



SECTION 2



The European Parliament and German unification



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THE EUROPEAN PARLIAMENT AND GERMAN UNIFICATION



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INTRODUCTION

The fall of the Berlin Wall in the night of 9-10 November 1989 symbolised the end of the Cold War and set in motion a chain of events that would forever change the face of Europe. As a direct consequence, Germany was fully unified in less than a year.

Although the heads of state of the four occupying forces and the two German states are seen as the principal architects of unification, the influence of the European Community (EC) should not be underestimated. Faced with the possibility of profound change affecting one of its founder members at all levels, the EC could not stand idly by.

This study intends to present the political work carried out by the European Parliament (EP) with regard to German unification. It will first analyse the EC's reaction to the reappearance of the German question. The EP was the first European institution to make a statement on the possibility of German unification. It will then present the Parliament's assessment of the possible repercussions of German unification on the EC, drawn up by the Temporary Committee to consider the impact of the process of German unification on the European Community (temporary/ad hoc committee), which the EP set up for this purpose.

The second chapter will provide an overview of the make-up, objectives and working methods of this committee, which became the central body for all EP activities relating to the process of German unification.

The extremely rapid pace of the unification process forced the EC to adapt to changes as they occurred. To give the reader a better understanding of reactions from the EC, a further chapter presents a chronology of major events.

The temporary committee's work concerned numerous different fields. The scope of this study is, however, limited to three particular aspects relating to the remit of the EC, and the action it took, in the areas of institutional affairs, budgetary implications and security policy.

I. THE EVENTS



I.1. Joy and distrust: European Community reactions in the weeks following the fall of the Berlin Wall

The metamorphosis of the GDR from a Stalinist Communist country into five federal states forming an integral part of the Federal Republic of Germany took less than a year. The great speed of the process of German unification can be explained largely by the desire for freedom and unity of an entire people, which made a concerted push for self-determination. Until autumn 1989, no one could have imagined the events that would come. The fall of the Berlin Wall saw the German question return to the international agenda, particularly within the European Community. It is apparent that the various bodies of the EC were taken completely unawares by this question: although at the inception of the EC, West Germany had insisted on including the possibility of a revision of the Treaties in a statement,¹ the EC had no plan or project to prepare for this eventuality.

¹ Die Bundesregierung geht von der Möglichkeit aus, dass im Falle der Wiedervereinigung Deutschlands eine Überprüfung der Verträge über den Gemeinsamen Markt und Euratom stattfindet', Meyer Carsten, Die Eingliederung der DDR in die EG, Cologne, 1993, p. 16. See also Die Kündigung des Vertrages zur Gründung der Europäischen Atomgemeinschaft (EURATOM). Ein Gutachten von Prof. Dr. Bernhard Wegener, Friedrich-Alexander-Universität Erlangen-Nürnberg im Auftrag von Bündnis 90/Die Grünen Bundestagsfraktion, ed. Bündnis 90/Die Grünen, s.l., 2007, pp. 39-40. This statement was repeated a few days later by the secretary of state to the German Ministry for Foreign Affairs at a German parliamentary debate at the Bundestag on the Treaties of Rome, see Rede von Walter Hallstein in Verhandlungen des deutschen Bundestages. 2. Deutscher Bundestag - 200. Sitzung vom 21. März 1957. pp. 11327-11334, available at <http://www.ena.lu?lang=3&doc=25371> (consulted on 20 March 2009).

In response to the fall of the Berlin Wall on 9 November 1989, the European Council held an extraordinary meeting in Paris (18 November 1989) but the question of German unification was not discussed. The European Parliament was the first to react, by adopting a resolution on the general situation in Central and Eastern Europe supporting, in addition to pluralist democracy and respect for human rights, the East German people's right to self-determination, including 'the possibility of forming part of a United Germany within a united Europe'.²

Furthermore, calling as it did for 'greater support for EC integration', 'emergency aid' and a 'support and cooperation plan', this resolution already encompassed the principal demands made by the EP in the months immediately following the fall of the Berlin Wall.³

The events in Central and Eastern Europe were covered in two successive debates in which both François Mitterrand, then president of the Council of Ministers of the European Community, and German Chancellor Helmut Kohl spoke on events in Eastern Europe.⁴ The overwhelming majority of MEPs enthusiastically welcomed these events. A sense of distrust towards West Germany could, however, be detected among a certain number of MEPs: the fact that it had yet to explicitly endorse the location of the eastern border of the GDR gave rise to fears of future German revisionism.⁵ The EP responded by stating in the aforementioned resolution that 'in the spirit of the Helsinki Final Act, all the peoples of Europe including the Polish people are entitled, both now and in future, to live in security within their present borders'.⁶

The EP also feared a slowdown in the process of European integration as defined in the Single Act of 1986.⁷ In the months immediately following the fall of the Berlin Wall, French MEPs especially were not shy to express their doubts regarding possible German unification: for example, Simone Veil, former EP President, stated that nothing should be rushed, while Valéry Giscard d'Estaing, president of the Liberal and Democratic Reformist Group, expressed the view in an interview that a united Germany would be virtually unthinkable for the European Community.⁸

The German question was finally discussed at the Strasbourg summit of 8 and 9 December 1989, at which ministers expressed their support for the principle of self-determination for the German people paving the way for German unification, provided that existing borders were respected, in accordance with the Helsinki Agreement, and unification took place in a wider context of

² EP Resolution of 23 November 1989 on the recent developments in Central and Eastern Europe, OJ C323 of 27 December 1989, pp. 109-110. After the fall of the Berlin Wall, the European Commission President, Jacques Delors, sent a telegram to the West German Chancellor, Helmut Kohl, expressing his joy and support. See Knodt Michèle, *Unterordnung der EG-Integration der DDR unter den deutschen Einigungsprozeß*, Frankfurt am Main, 1992, p. 34, including note No 35.

³ Ibid.

⁴ Events in Central and Eastern Europe, in Debates of the European Parliament. Session of 22 November 1989, pp. 165-205 pp. 151-187 and Session of 23 November 1989, pp. 289-383 pp. 265-268.

⁵ See for example the speech by Mr Gerd Walter, MEP of the Socialist Group, in the parliamentary debate of 22 November 1989: 'Poland's western boundary must therefore be recognised, with no ifs and buts'. From Events in Central and Eastern Europe, in Debates of the European Parliament. Session of 22 November 1989, pp. 165-205 and Session of 23 November 1989, 165-205 pp. 151-187, here p. 172. The Oder-Neisse Line had been set by the Allies as Germany's eastern border notwithstanding a future peace accord. Although the Federal Republic of Germany recognised the border in 1950, the GDR demanded that it be revised. In signing the Warsaw Treaty of 1970, West Germany undertook to recognise the border, but did not rule out future changes if a peace accord was reached.

⁶ EP, Resolution of 23 November on the recent developments in Central and Eastern Europe, as cited above, pp. 109-110.

⁷ This fear was illustrated by the fact that many MEPs stressed the urgent need of effective European integration in response to the profound changes in Eastern Europe. See Debates of the European Parliament. Session of 22 November 1989, as cited above and Session of 23 November 1989, as cited above.

⁸ See Jetzt beginnt die Freiheit, Interview mit Simone Veil, in EG-Magazin, No 1-2, 1990, p. 50; 'Sonderkonferenz noch im Frühjahr? Deutschlandpolitische Offensive der EG', in Das Parlament, 9 March 1990. See also Meyer Carsten, Die Eingliederung der DDR in die EG, as cited above, pp. 24-25 including footnotes 111-112.

European integration.⁹ This statement in favour of future unification concealed a diplomatic tug-of-war behind the scenes between the European Council, under French presidency, and Bonn.¹⁰ The Council eventually managed to come to a consensus on a position supporting unification on condition that Germany made efforts towards European integration.

The European Commission did not explicitly comment on the German question until its President, Jacques Delors, addressed the EP in a speech on 17 January 1990, which can be seen as the turning point in the European Community's position on German unification.¹¹ Delors stated that 'East Germany [is] a special case ... there is a place for East Germany in the Community should it so wish'.¹² The GDR was now seen as an exceptional case for which accession to the EC was now a genuine possibility. The European institutions began to take initial measures to prepare for this.

I.2. The Parliament reacts: setting up of the Temporary Committee to consider the impact of the process of German unification on the European Community

Jacques Delors's statement envisaging a possible unification of Germany or the accession of the GDR into the European Community took recent events into account: the people of East Germany, shaken to the core by their exposure to the Western lifestyle when the GDR's borders opened, rather than pushing for structural reforms in their country, demanded German unification.¹³ At the same time, thousands of people were fleeing the GDR each day. The East German government, in profound turmoil, was incapable of stemming these calls for unification. Pressure on the international stage was building.

With the momentum created by Delors's political offensive, the European Community began to intervene directly in the process of German unification, fully aware of both the risks for the EC's existing structures and the potential boost to European integration.¹⁴ Given this turn of events, the European institutions began the administrative process of analysing the possible repercussions and creating a Community structure to support an envisaged unification. Between December 1989 and January 1990, for example, the European Commission set up no fewer than five working groups. The EP followed suit in February by forming a temporary committee 'to consider the impact of the process of German unification on the European Community'.¹⁵

⁹ 'We seek the strengthening of the state of peace in Europe in which the German people will regain its unity through free self-determination. This process should take place peacefully and democratically, in full respect of the relevant agreements and treaties and of all the principles defined by the Helsinki Final Act, in a context of dialogue and East-West cooperation. It also has to be placed in the perspective of European integration'. Conclusions of the Presidency, European Council, Strasbourg 8 and 9 December 1989, European Parliament Activities, Special Edition, SN 441/2/89, available at: http://www.europarl.europa.eu/summits/strasbourg/default_en.htm

¹⁰ For a more complete picture of French and German positions during the unification process, see Meyer Carsten, *Die Eingliederung der DDR in die EG*, op; cit., pp. 20-21 and 23-24. For a very detailed account, see Bozo Frederique, *Mitterrand, la fin de la guerre froide et l'unification allemande*. De Yalta à Maastricht, Paris, 2005, pp. 119-156.

¹¹ For the few comments made by President Delors before the Strasbourg summit, see Meyer Carsten, *Die Eingliederung der DDR in die EG*, as cited above, p.25.

¹² Presentation of the annual programme of the Commission for 1990, Debates of the European Parliament, Session of 17 January 1990, pp. 108-129, here p. 111.

¹³ Weber Hermann, *Geschichte der DDR*, Updated and expanded 2nd edition, Munich, 2000, p. 356.

¹⁴ Meyer Carsten, *Die Eingliederung der DDR in die EG*, as cited above, pp. 27-29.

¹⁵ EP, Resolution of 15 February 1990 on the setting-up of a temporary committee on 'examination of the impact of the process of unification on the European Community', in OJ of 19 March 1990, No C 68, pp. 144-145. The resolution was adopted in the session following President Delors' speech on 17 January.

As its official name suggests, the committee was entrusted with the task of studying the possible consequences of unification. Its scope was therefore wide, and the first working document drawn up by Alan John Donnelly, who had been named rapporteur at the first committee meeting, set priorities and defined working methods.¹⁶

The temporary commission's remit was thus to analyse the impact the GDR's joining the EC would have on the Community's fields of activity in order to 'make a constructive Community contribution to the unification process and for the Community's own adaptation to the new circumstances'.¹⁷ The committee would be obliged to adapt its work in line with the accelerating speed of the process of unification. The independence of the committee's work throughout this procedure should be highlighted: by relying on the EP's own Directorate-General for Research and outside experts for the necessary assessments, the committee collected all data independently of the other EC bodies. Furthermore, direct links between the EP and both West Germany and the GDR were forged in order to obtain first-hand information.

The importance of the temporary committee is underlined by the status of its members: with Claude Cheysson, Fernando Morán Lopez and Leo Tindemanns it contained no fewer than three former foreign ministers. Major figures in European politics such as former EP President Simone Veil and former West German ambassador to the UN Rüdiger von Wechmar also sat on the committee. It was composed of a total of 20 MEPs, including five from France and five from West Germany.¹⁸ It should be added that the positions of president, vice-president and rapporteur were filled by non-Germans with the obvious intention of avoiding conflicts of interest.

In order to draw its conclusions, the committee began collecting information, especially opinions from across the political spectrum, on the GDR. For this purpose, short summary reports were drawn up by the Parliament's Directorate-General for Research.¹⁹ Some of these documents were produced in collaboration with experts and institutes from outside the Community, such as the German Economic Research Institute (DIW) in West Berlin or the Zentralinstitut für Wirtschaftswissenschaften der Akademie der Wissenschaften of the GDR in East Berlin. Other papers were produced by outside organisations.²⁰

The committee held regular meetings which were normally attended by one or more members of the European Commission. Discussions were held at these meetings with representatives of the

¹⁶ Temporary committee to consider the impact of the unification of Germany on the European Commission (UNIF), Minutes of the inaugural meeting of 1 March 1990, Brussels, held in the EP's historical archives (EPHA), ref.: PE3 AP PV/UNIF.1990 UNIF-19900301. See also Initial working document of the Initial working document of the Temporary Committee to consider the impact of the process of German unification on the European Community (author: Donnelly), EPHA, ref.: PE3 AP RP/UNIF.1990 A3-0183/90 0110.

¹⁷ Initial working document of the Temporary Committee to consider the impact of the process of German unification on the European Community, as cited above, p. 6.

¹⁸ Committee members: Gerardo Fernández Albor (Spain, PPE), president; Simone Veil (France, LDR), vice-president; Kirsten Jensen (Denmark, S), vice-president; Alan John Donnelly (UK, S), rapporteur; Claude Cheysson (France, S); Fernando Morán-Lopez (Spain, S); Klaus Wettig (Germany, S); Eisso Wöltjer (Netherlands, S); Elmar Brok (W. Germany, PPE); Maria Luisa Cassanmagnago Cerretti (Italy, PPE); Fritz Pirkel (W. Germany, PPE); Leo Tindemanns (Belgium, PPE), oldest member; Adrien Zeller (France, PPE); Rüdiger von Wechmar (W. Germany, LDR); Michael Welsh (UK, ED); Birgit Cramon Daiber (W. Germany, V); Luigi Alberto Colajanni (Italy, GUE); Henry Chabert (France, RDE); René-Émile Piquet (France, CG).

¹⁹ Some of these studies were published by the European Parliament. See *The impact of the unification of Germany on the European Commission* (Study and documentation files), ed. European Parliament Research DG Luxembourg, 1990. See also *Europäisches Parlament und deutsche Einheit (Materialien und Dokumente)*, ed. Europäisches Parlament, Informationsbüro für Deutschland, Bonn, 1990, pp. 50-226. All of these documents are held in the EP's Archive and Documentation Centre (CARDOC).

²⁰ See for example, *Social situation in the GDR*, study produced by the German Economic Research Institute on behalf of the European Parliament, Berlin, 1990, EPHA, ref.: PE3 AP RP/UNIF.1990-A3-0183/90 0690.

governments of the GDR, West Germany and even the USA and the USSR.²¹ As German unification had the potential to affect every aspect of the EC, the committee regularly sought the opinions of the other parliamentary committees.



The schedule for work drawn up by rapporteur Donnelly was adopted with minor changes at the meeting of 21-22 March. According to the schedule, the committee did not expect unification to take place before the end of 1990. It planned for an initial oral question with debate in plenary, followed by a resolution in April 1990. An interim report was then to be adopted in plenary in July, followed by a final report in the winter of 1990.²²

The temporary committee sat for nine months between March and December 1990. During this period it 'play[ed] a pivotal role in all parliamentary activity relating to German unification'.²³

²¹ See, for example, speeches by the GDR ambassador to the EC, Mr Öser, at the meeting of the temporary commission on 15 May 1990, UNIF, *Minutes of the meeting of 14 May 1990*, Strasbourg, EPHA, ref.: PE3 AP PV/UNIF.1990 UNIF-19900514; or by guests from the GDR *Volkammer* at the following meeting on 22-23 May 1990, see: UNIF, *Minutes of the meeting of 22 and 23 May*, Brussels, EPHA, ref.: PE3 AP PV/UNIF.1990 UNIF-19900522. GDR representatives were also present at the meeting on 29 August with the ambassador to the EC, Mr Trumpf, and his adviser, Mr Cuntz, see UNIF, *Minutes of the meeting of 29 August 1990*, Brussels, EPHA, ref.: PE3 AP PV/UNIF.1990 UNIF-19900829.

²² For the complete schedule of work, see UNIF, *Initial working document of the Temporary Committee to consider the impact of the process of German unification on the European Community*, as cited above, p. 8. It was approved at the meeting of 21-22 March, see UNIF, *Minutes of the meeting of 21-22 March 1990*, Brussels, EPHA, ref.: PE3 AP PV/UNIF.1990 UNIF-19900321, p. 5.

²³ UNIF, *Activity report for the enlarged Bureau*, submitted by Messrs G. Fernández Albor and A. Donnelly, EPHA, ref: PE3 AP PV/UNIF.1990 UNIF-19901211, p. 3.

I.3. 'Accession' under extraordinary conditions

German unification, and thus the inclusion of the GDR in the EC, posed many unprecedented problems and questions. This was why European Commission President Jacques Delors described the GDR as a 'special case' at a speech addressing the EP on 17 January 1990. As such, the exceptional nature of this process merits in-depth analysis.²⁴ This chapter will first present a chronology of the most important events.

It should be noted that no treaty between the GDR and the EC had ever been signed before 1990. It was only after the fall of the Berlin Wall in November 1989 that a genuine rapprochement began. Following this thaw in relations, an initial treaty on trade and economic and trade cooperation was signed on 8 May 1990.²⁵ This agreement was negotiated by the European Commission under a Council directive of 22 December 1989.²⁶ The EP, which had been studying the utility of entering into a possible trade treaty since October 1989 in the forum of its Committee on External Economic Relations, was not involved in the process of drafting the treaty; its participation was limited to presenting a resolution adopted on 16 March 1990 underlining the importance of this agreement.²⁷

However, the agreement, which presupposed the medium-term survival of the GDR, was already irrelevant when it was signed, overtaken by events which suggested German unification would happen within a matter of months.²⁸

This stage is an excellent illustration of the essential characteristic of the process whereby the GDR became part of the EC: the breakneck speed of events, pushed along not by European or national authorities but by the resolve of the German people. The will of the German people to press ahead with unification would force the Community to adjust many times to the changes that took place.

The victory of the Christian-conservative coalition 'Allianz für Deutschland' at the GDR's elections, which had been brought forward to 18 March 1990, paved the way for German unification under Article 23 of West Germany's Basic Law.²⁹ This article, by anticipating the full incorporation of the GDR into the Federal Republic of Germany, precluded the normal procedure of accession of a country to the Community via a treaty.

Furthermore, the procedure for unification would be essentially decided between the German states and at 'two plus four' meetings between the foreign affairs ministers of the two Germanies and the four member states of the Allied Control Council, which held authority over Berlin and

²⁴ It should be noted that this chapter will only include a description of how the unification process took place and its exceptional nature. Various other aspects will be covered in Part II of this study.

²⁵ For details of the background to and content of this agreement, see Scherer Peter, *Das Handels- und Kooperationsabkommen der EG mit der DDR*, in *Europäische Zeitschrift für Wirtschaftsrecht*, vol. 1, 1990, pp. 241-246.

²⁶ EP, Committee on External Economic Relations, Political Affairs Committee, *Notice to members concerning a memorandum concerning the negotiating brief*, 13 February 1990, EPHA, ref.: PE3 AP RP/RELA.1989 A3-0057/90.

²⁷ EP, Resolution of 16 March 1990 on the significance of the agreement between the EC and the German Democratic Republic on trade and commercial and economic cooperation, in OJ of 17 April 1990, No C 96, p. 353.

²⁸ See Meyer Carsten, *Die Eingliederung der DDR in die EG*, as cited above, pp. 42-44. A similar fear had already been expressed by Cano Pinto, MEP in the Socialist Group, at question time on 14 March 1990: 'does the Council not think it imprudent in this context to continue negotiations in view of an agreement between the EC and the GDR? Would it not also be wiser to suspend negotiations until such time as the situation is stable and secure enough for such an agreement to be signed?' *Debates of the European Parliament, Session of 14 March 1990*, question H-297/90, p. 143. The Council's president in office, Mr Collins rejected this proposal.

²⁹ See Meyer Carsten, *Die Eingliederung der DDR in die EG*, as cited above, pp. 44-45, including note 209. For the various possible ways the GDR could join the Federal Republic, see chapter II.A.

Germany.³⁰ Conferences were held regularly throughout 1990, and the parties arrived at a final agreement, signed on 12 September 1990 in Moscow, in favour of German unification.³¹

Although the EC's influence on this part of the procedure was limited, its impact on the process of unification as a whole should not be underestimated.



At a special European Council meeting in Dublin on 28-29 April 1990, the Council approved a proposal from the European Commission whereby EU law would be introduced in the GDR by means of a three-stage procedure³² consisting of an interim, a transitional and a final phase. The European Commission was officially instructed to present, 'as part of an overall report, proposals in view of the adoption of any transitional measures deemed necessary'.³³

³⁰ These conferences between the USA, UK, USSR and France served to iron out doubts and reticence with regard to German unification (particularly on the part of the USSR) and were held regularly throughout 1990 (5 May in Bonn, 22 June 1990 in Berlin, 17 July 1990 in Paris with the participation of the Polish foreign minister and 12 September 1990 in Moscow). For further details, see Kaiser, Karl, *Deutschlands Vereinigung. Die internationalen Aspekte. Mit den wichtigen Dokumenten bearbeitet von Klaus Becher, Bergisch-Gladbach, 1991 (Schriften des Forschungsinstituts der deutschen Gesellschaft für auswärtige Politik E. V. Bonn)*, passim; Weber Hermann, *Geschichte der DDR*, as cited above, pp. 364-365; Stern Klaus. / Schmidt-Bleibtreu Bruno. (ed.), *Zwei-plus-Vier-Vertrag: Partnerschaftsverträge, EG-Maßnahmenpaket mit Begründungen und Materialien*, München, 1991; Brand Christophe-Matthias, *Souveränität für Deutschland. Grundlagen, Entstehungsgeschichte und Bedeutung des Zwei-plus-Vier-Vertrages vom 12. September 1990*, Cologne, 1993.

³¹ Treaty on the Final Settlement with respect to Germany (Moscow, 12 September 1990), in *Bundesgesetzblatt* 1990 II. 13.10.1990, No 38, pp. 1318-1327, available at <http://www.ena.lu/> (viewed on 6 April 2009).

³² The Commission's proposal was presented to the EP by Vice-President Andriessen in the plenary session of 4 April 1990, see: *Unification of Germany, Debates of the European Parliament. Session of 4 April 1990*, p. 127.

³³ *Special meeting of the European Council in Dublin, 28 April 1990. Conclusions of the Presidency*, available (in French) at http://cuej.u-strasbg.fr/archives/europe/europe_conclusion/cons_43_63/43_dublin_29_04_1990.html (consulted on 6 April 1990).

The Council and other European institutions stressed how important it was for European integration to continue at its current pace. In the late 1980s, the Community was undergoing profound changes. The Single Act had been in force since 1987 and the creation of the internal market was under way. The GDR was thus brought into the EC at a critical moment in the Community's history. In this time of upheaval within the EC, the accession of the GDR was an additional challenge that pushed the Community to its limits.

