Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement
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Citation for published version (APA):
1 The Inter-war Experience: MFN and Preference

"I said...that it seemed to be imperative that we try to agree now upon the policy of constructive sanity in world economics as a fundamental factor in the creation of a new and better world and that except through an agreement upon such a policy by our two governments there would be no hindrance whatsoever to the continuation later of the present German policies of utilizing trade and financial policies in order to achieve political ends.” Sumner Welles, (1947) Where Are We Heading?

1.1 Introduction

This chapter will lay the historical groundwork for the re-establishment of the multilateral most-favoured nation principle following the Second World War. The purpose of the investigation is to identify the legal objectives underlying the later regional provisions in the GATT as they provided for exceptions from MFN. Thus the chapter outlines certain events regarding the use of preferences in international trade during the inter-war period, and especially as these practices would eventually be either permitted or proscribed by the emerging MFN provisions. In this, the notion of “economic nationalism” was at the forefront throughout the decade prior to the outbreak of World War II. A primary device for executing this strategy was the employment of regional preferences, both positive and negative.

As a general most-favoured nation treatment was not applied during the period, the tension between existing patterns of preference and the re-establishment of MFN emerged as a first distinct issue in the discussions of the post-war planners. The motive of terminating preference by the use of MFN was attributable to a mix of economic, political and legal concerns. Economically, much of the debate could be characterised in rather mercantilist terms as the external exclusionary effects of the British Imperial Preference came to the centre of the issue as far as the United States was concerned. However, both countries also underpinned their discussions on the principle for the Atlantic Charter by the political objective to not repeat the experience at Versailles and the resulting inter-war period. This consideration reached through to the later drafting whereby the U.S. failed to terminate the Imperial Preference, but received the promise of a standstill arrangement. Conceivably, the larger political construction was also reflected in the final provisions. By drawing the permitted regional exceptions only for customs unions, the overall plan, as agreed, was initially dedicated to the elimination of preferential regional systems not resulting in customs territories. The objective was to establish the credibility of MFN at the outset and to support the possibility of its coherent application over time.

1.2 The Paris Convention (1916) and inter-war preferences

The period of planning at the conclusion of the First World War did not find allies in any way united on the question of installing an MFN principle. Rather, the tone at Versailles, and the conduct of the conference itself, has been described more as an exercise in the repudiation of MFN.¹ Hirschman cited the 1916 Paris Economic Conference preamble as evidence of the mood between the allies, as

¹ The practices at issue included, the rapid and targeted expansion of exports relative to other countries, the use of unfair competition in trade, notably predatory dumping of exports, the intent to destroy competitive industries in other countries to prevent them from industrialising, and the export of capital and personnel to obtain financial control or dominance over key foreign enterprises. According to Hirschman, Germany was already arming for the next round of economic and commercial warfare, or was at least perceived to be so acting. Hirschman, Albert O. (1945), National Power and the Structure of Foreign Trade, University of California Press, Berkeley,

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"(T)he representatives of the Allied governments...declare that, after forcing upon them the military contest in spite of all the efforts to avoid the conflict, the Empires of Central Europe are today preparing, in concert with their allies, for a contest on the economic plane, which will not only survive the reestablishment of peace, but will at that moment attain its full scope and intensity.

They cannot therefore conceal from themselves that the agreements which are being prepared for this purpose between their enemies have the obvious object of establishing the domination of the latter over the production and markets of the whole world and of imposing on other countries an intolerable yoke."

1.2.1 Provisions regarding MFN at Versailles

The recognition that an economic war would continue after suspension of the military conflict led the allies to adopt many of the techniques allegedly employed by the German government. Hirschman concluded that,

"(O)ne after another we find enumerated all the fundamental policies of refined economic nationalism with which we have become so well acquainted in the period between the two wars—restricted access to raw materials and resources, preferential treatments and discriminations, restrictions on the activities of aliens, antidumping legislation, differential transport rates, autarky, not only with respect to key industries, but on a practically universal scale by means of subsidies, tariffs, prohibitions, etc. Even a cursory view of this amazing Pandora's box raises doubts whether these measures were devised for defense only."

This allied approach at Versailles conflicted with that envisioned by the United States as enunciated by the third of President Wilson's Fourteen Points for a post-war system based on non-discrimination. According to Young, the two views became conflicting fountainheads of the economic sections of the final Treaty of Versailles. This was exhibited by the compromise demonstrated in Articles 264 and 265, according to Hirschman, whereby Germany was required to grant MFN to the allies, but, "without stipulating anything with respect to the commercial policy of the Allies." The worst possible compromise was said to have evolved, "combining as it did the principle of full economic sovereignty and the practices of restriction and discrimination". John Maynard Keynes also located this point as central in the context of the economic provisions.

