

# Legal Aspects of the Unification of the Two German States

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## **Introduction**

The unification of the two German states has not fostered concerns about a destabilisation of the present political system in Europe and a reemergence of German nationalism. The process of European integration has not been slowed down; in the field of international relations, for the first time since the Second World War, an end of East-West military confrontation and the prospect of a larger European co-operation within the framework of the Council of Europe and the CSCE Conference is envisaged. Following the Hungarian and Polish example, other Eastern European States may soon decide to join the European Convention on Human Rights and the Council of Europe and enter into close economic relations with the EEC. For the first time in this century there is also a true chance to settle all the relicts of the Second World War and to achieve a lasting peace between Germany and its Eastern European neighbours. The agreement concluded between Germany and Poland on November 14, 1990<sup>1</sup> was not brought about by the *Diktat* by the Allied Powers but was based upon the conviction of the Polish and German Governments as well as of the peoples of both countries that the time had come for a final reconciliation, similar to that between France and Germany in the last decades.

On the way to a final settlement between Germany and Poland some legal obstacles had to be overcome. Not many people abroad may have understood the legal reservations to the Warsaw Treaty of 1970 until, finally, the German Federal Government and Parliament officially opened the door for a recognition of the existing Western frontiers of Poland which in legal terms may be considered as a cession of German territory, since the region involved had been a part of Germany for centuries. Under public international law the exercise of a right of self-defence against aggression cannot be considered in itself as a legal basis for annexation of territory. Even if one starts from the assumption that under the special circumstances of World War II particular legal rules apply with regard to those war measures undertaken by the Allied Powers against Nazi-Germany, it would be difficult to argue from an international law point of view that the Allied Powers were justified in transferring German territory. Article 107 of the UN Charter authorizing action 'in relation to any

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<sup>1</sup> Bulletin of the Federal Government of 16 November 1990, 1394.

state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the governments having responsibility for such action' cannot be interpreted as implying an unlimited right to disregard basic rules of public international law, such as the territorial sovereignty of a state. The question of the scope of application of Article 107 of the Charter, however, needs not to be discussed since the Allied Powers had never transferred territorial sovereignty of the former eastern territories to Poland. The term 'administration', whatever its precise legal meaning may be,<sup>2</sup> used by the Allied Powers in the relevant instruments did not effect a transfer of title.<sup>3</sup> Western Allied Powers as well as German Federal Government have stated repeatedly that only in a peace-settlement with a unified Germany could the question of a final delimitation of Germany's frontiers be solved.<sup>4</sup> Nor can the expulsion of millions of Germans be justified by an aggression against Poland and crimes committed during the Nazi rule in Poland.<sup>5</sup> International law principles on annexation and title to territory are, however, not the only criterion in international relations between two states. The official recognition of the existing Western frontiers of Poland was required not only by foreign policy considerations but also by the legitimate rights and expectations of the Polish people living now on this territory and, finally, by Germany's responsibility for World War II and its effects upon the Polish people. The principle confirmed by the Friendly Relations Declaration<sup>6</sup> that the territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force and that no territorial acquisition resulting from the threat or use of force shall be recognized as legal does not exclude a peaceful settlement and a compromise. On the other hand, the final territorial settlement with Poland raises some questions hitherto unsolved concerning the status of the German population in Poland, as well as their rights.

The German unification as well as the reconciliation with Poland would not have been possible without the process of European integration and the resulting evolution of the concept of national sovereignty. It is essential to understand that the unification of the two German states has primarily been the accession of the Eastern German population to a politically stable and economically prosperous European Economic

<sup>2</sup> Cf. Skubiszewski, 'Administration and Sovereignty: A Comment on the Potsdam Agreement', 23 *Archiv des Völkerrechts* (1985) 31.

<sup>3</sup> Cf. Rauschnig, 'Beendigung der Nachkriegszeit mit dem Vertrag über die abschließende Regelung in Bezug auf Deutschland', 75 *Deutsches Verwaltungsblatt* (1960) 1280; for a different view see Czaplinski, 'Reunification of Germany – International Legal Issues', in *Co-Existence*, Amsterdam 1990, 225.

<sup>4</sup> Cf. Frowein, 'Legal Problems of the German Ostpolitik', 23 *ICLQ* (1975) 105.

<sup>5</sup> Cf. Kimminich, 'Überlegungen zu einer friedensvertraglichen Regelung für ein wiedervereinigtes Deutschland unter völkerrechtlichen Gesichtspunkten', *Aus Politik und Zeitgeschichte* (10 August 1990) 34-45.

<sup>6</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, UNGA Res. 2625(XXV) of 24 October 1970.

Community in which everybody may travel freely and enjoy civil rights. This does not mean that the idea of German national unity has not played a significant role in the rapid breakdown of the GDR. The decisive factor, however, has been the overwhelming success of the European model which simply could not be ignored by the ruling elites of Eastern European communist states any more. This also affects, to some extent, the legal aspects of the unification of the two German states.

## **I. The German Unification Within the Framework of the Two-plus-Four-Agreement**

### **A. Sovereignty and Termination of Allied Reserved Powers Relating to Germany as a Whole and to Berlin**

Article 7 of the Treaty on the Final Settlement with respect to Germany of September 12, 1990<sup>7</sup> marked the end of the rights and responsibilities of the Four Powers in relation to Berlin and Germany as a whole. As a result, the corresponding Quadripartite Agreements, decisions and practices are terminated, and all related Four Power institutions are dissolved. The united Germany shall accordingly have full sovereignty over its internal and external affairs. As the preamble of the Settlement declares, the rights and responsibilities of the Four Powers lose their function.

The fact that the unification could be achieved only by an agreement of the German states with the Four Powers is a result of various agreements between the Allied Powers on the division of Germany into military occupation zones and the partition of responsibility, particularly by the Potsdam Protocol of August 12, 1945.<sup>8</sup> Military occupation rule ended with the establishment of the two German states in 1949 and the following treaties which both of them concluded with the occupation powers in their zones. However, the Western powers as well as the Soviet Union always reserved their rights relating to Germany as a whole and to Berlin.<sup>9</sup> Though being, according to the constitution, a part of the Federal Republic, Berlin

<sup>7</sup> Bundesgesetzblatt 1990 II, 1317, also (1990) ILM, 1187.

<sup>8</sup> British and Foreign State Papers, Vol. 145, 852.

<sup>9</sup> For a survey see Ress, 'Legal Status of Germany after World War II', 10 *EPIL (Encyclopedia of Public International Law)* (1987) 151.

therefore remained under military occupation rule, as confirmed later by the Quadripartite Agreement. The legal regime of Berlin thus was unilaterally imposed upon the two German states by the Four Powers – a clear indication of their continuing responsibility.

As regards Germany as a whole, a common responsibility of the Four Powers was only rarely exercised after the common military institutions had been dissolved at the outbreak of the cold war. As a demonstration of their rights and responsibilities the Western powers maintained a military mission in the GDR; the Soviet Union maintained two military missions in Frankfurt and Baden-Baden, a fact largely unknown to the German public. The GDR was reminded of its limited sovereignty only when a GDR soldier fired upon an American officer on duty near Potsdam.<sup>10</sup> Nevertheless, the common responsibility was repeatedly affirmed in international instruments. When the two German states joined the United Nations, the Four Powers stressed in a declaration that the membership of the two German states in the United Nations should in no way affect either the rights and responsibilities of the Four Powers or the related agreements, decisions and practices.<sup>11</sup>

It is an idle question whether international law on the rights of belligerent occupants provides a sufficient claim for the maintenance of such rights since both German states accepted those rights in successive treaties with the Four Powers. In fact, the responsibility of the Four Powers was considered by the Federal Republic of Germany as an essential safeguard against any attempt to an unilateral change of the existing status either of Germany as a whole, or Berlin in particular. Thus, the continued existence of the Four Powers' rights and responsibilities was considered as having three major legal implications. First, Berlin remained under the occupation and responsibility of the Western Allied Powers. Secondly, the competence for the final territorial settlement relating to Germany as a whole and its Eastern territories was reserved to a peace treaty. Thirdly, the process of German division and secession of the GDR remained provisional until a final settlement on Germany as a whole could be achieved with the Four Powers.