The interim phase of GDR accession into the EC, proposed by the Commission and approved by the Council, began with a State Treaty. On 18 May 1990, the two Germanies signed a State Treaty in order to move the integration process forward. This treaty, which entered into force in July 1990, established monetary, economic and social union between the two countries with the intention of slowing the economic and social decline of the GDR before final unification.³⁴ The treaty also contained a passage in which the GDR undertook to carry out the following before unification: 'the German Democratic Republic, taking into consideration the foreign trade relations that have evolved with the member countries of the Council for Mutual Economic Assistance, shall progressively bring its policy into line with the law and the economic policy goals of the European Communities'.³⁵

Following the signing of this treaty, the European Commission drew up initial legislative proposals with a view to establishing a 'de facto customs union between the Community and the GDR'.³⁶

The EP gave its view on the possible implications of German unification for the EC by adopting the interim report of the temporary committee presented in plenary on 12 July.³⁷ In the debate preceding the resolution's adoption, the Commission's Vice-President had announced a package of measures for 12 September.³⁸

However, the pace of events accelerated once again with the final date for unification now set, following a positive outcome from the 'two plus four' meetings and a statement from the East German People's Assembly on 23 August 1990 in favour of joining the Federal Republic of Germany under Article 23 of the Basic Law. Discussions then took place between the two Germanies to decide on how to proceed with unification. The unification date was set as 3 October 1990.

Confronted with this *fait accompli*, the European Commission had no choice but to take on the onerous and unprecedented task of putting before the EP and Council, on time, the package of measures for the gradual introduction of EC law in the former GDR. This task was completed on 21 August 1990, but despite the sterling efforts of the Commission, the European institutions realised that the package could not be implemented before German unification. Faced with this unprecedented problem, the Commission came up with a solution that was unique in the history of the European Community. It proposed a set of temporary measures that, owing to

³⁴ Lasserre René, *L'unification économique de l'Allemagne: bilan et perspectives*, in *Matériaux pour l'histoire de notre temps*, vol. 23, 1991, p. 14, available at http://www.persee.fr/web/revues/home/prescript/article/mat_0769-3206_1991_num_23_1_404062 (consulted on 14 April 2009).

³⁵ Treaty between the Federal Republic of Germany and the German Democratic Republic establishing a Monetary, Economic and Social Union (Bonn, 18 May 1990), available at <http://www.ena.lu/> (consulted on 14 April 2009).

³⁶ This union would concern industrial, agricultural and ECSC products. As the EP's consultation was only necessary for agricultural products, it entrusted the Committee on Agriculture with analysing the proposal and adopted the report presented by the committee on 13 July 1990. For an overview of initial legislative measures and the role of the temporary committee, see UNIF, *Activity report for the enlarged Bureau*, as cited above, p. 7. See also Spence David, *Enlargement without Accession: The European Community Response to the Issue of German Unification*, as cited above., pp. 352-353.

³⁷ See UNIF, *Interim Report on the implications of German unification on the European Community* (rapporteur: Donnelly), EPFA, ref.: PE3 AP RP/UNIF.1990 A3-0183/90, also published in *Europäisches Parlament und deutsche Einheit (Materialien und Dokumente)*, pp. 2-40 (only parts A and B of the report).

³⁸ *Unification of Germany*, in *Debates of the European Parliament. Session of 12 July 1990*, pp. 218-235, here p. 234.

time constraints, were to be applied before their adoption by the Community legislative authority. This step involved a major delegation of power to the Commission. The EP finally accepted this exceptional proposal, but only after including a number of amendments designed to curb the Commission's powers.³⁹

Owing to the exceptional circumstances, the presidents of the various European institutions met on 6 September and arrived at an institutional agreement declaring that 'Parliament [would] be consulted on all legislative measures proposed, irrespective of the legal basis, and ... the legislative package [would] be considered and adopted in its entirety after Parliament [had] given its views at two readings on the individual measures and the package as a whole'.⁴⁰ The EP's involvement in the process of merging the GDR into the Federal Republic of Germany was thus ensured.⁴¹ The institutional agreement brought further innovations and simplifications to the process of cooperation between the Council, Commission and Parliament concerning, for example, the EP's processing of provisional measures within a week, the deadline for submitting amendments before official receipt of Commission proposals and the explanatory statement in oral form following a first reading in plenary.⁴²

The package of measures consisted of 23 proposals subject to either the cooperation or the consultation procedure. The Council entitled proposals submitted via the latter process 'texts ... given sympathetic consideration' which it classed as "'common orientations'" within the meaning of the Joint Declaration of 4 March 1975 on the legislative conciliation procedure', another unprecedented development in institutional relations.⁴³

Within the EP, the temporary committee requested opinions from the standing committees concerned by the 23 proposals and drew up a legislative report, which was adopted in plenary on 24 October.⁴⁴

The package of measures was finally adopted in November 1990. At the final meeting of the temporary committee, on 11 December 1990, rapporteur Donnelly stated that 'the Council had accepted the spirit, if not always the letter, of Parliament's compromise proposals, but unfortunately had rejected nearly all the other amendments'.⁴⁵ In its activity report, the committee thus judged that it had played a positive role in the process of German unification.⁴⁶

³⁹ Delegation of powers took place via a draft directive and a draft regulation. The temporary committee was entrusted with analysing these texts. Following a procedure encompassing two readings in under a week, on 11 and 13 September 1990, The EP accepted the Commission proposals with a number of pre-prepared amendments to the two reports of the temporary committee. See UNIF, *Report of the Temporary Committee to consider the impact of the process of German unification on the European Community on a proposal from the Commission to the Council and -on the proposal from the Commission to the Council for a Regulation* (rapporteur: Donnelly), EPHA, ref.: PE3 AP RP/UNIF.1990 A3-0203/90; UNIF, *Recommendation on the common position established by the Council with a view to the adoption of a directive ... and a regulation ...* (rapporteur: Donnelly), EPHA, ref.: PE3 AP RP/UNIF.1990 A3-0204/90. These reports were adopted in plenary on 11 and 13 September respectively, following parliamentary debates.

⁴⁰ UNIF, *Activity report for the enlarged Bureau*, as cited above, p. 3.

⁴¹ It should be added that under ordinary circumstances the EP would have not have had a significant influence on the process, due the lack of an accession treaty and its consequent inability to endorse or reject an application for accession.

⁴² For the full list of institutional exceptions, see Spence David, *Enlargement without Accession: The European Community Response to the Issue of German Unification*, as cited above, pp. 356-357.

⁴³ UNIF, *Activity report for the enlarged Bureau*, as cited above, p. 11.

⁴⁴ UNIF, *Report on the Commission proposals to the Council for legislation concerning 'The Community and German unification'* (rapporteur: Donnelly), EPHA, ref.: PE3 AP RP/UNIF.1990 A3-0240/90.

⁴⁵ 'The Council had accepted the spirit, if not always the letter, of Parliament's compromise proposals, but unfortunately had rejected nearly all the other amendments' UNIF, *Temporary Committee to consider the impact of the process of German unification on the European Community Minutes of the meeting of 11 December 1990*, EPHA, ref.: PE3 AP PV/UNIF.1990 UNIF-19901211.

⁴⁶ UNIF, *Activity report for the enlarged Bureau*, as cited above

The European Dimension of German Reunification: East Germany's Integration into the European Communities

*Thomas Giegerich**

Introduction

In 1989–1990, the German question, which had (again) been open since 1945¹, found a definite answer in the form of a reunification² of the Federal Republic of Germany, the German Democratic Republic (GDR) and the whole of Berlin. The answer was European in nature, and it partly

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Abbreviations: All E.R. = All England Law Reports; BGBl. = Bundesgesetzblatt; BL = Basic Law; BR-Drs. = Drucksachen des Bundesrates; BT-Drs. = Drucksachen des Bundestages; BullBReg. = Bulletin der Bundesregierung; BullEC = Bulletin of the European Communities; BVerfGE = Entscheidungen des Bundesverfassungsgerichts; CMEA = Council for Mutual Economic Assistance; C.M.L.Rev. = Common Market Law Review; CSCE = Conference on Security and Cooperation in Europe; DA = Deutschland Archiv; DrZ = Deutsch-Deutsche Rechts-Zeitschrift; EA = Europa-Archiv; EC = European Communities; ECJ = Court of Justice of the European Communities; ECR = European Court Reports; ECSC = European Coal and Steel Community; EEC = European Economic Community; EPIL Inst. = R. Bernhardt (ed.), Encyclopedia of Public International Law, Instalment; ERP = European Recovery Program; EuGRZ = Europäische Grundrechte Zeitschrift; EuR = Europarecht; EuZW = Europäische Zeitschrift für Wirtschaftsrecht; FAZ = Frankfurter Allgemeine Zeitung; FS = Festschrift; JZ = Juristen Zeitung; n. = note(s); NJW = Neue Juristische Wochenschrift; OJ = Official Journal of the European Communities; RIW = Recht der internationalen Wirtschaft; SEA = Single European Act; VVDStRL = Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer.

¹ Cf. D. Blumenwitz, *What is Germany?* (1989).

² The term "reunification" is used throughout this article because, in the legal as well as political sense, it describes the event more accurately than the term "unification" appearing in the official documents of the EC.

also answered the wider question of »Quo vadis Europa?«. The following remarks intend to illuminate the European aspects of the historic events, which also makes it necessary to deal with their historical roots^{2a}.

Part One: Before the 1989 Revolutions in Central and Eastern Europe

Before the 1989 revolutions in central and eastern Europe, the stage of the European political and economic theater was dominated by two sets of players³: the three European Communities⁴, with their membership rising from six states including the Federal Republic of Germany in the 1950s to twelve in 1986, on the one hand, and the seven European states including the GDR⁵ which since 1949 had coordinated their economic policies in the Council for Mutual Economic Assistance (CMEA), on the other hand. The relationship between these organizations and their member states including the two German states was generally speaking one of simultaneous attraction and repulsion, for political as well as economic reasons; the intra-German relationship, however, showed special features which require separate treatment.

*I. The European Communities and the CMEA States in General:
Attraction and Repulsion*

A. The Idea of a "United States of Europe"

One of the sparks re-igniting the older European integration movement after World War II was Winston Churchill's famous Zurich speech on September 19, 1946⁶. There he called for the building of "a kind of United States of Europe" for the purpose of not only overcoming the destruction and misery of the immediate postwar period but of giving

^{2a} See already F. Tschöfen/C. Hausmaninger, *Legal Aspects of East and West Germany's Relationship with the European Economic Community after the Collapse of the Berlin Wall*, *Harvard International Law Journal* 1990, 647.

³ This excludes other players, as the Council of Europe and the military alliances NATO, WEU and Warsaw Pact.

⁴ European Coal and Steel Community (Treaty of April 18, 1951, entered into force on July 23, 1952); European Economic Community (Treaty of March 25, 1957, entered into force on January 1, 1958); European Atomic Energy Community (Treaty of March 25, 1957, entered into force on January 1, 1958).

⁵ Bulgaria, Czechoslovakia, Hungary, Poland, Rumania, the Soviet Union. The GDR acceded in 1950. Albania gave up its active membership in 1962.

⁶ W. Lipgens/W. Loth (eds.), *Documents on the History of European Integration*, Vol.3 (1988), 662.

Europe a permanent structure under which it could “dwell in peace, in safety and in freedom”. His objective was to facilitate reconstruction and to make tyranny and war impossible forever.

It is true that Churchill’s call actually meant all of (continental) Europe, but he realized that a unification on that scale could not be achieved immediately. Though the cold war had not yet reached its later rigor, “skirmishes” had already taken place, and Churchill’s appraisal of Soviet intentions was clear. He therefore excluded the Soviet Union from his European project and advocated a union of west European states including the former axis powers Germany, which had not yet been reorganized as an independent state, and Italy to resist further Soviet expansion. His project came down to an immediate west European integration with an open door towards the Soviet dominated eastern part of Europe: a full political, economic and military integration, but geographically limited for the time being.

B. The Schuman Plan

Churchill’s federal plan for Europe could not be realized. French Foreign Minister Robert Schuman in 1950 became the protagonist of a counter-proposal developed by Jean Monnet, advocating a functional approach⁷. Under it, integration would start in the limited area of coal and steel production, but later grow into a full European federation. As to the geographical scope, Schuman started from an integration of the centuries-old adversaries France and Germany, nevertheless expecting other European states to join in.

By then a state reorganization had taken place in still-occupied Germany. In its western part, comprising the British, French and United States occupation zones, a pluralistic constitutional system had been established by the Basic Law of May 23, 1949, under the name Federal Republic of Germany⁸, equipped with a free market economy modified by a comprehensive welfare-state system. Shortly thereafter, the Soviet occupation zone had been transformed into the GDR with a totalitarian political system of a Stalinist character and a strictly centralized planned

⁷ Statement of May 9, 1950 (Agence France Presse – Informations et Documentations, no.291 – May 13, 1950; J. Schwarze/R. Bieber [eds.], *Eine Verfassung für Europa* (1984), 394 [in German]). See R. Poidevin, *Robert Schumans Deutschland- und Europapolitik zwischen Tradition und Neuorientierung* (1976), 18 et seq.

⁸ BGBI., 1. For an updated English version cf. U. Karpen (ed.), *The Constitution of the Federal Republic of Germany* (1988), 223.

economy run by the state which in the course of time eliminated nearly all forms of private enterprise⁹.

In view of this development as well as the conditions in the other European countries under Soviet domination, Schuman knew that he would only be able to reach western European states with his appeal. But he still used the general terms "Germany" and "other European countries" instead of Federal Republic of Germany and other western European countries when he spoke of his proposal as being the first cornerstone of a European federation. Thus, he also in principle left the door open for those states that might one day be able to shake off the Soviet yoke. The adherents of the Schuman plan had in particular hoped that the favorable economic development which was to follow western Europe's economic integration would at last prove to be so attractive for the socialist states of central and eastern Europe that the division of the continent would come to an end¹⁰. The hope that a European federation would one day comprise all Europe was never given up¹¹.

C. Treaties Establishing the European Communities

The epithet "European" appearing in the name of all three European Communities, contrasted with the name of the Western European Union, already indicates those organizations' conception of themselves as nuclei of a future all-European integration. It was accordingly denounced by the socialist Eastern European states¹².

The ECSC, founded on the basis of the Schuman Plan, gives all European states the opportunity to apply for accession (Art.98 ECSC Treaty). The Organization's all-European disposition played an important role in

⁹ GDR Constitutions of October 7, 1949, and of April 9, 1968, as amended on October 7, 1974 (German texts in I. v. Münch [ed.], *Dokumente des geteilten Deutschland* [1968], 301, 525; *id.*, Vol.2 [1974], 463).

¹⁰ K. Doehring, *Die Wiedervereinigung Deutschlands und die Europäische Integration als Inhalte der Präambel des Grundgesetzes*, *Deutsches Verwaltungsblatt* 1979, 633 (634). A similar hope had also imbued those who had stimulated the foundation of the Federal Republic of Germany (see T. Schweisfurth, *Europabekennnis und Wiedervereinigungsgebot des Grundgesetzes*, in: *Völkerrecht als Rechtsordnung – Internationale Gerichtsbarkeit – Menschenrechte*, FS für Hermann Mosler (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol.81) [1983], 861 et seq.).

¹¹ K. Adenauer, *Erinnerungen 1945–53* (1965), 425; W. Hallstein, *Die Europäische Gemeinschaft* (1973), 43; *BullBRG.*, no.58 (May 11, 1990), 460; address by US Secretary of State J. Baker on December 12, 1989 (EA 1990, D77 [D80]).

¹² Cf. A. Dost /B. Hölzer, *Der politische Mechanismus der EG* (1986), 17.

the West German parliamentary debates in preparation for the Federal Republic's ratification of the Treaty¹³. The EURATOM Treaty in its preamble expresses the desire to associate other countries and Art.205 contains an accession clause similar to the one in the ECSC Treaty. An equivalent accession clause appears also in Art.237 of the EEC Treaty, but in this case the preamble is even more conspicuous, stating that the founders of the EEC were "DETERMINED to lay the foundations of an ever closer union among the peoples of Europe, RESOLVED ... to eliminate the barriers which divide Europe, ... and calling upon the other peoples of Europe who share their ideal to join in their efforts ...". The last preambular clause referring to shared ideals of liberty, however, indicates that the central and eastern European states were only welcome as EEC members after a complete reversal of their constitutional and economic systems.

Even though European Community law leaves the member states a wide discretion to pursue different economic policies, there is no doubt that membership depends on a basic decision in favor of a market economy and against the type of centrally planned and administered economy with a state foreign trade monopoly prevalent throughout the former East bloc before the 1989 revolutions. Otherwise the membership obligations concerning the freedom of movement of goods, persons and capital could not be fulfilled. But EC membership is also conditional on the recognition and realization of certain basic constitutional principles within the member states: They have to be parliamentary democracies respecting human rights¹⁴.

It is not clear whether these two unwritten conditions for EC membership have a legal or rather a political character¹⁵. In any event, they determine the exercise of discretion by the Council under Art.98(1) of the ECSC Treaty, Art.237(1) of the EEC Treaty and Art.205 of the EURATOM Treaty¹⁶. Experience anyhow shows that political liberty embodied in the constitutional principles mentioned is so closely related to a market economy that one cannot survive without the other.

¹³ Cf. Verhandlungen des Bundesrates. Stenographische Berichte, 61st session (June 27, 1951), 440 et seq.

¹⁴ Declaration of the European Council on Democracy (April 7/8, 1978), BullEC 1978, no.3, p.5.

¹⁵ C.-D. Ehlermann, Mitgliedschaft in der Europäischen Gemeinschaft, EuR 1984, 113 (114 et seq.); C. Tomuschat, Aller guten Dinge sind III?, EuR 1990, 340 (352).

¹⁶ C. Vedder, in: E. Grabitz (ed.), Kommentar zum EWG-Vertrag, Art.237 no.5 et seq. (September 1989).

D. The Council for Mutual Economic Assistance

The formal economic coordination of the Soviet bloc states in Europe began with the establishment of the CMEA in January 1949, though the Council's Charter dates only from December 14, 1959¹⁷. After having rejected cooperation in the European Recovery Program, the Soviet Union intended to counterbalance the expected economic progress in western Europe that could profit from Marshall Plan funds¹⁸, exploit the economic power of its satellite states and at the same time provide an economic clamp to complement the political and military grip on its sphere of influence¹⁹. According to the semi-official international law textbook of the former GDR, the setting up of the CMEA was an indispensable requirement in the international class struggle between socialism and capitalism²⁰.

The organization's main purposes were the coordination of the member states' economic plans, the organization of intra-bloc trade, the achievement of an international socialist division of labor which included specialization and cooperation concerning production, investment cooperation as well as scientific cooperation and the evening out of discrepancies in the level of economic development among the member states²¹.

Even though the CMEA was accorded legal personality by Art.I of the Convention on the Legal Capacity, Privileges and Immunities of the Council for Mutual Economic Assistance²² and its treaty-making capacity was expressly recognized in Art.III(2)(b) of its Charter, as amended by the Protocol of June 21, 1974, the Council was never able to attain inter-

¹⁷ UNTS Vol.368, 253 (as amended, GBl. DDR 1976 II, 142). See E. Lieser-Triebnigg/A. Uschakov, *Die DDR in der osteuropäischen Wirtschaftsintegration. Eine juristische Analyse* (1982), 9 et seq.; W. E. Butler, *Council for Mutual Economic Assistance*, in: *EPIL Inst.6* (1983), 82.

¹⁸ The ERP had originally been designed to benefit all of Europe but the Soviet Union and its satellite states had rejected the offer (T. Eschenburg, *Jahre der Besatzung 1945-1949* [1983]; K. D. Bracher [et al.] [eds.], *Geschichte der Bundesrepublik Deutschland*, Vol.1 [1983], 443).

¹⁹ Cf. Hallstein (note 11), 273; R. Schönfeld, *Der Rat für gegenseitige Wirtschaftshilfe als Instrument sozialistischer ökonomischer Integration und sowjetischer Hegemonie*, in: *Sowjetsystem und Ostrecht. FS für Boris Meissner* (1985), 687.

²⁰ *Arbeitsgemeinschaft für Völkerrecht beim Institut für Internationale Beziehungen an der Akademie für Staats- und Rechtswissenschaft der DDR* (ed.), *Völkerrecht. Lehrbuch*, part 2 (2nd ed. 1982), 91.

²¹ H. Machowski, *Rat für gegenseitige Wirtschaftshilfe (RGW)*, in: *Bundesministerium für innerdeutsche Beziehungen* (ed.), *DDR Handbuch*, Vol.2 (3rd ed. 1985), 1073.

²² Of December 14, 1959 (UNTS Vol.368, 237) (as amended, GBl. [note 17]).

national importance of its own because its organs could only make recommendations which the member states were free to disregard (Art.IV of the Charter).

The ideological basis and function of the CMEA rendered it practically defunct when several important member states introduced the market economy. After the GDR had left the Council, it was decided to dissolve the organization and replace it with a new consultative body whose concrete shape is, however, still controversial.

E. The Relationship between the European Communities and the CMEA

The relationship between the EC and the CMEA and its state-trading member states had long been strained, with detrimental effects on the economic exchange of goods and services between eastern and western Europe²³. The Soviet Union considered the EC as an unwelcome combination of economic power to resist its own political objective of hegemony over Europe and at the same time worried about the economic and social progress in liberty which the EC had come to embody and which might exercise a troublesome attractive force on parts of the Soviet sphere of influence²⁴. Consequently the state-trading countries were not ready to support the western European integration by recognizing the EC's international legal personality. Ideologically the socialist states adhered to Lenin's doctrine that the unification of Europe under capitalist circumstances was bound to fail²⁵. Finally, the economic exchange between western and eastern Europe was impeded by the military confrontation between the Warsaw Pact and NATO, the members of which imposed a strategic trade embargo on CMEA states to prevent high technology exports with potential military uses (COCOM list)²⁶.

On the other hand, the growing economic potential of the Common Market aroused the Soviet bloc's interest in strengthening economic ties. Before the end of the transitional period on December 31, 1969 (Art.8 of the EEC Treaty) this could be done by entering into bilateral relations with the individual EC member states without recognizing the Commu-

²³ See generally E. Schulz, *Moskau und die europäische Integration* (1975).

²⁴ Hallstein (note 11), 338 et seq. See also address by Federal President R. v. Weizsäcker on January 17, 1990, BullBReg., no.12 (January 23, 1990), 81 (83).

²⁵ Hallstein, *ibid.*, 272.

²⁶ This embargo outside the EEC framework was based on a questionable interpretation of Art.223(1)(b) of the EEC Treaty (cf. Vedder [note 16], Art.113 n.52-53).

ity's capacity to make international treaties. But then the common commercial policy set in according to Art.113 of the EEC Treaty, and commercial treaties with non-member states became a matter within the exclusive competence of the EEC²⁷. The EC Council, however, on December 16, 1969, took Decision No.69/494/EEC²⁸ permitting member states until December 31, 1972, to enter into bilateral trade agreements irrespective of the EEC's exclusive competence²⁹. All those agreements ultimately expired on December 31, 1974³⁰, and economic exchange was since then based on autonomous measures.

