WEST GERMANY'S EASTERN POLICY: LEGAL CLAIMS AND POLITICAL REALITIES*

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Since autumn of 1969 the West German government has been based on a coalition of the Social Democratic Party and the Free Democratic Party under the leadership of Chancellor Willy Brandt. The overwhelming victory of this coalition in the general election of November 19, 1972 provided a clear mandate for the continuation of the daring and intensive Eastern policy (Ostpolitik) that has been Chancellor Brandt’s principle objective in foreign affairs.

Previous West German governments, dominated by the Christian Democratic Party, had pursued a policy of “maximum claims” which led to a freezing of the status quo with the East. The successor Grand Coalition of the Christian and Social Democratic Parties tried unsuccessfully to thaw the frozen relationships with the East. Although it has not completely departed from the line drawn by the Grand Coalition, the Ostpolitik of the Brandt government has shown new initiative and has found response in the countries of the Eastern bloc. The Nobel Prize Committee rewarded these efforts by conferring the 1971 Peace Prize on Chancellor Brandt. However, the question remains whether, despite such efforts, the present West German government still adheres to legal positions which could hamper further dialogue between the Federal Republic and the East.

West and East Germany

In his inaugural declaration to the Bundestag, Chancellor Brandt
expressly admitted the existence of two states in Germany. In doing so he broke with the tradition of the West German government which, since the time of Adenauer, had denied the statehood of the German Democratic Republic (Deutsche Demokratische Republik or DDR). However, the present Chancellor still is not willing to recognize the DDR as he would any other foreign state.

Thus, prevailing considerations were combined by Brandt into a new legal theory which, while accepting the existence of two German states, denies that their relationship is governed by international law. The two German states are said to belong to a unity similar to the British Commonwealth of Nations. As this theory leads to a peculiar relationship of domestic law (Staatsrecht) it is appropriate to label it as the Staatsrechtliche Theorie. The three elements of this theory, to be discussed are: (1) acceptance of the DDR as a state; (2) denial that relationships between West and East Germany are governed by international law; and (3) refusal to formally recognize East Germany under international law.

1. Acceptance of the DDR as a State

By accepting the DDR as a state, the Brandt government puts an end to attempts to circumvent unpleasant political facts by theoretical tools. The main argument of the theory denying the statehood of the DDR was the lack of democratic legitimacy of the East German authorities. However, the countries of the Soviet Bloc, who do not have governments with such democratic legitimacy, are nonetheless considered to be states. Indeed, international law would lose its universality if its fundamental notion of statehood depended on such ideological approaches.

Another theoretical tool was that used by Chancellor Kiesinger of the
Grand Coalition. Kiesinger preferred to argue that the DDR was not a state because the people of that area felt themselves a part of the German nation as a whole. However, the sentiments of a people who cannot vote freely are too uncertain to determine the existence of a state.

It may yet be argued that the DDR is subordinated to the Soviet Union to the extent that the DDR is not possessed of sovereignty, but sovereignty is not a prerequisite of statehood. For example, members of a federation are considered to be states, and the history of international law shows cases of "protected" or "dependent" states. To qualify as a state, international law requires only that the regime exert effective control over the people living under its rule. The East German regime has proven that it satisfies this requirement in that it possesses effective governmental authority in the former Russian occupation zone. Significantly, neither the pre-Brandt West German legal doctrine nor the Christian Democratic governments doubted the effectiveness of the DDR regime under party leader Walter Ulbricht and his successor Erich Honecker.

The West German acceptance of the DDR as a state also removes the need for political adherence to the view that the DDR's status is that of a rebellious belligerent. The dogma that the Federal Republic was the only German state on the soil of the former German Reich left unexplained the governmental activities of the DDR authorities. For a considerable time, a "civil war" construction was officially adopted by the West German Foreign Ministry. However, Eastern propaganda could easily stigmatize this approach as a continuous threat to peaceful coexistence. Thus, the new West German government brought an end to this propagandist weakness.

As another consequence of the acceptance of the DDR as a state, West German authorities can no longer pretend to be the sole represent-
tives of the German people. Until autumn, 1969, the claim of sole representation was the official guideline for West German foreign policy. However, this claim had been somewhat diluted in practice. For instance, the West German Embassy in Romania refused to give diplomatic protection to DDR citizens. Willy Brandt, serving as the Foreign Minister of the Grand Coalition, gave an interpretation of the claim which made it almost meaningless. Yet the sole representation claim still hampered the establishment of normal relations between the DDR and other nations, particularly on the diplomatic level where the Hallstein Doctrine emphasized the claim.

