

German Unification and State Succession

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I. Introduction

The legal debate on the "German Question" has always been to a considerable extent a debate on problems of continuity of states and state succession. Whether the unified German state founded in 1867/1871 had

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Abbreviations: APoluZG = Aus Politik und Zeitgeschichte, Beilage zur Wochenzeitung »Das Parlament«; BGBl. = Bundesgesetzblatt; Bullec = Bulletin of the European Communities; BVerfGE = Entscheidungen des Bundesverfassungsgerichts; C.M.L.Rev. = Common Market Law Review; EPIL Inst. = R. Bernhardt (ed.), Encyclopedia of Public International Law, Instalment; EuZW = Europäische Zeitschrift für Wirtschaftsrecht; FS = Festschrift; FAZ = Frankfurter Allgemeine Zeitung; GATT = General Agreement on Tariffs and Trade; GYIL = German Yearbook of International Law; ILC = International Law Commission; ILO = International Labour Organisation; JZ = Juristen Zeitung; NJW = Neue Juristische Wochenschrift; NZZ = Neue Zürcher Zeitung; RdC = Recueil des Cours de l'Académie de Droit International; VVDStRL = Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer; ZaöRV = Zeitschrift für ausländisches öffentliches Recht und Völkerrecht.

perished with the declaration of unconditional surrender and the occupation of Germany by the Allied Powers or whether the German state had continued to exist and the Federal Republic of Germany as a state was (at least partially) identified with a still surviving "German Reich", were questions intrinsically connected to the historical self-image and political identity of the two German states. This is not the place to explain in detail all the different theories on the legal status of Germany after 1945; other authors have done that already in voluminous articles and monographs¹. One fact, however, should be borne in mind, and that is the fact that the two German states rested on completely different legal constructions concerning the continuity of the German state or its destruction and the subsequent state succession.

In this respect, the German unification probably will be seen as the ultimate victory of one of these legal constructions over the other. An attempt to synthesize the two contradicting positions often declared the German Democratic Republic (GDR) to be in a process of secession from the still-existing unitary German state². This separation or secession – for thus was the situation explained by the dominant theory – had not been fully realized, since no final settlement on Germany as a whole had been achieved; this meant that the Four Occupying Powers were still exercising some aspects of German sovereignty as a sort of trustee for the German Reich³.

¹ Cf. only G. Ress, *Die Rechtslage Deutschlands nach dem Grundlagenvertrag vom 21. Dezember 1972* (1978); R. Bernhardt, *Deutschland nach 30 Jahren Grundgesetz, VVDStRL 1989, 7 et seq.*; D. Blumenwitz, *Was ist Deutschland? Staats- und völkerrechtliche Grundsätze zur deutschen Frage und ihre Konsequenzen für die deutsche Ostpolitik* (1982); W. Fiedler, *Das völkerrechtliche Kontinuitätsproblem und die besonderen Fragen der Rechtslage Deutschlands*, in: B. Meissner/G. Zieger (eds.), *Staatliche Kontinuität unter besonderer Berücksichtigung der Rechtslage Deutschlands* (1983), 9 et seq.; J.A. Frowein, *Die Rechtslage Deutschlands und der Status Berlins*, in: E. Benda/W. Maihofer/H.J. Vogel (eds.), *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland* (1983), 29 et seq.; D. Blumenwitz /B. Meissner (eds.), *Staatliche und nationale Einheit Deutschlands – Ihre Effektivität* (1984); G. Ress, *Germany, Legal Status after World War II*, in: *EPIL Inst.10* (1987), 191 et seq.; R. Bernhardt, *Die deutsche Teilung und der Status Gesamtdeutschlands*, in: J. Isensee/P. Kirchhof (eds.), *Handbuch des Staatsrechts, Vol.1* (1987), 321 et seq.; G. Ress, *Grundlagen und Entwicklung der innerdeutschen Beziehungen*, in: Isensee/Kirchhof, *ibid.*, 449, 490 et seq.

² Cf. Frowein, *ibid.*, 48; Ress, *Germany ...*, *ibid.*, 199; *id.*, *Grundlagen ...*, *ibid.*, 492.

³ Cf. Frowein (note 1), 48; Ress, *Germany ...* (note 1), 199; Ress, *Grundlagen ...* (note 1), 492; E. Klein, *Kontinuitätsproblematik und Rechtsstellung der deutschen Ostgebiete*, in: Meissner/Zieger (note 1), 129, 133; D. Rauschnig, *Deutschlands aktuelle Verfassungslage*, *Deutsches Verwaltungsblatt* 1990, 393, 402.

The events of 1989/1990 demonstrated the accuracy of that thesis. The presumption that the secession of the eastern German state was not final has proved to be correct: with the first opportunity to exercise its right of self-determination⁴ the people of the eastern state in Germany expressed by an overwhelming majority its will to be unified in a single German state. The lack of legitimacy of any attempt to secede became obvious in 1990 at the latest. The separate state created in the “Cold War” in contradiction to the right of self-determination broke down as soon as the foreign “iron hand” was removed.

The GDR, however, had been recognized as an independent state by practically all states in the world (including the Federal Republic of Germany) and had been admitted to membership in the United Nations⁵. Thus, it cannot be disputed that the GDR constituted a “state” under the perspective of public international law. With the unification on October 3, 1990, this state perished and its territory was integrated into the Federal Republic of Germany, a process which in itself constitutes a new case of state succession.

The Treaty of Unification⁶ and the subsequent “Two-plus-Four” Treaty of September 9, 1990⁷, which for practical purposes have closed the book on the long-lasting disputes over continuity and state succession by the two German states, have at the same time opened a new chapter in the never-ending story of state succession in German legal history. Even if the procedure chosen for unification – the accession of the GDR to the Federal Republic under Art.23 of the Basic Law – seems to clarify a lot⁸, the matter of state succession nevertheless remains complex. It is true that by the GDR’s accession to the already-existing state of the Federal Republic, the basic assumptions for an analysis of succession issues have

⁴ For the problem of self-determination in the German context now cf. J. A. Frowein, *Die Verfassungslage Deutschlands im Rahmen des Völkerrechts*, VVDStRL 1990, 8, 12 et seq.; D. Blumenwitz, *Der Vertrag vom 12.9.1990 über die abschließende Regelung in bezug auf Deutschland*, NJW 1990, 2041, 2043.

⁵ Cf. G. Ress, *Einige völkerrechtliche und staatsrechtliche Konsequenzen der Mitgliedschaft von BRD und DDR in den Vereinten Nationen und ihren Sonderorganisationen*, in: *Der Staat 1972*, 27 et seq.

⁶ BGBl. 1990 II, 885.

⁷ Treaty on the Final Settlement with respect to Germany, BGBl. 1990 II, 1317.

⁸ A very clear picture concerning the legal consequences of an accession by the GDR under Art.23 Basic Law was given by E. Klein already in 1985 – cf. *id.*, *Wiedervereinigungsklauseln in Verträgen der Bundesrepublik Deutschland. Ein Beitrag zur Identitätsvorstellung und Sukzessionsproblematik*, in: *Sowjetsystem und Ostrecht. FS für Boris Meissner (1985)*, 774, 788 et seq.

become unequivocal: a new state was not founded in the wake of the unification, but one state, the Federal Republic, continued with an enlarged territory whilst the other German state, the GDR, perished.

Yet, notwithstanding the relatively clear-cut starting-point, to investigate the set of international law rules applicable to the situation created on October 3, 1990, is a task of utmost complexity. This is due not to the supposedly precipitate "reunification" process but to the complexities of international law itself, concretely articulated: to the chaotic status of the laws of state succession.

The purpose of this article is to examine and evaluate the succession rules of international law applicable to the case of the unified German state. A brief analysis of the present state of the law of state succession will be required as well as a more detailed survey of the small number of analogous cases of unification of states in contemporary practice. The rules on state contracts for economic purposes within the framework of COMECON is a particularly difficult matter, for there are no precedents at all in state practice concerning this question. State property and debts also pose problems which will have to be solved. In general, however, the unification treaty and the subsequent practice of the Federal Republic have already decisively set the reunified Germany on the right course. That practice will not only prove important in judging the legal status of previous treaties of the GDR and of its property and debts, but it will also deliver an interesting new empirical case of state succession in the immense variety of succession practice.

II. The Chaotic Status of the Laws of State Succession

The great variety of state practice in matters of succession has tempted dozens of authors, including some of the most learned writers of international law, to attempt to develop a general theory of state succession⁹. All

⁹ Cf. M. Huber, *Die Staatensuccession. Völkerrechtliche und staatsrechtliche Praxis im 19. Jahrhundert* (1898); G. Jellinek, *Allgemeine Staatslehre* (3rd ed. 1914), 271 et seq.; A. Cavaglieri, *La dottrina della successione di Stato a Stato e il suo valore giuridico*, in: *Archivio Giuridico*, 3rd series, Vol.13 (1910), 297 et seq.; W. Schönborn, *Staatensukzession*, in: G. A. Walz (ed.), *Handbuch des Völkerrechts*, Vol.2, part 3 (1913); P. Guggenheim, *Beiträge zur völkerrechtlichen Lehre vom Staatenwechsel* (1925); E. Castrén, *Aspects récents de la succession d'Etats*, *RdC* 78 (1951 I), 379 et seq.; R. W. G. De Muralt, *The Problem of State Succession with Regard to Treaties* (1954); L. Caflisch, *Law of State Succession. Theoretical Observations*, *Nederlands Tijdschrift voor Internationaal Recht* (1963), 337 et seq.; K. Zemanek, *Gegenwärtige Fragen der Staatensukzession* (1964); *id.*, *State Succession after Decolonisation*, *RdC* 116 (1965 III), 180 et seq.;

these efforts have failed, however, at least insofar as none of the attempts to deduce general principles out of a general theory of the state in international and constitutional law has found recognition as a common theoretical basis for a law of state succession. Already in the last century William Edward Hall wrote: "The subject is one upon which writers on international law are generally unsatisfactory. They are incomplete and they tend to copy one another"¹⁰ – which meant that they also copied the theoretical lacunae and mistakes from one another. A century has passed since then, but a convincing theory of state succession is still only about as far as it was in the 19th century, with authors complaining about a "crisis in the theory of State succession", a crisis "no more resolved today than it was in the eighteenth, nineteenth and even the first half of the twentieth centuries"¹¹.

