The Final Act of Helsinki and Non-discrimination in International Economic Relations

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Contents

I. Introduction

The subject under consideration requires more than simply an investigation whether the principle of non-discrimination in international economic relations is expressly mentioned in the Final Act of Helsinki. The juxtaposition of a document with a principle also imposes the task to examine:
- whether this principle, even if not mentioned expressly, is valid on the basis of other sources in the field concerned;

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Abbreviations: AJIL = American Journal of International Law; AnnIDI = Annuaire de l'Institut de Droit International; Comecon = Council for Mutual Economic Aid; CSCE = Conference on Security and Cooperation in Europe; EA = Europa-Archiv; ECE = Economic Commission for Europe; EEC = European Economic Community; GATT = General Agreement on Tariffs and Trade; ICJ = International Court of Justice; ILC = International Law Commission; UNCTAD = United Nations Conference on Trade and Development; UNESCO = United Nations Educational, Scientific and Cultural Organization; YILC = Yearbook of the International Law Commission.

– whether a rule of non-discrimination can be derived from other principles mentioned.

These introductory remarks are not intended to indicate the structure of the following paper. It seems, however, necessary to justify why it begins with remarks about concepts either directly used in the formulation of the subject or indirectly related to them.

It may be added that the present author feels obliged to take note of certain developments in the field of his investigation which preceded the elaboration and adoption of the Final Act, even if they took place outside the Conference, in order to illustrate the situation in which the work of Helsinki was taken up. Later developments which occurred after Helsinki are not systematically treated.

II. Definition of Concepts

A. The Final Act[1]

The document named above is a relatively stable element. One can rely on the words used therein, even if these words are sometimes vague and open to interpretation. This is not astonishing if parties not only from divergent schools of thought but also with divergent ideologies arrive at a compromise. Every compromise has, however, a common denominator.

Fortunately, the problem of the legal value of the Final Act need not be dealt with here. The problem has attracted more attention from learned scholars than many substantial questions[2] and certainly more than the "lost basket of Helsinki". Nevertheless, it seems necessary to say a word about this question because during the relevant discussions the legal character of the Final Act in general and especially of its Basket II played an important role when decisions had to be made on the way and style in which provisions would be drafted. Was this document to constitute a kind of Charter or Covenant containing general principles of law of a normative character, valid for eternity, or was it the intention to fix a programme with pragmatic scope and goals for the near future?

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[1] Text I. Brownlie, Basic Documents on Human Rights (2nd ed. 1981), pp.320–377.

[2] Th. Schweisfurth, Zur Frage der Rechtsverbindlichkeit und völkerrechtlichen Relevanz der KSZE-Schlußakte, ZaöRV vol.36 (1976), p.681; R. Bernhardt/I. von Münch/W. Rudolf (eds.), Drittes deutsch-polnisches Juristen-Kolloquium, vol.1: KSZE-Schlußakte (1977).

The view was expressed by a great number of the Heads of States at Helsinki shortly before the Final Act was signed[3] that this Act does not create formal legal obligations, and one can accept that a general consensus exists in this regard. One is moving on less solid ground if one speaks in this connection of "soft law". The significance of this term is controversial and has only recently been criticized by a Swiss colleague[4]. Between strict formal law and "no law" – he argues – there is no intermediate source of international law. Such traditionalism may be called excessive. For the purpose of our subject it is sufficient to recognize the view that the Final Act of Helsinki is a programme of action accepted as a guideline; and that it therefore is of the utmost political importance and should not be neglected irrespective of its formal characteristics. The fact that this instrument has influenced public opinion even more strongly than many formally binding treaties – as for instance the United Nations Covenants on Human Rights – speaks for itself.

B. Non-discrimination[5]

1. The expression "Non-discrimination in International Economic Relations" indicates only the field in which the problem has to be considered without mentioning the standard of comparison. It can, however, be accepted that, as far as the economic transactions as such are concerned, they have to be compared with the transactions of other foreign partners and not with internal economic acts carried out within the borders of the State concerned. Transactions in international economic relations, namely the import and export of goods, constitute acts with their own character, different from the production and sale of merchandise in the internal sphere. Non-discrimination therefore means that the trading partner concerned is treated at least in the same way as other foreign trading partners and is entitled to receive the same treatment as they do.

It is undeniable that international economic relations lead to personal contacts between a foreign trading partner and the authorities of the coun-

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[3] Conference on Security and Co-operation in Europe, Stage III – Helsinki, 30 July – 1 August 1975, Verbatim Records and Documents (CSCE/III/PV.), PV.1–7.

[4] D. Thürer, "Soft law" – eine neue Form von Völkerrecht?, Neue Zürcher Zeitung, July 14, 1984, p.23.

[5] Khurshid Hyder (Hasan), Equality of Treatment and Trade Discrimination in International Law (1968); W. Kewenig, Der Grundsatz der Nicht-Diskriminierung im Völkerrecht der Internationalen Handelsbeziehungen, vol.1: Der Begriff der Diskriminierung (1972).

try to which goods are delivered or from which they are exported. Representatives of the importing country visit their clients, may wish to take residence in their country, may need access to its tribunals and legal aid. Under a human rights aspect in these cases the problem of equal treatment of such persons with the nationals of the State concerned is raised, not only with the nationals of other foreign trading partners. The criterion applicable in such cases is mainly nationality in the sense of citizenship. The problem of the legal treatment of aliens is a very complex question treated frequently in treaties of commerce but also in human rights instruments. It may be mentioned here that in the main instrument concerning discrimination elaborated under the auspices of the United Nations the criterion of citizenship is excluded. Art.1 para.2 of the 1965 International Convention on the Elimination of all Forms of Racial Discrimination reads:

> "This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens".

