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The German Unification: Background and Prospects

DR. DIRK EHLERS*

I. INTRODUCTION

When President Ronald Reagan visited Berlin in 1987 and asked Soviet President Mikhail Gorbachev to tear down the Berlin Wall,¹ no one in Germany or abroad could foresee the upheavals in Central and Eastern Europe. These upheavals that shook the world would finally bring an end to the Cold War that had separated Germany and the rest of the world for almost forty years.²

Dramatic and peaceful change in Germany started with the opening of the Berlin Wall on November 9, 1989. Less than a year later, it culminated in the unification of the two German states. When the Wall fell, German Reunification was a topic of considerable debate. Nevertheless, most believed that reunification would be a lengthy process. Some commentators argued that the German Democratic Republic ("GDR") should remain a separate, democratic state.

Reunification, however, occurred faster than even the most ardent proponents of German unity had hoped. This was not only a remarkable political development, but it was also significant for the speed with which apparently insurmountable legal obstacles, based on legal positions asserted for over forty years, were overcome.

This Article will first outline the major events in the unification process. It will then assess several significant legal aspects of the process and their effects on reunification. However, this Article will leave a more detailed discussion of the legal issues for another occasion and will instead provide a general outlook for the future.

* Professor of Law, University of Münster, Germany. This Article is a revised version of a lecture given at the University of Iowa, College of Law on June 17, 1992. I have to thank Mr. Jörg Schanow, LL.M., Münster, Germany, for his assistance.

1. *Remarks on East-West Relations at the Brandenburg Gate in West Germany (June 12, 1987)* in 1 PUB. PAPERS 634, 635 (1987).

2. Gert-Joachim Glaessner, *Die Krise der DDR und die deutsche Frage in der Presse der USA*, 22 DEUTSCHLAND ARCHIV 1408 (1989); Michael H. Haltzel, *Amerikanische Einstellungen zur deutschen Wiedervereinigung*, 45 EUROPA ARCHIV 127 (1990). See also Jochen A. Frowein, *The Reunification of Germany*, 86 AM. J. INT'L L. 152 (1992).

II. THE UNIFICATION PROCESS

A. *The Decline of the Old Regime*

The breakdown of the totalitarian SED-regime³ in the GDR in the autumn of 1989 was part of a revolutionary movement in Eastern Europe. Beginning in Poland and Hungary in 1988, it had reached Czechoslovakia, Bulgaria and, finally, Romania by the end of 1989.⁴

In May 1989, Hungary began gradually dismantling the barbed wire fence along its border with Austria. East Germans began to use the relatively easy access to Hungary to slip past Hungarian border guards and migrate to the West. During August 1989, the initial trickle grew to a stream of 5000 per week, with thousands more camping in Hungary and waiting for permission to reach Austria legally. On September 10, 1989, Hungary relaxed its border controls and temporarily suspended a 1969 treaty with East Berlin that committed both countries to preventing each other's citizens from departing for third countries without authorization. Within seventy-two hours, more than 12,000 East Germans emigrated to Austria and from there to West Germany. Thus began the largest exodus since the building of the Berlin Wall in 1961.⁵

On Monday, September 25, 1989, mass demonstrations broke out in Leipzig and spread throughout the country.⁶ Increasing numbers of demonstrators demanded economic and political reforms in the GDR.⁷ The East German government tried to stem the exodus to

3. S.E.D. - The Sozialistische Einheitspartei Deutschlands ("SED") was the Communist Party of the GDR that ruled the GDR from 1949 to 1989. The name means "Socialist Unity Party of Germany."

4. For a detailed chronology of events, see 22 DEUTSCHLAND ARCHIV 1468, 1478 (1989); RENATA FRITSCH-BOURNAZEL, EUROPE AND GERMAN UNIFICATION 229 (1992); BUNDESZENTRALE FÜR POLITISCHE BILDUNG, DIE TEILUNG DEUTSCHLANDS 1955 BIS ZUR EINHEIT 40 (1991); James O. Jackson & Frederick Painton, *Breaching the Wall*, TIME, Sept. 11, 1989, at 32, 32-34; John Borrell et al., *The Great Escape*, TIME, Sept. 25, 1989, at 30, 30-32.

5. Borrell et al., *supra* note 4, at 30; Richard Hilmer & Anne Köhler, *Der DDR läuft die Zukunft davon*, 22 DEUTSCHLAND ARCHIV 1383 (1989); Richard Hilmer & Anne Köhler, *Die DDR im Aufbruch*, 22 DEUTSCHLAND ARCHIV 1389 (1989); Gisela Helwig, *Wir wollen raus - Wir bleiben hier*, 22 DEUTSCHLAND ARCHIV 1073 (1989); Thomas Ammer, *Stichwort: Flucht aus der DDR*, 22 DEUTSCHLAND ARCHIV 1206 (1989); Dieter Voigt et al., *Die innerdeutsche Wanderung und der Vereinigungsprozeß*, 23 DEUTSCHLAND ARCHIV 732 (1990); Anne Köhler, *Ist die Übersiedlerwelle noch zu stoppen?*, 23 DEUTSCHLAND ARCHIV 425 (1990).

6. *Into the vortex*, in *A Survey of the New Germany*, ECONOMIST, June 30-July 6, 1990, at 4.

7. Rolf Schneider, *Die Kerzen-Revolution*, 23 DEUTSCHLAND ARCHIV 869 (1990); *Vierzig Jahre DDR*, 22 DEUTSCHLAND ARCHIV 1466 (1989).

Hungary.⁸ In response, potential émigrés demanded safe passage to the west from West German missions in Prague, Warsaw and East Berlin.⁹

When the East German state celebrated its fortieth birthday on October 7, 1989, this vast exodus of citizens overshadowed the celebrations.¹⁰ On this occasion the guest-of-honor, Soviet President Mikhail Gorbachev, urged the East German members of the Politburo to seize their chance for democratic reforms and uttered the now famous phrase "he who comes around too late will be punished by life."¹¹ East German Prime Minister Erich Honecker and his hard line regime, however, rejected any reform as "unnecessary." It was clear that the East German regime no longer enjoyed the support of its main ally, the Soviet Union.¹² The end of the GDR was rapidly approaching.

The mass protests continued. Seventy thousand demonstrated in Leipzig on October 9, 1989, as did twice that number a week later, and twice that again on October 23, 1989.¹³ At the same time, opposition movements emerged.¹⁴ First, there was the "New Forum"¹⁵ of activists seeking to reform and democratize East Germany's communist system.¹⁶ Then, the Christian Democrats and the Liberal Democrats emerged from under the thumb of the SED, where they had long cowered.¹⁷ The Social Democratic Party, which the Russians forced to merge with the SED in 1946, claimed its independent status.¹⁸ Its goal was not to reform communism but to push for multi-party de-

8. *Into the vortex*, *supra* note 6, at 4.

9. *Id.*

10. See generally John Borrell & James O. Jackson, *Freedom Train*, TIME, Oct. 16, 1989, at 38.

11. See Frowein, *supra* note 2, at 152 (citing DAS ENDE DER TEILUNG 92 (J. Thies & W. Wagner eds., 1990)); Jochen A. Frowein, *Germany Reunited*, 51 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAÖRV] 333, 334 n.3 (1991); Günther Wagenlehner, *Gorbatschow und die deutsche Frage*, 22 DEUTSCHLAND ARCHIV 1005 (1989).

12. Frowein, *supra* note 2, at 152.

13. *Id.*

14. *Id.* See generally VON DER ILLEGALITÄT INS PARLAMENT (Helmut Müller-Enbergs et al. eds., 1992); Walter Süß, *Mit Unwillen zur Macht*, 24 DEUTSCHLAND ARCHIV 470 (1991).

15. New Forum was the main opposition group in the GDR during the final days of the Communist Regime. See James O. Jackson & Ken Olsen, *Lending an Ear*, TIME, Oct. 23, 1989, at 44, 45.

16. *Into the vortex*, *supra* note 6, at 4.

17. *Id.*

18. *Id.*

mocracy and "an ecology-oriented social market economy."¹⁹

On October 18, 1989, the Politburo dismissed Erich Honecker from his positions as head of State, Communist Party chief, and chairman of the National Defense Council, and replaced him with Egon Krenz, the Honecker protégé who had run East Germany's internal security.²⁰ From the beginning, there was very little expectation that Krenz would guide East Germany to political and economic reforms. Although Krenz called for a "new course" and "dialogue with all the citizens," he made it clear that his party would maintain firm control over all state affairs and that he intended to allow no opposition groups to take part in this process.²¹ His only conciliatory gesture was to hint at relaxing travel restrictions. As soon as the ban was lifted, East Germans began moving West again.²² Within a week, more than 8000 people had crossed the border to Czechoslovakia, whose government flung open its Western border to allow the growing flood of people to pass unhindered into West Germany.²³ Those who stayed behind increased mass demonstrations for reform, especially in East Berlin and Leipzig.²⁴ Then the Politburo announced that East Germans would be free to leave the country anywhere along the country's borders, including crossing points through the Wall. With this announcement, the Berlin Wall fell on November 9, 1989, unleashing scenes of jubilation that delighted the world.²⁵ Since its erection, the Wall had become a symbol of oppression around the world. Opening the Wall provided the strongest possible indication that Krenz intended to introduce freedoms that would make it worthwhile to stay in East Germany. Momentarily, it seemed that Krenz might have regained the initiative for his party.²⁶ By mid-November, however, the tide of expectation proved too much for him.²⁷ Revelations of the way the old regime had given itself privileges provided the

19. *Id.*

20. *Von Honecker zu Krenz*, 22 DEUTSCHLAND ARCHIV 1431 (1989). See also Thomas Ammer & Johannes L. Kuppe, *Ein langer Abschied*, 22 DEUTSCHLAND ARCHIV 1393 (1989).

21. Jürgen Becher, *Das Ringen um die Wirtschaftsreformen in der DDR*, 23 DEUTSCHLAND ARCHIV 687 (1990); Cord Schwartau, *Perestrojka in der DDR*, 22 DEUTSCHLAND ARCHIV 1371 (1990); Thomas Falkner, *Die letzten Tage der SED*, 23 DEUTSCHLAND ARCHIV 1750 (1990).

22. John Borrell, *No Longer If But When*, TIME, Nov. 13, 1989, at 42.

23. *Id.*

24. *Id.*

25. *Into the vortex*, *supra* note 6, at 5. See generally Michael Duffy et al., *Freedom!*, TIME, Nov. 20, 1989, at 24 (showing the reactions of those at the wall to its opening).

26. *Into the vortex*, *supra* note 6, at 5.

27. *Id.*

coup de grace for Krenz and the Politburo.²⁸ Television reports showed members of the Politburo as more corrupt than most East Germans had realized.²⁹ Finally, on December 3, 1989, Krenz and his Politburo resigned.³⁰

Meanwhile, the old structures of the party regime had been dissolved.³¹ The opposition pledged to keep up the pressure for a free press, free elections and a new constitution that would renounce the SED monopoly on power. Opposition groups, parties, trade unions and church officials formed a "round table" on December 7, 1989, and worked out a reforms program.³² Finally, the "round table" and Hans Modrow, who had succeeded Willi Stoph as Prime Minister on November 19, 1989, agreed on elections. They set March 18, 1990, as the date for the first free and democratic elections in the GDR territory in almost fifty-eight years.³³ Pragmatists knew that the question was no longer whether East Germany could change, but rather how to control the pace of increasingly inevitable reforms.