The attempt undertaken by the ILC to codify the major parts of the laws of state succession have failed for the same reasons, since there was no common theoretical basis available for such an ambitious codification¹². The ILC's codification project centered mainly on the problems of state succession in the wake of decolonization. Admittedly an important problem, which by that time, however, was not far from being solved in general¹³, the problem of new states in succession of colonial entities nevertheless proved to be far too particular to serve as the basis of a generalized codification of modern international law¹⁴. This abortive at-

D.P. O'Connell, *State Succession in Municipal Law and International Law*, 2 vols. (1967); A. Gonçalves Pereira, *La succession d'Etats en matière de traité* (1969); M. Bedjaoui, *Problèmes récents de succession d'Etats dans les Etats nouveaux*, RdC 130 (1970 II), 455 et seq.; D.P. O'Connell, *Recent Problems of State Succession in Relation to New States*, RdC 139 (1972 II), 95 et seq.

¹⁰ W.E. Hall, *A Treatise on International Law* (2nd ed. 1886), 80; cf. also Huber, *ibid.*, 8 et seq.

¹¹ O. Udokang, *Succession of New States to International Treaties* (1972), 164.

¹² Cf. W. Fiedler, *Die Konventionen zum Recht der Staatensukzession. Ein Beitrag der ILC zur Entwicklung eines "modern international law"*, GYIL 1981, 9, 10 et seq.

¹³ D.P. O'Connell remarked on the Convention that "this particular essay in re-fashioning the law was marred from its inception by a preoccupation with the special problem of decolonisation, around which myth and emotion have accumulated like mists in the marsh, so that the whole context became intellectually distorted; and, furthermore, it might be said that it has come too late to serve any practical purpose in that matter" – cf. *id.*, *Reflections on the State Succession Convention*, ZaöRV 1979, 725, 726.

¹⁴ That criticism was raised by many authors – cf. I. Sinclair, *Some Reflections on the Vienna Convention on Succession of States in respect of Treaties*, in: FS für Erik Castrén (1979), 149, 181; H.D. Treviranus, *Die Konvention der Vereinten Nationen über Staatensukzession bei Verträgen*, ZaöRV 1979, 259, 275 et seq.; O'Connell, *ibid.*, 725 et seq.; K. Zemanek, *Die Wiener Konvention über die Staatennachfolge in Ver-*

tempt of codification was accepted by a Diplomatic Conference in 1978 as the “Vienna Convention on State Succession in Respect of Treaties”¹⁵ and was opened to signature. Subsequent state practice, however, demonstrated disregard of that treaty, and since 1978 only eight states have ratified the Convention (15 ratifications are necessary for its entry into force), which means that the Convention probably will never have a chance to become legally binding¹⁶.

The Convention’s norm on state succession in cases of “Uniting of States” provides one of the best examples why the attempt at codification undertaken by the ILC had to fail. Art.31 of the Convention, entitled “Effects of a uniting of States in respect of treaties in force at the date of succession of States”, reads:

“1. When two or more States unite and so form one successor State, any treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State unless:

a) the successor State and the other State party or States parties otherwise agree; or

b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions of its operation.

2. Any treaty continuing in force in conformity with paragraph 1 shall apply only in respect of the part of the territory of the successor State in respect of which the treaty was in force at the date of the succession of States unless:

a) in the case of a multilateral treaty not falling within the category mentioned in article 17, paragraph 3, the successor State makes a notification that the treaty shall apply in respect of its entire territory;

b) in the case of a multilateral treaty falling within the category mentioned in article 17, paragraph 3, the successor State and the other States parties otherwise agree; or

c) in the case of a bilateral treaty, the successor State and the other State party otherwise agree ...”.

The rule stated by Art.31 of the Vienna Convention on State Succession in Respect of Treaties obviously is rather complicated. International

träge, in: *Ius Humanitatis*, FS für Alfred Verdross (1980), 719 et seq.; Fiedler (note 12), 9 et seq.

¹⁵ UN-Doc.A/CONF.80/31 of August 22, 1978; reprinted in *International Legal Materials* 17 (1978), 1488 et seq. and in *ZaöRV* 1979, 279 et seq.

¹⁶ Cf. W. Heintschel v. Heinegg, *Die Vereinigung der beiden deutschen Staaten und das Schicksal der von ihnen abgeschlossenen völkerrechtlichen Verträge*, in *Supplement* 23 to no.18 of *Betriebs-Berater* 1990, 9–10.

treaties in principle – so says the Convention – continue to apply even in cases of integration of states in a united state, but they continue to apply generally only with respect to the territory to which they were applicable before the unification.

A general rule like that – if existing at all – would enormously hinder states created by a process of unification of previously different states to advance the further process of unification, since the separation of the different territories of the former states in different legal orders would be cemented by the (territorially limited) application of the old treaties.

For the particular case of unification where a new state is formed out of the uniting of formerly separate states, a rule like that may perhaps make some sense (at least in some extraordinary cases). However, in the different case of a unification where one state is integrated in another state, continuing the latter while liquidating the former, the rule cited – i.e. territorially limited continuation of treaties – is utterly meaningless. Integration in these cases means assimilation of the legal order of the integrated territory to the legal order of the state supposed to be continued, and nothing could be worse in such cases than territorially limited continuation of the application of pre-existing treaties.

It appears that the differences between these two models of the uniting of states were overlooked totally by the ILC when drafting the State Succession Convention of 1978. The concept underlying Art.31 seems to have been deduced exclusively from the – more than scarce – third world practice since decolonization, totally leaving aside the previous practice of European states formative for traditional international law¹⁷.

There are only two precedents in state practice which could assist the concept developed by the ILC¹⁸. One is the case of the formation of the United Arab Republic (UAR) in 1958, a unification which was never really carried out. By Proclamation of February 1, 1958, the two states of Egypt and Syria were declared to be united in a single state called “The United Arab Republic”¹⁹. The two states had no common frontier, but formed two markedly different territorial components of the new “union”, which were to be organized in two regions of a supposedly unitarian state; thus, the previous treaties of the two states could be continued

¹⁷ This criticism is raised e.g. by C. Tomuschat, A United Germany within the European Community, C.M.L.Rev. 1990, 415, at 420–421.

¹⁸ As a survey of relevant state practice cf. V.J. Geers, Vereinigung von Staaten und völkerrechtliche Verträge (1973), 14 et seq.

¹⁹ Cf. Geers, *ibid.*, 23; O’Connell, State Succession ... (note 9), Vol.2, 71 et seq.

in application with regard to each of the respective territories. Art.69 of the provisional Constitution provided that the coming into effect of the Constitution of the UAR should “not infringe upon the provisions and clauses of the international treaties and agreements concluded each between Egypt and Syria and the foreign powers. Those treaties and agreements shall remain valid in the regional spheres for which they were intended at the time of their conclusion ...” – notwithstanding the unification in a new state²⁰.

The other case cited in this respect is the uniting of Tanganyika and Zanzibar in the new state of Tanzania. Tanganyika, which had gained independence in 1961, agreed in 1964 with the newly independent Zanzibar to “be united in one Sovereign Republic”²¹. Because both states continued to exist as separate states for a transitional period, and even after that time were provided for to exist as separate entities – with Zanzibar already geographically separated from mainland Tanzania –, the pre-existing treaties of both states were upheld in principle²². The Secretary-General of the United Nations was informed by the United Republic of Tanzania that “all international treaties and agreements in force between the Republic of Tanganyika or the People’s Republic of Zanzibar and other states or international organizations will ... remain in force with the regional limits prescribed on their conclusion ...”²³.

Both examples of a unification with continued application of existing treaties are rather peculiar cases, for in both cases what was formed was a sort of “hybrid” union. In both cases the two different parts which were agreed to form the union were two geographically clearly distinguished territories with no common land frontier; a real integration of both parts in a unified state was not envisaged, since the different constituent parts were supposed to continue their existence as separate entities even after “unification”.

Whether two exceptional cases like these are suitable as the basis of a general rule is more than questionable²⁴. Traditional state practice, on the contrary, supports a much more differentiated thesis, which treats diffe-

²⁰ Cf. P. K. Menon, Vienna Convention of 1978 on Succession of States in Respect of Treaties, *Revue de Droit International* 1981, 1, 36; Geers (note 18), 34 et seq.; O’Connell, *ibid.*, 71.

²¹ Preamble of the “Union of Tanganyika and Zanzibar Act (Union Act Tanzania)” of April 26, 1964; reprinted in Geers, *ibid.*, 23.

²² Cf. Menon (note 20), 36; Geers (note 18), 35, 42.

²³ Menon, *ibid.*, 36.

²⁴ Cf. Tomuschat (note 17), 420.

rently so-called “localized” treaties upheld in general while genuinely political treaties are terminated²⁵.

Thus, it is open to doubt whether the model codified in Art.31 of the State Succession Convention of 1978 provides a suitable rule on succession in treaties even in cases of a real unification where different states are merged to form a new, integrated state²⁶. But for cases of an integration of one state into another already existing state which continues its legal personality under international law, the rule laid down in Art.31 more than ever is clearly inadequate²⁷. According to the rule of moving treaty boundaries (Prinzip der beweglichen Vertragsgrenzen) the treaties of the state whose legal personality is continued are extended in their territorial applicability to the territory newly integrated²⁸. If at the same time all the pre-existing treaties of the state which has acceded and thus is discontinued were to apply, this would lead to often contradictory treaty obligations, for possibly opposite treaty régimes would be applicable in respect to the same territory.