It remained an open question to what extent the continuing responsibility of the Four Powers concerning the external aspects of the German unification implied a right of consent, if not a right to decide on Germany's political and military status. Yet, the political unification of Germany, the final delimitation of its borders and its integration as a whole into the international security system were generally described as 'external' aspects of the unification process, which fell within the realm of the Four Powers' responsibilities.<sup>12</sup> The internal aspects of the German unification (in

<sup>10</sup> Cf. Schweisfurth, 'Ohne einen Friedensvertrag wird alles bleiben, wie es ist', in 2 *Sicherheit und Frieden* (1985) 76-80.

<sup>11</sup> 12 ILM (1973) 217.

<sup>12</sup> Schweisfurth, 'Germany, Occupation after World War II', 3 *EPIL* (1982) 197; Frowein, 'Die Verfassungslage Deutschlands im Rahmen des Völkerrechts', 49 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (1990) 11.

particular, the constitution of the united Germany), and the way in which the unification would be achieved was considered as a matter within the exclusive domain of the two German states.

From a legal point of view, it is not easy to find a convincing legal argument for continuing rights of the Four Powers to determine the status of a unified Germany. The responsibility of the Four Powers relating to Germany as a whole – independently from its contractual basis – is inseparably connected with the rights and duties of the allied occupants. The legal nature of the German occupation regime, however, has always been controversial. The Allies did not consider themselves bound by the Hague Regulations on the rights of occupation powers annexed to Hague Convention IV concerning the laws and customs of war on land of October 18, 1907.<sup>13</sup> Their declared aim was to effect a complete change of the political system in Germany, and to establish a new order preventing any further German aggression. Consequently, the regime established by the Allies was defined as a new regime of ‘international administration’ rather than a regime of occupation under traditional rules of public international law.<sup>14</sup> Under such a regime the Allies were authorized to exercise much wider powers than allowed to the military authorities of a belligerent occupant. This would explain the assumption by the occupation powers of ‘supreme authority’, including all the powers possessed by the German Government as well as their claim of continuing responsibility long after both the hostilities had ceased and a new order had been established in Germany.

It is doubtful, however, if the theory of ‘international administration’ had gained sufficient international recognition to justify continuing responsibility, decades after the end of a military conflict. Both German states had been admitted to the United Nations and, therefore, been recognized as peace-loving nations. Both German states had been integrated into political and military alliances. The concept of international administration may explain a continuing responsibility of the Four Powers for the final settlement of unsolved matters arising from World War II. It did not provide a sufficient legal basis, however, to impose conditions for the unification of the two German states or to decide upon their legal status. So it is that the Friendly Relations Declaration explicitly states the principle that each state has the right freely to choose and develop its political, social, economic, and cultural system. As a mode of implementing the right of self-determination the Declaration mentions ‘the 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’.<sup>15</sup> After some confusion in the beginning of the negotiations

<sup>13</sup> Schweisfurth, ‘Ohne einen Friedensvertrag wird alles bleiben, wie es ist’, in 2 *Sicherheit und Frieden* (1985) 196.

<sup>14</sup> M. Virally, *L’administration internationale de l’Allemagne* (1948) 23, 26; cf. Schweisfurth, *supra* note 12, at 191, 196 (with further references).

<sup>15</sup> Bulletin of the Federal Government of 16 November 1990, 1394.

and in the legal literature,<sup>16</sup> the Western Allies consequently agreed that it is up to the Germans to decide upon their military allegiances. Article 6 of the Final Settlement explicitly declares that the right of the united Germany to belong to alliances, with all the rights and responsibilities arising therefrom, shall not be affected by the treaty.

As a result of the termination of all rights and responsibilities of the Four Powers the continuing presence of the allied armed forces in German territory rests upon the agreements concluded with the Western Allies and the Soviet Union. The Final Settlement provides for a complete withdrawal of the Soviet armed forces from German territory. Until that time, Article 5 provides that only those German military units not integrated into NATO will be stationed in east Germany and Berlin as armed forces of the united Germany. During that period armed forces of other states will not be stationed in that territory or carry out any other military activity there. For the duration of the presence of Soviet armed forces in East Germany and Berlin, armed forces of the Western Allies will, upon German request, remain stationed in Berlin. The number of troops and the armament as well as the equipment of the allied forces stationed in Berlin will not be greater than at the time of the signature of the Treaty and new categories of weapons will not be introduced. Following the completion of the withdrawal the Soviet armed forces, there will be no restriction to station German military forces in East Germany with the exception of nuclear weapon carriers.<sup>17</sup>

A corresponding agreement has been concluded by an exchange of diplomatic notes between the Federal Republic and the British, French and US Governments on September 25, 1990. The continuing presence of allied forces is agreed upon for a limited period of time as a contribution towards the security of Berlin. The number of troops as well as their armament is not to be reinforced. The allied armed forces have to coordinate all military activities with the competent German authorities which nevertheless have the main responsibility of guaranteeing the security of Berlin. Thus, the allied armed forces remain on German territory as invited guests, not as a military occupation power, as long as their presence is agreed upon by all parties. Every party of the agreement may cancel the agreement or ask for a modification one year after the agreement has entered into force.

On October 12, 1990 a treaty between the Federal Republic of Germany and the Soviet Union about the conditions on the withdrawal of Soviet troops from German territory was concluded.<sup>18</sup> An additional treaty of October 9, 1990 deals with the financial consequences arising from the withdrawal of Soviet armed forces.<sup>19</sup> The Soviet Union accepted the obligation not to reinforce its troops or armament stationed

<sup>16</sup> See, e.g., Frowein, 'Die Verfassungslage Deutschlands im Rahmen des Völkerrechts', 49 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (1990) 13, who refers to the right of self-determination while conceding at the same time a responsibility of the Four Powers relating to all 'internationally relevant questions'.

<sup>17</sup> Article 5, paragraph 3.

<sup>18</sup> Bulletin of the Federal Government of 17 October 1990, No. 123, 1284.

<sup>19</sup> Bulletin of the Federal Government of 17 October 1990, No. 123, 1281.

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in East Germany. The total withdrawal of the Soviet troops from Germany,

including Berlin, is to be completed by the end of 1994. In Berlin, Soviet troops are no longer allowed to hold military manoeuvres; while in the territory of the former GDR such manoeuvres may still be held within certain limits set by *ad hoc* arrangements with the competent German authorities. In principle, German jurisdiction applies; Soviet armed forces maintain, however, jurisdiction with regard to members of their armed forces and their relatives with regard to official activities of or acts against the Soviet Union or the Soviet armed forces (Article 18). Within their premises the Soviet armed forces maintain police and disciplinary power. This does not cover acts to prevent the enforcement of ordinary German jurisdiction over German nationals. Thus, the refusal of the Soviet military authorities to hand over Erich Honecker for trial from a Soviet military hospital can hardly be brought into line with the agreement. The agreement provides in Article 25 for an arbitration proceeding by a joint German-Soviet commission.

