Global Integration and the Complete Public Goods

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I. INTRODUCTION

Chris Brummer's article offers a refreshing perspective in understanding trade regionalism. Borrowing economic insights, Brummer argues that regional trading within regional integration agreements ("RIAs") or regional trade agreements ("RTAs") is a club good. Analogous to a club membership in a swimming pool, members of RTAs share benefits of liberalization and integration exclusively among members (excludability) and one member's utilization of the benefits does not usually affect that of other members (nonrivalrousness) until an oversize membership structure causes congestion and thus results in disutility of members. Yet Brummer's view is that RTAs produce incomplete club goods for two reasons. First, the disparity among members in size and economic power may lead to different congestion points for different members. This heterogeneous congestion departs from a normal club good which exhibits only a single congestion point. Second, the original excludability can be diluted by nonmember freeriding on liberalization and integration benefits. This weak exclusion tends to compromise the exclusive nature of club goods.

My response to Brummer's article is more complementary than critical. Concededly, some of his assumptions and methodology are subject to criticism in that they may be challenged normatively or may fail fully to capture realities. For example, an economic approach toward RTAs, which slights many critical noneconomic considerations in forming and operating them, may be criticized as an attempt to commodify regional trade and thereby debase it. Furthermore,

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these regional trades as social goods may be incommensurable among one another: they cannot be quantified and measured by certain metric units to be compared.\(^3\) Obviously, the purpose of the European Union ("EU") goes beyond a mere economic integration, and so does that of the Association of South East Asian Nations ("ASEAN"). After all, each member of an RTA may have its own unique reasons for joining the club, not only economic but also socio-political.

However, this criticism, albeit legitimate, should not unduly diminish the novel contribution that Brummer’s article makes: exploring a new avenue to grapple with RTAs via a microscopic investigation of intra-bloc dynamics. Rather than delving into inevitable weaknesses that are inherent in his methodology, I will take a different yet highly complementary angle, as the title of this Article may imply. While Brummer’s article mostly concerns an inward-looking analysis of RTAs, my Article takes an outward-looking approach, which his article addresses on a limited scale in its last section.

My main concern in this Article is for the negative externalities ("public bads") which self-fulfilling, self-optimizing RTAs may inflict on nonmembers and the global trading system as a whole. RTAs produce negative externalities vis-à-vis nonmembers in that various costs generated by the existence of RTAs, such as trade diversion or fragmentation of the global trading system, are borne not by members of those RTAs but by nonmembers, and more broadly by the global trading system as a whole.\(^4\) As each bloc seldom considers and internalizes this serious social cost, this collective action problem eventually harms members and nonmembers alike, since RTA members remain part of the global trading system. The history of interwar economic balkanization precipitated by mercantilist competition among regional trading blocs corroborates this reflection.\(^5\)

Markedly, the obverse side of RTA externalities is positive externalities ("public goods"), furnished by the global trading system in which RTAs can be constructive building blocks.\(^6\) A complementary, symbiotic relationship between

\(^3\) Id.

\(^4\) See Warren F. Schwartz and Alan O. Sykes, Toward a Positive Theory of the Most Favored Nation Obligation and Its Exceptions in the GATT/WTO System, 16 Intl Rev L & Econ 27, 46 (1996) (defining negative externalities of RTAs as "a loss of surplus for excluded producers associated with trade diversion and frustrated expectations").


the World Trade Organization ("WTO")\(^7\) and RTAs is capable of realizing public goods for the global trading system. Diffusive effects of trade creation can expand regional trade to global trade, which can further boost regional trade. This virtuous circle of trade creation can, and should, be engineered by multilateralizing RTAs.\(^8\) This holistic approach to breaking the barrier between multilateralism and regionalism is inevitably normative.\(^9\) Although it may be framed as a positive methodology using economic concepts of public goods and externalities, it is normative in that it presupposes what is desirable and undesirable for the global trading system, which is a fundamental question in defining public goods and bads for the purpose of this Article.\(^10\) In other words, it reveals the telos of the multilateral trading system—an integrated and thus sustainable trading system.\(^11\)

This Article unfolds as follows: Section II first situates RTAs against the backdrop of the global trading system in an effort to bring out RTAs’ global implications. Section III highlights certain negative effects of RTAs on nonmembers and the global trading system, and demonstrates how the club goods of regional trade may turn into public bads. In particular, this Section describes three aspects of negative externalities that RTAs may occasion: negative externalities to the global trading system as a whole, those to individual economic players (global businesspeople) within the system, and those to poor nations. In order to address these negative externalities, Section IV suggests multilateralizing RTAs in a way that allows coexistence with the WTO in a coherent fashion. It raises three multilateralizing strategies that reduce or eliminate the preferential features of RTAs: sharing regional liberalization and integration with the outer world (open regionalism), active alliances between and among RTAs (institutional merger), and WTO-consistent interpretation by regional trade tribunals (judicial convergence). Section V concludes that institutionalization, such as RTAs, is only instrumental to the government’s enlightened will to liberalize trade, which should be prioritized.