B. *The Monetary, Economic and Social Union*

In his address on November 24, 1989, Chancellor Helmut Kohl presented his "Ten Point Program for Overcoming the Division of Germany and Europe." The Chancellor envisaged an ever closer rapprochement between the two German states, leading first to a "treaty community" (*Vertragsgemeinschaft*), then to a confederation, and, finally, to a federal state.³⁴ Continued East German emigration, however, forced Chancellor Kohl to compress his plan beyond recognition.³⁵ Some 120,000 people left East Germany in the first two months of 1990, in addition to the 340,000 who had already voted with their feet for quick unification in 1989.³⁶

Obviously, an urgent need existed to offer good prospects sufficient to keep more East Germans from leaving.³⁷ The answer was an

28. *Id.*

29. *Id.*

30. *Id.*

31. Ammer & Kuppe, *supra* note 20, at 1393.

32. Süß, *supra* note 14, at 470.

33. Peter J. Winters, *Zum ersten Mal frei*, 23 DEUTSCHLAND ARCHIV 497 (1990).

34. *Zehn-Punkte-Program zur Überwindung der Teilung Deutschlands und Europas*, 134 BULLETIN 1141, 1143 (Presse-und Informationsamt der Bundesregieruns, Nov. 29, 1989).
See also *Into the vortex*, *supra* note 6, at 5.

35. *Into the vortex*, *supra* note 6, at 5.

36. *See id.*

37. *See id.*

attractive currency exchange for East Germans. When 2000 emigrants a day continued to flood into West Germany, Chancellor Kohl decided to attempt a quick monetary union, rather than follow a slower step-by-step approach.³⁸

The first free elections held on March 18, 1990, showed that a large majority of East Germans favored reunification with the Federal Republic as soon as possible, as the parties subscribing to that goal received approximately seventy-five percent of the total votes.³⁹ The monetary union proved to be the driving force behind German reunification. Sound economic reasons underlay economists' recommendations that the GDR have the opportunity to remain a separate economic and monetary entity alongside the Federal Republic for a limited period of time.⁴⁰ The economists predicted that large numbers of enterprises in the GDR would have difficulty competing with the more productive business of West Germany without the assistance of flexible exchange rates.

Countervailing political concerns underlay the monetary union. Without the immediate introduction of the Deutschmark into the GDR, it would have been practically impossible to end the flood of people leaving the GDR for the West. The decision for the monetary union was, therefore, one of the rare cases where politics had to have priority over the economic experts' advice. The manner in which the new currency was introduced in the GDR represented a compromise; an attempt to bring about social justice while taking economic realities into account. Permanent residents of the GDR were able to change the following amounts on a one-to-one basis: children up to the age of fourteen, 2000 marks; people aged fifteen to fifty-nine, 4000 marks; and people aged sixty and over, 6000 marks.⁴¹ Larger amounts were exchanged at a rate of two-to-one.⁴²

The impossibility of a currency union without economic union was clear from the outset, as the socialist economy's hidden subsidies

38. *The great money swap*, in *A Survey of the New Germany*, ECONOMIST, June 30-July 6, 1990, at 10.

39. Jörg Hesse, *Die Allianz für Deutschland*, 23 DEUTSCHLAND ARCHIV 502 (1990); Frowein, *Germany Reunited*, *supra* note 11, at 338.

40. Holger Schmieding & Wojciech Kostrzewa, *Währungsreform, Anpassungs-inflation oder Privatisierung von Staatsvermögen?*, 23 DEUTSCHLAND ARCHIV 212 (1990); Wolfgang Stinglwagner, *Schwere Zeiten für die DDR-Wirtschaft*, 23 DEUTSCHLAND ARCHIV 237 (1990).

41. *One-for-one or one-for-two?*, in *A Survey of the New Germany*, ECONOMIST, June 30-July 6, 1990, at 10.

42. *Id.*

and wealth transfers were politically unsustainable.⁴³ Therefore, it was vital to convert the GDR's economy to a social market economy,⁴⁴ one based on "private property, competition, the freedom to set prices and full freedom of movement of workers, capital, goods and services."⁴⁵ Because of this need, a central aspect of economic union involved the introduction of the Federal Republic's business, taxation and competition laws. To a large extent, this legal aspect of economic union was already prepared in the coalition agreement reached by the freely elected GDR government. With the necessary transitional arrangements and special procedural agreements, it became an integral part of the state treaty.⁴⁶

To mitigate the effects of the monetary and economic union, there was also a move towards a "social union" for those segments of the eastern population that were likely to have difficulty with the abrupt economic change. For example, pensions were not converted at a rate of one-to-one but were increased. After forty-five years of work, a worker was entitled to a pension amounting to seventy percent of his or her last earned wages. Once payment of a pension began, it had to be increased "dynamically" each year. In this manner, pensions were index-linked to general economic performance. In addition, the Federal Republic provided the initial financing to establish an unemployment insurance scheme, as well as to fund vocational schools and training programs for underqualified or unemployed professionals and employees.⁴⁷

Both German governments negotiated the various provisions of the monetary, economic and social union quickly, signing a treaty on May 18, 1990,⁴⁸ that took effect on July 1, 1990.⁴⁹ With this treaty,

43. *The great money swap*, *supra* note 38, at 10.

44. See *D-mark day dawns*, in *A Survey of the New Germany*, *ECONOMIST*, June 30-July 6, 1990, at 3.

45. *The great money swap*, *supra* note 38, at 10.

46. Stinglwagner, *supra* note 40, at 237.

47. See 4 *Scala* 8 (1990).

48. *Bundesgesetzblatt* [BGBl.] II, 518, 537 (F.R.G.).

49. 29 I.L.M. 1108 (1990); BGBl. II, 700; *Vertrag über die Schaffung einer Währungs-, Wirtschafts- und Sozialunion*, 23 *DEUTSCHLAND ARCHIV* 970 (1990); Fritz Schenk, *Zum Staatsvertrag zwischen der Bundesrepublik Deutschland und der DDR*, 23 *DEUTSCHLAND ARCHIV* 817 (1990); Dr. Bruno Schmidt-Bleibtreu, *Der Vertrag über die Schaffung einer Währungs-, Wirtschafts- und Sozialunion Zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik*, 1 *DEUTSCH-DEUTSCHE RECHTS-ZEITSCHRIFT* [DTZ] 138 (1990); Dr. Fabian v. Schlabrendorff & Dr. Harald M. de Vasconcellos, *Die Wirtschaftsunion der beiden deutschen Staaten ab 1.7. 1990*, 1 *DTZ* 142 (1990); *STAATSVERTRAG ZUR*

Germany moved even closer to reunification.⁵⁰

C. *The External Aspects of German Unification*

From the moment unification became a realistic goal, it was clear that it could only be achieved with the consent of the four Allied Powers, e.g., the United States, France, Great Britain and the Soviet Union.⁵¹ This was due to the unique international framework applicable to Germany since 1945.⁵² In the "Berlin Declaration" of June 5, 1945, the four Allied Powers assumed "supreme authority with respect to Germany."⁵³ This declaration had never been revoked, even though the Allies entered into various treaties with both German states that altered their relationships after military occupation rule ended with the establishment of the two German states in 1949.⁵⁴

Although the four Allies retained broad rights over the two German states and Berlin, the dizzying pace of events following the fall of the Berlin Wall on November 9, 1989, compelled them to reach rapid agreement on the external aspects of German unification. By that time, all four Allies had agreed in principle to German unification.⁵⁵

The "Convention on Relations" between the three Western Allies and the Federal Republic of Germany became effective on May 5, 1955.⁵⁶ Article 7 proclaimed the parties' common aim to achieve a reunified Germany under a liberal democratic constitution like that of the Federal Republic, which would be integrated in the European community.⁵⁷ On February 10, 1990, Soviet President Mikhail

WÄHRUNGS-, WIRTSCHAFTS- UND SOZIALUNION (Dr. Klaus Stern & Dr. Bruno Schmidt-Bleibtreu eds., 1990).

50. Ryszard W. Piotrowicz, *The Arithmetic of German Unification: Three into One Does Go*, 40 INT'L & COMP. L.Q. 635 (1991); Dr. Martin Kriele, *Die politische Bedeutung des Staatsvertrages*, 1 DTZ 188 (1990).

51. See Kay Hailbronner, *Legal Aspects of the Two German States*, 2 EUR. J. INT'L L. 18, 20 (1991).

52. Wilhelm Bruns, *Die Regelung der äusseren Aspekte der deutschen Einigung*, 23 DEUTSCHLAND ARCHIV 1726 (1990). See also Hailbronner, *supra* note 51, at 20.

53. Declaration Regarding the Defect of Germany and the Assumption of Supreme Authority with Respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics, and the United Kingdom of Great Britain and Northern Ireland, and the Provisional Government of the French Republic, June 5, 1945, 60 Stat. 1649, 68 U.N.T.S. 189.

54. Frowein, *supra* note 2, at 154.

55. Piotrowicz, *supra* note 50, at 641; Frowein, *supra* note 2, at 152. See Hailbronner, *supra* note 51, at 20.

56. Convention on Relations between the Three Powers and the Federal Republic of Germany, May 26, 1952, 6 U.S.T. 4251, 331 U.N.T.S. 327.

57. See Frowein, *supra* note 2, at 153.

Gorbachev also indicated his consent by agreeing with Chancellor Kohl "that it is the right of the German people alone to take the decision whether to line together in one state."⁵⁸ Consequently, the Treaty on the Final Settlement with Respect to Germany ("Treaty"), commonly known as the "Two plus Four Agreement," was concluded. The Federal Republic of Germany, the German Democratic Republic and the four Allies signed the Treaty in Moscow on September 12, 1990, just before the GDR acceded to the Federal Republic.⁵⁹

In Article 7 of the Treaty, the four Allies terminated their rights and responsibilities relating to Berlin and Germany as a whole,⁶⁰ thereby granting united Germany full sovereignty over its internal and external affairs.⁶¹ The Treaty became effective on March 15, 1991.⁶² By this time, however, the four Allies had already suspended operation of their rights in a declaration that took effect on October 3, 1990, the time of German unification.⁶³

As a result of the four Allies terminating all their rights and responsibilities, the continuing presence of Allied armed forces on German territory rests upon the agreements between the Federal Republic, the Western Allies and the Soviet Union. The Treaty provides for a complete withdrawal of the Soviet armed forces from German territory. Article 5 of the Treaty states that until a complete Soviet withdrawal only those German military units not integrated into NATO will be stationed in the GDR and Berlin as armed forces of the united Germany.⁶⁴ For the duration of the presence of Soviet armed forces in East Germany and Berlin, armed forces of the Western Allies will, upon German request, remain stationed in Berlin.⁶⁵ The number of Allied troops and the equipment of the Allied forces stationed in Berlin will be no greater than at the time of the signing of

58. Hans-Peter Riese, *Die Geschichte hat sich ans Werk gemacht*, 45 *EUROPA ARCHIV* 117 (1990); Frowein, *supra* note 2, at 153.

59. BGBl. II, 1318; 29 I.L.M. 1186 (1990) [hereinafter Treaty]; *Vertrag Über die abschliessende Regelung in bezug auf Deutschland*, 23 *DEUTSCHLAND ARCHIV* 1795, 1798 (1990); Andrea Kupfer, *International Agreements: Treaty on the Final Settlement with Respect to Germany*, Sept. 12, 1990, reprinted in 29 I.L.M. 1186 (1990), 32 *HARV. INT'L L.J.* 227 (1991).

60. Treaty, *supra* note 59, art. 7(1), at 1191.

61. *Id.* art. 7(2).

62. BGBl. II, 587.

63. Declaration Suspending the Operation of Quadripartite Rights and Responsibilities, Oct. 1, 1990, reprinted in 30 I.L.M. 555 (1991).

64. Treaty, *supra* note 59, art. 5(1), at 1190.

65. *Id.* art. 5(2), at 1191.

the Treaty, and new categories of weapons shall not be introduced.⁶⁶ Following the completion of the withdrawal of the Soviet armed forces, there will be no restrictions on stationing German military forces in East Germany, with the exception of nuclear weapons carriers.⁶⁷

The Federal Republic of Germany and the Western Allies reached a similar agreement on September 25, 1990.⁶⁸ These governments agreed to continue the presence of Allied forces in Berlin for a limited period of time to assure security. Neither the number of troops nor the number of armaments shall be increased. The Allied armed forces remain in German territory as invited guests, not as a military occupation power. Each party to the agreement may either cancel the agreement or ask for a modification one year after the agreement has entered into force. Nevertheless, the existing treaties of 1951 and 1959 regarding the presence of integrated NATO troops remain in force.