Concerning the status of the armed forces of the Western Allied Powers, the Federal Government has made clear by an exchange of diplomatic notes of September 25, 1990 that the existing treaties on the presence of NATO integrated troops of 1951 and 1959 remain in force. Any military activities of the armed forces in the former GDR, however, need explicit consent of the German authorities.

In Article 3 of the Final Settlement, both German states also reaffirmed their renunciation of the manufacture and possession of, and control over, nuclear, biological, and chemical weapons. They declared that the united Germany too, will abide by these commitments. In particular, the obligations arising from the treaty on the non-proliferation of nuclear weapons of July 1, 1968, will continue to apply to the united Germany. This provision is little more than a clarification of the existing legal situation, since both the Federal Republic and the GDR had constantly affirmed their renunciation of ABC weapons.<sup>20</sup> However, a novel restriction can be found in Article 3 paragraph 2 of the Final Settlement, which contains a report about a statement made by the Federal Government at the Vienna negotiations on conventional arms, whereby it undertakes to reduce the strength of the armed forces of the united Germany to 370,000 within three to four years. The form in which this commitment has been included in the Final Settlement is remarkable. The undertaking to reduce the armed forces has to be considered as a unilaterally binding commitment by Germany rather than an ordinary contractual obligation in the Final Settlement. Such a commitment must be seen in the context of the general negotiations on the reduction of conventional armed forces in Europe – as is made clear by the following clause in which the Federal Government *assumes* that in follow-on negotiations the other participants will render their contribution to enhancing security and stability in Europe. However, the fact that the commitment has been included into the Final Settlement brings it into the framework of the rights and obligations of this agreement. Shortly after the Treaty on the Final Settlement a further Treaty between

<sup>20</sup> See protocol No. III of 23 October 1954 on the control of armaments to the West European Union Treaty, Annex I, Bundesgesetzblatt 1955 II, 266.



the Federal Republic and the USSR on Good Neighbourhood, Friendly Relations, and Cooperation of November 9, 1990 as well as an additional Treaty on Economic Cooperation and an Inter-Governmental Agreement on Cooperation in Social and Labour-Relation Matters were concluded.<sup>21</sup> The first-mentioned treaty reaffirms the obligation to respect each other's territorial integrity and the inviolability of the existing borders. Both parties formally declare that they have no territorial claims against each other or against any other state and will not raise any territorial claims in the future. Unlike the legal situation in the former German territories in Poland, an explicit boundary agreement is not provided for in the treaty since the Soviet Union has taken the position that it has already acquired territorial sovereignty over the former German territory in the Soviet Union (Eastern Russia). Remarkably the preamble refers to human rights and fundamental freedoms as a common European heritage and the necessity to build up a new Europe based on common values and to establish a lasting and just order in Europe.

## **B. The Status of the Eastern Territories**

Article 1 of the Final Settlement makes clear that with the German unification the question of its borders shall be finally determined. The borders of the united Germany as described in the Settlement shall be definitive. The confirmation of the definitive nature of the borders of the united Germany is considered as an 'essential element of the peaceful order in Europe'. This provision embraces a final settlement of all territorial questions arising from World War II. The united Germany, as Article 1 para 3 of the Settlement provides – has no territorial claims whatsoever against other states and shall not assert any in the future. Concerning the Eastern border the existing border between Poland and Germany is to be confirmed in a binding treaty. The Settlement does not leave any discretion in that question.

These provisions are certainly one of the key elements of the Two-plus-Four-Agreement. The legal status of the Eastern territories of the German Reich was, until now, to await a final determination in a peace treaty. The status of those territories 'under foreign administration' was officially considered as being unchanged by the Moscow and Warsaw Treaties of 1970. Although these treaties had affirmed the inviolability of the existing Western borders of Poland and contained a renunciation of any territorial claims, the Federal Republic took the position that it concluded these treaties in its own name and therefore a united Germany would not be bound by them.<sup>22</sup> In addition, the obligation concerning the existing borders was

<sup>21</sup> Bulletin of the Federal Government of 15 November 1990, No. 133, 1379, 1382, 1387.

<sup>22</sup> For the text of both treaties see Bundesgesetzblatt 1972 II, 354, 362; cf. Ress, *supra* note 9, at 191; Klein, 'Viermächteproblematik und Rechtsstellung der deutschen Ostgebiete', in Meissner and Zieger (eds), *Staatliche Kontinuität unter besonderer Berücksichtigung der Rechtslage Deutschlands*, 129; for a Polish view see Skubiszewski, 'Poland's Western Frontier and the 1970 Treaties', 67 *AJIL* (1973) 23.

interpreted as a recognition of the exercise of territorial jurisdiction of Poland and not as a final territorial delimitation, which could be achieved only in a peace treaty with a united Germany. The argument that the Federal Republic could not bind a united Germany, however, was never very convincing since the Federal Republic considered itself as legally identical with the German Reich.<sup>23</sup> The Federal Constitutional Court, however, supported the German position by deciding that neither treaty could be interpreted as a final disposition on the territorial status of Germany as a whole.<sup>24</sup>

The Federal Government constantly maintained that all declarations and commitments undertaken with respect to the former Eastern German territories were only of preliminary character. To some extent, this position found support in practice of the Western Allied Powers, which had invariably declared that any rectification of the West German frontiers 'cannot be considered as a final determination unless confirmed by a peace settlement'.<sup>25</sup> Thus, although it may be argued that the Federal Republic, with the Warsaw and Moscow agreements, had already given a binding commitment that the Polish western border would no longer be challenged and that in a future peace agreement the recognition of the existing boundary line would be affirmed,<sup>26</sup> the German-Polish Boundary Treaty of November 14, 1990 cannot be considered merely as being of declaratory significance. In legal terms it is the implementation of the final peace settlement of the Two Plus Four Treaty of September 12, 1990 settling finally, in accordance with the Allied Powers, all questions relating to the territorial status of a unified Germany.

The Final Settlement as well as the treaty of November 1990 between Germany and Poland on the recognition of the existing borders has the effect of changing the territorial status of the former Eastern German territories. Several questions arise relating to the nationality of the former German population of these territories, their property, and their future status as members of a minority in Poland.

### C. Effects upon Nationality

The effect of the Warsaw Treaty upon nationality and the property of the German population had in fact been one of the main issues in the proceedings of the Federal Constitutional Court in 1975 on the Warsaw Treaty. Article 116 of the Basic Law defines a German within the meaning of the constitution 'as a person who possesses

23 Tomuschat, 'Die staatliche Einheit Deutschlands: Staats- und völkerrechtliche Aspekte', in Friedrich-Ebert-Stiftung (ed.), *Recht und Politik* (1990) 25; Schreuer, 'The Legal Status of the Polish Boundaries', paper presented at the conference on 'The Changing Political Structure of Europe, Aspects of International Law' (Amsterdam 14th and 15th December, 1990).

24 40 BVerfGE 141, 169 (decisions of the Federal Constitutional Court).

25 Rauschnig, 'Beendigung der Nachkriegszeit mit dem Vertrag über die abschließende Regelung in bezug auf Deutschland', 75 *Deutsches Verwaltungsblatt*, 1281 with further references.