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\(^11\) Final Act, 33 ILM at 1144 (cited in note 7).
II. PUTTING TRADE REGIONALISM IN PERSPECTIVE: REGIONAL INTEGRATION VERSUS GLOBAL DISINTEGRATION

Brummer's club goods thesis focuses mainly on an internal dynamic of RTA members in particular and regional integration in general. However, this regional integration needs to be put in the broader perspective of the global trading system because no RTA is an island, especially in this highly interdependent world. Although RTAs can affect the global trading system in a positive way via spillover effects of trade creation, history is rife with negative occurrences such as trade diversion and the consequent disintegration of the global trading system. For example, the interwar tussle among regional trading blocs precipitated economic balkanization on a global scale and eventually contributed to the outbreak of the Second World War. In this sense, history eloquently demonstrates that RTAs can be a fatal public bad to the global trading system.

In his classic work on RTAs, Jacob Viner articulated these positive and negative contributions of RTAs to the global trading system. Viner observed that:

From the free-trade point of view, whether a particular customs union is a move in the right or in the wrong direction depends... on which of the two types of consequences ensue from that custom union.

Where the trade-creating force is predominant, one of the members at least must benefit, both may benefit, the two combined must have a net benefit, and the world at large benefits; but the outside world loses, in the short-run at least, and can gain in the long-run only as the result of the general diffusion of the increased prosperity of the customs union area. Where the trade-diverting effect is predominant, at least one of the member countries is bound to be injured, both may be injured, the two combined will suffer a net injury, and there will be injury to the outside world and to the world at large.

The multilateral discipline over RTAs (GATT Article XXIV) corresponds with Viner's observation. Paragraph 4 of Article XXIV both recognizes RTAs' contributions to global integration (the "desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration") and cautions against their potential demerits to the global trading system ("not to raise barriers to the trade of other contracting parties with such territories").

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14 Id (emphasis added).
15 General Agreement on Tariffs and Trade, art XXIV, ¶ 4, 61 Stat A-11, TIAS 1700, 55 UN Treaty Ser 194 (1947) ("GATT").
To guard against these potential downsides, Article XXIV provides internal, external, and procedural requirements that any RTA should meet to remain valid under the General Agreement on Tariffs and Trade ("GATT"). In sum, GATT Article XXIV, drafted after the world learned its lessons from the economic balkanization of trading blocs, envisions RTAs as “building blocks,” or public goods, not “stumbling blocks,” or public bads. Unfortunately, however, this Article has proved to be mostly hortatory rather than fully operative in disciplining RTAs along the lines of multilateral norms. In the absence of legal disciplines, RTAs have exhibited their many dark sides—negative externalities to the global trading system.

III. DARK SIDES OF REGIONAL TRADING BLOCS: CLUB GOODS AS PUBLIC BADS

RTAs may reduce global efficiency by creating multiple inward-looking trading blocs, if trade diversion, which these blocs inevitably generate, fails to be fully compensated by trade creation which they may realize in the long-term. This fragmentation of world trade is an enormous public bad to the global trading community. The flip side of the RTAs’ exclusive, members-only nature is that RTAs divert potential trade from nonmembers and instead replace it with intra-bloc trade. The economic effects of this preferential treatment may be analogous to subsidizing member countries’ producers, resulting in global market distortion. In addition, regulatory heterogeneity from diverging regulatory standards among different RTAs tends to burden the global trading community because it imposes often prohibitive transaction costs on exporters. Last but not least, RTAs often aggravate development concerns by disadvantaging poor countries when they deteriorate these countries’ terms of trade. These three failures of RTAs can be translated into three public bads for the global trading system in that they, like pollution, generate certain social costs to the global trading community without bearing them.

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16 Paragraph 8 of Article XXIV provides that substantially all trade between and among the constituent territories should be liberalized. Id.