State practice traditionally has avoided this nonsensical result by regarding the legal personality of the state which is absorbed as having perished, which in consequence implies also that all political rights and duties connected to that legal personality vanish. Sir Hersch Lauterpacht put it in the classical formula: “When a State merges voluntarily into another State ... or when a State is subjugated by another State, the latter remains one and the same International Person and the former be-

²⁵ Cf. Geers (note 18), 26 et seq., with a survey of traditional state practice.

²⁶ That was recognized even by the “United Nations Conference on Succession of States in Respect of Treaties” of 1978, which – following a German initiative – expressed in a resolution:

“Considering that a uniting of States may give rise to incompatible obligations and rights as a result of the differing treaty regimes applicable to the two or more States which unite,

Recognizing the desirability of resolving such questions through a process of consultation and negotiation,

Recommends that if a uniting of States gives rise to incompatible obligations or rights under treaties, the successor State and the other States parties to the treaties in question make every effort to resolve the matter by mutual agreement”,

UN-Doc.A/CONF.80/25; cf. also Treviranus (note 14), 271 et seq.; for the contrary position cf. Menon (note 20), 34 et seq.

²⁷ The ILC assumed that Art.31 would also be applicable to these cases of complete absorption – cf. Yearbook ILC 1974 II, part 1, 253, 259; as a criticism of this position cf. Heintschel v. Heinegg (note 16), 11.

²⁸ For the principle of “moving treaty boundaries” cf. O’Connell, State Succession ... (note 9), Vol.2, 25, 374–381 with further references.

comes totally extinct as an International Person”²⁹. From that Sir Hersch deduced without any difficulties: “No succession takes place, therefore, with regard to rights and duties of the extinct State arising either from the character of the latter as an International Person or from its purely political treaties”³⁰. Even for treaties of commerce, extradition and the like, the category most controversial in respect to succession, he concluded that they become extinct, “because such treaties, although they are non-political in a sense, possess some prominent political features”. Only the special category of “localized” treaties was excluded from the general rule of extinction³¹.

Most evidence concerning state practice relevant in that respect supports these conclusions. Particularly the case of the Italian state formed in the mid-nineteenth century by the Sardinian kingdom which absorbed the other Italian states could be cited as an analogous case. The treaties of the Sardinian crown were extended to all of Italy while the treaties of the absorbed states were declared to be extinct³².

But even recent practice seems to have followed that model – despite all contradicting statements of socialist and third world authors. In the case of Vietnam³³, for example, when Northern Vietnam reunified the Vietnamese nation by conquering and absorbing the Southern Vietnamese state, the practice of an outspokenly socialist country of the Third World followed the traditional model of “bourgeois” authors and state practice, not paying any regard to the already existing ILC draft. And this happened not by accident: any other rule would have led to absurd consequences, because only by the general principle of termination of all treaties of the extinct state is such an absorption and integration of a formerly separate state possible at all.

As a result it can be concluded that Art.31 of the – not binding – State Succession Convention of 1978 does not reflect the actual state of cus-

²⁹ L. Oppenheim /H. Lauterpacht, *International Law*, Vol.1 (8th ed. 1955), 158 § 82.

³⁰ *Ibid.*

³¹ Oppenheim/Lauterpacht (note 29), 159 § 82(b).

³² Cf. G. Herbig, *Staatusukzession und Staatenintegration* (1968), 70 et seq. with further references; cf. also A. Verdross /B. Simma, *Universelles Völkerrecht* (3rd ed. 1984), 613; O’Connell, *State Succession ...* (note 9), Vol.2, 28 et seq.

³³ There is no legal literature on state succession in the case of Vietnam, but some information on the Vietnamese practice is given by H. Bokor-Szegö, *Identity and Succession of States in Modern International Law*, in: *Questions of International Law. Hungarian Perspective*, Vol.3 (1986), 15 (26).

tomary law in respect to state succession in cases of uniting of states³⁴. A careful examination of state practice, on the contrary, probably would prove that the traditional rules stated by most authors prior to the ILC's attempt at codification still reflect the relevant law of state succession in that respect. These rules differentiate between purely political treaties on the one hand, which are terminated by the extinction of the acceding state, localized treaties at the other extreme, which continue to apply, and ordinary treaties such as treaties of commerce, extradition etc., which have to be terminated or adapted to the changed circumstances by way of negotiations between the contracting parties.

III. The Applicable Laws of Succession with Respect to Treaties in the Light of Recent German Practice Concerning Unification

1. General Rules

The description of the general rule relevant for most categories of treaties has already had occasion to mention the decisive concept of "changed circumstances", to which the contractual regime has to be adapted. Probably the question of succession in the sense of survival or extinction of treaties is a question whether a treaty is "frustrated" or not in its performance by change of sovereignty. In a more abstract perspective it is thus a problem which should be subsumed under the category of *rebus sic stantibus* as the legal technique to cope with situations of "changed circumstances"³⁵.

As D. P. O'Connell put it in his brilliant essay on the laws of succession:

"The real question is the extent to which a treaty loses its effectiveness in the changed situation. If it be presumed that treaties in principle survive the change of government, a wider spectrum of treaties is likely to be excluded from lapse on frustration than if the contrary be presumed; and the presumption might very well vary according to whether the case is characterized as one of annexation, cession, federation, secession or independence. When the con

³⁴ Cf. Tomuschat (note 17), 420; for the opposite position cf. F. Enderlein/B. Graefrath, *Nochmals: Deutsche Einheit und internationales Kaufrecht*, in Supplement 6 to no. 6 of *Betriebs-Berater* 1991, 8, 10.

³⁵ This is a thought first developed by H. Wheaton in his "Elements of International Law" – cf. *id.*, *Elements of International Law* (8th ed., ed. by W. E. Dana in 1866), 275; O'Connell took up that conceptual insight 1967 in his "State Succession in Municipal Law and International Law" – cf. note 9, Vol. 2, 2; cf. also Heintschel v. Heinegg (note 16), 14.

tracting State totally disappears as an administrative entity, it is likely that a wide range of treaties would cease to be performable in the changed circumstances, and the presumption might be against treaty survival. But when the change of sovereignty modifies the circumstances of performance only slightly, if at all, the presumption will be reversed”³⁶.

Because German unification is a case of “unifying” characterized by total extinction of the one contracting party as an administrative entity, one could assume that most treaties concluded by the GDR would cease to govern the international relations of Germany (or at least the eastern part of it). This is even more convincing if one bears in mind the highly politicized character of “socialist international law”. Nearly every treaty of bilateral or multilateral cooperation between socialist countries could be seen as a political treaty in the most genuine sense of the word – besides the commerce protocols in the framework of COMECON coordination. And even treaties and agreements with non-socialist countries were often dominated by the special interests of the Eastern bloc, an interest which by no means can be supposed to operate in the same way in the case of the Federal Republic of Germany.

But the Treaty of Unification, which contains some articles on state succession in respect to treaties, does not contain such a presumption of termination with regard to treaties of the GDR. On the contrary, its Art.12 on the treaties and agreements of the GDR is drafted in an extremely flexible wording which implicitly makes reference to the general and open formula of *rebus sic stantibus*, while avoiding any clear-cut statement on the decisive question of survival vs. extinction of treaties. Art.12, para.1 reads as follows (translation by the author):

“The Contracting Parties are agreed that, in connection with the establishment of German unity, international treaties and agreements of the German Democratic Republic shall be discussed with the contracting parties concerned under the aspects of protection of legitimate trust (*Vertrauensschutz*), of the position of interest (*Interessenlage*) of the States concerned and of the contractual obligations of the Federal Republic of Germany as well as under the principles of a free, democratic and constitutional (*rechtsstaatlichen*) Basic Order and subject to the jurisdiction of the European Communities, in order to regulate or to establish their continuation, adaptation or termination”.

Paragraph 2 of Art.12 elaborates the procedural aspect of the succession régime:

“The united Germany establishes its position in respect to devolution of international treaties of the German Democratic Republic subsequent to con-

³⁶ O’Connell, *State Succession ...* (note 9), Vol.2, 3.

sultations with the respective parties to the treaty and with the European Communities, as far as the Communities' competences are concerned".

The reference to categories of *rebus sic stantibus* is rather obvious in these provisions. Consultations with the contracting parties of the GDR in order to adapt contractual relations to the changed circumstances in principle is the favourite instrument in coping with the succession problems, rather than a presumption of termination or of continuation of treaties. Adaptation to changed circumstances by negotiations is thus the crucial notion, at least in theory, and not an abstract principle such as extinction or continuity drawn from a general theory of the state – even if in practice termination proves to be the most likely solution in the overwhelming majority of cases (and the only clear-cut one derivable from legal principles). That most treaties will be declared to have expired *ipso jure*, as a logical consequence of the change of circumstances, however, does not affect the theoretical emphasis on the flexible categories of *rebus sic stantibus* as such.

In consequence Art.12 of the Unification Treaty with its reference to categories of *rebus sic stantibus* probably has to be understood as a mostly procedural norm. The treaties of the GDR do not terminate automatically, *ipso jure*, but will be declared to have expired by the successor, the Federal Republic of Germany, after consultations with the contracting parties. The procedural recourse to techniques of *rebus sic stantibus*, however, does not hinder the German state from using the declaration of expiration as the normal instrument in coping with treaties of the GDR, even in cases where consensus has not been reached during the consultations. Even if most treaties will cease to apply following the drastic change of circumstances, this is a result of adaptation to changed circumstances, not an automatic consequence of a legal rule of extinction.

