

The Reunification of Germany

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CURRENT DEVELOPMENTS

THE REUNIFICATION OF GERMANY

The reunification of Germany raised a variety of public international law questions that have been subjected to extensive scholarly review in Germany, where the interest is naturally intense.¹ This report is designed to bring before American and other international lawyers the basic facts and issues pertaining to that important event.

The Fall of the Wall

When President Reagan visited Berlin in 1987, he exclaimed, "Mr. Gorbachev, tear down this wall!"² Nobody believed at that time that Soviet President Gorbachev would do any such thing soon. In fact, in early 1989, articles appeared in the *International Herald Tribune* proposing that German politicians give up the idea of German reunification. But by the time the German Democratic Republic (GDR) celebrated its fortieth birthday in the fall of 1989, it had become clear that it no longer enjoyed the support of its central ally, the Soviet Union. When Gorbachev expressed the idea to General Secretary Honecker that "he who comes around too late will be punished by life" and published it, it was clear that the end of the GDR was approaching.³

In late 1989 and early 1990, the turn history had taken was not fully appreciated by all those concerned. President Bush made it clear at a very early stage that it was up to the Germans themselves to decide on reunification.⁴ Prime Minister Thatcher believed for a long time that the issue was not really on the international agenda.⁵ President Mitterrand appeared to sanction the enduring character of the GDR by making an official visit there in December 1989; yet it had become clear by then that the GDR would hold free elections whose outcome could hardly be in doubt.⁶ Even President Gorbachev, until January 1990, did not fully per-

¹ Readers of this article should also consult Frowein, *Germany Reunited*, 51 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAÖRV] 333 (1991), in which the author also analyzes aspects of this important legal development. See also, in the same issue of the *Zeitschrift*, Oeter, *German Unification and State Succession*, *id.* at 349; Giegerich, *The European Dimension of German Reunification: East Germany's Integration into the European Communities*, *id.* at 384; Stein, *External Security and Military Aspects of German Unification*, *id.* at 451; and Wilms, *The Legal Status of Berlin after the Fall of the Wall and German Reunification*, *id.* at 470.

² Remarks at Brandenburg Gate in West Berlin (June 12, 1987), [1987] 1 PUB. PAPERS (RONALD REAGAN) 634, 635.

³ DAS ENDE DER TEILUNG 92 (J. Thies & W. Wagner eds. 1990) [hereinafter Thies & Wagner].

⁴ Haltzel, *Amerikanische Einstellungen zur deutschen Wiedervereinigung*, 45 EUROPA ARCHIV 127 (1990); see also Thies & Wagner, *supra* note 3, at 99–104; U.S. DEP'T OF STATE, CURRENT POLICY, No. 1233, 1989, at 5.

⁵ Davy, *Großbritannien und die Deutsche Frage*, 45 EUROPA ARCHIV 139 (1990); see also Thies & Wagner, *supra* note 3, at 111–16.

⁶ Schutze, *Frankreich angesichts der deutschen Einheit*, 45 EUROPA ARCHIV 133 (1990); see also Thies & Wagner, *supra* note 3, at 105–10.

ceive the immediate consequences of his earlier decision.⁷ It is probably correct to say that the fundamental reality that one cannot mix freedom with totalitarian conditions was not quite understood.

The free elections in the GDR of March 18, 1990, settled any doubts about what its people wanted. In a genuine expression of the right to self-determination, 80 percent of the votes were cast for those parties which favored early German unification. Although the peaceful revolution in the GDR followed the developments in Eastern Europe, it was to be expected that liberalization in the GDR would immediately lead to a general demand for German reunification. A member state of the United Nations, with 17 million inhabitants, ranking high on the scale of industrialized states within the COMECON group, would disappear from the scene. All of the four powers, by that time, had agreed in principle to German unification. The three Western powers were bound by the Convention on Relations concluded by them and the Federal Republic of Germany, which entered into force on May 5, 1955.⁸ Its Article 7 stated their common aim to achieve a reunified Germany under a liberal democratic constitution, like that of the Federal Republic, to be integrated within the European community.⁹

The Soviet Union was also under an international legal obligation to respect the GDR's decision on self-determination. After elections were held and the GDR freely chose to join the Federal Republic, for the USSR to have blocked that development would have constituted intervention in Germany's internal affairs. For a long time, political decisions regarding Central Europe had prevented the German people from exercising its right to self-determination. The Federal Republic of Germany had always taken the position that such an opportunity must be given to the German people.¹⁰

⁷ Riese, *Die Geschichte hat sich ans Werk gemacht, Der Wandel der sowjetischen Position zur Deutschen Frage*, 45 *EUROPA ARCHIV* 117 (1990); see also Thies & Wagner, *supra* note 3, at 89-98. On February 10, 1990, President Gorbachev and Chancellor Kohl agreed in Moscow "that it is the right of the German people alone to take the decision whether to live together in one state." See Riese, *supra*, at 117; Thies & Wagner, *supra* note 3, at 89.

