-INTERNATIONAL COOPERATION IN THE 21ST CENTURY (Inge Kaul, Isabelle Grunberg & Marc A. Stern eds., 1999), 126, 134.

<sup>31</sup> Of course, it might not limit the ability to grant other favors, such as bribes.

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 which does not enjoy full and consistent support by the enforcing government might 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 discussions on how to create competition advocacy might all benefit from the pooling of scarce resources and from the experience of seasoned RJCA members with stronger competition cultures. Indeed, often not all members of the RJCA have competition laws.<sup>32</sup> The RJCA can help accelerate internal legal and economic reforms.<sup>33</sup> It can also reinforce or hasten the process of upgrading inefficient regulation.<sup>34</sup>

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 involves governmental changes in the regulatory framework or in market conditions which alter the assumptions on which investors base their financial calculations. Such changes create risks for potential investors which, in turn, reduce their incentives to invest in such jurisdictions, despite their economic potential.

An RJCA can reduce this problem due to the aggregation of different incentives in an authority which is one step removed from each member state, and which reduces the ability of a domestic group to exert pressures on the legislator or regulator to change the regulatory environment. The RJCA might therefore work as a commitment mechanism which allows members to create binding commitments of compliance that will be enforced beyond the term of the current government that signed the commitments.<sup>35</sup> Of course,

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<sup>32</sup> This applies, for example, to COMESA, CARICOM, OES and WAEMU.

<sup>33</sup> Birdsall and Lawrence, *supra* note 31, 135-6; Ana María Alvarez, Julian Clarke and Verónica Silva, *Lessons from the Negotiation and Enforcement of Competition Provisions in South-South and North-South RTAs* in UNCTAD, *supra* note 5, 123, 143.

<sup>34</sup> Anupam Chander, *Exporting DMCA Lockouts*, 11, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=931781](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931781).

<sup>35</sup> Sokol, *supra* note 5, 113; Birdsall & Lawrence, *supra* note 31, 136-37; Robert W. Staiger, *International Rules and Institutions for Cooperative Trade Policy*, in 3

overcoming commitment problems requires that the joint authority have powers of enforcement to override local decisions. The EU Commission, for example, can overrule some protectionist policies by Member States which clash with its competition law. Sanctions can also strengthen commitments as might reputational effects.<sup>36</sup>

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

The cumulative effect of reducing all 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 less people will be willing to engage in such conduct and thus deterrence will be increased even if the number of cases actually brought does not.<sup>37</sup> This, in turn, will reduce enforcement costs even further.

## B. ADDITIONAL BENEFITS FROM REGIONALIZATION

RJCA's not only hold the potential to reduce some of the most significant obstacles to competition law adoption and enforcement in developing and in small jurisdictions, but they often offer added benefits.

*Common market* A joint competition policy has the potential to further the goal of a common, integrated market. As Lawrence and Litan observe, regional agreements may assist regions in achieving a deeper degree of economic integration than an international system could achieve.<sup>38</sup> This is because negotiations generally involve a

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HANDBOOK OF INTERNATIONAL ECONOMICS 1497–547 (Gene M. Grossman & Kenneth Rogoff eds., 1995).

<sup>36</sup> Sokol, *id.*, 130, citing to Andrew T. Guzman, *The Design of International Agreements*, 16 *EURO. J. INT'L L.* 579, 640 (2005). For different conclusion see, e.g., Andrew K. Rose, *Do We Really Know That The WTO Increases Trade?*, 94 *AM. ECON. REV.* 98, 98 (2004).

<sup>37</sup> Gary S. Becker, *Crime and Punishment: An Economic Approach* 76 *J. POL. ECON.* 169 (1968). See also George J. Stigler, *The Optimum Enforcement of Laws*, 78 *J. POL. ECON.* 526 (1970) and William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 *U. CHI. L. REV.* 652, 656 (1983).

<sup>38</sup> ROBERT Z. LAWRENCE AND ROBERT E. LITAN, *SAVING FREE TRADE: A PRAGMATIC APPROACH* (1986).

smaller number of like-nations, and centralized enforcement-institutions are more likely to emerge. Countries will more likely cede the kind of political sovereignty to federalizing central institutions that is required for deeper economic integration. As the European experience demonstrates, joint competition law enforcement can play an important role in creating an integrated market that would further competition and curb internal and external, collective and unilateral abuses of market power.

