Regional Trade Agreements v. the WTO:
A Proposal for Reform of Article XXIV to COUNTER THIS INSTITUTIONAL THREAT

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1. A PROPOSAL REGARDING THE RELATIONSHIP BETWEEN THE WTO AND REGIONAL TRADE AGREEMENTS

The World Trade Organization ("WTO") should adopt the following proposal:

1. WTO Agreements

All provisions of WTO Agreements that regulate Regional Trade Agreements ("RTAs") (and other similar but differently named trade agreements) are amended to adopt the criteria below.

2. Application

A. Future RTAs. Future RTAs and ones presently under negotiation are permitted only to the extent they comply with the provisions below.

B. Extant RTAs. Existing RTAs are to be amended to include the provisions below over a phase-in period of five years.

3. Harmonization

A. Crucial Rules. The WTO's Committee on RTAs ("CRTA") will identify those WTO Rules to which RTA derogation is causing or will likely cause institutional harm (conflicts and/or resource diversion).

B. WTO Supremacy. Where RTA provisions are inconsistent with those specified WTO Rules, those WTO Rules shall be supreme.

C. Dispute Settlement. The WTO's Dispute Settlement Body ("DSB") is either to be employed as the final arbiter of RTA disputes or to supplant alternative arbiters completely. In deciding these cases the DSB shall employ WTO jurisprudence to the extent of any inconsistency with RTA jurisprudence.

4. Secretariat

A. Cooperation. When negotiating on RTA matters, Member government officials should work in cooperation with the WTO Secretariat throughout RTA negotiations and disputes to ensure consistency and compliance with WTO Rules.

B. Use of Secretariat. The WTO Secretariat shall consider ways in which it can assist RTAs with their institutional needs, including
offering use of the WTO Secretariat to meet those RTA institutional needs.

5. **Waiver**

   A. **Waiver Approval.** In order to facilitate innovation and recognize arrangements suggesting significant integration of members' economies and political structures, waiver of these provisions may be permitted subject to two-thirds approval of the WTO membership, following recommendation of the waiver by the CRTA Executive Committee.

   B. **Non-Customs Unions.** Such waivers are presumptively inapplicable to non-customs union arrangements.

   C. **Time Limit.** Waivers granted under this provision may apply for a maximum of ten years, subject to renewal under the same criteria as the original waiver.

6. **CRTA Executive Committee**

   A. **CRTA Executive Committee Membership.** The CRTA will include a rotating fifteen-member Executive Committee comprised of representatives from the different regions of the world, as well as permanent representatives from the six largest exporting economies, though no WTO member shall have more than one representative on the committee at any one time.

   B. **Recommendations.** Recommendations of the CRTA Executive Committee are to be issued only with the support of two-thirds of the members of the CRTA Executive Committee.

2. **INTRODUCTION**

   As we approach the Sixth Ministerial Conference\(^1\) of the WTO, there is a distinct possibility that it, like previous WTO Ministerials, may be doomed to failure or, at a minimum, will not achieve even a part of its goals. Indeed, the most recent Ministerial, the Cancun Ministerial in 2003, is generally considered to have failed.\(^2\)

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\(^1\) See World Trade Organization, *The Sixth WTO Ministerial Conference* (noting that the Sixth World Trade Organization ("WTO") Ministerial Conference will be in Hong Kong from December 13-18, 2005), at http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_e.htm (last visited Mar. 18, 2005).

That failure may be attributed to many causes, including the failure to agree on such crucial issues as agricultural supports, competition policy, investment rules, procurement, and intellectual property rights. Further failures like the Cancun and Seattle Ministerials could place the WTO at risk of stagnation and irrelevance.

There are many substantive reasons for WTO members' disagreements. This Article will focus on just one of those reasons: the increasing prevalence of regional trade agreements ("RTAs"). RTAs have grown at a phenomenal rate, from 50 in 1990 to over 230 today, and are a significant contributing factor to the present difficulties of the WTO. Despite the specific benefits of individual RTAs, when taken as a whole, they tend to undermine the development of the multilateral trade system. Specifically, they pose an institutional threat to the WTO.

Traditionally, however, RTAs have been examined through an economic and not an institutional lens. Those critiques have focused on trade patterns and efficiencies, and specifically on RTA attacks on the Most Favored Nation ("MFN") principle—one of the bedrocks of the movement to liberalize world trade. RTAs' im-

\[\text{reference} (\text{noting that the Fifth WTO Ministerial Conference was held in Cancin, Mexico from September 10-14, 2003, at } \text{http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm (last visited Mar. 18, 2005).})\]

\[3 \text{ See Cho, A Bridge Too Far, supra note 2, at 230-31 (placing much of the blame for the failure of the conference on "Singapore issues"—e.g., investment and competition).}\]

\[4 \text{ See Chapter 2 of THE INTERNATIONAL BANK OF RECONSTRUCTION AND DEVELOPMENT, WORLD BANK, GLOBAL ECONOMIC PROSPECTS: TRADE REGIONALISM & DEVELOPMENT (2005) [hereinafter WORLD BANK, GLOBAL ECONOMIC PROSPECTS], available at } \text{http://siteresources.worldbank.org/INTGEP2005/Resources/gep2005.pdf, for details on the numbers and compositions of Regional Trade Agreements ("RTAs"). In 2003 "only three WTO members—Macau China, Mongolia and Chinese Taipei—were not party to a regional trade agreement." World Trade Organization, Regionalism: Friends or Rivals?, at } \text{http://www.wto.org/english/thewto_e/whatitis_e/tif_e/bye1_e.htm (last visited Mar. 18, 2005).}\]

\[5 \text{ See General Agreement on Tariffs and Trade, Oct. 30, 1947, art. I, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] ("[A]ny advantage favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties"). The Most Favored Nation ("MFN") principle sets up one of the greatest conflicts in international trade—the conflict between the desire of a state to decide for itself with whom and on what terms it will trade (and its patterns of trade), versus the multilateral system's attempt to apply a rule of non-discrimination for the benefit of all.}\]
impact on the WTO has not been subjected to a detailed examination from an institutional perspective. Such a perspective considers how RTAs drain states' enthusiasm for multilateral trade negotiations, create conflicts between RTAs and the WTO, and divert resources from the WTO to the RTA process. Additionally, these institutional harms are interrelated and self-reinforcing. Furthermore, these institutional challenges may well spell the difference between WTO stagnation and growth, when considered in the context of the WTO's recent problems with non-tariff barriers, services, agriculture, intellectual property rights, trade, human rights, labor, the environment, and the many other issues now on the WTO negotiating table. Therefore, it is imperative that the WTO take the matter in hand and appropriately regulate the institutional impact of this massive proliferation of RTAs. After providing an institutional critique of RTAs and their relationship to the WTO, this Article offers a Proposal to ameliorate these institutional harms of RTAs.

It is no accident that this Article was first presented at a conference on WTO issues held in Israel. Israel is a country fully involved in both sides of these issues — on the one hand, as a participant in many RTAs, and, on the other hand, as a fully participating member of the WTO. As an isolated country, regionally and po-

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6 For the most part, discussion of RTAs and the General Agreement on Tariffs and Trade ("GATT") Article XXIV ("Article XXIV") focuses on economic, foreign policy and political themes, and rarely on the institutional issues presented in this Article. But see Jeffrey A. Frankel, Regional Trading Blocs in the World Economic System 214 (1997) (discussing, albeit briefly, some of the institutional issues); World Bank, Global Economic Perspectives, supra note 4, at 38-39 (while the World Bank Report touches on some institutional issues, it primarily focuses on development policy and the economic harms of RTAs, though it does discuss some of the institutional issues covered in this Article).

7 Israel has been a member of the WTO since April 1995. WTO, Israel and the WTO, at http://www.wto.org/english/tratop_e/countries_e/israel_e.htm (last visited Mar. 18, 2005). Israel is or has been a member of many RTAs, with partners as diverse as the United States, Canada, the European Free Trade Association ("EFTA"), the Slovak Republic, Turkey, the Czech Republic, Hungary, Poland, Slovenia, the European Community ("EC"), Mexico, and Bulgaria. See WTO, Regional Trade Agreements Notified to the GATT/WTO and in Force, at http://www.wto.org/english/tratop_e/region_e/eif_e.xls (listing trade agreements currently in effect) (last visited Mar. 18, 2005). Also, the United States-Israel Free Trade Association ("USIFTA") was an interesting RTA, as during its initial period of transition it was an "interim agreement," and hence should have been subject to the special rules for "interim agreements" (though it was not). Zakir Hafez, Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs, 79 N.D. L. Rev. 879, 886-87 (2003).
politically, Israel must negotiate regional arrangements with as many regions as possible. Yet, as a small country it must also rely on its involvement in multilateral organizations to assure global trade access, through the MFN principle, that it might not otherwise enjoy. Additionally, Israel also exemplifies those states that enter into RTAs for non-economic reasons—i.e., significant foreign relations benefits related to each one of its RTAs.\(^8\) Israel is also a perfect example of the institutional realities of involvement in both bilateral and multilateral trade agreements. After all, Israel is a small country with correspondingly limited resources and enthusiasm to devote to involvement in both the WTO and RTAs.\(^9\) Furthermore, Israel cannot afford to deal with the conflicts created between RTAs and the WTO. It is thus in the interest of countries like Israel, as well as larger countries like the United States, to resolve the institutional consequences of the proliferation of RTAs.

The next part of this Article considers why RTAs exist as well as how they have been regulated historically. That consideration provides the necessary backdrop against which the rest of the Article's critiques and proposed solutions may be examined.\(^10\) This Article will then explore the impact of RTAs on the institution of the WTO: the creation of harmful conflict between RTAs and the WTO; the loss of member states' enthusiasm for the WTO; and the reallocation of scarce resources away from the WTO. Finally, this Article will discuss the Proposal, providing a critique of its plan for ameliorating the institutional harms RTAs inflict on the WTO.

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\(^10\) In examinations of the operation of Article XXIV, it is typical to consider the origins of the trade system's treatment of regionalism to be relevant to consideration of present issues. See, e.g., Jagdish Bhagwati, WRITINGS ON INTERNATIONAL ECONOMICS 165 (V.N. Balasubramanyam ed., 1997) [hereinafter Bhagwati, WRITINGS] ("It is an interesting question why Article XXIV was accepted; and it is a question that also has significance for some of the issues raised by the Second Regionalism."); see also James H. Mathis, REGIONAL TRADE AGREEMENTS IN THE GATT-WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT 31-56 (2002).
3. RTAs, Article XXIV and the WTO

RTAs include all arrangements between states concerning their trade relations. Sometimes RTAs are called Free Trade Agreements ("FTAs"), Preferential Trade Agreements, or, in some circumstances, Customs Unions. These agreements may be bilateral, trilateral, or multilateral. Their sectoral and substantive coverage may be significant, minimal, or illusory. For purposes of this Article, the term "RTA" includes all regional trade arrangements except customs unions, for customs unions are significantly different. However, much of the critique of RTAs presented in this Article could also apply to customs unions. The term "RTA" will also be used interchangeably with the term "FTA" in this examination of the benefits and harms of RTAs in their relationship with the WTO.

3.1. The Benefits of RTAs

The multilateral trade system has witnessed phenomenal growth in the number, coverage, and scope of RTAs. While it has been asserted that the present "fever" of activity in developing re-

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11 See generally FRANKEL, supra note 6, at 12-16. It has been pointed out that the term "Free Trade Agreement" is a misnomer—it should rather be called a "Preferential Trade Agreement." jagdish bhagwati, a stream of windows: unsettling reflections on trade, immigration, and democracy 289 (1998) [hereinafter bhagwati, a stream of windows] (asserting that the term "Free Trade Agreement" ("FTA") is "nothing but Orwellian newspeak"). "Free Trade Agreement" was first officially used as a "term of art" during the development of the International Trade Organization ("ITO"). Mathis, supra note 10, at 42-43. "Customs Union" is defined in GATT Article XXIV(8)(a), while "Free Trade Agreement" is defined in GATT Article XXIV(8)(b). It should also be noted that some have claimed that there is a substantive difference between "regional" and "preferential" arrangements—that preferential agreements are intended to assist in development policy. If so, the difference between the two would be one of motive rather than the structure. Raj Bhala, The Forgotten Mercy: GATT Article XXIV: 11 and Trade on the Subcontinent, 2002 N.Z. L. Rev. 301, 314-316 (2002). This Article suggests that, regardless of their titles or goals, such agreements should still fall under this Article's Proposal, including the exceptions in the waiver provision.

12 See FRANKEL, supra note 6, at 19-20 (providing an example of an RTA that was essentially illusory: the Economic Community of West African States ("ECOWAS")).

13 See infra Section 5 (discussing why customs unions generally are not covered by this Article's Proposal and critiques).

14 Thomas Cottier, The Challenge of Regionalism and Preferential Relations in World Trade Law and Policy, 1 EUR. FOREIGN AFF. REV. 149, 149 (1996), see also WORLD BANK, TRADE BLOCS 1 (2000) ("The growth of regional trading blocs . . . is one of the major international relations developments of recent years.").
Regional arrangements is due to globalization, there have been other periods of regionalism before this present burst of activity, albeit none so frenetic as the period since the birth of the WTO. There are many reasons for this growth, though in the early period of the multilateral trade system—the post-war years—much of the growth in RTAs was related to continuing colonial associations. Additionally, in those post-war years, RTA formation was encouraged as another mechanism to help increase security in Europe. Geopolitics aside, however, there has been no shortage of reasons, historically and in modern times, for countries to enter into RTAs. Understanding those reasons allows a greater understanding of the feasibility of any proposal to regulate RTAs so as to reduce their negative impact. Such a proposal, like the one offered in this Article, must be able to achieve its regulatory goal, yet not detract from the many positive reasons for utilizing RTAs. Hence the importance of first identifying the reasons that states enter into RTAs and why the system allows RTAs to exist.