26 See Schreuer, 'The Legal Status of the Polish Boundaries', *supra* note 23.

German citizenship [usually acquired by descent] or who has been admitted to the territory of the German Reich within the frontiers of 31 December 1937 as a refugee or expellee of German stock or as the spouse or descendant of such person'. This concept may be described as an 'open door' granting ethnic Germans who had taken refuge in the territory of the Reich of 1937 a right to move into Germany. As a result in the last two years 700,000 Germans of foreign citizenship have immigrated into the Federal Republic of Germany. The nationality concept is very much along the same lines.<sup>27</sup> According to Articles 16 and 116 of the Basic Law<sup>28</sup> all German citizens living in the former Eastern territories who had acquired by birth German citizenship even in the second or third generation have to be treated as German citizens regardless of the fact that the Federal Republic could not exercise protection as long as these persons remained within the jurisdiction of Poland or the Soviet Union.<sup>29</sup> The Federal Supreme Court decided in 1979 that the term 'nationality of Sudeten-Germans' (Sudetenland is now a part of Czechoslovakia) is not affected by the German-Czechoslovakian treaty of 1973.<sup>30</sup>

The plaintiffs in the 1975 proceedings challenging the constitutionality of Warsaw and Moscow Treaties argued that the change of territorial status of the Eastern territories had – according to international law - terminated their German nationality. The Court rejected this argument by referring to the limited effect of the territorial provisions of the treaty and the declared intention of the Federal Government that the treaty was not intended to abridge rights granted by German laws and, in particular, German citizenship.

There is a diversity of opinions as to the effects of a transfer of territory on nationality.<sup>31</sup> The view 'that the population follows the change of sovereignty in matters of nationality' and that 'the affected population will normally acquire the nationality of the successor state'<sup>32</sup> has been supported by a reference to the Versailles minority treaties and similar instruments concluded in connection with the peace treaties after World War I. Under these treaties German nationals automatically became Polish nationals unless they made a declaration stating that they abandon Polish nationality.<sup>33</sup> It is very doubtful, however, whether state practice and theory supports a rule of automatic change of nationality following a transfer of territorial sovereignty.<sup>34</sup> Even if one accepts the assumption that 'the precedent value of such provisions is considerable in view of their uniformity and the international character

<sup>27</sup> See Hailbronner, 'Citizenship and Nationhood in Germany', in R. Brubaker (ed.), *Immigration and the Politics of Citizenship in Europe and North America* (1989) 67.

<sup>28</sup> Article 16 prohibits any deprivation of German citizenship.

<sup>29</sup> 36 BVerfGE 1, 30; 40 BVerfGE 141, 175.

<sup>30</sup> BGHZ 75, 32 (decisions of the Federal Supreme Court).

<sup>31</sup> Cf. Randelzhofer, 'Nationality', 8 *EPIL* (1985) 420.

<sup>32</sup> I. Brownlie, *Principles of Public International Law* (4th ed 1990) 661, 558.

<sup>33</sup> *Laws Concerning Nationality* (1954) 586.

<sup>34</sup> See Randelzhofer, *supra* note 31.

of the deliberations preceding the signature of these treaties',<sup>35</sup> an automatic change of nationality implying a loss of the original nationality is not called for. The rule to be deduced from the state practice is rather the existence of a right of the successor state to confer its nationality upon the population of the newly acquired territory. This may even include an automatic acquisition of citizenship according to the law of the successor state. It does not, however, necessarily imply a loss of original nationality.

Concerning the question of an automatic change of nationality, state practice does not provide a consistent pattern of rules. In many cases a right to opt for the new or the old nationality has been granted. The Federal German Courts had to decide in many cases upon the effects of territorial changes upon nationality. They have constantly held that in recent times the idea has taken root in international law that in cases of acquisition and loss of nationality the manifested will of the person affected shall not entirely be disregarded. The Supreme Court held that:

Where territories are ceded it is becoming the practice to grant the population a right of option. This practice conforms to the more enlightened opinion that everybody has a right to the free development of his personality and that it would be incompatible therewith to regard individuals simply as an object of domestic legislation, international treaties, and rules of international law.<sup>36</sup>

It is, however, left to individual states to adopt the rules they deem useful when entering into treaties and enacting municipal law.<sup>37</sup> Even more cautiously the Federal Constitutional Court has concluded that there is no general rule of public international law to the effect that the population affected by the creation of a new state by severance from an existing state must be given the option to choose between the nationality of the new state and the nationality of the old state.<sup>38</sup> Carefully analysing the existing state practice and theory on the subject, the Court came to the conclusion that international law does not recognize the existence of any general rules providing for a change of nationality in the case of territorial transfer.<sup>39</sup>

The question, however, has to be solved whether there is still a legal basis for treating part of the German population in the former Eastern German territories as German nationals. Territory, as Brownlie has pointed out, is not an 'empty plot' but connotes 'population, ethnic groupings, loyalty patterns, national aspirations'.<sup>40</sup> Similarly Weis, though very cautious in evaluating state practice, concludes that one

<sup>35</sup> I. Brownlie, *Principles of Public International Law* 662.

<sup>36</sup> BGHSt 9, 175 (decisions of the Federal Supreme Court in Penal Matters); see 4(1970) *Fontes Iuris Gentium*, Series II, Sectio II, 75 (Decisions of the Superior Courts of the Federal Republic of Germany relating to public international law, ed. by Max Planck Institute of Comparative Public Law and Public International Law, Heidelberg).

<sup>37</sup> 1 BVerwGE 213 (decisions of the Federal Administrative Court); see 4(1970) *Fontes Iuris Gentium*, Series II, Sectio II, 74

<sup>38</sup> 4 BVerfGE 322; 4(1970) *Fontes Iuris Gentium*, Series II, Sectio II, 75.

<sup>39</sup> 1 BVerfGE 322; 4(1970) *Fontes Iuris Gentium*, Series II, Sectio II, (see footnote 36), 73.

<sup>40</sup> I. Brownlie, *Principles of Public International Law* 664.

may speak of a positive rule of international law on nationality to the effect that, under international law and provided the territorial transfer is based on a valid

title, the predecessor state is under an obligation *vis-à-vis* the successor state to withdraw its nationality from the inhabitants of the transferred territory if they acquire the nationality of the successor state.<sup>41</sup> A very similar position has been taken by the Federal Supreme Court when deciding upon the effects of the reconstitution of the Austrian Republic. The Court held that the final abandonment of territorial sovereignty necessarily entails the severance of the ties between the resident population of the territory concerned and the old polity, because according to international law, nationality can be granted and consequently also maintained only by virtue of generally recognized connections with the state.<sup>42</sup> It follows that the transfer of German territory does not imply an automatic change of nationality. Rather, it entails a basic obligation to withdraw the right to claim German nationality from former German citizens who habitually reside on those territories.

#### **D. Effects upon Property and Reparations**

International law prohibits arbitrary expropriation without compensation. Expropriations from German citizens living in the former Eastern German territories decided by Polish and Soviet authorities immediately after World War II without providing for any kind of compensation, regardless of any affiliation of the affected persons with criminal activities and exclusively on the basis of their German nationality, were manifestly illegal.