Any military activities of the armed forces in the former GDR, however, need explicit consent of the German authorities. On October 12, 1990, the Federal Republic of Germany and the Soviet Union signed a treaty concerning the conditions for the withdrawal of Soviet troops from German territory.⁶⁹ An additional treaty of October 9, 1990, concerns the financial consequences arising from the withdrawal of Soviet armed forces.⁷⁰ In this treaty, the Soviet Union accepted the obligation not to reinforce its troops or armaments stationed in East Germany. This treaty also provided for the total withdrawal of Soviet troops from Germany, including Berlin, by the end of 1994.

In Article 3 of the Treaty, both German states reaffirmed their renunciation of the manufacture, possession and control of nuclear, biological and chemical weapons.⁷¹ They also declared that the united Germany will abide by these commitments.⁷² In particular, the obligations arising from the Treaty on the Non-Proliferation of

66. *Id.*

67. *Id.*

68. See Hailbronner, *supra* note 51, at 23.

69. Reprinted in 123 BULLETIN 1281, 1284 (Presse-und Informationsamt der Bundesregierung, Oct. 17, 1990).

70. *Id.* at 1281.

71. Treaty, *supra* note 59, art. 3(1), at 1189.

72. *Id.*

Nuclear Weapons of July 1, 1968, will apply to the united Germany.⁷³

Further, Article 3, paragraph 2 of the Treaty contains a report on a statement made by the Federal Government at the August 30, 1989, Vienna Negotiations on Conventional Arms, wherein it pledged to reduce the strength of the armed forces of the united Germany from the current level to 370,000 troops within three to four years.⁷⁴

Article 1 of the Treaty makes clear that, with German unification, the question of Germany's borders is settled.⁷⁵ United Germany shall consist of the territory of the Federal Republic of Germany, the German Democratic Republic and all of Berlin.⁷⁶ Its external borders shall be the borders of the Federal Republic of Germany and the German Democratic Republic, and shall be definitive from the Treaty's effective date.⁷⁷ All parties agree that "[t]he confirmation of the definitive nature of the borders of the united Germany is an essential element of the peaceful order in Europe."⁷⁸

According to the Treaty, united Germany has no territorial claims whatsoever against other states and shall not assert any in the future.⁷⁹ The Treaty also requires united Germany and the Republic of Poland to confirm the existing border between them in a treaty binding under international law.⁸⁰ The Federal Republic of Germany and the Republic of Poland signed this treaty on November 14, 1990, and ratified it in January 1992.⁸¹

Article 1 is a key element of the Treaty. Until the Treaty, the legal status of the former eastern territories of the German Reich awaited a final determination in a peace treaty.⁸² The status of those territories 'under foreign administration' was officially considered un-

73. *Id.*

74. *Id.* art. 3(2), at 1189-90.

75. *Id.* art. 1(1), at 1188.

76. *See id.*

77. *Id.*

78. *Id.*

79. *Id.* art. 1(3), at 1189.

80. *Id.* art. 1(2), at 1188.

81. Reprinted in 1394 BULLETIN 1154, 1158 (Presse-und Informationsamt der Bundesregierung, Nov. 16, 1990). See CZAPLINSKI, THE NEW POLISH-GERMAN TREATIES AND THE CHANGING POLITICAL STRUCTURE OF EUROPE 163 (1991); Karlheinz Lau, *Betrifft: Grenzvertrag mit Polen Heft 12, S. 1820*, 24 DEUTSCHLAND ARCHIV 187 (1991); *Vertrag zwischen der Bundesrepublik Deutschland und der Republik Polen über gute Nachbarschaft und freundschaftliche Zusammenarbeit*, 24 DEUTSCHLAND ARCHIV 868 (1991); *Verabschiedung des Staatsvertrages und Erklärung zur deutsch-polnischen Grenze*, 23 DEUTSCHLAND ARCHIV 1129 (1990); Marlies Jansen, *Nachbarschaft mit Polen*, 24 DEUTSCHLAND ARCHIV 787 (1991).

82. Hailbronner, *supra* note 51, at 25.

changed by the Moscow and Warsaw Treaties of 1970.⁸³ These treaties affirmed the inviolability of the existing western borders of Poland.⁸⁴ They also contained a renunciation of any territorial claims.⁸⁵ The Federal Republic, however, maintained that it concluded these treaties in its own name and, therefore, a united Germany would not be bound by them.⁸⁶ The Federal Republic further stated that all declarations and commitments regarding the former eastern German territories were only preliminary.⁸⁷ Perhaps in the Warsaw and Moscow agreements the Federal Republic had previously made a binding commitment that the western border of Poland would no longer be challenged and that, in a future peace agreement, recognition of the existing border would be affirmed.⁸⁸ Nevertheless, the German-Polish Border Treaty of November 14, 1990, cannot be considered merely for its declaratory significance; it also implements the final peace settlement of the Treaty, finally settling all questions relating to the territorial status of a unified Germany.⁸⁹

D. The Political Union

Under German constitutional law, two possible methods existed to unify the Federal Republic of Germany and the German Democratic Republic. First, Article 23 of the Basic Law of the Federal Republic could be employed. This article provided that other parts of Germany could accede to the Federal Republic. This was the procedure followed in 1956 for accession of the Saar territory. The other alternative to reunify Germany, according to the Basic Law, would have been to apply Article 146, which makes effective a new constitution adopted by the free decision of the German people. This Article, drafted by the Parliamentary Council that drafted the Federal Constitution, limited the existence of the Basic Law to cases wherein unification could not come about by accession to the Federal Republic of Germany. This procedure would have required the two German States to draft a new constitution after they concluded a treaty on

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. See Dr. Dietrich Rauschning, *Beendigung der Nachkriegszeit mit dem Vertrag über die abschließende Regelung in bezug auf Deutschland*, DEUTSCHES VERWALTUNGSBLATT [DVBL.] 1275 (1990) (containing further references).

88. Hailbronner, *supra* note 51, at 25.

89. See Frowein, *supra* note 2, at 155-57.

their merger.⁹⁰

Accession under Article 23 obviously contained the easier and speedier alternative. It therefore became the only realistic approach after people and politicians in the GDR made it clear that they wanted unification immediately. The decision by the GDR government made accession possible.

The Unification Treaty between the two German states regulated the final conditions and consequences of the accession. This treaty was concluded on August 31, 1990,⁹¹ and was entered into force on September 29, 1990.⁹² The accession took effect on October 3, 1990. According to Article 1 of the Unification Treaty, the five states that were formed in the GDR under the statute of July 22, 1990 (Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia), became Länder of the Federal Republic of Germany. East Berlin became part of the Land Berlin.⁹³

III. THE LEGAL CONSEQUENCES OF GERMAN UNIFICATION

A. *Matters of State Succession*

When newly found federal states acceded to the Federal Republic, the GDR ceased to exist as a sovereign state. Nevertheless, the identity of the Federal Republic as a subject of international law was

90. For a discussion, see Dr. Christian Tomuschat, *Wege zur deutschen Einheit*, 49 VER-
TUOFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER
[VVDStRL] 70 (1990); Dr. Josef Isensee, *Staatseinheit und Verfassungskontinuität*, 49
VVDStRL 39 (1990); Dr. Werner Thieme, *Fragen einer gesamtdeutschen Verfassung*, 43 DIE
ÖFFENTLICHE VERWALTUNG [DÖV] 401 (1990); Dr. Peter Häberle, *Verfassungspolitik für die
Freiheit und Einheit Deutschlands*, 45 JURISTENZEITUNG [JZ] 358 (1990); Dr. Christian
Starck, *Deutschland auf dem Wege zur staatlichen Einheit*, 45 JZ 349 (1990); Dr. Wolff Heint-
schel von Heinegg, *Der Beitritt "anderer Teile Deutschlands" zur Bundesrepublik nach Art. 23
Satz 2 GG*, 43 DÖV 425 (1990); Arnulf Clauder, *Beitritt schützt Eigenständigkeit der DDR*, 23
DEUTSCHLAND ARCHIV 555 (1990); Erich Röper, *Beitritt nach Artikel 23 GG sichert
finanzielle Handlungsfähigkeit der DDR-Länder*, 23 DEUTSCHLAND ARCHIV 559 (1990).

91. Federal Republic of Germany—German Democratic Republic: Treaty on the Estab-
lishment of German Unity, 30 I.L.M. 457 (1991) [hereinafter Unification Treaty]; BGBl. II,
889; 23 DEUTSCHLAND ARCHIV 1637 (1990).

92. Unification Treaty, *supra* note 91; BGBl. II, 1360. See Dieter Klein, *Der Einigun-
gsvertrag*, 44 DÖV 569 (1991); Dr. Klaus-Dieter Schnapauff, *Der Einigungsvertrag*, 105 DVBL.
1249 (1990).

93. Unification Treaty, *supra* note 91, art. 1, at 464. Bayer, *Die Konstituierung der
Bundesländer Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt und Thür-
ingen*, 106 DVBL. 1014 (1991); Peter J. Lapp, *Fünf plus eins, Länder statt DDR*, 23 DEUTSCH-
LAND ARCHIV 1079 (1990); Peter J. Lapp, *Fünf neue Länder - Das Ende der DDR*, 23
DEUTSCHLAND ARCHIV 1315 (1990); Wasmuth, *Das Regelwerk des Einigungsvertrages*, 1
DtZ 294 (1990).

not affected in any way. Since the Federal Republic had always claimed identity with the former German state that existed before the country's division, one may well conclude that this identity has now been formally confined by history.⁹⁴ All treaties entered into by the Federal Republic of Germany, as well as its membership in international organizations, remain unaffected by the GDR's accession. Article 11 of the Unification Treaty provides that international treaties and agreements of the Federal Republic, including those establishing membership in international organizations and institutions, remain binding in relation to the territory of the former GDR, except for agreements listed in Annex I of the Treaty.⁹⁵ Annex I specifically refers to treaties entered into by the Federal Republic of Germany with the Allied Powers concerning the termination of the occupation regime, additional agreements to the NATO Treaty, and agreements on the status of foreign troops in Germany, as well as some recent conventions concerning the site inspection to control the application of the disarmament provisions between the United States and the Soviet Union.⁹⁶ Negotiations with the contracting parties are also envisaged should it be necessary to adapt existing treaties to the changed circumstances.⁹⁷

As for the treaties and obligations of the GDR, the legal situation seems to be somewhat more difficult, since the GDR has been dissolved as a legal entity.⁹⁸ The Unification Treaty contains no rigid rules concerning the continuation or discontinuation of these obligations, but provides for a flexible approach to the matter. According to Article 12 of the Unification Treaty, both German states agree to discuss with the contracting parties of the former GDR whether to modify, adapt, discontinue, or continue the GDR's international treaties.⁹⁹ This discussion shall take into account the legitimate trust in the validity of those treaties, the interest of the contracting parties, the international obligations of the Federal Republic, as well as the principles

94. Frowein, *supra* note 2, at 157. For a detailed discussion of matters of state succession, see generally *id.* at 157; Stefan Oeter, *German Unification and State Succession*, 51 ZAÖRV 349 (1991); Hailbronner, *supra* note 51, at 30-37; Note, *Taking Reichs Seriously: German Unification and the Law of State Succession*, 104 HARV. L. REV. 588, 592 (1990).