The Hallstein Doctrine suggests that West German foreign policy must, by interrupting diplomatic relations with and stopping economic aid to offending nations, prevent other nations from recognizing the DDR. The reason offered for the Doctrine is that world-wide recognition of the DDR would destroy the basis for the sole representation claim by which the DDR’s statehood is denied. Thus far, the Federal Republic has been rather successful in applying the Doctrine. By political and economic means she has persuaded almost all countries outside the Soviet Bloc to refrain from officially recognizing the DDR. The Brandt government has not completely abandoned the Doctrine, as may be seen in the remarks of the Federal Minister of Foreign Affairs, Walter Scheel, who pointed out that reaction, on the establishment of diplomatic relations between the DDR and another country, is a question of political opportunity. However, Brandt’s opposition defends the

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12It has been pointed out that the sole representation claim is based on the assumption that the DDR is not a state. See C. von Wrede, Der Rechtsanspruch der deutschen Bundesregierung auf völkerrechtliche Alleinvertretung Gesamtdeutschlands und die Hallstein-Doktrin 58, 86 (1966) (unpublished dissertation at University of Fribourg, Switzerland).


14Böckenförde, Die Teilung Deutschlands und die deutsche Staatsangehörigkeit, in 2 Epiphrhosis, Festgabe für Carl Schmitt 423, 451 n. 82 (H. Barion ed. 1968).

15Brandt defined the claim of sole representation as the “duty to be active in the world with regard to German affairs and to take care of the German question.” G. Hoffmann, Staatslexikon col. 527 (6th ed. Supp. 1969) (translation by the author).


17Id.

legal theory which had dominated the policy of all the Christian Democratic governments of West Germany.

Although the acceptance of the DDR as a state tends to confirm to the inhabitants of that country that they are not subordinated in the West German legal order, the West German declaration does not of its own force alter either existing legislation or court decisions. Thus, the West German Penal Code as interpreted by the West German courts still applies to "Germans" in general. The courts hold that only the legislature by a political decision could change such an interpretation.

Thus far the legislature has confined its action to procedural improvements. For example, the Criminal Procedure Act was revised in 1968 to grant public prosecutors the discretionary power not to prosecute a person because of a crime committed in areas such as East Germany, where the Basic Law is not in force. This means, however, that such crimes may be prosecuted by the West German authorities regardless of the lawful nature of the act under the East German legal order—for example, the shooting of a fleeing refugee at the Berlin Wall.

Another procedural relief was the Act of July 29, 1966, empowering the Federal Government to grant immunity for a certain time to East Germans coming into West Germany. Though this Act had been promulgated in order to mitigate the Single State Dogma, it was denounced in East Germany as the "Handcuff Act."

2. West-East Relations Under International Law

The Brandt government, while accepting the existence of two states in Germany, still refuses to consider the DDR a foreign country. By classifying the DDR as the "home country," the Brandt government probably wants to appease those right wing groups which reproach the present coalition for "selling out" the unity of Germany. However, to say that the DDR is not a country foreign to the Federal Republic is to say the relations between East and West Germany are not to be governed by international law. The theory on which this assertion is predi-
cated is the so-called "roof theory" which presupposes the survival of the German Reich, supported by the two pillars: East and West Germany. Since the Reich admittedly has no organs of her own there must be other institutions in operation to sustain its existence above a fictional level. When the DDR authorities believed in a reunification of Germany, one could consider the two German states as the representatives of the Reich. However, the DDR authorities no longer hold to the idea of an undivided Germany, and thus the "roof theory" may only be upheld by forces maintaining the Reich against the will of the DDR.

Only the former occupation powers, under their self assumed responsibility for "Germany as a whole," could be capable of maintaining the Reich in the face of DDR insistence to the contrary. The Western Allies expressly retained "the rights, heretofore held or exercised by them, relating to . . . (Berlin) and . . . Germany as a whole, including the unification of Germany and a peace settlement." The Soviet Union in a 1955 treaty with the DDR was less explicit, but a proviso with respect to sovereignty was kept: "[h]aving regard to the obligations of the Soviet Union and the Democratic Peoples Republic under existing international agreements relating to Germany as a whole." Subse-

