Michigan Journal of International Law

Volume 13 | Issue 1

1991

German Unification: Constitutional and International Implications

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GERMAN UNIFICATION: CONSTITUTIONAL AND INTERNATIONAL IMPLICATIONS

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INTRODUCTION

It is a privilege to be invited to speak abroad about the legal problems of German unification. Coming from a relatively small country, I cannot expect a special interest from U.S. lawyers about German legal problems, but unification is not a German problem alone. Other States are substantially involved in the political and legal problems, especially the Four Allied Powers, the Member States of the European Communities, and Poland.

As a consequence, three different realms of law must be taken into account when dealing with the legal problems of German unification: (1) German constitutional law, (2) public international law, and (3) the law of the European Communities.

It goes without saying that it is impossible within the time available to deal with all the relevant legal items in even a superficial manner. I will have to concentrate on a few of the most important issues, confessing that the decision on what is important is to a certain degree influenced by my personal evaluation. Even with these selected problems it will not be possible to elaborate on them in a detailed way. I will have to confine myself to some sort of outline, thus not aiming at indisputable final conclusions, but being content if I succeed in instigating a lively and helpful discussion.

I. GERMAN CONSTITUTIONAL LAW

A. *The Idea of Unification in the Constitutions of the Two Germanies*

The Basic Law of 1949, the Constitution of the Federal Republic of Germany, always clung to the aim of German unity. This is clearly demonstrated by the statement of the preamble that the makers of the Basic Law "have also acted on behalf of those Germans to whom par-

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ticipation was denied," and that "the entire German people are called upon to achieve in free self-determination the unity and freedom of Germany."[1] The Federal Constitutional Court has repeatedly emphasized that this is not only the expression of a policy directive, but also valid law binding on all State organs.[2]

The attitude of the German Democratic Republic toward the problem of German unification has changed over time. Article 1 of the Constitution of October 7, 1949 states that "Germany is an indivisible democratic republic . . . ."[3] The Preamble of the Constitution of April 6, 1968 speaks of two German States, but Article 6 still adheres to one German nation.[4] The Constitution of September 27, 1974[5] totally abandons the idea of any German unity. The notion of "Germany" is carefully avoided.

Since the crumbling of the Wall on November 9, 1989, the main parts of the Constitution of 1974 have been invalid. Very soon after the Wall fell, hundreds of thousands of people shouted, "Germany, our undivided fatherland." The elections of March 18, 1990, the first free, democratic elections in the German Democratic Republic, expressed the desire of the overwhelming majority of the population for German unification. The *Volkskammer*, the parliament of the German Democratic Republic, repeatedly expressed the same desire.

B. *The Reunification Articles of the Constitution of the Federal Republic of Germany*

The Basic Law contains two provisions describing how to unify Germany legally.[6] Both have been neglected and almost forgotten during the last decades. Some of the commentaries on the Basic Law consider them to be of only theoretical significance. Recently, however, these provisions turned out to be of highly practical importance.

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1. GRUNDGESETZ [Constitution] [GG] pmbl. (F.R.G.).

2. *See* Judgment of July 31, 1973, Bundesverfassungsgericht [Constitutional Court], 36 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1, 17 (F.R.G.); Judgment of Aug. 17, 1956, 5 BVerfGE 85, 127 (F.R.G.).

3. DIE VERFASSUNG DER DDR of Oct. 7, 1949 [Constitution] [VERF] art. 1 (G.D.R.), *reprinted in* 2 QUELLEN ZUM STAATSRECHT DER NEUZEIT 292, 293 (Ernst R. Huber ed., 1951).

4. VERF of Apr. 6, 1968, pmbl. & art. 6, *reprinted in* SIEGFRIED MAMPEL, DIE SOZIALISTISCHE VERFASSUNG DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK 3, 5 (1972).

5. VERF of Sept. 27, 1974, *reprinted in* 1 THE FEDERAL REPUBLIC OF GERMANY & THE GERMAN DEMOCRATIC REPUBLIC IN INTERNATIONAL RELATIONS 95 (Günther Doeker & Jens A. Brückner eds., 1979) [hereinafter 1 INTERNATIONAL RELATIONS].

6. GG arts. 23, 146; Jochen A. Frowein, *Germany Reunited*, 51 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZaöRV] 336 (1991); Christian Tomuschat, *Wege zur deutschen Einheit*, 49 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 70 (1990).

Notwithstanding their importance, as is also true for other constitutional provisions, these provisions are short and unclear.

The first of the two provisions is Article 23. Sentence 1 enumerates the *Länder* (the states) of which the Federal Republic of Germany is composed, citing, for example, Bavaria and Hamburg, and states that the Basic Law shall apply in the territories of these *Länder*.[7] Sentence 2 says, "In other parts of Germany it [the Basic Law] shall be put into force on their accession."[8] That means that other parts of Germany may become parts of the Federal Republic by unilateral accession, with the Basic Law remaining the constitution of the then enlarged Federal Republic.

The second relevant provision of the Basic Law is Article 146. Article 146 states, "[t]his Basic Law shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force."[9] There are, therefore, two possibilities of German unification under Article 146: (1) the unilateral accession of other parts of Germany with the replacement of the Basic Law by a new constitution adopted by simple majority or (2) a unification of both German States into a new State with a new constitution.

Unification under either Article 23 or Article 146 is constitutionally possible. There was some debate among politicians and scholars of constitutional law as to which would be better. The main argument against Article 23 is that accession based on Article 23 would mean the surrender of the German Democratic Republic. Some even speak of an annexation or *Anschluß*, alluding to the incorporation of Austria into the German Reich in 1938. In my view this is not a valid argument. Article 23 presupposes the free and unilateral decision of the German Democratic Republic to accede to the Federal Republic of Germany.

Against unification under Article 146 of the Basic Law it is argued that elaborating a new constitution would be too time consuming. Further, it is stressed that the Basic Law is a good constitution, that it is accepted by the vast majority of the German people, and even that it is the best that they have ever had.

C. *Unification in Practice*

On August 23, 1990 the *Volkskammer* decided by a two-thirds majority in favor of the accession of the German Democratic Republic to

7. GG art. 23(1).

8. *Id.* art. 23(2).

9. *Id.* art. 146.

the Federal Republic of Germany. The accession was to be based on Article 23 of the Basic Law and to become effective on October 3, 1990.