Other human rights instruments are less clear in this regard. However, this marginal problem is not treated here *in extenso,* discrimination between States being the main issue.

2. In the field of human rights as well as in international economic relations there exists a common problem, i.e. whether the term "discrimination" can be used if only a distinction on the basis of certain criteria is made or if this distinction has to be made arbitrarily. The European organs for the protection of human rights – the European Commission and the European Court of Human Rights – have in a first period requested such an element of arbitrariness[6]. Later they have changed their opinion and regarded as "discrimination" any distinction based on certain criteria. It is, however, important that there is a further requirement in this field, namely that this distinction is one impairing the enjoyment of the rights and freedoms set forth in the relevant Convention, exactly as according to Art.1 of the International Convention on the Elimination of all Forms of Racial Discrimination. Only if the distinction has this effect is it illegal.

The situation in the field of international economic relations is similar. Any distinction made between a foreign trading partner and other foreign trading partners constitutes discrimination[7]. It is, however, illegal only if a

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[6] Kewenig, p.103 *et seq.;* M. Sachs, Art.14 MRK: Allgemeines Willkürverbot oder striktes Unterscheidungsverbot?, Österreichische Zeitschrift für öffentliches Recht und Völkerrecht, vol.34 (1984), p.333.

[7] Kewenig, p.148.

duty exists to treat both of them in the same way. Normally such a duty is imposed by treaties[8]. Whether customary law constitutes a basis for such a duty remains to be discussed.

There is reason to doubt whether the title given to the subject under consideration follows this terminology. The use of the negative form (non-discrimination) seems to indicate that an element of illegality is included. Otherwise it would only raise a purely academic question.

3: Modern international law has in certain special fields developed customary rules outlawing any discrimination. Diplomatic intercourse and participation in international organizations are almost uncontroversial examples. In the field of human rights such a rule of customary international law certainly exists concerning discrimination based on race, colour, descent, or national or ethnic origin, as recognized by the International Court of Justice in one of the *South West Africa* cases[9].

The problem whether international economic relations likewise belong to these special fields covered by a rule of customary international law is at least politically controversial and must be discussed. Socialist States have frequently requested to affirm the rule of non-discrimination in trade. An example from the drafting history of the Declaration on Friendly Relations will be quoted later. It is significant that Mr. Krushchev in his address before the General Assembly on September 18, 1959[10] combined legal with political arguments in favour of a rule of non-discrimination in trade. Legally he referred to the "United Nations Charter which commits all States Members to the development of friendly relations among nations based on respect for the principle of equal rights". Politically he stated: "The entire system of trade discrimination should have been summarily buried long ago", admitting by these words that the funeral had not yet taken place.

It is well known that authors from socialist countries largely follow the arguments referred to by Mr. Krushchev regarding the legal position in international law[11].

It cannot be excluded that a discriminatory treatment constitutes an abuse of rights and is as such illegitimate. This concept is controversial in international law. Those in favour of it require, however, that a damage be

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[8] Kewenig, p.132.

[9] ICJ Reports 1971, para.131 (Opinion on the Presence of South-Africa in Namibia).

[10] UN GAOR 14th Sess. (1959), Plenary Meeting 799, p.34.

[11] See the summary of E. Szaszy, AnnIDI vol.53 I (1969), pp.172–181; E. T. Usenko, Sozialistische internationale Arbeitsteilung und ihre rechtliche Regelung (Berlin 1966), pp.200–203, frequently quoted in the ILC Reports; Schulz (note 40).

caused by an "outrageous and unconscionable" exercise of a subjective right[12] – a case which may happen only in exceptional situations[13].

Irrespective of this possibility there is a common agreement not only between internationalists from the western world that there is no general rule of customary international law outlawing discrimination in trade with the effect that States have to treat each other and each other's nationals equally under all circumstances[14]. As Jessup put it, "States have wide latitude to accord or withhold special privileges and this latitude may be used for bargaining purposes" and the remarkable dissenting opinion of Judge Tanaka[15] in the *South West Africa* case has very impressively drawn the line between the protection of human rights and rules for commercial transactions by saying that the latter are derived "from considerations of expediency" or from "the creative power of the custom of a community", while the protection of human rights is based on *jus naturale*.

When the International Law Commission, discussing the most-favoured-nation clause[16], recognized that the principle of non-discrimination "is a general rule inherent in the sovereign equality of States", it avoided qualifying this general rule precisely. The ILC exclusively referred to statements made when the Vienna Conventions on Diplomatic and Consular Relations were discussed[17] in order to justify the inclusion of non-discrimination clauses in these Conventions. They are therefore valid only for these matters and constitute no basis for the extension of this rule to economic matters. It is also significant that during these discussions[18] several speakers expressed the opinion that a "general non-discriminatory regime" which could be expected by States was not based – or not yet – on a rule of customary international law. "If a general customary rule of non-discrimination came into existence, it would affect not only the beneficiary State but all States concerned", said M. Bedjaoui[19], without meeting with criticism from the side of A. Ushakov who spoke shortly after him.

In general it can be stated that the insertion of non-discrimination clauses into special conventions for a specific field may only serve as an

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[12] ICJ Reports 1955, p.37 (Dissenting Opinion Judge Read, *Nottebohm* case, 2nd phase).

[13] Kewenig (note 5), p.127.

[14] Kewenig, p.49; Hyder (note 5), p.18 (both with ample references).

[15] ICJ Reports 1966, p.296.

[16] YILC 1978 vol.II, part II, paras.48–50, pp.11/12.

[17] YILC 1958 vol.II, p.105; 1961 vol.II, p.128.

[18] On Art.7 of the Final Draft, YILC 1978 vol.II, part II, p.24.