States enter into RTAs for a whole host of reasons, including furthering economic, security, and foreign policy goals. The conventional wisdom is that states enter into RTAs to secure economic...
or welfare gains from exclusive access to the other RTA states' markets.\textsuperscript{20} States may also join RTAs to ensure continued access to a market already covered by an RTA. For example, the purpose of Canada's involvement in the North American Free Trade Agreement ("NAFTA") was, in part, to ensure it retained the access to the U.S. market that it had obtained from a previous RTA—the Canada-U.S. FTA ("CUSFTA").\textsuperscript{21} Similarly, when all other countries are perceived to be entering into such arrangements, a country will not want to be left behind.\textsuperscript{22} This is called "domino regionalism."\textsuperscript{23} In this way, involvement in RTAs ensures that a state is not "taken advantage of" through multilateralism.\textsuperscript{24} All these reasons speak to the underlying idea that a state will seek to establish positive preferences from other countries for the state's industries and interests—sometimes non-economic interests.\textsuperscript{25}

\textsuperscript{20} This Article will not consider the relative pros and cons of the various different types of RTAs—be they bilateral, trilateral, etc. For a serious economic analysis of why countries would choose one form over another, see generally, BETH V. YARBROUGH & ROBERT M. YARBROUGH, COOPERATION AND GOVERNANCE IN INTERNATIONAL TRADE: THE STRATEGIC ORGANIZATIONAL APPROACH 111-33 (1992). This Article will not delve into the details of the primary possible economic benefits of regional integration—"competition and scale" or the "trade and location." For more information, see WORLD BANK, TRADE Blocs, \textit{supra} note 14, at 29-61. Sufficient to say that those benefits can be substantial, but that they rely upon wise policy choices, as well as the type of integration and the parties involved. \textit{Id.} at 61.


\textsuperscript{22} See BHAGWATI, \textit{Writings}, \textit{supra} note 10, at 172 (explaining that the European Union ("EU") and the Canada–United States Free Trade Agreement ("CUSFTA") have created a sense that "others must follow suit"). Consider, also, the recent actions of Japan in negotiating its first RTA, with Singapore, in 2002, and its ongoing negotiations with Mexico, Republic of Korea, Thailand, Malaysia, and the Philippines. WORLD BANK, GLOBAL ECONOMIC PERSPECTIVES, \textit{supra} note 4, at 137.

\textsuperscript{23} WORLD BANK, TRADE Blocs, \textit{supra} note 14, at 96; see also Richard E. Baldwin, \textit{A Domino Theory of Regionalism}, in EXPANDING MEMBERSHIP OF THE EUROPEAN UNION 25, 27-31 (Richard Baldwin et al. eds., 1995) (arguing that this helps to explain the Mexican desire for an agreement with the United States and Canada following the CUSFTA, and the desire by the Scandinavian countries to join the European Community ("EC").

\textsuperscript{24} BHAGWATI, \textit{Writings}, \textit{supra} note 10, at 170.

\textsuperscript{25} See MATHIS, \textit{supra} note 10, at 127 (quoting Runato Ruggiero: ""[T]hese initiatives are less about advancing regional economic efficiency or cooperation . . . and more about securing regional preferences, even regional spheres of influence, in a world marked by growing competition for markets, for investment and for

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In addition to providing individual states with economic and welfare benefits, RTAs also provide benefits for individual states and the global economy through their interaction with the multilateral system and trade policy as a whole.\textsuperscript{26} As an initial matter, regionalism may serve as an inducement for the development of multilateralism.\textsuperscript{27} The United States' response to European regionalism was initially to push ever harder for multilateral trade development—with some success. That policy led to some of the more important rounds of the General Agreement on Tariffs and Trade ("GATT")—the Dillon, Kennedy, and Tokyo Rounds.\textsuperscript{28} The threat of regionalism, and the trade diversion that goes with it, may thus encourage the conclusion and acceptance of multilateral agreements.\textsuperscript{29}

Regional arrangements can also increase the bargaining power of an RTA's constituent members within multilateral arrangements.\textsuperscript{30} Additionally, with the recent increase in regionalism due to globalization, combined with the opening of economies in the post-tariff era, economic actors suddenly have become aware of Non-Tariff Barriers ("NTBs") and the need to deal with them.

\textsuperscript{26} See generally Frederick M. Abbott, \textit{The North American Integration Regime and its Implications for the World Trading System, in \textsc{the Eu, the Wto, and the NAFTA 169, 177-84 (J.H.H. Weiler ed., 2000)} (examining NAFTA's affects on the world trading system). Though perhaps this success has more to do with the economies of the member states than with the regional agreements themselves.

\textsuperscript{27} See BHAGWATI, \textsc{Writings, supra note 10, at 170} (discussing views that regionalism can supplement or even support multilaterism); see, e.g., BHAGWATI, \textit{A STREAM OF WINDOWS, supra note 11, at 307} (arguing that CUSFTA served "to jump-start" the GATT in the mid-1980s).

\textsuperscript{28} FRANKEL, \textit{supra} note 6, at 5. The Dillon Round effected $4.9 billion in trade, the Kennedy Round $40 billion, and the Tokyo Round $155 billion. JOHN H. JACKSON \textit{ET AL., \textsc{International Economic Relations: Cases, Materials and Texts} 314 (3d ed. 1995). But see \textsc{World Bank, Trade Blocs, supra note 14, at 102} (arguing that this exclusion really only impacted the timing as the negotiations would have happened anyway). At one point, it might have been argued that RTAs could promote multilateral trade development through those countries not parties to RTAs pushing extra hard for multilateral development, so as to reduce their comparative disadvantage, or to erode the benefits of those RTAs to RTA members. It has been argued that this fear of regionalism was a contributing factor in pushing the EU and the United States to a final agreement of disputed issues during the Uruguay Round. However, the evidence is mixed and as such it is unclear whether RTAs encouraged multilateral developments.

\textsuperscript{29} BHAGWATI, \textsc{Writings, supra note 10, at 170}.

\textsuperscript{30} See WORLD \textsc{Bank, Trade Blocs, supra note 14, at 17-21} (noting that while often sought through such arrangements, success in increasing bargaining power is less common).
Such actors have found it easiest to deal with these barriers through the employment of RTAs. RTAs may also create "lock-in" effects. Regional agreements may lock in economic reforms and give credibility to those reforms—internally and externally. RTAs may also serve as "laboratories" by trying out new approaches that can later be applied in the multilateral arena. For example, NAFTA's investor protection provisions may serve as a model in future multilateral trade negotiations. It has, however, been suggested that this benefit, like so many, can cut both ways; the European Union's ("EU") Common Agricultural Policy ("CAP") is a prime example of a novel policy with negative impacts on world trade policy; certainly not a policy that should be mirrored in the future. Another trade benefit of RTAs is that they are thought to be more likely to tackle hard issues, as resolving issues between two parties is much easier than within the multilateral framework. Examples include NAFTA's investor protection provisions in Chapter 11, the EU treatment of labor issues, and the treatment of information technology products between Brazil and the rest of the MERCOSUR.

Some studies, however, suggest that those economic, welfare,

31 Braga, supra note 15, at 310.
32 See WORLD BANK, TRADE BLOCS, supra note 14, at 22-26 (examining RTAs as lock-in mechanisms). It has also been noted that regional arrangements are unnecessary for this goal in light of the existence of the WTO. Id. at 23.
33 WORLD BANK, TRADE BLOCS, supra note 14, at 104-05. For a discussion of the new issues tackled by RTAs, see generally WORLD BANK, GLOBAL ECONOMIC PERSPECTIVES, supra note 4, at 97-123.
36 See generally NAFTA, supra note 34; European Commission, Free Movement of Workers, at http://europa.eu.int/scadplus/leg/en/s02305.htm (last visited Apr. 3, 2005) (discussing worker migration); WORLD BANK, TRADE BLOCS, supra note 14, at 105 ("the EU has addressed a wide range of deep integration issues). Mercosur is the "Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay" and was created in 1991 by the Treaty of Ascension, with the goal of creating a common market of the participating countries. See Mercosur (discussing the Mercosur report), at http://www.mercosur.org.uy/ (last visited Apr. 3, 2005); see also WORLD BANK, GLOBAL ECONOMIC PERSPECTIVES, supra note 4, at Chapter 5; European Commission, The EU's relations with Mercosur, available at http://europa.eu.int/comm/external_relations/mercosur/intro/ (last visited Apr. 3, 2005).
and trade gains are far from assured, if, in fact, they exist at all.\textsuperscript{37} Accordingly, many consider that it is the non-economic benefits that serve as the primary rationale for RTAs.\textsuperscript{38} In particular, foreign policy and national security continue to be significant reasons for entering into RTAs.\textsuperscript{39} Indeed, as mentioned above, trade agreements have played a role in the Middle East peace process.\textsuperscript{40} RTAs can also be employed to realign external relations, as in the cases of Turkey with Europe, and Mexico with North America.\textsuperscript{41} RTAs may also serve as a foreign policy reward for allies. For example, entering into an RTA with an economic power can serve to reward countries and convince them to adopt more market-oriented domestic policies.\textsuperscript{42} RTAs may even be thought to assist in domestic political affairs.\textsuperscript{43} The World Bank recently argued that

\textsuperscript{37} See, e.g., \textsc{World Bank, Global Economic Perspectives}, supra note 4, at Chapter 3 (examining such ideas); \textsc{Robert Z. Lawrence, Regionalism, Multilateralism, and Deeper Integration} 95 (1996) (discussing implications of regionalism); \textsc{Bhagwati, Writings}, supra note 10, at 182 (questioning popular assertions about regionalism). There has also been criticism of the assertions that RTAs provide quicker results, that they are more efficient, and that their results are more certain. \textit{See id.} at 187 (concluding that regionalism’s revival in the 1980s and 90s is “unfortunate”).

\textsuperscript{38} See, e.g., \textsc{World Bank, Trade Blocs}, supra note 14, at Ch. 2 (examining the non-economic political benefits of RTAs); \textsc{Mathis, supra} note 10, at 127 (focusing on the concept of regional spheres of influence).

\textsuperscript{39} \textit{See} \textsc{World Bank, Trade Blocs}, \textit{supra} note 14, at 12-17 (noting that sometimes regional agreements may increase tension between parties).

\textsuperscript{40} \textit{See generally}, \textsc{Karasik, supra} note 8, at 528 (“a new era of increasing economic cooperation”). The United States’ pursuit of RTAs in the Middle East is also associated with the current war on terror. \textit{See} Alvin Hilaire & Yongzheng Yang, \textit{The United States and the New Regionalism/Bilateralism}, 38 J. \textsc{World Trade} 603, 604 (2004) (describing the present extensive RTA efforts by the United States in the Middle East). The United States-Jordan FTA was a reward for its peace agreement with Israel. Mohammad Nsour, \textit{Fundamental Facets of the United States-Jordan Free Trade Agreement: E-Commerce, Dispute Resolution, and Beyond}, 27 \textsc{Fordham Int’l L.J.} 742, 742 (2004).

\textsuperscript{41} \textsc{Bhagwati, Writings, supra} note 10, at 171.


\textsuperscript{43} For example, one of the goals of the United States in entering into NAFTA was to help stem the tide of illegal Mexican immigrants to the United States. \textsc{Abbott, supra} note 21, at 17; \textit{see also} \textsc{Karasik, supra} note 8, at 534-35 (discussing factors that explain why nations form RTAs); \textsc{World Bank, Global Economic Perspectives, supra} note 4, at 111-115 (discussing EU and other RTA considerations of the movement of people). There is even an argument that some RTAs were entered into, at least in part, to ensure continued access to energy resources. \textit{See} Melaku Geboye Desta, \textit{The Organization of Oil Exporting Countries, the World
"[m]any of the arguments for membership in a regional agreement are political." But the reality is, of course, more complex. RTAs are formed for substantially the same reasons they have always been formed—a mixture of many reasons: political, economic, and security all included. Nonetheless, despite such varied rationales for RTAs, this Article's Proposal to reform the regulation of RTAs manages to confront the RTAs' institutional concerns, while leaving these rationales unharmed.

3.2. The Regulation of RTAs

Given the many benefits of RTAs, it is no surprise that RTAs existed long before the birth of the modern international trade regime in 1947. The concern about those RTAs also has a long history. Much of that early anxiety was related to the fact that RTAs are inherently discriminatory—with all the negative consequences associated with discrimination. Nonetheless, RTAs had long enjoyed exemption from MFN obligations in bilateral trade agreements. Despite this traditional acceptance of RTAs, the period between the two world wars cast RTAs in a particularly negative light as they were considered to be a contributing cause of the descent back into war. Indeed, even before work began on the

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Trade Organization, and Regional Trade Agreements, 37 J. World Trade 523, 539 (2003) (pointing to energy chapters in such trade agreements as NAFTA, the Free Trade Area of the Americas (“FTAA”), European Community Treaty, and the European Coal and Steel Community (“ECSC”).

44 WORLD BANK, TRADE BLOCS, supra note 14, at 6. But see ABBOTT, supra note 21, at 17-18 (arguing that America’s and Mexico’s primary goal in entering into NAFTA was economic). However, economics does not provide as much support for the entry into many of the non-territorially contiguous RTAs, such as United States-Israel. Politics explains that agreement much better than economics. See BHAGWATI, WRITINGS, supra note 10, at 180 (noting that politics seems to drive such decisions).

45 In 1947, the GATT was born.

46 See, e.g., MATHIS, supra note 10, at 37 (quoting George Washington’s farewell speech: “to hold an equal and impartial hand, neither seeking nor granting exclusive favors or preferences”).

47 Interestingly, the exemptions were sometimes not explicit, but by custom. MATHIS, supra note 10, at 31; see JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 576 (1969) (hereinafter JACKSON (1969)) (citing J. Viner, The Customs Union Issue 6-12 (1950)).

48 MATHIS, supra note 10, at 14-17. Consequently, that interwar period formed the backdrop against which the post-war world economic regime would be set: the Bretton Woods institutions, including the later negotiated Havana Charter, and its GATT substitute. FRANKEL, supra note 6, at 2-3. The Bretton Woods institutions initially included the World Bank and the IMF. JACKSON (1969), supra note
doomed International Trade Organization ("ITO"), elimination of the fragmented world economy of the interwar years, characterized by many preferential and regional systems, was one of the main economic goals for the post-war period.\textsuperscript{49} The United States, in particular, was intent on extension of the MFN principle as one device to ensure that the interwar period's harmful policies would not be replicated.\textsuperscript{50} It has been argued that the "purpose of the entire ITO exercise from the U.S. view was to terminate the use of preferences in international trade. . . ."\textsuperscript{51} However, the British and other colonial interests stood solidly in the way, and so the United States was forced to compromise and agree to some type of exception for preferential regimes.\textsuperscript{52}

The question was then what forms of preferential and regional arrangements should enjoy exemption from MFN. The original U.S. proposal allowed only for a customs union exemption to the MFN principle.\textsuperscript{53} But during the negotiation of the ITO, a MFN ex-

\textsuperscript{47} at 40. The ITO, while considered, was postponed for later detailed consideration.