The Governments of the (at the time of conclusion still two) German states have thus followed the line indicated by some prominent scholars such as Frowein and Tomuschat earlier in 1990³⁷. In order to prevent an automatic termination of all contractual bonds of the GDR, it had been proposed by them to create a sort of interim stage in which the united Germany should negotiate with the contracting partners of the GDR on termination of the treaties or their continuation (if necessary

³⁷ J.A. Frowein, Die Verfassungslage Deutschlands im Rahmen des Völkerrechts, presentation given at Berlin in April 1990, printed in VVDStRL 1990, 7, at 30; C. Tomuschat, A United Germany within the European Community, presentation given in June 1990, printed in C.M.L.Rev. 1990, 415, at 421; cf. also U. Drobniig, Das Schicksal der Staatsverträge der DDR nach dem Einigungsvertrag, Deutsch-Deutsche Rechtszeitschrift 1991, 76, 78.

under modifications). To cite from a presentation by Christian Tomuschat in June 1990: "... in order to protect the stability interest of the treaty partners of the incorporated State, one may well take the view that the treaties concluded by that State do not lapse ipso iure, but continue in force, with the possibility for the incorporating State to terminate them on terms to be agreed upon with the other parties"³⁸.

It remains unclear, however, what really happens with the treaties in the interim stage if one follows this "proposal *de lege ferenda*" (as happened in the Unification Treaty). Do these treaties remain applicable directly in judicial practice? Or are they suspended for an interim phase until agreement is reached on termination or continuation³⁹? The treaty itself does not answer that question, and doctrine is not very helpful in this respect, either. Continued direct application obviously would lead to serious problems, particularly in cases of contradictory norms in the treaty law of the Federal Republic of Germany⁴⁰. A further problem would be constituted by the lack of a legislative act incorporating the treaty law in the internal legal order. Probably a suspension of these treaties until final agreement as to their fate is much more appropriate for practical considerations⁴¹, but an explicit norm providing for such a suspensive effect admittedly is difficult to establish.

In addition, it must be said that a recourse to the legal techniques of *rebus sic stantibus* does not really solve the theoretical problems (and in some cases also not the practical problems) of all succession situations. What legal régime should be established if there is no agreement on termination or continuity of treaties? For these cases the doctrinal reflections on succession still have their validity.

2. "Political" Treaties

Even if the solutions vary very much according to the different forms of succession, it remains possible to give some general answers on certain categories of treaties. Legal doctrine has tried to single out the extreme cases where state practice in principle comes to rather clear answers.

One of these categories is the group of so-called "political" treaties

³⁸ Tomuschat, *ibid.*, 421.

³⁹ For these questions cf. H.-P. Mansel, *Staatsverträge und autonomes internationales Privat- und Verfahrensrecht nach der Wiedervereinigung*, Juristische Rundschau 1990, 441, 444; Drobniç (note 37), 79 et seq.; a different approach is propagated by Enderlein/Graefrath (note 34), 11.

⁴⁰ Mansel, *ibid.*

⁴¹ This solution is convincingly argued for by Mansel (note 39), 444.

regulating the political and economic status of the respective state⁴². Alliances and treaties of friendship, treaties forming a political union and treaties establishing a system of economic integration are such embodiments of genuine political treaties. But also a large variety of other forms of treaties are possibly subsumed under this category, depending from the concrete situation, for any treaty which is indissolubly linked to the particular political structure of a state, bound to its peculiar political and economic order, is a treaty inseparably coupled to the existence of the particular political entity that has concluded it.

The fate of these “political” treaties seems clear and unequivocal, at least in cases of extinction of one state by accession and integration of its territory into another state. Treaties which were negotiated to serve the particular political interests of a given state – interests which have their roots in the peculiarities of the specific political and economic order of that state – probably in all cases are not performable any more if that state vanishes, if it is replaced by another state with a completely different political and economic structure⁴³. The purpose of such a “political” treaty cannot but become “frustrated” by the replacement of the sovereign; thus the treaty should be deemed to terminate in its legal force.

The definition of this category, however, is a rather fluid affair, which makes any recourse to a general rule concerning extinction of “political” treaties a matter open to discussion. Whether a theoretical rule on termination of “political” treaties helps very much in practice (which means in the discussions on legal validity of treaties arising in the wake of consultations on succession matters), therefore, is open to doubt; probably such a rule can only serve as a sort of guideline to be used in the negotiations on the consequences of succession.

3. “Localized” Treaties

Another category which was singled out by the doctrinal writers on state succession as a group of cases that are solved in a parallel manner are the treaties classified as “localized”⁴⁴. The usefulness of the notion

⁴² For the category of “political” treaties cf. Oppenheim/Lauterpacht (note 29), 159 §82; G. Dahm /J. Delbrück /R. Wolfrum, *Völkerrecht*, Vol. I/1 (2nd ed. 1989), 165; B. von Hoffmann, *Internationales Privatrecht im Einigungsvertrag*, Praxis des Internationalen Privat- und Verfahrensrechts 1991, 1, 6, 8.

⁴³ Cf. Oppenheim/Lauterpacht, *ibid.*; Dahm/Delbrück/Wolfrum, *ibid.*

⁴⁴ German terminology generally uses the notion »radizierte Verträge« for this category – cf. F. A. v. d. Heydte, *Völkerrecht (1958–1960)*, Vol. 1, 307; A. Verdross, *Völkerrecht* (5th ed. 1964), 255; W. Wengler, *Völkerrecht* (1964), Vol. 1, 608 et seq.;

“localized” has been questioned⁴⁵; but besides the terminological question it is quite clear that in state practice there exists a certain category of treaties defining the legal regime of a territory, treaties which are in general resistant to changes of the territorial sovereign⁴⁶. “At least this much may be said: the hard core of treaties which do survive change of sovereignty” – to cite D.P. O’Connell again – “is the category of treaties which affect territory in somewhat the same fashion as executed conveyances, easements and servitudes affect personal estates”⁴⁷.

The rationale of that exceptional category, the reason why these “localized” treaties are resistant to changes in sovereignty, is not difficult to establish. Such “localized” treaties create or transfer a “real” right – “and real rights in international law are those which are attached to a territory, and which are in essence valid erga omnes. The restrictions imposed by the treaty are less of contractual character than equities in favour of the beneficiary States”⁴⁸. A “localized” treaty is “thus more of a conveyance than an agreement, and as such is an instrument for the delimitation of sovereign competence within the impressed territory”⁴⁹. This means that the state which accepts such “localized” obligations “possesses for the future no more than the conveyance assigned to it, and a Power which subsequently succeeds in sovereignty to the territory can take over only what its predecessor possessed”⁵⁰.

As an example of such a “localized” treaty in the context of German unification could be cited the Treaty between Poland and the German Democratic Republic concerning navigation on the River Oder of February 6, 1952⁵¹. This treaty probably will be seen as continuing to apply even after unification. In general, however, “localized” treaties are rare in the particular case of the GDR.

Verdross/Simma (note 32), 616 et seq.; Dahm/Delbrück/Wolfrum (note 42), 167 et seq.

⁴⁵ Cf. O’Connell, *State Succession ...* (note 9), Vol.2, 15 et seq.

⁴⁶ Cf. the literature cited above in note 44; also Art.12 of the Vienna Convention on State Succession in Respect to Treaties of 1978. Critical towards the concept of ‘localized’ treaties are I. Brownlie, *Principles of Public International Law* (3rd ed. 1979), 667; J.L. Brierly, *The Law of Nations* (6th ed. 1963), 154; R. Jennings, *General Course on Principles of International Law*, RdC 121 (1967 II), 442.

⁴⁷ O’Connell (note 9), Vol.2, 14.

⁴⁸ *Ibid.*, 14.

⁴⁹ O’Connell (note 9), Vol.2, 14–15.

⁵⁰ *Ibid.*, 15.

⁵¹ Published in *Dokumente zur Außenpolitik der DDR*, Vol.4 (1957), 157 et seq.; amended by an agreement of May 15, 1969, *Gesetzblatt der DDR* I, 1970, 113 et seq.

Even more important is that the most delicate variant of a "localized" treaty of the GDR, which is the boundary treaty with Poland signed at Görlitz in 1950, in all probability will have no legal significance for a unified Germany. When the government of the GDR signed that treaty which declared the "Oder-Neisse Line" to be the boundary between Poland and Germany, the German Democratic Republic did not have the legal competence to establish a legally binding boundary for the state of Germany, since the Allied Powers had taken over just that essential prerogative of German sovereignty with the occupation of Germany⁵².

Far more important with regard to the question of the eastern boundary of Germany will prove to be the Warsaw Treaty between Poland and the Federal Republic of Germany of December 7, 1970⁵³. The Federal Republic recognized in that treaty that the "Oder-Neisse Line" forms the western boundary of Poland and confirmed the "inviolability of the existing boundaries now and in future"; both Contracting Parties engaged themselves mutually to respect without reservation the territorial integrity of the other party.

In principle, admittedly, the same reservation in respect to the binding force of the treaty is true as for the Görlitz boundary treaty of the GDR. The Federal Republic also had no legal competence to establish a final boundary settlement which could oblige "Germany as a whole", i.e. the still existing German state whose sovereignty was still attributed in part to the Allied Powers⁵⁴. The Federal Republic even took care to include a formal reference to its lacking competence by mentioning in Art. IV of the treaty the bilateral or multilateral international agreements concerning Germany which should not be affected by the Warsaw Treaty⁵⁵.

If in the wake of German unification a new state were to have been formed which could have been classified as a separate legal personality representing "the entire Germany", some doubts probably would have

⁵² Cf. E. Klein, *An der Schwelle zur Wiedervereinigung Deutschlands*, NJW 1990, 1065, 1072; K. Hailbronner, *Völker- und europarechtliche Fragen der deutschen Wiedervereinigung*, JZ 1990, 449, 451–452.

⁵³ Published in BGBl. 1972 II, 362 et seq.