However, to avoid even the appearance of a "surrender" or "annexation," the conditions of the accession were negotiated by the Unification Treaty of August 31, 1990 between the two German States.[10] The main purposes of this treaty are to provide transitional regulations for a smooth adaptation of the two German States and to preserve some of the "achievements" of the German Democratic Republic. The Unification Treaty does not change the substance of the constitutional basis of the unification. That basis remains unilateral accession under Article 23 of the Basic Law.[11] This is demonstrated by the intention of both sides to use Article 23 just in case they failed to negotiate the treaty or their respective parliaments failed to ratify it. For those cases, both sides have explicitly declared that the basis of unification would remain Article 23 of the Basic Law and that the detailed problems would be regulated by an act of the parliament of the Federal Republic of Germany.

D. *Other Constitutional Problems*

The Unification Treaty will bring about German unification, but it does not solve all of the constitutional problems.

1. The Future of Article 146

Perhaps the most crucial problem is the meaning and importance of the new wording of Article 146. Article 4(1) of the Unification Treaty changes the preamble of the Basic Law to state that the German people have achieved the unity and freedom of Germany in free self-determination.[12] Article 4(2) of the Unification Treaty repeals Article 23 of the Basic Law.[13] These changes to the Basic Law are the logical consequences of the achievement of German unification. They demonstrate that the so-called "German question" is now answered and that no other parts of Germany remain for future unification.

It would have been logical to repeal Article 146 of the Basic Law as well because it also deals with methods for German unification. However, article 4(6) of the Unification Treaty only amends Article 146 by inserting a new introductory sentence saying that German

10. Treaty on the Establishment of German Unity, Aug. 31, 1990, F.R.G.-G.D.R., 1990 Bundesgesetzblatt II [BGBl.] 889, 30 I.L.M. 457 (1991) [hereinafter the Unification Treaty].

11. *Id.* art. 1(1), 30 I.L.M. at 464.

12. *Id.* art. 4(1), 30 I.L.M. at 465.

13. *Id.* art. 4(2), 30 I.L.M. at 465.

unity is achieved. The rest of the Article remains unchanged.[14] In article 5 of the Unification Treaty, the governments of both German States recommend that within the next two years the legislative bodies of unified Germany think over the problems of applying the new Article 146.[15]

There is already considerable controversy over how best to understand this new constitutional provision. Some writers think its continuance is a basis for amending, even fundamentally changing, the Basic Law either by simple majority vote in both the *Bundestag* and the *Bundesrat* or by referendum, in other words changing the Basic Law outside the regular amendment procedure.

The regular procedure, found in Article 79 of the Basic Law, requires the affirmative vote of two-thirds of the members of the *Bundestag* and two-thirds of the votes in the *Bundesrat*.[16] Article 79 additionally declares inadmissible amendments affecting the division of the federation into *Länder*, the participation on principle of the *Länder* in legislation, or the basic principles laid down in Articles 1 and 20.[17] The above understanding of the new Article 146 makes it sort of a time bomb for the whole constitution.

It is very doubtful, however, whether this is the correct understanding of the new Article 146. It must be considered that the accession of the German Democratic Republic to the Federal Republic of Germany is based on Article 23 which implies accession to the Basic Law; this is demonstrated by the wording of Article 23.[18] It is true that this way of unification was not the only one. There was also the possibility of unification based on Article 146 implying a new constitution for unified Germany. Both ways were legally possible, but it was not possible to combine both ways.[19] It would be contradictory to accede to the Federal Republic of Germany on the basis of Article 23, i.e., under the continuing reign of the Basic Law, and to foresee by this very act of accession the possibility of abolishing the Basic Law.

2. The Legal Importance of the Unification Treaty After Unification

Another important question is the legal significance of the Unifica-

14. GG art. 146; Unification Treaty, *supra* note 10, art. 4(6), 30 I.L.M. at 466.

15. Unification Treaty, *supra* note 10, art. 5, 30 I.L.M. at 467.

16. GG art. 79(2).

17. *Id.* art. 79(3).

18. *Id.* art. 23; Unification Treaty, *supra* note 10, art. 1(1), 30 I.L.M. at 464.

19. Josef Isensee, *Staatseinheit und Verfassungskontinuität*, 49 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 39, 53 (1990).

tion Treaty after October 3, 1990 when the German Democratic Republic no longer exists.

The Unification Treaty is a treaty under public international law. When one party of such a bilateral treaty vanishes, who then is entitled to claim the rights given by the treaty against the other party? Article 44 of the Unification Treaty tries to tackle this problem by saying that the *Länder* to be restored within the territory of the German Democratic Republic are entitled to assert the rights flowing from the Unification Treaty.[20] The old traditional *Länder* within the territory of the German Democratic Republic (Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt, and Thuringia) were abolished in 1953. They were restored on October 3, 1990. Ultimately this means that those *Länder* can sue the Federal Republic of Germany before the Federal Constitutional Court for an alleged breach of the treaty.

However, it is not altogether clear to what extent the provisions of article 44 of the Unification Treaty preserve the rights of the German Democratic Republic as a party to the treaty. Article 45 of the Unification Treaty says that, after German unification, the treaty continues to be valid as Federal Law.[21] It can then be changed, in principle, by the legislative bodies of the Federal Republic of Germany. Otherwise, these provisions would stand eternally as a barrier against the sovereignty of parliament.

3. Expropriation Issues

A further provision of the Unification Treaty that will certainly cause many controversies in practice is article 4(5) in connection with article 41 and annex III of the Unification Treaty.[22] Annex III states that expropriations which took place within the territory of the German Democratic Republic between 1945 and 1949 will not be revised.[23]

Voices are saying that this amounts to a violation of Article 14 of the Basic Law protecting property.[24] On the other hand, Article 14 is not retroactively applicable to what happened in the German Democratic Republic during that period.[25] The problem is whether the in-

20. Unification Treaty, *supra* note 10, art. 44, 30 I.L.M. at 497.

21. *Id.* art. 45(2), 30 I.L.M. at 498.

22. *Id.* arts. 4(5), 41, 30 I.L.M. at 466, 496; *Id.*, annex III, 1990 BGBl. II at 1237.

23. *Id.* annex III, 1990 BGBl. II at 1237.

24. GG art. 14; OTTO KIMMINICH, DIE EIGENTUMSGARANTIE IM PROZEß DER WIEDERVEREINIGUNG 69 *passim* (1990); Herbert v. Arnim, *Entzug der Grundrechte aus Opportunität?*, FRANKFURTER ALLGEMEINE ZEITUNG, Sept. 6, 1990, at 8.