17 Paragraph 5 of Article XXIV prescribes that the sum of all tariffs and other trade barriers after the formation of RTAs should not be higher than those before the formation. Id.

18 Paragraph 7 of Article XXIV states that RTA members should notify the GATT of their plans to launch RTAs. Id.

19 For a general discussion, see Cho, 42 Harv Int’l L.J 419 (cited in note 9).
A. NEGATIVE EXTERNALITIES TO THE GLOBAL TRADING SYSTEM

RTAs fragment world trade and thus reduce global efficiency due to their exclusive nature. The classical Vinerian trade diversion has been well-documented, as discussed below. Trade diversion may be too serious to be compensated for by trade creation. A network of RTAs may still create less trade than would otherwise exist under the global trading system.\(^2\) Empirical studies demonstrate that even well-established RTAs, such as NAFTA and MERCOSUR, have eventually been detrimental to nonmembers, failing to realize broader trade creation on a global scale.\(^2\) More seriously, regional trading blocs tend to compete with one another and thus trap themselves in a prisoners' dilemma, as demonstrated by colonialist competition in the early twentieth century.\(^2\)

The main engines powering this fragmentation are the “rules of origin.” The rules of origin create a screening mechanism with which to locate the titular “originating goods”\(^2\) eligible for preferential treatments and thus prevent nonmember countries’ goods from freeriding on such treatments. This labyrinthine set of “technical and seemingly innocuous details” defies any reasonable attempt to comprehend it.\(^4\) Its bizarre complexity derives from the protectionist architecture embedded in RTAs: rent-seeking domestic industries lobby and capture trade negotiators into manipulating the rules in a way that can shield them from foreign competition. Domestic producers want to avoid trade deflection under which nonmembers in the global supply chain take advantage of duty-free access to member countries’ markets.


For example, US garment producers would not allow rivals in one of the NAFTA partners (such as Mexico) to manufacture and to export duty-free competitive shirts and trousers made from cheap yet high-quality Indian yarn. Under NAFTA, those Mexican garment products could enjoy preferential (duty-free) access to the US markets only if the yarn also originated from NAFTA members (“yarn-forward” rule). Due to this arbitrary origin rule, India as a nonmember suffers deeply. Obviously, India’s direct textile exports to NAFTA markets would decrease. Moreover, potential foreign direct investments toward India for the purpose of manufacturing textile and apparel products exportable to the US would be replaced by such investments to NAFTA members.

In addition to trade and foreign direct investment diversion, most RTAs further impede global trade by carving out sensitive products from the list of trade liberalization. Examples abound: the Japan-Singapore FTA (2003) excluded many agricultural and textile products; both the US-Australia FTA (2004) and the Central American Free Trade Agreement (“CAFTA”) (2004) failed to cover sugar; and the Mexico-Japan FTA (2004) left out a number of service areas, such as automobile maintenance services, business services, construction, entertainment, and telecommunication, in addition to traditional sectors such as agriculture, forestry, fisheries, and livestock. These protectionist exemptions are more structural than anecdotal. They tend to “cement domestic constituencies” which will also resist multilateral trade liberalization. Hence, we find yet another dimension of negative externalities to the global trading system in the long run.

B. NEGATIVE EXTERNALITIES TO GLOBAL BUSINESS

The global trading system comprises not only trading nations but also a myriad of individual economic players, such as producers, importers, transporters, financiers, insurers, consumers, and investors. From a practical standpoint, the aforementioned negative externalities to the global trading system...
system are translated immediately into negative externalities to global business. In this regard, a WTO panel aptly observed that:

Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it.\(^\text{28}\)

Recent technological breakthroughs in the areas of communication and logistics have blessed global business with global supply chains in which they can optimize production via global sourcing.\(^\text{29}\) For example, a retailer can purchase fibers from one country, have it sewn, woven, and needled in another country, dyed and printed in a third country, and shipped to its export market. The retailer, a global businessperson, can reduce the production cost dramatically through this global sourcing in comparison with traditional single-source manufacturing. However, the “spaghetti bowl”-like messiness of rules of origin,\(^\text{30}\) which the disarray of numerous RTAs create on account of embedded complexities and uncertainties, seriously deters such global optimization. The same end-product could have different national origins under different rules, and thus could be subject to different tariff rates. Enormous transaction costs are incurred by global business in administering this unfathomable legal mess, let alone the heavy paperwork. Worse, importers might be fined if they submit wrong claims based on incorrect interpretation of rules of origin.\(^\text{31}\) While big companies may be able to afford these enormous risks and transaction costs, small businesses may not internalize such unfortunate negative externalities.\(^\text{32}\)

Another public bad to global business results from the regulatory heterogeneity that proliferating RTAs inevitably create. Many social regulations in areas that most RTAs concern, such as the environment, human health and safety, labor, and intellectual property, often diverge from those covered by

\(^{28}\) Id at ¶ 7.77.


