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SHORTER ARTICLES, COMMENTS AND NOTES

THE ARITHMETIC OF GERMAN UNIFICATION: THREE INTO ONE DOES GO

A. Introduction

The year 1989 was one of dramatic and (mostly) peaceful change in central and Eastern Europe. Poland held the region's first semi-free elections in about 40 years and found itself with a non-Communist government. Hungary moved in the same direction but, in a way, the most dramatic events really occurred in the last two or three months of the year, when the socialist regimes in East Germany, Czechoslovakia, Bulgaria and Romania collapsed.

The one event which surely exemplified all these changes was the opening of the Berlin Wall on 10 November 1989.¹ This started a process which culminated, less than one year later, in the "unification" of the two German States: the Federal Republic of Germany (FRG) and the German Democratic Republic (GDR).

It is perhaps worth recalling that, when the Wall came down, while the prospect of unity was of course a topic of some considerable debate, nevertheless there was also a belief that achieving it could be a lengthy process. There were also some who argued that the GDR should remain as a separate, albeit democratic rather than Democratic, German State.

In the end events moved faster than even the most ardent proponents of German unity could have hoped. As well as being remarkable as a political development, this process is significant for the speed with which apparently insurmountable legal obstacles, based on legal positions built up and asserted over 40 years, were more or less negotiated aside as irrelevances—which, perhaps, they were. So complex were the legal and political factors governing Germany's status that one writer took the view in 1989 that the division of Germany seemed permanent.² Yet one may argue with some justification that the division really did seem permanent as late as that summer.

The purpose of this article is to outline the legislative mechanism which was used to bring about German unity. In doing so an attempt will be made to assess some of the more significant legal aspects and consequences of that process, while leaving a more detailed assessment of what has happened for another occasion. It will be the basic argument of this article that no unification of West and East Germany has occurred: in fact and in law, the GDR has simply been taken over by the FRG.

1. One of the most thorough immediate reports of these events is in *Der Spiegel*, 13 Nov. 1989, Vol. 43, No. 46.

2. Piotrowicz, "The Status of Germany in International Law: *Deutschland über Deutschland?*" (1989) 38 I.C.L.Q. 609, 634.

B. *The Status of Germany Before the Opening of the Berlin Wall*

The status of Germany as of November 1989 was controversial.³ The basic position was as follows. There were at least two, and probably three, German States at this time: the FRG, the GDR and Germany itself. Following the defeat of Germany in 1945, the four powers (the United Kingdom, United States, Soviet Union and France) assumed supreme authority over Germany, including the right to decide its status and frontiers. They expressly said that this was not an annexation of Germany.⁴ Thus Germany continued to exist as a State. The intention was to prepare Germany for a peace settlement with its former adversaries but, due to a breakdown in co-operation among the Western powers on the one hand, and the Soviet Union on the other, such a peace settlement never actually occurred. Instead, in 1949 two new States, the FRG and the GDR, were established.

Despite these developments, however, the four powers repeatedly maintained at every critical date⁵ the existence of their rights and responsibilities with regard to Germany as a whole, including the right to decide upon its eventual status and frontiers. It was this continuous assertion of capacity which has formed the foundation for the view that Germany as a whole still exists (i.e. a third German State), since these rights were acquired with regard to the whole German State, rather than West or East Germany.

Another manifestation of this rather strange competence was the existence of a divided Berlin. Berlin, like Germany as a whole, was divided in 1945 into four zones of occupation, one for each of the four powers. Thus the Western powers were able to maintain a presence in Berlin solely on the basis of their capacity with regard to Germany as a whole. The Berlin Wall was put up in the first place in 1961 to stop East Germans leaving for the West via the open border in the city.⁶

By 1989 there were two German States which existed relatively independently. The FRG took the view that it was partly identical (*teildentisch*) with Germany as a whole⁷ and therefore entitled to represent the German people. The GDR, on the other hand, considered itself a successor State of the Reich,

3. Geck, "Germany and Contemporary International Law" (1974) 9 *Tex. Int. L.J.* 263; J. Hacker, *Der Rechtsstatus Deutschlands aus der Sicht der DDR* (1974); Ress, "Germany, Legal Status After World War II", in R. Bernhardt (ed.), *Encyclopedia of Public International Law, Vol.10* (1987), p.191.

4. US Department of State, *Documents on Germany 1944-1985* (1985), p.33.

5. E.g. when the USSR issued a statement concerning the attributing of full sovereignty to the GDR in 1954, it expressly retained these functions: *idem*, p.418. When the FRG initialled the 1970 Treaty with Poland in which it recognised the Oder-Neisse line, the US confirmed its view that the Treaty could not affect its rights and responsibilities: *idem*, p.1113.

