Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement
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Part One: Regionalism Before the GATT - MFN Foundations

Part One of this book provides a discussion of the practice of regional preference prior to the General Agreement on Tariffs and Trade (GATT) and the efforts made to bring into force a general rule of most-favoured nation treatment (MFN, or the MFN clause) to govern the conduct of international trade. The history of legal developments commences in the inter-war years and is taken through the Havana Charter ITO sessions in 1948 and up through the final text settled for GATT Article XXIV, the Article providing for the primary regional exceptions.¹

In the modern era, one views the application of regional preferences between territories as an initial violation of the general rule of most-favoured nation treatment. However, for nearly half of the last century, discriminatory preferences exchanged by states were more the norm for international economic diplomacy. While MFN clauses existed in various bilateral trade agreements, there was no multilateral framework for its application and the clause, when in effect, was applied conditionally as well as unconditionally. As found in the later GATT, The MFN clause incorporated drafting aspects of prior bilateral treaties, but by its multilateral and unconditional nature, it did not express the prior customary practice between trading nations.² Rather, GATT multilateral MFN was a decidedly radical departure from the previous practice.

The purpose for the historical review conducted in this Part is to extract from the historical record and the preparatory work the substantive elements that continue to tie the object and purpose of the MFN clause to the GATT provisions accorded for certain regional preferential exceptions. By this it is hoped that certain themes will develop. One is that a primary purpose for reviving MFN was to counter the injurious effects of preferential systems experienced by states during the inter-war years. As to non-members, these injuries included the loss of access to resources and to markets.

However, the documentation also raises a broader context for the application of MFN as it could also affect the commercial practices undertaken between members of a preferential system. This “internal” possibility for the application of the GATT is also raised by examining the resulting relationship between GATT Article 1:1 and GATT Article XXIV:8, sub-paragraphs 8(a)(i) and 8(b). These are the provisions which designate the so-called internal-trade requirements for the establishment of customs

¹ General Agreement on Tariffs and Trade, opened for signature, 30 October 1947, 61 Stat A3, T.I.A.S. No. 1700, 55 United Nations Treaty Series 187; Protocol of Provisional Application of the General Agreement on Tariffs and Trade (1947), 55 U.N.T.S. 308. GATT Article I, paragraph 1 providing for most-favoured nation reads: “With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any 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.”

² MFN or similar obligations are found in a number of other GATT Articles, including Article III:7, IV, V:2,5,6, IX:1, XII:1, XVII:1, and XX]. John H. Jackson (1969), World Trade Law and the Law of GATT, the Mitchie Company, Charlottesville, Virginia, p. 255. Jackson has characterised MFN and National Treatment (GATT Article III) as "two types of 'economic-equality' norms..." Besides economic arguments for MFN, he describes the "political" policies justifying the clause as, "Without MFN, governments could form trade cliques and groupings more readily. These special groupings can cause rancour, misunderstanding and disputes, as those countries 'left out' of favours resent their inferior status." John H. Jackson, Equality and Discrimination in International Economic Law, The Year Book of World Affairs, 1983, pp. 225 and 232.
unions and free-trade areas. They require the elimination of duties and other restrictive regulations of commerce between regional members, and appear to govern the scope of application of the GATT most-favoured nation obligation. The literature reviewed indicates that these coverage requirements were imposed to eliminate "partially preferential" discriminatory systems from the new international trading system in order to provide the broadest possible application for MFN. It is well documented that this would inure to the benefit of non-regional members, by reducing the incidence of MFN deviations in regard to their external trade to regional systems.

However, the inter-war period was also characterised by the use of positive and negative preferences between regional members as a means of establishing regional spheres of influence. MFN, together with a strict regional exception, could also have an impact on the use of commercial policies applied between members. The General Agreement's preamble was drafted broadly enough to capture this possibility. To accomplish their stated objectives, GATT parties would enter into mutually advantageous arrangements directed, not only to the reduction of tariffs and other barriers to trade, but also, "...to the elimination of discriminatory treatment in international commerce." This recognition of GATT's anti-discriminatory aspect overall also illuminates the legal architecture displayed in the final Article XXIV provisions in relation to MFN.

This permits one to suggest a view that GATT rules provide more than only a mechanism to achieve the expansion of trade by way of market access. Rather, as an integral set of rules governing trade relations between states, Article XXIV provisions emerge as coherent as they would act to frustrate not only the so-called "beggar thy neighbour" policies practised by regional members against non-members, but also as practices between regional members themselves.

Chapter One identifies the strand of MFN history that addressed the use of negative discriminatory practices between regional members. While the status of the British Colonial Preference and its alleged exclusionary effects dominated the negotiations leading to the Havana Charter of the ITO, the same planners who were responsible for post-war arrangements were well aware of the larger picture regarding regional systems during the period. At least as declared in the Atlantic Charter (1941), the resurrection of non-discrimination was explicitly dedicated to curbing the abuses occurring within regional systems. Chapter Two provides an account of those elements as they were raised in the accessible preparatory work in Geneva and Havana, all of which had a bearing on the legal issues that were presented in the drafting of the GATT Article XXIV in its final form. Particular attention is paid to the developments in Havana that introduced the free-trade area exception to the text. Although the sub-committee reports are unavailable for this purpose, the larger Commercial Policy Committee in Havana held extensive discussions on the future of developing country preferential systems in relation to the Article I compromise that had already been settled in Geneva.

It remains a ubiquitous feature of the literature to recount the various weaknesses and loopholes of Article XXIV regarding its interpretation in actual practice. However to the contrary, the record indicates a secure intention to establish a narrowest possible avenue for future preferential systems, while recognising that developing countries would not easily cope with the administrative requirements imposed by customs union formations. That the free-trade area provisions added in Havana mimicked those already established for customs unions, indicates that the new MFN clause was not intended to be diluted by the inclusion of this new regional exception. Since the Geneva customs union provisions already reflected the proposals advanced by the most stalwart MFN proponents, the final Havana provisions as extended to free-trade areas was not perceived to be an undermining of this legal obligation.