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WTO norms, such as the Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Measures. Each RTA tends to entertain a different type of regulatory capture and thus produces a different structure and different level of regulatory protection. As Michael Malloy has aptly observed, these diverging regulatory jurisdictions among RTAs tend to cause costly traffic like "uncoordinated, regionalized bumper cars [which] carom around the internationalized area." Undoubtedly, this regulatory heterogeneity is a serious obstacle to regulatory convergence at the multilateral level. As a global businessperson, it would be nightmarish to establish multiple production lines for the same product to meet these diverse regulations in different regional markets. This regulatory heterogeneity is yet another costly, often prohibitive, trade barrier to nonmember countries' producers.

C. NEGATIVE EXTERNALITIES TO THE WORLD'S POOREST COUNTRIES

Large RTAs tend to disadvantage small economies and thus exacerbate development concerns in the global trading community. Large blocs create an artificial gain in terms of trade by internal market integration and the consequent economies of scale at the expense of small nonmembers. Therefore, these terms of trade may contribute to uneven distribution of benefits from trade liberalization and a widening income gap between the rich and the poor. This is a serious negative externality to those poor countries which are not members of large RTAs.


35 For example, the EU provides a very strict and sophisticated set of regulations on genetically modified organisms, while NAFTA has no prominent disciplines on the same issue, except for the publication of certain nonbinding advisory reports. See European Commission, From the Farm to the Fork, available online at <http://ec.europa.eu/food/food/biotechnology/index_en.htm> (visited Nov 17, 2007); North American Commission for Environmental Cooperation, Maize & Biodiversity: The Effects of Transgenic Maize in Mexico, available online at <http://www.cec.org/maize/index.cfm?varlan=english> (visited Nov 17, 2007).


38 Id.
Even if poor countries seal bilateral trade deals with rich countries for the former’s protection, these deals may be developmentally pernicious to poor countries as a whole. This somewhat counterintuitive proposition has been demonstrated by a recent study using the Global Trade Analysis Project database.\(^3\) This study has hypothesized that all developing countries sign bilateral trade agreements with rich trading partners, such as the United States, the European Union, Japan, and Canada, and examined whether these developing countries would gain from these deals in the end. The outcome is telling. While the multilateral trade liberalization would create a gain of US$109 billion to developing countries in 2015, bilateral deals would cause them a loss of US$22 billion.\(^4\) More alarmingly, this loss tends to fall disproportionately upon low income countries (US$19 billion), as compared with middle income countries (US$2.6 billion).\(^4\)

IV. MULTILATERALIZING REGIONALISM: TURNING CLUB GOODS/PUBLIC BADS TO PUBLIC GOODS

Under Brummer’s assumptions of RTAs as club goods, RTAs are commodified. The preferential market access that RTAs provide exclusively to members are viewed as goods that can be consumed for certain utility. Two attributes characterize such goods. First, those goods are excludable: RTA members can prevent nonmembers from enjoying duty-free access to their markets by preserving tariffs and other trade restrictions against nonmembers. Second, those goods are rivalrous: “[when] one unit of the good is consumed by one individual, it detracts from the consumption opportunities of others.”\(^4\) However, unlike other “normal” (private) goods, this rivalrousness does not exist in club goods like RTAs until the number of members increases to the point of “congestion.”\(^4\)

A. RETHINKING EXCLUDABILITY

The club model hypothesis encapsulates a fundamental character of RTAs: preferentialism. First, clubbiness is synonymous with excludability, which can be


\(^4\) Id.

\(^4\) Id.

\(^4\) Brummer, 8 Chi J Intl L at 538 (cited in note 1).

\(^4\) Id. Brummer has added that RTAs are “incomplete” club goods in that a single RTA can have multiple equilibria for congestion. Id at 551.
translated as mercantilist reciprocity in that regional market opening (import) is granted to members only in exchange for matching regional market access (export). The underlying logic is that an RTA member "buys" its preferential access to RTA markets as one purchases a swim club membership: by giving other members preferential access to its own market if one pays the membership fee. Nonetheless, this aspect of clubbiness (excludability) is fluid, as Brummer has recognized. For example, RTA members often offer the same preferential trade benefits that they enjoy to certain nonmembers.