[19] YILC 1973 vol.I, p.77.

argument that this rule is valid for the respective field, though it has been argued that on the contrary they have been included in view of the fact that a customary rule was lacking[20]. Under no circumstances can such clauses be regarded as an argument that a general rule of customary law is valid also for other fields or even generally.

C. Adjacent Concepts

In connection with the discussions on the rule of non-discrimination in economic relations a number of other concepts of a somewhat similar nature are frequently mentioned.

1. It has frequently been stated that non-discrimination is nothing other than a corollary to equality[21], a negative expression of what the term "equality" is expressing positively. By establishing the rule of non-discrimination the goal of equality should be reached. It is true that both concepts are serving the same purpose. However, the ways in which this goal is reached are different. The principle of equality leaves a considerable margin of appreciation concerning the criteria to be applied and the values to be realized. Those who apply this principle have to decide which distinctions are legitimate and which arbitrary. The rule of non-discrimination usually indicates expressly illegitimate criteria – such as race, sex, language, religion or also citizenship – in order to eliminate potential uncertainties in their respect. Thus the rule of non-discrimination is stricter and more precise than the rule of equality. It is less flexible and the introduction of certain criteria can even lead to an unequal result hardly compatible with material justice.

On the other hand, equality is a term of public philosophy which embraces certain values not covered by the mere absence of negative elements. Its strong affinity to the idea of justice is undeniable. In history a great number of new fundamental rights and liberties have been developed on the basis of the guarantee of equality, while a non-discrimination rule is by its very nature limited to the elements expressed in it and can never constitute the source of new rights. It forbids and prohibits certain acts without imposing positive action which may be necessary in order to

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[20] Kewenig (note 5), p.44 note 72; U. Scheuner, Conflicts of Treaty Provisions with a Peremptory Norm of General International Law, ZaöRV vol.29 (1969), p.35 *et seq.*

[21] K. J. Partsch, Fundamental Principles of Human Rights: Self-Determination, Equality and Non-discrimination, in: Vasak/Alston, The International Dimensions of Human Rights (1982), p.68 *et seq.*

achieve substantial equality. An example is the equality between men and women. In Art.35 para.2 of the 1977 Constitution of the USSR such positive actions are mentioned in order to ensure equality. It therefore makes sense that Art.3 para.2 of the Basic Law for the Federal Republic of Germany provides that men and women shall have equal rights side by side with the rule of non-discrimination on the basis of sex, because these two rules are not identical though they partially overlap[22].

Furthermore, there is the problem that "equality" is used in different connotations according to the subjects to which it applies. Equality of States is different from equality of individuals. The term is widely used in connection with sovereignty, as in Art.2 para.1 of the UN Charter speaking of the "sovereign equality" of all its members. When this combination is used strongest emphasis is given to the autonomous decision of national policy which all States should enjoy in an equal manner. The "Declaration on Friendly Relations" carefully defines the contents of this concept. In first place is put the notion that "States are *juridically* equal" (emphasis added). Using this term the Declaration refers to the distinction between juridical equality, i.e. equality before the law on the one hand, and material equality, equality in the law on the other hand, sometimes also called "full equality", an expression which indicates that the partners concerned enjoy the same treatment without distinction. When this Declaration was adopted an attempt was made to include in the Chapter entitled "The duty of States to co-operate with one another in accordance with the Charter" a general and rigid commitment of States to "refrain from any discrimination in their relations with other States"[23]. This clause proposed for the operative part of the Chapter was not adopted. Instead in the preamble the provision was inserted that "States have ... to promote international co-operation free from discrimination based on such differences" (i.e. those "in their political, economic and social systems"). This fundamental change is amply explained in the report on these discussions:

> "A number of international instruments confirmed the existence of groups of States separated on the basis of economic, social and political differences which in themselves were not an element of international conflict. But there existed geographical, economic and political realities which explained the different treatment extended to various States by a particular State in its relations. It would be difficult, therefore, to accept a rule which implied the illegality of the

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[22] Kewenig (note 5), p.53, does not agree.

[23] Proposal made by Czechoslovakia, UN GAOR 21st Sess. (1966), Annexes vol.III agenda item 87, p.85.

mere act of drawing distinctions between one State and another, the more so if the States between which the distinction was drawn had different political, economic or social systems"[24].

In the final version of the operative part the rule of non-discrimination is not mentioned. *Lit.*(c) reads: "States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention" (emphasis added).

It is remarkable that States, not willing to introduce a general rule of discrimination, replaced it by a restatement of "sovereign equality".

The discussions in the ILC on this matter have already been mentioned.

2. From the clouds in which "equality" is floating we turn now to the sober and prosaic, though very ancient, concept of most-favoured-nation treatment. This concept appears in the Final Act with a very cautious wording which will be analyzed below. In connection with non-discrimination two general problems have to be discussed: the relationship between the two concepts and also whether there exists a legal obligation to introduce a most-favoured-nation régime, based on the same source as the alleged general non-discrimination rule.

During the discussions in the ILC concerning the most-favoured-nation clause from 1964 until 1978 a formula of the ICJ concerning these clauses gained much attention: They intended "to establish and to maintain at all times fundamental equality without discrimination among all the countries concerned"[25]. Such a close connection between most-favoured-nation treatment and non-discrimination did not find general agreement. Ago considered that this treatment was not necessarily a consequence of the principles of non-discrimination and equality of States[26] and Castañeda even regarded it as an "exception to the general principle of the sovereign equality of States"[27].

Varying arguments against identifying both concepts were brought forward. The rapporteur Endre Ustor had insisted on the differences regarding the field of application – a not very convincing argument in view of the attempt of the ILC to make most-favoured-nation clauses applicable also

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[24] Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States, September 26, 1967 (A/6799), p.15.