\textsuperscript{49} See Atlantic Joint Declaration, Aug. 14, 1941, available at http://www.yale.edu/lawweb/avalon/wwii/atlantic.htm (last visited Apr. 3, 2005) ("The President of the United States of America and the Prime Minister, Mr. Churchill . . . deem it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world. . . . [T]hey will endeavor, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity . . . .")

\textsuperscript{50} Id.

\textsuperscript{51} MATHIS, supra note 10, at 42. The United States' position was that one of its primary goals in the ITO negotiation was the elimination of preferential arrangements. JACKSON (1969), supra note 47, at 576.

\textsuperscript{52} See Hafez, supra note 7, at 881-82 (discussing the British position on their colonial preference system, that, in part, the preference system would allow the maintenance of imperial connections even as their former colonies broke free); MATHIS, supra note 10, at 42-43 (suggesting that the United States most likely acquiesced to the compromise, though the records are insufficient to clearly determine the final United States position during the final stages of the negotiations). It should be noted that the United States position on customs unions was less strict—both for economic reasons (more trade creating than trade diverting) and for political reasons (the need for economic cooperation in post-war Europe).

\textsuperscript{53} MATHIS, supra note 10, at 32. Indeed, the failure to have those non-customs union colonial preferences removed played a significant role in the Administration and Congressional failure to support the creation of the ITO. MATHIS, supra note 10, at 18, 23.

\textsuperscript{53} See MATHIS, supra note 10, at 34-35 (referencing draft proposals); JACKSON (1969), supra note 47, at 577 ("The original United States draft included clauses exempting such arrangements from Most-Favored-Nation and other obligations.").
ception for non-customs union RTAs was considered by the negotiators.\textsuperscript{54} The United States was willing to permit that additional exception, as it erroneously believed that serious FTA technical difficulties would quickly lead participants to embrace customs unions instead.\textsuperscript{55} Overall, the United States was not supportive of exceptions to the MFN principle. But the willingness of the negotiators, including the United States, to accept RTAs in that period may have been tied to the unusual circumstances of that era: the post-war, post-colonial period in which the world found itself.

When the ITO failed to garner the necessary international support to come into existence, the parties turned to an interim arrangement, GATT.\textsuperscript{56} The final compromise concerning those RTAs in GATT was embodied in Article XXIV.\textsuperscript{57} Because the traditional critique of RTAs focused on trade diversion, Article XXIV excepted

\textsuperscript{54} See JACKSON (1969), supra note 47, at 577 (describing the drafting process). Another reason for the general support of an exception to MFN for RTAs was to allow developing countries the option to adopt regional agreements among themselves. MATHIS, supra note 10, at 31. Furthermore, allowing such RTAs would accommodate developing countries which would not otherwise be able to benefit from GATT’s grandfather clause, as the developing countries had not yet developed their barriers. See also, Porges, supra note 17, at 313 (discussing the impact of RTAs); MATHIS, supra note 10, at 7 (commenting on regionalism in the context of dispute resolution). Additionally, developing countries thought that FTAs would be easier to implement than customs unions. Id.

\textsuperscript{55} See Hafez, supra note 7, at 883-884 (noting the United States’ view on FTAs). The rules of origin issue is the biggest problem. Id., at 887-88 (noting that the costs of implementation are high).

\textsuperscript{56} Nonetheless, the negotiation of the RTA exception within the ITO is crucial background for understanding the eventual GATT resolution and to any considerations of amending the present relationship. For example, an early proposal allowing the RTA exception to the MFN called for a two-thirds vote to allow exemptions for preferential arrangements. MATHIS, supra note 10, at 34. Additionally, there was consideration of a time limit, a sort of “infant industry” exemption, and an allowance for contiguous territories. Id. at 35.

\textsuperscript{57} Despite the fact that the regulation of RTAs is placed in the second half of GATT, Article XXIV, this should not be read to mean that the regulation of RTAs was not a central, perhaps one of the central, issues of the original GATT and the present-day WTO. Article XXIV’s position reflects early conceptions about the issue of regionalism—as an “administrative problem of defining the territorial scope of the agreement and providing for the special exceptions of neighboring countries.” JACKSON (1969), supra note 47, at 575 n.1. It was later proposed in the drafting stage of GATT to change Article XXIV’s location within GATT, though this was never implemented. Id. With respect to MFN, the regulation of preferential trading regimes was and is a primary issue. MATHIS, supra note 10, at 24. Indeed, Jackson’s early work, suggests that more had then been written on Article XXIV than any other aspect of GATT. JACKSON (1969), supra note 47, at 576.
those RTAs that concentrated on trade creation, and covered substantially all trade between the parties. GATT also grandfathered in existing preference schemes: the British Imperial preferences, the BENELUX preferences, Lebanon-Syrian preferences with Palestine and Transjordan, and the French Union preferences. Despite these exceptions, it was contemplated that Article XXIV would be the primary control on RTAs. Unfortunately, the power of Article XXIV was eroded early on as a consequence of one of the central weaknesses of the original GATT—the requirement of consensus for any action to be taken against any violators. This led to the absurd notion that the violating country could itself just veto any condemnation of its RTA violative behavior. Thus, no RTAs were condemned, while few received approval. Consequently, while there were many GATT working parties that considered the various RTAs, only one RTA was ever able to be certified as GATT compliant by the working groups. The position of RTAs within the multilateral system was essentially unchecked by the time the GATT was replaced by the WTO.

58 See Jackson (1969), supra note 47, at 601 (discussing one view of paragraph 4 of GATT as establishing a "'trade creating' versus 'trade diverting' dichotomy").

59 See Mathis, supra note 10, at 2-3 (noting that the drafting record establishes an approach to regional trade agreements designed to prevent regional members from selecting "diverting preferences").

60 See Mathis, supra note 10, at 45 (discussing the view that free trade would be supported as an exception).


62 See John H. Jackson et al., International Economic Relations: Cases, Materials and Texts 263 (4th ed. 2002) ("Traditionally, decisions in the Council were made by consensus, which meant that any party—including the losing party—could prevent the Council from adopting a panel report."). Of course, this reflected GATT’s mediation orientation to the resolution of disputes compared to the WTO’s binding rule adjudication orientation. Id. at 252. The GATT’s orientation perhaps better reflected then-prevailing concepts of state-to-state dispute resolution than are exhibited in today’s more litigious environment.

63 Approval also required consensus, and GATT signatories that were not a part of the RTA at issue would have been unwilling to lose future claims by agreeing that an RTA was GATT-compliant. Porges, supra note 17, at 313; see Yarbrough & Yarbrough, supra note 20, at 107-10 (providing examples of economic situations where RTAs would be desirable).

64 See World Bank, Global Economic Perspectives, supra note 4, at 140 (noting that only the Czech-Slovak Customs Union RTA has been certified).
During the Uruguay Round some of these problems were addressed. The issues raised in the GATT RTA working parties were considered in the Uruguay Round's reform of Article XXIV, resulting in the "Understanding on Article XXIV" ("the Understanding"). The Understanding, among other things, provides that the review process of Article XXIV does not insulate RTAs from the WTO's Dispute Settlement Understanding ("DSU"); includes specific details of how RTAs must measure trade so as to be in compliance with Article XXIV; provides a timetable during which new emerging RTAs must be phased into operation; and creates a Committee on Regional Trade Agreements ("CRTA") to engage in oversight of RTAs and their relationship with the WTO. The Understanding, however, is essentially technical and has not really altered the relationship of RTAs to the multilateral trading system. The Understanding and the CRTA examination report process, not surprisingly, have proven unable to ensure RTA compliance with Article XXIV. Indeed, today few RTAs are Article XXIV-

65 See generally Porgess, supra note 17, at 313 (detailing the various provisions addressed by the Uruguay Round).


67 ABBOTT, supra note 21, at 37. The 1994 GATT retains a historical tolerance for RIA formation. Id.

68 See WORLD BANK, GLOBAL ECONOMIC PERSPECTIVES, supra note 4, at 141 (discussing the difficulty of RTA examination). For a discussion of the operation of the CRTA in general, see MATHIS, supra note 10, at 227-258. It should be noted, however, that Article XXIV compliance may improve slightly, though not sufficiently, as a result of the Understanding's specific discussion of RTAs' relationship to the WTO's Dispute Settlement Understanding. The Dispute Settlement Body ("DSB") is starting to have an impact on Article XXIV jurisprudence. See, e.g., WTO Appellate Body, Report on Turkey--Restrictions on Imports of Textile and Clothing Products, ¶ 58, WT/DS34/AB/R (Oct. 22, 1999) [hereinafter Turkey Case] (appealing panel finding disallowing restrictions inconsistent with GATT 1994), available at http://www.worldtradelaw.net/reports/wtoab/turkey-textiles(ab).pdf. Perhaps of significance is that the DSB can address issues unresolved by the WTO members. An example is that it was long considered an issue as to whether Article XXIV merely provided an exception to Article I (MFN)—the DSB has suggested that is not the case. Id.
compliant, while there are many that are not even notified to the WTO.69 Most recently, WTO negotiations are attempting to examine the RTA rules yet again. That effort is largely focused on transparency70 and on some substantive issues.71 It is unclear, however, just how successful these negotiations will be, though on their own it appears unlikely that they would have an impact on the institutional concerns raised in this Article. Accordingly, just as GATT’s Article XXIV was much abused by GATT signatories, we now see the same pattern within the WTO.72

4. AN INSTITUTIONAL CRITIQUE OF RTAS—CONFLICT CREATION, RESOURCE DIVERSION, AND DIMINISHING STATE WTO ENTHUSIASM

As a mechanism to control RTAs, Article XXIV has proven weak and irrelevant over the decades, despite recent reform.73 In part, this is because Article XXIV only focuses on the economic aspects of RTAs.74 Certainly, the usual critique of RTAs concerns

69 See Hafez, supra note 7, at 916-17 (describing the current RTA examination process as being ineffective); World Bank, Global Economic Perspectives, supra note 4, at 29-30 (noting that the notification requirement has “enjoyed only inconsistent compliance”).

70 This is likely to include a greater role for the WTO Secretariat and greater detail required in the notification process. World Bank, Global Economic Perspectives, supra note 4, at 142-43.

71 While very early on in this process these issues are likely to include greater specification of product coverage requirements and to broaden the understanding of the concept that RTAs do not result in greater protectionism to include Non-Tariff Barrier (“NTB”) issues, such as anti-dumping policies. See id. (listing issues under consideration); see also CRTA Website, supra note 66 (describing the work of the CRTA).

72 See World Bank, Global Economic Perspectives, supra note 4, at 141 (discussing RTAs and WTO disciplines); Mathis, supra note 10, at 122-23 (discussing the difficulty the WTO encounters interpreting Article XXIV).

73 Perhaps it was because prior to the creation of an international trade organization with real power, as opposed to GATT’s diplomacy-oriented approach to international trade, there was not the same conflict we see today. Similarly, prior to NAFTA and the strengthening of the EU in the first half of the 1990s, RTAs were simply not the force they are today. See Sungjoon Cho, Breaking the Barrier Between Regionalism and Multilateralism, 42 Harv Int’l L.J. 419, 428 (2001) (“[A] strong economic, rather than political, motivation for the formation of an RTA is key to its success.”).

74 For the requirements of Article XXIV are at first definitional, and then are focused on the trade distorting effects — too great a trade distorting effect and the RTA could, theoretically, be denied the exception. GATT, art. XXIV. As noted earlier, this Article will not retread the economic critique, the most common critique of Article XXIV and of RTAs in general, though it has been suggested that an economic critique of RTAs will, however, at the end of the day be inconclusive.
their economic impact on the world trade system.\textsuperscript{75} Almost all the literature critiquing RTAs' relationships with the world trade system have focused on economic issues, despite the fact that the economic impact of RTAs on the multilateral trade system is far from clear.\textsuperscript{76} Nonetheless, consistent with these critiques, the response of the multilateral system to the problem of RTAs, first through the GATT and now through the WTO, has been economic. This response has been an attempt to control RTA formation so as to minimize the economic harm while maximizing the economic benefit.\textsuperscript{77} As a result, RTAs could well be formed "willy-nilly" so

\textit{See} Bhala, supra note 11, at 305 (noting that "it depends" is probably the true answer as to whether RTAs are beneficial); see also Jackson (1969), supra note 47, at 621 (stating that economists are uncertain about regional arrangements such as GATT); Frankel, supra note 6, at 208 ("[F]rom the standpoint of static economic welfare, trade economists are in fact ambivalent about the desirability of RTAs . . . .")

\textsuperscript{75} The many sources cited in this Article are a testament to this proposition — for only in small part, if at all, do they discuss noneconomic critiques of RTAs, and rarely, if ever, the institutional aspects of the relationship between RTAs and the multilateral system. Other noneconomic, yet not institutional criticisms of RTAs, include the idea that preferential systems like RTAs are just disguised imperialism — the idea being that RTAs tie smaller or weaker countries to bigger or more powerful ones, forcing the weaker or smaller state to orient its trade to the other even as the other state is free to do what it wants. The bigger or more powerful state can do this because its trade with the smaller is really of no great impact on its trade flows and structures. See Lawrence, supra note 37, at 3 ("Major regional arrangements could be dominated by considerations of market power . . . .") ; Mathis, supra note 10, at 20 (describing international trade preferences as an expression of modern imperialism). Another noneconomic critique of RTAs is that engagement in an RTA shows favoritism — that it shows "who your friends are" — to the detriment of cordial relations with other non-RTA countries. See Charles Roh, \textit{Regional Trade Organizations: Strengthening or Weakening Global Trade, Remarks Before the American Society of International Law (Apr. 7, 1994), in 88 AM. SOC'Y INT'L L. PROC. 309, 309 (1994) (stating that one of the reasons the United States has over the years refrained from free trade agreements was to avoid having to "look as though we were choosing from among our best friends"). Indeed, it was suggested that this reason, avoidance of a "slap in the face" to non-RTA allies, was one of the reasons the United States avoided RTAs until relatively recently. For other critiques of RTAs, see Cho, \textit{Breaking the Barrier, supra note 73, at 430.}

\textsuperscript{76} See discussion supra note 75; see also Cottier, supra note 14, at 154 (discussing the little impact of RTAs on trade flows due to the already low tariff levels in existence, the fact that agriculture is rarely covered, and the significant issue of NTBs and other trade distorting government actions (and that these issues are not covered well in RTAs, but rather at the multilateral level, and that absent a move to federalism there is a limit on what regional arrangements can accomplish)).