25. Hans-Jürgen Papier, *Verfassungsrechtliche Probleme der Eigentumsregelung im*

clusion of such a regulation in the Unification Treaty is in itself a violation of Article 14. Additionally, it may be asked whether article 4(5) is compatible with Article 3 of the Basic Law, equality before the law,[26] as the Unification Treaty deals differently with expropriations between 1945 and 1949 on the one hand and expropriations after 1949 on the other hand. It is easy to foresee that this problem will be brought before the Federal Constitutional Court by former proprietors whose property within the German Democratic Republic was expropriated between 1945 and 1949.[27]

II. PUBLIC INTERNATIONAL LAW AND GERMAN UNIFICATION

A. *Rights and Responsibilities of the Four Allied Powers*

Normally, if two States want to unite they don't have to ask other States to agree. In the case of German unification the situation is quite different because of the rights of the Four Allied Powers.[28] The origin and content of these rights are somewhat different in the Federal Republic of Germany and the German Democratic Republic.

1. The Federal Republic of Germany

After the unconditional surrender of the German armed forces, the Four Allied Powers (France, the Soviet Union, the United Kingdom, and the United States) made a formal declaration on June 5, 1945 (the Berlin Declaration).[29] In the Berlin Declaration the Four Allied Powers stated that they were assuming supreme authority with respect to Germany, but emphasized that the assumption of supreme authority did not affect the annexation of Germany.[30]

When the Federal Republic came into existence on May 23, 1949 it was far from being a sovereign State, quite the opposite. It was a State under the rule of the Occupation Statute of May 12, 1949,[31] lacking

Einigungsvertrag, 44 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 193, 195 (1991); Edzard Schmidt-Jortzig, *Sind nicht in Wahrheit bloß Hoffnungen enttäuscht worden?*, FRANKFURTER ALLGEMEINE ZEITUNG, Sept. 22, 1990, at 10.

26. GG art. 3.

27. This prediction turned out to be correct, but the claims brought before the Federal Constitutional Court have been rejected. In its Judgment of April 23, 1991 the Federal Constitutional Court held that the relevant regulations of the Unification Treaty were compatible with the Basic Law. Judgment of April 23, 1991, Bundesverfassungsgericht, 18 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 121 (1991).

28. Jochen A. Frowein, *Die Verfassungslage Deutschlands im Rahmen des Völkerrechts*, 49 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 7, 12 (1990).

29. Berlin Declaration, June 5, 1945, 60 Stat. 1649, 68 U.N.T.S. 189.

30. *Id.* pmbl., 60 Stat. at 1650, 68 U.N.T.S. at 190.

31. Council of the Allied High Commission, *Declaration Concerning the Entry into Force of*

competence in the areas of foreign and military policy. Sovereignty was conceded to the Federal Republic of Germany by the Convention on the Relations between the Three Powers and the Federal Republic of Germany of May 26, 1952 (the General Treaty), as amended on October 23, 1954.[32] Article 1 states that the occupation regime will end when the General Treaty enters into force. "The Federal Republic shall have full authority over its internal and external affairs, except as provided in the present convention."[33] However, article 1 is immediately followed by article 2 saying that "[t]he Three Powers retain, in view of the international situation, the rights, heretofore exercised or held by them, relating to . . . (b) Berlin, and (c) Germany as a whole, including the unification of Germany and a peace settlement."[34] This demonstrates that, even after the entry into force of the General Treaty and notwithstanding article 1 of the General Treaty, the Federal Republic of Germany was not sovereign in every respect.

2. The German Democratic Republic

The legal situation is very much the same for the German Democratic Republic. The above-mentioned Berlin Declaration of June 5, 1945 is of importance, too.

The German Democratic Republic came into existence shortly after the Federal Republic of Germany. It was also not a sovereign State. When, on March 26, 1954, the Soviet Union made a formal declaration of sovereignty for the German Democratic Republic, it retained its rights regarding an all-German character (i.e., its rights as to Germany as a whole).[35] This position was upheld in the consecutive treaties of friendship concluded between the Soviet Union and the German Democratic Republic on September 20, 1955,[36] June 12, 1964,[37] and October 7, 1975.[38]

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the Occupation Statute, OFFICIAL GAZETTE OF THE ALLIED HIGH COMMISSION FOR GERMANY, Sept. 23, 1949, No. 1, at 2.

32. Convention on the Relations between the Three Powers and the Federal Republic of Germany, May 26, 1952, *as amended* Oct. 23, 1954, 6 U.S.T. 4251, 5599, 331 U.N.T.S. 327 [hereinafter the General Treaty].

33. *Id.* art. 1(1), 6 U.S.T. at 4254.

34. *Id.* art. 2(1), 6 U.S.T. at 4254.

35. Statement by the Soviet Government on the Relations between the Soviet Union and the German Democratic Republic, Mar. 26, 1954, *reprinted in* 1 INTERNATIONAL RELATIONS, *supra* note 5, at 160 [hereinafter the Soviet Statement].

36. Treaty Concerning Relations Between the Union of Soviet Socialist Republics and the German Democratic Republic, Sept. 20, 1955, U.S.S.R.-G.D.R., pmbl., 226 U.N.T.S. 201, 208.

37. Treaty of Friendship, Mutual Assistance and Cooperation, June 12, 1964, U.S.S.R.-G.D.R., art. 9, 553 U.N.T.S. 249, 264.

38. Treaty of Friendship, Cooperation and Mutual Assistance, Oct. 7, 1975, U.S.S.R.-G.D.R., art. 10, 1077 U.N.T.S. 75, 86 [hereinafter 1975 Friendship Treaty].