6. Another view is that the Wall was an anti-Fascist defence mechanism, put there to prevent the infiltration of imperialism into the East through Berlin: A. Gromyko, *Memories* (1989), p.197.

7. This view received judicial sanction in the *FRG-GDR Relations Case*, an action initiated by the Bavarian government in an attempt to have the Treaty between West and East Germany declared incompatible with the Basic Law and therefore void: (1988) 78 I.L.R. 149, 161-162.

which no longer existed.⁸ This difference in attitude was reflected in the stance West and East Germany adopted towards each other. The FRG at first refused to recognise the GDR⁹ while the GDR regarded the FRG as a foreign State just like any other.

The situation was resolved in 1972 when the two States entered into a Treaty on the Basis of their Mutual Relations (the *Grundlagenvertrag*).¹⁰ In this agreement the two States recognised each other's independence¹¹ but still failed to agree on major aspects of their mutual relations—a situation even acknowledged in the Treaty.¹² While the GDR continued to treat the FRG like any third State, the FRG, while accepting the GDR's separate Statehood, nevertheless maintained that the GDR was not a *foreign State*.¹³ This dispute plagued intra-German relations throughout the period of the GDR's existence.

In addition to the two German States, the clearest affirmation for a long time of the existence of Germany as a whole was offered by the United Kingdom in 1985, when the Foreign Secretary issued an executive certificate to the effect that Germany was still with us.¹⁴

C. *The Process of Achieving Unity*

When the Wall was opened West German Chancellor Kohl interrupted his visit to Poland to fly back to Germany in order to assess the situation for himself. His personal commitment to swift unification succeeded in overcoming the ambivalence of the United Kingdom and France. The United States was always supportive while the Soviet Union seemed sometimes to be opposed. Poland immediately spoke out in favour of the right of self-determination, including unification, of the German people if they so wished it, though there was clearly substantial concern in Warsaw about the consequences for Poland.

These countries have been mentioned because, in one way or another, their co-operation was legally either essential or important in the process of achieving unity. That co-operation was obtained despite the initial caution shown by many of the States involved.

There were two main strands in the road towards unity. The first was the strictly German one, involving negotiations between West and East Germany

8. Geck, *op. cit. supra* n.3, at p.266.

9. Under the Hallstein doctrine, the FRG refused to treat the GDR as a State and moreover refused to have diplomatic relations with any State which maintained such relations with the GDR. The only exception was the USSR.

10. (1973) 12 I.L.M. 16.

11. This is clear from Arts.1, 4 and 6, which provide for the development of relations on the basis of equal rights, the recognition that neither can represent the other internationally, and the undertaking to respect each other's independence.

12. The Preamble mentions, *inter alia*, the "differing views of the [FRG] and the [GDR] on questions of principle, including the national question".

13. See e.g. the statement by Chancellor Brandt to the Bundestag on 14 Jan. 1970, outlining several principles concerning Germany. One of these was the view that the FRG and the GDR are not foreign countries to each other: US State Dept., *op. cit. supra* n.4, at p.1064.

14. *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex p. Trawnik and Reimelt* [1985] W.L.R. 250.

on the various aspects of their mutual relations that had to be settled. The second strand involved the four powers, and these negotiations were concerned with the redefinition of four-power rights and responsibilities with regard to Germany as a whole in light of the new situation. While the first concerned, as it were, purely German issues, the second set of negotiations was crucial for establishing the place of the single German State in Europe and its relations with the four powers. In particular, questions arose with regard to Germany's borders and its membership of military alliances.

1. The role of West and East Germany

Following the collapse of, first, the Honecker then the Krenz regimes in the GDR, effective power was taken over by Prime Minister Hans Modrow, who held office until the free elections in March 1990. That election returned a Christian Democrat-dominated government under Lothar de Maiziere. Negotiations then led to two major treaties between the FRG and the GDR: the Treaty of 18 May 1990 establishing a Monetary, Economic and Social Union;¹⁵ and the actual unification treaty of 31 August 1990.¹⁶

(a) *The Treaty on Monetary, Economic and Social Union.* This Treaty came into force on 1 July 1990. It is significant because it dealt with a subject central to the German problem: money. The failure to maintain a single effective currency for the whole of Germany was a major factor in bringing about the division of Germany in the 1940s. It prompted the three Western powers, in the absence of Soviet agreement, to organise a currency reform in their own zones of occupation, which helped to deepen the division of the country. And one might suggest that the Germans simply reversed this process as an essential stage in reversing the division of Germany. There are precedents for such a move. One of the main methods by which the peoples of the European Community are to achieve "an ever closer union" is through economic integration.¹⁷

The Treaty acknowledges in the Preamble the significance that reform through economic unity has for Germany. It describes the introduction of "the social market economy in the German Democratic Republic as the basis for further economic and social development". Moreover, the monetary, economic and social union is seen as "an initial significant step . . . towards national unity".