In 1972 the Soviet Union signalled its readiness to recognize "realities in western Europe" and thus opened the way for negotiations with the EEC³¹ which extended over several years³², but did not produce an agreement. The reasons for this failure were political – the EC's refusal to bolster Soviet hegemony in the CMEA and the Soviet invasion of Afghanistan³³ – but also legal: The state trading countries insisted that the CMEA as such also be one of the parties to the planned agreement while the EC denied the organization's treaty-making capacity because it lacked any competence of its own regarding trade. The eastern side also demanded that not only the EEC but also its member states ratify the agreement in spite of the Community's exclusive commercial policy competence. At last, with *perestroika* in the Soviet Union and the new political thaw in its wake, a Joint Declaration on the Establishment of Official Relations between the European Economic Community and the Council for Mutual Economic Assistance was signed on June 25, 1988³⁴, which opened the way for bilateral trade agreements between the EEC and the

²⁷ ECJ, advisory opinion of November 11, 1975 (Case 1/75), ECR 1975, 1355 (1363 et seq.); advisory opinion of October 4, 1979 (Case 1/78), ECR 1979, 2871 (2910).

²⁸ OJ no.L 326/39.

²⁹ Cf. ECJ, judgment of December 15, 1976 (Case 41/76), ECR 1976, 1921 (1937).

³⁰ Vedder (note 16), Art.113 n.110 et seq., 166.

³¹ Cf. J. Maslen, Stand und Perspektiven der Beziehungen zwischen EG und RGW sowie seinen Mitgliedstaaten [in English], in: G. Zieger/A. Lebahn (eds.), Rechtliche und wirtschaftliche Beziehungen zwischen den Integrationsräumen in West- und Osteuropa (1980), 89 (90 et seq.); Vedder, *ibid.*, Art.113 n.167.

³² See Materialien zur Lage der Nation im geteilten Deutschland 1987, Verhandlungen des Deutschen Bundestages, 11. Wahlperiode, BT-Drs.11/11 (February 18, 1987), 219; J. Pfeffer, Analyse der Vertragsentwürfe zwischen EG und RGW, in: Zieger/Lebahn (note 31), 59.

³³ A. N. Zarges, Europäische Gemeinschaft und Rat für gegenseitige Wirtschaftshilfe (1988), 33 et seq.

³⁴ OJ no.L 157/35.

CMEA states³⁵. On August 15, 1988, the GDR established diplomatic relations with the European Communities and was now willing to conclude a trade agreement with the EEC³⁶.

*II. The European Communities and the German Democratic Republic
in Particular: Triangular Relationship EC – Federal Republic
of Germany – GDR*

A. General Description

While the Federal Republic was integrated into the EEC and the GDR into the CMEA, both states participated in the difficult relationship between the two economic organizations. But the bilateral economic relations between the two German states had nevertheless also retained their special character from the immediate post-war period. As to the economic exchange with third CMEA states, the Federal Republic could not reap any special benefit from its economic ties with the GDR, due to the fact that the Eastern trading bloc had left the organization of foreign trade and payments to the individual member states. In this respect the distribution of competences in the CMEA differed fundamentally from that in the EEC system where the member states had totally ceded their foreign commerce power to the Community. Under these circumstances the Federal Republic faithfully observed its special responsibilities toward the other German state by ensuring that its EEC membership had no detrimental effect on intra-German economic relations. This from the very first gave the GDR certain benefits normally reserved for EEC member states.

B. The Organization of Intra-German Trade: The Federal
Republic of Germany's Pre-Community Heritage

The Federal Republic for political rather than economic reasons never treated intra-German trade as foreign trade but as a special kind of inland

³⁵ A. Kolinski, EEC-COMECON, Difficulties in Reaching an Agreement (1989), 8 et seq.

³⁶ W. Ersil, Die Politik der DDR gegenüber entwickelten kapitalistischen Ländern, in: Akademie für Staats- und Rechtswissenschaft der DDR, Institut für Internationale Beziehungen (ed.), Die Außenpolitik der Deutschen Demokratischen Republik in der Welt von heute, Vol.2 (1989), 59 (67 et seq.).

trade because it did not consider the GDR as a foreign state³⁷. It took the trade régime for one of several instances showing that the bilateral relationship between the two German states was of a special nature³⁸.

The legal basis of intra-German trade in the Federal Republic of Germany went back to occupation law which was supplemented by a number of German regulations and directives³⁹. In relation to the GDR, intra-German trade was transacted in accordance with the Berlin Agreement on Trade between the Currency Areas of the Deutsche Mark (DM-West) and the Currency Areas of the Deutsche Mark of the Deutsche Notenbank (DM-East) of September 20, 1951⁴⁰. Under the Berlin agreement, trade between the two German states had the status of German inland trade; the intra-German border never was a customs frontier. Even though the GDR did not formally accord its economic exchange with the Federal Republic any special status, it readily took advantage of the preferential treatment granted to it by the Federal Republic of Germany⁴¹.

C. All-German and European Options of the Federal Republic of Germany in Conflict – Real or Seeming?

As long as the division of Germany continued, the Federal Republic of Germany faced the difficult task of reconciling its all-German policy option and its European policy option, a task which was hardly made easier by the fact that both policy options had constitutional underpinnings.

1. Constitutional provisions on reunification and European integration

The Preamble of the Basic Law ended with the reunification clause, calling upon the entire German people "to perfect in free self-determination the unity and freedom of Germany". This clause, which was deleted by Art.4(1) of the Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of the Unity of Ger-

³⁷ BVerfGE 18, 353 (354); G. Röss, Grundlagen und Entwicklung der innerdeutschen Beziehungen, in: J. Isensee/P. Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, Vol.1 (1987), 449 (494 et seq.).

³⁸ BVerfGE 36, 1 (17).

³⁹ W. Vogel-Claussen, Das Recht des innerdeutschen Wirtschaftsverkehrs im Vorfeld der deutsch-deutschen Wirtschafts- und Währungsunion, DtZ 1990, 33 (34 et seq.). Cf. BVerfGE 18, 353–356. See also BVerfGE 62, 169 (181 et seq.).

⁴⁰ v. Münch (note 9), Vol.1, 218.

⁴¹ See R. Dietz, Der Westhandel der DDR, Deutschland Archiv 1985, 294; Ersil (note 36), 70.

many (Unification Treaty)⁴², had imposed a binding constitutional obligation on the political organs of the Federal Republic to work for reunification. They were left with a broad political discretion concerning the means by which to achieve the goal but strictly bound not to renounce any legal claim or title that might be used to further reunification nor to participate in the creation of any legal régime that might hinder reunification⁴³.

On the other hand, the Basic Law had opted for an "open statehood"⁴⁴, a form of sovereignty which was in particular open towards European integration: The Preamble also contained a clause proclaiming that in exercising their constituent power, the German People was not only "animated by the resolve to preserve their national and political unity" but also "to serve the peace of the world as an equal member in a united Europe". While the first part of this clause was also deleted by Art.4 of the Unification Treaty, the European option in its latter part has remained intact. Though there has been no clear statement by the Federal Constitutional Court as to what obligations might ensue for the West German political organs from the European integration objective, it appears that the clause has legal effects beyond a mere political postulate⁴⁵. The Federal Constitutional Court accordingly underlined that the acknowledgment of a united Europe in the Preamble possessed legal value and had to be taken into account in interpreting other parts of the Basic Law⁴⁶.

The Preamble's mission concerning European integration is taken up by Art.24(1) of the BL which provides the Federation with the integration power necessary to accomplish the European objective. Art.24(1) of

⁴² Of August 31, 1990 (BGBl.II, 885, 889), entered into force on September 29, 1990 (*ibid.*, 1360), ratified domestically in accordance with the constitutional amendment procedure (Art.79[2]BL). English translation in *International Legal Materials* 1991, 463 et seq.

⁴³ BVerfGE 5, 85 (126 et seq.); 36, 1 (17 et seq.); 77, 137 (149 et seq.). See also E. Klein, *Die Staatsräson der Bundesrepublik Deutschland*, in: *Staat und Völkerrechtsordnung*, FS für Karl Doehring (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol. 98) (1989), 459 (471 et seq.).

⁴⁴ K. Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit* (1964); K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, Vol.1 (2nd ed. 1984), 512 et seq.

⁴⁵ Doehring (note 10), 635 et seq. But see also D. Murswiek, *Wiedervereinigung Deutschlands und Vereinigung Europas – zwei Verfassungsziele und ihr Verhältnis zueinander*, in: D. Blumenwitz/B. Meissner (eds.), *Die Überwindung der europäischen Teilung und die deutsche Frage* (1986), 103 (104 et seq.).

⁴⁶ BVerfGE 73, 339 (386).

the BL authorizes the transfer of sovereign powers to inter-governmental institutions through a legislative act opening up German sovereignty so that legal norms from an extra-constitutional supranational source can be directly applied in Germany⁴⁷. This integration power is not boundless, for Art.24(1) of the BL must be interpreted in harmony with other constitutional provisions, including the Preamble. It does not open the possibility to change the basic structure of the Basic Law on which the identity of the constitutional order rests⁴⁸. There has been no exact definition of the scope of those inviolable essential constitutional principles⁴⁹. It has only been settled that the legal principles underlying the fundamental rights part of the Basic Law are among such principles⁵⁰.

In view of the two constitutional objectives concerning German and European unification, arguably of equal rank, and the bounds imposed on the integration power of Art.24(1) of the BL by the context of all other constitutional provisions, the question was discussed whether the Preamble's all-German and European options contradicted each other and, if so, how to resolve the conflict of norms. As a matter of law, however, there was no conflict. A conflict could only arise between the reunification goal and the practical policy of the Federal Republic's participating in the western European integration, embodied in the European Communities, to which the concept of Europe had been reduced, although in 1949 it had comprised all Europe⁵¹.

The members of the Parliamentary Council did not conceive that the German state reorganized temporarily only in the western part of the country would be forced to make a choice between German and European unity because their concept of "Europe" included the central and eastern parts of the continent under Soviet domination⁵². For them, the

⁴⁷ BVerfGE 37, 271 (280); 58, 1(28); 73, 339 (374 et seq.); C. Tomuschat, in: Kommentar zum Bonner Grundgesetz (Bonner Kommentar), Art.24 (2nd rev. ed. April 1981/July 1985).

⁴⁸ BVerfGE 37, 271 (279 et seq.); 73, 339 (375 et seq.).

⁴⁹ Cf. M. Herdegen, *Europäisches Gemeinschaftsrecht und die Bindung deutscher Verfassungsorgane an das Grundgesetz*, EuGRZ 1989, 309 (312f.); T. Stein, *Europäische Integration und nationale Reservate*, in: D. Merten (ed.), *Föderalismus und Europäische Gemeinschaften* (1990), 91 (97 et seq.).

⁵⁰ BVerfGE 73, 339 (376).

⁵¹ Schweisfurth (note 10), 860, 866; A. Randelzhofer, *Deutsche Einheit und europäische Integration*, VVDStRL 1990, 101 (104). But see K. Doehring, *Das Staatsrecht der Bundesrepublik Deutschland* (3rd ed. 1984), 119 et seq.

⁵² H.-P. Schwarz, *Die Ära Adenauer 1949-1957 (Geschichte der Bundesrepublik Deutschland, Vol.2 [1981] [see note 18])*, 459 et seq.; Murswiek (note 45), 111 et seq.

Basic Law's European and all-German objectives were not in conflict with but contingent upon one another⁵³.

A dispute early arose as to how the universally accepted goal of reuniting all of Germany and all of Europe could best be achieved. While the Government of Adenauer thought that a Federal Republic of Germany firmly rooted in the community of western European states and allied with the USA would have the better chances to remove the split through Germany and Europe⁵⁴, the opposition rejected the west integration, preferred a neutral stance between west and east⁵⁵, and advocated a "third way", meaning a "socialist" Europe, keeping equal distance to American capitalism and Soviet bolshevism⁵⁶.

The interlocking of German and European reunification was also touched upon in Art.7(2) of the Convention on Relations between the Three Powers and the Federal Republic of Germany (General Treaty)⁵⁷. Britain, France and the United States therein agreed to cooperate with West Germany, pending the conclusion of a peace treaty, to achieve, by peaceful means, their common aim of a reunified Germany enjoying a liberal-democratic constitution like that of the Federal Republic, and integrated within the European community. The term "European community" was not confined to the ECSC, already established when the treaty was concluded, or to the EEC and EURATOM, which were not yet conceived; it rather referred to a system of free and democratic European states as was expected to be in existence at the time when German unity would be achieved⁵⁸. The reunified Germany was, according to the inten-

⁵³ Cf. statement by Carlo Schmid in the Parliamentary Council: "Europe can only be established, if all of Germany takes part. The rift which today runs through Germany in fact runs through Europe, and to establish Europe recognizing this rift would mean to degrade Europe to a small Europe ... In demanding our unity we are conscious that we are fulfilling a European concern. Our demand is a European demand" (cited from Murswiek, *ibid.*, 112). See also Schweisfurth (note 10), 861 et seq.

⁵⁴ Adenauer (note 11), 535 et seq. See also E. Klein, *Deutschlandrechtliche Grenzen einer Integration der Bundesrepublik Deutschland in die Europäischen Gemeinschaften*, Die Öffentliche Verwaltung 1989, 957 (958).

⁵⁵ Schweisfurth (note 10), 864 et seq.

⁵⁶ Eschenburg (note 18), 176. But see also Schwarz (note 52), 457 et seq.

⁵⁷ Of May 26, 1952/October 23, 1954 (BGBl. 1955 II, 305), now suspended (BGBl. 1990 II, 1386 et seq.).

⁵⁸ E. Klein, *Die deutsche Frage in der Europäischen Gemeinschaft*, in: Blumenwitz/Meissner (note 45), 65 et seq. See also the Petersberg Agreement of November 22, 1949, between the three Allied High Commissioners and West German Chancellor Adenauer (v. Münch [note 9], Vol. 1, 226) which clearly distinguishes between the European community and the western European states.

tions of the states parties to the treaty, to be firmly integrated into a European system so that it could neither attain hegemony over its neighbors nor threaten stability by behaving as a neutral "wayfarer" between the two worlds of the east and west.

History, however, seemed to take a different path as the west European integration of the Federal Republic intensified and German partition became deeper in the course of time⁵⁹. West Germany's involvement in the EC had, according to some analysts, gradually passed the point of no return not only in terms of economic intertwinement but also as a matter of law⁶⁰. Moreover, the Treaty on the Bases of Relations between the Federal Republic of Germany and the German Democratic Republic (Basic Treaty)⁶¹ as well as the membership of both German states in the United Nations since 1973 for many observers seemed to have solved the German question for all practical purposes on a long-term basis⁶².

While Art.24 (1) of the BL certainly allowed West Germany's practical policy of integration into what was only a part of Europe, the question arose what constitutional limits the reunification clause imposed on West Germany's ability to cooperate in the forming of "an ever closer union among the peoples of Europe", as provided in the preamble of the EEC Treaty⁶³. The Federal Constitutional Court held that the reunification clause as well as Art.23 of the BL would be violated if the Federal Republic entered into a treaty relationship, including membership in an international or supranational organization, in which it would no longer be factually or legally able to decide independently about reunification⁶⁴.

⁵⁹ Cf. W. Brandt, *Erinnerungen* (1989), 153 et seq.

⁶⁰ U. Everling, *Sind die Mitgliedstaaten der Europäischen Gemeinschaften noch Herren der Verträge?*, in: FS Mosler (note 10), 172 (183 et seq.). See also Ress (note 37), 453. But see BVerfGE 75, 223 (242).

⁶¹ Of December 21, 1972 (BGBl. 1973 II, 423), entered into force on June 21, 1973 (BGBl. II, 559).

⁶² R. Bernhardt, *Deutschland nach 30 Jahren Grundgesetz*, VVDStRL 1980, 7 (13 et seq.).

⁶³ See Doehring (note 10), 636 et seq.; *id.*, *Die Wiedervereinigung Deutschlands und die europäische Integration*, NJW 1982, 2209 (2211 et seq.); Tomuschat (note 47), Art.24 n.6; Klein (note 54), 959; Schweisfurth (note 10), 876 et seq.

⁶⁴ BVerfGE 36, 1 (28).

2. Consequences for West Germany's European policy

The Federal Republic's European policy had from early on been influenced by its obligation to work toward achieving reunification with the GDR. West Germany's concern for the eastern part of the country becomes apparent from three acts of international relevance: the declaration concerning reunification of February 28, 1957; the declaration concerning citizenship of the Federal Republic of March 25, 1957; and the Protocol on German Internal Trade and Connected Problems of March 25, 1957.

(i) Declaration concerning reunification of February 28, 1957

The German delegation chief at the negotiations resulting in the Treaties of Rome made the following declaration on February 28, 1957, which he had entered in the record:

"The Federal Government proceeds from the possibility that in case of a reunification of Germany a review of the Treaties on the Common Market and on EURATOM will take place"⁶⁵.

The formulation "review of the Treaties" was carefully chosen to keep all options open: that the reunited Germany would remain a party to the unaltered Treaties, that it would leave the Communities, or – most probably – that, while continuing to participate in the integration, it would have the right to request an adjustment of the Treaties to the new situation⁶⁶, though not a definite right to demand the admission of the GDR⁶⁷.

The declaration was not made part of the Treaties, even though it did not meet with any protest but was acknowledged as self-evident by all states parties⁶⁸. Nothing similar had namely been introduced into treaties concluded earlier by the Federal Republic of Germany, including the ECSC Treaty⁶⁹, and it was considered inappropriate to invite an *ar-*

⁶⁵ Cf. Statement by the secretary of state in the Foreign Office, W. Hallstein, on March 21, 1957, reprinted in: J. Schwarz (ed.), *Der Aufbau Europas* (1980), 337 (344). See also *Verhandlungen des Bundesrates, Stenographische Berichte*, 176th session (May 3, 1957), 611. On the comparable GDR declaration when acceding to the CMEA cf. Uscchakow (note 17), 11, 66 note 12.

⁶⁶ Hallstein, *ibid.*, 344.

⁶⁷ But see R. Scholz, *Europäische Einigung und deutsche Frage*, in: Merten (note 49), 283 (289).

⁶⁸ Hallstein (note 65), 344; P. Dagtoglou, *Recht auf Rücktritt von den römischen Verträgen?*, in: R. Schnur (ed.), *FS für Ernst Forsthoff zum 70. Geburtstag* (1972), 77 (90 et seq.).

⁶⁹ See Klein (note 58), 70.

gumentum e contrario in their regard⁷⁰. Although one must keep in mind that the new European impulse of 1956/1957 creating the EEC and EURATOM was also intended to keep (West) Germany from relapsing into a nationalist policy with Rapallo-like consequences detrimental to common west European interests⁷¹, this intention was not incorporated in any of the Treaty provisions either⁷².

In any event, the formal status of the declaration was a matter of dispute. Some considered it as a reservation which in essence reflected the *clausula rebus sic stantibus*⁷³. Others referred to the legal norm embodied in Art.31(2)(b) of the Vienna I Convention on the Law of Treaties of May 23, 1969⁷⁴, and suggested that the declaration be used as a means of interpreting the EEC and EURATOM Treaties⁷⁵. Finally, some denied the declaration's legal effect altogether⁷⁶.

As far as one can tell from the published statements, the Federal Republic did not try to invoke the declaration during the political developments in 1989/90.

(ii) Declaration concerning citizenship of the Federal Republic of Germany

Due to the events in the aftermath of World War II, the German law on citizenship is rather intricate⁷⁷. According to the basic rule in Art.116(1) of the BL, the main group of "Germans" in the constitutional sense consists of persons possessing German citizenship pursuant to the Reichs- und Staatsangehörigkeitsgesetz of July 22, 1913, as amended⁷⁸, and supplementary legislation.

⁷⁰ Hallstein (note 65), 345.

⁷¹ Schwarz (note 52), 340.

⁷² Cf. the textual development of the General Treaty 1952/1954 (note 57) (H. Steinberger, *Völkerrechtliche Aspekte des deutsch-sowjetischen Vertragswerks vom 12. August 1970*, ZaöRV 1971, 63 [141 et seq.]); E. Klein, *Wiedervereinigungsklauseln in Verträgen der Bundesrepublik Deutschland*, in: *Sowjetsystem und Ostrecht* (note 19), 775 (778).

⁷³ M. Schweitzer/W. Hummer, *Europarecht* (3rd ed. 1990), 176. See also M. Schweitzer, in: Grabitz (note 16), Art.240 n.5.

⁷⁴ UN Doc.A/CONF.39/11/Add.2, BGBl. 1985 II, 926. See also *ibid.*, Art.4.

⁷⁵ Klein (note 58), 69 et seq.

⁷⁶ E. Grabitz/A. v. Bogdandy, *Deutsche Einheit und europäische Integration*, NJW 1990, 1073 (1077).

⁷⁷ Stern (note 44), 260 et seq.; R. Grawert, *Staatsvolk und Staatsangehörigkeit*, in: Isensee/Kirchhof (note 37), 663 (675 et seq.).

⁷⁸ Updated version in Sartorius, Vol.1: *Verfassungs- und Verwaltungsgesetze der Bundesrepublik Deutschland* (as of July 1, 1990), no.15.

Because German law on citizenship follows the *jus sanguinis* principle, and most Germans in the GDR were descended from German citizens born before the partition of Germany, the major part of the population of the former GDR had always had the same German citizenship as the people of the Federal Republic⁷⁹, irrespective of their simultaneous GDR citizenship. This was a special case of dual citizenship according to which East Germans' German citizenship was suspended until they were able and willing actively to make use of it. West Germany referred to the continuing existence of the German Reich as a legal person and the right of self-determination, as yet denied to the German people as a whole⁸⁰, to counter the GDR claim that this approach violated public international law⁸¹.

The reunification clause in the Preamble of the Basic Law obligated the West German organs to preserve the common German citizenship of East and West Germans⁸², and included a general obligation of the Federal Government to try to make the Basic Law's concept of German citizenship internationally as effective as possible. Concerning the European Community Treaties, this was crucial because the Common Market freedoms are attached to citizenship of a member state. The Federal Government accordingly made the following declaration when signing the EEC and EURATOM Treaties:

"All Germans in the sense of the Basic Law of the Federal Republic of Germany are to be considered as citizens of the Federal Republic of Germany"⁸³.

Despite the fact that this was merely a unilateral declaration, it produced legal effects because the Treaties leave it to the member states to define their own citizenship within the bounds of international law⁸⁴. The declaration's legal effects consisted in the GDR citizens' opportunity to avail themselves of all the freedoms of Common Market citizens, if

⁷⁹ BVerfGE 36, 1 (29 et seq.); 77, 137 (148 et seq.); R. Hofmann, Staatsangehörigkeit im geteilten Deutschland. Der Teso-Beschluß des Bundesverfassungsgerichts, ZaöRV 1989, 257 et seq.

⁸⁰ BVerfGE 77, 137 (153 et seq.).

⁸¹ Völkerrecht. Lehrbuch (note 20), part 1 (2nd ed. 1981), 220 et seq.; G. Riege, Die Staatsbürgerschaft der DDR (2nd ed. 1986), 184 et seq.

⁸² BVerfGE 77, 137 (148 et seq.).

⁸³ BGBl. 1957 II, 764. Similar declarations were made when Greece (OJ 1979 no.L 291/189) and when Portugal and Spain (OJ 1985 no.L 302/484) acceded.

⁸⁴ Klein (note 58), 79 et seq. See also C. Tomuschat, EWG und DDR, EuR 1969, 298 (317 et seq.); A. Bleckmann /I. Erberich, Europarecht (5th ed. 1990), 853, refer to Art.31 of the Vienna I Convention (note 74).

they were able to leave their country and make practical use of them. In fact, many East Germans did so before the construction of the Berlin Wall in 1961, with the support of the Federal Republic of Germany and the acquiescence of the other member states⁸⁵. Since then, disputes between the Federal Republic of Germany and the other member states on this matter could not arise due to the GDR's very restrictive granting of exit permits⁸⁶.