[25] ICJ Reports 1952 (*US Nationals in Morocco*, Judgment of August 27, 1952), p.192.

[26] YILC 1973 vol.I, p.67; similar P. Pescatore, La clause de la nation la plus favorisée, AnnIDI vol.53 I (1969), pp.20–22.

[27] YILC 1973 vol.1, p.76.

to other fields than economic relations. Following E. T. Usenko[28], he found a second difference in the fact that most-favoured-nation treatment always needs a conventional basis while the régime of non-discrimination does not need it as a general rule. It is convincing that there exists a difference between the legal sources of both concepts and that most-favoured-nation treatment needs a conventional basis. It can, however, not be admitted that in economic matters the alleged non-discrimination rule has been made evident.

The following argumentation of the ILC itself suffers from the fact that the theory of the rapporteur concerning the existence of a general rule of non-discrimination is at least tolerated, if not accepted. If such a rule really had a basis in customary international law and if it had to be applied rigidly and without exceptions the limitations of most-favoured-nation treatment generally recognized and incorporated in the General Agreement on Tariffs and Trade (GATT) in favour of customs unions as well as those conceded under this régime by a waiver would be absolutely illegal and could not be justified. This would equally be valid for exceptions or privileges in favour of developing countries according to the proposals of UNCTAD. If one accepts that non-discrimination in trade is not more than a political principle which may or may not be followed according to circumstances no objections against these limitations can be raised.

The second general problem is the legal basis of most-favoured-nation treatment. Here I can largely rely on the results of the discussions of the ILC which resulted in Art.7 of its Draft:

> "Nothing in the present articles shall imply that a State is entitled to be accorded most-favoured-nation treatment by another State otherwise than on the basis of an international obligation undertaken by the latter State" (emphasis added).

It has been clearly stated that such an "international obligation" cannot at present be derived from a rule of customary law. The flexible wording – "international obligation" instead of "treaty" – has been preferred in order not to exclude obligations created informally or unilaterally and also in order not to prejudice a development which may lead to the creation of a customary rule in the future[29].

This result indirectly confirms the opinion that in the field of economic relations no legally binding rule of non-discrimination exists. The whole institution of most-favoured-nation treatment is based on the idea that

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[28] See note 11.

[29] YILC 1973 vol.I, p.74 *et seq.*

distinctions between trading parties are possible and legitimate. Otherwise there could not be less favoured nations and no necessity for a conventional basis[30].

Finally one special problem has at least to be mentioned briefly: the application of most-favoured-nation treatment between market economy countries and State trading countries. The problem is well known: How can it be managed to substitute non-functioning automatism by special agreements in order to establish material reciprocity? The problem, together with its historical development, has been ably presented years ago by Martin Domke and John Hazard[31]. Many of the arguments which later appeared in the discussions of the ILC have been used by both sides during long-lasting negotiations between governments and also in a Conference of Experts held under the auspices of UNESCO in March 1958 at Rome[32]. Of interest here is the fact that one side insisted on formal equality while the other side tried to find a solution on the basis of material justice. One may say that in this regard a certain parallelism exists with the discussions in UNCTAD concerning the application of the most-favoured-nation clause to developing countries[33]. In both cases a strict application of a formalized rule intended to reach equality resulted in creating inequality and made special measures necessary in order to establish a balance.

3. The concepts of "equality" and "most-favoured-nation treatment" are rather near to the rule of non-discrimination. The same cannot be said of the rule of "non-intervention" which is, however, also brought into play in the discussions.

According to the definition contained in the "Declaration on Friendly Relations" this rule prohibits *inter alia* the use of economic measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.

It is true that the introduction of the rule of non-discrimination in economic relations with another nation is an economic measure in order to obtain from it advantages, namely the concession of most-favoured-nation treatment for its own exports. If such agreement is based on the mutual interest of both sides and if it is entered into voluntarily, one can hardly speak of coercion in order to subordinate the exercise of sovereign rights. The refusal to introduce the rule of non-discrimination in trade relations is

30 Kewenig (note 5), p.62.
31 AJIL vol.52 (1958), pp.55–68.
32 *Ibid.*, pp.495–498 (Report of J. Hazard).
33 YILC 1978 vol.II, part II, p.12.

also based on the sovereign right of the acting State and can hardly be regarded as a measure of coercion.

A connection between the rule of non-intervention on the one hand and either the introduction of the rule of non-discrimination or the refusal to introduce it on the other hand apparently only exists in quite exceptional situations where a State is able to impose its will on another State either on the basis of a dependence in fact or also in law. Under such circumstances no equality between the respective States would exist.

III. Conditioning Factors

The definition of concepts has already led to some negotiations in other fora on economic relations. Some others should be mentioned before describing the events at the Conference itself.

1. The Economic Commission for Europe (ECE) since 1947 had discussed most of the problems which now form the object of Basket II. The discussion on the application of the most-favoured-nation clause between State trading and private enterprise economies which led in 1958 to the Conference of Experts at Rome had begun in the ECE when a draft All-European Agreement on Economic Co-operation was on its agenda[34].

Later this subject was taken up in the ECE Committee on the Development of Trade[35]. In 1963 an *ad hoc* Working Group of Experts was established to study policy problems of East-West trade including the most-favoured-nation principle and non-discrimination treatment as applied under different economic systems[36]. It began its work with extensive discussions of the general principles. Experts from countries with planned economies denied that the European Economic Community (EEC), as a customs union, fell outside the régime of the most-favoured-nation clause. On the contrary, it was obliged to extend to third countries to which they granted most-favoured-nation treatment the specific régime applied between member States. No agreement was reached and after some vain attempts with other organs the ECE finally adopted on May 2, 1968 a resolution which, without mentioning the two principles, called for the

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[34] UN Doc.E/ECE/270 parts 1 and 2, March 12, 1957.