Without attempting to examine in detail the substantive economic provisions of this instrument, there are three points of relevance for an assessment of the wider aspects of the German *rapprochement*. First, taking another look at the Preamble, it is there provided that the parties are moving towards national unity "in accordance with Article 23 of the Basic Law" (Constitution) of the FRG.

15. Original German text available in *Frankfurter Allgemeine Zeitung*, 18 May 1990, p.8. For the English text see Press and Information Office of the Federal Government, *The Unity of Germany and Peace in Europe* (1990), p.65.

16. Bulletin of the Press and Information Office of the Federal Government, 6 Sept. 1990, No.104, p.877.

17. Preamble of the Treaty of Rome establishing the EEC.

This formula conceals one of the most controversial issues in Germany during the post-Honecker period. While some West Germans, including Oscar Lafontaine, the leader of the opposition Social Democratic Party, maintained that unification should take place according to some method which reflected the equality of the two German States, others, including Helmut Kohl—and their view prevailed—believed that the most important thing was to achieve speedy unification. They therefore argued that unity could be facilitated by employing the mechanism which already existed in the West German Constitution.

This proposal was controversial for two reasons. First, some genuinely believed that the two States were moving too quickly. But from a legal perspective the use of Article 23 is really quite intriguing. It provides that the Basic Law is to apply in all parts of Germany under West German control, plus West Berlin (although the text of the Article mentions Greater Berlin). It then stipulates that: "In other parts of Germany it shall be put into force on their accession."

This was drafted in 1949 and reflected the West German attitude at the time, and later, that the FRG was the "real" Germany, so to speak. It also reflected the inaccurate West German belief that the FRG was legally identical with Germany as a whole, in as much as it provided for the rest of "Germany", i.e. the GDR, to accede to the Constitution if and when it was ready. By agreeing for unification under Article 23, it is almost as if the East Germans gave some legitimacy to what was and remains a seriously flawed stance.

What is also surprising is that the four powers were prepared to accept this method of unification. None of these States had ever accepted that the FRG was identical with Germany,¹⁸ and the unification process indicates that no such identity existed. Yet, by accepting unification in accordance with Article 23, they might be seen as having accepted the FRG stance on the German question. Another possibility is that the four powers simply accepted that East and West Germany would achieve unity using this method as this was the one acceptable to the German people, without accepting that this amounted to a weakening of their position.

The Preamble is also significant for its acknowledgement of the role of the four powers. It provides: "... taking into account that the external aspects of establishing unity are the subject of negotiations with the Governments of the [four powers]". In other words, the Germans were accepting that certain aspects of the process lay outside their control. These "external aspects" included the matter of the Polish-German border and the actual position of the four powers in Germany after unity was achieved: it was not for the FRG and the GDR to end the four-power capacity; this had to be achieved by these countries themselves.

Finally, the use of Article 23 to achieve unity represents a surrender by the GDR to the FRG interpretation of Germany's legal status because the GDR has not entered into a process of unification such as occurs between two independent States, where each loses its own personality in the creation of the new State. The GDR has acceded to the West German Constitution. It has become a part of the FRG. Thus no new State has been created; one has ceased to exist,

18. Piotrowicz, *op. cit. supra* n.2, at pp.615-620.

having been incorporated into the other, which has consequently expanded its territory.

(b) *The Treaty on the Establishment of the Unity of Germany*. This agreement was signed on 31 August 1990 and entered into force on 3 October of the same year. The treaty itself is relatively short: 45 articles over 12 pages. However, it is accompanied by a short Protocol plus some Special Provisions on the Application of Federal Law. These Special Provisions run to 230 pages.

This is the agreement which actually established the unity of the two States and brought about the demise of the GDR. Like the earlier treaty, it mentions Article 23 of the FRG Constitution. In fact, Article 23 is actually brought into play here, in contradistinction to the earlier treaty, where it is simply mentioned.

Article 1 provides that the five East German *Länder*: Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt and Thüringen have become *Länder* of the FRG from 3 October 1990 as a result of the accession of the GDR to the FRG in accordance with Article 23.

Apart from the Preamble, there is little evidence in the Treaty of the peculiar position of Germany. However, the sixth paragraph does refer to the “. . . awareness that the inviolability of borders and the territorial integrity and sovereignty of all States in Europe within their borders is a fundamental condition for peace”.

After naming Berlin as the capital of Germany in Article 2, while leaving the more vexed question of the seat of government and Parliament till later, the Treaty then deals with the legal aspects of unification in as much as this is not the responsibility of the four powers. These include the entry into effect of the Basic Law in the former GDR, the amendment of the Basic Law, the harmonisation of laws and the application of treaties of the two States. The most important part of the Treaty, as far as the external aspect of unification is concerned, is Part IV, dealing with international treaties and agreements.