Furthermore, if one departs from the underlying rationale of reciprocity in trade liberalization, excludability no longer seems essential. Even without an export, an import alone can bring the importing country a good deal of benefits, such as enhanced consumer welfare. In fact, more trade barriers have been dismantled by unilateral, nonreciprocal trade liberalization than by reciprocal trade negotiations.

An RTA may adopt an open membership without requiring any binding reciprocal concessions of members, as the Asia-Pacific Economic Cooperation ("APEC") example below suggests.

**B. RETHINKING RIVALROUSNESS**

In a swim club model, one member's access to one market does not diminish another member's access to the same market, as long as the former does not inconvenience the other's use of the club. Yet if too many members aim for access to the same market ("congestion"), the original nonrivalrousness assumption no longer works, just as an overcrowded swim club would affect members' full enjoyment of it. Interestingly, Brummer has argued that each member of an RTA would find a different equilibrium of congestion depending on its economic size.

However, the very idea of congestion is yet another brainchild of mercantilism with an entropic vision. It conjures up a limited market space or demands which would be gradually taken away and eventually exhausted by an
increasing number of (mutually crowding) members. However, trade is not a static phenomenon. The total volume of trade is not fixed as of the day an RTA is created. Trade is continuously created as new products and new transactions are added to RTA markets. In other words, there is no cause for congestion in the market because the market itself gets bigger as it develops.

If the notion of congestion is defensible, we should be able to obtain the optimal size of an RTA or the optimal number of members of the RTA. However, this optimality remains largely theoretical, since most RTAs have very limited memberships and seldom expand. When they do expand, their expansion is driven more by long-term economic gains of deeper integration as well as noneconomic considerations such as security, rather than by short-term mercantilist tradeoffs such as congestion. Furthermore, the notion of competitiveness employed to explain congestion is misleading. Competitiveness may apply to individual firms, but not to countries. Even if Country A is stronger economically than Country B in every aspect, Country B can still export some goods to Country A as long as Country B enjoys a comparative, if not absolute, advantage vis-à-vis Country A in some area (for example, labor-intensive goods).

C. CREATING A COMPLETE PUBLIC GOOD: TOWARD MULTILATERALIZED TRADE REGIONALISM

Brummer has submitted that the incompleteness of the club goods nature of RTAs would enhance free trade and global efficiency by allowing freeriders, or nonmembers, to share whatever preferential benefits were originally reserved exclusively for members. However, having considered potential negative externalities that RTAs are capable of imposing on the global trading system, we need to take a more proactive approach. In other words, beyond the point of merely benefiting from RTAs’ inability to exclude others entirely, we should vigorously cultivate various means to multilateralize RTAs to extend inclusiveness. This is tantamount to creating a complete public good for the global trading community. This public good is complete in that it tends to

49 See, for example, European Commission, Enlargement, available at <http://ec.europa.eu/enlargement/index_en.htm> (visited Nov 17, 2007) (“Enlargement is a carefully managed process which helps the transformation of the countries involved, extending peace, stability, prosperity, democracy, human rights and the rule of law across Europe.”) (emphasis added).

50 See id.

51 Multilateral trade norms (WTO norms) operate this multilateralized regionalism in the global trading system. Therefore, those norms constitute an essential element of public goods. See Birdsall and Lawrence, Deep Integration and Trade Agreements at 133 (cited in note 6). Many scholars regard law as a public good in other contexts. See, for example, Stephen L. Pepper, Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering, 104 Yale L J 1545, 1582.
provide positive externalities for both members and nonmembers of RTAs. In this sense, RTAs can complement, not replace, the WTO. The WTO can be a public good to RTAs, and vice versa.

Under this public good model of multilateralized trade regionalism, excludability no longer exists, since the barrier between an RTA and the outer world is broken. While RTAs facilitate and promote regional liberalization and integration among geographically proximate nations, benefits from such liberalization and integration may be shared by nonmembers. When an RTA merges with another to form a larger RTA, the previous excludability tends to decrease to the extent that the new RTA has more members than any prior RTA. This results in a smaller degree of fragmentation of the global trading system, creating an institutional merger. Rivalrousness due to congestion is also unlikely, since regional trade is continuously created as it is integrated into global trade. In fact, the volume of intra-bloc trade tends to decrease and that of inter-bloc trade tends to increase as an RTA become more mature.\footnote{See Cho, 42 Harv Int'l L. J at 433 (cited in note 9).} Finally, even when the aforementioned modes of institutional multilateralization are not available, some type of convergence or coherence in judicial practices or jurisprudences between the RTA tribunal and the WTO tribunal can mitigate negative externalities of RTAs, and can produce positive externalities by providing the global trading system with more predictability.