[35] B. G. Ramcharan, Equality and Discrimination in International Economic Law (VIII). The United Nations Regional Economic Commissions, Yearbook of World Affairs, vol.32 (1978), p.278.

[36] ECE Res.4 (XVIII).

preparation of practical measures contributing to the further development of trade[37].

Also during later discussions in the ECE the conclusion was reached that a precise and legalistic balancing of rights and duties is likely to be less rewarding than attempts to ensure a result by other means[38].

Basket II of the Final Act pays tribute to the work already undertaken in the ECE by mentioning this organ not less than 13 times and it has been remarked that the text of this Basket closely resembles to the ECE's revised programme of work for 1969/70[39].

2. As all members of the enlarged Communities participated in the Conference their existence was an important factor in the negotiations.

It is well known that at the beginning of the Conference the relations between the European Communities and the States from eastern Europe were more than problematic[40]. This antagonism was largely overcome during the negotiations since the Communities were admitted to raise their voice in the Conference[41].

Some remarks on their internal structure may be helpful to understand the situation.

As regards customs duties and related charges the EEC is profiting from the principle "customs union overrides most-favoured-nation treatment". Third States cannot claim to enjoy the privileges of member States. This is also recognized by GATT[42]. It has, however, to be noted that the concept of "customs duties" and charges related thereto is narrower than the understanding of most-favoured-nation treatment between socialist States. Quantitative restrictions are not included if not expressly mentioned.

A similar situation exists with regard to non-discrimination. According to the legal order of the Communities the concept of "equality" is under-

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[37] ECE Res.1 (XXIII); see also Ramcharan (note 35), pp.278–283.

[38] Ramcharan, p.285.

[39] I. Bailey-Wiebecke/P. I. Bailey, ECE and the Belgrade Follow-up Conference, German Foreign Affairs Review, vol.28 (1977), pp.257 (260 note 9).

[40] E. Schulz, Moskau und die europäische Integration (1975), pp.115, 139 *et seq.*, with quotations from the writings of Mrs. Maksimova and Mr. Saban and their criticism of the Communities. On the other hand the former President of the European Commission, W. Hallstein, Die Europäische Gemeinschaft (1973), pp.389, 400, regarded the negotiations at Helsinki as a vital challenge for the process of European Integration.

[41] G. von Groll, Die KSZE und die europäische Gemeinschaft, in: J. Delbrück *et al.* (eds.), Grünbuch zu den Folgewirkungen der KSZE (DGFK-Veröffentlichungen, vol.3) (1977), pp.27–36.

[42] H. Steinberger, GATT und regionale Wirtschaftszusammenschlüsse (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol.41) (1963), p.123 *et seq.*

stood only as prohibiting arbitrary differentiations and does not include a general rule of non-discrimination. There are specific treaty provisions introducing the rule of non-discrimination for special matters combined with equal treatment with own nationals. They apply only to the matters listed[43].

If most-favoured-nation treatment in the broad sense would be conceded to a socialist State this State would even receive more than is guaranteed to a member of the Communities or could be conceded to an associated State. A similar situation prevails for the rule of non-discrimination.

The reluctant position of the members of the Communities has to be seen in this light. In addition, the facts played a decisive role that as from January 1 the competence for foreign commercial policy had passed to the Community and that former treaties with eastern States with most-favoured-nation clauses expired at the end of 1974. Thus the members tried to avoid any commitment which could have an impact on the Community's liberty of action in this field.

3. The conclusion of treaties of commerce is not within the competence of Comecon. In this respect its position is different from the EEC. Such treaties had to be concluded between the EEC on the one hand and the individual members of Comecon on the other.

4. Some days after the first consultations began at Helsinki, the General Assembly created the basis for the elaboration of a Charter of Economic Rights and Duties of States[44], which was later adopted against the votes of the main developed countries from the West[45].

Art.26 sentence 1 of the Charter provides:

> "All States have the duty to coexist in tolerance and live together in peace, irrespective of differences in political, economic, social and cultural systems, and to facilitate trade between States having different economic and social systems".

This very general provision has the character of a programme which can hardly be interpreted as imposing concrete obligations concerning non-discrimination in economic matters[46].

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[43] H. P. Ipsen, Europäisches Gemeinschaftsrecht (1972), pp.572, 590–593.

[44] A/RES/3037 (XXVII) of December 19, 1972.

[45] A/RES/3281 (XXIX) of December 12, 1974; voting see ILM vol.14 (1975), p.265.

[46] H. Reinhard, Rechtsgleichheit und Selbstbestimmung der Völker in wirtschaftlicher Hinsicht (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol.74) (1980), p.102; C. Tomuschat, Die neue Weltwirtschaftsordnung, Vereinte Nationen, vol.23 (1975), p.98.

Greater attention should be given to the second sentence of Art.26 expressing a reservation for preferences in favour of developing countries of a non-discriminatory and non-reciprocal nature under a most-favoured-nation régime. GATT has legitimized this deviation from its principles by a waiver. Nevertheless it can be asked whether most-favoured-nation treatment can still be regarded as a common standard and whether the strong moral arguments in favour of it have lost their validity[47].

IV. Developments in the Conference

Before surveying the negotiations during the different phases of the Conference the general situation under which these discussions were taken up may be described.

On the one hand, it was no new element that certain States were in favour of establishing certain general principles for the conduct of international economic relations to be observed when bilateral treaties of commerce were concluded. On the other hand, the States which after long endeavours met at the Conference were ready to promote *détente* by the adoption of pragmatic programmes of action in certain fields without adopting a formal convention with legally binding force. In spite of this general trend, already during the preliminary consultations certain divergencies of views also appeared concerning the matters of Basket II.