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25Friedrich Klein is considered the protagonist of the so called "roof-theory." See H. VON MANGOLDT & F. KLEIN, 1 DAS BONNER GRUNDGESETZ 35 (2d ed. 1957).
26Von der Heydte rightly warns against the use of fictions in international relations. Von der Heydte, Der deutsche Staat im Jahre 1945 und seither, 13 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTLER 6, 12 (1955). See also Vocke, Politische Gefahren der Theorien über Deutschlands Rechtslage, 12 EUROPA-ARCHIV 10199, 10210 (1957).
27The last utterance of this kind may be found in the Dec. 31, 1966, New Year's Speech of Walter Ulbricht, Chairman of the National Council of the DDR. See 2 WIEDERVEREINIGUNG UND SICHERHEIT DEUTSCHLANDS 212-213 (H. von Siegler ed. 1968).
28Contra Scheuner, Die Funktionsnachfolge und das Problem der staatsrechtlichen Kontinuität, in VOM BONNER GRUNDGESETZ ZUR GESAMTDEUTSCHEN VERFASSUNG, FESTSCHRIFT HANS NAWIASKY 9, 26 (T. Mauntz ed. 1956).
32Treaty Between the Soviet Union and the East German Regime, Sept. 20, 1955, 226 U.N.T.S. 201. See also DOCUMENTS ON GERMANY, supra note 30, at 188.
quently, however, the Soviet Union declared reunification to be a matter between the two Germanys. In a note to the United States, the Soviet government, relying on the principle of self-determination, declined to impose a solution upon the two German states. Thus, at least one of the four powers has refused to have any further responsibility for “Germany as a whole.” It may happen that the Soviets will one day invoke the reservation in the 1955 Treaty as a pretext for an intervention in the DDR, but such future intervention could not give form to the present illusion of a Reich in suspension.

Brandt regards the “nation” as the uniting tie between the two German states. Politically, this consideration may be valuable, but in international law a unity having several states is not recognized as qualifying the relations between such states to the extent that international law is not applicable to govern those relations. The British Commonwealth example is not contrary. Whereas the special relations between the dominions originate from their common understanding, the DDR is not at all willing to form a special union with the Federal Republic. In addition, the Staatsrechtliche Theorie admits that a confederation of German states is not presently organized. The hypothesis that such a confederation might be realized in the future should not blur our view of the present situation.

Thus it can be seen that the DDR has no common ties with West Germany which could exclude the applicability of international law to their relations. Therefore, the argument of the Brandt government, that the DDR cannot be a foreign country, is merely a political wish nourishing the hope that there will be a reunification of Germany in the near future. However, since to a large extent the Federal Republic already treats the DDR as a foreign country and since the Brandt government itself seems to not believe in its professed hope of reunification, the Staatsrechtliche Theorie turns out to be another illusory legal position.

Note from the Soviet Union to the United States concerning a Peace Treaty with Germany, Aug. 3, 1961, in Documents on Germany, supra note 30, at 704, 709.

Inaugural Declaration, supra note 1, at 500. See also Brandt, German Policy Toward the East, 46 FOREIGN AFFAIRS 476, 481 (1967-68).

R. Wilson, The International Law Standard and Commonwealth Developments 3, 19 (1966) states that the inter se doctrine is gradually disappearing.

See note 3, supra, and accompanying text.

Kriele, supra note 3. For a statement against inter se relations between the German states, see G. Hoffmann, Die deutsche Teilung 45 (1969).


Chancellor Brandt pointed out in his Report on the State of the Nation that under the present
3. **Formal Recognition of East Germany**

Although the DDR in the first months after Brandt assumed control of the West German government seemed inclined to enter negotiations without preconditions, Ulbricht of the DDR made it quite clear that any substantive result required prior recognition of his state.⁴⁰ Therefore, it was no surprise that the 1970 meetings at Erfurt⁴¹ and Kassel⁴² between Brandt and Willi Stoph, Minister President of the DDR, concluded without results. Subsequently, the Brandt government, while continuing to negotiate with the DDR, shifted its focus to the other members of the Eastern Bloc, notably the Soviet Union. The fact that the Soviets did not insist on prior recognition of the DDR resulted in three spectacular agreements being reached: the Moscow Treaty, between West Germany and the Soviet Union, which was signed on August 12, 1970;¹³ the Treaty of Warsaw, between West Germany and Poland, which followed on December 7, 1970;¹⁴ and the Agreement of the Four Powers on Berlin which was signed on September 3, 1971, by representatives of France, Great Britain, the Soviet Union and the United States.⁴⁵

On the basis of the Four Powers Agreement, the Federal Republic of Germany and the DDR entered into negotiations on a detailed arrangement concerning the access roads to West Berlin and the possibilities of West German and West Berlin citizens visiting in the DDR. The new party leader of the DDR, Erich Honecker, who advocated a policy of delimitation (Abgrenzung) towards the Federal Republic, seemed reluctant to come to terms with the West German and West Berlin negotiators. Although his aim to have the DDR recognized under international law, especially by the Federal Republic, was not yet reached, the pressure of the Soviet leadership, who did not want the German satellite to block the effectiveness of the Four Powers Agreement, caused Honecker to relent. Thus, supplementary arrangements between West Germany, the city of West Berlin and the DDR were able to be signed at the end of 1971.⁴⁶