3. The Two-Plus-Four Talks

From a political point of view, it was interesting that, on the occasion of the admission of the two German States to the United Nations, the Four Allied Powers made a joint declaration on November 9, 1972. The declaration stated that the admission of the German States to the United Nations did not adversely affect the rights and responsibilities of the Four Allied Powers relating to Germany as a whole.[39]

Consequently, it is not possible to effect German unification by an agreement between only the two German States. Therefore, the Two-Plus-Four Talks started in Ottawa on February 1990. These talks led to the conclusion of the Treaty on the Final Settlement with Respect to Germany, signed on September 12, 1990 in Moscow.[40]

For Germany the most important provision of this treaty is article 7, which states that

> (1) [The Four Allied Powers] 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.[41]

According to article 8, this treaty is subject to ratification.[42] On the German side it will be ratified by unified Germany and will therefore apply to unified Germany. That a treaty of such fundamental importance requires ratification is quite common and in line with public international law. It is also important that article 8 subjects the treaty to ratification or acceptance "as soon as possible."[43] Additionally, when signing the treaty in Moscow, the Four Allied Powers stated that they would later issue a common declaration to express their intention not to exercise their retained rights from October 3, 1990 onward. They did this because it was quite clear that the process of ratification would not end before the day of German unification. The Joint Declaration was signed on October 1, 1990 in New York, and the two German governments officially took notice of it by signing

39. Declaration on the Question of U.N. Membership for the Two Germanies, Nov. 9, 1972, 157 BULLETIN (Presse-und Informationsamt der Bundesregierung) 1884, 12 I.L.M. 217.

40. Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 104 BULLETIN (Presse-und Informationsamt der Bundesregierung) 1153, 29 I.L.M. 1186 [hereinafter the Final Settlement].

41. *Id.* art. 7, 29 I.L.M. at 1191.

42. *Id.* art. 8, 29 I.L.M. at 1192.

43. *Id.*

too. That means in substance that the retained rights of the Four Allied Powers ended no sooner than the termination of the ratification process but were suspended from the date of unification.

4. The Legal Capacity of the Four Powers

It is quite obvious that this is a very satisfactory development for Germany. I do hope that it will not give the impression of ingratitude when I think about whether the Four Powers freely decided to grant sovereignty to Germany or whether they were under a legal obligation to do so.

In my view it is at least open to doubt whether the Four Powers had the *legal* capability to hinder German unification. When I cited article 2 of the General Treaty between the Three Allied Powers and the Federal Republic of Germany by which the Three Powers retained their rights to Berlin and to Germany as a whole, I did not cite the full text of that provision. Reading the full text it becomes clear that the Three Powers retained these rights on the basis of a given political situation. This becomes apparent on examining the full wording of article 2, "In the view of the international situation, which has so far prevented the reunification of Germany and the conclusion of a peace settlement, the Three Powers retain [their] rights . . . ."[44] That means that the Three Powers retained these rights for the purpose of bringing about German reunification. Support for this view also comes from article 7 of the General Treaty which states that a peace settlement for the whole of Germany, "a reunified Germany enjoying a liberal-democratic constitution, like that of the Federal Republic," and a Germany integrated within the European community are essential aims of the common policy of the parties to the treaty.[45]

As far as the Soviet Union is concerned, it must be emphasized that it retained rights to Germany as a whole in the Declaration of Sovereignty of 1954, but in the same document committed itself to the aim of a unified Germany.[46] It is true that we read nothing of this commitment in the Treaty of Friendship of 1975 between the Soviet Union and the German Democratic Republic,[47] but it must be considered that the Soviet Union and both German States are parties to the

44. General Treaty, *supra* note 32, art. 2, 6 U.S.T. at 5600, 331 U.N.T.S. at 328, 330, *as amended* Oct. 23, 1954.

45. *Id.* art. 7, 6 U.S.T. at 5601, 331 U.N.T.S. at 334, *as amended* Oct. 23, 1954. The importance of this provision is also emphasized in Frowein, *supra* note 28, at 12.

46. Soviet Statement, *supra* note 35.

47. 1975 Friendship Treaty, *supra* note 38, 1077 U.N.T.S. at 76. In fact, articles 6 and 7 could be seen as a break from past commitments to German unification. *Id.*, arts. 6, 7, 1077 U.N.T.S. at 86.

two Covenants on Human Rights of December 19, 1966, elaborated by the United Nations.[48] The common article 1 of these agreements states that "all peoples have the right of self-determination."[49] There are some doubts as to the notion of "peoples," but it would be difficult to argue that the whole of the population of both German States is not entitled to the right of self-determination. The common view is that a people's right of self-determination includes a right to have its own State.

B. *Other Public International Law Problems Regarding German Unification*

1. The Treaties of the Two Germanies

A question of considerable importance is what will happen to the treaties of the two German States. The law of State succession notwithstanding, the Vienna Convention of August 22, 1978 on Succession of States in Respect of Treaties (the Vienna Convention)[50] is an extremely shaky ground on which to base a conclusion. By far the majority of German writers are of the opinion that, according to the rule of movable treaty frontiers, the treaties of the Federal Republic of Germany will continue while the treaties of the German Democratic Republic will come to an end, except those regulating a territorial regime.[51] In my view the rule of movable treaty frontiers is only applicable to cases where no party to a treaty vanishes, i.e., in cases of a transfer of territory from one State to another and in cases of secession and separation. The applicability of this rule is undisputed only in the case of a transfer of territory from one State to another as is demonstrated by article 15 of the just mentioned Vienna Convention.[52]

German unification is not a case of the transfer of territory between States but rather of the incorporation of one State into another,

48. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

49. International Covenant on Civil and Political Rights, *supra* note 48, art. 1(1), 999 U.N.T.S. at 173; International Covenant on Economic, Social and Cultural Rights, *supra* note 48, art. 1(1), 993 U.N.T.S. at 5. *See* Frowein, *supra* note 28, at 12; Clemens v. Goetze, *Die Rechte der Alliierten auf Mitwirkung bei der deutschen Einigung*, 43 NJW 2161, 2163 (1990).

50. Vienna Convention on Succession of States in Respect of Treaties, *opened for signature* Aug. 23, 1978, U.N. Doc. A/Conf.80/31 [hereinafter the Vienna Convention].

51. See sources cited in Albrecht Randelzhofer, *Deutsche Einheit und europäische Integration*, 49 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 101, 106 n.14 (1990).

52. Vienna Convention, *supra* note 50, art. 15.

making article 31 of the Vienna Convention the relevant provision.[53] At first sight, the wording of article 31 could lead to the conclusion that it only applies when two or more States unite to form a new successor State. However, the *travaux préparatoires* within the International Law Commission prove that article 31 also includes incorporation.[54] Article 31(1) says that any treaty of the involved States "continues in force in respect of the successor State" with two exceptions.[55] First, the States can agree otherwise. Second, it could appear from the treaty that its application with respect to the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.[56]

One might possibly argue that, for example, the Warsaw Pact and the Comecon Treaty will not continue in force for unified Germany as this would be incompatible with the object and purpose of those treaties. Otherwise, Germany would be a member of NATO *and* the Warsaw Pact, of the European Communities *and* Comecon.