⁸ Convention on Relations between the Three Powers and the Federal Republic of Germany, May 26, 1952, 6 UST 4251, TIAS No. 3425, 331 UNTS 327.

⁹ Article 7 of the treaty reads:

1. The Three Powers and the Federal Republic are agreed that an essential aim of their common policy is a peace settlement for the whole of Germany, freely negotiated between Germany and her former enemies, which should lay the foundation for a lasting peace. They further agree that the final determination of the boundaries of Germany must await such a settlement.

2. Pending the peace settlement, the Three Powers and the Federal Republic will cooperate to achieve, by peaceful means, their common aim of a unified Germany enjoying a liberal-democratic constitution, like that of the Federal Republic, and integrated within the European community.

Id. See G. RESS, *DIE RECHTSLAGE DEUTSCHLANDS NACH DEM GRUNDLAGENVERTRAG VOM 21. DEZEMBER 1972* (1978).

¹⁰ The right to self-determination includes, as defined in the United Nations General Assembly's Declaration on Principles of International Law concerning Friendly Relations among States in Accordance with the Charter of the United Nations, the following: "[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people." GA Res. 2625 (XXV) (Oct. 24, 1970).

It is a moot question, therefore, to what extent such a right would have existed if only a minority in the GDR had opted for unification and a majority could only have been formed by including the people of the Federal Republic of Germany. When a state is divided, whether the right to self-determi-

The Process of Unification

On October 3, 1990, the GDR ceased to exist and its territory became part of the Federal Republic of Germany. The five states formed in the GDR under the statute of July 22, 1990¹¹—Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt and Thüringen—became *Länder* of the Federal Republic of Germany. East Berlin became part of Land Berlin. As far as German law is concerned, unification was implemented by the GDR's accession to the Federal Republic in accordance with Article 23 of the Federal Constitution.¹² The details were agreed upon in the Unification Agreement of August 31, 1990.¹³

The act of unification, however, took place within a unique international framework that had applied to Germany since 1945. In the Berlin Declaration of June 5, 1945, the four Allied powers had assumed "supreme authority with respect to Germany."¹⁴ This declaration had never been revoked, even though the Allies later entered into various treaties with each of the German states that altered their relationships, including the Convention on Relations of 1955. Consequently, the Treaty on the Final Settlement with Respect to Germany was concluded by the Federal Republic of Germany, the German Democratic Republic and the four powers and signed in Moscow on September 12, 1990, immediately before the GDR acceded to the Federal Republic.¹⁵ In Article 7 of the Treaty, the four

nation is held by the peoples of both entities and also by the people as a whole, or only by the latter is a difficult issue. See Doehring, *Das Selbstbestimmungsrecht der Völker als Grundsatz des Völkerrechts*, 14 *BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT* 7 (1974). Under German constitutional law, as well as under public international law, it seems that the Federal Republic would have had to respect a decision by the majority in the GDR to retain a second German state. Frowein, *Deutschlands aktuelle Verfassungslage*, 49 *VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER* 12 (1990). As soon as a state becomes a member of the United Nations, the right to self-determination must certainly apply to its people.

¹¹ 1990 Gesetzblatt der DDR, Teil I, at 955.

¹² From the beginning, Article 23 of the Constitution (Basic Law or *Grundgesetz*) of 1949 provided for the accession of other parts of Germany. The article was first used in 1956 when the Saar acceded to the Federal Republic. Cf. Münch, *Zum Saarvertrag vom 27. Okt. 1956*, 18 *ZAÖRV* 1 (1957–58). It was clear from the beginning of the unification process that application of Article 23 was by far the easiest way to bring about German reunification. Article 146 of the Federal Constitution was frequently discussed as another way to bring about reunification. The original text of Article 146, which applied before reunification, read: "This Basic Law loses its validity on the day on which a constitution enters into force which has been adopted by the German people in a free decision." This article was interpreted as leaving open an alternative: the two German states could decide to elect a constituent assembly that would draft a new constitution for a united Germany. Although such a procedure was possible in theory, it certainly did not meet the requirements of the situation in 1989–1990.