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¹ See DER SPIEGEL, Jan. 26, 1970, at 22; DIE ZEIT, Jan. 27, 1970, at 3 (Toronto ed.).
² For documents on the meeting at Erfurt, see 25 EUROPA-ARCHIV, DOKUMENTE 203 (1970).
³ For documents on the meeting at Cassel, see 25 EUROPA-ARCHIV, DOKUMENTE 325 (1970).
⁴ For the German text, see 31 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 150 (1971). For the English translation, see 9 INT’L LEGAL MAT’LS 1026 (1970).
⁵ For the German text, see id. at 156. For the English translation, see 10 INT’L LEGAL MAT’LS 127 (1971).
⁶ See 65 DEP’T STATE BULL. 318-322 (1971); 26 EUROPA-ARCHIV, DOKUMENTE 453 (1971). A German translation was published in several German newspapers. The author used the text found in Kölnner Stadt-Anzeiger, Sept. 4-5, 1971 at 3.
However, since the Brandt government is eager to come into still closer contact with the DDR, the question of recognition has not lost its importance. In negotiations toward a general or basic treaty, which is the proclaimed goal of the Brandt government, the East German authorities could again demand recognition of their state since the Soviet Union will not likely again intervene.

Recognition of the DDR under international law could arguably be withheld on the grounds that the DDR is not possessed of sovereignty due to a lack of requisite independence. However, recent events in Czechoslovakia indicate that other satellite states of the Soviet Union, even though considered to be sovereign, are still subject to Soviet intervention. Universal recognition of the DDR would give that state the status possessed by other states of the Eastern bloc and would remove the need to make reference to the degree of DDR independence from the Soviet Union. Thus, in spite of a lack of complete independence, recognition under international law would have a constitutive effect.

However, the Federal Republic's recognition of the DDR may not be a decision which is entirely a political one. West Germany could be bound by constitutional provisions to a policy of non-recognition. Articles 23 and 146 of the Basic Law show that the Constitution of the Federal Republic is intended to be a transitional order until "Germany as a whole" will be restored. The Preamble to that document asks the whole German people to complete German unity by self-determination. In addition, the Federal Constitutional Court has derived from the above provisions a mandate to strive for reunification. Whether recognition of the DDR would violate these provisions would turn on whether recognition would hinder or assist prospects of reunification. It could be argued that self-esteem and independence of the East German regime would be promoted by West Germany's act of recognition which would, in turn, smooth the path to reunification. A confederation of sovereign states could as well lead to reunification.

Under these conditions the holding of the Federal Constitutional Court in the Saar case may be applied: actions of the government are

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50 Grundgesetz für die Bundesrepublik Deutschland of May 23, 1949, [1949] BGBl.1.


unconstitutional only when they manifestly set up obstacles to reunification. Whenever the impact on German unity is uncertain, as is arguably the case here, courts are prevented from deciding the question. Such political issues are within the discretionary power of the political organs.

Thus, the Constitution does not force the West German government into a policy of non-recognition as the Staatsrechtliche Theorie seems to impose. The decision whether to recognize the DDR is, therefore, merely a political one.

If a general or basic treaty between the Federal Republic and the DDR should be concluded, Brandt arguably risks that such an agreement will be interpreted as implied recognition by his government of the DDR. However, several commercial agreements which the Federal Republic has already concluded with the DDR have not been considered to imply such recognition. Recognition under international law at the present is, as a practical matter, left to such explicit declarations of recognition as the establishment of diplomatic relations. All other dealings between states, especially the negotiation and conclusion of treaties, are not generally held to imply recognition of a state party to such dealings. Otherwise states would tend to abstain from treaties and other agreements for fear that such actions would be construed as implied recognition.

It should be noted that as international law does not require states to possess full rights and duties in order to effect binding agreements, treaties with non-recognized states or other entities are valid and binding despite their not being seen as acts implying recognition. Thus, the program of the Federal Government to come to terms with the DDR is, from a legal point of view, reconcilable with the Brandt government’s policy of non-recognition. Since, recognition lies within the discretion-

3B. Bot, supra note 16, at 102.

34Id. at 255.


The fact that the present convention does not apply to international agreements concluded between states and other subjects of international law or between such other subjects of international law . . . shall not affect:

(a) the legal force of such agreements; . . . .


Although the Convention has not yet entered into force, the cited phrases may be taken as an expression of general consent.

3Contra Steiger, supra note 6, at 124. It has been predicted that the intended membership of the two German states in the United Nations will be taken as tacit recognition of the DDR by the Federal Republic. Kewenig, Deutschland und die Vereinten Nationen, 25 Europa-Archiv 339, 342 (1970).
ary power of a government,\(^57\) this *Ostpolitik* policy is approved by international law.