Moreover, in the absence of competition law rules a regional trade agreement might create incentives for new anti-competitive forms of behavior. Once trade liberalization is facilitated, there are likely to be risks of cartels being formed at a regional level to prevent the erosion of the market-sharing arrangements arising from border barriers; of barriers to entry being created by firms in each country in order to keep out firms via collusion or abuse of market power; or mergers designed to create regional dominant positions. Competition provisions therefore may have a positive effect on economic integration between member states.

*Reducing entry barriers to neighboring markets* A more modest benefit involves the opening up of at least some neighboring markets. Most regional competition agreements include a commitment of members to enforce their national competition laws,<sup>39</sup> 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 an important tool for increasing social welfare and is 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 has one dominant effect on domestic ones: it enlarges their scope. An expansion of the market could induce the creation of plants and product runs of larger size and the achievement of lower average costs of production by domestic firms. It may also change the technology choices of market players by allowing them to utilize efficient production methods that require a large output to be profitable.<sup>40</sup> Imports may also significantly affect domestic welfare. Imports, or even their potential, may induce domestic firms to lower their prices as they create an upper limit on domestic firms' prices. The contestability they provide may also mandate domestic firms to produce at efficient scales.<sup>41</sup>

*Certainty and compatibility* Decentralized implementation increases the risks of inconsistent application of competition rules.

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<sup>39</sup> See, e.g., Article 169 (1) of the Revised Treaty of the Chaguarama (CARICOM).

<sup>40</sup> Gal, Small Economies, chapter 2.

<sup>41</sup> *Id.*

Without cooperation, each jurisdiction might apply its own rules and outcomes might differ due, for example, to differences in technical standards. This creates incompatibility of outcomes which may impose high costs on firms operating in or wishing to enter the market and even prevent them from engaging in welfare-enhancing projects. Again, a joint competition law can overcome such problems.<sup>42</sup>

Certainty and compatibility may further strengthen pro-competitive pressures in the region by increasing the incentives of foreign firms to import into them. The lower the barriers to trade - including the costs of learning about domestic competition laws- the stronger the incentives of foreign firms to import their products into it, all else equal.<sup>43</sup>

*Externalities* If decision-makers ignore impacts beyond their borders, their decisions might impose negative externalities on other jurisdictions.<sup>44</sup> Such externalities among member states might be overcome by a joint competition law which is based on joint welfare considerations. Furthermore, RJCAs can reduce the ability of other jurisdictions to disregard the externalities they impose on their members. Rather, RJCA members can become actors, rather than spectators, on the world scene, if they create a combined voice.<sup>45</sup>

*Broadening the point of view* If regional interests are taken into account, local firms might be allowed to grow to more efficient sizes. Additionally, welfare-reducing conduct might more easily be detected. The takeover of Pan African Cement (PAC) by Lafarge S.A. of France provides an interesting example of the benefits of focusing on regional interests rather than on narrow domestic ones. PAC owned (through its subsidiaries) 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 either of these countries individually, it clearly consolidated Lafarge's regional position. Zambia, Malawi, Zimbabwe and Kenya are members of COMESA, but Tanzania and South Africa are not. It therefore became difficult to effectively

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<sup>42</sup> 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*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=879031](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=879031).

<sup>43</sup> Of course, the content of the domestic law is also an important parameter.

<sup>44</sup> For the effects one jurisdiction can impose on another see, e.g., Michal S. Gal and Jorge Padilla, *The Follower Effect: Implications for Monopolization*, ANTITRUST L. J. (forthcoming).

<sup>45</sup> Birdsall & Lawrence, *supra* note 31, 139.

regulate the takeover in the absence of a regional competition authority.<sup>46</sup>

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

It is noteworthy that geographic proximity often strengthens the benefits to be had from 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. Moreover, some level of socio-economic convergence may well be the long-term goal of the creation of the regional agreement, rather than its starting point, as illustrated by the EU. Second, neighboring states oftentimes deal with similar issues and with relatively similar market players. This is because business does not comply with national borders but rather with demand patterns and entry barriers. 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, storage, etc. Also, demand patterns might be quite similar in 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 to your neighbor is much more relevant and interesting than what happens halfway around the world.