95. Unification Treaty, *supra* note 91, art. 11, at 471.

96. See *id.*

97. *Id.*

98. Ulrich Drobnig, *Das Schicksal der Staatsverträge der DDR nach dem Einigungsvertrag*, 2 DtZ 76 (1991); Gerhard Dannemann, *Das staatsvertragliche Kollisionsrecht der DDR nach der Vereinigung*, 2 DtZ 130 (1991).

99. Unification Treaty, *supra* note 91, art. 11, at 471.

of a free, democratic and constitutional order and the competence of the European Economic Community (EEC).¹⁰⁰ The Unification Treaty further provides that the united Germany will specify its position concerning the succession to treaties of the GDR after consultation with the contracting parties of those treaties and the EEC, if concerned.¹⁰¹ Article 12 provides an option to join international organizations or multilateral conventions,¹⁰² envisaging a consensus between contracting parties and the EEC.

In all likelihood, all 'political' treaties concerned with the political and economic integration of the GDR into the Eastern Block treaty system will cease to operate.¹⁰³ On the other hand, economic bilateral treaties of the GDR with various eastern countries will likely continue, albeit with modifications. In the Treaty of Good Relations, Partnership and Cooperation between the Federal Republic of Germany and the Union of the Soviet Socialist Republics of September 13, 1990,¹⁰⁴ the Federal Republic accepted a reference to the treaty relations that have developed in the past years between the GDR and the Soviet Union. Nonetheless, the parties adopted no explicit position on their continuance. Due to political considerations, however, the federal government has already declared that the Federal Republic will recognize some of the financial and economic obligations undertaken by the GDR.¹⁰⁵

B. The European Dimension of German Unification

The complex legal implementation of accession occurred not only within the sphere of public international law, but also within a supranational framework that amounted, in many respects, to an additional constitutional dimension. The importance of the European structure in the context of German unification need not be stressed. Obviously, the firm affiliation of a united Germany with the EEC was one of the implied conditions that made unification possible.¹⁰⁶

With the accession of the new federal states to the Federal Re-

100. *Id.*

101. *Id.* art. 12(2).

102. *Id.* art. 12(3).

103. See Johannes L. Kuppe, *Die östlichen Bündnissysteme haben sich aufgelöst*, 24 DEUTSCHLAND ARCHIV 790 (1991).

104. Reprinted in 133 BULLETIN 1373, 1379, 1382, 1387 (Presse-und Informationsamt der Bundesregierung, Nov. 15, 1990).

105. See generally Oeter, *supra* note 94, at 349.

106. See Thomas Giegerich, *The European Dimension of German Reunification: East Germany's Integration into the European Communities*, 51 ZAÖRV 384 (1991); Frowein, *supra*

public the territory of the former GDR automatically joined the EEC without any amendment to the Treaty of Rome. The EEC has thus confirmed the legal integration of the GDR as an enlargement of an existing member state's territory. The integration, therefore, became effective as soon as the unification was legally established.

The immediate application of EEC law in the new federal states results from Article 227 of the EEC Treaty, which provides that the EEC Treaty applies to the member states in their respective territories.¹⁰⁷ Therefore, Article 10 of the Unification Treaty, stating that all primary and secondary EEC law shall apply in the territory of the new federal states, has only a declaratory meaning.¹⁰⁸

Essential parts of the EEC legal order, however, could not be applied before the East German industrial and economic systems achieved parity with those of the other member states. Interim measures were necessary to integrate the territory of the former GDR into the EEC. Therefore, on September 17, 1990, the EEC enacted a regulation instituting interim measures applicable after Germany's unification.¹⁰⁹ Under Article 2, the EEC may provisionally authorize the Federal Republic to retain legislation applicable to the territory of the former GDR that is not in compliance with EEC law.¹¹⁰ This authorization expired on December 31, 1990.¹¹¹ Since the end of 1990, however, special rules still govern the new federal states on the basis of specific EEC authorizations.¹¹²

C. *The Domestic Dimension of German Unification*

Upon accession, the Basic Law of the Federal Republic entered into force in the new states.¹¹³ A sound basis for the development of a stable democracy in the Federal Republic, the Basic Law could define the guiding principles for a reconstruction of the legal, economic and social system in these new federal states.

note 2, at 160; Jean-Paul Jacqué, *German Unification and the European Community*, 2 EUR. J. INT'L L. 1, 15 (1991).

107. *Id.*

108. Unification Treaty, *supra* note 91, art. 10(3), at 471; see Hailbronner, *supra* note 51, at 37.

109. Council Regulation 2684/90 on Interim Measures Applicable After the Unification of Germany, 1990 O.J. (L 263) 1.

110. *Id.*

111. *Id.*

112. See Giegerich, *supra* note 106, at 425-34; Frowein, *supra* note 2, at 160.

113. Unification Treaty, *supra* note 91, art. 3, at 464. See Stern, *Der verfassungsändernde Charakter des Einigungsvertrages*, 1 DTZ 289 (1990).

Article 20 sums up the basic principles. According to this provision, the Federal Republic is a democratic and social federal state with law governing all state action.¹¹⁴ These accession principles replaced those of the former socialist state, which were largely derived from Marxism-Leninism.¹¹⁵

1. The Creation of a Democratic Administrative Structure

The first and most fundamental change involved the replacement of the centralized administrative structure of the former GDR by the federal system of the Basic Law (*Grundgesetz*).¹¹⁶ Under this system, the federal territory is divided into autonomous *Länder* (states) and municipalities that enjoy autonomous local governance. Each *Länder* has its own constitution. In line with the principle of constitutional homogeneity,¹¹⁷ however, states and municipalities must conform to the principles of republican, democratic and social government based on the rule of law, as laid down in the Basic Law.¹¹⁸

Since 1952, the historic German *Länder* in the GDR were dissolved and the whole country was divided into "administrative areas." Municipalities became mere arms of the state and no longer enjoyed the right to local self government.¹¹⁹

The first steps towards federalism had already been taken by the late GDR government immediately before accession. The historic *Länder* Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt, and Thuringia were reestablished by the Constitutional Act of July 22, 1990 (*Länder Establishment Act*).¹²⁰ Previously, the Local Government Act of May 17, 1990, reestablished the right to local self governance and served as a legal foundation for the

114. Unification Treaty, *supra* note 91, art. 20, at 475-76.

115. See generally DR. GEORG BRUNNER, *EINFÜHRUNG IN DAS RECHT DER DDR* (2d ed. 1979); ERIKA LIESER-TRIEBNIGG, *RECHT IN DER DDR* (1985). See also MARY A. GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 258-376 (1990); Wolfgang Seiffert, *Das Rechtsstaatsprinzip und die DDR*, 23 *DEUTSCHLAND ARCHIV* 48 (1990); Sighart Lörler, *Sozialistischer Rechtsstaat - sozialistische Wirtschaftsordnung*, 23 *DEUTSCHLAND ARCHIV* 77 (1990).

116. See Dr. Volker Busse, *Herausforderungen für den Rechtsstaat nach Schaffung der deutschen Einheit*, 24 *ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP]* 332 (1991); Dr. Detlef Czybulka, *Zur Entwicklung des Föderalismus in der DDR und in Deutschland (mit einem Seitenblick auf Europa)*, 23 *ZRP* 269 (1990).

117. *GRUNDGESETZ [GG]* art. 28 (W. Ger.) [hereinafter Basic Law].

118. *Id.* art. 20.

119. SIEGFRIED MAMPEL, *HERRSCHAFTSSYSTEM UND VERFASSUNGSSTRUKTUR IN MITTELDEUTSCHLAND* 124-30 (1968).

120. *Gesetzblatt DDR [GBl.]* I, 787 (G.D.R.).

restructured local authorities.¹²¹ The subsequent creation of new administrative bodies on the federal, state and local levels has caused a variety of problems that have long been underestimated in both parts of Germany. Problems have been both quantitative and qualitative.¹²²

In the former GDR, the field of public administration engaged approximately 1.74 million employees to administer a population of roughly 16 million people.¹²³ Compared to the Land NorthRhine-Westfalia in West Germany, which has about the same population, the GDR employed three times as many public officials.

This comparison demonstrates that public administration in the new states was hopelessly overstaffed. Upon accession of the new federal states, however, no provisions were made regarding termination of labor contracts. The Unification Treaty allows employers to make decisions about further employment in the public sector on a case-by-case basis at the federal, state and local levels.¹²⁴ To achieve confidence in public administration, employers were given discretion to terminate the jobs of former party members or members of the former internal state security who had dominated and controlled public administration in the GDR and had been responsible for most of the hardships suffered by the East German population. While waiting for a final decision on further employment, former state employees could collect continued compensation for a period of up to six months (the so-called Warteschleifenregelung). During this time, they also had the opportunity to take part in advanced training and qualification programs sponsored by the Federal Labor Board (Bundesanstalt für Arbeit) to help them find a new job in the event their employment in the public sector ceased. At the beginning of 1991, about 700,000 former state employees anxiously awaited a final decision concerning their jobs - most of them without success.¹²⁵

In addition to the great number of employees in the public sector, the lack of expertise and professionalism of the former GDR state

121. GBl. DDR I, 255; Dr. Siegfried Petzold, *Zur neuen Kommunalverfassung in der DDR*, 43 DÖV 816 (1990).

122. See Wolfgang Schäuble, *Der Einigungsvertrag in seiner praktischen Bewährung*, 25 DEUTSCHLAND ARCHIV 233 (1992); Seibel, *Verwaltungsreform in den ostdeutschen Bundesländern*, 44 DÖV 198 (1991); König, *Zur Transformation einer real-sozialistischen Verwaltung in eine klassisch-europäische Verwaltung*, 82 VERWALTUNGS ARCHIV 229 (1991).

123. Schäuble, *supra* note 122, at 238.

124. Unification Treaty, *supra* note 91, art. 20(1), at 475-76.

125. See Schäuble, *supra* note 122, at 239.

employees presented another obstacle to any speedy reform and restructuring of administrative bodies.¹²⁶ Most state officials in the GDR had been recruited from among party members, members of national trade union, or other social groups such as factory workers, farmers and other individuals with a variety of skills and professional backgrounds. Hardly anyone had a professional education in public administration as officials in West Germany often do.¹²⁷ Therefore, there was a great dependence on administrative assistance from western Germany from the beginning. Much of this aid had been organized regionally and locally. NorthRhine-Westfalia alone has had more than 2000 officials and advisers at work in Brandenburg, its "twin" state in eastern Germany. In addition, Saxony-Anhalt receives much personnel from its eastern neighbor, Lower Saxony; Baden-Württemberg helps Saxony; and so on.¹²⁸ Similarly, on a local level, western cities often rendered technical as well as personal assistance. According to a report of the Federal Minister of the Interior, more than 20,000 public officials from western Germany have been engaged in eastern Germany to help build a modern and efficient democratic administration according to western standards.¹²⁹ Assistance has been especially necessary since unification introduced administrative tasks and authorities previously unknown to East Germans, such as the creation of authorities involving tax, land registry and contested property ownership.¹³⁰

This type of support can only be rendered for a limited period of time. In the long run, people in the new federal states must take responsibility for their respective administrative organs. To speed up this process, state and local authorities have launched a variety of training programs for their employees. Authorities hope that in the near future most local and state authorities will be able to fulfill their

126. Niksch, *Die Einführung des Berufsbeamtentums auf dem Gebiet der früheren DDR nach dem Einigungsvertrag*, 1 DTZ 340 (1990); Jan Hoesch, *Probleme des Verwaltungsaufbaus in den neuen Ländern*, 3 DTZ 139 (1992).

127. See Dr. Joachim Vollmuth, *Vom Staatsfunktionär zum Beamten einer rechtsstaatlichen Verwaltung*, 45 DÖV 376 (1992).

128. See Karl-Eberhard Hain & Thomas Rieckhoff, *Beamtenrechtliche Versetzung und Abordnung im Rahmen des deutschen Wiedervereinigungsprozesses*, 24 ZRP 336 (1991); Gisela Hellwig, "Wer langsam hilft, zahlt doppelt," 24 DEUTSCHLAND ARCHIV 227 (1991). See also Ulrich Rensch, *Starthilfe für die neuen Länder*, 24 DEUTSCHLAND ARCHIV 230 (1991); Oliver Scheytt, *Städte, Kreise und Gemeinden im Umbruch - Der Aufbau der Kommunalverwaltungen in den neuen Bundesländern*, 25 DEUTSCHLAND ARCHIV 12 (1992).