Obviously, this would not be a reasonable result even under the auspices of article 31(2) which states that any treaty continuing in force in conformity with paragraph 1 shall apply only with respect to the part of the territory of the successor State in which the treaty was in force at the date of the succession of States.[57] Still, under article 31 almost all of the other treaties of the German Democratic Republic would continue to be in force in unified Germany.

On the other hand, it is very doubtful whether article 31 reflects valid customary law.[58] The majority of authors are of the opinion that, in the case of incorporation, the treaties of the incorporated State come to an end whereas the treaties of the incorporating State continue and are extended to the enlarged territory of that State.[59] Some State practice in favor of this solution can also be found.[60]

The Unification Treaty follows the substance of existing customary law but modifies it to some extent. Article 11 says that the treaties of

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53. *Id.* art. 31.

54. *See Report of the Commission to the General Assembly*, [1974] 2(1) Y.B. Int'l L. Comm'n 157, 253, U.N. Doc. A/9610/Rev. 1.

55. Vienna Convention, *supra* note 50, art. 31(1).

56. *Id.*

57. *Id.* art. 31(2).

58. *See* ALFRED VERDROSS & BRUNO SIMMA, UNIVERSELLES VÖLKERRECHT: THEORIE UND PRAXIS 613 (3d ed. 1984). This is the view of the majority of the writers on the subject.

59. *See, e.g.*, 1(1) GEORG DAHM, VÖLKERRECHT 163 (Jost Delbrück & Rüdiger Wolfrum eds., 2d ed. 1989).

60. Examples include the incorporation of Texas into the United States, of Italian Principalities into Savoy-Piedmont, of the Baltic States into the Soviet Union, and of Austria into the German Reich.

the Federal Republic of Germany will continue and will be extended to the territory of the former German Democratic Republic.[61] However, some treaties mentioned in annex I of the Unification Treaty are excluded from this extension. Those are the treaties regulating the special relations between the Federal Republic of Germany and the Three Allied Powers in consequence of World War II (e.g., the above mentioned General Treaty) and the treaties regulating the stationing of foreign troops in the Federal Republic of Germany, especially within the framework of NATO.[62] However, it must be emphasized that the NATO Treaty as such does not fall under this category. This treaty will be applicable in substance after the unification of Germany to the whole territory of the united German States.

As far as the treaties of the German Democratic Republic are concerned, article 12 of the Unification Treaty says that these treaties will be reviewed as to whether they will continue, will be adapted, or will come to an end, thus taking into account the interests of the other parties to the treaties.[63] This procedure was confirmed in a letter by the Foreign Ministers of both German States to the Four Allied Powers on the occasion of the signing of the Final Settlement concerning Germany on September 12, 1990 in Moscow.

This partial deviation from the rules of customary international law is possible because the rules of State succession are far from mandatory. Political considerations made it necessary not to rely totally on the rules of customary international law. It would have been highly difficult, if not impossible, to persuade the Soviet Union to accept, for example, the replacement of Soviet troops in Germany not only by German troops but also by the troops of other NATO States. It was certainly more political bargaining than legal reasoning that made the Soviet Union ready to accept German unification with unified Germany remaining a member of NATO.[64]

Germany and NATO had to pay a price for that result. Unified Germany will have to reduce the personnel strength of its armed forces to 370,000.[65] It will have to adhere to the already existing obligations of the two German States not to manufacture, possess, or con-

61. Unification Treaty, *supra* note 10, art. 11, 30 I.L.M. at 471.

62. *Id.* annex I, 1990 BGBl. II at 907.

63. *Id.* art. 12, 30 I.L.M. at 472.

64. *See* Final Settlement, *supra* note 40, art. 6, 29 I.L.M. at 1191. This is the provision which allows the unified Germany to remain in NATO. "The 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." *Id. See also* Torsten Stein, *External Security and Military Aspects of German Unification*, 51 ZAöRV 451 (1991).

65. Final Settlement, *supra* note 40, art 3(2), 29 I.L.M. at 1189-90.

trol nuclear, biological, and chemical weapons.[66] Until the end of 1994, no troops integrated into NATO are allowed to be stationed within the territory of the former German Democratic Republic.[67] After 1994 NATO troops can be stationed there, but they must be German. No other NATO troops will be allowed.[68] After 1994, maneuvers of NATO troops within the territory of the former German Democratic Republic will be possible only with the consent of the German government. This consent will be given only with due regard to the safety interests of the Soviet Union.[69]

Irrespective of these treaty obligations, the Foreign Minister of the Federal Republic of Germany officially declared on August 30, 1990, the same commitments in the Vienna Negotiations on Arms Reductions. In view of the decision of the International Court of Justice in the Nuclear Test Cases,[70] this unilateral declaration is already binding on the Federal Republic of Germany.

Article 4 of the Final Settlement foresees the conclusion of a treaty between unified Germany and the Soviet Union regulating the withdrawal of Soviet troops.[71] This treaty has already been concluded,[72] and Germany will pay 9 billion marks to help the Soviet Union withdraw its troops.[73]

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66. *Id.* art. 3(1), 29 I.L.M. at 1189.

67. *See id.* art. 5(1), 29 I.L.M. at 1190.

68. *See id.* art. 5(3), 29 I.L.M. at 1191. It is worth mentioning that, according to article 5(2) of the Treaty on Final Settlement Concerning Germany, troops of the Three Western Allied Powers are, at German request, to remain stationed in Berlin for the duration of the presence of Soviet troops in the territory of the former German Democratic Republic. *Id.* art. 5(2), 29 I.L.M. at 1191. The legal basis for this has already been established by the Exchange of Notes of September 25, 1990 Concerning the Limited Stationing of the Troops of the Western Allied Powers in Berlin. 1990 BGBl. II 1252.

69. This is not stated explicitly in the treaty itself, but it can be derived from comparing parts 1 and 3 of article 5 and from the Agreed Minute to the Treaty referring to article 5(3). Final Settlement, *supra* note 40, arts. 5(1), 5(3), 29 I.L.M. at 1190-91; Agreed Minute to the Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 29 I.L.M. 1193.

70. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20); (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20).