The accession by the GDR to the FRG is an instance of State succession. In other words, the FRG has replaced the GDR as the State responsible for the international relations of the latter's territory.¹⁹ State succession may occur in several ways, for instance when two States unite to form a third State, or when one State, with its consent, is absorbed by another, thereby forfeiting its own separate legal identity. The GDR requested that it become part of the FRG in accordance with Article 23 of the latter's constitution. Thus the unification treaty regulates the application of the two States' treaties after the accession by, and disappearance of, the GDR.

Article 11 deals with treaties of the FRG. Its effect is that, with a few exceptions, all treaties and international agreements to which the FRG is a party retain their validity and will apply in the territory of the former GDR. In as

19. Art.2(i)(a) of the Vienna Convention on Succession of States in Respect of Treaties, 1978 ((1978) 17 I.L.M. 1488) defines State succession as “the replacement of one State by another in the responsibility for the international relations of territory”. Brownlie, *Principles of Public International Law* (1990), p.654, offers a similar definition but adds that the succession must be in conformity with international law.

much as adjustments may be required in individual cases, the all-German government will consult the appropriate treaty partners to deal with the situation.

Article 12 is concerned with the treaties of the GDR. Obviously some agreement had to be reached about the GDR's treaty commitments. The essential position taken, in Article 12(1), is that the parties agree to examine the GDR's treaties in the course of the establishment of German unity. In doing so they will take account of the interests of the parties and the obligations of the FRG. They will do so in order to decide whether to continue, amend or repeal them. However, while the law of State succession with respect to treaties may in some cases be the object of disagreement among States, in the case of treaties or parts of treaties regulating borders a successor State inherits the obligations of the predecessor.²⁰ It therefore follows that the FRG has inherited from the GDR the obligation not to question the Polish-German border, which the GDR recognised in 1950.²¹

2. *The role of the four powers*

The four powers were closely involved in the process of German unity from the outset. In addition to the intra-German negotiations, there were also talks between the four powers on the one hand, and the two German States on the other.

(a) *The "four plus two" talks.* These talks, apart from the significance of their content, were important for several reasons simply because they were taking place. First, regardless of previously expressed views on the German question, each of the four powers accepted the existence of the FRG and the GDR as equal partners. This was significant because it meant that the Germans were being given a say on issues which, theoretically, were within the exclusive competence of the four powers. It is true that the Western powers, in according independence to the FRG in 1955, accepted the right of the FRG to be involved in negotiations on German unity,²² but it is debatable to what extent the four powers as a group could be bound by this, given that the Soviet Union was not a party to this agreement. Conversely, there could be no doubt that West and East Germany accepted the right of the four powers to have a say in the process of unification.

One question which must remain unanswered is whether the Germans could have gone ahead and unified even in the face of opposition from one or more of

20. Art.11 of the Vienna Convention, *idem*, states, in full: "A succession of States does not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary." While the Convention is not in force there is strong support for the view that Art.11 is declaratory of customary international law. This was certainly the view taken by the ILC in its Commentary: (1974) Y.B.I.L.C. Vol.II, Pt.1, p.197, para.3. See also I. Brownlie, *idem*, pp.669-670.

21. Zgorzelec Treaty, 319 U.N.T.S. 93.

22. Convention on Relations Between the Three Powers and the FRG, 26 May 1952, As Amended by Schedule 1 of the Protocol on Termination of the Occupation Regime in Germany, 23 Oct. 1954, Art.7, 331 U.N.T.S. 327.

the four powers. In other words, would the right of the German people to self-determination take precedence over the right of the four powers to decide the status of Germany? This potentially difficult question was avoided because, in the end, the four powers were prepared to accept unity.²³

The negotiations involving the four powers soon came to be known as the "four plus two" talks, since they involved the four powers plus the two German States. The aim of these talks was to draft a treaty on the final settlement with respect to Germany. This was eventually to have the effect of deciding matters outstanding since the end of the war and bringing to a close any remaining four-power rights and responsibilities with regard to Germany as a whole.

The talks were held at Foreign Minister level. The agreement to hold them was made in February at a meeting in Ottawa of the six Foreign Ministers. The six countries met in Bonn on 5 May 1990 for the first round of discussions on external aspects of German unity. They subsequently met in Paris on 17 July. The Polish Foreign Minister, Professor Skubiszewski, also participated in these talks as they dealt with the establishment of definitive borders for the united Germany (and, therefore, Poland). The last round took place in Moscow. It was concluded on 12 September, the same day that the six States signed the Treaty on the Final Settlement with Respect to Germany²⁴ (the Moscow Treaty).