129. See Schäuble, *supra* note 122, at 239.

130. See Hain & Rieckhoff, *supra* note 128, at 336; Schäuble, *supra* note 122, at 239; Seibel, *supra* note 122, at 199.

tasks without depending on administrative help from western Germany.

2. The Harmonization of Law

Another important question concerns the process of harmonizing the legal norms in both parts of Germany.¹³¹ One proposal suggested extending West German legislation to the territory of the new federal states, with exceptions made where necessary on a case-by-case basis. Another proposal suggested that the law of the German Democratic Republic continue for a transitional period as long as compatible with the Basic Law, and suggested that West German legislation or transitional rules only be adopted where appropriate.

Some commentators argued that the abrupt introduction of the entire West German legislation into the new states might overburden the legal profession and administrators in eastern Germany. They pointed out that most legislation, especially in the field of social welfare law and environmental law, was designed and drafted for the prosperous situation in West Germany, and thus would not be appropriate for the new federal states immediately after unification. They feared that strict West German laws might reduce the chances for private investment. Other commentators argued to the contrary, insisting that only the general introduction of West German legislation would create a favorable and stable investment climate, as private investors could rely on a legal framework with which they were already familiar. They also expected that two different sets of rules in the country would hinder the process of unification. These commentators also criticized the poor quality of most GDR enactments, which were not suitable to cope with the upcoming challenges, especially that of a free market economy.¹³²

In 1990, however, the view that a unified nation needed a common legal system prevailed. The Unification Treaty, therefore, provides federal law for implementation in the new federal states, unless its area of application is restricted to certain Länder or parts of Länder of the Federal Republic of Germany, and unless otherwise provided in the Treaty.¹³³ Article 9 of the Unification Treaty states that the Law of the German Democratic Republic, valid at the time of signing of the Treaty and considered Länder law under the Basic

131. See Schäuble, *supra* note 122, at 234.

132. *Id.*

133. Unification Treaty, *supra* note 91, art. 8, at 469-70.

Law's distribution of competence, shall remain in force. This, however, is only true in so far as the Länder law is compatible with the Basic Law, the federal law put into force in the new federal states and the directly applicable law of the EEC.¹³⁴ Further, Länder law is applicable unless the Treaty provides otherwise.¹³⁵

In a few areas, no consensus for uniform regulations exists. One of the most hotly debated legal issues lacking a uniform regulation concerns abortion rights. At present, the two parts of the country apply different abortion laws. Under West German criminal law, an abortion is legal only after rape, where the life or health of mother or child is in danger, or when the mother, for social reasons, cannot be expected to give birth to her child. Further, abortion is possible only after consultation with a doctor or an accepted public service agency that renders support and advice to pregnant women. According to the current GDR abortion law, however, an abortion is legal if performed within the first twelve weeks of pregnancy.¹³⁶ The German parliament is currently debating this highly charged matter and a compromise result is expected.¹³⁷

Another unsettled legal question of great public interest concerns the blood-alcohol concentration level necessary for criminal prosecution for intoxicated driving. Under West German law, driving with a blood-alcohol concentration of at least 0.08% constitutes a criminal offense. Under the still existing GDR law, however, any blood alcohol concentration leads to criminal prosecution. This matter, like many others, will be reconciled in the near future. The federal parliament is currently debating a bill that provides for a 0.05 % limit for Germany as a whole.

3. The Transition to a Social Market Economy

Another urgent concern in the unification process is the conversion of the centrally-planned state economy in the new Länder into a

134. *Id.* art 9(1), at 470. See generally Kloepper, *Rechtsangleichung nach Art. 8 und 9 des Einigungsvertrages*, 106 DVBL 1031 (1991).

135. *Id.*

136. See Dr. Michael Sachs, *Der Fortbestand der Fristenlösung für die DDR und das Abtreibungsurteil des Bundesverfassungsgerichts*, 1 DTZ 193 (1990).

137. See Heiner Wilms, *Rechtsprobleme des Schwangerschaftsabbruchs im vereinten Deutschland*, 23 ZRP 470 (1990); Dr. Horst Leutheusser & Tobias H. Strömer, *Rechtsprobleme des Schwangerschaftsabbruchs*, 24 ZRP 151 (1991); Dr. Bernd Schünemann, *Quo vadis § 218 StGB?*, 24 ZRP 379 (1991); Dagmar Oberlies, *Ist die DDR-Fristenregelung wirklich verfassungswidrig?*, 25 ZRP 264 (1992); Gisela Hellwig, *Gewissensentscheidung*, 25 DEUTSCHLAND ARCHIV 673 (1992).

social market economy. The isolation of the East German economy, created by its dependence upon the Common Market, prevented it from developing like western countries.¹³⁸ Production facilities were almost always outdated or polluted. Government short-sightedness decreased capital stock. Computers were a rarity, and endless sheets of carbon paper were the norm. Companies' staff lacked any knowledge of market rules, since state authorities regulated production planning, sales and distribution under the old regime. Economists estimated that roughly half of the workforce of the average East German state-enterprise was unproductive. The real output per worker, therefore, amounted to only forty to sixty percent of West Germany's, a standard roughly equivalent to West Germany in the late 1960s. Following the monetary union, many business partners from the COMECON world could no longer fulfill their obligations due to a shortage of hard currency. Simultaneously, the East German distribution system broke down. Companies could no longer write paychecks to their employees, and many firms feared being forced out of business. The collapse of the whole economic system seemed inevitable.¹³⁹

Immediately after instituting the monetary union, however, officials launched far reaching steps to restructure and modernize the economy throughout the new federal states. Intensive efforts are now under way to convert and streamline the GDR's rigidly managed and often outdated production facilities.¹⁴⁰

a. *The Federal Trust Agency*

The main actor in this reorganization process was the *Treuhandanstalt*, the Federal Trust Agency. The former government set up this Agency, and the Trusteeship Act of June 17, 1990,¹⁴¹ provided its mandate.¹⁴² According to Article 25 of the Unification Treaty, upon the accession of the five new Länder the Trust Agency became an institution of the Federal government, vested with legal capacity

138. Maria Haendcke-Hoppe, *Der Osthandel der DDR*, 23 DEUTSCHLAND ARCHIV 819 (1990).

139. Wolfgang Stinglewagner, *Kein Anlaß zur Euphorie*, 22 DEUTSCHLAND ARCHIV 129 (1989).

140. Harald Becker, *Wirtschaft in den neuen Bundesländern Strukturwandel und Neuaufbau*, 25 DEUTSCHLAND ARCHIV 461 (1992).

141. GBl. I, 300, reprinted in 23 DEUTSCHLAND ARCHIV 1301 (1990). The Trusteeship Act was altered by the Unification Treaty. Unification Treaty, *supra* note 91, art. 25, at 481.

142. See Bärwaldt, *Die Treuhandanstalt nach dem Inkrafttreten des Einigungsvertrages*, 1 DtZ 347 (1990).

and subject to public law.¹⁴³ The Federal Minister of Finance has the responsibility of technical and legal supervision, and exercises technical supervision in conjunction with the Federal Minister of Economics.¹⁴⁴

The Trust Agency is charged with restructuring and privatizing the formerly publicly-owned enterprises to align them with the requirements of a competitive economy.¹⁴⁵ Often it accomplishes this by breaking down large state enterprises into smaller, more efficient and more competitive entities, and transforming them into partnerships or corporations under German corporate law.¹⁴⁶ Therefore, the first goal has been to sell these companies to private investors. The Trust Agency has helped to restructure promising companies and to liquidate firms where necessary.¹⁴⁷

Although the Trust Agency started from scratch in 1990, it now has a staff of more than 3000. Approximately 1000 come from western Germany, consisting mainly of managers, accountants, auditors and lawyers. In many cases, the Trust Agency delegates specific tasks to outsiders. For example, it has recruited approximately thirty investment banks, most of them foreign, to help increase sales and give advice on techniques with which the Trust Agency has little experience, such as management buy-outs and buy-ins. It also brought in an outside team of approximately ninety accountants, lawyers and others to provide an independent evaluation of firms' restructuring and privatization plans. The fifteen Trust Agency regional offices have responsibility for the sale of businesses with up to 1500 employees. The appropriate industry directorate at the Trust Agency's headquarters in Berlin handles the sale of larger enterprises. An official register of firms owned by the Trust Agency provides potential buyers with a comprehensive overview of the companies available through the Trust Agency. This register presents current vital statistics on all available firms, catalogued by industry and region.

The Trust Agency's goal is not to obtain the maximum purchase

143. Unification Treaty, *supra* note 91, art. 25, at 481.

144. *Id.*

145. *Id.*

146. Ralf-Friedrich Fahrenbach, *Das Privatisierungsverfahren nach dem Treuhandgesetz*, 1 DTZ 268 (1990); Dr. Robert Weimar, *Spaltung von Treuhandunternehmen*, 2 DTZ 182 (1991); Hans Luft, *Die Treuhandanstalt*, 24 DEUTSCHLAND ARCHIV 1270 (1991).

147. See Fritz Homann, *Treuhandanstalt: Zwischenbilanz, Perspektiven*, 24 DEUTSCHLAND ARCHIV 1277 (1991); Thomas Schmidt-Schönbein & Frank C. Hansel, *Die Transformationspolitik der Treuhandanstalt*, WIRTSCHAFTSDIENST 462 (1991).

price, but rather to negotiate an optimal purchase price. In other words, it considers a variety of factors other than the actual purchase price, including the number of jobs created or preserved, the nature of the planned investment and the potential buyer's solvency and reliability.¹⁴⁸

The Trust Agency can partially or fully assume a firm's debt transferred from its balance as of June 30, 1990,¹⁴⁹ to its Deutschmark ("DM") opening balance at the rate of two-to-one. In order to receive such debt relief, however, the enterprise in question must file an appropriate application. Only firms that can be modernized may receive debt relief, and it is only granted on a case-by-case basis. Since its inception, the Trust Agency has, on average, assumed eighty-five percent of the debt of the privatized firms.¹⁵⁰

Many firms in the new federal states may be forced to lay off a large number of employees due to overstaffing. The social provisions of the Unification Treaty require that financial compensation be extended to those affected. To account for this need, enterprises could establish reserves in their DM opening balance sheets. As a result, the cost of the social plan is shifted to the Trust Agency in the form of a reduced purchase price. In many cases, companies have been sold for one symbolic DM when the buyer promised to guarantee jobs and promised to make investments that would allow the company to continue operations.¹⁵¹

The Federal Ministry of Finance published a report on the achievements of the Trust Agency at the end of October 1991. Of the 10,500 enterprises and firms held by the Trust Agency, approximately 4300 had been successfully privatized, with sales totalling approximately 15 billion DM.¹⁵² Unfortunately, this is not as good as it sounds. The amount of money spent to restructure firms by making payments to displaced workers and spent on debts accrued by the former GDR was even greater. Further, the cost of cleaning up past environmental damage, which the agency shares with private investors, remains unknown.

As important as the successful sales figures is the fact that the sales agreements secured approximately 790,000 jobs, as well as in-

148. Unification Treaty, *supra* note 91, art. 28, at 483-84.

149. See FEDERAL MINISTRY OF ECONOMICS, INVESTING IN THE FUTURE, GERMANY'S NEW FEDERAL STATES 23 (1991).

150. *Id.*

151. *Id.* at 24.