It should also be noted that international endeavors have, so far, not succeeded in significantly reducing the enforcement limitations of small and of developing jurisdictions resulting from the current system of unilateral enforcement whereby each jurisdiction enforces its laws to issues which affect its jurisdiction. International bodies such as the Organization for Economic Cooperation and Development (OECD), United National Committee on Trade and Development (UNCTAD) and the International competition network (ICN) have all created important venues for voluntary coordination and cooperation. As 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. They have been less effective on issues of substantive disagreement in

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<sup>46</sup> Socks, *supra* note 13, 61.

## REGIONAL AGREEMENTS

15

Competition law.<sup>47</sup> In particular, they have not succeeded in overcoming the main obstacles to enforcement elaborated above.<sup>48</sup> Accordingly, other solutions, such as RJCAs, become more important.

To sum, RJCAs carry an important potential to overcome the main obstacles to competition law adoption and enforcement faced by developing as well as by 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 set 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.

## II. COSTS AND LIMITATIONS ON MEMBER STATES

RJCAs are not costless. This chapter analyzes the potential costs and objections of potential member states to such agreements and suggests solutions to minimize them, where possible. Indeed, the height of the costs, relative to the potential benefits, will determine the attractiveness of RJCAs for member states.

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 the structuring of the institution to ensure that the joint resources are put to good use and that it creates incentives for attracting the best people available. CARICOM provides an illuminating example: the commission's institutions were placed in Surinam, in which the quality of life is much lower than in most other Caribbean countries. While this would advance the development of Surinam, it created serious practical problem of attracting the best people to serve on the CARICOM Competition Commission and to commit for long terms. Accordingly, 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 of adopting a competition law and enforcing it domestically, can be very

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<sup>47</sup> D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 97–116 (2007).

<sup>48</sup> For the benefits of such endeavors as well as their limited ability to significantly overcome unilateral enforcement problems *see, e.g.*, Guzman, *supra* note ?; Unique Challenges, *supra* note 17.

## REGIONAL AGREEMENTS

16

costly for some jurisdictions, due to their inadequate institutional and regulatory capacity, unless full joint enforcement is adopted. This can make them more vulnerable to sanctions, and therefore would further increase their costs.<sup>49</sup>

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

Undoubtedly joint enforcement limits the sovereignty of member states to decide all competition law cases surfacing at their shores. Yet harm to sovereignty is generally not prohibitive. First, entering into an RJCA is voluntary: each jurisdiction exercises its discretion and sovereign decision-making power in deciding whether and under which conditions to enter the agreement. Second, and more importantly, sovereignty—in its embodiment as unilateral enforcement—has proven to be a highly problematic tool for competition law enforcement in developing and in small jurisdictions, especially with regard to multinational issues. It should thus be weighed against other tools which allow the jurisdiction to further its domestic policy of deterrence of anti-competitive conduct by overcoming its existing enforcement problems. This leads to the second concern.

As shown in Guzman's seminal work, joint enforcement might not always lead to decisions that benefit all member states.<sup>50</sup> Assume, for example, that a merger or a joint venture 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 or joint venture will harm some member states and benefit others. Setting a joint standard for review in such cases is highly problematic. If it is based on total welfare—counting benefits and harms by their absolute size, then the outcome will generally be driven by the effects of the conduct on the larger jurisdictions. If it is based on a calculation of effects in each jurisdiction in relative terms, then the outcome might be driven by the effects on a small number of consumers in micro-states. Accordingly, setting such a standard is highly contentious. Thus, if the optimal policies for different members clash, regionalization will require that some measure of domestic welfare be sacrificed, at least in some cases. Such sacrifice might be especially costly for those potential member states which can create a

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<sup>49</sup> Birdsall & Lawrence, *supra* note 31, 141.