**Berlin**

WhereasUlbricht of the DDR demanded that West Germany recognize West Berlin as having the status of an autonomous legal entity,\(^58\) the DDR has not demanded that a similar status be recognized for East Berlin. This may be in part due to the fact that the special legal status which East Berlin had enjoyed as a part of the greater Berlin area under the Four Powers’ administration has been systematically removed.\(^59\) East Berlin today is incorporated into the territory of the DDR, with the Soviet Union’s approval manifested by the erection of the Berlin Wall. Representatives of East Berlin have obtained the right to vote in the *Volkskammer* (People’s Chamber) of the DDR.\(^60\) In addition, the authorities of the DDR in reality exert full power over the territory of East Berlin, which serves as that state’s capital. The guarantee\(^61\) by the West German government of the territorial integrity of the DDR must extend to that state’s capital. Thus, although the present Federal Government has emphasized that the status of the city of Berlin under the special responsibility of the Four Powers must remain incontestable,\(^62\) political realities indicate that the former status of the East Berlin sector of that city has been eroded, if not openly contested.

Thus, the special status formerly possessed by the city of Berlin as a whole can only be related to West Berlin. Concerning this sector’s status, the positions of both German governments do not seem widely divergent. Neither government pretends to be the supreme authority for West Berlin. After the withdrawal of the Soviet Union from the Four Powers’ administration, the Western Allies—France, Great Britain and the United States, assumed supreme authority as occupation forces over the territory of West Berlin.\(^63\) West Germany yielded to their request that Berlin not be governed by the Federal Republic.\(^64\)

\(^57\)See De Visscher, supra note 10, at 39-40.
\(^61\)See Inaugural Declaration, supra note 1.
\(^62\)Inaugural Declaration, supra note 1, at 500.
\(^64\)Letter from the Three Western Military Governors to the President of the Parliamentary
West Berlin is represented by the Federal President who is elected in the city and has a permanent residence there. West German laws are automatically adopted by the House of Representatives of West Berlin, with the exception of those not pertaining to the peculiar situation of the city. Federal courts, such as the Federal Administrative Court, and federal agencies, such as the Federal Antitrust Agency, are situated in West Berlin. The treaty-making power of the Federal Republic extends to West Berlin by authorization of the Western Allies. Whether the West German authorities are required by domestic law to maintain the present status quo as to the amount of influence which the Federal Republic has on West Berlin must be determined from the West German Constitution. The Federal Constitutional Court interpreted Article 23 of the Basic Law, which defines its scope as including "Greater Berlin," to require that Berlin be included in the federal organization insofar as there are no restrictions by the Occupation Powers. Under this clear decision the internal ties between the Federal Republic and West Berlin, as accepted by the Western Allies, could not constitutionally become a negotiable point for any West German government.

In his inaugural declaration, Brandt promised to seek to relieve the traffic situation in, and to, Berlin. Whereas relief in Berlin is aimed at penetration of the Berlin Wall, access to West Berlin deals with travel through the territory of the DDR. The latter access efforts rest upon agreements which the Western Allies have made with the Soviet Union.

After the Soviets had handed over control of the access roads to the DDR her authorities could not interdict the traffic of the occupation forces, especially where troop movements were concerned. Thus, the rights of the occupation forces to have access to West Berlin could be considered as customary law. However, despite statements by the Western side to the contrary one cannot speak of customary law as having
established a right to unrestricted access. The Allied Forces have tolerated restrictions and temporary closures of the access roads, launching only verbal protests to the authorities of the DDR or to the Soviets, who have repeatedly declared themselves not responsible. On the other hand, it should be noted that civilian traffic was not totally disrupted by DDR authorities. After the Berlin Blockade, which took place when the Soviets were still in control of access roads, refusals to grant access were usually based on specific grounds. The practice of refusing entry did not thus seem to be completely arbitrary. The DDR apparently did not want to openly challenge the contention of the Western Allies that civilian traffic, which is necessary for the viability of the city, is to be governed by the customary law originated in the agreements of the Four Powers.

Notwithstanding DDR reluctance to openly challenge the customary law contention, the DDR possesses the physical power to sever the flow of all civilian traffic to and from West Berlin. Since West Germany can do very little to protect civilian traffic from such measures, the principal objective of the Federal Republic in negotiations on Berlin was to secure access to West Berlin. Such a result has been obtained in the Four Power Berlin Agreement of September 3, 1971, a landmark in the West German Ostpolitik. Though not a partner to the Agreement, the Federal Chancellor rightly considered it as the fruit of his policy of détente, since there is little doubt that the Agreement comes into force only after complementary agreements between the Federal Republic and the DDR. The main issues, however, are treated in the paper signed by the representatives of the Four Powers.