152. See Homann, *supra* note 147, at 1278.

vestment pledges for more than 97 billion DM. At the same time, the Trust Agency sold off nearly all of its 20,000 small businesses, such as shops, cinemas, restaurants and hotels. It closed more than 600 firms, including makers of the famous but money-losing products such as "Practica" cameras and "Wartburg" cars, and dismissed more than 1400 eastern managers for incompetence. Still, a desperate need exists for skilled westerners to run thousands of eastern firms.¹⁵³

By now, the best parts of the Trust Agency's stock have been sold, and privatization will become even more difficult in the future. The agency encounters increasing opposition from East Germans against closing down factories or approving restructuring plans that result in thousands of employee lay offs. It is unclear what will happen to the many firms that cannot be sold but, for one reason or another, cannot be closed down.

b. Investment Prospects in the New Federal States

To supplement the work of the Trust Agency, the federal government encourages private investment¹⁵⁴ in the new federal states by using a wide range of incentive programs and offering investment assistance of up to 53.7%. These incentives ensure a high degree of liquidity and a substantial return on investment, more than offsetting the comparatively difficult working conditions that still characterize eastern Germany. In addition to federal assistance, each of the five former GDR states have launched their own incentive programs, including direct financial support and tax incentives.

Interest in the federal support programs has been strong; in 1991 approximately 60-70 billion DM were invested in the new federal states. At an estimated 30% return, the reinvestment rate in eastern Germany compares quite favorably in contrast to the western part of the country. Approximately 80% of the total investment in the new federal states is financed through public funds, and the bulk of these funds are spent on developing infrastructure.¹⁵⁵ Nevertheless, given the massive infrastructure requirements, there is a continuing need for a substantial infusion of private capital.

The German government has been working hard to create a favorable and stable investment climate that addresses the concerns of private investors. Two factors, however, present major obstacles to

153. *Id.* at 1279.

154. See FEDERAL MINISTRY OF ECONOMICS, *supra* note 149, at 18.

155. *Id.*

investments in the new Länder: the unsettled property issues and the unsettled questions concerning liability for pollution by production facilities.

i. Unsettled Property Issues

The origin of this problem lies in the policies of the East German state towards property since World War II.¹⁵⁶ The communists were determined to put their Marxist definition of property into practice. "Socialist property" was to be owned by and administered for the benefit of all the people. Private property was strictly for non-productive use by individual citizens. To achieve this goal, the legislature enacted a series of laws over the years. Orders from the ruling Soviet Military Administration led to the Bodenreform, a large land reform carried out in 1945-46 by communist-controlled state governments. The Bodenreform led to the expropriation of all estates of more than 100 hectares (250 acres)¹⁵⁷ and of the property held by Nazi war criminals. In the countryside, estates were broken up and parcelled out to small farmers, many of them refugees from Poland and the Sudetenland. In the towns, this land reform allowed the Russians to proceed with the wholesale dismantling of some German factories. Other factories such as the huge "Leuna" chemical works passed into state control.¹⁵⁸

A wave of collectivization began in 1952. Farmers, many of them beneficiaries of the 1945 Bodenreform, were coerced into this process. Although on paper the land was still theirs, with the state paying a nominal rent for the lease, in reality they lost all control over their property and were turned into employees of the state. Collectivization continued throughout the 1950s and 1960s. By 1960, there were 19,200 farms, all state run; before collectivization there had been approximately 855,000 farms, mostly small holdings. The effort to merge farms and make them even bigger continued to the end of communist rule, so that after unification state farms numbered approxi-

156. See Rolf Steding, *Agrar-, Genossenschafts- und Bodenrecht in den neuen Bundesländern - Reflexionen zu Vergangenheit, Übergang und Zukunft*, 2 DtZ 393 (1991).

157. *A question of property*, in *A Survey of the New Germany*, ECONOMIST, June 30-July 6, 1990, at 14.

158. Hans-George Merz, *Bodenreform in der SBZ*, 24 DEUTSCHLAND ARCHIV 1159 (1991); Hans-Hermann Lochen, *Grundlagen der Enteignungen zwischen 1945 und 1949*, 24 DEUTSCHLAND ARCHIV 1025 (1991); Dr. Bernd Schildt, *Bodenreform und Deutsche Einheit*, 3 DtZ 97 (1992).

mately 3800.¹⁵⁹

Nationalization of large industries began with the birth of the East German state. In the mid-1960s the government decided to extend the process to all industry and trade. This culminated in the nationalization of all small and medium sized businesses by 1972.

Property belonging to any East German citizen who "fled the republic" to West Germany was also put under state control.¹⁶⁰ Most of these properties belonged to citizens who had left East Germany before the closing of the borders and the building of the Berlin Wall in 1961. In addition, the state gained control over property owned by citizens of West Germany before East Germany came into existence. In Berlin, for example, inherited or second homes belonging to West Germans often lay in the East. The administration of such properties was carried out by a state-controlled "trustees' authority," the "Treuhanderverwaltung."

After German reunification, two sorts of property claimants emerged. Former businessmen who lost their firms in 1972, and farmers whose land was collectivized, are considered "internal claimants," as they continue to live in the territory of former GDR. "External claimants" are those who live abroad or in the territory of former West Germany.

The late GDR government had already taken measures to return businesses nationalized in 1972 to their former owners in East Germany. Far trickier was the question of property claimed by West Germans. The East German state and later the Trust Agency had the power to sell this property.¹⁶¹ But until the claims of former owners were sorted out, no westerner could invest capital in the East. This hesitation initially hampered all efforts to attract western investment needed to regenerate the run-down eastern economy.¹⁶²

Uncertainty over the future of residential property claimed by former owners also caused difficulties. A dire shortage of money and materials for housing in the new federal states exists.¹⁶³ Many buildings remain empty and unrepaired since the war. With the state unable to finance the necessary repair program, many people believe that former owners could provide the needed capital. On the other hand,

159. See *A question of property*, *supra* note 157, at 14.

160. *Id.*

161. Unification Treaty, *supra* note 91, art. 22, at 477-78.

162. *A question of property*, *supra* note 157, at 14.

163. Dr. Wernhard Möschel, *Wohnungswirtschaft in den fünf neuen Bundesländern*, 2 DtZ 72 (1991).

people in the East fear that the return of property to former owners will lead to evictions or higher rents that they cannot afford to pay. They also do not understand why former owners should receive this property, while East Germans lose their houses and apartments after having taken care of them for often more than forty years.

Politicians and legal scholars first argued whether the re-emerging owners should be allowed to repossess their property or instead be granted monetary compensation.¹⁶⁴ The Bundesverfassungsgericht, the German Federal Supreme Court, held in a ruling of April 23, 1991,¹⁶⁵ that former owners are not entitled to the return of property expropriated under Soviet military occupation rule before 1949.

The Joint Declaration of June 15, 1990,¹⁶⁶ issued by the Federal Republic of Germany and the German Democratic Republic, covered expropriations after 1949. This later became part of the Unification Treaty and gave precedence to claims for compensation.¹⁶⁷

This declaration created a roadblock to further investment. Article 41(2) of the Unification Treaty states that, in accordance "with separate legislative arrangements, there shall be no return of property rights to real estate or buildings if the real estate or building concerned is required for urgent investment purposes"¹⁶⁸ This is particularly applicable if it is to be used to establish an industrial enterprise that will create general economic benefits, especially if it creates or safeguards jobs.¹⁶⁹ This provision of the Unification Treaty introduced a "green light" clause for investors into Germany's property law (*Vermögensgesetz*).¹⁷⁰

Section 3a of the property law, which remained in effect until December 31, 1992, stated that the Federal Trust Agency, as well as the federal, state, district and local governments, could sell, rent or lease real estate, buildings and companies to investors. They can do so immediately, even in those instances where property claims were

164. Michael Piazolo, *Ungeklärte Eigentumsfragen als Hauptinvestitionshindernis in den neuen Bundesländern*, 25 DEUTSCHLAND ARCHIV 484 (1992); Schäuble, *supra* note 122, at 237; Joachim Lieser, *Eigentumsordnung und Immobilienrecht in der DDR*, 23 DEUTSCHLAND ARCHIV 246 (1990); Dr. Wolfram Försterling, *Rechtsprobleme der Investitionsförderung und der Regelung der Eigentumsordnung in den neuen Ländern*, 107 DVBL. 497 (1992).

165. 44 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1597 (1991).

166. *Reprinted in* 23 DEUTSCHLAND ARCHIV 1139 (1990).

167. Unification Treaty, *supra* note 91, art. 41(1), at 496.

168. *Id.*

169. *Id.*

170. Gesetz zur Regelung offener Vermögensfragen vom Nov. 23, 1990, *as amended* April 18, 1991 (BGBl. I, 957).

filed by third parties, e.g., former owners. The investor need not wait for a time-consuming decision by the authorities or the courts on the property claim. The Trust Agency and local authorities have full decisionmaking powers and have sole responsibility for the sale of the properties.

In other words, investments take precedence over ownership claims, provided they are "genuine" investments.¹⁷¹ To qualify as a "genuine" investment, the law requires that the acquisition, lease or rental of the *land and/or buildings* be geared towards:

- preserving and/or creating jobs; or
- alleviating the enormous demand for housing; or
- providing the proper infrastructure for these investment projects.

Companies can be sold or leased regardless of ownership claims filed by a third party, if:

- such a course of action saves and/or creates jobs or improves the competitiveness of the company; or
- the former owner is unable to provide guarantees for the continued existence of the company.

According to Germany's investment law (*Investitionshilfegesetz*),¹⁷² the precedence of investors also applies to properties and buildings administered by an agency other than the Trust Agency or local authorities. Conditions similar to those in Section 3a of the property law apply.¹⁷³ In these circumstances, however, the municipal or district authorities must approve the transaction.

In short, under German law, willingness to invest is now the primary consideration in determining property rights. A former owner who does not wish to invest will receive compensation for his claim from the state. If both the previous owner and one or more investors willing to invest claim the property, the more promising project is given preference. With the "green light" clauses in the property law and the investment law, in theory one of the major obstacles to private investments in the new *Länder* has been removed.

In practice, however, many problems remain. In many cases, the

171. See Gerhard Fieberg & Harald Reichenbach, *Offene Vermögensfragen und Investitionen in den neuen Bundesländern*, 44 NJW 1977 (1991); FEDERAL MINISTRY OF ECONOMICS, *supra* note 149, at 32. See also Rohde, *Die Entwicklung der Grundeigentums und Bodennutzungsverhältnisse nach dem Einigungsvertrag*, 1 DtZ 312 (1990).

172. Gesetz zur Beseitigung von Hemmnissen bei der Privatisierung von Unternehmen und zur Förderung von Investitionen, Mar. 22, 1991 (BGBl. I, 766).

173. See Fieberg & Reichenbach, *supra* note 171, at 1979; FEDERAL MINISTRY OF ECONOMICS, *supra* note 149, at 32.

factual and legal issues are unclear. To a certain extent, this is a result of missing deeds that were lost in World War II or destroyed pursuant to orders of the former GDR government. Due to this situation, several persons may claim title to the same land. Further, the newly established real-estate title recording offices in the eastern Länder still function slowly and inefficiently. In many cases, these offices wait for final court rulings on property claims before registering a person's title to land. Due to the court's workload in the new Länder, it will probably take the judiciary a few more years to solve all the property issues resulting from unification.

ii. Liability for Environmental Pollution

For many businesses, cleaning up eastern Germany's disastrous pollution could prove ruinously expensive.¹⁷⁴ As a result, western companies have been reluctant to buy eastern chemical plants or other polluting or energy-intensive businesses.¹⁷⁵ Most investors in the industry have preferred to build new factories rather than take over existing businesses.¹⁷⁶

To overcome this obstacle to investment, the Unification Treaty introduced the "polluter pays" principle, which releases new property owners in eastern Germany from liability for environmental damage occurring prior to their purchase.¹⁷⁷ The scope of the Law on the Removal of Obstacles to Privatization and on the Promotion of Investment (*Gesetz zur Beseitigung von Hemmnissen bei der Privatisierung von Unternehmen und zur Förderung von Investitionen*) of March 22, 1991, has been broadened considerably since unification.¹⁷⁸ In effect, the "Environment Act"¹⁷⁹ grants exemptions from legal liability and private claims for environmental damage caused by industrial operations or other uses of property prior to July 1, 1990. Any natural person or company that owns, operates or acquires commercial property or an industrial plant in the new federal states may apply for such an exemption. Full, partial or conditional

174. *Investing in Eastern Germany*, ECONOMIST, Jan. 26-Feb. 1, 1991, at 63, 64.