<sup>50</sup> Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U.L. REV. 1142 (2001); Guzman, *Is International Antitrust Possible?* 73 N.Y.U.L. REV. 1501 (1998).

stronger credible threat to prevent the anti-competitive conduct than others. This is because without the agreement they would, in more cases than others, be able to prevent conduct which harms their jurisdictions, while the interests of other jurisdictions would generally not be taken into account.<sup>51</sup> The lack of substantive convergence in some areas of competition law across jurisdictions, most notably monopolization, may further increase the problems involved in reaching a common standard.<sup>52</sup>

Such costs, while important, can be reduced in several ways, some of which are available due to the RJCA framework. One solution is to jointly enforce only those cases which further the interests of all countries involved, such as the pursuit of regional or international cartels, and leave others outside the scope of the agreement. This case-by-case Pareto-optimality standard, however, reduces the benefits from the agreement for all involved. A more effective although less simple way of tackling such issues is by ensuring that an overall balance of social welfare exists. While, for example, a merger might not be blocked if it benefits most jurisdictions, those jurisdictions which are harmed might be otherwise compensated, whether by creating behavioral remedies that apply only in them, by transfer-payments as Guzman has suggested, or by giving their interests priority in other enforcement decisions.<sup>53</sup> While Pareto-optimality might not be reached in each case, it might be reached overall.

An additional tool involves the recognition of the special interests of member states in specific markets, such as strengthening an export joint venture in a currently weak industry that might allow domestic firms to reach scale economies in marketing and sell their products more effectively in other jurisdictions, whether within or outside the region.<sup>54</sup> Since one member's joint venture might be another's export cartel, given that each country only considers the effects of the conduct on its markets, members will need to seek tools to reduce such clashes. One possible tool, which follows regional trade agreements, involves the inclusion of special treatment provisions that exempt certain industries.<sup>55</sup> Indeed, developing countries in particular may sometimes need differential treatment to ensure reasonable adjustment for their industries to the full impact of competition. Yet as long as such exemptions are the exception rather than the rule, the overall benefits of the RJCA can still be achieved.

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<sup>51</sup> *Id.*

<sup>52</sup> Sokol, *supra* note 5.

<sup>53</sup> Guzman, *supra* note 42.

<sup>54</sup> For an example of such a joint venture see Small Economies, *supra* note ?, ch. 3.

<sup>55</sup> Michael Scherer [cite].

The ability to reach such solutions might be reduced, however, by power dynamics: by the fact that negotiations might sometimes tilt towards the interests of jurisdictions with stronger power due, for example, to their relative size or contribution to the agreement. Such jurisdictions might be able to alter the choices of other jurisdictions and coerce them to adopt a joint standard which serves their domestic interests, in order to reduce possible negative welfare effects on their consumers.<sup>56</sup> The less homogenous the member states, the higher such potential costs, *ceteris paribus*. While such costs are undoubtedly important, they should still be checked against the existing situation. The most important question that each jurisdiction should ask is whether the standard likely to emerge has the potential to further its domestic interests relative to the existing situation. If the agreement makes the signatories to such agreements better off than the lack thereof, there is a rationale to committing to it.

Finally, in structuring the agreement thought should be given to its effects on consumers in the different member states, to avoid significant harm to welfare resulting from regulatory changes. Non-discrimination requirements by a dominant firm, which are imposed on a regional basis, create an interesting example. Such a prohibition could hurt least developing jurisdictions that may have benefited from international price discrimination. Companies may no longer be able to discriminate among markets in order to price their products according to the ability to pay and price might rise in some jurisdictions and prevent citizens from buying certain products, most importantly pharmaceuticals. Again, such costs can be avoided by including special provisions designed to avoid this outcome in certain markets.

To sum, the desirability of RJCAs on joint enforcement is a derivative of the shortcomings of the current unilateral enforcement system and alternative solutions, the benefits of RJCAs and their costs. As was shown, 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 might well be in the self-interest of developing and of small jurisdictions to enter into RJCAs.

If, indeed, the potential benefits from an RJCA are so significant and seem to outweigh the costs, how come we do not observe many such agreements?<sup>57</sup> One of the main reasons may be the institutional

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<sup>56</sup> Sokol, *supra* note 5, citing to Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 INT'L ORG. 589, 591 (2001); DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* 5–6 (1995).