\textsuperscript{77} See, e.g., \textit{World Bank, Global Economic Perspectives, supra note 4, at 111-115 (presenting a collection of suggested reforms to Article XXIV that are all economic-based proposals).}
long as the economic criteria are addressed. However, this focus on economic solutions to RTAs, embodied in Article XXIV and its jurisprudence, fails to consider the noneconomic harms of RTAs, and, in particular, the institutional impact of RTAs on the WTO.

Furthermore, while Article XXIV’s economic focus may have been appropriate in the post-war economic and political environment, it is far from clear that this focus works today. The trade environment today is radically different from that when the GATT and its Article XXIV came into being in 1947. Today, the general tariff levels are a bare fraction of what they were fifty years ago. NTBs and other trade-related issues such as intellectual property, investment measures, and services, are being tackled, and there is a concerted effort to improve members’ transparency. Furthermore, reflecting its formal institutional character, the new WTO employs a dispute settlement body (“DSB”) with serious powers to authorize state retaliation for violations of WTO agreements. Yet, even as new sectors and issues are addressed by the WTO, RTAs remain largely unregulated by the weak Article XXIV. Furthermore, the one modernization to the regulation of RTAs, the Understanding, falls short of any real practical effort to control RTAs. It especially fails to reign in the growing institutional impact of RTAs on the WTO.

Additionally, certain trends of the WTO and international institutions suggest that the WTO’s institutional health is more fragile than many would believe, and that the unprotected threat from the RTAs could strike the fatal blow. This is not to say that the WTO

78 Indeed, a question is raised whether the exception permitting RTAs was really suitable to a multilateral trade institution. With the birth of the FTA movement in the 1980s, starting with the IUSFTA and then the CUSFTA, a legitimate question may be whether Article XXIV responded sufficiently to RTAs so as to stave off the RTA’s role in the institutional demise of GATT. That question inevitably leads to the present issue of whether the harder WTO is not now feeling that pressure and whether it will survive the conflict.

79 World tariff rates have dropped from an average of 40% to below 5%. WORLD BANK, TRADE BLOCS, supra note 14, at 101.


81 Furthermore, in a post-cold war era, the modern economic superpowers (Japan, EU, United States, and perhaps China) are not under pressure to remain united, as they were when facing communism or the common enemy of the Soviet Union. Thus, they may be less committed to multilateralism and may seek their own regional goals at the expense of multilateralism. MATHIS, supra note 10, at
will disappear, so much as it would become irrelevant.\textsuperscript{82} Large organizations like the WTO that, for the most part, run on consensus or that provide even the smallest member with equal voting powers (thereby allowing the formation of blocs to defeat change) are particularly vulnerable.\textsuperscript{83} Thus, the WTO's institutional vulnerability demands that institutional threats be addressed.\textsuperscript{84} The first step in addressing this issue is to identify and explore the contours of the specific institutional threats.

4.1. Conflict Creation

Conflicts occur whenever different legal systems or different rules apply concurrently to an issue. Indeed, the concept of conflicts of laws is sufficiently serious and widespread that it is considered a separate and distinct part of legal analysis—whether as private international law or, as it is called in the United States, conflicts of laws. Considering RTAs and the WTO to be separate systems and jurisdictions,\textsuperscript{85} it should come as no surprise that there

\footnotesize{133-34.}

\textsuperscript{82} Such irrelevancy may be akin to that which some have claimed is the case now with the UN General Assembly. While not commenting on his substantive conclusion, President George W. Bush's speech to the General Assembly before the recent Iraq War raised it as a legitimate topic of conversation. See President George W. Bush, Remarks at the United Nations General Assembly (Sept. 12, 2002) ("Will the United Nations serve the purpose of its founding, or will it be irrelevant?"), available at http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html.

\textsuperscript{83} See generally WTO Agreement, supra note 61, art. IX, X (stating that decisionmaking in the WTO shall be by consensus, that all member nations shall have an equal vote, and that each member state shall have the ability to propose an amendment).

\textsuperscript{84} Perhaps, in part, the failure of Article XXIV to respond to an institutional threat is related to the fact that Article XXIV was originally a part of GATT—an agreement, not an institution. Article XXIV was created and grew out of the period in which there was no clear world trade institution. Of course, even though GATT was not an institution, by its end it shared many of the properties and characteristics of an institution. Still, the early RTAs were formed often, with institutional structure, when the overarching body to regulate them had no official institutional frame. This changed with the creation of the WTO—an institution. Given the modern institutional structure of the WTO, perhaps this Article's examination of an institutional challenge is more timely than such an examination would have been in the GATT period before the WTO. Indeed, perhaps Article XXIV, while appropriate for GATT, fails to provide all that is necessary in the era of proliferating trade institutions—regional and multilateral.

\textsuperscript{85} Perhaps one avenue would be to consider the RTA systems sub-federal systems (states or provinces) and the WTO system a federal system, as opposed to considering them as unrelated and distinct legal systems. In which case, resort to
would be the potential for conflict between them. Such conflicts, while beneficial in small doses, may otherwise be quite destructive. For example, conflict may cause increased tension between parties or within the system as a whole. Sometimes the conflict may even erupt into a full blown "trade war." Unfortunately, these trade wars can be quite harmful to WTO development by, for example, impeding multilateral negotiations. More specifically, the conflicts between the WTO and RTAs appear in different contexts: during RTA creation; through the application of the RTA's substantive provisions; during the management of the RTA; as a result of the development of RTA jurisprudence; and during the RTA dispute settlement procedures. This section will survey many of these conflicts and their associated harms.

Perhaps the most obvious conflict caused by RTAs is also the one that strikes the greatest threat to the WTO: rampant RTA failure to satisfy Article XXIV and its consequent potential to undermine the very legitimacy of the WTO. Despite the fact that WTO members can only enter into RTAs pursuant to WTO rules, few RTAs appear to be consistent with the WTO's requirements in Article XXIV. Although RTAs may be treated more seriously by the

the jurisprudence of domestic constitutional systems may be enlightening and assist in the examination of the relationship between RTAs and the WTO. It has also been suggested that resolution of the "RTA problem" could come from RTAs and the WTO learning to co-exist, and that the status of RTAs as exceptions to the WTO, and as therefore conceptually inferior to the WTO, should be abandoned. *See* Cho, *Breaking the Barrier*, *supra* note 73, at 452-53 (proposing that the WTO and the RTAs be understood as operating in a non-hierarchical "global trading community"). But that assumes that they can safely exist together as equals. Such an assumption is far from obviously true. Indeed, just as the United States had to force the internal states to be subservient to the U.S. Constitution and federal authority, so too RTAs may need to be reined in by the WTO, under whose auspices they owe their existence. Perhaps the WTO, through a proposal such as the one suggested here, might reinforce the fact that RTAs cannot exist as equals with the WTO, but should rather behave as participants within the WTO process, whose goals and activities must not harm the WTO. Achieving that goal, whether through the Proposal or otherwise, would go a long way to preserving the future for the WTO.

Of course, RTAs may also contribute to conflict elimination—many believe that countries that trade with each other do not fight with each other—but the benefit of the bilateral trade relationship should exist as easily within a multilateral as a bilateral context. *But see* Colin B. Picker, *International Trade as an Tool for Peace: Empiricism, Change, Passion, and the Israeli-Palestinian Conflict* (forthcoming) (arguing that international trade is largely irrelevant to armed conflict reduction).

For example, by generating a greater understanding of the law when working through to a resolution of the conflicts.

*WORLD BANK, GLOBAL ECONOMIC PERSPECTIVES, supra* note 4, at 143-44;
WTO than was the case with GATT, the enforcement by the WTO of the Article XXIV requirements is still insufficient.\(^8\) The very public and repeated failure of the WTO to win this conflict with RTAs casts a large shadow over the WTO and its legitimacy as a "rule of law" international organization. Nor will this crisis of legitimacy be confined solely to the interaction of RTAs and the WTO, but will likely spill over into other aspects of the WTO. This erosion of the world's trust in WTO institutions and rules may prove fatal to the WTO.

At a less prominent level, RTA negotiators will confront WTO-RTA conflicts during RTA negotiations. That conflict may exist as a result of conflicting goals or the government negotiators may have to argue for a conflicting position from that which the state holds within the WTO context.\(^9\) These conflicts may never be resolved, and may be reflected in ambiguous language in the RTA.\(^1\) That ambiguity, in turn, will then likely encourage future conflicts—between RTA members, nonmembers, and with the WTO itself.\(^2\) Indeed, these conflicts may arise despite the fact that RTA members may have appeared to have resolved the issue and ex-

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\(^8\) There is, however, some cause for optimism that these conflicts will be treated more seriously by the WTO. For example, the employment of the DSB in RTA cases is a good sign. See, e.g., Turkey Case, supra note 68, \(\parallel\) 42-63 (rejecting a defense under Article XXIV). The Understanding on Art. XXIV also clarified the relationship of the Dispute Settlement Understanding ("DSU") with RTAs. See Understanding on Art. XXIV, supra note 66, para. 12 ("The provisions of Articles XXII and XXIII of the GATT 1994 . . . may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to . . . free trade areas") (emphasis added).

\(^9\) An example could be concessions on agricultural protections in the RTA, while holding firm against any such reductions within the multilateral process.

\(^2\) Rules of origin are a good example of the trouble that may exist between attempts at harmonizing those rules in the multilateral context, and the resistance to such harmonization within RTAs. See WORLD BANK, GLOBAL ECONOMIC PERSPECTIVES, supra note 4, at 143 (discussing whether rules of origin are a regulation of commerce); WORK OF THE COMMITTEE ON REGIONAL TRADE AGREEMENTS (CRTA) (describing institutional problems from the absence of WTO rules or discrepancies between WTO rules and those in some RTAs) at http://www.wto.org/english/tratop_e/region_e/regcom_e.htm; see also WORLD BANK, TRADE BLOCs, supra note 14, at 72 ("In some cases membership in multiple RTAs creates obligations made in one that contradict those made in others.").
plicitly committed it to the text of the RTA.93

Conflict also arises in the implementation of RTAs. Once the RTA is concluded and the provisions are in operation, the possibilities for conflict between RTAs and the WTO are almost innumerable. Those conflicts may be a result of substantive or competitive factors. Substantively, conflicts between RTAs and the WTO occur because the RTAs include provisions or rules that may suggest different requirements than those in the WTO.94 A perfect example of a substantive conflict between an RTA and the WTO appears in NAFTA, which does not clearly resolve the issue of the relationship between the WTO and NAFTA agreements.95 Two of the very few NAFTA state-to-state disputes were forced to confront this issue,96 an issue still unresolved ten years later.97 An-

93 See, e.g., NAFTA, supra note 34, art. 101, 32 I.L.M. at 297 (establishing NAFTA pursuant to Article XXIV of GATT); id. art. 103(1), 32 I.L.M. at 297 (affirming existing rights and obligations to each other under GATT); id. art. 103(2), 32 I.L.M. at 297 (establishing that NAFTA prevails in the event of an inconsistency).


95 Abbott, supra note 26, at 177-78. See also NAFTA, supra note 34, art. 103(2), 32 I.L.M. at 297 ("In the event of any inconsistency between this Agreement and such other Agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement"). The "otherwise provided" language has caused complications. For example, even though NAFTA came into effect before the WTO, and was drafted before the Uruguay Round results were known, NAFTA possibly incorporated the future, yet unknowable, WTO agreements in certain instances. See id. art. 309(1), 32 I.L.M. at 303 (incorporating GATT provisions); id. at n.5, 32 I.L.M. at 394 (incorporating GATT provisions); id. Annex 702.1, 32 I.L.M. at 370 (incorporating CUSFTA Article 710); see also ABBOTT, supra note 21, at 3.

other example of RTA conflict with the WTO relates to the EU’s preferential arrangements with its former colonies.\textsuperscript{98} That relationship led to a long and full scale conflict in the WTO, with the United States taking charge.\textsuperscript{99} Such conflicts can create or exacerbate serious conflict between the two economic superpowers, and correspondingly impede their ability to work closely together. Furthermore, even when eventually resolved, the effort expended and conflict created is considerable. The consequences can endure for years and shape state and institutional behavior and development. Even leaving aside “tit-for-tat” retaliation, the resolution of one such conflict will not serve to fend off future conflicts between RTAs and the WTO. This is because the substantive provisions of RTAs so often reflect different goals, cultures, and histories.\textsuperscript{100}

Another substantive conflict may arise with respect to negotiations within the WTO when the RTA has committed to negotiate as one unit rather than through the individual state members of the RTA. Achieving consensus is difficult, creates conflicts, and eventually may impede the ability of that RTA and its members to participate in the WTO negotiations.\textsuperscript{101} An example of such a conflict is the unusual dual nature of the EU in the WTO—where both the member states individually and the EU collectively are WTO

\textsuperscript{97} See \textit{Abbott, supra} note 21, at 107, 170, 177–87 (“NAFTA and WTO panels may develop different answers to the same questions arising under the same agreements . . . .”).

\textsuperscript{98} The agreement covering these preferential arrangements had a waiver, Fourth ACP-EEC Convention of Lomé, Dec. 15, 1989, African, Caribbean and Pacific States-European Economic Community, 29 I.L.M. 783, but the issue that was subsequently litigated was the scope of the waiver, as what was outside that waiver would not be covered and would be subject to the MFN. See Fourth ACP-EEC Convention of Lomé, Dec. 9, 1994, Declaration of the Contracting Parties, GATT Doc. L/7604. The Lomé Convention has now been replaced by the Cotonou Convention. See generally Regina Gerrick, \textit{The Cotonou Agreement: Will it Successfully Improve the Small Island Economies of the Caribbean?}, 27 B.C. INT’L & COMP. L. REV. 131 (2004) (describing the Cotonou Agreement).

\textsuperscript{99} See, \textit{e.g.}, European Communities—Regime for the Importation, Sale and Distribution of Bananas (Bananas III), Sept. 25, 1997 (AB WT/DS27/AB/R) (finding violations of GATT Articles XI and XIII).

\textsuperscript{100} Cottier, \textit{supra} note 14, at 153. Thus, resolution of NAFTA’s prohibition on the increase of tariffs conflicting with the WTO Agriculture Agreement’s requirement that tariffs be applied instead of quotas (hence increasing tariffs) will most likely be inapplicable to the next RTAs’ conflict with the Agricultural Agreement’s tariff provisions. This lack of uniformity is an exacerbating factor that is especially troubling—hence the Proposal’s harmonization provisions. See \textit{infra} Section V.