"The miscellaneous Economic Clauses commence with a number of provisions which would be in accordance with the spirit of the third of the Fourteen Points, if they were reciprocal. Both for imports and exports, and as regards tariffs, regulations, and prohibition, Germany binds herself for five years to accord most-favoured-nation treatment to the Allied and Associated States. But she is not entitled herself to receive such treatment."

2 A. O. Hirschman, Ibid., at pp. 60-61, quoting from H. W. V. Temperly, A History of the Peace Conference of Paris, Vol. V, London, 1921, p. 367. Jacob Viner suggested that while the agreement in Paris was mainly directed to the Central Powers, there was also a growing disillusion with the MFN principle. This was demonstrated by the retention of preferential relations for a time between the European powers as to the Central and neutral powers and to the United States. Viner, Jacob, The Customs Union Issue, Carnegie Endowment, 1950, p. 24.
3 A.O. Hirschman, Ibid., at p. 6-61 (italics added), making reference to "Resolutions of the Paris Economic Conference of the Allies, June, 1916, Transitory and Permanent Measures of the Allied Countries." The resolution text is reprinted in full in Hirschman, Ibid., at pp. 163-165.
4 A. O. Hirschman, Ibid., at 66. Point three of the Fourteen Points provided for, "The removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the Peace and associating themselves for its maintenance."
5 Keynes, J.M., The Economic Consequences of the Peace, Harper and Row, New York, (1920, 1971 Edition), pp. 62 and 102. However, Keynes did not assign the difficulties of the peace to the economic provisions,
1.2.2 The effect of Versailles provisions on German diplomacy

Thus, any preference granted by Germany to any party would inure to all the allied signatories. However, the allied signatories could freely exchange or obtain preferences between each other without extending any benefits to Germany. The effect of this imbalance is imprecise, but it has been claimed to have led Germany, also relieved of its colonies, to evolve a distinct economic diplomatic strategy of turning upon its small and weaker neighbours for the implementation of a bilateral and preferential policy. Condliffe provided a later description of the strategy that not only describes what we would now call a "hub and spoke" regional system, but also which frames the economic diplomacy of the hub nation in terms of a dominant position and the abuse of monopoly power.

"They were, in fact, building a new trading system, the centre of which was the German military economy—a bilateral system in which all the traffic should flow to and from the centre. This system was not designed to broaden into multilateral interchange in which there would be room for all the great trading countries to cooperate. It was designed to supplant and destroy the world trading system that Great Britain had built up and that the United States was trying to revive. Its methods are best understood when compared with those by which great monopolistic corporations have attempted, by horizontal and vertical integration to destroy the trade of their competitors."

Hirschman made some effort to document why the allied parties failed to constrain this development of economic nationalism between the wars, placing some significant share of the responsibility on the United States for its unwillingness to reduce its own trade barriers. This was said to have placed the allies in the difficult position of waging America's "free trade war" but without access to American markets. Additionally, he cited the premature break-up of the war-time agencies; a failure by the Americans to appreciate the degree of fear which had evolved among the allies concerning the threat of economic domination; and finally, the dismissal by free traders in England and the U.S. of the idea that any state, "could use commercial relations for ends of national power."

Michael Heilperin also provided reflective accounts of the responses of various countries confronted with German bilateral policies. He quoted Howard Ellis who provided a description of the linkage between "bilateralism" and "preferentialism" whereby,

"It should be sharply emphasized that this power of the current-account debtor in a given bilateral relation cannot be brought to bear upon a particular country unless the bilateral trade of the two is separated from the rest of its trade."

but to those concerned with reparations. Also contrary, Jacob Viner indicated a dual motive in the economic provisions, to effect discrimination against the Central powers as well as to form a system of protection against the neutral parties, particularly the perceived competitive position of the United States. J. Viner, Supra note 2 at pp. 24-27. As such, inter war European preferences were also attempted to avoid U.S. commercial pressure and its conditional MFN clause.

7 A. Isaacs, Ibid., at 378, quoting Condliffe from a non-identified source.
8 A. O. Hirschman, Supra note 1 at 68. This is not to suggest that a similar lack of awareness governed policy at the closing of the Second World War.
1.2.3 The rise of "economic nationalism"

Within twenty years after the conclusion of the Versailles peace, the effect of the inter-war policies had risen to the level of alarm as the same policies were also being blamed for the cause of the great economic depression. As William Culbertson wrote, "(W)e have witnessed since the (first) World War an unprecedented revival of mercantilism. Fear stimulated by economic losses, social disorders, the destruction of classes, war, and rumors of war has revived mercantilistic policies as drastic as those of the age of Colbert, Frederick the Great, and Cromwell..."10

Nationalism was a sufficient danger in any period, but it was rendered even more dangerous by its capacity to capture commercial policy instruments for its service. It was this linkage between the two which raised the term "economic nationalism" to a common usage in the later inter-war period, and that period of time immediately proceeding World War II.