¹³ Agreement with Respect to the Unification of Germany, 1990 *Bundesgesetzblatt*, Teil II [BGBl.II], at 889, translated and reprinted in 30 *ILM* 457 (1991).

¹⁴ Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland, and the Provisional Government of the French Republic, 60 Stat. 1649, TIAS No. 1520, 68 UNTS 189. The Preamble states:

The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany.

¹⁵ 1990 BGBl.II 1318, 29 *ILM* 1187 (1990).

powers terminated their rights and responsibilities relating to Berlin and to Germany as a whole. United Germany is to have full sovereignty over its internal and external affairs. The Treaty entered into force on March 15, 1991, when the Soviet Union, as the last party, deposited its instrument of ratification.¹⁶ However, the four powers had already suspended operation of their rights in a declaration that took effect on October 3 with German unification.¹⁷

Settling the Boundaries

Article 1(1) of the Treaty on the Final Settlement with Respect to Germany provides:

The united Germany shall comprise the territory of the Federal Republic of Germany, the German Democratic Republic and the whole of Berlin. Its external borders shall be the borders of the Federal Republic of Germany and the German Democratic Republic and shall be definitive from the date on which the present Treaty comes into force.

Article 1(2) states that “[t]he united Germany and the Republic of Poland shall confirm the existing border between them in a treaty that is binding under international law.” This Treaty was signed on November 14, 1990, by the Federal Republic of Germany and Poland¹⁸ and was ratified in January 1992.

The Allied powers and the two German states further agreed in Article 1(1) of the Final Settlement Treaty that “[t]he confirmation of the definitive nature of the borders of the united Germany is an essential element of the peaceful order in Europe.” This statement shows that the four powers retain certain rights regarding any radical changes in the borders between Germany and its neighbors as defined by Article 1. Article 1(5) of the Treaty introduces an interesting additional element on the position of the four powers. Under that provision, the four Governments “take formal note of the corresponding commitments and declarations” by the two German Governments and “declare that their implementation will confirm the definitive nature of the united Germany’s borders.” Without doubt, by this formal participation in the final legal confirmation of Germany’s borders the four powers acquired a certain “droit de regard” concerning these borders.¹⁹

The legal consequences, however, are not altogether clear. As far as ordinary border treaties are concerned, German sovereignty is not limited and Germany may conclude border treaties with its neighbors. But it is less certain that a radical change in Germany’s borders with the agreement of the state concerned could be brought about without legally involving the four powers. Even if one were to

¹⁶ 1991 BGBl.II 587.

¹⁷ Declaration Suspending the Operation of Quadripartite Rights and Responsibilities, Oct. 1, 1990, *reprinted in* 30 ILM 555 (1991), 85 AJIL 175 (1991).

¹⁸ 1990 Bulletin des Presse- und Informationsamtes der Bundesregierung 1394. The Treaty confirms the existing border in Article 1, making reference to bilateral treaties between Poland and the two German states, *infra* notes 22, 23. Article 2 provides: “The parties declare that the border which exists between them is inviolable now and for the future and they agree to respect unconditionally their sovereignty and territorial integrity.” For additional discussion of the Treaty from the Polish perspective, see Czaplinski, *The New Polish-German Treaties and the Changing Political Structure of Europe*, *infra* p. 163.

¹⁹ One has avoided speaking of a formal guarantee of the borders by the four powers, but the result is the same. See Ress, *Guarantee*, in [Instalment] 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 109 (R. Bernhardt ed. 1984) [hereinafter EPIL].

assume, *arguendo*, that Poland would ever cede its former German territories back to Germany, the sovereign rights of Poland under international law would encompass that decision as long as its consent were given voluntarily. Article 1 of the Final Settlement Treaty, however, would enable the four powers to make the legal argument that they are entitled to participate in negotiating such a change. They could assert that the peaceful order in Europe might be endangered by so drastic a change in the territorial composition of major European states. Thus, the four Allies seem to retain a residual competence as a result of the Treaty of September 12, 1990.²⁰

Just how did Poland acquire title to the former German eastern territories? The Potsdam Protocol of 1945 could not bring about a formal change in territorial sovereignty. In fact, the Protocol clearly reserved the final delimitation of the western frontier of Poland for a peace settlement.²¹ However, at Yalta in 1944 the four powers had committed themselves to moving the Polish border westward. Each German state later concluded a bilateral agreement with Poland concerning the Oder-Neisse boundary. The GDR recognized the border as early as 1950.²² The Warsaw Treaty concluded by the Federal Republic and Poland in 1970 stated that the parties are in agreement that the Oder-Neisse line is "the western State boundary of the People's Republic of Poland"; but the Federal Republic insisted on including a reference in Article IV to the other treaties concerning the border and, consequently, to the four-power position as well.²³ The Federal Republic of Germany could therefore argue that the question of the Oder-Neisse line was not finally determined.²⁴