(iii) Protocol on German Internal Trade
and Connected Problems

Trade between West and East Germany was transacted as internal trade when the EEC was founded. The Community set up a customs union with a Common Customs Tariff levied at its external frontiers and introduced a system of refunds on exports and price adjustment levies on imports regarding products subject to a common organization of the market. If the pertinent provisions of the EEC Treaty had been strictly applied, the border between the Federal Republic and the GDR would have become a customs frontier, and intra-German trade could no longer have been treated as domestic trade. Pursuant to Art.227(1) of the EEC Treaty, the Treaty covered the territory of the Federal Republic but not the territory of the GDR which was neither a part of the Federal Republic⁸⁷ nor a European territory for the external relations of which the Federal Republic was responsible (Art.227[4] of the EEC Treaty)⁸⁸. It would, however, have been unacceptable to the Federal Republic – and moreover constitutionally impossible in view of the reunification mandate of the Basic Law – to subject intra-German trade to EEC norms and competences regarding external trade.

The problem had already come up when the ECSC Treaty was concluded in 1951. At that time it was solved by Art.22 of the Convention on the Transitional Provisions of April 18, 1951⁸⁹, which accorded to the Federal Republic the power to regulate intra-German trade in agreement with the Commission. But the Commission, apparently with the tacit consent of the other member states, never participated in the decision-

⁸⁵ M. Beise, Die DDR und die Europäische Gemeinschaft, EA 1990, 149 (152).

⁸⁶ But see *infra* VI.B.

⁸⁷ ECJ, judgment of October 1, 1974 (Case 14/74), ECR 1974, 899 (906 et seq.).

⁸⁸ Tomuschat (note 84), 299 et seq.

⁸⁹ BGBl. 1951 II, 491.

making so that the West German Government could in fact act autonomously⁹⁰.

With regard to the EEC, the member states took a different course when they agreed on the Protocol on German Internal Trade and Connected Problems of March 25, 1957⁹¹, and made it an integral part of the Treaty (Art. 239 of the EEC Treaty). The Protocol determined chiefly (1) that the application of the EEC Treaty in Germany did not require any change in the existing system of intra-German trade, which was conceived as a German domestic matter; and (2) that, however, all other member states could take appropriate measures to prevent difficulties which might arise for them from the organization of that trade. The Protocol had the effect of releasing the Federal Republic from its obligation to apply EEC law to intra-German trade, but did not transform the latter into intra-Community trade⁹². Its purpose was to guarantee that the implementation of the EEC Treaty would not aggravate the partition of Germany.

The fate of the Protocol was put up for discussion in view of the completion of the internal market projected for the end of 1992⁹³. Discussion intensified when, after the revolution in the GDR, a closer cooperation or even confederation between the two German states with the accompanying expansion of intra-German trade was expected⁹⁴. With reunification on October 3, 1990, the Protocol became obsolete.

D. German Democratic Republic: Ideological Enmity and Practical Benefits

The attitude of the GDR towards the western European integration had always been ambivalent. It was at the same time determined by ideological enmity as well as the readiness to draw economic benefits. As a matter of theory, the GDR had adopted a position conforming to the Soviet Union's which had from early on opposed the European Com-

⁹⁰ Klein (note 58), 72 et seq.

⁹¹ BGBl. 1957 II, 984. There was no arrangement concerning EURATOM because fissionable material was not traded between the German states (Klein [note 58], 78).

⁹² Klein, *ibid.*, 73 et seq. See also the ECJ decisions concerning the Protocol in ECR 1974, 899; 1979, 2789; 1987, 4199; 1989, 2937, and the survey by W. Vogel-Clausen, *Der innerdeutsche Handel in der Rechtsprechung des EuGH*, NJW 1989, 3058 et seq.

⁹³ M. Seidel, *Innerdeutscher Handel und Europäischer Binnenmarkt* (1989).

⁹⁴ G. Meier, »Innerdeutsches Protokoll« und Europäischer Binnenmarkt, *BetriebsBerater*, Beilage 11 zu Heft 9/1990, 1.

munities⁹⁵. GDR publications on international law called the EC a "state-monopolistic organization" in which the close integration of the power of economic monopolies and the power of the state had reached international dimensions, supporting the interests of large-scale capital against those of the working class⁹⁶. They provided the economic basis of the imperialist military pacts of the West and thus imperiled the progressive social order established in the eastern part of Europe⁹⁷. In accordance with the theory of "peaceful coexistence", this ideological enmity continued during the period in the 1970s in which there were attempts from both the CMEA and the EEC to establish a working relationship.

For economic reasons, however, the GDR had never tried to replace intra-German trade, providing easy access to the Common Market state Federal Republic of Germany, by a veritable system of foreign trade. Even though it had been eager to demonstrate that its relations with the Federal Republic were indistinguishable from its relations with any other "imperialist state", the GDR had in connection with the Basic Treaty agreed to maintain the existing trade arrangement⁹⁸.

In the second half of the 1980s, when under the influence of perestroika and the concept of a "Common European House" the relations between the CMEA and the EEC improved, the tone in the semi-official GDR publications on the Communities also changed⁹⁹.

E. Conclusion: Buried Hopes and Beginnings

On the eve of the revolutions of 1989, passivity toward central and eastern Europe reigned in the western part of the continent. Forty years after the enactment of the Basic Law the reunification goal, though still counted among the fundamentals of West German policy¹⁰⁰, was not given priority on the political agenda, nor was it actively pursued because the general political climate did not seem favorable. The German question was simply kept open. The European Communities had concentrated on their internal development and on the integration of other western-

⁹⁵ I. Bailey-Wiebecke, *Die Europäische Gemeinschaft und der Rat für Gegenseitige Wirtschaftshilfe* (1989), 31 et seq.

⁹⁶ Dost/Hölzer (note 12), 11 et seq., 261 et seq.

⁹⁷ *Völkerrecht. Lehrbuch* (note 20), 154, 157.

⁹⁸ Protocol Additional to the Treaty on the Bases of Relations (BGBl. 1973 II, 426).

⁹⁹ Ersil (note 36), 67, 69.

¹⁰⁰ See the report of the Federal Government on the state of the nation (October 15, 1987), sub I (BullBReg., no.106 [October 16, 1987], 909).

oriented European states. With regard to central and eastern Europe, their ambitions did not reach beyond the establishment of a working treaty relationship.

Part Two: After the 1989 Revolutions in Central and Eastern Europe

With the peaceful revolution in the GDR in October/November 1989 and parallel events particularly in Poland, Hungary and Czechoslovakia new light was suddenly shed on the Federal Republic's all-German and all-European options. The expectations of the founders of West Germany and the western European organizations were fulfilled in three respects: The division of Germany and Europe vanished when the Soviet Union allowed its long-time satellites self-determination; those newly independent states immediately sought a very close relationship to the fully-developed western European international and supranational organizations; and, specifically, German reunification proceeded within the framework of European integration as embodied in the European Communities. While in both parts of Germany considerations on how to master the events were concentrated on the constitutional aspects of reunification¹⁰¹, the European dimension of the process played a major role.

I. European Background Determines West German Approach towards Reunification

A. Political Statements

After the Honecker régime in the GDR had been replaced, West German policy makers early insisted that a realistic rapprochement between the two German states would only be conceivable within the framework of the European Communities. This was often repeated to dispel doubts that had been voiced by concerned western European partner states¹⁰². In fact, the other member states of the European Communities worried about the prospect of a reunified Germany which might again strive for a dominant position in Europe while at the same time freeing itself from its

¹⁰¹ See P. E. Quint, *The Constitutional Law of German Unification*, Maryland Law Review 1991 (forthcoming).

¹⁰² Address by the Federal President on October 3, 1990, EA 1990, D 543 (D 551). See also N. Kohlhase, *Die Europäische Gemeinschaft und die Deutschen*, in: *Auf der Suche nach der Gestalt Europas*. FS für Wolfgang Wagner (1990), 73.

Community ties and seeking a close relationship with the Soviet Union¹⁰³. In view of such concerns the West German Government repeatedly emphasized that the Federal Republic would remain integrated in the European Communities and continue to cooperate closely with the other member states¹⁰⁴.

In his address on November 28, 1989, Federal Chancellor H. Kohl presented his "Ten-Point Program for the Overcoming of the Division of Germany and Europe"¹⁰⁵ which he had not discussed in advance with any of the (West European) partners so that their concern actually increased. The Chancellor envisaged an ever closer rapprochement between the two German states which in the course of time would lead first to a "treaty community" (*Vertragsgemeinschaft*), then to confederative structures and finally to a federal state. He immediately emphasized that the development of intra-German relations would remain embedded in the all-European process¹⁰⁶. It was advocated that the European Community, which had to be strengthened, should soon conclude a trade and cooperation agreement with the GDR to give East Germany easier access to the Common Market:

"... we have always understood the process of regaining German unity also as a European concern. It must also be put in the perspective of European integration ... The EC must not end at the Elbe river but has to remain open also toward the east. Only then – we have always taken the Europe of the Twelve as a part and not as the whole – can the European Community become the basis of truly comprehensive European unification"¹⁰⁷.

The Chancellor also underlined that the EC was the successful model of a free union of European peoples which had a very strong attraction far beyond the present member states¹⁰⁸. At that time, the manner in which the GDR would be integrated into the EC was still open. Possibilities ranged from an association with a later accession leading to a

¹⁰³ Cf. L.V. Ferraris, *Deutsche Einheit aus italienischer Sicht*, *Europäische Rundschau* 1990, 15; A. Volle, *Großbritannien und die deutsche Einheit*, in: FS Wagner (note 102), 130; M. Mertes/N.J. Prill, *L'Allemagne unifiée et l'Europe. Continuité ou nouvelle tentation du pouvoir?*, *Politique Etrangère* 1990, 559.

¹⁰⁴ BullBReg., no.85 (May 6, 1955), 701 (702). See statement by Federal Chancellor H. Kohl on February 15, 1990 (BullBReg., no.26 [February 16, 1990], 201 [202 et seq.]).

¹⁰⁵ BullBReg., no.134 (November 29, 1989), 1143 (see in particular p.1147 et seq.).

¹⁰⁶ See also the statement made by the party convention of the opposition SPD (December 18/20, 1989), DA 1990, 152.

¹⁰⁷ See also further statements by the Chancellor, BullBReg., no.1 (January 3, 1990), 1(2); no.4 (January 11, 1990), 25 et seq.; no.21 (February 6, 1990), 165 (167).

¹⁰⁸ See note 105, 1145.

separate membership¹⁰⁹ – with the incidental stabilization of the GDR as a separate state and the consequential increase in the “German” number of votes in the EC institutions – to automatic integration as a part of the Federal Republic by way of reunification¹¹⁰.

When the first free GDR elections on March 18, 1990, had shown that a large majority of East Germans favored reunification with the Federal Republic as soon as possible, the Federal Government immediately began to prepare the ground for a smooth EC integration of the GDR via the reunification route. On March 19, 1990, the Federal Chancellor declared:

“The future unified Germany will ... remain embedded in the European Communities ... As early as 1957 in the Treaties of Rome we have together with our partners kept open the door for the GDR. We proceed from the assumption that the unified Germany will be a member of the Community without any amendment to those Treaties and the subsequent Treaties. This will not hinder or delay European integration”¹¹¹.

So for political reasons the West German Government officially renounced all legal options such as withdrawal from the EC and renegotiation of the Treaties which it had arguably kept open pursuant to the declaration concerning reunification of February 28, 1957. As a *quid pro quo* it insisted that the integration of the GDR into the European Communities would not formally be treated as an accession of a new member state, which would have caused delay and uncertainty in view of the cumbersome admission procedure, but handled according to the principle of moving treaty boundaries. This was essential, as West Germany’s EC commitment made a parallel attainment of an East German integration into the EC and the Federal Republic indispensable. In a political deal, the other member states also renounced their reciprocal option under the West German declaration to invoke the *clausula rebus sic stantibus*¹¹².

When on September 12, 1990, the Treaty on the Final Settlement with respect to Germany was signed by the two German states, France, the Soviet Union, the United Kingdom and the United States, the European foundation of the German reunification process was so firm that the four

¹⁰⁹ Beise (note 85), 153 et seq. See also Randelzhofer (note 51), 119.

¹¹⁰ Cf. D. Blumenwitz, Europäische Integration und deutsche Wiedervereinigung, Zeitschrift für Politik 1990, 1 (4 et seq.).

¹¹¹ EA 1990, D 213 (D 215).

¹¹² Cf. C. Tomuschat, A United Germany within the European Community, C.M.L.Rev. 1990, 424 et seq., 429; J.-P. Jacqué, L’unification de l’Allemagne et la Communauté Européenne, Revue Générale de Droit International Public 1990, 997 (1000).

main victorious powers were satisfied with referring to European unity in a preambular paragraph¹¹³.

The Federal Government also made plain that the reunified Germany would not assume a passive role within the Community but would actively work for intensifying integration beyond the internal market concept of 1992 toward an economic and monetary as well as a political union. At the same time it would advocate closer ties between the EC and other European states, primarily the revolutionized CMEA states¹¹⁴. All those objectives reappeared in the policy statement of the first all-German Government of October 4, 1990, advocating the establishment of a United States of Europe and considering the political union, to be completed until December 31, 1992, as a firm basis on which all of Europe could grow together. The statement supported the French initiative to establish a European Confederation in which all European states would cooperate on the basis of equal rights and duties¹¹⁵.

The strong pro-European approach that West Germany took with regard to reunification also had other than atmospheric reasons. The four main victorious powers, two of them EC members, having retained the final say in all matters concerning Germany as a whole, would not, in fact, have allowed a reunified Germany without firm roots in the EC¹¹⁶, leaving aside the question whether their reserved rights extended thus far¹¹⁷. Furthermore, the major political forces in Germany had long considered a firm integration of Germany into the rest of Europe as the best assurance against any relapse into nationalistic mistakes. From an economic viewpoint, the interpenetration of the EC member states had reached such dimensions that the German economy was practically unable to withdraw. It is also arguable that the European integration clause

¹¹³ "Welcoming the fact that the German people, freely exercising their right of self-determination, have expressed their will to bring about the unity of Germany as a state so that they will be able to serve the peace of the world as an equal and sovereign partner in a united Europe ..." (BGBl II, 1318).

¹¹⁴ See note 111, D 215. Message of the Federal Chancellor to all governments of the world of October 3, 1990 (EA 1990, D 540 [541]).

¹¹⁵ EA 1990, D 552 (D 553, D 561 et seq.). See also the policy statement of January 30, 1991 (BullBReg., no. 11 [January 31, 1991], 61 [72 et seq.]).

¹¹⁶ M. H. Hatzel, *Amerikanische Einstellungen zur deutschen Wiedervereinigung*, EA 1990, 127 (129 et seq.); interview by French President F. Mitterand on December 22, 1989, EA 1990, D 96 (D 98 et seq.); C. Weston, *Die USA und der politische Wandel in Europa*, *Aus Politik und Zeitgeschichte*, B 49/90 (November 30, 1990), 28 (33 et seq.).

¹¹⁷ K. Hailbronner, *Völker- und europarechtliche Fragen der deutschen Wiedervereinigung*, JZ 1990, 449 (452).

of the Basic Law's Preamble compelled the Federal Government to do its part to achieve reunification within the Community framework¹¹⁸.

B. West German Academic Discussion on Constitutional Ways to Achieve Reunification

The EC perspective also influenced the West German academic discussion on the constitutional way to achieve reunification. The Basic Law contained two provisions offering different ways toward that end, namely Art.23 clause 2, that was ultimately used, and Art.146¹¹⁹. Under Art.23 clause 2 of the BL, the GDR could accede to the Federal Republic, and the Basic Law would be put into force in its territory. Reunification via Art.146 of the BL would have required the adoption of an all-German constitution by the German *pouvoir constituant*. In the debates on these alternatives¹²⁰, the Federal Republic's EC membership was referred to in support of accession and to warn against the use of Art.146 of the BL: While a GDR accession pursuant to Art.23 clause 2 of the BL would guarantee the continuity of the Federal Republic's international legal personality on which its EC membership rested, an act of the German *pouvoir constituant* would¹²¹ or might¹²² bring about a new legal entity whose EC membership was questionable. At least, the process under Art.146 of the BL was said to provoke a dispute on that matter more easily¹²³.

Under international legal standards it is clear that the adoption of a new constitution as such does not affect the international legal personality of a state¹²⁴, that the unification of two states will normally create a new state

¹¹⁸ Cf. Bleckmann/Erberich (note 84), 857.

¹¹⁹ Art.23 of the BL was eliminated and Art.146 of the BL reformulated by Art.4 nos.2, 6 of the Unification Treaty (note 42).

¹²⁰ C. Tomuschat, *Wege zur deutschen Einheit*, VVDS:RL 1990, 70.

¹²¹ W. Möschel, *DDR – Wege aus der Krise*, JZ 1990, 306 (310); J. Sedemund, *Deutsche Einheit und EG*, EuZW 1990, 11 (12).

¹²² Statement by one hundred constitutional law professors at German universities: *Vote for Article 23 of the Basic Law*, reprinted in *Die Welt* (March 28, 1990); Scholz (note 67), 283 (287 et seq.).

¹²³ U. Everling, *Der Weg nach Deutschland ist langwierig*, FAZ (March 15, 1990), 14; J. A. Frowein, *Rechtliche Probleme der Einigung Deutschlands*, EA 1990, 237. See also J. Scherer, *EG und DDR: Auf dem Weg zur Integration*, RIW (Beilage 6 zu Heft 4/1990), 11 (12).

¹²⁴ Frowein (note 123), 235; D. Rauschnig, *Deutschlands aktuelle Verfassungslage*, DVBl. 1990, 393 (402 et seq.).

only in case the two earlier states have such an intention¹²⁵, and that if the reunified state continues to reflect the legal personality of one of its component parts, it will normally be the personality of the largest¹²⁶. As both the Federal Republic of Germany and the GDR intended to continue the international legal personality of the German state of 1867/1871, embodied in the Federal Republic, and as this intention was generally accepted by the international community, a reunification under the procedure under Art.146 of the BL would not have affected the Federal Republic's international legal personality and the EC membership tied to it¹²⁷.

The EC-Commission stated accordingly that the choice between Art.23 of the BL and Art.146 of the BL was a German matter, adding, however, that the procedure under Art.23 of the BL procedure was simpler as far as the Community was concerned¹²⁸. This remark was not necessarily meant to call the legal identity of the Federal Republic and its continuing EC membership in question in case the Art.146 alternative was chosen. It may rather have referred to the fact that under Art.146 the entire constitutional order of the Federal Republic would have become temporarily uncertain. As the EC depends on a basic harmony among the constitutional systems of its member states¹²⁹, that was disagreeable. Viewed from this angle, the argument made in favor of Art.23 was essentially correct.

II. The Community Law Obligations of Consultation, Coordination and Adaptation in the Reunification Process

West Germany's pro-European stance had several Community law components. As German reunification was a matter deeply affecting the interests of the European Communities as well as the other member states, the Federal Republic did not enjoy complete freedom as to how it pursued the reunification objective. Rather, Community law imposed

¹²⁵ J.A. Frowein, *Die Verfassungslage Deutschlands im Rahmen des Völkerrechts*, VVDStRL 1990, 7 (25 et seq.). See also G. Dahm/J. Delbrück/R. Wolfrum, *Völkerrecht*, Vol.I/1 (1988), 154 et seq.; J.L. Brierly, *The Law of Nations* (6th ed. H. Waldock 1963), 151 et seq.

¹²⁶ Frowein (note 123), 233.

¹²⁷ Frowein (note 125), 25 et seq.; Tomuschat (note 120), 91; Everling (note 123), 14. See also J. Isensee, *Staatseinheit und Verfassungskontinuität*, VVDStRL 1990, 39 (47 et seq.).

¹²⁸ BullEC, Suppl.4/1990, 9. See also Randelzhofer (note 51), 118.

¹²⁹ H.P. Ipsen, *Über Verfassungs-Homogenität in der Europäischen Gemeinschaft*, in: *Das akzeptierte Grundgesetz*. FS für Günter Dürig (1990), 159.

procedural as well as substantive obligations on it, as well as on the EC and the other member states, which can be classified as duties of consultation, coordination and adaptation.

It cannot be assumed that the declaration concerning reunification entirely relieved West Germany from paying regard to its EC commitments¹³⁰. Even if the declaration included a right to withdraw or to demand Treaty amendments, the Federal Republic, as long as it did not exercise those rights but on the contrary declared its determination to pursue the path of European unity, as it had done for years¹³¹, remained bound to adhere to the procedural and substantive obligations flowing from its membership.

From the procedural point of view, reunification being a foreign policy matter of general interest, the Federal Republic was obligated under Art.30 (2) of the SEA to consult the other states parties before making a final decision¹³². Beyond these consultations, which took place outside the Community framework proper, the Federal Republic was under a substantive Community law obligation of coordination, meaning that it had to take care that the integration of the GDR would be effected with as little disruption of the European integration process as possible. For that purpose, West Germany was required to prepare the GDR for integration into the European system, so as to reduce the necessity for exemptions and transition periods with regard to secondary legislation. This coordination obligation was a consequence of the Federal Republic's general duty of loyalty under Art.5 of the EEC Treaty, owed to the Community as such as well to the other member states individually¹³³. It goes without saying that the principle of Community loyalty also has a procedural component requiring the Federal Republic to inform and consult with the competent Community organs¹³⁴. On the other hand, the Communities and the other member states were under a reciprocal adaptation obligation: They had to facilitate as much as possible the incorporation of the GDR into the EC. The general duty of solidarity specifically required loyal cooperation by all sides concerning the inevitable adjustments of many acts of secondary

¹³⁰ Tomuschat (note 112), 433 note 33.

¹³¹ Hailbronner (note 117), 455; *id.*, VVDStRL 1990, 183. Cf. W. Fiedler, *Unilateral Acts in International Law*, in: EPIL Inst.7 (1984), 517.

¹³² Grabitz/v. Bogdandy (note 76), 1075. See BullBReg., no.40 (March 27, 1990), 314.

¹³³ Grabitz (note 16), Art.5.

¹³⁴ Scherer (note 123), 15; Grabitz/v. Bogdandy (note 76), 1075, and Ranzelzhofer (note 51), 115, also refer to Art.105 of the EEC Treaty.

legislation to the special situation of the GDR. In concrete terms such adjustments entailed exemptions of the GDR for a transitional period from the strict Community standards with regard to product quality, environment protection, agriculture, state subsidies, etc.¹³⁵

Generally the Federal Republic fulfilled its consultation and coordination duties. The Federal Government had early included the EC Council and the European Council as well as the EC Commission in the decision-making process concerning the rapprochement and later reunification of the two German states. Both German Governments closely cooperated with the Commission in drawing up the proposals for transitional measures intended to guarantee a gradual adaptation of the GDR to the *acquis communautaire*¹³⁶.

During the intra-German negotiations on the establishment of an economic and monetary union, the Commission insisted that it had to be fully involved from the outset in the process of German unification and that there was a need to move from information and consultation on the part of German authorities to real concerted action¹³⁷. Irrespective of the legal substance of that claim the Commission actively participated in the subsequent negotiations resulting in the Unification Treaty¹³⁸.