⁵⁴ Cf. the decision of the Federal Constitutional Court on the Warsaw Treaty in BVerfGE 40, 141, 171 = NJW 1975, 2287, which claimed that by the Treaties of Warsaw and Moscow the territories eastern of Oder and Neisse could not be removed finally from German sovereignty since the Federal Republic had no competence to bind "Germany as a whole" with regard to its territorial sovereignty.

⁵⁵ Cf. only Rauschnig (note 3), 399 with further references in note 63.

been brought up concerning the binding force of the Warsaw Treaty with respect to that “new” German state. Nevertheless, as far as the Federal Republic, which is the original contracting party to the Warsaw Treaty, is continued in its existence, there can be no doubt that the obligations of the Warsaw Treaty still apply in the German-Polish relationship⁵⁶. The Federal Republic of Germany, as long as it survives as a state with a continuous legal personality, is bound by Art.I of the Warsaw Treaty with its guarantee of the inviolability of the boundaries⁵⁷; and since the Federal Republic has prevailed with its concept of continuity of the German states, the unified German state will be not only identical with the pre-1945 German state, but also with the Federal Republic which reconstituted the German state in 1949.

It is true that also the Federal Republic could according to Art.IV of the Warsaw Treaty refer to the requirement that the Four Allied Powers give their consent to any boundary settlement⁵⁸, a requirement explicitly reserved for in the Potsdam Protocol. As the Western Allied Powers often have declared: a final settlement of the boundary question presupposes a peace settlement regarding Germany⁵⁹. But if this “peace settlement” is achieved by a simple international treaty between the Allied Powers and Germany – as has happened with the “Two-Plus-Four Treaty”⁶⁰ – the boundary settlement concluded between the Federal Republic and Poland in the Warsaw Treaty to become finally binding, requires only a formal confirmation of the Allied Powers that they approve the arrangement agreed upon with Poland⁶¹. And that the “Two-Plus-Four Treaty” of September 12, 1990, contains such a confirmation of the boundary settlement established in the Warsaw Treaty is beyond any question, if one reads Art.1 of the Treaty. Paragraph 1 of Art.1 provides:

⁵⁶ Cf. in this sense Frowein (note 37), 7, 18.

⁵⁷ Cf. J. A. Frowein, *Zur verfassungsrechtlichen Beurteilung des Warschauer Vertrages*, *Jahrbuch für Internationales Recht* 1975, 11, 54.

⁵⁸ To the Warsaw Treaty and in particular its Art.IV cf. Frowein, *ibid.*, 14 et seq.

⁵⁹ Cf. the statement of the British Foreign Minister before the Foreign Press Association on December 1, 1970: “We have taken the same view as Herr Brandt’s Government that we are glad to note that the German government has come to this arrangement; but of course a final arrangement must await a final peace settlement of the German problem” (reprinted in Frowein [note 37], 18 note 38).

⁶⁰ Whether the “Two-Plus-Four Treaty” constitutes a “final peace settlement” in the sense of the Potsdam Protocol is in debate – cf. Blumenwitz (note 4), 3041, 3042.

⁶¹ Cf. Frowein (note 37), 19; for the right reserved to the Allied Powers to confirm a final arrangement of the German borders cf. in detail C. v. Goetze, *Die Rechte der Alliierten auf Mitwirkung bei der deutschen Einigung*, *NJW* 1990, 2161, 2165–2166.

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

In addition, paragraph 5 of Art.1 establishes:

“The Governments of the French Republic, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America take formal note of the corresponding commitments and declarations by the Governments of the Federal Republic of Germany and the German Democratic Republic and declare that their implementation will confirm the definitive nature of the united Germany’s borders”.

No doubt, paragraph 2 of Art.1 requires: “The united Germany and the Republic of Poland shall confirm the existing border between them in a treaty that is binding under international law”. That provision, however, is more a question of political rhetoric and of diplomatic convenience than a legal necessity. Since the Federal Republic, which now has taken over all constituent parts of German sovereignty, has formally recognized the “Oder-Neisse Line” as forming the international boundary of Poland, there is no further act required to settle the attribution of the territories east of the Oder and Neisse to Polish sovereignty except for the formal confirmation of the Allied Powers declared in Art.1 of the “Two-Plus-Four Treaty”⁶². For a renewed recognition with constitutive effects, or even for a formal cession, there is no occasion any more⁶³.

In regard to the (admittedly rather small) adjustments of the western boundaries, the same principle applies. These changes of the boundary were also under the reservation of a “final peace settlement”, a reservation which now is discarded by the confirmation of the boundary changes declared by the Allied Powers in the “Two-Plus-Four Treaty”⁶⁴.

⁶² In this sense cf. Frowein, *ibid.*, 19.

⁶³ For the opposite position cf. Klein (note 52), 1071 et seq.; Blumenwitz (note 4), 3044.

⁶⁴ Cf. Rauschnig (note 3), 398; Blumenwitz, *ibid.*, 3043; Frowein (note 37), 19.

4. Multilateral Conventions and Membership in International Organizations

Another category of treaties which was singled out by some authors to be put under a special succession régime is the group of multilateral conventions with a generalized "law-making" character and the treaties establishing membership in international organizations.

In the majority of cases, this "special category" will be a more theoretical than practical problem, however. In most multilateral conventions emerging from the efforts of the United Nations to codify international law and in most organizations of the United Nations network both states have been Contracting Parties or members, which means that no dispute can arise about membership in practice. The only question left at all is the theoretical construction of the devolution which explains how the dual membership is transformed into a unitary membership after unification. Yet because the one state which has decided to integrate in the other, i. e. the GDR, loses its legal personality by the integration into the Federal Republic of Germany, which is specified at the same time to continue German statehood in its entirety, there is no problem left. The GDR (with its membership in international organizations and multilateral conventions) ceases to exist as a subject of international law, while the Federal Republic, enlarged by the territories of the five new "Länder", continues to be a member of the organizations and conventions, with their respective legal régimes "binding upon each party in respect of its entire territory" (Art.29 of the Vienna Convention on the Law of Treaties)⁶⁵.

The principle just described is nothing else but the principle of "moving treaty boundaries" combined with the concept of extinction of the GDR as a subject of international law. The united German state (identical with the Federal Republic) since unification represents all Germany and is bound as a member of multilateral conventions and of international organizations in respect to its entire territory, including both the former territory of the Federal Republic and the territory of the former GDR⁶⁶.

⁶⁵ In this sense Rauschnig, *ibid.*, 403 and von Hoffmann (note 42), 8.

⁶⁶ Cf. J. A. Frowein, *Rechtliche Probleme der Einigung Deutschlands*, Europa-Archiv 1990, 233, 234 et seq.; Frowein (note 37), 25 et seq.; A. Randelzhofer, *Deutsche Einheit und europäische Integration*, VVDStRL 1990, 101, 108-111; Hailbronner (note 52), 453-454; Rauschnig (note 3), 403; K. Stern, *Einführung*, in: *id.* (ed.), *Staatsvertrag zur Währungs-, Wirtschafts- und Sozialunion* (1990), 38 et seq.; D. Murswiek, *Deutschlands aktuelle Verfassungslage*, JZ 1990, 682-686; E. Grabitz / A. v. Bogdandy, *Deutsche Einheit und europäische Integration*, NJW 1990, 1073, 1076; Heintschel v. Heinegg (note 16), 13; Mansel (note 39), 442; von Hoff-

That precisely this concept of extinction and continuity with an enlarged territory characterizes the official position of both German States when agreeing upon the unification, follows from Art.11 of the "Unification Treaty" which provides:

"The Contracting Parties proceed on the understanding that international treaties and agreements to which the Federal Republic of Germany is a contracting party, including treaties establishing membership in international organizations or institutions, shall retain their validity and that the rights and obligations arising therefrom, with exception of the treaties mentioned in annex I, shall also relate to the territory specified in Article 3 of this treaty. As far as adaptations become necessary in individual cases, the government of unified Germany will consult with the respective Contracting Parties".

Only in a small minority of cases will real difficulties arise in regard to membership in multilateral conventions and international organizations. Serious problems are only possible in respect of conventions and organizations where the GDR had been a member whilst the Federal Republic had abstained from participation, e.g. concerning some ILO Conventions. B. Graefrath has suggested in this respect, referring to Art.31 of the 1978 Vienna Convention, that the conventions should apply even after unification in respect of the territory of the former GDR, in order that the population of the GDR should not lose its protection under these conventions⁶⁷. Apart from the question whether the protection given by these conventions is really as essential in practice as Graefrath seems to assume, such a (territorially limited) application would raise serious practical and theoretical questions⁶⁸. On the one hand it is more than doubtful whether these conventions are suitable for limited application in respect of only parts of a national territory; on the other hand, if a restricted application would make any sense at all, it would run counter to the ultimate goal of the entire unification, which is to bring about legal unity in all parts of Germany.

Probably more realistic is a solution which is based on the assumption that in principle the membership of the GDR in all multilateral conventions and in international organizations ceased to exist with the extinction

mann, *ibid.*, 5; cf. also C. Tomuschat, *Wege zur deutschen Einheit*, VVDStRL 1990, 70, 81–82, as well as, in the negative, L. Horn, *Völkerrechtliche Aspekte der deutschen Vereinigung*, NJW 1990, 2173–2174 with a somewhat misleading argumentation (accession of the GDR as a case of "cession" in the sense of Art.15 Vienna Convention on State Succession in Respect to Treaties) and Klein (note 52), 1073.

⁶⁷ Neues Deutschland of April 5, 1990, 5.

⁶⁸ Cf. Frowein (note 37), 29 et seq.

of the GDR as a state. State practice in the few cases of fusion or accession where such membership positions were in question speaks much in favour of such an approach⁶⁹, and Art.12, para.3 of the "Unification Treaty" is also built upon that premise when it declares:

"Should the unified Germany envisage to accede to international organizations or to other multilateral treaties, to which the German Democratic Republic, but not the Federal Republic of Germany was a party, it will bring about an understanding with the respective Contracting Parties and with the European Communities, as far as their jurisdiction is concerned".