1. Open Regionalism

Multilateralization begins with breaking the hermetrical nature of regionalism. Unlocking RTAs signifies a departure from their core attribute—excludability. RTAs, at least at a certain period of time after formation, should offer their preferential concessions to the rest of the global trading community. At any rate, those preferential treatments tend to erode eventually, as some members form new RTAs with other countries or open their markets unilaterally. When they open their preferential club, RTA members need not seek a quid-pro-quo type of reciprocal concession from nonmembers, save the latter’s commitment to good faith liberalization efforts, if the former abandon the old mercantilist obsession. Market opening itself is of value to the opening country’s economic welfare. From a more mature, communitarian perspective,
reciprocity need not be commercially calculated and balanced but may rather become diffuse, although it can still discourage uncooperative behaviors such as freeriding even without selective incentives.\textsuperscript{53}

APEC is a case in point. APEC was established in 1989 to promote trade and investment liberalization, as well as to deepen economic cooperation in the Asia-Pacific region. Its unique institutional features, such as soft institutionalism and a nonbinding structure, distinguish it from many other RTAs. Most of all, APEC's strong commitment to the multilateral trading system has been its defining characteristic.\textsuperscript{54} Unlike preferential regional trading blocs, APEC members' trade and investment liberalization are meant to be shared by both members and nonmembers.\textsuperscript{55} In this sense, APEC is truly a building block of the WTO. In 1994, APEC announced its bold liberalization blueprint, dubbed the "Bogor Declaration," in which members committed themselves to achieve full-fledged trade and investment liberalization in the Asia-Pacific region by 2020 (2010 for developed countries).\textsuperscript{56} This blueprint was elaborated, implemented, and even expedited by a series of subsequent initiatives: the Osaka Action Agenda \textsuperscript{57} in 1995, Manila Action Plan for APEC \textsuperscript{58} in 1996, and the Early Voluntary Sectoral Liberalization program in 1997.\textsuperscript{59}

This ambitious trade and investment liberalization scheme, which exceeds the WTO both in terms of scope and depth, was made possible by APEC's soft institutionalization, defined by its nonbinding nature and voluntarism. APEC's


experimental informalism\textsuperscript{60} or "minilateralism,"\textsuperscript{61} has made APEC a rehearsal stage before a grand opening in the WTO. A Chinese government official once stated that "the WTO is like a lovely banquet, and APEC is the kitchen where the food is prepared."\textsuperscript{62} Despite this soft nature, APEC has performed quite well in terms of liberalization. Under the APEC scheme, Japan and Singapore vowed to liberalize their telecommunications market; Japan increased the number of US auto dealerships; China allowed foreigners to lease farmland; and Korea opened its construction market to foreigners.\textsuperscript{63} Even in the aftermath of the financial crisis, APEC members refused to backpedal from their previous voluntary commitments.\textsuperscript{64}

The APEC model suggests a feasible path to multilateralization. RTA members, especially after they have achieved some degree of regional integration, need not be reluctant to open their regional markets to the outer world. Trade is meant to be expansive, not isolated. When a country imports another nation's goods and services, it gets more than just those tradables. The importing country also learns about the other's culture, technology, and economic system, which helps it to export more tradables to that country. If a substantial number of countries follow this path, a culture of liberalization can emerge and lead to a virtuous circle of trade liberalization.

Admittedly, open regionalism presupposes a leap of faith in liberal trade among trading nations. They should at least tame, if not eliminate, mercantilist politics when it comes to market opening. It all starts on the home front: "all politics is local."\textsuperscript{65} More than anything, we need a fair amount of social marketing to educate domestic constituencies—who, importantly, are also

\textsuperscript{60} See Lorraine C. Cardenas and Arpaporn Buranakanits, The Role of APEC in the Achievement of Regional Cooperation in Southeast Asia, 5 Ann Surv Intl & Comp L 49, 49, 60 (1999).


\textsuperscript{64} Id at 351.