An appreciation of the risks of connecting commercial instruments to the policies of greater national diplomacy may not have been well appreciated at the conclusion of the First World War. By the commencement of the Second World War, the unabated effects of the policies and their contribution to tensions between the powers could not have likely escaped notice by even the United States in its relatively isolated position. What was seen to emerge in the comparable period of post-war planning for Second World War was a stronger proposition relying upon the original non-discrimination provisions of the Fourteen Points. If economic nationalism required an environment tolerant of commercial discrimination, the corrective policy was to change this environment so as to eliminate the conditions for discriminatory practices.

1.3 MFN issues prior to Geneva Negotiations (1947)

The challenge confronting the so-called post-war planners in the early 1940's was understood to be similar to that which confronted the Allies in 1916, as "the fear of economic aggression and the prevention of its recurrence will be a major preoccupation of our future peacemakers."11 However, the ultimate direction in which arrangements proceeded were markedly different from the outset of the process, as the United States and Great Britain assumed a more activist role in framing the final conditions even while the military conflict was in process. As such, much of the documentation available to identify the revival of multilateral conditions for trade is contributed from the American and British commentary, most notably, Richard Gardner's Sterling Dollar Diplomacy.12 The purpose of this section is to only draw from this work, and others, those aspects of the negotiations and contemplated arrangements which were sought to address preferential systems in light of the emerging principle of non-discrimination.

1.3.1 Non-discrimination as the central objective

Gardner's account demonstrates without difficulty that the American planners placed the revival of the non-discrimination principle at the centre of their policy regarding post-war economic arrangements.13 Moreover, he attributed this motivation, at least in the earlier phases, to a desire to...

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10 "My concern here is to emphasize that the problem of commercial policy today is, in a broad approach to our life, a part of the problem of nationalism..." Culbertson, William S., Reciprocity, McGraw-Hill Co., New York, (1937), reprinted in A. J. Kress, Supra note 6 at pp. 18-19.
11 A. O. Hirschman, Supra note 1 at p. 71.
12 Gardner, Richard, N., Sterling-Dollar Diplomacy in Current Perspective, Columbia University Press, New York, 1980 edition. Since these countries were in a leadership position during the war, events focus on their negotiations for the revival of normal trade relations, including the application of nondiscrimination. Gardner recounted events leading through the Savannah and Bretton Woods conferences for both monetary and trade aspects.
13 Gardner quoted a number of commentators to establish this theme. "Pasvolsky warned that unwillingness to
curb the practices of economic nationalism and the use of certain commercial instruments. As he concluded,

"The U.S. post-war planners were united in their determination to break completely with the legacy of economic nationalism and economic isolationism..."\(^\text{14}\)

The advocates of the policy could summon a long train of precedent for a U.S. position supporting non-discrimination. This commenced as early as Washington's famous farewell speech "to hold an equal and impartial hand, neither seeking nor granting exclusive favours or preferences." It was restated by John Hay's declaration of the open door in regard to China at the beginning of the 20th century; and finally, to Wilson's third of Fourteen Points declaring, "the removal so far as is possible, all economic barriers and the establishment of an equality of trade conditions."\(^\text{15}\)

While the revival of a non-discrimination principle was pre-eminent and ascendent in U.S. policy, the desire to return to a liberal trading system was also rising in the United Kingdom.\(^\text{16}\) There was however a critical difference between the two, as the British considered that the first priority should be placed upon the reduction of trade barriers between the major partners, and particularly upon a reduction of U.S. barriers.\(^\text{17}\) As this division became more attenuated through the negotiations, it is suggested that the U.S. justification for asserting a non-discrimination appeared to become more mercantilist. A contributing cause of this shift was the later tendency to view its major ally's colonial preference as the central object to be affected by the revival of non discrimination, particularly as this position became increasingly defensive on the question of U.S. trade barriers.

1.3.2 The rise of the colonial preference issue

In earlier times Britain's Imperial preference had been cited by Americans as a best indicator of an open door policy. However, the Commonwealth system became a point of contention as preferences were expanded by the Ottawa Agreements of 1932 in response to economic depression. As Cordell Hull has been singly identified with the American position on the resurrection of the MFN principle, his well-cited positions on the evils of the Commonwealth forged the linkage between the MFN principle and termination of this particular preference system. According to Gardner,

"(T)he climax of this campaign against Imperial Preference came with Hull's appointment as Secretary of State. American producers, beset by the Great Depression, were looking anxiously to foreign markets. In the midst of their difficulties they were met with the Ottawa Agreements, which not only increased the preferences granted to Britain by the Empire but inaugurated a comprehensive system of preferences in favour of the Empire by the United Kingdom."\(^\text{18}\)

abandon policies of economic warfare would constitute 'the greatest danger that can confront us after the war...Likewise, White argued that, "(J)ust as the failure to develop an effective League of nations has made possible two devastating wars within one generation, so the absence of a high degree of economic collaboration among the leading nations will, during the coming decade, inevitably result in economic warfare that will be but the prelude and instigator of military warfare on an even vaster scale.' R. Gardner, ibid., at p. 8.