For multilateral treaties Germany thus has taken the position that, contrary to its general approach towards the succession in respect to bilateral treaties and agreements, the treaties of the GDR cease to apply in general, since with the extinction of the GDR the respective contracting party has vanished. Only in the (probably rare) cases where the unified Germany chooses to negotiate with the respective contracting parties on continuing the GDR's membership, will the membership status be resumed – but in these cases not only in respect of the territory of the former GDR, but in respect of the entire German territory.

Undoubtedly the most important question of continuity or termination of membership position is the participation of Germany in the organizations of economic integration in Europe, i. e. the European Communities and the COMECON. That a unified Germany cannot continue the membership of the two German states in both organizations is fully clear. According to the legal position explained above it is just as clear that with the extinction of the GDR as a legal subject its membership not only in the Warsaw Pact Organization, but also in the economic integration of the COMECON has been terminated.

This is of the utmost importance since at the same time the Treaties creating the European Communities apply since October 3, 1990, to the whole territory of unified Germany⁷⁰. Initially there had been some debate in doctrine whether the accession of the GDR to the Federal Republic would lead automatically to the application of the Treaty of Rome to all of Germany (including its newly integrated eastern parts) or whether the change in territory and population would require the unified Ger-

⁶⁹ Cf. O'Connell, *State Succession ...* (note 9), Vol.2, 190 et seq., 216 et seq.

⁷⁰ For a detailed analysis of that topic cf. the article by T. Giegerich, *The European Dimension of German Reunification: East Germany's Integration into the European Communities*, 384 et seq., in this journal.

many to accede newly to the European Communities⁷¹. But consensus was soon reached that the principle of “moving treaty boundaries” applies without any difficulties also to the German membership in the European Communities⁷². As the Commission of the European Communities declared in its request for a waiver submitted to the GATT on October 31, 1990:

“On 3 October 1990, the German Democratic Republic has been united with the Federal Republic of Germany on the basis of an accession to the latter. Thus the Territory of the Federal Republic of Germany, a member state of the European Communities, has been extended and, as a consequence, the territory to which the treaties establishing respectively the European Community for Coal and Steel, the European Economic Community and the European Atomic Energy Community apply, has also been extended to include the territory of the former German Democratic Republic and of Berlin (East)”⁷³.

To make use, if not of the principle of “moving treaty boundaries” itself, then of an analogous rule undoubtedly existing in cases of incorporation of one state into another⁷⁴ seems to be consistent if one takes into consideration the previous practice of the Communities. Already in the case of the “Saar” territory which was integrated into the Federal Republic in 1957 there was brought to application the principle of “moving treaty boundaries” with regard to the newly formed state of “Saarland”⁷⁵.

In consequence not only the primary (and, in principle, also the secondary) law of the Communities applies in full scope to the new “Länder” of the Federal Republic⁷⁶, but also the international treaties con-

⁷¹ Cf. Rauschnig (note 3), 403–404; Grabitz/v. Bogdandy (note 66), 1076; Randelzhofer (note 66), 105 et seq.; Tomuschat (note 17), 418–419.

⁷² Cf. Declaration of Dublin of April 28, 1990, Bulletin des Presse- und Informationsamtes der Bundesregierung, no. 51, 401; cf. also the explanatory memorandum of the Commission of the European Communities, COM(90)400 endg. – Vol. 1, August 21, 1990, 29, 31.

⁷³ GATT-Doc.L/6759 of October 31, 1990, para. 1.

⁷⁴ For this differentiation between the principle of “moving treaty boundaries” and an analogous rule in respect of cases of incorporation cf. Randelzhofer (note 66), 108–111.

⁷⁵ Cf. F. Münch, Zum Saarvertrag vom 27. Oktober 1956, *ZaöRV* 1957, 1, 13, and E. Klein, Die deutsche Frage in der Europäischen Gemeinschaft, in: D. Blumenwitz/B. Meissner (eds.), *Die Überwindung der europäischen Teilung und die deutsche Frage* (1986), 65, 67.

⁷⁶ Cf. Giegerich (note 70), 384 et seq.; cf. also Grabitz/v. Bogdandy (note 66), 1076; Randelzhofer (note 66), 111–112; Hailbronner (note 52), 455–456; Rauschnig (note 3), 404; C. Starck, Deutschland auf dem Wege zur staatlichen Einheit, *JZ* 1990, 349, 356; Tomuschat (note 17), 418 et seq.; J. Scherer, *EG und DDR: Auf dem Weg zur Integration, Recht der internationalen Wirtschaft* 1990, Supplement DDR-Rechtsent-

cluded by the Communities⁷⁷. Moreover, as far as the subject matter of a treaty concluded by the GDR falls within the Communities' sphere of competence, the Communities succeed to the GDR as contracting party.

Concerning its approach in respect of succession to treaties, the Communities have formulated a position largely analogous to the German stance taken in the Unification Treaty. "The Commission rejects" – declared the explanatory memorandum presented by the Commission to the Council on August 22, 1990⁷⁸ – "the application of the so-called negative aspect of the abovementioned rule of moving treaty boundaries, which would lead to the automatic extinction of all GDR treaties with third States"⁷⁹. The Commission continues in its memorandum:

"The Community is bound by the legal principle of the continuity of treaty rights and obligations. A fundamental exception is to be made for so-called personal treaties, i.e. those which are inextricably linked with the political 'persona' of the former German Democratic Republic. Moreover, as it is likely that inherited treaty rights and obligations will conflict with Community law, including Community treaties, it is clear that their continuity must be subject to (re)negotiation"⁸⁰.

If the subject-matter of such a treaty of the GDR affecting Community law is within the exclusive competence of the Communities, the Community succeeds directly – which means that the Communities also will carry out any necessary renegotiation. If it is in the mixed competence of the Communities and the member state, the Communities and the unified Germany "each succeed in respect of their own competence. (Re)negotiation should be carried out jointly, subject of course to careful coordination"⁸¹.

In both cases the Communities have reserved themselves the possibility to undertake the necessary (re)negotiations on its own account; but also the possibility of a temporary authorization to a unified Germany "to

wicklungen 6 to no.4 RIW, 11, 12–14; J. Sedemund, Deutsche Einheit und EG, EuZW 1990, 11 et seq.; D. Rauschnig /R. Hach, Geltung des Rechts der Europäischen Gemeinschaften im Gebiet der DDR nach der Wiedervereinigung, EuZW 1990, 344 et seq.; C. W. A. Timmermans, German Unification and Community Law, C.M.L.Rev. 1990, 437, 438 et seq.

⁷⁷ Cf. the memorandum presented by the Commission to the Council on August 22, 1990, COM(90)400 endg. – Vol.1, 35; reprinted in *The European Community and German Unification*, Supplement 4/90 to the BULLEC (S.4/90), 47.

⁷⁸ COM(90)400 endg.

⁷⁹ COM(90)400 endg. = S.4/90 (note 77), 47.

⁸⁰ *Ibid.*

⁸¹ COM(90)400 endg. = S.4/90 (note 77).

exercise rights and obligations under the inherited treaty should not be excluded. This may, indeed, provide a practical solution to difficult situations in practice. Such authorization should clearly be subject to safeguards, for example Commission supervision”⁸².

5. Trade Agreements of the GDR

The most important categories of treaties and agreements that fall under this particular succession régime (characterized by participation of the European Communities) are the bilateral trade agreements concluded with all COMECON countries and, additionally, with a number of Less Developed Countries. Such treaties provided a framework for trade between the partners in the COMECON, running parallel to the organization’s five-year plan 1986–1990. Lists of goods in which trade may take place were attached to them, whereas the concrete goods and the quantities of the trade agreed in detail between the partners were laid down in yearly bilateral trade protocols⁸³. In a host of other specific treaties (long-term cooperation treaties) between the same partners were agreed investment projects and similar cooperative ventures, where often cooperation of one partner was compensated by deliveries of raw-materials, semi-finished or finished goods and energy goods, in many cases originating themselves from the common project⁸⁴.

All these bilateral trade relationships were designed to guide the respective partners’ commercial exchanges for rather long periods, which meant that a lot of investment decisions and long-term calculations of reciprocity were based on the existence of these networks of trade agreements and cooperation treaties. In other words: there are a lot of legally fixed “expectations” of the traditional trade partners of the GDR which have to be taken into account when the issue of succession in respect of these treaties is debated.

To find a legal corner-stone for a discussion of that problem is not easy. A precedent for succession in treaties of that kind is not available, since the GDR is the first case of a socialist country to be integrated into a liberal market economy. That there is a political necessity to take into

⁸² *Ibid.*

⁸³ For an overview of these trade arrangements cf. Annex III of COM(90)400 endg. = BullEC, S.4/90 (note 77), 65 et seq.

⁸⁴ Cf. the list of these long-term cooperation treaties in Annex II of COM(90)400 endg. = BullEC, S.4/90 (note 77), 61 et seq.

consideration these commercial expectations of the eastern trade partners of the GDR, particularly the Soviet Union, is quite obvious, on the other hand. The Federal Republic (and the European Communities) thus had to develop an *ad hoc* position, which they did by recourse to principles of internal law.

The two German states for the first time referred to that problem under the notion of *Vertrauensschutz* (protection of "legitimate expectations") in the so-called »Staatsvertrag« of May 18, 1990, establishing a monetary, economic and social union between the two German states⁸⁵. In Art.13 para.2 of that Treaty the Federal Republic and the GDR agreed that "the existing foreign trade relations (gewachsenen außenwirtschaftlichen Beziehungen) of the German Democratic Republic ... shall be respected" (in German: »genießen Vertrauensschutz«).