\textsuperscript{65} See generally Tip O'Neill with Gary Hymel, All Politics is Local and Other Rules of the Game (Times Books 1994).
voters—on the true cost of protectionism and the true benefit of liberalization lest they should elect myopic populists.66

2. Institutional Merger

Another way of adapting RTAs to the multilateral trading system may be to broaden their trade horizons by fusing them institutionally. This phenomenon of institutional merger has the potential to multilateralize bilateral and regional trade relations, since it tends to diffuse enhanced market access to the larger part of the global trading community. In an ideal situation, a web of these mergers, if it ever passes a critical point, may generate something close to a “universal customs union.”67 However, a number of failed attempts have been witnessed: between the EU and MERCOSUR; between the EU and NAFTA; between the EU and the US; and among NAFTA, the CACM, and MERCOSUR (Free Trade Agreement of Americas, or “FTAA”).68

The level of ambition in an institutional merger should be adjusted according to the complex challenges that these attempts have encountered. These mega-RTA projects tend to generate new cultural or political dynamics among interest groups in countries that may not necessarily favor such projects. For example, some Latin American countries have protested the idea of extending NAFTA to the whole western hemisphere.69 They caution against any radical liberalization or market integration whose side effects, such as social cost due to massive adjustment, would trump any potential gains of such mergers.70 These predicaments are attributable to the fact that most of those merger projects have not yet been concluded. Concomitantly, such a poor record rehighlights the significance of the WTO as a vehicle for further trade liberalization.

67 Viner, The Customs Union Issue at 52 (cited in note 13) (“A universal customs union . . . would be the equivalent of universal free trade.”).
3. Judicial Convergence

The institutional modes of multilateralization discussed above—opening regionalism and merging different RTAs—are not necessarily easy options for turning club goods into public goods. A hefty amount of political capital would be necessary to initiate and to conclude these projects. Often, the negotiation process would deadlock as political battles among interest groups prevent politicians from taking action. Once losing momentum, the negotiation could be easily buried in politically convenient collective obliviousness.

However, without ever creating a new hardware of multilateralization, regional trade tribunals could generate certain positive externalities to the global trading system by modifying their software, or judicial interpretation, in a way that coheres with the WTO tribunal. In other words, regional trade tribunals can interpret RTA provisions in a way which avoids any conflicts with the WTO jurisprudence. Such judicial convergence or coherence will provide global business with a desirable level of predictability and certainty that enables businesspeople to design their transnational business plans with comfort and confidence. The very existence of such a coherent legal system is a valuable public good to global business and thus a road to prosperity.

In fact, NAFTA tribunals have already demonstrated this propitious possibility. In one case, a NAFTA Chapter 20 panel (Tariffs Applied by Canada to Certain US-Origin Agricultural Products) avoided a possible legal clash with WTO norms through a holistic interpretation that configured NAFTA and the WTO in the same teleological space—free trade. In this case, Canada raised its agricultural tariffs, which on its face would have violated Article 302(1) of NAFTA (prohibiting the tariff increase). Yet Canada did so in the pursuit of the “tarification” mechanism that converts nontariff barriers (such as quotas) to tariffs under the WTO Agreement on Agriculture. The rationale of tarification is that tariffs would be superior to quotas, even as a trade barrier, on account of the predictability of their impact on the market. While the US accused Canada of

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71 One might object to such interpretation as judicial activism or judicial legislation. However, courts, domestic and international, do not necessarily apply pre-existing statutes in a mechanical way. See notably Ezra R. Thayer, Judicial Legislation: Its Legitimate Function in the Development of the Common Law, 5 Harv L Rev 172 (1892). In particular, international tribunals often engage in the “teleological” interpretation, which may best describe the type of judicial interpretation proposed here. See Competence of the General Assembly for the Admission of a State to the UN, 1950 ICJ Rep 4, 17–18 (observing that international judges “must have regard to the exigencies of contemporary life, rather than to the intentions of those who framed it”) (quoted in José E. Alvarez, International Organizations as Lawmakers 96 (Oxford 2005)).

violating Article 302(1), the panel unanimously exonerated Canada by interpreting the NAFTA’s raison d’être in a coherent fashion with that of the WTO.\(^7\) Having observed that WTO tariffication does further the NAFTA objective of trade liberalization, the panel viewed that the tariffication mechanism withstood any technical violation of Article 302(1).\(^7\)