14 Gardner indicated that the goal of implementing nondiscrimination was not the only component of multilateralism in U.S. planning, but among the other components, the reduction of trade barriers and economic (lending) reconstruction, non discrimination was preeminent. R. Gardner, ibid., at p. 12. It would follow that the policy would therefore tend to support a strong non discrimination clause and seek to narrowly prescribe any exceptions to it.

15 R. Gardner, ibid., at pp. 16-17.

16 "In the early years of the war-time Government the reconstruction of such a regime became a major objective of British no less than of American planning..." R. Gardner, ibid., at p. 27.

17 The rationale was twofold, first, the preservation of special economic ties between the members of the British Commonwealth, and second, the practical need to obtain an increase in British exports after the war to make up for the loss of foreign exchange receipts caused by war time losses. R. Gardner, ibid.

18 To Hull, these agreements, constituted, "the greatest injury, in a commercial way, that has been inflicted on
That the Commonwealth became the central issue is clear if one examines the amendments introduced by the Ottawa Agreements with which Hull was so intensely concerned. H. P. Whidden described the main changes implemented.

"(I)n return for new or increased preferences in the Dominions on British products, mostly manufactured goods, Britain bound itself to levy duties on foreign (non-empire) imports...to control by quotas the purchase of meats ...; not to reduce below 10 percent the recently imposed British duties on foreign commodities; and to continue the duty-free admission of many products from the Dominions."19

Accordingly, the changes,

"have constituted a substantial addition to the network of trade barriers restricting the free movement of international commerce, and, if maintained in the postwar period, would provide a serious obstacle to the restoration of multilateral trade based on equality of treatment." Ottawa therefore, "...marked the passing of the open door in virtually all of the world dependencies..."20

1.3.3 The distinction between protectionism and preference

Although the main change implemented at Ottawa was to raise protection against third-country goods, detrimental enough from the U.S. view, there was perceived to be a difference between its own prohibitive levels of protection and the use of preferences in international trade as exhibited by the Commonwealth after Ottawa. An explanation of the relatively more evil nature of preferences as compared to mere protectionism was offered by Culbertson.

"Protection of the home market for the benefit of national industries is an expression of nationalism. Its object is to diversify a nation's economic life and to afford varied opportunities for the application of the genius of a people (citing Alexander Hamilton's Report on Manufacturers, 1791). It is in no sense aggressive...Preference, on the other hand, is an expression of modern imperialism. In contrast with the policy of protection it is aggressive. In its extreme form as found in the French policy of assimilation, it seeks to extend to new areas (e.g., Indo-China) the control of the economic system of the country which happens to have the political power to impose the preferential conditions..."21
Culbertson demonstrated a certain premonition for the later U.S.-British dispute. Also characteristic of a later American view, he also did not attempt a distinction between preferences applied to extend political power in the form of economic nationalism and those preferences interposed for economic protection, Britain’s view of its own Commonwealth arrangements. From the British view, the colonial preference after 1932 represented a similar policy as the high American tariff, and was a necessary reaction to it. Both were intended to raise barriers as a defence to the financial crisis of the early 1930s. Nevertheless, perception is important to motive. Culbertson’s 1925 statement likely summarises accurately the U.S. view which emerged later in the inter-war period, that the difference between protectionism and preference is that in the former, a country operates its autonomous policy vis a vis its own customs territory. In the latter, an international system is established which by its nature is discriminatory to other parties and therefore objectionable for its exclusionary effects to third-country markets.

1.3.4 The Atlantic Charter debate (1941)

The question of reintroducing non discrimination to international trade came to the centre of the U.S.-British relationship in what Gardner cited as "the first definition of multilateralism", as found in the August 1941 Atlantic Charter, the joint declaration of principles enunciated by President Roosevelt and Prime Minister Churchill.23

The issue over the economic portion of the text for the proposed declaration concerned the use of the phrase, "access without discrimination on equal terms". This provision was drafted by Sumner Welles who represented Cordell Hull and the Department of State in the negotiations. While his text was a response to Churchill’s initial draft proposal, the Welles formulation was viewed with outright concern by the British for its implications for the 1932 Ottawa convention and the Commonwealth preference system. Churchill’s counter-proposal was to drop the explicit reference to discrimination and to tie the obligation subject to the phrase, "with due respect for their existing obligations." Cordell Hull’s recorded reaction to the Atlantic Charter provision indicates the importance he attached to this question on behalf of the State Department,

"...since it meant that Britain would continue to retain her Empire tariff preferences against which I had been fighting for eight years. Mr. Churchill had insisted on this qualification; Welles had argued for a stronger declaration...the President gave in."24

However, Welles recollected a somewhat different view in that he made his case on a common theme intended to both the parties. This took aim at the predatory and political aspects of commercial policy practices from the inter-war years.