\textsuperscript{101} Abbott, \textit{supra} note 26, at 176.
members.\textsuperscript{102} This internal conflict is especially contentious if the RTA is itself in the process of internal negotiation or reformation.\textsuperscript{103}

As well as creating RTA-WTO, RTA-RTA, and RTA-state conflict, RTAs may also exacerbate conflict between the developed and the developing world. One mechanism that precipitates that conflict is Article XXIV, and it is considered to apply in a more relaxed fashion to developing countries.\textsuperscript{104} Developing countries, then, may more easily achieve preferential advantages, particularly with developed countries. This is particularly problematic, if at the same time as negotiating or working those agreements, the developing countries are able to operate as a bloc to stop WTO development unless their demands are met. As a bloc they will be able to hold out for longer, believing that in the meantime they will be achieving many of their goals through RTAs, particularly RTAs with developed countries. This sort of conflict can seriously retard the development of the multilateral system.

In addition to conflicts arising out of substantive provisions, there will also be conflicts arising from the competition of the marketplace. Most notably, conflict will be generated as a consequence of the fact that RTAs are exceptions to the MFN principle. In other words, states outside an RTA will find their ability to play in the RTA market significantly impeded, and, in the language of GATT Article I's MFN, they will not be favored. This is likely to engender bad feelings and jealousy at being denied access to what may have been, or may be in the future, a lucrative, and perhaps essential,


\textsuperscript{103} This may impact the role of the RTA members in the WTO as they form alliances that they would not otherwise form, or adhere to positions that have more to do with the goals of the RTA or its members than that of the individual country and the WTO. Abbott, supra note 26, at 177.

\textsuperscript{104} See Decision on Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries, Nov. 28, 1979, B.I.S.D. (26th Supp.) at 203 (1980) [hereinafter CSP Waiver] (allowing favorable treatment of developing countries) available at http://www.wto.org/english/docs_e/legal_e/enabling_e.pdf; WORLD BANK, TRADE BLOCKS, supra note 14, at 110-111 (arguing that in practice, developing countries have had "carte blanche" in setting up RTAs under Article XXIV); see also Jackson (1969), supra note 47, at 590 (explaining that during GATT, Article XXIV was applied to developing countries in a "somewhat less stringent" manner); Bhala, supra note 11, at 310-15 (describing the history of the inclusion of special rules on development in the Havana Charter RTA clauses and in GATT Article XXIV).
Such jealousy is easily converted into conflict, despite the fact that it has long been thought that trade between states reduces the likelihood of traditional use-of-force conflict. Certainly, such conflict has existed in the past and was a factor in the increased economic tensions of the 1920s and 1930s. Furthermore, while states will not likely resort to the traditional use of force, there are plenty of other mechanisms for a state to express its displeasure. Thus, the fact that the RTA is regional and exclusive will likely cause conflict.

Another area of "competition conflict" arises when two RTAs compete between themselves as economic units: either for markets, influence, or power within the world trading system. This competition is exacerbated by the overlapping of RTAs' coverage of sectors and territories, the so-called Spaghetti Bowl of regulations of overlapping RTAs. RTAs not only cause "competition conflict" with the WTO, other states, and with other RTAs, but they also, ironically, cause conflict within their own RTAs. For sure, while they have removed much conflict by entering into an RTA, unless that RTA is well created, it is likely to produce its own measure of conflict between the RTA members. Indeed, it may not be possible to create an RTA that will not produce some measure of conflict between states, as the governments of each state seek to maximize the benefits to their constituents. Accordingly, competition, while healthy and necessary in economic markets, must be considered from a slightly different perspective when the competitors are sovereign states, with all the independence of action such sovereignty implies.

In addition to conflicts created during RTA negotiations or during its implementation, conflicts may be created or exacerbated by the differing jurisprudences of the RTAs and the WTO. These con-

\[105\] See Karasik, supra note 8, at 552-53 (noting the examples of Arabs fearful that Israel will benefit from closer economic interaction just as France feared the economic aid the United States sent to West Germany following the Second World War).

\[106\] See, Picker, supra note 86 (manuscript at 5, on file with author).

\[107\] It should be noted that not all RTAs must be exclusive. There has been some discussion of open RTAs—RTAs that allow any state to join. Frankel, supra note 6, at 225, 231, 238-39. But, such open RTAs, to the extent they exist at all, are the exception to the typical RTA. The term is generally associated with the Asia Pacific Economic Forum ("APEC"), though it is unclear just how applicable the term is to that arrangement. Id. at 238 n.5.

\[108\] World Bank, Global Economic Perspectives, supra note 4, at 38-40.
flicts are particularly problematic as the jurisprudence created may have long lasting consequences within each of the arrangements. In reality, those conflicts have formed a significant share of the issues facing both the multilateral adjudicatory body, the DSB, and the RTA secretariats and their adjudicatory bodies. With increased employment of DSUs in RTAs, such conflicts with the WTO will continue to proliferate. We find the conflicts played out again and again within the adjudicatory bodies, confusing the trade community and sowing further conflict in its wake. This is despite the fact that RTAs should complement, not compete with, the WTO.

Of course, RTAs often serve to reduce conflict, but they also create a great deal of conflict. Furthermore, this conflict is created at all stages of the life of an RTA and serves to weaken the multilateral trade institution as a whole: through the creation of the perception of illegitimacy; through the obstacles that conflict places in the way of the development and effective implementation of the WTO; through the role conflict plays in the erosion of state enthusiasm for the multilateral system in general; and by diverting resources from the WTO development process. As the Proposal is structured, it should leave intact the conflict reduction aspects of RTAs while reducing or eliminating many of the conflict creation features of RTAs.

4.2. Resource Diversion

In addition to conflict creation and erosion of states' enthusiasm for the multilateral trade system, RTAs also divert resources from the multilateral trade system to the negotiation, development, and nurturing of RTAs. To the extent states engage in RTA negotiation and development, with its concomitant expenditure of scarce energies and resources, these are resources denied to WTO development. It is not just the formation of RTAs that saps the

109 Abbott, supra note 26, at 177 n.27.
110 Id., at 177-78 n.30.
111 See Turkey Case, supra note 68, ¶¶ 9.163 and 1.186-.187 (concluding that "the objectives of regional trade agreements and those of the GATT and the WTO have always been complimentary, and therefore should be interpreted consistently with one another."); see also, Cho, Breaking the Barrier, supra note 73, at 446-47 (discussing how the objective of trade regionalism lies in complementing the global trading system).
112 This concept, of RTA resource diversion, is not new—it has been discussed before, albeit briefly—too briefly, often receiving no more than a sentence
institutional life-blood of the WTO, but RTAs' ongoing maintenance as well, through their dispute resolution, renegotiation, and amendment processes.\textsuperscript{113} Resources and enthusiasm applied to the development of RTAs or litigation regarding RTAs are consequently resources unavailable for the nurturing of the WTO.\textsuperscript{114}

As an initial matter, it is necessary to explain what is meant in this Article by the concept of resources in the trade system. The issue of resource diversion in this Article is not confined to the usual considerations of national economic sectoral diversion or macroeconomic efficiency traditionally raised when critiquing RTAs. Rather, the resource issue in this Article is strictly concerned with institutional resource issues. While ignored or treated as a minor issue by those involved on the ground in trade matters, as a result of their local and personal perspectives, there is no doubt that there must be a cost to the formation and maintenance of RTAs. Trade agreements are not free; they cost in terms of the resources expended to create and nurture them, including resources inevitably involved in litigation in and about those RTAs.\textsuperscript{115} Indeed, "[r]eserves of administrative skill, political capital, or imagination are finite, if they are devoted to a [RTA] they are not available for multilateral objectives."\textsuperscript{116} True, there may be cost savings for multilateral development as a result of RTA development and maintenance, but those benefits can surely be gained in a less destructive manner.

or paragraph. See, e.g., WORLD BANK, GLOBAL ECONOMIC PERSPECTIVES, supra note 4, at 133 ("proliferating regional agreements absorb scarce negotiating resources").

\textsuperscript{113} See YARBRough & YARBRough, supra note 20, at 20 ("Bounded rationality and an uncertain future make it impossible to write long-term agreements that can govern a continuing relationship without periodic renegotiation; but the potential for opportunistic behavior makes adjustment and renegotiation problematic, since parties cannot be counted on to renegotiate in 'good faith'.").

\textsuperscript{114} See LAWRENCE, supra note 37, at 39 ("Trade policymakers who are negotiating and operating regional agreements will have less time and fewer resources available for multilateral negotiations.").

\textsuperscript{115} FRANKEL, supra note 6, at 214. Such involvement uses up a huge amount of resources. The United States and the EU rely upon assistance from the private sector, a resource not always available in many countries. See generally GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION 160 (2003) (raising the issue that "if the United States and the EC depend on assistance from private firms and trade associations, what does this bode for developing country participation in the system?").

\textsuperscript{116} WORLD BANK, TRADE BLOCS, supra note 14, at 104. See table of different country involvement in WTO litigation in SHAFFER, supra note 115, at 157-58.
The specific resources include the governmental officials in international trade—involving both full and part-time in international trade—budgets of the different offices devoted to the trade system, and may also include nongovernmental participants, such as industry or academic actors. Accordingly, a state’s human resources, governmental and private, may be diverted from the multilateral to the regional trade system. The primary diversion of resources, however, occurs to the state’s own workers engaged in international trade—from the ministers in charge, to the rank-and-file trade negotiators and litigators, to the customs officers on the ground. In this critique each will be considered, for each plays a vital role in the development of the multilateral trade system.

Starting at the “top,” government ministers may find that they spend scarce time and energy finalizing the negotiations of RTAs with both public and private participants. Further, time will be expended shuttling back and forth between capitals working with foreign parties. Of course, the minister must work domestically, visiting with the different branches of government, trying to persuade typically protectionist legislators of the benefits of the proposed RTA. Additional time may also be spent holding public hearings or attending conferences on contentious issues in the RTA. To the extent that the same minister would otherwise have spent that time working on multilateral trade issues, that is time and political capital lost, perhaps never to be regained.

Moving down the hierarchy, to the “worker bees,” involved in the “nitty gritty” of international trade negotiation, litigation, and maintenance, we see the same drain of time and energy. RTAs are particularly time-consuming inasmuch as they require consideration of many detailed issues with different countries, involving different RTAs, with different issues, with different and complex provisions, histories, and cultures. By way of example, an official

117 See generally, Shaffer, supra note 115, at 33, 148, 159 (discussing various resources in the EU and United States which go toward the WTO).
118 Frankel, supra note 6, at 204. Indeed, this resource issue is particularly problematic for developing countries that may not have large resources, private or public, devoted to participation in the world trade system. Thus, very quickly their involvement in RTAs, especially with developed countries, will serve as a significant drain on their limited resources. World Bank, Trade Blocs, supra note 14, at 104. Additionally, developed country negotiating demands may also serve to stretch the capabilities of the much smaller developing country negotiation team. Id.
119 See World Bank, Global Economic Perspectives, supra note 4, at 126.
working on a RTA and assigned the task of resolving dispute settlement issues would have to consider and manage, through the life of the RTA, the following dispute settlement issues: the appropriate rules and procedures; the appointment of the arbitrator rosters; the funding of the dispute resolution institution; the role of the jurisprudence; the reporting of the jurisprudence; the consistency across cases and adjudicatory bodies; the role of the private sector (directly and indirectly in dispute issues); the relationship between the WTO and the RTA’s dispute processes and rules; and collection and maintenance of relevant records. These issues constitute a logistical nightmare and would serve as a significant obstacle to this official’s ability to contribute to the development of the WTO.\footnote{See, e.g., David A. Gantz, Government-to-Government Dispute Resolution Under NAFTA’s Chapter 20: A Commentary on the Process, 11 AM. REV. INT’L ARB. 481, 491–92 (2000) (detailing various obstacles to the dispute resolution process). Furthermore, with different RTAs, states must deal with different fora (geographically and substantively) in the different RTAs’ dispute settlement institutions and procedures. For examples of United States’ adjudication with its RTA partners, see Israel–United States Free Trade Agreement, Aug. 22, 1985, U.S.-Israel, art. 19, 24 I.L.M. 653, 664–65 available at http://www.mac.doc.gov/tcc/data/commerce_html/TCC_Documents/IsraelFreeTrade.html; NAFTA, supra note 34, ch. 20, 32 I.L.M. at 693–99; U.S.-Singapore Free Trade Agreement, May 6, 2003, U.S.-Singapore, ch. 20, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf.} Yet, the issue of dispute settlement institutions is merely one of hundreds of important issues that must be handled for each and every RTA. The aggregate time required to administer these RTAs and their interaction with other RTAs and the WTO is simply astounding.\footnote{Juggling the RTA with domestic law is an additional drain on administrative time.}

This significant resource drain is even apparent with respect to those government, customs, and compliance officials engaged in the on-the-ground movement of trade. The employment of RTAs causes a significant workload increase for those officials. RTAs add levels of complexity that would otherwise be absent.\footnote{See BHAGWATI, A STREAM OF WINDOWS, supra note 11, at 290–91 (discussing his “spaghetti bowl” theory concerning ever-complex rules of origins emanating from RTAs and the negative consequences for government and private industry). But see WORLD BANK, GLOBAL ECONOMIC PERSPECTIVES, supra note 4, at 77–95 (discussing the many ways that RTAs could be employed to bring these costs down—through harmonization—though the Report focuses mainly on a one-RTA model and does not discuss the impact of the different rules on the customs official trying to determine which of many complex rules apply to a good, parts of which come from different states, all of which are in different RTA relationships with the}
ticular, for every product entering the country, these officials must consider the varied rules of origin and special tariff rates (and occasionally quotas), as well as other complex trade issues. This must make, even with sophisticated technology, an already difficult job all the more difficult.\textsuperscript{123} This added workload draws those officials away from the smoother and more efficient interaction of national customs clearance and the WTO's rules and requirements.\textsuperscript{124}

The involvement with RTAs is no minor drain on government resources, even for the most economically developed countries. Typically, states staff their trade offices with a few dedicated specialists operating in a trade office and occasionally in foreign missions. Those officials are then supplemented with specialists from the many other government departments occasionally involved in trade matters. Thus, there may only be a few government officials that have a real feel for the details and complexities of an increasingly specialized set of subfields within international trade law. These workers are then called on to juggle the different issues and alliances involved. Furthermore, because workers change jobs, responsibilities, and advance into different roles (often leaving in place those not competent to handle the work\textsuperscript{125}), and because government administrations often change after elections, the difficult task of administering the many different trade agreements is made all the more complex. And, of course, alongside time and energy resources, there are also expenditures of finite political capital. To the extent government officials expend political capital on RTAs, there may very well be less for multilateral endeavors.\textsuperscript{126} Such a

\textsuperscript{123} See World Bank, Global Economic Perspectives, supra note 4, at 68 (noting that rules of origin are "increasing the burdens on customs services in many countries, and these burdens have consequent implications for trade.").