In the case concerning the constitutionality of the Moscow and Warsaw Treaties the plaintiffs argued that the Federal Republic had agreed to such expropriations and the following expulsion. The argument, however, was rejected by the Constitutional Court since the Federal Government could show that the treaties were not intended in any way as a recognition of the illegal measures undertaken by Polish or Soviet authorities against the German population. The Court left open whether 'under the influence of the existing situation former property rights are replaced by claims of compensation or restitution'.<sup>43</sup> Such claims, the Court continued, referring to a statement of the Federal Government, could be deduced from general rules of public international law on state responsibility. State practice does not indicate whether the rules on protection of property, as well as those on basic human rights, are applicable when retaliatory measures are taken against the population of an aggressor state. It is, however, an established rule of public international law that the civilian population of a territory involved in a conflict may not be the target of retaliatory measures. This applies *a fortiori* when hostilities have ceased.

<sup>41</sup> F. Weis, *Nationality and Statelessness in International Law* (2nd ed. 1979) 143.

<sup>42</sup> BGHSt. 9, 175 (decisions of the Federal Supreme Court in Penal Matters); 4(1970) *Fontes Iuris Gentium*, Series II, Sectio II, 77.

<sup>43</sup> 40 BVerfGE 141, 167; see Blumenwitz, 'Die vermögensrechtlichen Folgen der Ostverträge', XIII *Jahrbuch für Ostrecht* (1971) 179, 196.

The confiscations of 1945-6, in combination with the expulsion of a large part of the German population, thus, have no basis in public international law and should not be recognized as legally valid for reasons of international justice.<sup>44</sup>

The Federal Government therefore may exercise diplomatic protection in favour of those German nationals who have suffered measures violating recognized principles of public international law. It has been argued that claims arising from illegal expropriations have ceased to exist due to a mutual settling of accounts.<sup>45</sup> The Constitutional Court, however, in a very detailed analysis of all the relevant instruments relating to the Warsaw and Moscow Treaties, has shown that neither treaty allows any firm conclusions as to a settlement of accounts. There is not much which can be added to the arguments of the Court. When the Warsaw Treaty was signed, Poland and the Soviet Union had waived all claims for reparations against Germany as a whole by a declaration of August 23, 1953.<sup>46</sup> This waiver was based upon the agreement at the Potsdam Conference that Polish claims for reparations were to be satisfied by the Soviet share for reparation payments.<sup>47</sup> The declaration by the Polish Government stated that Germany had already paid substantial reparations and that the Polish Government therefore renounced all claims, in order to contribute to a peaceful solution of the German question. The waiver was explicitly confirmed in the negotiations between the two states on the Warsaw Treaty. Thus, Poland has, as a result of former reparation payments, waived all claims for reparations which may have been filed as a result of the German measures during World War II.<sup>48</sup>

## II. German Unification as a Case of State Succession

### A. The Legal Status of Germany before the Unification and its Influence upon International Law Rules on State Succession

With the unification of the two German states problems arise as to the continuity of international treaties and the responsibility for the predecessors' debts and other obligations. They are partly dealt with in the Unification Treaty.<sup>49</sup> The law on state

<sup>44</sup> Cf. for a different view Czaplinski, 'Vermögensrechtliche Probleme in den Beziehungen' VRP-BRD', 7 *Polnische Weststudien* (1988) 96, 134.

<sup>45</sup> Kimminich, *Juristenzeitung* (1971) 485, 489.

<sup>46</sup> Declaration of the Polish People's Republic, 9 *Zbior Dokumentow* (1953) 1830, quoted in: 49 BVerfGE 169.

<sup>47</sup> See part IV of the Potsdam Conference Protocol of 2 August 1945, Official Bulletin of the Allied Control Council, suppl. No. 1, 13.

<sup>48</sup> See Rumpf, 'Die deutsche Frage und die Reparationen', 33 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1973) 344, 351.

<sup>49</sup> Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands, 104 (1990) BullBReg. 877.

succession is generally regarded as an area of great uncertainty and controversy.<sup>50</sup> The two conventions dealing with matters of state succession, the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983<sup>51</sup> and the Vienna Convention on Succession of States in Respect of Treaties of 1978<sup>52</sup> have been ratified only by a small number of states and can thus be regarded only partially as expressions of customary international law on the subject. The question has to be examined, therefore, whether customary rules of international law are applicable to the unification of the two German states. State practice does not permit easily identifiable conclusions. State succession may occur under very different circumstances and in very different forms. There is clearly a close relation between the nature of the territorial change and the transmissibility of rights and duties.<sup>53</sup> The efforts to develop a common theoretical basis for all categories of state succession have failed.<sup>54</sup> It is essential therefore to identify the legal and political features of the unification of the two German states.

The legal status of Germany has always been very controversial. Although some of the relations between the Federal Republic of Germany and the GDR were regulated in a treaty of December 21, 1972,<sup>55</sup> the issues relating to Germany as a whole and the relationship between each of the two German states and the German Reich remained unsolved. The Federal government in accordance with a judgment on the constitutionality of the *Grundlagenvertrag* by the Constitutional Court<sup>56</sup> took the position that the Federal Republic was not a new West German state but an international legal personality identical with the German Reich which had never ceased to exist as a state. The relationship between the two German states, therefore, could not be qualified as 'international relations' between foreign states but rather as a special relationship consisting of international as well as internal (constitutional) elements. Characteristics of this special relationship were firstly, the common nationality under the German Nationality Act of 1913 which included all 'citizens of the GDR' as German citizens, secondly, the adherence of the GDR to the defunct German Reich and, finally, the unsolved issue of German reunification which had as its corollary on the international level the responsibility of the Four Powers relating to Germany as a

<sup>50</sup> I. Brownlie, *Principles of Public International Law* (4th ed) 655.

<sup>51</sup> 22 ILM (1983) 298, 306; see Streinz, 'Succession of States in Assets and Liability – A New Regime? The 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts', 26 *GYIL* (1983) 198; Monnier, 'La Convention de Vienne sur la succession d'Etats en matière des biens, archives et dettes d'Etat', 30 *AFDI* (1984) 221.

<sup>52</sup> 17 ILM (1978) 1488; see Bello, 'Reflections on Succession of States in the Light of the Vienna Convention on Succession of States in Respect of Treaties 1978', 23 *GYIL* (1980) 296.

<sup>53</sup> I. Brownlie, *Principles of Public International Law* 673; G. Dahm, J. Delbrueck, R. Wolfrum, I *Voelkerrecht* (2nd ed. 1989) 159.

<sup>54</sup> Fiedler, 'State Succession', 10 *EPIL* (1987) 446 with further references.

<sup>55</sup> Bundesgesetzblatt 1973 II, p. 423; see G. Ress, *Die Rechtslage Deutschlands nach dem Grundlagenvertrag vom 21.12.1972* (1978).

<sup>56</sup> BVerfGE 36, 1.



whole. Therefore, the GDR could in some way be looked upon as a part of Germany as a whole, although after the *Grundlagenvertrag* of 1972 both states agreed to respect each other's territorial integrity and stated that neither state could represent the other on the international level nor could it act in the name of the other. The *Grundlagenvertrag* thus prescribed that the sovereign rights of each state were confined to its own territory. The theory of special relationship and of the continuing identity of the Federal Republic with the German Reich was of course strongly rejected by the GDR government. It was, however, confirmed as constitutionally binding by the Federal Constitutional Court.<sup>57</sup>

Although the position of the Federal government gradually received less support even within the Federal Republic, it can be considered as the legal basis for the process of unification between the two German states. The Treaty on the Unification of the two German states of August 31, 1990, does not explicitly qualify the process of unification. In the preamble of the Treaty, reference however is made to the unity of Germany as well as to 'both parts of Germany', which are willing to live united together in a federal state. It is quite clear that this state is meant to be the Federal Republic. The unification process, therefore, cannot be considered as a merger of two sovereign German states but rather as an accession of the GDR (being a part of Germany) to the Federal Republic of Germany as the political organisation of Germany as a whole. Article 1 of the Treaty thus provides for the special accession procedure of Article 23 of the Basic Law whereby 'in other parts of Germany it [the Basic Law] shall be put into force on their accession'. Accordingly, the accession of the new *Länder* on October 3, 1990, was the decisive constitutional and international act to complete the German unification.