Some commentators take the view that the 1990 Treaty should be seen as a cession of territory by Germany.²⁵ It seems appropriate, however, to approach the matter in a different way. Poland treated the territories as falling under Polish sovereignty soon after the Potsdam Agreement. Whatever the validity of that position under public international law, Poland gained recognition for its actions by all the states of the eastern bloc, including the GDR.²⁶ In 1970 the Federal Republic of Germany decided to accept that the territories had become Polish but

²⁰ It is not easy to describe the remaining competence accurately. Since all four Governments agreed that Germany is fully sovereign, they probably could only ensure that any treaty involving a change in German boundaries be brought about by fair and equitable negotiations that would not bring any other party under pressure.

²¹ Protocol of the Proceedings of the Tripartite Conference of Berlin, Aug. 2, 1945, United Kingdom-USSR-United States, 3 Bevens 1207, [1945] 2 FOREIGN RELATIONS OF THE UNITED STATES 1478. Part VIII(B) provides:

[P]ending the final determination of Poland's western frontier, the former German territories east of a line running from the Baltic Sea immediately west [of] Swinemunde, and thence along the Oder River to the confluence of the western Neisse River and along the western Neisse to the Czechoslovak frontier, . . . shall be under the administration of the Polish state and for such purposes it should not be considered as part of the Soviet zone of occupation in Germany.

²² Agreement concerning the Demarcation of the Established and Existing Polish-German State Frontier, July 6, 1950, 319 UNTS 93.

²³ Agreement concerning the Basis for Normalization of Their Mutual Relations, Dec. 7, 1970, 830 UNTS 327.

²⁴ Frowein, *Legal Problems of the German Ostpolitik*, 23 INT'L & COMP. L.Q. 105 (1974).

²⁵ Klein, *An der Schwelle zur Wiedervereinigung Deutschlands*, 43 NEUE JURISTISCHE WOCHENSCHRIFT 1065, 1071 (1990); Hailbronner, *Legal Aspects of the Unification of the Two German States*, 2 EUR. J. INT'L L. 18 (1991).

²⁶ S. KRÜLLE, *DIE VÖLKERRECHTLICHEN ASPEKTE DES ODER-NEIßE-PROBLEMS* (1970); Frowein, *Potsdam Agreements on Germany*, in 4 EPIL, *supra* note 19, at 141 (1982).

added the reservation on the position of the Allied powers. Of the four Allies, at least two, the United States and Great Britain, had not consented to a final change. In 1990 all four powers and the Federal Republic finally recognized the outcome of World War II. This action should be seen as recognition of an annexation brought about by the immediate postwar developments. When the four powers agreed to transfer these territories to Polish administration in 1945, they intended to prepare the way for a peace settlement under which the Polish border would be moved to the west. From this development, a lengthy territorial dispute arose that was only settled in 1990 with the unification of Germany.²⁷

The legal basis for the decision taken at Potsdam remains doubtful, especially as regards the agreement on population transfer.²⁸ Nevertheless, the provisional territorial arrangements agreed upon at Potsdam became the basis for the postwar order in Europe and for detaching vast parts of its former territory from Germany, especially the old German provinces of East Prussia and Silesia. By virtue of its treaty commitments of 1990, Germany finally acknowledged that situation.

The confirmation of German borders in the Final Settlement Treaty also applies to small adjustments in the western borders of Germany agreed upon by the Federal Republic and its western neighbors. During the period 1949–1990, the three Western powers always held that *all* border changes remained subject to final confirmation in a peace settlement for Germany as a whole.²⁹

Matters of State Succession

From the way German reunification took place, the identity of the subject of international law called the Federal Republic of Germany was clearly not affected in any way. Since the Federal Republic had always claimed identity with the former German state, one may well conclude that this identity has now been formally confirmed by history and cannot be put into doubt.³⁰ All treaties concluded by the Federal Republic of Germany, as well as its membership in international organizations, remain unaffected by the accession of the GDR. This point is clarified by Article 11 of the Agreement on the Establishment of German Unity between the Federal Republic of Germany and the German Democratic Republic.³¹ It states that the parties proceed on the understanding that international agreements to which the Federal Republic of Germany is a party, including treaties establishing membership in international organizations or institutions, shall retain their validity and that the rights and obligations arising therefrom shall also relate to the territories of the former GDR. There are some exceptions, but this is the general rule.³²

²⁷ See Kimminich, *Oder-Neisse Linie*, in 12 EPIL, *supra* note 19, at 267 (1990); Hailbronner, *supra* note 25, at 25.