\textsuperscript{124} The diversion from enforcement and compliance of the WTO's concessions and agreements, must also serve to erode those same multilateral agreements and concessions. This, in turn, impacts the observation of the effectiveness of those multilateral agreements, which in turn has an impact on the provisions of future multilateral agreements.

\textsuperscript{125} See, e.g., Random House Webster's Unabridged Dictionary 1448 (2d ed. 2001) (defining "Peter Principle" as a "satirical 'law' concerning organizational structure . . . that holds that people tend to be promoted until they reach their level of incompetence"—thus resulting in a cadre of incompetence at all levels of government).

\textsuperscript{126} Of course, successful RTAs may "replenish" political capital that can then be expended on multilateral objectives—though the measurement and realization of success in the RTA context is perhaps sufficiently elusive as to undermine the
situation suggests that the drain of time, energy, and knowledge base from the WTO to RTAs must reduce the effective participation of states in the development of the WTO.\textsuperscript{127}

Another diversion of governmental resources away from the WTO takes place at the legislative level. Normally the executive branch of government handles trade matters. The legislatures are, however, often called upon to take part in the ratification process and to implement trade agreements in domestic law and/or to pass the necessary secondary legislation.\textsuperscript{128} This can constitute a tremendous expenditure of time on floor debates, committee hearings, and meetings with administration and private interests. In addition to national governmental bodies, subfederal entities such as the Canadian provinces, may also play a role that varies according to the constitutional and practical divisions of powers within each country.\textsuperscript{129} To the extent these legislative or subfederal entities are engaged in RTAs, that is time away from the busy schedules that could otherwise be devoted to the multilateral system.

A similar diversion of scarce time and political capital from the WTO to RTAs can be attributed to lobbyists and other private parties.\textsuperscript{130} Those participants include industry representatives (lobbyists included), nongovernmental organizations, public interest activists, academics, and think tanks.\textsuperscript{131} Indeed, those non-

\textsuperscript{127} Also, there will be times when, for smaller less developed countries in particular, that but for the RTA work, an official with insufficient multilateral work would be working in a nontrade area for part of the time—and thus involvement in RTAs allows that official to work more in the trade field and so develop greater skills and knowledge to bring to the multilateral objectives of the state. However, such a benefit is offset by the conflicts raised by the obligations and duties of the RTA versus those imposed and required by the WTO. See discussion \textit{supra} Section 4.1.

\textsuperscript{128} An example of this is the recent expenditure of time and effort on the United States–Central America Free Trade Agreement. \textit{See Grassley, Blunt Wants CAFTA Passage in Possible Lame Duck Session, \textit{Inside U.S. Trade}, July 30, 2004, at 31.}


\textsuperscript{130} Grassley, Blunt Want CAFTA Passage in Possible Lame Duck Session, \textit{supra} note 128.

\textsuperscript{131} It should be noted that the level and sophistication of the involvement varies across countries—to such an extent that this resource diversion actually assumes a greater impact than may be obvious in such places as the United States, and even the EU. Indeed, while such a public-private partnership is alive and well in the United States, and emerging in the EU, it is certainly not sufficiently
governmental participants are actively involved in all stages of international trade policy: from assisting with negotiating (usually behind the scenes) to assistance with compliance. Industry is directly impacted by the specific rules of the RTAs, from the private remedies provisions to the supposedly neutral rules of origin in the different RTAs. Private participation is even more significant when there are controversial provisions, for example, on environment or labor. All of the private participants’ involvement with RTAs serves as a significant distraction from their necessary involvement in the development of the multilateral system. After all, private parties, like governments, also have limited resources. To the extent that they work on RTAs, there are correspondingly fewer resources, be it person-power or public relations expenditures, to ensure political or logistical support for the creation and maintenance of the WTO.

Certainly there are arguments that the officials and private participants can do both tasks, and some of them may even do each better as a result of their experiences from the other. Yet, there can be little doubt that if these non-state participants applied themselves one hundred percent to the WTO, the WTO would have progressed much further in its first ten years.

4.3. Erosion of WTO Enthusiasm

Before examining the role of RTAs in the erosion of enthusiasm for the WTO, the concept of enthusiasm must first be defined for purposes of this Article. "Enthusiasm," in this Article, and consis-

present in most other parts of the world. See Shaffer, supra note 115, at 160 (suggesting that developing countries may not have the resources to implement RTAs). It may well be that to the extent there is an industry with sufficient interest and capability to mobilize such a partnership, it would be more interested in RTAs for the benefit of specific markets than in pursuing a global strategy.

132 See generally Shaffer, supra note 115, at 10–18 (describing the role of public and private organizations in implementing international trade policy).

133 World Bank, Trade Blocs, supra note 14, at 104.

134 Grassley, Blunt Want CAFTA Passage In Possible Lame Duck Session, supra note 128.

135 The existence of these RTAs diverts academics’ time to analyze and research RTA issues, when that time and effort may be better directed to assisting in the development of the WTO. This Article would be a perfect example of academic time diverted from the study of the WTO to the study of RTAs—but for the Article’s goal of improving the WTO and protecting it from the institutional threat posed by those same RTAs.
tent with dictionary definitions, means the dedicated and serious support to a cause—in this case, the multilateral system as exemplified by the WTO. "Enthusiasm" includes within the term, the possession of knowledge of the cause and application of one's imagination to that cause. Even before exploring the concept in detail, it appears that the existence of RTAs makes it impossible, definitionally, for states to be both enthusiastic about RTAs and the WTO—as dedication to two different trade relation mechanisms appears not to be possible—at least, not easily possible.

As with conflict creation and resource diversion, RTAs have a pernicious effect on WTO enthusiasm—they are eroding states' and their negotiators' enthusiasm for the WTO. That enthusiasm, furthermore, is not and has not always been guaranteed. Though, today that enthusiasm is even more tenuous in light of the recent challenges facing the multilateral trade system. These challenges include: the fact that the WTO includes more countries than ever before, reflecting a greater diversity of economies and opinions on the future of the WTO; the traditional state power structure in the WTO is more diffuse; the traditional negotiating mechanisms, as exemplified by the "Green Room," are dysfunctional.

136 "(A)bsorbing or controlling possession of the mind by any interest or pursuit"; "ardent interest." The final meaning, though archaic, is still consistent with this Article's use of the term—"extreme religious devotion." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 649 (2d ed. 2001).

137 There are 148 members (October 13, 2004) and 30 "Observer Governments," all of which (with the exception of the Holy See (Vatican)) must start or have started accession negotiations within five years of becoming an "Observer" of the WTO. WTO, Members and Observers, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Apr. 11, 2005).

138 The United States is not the hegemon anymore. Japan, the EU, Brazil, and groupings of countries have stepped up to exert influence and power in the ongoing WTO negotiations.

139 The "Green Room" was a device whereby a small number of interested countries (varying by the issue) would meet in private to hammer out the difficult parts of the trade negotiations at GATT and WTO meetings, presenting the conclusions to the remainder of the GATT signatories or WTO members for their acceptance. Today, there are simply too many WTO members that want to be involved in the negotiations for the Green Room mechanism to work as effectively as in prior times. The system finally broke down at the Seattle Ministerial in 2000. See JEFFREY J. SCHOTT & JAYASHREE WATAL, INSTITUTE FOR INTERNATIONAL ECONOMICS POLICY BRIEF 00-2: DECISION-MAKING IN THE WTO (2000) (exploring issues that arose at Seattle and recommending changes), at http://www.iie.com/publications/pb/pb00-2.htm; see also Cho, A Bridge Too Far, supra note 2, at 241 (discussing alternatives to the traditional great power driven negotiations in the "Green Room").
the trade issues today are more complex than simply the reduction of tariffs on discrete tariff lines; and in an increasingly transparent world, negotiations with their traditionally hidden political costs are now more difficult. Given these realities, it is no wonder that state enthusiasm for the WTO is fragile. That fragility, however, may prove insufficient to fend off the impact of the proliferation of RTAs.

Perhaps the clearest RTA source for this erosion of enthusiasm is simply that states perceive it to be easier and more effective to negotiate RTAs to achieve their specific goals quickly and directly. Given that perception, it would be surprising if that enthusiasm was not eroded. Another significant factor in the erosion of WTO enthusiasm is the fact that the proliferation of RTAs may itself cast doubt on the WTO's underlying rationale, its legitimacy, by undermining the multilateralism for which it stands. That legitimacy is further eroded when states consider the failure of the GATT, and now the WTO, to police RTA compliance with Article XXIV. This continuing failure casts serious doubt about the WTO's commitment to a multilateral Rule of Law. The knowledge that

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140 See generally Cho, A Bridge Too Far, supra note 2 (discussing the many-faceted reasons for the present negotiating impasse).

141 See ABBOTT, supra note 21, at 155-59 (surveying economic analysis of RTAs, suggesting considerable uncertainty about the economic implications of RTAs). There are economic studies and modeling that at a theoretical level support the proliferation of RTAs, though with changes in the modeling parameters, the opposite conclusion can be reached. See WORLD BANK, GLOBAL ECONOMIC PERSPECTIVES, supra note 4, at 34 (surveying the impact of RTAs). This ability to change parameters to get the result desired, brings to mind President Truman's search for a "one-handed economist." See The Princeton Review, Major: Economics, at http://www.princetonreview.com/college/research/majors/funfacts.asp?MajorID=86 (last visited Apr. 11, 2005).

142 Jagdish Bhagwati, Beyond NAFTA: Clinton's Trading Choices, FOREIGN POL'Y, Summer 1993, at 155 (contrasting NAFTA and GATT); see also Hilaire & Yang, supra note 40, at 622 (discussing bilateralism).

143 Cho, Breaking the Barrier, supra note 73, at 451-52; see also, Karasik, supra note 8, at 541 (supporting the assertion of bilaterism).

144 See KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 275 (1970) ("The effort to attain precision and to force future arrangements into Article XXIV's mold proved to be...a failure, if not a fiasco.").

145 See id., at 275 (discussing serious ambiguities in Article XXIV); see also Kevin A. Wechter, NAFTA: A Complement to GATT or a Setback to Global Free Trade?, 66 S. CAL. L. REV. 2611, 2614 (providing history of early GATT failure to enforce Article XXIV against some of the early and important RTAs).
RTA rules that are opposite to the general WTO rules can survive challenge will lead a trade negotiator to question the benefit of negotiating global rules that will be diluted by the ever increasing legions of RTAs around the world.

The erosion of enthusiasm for the WTO may also be caused by an excessive focus on RTAs by local policy makers, academics, and government civil servants busy concentrating on putting RTAs into operation. Consequently, those policy makers will have less enthusiasm for the WTO as they are fixated on the RTA. For example, in the EU, there is considerably more knowledge and involvement (enthusiasm) with EU law than that of the WTO—despite the centrality of the WTO to the EU and convergence in much of the substantive parts.\textsuperscript{146} Similarly, a comparable loss of enthusiasm for the multilateral treatment of specific substantive trade issues may be associated with the fact that those issues are being developed within RTAs. Examples could include competition law or labor issues.\textsuperscript{147} The treatment of such issues in RTAs likely makes it harder to mobilize support for their inclusion in the WTO. This is a problem for the WTO, to the extent one believes such efforts should proceed through the WTO.

As mentioned infra Section 4.1., the many conflicts created by the negotiation for and operation of RTAs also serve to reduce enthusiasm for the multilateral system. This occurs not only because there may be a reduction in support for any multilateral system that allows RTAs to create such conflict, but also because of the consequences of the conflicts themselves. States may be reluctant to be involved in the negotiation of new WTO agreements that may place the state in conflict with many different and already op-

\textsuperscript{146} J.H.H. Weiler, \textit{Cain and Abel-Convergence and Divergence in International Trade Law}, in \textit{THE EU, THE WTO AND THE NAFTA} (J.H.H. Weiler ed., 2000). But, note that the World Bank Report asserts that "neither the EU nor the United States seem to be less disposed toward multilateral negotiations because of their RTAs or the RTAs of other." \textit{WORLD BANK, GLOBAL ECONOMIC PERSPECTIVES}, supra note 4, at 134. But the same study then suggests that the evidence and studies do not provide support for either view of the impact of RTAs on multilateral negotiations. \textit{Id.} at 136. Also, the Report's study of United States actions post-Cancun in pursuing RTAs suggests that the United States is less committed to multilateral negotiations than it would otherwise be in the absence of such RTA possibilities. The Report then suggests these negotiations have not impacted the United States' involvement in the WTO negotiations—though it is hard to believe how that could be in light of the finite level of resources available, even for such a large country as the United States. Similarly for the EU. \textit{Id.} at 136-37.

\textsuperscript{147} These two examples are ably dealt with in RTAs: competition law being dealt with in the EU and labor issues in NAFTA. \textit{See supra} note 95.
erational RTAs. Similarly, a state, if a member of an RTA, may end up in a conflict with the WTO as a result of any new developments in the WTO. Thus, the benefits of the RTA may be lost when multilateral obligations “kick in.” This will then lead to opposition to the multilateral negotiations by those that benefit from the RTA.\textsuperscript{148} Similarly, the other institutional threat of RTAs, resource diversion, discussed \textit{infra} Section 4.2., also plays into the decline of WTO enthusiasm. The loss or diversion of resources makes state enthusiasm for multilateral negotiations particularly difficult. Overworked government or private parties, covering too many different issues, will likely find it difficult to muster sufficient enthusiasm for the multilateral trade system.