In the same context, a recent NAFTA Chapter 19 panel (\textit{Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination (“Softwood Lumber”)}) upheld the WTO case law in an antidumping dispute.\(^7\) In calculating overall dumping margins that determine the amount of antidumping duties, the US had long ignored any negative individual dumping margins (export prices minus normal values) and selectively included positive individual dumping margins (normal values minus export prices).\(^7\) Under this practice, labeled “zeroing,” overall dumping margins tended to be inflated since any negative individual dumping margins failed to offset any positive individual dumping margins, resulting in higher dumping rates (antidumping duties). While the US Court of Appeals for the Federal Circuit has ruled that the zeroing methodology is a reasonable interpretation by the Department of Commerce,\(^7\) the WTO Appellate Body has struck it down in a series of recent cases.\(^7\)

The NAFTA \textit{Softwood Lumber} panel referred to this WTO jurisprudence and invalidated the zeroing methodology.\(^7\) Binational review under NAFTA Chapter 19 replaces judicial review of final antidumping determinations by an importing country’s court.\(^8\) The binational panel should apply “the general legal principles that a court of the importing Party otherwise would apply.”\(^8\) Therefore, the \textit{Softwood Lumber} panel applied the celebrated \textit{Charming Betsy} doctrine, which requires the US courts to interpret domestic law in a way which

\^7 Id at ¶167.
\^8 Id at ¶208.
\^10 19 CFR § 351.414(c)(2) (2007).
\^13 \textit{Softwood Lumber} at 43–44 (cited in note 75).
\^14 NAFTA, art 1904:1 (cited in note 23).
\^15 Id, art 1904:3.
is consistent with international law when there is room for such interpretation.\footnote{Murray v Schooner Charming Betsy, 6 US 64 (1804). See Ralph G. Steinhardt, The Role of International Law as a Canon of Domestic Statutory Construction, 43 Vand L Rev 1103, 1197 (1990).} The panel found that the Commerce Department should have departed from the zeroing practice because it could have reached another reasonable interpretation of the US antidumping statute which would be consistent with the WTO rulings invalidating the zeroing methodology.\footnote{Softwood Lumber at 42–43 (cited in note 75).}

This judicial convergence to the multilateral trade rules, which has been voluntarily initiated by regional trade tribunals, can further be promoted. For example, regional trade tribunals may refer those legal questions that may concern any potential conflicts between RTAs and the WTO to the WTO Appellate Body to seek nonbinding advisory opinions.\footnote{See Cho, 27 Nw J Intl L & Bus at 87–88 (cited in note 8).} Upon such request, the Appellate Body Secretariat may respond to the referring regional trade tribunal with its legal opinion on the issue in question to assist regional trade tribunals in reaching WTO-consistent decisions.

V. CONCLUSION

This Article has attempted to complement Brummer’s contribution by shedding light on the broader implications of his article. This Article argues that RTAs as club goods/public bads can, and should, be re-engineered into public goods through multilateralization, which tends to reconfigure both multilateralism and regionalism in a coherent, symbiotic, and holistic fashion. Concededly, such multilateralization necessitates a varying degree of institutionalization, which does not come cheap. Under certain circumstances, the cost of internalizing negative externalities might exceed the gains from such internalization.\footnote{See Dunoff and Trachtman, 24 Yale J Intl L at 15 (quoting Harold Demsetz, Toward a Theory of Property Rights, 57 Am Econ Rev Papers & Proc 347, 350 (1967)) (cited in note 2).} Nonetheless, the WTO members should diligently engage in such multilateralization to rationalize currently prevalent RTAs within an integrated global trading system. Long-term systematic gains from this multilateralization would go beyond any short-term political costs of institutionalization.

Finally, institutions, both regional and global, are alone an insufficient condition for free trade. We are often oblivious to the fact that, most of the time, nations liberalize trade unilaterally and voluntarily.\footnote{Moisés Naim, The Free-Trade Paradox, Foreign Pol’y 95, 95–96 (Sept/Oct 2007) (observing that between 1983 and 2003, 66 percent of tariff reductions came from voluntary, unilateral liberalization).} Institutions, no matter

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how well-designed they may be, cannot replace an enlightened free trade policy that boldly forsakes mercantilism for the sake of the nation's general economic welfare. After all, institutions are means, not ends. To overemphasize institutions risks losing sight of the fundamental thesis that international trade is a logical extension of market competition. A well-operating market, be it domestic or global, enshrined in a prudent government policy is the best public good for domestic and global welfare and prosperity.