²⁸ The “orderly transfer” mentioned in the Potsdam Protocol was in fact a measure disregarding all standards of the law of war and resulting in the deaths of millions of people.

²⁹ See 3 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 423 (1964).

³⁰ The Federal Republic of Germany had always considered itself to be the continuation of the German state founded in 1867–1871. In 1867 the North German Federation (Norddeutscher Bund) was established under the political leadership of Prussia. The southern German states acceded to this federation in 1871, according to the view that is generally accepted.

³¹ Note 13 *supra*.

³² The well-known rule of moving treaty boundaries was immediately accepted as the correct solution for the treaties concluded by the Federal Republic of Germany. Frowein, *Völkerrechtliche Probleme der Einigung Deutschlands*, 45 EUROPA ARCHIV 234 (1990).

As for treaties concluded by the GDR, Article 12 of the Unification Agreement provides as follows:

(1) The Contracting Parties are agreed that, in connection with the establishment of German unity, international treaties of the German Democratic Republic shall be discussed with the contracting parties concerned with a view to regulating or confirming their continued application, adjustment or expiry, taking into account protection of confidence, the interests of the states concerned, the treaty obligations of the Federal Republic of Germany as well as the principles of a free, democratic basic order governed by the rule of law, and respecting the competence of the European Communities.

(2) The united Germany shall determine its position with regard to the adoption of international treaties of the German Democratic Republic following consultations with the respective contracting parties and with the European Communities where the latter's competence is affected.

(3) Should the united Germany intend to accede to international organizations or other multilateral treaties of which the German Democratic Republic but not the Federal Republic of Germany is a member, agreement shall be reached with the respective contracting parties and with the European Communities where the latter's competence is affected.

The provisions agreed upon by the two German states are based on the understanding that public international law prescribes no clear rules on these matters.³³ Significantly, the two states recognized a need to maintain the confidence of the GDR's treaty partners. Yet in most cases only the expiry of the treaties concluded by the GDR is likely to be confirmed.³⁴ This result conforms to the general view in public international law as to the consequence of one state's acceding to another.³⁵ Only so-called localized treaties are generally thought to remain in force. A good example of a localized treaty is the one between the GDR and Poland on navigation on the Oder River.³⁶

Admittedly, the Vienna Convention on Succession of States in Respect of Treaties of 1978—which has not entered into force since only eight states have ratified it—has added to the lack of clarity about rules of state succession. Article 31 states that when two or more states unite to form a single successor state, each treaty in force of either one of them continues in force unless a new agreement is made or its continued application would be incompatible with its provisions.³⁷ This rule seems to be based primarily on protecting legal continuity in cases where a new subject of international law is created by the merger of two states. It is not appropriate when only one of the states loses its existence because of accession, while the other is not affected in its identity as a subject of international law.³⁸ In the consultations between the Federal Republic of Germany and the former

³³ For a detailed discussion, see Oeter, *supra* note 1.

³⁴ The consultations that are being conducted with the treaty partners of the former GDR seem to show that already.

³⁵ 1 L. OPPENHEIM, *INTERNATIONAL LAW* 153 (Lauterpacht 7th ed. 1948); 2 D. O'CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* 26, 61, 375 (1967).

³⁶ Treaty on Navigation on the River Oder, Feb. 6, 1952, GDR-Poland, 4 *Dokumente zur Außenpolitik der DDR* 157 (1957), amended May 15, 1969, 1970 *Gesetzblatt der DDR*, Teil I, at 113. On localized treaties, see 2 D. O'CONNELL, *supra* note 35, at 17; Oeter, *supra* note 1, at 363.

³⁷ Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, 3 *UNITED NATIONS CONFERENCE ON SUCCESSION OF STATES IN RESPECT OF TREATIES, OFFICIAL DOCUMENTS*, UN Sales No. F.79.U.10 (1979), reprinted in 17 *ILM* 1488 (1978).