The same legal pattern can be seen in the provisions on the validity of laws enacted by the former GDR as well as in the provisions on international treaties. The Unification Treaty as a whole is clearly based on the assumption that the GDR accedes, with its territory, to the Federal Republic thereby giving up its international legal personality. It follows that Germany has not been established as a new state although the Final Settlement as well as the Unification Treaty speak of the united Germany as 'Germany' instead of the Federal Republic. This, however, can be explained by the wish to avoid a confusion on terms as long as the unification process was not yet completed.

## **B. Succession to Treaties**

The unification of the two German states is a case of universal succession. The GDR has ceased to exist as a sovereign state; its territory has been integrated into the Federal Republic. Therefore, it is clear that with regard to the Federal Republic's treaties only an enlargement of territory has taken place. In this case, the 'principle of

<sup>57</sup> BVerfGE 36, 1.

moving treaty frontiers'<sup>58</sup> is applicable, 'unless it appears from the treaty or is

<sup>58</sup> See Klein, 'Treaties' Effects of Territorial Changes', 7 *EPIL* (1984) 473.

otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation'.<sup>59</sup>

Article 11 of the Unification Treaty thus provides that international treaties and agreements of the Federal Republic, including those establishing membership in international organisations and institutions, remain binding in relation to the territory of the former GDR, except for agreements listed in Annex I of the Treaty. Annex I refers to treaties concluded by the Federal Republic with the Western Allies concerning the termination of the occupation regime, some additional agreements to the NATO Treaty and agreements on the status of foreign troops in Germany, as well as some recent conventions concerning the inspection of sites to control the application of disarmament provisions between the United States and the Soviet Union. Negotiations with the contracting parties are also envisaged should it be necessary to adapt existing treaties to the changed circumstances.

Concerning the treaties of the GDR, the legal situation seems to be somewhat more difficult since the GDR has been dissolved as a legal entity. In case of union between two states, the 1978 Vienna Convention provides in principle for the continuation of the treaties of both states when states unite and form one successor state unless it is otherwise agreed, or unless it appears that the application of the treaty in respect of the successor state would be incompatible with the object and purpose of the treaty, or would radically change the conditions for its operation.<sup>60</sup> Such treaties continuing in force shall, however, in general apply only in respect of the part of the territory of the successor state in respect of which the treaty was in force at the date of succession.

Articles 31 to 34 of the Vienna Convention on State Succession to Treaties at first sight seem to cover only the case of a union of two or more states establishing a new successor state as a separate international legal subject. The ILC, however, has taken the view that 'where a state voluntarily united with an existing state which continued to possess its international personality, it was better to provide for the *de iure* continuity of treaties than to apply the moving frontier rule.'<sup>61</sup> It may be questioned, however, whether Article 31 provides a proper solution in case of a merger of one state in an existing state which keeps its international legal personality.<sup>62</sup> The principle of continuity of treaties leads to numerous problems which cannot be solved by a reference to the rules of the Vienna Convention. The most difficult problem seems to be that the treaties of the dissolved state which are to be continued on a

<sup>59</sup> See Article 15 of the 1978 Vienna Convention.

<sup>60</sup> Article 31 para 1; see Zemanek, 'Die Wiener Konvention über die Staatennachfolge in Verträge', in *Essays in honour of Alfred Verdross* (1980) 719.

<sup>61</sup> I *Yearbook of the ILC* (1974) 253, 259; see also Poeggel *et al.*, *Staatennachfolge im Völkerrecht*, (Ostberlin 1986) 49.

<sup>62</sup> Hentschel von Heinegg, 'Die Vereinigung der beiden deutschen Staaten und das Schicksal der von ihnen abgeschlossenen völkerrechtlichen Verträge', *Betriebsberater* 18/1990 (Supplement No. 23) 9.

geographically limited basis may often be incompatible with the existing treaty system of the continuing state. In addition, a geographical limitation in many cases may hardly be practicable. Some of these problems had been recognized already at the Vienna Conference.<sup>63</sup> At the request of the Federal Republic, a resolution was passed relating to incompatible treaty obligations and rights arising from a unification of states.<sup>64</sup> The resolution, however, does not solve the problem of incompatible obligations and rights as a result of differing treaty regimes applicable to two or more states which unite, but recognizes instead the desirability of resolving such questions through a process of consultation and negotiation between the successor state and the other states parties to the treaties. It has been correctly observed that under this resolution the principle of continuity as laid down in the Vienna Convention cannot be considered as a general principle in the case of a merger of a state with another state which continues to exist as a international legal personality.<sup>65</sup>

In addition, the relevant rules of the Vienna Convention can hardly be considered as reflecting customary international law.<sup>66</sup> The Convention was primarily devised as an instrument to promote the interests of newly independent states. Little regard had been given to the manifold interests and rights of states under different categories of state succession.

Besides, the unification of the two German states has very different legal and political characteristics. It could rather be qualified as an accession of a dismembered territory which for some time had acquired the status of a sovereign entity. The continuing identity of the Federal Republic with the German Reich and its particular relationship with the GDR create a substantially different basis for the application of customary rules on state succession. In this case, it must be assumed that the treaty relations of the Federal Republic as a rule continue to be in force while those of the GDR have ceased to exist.

State practice indicates a preference for a principle of discontinuance of treaties in related situations, although it is of course difficult to establish a sufficiently broad and uniform international practice. The rule that treaties of a territory which had been integrated into a continuing state have ceased to be in force has been applied not only in cases of a simple accession of territory<sup>67</sup> but also in cases of a integration of a formally sovereign territory into an existing state. It is generally assumed that when states become dissolved, *prima facie*, no treaties pass to the successor state.<sup>68</sup> Thus, treaties concluded by former sovereign parts of the Indian, American and Australian

<sup>63</sup> Cf. Treviranus, 'Die Konvention der Vereinten Nationen über Staatensukzession bei Verträgen', 39 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1979) 271.

<sup>64</sup> UN Doc. A/Conf 80/25; cf. Treviranus, *ibid.*

<sup>65</sup> Hentschel von Heinegg, 'Die Vereinigung der beiden deutschen Staaten', 13.

<sup>66</sup> Treviranus, *supra* note 63, at 275; O'Connell, *State Succession in Municipal and International Law*, Vol. 2, (1967) 726; for a different view Poeggel *et al.*, *Staatennachfolge im Völkerrecht* (1986) 15.

<sup>67</sup> See Article 15 lit. a of the 1978 Convention.

<sup>68</sup> Starke, *Introduction to International Law* (10th ed. 1989) 326.