<sup>57</sup> See, e.g., Sokol, *id.*, Appendix A.

limitations of a joint competition authority. The analysis in this paper is based on the assumption that the joint authority can be workable. Yet this might not be easily achieved. The effectiveness of the joint authority depends on the commitment of all or at least most of its member states to its successful operation. If some member states, for example, do not provide funding or do not abide by the decision imposed by the joint authority, the joint endeavor might fall apart.<sup>58</sup> In addition, as Trebilcock and Howse observe in the trade agreement context, one should not underestimate the sequencing problem in committing to an RJCA.<sup>59</sup> First-movers face considerable uncertainty in their investment and commitment, which might be eroded by other members if they do not meet their commitments. This, in turn, creates a significant risk at the formative stages that might lead jurisdictions to be more reluctant to create a joint authority in the first place. The CARICOM joint authority has already experienced significant problems since not all member states transferred the required funding.<sup>60</sup> An additional reason is that most developing jurisdictions have only adopted a competition law quite recently and their competition culture is generally quite weak. It is only after a jurisdiction is committed to competition law enforcement that it will voluntarily enter into an agreement which imposes on it more demanding commitments to such enforcement. The potential positive experience of such agreements, the general change in socio-economic ideologies towards more pro-market orientations and external pressures by international bodies might, nonetheless, enable jurisdictions to overcome these obstacles.

### III. WELFARE EFFECTS ON NON-MEMBERS

So far we have focused on the effects of RJCAs on member states. This chapter broadens the analysis to include their possible effects on non-members. It focuses on two inter-related issues: RJCAs' externalities on non-member jurisdictions and their effects on the 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 analyze the desirability of RJCAs from an international welfare point of view.

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<sup>58</sup> This can be partly solved by reputational effects and tit-for-tat retaliation strategies in a multi-period game. MICHAEL J. TREBILCOCK AND ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 130 (2<sup>nd</sup> ed., 1999).

<sup>59</sup> *Id.*, 134.

<sup>60</sup> For such problems *see, e.g.*, Caricom: Anti-Monopoly Commission Suffers Funding, Legal Bottlenecks (January 24, 2008), available at [www.afp.com](http://www.afp.com).

#### A. EXTERNALITIES ON 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 competition within the region. It is thus interesting to ask whether RJCAs deserve the same criticism of regional trading blocks.

As Trebilcock and Howse note in their illuminating analysis of such criticisms, at a political level a regional trade agreement entails playing favorites 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.<sup>61</sup> 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 non-formal, resulting, for example, from the elastic and selective nature of trade remedies, whereby reduced trade remedy actions are taken against members, but a greater frequency of actions are taken against non-members.<sup>62</sup>

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, similar to the GATT. Accordingly, 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 might well be much weaker in RJCAs. This is because a large part of competition law cases with cross-border effects, which often will be the only or the main type of cases 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 benefit all, as it

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<sup>61</sup> Trebilcock and Howse, *supra* note 50, 130.

<sup>62</sup> Robert Teh, Thomas J. Prusa and Michelle Budetta, Trade Remedy Provisions in Regional Trade Agreements, WTO Staff Working Paper No. ERSD-2007-03, available at <http://ssrn.com/abstract=1019414>

increases overall deterrence of such cartels.<sup>63</sup> The same is generally true, but to a lesser extent, of abuse of dominance by international firms.<sup>64</sup> Protectionism and the resulting harm to competitiveness—one of the great fears from regional trading blocks— is thus much less potent in such competition law cases.

In some cases, however, the interests of members and of non-member states might clash. International merger and joint venture cases are the most likely to create different effects on different jurisdictions or regions. For example, a merger might have negative welfare effects in a jurisdiction with highly concentrated markets, and might create neutral or positive welfare effects in another jurisdiction in which many competitors can operate. Likewise, a joint venture for marketing a product abroad might create positive welfare effects in its domestic jurisdiction and negative effects in others. As elaborated above, the RJCA increases the weight given to the effects of the conduct on its members. While this will serve the interests of non-members with comparable welfare effects, it will clash with the interests of non-members with clashing welfare effects.