"I said...that it seemed to be imperative that we try to agree now upon the policy of constructive sanity in world economics as a fundamental factor in the creation of a new and better world and that except through an agreement upon such a policy by our two

22 An assimilation policy, like the example Culbertson cites for France in Indo-China is argued to be distinguishable from the following example he also provided and which places its emphasis on the exclusionary effects. "An exclusive reciprocity agreement between South Africa and Australia, for example, is open to the same objection as an exclusive reciprocity agreement between the United States and France. Excluded nations cannot be expected to accept the fiction of empire in justification of their exclusion from extensive areas of the earth’s surface. British control of large areas has been tolerated because of a liberal commercial policy, and careful students of international relations have watched with much concern the growth of imperial preference." W.S. Culbertson, Ibid., at p. 192.

23 Gardner referred to the "second" expression of MFN as that provided in Article VII of the Mutual Aid Agreements of 1942 negotiated between the United States and Great Britain, as "directed...to the elimination of all forms of discriminatory treatment in international commerce, and to the reduction of tariffs and other trade barriers." See generally, Gardner, Supra note 12 at pp. 54-68.

governments there would be no hindrance whatsoever to the continuation later of the present German policies of utilizing trade and financial policies in order to achieve political ends."25

This recollection may be the last documented notation from an American policy maker connecting non-discrimination to interwar economic nationalism. As the MFN clause evolved through preparations of the Mutual Aid Agreements and onto the stage of the ITO preparatory work through Geneva in 1947, U.S. policy appears from all documentation available to have become solely oriented upon extinguishing the British Imperial preference.

1.3.5 Why the U.S. policy shifted

This change was attributable to the domestic political situation in the United States. As the U.S. came out of the war, the Truman Administration confronted a new protectionist Republican Congress. Non-discrimination continued at the centre of the policy, but the Administration's argument for it in the Congress necessarily shifted to reflect the service of American economic interests, particularly as they were excluded from British markets. As far as trade flows were concerned, the British system certainly presented greater barriers for the Americans than the far-away markets of middle Europe. Whatever injuries had been promulgated by the Axis policies were rendered less important over time as these countries were militarily defeated in any event. Likewise, the new threat of state socialism, the "new economic nationalism" as Heilperin called it, was only beginning to emerge as a concern in the formulation of the multilateral policy.

Therefore, while non-discrimination remained at the centre of U.S. policy, its only possible basis for retaining post-war domestic support was for the administration to link the policy to the trading gains derivable by its acceptance and implementation. This appeal would have to be based on the exclusionary effects of the British Commonwealth system, as this system would be sought to be ultimately challenged by the new provisions.

Near the end of the process of seeking legislative endorsement for the MFN principle, the emphasis on dismantling the Commonwealth system became a conditional requirement for Congressional support of the ITO process itself. Not so ironically, linkage between MFN and the Commonwealth also was a significant factor in the loss of support in the Congress for the process in Geneva. This was demonstrated by the Administration's literal guarantee to Congress that U.S. negotiators would deal a fatal blow to the Imperial preference at the negotiations in Geneva. If this blow could not be delivered, the Administration admitted in open Congressional testimony that there would be little point in supporting the (resulting) ITO Charter. Since ultimately the British did not yield their position, there was no retreat position for the Administration to stand upon other than to admit that the Charter negotiations had failed in their expressed purpose.26

25 "I said that it was not a question of phraseology, but that it was a vital principle which was involved. I said that if the British and the United States governments could not agree to do everything within their power to further after the termination of the present war, a restoration of free and liberal trade policies, they might as well throw in the sponge and realize that one of the greatest factors in creating the present tragic situation in the world was going to be permitted to continue unchecked in the postwar world..." R. Gardner, Supra note 12 at 45, quoting from Sumner Welles, Where are we Heading?, London, 1947, pp. 13-14. The final agreed upon clause read as follows: "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..." R. Gardner, Ibid., at p. 46. To contrast, the earlier Welles draft read, "Fourth, they will strive to promote mutually advantageous economic relations between them through the elimination of any discrimination in either the United States of America or in the United Kingdom against the importation of any product originating in the other country; and they will endeavour to further the enjoyment by all peoples of access on equal terms to the markets and to the raw materials which are needed for their economic prosperity." Ibid., at p. 43-44.