71. Final Settlement, *supra* note 40, art. 4, 29 I.L.M. at 1190.

72. Vertrag zwischen der Bundesrepublik Deutschland und der Union der Sozialistischen Sowjetrepubliken über die Bedingungen des befristeten Aufenthalts und die Modalitäten des planmässigen Abzugs der sowjetischen Truppen aus dem Gebiet der Bundesrepublik Deutschland [Treaty on the Conditions of the Limited Presence and the Conduct of Withdrawal of Soviet Troops on the Territory of the Federal Republic of Germany], Oct. 12, 1990, F.R.G.-U.S.S.R., 1991 BGBl. II 258.

73. Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Union der Sozialistischen Sowjetrepubliken über einige überleitende Maßnahmen [Agreement on Some Transitional Measures], Oct. 9, 1990, F.R.G.-U.S.S.R., arts. 2(1), 3(2), 4(4), 1990 BGBl. II 1655, 1656-57.

2. Is a Peace Treaty with Germany Still Necessary?

Article 7 of the above mentioned General Treaty speaks of a peace settlement for the whole of Germany as being an essential aim of the actual policy of the Federal Republic of Germany and of the Three Allied Powers.[74] Notwithstanding, it is extremely doubtful today whether the conclusion of a peace treaty would make any sense.[75]

The main purpose of a peace treaty is to end a status of war. This main purpose can no longer be achieved as a status of war long ago ceased to exist between the Allied Powers and the two German States. It may be difficult to fix the exact date when the status of war ended, but there is no doubt that the reestablishment of peaceful relations between both German States and the Allied Powers ended the status of war.[76]

An additional traditional purpose of a peace treaty is the regulation of reparations. It is also very doubtful whether this is still an open question. After extensive dismantling in its zone of occupation, the Soviet Union officially declared that it no longer had any claims of reparations toward either the German Democratic Republic or Germany as a whole.[77] The London Agreement[78] postponed but did not settle the question of reparations between the Western Powers and the Federal Republic of Germany. However, taking into account that the Western Powers also substantially dismantled parts of the Federal Republic of Germany and that the Federal Republic has paid a considerable amount of money since its formation,[79] it is open to question whether there is still a sound basis for a claim of reparations.

The regulation of borders is another important aspect of peace treaties. Only the border between Germany and Poland can be seen as a problem awaiting a final resolution.

3. The Border Between Germany and Poland

The Potsdam Conference of August 1945 showed the intention of the Allied Powers to transfer German territory to Poland. Irrespec-

74. General Treaty, *supra* note 32, art. 7, 6 U.S.T. at 5601, 331 U.N.T.S. at 334, *as amended* Oct. 23, 1954.

75. This view is shared by others. *See, e.g.*, Frowein, *supra* note 28, at 21.

76. HERMAN MOSLER & KARL DOEHRING, DIE BEENDIGUNG DES KRIEGZUSTANDS MIT DEUTSCHLAND NACH DEM ZWEITEN WELTKRIEG (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht No. 37, 1963).

77. *See* INSTITUT FÜR EUROPÄISCHE POLITIK UND WIRTSCHAFT, EUROPA-ARCHIV 5974-75, 5981 (Wilhelm Cornides ed., 1953).

78. Agreement on German External Debts, Feb. 27, 1953, art. 5, 333 U.N.T.S. 3, 14.

79. Ignaz Seidl-Hohenveldern, *Reparations after World War II*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 180, 181-83 (Rudolf Bernhardt ed., 1982).

tive of whether the Allied Powers had a legal capacity to transfer territory, it must be noted that the Potsdam Conference did not do so.[80] Section IX of the communication of the Conference explicitly states that "the final delimitation of the western frontier of Poland should await the peace settlement."[81] This is reiterated by article 7 of the General Treaty stating that the "final determination of the boundaries of Germany must await [a peace settlement for the whole of Germany]."[82]

Notwithstanding, the German Democratic Republic concluded a treaty with Poland on July 6, 1950 acknowledging the actual border between the two States as permanent.[83] When the Federal Republic of Germany and Poland concluded a treaty on December 7, 1970,[84] the resolution of the border question was unclear, and, in a certain sense, contradictory. Article 1 of this treaty says that the actual Polish western border is inviolable and that there will be no territorial claims toward Poland in the future.[85] On the other hand, article 4 says that this treaty does not affect former treaties.[86] This provision aims, *inter alia*, at article 2 of the General Treaty saying that the rights as to Germany as a whole are retained by the Allied Powers.[87] That means that the Federal Republic of Germany was not entitled to answer definitely questions about German territory. However, because of article 1 of the treaty between the Federal Republic of Germany and Poland, the Federal Republic is no longer free after unification to challenge the Polish western border. This fact has been acknowledged by formal declarations of the *Bundestag* and the *Volkskammer*.

This obligation is confirmed by article 1(2) of the Final Settlement

80. Jochen A. Frowein, *Potsdam Agreements on Germany (1945)*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 79, at 141, 145-46; Kay Hailbronner, *Legal Aspects of the Unification of the Two German States*, 2 EUR. J. INT'L L. 19 (1991).

81. Protocol of the Proceedings of the Berlin (Potsdam) Conference of the Three Heads of Government of the United States, the Soviet Union, and the United Kingdom, Aug. 2, 1945, *reprinted in* DOCUMENTS ON BERLIN 1943-1963, at 15, 21 (Wolfgang Heidelmeyer & Gunter Hindrichs eds., 2d rev. ed. 1963).

82. General Treaty, *supra* note 32, art. 7, 6 U.S.T. at 5601, 331 U.N.T.S. at 334, *as amended* Oct. 23, 1954.

83. Abkommen über die Markierung der festgelegten und bestehenden polnisch-deutschen Staatsgrenze [Agreement Concerning the Demarcation of the Established and Existing Polish-German State Frontier], July 6, 1950, Pol.-G.D.R., 319 U.N.T.S. 93, 104.

84. Vertrag zwischen der Volksrepublik Polen und der Bundesrepublik Deutschland über die Grundlagen der Normalisierung ihrer Gegenseitigen Beziehungen [Agreement Concerning the Basis for Normalization of Their Mutual Relations], Dec. 7, 1970, F.R.G.-Pol., 830 U.N.T.S. 327.

85. *Id.* art. 1, 830 U.N.T.S. at 332.

86. *Id.* art. 4, 830 U.N.T.S. at 334.