Since the articles only mention the three western sectors of Berlin, it is now clear that the Western Allies are tolerating the incorporation of East Berlin into the territory of the DDR. The Soviets, on the other hand, accept the present regime in West Berlin, which remains under occupation by the United States, Great Britain and France. The contention of these Powers, that West Berlin is not a constitutive part of the

70 See Documents on Berlin, supra note 64, at 266. See also Note from the Union of Soviet Socialist Republics to the United States, Sept. 26, 1960, 43 Dept State Bull. 750 (1960), Documents on Berlin, supra note 64, at 269.
71 See, e.g., Note from the United States Government to the Union of Soviet Socialist Republics, Sept. 8, 1961, in 45 Dept State Bull. pt. 1, at 511 (1961), excerpts in Documents on Berlin, supra note 64, at 177.
72 For tactics available to avoid a strong western protest, see Richardson, Probleme und Aussichten der neuen deutschen Ostpolitik, 23 Europa-Archiv 613, 620 (1968).
73 See note 45 supra. For comments on this agreement, see Mahncke, Das Viermüchte-Abkommen über Berlin: Bilanz und Aussichten, 26 Europa-Archiv 703 (1971).
Federal Republic and is therefore not to be governed by it, became part of the Agreement. Thus, the Western Allies are no longer free to unilaterally accede to any increase in West Germany's control of West Berlin. Although the Western Allies, after consultation with the Federal Government, promise in the Agreement that no organ of the Federal Republic will exert direct sovereign power over West Berlin, the Agreement provides that existing ties between the Federal Republic and West Berlin are expressly upheld and may be "developed." While the Federal Assembly for the election of the Federal President will no longer take place in West Berlin, those administrative and judicial bodies of the Federal Republic which are located in West Berlin can continue to reside there, and additional similar bodies may be newly transferred to the city. The Four Power Agreement on Berlin makes no essential change in the generally accepted view that the validity of the Basic Law in West Berlin could be legally suspended by the Occupation Forces.

The Agreement has advantages for the Federal Republic in relation to West Berlin in three other points. First, the Federal Republic is authorized to represent the city of West Berlin and its citizens internationally, except concerning the security and the status of the city. The latter subjects remain within the competence of the three Western Powers, who, while nominally retaining authority, have delegated it to the Federal Republic. Second, the Soviet Union asserts that civilian traffic to and from the western sectors of Berlin will be undisturbed. Although some detailed regulations are given in an explanatory declaration of the Soviet Government, further details must be dealt with by the German authorities. Third, the Soviet Union grants easier entrance to the territory of the DDR to West Berlin visitors and promises better means of communications for the western sectors of Berlin. Although it consulted and agreed with the DDR before acting, the Soviet Union gave the above assertions in its own name. The role of the DDR is reduced to that of a substitute for the detailed regulations. In so asserting, the Soviet Union presumably has again assumed a responsibility for "Germany as a whole." Otherwise, it would be unclear under what authority the Soviets could dispose of such "sovereign" rights of the DDR, as the control of its traffic roads. Thus, arguments which deny that the DDR is possessed of sovereignty because of her lack of independence gain new support.

The Federal Republic, while accepting the rights and delegations of

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11See supra note 45 at 319.
the Four Powers regarding Berlin and Germany as a whole,\textsuperscript{78} appears to be more a beneficiary of the Agreement than a party to it. Due, obviously, to its less proximate geographic location, the Federal Republic was not forced to relinquish sovereignty as was the DDR. Furthermore, the Federal Republic has the advantage of not having to negotiate the crucial issues of a Berlin settlement with the authorities of the DDR, as was expected a year ago. The Soviet Union turned out to be far less stubborn than her satellite DDR, which is now bound by the concessions of her ally. In addition, the DDR has, without requiring prior recognition under international law, consented to an arrangement with the Federal Republic based on the Four Powers' Agreement.

Thus, the Federal Republic, as beneficiary of the Four Power Berlin Agreement and as a party to future agreements with the DDR, will be able to substitute for unsatisfactory customary law more secure and defined rules to govern access to West Berlin.

\textit{Relations with the Soviet Union}

Contrary to its predecessors, the Brandt government has concentrated its Communist Bloc efforts upon the Soviet Union, the Bloc's leading power. These efforts led to the Moscow Treaty\textsuperscript{77} which has already become a cornerstone of the \textit{Ostpolitik}. The Treaty's importance in the negotiations of the Four Powers' Berlin Agreement is in its creation of an atmosphere of mutual trust. However, the legal consequences of the Treaty are minimal.\textsuperscript{78} Article one of the Treaty sets forth the maxims of \textit{détente} and normalization implemented by the Articles which follow. Article two of the Treaty which makes reference to the purposes and principles of the United Nations Charter, leaves open the question whether the Soviet Union in this agreement has by Articles 107 and 53 of the United Nations Charter undertaken not to unilaterally intervene in the Federal Republic. Article three neither recognizes nor legalizes any territorial status in Europe. By its terms the two sides merely pledge not to use means violative of Article two in order to change the present territorial situation.