175. *Id.*

176. See *id.*; Dr. Peter J. Tettinger, *Risiken eines Flächenrecycling für Anlagenerwerber in der früheren DDR*, 2 Dtz 40 (1991).

177. See Unification Treaty, *supra* note 91, art. 34, at 488-89.

178. See Kröger, *Haftungsfreistellung für "Altlasten" in den neuen Bundesländern*, 44 DÖV 989 (1991); Dr. MICHAEL KLOEPFER, *DAS UMWELTRECHT IN DER DEUTSCHEN EINIGUNG* (1991).

179. *Umweltrahmengesetz* of June 29, 1990, GBl. I, 649.

exemptions are granted at the discretion of the appropriate authorities. The application for exemption must have been submitted to the appropriate state agency by March 29, 1992, one year after the date that the Law on the Removal of Obstacles to Privatization and on the Promotion of Investment went into effect.¹⁸⁰

In the past, the Trust Agency has also demonstrated its willingness to assume a substantial part of the costs arising from existing environmental burdens. The exact percentage of the costs that the agency will assume is subject to negotiation. While determinations of the costs to investors, i.e., new owners, are made on a case-by-case basis, investor shares will comprise around ten percent of the total costs in most instances.¹⁸¹

4. Unification and Criminal Law

The people in East Germany fought successfully and non-violently for human rights and dignity, for freedom and democracy, as well as for a new economic system. Now they impatiently await the prosecution of injustice and crimes committed by members of the former GDR regime. The extent of the legal wrongs committed in forty years of communist rule is inestimable. Every day, there are new, spectacular and unbelievable cases. Many more people than previously estimated were killed at the inner-German border, in the basement of the State Security Police ("Stasi") headquarters, in East Berlin and elsewhere. The secret police forced people to take drugs during interrogation; parents were forced to give away their children and consent to adoptions; terrorists were hidden and supported by the old regime; elections were manipulated; and people were sent to prison for expressing views critical of the state or for trying to escape from state terrorism to a western democracy.¹⁸²

The East German secret police, the Stasi, used banal and ruthless methods to spy upon, blackmail and corrupt people, and to encourage denunciation. The most insidious method of all was to make victims accomplices.¹⁸³ Probably the most striking evidence of this kind of oppression is the material located in the vast archives of the former

180. See Kroger, *supra* note 178, at 990; FEDERAL MINISTRY OF ECONOMICS, *supra* note 149, at 33.

181. See FEDERAL MINISTRY OF ECONOMICS, *supra* note 149, at 33.

182. See generally Dr. Klaus Kinkel, *Wiedervereinigung und Strafrecht*, 47 JZ 485 (1992).

183. Fritz Schenk, *Die Bürde mit den Stasi-Akten*, 25 DEUTSCHLAND ARCHIV 80 (1992); Karl W. Fricke, *Stasi-Erbe und Vergangenheitsbewältigung*, 25 DEUTSCHLAND ARCHIV 113 (1992).

GDR Ministry of Internal State Security. These archives were opened on January 1, 1992, for public inspection by the six million East Germans - one third of the population - on whom dossiers were compiled. So far, approximately one million people have applied to read their files. Many are appalled at what they find; treachery by friends and, in a few cases, by parents, brothers, sisters and spouses. Some 200,000 "unofficial co-workers" supported the approximately 100,000 members of the secret police by reporting and collecting materials on people around them.¹⁸⁴

File readers can now discover the pervasiveness of the betrayal network.¹⁸⁵ Stasi tentacles extended into the schoolroom, the pulpit, the bedroom and other intimate spheres of life.¹⁸⁶ Stasi technicians bugged homes, telephones, cars and even seats in concert halls.¹⁸⁷ An example of the pervasiveness of this system was Stasi "Section 8," which dealt with children.¹⁸⁸ It required principals of every school in the country to keep a file of "dangerous persons" in their classrooms.¹⁸⁹ Teachers filled out forms on "suspicious" children, some as young as nine years of age, who expressed views critical of the state or favorable to the West.¹⁹⁰ The information went into the archives and, years later, was used to block youngsters from jobs or higher education.¹⁹¹

The government had long debated whether to open these files to the public or keep them shut forever. It was argued that files should not be made public because of the need to protect personal data. Others feared that close friendships and even family relations might break up when file readers learned that they were turned in by friends or relatives. In the end, Germany decided that victims of the Stasi regime needed adequate access to the files in order to permit their rehabilitation and allow the prosecution of those responsible for their

184. See STASI INTERN, MACHT UND BANALITÄT (Bürgerkomitee Leipzig eds., 2d ed. 1991); DAVID GILL & ULRICH SCHRÖTER, DAS MINISTERIUM FÜR STAATSSICHERHEIT (1991); THOMAS AMMER & HANS-JOACHIM MEMMLER, STAATSSICHERHEIT IN ROSTOCK (1991); KARL W. FRICKE, MFS INTERN (1991).

185. See generally James O. Jackson, *Fear and Betrayal in the Stasi State*, TIME, Feb. 3, 1992, at 32-33; Erich Loest, *Der Schatz hinter der Mülltonne oder Mein Leben mit der Wanze*, 23 DEUTSCHLAND ARCHIV 1318 (1990).

186. Jackson, *supra* note 185, at 32.

187. *Id.*

188. *Id.* at 33.

189. *Id.*

190. *Id.*

191. *Id.*

hardships.¹⁹²

It would be unreasonable from a human point of view, and intolerable in a country based on the rule of law, to hide the reality of the Stasi oppression. Justice and the law must take their course. Investigation, prosecution and trials take their time, and many victims of the GDR regime are dissatisfied with time-consuming proceedings.¹⁹³ They particularly detest the thought that their oppressors, who did not respect the law for forty years, now profit from the principles of fair trial and the rule of law.

Bärbel Bohley, an East German writer and a leading activist in the reform movement prior to unification, once expressed what most East Germans think: "[w]e wanted justice and what we got is the rule of law!"¹⁹⁴ It will probably take some time to demonstrate to East Germans what the rule of law means, its importance to a democratic state, and the fact that no alternative to this principle exists even if trials and verdicts are delayed in many cases.

What makes criminal proceedings even more complicated is the highly bureaucratic nature of the former GDR state. Difficulties arise when attempting to trace responsibility and guilt to people who gave orders from their desks. Files have been destroyed, and it often takes a long time to review all materials. Courts must contend with a shortage of staff and a flood of cases.¹⁹⁵

The most fundamental problem lies in the fact that the criminal law system is not designed to redress organized injustice committed by all state organs. For almost forty years, an entire state disregarded the rule of law and used legal rules as an instrument of social engineering. These rules became a weapon in the hands of the rulers who tried to achieve their political goals through coercion. Legal norms and verdicts merely served to justify injustice. Some draw parallels to

192. See generally Klaus Stoltenberg, *Die historische Entscheidung für die Öffnung der Stasi-Akten - Anmerkungen zum Stasi-Unterlagen-Gesetz*, 3 DTZ 65 (1992); Dr. Johannes Weberling, *Anmerkungen zum Entwurf des Stasi-Unterlagen Gesetzes*, 45 DÖV 161 (1992); Dr. Thilo Weichert, *Von der rechtlichen und tatsächlichen Unmöglichkeit des Stasi-Unterlagengesetzes*, 25 ZRP 241 (1992); Hermann Weber, *Die Wissenschaft benötigt die Unterlagen der Archive*, 24 DEUTSCHLAND ARCHIV 452 (1991); *Immer noch Probleme mit Archiven*, 25 DEUTSCHLAND ARCHIV 580 (1992). See also Klaus Stoltenberg, *Die "Vorläufige Benutzerordnung" für die Stasi-Unterlagen*, 2 DTZ 205 (1991).

193. See generally Dr. Roman Herzog, *Verfassungsanwälte als Fitter von elem BVwfg*, 24 ZRP 28 (1991).

194. Kinkel, *supra* note 182, at 486.

195. See *id.* at 485.

the totalitarian system of Nazi Germany.¹⁹⁶ Some even argue that collective injustice cannot be redressed at all by the punishment of individuals who, in most cases, only carried out orders of their superiors. Many argue that the system as a whole is responsible for injustice and that there is no room for reprisal by prosecuting selected individuals. This view, however, cannot be accepted. In many cases, clear evidence of individual misconduct exists. The life, health or freedom of people depended on individual decisions. There is no doubt that, in the future, crimes traced back to such individual misconduct will be prosecuted.¹⁹⁷

When the new government prosecutes criminal offenses committed during the years of Stasi oppression, the criminal law of the former GDR must be applied. This follows from the constitutional principle against retroactive application of the law, which holds that a person can only be prosecuted under criminal laws existing at the time of the act. Exceptions are made only where the later criminal law provides for less severe penal sanctions.

Prosecution proved to be difficult in cases where, under former GDR law, defendants were excused for their deeds. One example arises in the prosecution of former border guards for homicide.¹⁹⁸ Since the erection of the Berlin Wall in 1961, more than 160 people were shot dead by border guards while attempting to "flee the republic" and escape to West Germany. The shootings were justified by the notorious Service Regulation 30/10, commonly known as the "order to shoot." In practice, superiors gave this order orally to border guards. Consequently, when taken to trial, border guards have asserted "superior orders" as a defense. Courts accept this defense only if the accused honestly believed he was doing his duty in obeying his superior's commands and the orders were not so manifestly illegal that he ought to have known them to be unlawful. The courts regularly reject the second assertion in these cases, however, on the grounds that the order to shoot clearly violated commonly recognized principles of international law, such as the fundamental rights to free

196. See Dr. Eckart Klein, *Die Bedeutung der Nürnberger Prozesse für die Bewältigung des SED-Unrechts*, 25 ZRP 208 (1992); Kinkel, *supra* note 182, at 487.

197. Kinkel, *supra* note 182, at 487. See Hubertus Knabe, *Vergangenheitsbewältigung per Gesetz?*, 24 DEUTSCHLAND ARCHIV 1011 (1991). See also Dr. Horst Luther, *Der Einigungsvertrag über die strafrechtliche Behandlung von DDR-Alttaten nach der Einigung Deutschlands*, 2 DTZ 433 (1991).

198. Matthias Bath, *Zur Strafbarkeit der Todesschützen an der innerdeutschen Grenze*, 23 DEUTSCHLAND ARCHIV 1733 (1990).

movement and personal freedom, and had the sole aim of securing the continued existence of a totalitarian regime.¹⁹⁹ Therefore, the common understanding of fundamental legal principles must prevail over the arbitrariness of the totalitarian rules of the former GDR's law.

In addition to trials involving crimes committed by border guards, the prosecution of espionage and treason have attracted much public attention and have caused disputes among courts and legal scholars.²⁰⁰ The unusual aspect of these cases arises from the fact that treason and espionage were already criminal offenses under West German law, even if the action had been planned or executed from the territory of the GDR. After the dissolution of the GDR as a sovereign state, it was quite easy for German authorities who, immediately upon accession of the new federal states, took over the archives of the former GDR Central Intelligence Service to prove cases of espionage or treason subsequently prosecuted in the courts.