³⁸ See Oeter, *supra* note 1, at 354.

partners of the GDR, it has apparently been accepted that most of the GDR's treaties were terminated.³⁹ As far as trade agreements are concerned, the complete change in the economic context has practically excluded continuation of the former trade of the GDR with eastern countries.⁴⁰ As for state property and debts, the rules of state succession are rather clear. The Federal Republic succeeds to all GDR property, including embassies and diplomatic missions in third countries; and Articles 23–24 of the Unification Agreement are based on the recognition that the Federal Republic of Germany is liable for state debts of the GDR.⁴¹

German Unification and the European Communities

During the negotiations on the EEC Treaty, the German delegation, on February 28, 1957, issued the following famous declaration: "The Federal Government proceeds on the possibility that in case of reunification of Germany a review of the treaties on the Common Market and Euratom will take place."⁴² In this way, the Federal Republic of Germany recognized that reunification would also be a matter of concern to the other members of the Communities. In fact, throughout 1989–1990 the process of German unification was closely followed and discussed by all the Community organs—the Council, the Commission and the Parliament. The Federal Government kept all the EC institutions continuously informed and a harmonized position on the legal consequences of reunification was soon established by the Federal Government and the Community.⁴³

Vice-President Andriessen of the European Commission explained to the European Parliament on April 4, 1990, shortly after the elections in the GDR demonstrated the wish of its people to accede to the Federal Republic, that accession would not in any way change the EC membership of the Federal Republic. Moreover, accession would make not only the treaties, but also Community law in its entirety applicable to the new *Länder*, except insofar as the Communities decided otherwise.⁴⁴ After the EC Commission expressed the legal opinion that Community law, in accordance with the so-called rule on moving treaty boundaries, would automatically become applicable with the extension of the Federal Republic of Germany to the new *Länder*, this view was adopted by all the Community organs. The Council proceeded accordingly and no member state objected.⁴⁵ It was also established, on the basis of Community practice, that treaties concluded by the EC before German unification extended to the territory of the former GDR.⁴⁶

The Commission of the Communities, however, rejected the view that the trade agreements of the GDR would automatically be extinguished with the accession of the GDR to the Federal Republic.⁴⁷ Rather, the Commission claimed that the Community succeeded directly to these treaties since they fall under its jurisdiction.⁴⁸ This position does not seem to have been accepted by the Federal Republic or any other state as yet.

³⁹ See *id.* at 378.

⁴⁰ *Id.* at 373–77.

⁴¹ *Id.* at 379–81.

⁴² Giegerich, *supra* note 1, at 398.

⁴³ *Id.* at 404.

⁴⁴ Protocol Eur. Parl. (Ausführlicher Sitzungsbericht), Apr. 4, 1990, at 266; see also Jacque, *German Unification and the European Community*, 2 EUR. J. INT'L L. 1 (1991).

⁴⁵ One can certainly agree with Jacque, *supra* note 44, that a consensus of all the members of the Community was reached in Dublin on April 28, 1990. However, whether it was legally possible for them to have decided otherwise is much more doubtful. They would seem to have been bound to accept the consequences of the accession if Germany complied fully with Community rules.

⁴⁶ Giegerich, *supra* note 1, at 422.

⁴⁷ *Id.* at 423–25.

⁴⁸ *Id.* at 424.

It soon became clear that interim measures would be necessary to integrate the territory of the GDR into the Community.⁴⁹ Therefore, on September 17, 1990, the Council enacted EEC regulation No. 2864/90 on interim measures applicable after the unification of Germany.⁵⁰ Under Article 2, the Commission may authorize the Federal Republic of Germany provisionally to maintain in force legislation applicable to the territory of the former GDR that is not in compliance with Community law. This authorization expired on December 31, 1990. However, since the end of 1990, special rules on some subjects have still applied to the new German *Länder* on the basis of specific EC authorizations.⁵¹ The process of German reunification is unique because the complex legal implementation of accession was brought about not only within the sphere of both public international law and constitutional law, but also within a supranational framework that amounted in many respects to an additional constitutional dimension. One need not stress the importance of the European structure in the context of German unification: the firm affiliation of a united Germany with the European Community was one of the implied conditions that made unification possible. Moreover, President Gorbachev had come to believe that a united Germany within the European Community would be in the interests of the Soviet Union.

Termination of the Four-Power Rights and Responsibilities

Article 7 of the Final Settlement Treaty provides:

(1) The French Republic, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America hereby terminate their rights and responsibilities relating to Berlin and to Germany as a whole. As a result, the corresponding, related quadripartite agreements, decisions and practices are terminated and all related Four Power institutions are dissolved.