Some loss of enthusiasm is also related to a state’s domestic constituencies, many of whom are vital partners in the development of a state’s trade policy. For example, once an industry gains from an RTA, that industry may be less enthusiastic to provide its valuable support for multilateral agreements. This may occur as a result of the industry achieving its international trade goals through the RTA or because it perceives that the multilateral efforts may actually reduce the benefits it already received in the RTA. This latter situation may even lead the industry to work against further development of the multilateral trade system. Furthermore, the industries’ reduced enthusiasm, when characterized as concerns about employment and tax contributions, will quickly spread to policy makers.\textsuperscript{149}

This loss of enthusiasm, like so much else in the institutional battle between RTAs and the WTO, feeds itself and ends up in a vicious circle. For example, it may very well be the case that states, particularly smaller states, that are disillusioned with the pace of development of the WTO, will assertively negotiate RTAs to send a clear signal to WTO negotiators that either the pace of WTO development is too slow or that their interests in the WTO are not being represented.\textsuperscript{150} But those RTAs then capture the enthusiasm of those states, further diverting their enthusiasm away from the WTO. These reductions add incrementally to the lack of enthusiasm that then sends other states to the RTA negotiating table, perceiving that they should abandon the failing multilateral for the bi-

\textsuperscript{148} FRANKEL, \textit{supra} note 6, at 215.
\textsuperscript{149} \textit{Id.} at 215-216.
\textsuperscript{150} See, \textit{e.g.}, Karasik, \textit{supra} note 8, at 534 (describing negotiations between Arab nations and Israel).

https://scholarship.law.upenn.edu/jil/vol26/iss2/2
lateral stage.\textsuperscript{151} In the process, those states will be unlikely to pro-
fer concessions at the multilateral negotiations, preferring to save those concessions for bilateral negotiations, to the further harm of the WTO.\textsuperscript{152}

Accordingly, the many causes and factors in reducing the world’s enthusiasm for multilateral trade developments is serving to seriously undermine the WTO. That loss of enthusiasm only tightens the vicious circle of RTA proliferation, undermining the WTO and, in turn, leading to more RTAs, and continuing the cycle. The loss of enthusiasm on its own would not be so harmful to the WTO, but when combined with the conflicts created by RTAs and then with the diversion of resources from WTO development, that harm takes on a significance not otherwise possible.

5. Contours of the Proposal

This Article proposes serious revisions to the WTO’s treatment of RTAs and to the future institutional relationship between RTAs and the WTO. Implementation of the Proposal would harmonize and centrally institutionalize RTAs with the WTO. Each part of the Proposal is intended to address the institutional issues raised as a result of the proliferation of RTAs and the impact of that proliferation on the WTO. A critique of the Proposal is presented infra Section 6.

The Proposal initially provides that “[a]ll provisions of [WTO] Agreements that regulate [RTAs] (and other similar but differently named trade agreements) are amended to adopt the criteria [of the Proposal].”\textsuperscript{153} The Proposal would serve as a formal amendment to the WTO agreements insofar as those agreements impact RTAs. Obviously, the primary provision impacted by the Proposal would be GATT’s Article XXIV. But provisions governing preferential access show up in places other than Article XXIV. For example, the WTO’s General Agreement on Trade and Services (“GATS”) Article V also concerns preferential access.\textsuperscript{154} Another explicit provi-

\textsuperscript{151} It has been suggested that the 1990–1994 upsurge in negotiations and creation of RTAs was a result of the perception that the Uruguay Round would prove inconclusive. Cottier, supra note 14, at 153.

\textsuperscript{152} Hilaire & Yang, supra note 40, at 608.

\textsuperscript{153} See, supra Section 1.1.

sion is the "Enabling Clause" of the GATT concerning developing countries. The Proposal's application beyond Article XXIV is necessary to ensure all provisions governing preferential arrangements are covered. Failure to include all such issues would leave a big hole of which countries would quickly take advantage. The waiver provisions may be employed in this regard; therefore, although developing countries should be afforded all possible accommodations, relevant development policy provisions in the WTO agreements should, nonetheless, also be covered by this Proposal. Finally, the Proposal takes into account the variability in the names of such agreements, from "Free Trade Agreements" to "Preferential Trade Agreements" to "Customs Union," and seeks to apply to all. Thus, the first provision is intended to provide as wide a coverage as possible for the Proposal by seeking to eliminate all technical difficulties with its coverage and to cover all relevant provisions of the WTO.

Part 2 of the Proposal provides that "[f]uture RTAs and ones presently under negotiation are permitted only to the extent they comply with the provisions" of the Proposal and that "[e]xisting RTAs are to be amended to include the provisions [of the Proposal] over a phase-in period of five years." This provision is intended to deal with the treatment of existing RTAs. This is not an consequential number of agreements, presently over 230. Indeed, the sheer number and coverage of existing RTAs suggests that reform of Article XXIV must apply to extant agreements, not just to future agreements, or else the Proposal will not come close to achieving its goals.

Just as the original GATT encountered serious opposition with respect to provisions already in force in countries, so too will this Proposal. The issue is complicated as many RTAs have been im-

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155 GSP Waiver, supra note 104; see also WORLD BANK, TRADE BLOCS, supra note 14, at 110-111 (stating that the "Enabling Clause" is a complication for developing countries). For information on the WTO's development provisions, see generally Colin B. Picker, Neither Here nor There-Countries that Are Neither Developing nor Developed in the WTO: Geographic Differentiation as applied to Russia and the WTO, 36 GEO. WASH. INT'L L. REV. 147 (2004).

156 Indeed, not only does the proposal not hurt developing countries, it may even make their position better by relieving them of the institutional pressure of participation in these regimes. It also, by making negotiation easier, would have the impact of making it easier for developing countries to enter into RTAs.

157 See supra Section 1.

158 See supra text accompanying note 4.

159 See Protocol of Provisional Application of the GATT, Oct. 30 1947, 55 https://scholarship.law.upenn.edu/jil/vol26/iss2/2
implemented through national legislation that was difficult to pass at the time, and may require new legislation to change. A phase-in period is consequently a necessary compromise. Of course, for some RTAs it may prove too complicated to force change, especially for those RTAs that have moved beyond being trade agreements; where the RTA constitutes a step on the way to political union or federalism as is the case with the EU. Rather than carve out exceptions within the Proposal, exceptions should be covered through the waiver provisions discussed below.

The real heart of the Proposal is its treatment of those RTA rules and jurisprudence that are inconsistent with the WTO. The Proposal provides that "[w]here RTA provisions are inconsistent with WTO Rules, WTO Rules shall be supreme."160 This provision of the Proposal is intended to deal with much of the conflict and resource diversion discussed above.161 Accordingly, harmonizing those provisions, by bringing the many different provisions into line with the WTO, will eliminate much of the conflict and resource diversion, and correspondingly stem the continuing erosion of enthusiasm for the WTO.162 The rules covered would, however, only be those where there is clear inconsistency between the WTO and the RTA provisions or where the inconsistency is likely to lead to real conflict. The Proposal's additional suggestion to employ the CRTA to identify those provisions that are or will cause such conflict is an attempt to ensure that the harmonization proceeds at the level least likely to disrupt the individual character of the RTAs. Finally, the committee's involvement should reduce the likelihood that the endeavor would reduce trade liberalization between RTA partners where such liberalization is not institutionally harmful to the WTO.

Simply harmonizing the various RTA rules, however, is insufficient in light of the role that RTA adjudicatory bodies and their decisions now play in the development of RTAs. Indeed, the decisions of those bodies are increasingly reported and published, creating a jurisprudence that can be as significant as the RTA's sub-

160 See supra Section 1.
161 FRANKEL, supra note 6, at 239.
stantive rules themselves. While as a formal matter RTA and WTO cases, and international law adjudication in general, have no formal weight as precedent, the truth is that they are treated functionally the same way that cases are treated in the common law world. Consequently, it is more important than ever that a degree of jurisprudential consistency is brought to bear across the many international trade regimes. Accordingly, the Proposal provides that "The WTO's DSB is either to be employed as the final arbiter of RTA disputes or to supplant alternative arbiters completely" and that when deciding those "cases the [WTO] DSB shall employ WTO jurisprudence to the extent of any inconsistency with the RTA jurisprudence." The Proposal consequently takes this emerging "case law" into account, essentially creating a uniform international trade jurisprudence. This provision, and the other harmonization provisions, would firmly bring the RTAs into the WTO, under the guidance, control, and direction of the WTO.

Having dealt with the substantive conflicts among RTAs, the Proposal next considers explicit institutional challenges posed by the proliferation of RTAs. The Proposal provides that "[w]hen negotiating on RTA matters the Member government officials should work in cooperation with the WTO Secretariat throughout RTA negotiations and disputes to ensure consistency and compliance with the WTO." While the WTO Agreements presently require some interaction with the WTO, that interaction takes place mainly when RTAs are formed or undergo explicit amendments. WTO members are presently obliged to provide information to the newly

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165 See supra Section 1.

166 Id.

167 See supra Section 1.4.A.
created CRTA and respond to its critique of the planned RTA.\textsuperscript{168} Additionally, if there are any changes to an RTA, the CRTA must be informed, and may once again subject the RTA to its recommendations.\textsuperscript{169} The Proposal goes beyond the issue of RTA formation by requiring that the WTO be involved in all aspects of an RTA’s life. The Proposal ensures transparency of the RTAs, at all stages of their development.\textsuperscript{170} The Proposal allows the WTO Secretariat to follow the RTA’s development and to suggest where an RTA may be straying off course. But the Proposal goes further and provides that the “WTO Secretariat shall consider ways in which it can assist RTAs with their institutional needs, including offering the use of the WTO Secretariat to meet those RTA institutional needs.”\textsuperscript{171} There would hence be the possibility that RTAs would employ the WTO Secretariat for the RTA’s institutional needs. By using the Secretariat for the regulation and management of RTAs, significant resource savings will occur for RTA members, who would otherwise have to maintain a costly presence in the many different countries where many different RTA Secretariat or institutional structures are located. These savings should make it easier for resource-strapped developing countries to engage in more efficient and effective RTAs. Having the institutional structure centralized will also assist in ensuring that RTAs remain consistent with the WTO’s requirements.

Recognizing the value of RTAs as the “laboratory” of trade policy, the Proposal provides for exceptions “[i]n order to facilitate innovation.”\textsuperscript{172} The Proposal also takes into account the fact that customs unions are conceptually different as well, by providing an exception for “arrangements suggesting significant integration of

\textsuperscript{168} Committee on Regional Trade Agreements, Decision of the General Council of 6 February 1996 [hereinafter “Terms of Reference of the CRTA”], WT/L/127, available at http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Mar. 4, 2005); see also WTO Understanding on Art. XXIV, supra note 66; MATHIS, supra note 10, at 131 (describing the CRTA as a “standing review committee for regional trade agreements”).

\textsuperscript{169} Understanding on Article XXIV, supra note 66, § 11; Terms of Reference of the CRTA, supra note 168.

\textsuperscript{170} This would respond to the World Bank’s suggestion of greater transparency of RTAs. See THE WORLD BANK, GLOBAL ECONOMIC PROSPECTS, supra note 4, at vii (proposing to “increase transparency by empowering the WTO to collect and regularly make public full details of all arrangements”).

\textsuperscript{171} See supra Section 1.4.B.

\textsuperscript{172} See supra Section 1.5.A.
members' economies and political structure.\textsuperscript{173} Those exceptions, however, are applied through a waiver, which itself requires "a two-thirds approval of the WTO membership, following recommendation of the \ldots CRTA."\textsuperscript{174} The two-thirds requirement is a reasonable, but not too high, hurdle for RTAs to overcome in order to receive the waiver.\textsuperscript{175} However, the requirement that the CRTA Executive Committee must first recommend the waiver to the WTO membership should allow some control of the waiver process and reduce "log rolling" effects.\textsuperscript{176} Further consideration of the CRTA membership and voting requirement would have to be undertaken to ensure it can perform this important function.

To prevent the waivers from "gutting" the whole Proposal, the waivers are further constrained through the Proposal provision that "[s]uch waivers are presumptively inapplicable to non-customs union arrangements."\textsuperscript{177} This presumption of non-applicability to non-customs union RTAs will strengthen the Proposal, while permitting the special cases of "real" customs unions to be protected from the Proposal. Customs unions, such as the EU, are very different from the majority of RTAs, and the waiver provision of the Proposal states that they are "arrangements suggesting significant integration of members' economies and political structure."\textsuperscript{178} Customs unions in fact, rather than just in name, show a degree of internal harmonization and unification that suggests something beyond the usual RTAs; this may imply that the arrangement is on the path to becoming a confederation or a more permanent and political union. Interfering in those endeavors comes too close to interference in the internal workings of countries, and should generally be outside the scope of the Proposal, although they would still be subject to the requirements unless a waiver is obtained. The presumption against the waiver for non-

\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{175} Compare with the WTO's language on waivers. See WTO Agreement, supra note 61, art. IX (3-4) (providing for waivers in "exceptional circumstances" for a specific period, with review every year). See also GATT, supra note 5, arts. XXIV (10), XXV (5).
\textsuperscript{176} Defined as "[a]pplied in politics to the 'give and take' principle, by which one party will further certain interests of another in return for help given in passing their own measures." BREWER'S DICTIONARY OF PHRASE AND FABLE 655 (Centenary 1970) (1959).
\textsuperscript{177} See supra Section 1.5.B.
\textsuperscript{178} See supra Section 1.5.A.
customs union RTAs, as well as those RTAs that are customs unions in name but not in actuality, also makes the waiver harder for RTAs to obtain by ensuring that the presumption is against and not in favor of the grant of the waivers. Finally, the waivers under the Proposal "may [only] apply for a maximum of ten years, subject to renewal under the same criteria as the original waiver." This time limitation is intended to force a reappraisal of the original waivers in light of the development of the WTO and the RTA over that time period.

Lastly, the Proposal recognizes that its application would be complex. Accordingly, it would create a small Executive Committee of the WTO's Committee on Regional Trade Organizations to consider the issues and to make the initial recommendations to the WTO body as a whole. That body would be representative of the WTO members, but also take into account the special status of the largest exporting economies—in order to secure their support for the Proposal and the committee, as well as to assuage their fears about the powers such a committee may exercise. Furthermore, the two-thirds requirement for the committee's recommendations will also serve as a check on improvident or political machinations reflected in the recommendations.

Certainly, this Proposal may be considered radical. However, it may be that such a radical reorganization of the RTA-WTO relationship is necessary to save the WTO from marginalization. Nonetheless, the specifics of the Proposal raise difficult issues and may likely result in some negative consequences, which are discussed below, with possible mitigating factors juxtaposed.

6. CRITIQUE OF THE PROPOSAL

As an initial matter, it must be reemphasized that this Proposal does not seek to eliminate RTAs, for their contributions and value to the world trading system are undeniable. Rather, the Proposal simply seeks to ensure that RTAs do not work to the detriment of the WTO. RTAs are not a core value of the WTO, and, hence, where there is a conflict between the WTO and RTAs, the Proposal reflects the idea that it is the RTAs that should then be modified so as to reduce or eliminate the conflict. Nonetheless, the Proposal recognizes that RTAs are here to stay, but then seeks to

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179 See supra Section 1.5.C.
180 Cho, Breaking the Barrier, supra note 73, at 452-55.
mitigate their negative impact on the WTO while seeking to retain their benefits. The provisions of the Proposal should not reduce RTAs' ability to assist in regional economic integration, but should enhance peace and security between countries, serve as a laboratory for trade law experimentation, or provide all the other benefits discussed above. As with every change, there will be changes that prove to be problematic. Those potential problems will be discussed below.