A recently published declaration\textsuperscript{79} of the Soviet Minister of Foreign Affairs, Andrej Gromyko, made it clear that the Moscow Treaty in-

\textsuperscript{78}See Note of the Federal Republic to the Three Western Powers, Aug. 7, 1970, 31 \textit{ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT} 152 (1971).

\textsuperscript{77}Supra note 43.

\textsuperscript{78}Helmut Steinberger began an extensive analysis on the assumption that the Treaty had more than political relevance, but he found no substantive legal results. Id. at 156.

cludes the renunciation of the intervention rights which the Soviet Union had previously asserted under Articles 107 and 53 of the United Nations Charter. However, since the Federal Republic is not a member of the United Nations, and since, therefore, the Charter provisions are for her res inter alios acta and not binding, the Soviet Union’s use of the alleged intervention rights would have impinged upon the sovereignty of the Federal Republic. On its surface, Soviet relinquishment of such intervention rights are thus of little legal consequence. However, since the Czechoslovakian crisis made it obvious that the Soviet Union might use any available pretext to justify her acts if she deemed intervention necessary, the Federal Government was well advised to eliminate any such potential threat.

Notwithstanding the minimal legal outcome of the Treaty itself and of the subsequent agreeable Soviet interpretation as to renunciation of rights under Articles 107 and 53 of the United Nations Charter, Brandt’s Christian Democratic opposition denounced the constitutionality of the Treaty. However, the constitutional argument used by the opposition, that the Basic Law demands a policy of reunification, is not well founded. The Moscow Treaty is in no way a manifest obstacle to reunification, if such a goal is still realistic.

Relations with Other Eastern Bloc States

Former West German governments refused to accept the Oder-Neisse Line as the western boundary of Poland, even though the Federal Republic has no immediate territorial link with the former German provinces in the East, and even though the DDR had recognized the Oder-Neisse Frontier in 1950 and had confirmed it by subsequent treaties.

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80 Aide-Mémoire of the Soviet Government to the Federal German Government Concerning the Renunciation of Force, July 5, 1968, 23 EUROPA-ARCHIV, DOKUMENTE 378 (1968). As to arguments advanced against this assertion that articles 107 and 53 are obsolete and that the Federal Republic is not an enemy state within the meaning of those provisions, see Frenzke, Einige Aspekte der Artikel 53 und 107 der VN-Satzung aus östlicher Sicht, 13 RECHT IN OST UND WEST 158 (1969).


82 This has been confirmed by the Soviet Minister of Foreign Affairs. See Bulletin of the Federal Government, Dec. 15, 1971, at 2017.

83 For a detailed discussion of the questions of constitutionality see Menzel, Verfassungswidrigkeit der Ostverträge von 1970, 24 DIE ÖFFENTLICHE VERWALTUNG 361 (1971); see also Kewenig, Die deutsche Ostpolitik und das Grundgesetz, 26 EUROPA-ARCHIV 469 (1971).

84 Agreement between Poland and the German Democratic Republic Concerning the Demarcation of the Polish-German State Frontier, July 6, 1950, 319 U.N.T.S. 93.
with the Soviet Union and Poland. The Warsaw Treaty, in its most important Article one, contains the principle of inviolability of the existing frontiers of both countries and especially of the Oder-Neisse Line.

The constitutionality of the Treaty on this point has been assailed by Brandt's opposition, who have found support from some international law experts. However, the rights the Federal Republic surrenders in the Treaty are illusory at best. The territorial status quo has existed so long that the Oder-Neisse Line must be considered the western frontier of Poland. Although West German doctrine denies that adverse possession gave rise to title to the former German territories in the Soviet Union and Poland, the latter nations would nevertheless have title under the treaties which they concluded with the DDR. After all, the Oder-Neisse Line is the eastern boundary of the DDR and not of the Federal Republic. Furthermore, by giving up all legal claim to the territory east of the Oder-Neisse Line, the West German government was indirectly able to be of great service to the former German citizens and their descendants living in that area. Though under no textual treaty obligation to do so, the Polish government now seems to be interpreting its emigration restrictions liberally. Thus, a refusal to ratify the Treaty because of the claim to the 1937 boundaries would only increase the difficulty of those wishing to emigrate from Poland.

Having achieved agreement with the Soviet Union, the Brandt government is eager to come to terms with other communist satellite states. An obstacle to bettering relations with Czechoslovakia is the latter state's insistence that the Federal Republic join her in the opinion that the Munich Agreement of 1938 be considered null and void from its inception even though Chancellor Erhard, on behalf of the Federal

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87 See, e.g., Friedrich Klein, a contributor to a conference on the Treaties of Moscow and Warsaw organized by the Institut für Internationales Recht, University of Kiel. These materials will be published in the near future.
88 The prevailing West German position holding that the Oder-Neisse Line is only a provisional delimitation is outlined in Knittel, Der völkerrechtliche Status der Oder-Neisse-Gebiete nach dem Postdamer Abkommen, 7 JURISTISCHE SCHULUNG 8 (1967), and in S. Krölle, Die völkerrechtlichen Aspekte des Oder-Neisse- Problems (1970).
Republic had declared the Munich Agreement to have been torn up by Hitler himself. The Federal Republic could comply with the demand of the Czechoslovaks without detriment to Federal interests, since West Germany has no territorial claims against Czechoslovakian soil. In addition, special regulations already exist with respect to the citizenship of Germans who lived in Czechoslovakia prior to the Second World War.