26 Gardner, 1980, p. 349-350. Although Gardner was not attempting to treat the same issue as here. Thus, the
1.3.6 Conclusion on the Commonwealth Preference

As a U.S. and British agreement was essential to forming a post-war multilateral trading institution, the rift between them over the status of the Colonial preference increasingly undermined their common interest in support of it. The shift of emphasis as the debate moved into the ITO phase was however unfortunate in another respect, as the justification for an MFN provision tended over time to only reflect the circumstances of this well-documented debate. It is not so difficult to understand why commentators since have tended to equate the purpose of the principle only with the trade objectives of GATT parties in seeking the expansion of world trade. A conception of GATT MFN as it evolved can be drawn from the latter stages of this history in isolation to suggest that the principle was intended to serve GATT parties only as a market-access instrument. The result is that the MFN principle is more often than not attributed with mercantilist intent.

This is in contrast with a more comprehensive role for the principle as it functions to underpin the multilateral trade system. Since such a system was intended to eliminate bilateral and preferential sub-systems, this conception of the principle becomes relevant when the attempt is made to isolate the relationship between the final MFN clause and the exceptions that would eventually be settled for granted for certain preferential exchanges. Thus, depending upon one’s view of the purpose of MFN, the regional exceptions provided in the later GATT Article XXIV provisions could be seen to serve two perhaps conflicting purposes. They could have been intended to permit a great number of preferential systems as long as they did not generate exclusionary effects to the trade of other parties or overall promoted trade. Alternatively, the provisions could have been dedicated to curtailing the number of such exchanges so that the MFN principle itself would retain general applicability in its purpose of eliminating discrimination in international commerce.

1.4 Categorising Inter-war preferential systems

The Commonwealth preference was not the only inter-war system to be affected by a non-discrimination clause, as certain other preferential exceptions to MFN were also a part of common practice. Determinations on these systems were also in question as to which preference practices would be either discouraged or endorsed by the emerging MFN clause.27

1.4.1 Whidden’s preferential categories

In attempting to reconcile an emerging multilateral MFN principle with existing regional systems, H.P Whidden made a 1945 survey of preferential systems in use during the inter-war period and then added an assessment as to which systems should be tolerated to derogate from MFN.28 Whidden designated these following categories.

- Frontier traffic - The U.S. and most other trading countries commonly recognised a 10 mile zone of exception along a border area, where to deny the exception would cause hardship for

conclusion is drawn by negative inference. For his account, there is absent any indication from the domestic political debate a suggestion that the purpose of the clause would be to serve a larger political goal of re-instituting fair play in the trading system or an attempt to constrain the political use of commercial policy. While such an opinion might have well been retained by the planners, the public domestic argument for the principle appears to have been purely a matter of what we would now refer to as a “market access” issue.

27 Since MFN was contained as a provision in a large number of bilateral trade agreements, legal analysis would relate to describing those conditions by which MFN could or could not be required to be exacted when a trade agreement party extended a preference to a third territory.

28 The question being, for which types of arrangements should outsiders be willing to forego a claim for equitable treatment in regard to their trade? Whidden, H.P., Preferences and Discriminations in International Trade, Committee on International Policy, Carnegie Endowment for International Peace, New York, 1945, pp. 5-30, reprinted in the Economics of Diplomacy, ed. A.J. Kress, Georgetown University, Washington, (1949).
border commerce. A simple example would be where a customs frontier passes through a city.  

-Customs unions - recognising the standard U.S. practice in its bilateral trade agreements to acknowledge exceptions in respect to advantages accorded in a customs union to which either signatory was (or would thereafter) be a party. MFN would be then accorded to the new formed territory.

-Tariff assimilations - in which the metropolitan area and its colonies are intended to be treated as a single unit. Whidden's example was the French system of incorporating its colonies, particularly Madagascar, Guadalupe, Martinique and Indo-china.

-Colonial Preference.

-Regional preferences and low tariff clubs - Whidden distinguished this group from the category of colonial preferences by surveying in detail a number of inter-war declarations made in Europe and various arrangements formed in Latin America.

In attempting to isolate the British and U.S. attitude toward such arrangements, he concluded that no consistent practice appeared to evolve in either recognising or refusing to recognise the granted preferences as exceptions to the MFN clauses. However, he did determine that there was a tendency to endorse arrangements when the countries concerned had some former historical relationship which was more close in the past then during the present. In the inter-war period, three other examples were noted by Whidden wherein a number of countries attempted to create a conventional formula for reducing trade barriers and where other parties would recognise these preferences without invoking MFN. As also recounted by Jacob Viner, these efforts generally grew out of the Geneva Economic Conference of 1927 and attempted to adhere to the principle contained in the 1929 report of the Economic Committee of the League of Nations. This, "recommended the granting of exceptions to the most-favoured-nation clause in the case of multilateral conventions of a general character".