Federal States have been considered as dissolved, while according to the principle of moving treaty frontiers those of the Federation remain in force.<sup>69</sup>

The principle of discontinuance, however, may considerably affect interests of third contracting states. The 1978 Convention, together with state practice, therefore, suggest some exceptions to the rule of discontinuance. First, localized treaties, i.e. treaties concerning the use of territory and established for the benefit of a territory of a foreign state are considered as primarily attached to the territories in question. Accordingly, they are assumed to pass on to the successor state.<sup>70</sup> Treaties of this kind include rights of transit, navigation, port facilities, and fishing rights. Boundary regimes have also been considered as binding on the successor state.<sup>71</sup> Other categories of treaties which are sometimes considered to be binding are multilateral conventions providing for a comprehensive body of rules for the subject matter which are intended to apply notwithstanding a transfer of sovereignty of a particular territory.<sup>72</sup> It seems, however, that in these cases state practice rather supports a right of the successor state to opt for such a convention instead of an automatic partial succession to such conventions.<sup>73</sup>

In summary, it is difficult to find a set of rules in customary international law which could be easily applied to the German unification. It seems reasonable to avoid any rigid or automatic solutions. It is up to the state parties to enter into negotiations although one could, with some justification, start from the assumption of a discontinuance of the treaty regime of the dissolved state unless vested rights and interests of a third party are concerned. The law of treaties and the rules on validity of treaties and on fundamental change of circumstances can be used as guidelines to determine whether a treaty should be discontinued, continued or modified.<sup>74</sup> The Unification Treaty follows these lines. Article 11 of the Unification Treaty does not contain any rigid solution on the continuation or discontinuation of the treaties of the GDR but provides for a flexible solution which fits into the pattern of international practices as described above. Both German states agree that the international treaties of the GDR are to be discussed with the contracting parties of the former GDR, in order to find out whether these treaties are to be modified or adapted, discontinued or continued. Aspects that are to be taken into account are the legitimate trust in the validity of those treaties, the interest of the contracting parties and the international treaty obligations of the Federal Republic, as well as the principles of a free, democratic, and constitutional order, and the competences of the European Economic

<sup>69</sup> E.g. see O'Connell, *State Succession in Municipal and International Law* 375ff., 26ff., 61ff.; A. Verdross and B. Simma, *Völkerrecht* (3rd ed. 1984) 982; G. Dahm *et al.*, *Voelkerrecht* 163.

<sup>70</sup> Article 12 of the 1978 Convention; Starke, *Introduction to International Law* (1989) 326; O'Connell, *State Succession in Municipal and International Law* 12ff., 231ff.; for a dissenting opinion see I. Brownlie, *Principles of Public International Law* 669.

<sup>71</sup> See the judgment of the ICJ in the Burkina Faso/Mali Dispute, ICJ Reports (1986) 554, 556.

<sup>72</sup> Starke, *Introduction to International Law* 326.

<sup>73</sup> I. Brownlie, *Principles of Public International Law*, 670 with further references.

<sup>74</sup> Hentschel von Heinegg, 'Die Vereinigung der beiden deutschen Staaten', 14ff.

Community. It is further provided that the united Germany will specify its position concerning the succession to treaties of the GDR after consultation with the contracting parties of those treaties, and the EEC, if the latter's competence is concerned. Article 12 paragraph 3 finally provides for an option to join international organisations or multilateral conventions to which only the GDR had acceded. Again in this case, consensus with the contracting parties, as well as with the EEC is envisaged.

Applying general principles of public international law, it is to be expected that all 'political' treaties dealing with the political and economic integration of the GDR into the Eastern Block treaty system will be discontinued. Concerning economic bilateral treaties of the GDR with various Eastern countries, it can be assumed that most of these treaties will – with some adaptations – be continued. In the Treaty of Good Neighbourhood, Partnership and Co-operation between the Federal Republic of Germany and the Union of the Soviet Socialist Republic of September 13, 1990,<sup>75</sup> the Federal Republic also accepted a reference to the treaty relations which have developed in the past years between the German Democratic Republic and the USSR, though no explicit position was adopted on their continuance. As a political position, however, the Federal government has already declared that some of the financial and economic obligations undertaken by the GDR will be recognized by the Federal Republic.

### **C. Succession to State Property and Debts**

The Unification Treaty does not contain any provisions on succession to state property and debts. It is beyond doubt, however, under general principles of public international law that with the unification all state property of the GDR, whether situated in her own territory or in the territory of a third state, passes to the Federal Republic. State property includes creditors' rights, archives, and any other claims against third states or international organisations. The uncertainty about the succession of states to assets and liabilities which had marked the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts<sup>76</sup>, mainly relates to special problems of newly independent states but does not affect the basic principle in cases where the predecessor state has ceased to exist.

As a rule, financial obligations of the predecessor state arising in conformity with international law towards another state, international organisation or any other subject of international law pass to the successor state. An exception, however, is usually made concerning 'odious debts', meaning debts which were contracted for

<sup>75</sup> *Frankfurter Allgemeine Zeitung* of 14 September 1990, 7.

<sup>76</sup> 22 ILM (1983) 298, 306; see Streinz, *supra* note 51, at 198.

purposes not in conformity with international law or contrary to the primary interests of the successor state.<sup>77</sup> For local debts contracted by a territorial authority in account of its financial autonomy, the territorial authority remains the debtor. Since in the GDR, under the communist regime, all former *Länder* had been dissolved, the existence of localized debts is unlikely. In this case, the Federal Republic will on the international level still be responsible, although as a rule, localized debts which are exclusively contracted in the interest of a part of the territory pass to the state which succeeds in the territory.<sup>78</sup>

### **III. The Unification of the Two German States Within the Legal Order of the EEC**

#### **A. The Application of EEC Law in the Former GDR**

With the accession of the former GDR to the Basic Law of the Federal Republic the territory of the former GDR automatically became part of the EEC without any amendment of the Treaty of Rome.<sup>79</sup> The European Council has thus confirmed the legal integration of the GDR as an enlargement of the territory of an existing member state. The integration, therefore, became effective as soon as the unification had been legally established, subject to the necessary transitional arrangements.<sup>80</sup>

The immediate application of EEC law in the new German *Länder* follows from Article 227 EEC Treaty which provides that the EEC Treaty is applicable to the member states in their respective territories unless special provisions like Article 227 paragraph 2 apply. The principle of ‘moving frontiers’, therefore, may be applied to supranational organisations like the EEC in the same way as to states.

A number of questions arise concerning the legal order of the EEC and the treaty relations of the EEC with third states. As to treaties falling into the exclusive competence of the EEC, the EEC is called upon to decide to what extent it is obliged to continue, cancel or adapt treaties of the former GDR in cooperation with the former contracting parties. General principles on succession of states to treaties – unclear as they may be – do not apply *ipso facto* to supranational organisations. The rules en-

<sup>77</sup> Streinz, *ibid.* at 204; Starke, *Introduction to International Law* 334.

<sup>78</sup> Streinz, *ibid.* at 204; Fiedler, *supra* note 54, at 451ff.

<sup>79</sup> Art. 237 of the EEC Treaty provides for a formal treaty in case of an accession of new member states to the Community. See Jacqu e *supra* at 3-8.

<sup>80</sup> European Council Doc/90/1 of 28 April 1990; see also Hailbronner, ‘V lkerrechtliche und staatsrechtliche Aspekte der deutschen Wiedervereinigung’, *Juristenzeitung* (1990) 449, 454; Tomuschat, ‘An United Germany within the European Community’, *27 CML Rev.* (1990) 415; Rengeling, ‘Das vereinte Deutschland in der Europ ischen Gemeinschaft: Grundlagen zur Geltung des Gemeinschaftsrechts’, *Deutsches Verwaltungsblatt* (1990) 1307; Scherer, ‘EG und DDR: Auf dem Weg zur Integration’, *Betriebsberater* 12/1990 (Supplement No. 16) 11; Grabitz and Bogdandy, ‘Deutsche Einheit und europ ische Integration’, *NJW* (1990) 1073.

visaged for succession to treaties by the organs of the EEC, therefore, gain a greater practical importance.