Two schools of thought can be distinguished. One was in favour of establishing general principles as guidelines for specific programmes. The other wanted to take up these programmes immediately without defining fundamental principles in order to avoid not only controversies of a political or doctrinal character but also the danger that such principles could later be interpreted in divergent ways.

This procedural and tactical situation has to be taken into account. Concessions made during the discussions cannot in all cases be interpreted as the abandonment of a position previously taken but may also be regarded as an approximation in the style of negotiations.

1. During the pre-conference phase members of the eastern European group had with varying emphasis pronounced themselves in favour of confirming the principle of non-discrimination in trade and other

[47] G. P. Verbit, Preferences and the Public Law of International Trade: The End of Most-Favoured-Nation Treatment?, in: Les accords de commerce international/International Trade Agreements (1969) (Colloque 1968 de l'Académie de Droit International de La Haye), p.19.

economic relations at the future Conference. Some of the most important examples may be recalled.

On October 31, 1969 the Conference of Foreign Ministers of the Warsaw Treaty requested relations of States with equal rights, free from any discrimination in the field of trade and economic relations, and emphasized the necessity of renouncing discrimination in economic policy[48].

The same Conference meeting at Budapest on July 22, 1970 expressed itself less distinctly. It wished to expand economic relations on the basis of equality[49]. Prime Minister Kossygin in his speech at the 24th Party Congress explained more specifically his discontent with capsular groupements of the "Common Market" variety and expressed his preference for a broad development of multilateral economic relations without any discrimination[50].

Similarly, a Declaration adopted by the Political Advisory Board of the Member States of the Warsaw Treaty at Prague on January 26, 1972, spoke in favour of the elimination of any discrimination, inequality or artificial barriers of trade[51].

A few weeks later Secretary General Breshnev used the opportunity of the 15th Congress of Labour Unions, March 20, 1972, to define the position of the Soviet Union concerning the European Communities. "Certain people" – he said – "suggest the senseless idea that our policy is directed to undermining the European Communities. It is true that we are following with interest their development. Our relations with them will depend on the extent to which these Communities recognize the realities of the socialist States of Europe, namely the interests of the member States of Comecon. We are in favour of equal rights in economic relations and against discrimination"[52].

The first proposal of the Soviet Union for an agenda of the Conference (1st phase) at the end of 1972 listed among the principles in economic matters to be treated by a special Committee: "General principles aimed at broadening trade, including principles of most-favoured-nation treatment and non-discrimination"[53].

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[48] See the Documentation in: Sicherheit und Zusammenarbeit in Europa (KSZE), Analyse und Dokumentation, ed. by H.-A. Jacobsen *et al.*, vol.1 (1973), vol.2 (1978), Doc.32.

[49] *Ibid.*, Doc.55.

[50] *Ibid.*, Doc.85

[51] *Ibid.*, Doc.111.

[52] *Ibid.*, Doc.116.

[53] *Ibid.*, Analyse, p.35.

The first semi-official document which showed a less rigid position was an article by Ambassador Falin[54]. As authoritative source he referred to the Conference of Foreign Ministers at Prague, January 1972, without using the opportunity to mention again expressly the principle of non-discrimination. Instead he concentrated on pragmatic proposals.

On the other side, among western States, the compatibility of certain principles with the existence of the European Communities was the dominant issue. As early as 1969 Marshall D. Shulman from Columbia University[55] drew attention to the problem when interpreting a passage of the 1966 Bucarest Declaration of the Political Advisory Committee of the Member States of the Warsaw Treaty. In 1971 the Foreign Minister of Belgium, M. Harmel, stated that the proposed negotiations should under no circumstances call into question the progress reached by the integration of western Europe[56].

When the Heads of State and Government of the member States of the enlarged Communities met in Paris on October 19/20, 1972 they confirmed – *inter alia* in view of the preparations for Helsinki – their readiness to develop world trade with all countries on the basis of reciprocity and to create a solid and stable basis for a closer collaboration with eastern countries (Preamble nos.5 and 6). A liberalization of trade and the removal of barriers in the field of customs and also in other fields was to be their policy – again on the basis of reciprocity, especially in relation to eastern European countries (operative part nos.12, 13)[57].

The general declarations made by the delegations of western countries at the beginning of the consultations in November/December 1972 were made in the same spirit. Appeals to concentrate on practical problems were shared also by the delegations of neutral States. If general principles were mentioned at all these were the principles of mutual benefit and reciprocity[58].

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[54] *Ibid.*, Doc.127 (extract) = EA vol.27 (1972), pp.725–732.

[55] EA vol.24 (1969), pp.671–684.

[56] EA vol.26 (1971), pp.151–158.

[57] Erklärung der Konferenz der Staats- bzw. Regierungschefs der Mitgliedstaaten der erweiterten Europäischen Gemeinschaften in Paris am 19. und 20. Oktober 1972, EA vol. 27 (1972), pp. D 501 *et seq.* (502).

[58] KSZE, Konferenz über Sicherheit und Zusammenarbeit in Europa in Beiträgen und Dokumenten aus dem Europa-Archiv, H. Volle and W. Wagner (eds.) (1976), pp.131–152.

2. During the consultations between the representatives of ministers from November 1972 to June 1973 at Helsinki[59], separate Working Groups discussed the matters which finally appeared in the different Baskets. Concerning Basket II, two main phases can be distinguished: from March 20 to April 6, and from May 7 until the end of that month.