Yet the total welfare effects created by the RJCA in such cases might 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, the question must be asked, 'compared to what?'<sup>65</sup> Compared to the prevailing situation, the case against RJCAs is not clear. On the contrary: RJCAs enable jurisdictions that did not have a voice in the merger decision now to join forces in order to create such a voice. While this might not benefit jurisdictions which previously determined whether the merger could go through, it might well create an outcome which is closer to the total welfare optimum given that a wider array of welfare implications is now taken into account. Moreover, joint merger enforcement may reduce costs and beaurocratic complications rather than create "a spaghetti bowl" merger regulations, to borrow the term Bhagwati used to characterize regional trade agreements.<sup>66</sup> The same is true for joint ventures. Additionally, given that competition law comprises a generally known set of rules which apply to all or most

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<sup>63</sup> Michal S. Gal, Free Movement of Judgments (on file with author). An exception arises in the case of an export cartel.

<sup>64</sup> This conclusion is based on the assumption that the prohibitions are similarly defined across the affected jurisdictions.

<sup>65</sup> Trebilcock and Howse, *supra* note ?, 130.

<sup>66</sup> Jagdish Bhagwati, U.S. *Trade Policy: The Infatuation with Free Trade Agreements* in THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS (Jagdish Bhagwati & Anne O. Krueger eds., 1995).

industries in an equal fashion, rather than a set of industry or product-specific rules, it is less susceptible to strategic exploitation than trade agreements. Finally, the fact that the RJCA might require the balancing of the different interests of its members might reduce the clash of interests with at least some non-member states as well.

Furthermore, the opening up of 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 course, there is always a fear that the RJCA will apply the laws discriminatorily, hearing cases which harm firms from member states and not 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 the limits on the entry of foreign exports into their markets.

#### 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 in the future an international joint competition authority on at least some matters. The analysis is based on the assumption that arrangements at the regional and multilateral level are not mutually exclusive, but could indeed be complementary in nature.<sup>67</sup>

The past decade has seen an upsurge in attempts to reach international cooperative solutions. Globalization has created new and complex new patterns of overlap and spillover effects, which have brought many jurisdictions to the realization that some form of coordination and harmonization are required on a global level.<sup>68</sup> As noted above, current efforts mainly focus on increasing enforcement and reducing its negative spillovers through better understanding of competition laws and coordination of unilateral enforcement.<sup>69</sup> These actions, while commendable, are relatively limited in their ability to

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<sup>67</sup> WT/WGTCP/5 Report of the Working Group on the Interaction between Trade and Competition Policy to the General Council (2001), paragraph 53.

<sup>68</sup> For a historical survey of such efforts *see, e.g.*, Trebilcock and Howse, *supra* note ?, 469-71; Eleanor M. Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 INTERNATIONAL LAWYER 151 (2009).

<sup>69</sup> Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L. J. 1, 5 (2007).

solve international competition law problems. This is because in unilateral action still remains the main tool for enforcement.<sup>70</sup>

There have been several attempts to increase cooperation by creating some forum for enforcement coordination, especially with regard to hard-core cartels.<sup>71</sup> Most importantly, the World Trade Organization has considered the inclusion of some competition law prohibitions in its provisions.<sup>72</sup> This option is currently off the table,<sup>73</sup> but it is likely to be raised again, given the existing international competition law problems. In addition, scholars have raised the idea of the establishment of a supra-national antitrust authority. This idea, which carries a strong potential to significantly reduce international competition law problems, at least on a global-welfare basis, is fraught with problems which have so far prevented its adoption. Yet the weakness of other solutions might put this option on the negotiation table, especially with regard to international cartels. This section attempts to determine whether RJCAs can benefit or can harm efforts to increase international cooperation.

Let us first ask how RJCAs affect current efforts of coordination. RJCAs may further such efforts in several ways. First, they may encourage domestic compliance through competition law norm creation.<sup>74</sup> If the RJCA is successful in achieving its goals, this may strengthen the social acceptance of competition law in jurisdictions which 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 needing increased capacity-building in related domestic institutions, and for which international institutions can play a role.<sup>75</sup>

Yet especially where a competition law norm is not settled, RJCAs can reduce coordination in competition rules, if each region creates a set of idiosyncratic rules. In particular, RJCAs might create greater reluctance of newcomers to follow the competition law norms

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<sup>70</sup> Unique Challenges, *supra* note ?.

<sup>71</sup> See, e.g., sources cited in footnote 60.

<sup>72</sup> WTO, The WTO Doha Ministerial Declaration (14 November, 2001) suggested the start of negotiations on modalities of cooperation towards the creation of a multilateral framework on antitrust issues.