The Unification Treaty repeats the reference to the principle of *Vertrauensschutz* with a wording nearly identical to that of Art.13 para.2 of the (first) Staatsvertrag:

"The existing foreign trade relations of the former German Democratic Republic, in particular its contractual obligations towards the countries of the Council for Mutual Economic Assistance, shall be respected (genießen Vertrauensschutz). They shall be further developed and extended, taking into account the interests of all involved and with due regard for free-market principles and for the jurisdiction of the European Community. The Government of a united Germany will take care of that these relations will be regulated adequately under organizational aspects in the framework of the respective technical competence.

The Federal Government respectively the Government of a united Germany shall agree with the relevant institutions of the European Communities on the transitional exceptions which are necessary in the field of foreign trade for the purposes of the first paragraph".

The last paragraph deserves attention, for some of the most significant arrangements necessary to secure the "legitimate trade interests" of the former main trading partners of the GDR had to be taken by the Communities, and not by the united Germany. Particular mention should be made of the measures taken by the Commission provisionally in September 1990, which had become necessary since the proposals for a set of

⁸⁵ BGBl.1990 II, 537; cf. also Commission of the European Communities, COM(90)400 endg. = BullEC, S.4/90 (note77), 37 et seq.; D. Rauschnig, Der deutsch-deutsche Staatsvertrag als Schritt zur Einheit Deutschlands, APoluZG B 23/1990, 3 et seq.; K. Stern /B. Schmidt-Bleibtreu (eds.), Staatsvertrag zur Währungs-, Wirtschafts- und Sozialunion, Einführung (1991), 5 et seq.

transitional measures presented by the Commission to Council and Parliament⁸⁶ were supposed to take some time until final adoption.

The main problem for the Communities was the fact that since unification the Common Customs Tariff is fully applicable to the territory of the former GDR. Even if the multi-annual trade agreements, and the yearly concluded trade protocols which elaborated the coordination of the reciprocal deliveries in the framework of the five-year plans fixed only maximum quantities and values, which did not constitute by themselves legal obligations to export or import these quantities, the Communities saw themselves in a certain obligation. "The European Community has ... no obligation to respect these maximum quantities or values" – was declared by the Commission when requesting a waiver from GATT – "but it has a certain obligation to respect the conditions on which the traditional trade flows between the former GDR and its principal trading partners took place, i. e. absence of customs duties. In addition the European Community has to take into account the legitimate expectations of the GDR's traditional trading partners in Central and Eastern Europe that trade could continue on this basis for some time to come"⁸⁷.

The Community for these reasons "considered it appropriate" to temporarily suspend import duties, including anti-dumping duties in force against eastern European states, as well as the application of a number of technical rules for products which are traded in the context of these trade agreements. The transitional tariff measures are limited until December 31, 1992⁸⁸.

A comparable necessity to obtain exemptions from the ordinary rules exists in the field of "strategic export controls" organized by COCOM⁸⁹. With the integration of the former GDR into the territory of the Federal Republic, the framework of COCOM controls is applicable also to deliveries from the new »Länder« to its former trading partners in the east. Because a significant part of the deliveries covered by the provisions on »Vertrauensschutz« in the »Staatsvertrag« and Unifica

⁸⁶ COM (90) 400, Vols.1–3; reprinted in BulLEC, S.4/90 (note 77), 27 et seq.

⁸⁷ GATT-Doc.L/6759 of October 31, 1990, para.4.

⁸⁸ For the details cf. *ibid.*, paras.6–9; cf. also NZZ of November 9, 1990, 16.

⁸⁹ Probably the best introduction to the mechanisms of COCOM is still C. Hunt, Multilateral Cooperation in Export Controls – The Role of CoCom, University of Toledo Law Review 1983, 1285–1297; cf. also R. Yakemtchouk, Transferts de technologies sensibles entre l'Est et l'Ouest, Studia Diplomatica 1984, 395, 417 et seq. and the recent publication of B. Großfeld/A. Junker, Das CoCom im Internationalen Wirtschaftsrecht (1991), 16 et seq.

tion Treaty would become impossible if the rules of COCOM were to be applied fully, the Federal Republic was forced to ask for exemptions from the operating rules⁹⁰.

But the principal German measure which was needed to support the execution of the old intra-COMECON trade agreements was the payment of considerable subsidies to exporters. The deliveries were arranged originally in a complicated system of bilateral clearing on the basis of so-called "transfer roubles", where the enterprises were paid by the exporter state in its own currency while the state on the COMECON level could balance its deliveries in a certain other state with its debts from the same bilateral trade⁹¹. With the breakdown of the COMECON's clearing system⁹², and particularly with the sudden conversion of the East German economy to a free market economy, deliveries to the Soviet Union or other eastern states became unprofitable, for the credits in clearing-accounts could not even match the costs of the enterprises. Export trade with the eastern trading partners of the former GDR could be upheld only with considerable subsidies paid to the enterprises engaged in this trade⁹³. Although these subsidies were supposed to run out at the end of 1990, the Federal Government had recognized already in September 1990 claims of subsidies charging the budget with more than 5 billion DM⁹⁴ – and it was foreseeable that the relevant titles of the budget would be exhausted prematurely. As a result, the export trade from the former GDR with the eastern states had practically broken down already at the end of 1990⁹⁵.

Probably there will not be any comparable programme of subsidies following up the original one, which will mean that the »Vertrauensschutz« declared in the two treaties instituting unification is a principle more proclaimed on paper than realized in practice. Whether this result has not been inevitable from the beginning is an open question, since a German state already loaded with the enormous burden of reconstructing the economy in the eastern parts of Germany probably would be incapable of subsidizing indefinitely with huge amounts of money the

⁹⁰ Cf. FAZ of December 28, 1990, 13.

⁹¹ For the functioning of CMEA cf. S. A u s c h, *Theory and Practice of CMEA Cooperation* (1972); V. S o b e l l, *The Red Market. Industrial Cooperation and Specialisation in Comecon* (1984); A. Z w a s s, *The Council for Mutual Economic Assistance: The Thorny Path from Political to Economic Integration* (1989).

⁹² Cf. A. G w i a z d a, *Die Desintegration des Rates für gegenseitige Wirtschaftshilfe*, APoluZGB 45/1990, 35, 43 et seq.; cf. also FAZ, January 9, 1991, 12.

⁹³ Cf. NZZ of November 3, 1990, 19.

⁹⁴ *Ibid.*

⁹⁵ NZZ of November 3, 1990, 19.

continuance of the former COMECON five-year plan economy. In any case it is doubtful whether the principle of »Vertrauensschutz« really is a legal duty arising under the laws of succession or the principles of *rebus sic stantibus*, or whether its proclamation by Germany was not merely a political gesture of goodwill without any firm roots in international law⁹⁶.

6. Procedural Aspects

As was mentioned above, Art.12 of the Unification Treaty, which was notified generally to all contracting partners of the GDR, should be interpreted as a mainly procedural norm, providing for consultations with these contracting partners. The fate of the contractual relations shall be discussed in these consultations in order to reach agreement on continuation, adaptation or termination. Consensus, however, is not necessarily required, as in other cases of changed circumstances where the contracting parties can unilaterally adapt a treaty that has been frustrated in its purpose, too. The requirement of consultations does not force the states concerned to seek the formal consent of the contracting parties, but it ensures that all the relevant interests of the parties concerned are taken into account in the process of adaptation of the treaty relations to the changed circumstances.

The Federal Republic of Germany thus is not prevented from declaring most treaties to have expired, a solution which it seems is preferred in practice. Nevertheless, before termination is stated formally and is notified to the contracting partner, consultations have to be held in order to ascertain the position of the other side; at the same time, the (sometimes differing) positions of the various German ministries have to be coordinated. In practice, therefore, the procedure is coordinated and supervised by the Foreign Ministry, with the result that the other ministries involved may not proceed on their own. The Foreign Ministry takes the initiative in opening the consultations. The basis for these consultations with the contracting partners of the GDR is a list of all treaties which were concluded bilaterally by the GDR. In a first round of bilateral consultations all the treaties are sorted into categories and put on

⁹⁶ Frowein in his report to the special session of the German Association of Constitutional Law Professors in April 1990 still limited his conclusions in that respect to a "duty to negotiate" based on the principle of »Treu und Glauben« – cf. VVDStRL 1990, 29.

record in separate lists, annexed to a protocol agreed on as a result of the first round⁹⁷. In a first list are entered all treaties which are considered by both parties to have expired; in a second list are enumerated all treaties which require further examination and negotiation. Concerning the treaties of the second list, technical consultations are then held by the various ministries as a second round of bilateral negotiations. The result of these bilateral negotiations is then communicated to the Foreign Ministry – without at that phase giving any formal declaration on the state of the treaty. Finally the Foreign Ministry states the termination or continuation of the treaty in a diplomatic note addressed to the contracting partner and published in the Official Gazette.

In most cases, obviously, termination is the only practicable solution for bilateral treaties, as the quickly-developing practice seems to demonstrate. Yet in some specific areas exceptional rules have been applied, where for special categories of treaties continuation (or at least temporary continuation) was considered to be a more adequate response than termination. Double taxation agreements, which were declared to continue to apply temporarily until the end of 1990, and treaties on matters of social security, are examples of these special categories. In particular the latter are an interesting case, since the statute on the Unification Treaty⁹⁸ explicitly provided for legislative delegation, authorizing the government to regulate “temporarily the continued application of the international treaties of the GDR concerning matters of social security ... until the united Germany has laid down its position concerning succession to these treaties”⁹⁹. By a regulation dated April 3, 1991¹⁰⁰, the German Government has stated the (temporary) continuation of application of social security agreements of the GDR with Bulgaria, Poland, Romania, Czechoslovakia, Hungary and the Soviet Union.