(b) *The Moscow Treaty: Germany's status and borders.* This is the third treaty, along with the two between the FRG and the GDR, in the group of agreements which actually regulates the process of achieving German unity. However, there are three other instruments which are relevant to a full understanding of the process. Reference will be made to these below.

The Treaty is relatively short, consisting of a Preamble and ten articles. It is accompanied by an Agreed Minute and a Joint Letter from the Foreign Ministers of the FRG and the GDR to the Foreign Ministers of the four powers. The Treaty deals with all the external aspects of German unity, but arguably the crucial provisions are to be found in Articles 1 and 7, which specify what are to be the territory and borders of Germany and bring to an end the four-power competence there.

Article 1(1) states:

The united Germany shall comprise the territory of the Federal Republic of Germany, the German Democratic Republic and the whole of Berlin. Its external borders shall be the borders of the Federal Republic of Germany and the German Democratic Republic and shall be definitive from the date on which the present Treaty comes into force. The confirmation of the definitive nature of the borders of the united Germany is an essential element of the peaceful order in Europe.

The importance of this provision cannot be overestimated. It signifies the final acceptance by Germany that it must live within its current borders. After the defeat of Germany in 1945, substantial areas of pre-war German territory were

23. For a brief discussion of this issue see Frowein, "Die Verfassungslage Deutschlands im Rahmen des Völkerrechts", in J. A. Frowein, J. Isensee, C. Tomuschat and A. Randelzhofer, *Deutschlands aktuelle Verfassungslage* (1990), p.7, at pp.12-14.

24. (1990) 29 I.L.M. 1187.

placed under Polish "administration".²⁵ The Polish-German border was shunted westwards to the Oder and western Neisse rivers.

The actual meaning of this has always been controversial; some have argued that it effectively means sovereignty,²⁶ while others have maintained that it was meant to deny Poland title at least until that had been confirmed at a peace settlement.²⁷ In any case, the controversy which remained was as to the nature and validity of Poland's title to these areas, which comprise about a third of its territory.

Article 1 of the Moscow Treaty decisively removes any possible doubts which may have existed with regard to the nature of Poland's tenure over the Oder-Neisse territories; they are entirely Polish territory and no other State has any claim to them. In the view of this writer, however, this question of Poland's tenure was settled legally a long time ago. Article 1 does have legal effect; it binds the parties, but not Poland, since for Poland the Treaty is *res inter alios acta*, not to question the Oder-Neisse line as the border between Germany and Poland. The true importance of Article 1 is its political impact. All the States which, on the basis of the existing legal regime with regard to Germany, might claim to have a say in the matter, have accepted the border in connection with the unification of Germany.²⁸

The issue of four-power capacity with regard to Germany has been disposed of in the Moscow Treaty. Article 7 of the Treaty provides:

- (1) The [four powers] . . . hereby terminate their rights and responsibilities relating to Berlin and Germany as a whole. As a result, the corresponding related quadripartite agreements, decisions and practices are terminated and all related four powers institutions are dissolved.
- (2) The united Germany shall have accordingly full sovereignty in its internal and external affairs.

25. Protocol of the Potsdam Conference, s.VIII B: "pending the final determination of Poland's western frontier, the former German territories east of a line running from the Baltic sea immediately west of Swinemunde, and thence along the Oder River to the confluence of the western Neisse River and along the western Neisse to the Czechoslovak frontier, including that portion of East Prussia not placed under the administration of the [USSR] in accordance with the understanding reached at this conference and including the area of the former free city of Danzig, shall be under the administration of the Polish State and for such purposes should not be considered as part of the Soviet zone of occupation in Germany": US State Dept., *op. cit. supra* n.4, at p.63.

26. This view has been expressed frequently by Polish authors. See e.g. M. Lachs, *The Polish-German Frontier* (1964), p.21; Klafkowski, "The Polish-German Frontier and Two German States" (1966) 7 *Polish Western Affairs* 109, 116-118.

27. Doehring, "Peace Settlements After World War II", in Bernhardt, *op. cit. supra* n.3 (Vol.4, 1982), at pp.95, 97; Ress, *op. cit. supra* n.3, at p.202.

28. However, the GDR and the FRG had already recognised the border in 1950 (*supra* n.21) and 1970 (Warsaw Treaty, 830 U.N.T.S. 328) respectively. While Germany as a whole, represented by the four powers, arguably was not yet obliged to accept the border, the four powers have now expressly renounced their capacity with regard to Germany in the Moscow Treaty. Germany as such no longer exists separately from the FRG and thus can have no claims with regard to German borders. It has also been argued persuasively, though this writer does not entirely share this view, that at least three of the four powers, through various acts of recognition and acceptance, would have been estopped from questioning the border: Skubiszewski, "Poland's Western Frontier and the 1970 Treaties" (1973) 67 *A.J.I.L.* 23, 28-32.