On the other hand, the Commission never expressly claimed that the conclusion of the State Treaty, or the Unification Treaty, was subject to the prior consent of the EC even though both Treaties strongly affected Community jurisdiction, nor was such consent ever given in a formal legal instrument although it in fact existed. As the Treaties went clearly beyond German internal trade separated out of the EEC framework by the pertinent Protocol, one cannot base the argument that they constituted a German domestic affair on that Protocol¹³⁹. Nor did the West German declaration concerning reunification by itself work a change in competences between the Federal Republic of Germany and the EC but at best gave West Germany a right to demand corresponding Treaty amendments¹⁴⁰. The solution seems to lie in a rule of Community law implicit in Art.79 of the ECSC Treaty, Art.227(1) of the EEC Treaty and

¹³⁵ Sedemund (note 121); Bleckmann/Erberich (note 84), 858. But see I. Pernice, VVDStRL 1990, 185.

¹³⁶ Denkschrift zum Einigungsvertrag, BT-Drs.11/7760 (August 31, 1990), 355.

¹³⁷ Bullec, Suppl.4/1990, 12; see also *ibid.*, 17.

¹³⁸ *Ibid.*, 42.

¹³⁹ Randelzhofer (note 51), 115. See also C.W.A. Timmermans, German Reunification and Community Law, C.M.L.Rev. 1990, 436 (446).

¹⁴⁰ But see Hailbronner (note 117), 455; *id.* (note 131), 182.

Art.198 of the EURATOM Treaty leaving acquisition of territory, and consequently all steps leading to it, within the *domaine réservé* of the member states¹⁴¹.

III. The Opinion-Forming Process within the European Council

At an informal meeting in Paris on November 18, 1989, the heads of state or government of the EC member states specifically discussed the developments in eastern Europe. They did not issue any formal proclamation but the French President made a short statement to the press. He indicated that they had specifically talked about the GDR or East Germany (*sic!*), where an unexpected and necessary evolution toward democratic reforms had taken place. Trade talks with the GDR would be initiated soon¹⁴².

At the Strasbourg summit of December 8/9, 1989, the European Council made a carefully worded but unequivocal statement in favor of German unity within the EC framework after expressing the hope that the changes in the eastern part of Europe would help to overcome the division of the continent:

"We seek the strengthening of the state of peace in Europe in which the German people will regain its unity through free self-determination¹⁴³. This process should take place peacefully and democratically, in full respect of the relevant agreements and treaties and of all the principles defined by the Helsinki Final Act, in a context of dialogue and East-West cooperation. It also has to be placed in the perspective of European integration"¹⁴⁴.

On April 28, 1990, after the historic March election in the GDR, the European Council held a special session in Dublin¹⁴⁵ at which the unification of Germany, about to take place under a European roof, was warmly welcomed. The Community promised to take care that the integration of the GDR into the EC would be carried out smoothly and

¹⁴¹ See *infra* V.C.1. See also Tomuschat (note112), 434. But see Grabitz/v. Bogdandy (note76), 1075.

¹⁴² EA 1990, D4 (D5).

¹⁴³ This formulation almost copied the wording of the policy statement in the letter concerning German unity presented by the West German Government to the Soviet Government when the Treaty of August 12, 1970, was signed (BGBl. 1972 II, 356) and to the East German Government when the Basic Treaty was signed on December 21, 1972 (BGBl. 1973 II, 425).

¹⁴⁴ BullEC 12/1989, 8 (14). See H. G. Krenzler, Die Europäische Gemeinschaft und der Wandel in Mittel- und Osteuropa, EA 1990, 89 (92).

¹⁴⁵ BullBReg., no.51 (May 4, 1990), 401.

harmoniously and without any amendments to the Treaties. This meant that on the one hand the incorporation of the GDR would not be treated as an accession of a new member state, which would have required Treaty amendments (Art.98 of the ECSC Treaty, Art.237 of the EEC Treaty, Art.205 of the EURATOM Treaty), but as a territorial expansion of a current member state, and that on the other hand the Federal Republic of Germany would not insist on an increase in the number of votes it had in the Council (Art.28 of the ECSC Treaty, Art.148[2] of the EEC Treaty, Art.118[2] of the EURATOM Treaty) or in the European Parliament (Art.2 of the Act concerning the election of the representatives of the Assembly by direct universal suffrage of September 20, 1976¹⁴⁶). The Federal Government agreed to inform the Community about all important measures discussed and agreed between the two German states with regard to harmonization of policy and legislation. The EC Commission would fully participate in these discussions. It was also made clear that the Federal Republic would not make demands in favor of the GDR concerning Community subsidies for structurally weak areas (Art.130a et seq. of the EEC Treaty) but would alone shoulder the economic and financial burden of rebuilding the eastern part of Germany after reunification¹⁴⁷.

The results of the April Dublin summit could rightly be summed up in the observation by the West German Government that in accordance with K. Adenauer's idea German unity was not inconsistent with European unity but that the two goals constituted the two sides of the same coin. Both unification processes would run parallel and would be sped up¹⁴⁸. A second Dublin summit on June 25/26, 1990, at which the freely-elected GDR prime minister L. de Maizière was given the opportunity to speak, confirmed the April results¹⁴⁹. The conclusion of the Treaty between the Federal Republic of Germany and the German Democratic Re-

¹⁴⁶ OJ no.L. 278/1.

¹⁴⁷ Declaration of May 10, 1990, by the Federal Government, BullBReg., no.58 (May 11, 1990), 453; statement by the Federal Chancellor in the European Parliament on May 16, 1990 (BullBReg., no.64 [May 22, 1990], 548). But see now Council Regulation (EEC) no.3575/90 of December 4, 1990 concerning the activities of the Structural Funds in the territory of the former German Democratic Republic (OJ no.L353/19) according to which special appropriations of 3 billion ECU are provided for covering 1991-1993. See also OJ 1991 no.L114/30. J. Stremmel/W. Wedderkopf, EG-Regionalpolitik und Deutsche Einheit, Zeitschrift für Rechtspolitik 1990, 369; K.-P. Repplinger, Hilfen der EG für die Einheit Deutschlands, EuZW 1991, 79.

¹⁴⁸ See preceding note.

¹⁴⁹ BullBReg., no.84 (June 30, 1990), 717 (719).

public Establishing a Monetary, Economic and Social Union of May 18, 1990 (State Treaty)¹⁵⁰ was welcomed as it would promote and accelerate the integration of the territory of the GDR into the Community.

At the European Council meeting in Rome on October 27/28, 1990, the presiding Italian prime minister welcomed the regained unity of Germany and congratulated Federal Chancellor Kohl and Foreign Minister Genscher on their decisive contribution to this historical event, which they had consciously placed in the perspective of an acceleration of European unification¹⁵¹.

IV. East German Moves Taking up the "European" Option

Immediately after the dismissal of E. Honecker in October 1989 and before reunification projects had been devised, the GDR Government established close contacts with the EC with a view towards entering into constructive cooperation and in particular concluding a trade agreement with the EEC without delay¹⁵². This was meant to remove existing trade barriers and prevent the development of new ones following the completion of the internal market in 1992. The intra-German trade was to be continued on the present treaty basis¹⁵³.

On November 17, 1989, GDR Prime Minister H. Modrow sent a memorandum to the EC heads of state or government on the eve of their Paris meeting in which he advocated overcoming the division of Europe while preserving the existing different social systems and the two German states in their present shape. He declared that the GDR was ready to cooperate in a comprehensive manner with the European Communities also in view of the future completion of the internal market. He favored an early start to negotiations on a trade agreement¹⁵⁴.

When West German Chancellor Kohl met East German Prime Minister Modrow in Dresden on December 19/20, 1989, both agreed that the in-

¹⁵⁰ BGBl. II, 537 (International Legal Materials 1990, 1108), entered into force on June 30, 1990 (BGBl. II, 700). See *infra* VI.

¹⁵¹ BullBReg., no. 128 (November 6, 1990), 1333.

¹⁵² There had been exploratory talks in the summer of 1989 (P. Scherer, *Das Handels- und Kooperationsabkommen der EG mit der DDR*, EuZW 1990, 241).

¹⁵³ Cf. talks held by EC Commission Vice-Presidents M. Bangemann on November 2, 1989 (Hauptabteilung Presse des Ministeriums für Auswärtige Angelegenheiten der Deutschen Demokratischen Republik [ed.], *Aussenpolitische Korrespondenz*, no. 44/1989, 351), and F. Andriessen on December 4/5, 1989 (*ibid.*, no. 47/1989, 373).

¹⁵⁴ EA 1990, D 2.

tra-German relations were part of an all-European process. Kohl emphasized that the Federal Republic of Germany considered the EC as the corner-stone of a new European architecture and the balance beam of a new European equilibrium. The Community was ready to develop close and comprehensive relations with those central and eastern European countries that were undertaking democratic reforms. The Federal Republic would support the early conclusion of an EEC-GDR trade and cooperation agreement¹⁵⁵.

An Agreement between the German Democratic Republic and the European Economic Community on trade and commercial and economic cooperation, modelled after recent agreements between the EC and other CMEA states, was in fact signed on May 8, 1990¹⁵⁶. According to its Art.27, intra-German trade under the pertinent Protocol was to remain unaffected. Neither party, however, ratified the Agreement because it was overtaken by the reunification process¹⁵⁷.

On February 1, 1990, GDR Prime Minister Modrow for the first time presented a plan on steps by which to reach a (neutral) German federation via a German confederation. He conceived of German unification as a part of a European unification process and emphasized that steps towards German unity would have to be compatible with the obligations of each German state toward third states or state groups¹⁵⁸.

In the elections of March 18, 1990, those political forces which advocated an early accession of the GDR to the Federal Republic based on Art.23 of the BL obtained a large majority. On April 12, 1990, they entered into a coalition agreement¹⁵⁹ which made it a principal foreign policy task of the GDR Government under L. de Maizière to embed the German reunification process in the all-European unification process. Germany had to be firmly integrated into the EC. Until the unification of Germany the GDR Government would, in coordination with the West German Government, negotiate on the extension of the EC to the present GDR with a view to fix transitional periods within which the GDR would gradually assume full rights and obligations under the Community Treaties. Concerning

¹⁵⁵ DA 1990, 317 et seq.

¹⁵⁶ The Agreement has not been published yet but reports exist about its contents (see Scherer [note 152]).

¹⁵⁷ XXIVth General Report on the Activities of the European Communities 1990 (1991), 46.

¹⁵⁸ DA 1990, 471.

¹⁵⁹ Bundesministerium für innerdeutsche Beziehungen (ed.), Beilage zu »Informationen«, no.8/1990 (April 27, 1990).

the existing external trade commitments of the GDR particularly to the Soviet Union, solutions would have to be found within the EC framework that maintained the GDR's loyalty to treaties and contributed to the stabilization of the situation in central and eastern Europe¹⁶⁰.

Academic projects in the GDR also took up the "European" option¹⁶¹.

V. The EC Commission's Contribution: Practical Realization of the GDR's Integration into the European Communities

A. Survey

The statements of the European Council on German reunification were based on several communications by the EC Commission which considered the process from a Community perspective while the Council had rather been dominated by the national interests of the member states. The Commission plans all proceeded from the assumption that German reunification would not affect the Federal Republic's EC membership as such. They dealt mainly with the application of the Treaties and of secondary legislation to the GDR territory as well as with the fate of the GDR's international treaties in so far as they affected EC competences.

A speech by Commission President J. Delors on January 17, 1990¹⁶², in the European Parliament set the tone¹⁶³: East Germany (*sic!*) constituted a special case, and it would have its place in the Community should it so wish. President Delors here referred to the conditions set by the European Council at Strasbourg¹⁶⁴ but emphasized that the form which the integration of East Germany would take was a matter to be determined by the Germans¹⁶⁵. This address initiated an opinion-forming process

¹⁶⁰ See also Government policy statement by GDR Prime Minister de Maizière on April 19, 1990 (DA 1990, 795 [808]).

¹⁶¹ See Draft Treaty on the Foundation of a Confederation of Germany in Preparation of a Future German Federal State, EuGRZ 1990, 83; preamble and Art.44(1) of a Draft Constitution of the GDR (Neues Deutschland, April 18, 1990, 7).

¹⁶² See already his cautious reference to the German question as early as October 17, 1989 (BulleC 1989, 110 [117]).

¹⁶³ BullEC, Suppl.1/1990, 6 (9). See also his address on February 14, 1990 (OJ Annex no.3-386, 155). Cf. J. Falke, Die Erstreckung des Gemeinschaftsrechts auf das Territorium der DDR, in: N. Reich/C. Ahrazoglu (eds.), Deutsche Einigung und EG-Integration (1990), 23 (26).

¹⁶⁴ *Supra* note 144.

¹⁶⁵ I could not verify reports that J. Delors initially suggested treating the GDR's integration as an accession (cf. Randelzhofer [note 51], 105, 118; Tomuschat

within the Commission quite favorable to German unity¹⁶⁶ the establishment of which was considered as fulfilment of a long-standing political goal of West Germany as well as of the EC¹⁶⁷.

The Commission paved the way for a smooth integration of the GDR into the EC by means of two communications¹⁶⁸ and a final comprehensive report¹⁶⁹ to the European Council, the latter containing a multitude of proposals for legal instruments to be enacted with a view to allowing for a gradual introduction of European Community law into the territory of the GDR.

B. Three-Stage Integration Scenario

The Commission in its communication to the April Dublin summit¹⁷⁰ developed an integration scenario comprising three stages: an interim adjustment stage, beginning with the introduction of an inter-German monetary union, accompanied by a number of social and economic reforms; a second, transitional stage, starting with the formal reunification of the two German states; and the final stage, bringing about the full application of the *acquis communautaire*, to begin, as far as possible, no later than January 1, 1993.

During the interim adjustment stage, while the Protocol on German Internal Trade continued to apply, the GDR would already enact legislation necessary for later integration into the West German and Community systems and thus reduce the number of instances in which transitional arrangements would be needed for gradual adjustment to the *acquis communautaire*.

During the transitional stage the Commission would have to tackle a variety of problems concerning external relations as well as the internal

[note 112], 418) but only that in the Commission's view the ensuing practical problems would be the same (*infra* C.1).

¹⁶⁶ See the repeated expressions of gratitude by the Federal Chancellor (e.g., Bull-BReg., no.34 [March 9, 1990], 265 [267]).

¹⁶⁷ See statement on German unification (October 3, 1990), Bullec, Suppl.4/1990, 7.

¹⁶⁸ The Community and German unification, Communication from the Commission to the special session of the European Council in Dublin on April 28, 1990 (SEC[90] 751 of April 19, 1990) (Bullec, Suppl.4/1990, 9). The Community and German unification: implication of the Staatsvertrag, Communication from the Commission to the European Council in Dublin on June 25 and 26, 1990 (SEC[90] 1138 of June 13, 1990) (*ibid.*, 17).

¹⁶⁹ The Community and German unification (COM[90] 400, 3 volumes (August 21/31, 1990) (Bullec, Suppl.4/1990, 27).

¹⁷⁰ Bullec, Suppl.4/1990, 9.

policies of the Community, primarily regarding the free movement of goods produced in the territory of the former GDR, avoidance of distortion of competition through West German aid necessary for rebuilding the economy, equal access of all member states' exports and investments to the relevant area, infrastructure improvements in the field of transport, and the environmental situation. The entire body of existing secondary Community law had to be reviewed in detail to identify where there were objective grounds warranting transitional measures (mostly temporary derogations) or possibly adjustments of Community law instead, and the active assistance of the German authorities was needed by the Commission to compare their respective legislation, assess the economic possibilities and verify the factual data¹⁷¹. The lack of reliable statistics and other information in the end proved to be one of the major obstacles when the transitional measures were drafted.

The Commission, however, saw no need to adapt any secondary legislation under the EURATOM Treaty¹⁷², nor did it expect any serious legal problems in the ECSC field¹⁷³. The following exposition will therefore be exclusively devoted to the EEC.

C. The Basic Assumption: Automatic Community Enlargement and Automatic Extension of Community Law to the GDR Territory after German Reunification

1. Automatic Community enlargement and extension of the European Treaties

(i) The Commission's position

The Commission proceeded from the basic assumption that the integration of the territory of the GDR into the Community by way of a German reunification constituted a "special" case so that Art.237 of the EEC Treaty relating to the accession of third states did not apply. On the other hand, this integration would involve practical problems on a par with those posed by the most recent enlargements of the Community. It would quite similarly have to proceed by stages, requiring transitional measures to facilitate the gradual application of the *acquis communautaire*.

¹⁷¹ BullEC, Suppl.4/1990, 29. Detailed analysis of the necessary adjustment measures, *ibid.*, 44 et seq.

¹⁷² *Ibid.*, 93, 99.

¹⁷³ BullEC, Suppl.4/1990, 106 et seq.

The Commission expected the integration to be possible without the need to amend the Treaties, which would with reunification extend to the eastern part of Germany automatically, i.e. without the consent of the other member states being required¹⁷⁴.

(ii) Moving treaty boundary rule in Community law

The automatic extension of the Treaties could be considered as an application of the international legal principle of moving treaty boundaries. The Commission, however, assumed that the automatic extension would be effected by a norm of Community law not further specified. Thus, it was not compelled to deal with the question as to whether and how far the present international law of succession recognizes the above-mentioned principle¹⁷⁵. Since all the member states as well as the GDR were agreed on the mode of integration, the international law problem did simply not arise¹⁷⁶.

According to Art.79 of the ECSC Treaty, Art.227(1) of the EEC Treaty and Art.198 of the EURATOM Treaty, the Treaties apply to the whole of a member state's (European) territory, notwithstanding a limited number of exceptions. These Treaty provisions, which were not expressly invoked by the Commission, can be taken to constitute the Community law recognition, independent of public international law, of the principle of moving treaty boundaries¹⁷⁷. But this dynamic interpretation, which would leave it entirely to the member states to define their

¹⁷⁴ *Ibid.*, 43; Timmermans (note 139), 438. See already Ehlermann (note 15), 118 et seq. But see E. Klein, *An der Schwelle zur Wiedervereinigung Deutschlands*, NJW 1990, 1065 (1073).

¹⁷⁵ See S. Oeter, *German Unification and State Succession*, 349 et seq., in this issue.

¹⁷⁶ Cf. Klein (note 174).

¹⁷⁷ W. Hummer, in: Grabitz (note 16), Art.227 n.4; Everling (note 123), 14; D. Rauschnig /R. Hach, *Geltung des Rechts der Europäischen Gemeinschaften im Gebiet der DDR nach der Wiedervereinigung*, EuZW 1990, 344; Tomuschat (note 112), 422; Haifbronner (note 117), 455 et seq.; H.-W. Rengeling, *Das vereinte Deutschland in der Europäischen Gemeinschaft: Grundlagen zur Geltung des Gemeinschaftsrechts*, DVBl. 1990, 1307 (1308). But see also J. Thiesing, in: H. v. d. Groeben [et al.], *Kommentar zum EWG-Vertrag* (3rd ed. 1983), Art.227 n.10 et seq. (renegotiation of the Treaty would be inevitable in the case of German reunification); Rauschnig (note 124), 404; opinion of the Legal Committee of the European Parliament (June 1990), Doc.A 3-183/90/Part C, 60 (61).

territory for the purposes of Community law, is not cogent¹⁷⁸. A static interpretation, restricting the territorial scope of the Treaties to the member states' territorial extent at the time of their conclusion, would also do justice to the text of the cited provisions¹⁷⁹. It would furthermore take better account of the fact that the Treaties bring the influence of small and large member states into a complicated balance not to be upset by the territorial expansion of one of them¹⁸⁰. On the other hand, it does not seem practical to condition the effectiveness "with regard to European Community law" of acquisition of territory by West Germany on the consent of all the other member states¹⁸¹. The Federal Republic's declaration concerning reunification would, however, have given them a reciprocal right to a review of the Treaties¹⁸².

(iii) Precedents: Saarland and St. Pierre-et-Miquelon

Two earlier cases of territorial expansion of a member state were handled as if there was a moving treaty boundary norm in EC law. It is uncertain, however, if the member states then had an *opinio juris* to this effect or rather acted according to a political rationale. Apart from this, neither of the two cases reached an order of magnitude comparable to German reunification.

The first case occurred in 1957 when the Saarland was incorporated into the Federal Republic of Germany under a treaty with France. At that time, the member states of the ECSC were apparently agreed that the ECSC Treaty would subsequently cover the Saarland as a part of the Federal Republic, while it had earlier been included as a part of the French economic territory¹⁸³. A «Traité portant modification au Traité

¹⁷⁸ Cf. Randelzhofer (note 51), 106 et seq.; A. Dost /B. Hölzer, EG-Integration der DDR – rechtliche und praktische Probleme, Staat und Recht 1990, 672 (673 et seq.).

¹⁷⁹ Jacqué (note 112), 1002.

¹⁸⁰ H. Rittstieg, Deutschlands Rechtslage nach dem Staatsvertrag, Demokratie und Recht 1990, 289 (295); Grabitz/v. Bogdandy (note 76), 1076. Cf. also J. Delbrück, A European Peace Order and the German Question: Legal and Political Aspects, Michigan Journal of International Law 1990, 897 (910). But see Randelzhofer (note 51), 111; Hailbronner (note 117), 456.

¹⁸¹ But see Rittstieg *ibid.*

¹⁸² Randelzhofer (note 51), 113; Tomuschat (note 112), 424 et seq. But see Timmermans (note 139) (who ignores the declaration).

¹⁸³ F. Münch, Zum Saarvertrag vom 27. Oktober 1956, ZaöRV 1957/58, 1 (13); *id.*, Saar Territory, in: EPIL Inst.12 (1990), 334; Klein (note 58), 67.

instituant la Communauté Européenne du Charbon et de l'Acier»¹⁸⁴ that was actually concluded only effected some necessary formal changes and cannot serve to call in question the Community law principle of moving treaty boundaries¹⁸⁵. On the other hand, the Saarland was not newly integrated into the ECSC so that the handling of this case does not sufficiently prove the automatic extension rule either.

The second case concerned the French islands of St. Pierre-et-Miquelon off Canada that had originally been treated as overseas territories not covered by the EEC Treaty (Art.227(3) of the EEC Treaty and Annex IV). On July 19, 1976, the islands' status was changed by a French law into one of an overseas *département*¹⁸⁶ which would bring them within the area of application of the Treaty if Art.227(1) of the EEC Treaty was interpreted dynamically¹⁸⁷. The EEC Treaty was not amended and, though there was no express confirmation as to its automatic extension, St. Pierre-et-Miquelon was later omitted from the list of French overseas territories¹⁸⁸.

(iv) Result: legal uncertainty removed

Before German reunification, neither the text of the relevant Treaty provisions nor legal literature nor the Communities' practice offered a compelling argument for or against the existence of a moving treaty boundary rule in EC law. The reunification case has now settled the matter. The EC Commission expressed a legal opinion as to the existence of a moving treaty boundary rule of Community law, and the Council did not object but proceeded accordingly, nor was there any objection from individual member states. This tacit approval of the Commission's handling of the case bears sufficient testimony to a corresponding *opinio juris*.

It is also important to note that third states, including specially affected states like the CMEA countries, did not raise any protest either. Their conduct proves that the EC rule of moving treaty boundaries, now established beyond doubt, is compatible with international law.

¹⁸⁴ Of October 27, 1957 (BGBl. II, 1875).

¹⁸⁵ Cf. Ranzelzhofer (note 51), 108 note 17; Scherer (note 123), 14.