87. General Treaty, *supra* note 32, art. 2, 6 U.S.T. at 5600, 331 U.N.T.S. at 328, 330, *as amended* Oct. 23, 1954.

concerning Germany calling for unified Germany and Poland to confirm the border existing between them by a treaty binding under public international law.[88] Article 1(3) adds that unified Germany has no territorial claims toward other States and will not raise such claims in the future.[89] Meanwhile, a treaty has been worked out between unified Germany and Poland confirming the actual border between the two States.[90]

III. GERMAN UNIFICATION AND THE EUROPEAN COMMUNITIES[91]

A. *Change of the Problem*

Until recently, the question was whether constitutional obligations to struggle for the unification of Germany stood against further European integration. For example, the Federal Constitutional Court said that the Federal Republic of Germany was not allowed to become a member of a European Federal State because, in that case, it would no longer be free to decide independently on German unification.[92] Today, the decisive question is whether membership in the European Communities is an obstacle toward German unification as the latter was said to depend on the approval of the other Member States of the European Communities.

From its very beginning, the Federal Republic of Germany was aware of a possible conflict between the two aims of German unification and European integration. Therefore, on February 28, 1957, it made a formal declaration during the negotiations for the treaty establishing the European Economic Community, that "[t]he Federal Government starts from the idea that in the case of German unification there will be the possibility of a revision of the treaty . . . ."[93]

88. Final Settlement, *supra* note 40, art. 1(2), 29 I.L.M. at 1188.

89. *Id.* art. 3, 29 I.L.M. at 1189.

90. Vertrag zwischen der Bundesrepublik Deutschland und der Republik Polen über die Bestätigung der zwischen ihnen bestehenden Grenzen, Nov. 14, 1990, F.R.G.-Pol., 134 BULLETIN (Presse- und Informationsamt der Bundesregierung) 1394.

91. For a more detailed analysis, see Randelzhofer, *supra* note 51, at 101. *See also* Thomas Giegerich, *The European Dimension of German Reunification: East Germany's Integration into the European Communities*, 51 ZAÖRV 386 (1991); Jean-Paul Jacqué, *German Unification and the European Community*, 2 EUR. J. INT'L L. 1 (1991); Stefan Oeter, *German Unification and State Succession*, 51 ZAÖRV 370 (1991).

92. Judgment of Oct. 22, 1986, 73 BVerfGE 339, 375 (F.R.G.); Judgment of June 23, 1981, 58 BVerfGE 1, 40 (F.R.G.); Judgment of July 31, 1973, 36 BVerfGE 1, 28-29 (F.R.G.).

93. Deutscher Bundestag, Drucksache 3660, at 11 [hereinafter the German Declaration].

B. *Is a Change of the EEC Treaty Required by German Unification?*

This question must take into account that German unification will be brought about through Article 23 of the Basic Law, i.e., by the incorporation of the German Democratic Republic into the Federal Republic of Germany. In one of his early statements, the president of the Commission of the European Communities, Mr. Delors, was of the opinion that, even in this case, membership of unified Germany required the admissions procedure of a new Member State under article 237 of the EEC Treaty.[94] That would require a unanimous decision of the Council, the consent of the European Parliament by absolute majority, and approval by all EC Member States.[95] Such a procedure could have risked Germany's continued membership.

Today, however, it is the almost universal view of legal writers and politicians that the Federal Republic's EC membership will remain unchanged in substance by the incorporation of the German Democratic Republic and that the EEC Treaty will be extended automatically to the territory of the German Democratic Republic.[96] This view is also expressed by article 10 of the Unification Treaty.[97]

There is no article within the EEC Treaty dealing explicitly with the problem of a change in size of the territory of a Member State. Article 237 is not applicable as it only deals with the admission of *new* Member States.[98] Article 227(1) enumerates all the Member States of the EC, including the Federal Republic of Germany.[99] It could be interpreted, in my view, in the sense that the enumerated States are members of the EC regardless of the actual size of their State territory. However, it is the view of almost all the writers that this provision does not deal with the problem of a change in size of the territory of the Member States.[100]

There is some practice of the European Communities automa-

94. FRANKFURTER ALLGEMEINE ZEITUNG, Feb. 15, 1990, at 1.

95. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 237.

96. *See, e.g.*, Christian Tomuschat, *A United Germany Within the European Community*, 27 COMMON MKT. L. REV. 415, 418 (1990).

97. Unification Treaty, *supra* note 10, art. 10, 30 I.L.M. at 471.

98. EEC TREATY art. 237.

99. *Id.* art. 227(1).

100. *See, e.g.*, Waldemar Hummer, *in* KOMMENTAR ZUM EWG-VERTRAG art. 227 n.4 (Eberhard Grabitz ed., 1984 & Supp. 1989); Jean-Paul Jacqué, *L'Unification de l'Allemagne et la Communauté Européenne*, 94 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 997, 1000 (1990); Paul Reuter & Piet-Hein Houben, *Article 227, in* 5 THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY ON THE EEC TREATY 6-216.08, 6-216.111 (Hans Smit & Peter E. Herzog eds., 1991).

tically extending the treaties to the enlarged territory of a Member State. When, in 1956, the Saar was incorporated into the Federal Republic of Germany, the treaty establishing the European Coal and Steel Community was automatically extended to the Saar, as far as the Federal Republic of Germany was concerned. This automatic extension also took place when, in 1956, the islands of St.-Pierre-et-Miquelon became Départements d'Outre-Mer of France. However, it is doubtful whether these two examples are comparable to the enlargement of the territory of the Federal Republic of Germany by the incorporation of the German Democratic Republic.

Notwithstanding, it is the common view today that the law of the European Communities will be extended to the territory of the former German Democratic Republic after German unification. This is derived from the law of State succession as shown above.

However, there is still a special problem within the law of State succession. It is maintained by some writers that the rules of State succession are not applicable to long term economic treaties based explicitly or implicitly on the population, the territory, and/or the economic strength of each of the Member States.

Irrespective of EEC Treaty article 148, which stipulates weighted voting in the Council, the EEC Treaty is not a treaty of the character just mentioned. Article 148 alludes to these items only in a very levelling way.[101] Thus it turns out that EC membership is no real obstacle to German unification and that the consent of the other Member States of the EC is not required for this end. On the other hand, just as German unification affects foreign policy issues as a whole, the Federal Republic of Germany was obliged by article 30(2)(a) of the Single European Act[102] to enter into consultations with the European Communities when negotiating both the Treaty of May 18, 1990 establishing economic, financial, and social union with the German Democratic Republic[103] and the Unification Treaty of August 31, 1990.[104] These requirements have been fulfilled.[105]

After all, the EEC Treaty need not and will not be changed.[106]

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101. EEC TREATY art. 148.