In other words, the four powers have given up in the Treaty any rights they may have had with regard to Germany, including any say they may have had in deciding its borders.²⁹ This treaty is the peace settlement provided for in the Potsdam Agreement.³⁰

The Moscow Treaty was not due to enter into force until the deposit of the last instrument of ratification.³¹ On 4 March 1991, the last ratification, by the Soviet Union, took place.³² Germany then became fully sovereign when the ratification was deposited.

To emphasise the definitive character of the existing territorial status quo, Article 1 contains three further provisions. Paragraph 3 provides: "The united Germany has no territorial claims whatsoever against other States and shall not assert any in the future." A similar provision is contained in the 1970 Treaty between Poland and the FRG on the Normalisation of their Mutual Relations.³³ It is interesting that, in this latest Treaty, the FRG is prepared to accept that a future, united Germany shall be bound to accept the borders. The previous position taken frequently by the FRG was that it could not bind a future, united Germany with regard to its external borders.³⁴ It has said as much when discussing its obligations under the 1970 Treaty with Poland.³⁵ However, such assertions seemed to ignore the binding effect that border provisions in treaties may have upon successor States. The FRG remains in existence and is therefore bound by its earlier commitment to the Oder–Neisse border. As a successor State, it is bound by the GDR's treaty commitments with regard to borders. But even if the FRG had lost its personality in the establishment of the united Germany, that State would have been bound by the FRG's border commitments.

Paragraph 4 deals with any possible attempt to frustrate the border commitment by reference to provisions of internal law. Of course, a State may not normally cite provisions of its internal law as justification for failure to adhere to treaty obligations.³⁶ An exception occurs when two conditions are satisfied: where the treaty obligation has been incurred, first, in breach of a provision of its internal law regarding competence to conclude treaties of fundamental

29. Art.1(2), which provides that Germany and Poland "shall confirm the existing border between them in a treaty that is binding under international law", emphasises the commitment of Germany towards the border. This treaty will not, legally, strengthen Poland's tenure over the Oder–Neisse territories, because the FRG was already bound, by its own commitments and the law of State succession, to accept it. This view is supported by the use of the word "confirm": the treaty will establish no new rights or obligations for either party *vis-à-vis* the border but rather emphasise the status quo. There is, however, much to be said for the notion that Poland's title is strengthened by the four powers' final renunciation of any say in the course of the border.

30. US State Dept., *op. cit. supra* n.4, at p.55.

31. Art.9.

32. *Das Parlament*, 8/15 Mar. 1991, No.11–12, p.1.

33. Art.I(3): "[Poland and the FRG] declare that they have no territorial claims against each other and will advance none in the future."

34. See e.g. the statement by Chancellor Kiesinger to the Bundestag on the foreign policy of the FRG, 13 Dec. 1966: "the boundaries of a reunified Germany can only be determined in a settlement freely agreed upon with an all-German Government". US State Dept., *op. cit. supra* n.4, at p.937.

35. *Idem.* p.1112.

36. Vienna Convention on the Law of Treaties, Art.27.

importance and, second, that breach was manifest.³⁷ The FRG has argued previously that its Constitution prevented it from entering into certain arrangements as these could conflict with provisions of its Constitution with regard to a united Germany. It has also maintained that treaties entered into were limited in as much as they were in conflict with those constitutional provisions.³⁸ Paragraph 4 states: "The Governments of the FRG and the GDR shall ensure that the constitution of the united Germany does not contain any provision incompatible with these principles [with regard to Germany's borders]." Particular provisions from the FRG Constitution are even mentioned: the Preamble, Article 123 and Article 146. The Preamble and Article 123 refer respectively to Germans who were unable to participate in the enactment of the Basic Law, and to other parts of Germany where the Basic Law cannot be applied. Their removal will stress that the territory east of the Oder-Neisse line has no connection with Germany. Article 146 provides that the Basic Law would cease to be in force when a constitution adopted freely by the German people comes into force. In fact, the Basic Law will be that constitution, amended to include the *Länder* of the GDR.

Finally, paragraph 5 of Article 1 contains the statement by the four powers that the commitments made by West and East Germany "will confirm the definitive nature of the united Germany's borders".

If it would seem that undue attention has been accorded to the border question in the context of German unification, it is worth bearing in mind the views of the Germans themselves. In a statement made at the conclusion of the "four plus two" talks, the FRG Foreign Minister, Hans-Dietrich Genscher, referred to the inviolability of frontiers as a basic element in the European peace order. In the same breath he then stressed the definitive nature of the Polish-German border. The point is that, without settling this issue in a manner which was accepted by all as final, the unification of Germany could have been very hazardous for the peaceful evolution of international relations in central Europe.