1.4.2 Viner's preferential categories

As an aspect of his study of Customs Unions published in 1950, Jacob Viner also reviewed the types of preferential systems employed by territories in the inter-war years. He provided detailed discussion of the relation between these preferences and the MFN principle as it was then applied in pre-existing bilateral agreements and as later included in the draft Havana Charter for the ITO. Viner was

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29 H.P. Whidden, Ibid., p.9.
30 Whidden noted the criticism of Haight who described such systems as essentially preferential in diverting the regular flow of international trade to the colonies in favour of the metropolitan area. H.P. Whidden, Ibid, citing, F. A. Haight, A History of French Commercial Policies, Macmillan, New York, 1941, Pg. 248. The cornerstone of the criticism is in the isolation of the colony from the general flow international commerce which would be otherwise be competitive with the metropolitan area producers.
31 As discussed in the previous section.
32 H.P. Whidden, Supra note 28, at pp. 14-15. For European arrangements, he concentrated on the 1930 Oslo convention and the 1934 Baltic arrangement. A best example recognised by both powers was the Baltic group which exchanged preferential tariff concessions between 1924 and 1932. "In this case the great powers were willing to accept the exemption from most-favoured-nation treatment in commercial treaties signed by members of a group of countries which had been long associated historically through ethnic, economic or political ties." Along similar lines the U.S. recognised exchanged preferences as exceptions to MFN in its 1937 Agreement with Czechoslovakia in regard to the Danubian area clause for preferential arrangements in agriculture products.
33 H.P. Whidden, Ibid., at p. 13-14, also indicating that the Oslo format was eventually doomed by the disagreement resulting from the Ottawa Conference of 1932 amending the Commonwealth system preferences and the 1931 protective British Tariff.
primarily concerned with customs unions and his thesis remains widely cited for the proposition that economic considerations do not support a blanket exception from MFN for customs unions. We do not treat this aspect of his work here at this time. Rather, Viner's work is also valuable for its description of the origins of certain preferential systems and particularly how the traditional treatment of customs unions in receiving an exemption form MFN should also relate to the later exception provided for free-trade areas.

As he explained, since a customs union by definition provides for the elimination of tariffs between its members, the question of compatibility with the MFN clause must always arise.44

"It came to be widely accepted, however, that the most-favored nation obligation did not cover the commercial relations inter se of members of a customs union, since by virtue of such union they had become for tariff purposes, even if for no other purpose, a single entity in the relations with outside states.\(^{35}\)

Although he cited several cases where the completeness of a formation was challenged or challengeable as it was portrayed as a customs union, it was generally accepted in the practice between nations that territory formations would not invoke the MFN clause. From this practice,

"(T)he fact that customs union was generally regarded as compatible with most-favored-nation had the result that customs union was promoted whereas otherwise some other form of preferential arrangement would have been chosen."\(^{36}\)

This would of course lead to a discussion of these other forms of preferential agreements and the manner in which they were treated according to MFN clauses. Viner indicated that a desire to escape the rigours of MFN, together with an unwillingness to complete full customs unions, led parties to, "establish the propriety of other types of relaxations of, or exceptions from, the most-favored-nation rule."\(^{37}\)

He determined that there were three categories of preferences applicable to the inter-war period. These included the Imperial Preference characterised by political ties; regional agreements as characterised by propinquity; and plurilateral agreements characterised by the number of participants.\(^{38}\) As to each, Imperial Preference developed as an MFN exception to the extent that territories were subject to common sovereignty. In this, he noted that some authors included the concept of tariff assimilation, whereby, "the rates of duty of the tariff of the mother country are enforced also in the colony, the trade between these two units being free...".\(^{39}\) Viner did not fully equate the two categories, noting that,

\[\text{\textsuperscript{34} Jacob Viner employed a definition of customs unions that included the following: 1) the complete elimination of tariffs as between the member territories; 2) the establishment of a uniform tariff on imports from outside the union; and 3) an apportionment of customs revenue between the members. Viner, Jacob, The Customs Union Issue, Carnegie Endowment, 1950, p. 5, and citations therein.} \]

\[\text{\textsuperscript{35} J. Viner, Ibid., at p. 6.} \]

\[\text{\textsuperscript{36} J. Viner, Ibid., at p. 14.} \]

\[\text{\textsuperscript{37} A point later applied in the principle text to the role of free-trade areas. J. Viner, Ibid., at p. 15.} \]