102. Single European Act, Feb. 28, 1986, art. 30(2)(a).

103. Treaty Establishing a Monetary, Economic and Social Union, May 18, 1990, F.R.G.-G.D.R., 29 I.L.M. 1108.

104. Unification Treaty, *supra* note 10.

105. *See* Commission, *German Unification and Relations with the GDR*, 23 BULL. EC, Oct. 1990, No. 6 at 27.

106. *See* Jacqué, *supra* note 100, at 1003; Hans-Werner Rengeling, *Das vereinigte Deutschland in der Europäischen Gemeinschaft: Grundlagen zur Geltung des Gemeinschaftsrechts*, 105 DEUTSCHES VERWALTUNGSBLATT 1307, 1308 (No. 23 1990); C.W.A. Timmermans, *German Unification and Community Law*, 27 COMMON MKT. L. REV. 437, 438 (1990).

The Federal Republic of Germany and the other Member States would, though, be entitled to claim such a change based on the German declaration of February 28, 1957.[107] That declaration qualifies as a means of interpretation of the treaty in the sense of article 31(2)(b) of the Vienna Convention on the Law of Treaties of May 23, 1969.[108] In my view, this declaration entitles not only the Federal Republic of Germany but also, by way of reciprocity, the other Member States to claim a change of the EEC Treaty. On April 4, 1990, the Federal Republic of Germany officially declared to the European Parliament that it does not claim any change of the treaty.[109] No other Member State has claimed such a change.

C. *Necessity of Transitional Regulations of Adaptation*[110]

The automatic extension of the EEC Treaty to the territory of the former German Democratic Republic might be a satisfactory overall legal solution to the problem of German membership in the European Communities. On the other hand, such an automatic extension will cause considerable practical problems. The enterprises in the territory of the former German Democratic Republic are currently not able to withstand free competition. It will be impossible for them to comply immediately with the technical standards of the European Communities. The same is true for EC environmental standards. Without special regulations, the Commission of the European Communities will repeatedly sue unified Germany under article 169 for failure to fulfill its treaty obligations.[111]

The Commission has already tackled the problem by delivering on August 21, 1990 to the European Parliament and to the governments of the Member States the draft of a comprehensive set of transitional regulations.[112] The Commission was also prepared to take preliminary measures on its own account in case the Council and the Member States did not succeed in bringing about the necessary regulations in time. Meanwhile, on September 17, 1990, the Council of Ministers of

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107. German Declaration, *supra* note 93.

108. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31(2)(b), 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980).

109. FRANKFURTER ALLGEMEINE ZEITUNG, Apr. 5, 1990, at 2.

110. For further discussion, see Kay Hailbronner, *Völker- und europarechtliche Fragen der deutschen Wiedervereinigung*, 45 JURISTENZEITUNG 449, 456 (1990); Rengeling, *supra* note 106, at 1311; Timmermans, *supra* note 106, at 444.

111. EEC TREATY art. 169.

112. The European Parliament had already adopted, on July 12, 1990, a resolution on the effects of German unification on the European Community recognizing the necessity of transitional adaptation regulations. 1990 O.J. (C 231) 154.

the European Communities empowered the Commission to take the relevant measures to cope with the problem of transition and adaption and therefore to create preliminary regulations.[113]

The transitional regulations for adaptation will be almost the same as those used in the cases of admission of new Member States. The treaty and the main bulk of regulations will not be changed, but the applicability, at least the full applicability, of some parts will be postponed.

This example is from the accession of Spain and Portugal to the European Communities. Articles 31 and 190 of the Act annexed to the Treaty of June 12, 1985 Concerning the Accession of Spain and Portugal provide for the *progressive* abolition of the customs between Spain and Portugal on the one hand and the other Member States of the European Communities on the other.[114] The full applicability of EEC Treaty article 9 and the articles following it was postponed to January 1, 1993.[115] Accession Act articles 37 and 197 foresee the *progressive* introduction of the Common Customs Tariff with total effectiveness on January 1, 1993.[116] The same date is set in Accession Act articles 55 and 215 and the articles following them for the *full* applicability of EEC Treaty article 48 and the relevant regulations for the free movement of workers.[117] The full applicability of the provisions on agriculture is postponed by Accession Act articles 67 and 233 until January 1, 1996.[118]

As far as the territory of the former German Democratic Republic is concerned, the proposals of the Commission foresee the general postponement of the full applicability of most of the "sensitive" provisions of the EEC Treaty until January 1, 1993.[119] The applicability of the environmental provisions of the EEC shall be postponed until January 1, 1996.[120]

It can be said that the problems concerning the EC in connection with the German unification are far from a real obstacle. The EC

113. For a survey of preliminary measures, see Commission, *German Unification and Relations with the German Democratic Republic*, 23 BULL. EC, No. 9, at 8 (1990). *See also* Rengeling, *supra* note 106, at 1311 (evaluating relevant legal instruments).

114. Act Concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the Adjustments to the Treaties, 1985 O.J. (L 302) 23, 29, 81.

115. *See id.*, tit. II, ch. 1, at 28; tit. III, ch. 1, at 81.

116. *Id.* art. 37, at 30; art. 197, at 83.

117. *Id.* art. 55, at 35; art. 215, at 88.

118. *Id.* art. 67, at 38; art. 233, at 91.

119. Commission, *The Community and German Unification*, BULL. EC, Supp. 4/90, at 27, 50 (1990).

120. *Id.* at 100-05.

membership of the Federal Republic of Germany has turned out not to be a substantial barrier to German unity.[121]

CONCLUSION

To most people, German unification, especially the quick way it was brought about, seems to be sort of a political miracle. Others, especially partisans of Hegel's philosophy, might be tempted not to speak of a miracle, but of a performance of the ruse of reason (a *List der Vernunft*). The retained rights of the Four Allied Powers to Germany as a whole, repeatedly criticized during the last years as outdated, were the very center of the preservation of the last remnants of German unity, impeding definite cessation into two completely separate States.

Hopefully, German unity will help to overcome the division of Europe, for the division of Germany was not mainly a consequence of the East-West split but one of its major reasons.

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121. *See* Tomuschat, *supra* note 96, at 436. *See also* Hans-Jürgen Wolff, *Schrittweise Herstellung der deutschen Einheit und Europäisches Gemeinschaftsrecht*, 43 NJW 2168 (1990).