There is agreement within the Community that essential parts of the EEC legal order cannot be applied before the East German industrial and economic system has been brought up to the level of the other member states. The Unification Treaty between the two German states provides in principle for the application of EEC law while envisaging exceptional measures which ought to take into account the administrative and economic problems encountered in the territory of the former GDR. This provision does not in any way bind the EEC organs. It is up to the EEC to decide – basically by a majority ruling – about an interim regime by which the former GDR is to adjust to the economic structures in the Community.

The interim measures which the Council has taken concern almost all areas of industry, trade and agriculture. They are strictly limited in time and purpose. Only provisional measures on an interim basis have been suggested. Their purpose is the adaption of the GDR economic system to the Common Market. Provisional exemptions are admissible only to the extent that is absolutely necessary to achieve this purpose. This means that at the end of the interim regime, the EEC legal order will apply fully. Derogations from the treaty provisions or Community legislation will therefore only be possible in the framework of the general provisions of the EEC Treaty, which generally require a special authorization in a Community Regulation.

The new *Länder* are therefore obliged within their competence not only to respect the existing legal order of the Community, including the '*acquis communautaire*' but also to follow the aims and political obligations of the EEC Treaty as amended by the Single European Act and in particular Article 8A of the Treaty defining the aims of the Single Market to be achieved by the end of 1992. Although only the Federal Republic is a contracting party of the Treaty of Rome, it is clear that provinces, regions and *Länder* are also bound as being constitutional subdivisions of the Federal Republic. The Unification Treaty clarifies this situation by explicitly stating the duty of the new *Länder* to implement or apply those legal acts falling into their competence by legislative or administrative regulations.<sup>81</sup>

## **B. The Interim Regime**

The Commission suggested various phases for the adjustment of the GDR economy. Even before legal unification a number of measures had to be taken in order to promote the constitutional process in accordance with Community aims and prescriptions.

<sup>81</sup> Art. 10 para. 3 of the Unification Treaty.



The Treaty of May 1990 establishing a monetary, economic, and social union between the two German states<sup>82</sup> guaranteed the equal application of all provisions of the Treaty to all EEC citizens and enterprises. Since July 1, 1990, the GDR has opened its market to all products from EEC countries on the basis of reciprocity and has treated the trade with third countries, with the exception of agricultural products, as foreign trade within the meaning of EEC law – notwithstanding specific treaty obligations with third countries. The Treaty also provided for an extension of individual economic rights, such as the guarantee of private property and the freedom of establishment, to the territory of the GDR.

A second stage of interim regulations has been reached after the unification. The largest part of Community law including the market freedoms are valid automatically on the territory of the former GDR since October 3, 1990. The rest is – according to a detailed schedule of the Commission – delayed for a period of months or will not be enforced for the time being. The provisions which are in principle applicable include the rules governing the free movement of goods, services and people, policies on financial aids, unfair competition and merger, agriculture, energy, and transport.

Due to the rapid progress of the constitutional unification process, it proved impossible to enact all interim Regulations as from the unification. The Commission was therefore authorized by the Council of Ministers to adopt provisional measures.<sup>83</sup> Accordingly, it may authorize the Federal Republic to maintain in force any regulation in the territory of the former GDR on a provisional basis. The limits for these exceptions are drawn by the proposals of the Commission for interim measures included in an Annex to the Regulation. In any case interim measures based on this special authorisation are only valid until the Council has enacted final Regulations on the subject.

The interim regime thereby enacted is based on a comprehensive set of proposals by the Commission.<sup>84</sup> Concerning the procedure within the EEC, it was agreed that the European Parliament should be given – regardless of the applicable treaty provisions in every single case – the opportunity to comment on the whole set of rules as well as on the individual proposals. In most cases the majority rule will be applicable. The Federal Republic has no right to veto any proposals although it is, of course, affected in a very particular way.

The provisional interim measures enacted by the Commission primarily concern agriculture and trade. The Federal Republic may maintain those rules concerning the production and distribution of agricultural and industrial products provided they are not exported or sold outside the territory of the former GDR. Other member states

<sup>82</sup> II (1990) Bundesgesetzblatt 537; for a detailed analysis see Stern, Schmidt, Bleibtreu (eds), *Staatsvertrag zur Währungs-, Wirtschafts- und Sozialunion* (1990).

<sup>83</sup> Art. 1 Regulation 2684/90 of 17 September 1990, Official Journal No. L 263/1 of 26 September 1990.

<sup>84</sup> COM(90) 400 final of 31 August 1990, Vol. I and II; see also SEC (90) 2136 final of 7 November 1990; the proposals have been approved with minor modifications by the Council on 4 December 1990 (see OJ L 353/1-79 of 7 December 1990).

will have the right to take those products not being produced in conformity with EEC regulations out of the Market.

Market freedoms are, in principle, automatically applicable in the territory of the former GDR. This also applies to those EEC regulations providing for a recognition of diplomas and professional qualifications. Special provisions, however, determine qualifications in the legal profession, as long as there is no uniform regulation within the unified Germany. For the time being East German diplomas are not yet recognized as equivalent.

Special problems arise in the area of state aids. The Commission has taken the view that no interim Regulations are required. It is, however, doubtful whether the provisions of the EEC Treaty, devised for a 'normal' situation, will prove flexible enough to cope with the difficulties of the East German economy and to facilitate the transition towards market economy. The Commission has, however, announced its intention to supervise the application of these provisions in a 'constructive way', provided that equal chances are guaranteed in the whole Community and unjustified advantages for East German enterprises are avoided.<sup>85</sup>

### **C. Treaties of the Former GDR**

According to Article 113 of the EEC Treaty, trade policy including trade agreements with third states, liberalisation of foreign trade and protection measures fall within the exclusive competence of the EEC. Concerning the scope of international treaties of the EEC with third states or those international trade agreements binding for all member states which are part of the EEC foreign trade order, general principles on the supremacy of Community law, including international treaties, apply. In case of a conflict with treaty obligations undertaken by the GDR, Community law takes precedence.

The General Agreement on Tariffs and Trade (GATT) forms part of the binding EEC legal order though the EEC has never officially acceded to the GATT. Within the GATT an agreement apparently has been achieved that there is a necessity for a waiver making the continuance of GDR's treaty obligations with Eastern European states legally possible. This concerns primarily the admission of duty free products from certain Eastern European countries destined for consumption within the former GDR. Correspondingly, a waiver was granted by majority vote (US, Japan, and Hongkong voting against) for transitional EC trade measures related to the unification of Germany.<sup>86</sup>

Concerning international trade arrangements, the EEC has accepted the position taken by the Federal Government that the continuance, adoption or termination of these treaties is to be negotiated with the contracting parties in every single case. The

<sup>85</sup> COM(90) 1138, final of 6 June 1990, p. 69.

<sup>86</sup> 77 *GATT Newsletter* (December 1990) 6.

Commission, however, has also accepted the principle that the special treaty relations of the former GDR established within the COMECON deserve protection and should be developed by taking into account the economic structure of the EEC. This, in effect, will entail an extensive adaptation of some of these treaties to the changed economic and political circumstances. The Commission at the same time has emphasized its jurisdiction in the handling of the foreign trade policy of the EEC. It does not, however, exclude that the Federal Republic be given a special mandate to negotiate on behalf of the EEC the implications of some treaty relations of the former GDR.