(c) *The Moscow Treaty: Germany's armed forces and alliances.* The Moscow Treaty does regulate other matters which were necessary for achieving this final settlement. Article 3 contains a renunciation of the manufacture and possession of, and control over, nuclear, biological and chemical weapons. It also provides for limitations to the size of the armed forces of a united Germany, which are to be reduced to 370,000 within four years. The eventual removal of Soviet armed forces is, according to Article 4, to be completed by the end of 1994. The conditions for, and the duration of, the presence of Soviet forces in the former GDR and Berlin, as well as their withdrawal by 1994, are to be regulated in a separate treaty between Germany and the Soviet Union. The presence of other

37. *Idem*, Art.46.

38. These provisions were concerned with the achievement of German unity. When the FRG ratified its 1970 treaty with Poland, the Bundestag passed a resolution stating, *inter alia*: "The inalienable right of self-determination is not affected by the treaties. The policy of the [FRG] aiming at the peaceful restoration of national unity . . . is not in contradiction to the treaties which do not prejudice the solution of the German question." US State Dept., *op. cit. supra* n.4, at p.1189. The FRG was here asserting that the Warsaw Treaty could not affect the right of the German people to unification, as provided for in the FRG Basic Law.

armed forces is covered by Article 5. Forces of the United Kingdom, United States and France will remain in Berlin, but now they will do so with the consent, and at the request of, Germany, until the removal of Soviet troops is completed. Thus there will continue to be a four-power presence in Berlin, not as of right but with the consent of Germany under the Moscow Treaty. Until the Soviet troops leave the territory of the former GDR, German troops may be stationed there but only if they are not integrated into the NATO alliance structure (paragraph 1). After the Soviet withdrawal, however, it will be permitted for German forces assigned to any alliance (effectively, NATO) to be stationed in the former GDR, so long as they do not have nuclear weapon carriers. Furthermore, no foreign armed forces, nuclear weapons or carriers for such weapons may be stationed or deployed in that part of Germany (paragraph 3).

Article 6 deals with what was potentially the major hurdle to the swift realisation of German unity. Throughout the early months of 1990 debate raged as to the future political alignments of the united German State. Clearly, the FRG was not prepared to join COMECON and the Warsaw Pact, the major Soviet-bloc economic and military alliances. On the other hand, there was no apparent reason why the GDR should be forced into the European Communities and NATO. Yet effective unity was unattainable without full integration of the two countries. There were suggestions that the united Germany should be neutral. There were also suggestions from Eastern Europe that Germany should be firmly locked into NATO and the European Community, the idea being that, the closer Germany was tied to these organisations, the less scope and potential there might be for it to contemplate any sort of unfriendly act towards the countries to its east.

In the end, the problem was solved when Chancellor Kohl persuaded President Gorbachev to accept that Germany could remain in NATO. There was never any serious suggestion that it should withdraw from the European Community. The issue is clearly regulated by Article 6, which states: "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."

Since 3 October 1990, when the Treaty on German unity, signed on 31 August 1990, came into effect, Germany has effectively been united. The Moscow Treaty does not come into effect until it has been ratified, but the four powers agreed that their rights with regard to Berlin and Germany as a whole would end effectively, if not yet formally, on 3 October.³⁹

D. Instruments Connected to the Unification Process

There are three other instruments worth noting in connection with German unity: first, the Germany–Soviet Union Friendship Treaty initialled in Moscow on 13 September 1990.⁴⁰ This is the first Soviet–German friendship treaty since that concluded in August 1939. It sets out the basic principles for the future development of relations between the two countries, and signifies a new period

39. The agreement suspending four-power rights was signed in New York on 1–2 Oct. 1990.

40. *Gazeta Wyborcza* (Warsaw), 14 Sept. 1990.

of co-operation between them. The treaty was described by Chancellor Kohl as "the first basic political treaty to be concluded by the united Germany".⁴¹ Though not formally part of the mechanism for German unity, the agreement may certainly be regarded as linked to that process. The Soviet Union had been perceived as the State most likely to raise objections to German unification. In this treaty Germany has reached an understanding with the Soviet Union as to their future relations, thus facilitating Soviet agreement to unification.

The Treaty was initialled in Moscow only one day after the signing of the agreement ending four-power capacity in Germany, by the Foreign Ministers of the FRG, GDR and the Soviet Union. It was signed in Bonn on 9 November 1990 by Kohl and Gorbachev. It enters into force, upon ratification, for an initial period of 20 years, then automatically for further periods of five years provided that neither party gives one year's written notice of withdrawal.