Some authorities express misgivings about the lawfulness of this practice. Some believe it will be unlawful retroactive criminal punishment because people accused at the time the offense was committed could only have been expected to adhere to the criminal rules of the GDR. Their actions were lawful and appropriate according to their understanding of the previous legal rules. Some want to apply Article 31 of the Hague Land Warfare Convention, which provides spies with amnesty after a war ends.²⁰¹ The Berlin Superior Court has suspended a trial in order to obtain a ruling by the Federal Constitutional Court on the legality of the prosecution of a former East German member of the Central Intelligence Service for espionage. The Court suggests that prosecuting former East German spies might violate the equal protection clause of the Basic Law because only East Germans are subject to prosecution.²⁰² On the other hand, the Federal High Court of Justice, in rulings on January 30, 1991,²⁰³ and May

199. See *Strafrecht*, 47 JZ 691 (1992). See also Dr. Joachim Hruschka, *Die Todesschüsse an der Berliner Mauer vor Gericht*, 47 JZ 665 (1992).

200. See Dr. Peter Alexis Albrecht & Dr. Stefan Kadelbach, *Zur strafrechtlichen Verfolgung von DDR-Außenspionage*, 46 NEVE JUSTIZ 137 (1992); Dr. Rainer Lippold, *Die Strafbarkeit der DDR-Spionage und ihre Verfassungsmässigkeit*, 45 NJW 18 (1992); Dr. Erich Samson, *Die strafrechtliche Behandlung von DDR-Alttaten nach der Einigung Deutschlands*, 44 NJW 335 (1991); Dr. Gerald Grünwald, *Die strafrechtliche Bewertung in der DDR begangener Handlungen*, 1991 STRAFVERTEIDIGER 31.

201. See generally Dr. Gunter Widmaier, *Strafbarkeit der DDR-Spionage gegen die Bundesrepublik - auch noch nach der Wiedervereinigung?*, 43 NJW 3169 (1990).

202. Werner Grossmann, *Zur Strafbarkeit von DDR-Spionen*, 44 NJW 2501 (1991).

203. *Strafbarkeit der DDR-Spione*, 44 NJW 929 (1991).

29, 1991,²⁰⁴ made it clear that these cases will be prosecuted without any legal doubt. However, the court suggested in dictum a general amnesty for former East German spies. Nevertheless, a bill introduced in the German Parliament was withdrawn due to public pressure. The Federal Supreme Court will soon be under a final ruling on this matter.

5. Constitutional Reform

After the accession of the five new federal states, it became necessary to amend the Basic Law. Among the most important amendments were those affecting the preamble and Article 146. According to Article 4 of the Unification Treaty, the preamble now reads as follows:

Conscious of their responsibility before God and men, animated by the resolve to serve world peace as an equal partner in a united Europe, the German people have adopted, by virtue of their constituent power, this Basic Law.

The Germans in the Länder of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hessen, Lower Saxony, Mecklenburg-Western Pomerania, North-Rhine Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia have achieved the unity and freedom of Germany in free self-determination. This Basic Law is thus valid for the entire German people.²⁰⁵

Article 146 of the Basic Law was amended by the Unification Treaty to read as follows: "This Basic Law, which is valid for the entire German people following the achievement of the unity and freedom of Germany, shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force."²⁰⁶

Another amendment worth mentioning is Article 143, which is now part of the Basic Law.²⁰⁷ Article 143 provides that law in the new federal states may deviate from provisions of the Basic Law for a period not extending beyond December 31, 1992, in so far as, and so long as, no complete adjustment to the order of the Basic Law can be achieved as a consequence of the different conditions. Deviations, however, must not violate Article 19(2), and must be compatible with

204. *Strafbarkeit der DDR-Spione*, 44 NJW 2498 (1991).

205. Unification Treaty, *supra* note 91, art. 4, at 465.

206. *Id.* at 466.

207. *Id.*

the principles set out in Article 79(3).²⁰⁸

In Article 5 of the Unification Treaty, the governments of the two contracting parties recommended that, within two years, the legislative bodies of the united Germany should deal with the questions regarding amendments or additions to the Basic Law as raised in connection with German unification, in particular:

- regarding the relationship between the Federation and the Länder in accordance with the Joint Resolution of the Minister Presidents of July 5, 1990;
- regarding the possibility of restructuring the Berlin/ Brandenburg area in derogation of the provisions of Article 29 of the Basic Law by way of an agreement between the Länder concerned;
- regarding the introduction of state objectives into the Basic Law; and
- regarding the question of applying Article 146 of the Basic Law and of holding a referendum in this context.²⁰⁹

According to the recommendation in Article 5 of the Unification Treaty, on November 28, 1991, the German "Bundestag" decided to establish a joint committee on constitutional reform. This committee, consisting of thirty-two members of the "Bundestag" (congress) and thirty-two members of the "Bundesrat" (senate), started work on January 16, 1992.

As set out in its charter, the joint committee must propose changes and amendments to the Basic Law to the legislative bodies. The committee must contend with the topics set out in Article 5 of the Unification Treaty, as well as with the amendments required by the process of European integration.²¹⁰

One of the most important issues raised by the unification is the restructuring of the federal system. United Germany now has sixteen Länder, ten in the old western part, five in the east, and Berlin, although Berlin's future remains unclear. Critics have complained that there are far too many federal states. Decision-making problems already exist and could become almost unmanageable with five more Länder voting in the "Bundesrat" and five more members on the central council of the "Bundesbank." Moreover, most of the re-emerging

208. *Id.*

209. Unification Treaty, *supra* note 91, art. 5, at 467.

210. See Dr. Fritz Ossenbühl, *Probleme der Verfassungsreform in der Bundesrepublik Deutschland*, 107 DVBL. 468 (1992).

East German Länder are quite small, with a combined population comparable to North-Rhine Westphalia.

The question has stirred an old debate about the federal arrangement. According to the Basic Law, federal territory was to be reorganized "to create Länder which by their size and capacity are able effectively to fulfill the functions incumbent upon them."²¹¹ In fact, there has been very little reorganization so far. Three smaller states merged to create Baden-Württemberg in 1951, and the people of the Saarland voted to join the federation in 1957. Today, big differences exist between the Länder in size, population, and, more importantly, in wealth. To cope with the wealth gap between the various Länder, the Basic Law provides for a system of finance equalization between the Länder, the so called "Finanzausgleich," by which financially strong states transfer money to help weaker ones.²¹² Although the Unification Treaty provides in Article 7 that the new eastern states will not take part in this system before December 31, 1994,²¹³ the whole system requires review to satisfy the interests of all states in the future and to prevent virtually all the western states from paying the poorer eastern states. The time may now be ripe for radical reform, for a reshaping of the federal system by forming larger, more efficient federal units. This is easier said than done, however, because tradition and regional pride may hinder the required constitutional reform.

Another issue the joint committee must focus on concerns the introduction of state objectives into the Basic Law. These objectives would require all federal and state organs to comply with the objectives but would not give an individual standing to sue. It is argued that objectives make no sense if they cannot be enforced by individuals.²¹⁴ However, the opposing view considers it important to set forth the state's goals for all state organs to follow, and insist they can only receive the respect they deserve if they are made at the constitutional level. So far, only general agreement exists on the inclusion of the duty to protect the environment as a state objective in the Basic Law.

Currently, one of the most intensely debated issues concerns whether Article 16, paragraph 2, section 2 of the Basic Law, which gives political refugees a fundamental right to asylum in Germany, should be modified to prevent abuse of this right by people moving to

211. Basic Law, *supra* note 117, art. 29.

212. *Id.* art. 107.

213. Unification Treaty, *supra* note 91, art. 7, at 467-68.

214. Ossenbühl, *supra* note 210, at 475.

Germany for purely economic reasons.²¹⁵ Another current discussion concerns whether to amend the Basic Law to allow the German army's participation in United Nations' peace-keeping missions.

One of the most important issues the joint committee must face concerns the applicability of Article 146 of the Basic Law. This would imply a referendum by which a new constitution could be adopted. Legal scholars must discuss the arguments for and against such a procedure.²¹⁶

Several other issues in the field of constitutional reform are outside the scope of this article. The forthcoming constitutional reform in Germany will bring risks as well as opportunities. The Basic Law is one of the main achievements of post-war Germany. Although the Basic Law was drafted on the orders of the occupying powers, it represents an authentic German achievement. It reflects a determination to return to liberal democratic traditions and to take into account the experiences of the Weimar Republic. In the forty years that it has been in force, the Basic Law has proven to be a sound basis for the development of a stable democracy in the Federal Republic. The Basic Law contains not merely words, but has actively regulated and shaped public and social life in Germany from the day it came into force. Contrary to previous German constitutions, the Basic Law contains rules directly binding on all state organs, the application of which is secured by an independent judiciary. If all the proposed amendments to the Basic Law, in particular the inclusion of various state objectives, are accepted, danger exists that the Basic Law might lose its function as a legal framework for public and private life. One hopes that the joint committee shares an awareness of this danger and will refrain from including promises in the Basic Law that cannot be kept in the future.

III. CONCLUSION

This Article has shown that German unification brought about a vast array of legal, economic and social problems. Although the legal problems must certainly be solved, priority must now be given to economic and social problems. The old GDR system failed in large part because of the critical economic situation. This makes it imperative

215. In 1991, more than 256,100 people applied for asylum in Germany. Only about five percent of all applicants were finally recognized as political refugees. See STATISTISCHES BUNDESAMT, STATISTISCHES JAHRBUCH 1991, at 48.

216. See Ossenbühl, *supra* note 210, at 476.

to ensure that the people in the former GDR do not experience their newly-won freedom as another period of severe hardship.

The East Germans have opted for the social market economy proven successful in the West. The monetary union has paved the way for the free movement of people and private enterprises. Germany has pushed ahead with the task of creating the legal basis for the development of competition and social security. But this framework alone will not produce economic output. That is a job for the people. A social market economy comes alive not in the statute books but in the minds and actions of the people. To many, the cut is deep and severe: learning afresh, changing attitudes, moving from one place to another, looking for new opportunities, starting all over again. Experience, however, in Germany as well as in the United States, teaches us that individual initiative is always worthwhile.

No less necessary is cooperation in the united country. Germans in both the East and the West must now act together in their most fundamental interest. They share responsibility for economic recovery in the new federal states. The success of these efforts is in their mutual interest, for, in the long run, failures will burden Germans in both the West and the East. The constitutional mandate is to secure comparable living conditions and opportunities for all Germans. Highly profitable loans alone will not suffice to finance German unity. Both public and private readjustments are necessary. Many good examples demonstrate this possibility, including hospitals, schools and universities, factories and associations, clubs, and families. Sister city programs can also develop into solid foundations for the community.

The nation-state has not ceased to exist, but anyone who believes that the world can cope with the nation-state alone is living in a by-gone era. No nation-state in the world can solve the world's major problems by itself. Modern systems do not function nationally. This applies to the environment, security, industry and energy, and transport and telecommunications. In this age, sovereignty means playing a part within the community of states. The EEC has created a convincing model for such cooperation. It has fused those national powers crucial for peaceful neighborly relations into a supranational framework. In the contest between the systems of the East and the West, it has provided a source of powerful impulses for reform in eastern Europe.

The Cold War is over. Freedom and democracy have prevailed in nearly every European country. Not through coercion by dominat-

ing countries but of their own free will, they can now intensify and institutionalize their relations and create, for the first time, a peaceful common order. This marks the beginning of a completely new chapter in the history of the European nations.

Germany will only make headway towards this ambitious goal if it proceeds together with its western partners, especially those within the EEC. Everything the member countries do for the whole of Europe through the EEC strengthens both the EEC itself and its individual members. Germans can best look after their interests and dispel their partners' doubts about unification by refusing to allow themselves to be outdone in their efforts to strengthen the EEC, and by continuing without any hesitation along the road to economic and monetary union leading to political union on a European level. The goal of unified Germany is to remain fully integrated with the West, oriented not only to western Europe, but to the whole of Europe.