¹⁸⁶ Scherer, *ibid.*, 14. In 1985, the islands' former status was restored (Ranzelzhofer [note 51], 107).

¹⁸⁷ The ECJ judgment of October 10, 1978 (Case 148/77, *Hansen*), ECR 1978, 1787 (1805), does not touch this problem.

¹⁸⁸ Cf. Annex I of the Council Decision of December 16, 1980 (80/1186/EEC), OJ no. L 361/1.

*2. Automatic extension of secondary legislation and treaties concluded
by the Communities*

The Commission assumed that with the formal reunification not only the European Treaties but also secondary Community legislation would automatically apply in the territory of the former GDR, except where the Council specifically enacted temporary exceptions on a proposal from the Commission.

If one accepts the automatic extension of the Treaties to the territory accrued to the Federal Republic, the same will necessarily follow with regard to the whole body of secondary legislation. Regulations are directly applicable in and directives are binding upon each member state, i. e., with regard to their entire territory (Art.189[2],[3] of the EEC Treaty; Art.161 [2],[3] of the EURATOM Treaty^{189,190}). In the same way decisions are binding on the entire territory of those member states to which they are addressed.

The Commission went even further in stating, as a general principle, that the treaties concluded by the EC before German reunification also extended to the territory of the former GDR¹⁹¹. As those treaties are an integral part of Community law according to Art.228(2) of the EEC Treaty¹⁹², the Commission's position is consistent from a Community law perspective. The question, however, whether the other party or parties to the Community treaties are bound to accept this rule of Community law depends on the pertinent norms of public international law.

In this regard, the Commission stated that public international law concerning state succession was in a state of flux. Still there was no inherent reason why the basic legal rules of succession to treaty rights and obligations, like the rule of moving treaty boundaries, though addressed to states, should not apply to an entity like the EEC having international personality and having been granted extensive treaty-making power¹⁹³.

¹⁸⁹ Art.14 of the ECSC Treaty is less specific in this respect.

¹⁹⁰ But see Rauschnig/Hach (note 177), 344 et seq. See also C. Starck, *Deutschland auf dem Wege zur staatlichen Einheit*, JZ 1990, 349 (356).

¹⁹¹ Bullec, Suppl.4/1990, 47. See also Vedder (note 16), Art.228 n.44; Hailbronner (note 117), 456.

¹⁹² Vedder, *ibid.*, Art.228 n.45 with reference to the case law of the ECJ.

¹⁹³ But cf. Art.29 of the Vienna III Convention on the Law of Treaties between States and International Organizations or between International Organizations of March 21, 1986 (not yet in force; BGBl. 1990 II, 1415) which provides that each state party is bound in respect of its entire territory but does not contain an equivalent norm concerning international organizations.

But as the question of what those basic rules of international law provide is a matter of controversy, the Commission's reasoning is rather weak. As a practical matter, however, difficulties with the treaty partners of the EC will probably not arise over this issue.

3. Fate of treaties of the former GDR

Concerning the treaties concluded by the former GDR with third states¹⁹⁴, the Commission "rejects the application of the so-called negative aspect of the above-mentioned rule of moving treaty boundaries, which would lead to the automatic extinction of all GDR treaties with third States"¹⁹⁵. The Community was bound by the legal principle of the continuity of treaty rights and obligations, except for personal treaties inextricably linked with the political "persona" of the former GDR. On the other hand, it was clear that the continuity of those treaties would have to be subject to (re)negotiation, as it was likely that they conflicted with Community law, including Community treaties.

The latter statement leaves the alleged legal principle in an uncertain state. The potential conflict of GDR treaties with Community law could not be invoked as a legal ground to exonerate the EC from treaty obligations which would otherwise be binding upon it under an assumed succession rule of public international law¹⁹⁶. The Commission's position must therefore be taken as an objection to the existence of such an international legal norm. It seems that the Commission instead advocated a succession rule binding the Community only to the extent that it must be ready to (re)negotiate those treaties in good faith. In contrast to this, the UN Conference on Succession of States in Respect of Treaties had entered a legal rule into the Vienna II Convention on Succession of States in Respect of Treaties¹⁹⁷, obliging the successor state in merger cases to honor even incompatible treaty obligations of the states which have

¹⁹⁴ See the (incomplete) analytic inventory of GDR treaties affecting Community competence in BullEC, Suppl.4/1990, 48 et seq.

¹⁹⁵ *Ibid.*, 47.

¹⁹⁶ Cf. Art.27 (2) of the Vienna III Convention (note 193) reflecting a general rule of international law (see also Art.27 of the Vienna I Convention [note 74]).

¹⁹⁷ Of August 23, 1978 (not yet in force) (UN Doc.A/CONF.80/31, reprinted in ZaöRV 1979, 279).

united. It added only a political recommendation that problems arising be resolved by mutual agreement¹⁹⁸.

In any event, Art.234 of the EEC Treaty, which the Commission does not even mention, is inapplicable, because it only covers treaties of the Federal Republic of Germany concluded before the EEC Treaty entered into force. Even if one were ready to support an analogy, perhaps because the reunification in practical effect meant that the new part of the Federal Republic belatedly acceded to the EEC Treaty, Art.234 would still presuppose that the Federal Republic was in fact bound by GDR treaties, which is doubtful¹⁹⁹.

The matter is made more complicated by the fact that the allocation of treaty-making power to the EEC and its member states does not always correspond to the subject-matter of the various treaties concerned. There may thus be GDR treaties touching upon a number of subjects within the exclusive competence of the EEC as well as others within the exclusive competence of the Federal Republic. The Commission assumed that in cases of such treaties of mixed competence, the Community and united Germany each succeeded to the extent of their respective competence, and, as the obligation to (re)negotiate treaties must correspond to the treaty-making power, were jointly responsible for (re)negotiation in a carefully coordinated manner²⁰⁰.

Whether the EEC in fact succeeds to treaties of its member states in the case of devolution of competences is questionable²⁰¹. When in the *Burgoa* case the Commission based such a claim on Art.234 of the EEC Treaty, the ECJ rejected it²⁰². One should note that even under Art.106 of the EURATOM Treaty, which goes much further toward a succession by the Organization than Art.234 of the EEC Treaty, the Community assumes rights and obligations arising out of member states' treaties only as a result of agreements with the third states concerned.

¹⁹⁸ H. D. Treviranus, Die Konvention der Vereinten Nationen über Staatensukzession bei Verträgen, ZaöRV 1979, 259 (271 et seq.).

¹⁹⁹ Frowein (note 123), 27 et seq.; W. Heintschel v. Heinegg, Die Vereinigung der beiden deutschen Staaten und das Schicksal der von ihnen beiden abgeschlossenen völkerrechtlichen Verträge (RIW [Beilage 12 zu no.7/1990], 9 (14 et seq.)). But see Bleckmann/Erberich (note 84), 859; H.-J. Wolff, Schrittweise Herstellung der deutschen Einheit und Europäisches Gemeinschaftsrecht, NJW 1990, 2168 (2172).

²⁰⁰ BullEC, Suppl.4/1990, 47. See *infra* VII for the German position.

²⁰¹ H. Krück, Völkerrechtliche Verträge im Recht der Europäischen Gemeinschaften (1977), 121 et seq.

²⁰² Judgment of October 14, 1980 (Case 812/79), ECR 1980, 2787 (2798, 2803); Vedder (note 16), Art.234 n.16.

Besides (re)negotiation, the Commission suggested four different ways to resolve conflicts between GDR treaties and Community law²⁰³. The GDR could, before reunification, denounce such treaties, if possible, and in fact did so in a number of cases. In other cases the united Germany could, until (re)negotiations were concluded, be authorized, in derogation of Community law, to exercise the rights and fulfil the duties under inherited treaties falling within the range of exclusive Community competence or mixed competence. If (re)negotiations failed, incompatibilities of inherited treaty obligations with Community law could be reconciled by autonomous adaption of Community law. The Commission finally referred to the present law of succession in respect of treaties which might open the possibility of restricting treaty rights and obligations to the territory to which they formerly applied²⁰⁴. Such a solution could be reasonable in the case of economic obligations of a limited duration and of economic rights specifically geared to GDR capacities like fishing rights. The Commission, however, noted that such a solution could only be the result of an understanding with the treaty partner concerned, and that it might be the most convenient legal technique to meet justified economic or political requests from third states outside the realm of legal obligation. These remarks clearly indicate that the Commission did not consider the régime proposed in the Vienna II Convention as an already binding rule of international law. The Commission further pointed out that the divided treaty régime would only be suitable for a brief period, since the former GDR territory could not be effectively isolated from the rest of the Common Market for any length of time.

D. Transitional and Interim Measures of the EEC and their Implementation by Germany

1. Outline of the problems

It had been obvious from the first that East Germany could not immediately be lifted to the *acquis communautaire* level in all fields but that considerable exceptions and adaptation periods would have to be allowed (transitional measures), concerning roughly 20 per cent of the secondary legislation, much the same as in the case of some recently acceded

²⁰³ BullEC, Suppl.4/1990, 47 et seq.

²⁰⁴ Cf. Art.31 (2) of the Vienna II Convention (note 197). See Treviranus (note 198), 271 et seq.

member states. Due to the growing pace of the German reunification process it was not possible to complete the necessary process of secondary legislation on time. Thus interim measures of an extraordinary character were required to bridge the gap.

The European Council's Dublin session on April 28, 1990, charged the EC Commission with drawing up the necessary transitional measures in accordance with the following standards: They had to "permit a balanced integration based on the principles of cohesion and solidarity and on the need to take account of all the interests involved, including those resulting from the *acquis communautaire*". The transitional measures had to be confined to what was strictly necessary and aim at full integration as rapidly and as harmoniously as possible²⁰⁵.

Transitional measures in accession cases are included in the accession treaty made according to Art.237 of the EEC Treaty so that they attain the status of primary Community law. With regard to the GDR, however, the integration was to be accomplished solely on the level of secondary legislation, without any Treaty amendments. This raised questions heretofore unknown, namely concerning the Treaty bases of adjustment acts of secondary legislation and their compatibility with general principles of Community law. The necessary interim measures aggravated those problems because they had to take the form of large-scale delegations of legislative powers.

2. Admissibility of transitional measures

According to the Commission's view, transitional adjustments of secondary legislation had to be based on the respective enabling clauses of the Treaties carrying the original enactment²⁰⁶, and not on Art.235 of the EEC Treaty²⁰⁷. The Commission held that such kinds of measures could be taken without departing in any way from the Treaties, and it relied on the principle of equality, recognized as a general principle of Community law in the case law of the ECJ²⁰⁸.

This principle allowed and indeed required that rules of secondary legislation be modulated to take account of objective differences between

²⁰⁵ BullEC No.4/1990, 8.

²⁰⁶ *Ibid.*, 44.

²⁰⁷ But see Starck (note 190), 356.

²⁰⁸ J. Schwarze, *Europäisches Verwaltungsrecht*, Vol.1 (1988), 610 et seq. See also Jacqu e (note 112), 1013.

economies in different parts of the Communities. Since the SEA, the principle was even enshrined as follows in Art.8c of the EEC Treaty: If lesser developed national economies are unable to keep pace with the general integration progress, the Commission may under Art.8c(2) of the EEC Treaty propose those appropriate exceptional provisions of a temporary nature which cause the least possible disturbance to the Common Market, in derogation of the fundamental principle of uniform application of Community law²⁰⁹. Though Art.8c of the EEC Treaty is apparently designed to be applied to the whole of a member state's territory and not to a mere region, there is no objection to using the provision's fundamental concept in favor of only the eastern part of reunified Germany. This actually corresponds to the least possible disturbance condition.

The Commission tried to restrict the derogations from secondary legislation to those absolutely essential so as to uphold the principle of uniform application of Community law as far as possible. It therefore developed its adjustment program within a framework determined by three fixed points: (i) the acceptance of the *acquis communautaire* had to be both the starting point and the ultimate objective; (ii) any transitional arrangements had to be warranted on objective economic, social, or legal grounds; and (iii) all exceptions or derogations had to be temporary and cause as little disturbance as possible to the functioning of the Common Market²¹⁰. According to the Commission's view, this was not only necessary to meet the conditions of Art.8c(2) of the EEC Treaty but also to enable it to base individual measures on the same Treaty provision that allowed for the original legal instrument from which derogation was granted. Apparently the Commission read into each Treaty article granting legislative power the implicit condition that the legal instrument to which it gave rise must have uniform application throughout the European Communities.

²⁰⁹ The importance of this principle has been continuously emphasized by the ECJ (see ECJ, judgment of July 15, 1964 [Case 6/64, *Costa v. ENEL*]), ECR 1964, 1251 (1269 et seq.); judgment of June 19, 1990 (Case C-213/89, *Factortame*), (1991) 1 ALLER 70, 104 et seq.).

²¹⁰ BullEC, Suppl.4/1990, 44.

3. Interim measures

(i) Necessity of interim measures

The desire of the Community institutions to bring about integration of the GDR territory in parallel with German reunification ran into difficulties when the pace of reunification increased dramatically after the March elections in the GDR. As the completion of reunification would automatically put into effect the entire Community legislation in East Germany, all adjustments necessary to keep either the economy there from coming to a standstill or the Federal Republic of Germany from committing massive violations of Community law would have had to become effective before that date to prevent legal chaos²¹¹. When the East German Parliament on August 23, 1990, passed a declaration of accession to the Federal Republic according to Art.23 of the BL with effect from October 3, 1990²¹², a close deadline was set for the passage of dozens of necessary legal instruments.

The Community legislative procedure requires collaboration of the Commission and the Council and normally participation of the European Parliament either in form of mere consultation or even cooperation (Art.149[2] of the EEC Treaty), depending on the pertinent enabling clause of the Treaties. It therefore is rather cumbersome and could not have been completed in time so that the Commission was compelled to propose that interim measures be enacted in an expedited procedure.

(ii) Commission proposals

The Commission presented, together with a large number of specific proposals for transitional measures geared to existing individual legal instruments or groups of closely related legal instruments, two comprehensive contingency proposals for interim measures that covered the whole field of secondary legislation requiring some kind of adaptation.

For reasons of form and procedure, the Commission submitted two separate contingency proposals: a Proposal for a Council Directive on interim measures applicable after the unification of Germany, in anticipation of the adoption of transitional measures by the Council in cooperation

²¹¹ The Commission instead apprehended a "legal vacuum" between German reunification and the final adoption by the Council of the necessary transitional and technical adaptation measures (*ibid.*, 29, 46). The term is technically incorrect.

²¹² GBl. DDR I, no.57 (September 4, 1990), 1324.

with the European Parliament²¹³, and a Proposal for a Council Regulation on interim measures applicable after the unification of Germany, in anticipation of the adoption of transitional measures by the Council after consultation with the European Parliament²¹⁴. Both were based on a number of EEC Treaty provisions. The proposed directive made use of all those enabling clauses that only permitted the enactment of legal instruments in the form of a directive and/or required cooperation with the European Parliament (Arts.49, 57, 66, 100a, 118a of the EEC Treaty). The proposed regulation rested on Treaty norms allowing regulations and requiring only consultation of the Parliament (Arts.28, 42, 43, 75, 103, 113, 130s, 235 of the EEC Treaty).

Arts.1 and 2 of the two Proposals provided in almost identical words that interim measures in derogation of secondary legislation should apply, corresponding to the transitional measures proposed by the Commission but not put into force in time before the reunification date. These interim measures were to consist of German legislation, enacted pursuant to an authorization by the Commission, which would keep in force in the East German territory legislation incompatible with secondary Community law. This solution amounted to a preliminary enactment, in an extraordinary procedure, of the transitional measures of the EEC by the German legislature, based on an authorization of the Commission from the Council, passed on to the Federal Republic by the Commission.

(iii) Interim measures ultimately enacted

On September 17, 1990, the Council enacted Regulation (EEC) No.2684/90 on interim measures applicable after the reunification of Germany, in anticipation of the adoption of transitional measures by the Council either in cooperation²¹⁵ or after consultation with the European Parliament²¹⁶, and Directive 90/476/EEC on interim measures applicable after the reunification of Germany in anticipation of the adoption of transitional measures by the Council in cooperation with the European Parliament²¹⁷. The Regulation entered into force on September 26, 1990

²¹³ BullEC, Suppl.4/1990, 116.

²¹⁴ *Ibid.*, 118.

²¹⁵ This reference had to be added because the Council, departing from the original Commission proposal, included in the Regulation also measures based on Art.100a of the EEC Treaty.

²¹⁶ OJ no.L 263/1 (reprinted in the annex C.1).

²¹⁷ OJ no.L 266/1 (reprinted in the annex C.2).

(Art.191 [1] of the EEC Treaty); notification of the Directive was notified to the member states on September 20, 1990 (Art.191 [2] of the EEC Treaty). Though both follow the Commission Proposals' general approach, and in particular adopt the double authorization solution, they contain several amendments: Common Art.2 (2) includes a reference to the extraordinary character of the legal instruments, not to be subsequently cited as precedents, and sets December 31, 1990, as their ultimate expiration date. Art.4 (2) of the Regulation and Art.3 (2) of the Directive accord member states the right to refer difficulties arising from derogations made by the Federal Republic to the Commission, which is obligated to deal with these references as a matter of urgency. Moreover, separate provisions were added to enable the European Parliament to exercise at least some political control of the handling of East Germany's integration into the EC (common Art.2 [3]; Art.6 of the Regulation, Art.5 of the Directive).

In a multitude of legal instruments enacted mostly on September 27, 1990, the Commission made use of the authorizations²¹⁸. While most of the instruments concern agricultural matters only, one also covers all the other fields requiring adjustments, namely Commission Decision 90/481/EEC introducing interim measures relating to the unification of Germany²¹⁹. Taking the form of a decision addressed to the Federal Republic, it contains an authorization not to comply with a great number of regulations and directives listed in the Decision's annex. Ordinarily one should expect that derogations from regulations or directives be granted in the form of a regulation or directive while here the Commission took a decision. There is nevertheless no incompatibility of legal form, as the basic legal instruments, namely the Council Regulation (EEC) no.2684/90 and the Council Directive 90/476/EEC, were enacted in the appropriate form and do not bind the Commission as to the legal form in which it may make use of the authorization granted.

(iv) Admissibility of the interim measures

It is doubtful whether the EEC Treaty permits the kind of "highly unorthodox"^{219a} double authorization that is at the heart of the interim

²¹⁸ See OJ nos.L 267 and L 317. See also Commission Regulation (EEC) no.3112/90 of October 26, 1990 (OJ no.L 296/51).

²¹⁹ OJ no.L 267/37 (reprinted in the annex C.3).

^{219a} Cf. resolution of November 21, 1990, of the European Parliament, sub 4 (OJ no.C 324/136).

measures. The Treaty's only delegation norms, pertaining to the first or inter-organ authorization, are Art.145 cl.3 and Art.155 cl.4. Delegations of powers outside the scope of these provisions are considered impermissible pursuant to the *compétence d'attribution* doctrine²²⁰.

Under these Treaty provisions, the Council is normally restricted to conferring on the Commission only powers for the "implementation" of rules enacted by itself. The Regulation and Directive on interim measures, however, confer on the Commission power to authorize derogation from existing secondary legislation. This amounts to a transfer of original legislative power and effects a shift in the institutional balance, the maintenance of which is one of the unwritten fundamental constitutional principles of the Treaties²²¹.

At the outset it should be noted that the ECJ has interpreted the term "implementation" broadly²²². Account should also be taken of the emergency situation and the fact that the derogation power was granted for only about three months and circumscribed in detail in common Art.2(1) subsection 2 by way of reference to the individual proposals of transitional measures annexed to the instruments. The Commission was the only body capable of acting quickly enough to guarantee that the necessary interim measures were in force by the deadline of October 3, 1990. With regard to all this, the authorization of the Commission can be considered as compatible with the EEC Treaty.

But if the Commission proposals for the necessary transitional measures had already been submitted, why did not the Council itself put them provisionally into force instead of authorizing the Commission to do so? This objection seemingly casts doubt on whether the Council was really "unable to act", as it asserts in Art.1 of the Regulation and Directive. Actually, however, it misconceives the political content of the term "ability to act". The Council had a legitimate interest not to preempt in any way its political discretion with regard to the transitional measures by prematurely approving the Commission proposals, and be it only provisionally, before it had had sufficient time to deliberate²²³. If one considers the sensitivity of dispensing with the fundamental principle of uni-

²²⁰ W. H u m m e r, in: Grabitz (note 16), Art.155 n.46.

²²¹ Cf., e.g., ECJ, judgment of May 22, 1990 (Case C-70/88, *European Parliament v. Council*), ZaöRV 1990, 832.

²²² ECJ, judgment of October 30, 1975 (Case 23/75, *Rey Soda*), ECR 1975, 1279 (1302); judgment of May 15, 1984 (Case 121/83, *Zuckerfabrik Franken*), ECR 1984, 2039 (2058).

²²³ Cf. the last recital of both legal instruments (in the annex).

form application of Community law throughout the EC which was at stake, the Council's political interest was not devoid of a legal basis.

The second authorization concerning the relationship Commission/Germany is less problematic. There are precedents for the authorization of member states by the EEC temporarily to maintain legislation incompatible with the Treaty²²⁴. Even though the EEC Treaty does not contain an express enabling clause to this effect, the *compétence d'attribution* principle is not violated. It serves namely only to protect the member states against power arrogations by the Community institutions which impair the states' residuary competences and not against an expansion of the states' capacity to act in areas of Community jurisdiction.

As far as legalizing the maintenance of national laws incompatible with Community law is concerned, practicability also dictates the granting of a corresponding authorization to the member states concerned. This holds even more true in an emergency situation like the one on hand. The alternative would namely be to enact a Community legal instrument containing all the necessary derogations. Misgivings with regard to legal certainty can be removed by obliging the member state to notify the Commission of any use made of the authorization (cf. common Art.2(3) of the instruments).

(v) Implementation acts by Germany

Art.4(1) of the legislative act of assent to the Unification Treaty of August 31, 1990, took up the EEC authorizations and turned them into a legislative authorization under Art.80 of the BL of the Federal Government to enact by way of executive regulation the necessary measures²²⁵. The Federal Government made use of this authorization by the »EG-Recht-Überleitungsverordnung« (EC Law Transitory Regulation) of Sep-

²²⁴ Cf. the regularly renewed authorizations of member states to maintain trade agreements with third states long after the devolution to the EEC of the exclusive treaty-making power in the field of foreign commerce (cf., e.g., Decision of the Council of February 12, 1990 [90/61/EEC], OJ no.L 42/59).

²²⁵ Of September 23, 1990 (BGBl.II, 885), entered into force on September 29, 1990. Art.4(1) reads: "The Federal Government is hereby authorized, in making use of authorizations by the Council of the European communities or according to relevant legal instruments of the European communities, by way of regulation temporarily to postpone or facilitate the application and implementation of European Community law or of federal law enacted on the basis of such law, or to adjust the legal provisions concerned ...".

tember 28, 1990²²⁶, that had been drawn up even before the Commission passed the authorization acts²²⁷.

The Regulation's § 1 in conjunction with Annex 1 modified several directly applicable EEC regulations. § 2 in conjunction with Annexes 2 and 3 modified a large number of German statutory provisions transposing EEC directives. Under § 3, products made in derogation of EEC standards could only be brought in circulation within the territory of the former GDR or exported to third states not members of the EC, as required by the pertinent EEC authorizations.