The Treaty is one of "Goodneighbourliness, Partnership and Co-operation". In the Preamble it stresses the desire of the parties to co-operate to create a just and lasting peace in Europe. They expressly confirm their commitment to the basic principles and purposes of the UN Charter and the provisions of the Helsinki Final Act and related instruments.

The Treaty then covers broadly the field of German-Soviet relations. First, there is the statement of principles guiding their mutual relations (Article 1), which are based on respect for their sovereign equality and political independence. Article 6 provides for regular contacts at the highest political level at least once annually. The Foreign Ministers will meet at least twice every year, while the Defence Ministers are to meet "regularly". Furthermore, the parties are to conclude a comprehensive treaty on the development of co-operation in the economic, industrial, scientific and technological fields (Article 8). (This Treaty was also signed on 9 November 1990.) On the more personal level, visa procedures are to be simplified (Article 13) and comprehensive links between people and organisations in each country are to be promoted (Article 14).

The treaty runs to 22 articles and provides the basis for the conduct of Soviet-German relations for at least the next 20 years.

Then, on 14 November 1990 the FRG and Poland signed the treaty, provided for in the Moscow Treaty, which confirmed the Oder-Neisse line as their common border.⁴² It signifies the acceptance by the united Federal Republic of Germany of the Oder-Neisse line as its common border with the Republic of Poland.

The third instrument which is relevant here preceded the border treaty but is important in that it shows the willingness of the two German States to negotiate the border treaty with Poland. It is the resolution adopted separately by the Parliaments of the FRG and the GDR, on 21 June 1990.⁴³ This Resolution contains an expression of the willingness of the Germans to confirm (i.e. acknowledge

41. Statement made in the Bundestag, 15 Nov. 1990. Text in Information Service of the Canberra Embassy of the FRG, 20 Nov. 1990. For the full text of the treaty, see Presse und Informationsamt der Bundesregierung, Bulletin, 15 Nov. 1990, No.133, p.1379.

42. *The German Tribune*, 25 Nov. 1990.

43. Press and Information Office, *op. cit. supra* n.15, at p.59.

that which already exists) the Polish–German border, as it currently exists, in a treaty. This Resolution was communicated to Poland.⁴⁴

E. Conclusions

Germany became one country again on 3 October 1990. Before that date there were three German States: the FRG, the GDR and Germany as a whole. The first two were more or less independent but subject to major constraints on their freedom of action with regard to Germany as a whole, which was represented by the rights and duties of the four powers and was relatively inactive. Following the change of government in the GDR in November 1989 it became apparent that unification was a possibility.

In fact, while the term “unification” is accurate in as much as it reflects the joining together of the GDR and the FRG, legally the term is misleading: what has happened is that the GDR has actually become a part of the FRG by acceding to it under Article 23 of the latter’s Basic Law. In so doing the number of German States was reduced to two. That number was further reduced by one when the four powers, in the Moscow Treaty, agreed to the ending of their capacity with regard to Germany as a whole. While the agreement was subject to ratification, the four powers agreed to stop exercising these functions from 3 October 1990. Thus the only State left was the FRG. This proves that in 1990, the year of the disappearing Germanies, three into one does go.

A question arises as to whether, since the FRG survives, it was really correct all along in its assertion that it was the true Germany, identical, later partly identical, with the Reich. It was not correct. While it might have been appropriate for the four powers to insist on the unification process creating some new State from the two old ones, they elected to follow the will of the German people. In doing so, they made provision for the ending of their joint rights and responsibilities in the Moscow Treaty: the FRG remained a separate subject of international law.

Germany is now an independent State. It has accepted limitations on the size of its armed forces and the kind of weapons it may possess. Such limitations are no more onerous than those affecting many other States. The Soviet Union retains a military presence there but this is temporary, to allow for the orderly withdrawal of its forces. The border between Poland and Germany is the Oder–Neisse Line. Germany is obliged not to question this border in the future.

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44. The resolution also sought to placate opposition in the FRG to the acceptance of the border by referring to “the great injustice done to millions of Germans” who were expelled from the former German territories, though it makes no reference to the injustice done to millions of Poles expelled from Polish territory taken over unilaterally by the USSR. It should be noted that Poland did not create the policy of expulsion, though it had to execute it. The expulsions were ordered by the UK, US and USSR in the Potsdam Agreement. As the German Foreign Minister, Hans-Dietrich Genscher, indicated at the signing of the border treaty with Poland in Warsaw on 14 Nov. 1990: “We Germans are aware that the treaty signed today does not surrender anything that was not lost long ago as a result of a criminal war and a criminal system” (extracted from the text of Genscher’s speech as published in the Information Service of the Canberra Embassy of the FRG. 19 Nov. 1990).