⁹⁷ See the model of such a protocol annexed below (Annex part B.).

⁹⁸ Gesetz zu dem Vertrag vom 31. August 1990 zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands (Einigungsvertragsgesetz) vom 23.9.1990, BGBl.II, 885.

⁹⁹ Art.3 para.1 Einigungsvertragsgesetz: »Die Bundesregierung wird ermächtigt, durch Rechtsverordnung vorübergehend die weitere Anwendung der von Art.12 des Einigungsvertrages erfaßten völkerrechtlichen Verträge der Deutschen Demokratischen Republik im Bereich der sozialen Sicherheit ... in dem in Artikel 3 des Einigungsvertrages genannten Gebiet zu regeln, bis das vereinte Deutschland seine Haltung zum Übergang dieser Verträge festgelegt hat ...«.

¹⁰⁰ Verordnung über die vorübergehende weitere Anwendung verschiedener völkerrechtlicher Verträge der Deutschen Demokratischen Republik im Bereich der sozialen Sicherheit vom 3.4.1991, BGBl.II, 614.

IV. Succession in State Property and Debts

1. General Remarks

The laws of succession in respect to state property and debts are still a subject-matter solely regulated by customary law¹⁰¹. Corresponding to the 1978 Vienna Convention on State Succession in Respect of Treaties the ILC also tried to elaborate a convention codifying the rules on succession concerning state property, archives and debts. The draft convention passed by the ILC at the beginning of the eighties and then adopted in 1983 by a diplomatic conference (again in Vienna)¹⁰², however, was so irreconcilably flawed with the rhetoric of decolonization and a confusion of special rules for “newly independent states” following from this rhetoric¹⁰³, that it never gained acceptance in the international community – and probably will never enter into force because of the lack of the necessary minimum of ratifications¹⁰⁴.

Even if the laws of succession regarding state property and debts are to a high degree uncertain¹⁰⁵, in principle, this does not matter in the particular case of German unification. The accession of the GDR to the Federal Republic as the German state now representing the entire Germany creates no problem with regard to succession in property and debts of the GDR¹⁰⁶, for in such a case where one state is integrated entirely into another state the succession rule in respect to property and debt is abundantly clear: the successor state takes over all the assets and liabilities of its newly integrated part.

¹⁰¹ Cf. Verdross/Simma (note 32), 620–34 §§ 997–1018; W. Fiedler, State Succession, in: EPIL Inst.10 (1987), 446, 450 et seq.

¹⁰² Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of April 8, 1983, UN Doc.A/CONF.117/14 (1983).

¹⁰³ As commentaries to the Convention cf. I. Seidl-Hohenveldern, Das Wiener Übereinkommen über Staatennachfolge in Vermögen, Archive und Schulden von Staaten, Österreichische Zeitschrift für öffentliches Recht und Völkerrecht 1983, 173–199; R. Streinz, Succession of States in Assets and Liabilities – A New Régime?, The 1983 Convention on Succession of States in Respect of State Property, Archives and Debts, GYIL 1983, 198–237.

¹⁰⁴ Cf. Verdross/Simma (note 32), 621 § 997; Fiedler (note 101), 454.

¹⁰⁵ Cf. Dahm/Delbrück/Wolfrum (note 42), 169 et seq.

¹⁰⁶ In this sense cf. Frowein (note 37), 30.

2. State Property

Concerning the assets, i.e. the property of the acceding state, this is already the general rule for all cases of succession¹⁰⁷. All the assets owned by a state, be it public property or private property of the state, which are situated on the territory taken over devolve upon the successor state¹⁰⁸. Even in cases of dismemberment or cession this is seen as the general rule. The subsequent problem of partition of the movable property and of the immovable property situated outside the territory affected by the transfer of sovereignty, which normally arises in cases of dismemberment and cession¹⁰⁹, is spared the German state in this case, since the GDR has acceded with its entire territory and is extinguished as a legal personality accordingly. Thus, also the premises of the embassies and diplomatic missions of the GDR in third countries pass over to the Federal Republic¹¹⁰.

The only problem which arises (but as a problem of internal law) is the problem of (internal) partition of the GDR's property between the Federal state, the newly formed five »Länder«, the municipalities and the »Treuhandanstalt«, which is the Trustee institution formed to organize the privatization of the former GDR's state economy. This is a mere problem of German constitutional and administrative law, regulated in the framework of eight extremely complicated articles of the Unification Treaty¹¹¹.

3. State Debts

In principle, the same is true for the question of state debts. Even if it is difficult to establish a general rule in respect of succession in state debts¹¹², the fate of state debts in cases of total integration of one state into another state gives no ground for any discussion. At least when the state which was the debtor is integrated with its entire territory, thus is merged totally in the state enlarged by the accession, which means extinc-

¹⁰⁷ Cf. Verdross/Simma (note 32), 622–623 § 1000.

¹⁰⁸ Cf. Dahm/Delbrück/Wolfrum (note 42), 169–173; Fiedler (note 101), 450–451.

¹⁰⁹ Cf. Fiedler, *ibid.*, 451; Dahm/Delbrück/Wolfrum, *ibid.*, 172–174.

¹¹⁰ Doubted by Horn (note 66), 2173, 2175, on the false presumption that German unification by accession of the GDR according to Art. 23 Basic Law would constitute a case of cession in the sense of Art. 14 of the 1984 Vienna Convention.

¹¹¹ Arts. 21–28 of the Unification Treaty.

¹¹² Cf. Dahm/Delbrück/Wolfrum (note 42), 175–183.

tion of the legal personality of the former debtor state, there exists practically unanimity that the successor state succeeds also in all liabilities of the state absorbed¹¹³. The draft Convention of 1983 has decreed such a rule for the cases of fusion of states in its Art.39; but the same rule is self-evident for state practice in cases of total absorption of states with the result of extinction of the debtor state.

Included in the debts passing over to the successor are the claims for compensation based on expropriations undertaken by the socialist régime of the GDR¹¹⁴. A problem of international law exists in this respect only insofar as foreigners were expropriated under violation of the recognized principles of international law concerning protection of property; at least in these cases, however, the Federal Republic will have to pay compensation hitherto denied by the GDR.

The two German states have recognized the succession in debts in the provisions on the GDR's state debts contained in the Unification Treaty. In Art.23 of the Unification Treaty they assume that all liabilities of the GDR devolve upon the unified Germany, which creates a special administration, a so-called »nicht rechtsfähiges Sondervermögen«, in order to handle the debts of the German Democratic Republic. In the case of liabilities towards foreign creditors resulting from state activities of the GDR abroad, the negotiations on debt restructuring fall into the responsibility of the Federal Minister of Finance (Art.24 para.1 of the Unification Treaty), and for assets and liabilities resulting from the membership of the GDR in the Council for Mutual Economic Assistance is reserved the possibility of special arrangements to be worked out later (Art.24 para.3 of the Unification Treaty).

V. Concluding Remarks

The case of German unification undoubtedly will be seen in the future as one of the most interesting cases of state succession in the late twentieth century. With the problems arising out of the accession of the GDR to the Federal Republic the interest of public international lawyers will be shifted back to the problems of classical succession cases resulting from

¹¹³ In this sense cf. Oppenheim/Lauterpacht (note 29), 160–161 §82; Verdross/Simma (note 44), 627 §1005–1006; uncertain Dahm/Delbrück/Wolfrum, *ibid.*, 177; falsely negative Horn (note 110), 2175, again on the false presumption of a cession.

¹¹⁴ Cf. Horn (note 10), 2176.

acts of cession, fusion, accession or secession, problems that will prove to be of enormous importance in the coming years. The concentration on questions of decolonization which dominated the discussion of the last three decades and which unfortunately flawed the attempts of the ILC to codify the laws of succession, could be loosened by that event – a result that probably would help the science of international law to overcome the deadlock in which it has been caught in the past decades concerning questions of succession.

In a certain sense, German unification belongs to one of the most easily solvable categories of succession. If one state accedes *in toto* to another state, its entire territory and population is absorbed by that state, and the legal personality of the former holder of territorial sovereignty is extinguished completely. Not only do all the attributes of sovereignty and all public authority pass over to the new sovereign, but also all assets and liabilities of the state extinguished. No dispute on partition of authority, of property and of debts can arise – a dispute which has kept international lawyers busy in the hitherto usual debates on consequences of decolonialization.

Admittedly, in respect of succession in treaties even such a relatively easy case knows no undisputed solution. The doctrine of succession in respect of treaties is so uncertain, and state practice in this field is so inconsistent, that every approach which is theoretically conceivable has been utilized somewhere. But the practice of the German states in the two treaties on unification, and even more the subsequent practice of the united Germany, with its reliance on the vague, but also flexible formula of *rebus sic stantibus*, will help much to clarify the basic structures of the laws of succession. That succession is not a subject-matter for rigid doctrinal categories is nearly a truism. Some basic theoretical structures, however, are appropriate even for the most flexible forms of practice, because some general guidelines on how to find a consensus in the difficult questions of succession are needed if a case of succession arises suddenly.

How useful such general doctrines can be – doctrines which in a certain sense are nothing other than condensed experience on the question where agreement could be found on the consequences of succession – is demonstrated by the unification process and its aftermath. Perhaps the process of German unification was not the most elegant way (seen from the perspective of legal technique) to handle the reintegration of the GDR in a united Germany and thus to reorganize the (still existing) German State, which represents “Germany as a whole” now. The lack of a formal peace

treaty will be felt in this respect, since not all the problems arising out of the continuity of the German »Reich« through the Federal Republic to a united Germany can be solved in the step-by-step procedure chosen by the states concerned. That the course which was followed by Germany and the Allied Powers was the most effective way to deal with these problems in the shortest possible time cannot be disputed, however. In conclusion, therefore, the case of German unification was a rather singular case – but a singular case indicative of the state of the laws of succession.