(2) The united Germany shall have accordingly full sovereignty over its internal and external affairs.⁵²

Forty-five years, three months and six days after the four Allied powers assumed supreme authority over Germany, they agreed to terminate their rights. However, the Treaty was only signed on September 12, 1990. According to Article 9, it was to enter into force "on the date of deposit of the last instrument of ratification or acceptance by" the contracting states. United Germany ratified the Treaty on October 13, 1990; the United States, on October 25, 1990; the United Kingdom, on November 16, 1990; the French Republic, on February 4, 1991; and, as mentioned above, the Soviet Union, on March 15, 1991.⁵³

With the signing of the Treaty on September 12, 1990, in Moscow, the four powers formally suspended their rights and responsibilities concerning Berlin and Germany as a whole from the date of unification until the entry into force of the Treaty.⁵⁴ Consequently, as of the date of unification, October 3, 1990, the rights and responsibilities could no longer be exercised but were "suspended." An interesting legal question would have arisen if one of the four Allies had not ratified the Final Settlement Treaty. Could it then have been said that Germany had not

⁴⁹ On April 28, 1990, the European Council charged the Commission in Dublin with drawing up the necessary transitional measures. EC BULL., No. 4, 1990, at 8.

⁵⁰ 33 O.J. EUR. COMM. (No. L 263) 1 (1990).

⁵¹ Giegerich, *supra* note 1, at 425-34.

⁵² Note 15 *supra*.

⁵³ See text at note 16 *supra*.

⁵⁴ See Declaration Suspending the Operation of Quadripartite Rights, *supra* note 17.

acquired full sovereignty since the four powers' rights were only suspended? Because the unification of Germany was based on the agreement of all those concerned, the four powers' rights apparently could not have been revitalized. In the Preamble to the Treaty, the four Allies stated: "Recognizing that thereby, and with the unification of Germany as a democratic and peaceful state, the rights and responsibilities of the four powers relating to Berlin and to Germany as a whole lose their function." Accordingly, all four powers, under international law, would have been estopped from arguing that they could revive the four-power rights if one of them had not ratified the Final Settlement Treaty. The correct legal analysis would have been that the unification of Germany by an act of self-determination with the consensus of the four powers rendered their rights and responsibilities obsolete even without the entry into force of a formal treaty.

It has not always been understood, even in Germany, that after 1955 the position of the four powers on Germany as a whole contained an important dynamic for the possible reunification of Germany. The three Western powers agreed in Article 7 of the Convention on Relations between them and the Federal Republic that reunification was their aim.⁵⁵ The Soviet Union eventually discovered its interest in that goal, which threatened the existence of the GDR. In 1989–1990, the Soviet Union exercised its rights as one of the four powers by agreeing to unification.

It seems correct to say that the four powers' rights and responsibilities were always conditioned by the fact that the German question had not been resolved. President von Weizsäcker aptly summed up the situation as follows: "The German question is open as long as the Brandenburg Gate is closed." The opening of the Brandenburg Gate set in motion the process that ended on October 3, 1990. As of this day, four-power rights and responsibilities could no longer limit Germany since all four Allies had agreed on German reunification.

The North Atlantic Treaty Organization

While the Soviet Union had always claimed that a reunified Germany could not be a party to any military alliance, Article 6 of the Final Settlement Treaty provides that "[t]he right of the united Germany to belong to alliances, with all the rights and responsibilities arising therefrom, shall not be affected by the present Treaty." The Federal Republic of Germany had made clear from the beginning of the reunification process that it was not willing to have its membership in the North Atlantic Treaty Organization put in jeopardy. Although specific agreements had to be reached for a transitional period because Soviet forces were still stationed in the eastern *Länder* of Germany, Article 6 confirms that Germany cannot be forced to leave NATO. In addition, the Soviet Union, or rather its leader, President Gorbachev, had come to believe that German participation in NATO, which perforce includes the integration of German armed forces into the alliance, is far preferable to any sort of German neutrality.⁵⁶

German Nationality

In the minds of the German people, probably the most important factor for the continuation of Germany was the existence of a common German nationality. Under Article 116 of the Federal Constitution, those persons are German, in the

⁵⁵ Note 8 *supra*.

⁵⁶ See Stein, *supra* note 1.

constitutional sense, who held German nationality in 1949. The Federal Republic of Germany has successfully claimed that this rule includes all those who had acquired German nationality in accordance with legislation.⁵⁷ For those who also held GDR nationality, German nationality was in effect an "open door"; all citizens of the GDR were entitled, when they had the opportunity, to put themselves under the protection of the Federal Republic. In fact, the Federal Republic convinced many states that they should let the individual decide which of the two German nationalities he or she wanted to invoke.⁵⁸ The justification for that practice lay in the fact that the German people had not been able to exercise self-determination after 1945. The special status of Germany, with the continuing existence of the four-power rights and responsibilities, was seen as a reason to keep that choice open. To respect the individual decision of any German citizen could not be considered an abuse as long as free self-determination of the German people was not possible. In this practice, based on federal constitutional law, the responsibility of the Federal Republic of Germany for Germany as a whole found its most effective expression.⁵⁹

Conclusion

Historians may tell us one day that the process leading to German reunification was brought about by two main factors, the complete integration of the Federal Republic of Germany into Western European institutions, begun by Chancellor Konrad Adenauer, and the opening toward the East, brought about by the so-called *Neue Ostpolitik* under Chancellor Willy Brandt from 1969 to 1972. Neither of these political moves can be ignored when one analyzes the development of reunification.