During the first phase the State trading countries insisted energetically on the principles of most-favoured-nation treatment and of non-discrimination as means of increasing foreign trade. The Communities and Comecon should collaborate without leading a discriminatory policy in the field of quantitative restrictions and export conditions. The concept of "most-favoured-nation", regularly mentioned together with non-discrimination, was understood in a broad sense, not limited to customs duties. Non-members of the Communities, however, did not claim to enjoy the same preferences regarding customs duties as member States.

Certain advances towards reciprocal harmony can already be noted during this first phase – mainly in the procedural field. Understanding was increasing from both sides concerning the fundamental difference between a convention with legal norms and actual programmes and projects. In a Romanian proposal, of March 30, 1973, for a preamble neither the principle of non-discrimination nor of most-favoured-nation treatment appeared. Reciprocity took their place.

After the break in April, proposed by France, a new proposal of the USSR delegation for a preamble created a new atmosphere. It spoke of "joint action in the field of economics ... that might constitute the outline of a European programme for the development of economic co-operation", of a "common agreement among the participating States under conditions of equality of rights and mutual advantage to facilitate the development of trade", without coming back to broad general principles. It was only mentioned that general problems of the application of most-favoured-nation treatment regarding customs should be discussed during the Conference. Finally, the principle "of reciprocity of advantages and obligations" was expressly mentioned – quite new language in the economic relations between east and west.

One can legitimately speak here of the two main economic groups – Comecon and the Communities – because the negotiations concerning Basket II were mainly led between the delegations from the member States

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[59] G. Brunner, Das Ergebnis von Helsinki, EA vol.28 (1973), pp.439–444; L. V. Ferraris, Report on a Negotiation: Helsinki – Geneva – Helsinki 1972–1975 (1979), pp.47–52.

of these two groups without a stronger active participation of other delegations which so effectively acted as mediators when the matters of Baskets I and III were discussed.

The new formulations had a remarkable influence not only on the Final Recommendations of the Helsinki Consultations of June 8, 1973[60], but likewise on the proposals of the USSR delegation of July 4, 1973 for a General Declaration concerning the principles guiding relations between States in Europe[61] and also on the common intervention of the delegations of the German Democratic Republic and of Hungary of the following day[62].

This balanced result was reached by the assurance that the Committee competent for co-operation in the field of economics would examine special measures designed to facilitate transactions and the exchange of services in specific forms[63], by the establishment of a catalogue of subjects to be studied and examined in the field of industrial co-operation and projects of common interest[64], in science and technology[65], environment[66] and other areas[67].

In exchange for these assurances the eastern side renounced to treat in the Conference a general rule of most-favoured-nation treatment outside contractual relations and of the principle of non-discrimination, expecting that the latter problem would be discussed on other occasions.

3. During the negotiations at Geneva (during phase 2) the problem of most-favoured-nation treatment played a certain role. It was even reported that the wish to establish a general rule for most-favoured-nation treatment had been renewed by eastern States[68]. No confirmation for this statement can, however, be found in the declarations made by the Heads of State in July 1975.

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[60] Official Documents of the CSCE, Helsinki 1973, pp.10–13.

[61] Konferenz über Sicherheit und Zusammenarbeit in Europa, Phase I – Helsinki, Dokumente (CSCE/I), CSCE/I/7.

[62] Sicherheit und Zusammenarbeit in Europa (note 48), Doc.153; Romania (*ibid.*, Doc.141) and Yugoslavia (*ibid.*, Doc.174) were in this phase still insisting on the principle of non-discrimination.

[63] Final Recommendations (note 60), para.32.

[64] *Ibid.*, paras. 33–36.

[65] *Ibid.*, paras. 37–38.

[66] *Ibid.*, paras. 39–40.

[67] *Ibid.*, para.41.

[68] K. E. Birnbaum, Die KSZE: eine Zwischenbilanz der Genfer Kommissionsphase, Arbeitspapiere zur Internationalen Politik, No.2, May 1974, p.34.

When they met in Helsinki from July 30 to August 1 in order to sign the Final Act they not only expressed their satisfaction with the positive achievements but also did not hide their criticism that not all of their far-reaching expectations had been fulfilled[69]. Most-favoured-nation treatment was not even mentioned.

Basket II had only a modest place in these declarations. The problem of discrimination in trade was mentioned only twice and in both cases not as a rule, but only as a result to be achieved[70]. In one case this goal appeared together with collaboration based on mutual interest and advantage[71].

On the other hand the element of reciprocity played an important role in the declarations of many speakers from countries with entirely different economic, social and political structures.

V. Conclusions: Analysis of the Text

In closing our investigation, analysis of the text may be combined with a summary and conclusions. The relevant provisions of the Final Act are annexed to this paper.

1. The term non-discrimination does not appear in connection with economic relations. "Distinctions as to race, sex, language or religion" appear in connection with human rights, clearly a field to be distinguished from economic relations.

2. Most-favoured-nation treatment appears in the provisions concerning co-operation in the field of economics. From the application of this treatment beneficial effects can result for the development of trade. It is not even stated that this development is under all cirumstances furthered; this is only a possibility. Only beneficial effects are recognized. It is left open whether non-beneficial effects may occur. One could have thought of the relations to developing countries not satisfied with this mechanism in order to achieve equality but needing preferences in order to establish a balance with the quite different conditions in developed countries.

Under no circumstances can this recognition, limited to the beneficial effects of most-favoured-nation treatment, be interpreted as confirming an obligation to grant most-favoured-nation treatment[72]. It even contains a

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[69] CSCE/III/PV. 1–7.

[70] Zhivkov, CSCE/III/PV.2, p.20; Kadar, *ibid.*, PV.3, p.30.

[71] Kadar, *ibid.*

[72] P. Frere, The Lost Basket of Helsinki, Atlantic Community Quarterly, vol.15 No.1 (1977), pp.43 (49).

reservation against the frequently used definition that in view of its world-wide application most-favoured-nation treatment constitutes a common standard.