<sup>73</sup> The issue was dropped from the WTO agenda in 2004. Doha Work Programme, Decision Adopted by the General Council of the WTO (1 August, 2004).

<sup>74</sup> Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986).

<sup>75</sup> Sokol, *supra* note 5, 118.

of established jurisdictions<sup>76</sup> and might, alternatively, strengthen their ability and motivation to adopt norms which better fit their special conditions. However, 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 whether the rise of RJCAs carries the potential to move international competition law beyond the level that it currently reached, towards the creation of some sort of an international competition authority.<sup>77</sup> As Trebilcock and Howse observe, it is not trivial that if jurisdictions are amenable to regional enforcement they would as readily perceive the virtue of just keeping on going, and integrating inter-regionally.<sup>78</sup> 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 which are based on some form of participatory and cooperative governance. Through their experience, RJCAs may serve as mini-laboratories of experimentation for how at least some aspects of competition law at a global level could play out.<sup>79</sup> For example, they exemplify how different standards might play out and which areas are more susceptible to joint enforcement. The experience gained in RJCAs might thus serve as an important building block for developing a more centralized solution to joint competition problems.

Yet a necessary condition for the strengthening of motivations for the creation of an international authority 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.

An additional condition requires that the experience in the RJCA can be carried over to a large scale of cooperation. This condition is much less trivial than the previous one. For one, 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 which involves placing additional limits on one's sovereignty. Second, the geographic factor- which, as noted above, increases the benefits from joint cooperation agreements, must not

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<sup>76</sup> 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*, 9 EUR. J. OF LAW REFORM 467 (2007).

<sup>77</sup> The analysis of this question is partly based on Michal S. Gal, *A Step Theory of International Antitrust*, in INTERNATIONAL ANTITRUST (Josef Drexler ed., 2010).

<sup>78</sup> Trebilcock and Howse, *supra* note ?, 133-4.

<sup>79</sup> Sokol, *supra* note 5, foot 66.

dominate the analysis of the possible benefits. In international cartel cases, for example, geographic proximity is not a necessary condition for economic incentives to be intertwined. Rather, global cartels might harm jurisdictions which are far apart. Accordingly, the motivation to cooperate in prosecuting international cartels extends beyond one's region.

RJCA's might provide a further catalyst for stronger cooperation on international antitrust, resulting from the aggregate bargaining power it might provide its members in the inter-governmental 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, might increase their willingness to take the next steps in international antitrust 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 RJCA might now commit to a higher degree of information sharing and of credible enforcement,

Indeed, RJCA's 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. In particular, two issues arose. First, developing countries were concerned that a WTO rule that would mandate them 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 RJCA 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. RJCA's 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.<sup>80</sup>

## VI. CONCLUSION

Competition law is experiencing a 'new wave of regionalism'. Parties to regional agreements experiment with different degrees of

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<sup>80</sup> Step theory, *supra* note 69.

*REGIONAL AGREEMENTS*

26

coherence and diversity, from ones still mainly focused on unilateral enforcement to more centralized ones. Interestingly, some of the recent agreements among developing or small jurisdictions have adopted more centralized models, which include some form of joint enforcement. Such agreements are the focus of this essay.

RJCA's carry an important potential for overcoming some of the most significant obstacles holding back competition law enforcement in many developing and small jurisdictions. As this paper has argued, 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 practical ability to create credible enforcement threats and reach Pareto-superior solutions to their enforcement and advocacy problems. It is thus not surprising that RJCA's 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.<sup>81</sup> They will serve as the foundation for relationships among members as well as between members and non-members. Accordingly, this essay systematically analyzed the possible internal and external effects of such agreements, including their effects on international efforts of competition law coordination. As has been shown, RJCA's hold the potential to increase the welfare of its members, as well as total welfare, although it might sometimes harm the welfare of some non-members.

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<sup>81</sup> *See, e.g.*, RUTH B. COLLIER & DAVID COLLIER, *SHAPING THE POLITICAL ARENA: CRITICAL CONJUNCTURES, THE LABOR MOVEMENT, AND REGIME DYNAMICS IN LATIN AMERICA* 29 (1991).