At first glance, it may seem surprising that Article 1 of the Final Settlement Treaty refers to the constitution of the united Germany. Under paragraph 4 of that provision, the Governments of the Federal Republic of Germany and the GDR are to ensure that this constitution does not contain any provision incompatible with the principles laid down elsewhere in Article 1 about the definitive nature of the German borders. Actually, this provision continues a tradition that may be explained at bottom by the central location of Germany in Europe. Over the centuries, German constitutional structures have frequently been established or affected by international treaty systems. The prime examples are the peace treaties concluded after the Thirty Years' War in 1648, the settlement after the Napoleonic Wars in 1815, and the Versailles Treaty of 1919—a case with unfortunate consequences. It would be difficult to overstate the importance of the agreement by the four Allied powers, forty-five years after World War II, that the full sovereignty of Germany within the European and international frameworks was the best resolution of the German question.

Not by accident was the Treaty concluded in 1990 by the four powers and the two German states called the Treaty on the Final Settlement with Respect to

⁵⁷ Frowein, *supra* note 1, at 348.

⁵⁸ Frowein, *Das Individuum als Rechtssubjekt im Konsularrecht. Zu den Konsularverträgen mit der DDR*, in *INTERNATIONALES RECHT UND WIRTSCHAFTSORDNUNG: FESTSCHRIFT FÜR F. A. MANN ZUM 70. GEBURTSTAG* 367 (1977).

⁵⁹ The Federal Constitutional Court, in the famous *Teso* decision, found that persons naturalized in the GDR acquired German nationality. Judgment of Oct. 21, 1987, 77 BVerfGE 137 (1987).

Germany. In the Preamble the parties emphasize their intention to conclude the "final settlement with respect to Germany." The definitive settlement of the borders is called an "essential element of the peaceful order in Europe" (Article 1(1)). This terminology makes clear that on March 15, 1991, the "peace settlement" foreseen in the Potsdam Protocol of 1945 and other international treaties and instruments was finally reached.⁶⁰ That other states hold this view was confirmed by Austria and Finland. Both countries—the one by an exchange of notes with the four powers, and the other by a unilateral declaration—characterized the resolution of the German question as having made several of their treaty provisions obsolete (the Austrian State Treaty and the treaty between Finland and the Soviet Union, respectively).⁶¹

Since unification, some states have raised the issue of reparations. Of course, immediately after the war a considerable amount of reparations were taken from Germany. The exact quantity has never been calculated. Since reparations are generally determined by agreement in a peace treaty or similar international agreement, there is no legal basis for requesting reparations from united Germany. Nevertheless, states can be expected to turn to Germany as responsible for violations of international law, for instance by confiscating property, that took place during the existence of the GDR.

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THE NEW POLISH-GERMAN TREATIES AND THE CHANGING POLITICAL STRUCTURE OF EUROPE

The bilateral treaties concluded by Poland and Germany on November 14, 1990, and June 17, 1991, are an ideal illustration of the political and social changes in Central Europe. They were intended to constitute a turning point in the relations between the two neighbors, enemies for centuries that are now starting to construct a common future.

The Boundary Treaty

The first, and perhaps most important, problem was to settle the boundary dispute between the two states, which had lasted since the end of World War II. The dispute concerned the interpretation of part IX(B) of the Potsdam Agreement,¹ which deals with the eastern boundary of Germany. Under that provision, the final delimitation of the western frontier of Poland was to await a peace settlement. Pending this final determination, the former German eastern territories (Silesia, Pomerania and East Prussia) were to remain under Polish administration and were not to be considered part of the Soviet occupation zone in Germany.

⁶⁰ See note 21 *supra*.

⁶¹ See documents in 51 ZAÖRV 520–28 (1991).

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¹ Report on the Tripartite Conference of Berlin, Aug. 2, 1945, United Kingdom–USSR–United States, 3 Bevans 1224, 1234, [1945] 2 FOREIGN RELATIONS OF THE UNITED STATES 1499, 1509.