Perhaps the most significant drawback could be that the movement towards free trade is chilled through the curtailment of the proliferation of RTAs. To the extent one believes that RTAs promote freer trade, stimulate the development of international trade ideas, and mobilize resources for the goal of free trade, then any diminishment of these roles would be harmful to the movement towards free trade. And indeed, each RTA is a reduction in protectionism and an incremental movement towards free trade, albeit just by those countries within the RTA.181 However, to the extent that RTAs are hurting the WTO, they are themselves an obstacle to free trade. That obstacle exists only to the extent that the impact on global welfare and the move towards free trade is hurt more than the WTO is helped. Figuring out the correct balance is difficult, if not impossible.182 Yet, given that RTAs are an exception to the WTO, any uncertainty on the impact of a trade regulation should be resolved in favor of the WTO.

An incongruous result of the Proposal may be that the WTO itself is hurt. For example, the Proposal will, in the short term, have the opposite result intended as it will force trade policy makers to concentrate on RTAs, adjusting them to comply with the Proposal, thereby diverting them from work on the WTO. But after an initial period of transition, there will be immediate savings in efficiencies and transparencies, and the institutional harm caused by these

181 Indeed, that very limitation does undermine this argument, for every RTA implies the maintenance of protectionism against non RTA members, though the level of protection after the creation of the RTA must not, on average, be greater than that before the RTA was formed. GATT, supra note 5, art. XXIV, § 5 ([The protections provided by an RTA shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the . . . territories prior to the formation of the [RTA]. . . .]); see also Understanding on Art. XXIV, supra note 66, § 2 (clarifying how Article XXIV, § 5's measurements shall be computed).

182 See GATT, supra note 5, art. XXIV, § 5(a) (providing an economic analysis of RTAs).
RTAs will be greatly reduced. A similar situation occurred with respect to the initiation of the Uruguay Round's "sunset review" of Antidumping and Countervailing Duty ("AD/CVD") orders. Initially, there was a significantly increased level of activity in the litigation of the old dumping/subsidies orders, but once the backlog was dealt with, the activity level has abated. Thus, while it may appear that the Proposal's initial impact would be the opposite of that desired, such harm will be short-lived, and quickly offset.

To the extent that RTA formation is chilled by the Proposal, individual states may feel that they have lost the welfare and economic benefits that preferential access provides. However, those are short-term losses, for just as the state may gain an advantage in one market through an RTA, it will consequently lose access to other markets located in alien RTAs. In addition, given the significant proliferation of RTAs, there will be many more markets lost than gained. After all, the idea of multilateral trade and its belief in non-discrimination through MFN supports the concept that in the long term all states will be better off through equal non-discriminatory access to free trade; an ideal that is frustrated by RTAs.

Another critique of the Proposal may be that with rule harmonization, there will be little to gain from being a member of an RTA. Such an argument, however, fails to take into account that much of the benefits of membership in an RTA are not through the RTA's unique provisions, but through the preferential market access—secured through special tariff bindings, rules of origin, and other concessions between the RTA parties. While the Proposal does provide that substantive rules would be harmonized to the extent the rules concern the same issues, the Proposal leaves untouched the level of trade bindings, sectoral coverages, and other reciprocal concessions. Furthermore, to the extent that the RTA is innovative and covers issues and sectors not addressed by the WTO agreements, it is not impacted by the Proposal. Accordingly, the impression that the Proposal eliminates the advantages of RTAs is largely false, and should not, therefore, serve to inhibit

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membership in RTAs.\footnote{One of the comments from the audience at the Bar Ilan symposium suggested that the Proposal would essentially convert RTAs into something akin to the WTO’s Plurilateral Agreements.}

The Proposal may, however, negatively impact private trade participants within RTA member states. With respect to specific businesses, there may be some, though probably not many, that are hurt through lost preferential access to markets based upon harmonized rules or jurisprudence. Though, on balance, there may be parties within the same state that find new markets in previously inaccessible RTAs or that are able to take advantage of newly harmonized rules.

In any event, it is far from clear that the Proposal would chill the creation of RTAs or, in the aggregate, reduce the welfare benefits of a state’s industrial sector. Indeed, the opposite may be true, and there may very likely be an increase in RTA activity and popularity. This effect would be a consequence of the Proposal’s provisions on rule and institutional harmonization which would likely make the creation of RTAs easier.\footnote{See WORLD BANK, GLOBAL ECONOMIC PERSPECTIVES, supra note 4, at 143-44 (discussing harmonization of rules of origin).} RTAs would be easier to form because there would be fewer issues over which countries would disagree.\footnote{The rules of origin issue is a perfect example of a very complex issue that can tie up RTA negotiations as states and participants within the individual states attempt to manipulate the rules of origin to obtain advantages—whereas the rules should simply be there to help the RTA confine the advantages of the RTA to the members themselves, and not be employed to achieve a substantive outcome.} Similarly, the employment of a centralized DSB and Secretariat will make the RTAs less costly and more efficient.\footnote{FRANKEL, supra note 6, at 239-40. After all, if two different RTAs have different patent rules (e.g., whether a patent award goes to the first to file or first to invent) they will find it difficult to join. Id. Indeed, this aspect of the Proposal will further the goals of the Proposal as a reduced number of RTAs “cluttering the international trade landscape” should result in less resource diversion, conflict creation, and erosion of enthusiasm.} Alternatively, though harmonization may lead to the reduction in absolute numbers of RTAs as they join together. RTAs with standard rules would find it easier to work together and eventually merge.\footnote{There is some suggestion that there is not much of this “laboratory effect”}

A related concern may be that the Proposal would result in a “chilling” of RTA innovation. However, with respect to reducing the role RTAs play as the “laboratory of trade policy,” it is unlikely that the Proposal, as drafted, would have that impact.\footnote{The Proposal would not necessarily chill RTA innovation. In fact, it is likely that the Proposal would result in an increase in RTA activity and popularity. This is because the Proposal would make the creation of RTAs easier, and RTAs would be less costly and more efficient. Similarly, the employment of a centralized DSB and Secretariat will make the RTAs less costly and more efficient.}
Proposal's "chilling" effect, if it occurs, would only impact those rules important to the multilateral system and sufficiently common for the CRTA to have determined the necessity of harmonization. The Proposal's harmonization, would not, however, impact real areas of innovation, especially those areas of trade and subjects presently not a part of the WTO, such as labor, competition, environment, and human rights. For those reasons, the Proposal would likely not serve to erode the "laboratory" benefit of RTAs, while any potential chilling effect of the Proposal would likely be off-set by the aspects of the Proposal that make RTAs easier to form and more efficient.

Another perceived issue is that while there may be increased efficiencies enjoyed by the RTAs as a result of the Proposal, the Proposal's increased role for the WTO Secretariat may create an inefficient and bloated civil service. Furthermore, there may be concern that the newly enlarged Secretariat would serve to erode state sovereignty—sovereignty already perceived to be significantly diminished in the modern globalized world. However, to the extent there is any transfer of sovereignty, it is a transfer from RTAs, themselves already the recipient of any sovereignty given up by member states. Therefore, there is no new diminishment of state sovereignty. Furthermore, the sovereignty issue is a "red herring," as countries are constantly agreeing to constrain their behavior through international agreements and through the transfer or delegation of some activities to international organizations such as the United Nations or the Red Cross. Allowing the WTO Secretariat a larger role in RTAs would therefore not be so novel. The other side of this argument, that the Secretariat would become a bloated inefficient body, may have some merit for it is all too often true that organizations evolve into such entities. However, it is not automatic that they should undergo that transformation. Careful monitoring by WTO members could ensure that the Secretariat remains efficient and responsive.

Another broad institutional critique is that the Proposal is unnecessary as the WTO's DSB will serve to protect the WTO. But the DSB is not necessarily a sufficient protector of the institutional

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going on—as there are few "high level integration" RTAs like NAFTA and the EU to provide the new ideas. See Mathis, supra note 10, at 123-25 (noting that "advanced examples of integration are few" in response to the idea that regionalism might allow countries to achieve higher levels of integration). See also Cho, Breaking the Barrier, supra note 73, at 433 ("RTAs tend to provide test laboratories for the multilateral trading system.").

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viability of the WTO in the face of competition from RTAs. The DSB would fail to provide that protection because as a judicial body it focuses on the specific conflicts in the context of a "case or controversy." It is hard to imagine how the DSB would deal with a case involving the institutional issues discussed in this Article. While the DSB may deal with conflicts of rules in specific and narrow contexts, it is unlikely to address diversion of resources or erosion of enthusiasm.

At a more specific level, there are potential issues relating to individual provisions of the Proposal. For example, the waiver provisions may prove to be particularly problematic. The multilateral trade system's experience with waivers and grandfather rights is "checkered," to say the least. The Grandfather Clause of the GATT 1947's Protocol of Provisional Application is the preeminent example of that past, with all of its destructive impact on the trade system in the ensuing decades. For sure, each of the Proposal's provisions could be examined under a microscope and many potential problems identified. Such a detailed critique, however, is unnecessary pending, if ever, any serious consideration of the Proposal's provisions. Until that time, broad criticisms serve the useful goal of furthering the examination of the underlying institutional critique of RTAs.

Perhaps the single most pertinent, and most likely accurate, critique of the Proposal is that it is too radical to be acceptable to the WTO's membership. Consequently, it is unlikely to engender much support among WTO members. Certainly, all proposals for change at the WTO face serious hurdles, especially ones concerning such widespread practices as the use of RTAs. In addition to the usual barriers to change present in an international or-

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189 See PPA, supra note 159, at 308 (providing for immediate application of Article I and II of GATT, while part III of GATT, which includes Articles III to XXIII, is to be applied "to the fullest extent not inconsistent with existing legislation"). The relaxed use of the waiver provisions of GATT also comes to mind, and may be viewed quite negatively by WTO membership in light of the advances in strengthening the waiver provisions in the WTO. See WTO Agreement, supra note 61, art. IX, paras. 3-4 (discussing the granting of waivers of obligations under the Agreement by the Ministerial Conference); JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 55-57, 69 (2d. ed. 1997) (discussing the GATT waiver provisions).

190 See WORLD BANK, TRADE BLOCS, supra note 14, at 111-12 ("[M]ajor political backing for tightening [rules on RTAs] looks improbable . . . .").

191 See, e.g., WORLD BANK, GLOBAL ECONOMIC PERSPECTIVES, supra note 4, at 112 (noting that progress on provisions easing labor force mobility has been limited).
organization such as the WTO, in this case there are additional significant problems. Perhaps the most troublesome barrier to the Proposal is that the two superpowers of the WTO, the EU, itself an RTA, and the United States, are themselves significant users of RTAs. It has even been remarked that they are almost in competition with each other: "What we see when we look at the pattern of regional expansion in the world today is essentially two focal points with concentric circles of preferential trade arrangements radiating outwards—almost as if they were competing to see who can establish the greatest number of preferential areas the fastest."  

Nonetheless, there is merit to proposing such a radical solution to a problem. Like a "straw man" set up to "take a fall" there are advantages to a consideration of the Proposal. By alerting the WTO to this institutional attack, perhaps the WTO may undertake its own examination of these issues and make its own proposals for their resolution. The Proposal here is certainly a radical response to the problem, but then it may set the discussion in motion, and perhaps provide direction to that important conversation. Each part of the Proposal, from the widespread applicability to the waiver provisions, raises specific issues that are of concern to the problem of institutional conflict between the WTO and RTAs. To the extent each provision encounters opposition, the articulation of that opposition is a positive development towards an eventual solution to the problem.

Of course, while the Proposal as a whole may be unacceptable, there is a greater possibility that individual parts of the provision could be acceptable. In other words, the Proposal’s provisions are severable. Thus, for example, the Proposal’s provision requiring WTO jurisprudence to be directly applicable within RTAs, or that the WTO’s DSB would be the final body of appeal of RTA disputes is, perhaps, not so controversial or, even if so controversial, could stand a better chance of being accepted if considered alone. Alternatively, this Proposal may not need to be implemented through amendment of the WTO agreements. Rather there are other avenues available: state commitments, adoption of procedures by the

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192 Matthis, supra note 10, at 132 (quoting Renatto Ruggiero, Address to the Third Conference of the Transatlantic Business Dialogue (Nov. 7, 1997)).

193 A “straw man” or “man of straw” is, among other things, “an imaginary adversary, or an invented adverse argument, adduced in order to be triumphantly confuted . . .” The Oxford English Dictionary 1090 (1933).
WTO Secretariat, or the CRTA could become more involved in the issues raised in this Article. So even though the Proposal as a whole may be unacceptable, there are alternative mechanisms under which the Proposal's goals may stand a chance of acceptance when considered alone.

7. CONCLUSION

While there is no shortage of factors to blame for the slow development of the WTO, this Article has suggested one additional factor: the institutional conflict between RTAs and the WTO. This Article offers a Proposal to respond to this institutional threat. The Proposal suggests substantive harmonization and institutional centralization of RTAs with the WTO. Certainly the likelihood of the adoption of a formal amendment, this one in particular, to the WTO is unlikely, especially one that would require states to act selflessly. Nonetheless, this Proposal and the reasoning behind it may serve to remind WTO members of their obligations to the WTO, and that the WTO is not immortal. The Proposal and the issues raised in this Article should serve as a wake-up call to WTO members. The United States, Europe, Canada, Brazil, China, Japan, Australia, and the other big players should take a stand as parties with the largest global trade and the ones most likely to suffer from the harms caused to the WTO by these RTAs. Additionally, as some of the most significant users of RTAs, they should also take responsibility for their role in this problem and seek to rectify the damage and avert the potential disaster their RTA's may produce.

Of course, there is another route to resolve this battle between RTAs and the WTO. That route would be through the WTO taking into account the reasons for the growth and strength of these RTAs: simply put, its failure to give its members what they want. Unfortunately, the desires of its members are far from uniform and are often mutually exclusive. Broadly speaking, for the developing world, those demands include reform of agriculture policies, intellectual property protections that take into account the realities of developing countries' needs, and so on. But then, and also broadly speaking, the demands of the developed world include a faster pace of liberalization, reduction of NTBs, expansion into new and related areas such as competition law, and so on. Although progress on these issues is almost as unrealistic as the Proposal itself, perhaps the Proposal, when compared to the alternatives, is the
least harmful way to resolve the issue, and as such may not appear so unrealistic after all.