The EC Law Transitory Regulation entered into force on October 3, 1990, and expired on December 31, 1990. Its operative parts nevertheless contained many provisions which were to remain effective beyond that date. This contradiction was presumably due to the fact that the Federal Government hurriedly copied the Commission proposals for the transitional measures ultimately to be enacted by the Council which were to extend beyond December 31, 1990.

4. Survey of the ultimately adopted transitional measures

The transitional measures ultimately adopted by the Council or Commission after German reunification in general assume two different basic forms²²⁸. They either leave an act of secondary legislation untouched and authorize the Federal Republic of Germany to make specified derogations for a certain period of time²²⁹, mostly until December 31, 1992, but

²²⁶ BGBl.I, 2117, retroactively amended by Regulation of November 14, 1990 (BGBl.I, 2502). See also the draft regulation with supporting arguments of September 18, 1990 (BR-Drs.628/90 [September 18, 1990]).

²²⁷ See BR-Drs.628/90, 45.

²²⁸ On the legislative procedure cf. XXIVth General Report (note 157), 43 et seq. See also R. Priebe, Die Beschlüsse des Rates zur Eingliederung der neuen deutschen Bundesländer in die Europäischen Gemeinschaften, *EuZW* 1991, 113.

²²⁹ See, e.g., Council Decision of September 3, 1990 authorizing the Federal Republic of Germany to grant an exemption from Arts.14 and 15 of the Sixth Directive 77/388/EEC on the harmonization of the laws of the Member States relating to turnover taxes for Soviet armed forces stationed on the territory of the Federal Republic of Germany (OJ no.L 349/19); Council Regulation (EEC) no.3571/90 of December 4, 1990 introducing various measures concerning the implementation of the common fisheries policy in the former German Democratic Republic (OJ no.L 353/10); Council Directive of December 4, 1990 on transitional measures applicable in Germany in the context of the harmonization of technical rules for certain products (90/650/EEC) (OJ no.L 353/39).

sometimes until December 1, 1995²³⁰, or they amend the Community legal instruments themselves, normally also for a certain period of time²³¹, sometimes, however, permanently²³².

The Federal Republic made use of the derogation authorizations when on December 18, 1990, the Federal Government enacted a new EC Law Transitory Regulation that entered into force on January 1, 1991, and contains no expiration date²³³. Its provisions are in line with its predecessor, except for §3, allowing German authorities to admit certain products from CMEA states which do not meet Community standards into the territory of the former GDR without levying customs duties according to the Common Customs Tariff. This provision is based on additional EEC authorizations²³⁴, enacted to enable Germany to honor treaty arrangements of the former GDR with its CMEA trading partners²³⁵.

²³⁰ Cf. Council Directive of December 4, 1990 on transitional measures applicable in Germany with regard to certain Community provisions relating to the protection of the environment (90/656/EEC) (OJ no.L 353/59).

²³¹ See, e.g., Commission Regulation (EEC) no.2776/90 of September 27, 1990 on transitional measures to be applied in the wine sector after the unification of Germany in the territory of the former German Democratic Republic (OJ no.L 267/30); Council Regulation (EEC) no.3577/90 of December 4, 1990 on the transitional measures and adjustments required in the agricultural sector as a result of German unification (OJ no.L 353/23); Commission Decision no.3788/90/ECSC of December 19, 1990 on the introduction of transitional tariff measures for products covered by the Treaty establishing the ECSC for Bulgaria, Czechoslovakia, Hungary, Poland, Romania, the Soviet Union and Yugoslavia until December 31, 1992 to take account of German unification (OJ no.L 364/27).

²³² See, e.g., Commission Regulation (EEC) no.3784/90 of December 19, 1990, amending Regulation (EEC) no.610/77 on the determination of prices of nature bovine animals on representative Community markets and the survey of prices of certain other cattle in the Community (OJ no.L 364/21).

²³³ BGBl.I, 2915.

²³⁴ Council Regulation (EEC) no.3568/90 of December 4, 1990 on the introduction of transitional tariff measures for Bulgaria, Czechoslovakia, Hungary, Poland, Romania, the Soviet Union and Yugoslavia until December 31, 1992 to take account of German unification (OJ no.L 353/1); Council Directive of December 4, 1990 on transitional measures applicable in Germany in the context of the harmonization of technical rules (90/657/EEC) (OJ no.L 353/65).

²³⁵ See also Commission Regulation (EEC) no.3714/90 of December 19, 1990 on transitional measures on trade in certain fishery products with the Soviet Union after the unification of Germany (OJ no.L 358/36).

VI. EC Aspects of the Treaty Establishing a Monetary, Economic and Social Union (State Treaty) of May 18, 1990

A. Preparing the Ground for the GDR's Integration into the EC

The first decisive step towards reunification was made when the two German states concluded the Treaty Establishing a Monetary, Economic and Social Union²³⁶. The Treaty's preamble, in which both parties committed themselves to achieve unification according to Art.23 of the BL, contains clauses to the effect that German unity was to be embedded in a European peace order, that it was to contribute to European unity, and more specifically that the Treaty provisions were to safeguard the application of the law of the European Communities following the establishment of national unity.

The State Treaty was decisive also in that it enabled the GDR to fulfil several indispensable conditions to which its integration into the EC, and, for that matter, its accession to the Federal Republic of Germany²³⁷, was subject. Those conditions concerned the GDR's economic, political as well as legal system.

With regard to the economic system, Art.1 (3) of the Treaty provided that the common economic system of the two parts of Germany was to be the social market economy, i. e., a system determined particularly by private ownership, competition, free pricing and, as a basic principle, complete freedom of movement of labor, capital, goods and services, taking into account the requirements of environmental protection. The hardships of the market economy were to be mitigated by the principle of social justice, realized primarily through a comprehensive system of social security (Art.1[4]). The GDR thus agreed completely to reverse its economic system and bring it into line with the common standard of the EC countries. With the establishment of a monetary union on July 1, 1990, the GDR was already *ipso facto* included in the European Monetary System.

But the GDR also underwent a total remodelling of its political system when it agreed to introduce a free, democratic, federal and social basic order governed by the rule of law²³⁸ and to abolish all constitutional

²³⁶ *Supra* note 150.

²³⁷ Cf. Art.28 (1), (3) BL; Randelzhofer (note 51), 114.

²³⁸ Cf. BVerfGE 2, 1 (12 et seq.).

provisions to the contrary (Art.2 of the State Treaty)²³⁹. The GDR formally complied with Art.2, even before it ratified the Treaty, by the Act on the Amendment and Supplementing of the Constitution of the German Democratic Republic (Constitutional Principles) of June 17, 1990²⁴⁰. Art.8 of the Act furthermore provided that the GDR could by constitutional amendment transfer sovereign powers to inter-governmental institutions and institutions of the Federal Republic or consent to limitations upon its rights of sovereignty.

Finally the GDR agreed to introduce a great number of laws of the Federal Republic already in line with Community law pertaining to currency, credit, money and coinage, competition, commerce, corporations and partnerships, workers' participation in management etc. in full or in part (Art.3 of the State Treaty in conjunction with Annex II). Thus a considerable part of the *acquis communautaire* was adopted by the GDR before formal reunification. Pursuant to Art.4 of the Treaty, the GDR moreover had to adjust its entire legal system to the principles of a free democratic basic order and a social market economy²⁴¹.

In Art.11 (3), the GDR specifically agreed, taking into consideration its foreign trade relations with CMEA states, to bring its policy progressively into line with the law and the economic policy goals of the European Communities. Concerning customs duties the GDR was obliged, notwithstanding Art.11 (3), to adopt gradually the EC customs law including the Common Customs Tariff (Art.30 [1] of the Treaty). According to Art.30 (2), the intra-German border did, however, not become an EC customs frontier²⁴².

Art.12 of the State Treaty adjusted intra-German trade to the requirements of the monetary and economic union. While the Protocol on German Internal Trade remained formally in force, the two German states undertook in Art.12 (2) to guarantee that goods of third-state origin, not covered by the Protocol, would be transported across the intra-German bor-

²³⁹ Art.2 may have only been declaratory of constitutional changes already effected by the 1989 revolution as such and/or the developments since then (D. Rauschnig, *Der deutsch-deutsche Staatsvertrag als Schritt zur Einheit Deutschlands*, *Aus Politik und Zeitgeschichte*, B 33/90 [August 10, 1990], 3, 12).

²⁴⁰ *GBL DDR I*, no.33 (June 22, 1990), 299.

²⁴¹ See also Principle A.I.1 of the Joint Protocol on Guiding Principles annexed to the Treaty providing that the law of the GDR would be remodelled and guided by the legal order of the EC.

²⁴² See *Denkschrift zum Staatsvertrag* (BT-Drs.11/7350, 97). See also Stiehle/Suwalski, *Zum Stand der Neugestaltung des Zoll- und Verbrauchsteuerrechts der DDR*, *DtZ* 1990, 270.

der only under customs supervision²⁴³. They promised to cooperate in foreign trade matters while observing the competences of the European Communities (Art.13[3] of the Treaty). Under Art.13(2), the developed external economic relations of the GDR, particularly existing treaty obligations, enjoyed protection regarding legitimate trade expectations (*Vertrauensschutz*). They would be further developed and extended in accordance with free market principles, and, where necessary, adjusted in agreement with the other contracting parties.

Concerning agriculture, according to Art.15 of the State Treaty, the GDR had to introduce a price support and external protection scheme in line with the EC market organization, so that agricultural producer prices became adjusted to those in the Federal Republic, and to refrain from introducing levies or refunds with regard to trade with the other eleven EC member states, provided that the Community did likewise *vis-à-vis* the GDR.

Art.35 eventually provided that the State Treaty did not affect treaties concluded by the Federal Republic or the GDR with third states, which amounted to a general proviso also in favor of the EC Treaties²⁴⁴.

B. The Schengen Problem

Art.12(3) of the State Treaty deserves some closer examination. In view of EC rules concerning the free flow of persons, goods, services and capital within the Community, the two German states agreed in this article to create as soon as possible the preconditions for complete abolition of controls at the intra-German border. For the implementation of the undertaking, the Government of the Federal Republic and the Government of the GDR on July 1, 1990, concluded an Agreement on the Termination of Passport Controls at the Intra-German Borders²⁴⁵.

This agreement came relatively late so that it could not be incorporated into the State Treaty because the Federal Republic of Germany was a party to the Schengen Accord, an executive agreement of June 14,

²⁴³ See the Regulation concerning the Movement of Goods and Services between the German Democratic Republic and the Federal Republic of Germany of July 4, 1990 (GBl. DDR I, no.48 [August 8, 1990], 859).

²⁴⁴ Cf. Arts.4, 30(2) Vienna I Convention (note 74).

²⁴⁵ BGBl.II, 570. The agreement was put into force in an abbreviated procedure based on Art.35 of the act assenting to the State Treaty of June 25, 1990 (BGBl.II, 518).

1985²⁴⁶. In it, Belgium, France, Luxemburg, the Netherlands and the Federal Republic had agreed to simplify controls at their common borders and work for their complete abolition. This was to serve as a model for the entire EC where with the completion of the internal market on January 1, 1993, all internal border controls should be eliminated while controls at the Community's external frontiers should at the same time be intensified. In this Schengen I Accord, no specific account was taken of the Germans in the GDR who then did not enjoy freedom to travel. The West German Government considered them as German nationals and without hesitation issued West German passports to those few able (and willing) to apply for them, a practice to which the other parties to the Accord did not object.

Soon after Schengen I, talks began between the five states parties to reach a new accord on the total abolition of border controls for the sake of the free movement of persons, goods and services. At the end of 1989, the Schengen II Accord was ready for signature. But the signing ceremony was postponed at the request of the Federal Republic²⁴⁷ after the GDR had opened its borders on November 9, 1989. More and more East Germans thereupon tried to cross the West German border with France etc., using their GDR passports, and many were rejected because they did not have the necessary visas. The West German declaration concerning citizenship of 1957 arguably did not cover East Germans using GDR passports²⁴⁸ because they had not "activated" their dormant (West) German citizenship. It did not extend to the Schengen system either, which was deliberately kept outside the Community framework. The Federal Republic insisted that the East Germans benefit from the freedom of movement in the Schengen area while the four other parties to the system feared that the opening of the intra-German border, which was an external frontier for the purposes of the Schengen system, would lead to an uncontrolled influx of third-country aliens.

On June 19, 1990, the Schengen II Accord was finally signed²⁴⁹. Pur-

²⁴⁶ Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on gradual abolition of controls at frontiers, reprinted in *Archiv des Völkerrechts* 1989, 487.

²⁴⁷ W. Schäuble, *Europa ohne Grenzen – eine sichere Gemeinschaft*, EA 1990, 203 (205, footnote).

²⁴⁸ But see Bleckmann/Erberich (note 84), 853.

²⁴⁹ Agreement on the Implementation of the Schengen Accord of June 14, 1985, between the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic concerning the Gradual Reduction of Controls at their Common

suant to its Art.136 bilateral agreements of any signatory with third states on the reduction of border controls are prohibited unless the other parties give their consent²⁵⁰. The attached protocol contains a joint declaration with regard to the territorial scope of the Accord:

"The States Parties declare: After the unification of the two German States the binding effect of the Accord under public international law will also extend to the present territory of the German Democratic Republic".

The Federal Republic made the following unilateral declaration:

"1. The Accord is being concluded with the unification of the two German States in view. The German Democratic Republic is not a foreign country in relation to the Federal Republic of Germany. Article 136 does not apply to the relation of the Federal Republic of Germany to the German Democratic Republic ...".

The GDR expressly consented to the view that the Accord would be applicable to its territory after reunification. Beginning July 1, 1990, the Benelux states and France permitted East Germans entry without a visa for visits of up to three months²⁵¹.

The Agreement on the Termination of Passport Controls at the Intra-German Borders, which became obsolete with formal reunification²⁵², expressly refers to the two Schengen Accords in its preamble and in Arts.4 and 5, dealing with visa regulations and controls at the external frontiers with regard to third-country aliens.

C. Compatibility of the State Treaty of May 18, 1990, with Community Law

In its communication of June 14, 1990, to the European Council²⁵³, the EC Commission examined the implications of the State Treaty for the Communities. It considered the Treaty to be both the legal framework and the main instrument for the gradual integration of the GDR into the legal order of the Community before the formal unification of the two German states. The Treaty's general content was compatible with Community law, and even Art.13 on foreign trade and payments, entering an

Borders (not yet in force; not yet published). Italy signed the Accord on November 27, 1990 (EUROPE, no.5379, November 28, 1990, 3).

²⁵⁰ Cf. Art.28 of Schengen I Accord.

²⁵¹ See the Federal Government's draft memorial on the Schengen II Accord, p.3 (not yet published).

²⁵² See Art.40(2) Unification Treaty.

²⁵³ *Supra* note 168.

area of exclusive Community jurisdiction, was acceptable as it took account of the allocation of competences in its Sec.3²⁵⁴.

The Commission also considered the general proviso in favor of international treaties in Art.35 of the Treaty, in particular its relevance to the arbitral tribunal provided for in Art.7. It criticized that no specific stipulation had been made to the effect that the tribunal should seek preliminary rulings from the ECJ pursuant to Art.177 of the EEC Treaty when a dispute between the contracting parties involved questions of Community law. But it could be argued that Art.35 also referred to Art.177 of the EEC Treaty, particularly if interpreted in the light of the State Treaty objective to make preparations for the formal integration of the GDR into the EC²⁵⁵. The Commission nevertheless expected the Federal Government to give an undertaking that it would defend this point of view in any procedure before the arbitral tribunal. There has, however, been no such procedure so far, and there probably never will be.

In another respect, Art.7(3) of the Treaty established a connection between the arbitral tribunal and the EC providing that if the tribunal's members were not nominated within the period prescribed, the President of the ECJ would make the necessary appointments, a precautionary measure that proved unnecessary.

A further objection made by the Commission concerned the fact that the State Treaty did not contain an express provision guaranteeing the principle of equal treatment for Community nationals and firms. When signing the Treaty, the GDR had declared that it would, on a basis of reciprocity, accord nationals and firms from all Community member states the same treatment as natural persons and firms from the Federal Republic, if the matter concerned might affect the area of EC jurisdiction and if there was no express provision to the contrary in the State Treaty²⁵⁶.

Finally, according to Art.4(1) of the State Treaty in conjunction with Annex IV No.7, the GDR was actually bound to introduce the West German road-tax for trucks the legality of which was being contested by the Commission in a procedure under Art.169 of the EEC Treaty still pending before the EEC. Following an interim order by the Court²⁵⁷, the road tax was suspended in all of Germany.

²⁵⁴ See also Bleckmann/Erberich (note 84), 859 et seq.

²⁵⁵ *Ibid.*, 854.

²⁵⁶ BGBl.II, 567. See N. Reich, Die Bedeutung des EG-Wirtschaftsrechts für den deutschen Einigungsprozeß, in: Reich/Ahrzogl (note 163), 61 (65 et seq.).

²⁵⁷ Order of July 12, 1990 (Case C-195/90R), OJ no.C 199/7.

D. Community Reaction: Establishment of a
de facto Customs Union

The Commission interpreted the State Treaty, in conformity with the principle of equal treatment, to the effect that the GDR would not apply levies, refunds, customs duties and quantitative restrictions to the member states other than the Federal Republic of Germany, provided that the EC offered reciprocity²⁵⁸. Consequently, the Commission proposed legislation authorizing it to suspend customs duties and agricultural levies in the light of measures applied in the GDR.

The Council gave such authorization in Regulation (EEC) No.1794/90 of June 28, 1990 on transitional measures concerning trade with the German Democratic Republic²⁵⁹, based on Arts.28, 113 of the EEC Treaty. Technically, the Council itself determined that customs duties and charges having equivalent effect, as well as quantitative restrictions were suspended if the Commission determined, under a specific procedure with the assistance of a committee composed of representatives of the member states, that certain conditions were met by the GDR. The Commission accordingly enacted Regulation (EEC) no.1795/90 of June 29, 1990 concerning the methods of implementation of Council Regulation No.1794/90 on the transitional measures for trade with the German Democratic Republic²⁶⁰.

Concerning agricultural products, a separate Council Regulation (EEC) No.2060/90 of July 16, 1990²⁶¹ on transitional measures concerning trade with the German Democratic Republic in the agriculture and fisheries sector had to be made because under Art.43 (2) of the EEC Treaty consultation with the European Parliament was required, which caused some delay²⁶². Acting on the authorization thus given, the Commission then on July 31, 1990, made Regulation (EEC) No.2252/90 concerning the methods of implementation of Council Regulation No.2060/90²⁶³.

²⁵⁸ Bullec, Suppl.4/1990, 20, 23.

²⁵⁹ OJ no.L 166/1. Concerning the ECSC, the Commission took the corresponding Decision no.1796/90/ECSC of June 29, 1990 on the suspension of customs duties and quantitative restrictions for products falling within the ECSC Treaty coming from the German Democratic Republic (OJ no.L 166/5) (see Timmermans [note 139], 449).

²⁶⁰ OJ no.L 166/3. This Regulation was also based on the ECSC Decision (note 259).

²⁶¹ OJ no.L 188/1.

²⁶² See J. Schultze, Errichtung einer de facto-Zollunion zwischen EG und DDR ab 1.7.1990, RIW 1990, 679 et seq.

²⁶³ OJ no.L 203/61. J. Heine, Les mesures prises dans le secteur agricole pour l'intégration de la RDA dans la Communauté, Revue du Marché Commun 1991, 199 et seq.

The GDR on June 22, 1990, enacted a new Tariff Act²⁶⁴, in accordance with Art.4(1) and Annex V no.6 of the State Treaty, and on July 4, 1990, adopted the Regulation on the Trade in Goods and Services between the German Democratic Republic and the Federal Republic of Germany which abolished controls concerning the movement of goods in free circulation in the member states of the EC²⁶⁵.

Thus, by unilateral but reciprocal acts, a *de facto* customs union²⁶⁶ was established between the EC and the GDR from July 1, 1990, or, with regard to agricultural products, from August 1, 1990, which included a blanket suspension of all quantitative restrictions for an unlimited period, in fact lasting until the formal reunification of Germany on October 3, 1990. The GDR had thus attained a kind of "unofficial membership" in advance²⁶⁷. If it had not been for this *de facto* customs union, the intra-German border would have remained a Community external frontier, and the Federal Republic would have been compelled to maintain controls in spite of the economic union of the two German states²⁶⁸.

After the conclusion of the State Treaty, the GDR was also given access to the financial instruments of the EC²⁶⁹.

VII. EC Aspects of the Unification Treaty

A. General Survey

The two German states concluded the Unification Treaty, "(s)eeing through German unity to contribute to the unification of Europe", as stated in the preamble. Art.1 of the Treaty declares that upon the accession of the GDR to the Federal Republic in accordance with Art.23 of the BL, the reconstituted five states of the GDR would become *Länder* (constituent states) of the Federal Republic. Art.3 put the Basic Law into effect in those five states and East Berlin, subject to certain modifications. Art.8 did the same with regard to the entire body of West German federal law, subject to a great number of exceptions and modifications listed in

²⁶⁴ GBl. DDR I, no.37 (June 30, 1990), 451.

²⁶⁵ GBl. DDR I, no.48 (August 8, 1990), 859. The Regulation applied to all legal relations created on or after July 1, 1990 (§ 8).

²⁶⁶ J. Sack, *Anmerkungen zur Zollunion zwischen der EG und der DDR*, EuZW 1990, 309.

²⁶⁷ BullEC, Suppl.4/1990, 28.

²⁶⁸ Schultze (note 262), 678.

²⁶⁹ XXIVth General Report (note 157), 43.

Annex I, Art.9(2), in conjunction with Annex II, provides that certain parts of GDR law shall remain in force, subject to their being compatible also with the directly applicable EC law. As Community law prevails in any event over national law in cases of conflict, this condition is merely declaratory²⁷⁰.

Art.10 directly deals with EC law, declaring in Sec.1 that the Treaties establishing the European Communities, amendments and additions thereto and international agreements, treaties and decisions which have been brought into effect in connection with these Treaties would apply in the territory of the former GDR including East Berlin²⁷¹. Art.10(2) states that all acts of secondary legislation shall apply in this territory from October 3, 1990, save where exceptions are made by the competent organs of the European Communities. Art.10(3) obligates the *Länder* to transpose or implement all those acts of secondary legislation the transposition or implementation of which falls within their jurisdiction. There was never an express provision of this kind in federal law before. To establish such a *Länder* obligation it had always been necessary to refer to unwritten general constitutional principles like the duty of federal loyalty which the *Länder* owe the Federation derived from the general norm of Art.20(1) of the BL (*Bundestreue*)²⁷².

Art.12 of the Unification Treaty regulates the fate of the treaties of the former GDR²⁷³. It declares the readiness of the reunified Germany to (re)negotiate them in good faith, subject to the competences of the EC, and thus corresponds to the Commission's position²⁷⁴. However, it stops short of acknowledging an international legal obligation to this effect. Art.12 reads:

"(1) The contracting Parties are agreed that the international treaties of the German Democratic Republic shall, in the course of the establishment of the unity of Germany, be discussed with the contracting partners of the German Democratic Republic under the aspects of the protection of legitimate expectations, the interests of the states concerned and the treaty obligations of the

²⁷⁰ Rengeling (note 177), 1312.

²⁷¹ The Commission considered Art.10 as a helpful clarification, though the provision was unnecessary on purely legal grounds (BulleC, Suppl.4/90, 43).

²⁷² See B. Langeheine, in: Grabitz (note 16), Art.100 n.65.