3. Among the concepts somewhat related to "non-discrimination" we find "equality" and the "rights inherent in sovereignty" twice, and finally "the narrowing of differences in the levels of economic development" as well as "the elimination of obstacles to the development of trade".

4. For the first time "equality" – even "full equality" – appears in the second sentence of Chapter IX of the Declaration of Principles after a reference has been made in the first sentence to the purposes and principles of the Charter in its Arts.1 and 2. The manner and context in which "full equality" is used here clearly exclude the understanding that this term should interpret the contents of principles mentioned in Arts.1 and 2 of the Charter as "equal rights" or "sovereign equality". States have just to make contributions "in conditions of full equality". They are equal when deciding about the contribution to be made.

5. For the second time the term "equality" appears in the Preamble to Basket II (al.5), combined with two other concepts, "mutual satisfaction" and "reciprocity". This combination of three principles shall permit "an equal distribution of advantages and obligations of comparable scale", and it is added "with respect for bilateral and multilateral agreements".

The combination of three principles already constitutes a limitation of their application. Each of them applies only as far as this is compatible with the others. For instance, a strict application of formalized equality may not find mutual satisfaction. The case can be quoted that States with a planned economy insist on most-favoured-nation treatment though the extent of purchases to be imported from the conceding countries depends on a plan unilaterally decreed by them.

The combination of reciprocity with equality has similar effects. The concession of privileges may be justified under material justice without respecting reciprocity.

Further limitations are imposed by the following requirements. It should, however, be taken into account that the whole preambular clause is speaking only of a possibility ("co-operation ... can be developed") without imposing specific obligations. In any case it can be stated that no strict rule of equality is envisaged.

6. The "rights inherent in its [the States] s o v e r e i g n t y" appear in the Declaration on Principles, first (under I) together with a definition mentioning "juridical equality". This definition prevents an interpretation in the sense that the rule of non-discrimination should be included.

In the chapter "Non-intervention in Internal Affairs" of the Declaration on Principles (VI para.3) the rule concerning economic coercion mentions the exercise of the "rights inherent in ... sovereignty". It may be theoretically conceivable that a State is under economic pressure to concede or to refuse non-discrimination or most-favoured-nation treatment. In this case "the right inherent in sovereignty" would be the decision whether the treatment should be conceded or not. The provision confirms the free disposition of a State to decide on its external affairs.

7. The "narrowing of differences in the levels of economic development" appears in the Declaration on Principles (IX: Co-operation among States, al.2, third sentence) as a general goal to be achieved. One of the means among others to encourage the expansion of trade is the reduction or elimination "of obstacles to the development of trade" (Basket II, 1.Commercial Exchanges – General Provisions, al.3 paras.3 and 6). It is emphasized that States shall endeavour "to utilize the various economic and commercial possibilities" (para.3), leaving the choice between them according to the situation. An obligation to make use of specific means – e.g. the introduction of a régime of non-discrimination or most-favoured-nation treatment – cannot be derived from these provisions. On the contrary, one may say that the catalogue of possible means inserted into these General Provisions constitutes a kind of restatement of the notion of free choice in economic policy.

The final conclusions of this investigation of the principle of non-discrimination in the Final Act of Helsinki, namely its Basket II concerning co-operation in the economic field, can be summarized as follows:

- This document does not expressly impose on States an obligation to introduce a régime of non-discrimination in any form;
- no indirect formulation which could be interpreted in this sense is to be found in the document;
- States are free to make a choice between the different means in order to intensify their economic collaboration.

Whether the introduction of a rule of non-discrimination – or even of most-favoured-nation treatment – is an appropriate measure in order to achieve this goal has to be decided by them taking due regard to the values envisaged in the Final Act.

Annex

Final Act of the Helsinki Conference, 1975 (extracts)

(a) Declaration on Principles: I. Sovereign Equality ...

The participating States shall respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty, including in particular the right of every State to juridical equality, to territorial integrity and to freedom and political independence ...

Within the framework of international law, all the participating States have equal rights and duties. They will respect each other's right to define and conduct as it wishes its relations with other States in accordance with international law and in the spirit of the present Declaration.

VI. Non-intervention in Internal Affairs ...

They will likewise in all circumstances refrain from any other act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind.

IX. Co-operation among States

The participating States will develop their co-operation with one another and with all States in all fields in accordance with the purposes and principles of the Charter of the United Nations. In developing their co-operation the participating States will place special emphasis on the fields as set forth within the framework of the CSCE, with each of them making its contribution in conditions of full equality ...

They will take steps to promote conditions favourable to making these benefits available to all; they will take into account the interest of all in the narrowing of differences in the levels of economic development, and in particular the interest of developing countries throughout the world.

(Basket II): Co-operation in the Fields of Economics etc.

The participating States ...

Recognizing that such co-operation, with due regard for the different levels of economic development, can be developed, on the basis of equality and mutual satisfaction of the partners, and of reciprocity permitting, as a whole, an equitable distribution of advantages and obligations of comparable scale, with respect for bilateral and multilateral agreements, ...

1. Commercial Exchanges: General Provisions

The participating States ...

are resolved to promote, on the basis of the modalities of their economic co-operation, the expansion of their mutual trade in goods and services, and to ensure conditions favourable to such development;

recognize the beneficial effects which can result for the development of trade from the application of most-favoured-nation treatment;

will encourage the expansion of trade on as broad a multilateral basis as possible, thereby endeavouring to utilize the various economic and commercial possibilities;

recognize the importance of bilateral and multilateral intergovernmental and other agreements for the long-term development of trade; ...

will endeavour to reduce or progressively eliminate all kinds of obstacles to the development of trade; ...