\[\text{\textsuperscript{38} J. Viner, Ibid, at p. 15. A thesaurus provides the following substitutes for "propinquity": nearness, closeness, contiguity. Thus, this category appears to be most closely associated with the modern characterisation of "regional" trade agreements.} \]

\[\text{\textsuperscript{39} Citing as examples, the case of France and some of its colonies, the United States and Puerto Rico, and of Japan and Formosa. "From the economic point of view there is little or no difference between tariff assimilation and a customs union, the chief difference being that when tariff assimilation is introduced within an empire, it is invariably imposed by the mother country without having to be 'negotiated', and the tariff is framed to suit the needs and wishes of the mother country's economy without much, if any, reference to the interests or wishes of the colonies." J. Viner, Ibid., at pp. 16-17.} \]
"(F)or the most part, however, imperial preferences take other forms than tariff assimilation. They are in some cases the gradual product of several centuries of evolution, and even within an empire the forms and degrees of preferences vary from colony to colony."\(^{40}\)

Viner separately categorised "regional agreements", whereby a trade agreement would provide for MFN exemptions for specified countries. However, as such preferences would relate to MFN, "(T)he inclusion of such clauses frequently reflected little more than a sentimental contemplation of the desirability in the abstract of closer economic relations with countries with which there were - or it was pleasant to think that there were, or could be developed - specially close ties of sentiment and interest arising out of ethnological, or cultural, or historical political affiliations."\(^{41}\)

A final category of plurilateral agreements related to the League of Nations Economic Committee report of 1929, as mentioned above, which recommended the use of plurilateral tariff cutting conventions in order to improve the world economic situation. In their final form, such conferences would be open in principle to the adhesion of other interested states on the basis of reciprocal exchanges.\(^{42}\)

1.5 Chapter Conclusion

In calling for the Atlantic joint declaration in 1941, Gardner reported that President Roosevelt declared that the pronouncement was necessary to send a signal to both potential victors and the vanquished that post-war principles would not be a replay of the Versailles Treaty, that there was hope that the cycle could be broken. In this sense, the decision to seek a joint statement in the first instance related closely to a reflection of the parallel period of 1916-1917. Roosevelt felt that he needed evidence that Britain was fighting for the same principles of freedom and justice that had been affirmed as the objectives of U.S. policy.\(^{43}\) The leading press in England was also cited in viewing the Charter's declaration in this broader context. Thus, the Charter was said to forecast, "an integrated world economy and not a series of independent and mutually exclusive systems", and that, "The considerable number of people in this country who are already planning our post-war trade in terms of barter, bilateralism, trade zones, clearings, exchange control, and by the concepts of the 'between wars' era must begin at once to recast their ideas".\(^{44}\)

Within the larger frame of international economic relations, these statements appear to consistently reflect a larger goal sought to be achieved. Perhaps Richard Gardner also sensed the loss of the

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\(^{40}\) His final comment on the relationship between the two indicated that tariff assimilation can be seen as a most severe form of colonial preference, a point he believes was lost on American legislation which, permitted sanctions against colonial preferences, but not tariff assimilation. He attributes this to the U.S. bias in favour of customs unions. J. Viner, Ibid., p. 17.

\(^{41}\) J. Viner, Ibid., p. 19, citing for example the "Balkan", "Nordic" or "Central American" arrangements.

\(^{42}\) League of Nations, Monetary and Economic Conference, Draft Agenda, Geneva, 1933, cited in J. Viner, Ibid., note 30 at p. 34. "In the plurilateral clause, on the other hand, the emphasis, express or implied, is always on the nonexclusiveness of the arrangement and on the substantial number of countries contemplated as members of a prospective arrangement. J. Viner, Ibid., at p. 22. Whidden varies from this as he bundled both the plurilateral and regional categories together. Viner's treatment presents greater legal accuracy if one considers that a plurilateral low tariff club would be open to non-members on the basis of reciprocity, while a regional agreement would not. A modern term "open regionalism" appears to be a contemporary application of the concept of a low tariff club.

\(^{43}\) "No doubt he remembered the unfortunate experience of Woodrow Wilson, who had drafted a unilateral statement of American war aims during the first world war in ignorance of the secret treaties already concluded between America's allies." R. Gardner, Supra note 12 at p. 41.

\(^{44}\) R. Gardner, Ibid., at p. 50, citing the Banker and News Chronicle respectively.
identity of this greater objective in concluding that it was rather unfortunate that an issue like Imperial preference was raised in direct form, and that "the controversy about it became such a celebrated part of the history of the Atlantic Conference." For the purposes of understanding MFN's later application to preferential systems, it may also be unfortunate that the issues surrounding Imperial preference came to dominate an understanding of what the non-discrimination clause sought to achieve.

45 R. Gardner, Ibid., at p. 53.