²⁷³ Notice of this provision was given to the Foreign Ministers of Britain, France, the Soviet Union and the United States by the joint letter of the West and East German Foreign Ministers in connection with the Treaty on the Final Settlement with respect to Germany of September 12, 1990 (BullBReg., no.109 [September 14, 1990], 11).

²⁷⁴ *Supra* V.C.3.

Federal Republic of Germany. The discussion shall take into account the principles of a free democratic basic order founded on the rule of law, observe the competences of the European Communities and shall be aimed at regulating or determining those treaties' continued applicability, adjustment or expiration.

(2) The united Germany shall define its position concerning the devolution of international treaties of the German Democratic Republic after consultations with the contracting parties concerned as well as the European Communities, if the latter's competences are affected.

(3) If the united Germany intends to accede to international organizations or other multilateral treaties to which the German Democratic Republic but not the Federal Republic of Germany is a party, an agreement shall be reached with the contracting parties concerned and with the European Communities, if the latter's competences are affected".

Art.29 contains specific provisions on the GDR's external trade relations (CMEA) which follow a similar policy and also take account of EC competences. The Commission emphasized in this regard that the continuation of traditional trade flows was important for maintaining good political and commercial relations with eastern European countries²⁷⁵.

B. The Problem of State Aid

Art.28 of the Unification Treaty on the promotion of economic development touches a problematic issue in view of the strict rules on state aid in Arts.92 et seq. of the EEC Treaty. Art.28 at least acknowledges the jurisdiction of the EC in this field. The Commission was of the opinion that the Community state aid rules should, with some exceptions, be immediately applied to the territory of the former GDR. It expected the German Government to comply with them in full after reunification, referring to Arts.14 and 28 of the State Treaty²⁷⁶.

An argument can, however, be made that financial assistance flowing to East Germany is covered by the exemption in Art.92(2)(c) of the EEC Treaty. This clause, which has always covered the special Berlin and zonal border area assistance now being phased out, could, by way of a dynamic interpretation, be extended to the new kind of assistance which can also be considered as "aid granted to the economy of certain areas of

²⁷⁵ BullEC, Suppl.4/1990, 13. See already Art.13(2) of the State Treaty. The necessary GATT waiver was obtained in December 1990 (EuZW 1991, 134).

²⁷⁶ BullEC, Suppl.4/1990, 23 et seq., 74 et seq. See also Council Directive of December 4, 1990 amending Directive 87/167/EEC on aid to shipbuilding (90/652/EEC) (OJ no.L353/45), based on Art.92(3)(d) and 113 EEC Treaty.

the Federal Republic of Germany (still) affected by the (former) division of Germany, in so far as such aid is required in order to compensate for the (continuing) economic disadvantages caused by that division²⁷⁷. On the other hand, Art.92(2)(c) of the EEC Treaty was apparently only intended to compensate for economic disadvantages due to the geographical location of certain German regions cut off from their hinterland by the intra-German border. The economic disadvantages endured by the territory of the former GDR were, however, caused by the disastrous former economic system²⁷⁸. In any event, on November 22, 1990, the EC Commission provisionally approved an aid-package for the former East German territories²⁷⁹.

It is also arguable that means flowing from the "Fund for German Unity"²⁸⁰ to public bodies rather than private undertakings are not state aid in the sense of Art.92 of the EEC Treaty but belong to the intra-federal fiscal equalization outside the scope of the EEC Treaty²⁸¹.

VIII. The European Parliament and the GDR's Integration into the European Communities

A. Parliamentary Cooperation

The European Parliament took a favorable position on German reunification²⁸². It set up a Temporary Committee to consider the impact of German unification on the European Community which worked in close consultation with the Commission and the German authorities. It also moved as quickly as possible wherever its consultation or cooperation was required to enable the other organs to enact the necessary pieces of secondary legislation in time. On the other hand, the Parliament also emphasized that German unification had to take place within a Community framework and that it must not slow down the process leading to the

²⁷⁷ D. Carl, *Die Gemeinschaft und die deutsche Einigung*, EuZW 1990, 561 (564); Rengeling (note 177), 1311; Scherer (note 123), 15. See also S. Richter, *Das Recht der EG und die Gebiete der ehemaligen DDR*, in: B. Messerschmidt (ed.), *Deutsche Rechtspraxis* (1991), 1012 (1013).

²⁷⁸ Bleckmann/Erberich (note 84), 862.

²⁷⁹ EUROPE, no.5376 (November 23, 1990), 7.

²⁸⁰ Established by Art.31 of the Act assenting to the State Treaty of May 18, 1990, of June 25, 1990 (BGBl.II, 518).

²⁸¹ Carl (note 277). Resolution by the German Bundesrat, EuZW 1991, 86, 87.

²⁸² See XXIVth General Report (note 157), 41 et seq.

completion of the internal market and an economic and monetary as well as a political union. It also resolved that, though the European Community should make a contribution to the restructuring of the GDR economy, this should not be done at the expense of the Communities' other disadvantaged regions. The Parliament finally insisted that its own right of participation be observed²⁸³.

B. Representation of the East German Population in the European Parliament

A serious problem arose with regard to the representation of the territory of the former GDR in the European Parliament. The parliamentary organ of the EC is based on the system of representative democracy (Art.137 of the EEC Treaty) in the sense that the political will of the peoples of the member states in their entirety must be reflected in the composition of the European Parliament. According to Art.2 of the Act concerning the election of the representatives of the Assembly by direct universal suffrage of September 20, 1976²⁸⁴, the Federal Republic of Germany has 81 representatives, like Britain, France and Italy. In the last elections held between June 15 and 18, 1989, all the German representatives were elected from the former West Germany. As the next direct elections in which the East Germans could participate would not be held before 1994, how could the requirements of representative democracy be satisfied in the meantime?

The GDR Parliament had already sent 18 members to the September session of the European Parliament who had observed the work from the visitors' gallery²⁸⁵. Based on Art.13 of the Act, proposals were made for new election of just the 81 German representatives by an all-German electorate²⁸⁶. But another route was eventually taken when on October 24,

²⁸³ Resolution of April 4, 1990 (OJ no.C 113/97). Resolution of October 24, 1990 (OJ no.C 295/31).

²⁸⁴ OJ no.L 278/1, amended by the Treaty of May 28, 1979, concerning the accession of Greece (OJ no.L 291/1) and the Treaty of June 12, 1985, concerning the accession of Portugal and Spain (OJ no.L 302/1).

²⁸⁵ EUROPE, no.5353 (October 19, 1990), 3. The Unification Treaty, Annex II.B Chapter II, Subject A, Sec.III.2.f) provided that those members were, for the purposes of German law, temporarily accorded the status of a Member of the European Parliament.

²⁸⁶ Scherer (note 123), 13; Bleckmann/Erberich (note 84), 860 et seq.; Timmermans (note 139), 441 et seq.

1990, the Parliament amended its Rules of Procedure, adding Art.136 (a)²⁸⁷:

Transitional provisions concerning observers from the territory of the former GDR

1. The European Parliament may, on a proposal from its President, invite the German Bundestag to nominate observers from the territory of the former German Democratic Republic who have been elected at democratic elections.

2. These observers may take part in the proceedings of the European Parliament without the right to vote or to stand for election. Such participation may not have any legal effect on the conduct or conclusions of these proceedings or on decisions connected with the number of Members in each political group. Detailed arrangements shall be determined by the Bureau and the enlarged Bureau.

3. The number of such observers shall be fixed by Parliament on a proposal from its President.

4. This rule shall cease to apply at the latest on the date of the first sitting of the European Parliament following the elections in 1994.

On November 21, 1990, Parliament adopted a proposal by its President to set the number of observers at 18^{287a}. Only after a dispute between the German Bundestag and the European Parliament on the nomination procedure could the 18 East Germans already named by the former GDR Parliament take their seats on March 12, 1991²⁸⁸.

There was a tacit consent that these observers would have no right to speak in plenary sessions, but that they could fully participate in committee sessions and within the parliamentary groups²⁸⁹. It is doubtful whether this temporary solution satisfies the requirements of Art.137 of the EEC Treaty, as the East German part of the German population will not be represented in the Parliament on equal terms for over three years²⁹⁰.

Another question was whether after German reunification the allocation of parliamentary seats to the member states should be adjusted so that the principle of equal representation of all Common Market citizens would be better realized²⁹¹. Proposals to this effect have been made from

²⁸⁷ OJ no.C 295/78.

^{287a} OJ no.C 324/116.

²⁸⁸ FAZ, November 28, 1990, 6; March 13, 1991, 2.

²⁸⁹ Das Parlament, no.50 (December 7, 1990), 11.

²⁹⁰ *Dost/Hölzer* (note 178), 675 et seq.

²⁹¹ While one Luxemburg member represents 62,000 inhabitants, one member from reunified Germany represents nearly a million.

within the Parliament²⁹², but any change in the number of representatives would require an amendment to the 1976 Act concerning their election that would have to be ratified by all member states (Art.21 [3] of the ECSC Treaty, Art.138 [3] of the EEC Treaty, Art.108 [3] of the EURATOM Treaty).

IX. Result and Outlook

The German reunification process was in all its stages deeply embedded in the European Community context. The GDR became as much a part of the EC as it became a part of the Federal Republic of Germany. Remaining within the European framework was a political condition for reunification readily fulfilled by Germany and all its European partners. German unity and European unity proved to be in a symbiotic relationship.

From the very first the GDR wanted to belong not only to the Federal Republic but also to the Communities. In this respect, the GDR's intentions, proving the Communities' attractive force, were in tune with the long-term goals of other CMEA countries, particularly Czechoslovakia, Hungary and Poland. For them a successful integration of the eastern part of Germany into the EC will serve as a model. The Communities' leadership in the recovery of central and eastern Europe is symbolized in the EC Commission's coordination of economic aid granted by the group of 24 OECD states²⁹³ and by the establishment of the European Bank for Reconstruction and Development by the Treaty of May 29, 1990²⁹⁴.

But German reunification within the EC framework was not only significant in a quantitative respect, in view of a future eastern extension of the European Communities. It also gave an important impulse to the quality of European integration. In pursuit of the goal of binding the united Germany firmly into the EC, and at the same time preparing for the economic and political challenges involved in the reconstruction of central and eastern Europe, the project of establishing an economic and monetary union was carried further than ever. The closely related project

²⁹² FAZ, November 22, 1990, 2; December 4, 1990, 16.

²⁹³ G. van Well, Zur Frage der EG-Mitgliedschaft der mittel- und osteuropäischen Staaten, FS Wagner (note 102), 94 (96 et seq.); Krenzler (note 144), 93 et seq.

²⁹⁴ OJ no.L 372.

of a political union was stimulated by the image of German unity²⁹⁵. The Dublin special session of the European Council on April 28, 1990, both approved the German reunification, effecting the GDR's integration into the Common Market, and initiated concrete studies concerning the establishment of a political union²⁹⁶. It remains to be seen whether the two conferences instituted in December 1990 to draft the treaties for realizing the two European union projects will be successfully concluded.

The concept of "Europe" comprises the whole continent, not only its western part. Accordingly, French President F. Mitterrand's concept of a European Confederation, expressly approved at the Franco-German summit on September 17/18, 1990²⁹⁷, is addressed to all European states. And Italian Foreign Minister G. de Michelis has projected a Europe of four concentric circles²⁹⁸, the innermost circle being formed by the political union of the European Communities; the second by the EFTA states which would enjoy a privileged relationship with the EC and would be potential candidates for membership at some later date; the third circle by the central and eastern European CMEA countries the relations of which with the EC were, by way of special association agreements, to be strengthened up to a point at which EC membership might be possible; and the fourth circle consisting of the so-called "CSCE Europe" of the Thirty-four.

It was no accident that the same Dublin summit of April 28, 1990, which approved the German reunification and the establishment of a political union also sanctioned the project of association agreements ("European agreements")²⁹⁹ with the CMEA states and advocated a leading role for the EC in developing new CSCE structures³⁰⁰. The CSCE

²⁹⁵ Cf. the underlying Franco-German initiative of April 18, 1990 (EA 1990, D 283) and the follow-up initiative of December 6, 1990 (BullBReg., no.144 [December 11, 1990], 1513).

²⁹⁶ BullBReg., no.51 (May 4, 1990), 401 (402 et seq.).

²⁹⁷ BullBReg., no.111 (September 19, 1990), 1169 (1170).

²⁹⁸ G. de Michelis, *Die EG als Gravitationszentrum: Für ein Europa der vier Kreise*, *Integration* 1990, 143. See the earlier and very similar "vision of Europe" by M. Mertes/N.J. Prill, *FAZ*, July 19, 1989, 8; *id.* (note 103), 565.

²⁹⁹ Conclusion of the European Council's Rome session (December 14/15, 1990), EA 1991, D27 (D38). Cf. the EC Commission's model of association agreements with central and eastern European states (COM[90]389, August 27, 1990). B. Lippert, *Etappen der EG-Osteuropapolitik: Distanz - Kooperation - Assoziation*, *Integration* 13 (1990), 111 (120 et seq.); A. Deen/D.A. Westbrook, *Return to Europe*, *Harvard International Law Journal* 1990, 660.

³⁰⁰ BullBReg., no.51 (May 4, 1990), 401 (402 et seq.). See also the results of the European Council's special session in Rome on October 27/28, 1990 (BullBReg., no.128 [November 6, 1990], 1333).

Paris summit on November 21, 1990, in turn adopted a Charter for a New Europe³⁰¹ in which the unity of the German state was approved and called an important contribution to a lasting and just peace order of a united democratic Europe. The Charter also acknowledged the important role of the European Communities in the political and economic development of Europe.

³⁰¹ EUROPE/Documents, no.1672 (December 14, 1990).

Information on EU Agreements with their Overseas Countries and Territories

Research for Senator Mark Daly

Abstract

This research request sought information relating to European Union (EU) agreements with their Overseas Countries and Territories (OCTs). This paper will outline the various EU agreements underlying the EU Member States 'special relationship' with the OCTs and the alternative agreements made between the EU, Greenland and the Government of Denmark.

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Library & Research Service central enquiry desk: Tel – 618 4701

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Introduction

The [European Commission](#) defines the Overseas Countries and Territories (OCTs) as “25 countries and territories, which have special links with either Member States: Denmark, France, the Netherlands and the United Kingdom” of the European Union (EU). The relationship between the EU and the OCTs are based on EU law and not the constitutional law of the Member State and citizens of each OCT are in principal EU citizens.

Annex II of the Treaty of the Functioning of the European Union ([The Treaty](#)) provides a full list of the Overseas Countries and Territories of the EU. Territories include Greenland, New Caledonia and Dependencies, French Polynesia and others.

There are many common characteristics of the OCTs. None of them are classified as a sovereign country, they are all parliamentary democracies, they are all islands, and they all have small populations. However, there are significant differences between each OCT. These differences mainly relate to the degree of autonomy the Territory has with the Member State of which they are linked. Other differences include the economic and social development, geography, and climate of each OCT. The aim of the EU’s partnership with the OCTs, according to the [European Commission](#), is to enhance the competitiveness of the OCTs, strengthen their resilience to external shocks, reduce their economic and environmental vulnerability, and promote cooperation between the OCTs and their partners.

Legal Framework

The legal framework behind the partnership between the EU and the OCTs is derived from Part IV of the [Treaty on the Functioning of the European Union](#) (Articles 198 to 204). Under Article 198 “*the Member States agree to associate with the Union the non-European countries and territories which have ‘special relations’ with Denmark, France, the Netherlands and the United Kingdom*”.

The following Articles from the Treaty provide an overview of the objectives of the agreement between the EU and the OCTs.

Article 199 of the Treaty states that the OCTs association with the EU shall have the following objectives:

1. Member States shall apply to their trade with the OCTs the same treatment as they accord to each other pursuant to the Treaties.
2. Each country or territory shall apply to its trade with Member States and with the other OCTs the same treatment as that which it applies to the European State with which it has special relations.
3. The Member States shall contribute to the investments required for the progressive development of the OCTs.
4. For investments financed by the EU, participation in tenders and supplies shall be open on equal terms to all natural and legal persons who are nationals of a Member State or of one of the OCTs.

Article 200 of the Treaty states that:

1. Customs duties on imports into the Member States of goods originating in the OCTs shall be prohibited in conformity with the prohibition of customs duties between Member States in accordance with the provisions of the Treaties.
2. Customs duties on imports into each OCT from Member States or from the other countries or territories shall be prohibited in accordance with the provisions of Article 30.
3. The OCTs may, however, levy customs duties which meet the needs of their development and industrialisation or produce revenue for their budgets.
4. Paragraph 2 shall not apply to countries and territories which, by reason of the particular international obligations by which they are bound, already apply a non-discriminatory customs tariff.

5. The introduction of or any change in customs duties imposed on goods imported into the OCTs shall not, either in law or in fact, give rise to any direct or indirect discrimination between imports from the various Member States.

It should be noted that the European [acquis](#)¹ does not apply to the OCTs. The rules and procedures on the Association of the OCTs with the EU are provided for by the [Council Decision 2013/755/EU](#) and were adopted on 25 November 2013. This Overseas Association Decision (OAD) replaced the [Council Decision 2001/822/EC](#) which expired on 31 December 2013.

The OAD focuses on three main areas of trade. Trade in goods, trade in services, and cooperation among the EU and OCT on issues relating to free trade. The OCTs will rank among the EU's most favoured trading partners and will receive better terms of trade.

The general objectives of the trade and trade-related cooperation between the EU and the OCTs are to:

- Promote the economic and social development of the OCTs through close economic relations between the OCTs and the EU;
- Support the OCTs integration into the regional and world economies and the development of trade;
- Support OCT efforts to create a favourable investment climate;
- Promote the stability of the global financial system;
- Support diversification within the OCT economies;
- Support OCT efforts for the development of trade in goods and services;
- Support OCT trading capacities;
- Support OCT efforts to merge local legislation with EU legislation;
- Provide possibilities for cooperation on trade and trade related issues.

¹ The body of common rights and obligations that is binding on all EU member states.

EU agreements with Greenland

Greenland, as the only territory prior to Brexit to vote in a referendum to withdraw from the EU, has since January 1985 been regulated by agreements reached between the Greenlandic and Danish governments with the EU. Although officially a region of Denmark, Greenland has extensive powers of self-government which allowed for the November 1983 referendum which resulted in a 52-48 per cent decision to withdraw from the EU, according to an [article](#) from the Foreign Policy Centre².

The EU currently has a comprehensive partnership in place with Greenland, enacted in conjunction with the Overseas Countries and Territories (OCT) arrangements operating under the Overseas Association Decision (OAD).

This partnership is based on two agreements. The first is the [Council Decision 2014/137](#) of 14 March 2014 on relations between the European Community ('the Community') on the one hand, and Greenland and the Kingdom of Denmark on the other. The second is the [Fisheries Partnership Agreement](#) of 30 June 2007 between the European Community ('the Community') on the one hand, and the Government of Denmark and the Home Rule Government of Greenland, on the other.

The Council Decision 2014/137 establishes Greenland as one of the OCTs of the EU due to their 'special relationship' with a Member State (Denmark). The purpose of the Decision is to lay down the rules concerning relations between the EU and Greenland with the view to preserve the close and lasting links between the partners.

The main objectives of the partnership are to support cooperation between the EU and Greenland, to address major challenges, increase the skills of its workforce, and to improve its information systems in the areas of Informational and Communication Technology. These goals shall be measured by the percentage of trade balance in

² UK based, Pro-European, foreign affairs think tank.

Greenlandic GDP, the percentage of total exports represented by the fisheries sector, and the results of educational statistical indicators.

The other main objective is to contribute to Greenland's capacity to formulate and implement national policies.

The main areas of cooperation of the partnership shall include:

- Education and training, tourism and culture;
- Natural resources, including raw materials;
- Energy, climate, environment and biodiversity;
- Arctic issues;
- The social sector, mobility of the workforce, social protection systems, food safety and food security issues; and
- Research and innovation in areas such as energy, climate change, disaster resilience, natural resources, including raw materials, and sustainable use of living resources.

The first fisheries agreement between the EU and Greenland dates back to 1985 and lasted for a duration of ten years. This agreement was then extended for multiple six-year periods before it was replaced with the fisheries partnership agreement. Further information can be found on the European Commission website [here](#).

The latest continuation of the EU-Greenland Sustainable Fisheries Partnership Agreement was announced on 23 March 2015. The new protocol represents a balanced package of €17.8 million in total annual value from the EU budget. This agreement entered into force on 01 January 2016 for a period of five years.

The announcement from the European Commission on the latest continuation of the Fisheries Partnership Agreement can be found [here](#). The Council Decision 2015/2103 of 16 November 2015 concerning the continuation of the Fisheries Partnership Agreement can be found [here](#).

The [Fisheries Partnership Agreement](#) of 30 June 2007 established the following principals, rules and procedures governing:

- The economic, financial, technical and scientific cooperation in the fisheries sector to ensure the economic and social sustainability of the Greenlandic fisheries sector;
- The conditions governing Community fishing vessels access to the Greenlandic [Exclusive Economic Zone](#) (EEZ);
- The arrangements for regulating Community vessels in the Greenlandic EEZ; and
- Partnership between companies aimed at developing economic activities within the fisheries sector.

The general principals underlying the agreement involve:

- Scientific cooperation;
- Access to fisheries in the Greenlandic EEZ;
- The granting of licences;
- Financial contributions granted to Greenland;
- Promoting cooperation among economic operators and in civil society; and
- Experimental fisheries.

EU financial cooperation with OCTs

Details of the EU's financial support for each OCTs development strategy can be found on the European Commission [website](#). The EU provides funding to the OCTs through the [European Development Fund](#) (EDF) under which a total value of €364.5 million is provided for all OCTs for the 2014-2020 period.

Table 1 presents an allocation of EDF-OCT funds for the 10th allocation (2008-2013) and the 11th allocation (2014-2020). The EDF is the EU's main instrument for providing development aid to African, Caribbean and Pacific countries, and to the OCTs. It is financed directly by the EU Member States and it is not part of the EU budget.

Greenland, however, is not eligible for EDF funds as funding for Greenland operates through the General budget of the EU due to the Partnership Agreement between the European Community, the Government of Denmark and the Home Rule Government of Greenland. Between 2014 and 2020 it is foreseen that Greenland will receive 217.8 million in funding through the EU's general budget.

The OCT's also receive financial support for programmes funded by the EU general budget in areas such as research, education, innovation and competitiveness, and culture and media.

Table 1: Allocation of EDF-OCT Funds

	Indicative* allocation 10th EDF-OCT (in million EUR)	Indicative* allocation 11th EDF-OCT (in million EUR)
Territorial	195	229.5
Aruba	8.88	13
Bonaire	3	3.9
Curaçao	11.25	16.9
Saba	3	3.5
St-Eustatius	2	2.4
St-Maarten	4.75	7
New Caledonia	19.81	29.8
French Polynesia	19.79	29.9
Wallis et Futuna	16.49	19.6
Saint-Pierre et Miquelon	20.74	26.3
Mayotte	22.92	
Anguilla	11.7	14
Montserrat	15.66	18.4
Turks et Caicos	11.85	14.6
Pitcairn	2.4	2.4
Falkland Islands	4.13	5.9
Saint Helena, Ascension and Tristan da Cunha	16.63	21.5
Regional	40	100
Reserve B	15	21.5
EIB Investment Facility	30	5
Greenland	2007-2013 175	2014-2020 217.8

Source: [European Commission](#)