As to prospects of agreements with the remainder of the Eastern Bloc states, there are no abstract problems comparable to the validity of the Munich Agreement. The Hallstein Doctrine did not prevent the Federal Republic from establishing diplomatic relations with Romania, and it is not likely that the doctrine will be applied to other Communist Bloc states.

Ties to the West

In addition to bilateral renunciations of force, the present West German coalition government has worked for a multi-national European security agreement. It felt that such an arrangement would not imperil the good relations which the Federal Republic has with her Western Allies. For example, Brandt's Ostpolitik does not conflict with West Germany's NATO obligations. The purpose of NATO, a defense alliance, would be served if one of its members relaxes tensions with a potential enemy.

West Germany's membership in the European Economic Community (EEC) is not without impact on her Eastern policy. Since the transitional period of the EEC ended on December 31, 1969, EEC member states have exercised a common policy toward foreign commerce. Thus, the Federal Republic is no longer free to make independent decisions concerning her external commercial relations. Although it is unlikely

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92The West German delegation under State Secretary Paul Frank, however, is not prone to accept the Czechoslovakian conditions. See 26 EUROPA-ARCHIV, ZEITTAfel 250 (1971).
94Von Borries, Staatsangehörigkeit der heimatvertriebenen Sudentendeutschen, 4 NEUE JURISTISCHE WODENSCHRIFT 584 (1951).
95Supra note 16.
96Inaugural Declaration, supra note 1, at 500.
97As to the conformance of the NATO agreement to the United Nations Charter, see K. IPSEN, RECHTSGRUNDLAGEN UND INSTITUTIONALISIERUNG DER ATLANTISCH-WESTEUROPAISCHEN VERTEIDIGUNG 22 (1967).
that the member states will be deprived of all treaty-making powers in this field. West Germany must at least convince her EEC partners that her commercial arrangements with the East are serving the common interests of the member states.

An exception exists with respect to West German trade with the DDR. In the Protocol on Internal German Trade the EEC members sanctioned the view that such trade is not properly to be deemed within the foreign commercial relations of the Federal Republic. Thus despite its membership in the EEC, the Federal Republic does not find itself bound to decisions of that collective body with respect to West German—DDR trade. The language of this Protocol can easily be construed to make it compatible with West Germany’s acceptance of the DDR as a state, and can arguably be extended to sanction free inter-German trade in the event the Federal Republic recognized the DDR under international law.

The EEC policy of the Brandt government is said to be influenced by its Ostpolitik. Economic integration, more than before, is understood as a way to relax tensions and to find a balance of interests. Accordingly, the government stresses the enlargement of the Community. Naturally, it would be illusory to hope for an inclusion of communist countries, but economic arrangements of some sort are conceivable.

**Evaluation and the Question of the Peace Treaty**

The Ostpolitik of the present Federal Government has had extraordinary success. Admittedly the general political state of affairs was favorable to such a development, but without the Brandt government’s acceptance of the political realities, its Eastern policy would have suffered under self-imposed legal restrictions as did the policy of its predecessors. In some respects, however, the new government still restricts its freedom of action by adhering to legal positions which are unjustified under the existing facts and with respect to rules of both international law and

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89In favor of a more restricted power of the member states, see Everling, Rechtsprobleme der Gemeinsamen Handelspolitik in der Europäischen Wirtschaftsgemeinschaft, I BEITRÄGE ZUM INTERNATIONALEN WIRTSCHAFTSRECHT UND ATOMENERGIERECHT 189, 207 (1965); contra Carstens, Die Errichtung des Gemeinsamen Marktes in der Europäischen Wirtschaftsgemeinschaft, der Europäischen Atomgemeinschaft und Gemeinschaft für Kohle und Stahl, 18 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 459, 498 (1957-58).


federal constitutional law. Political realities, not legal claims, should be the principal guideline for West German foreign policy in these respects also.

Before the Warsaw Treaty, Brandt remarked in an interview that there could be a separate agreement with Poland without prejudice to a subsequent peace treaty. Only a short time ago, Federal Foreign Minister Scheel emphasized the fact that the Federal Republic is still waiting for a peace treaty. Perhaps this was only lip service to the traditional pre-Brandt dogma of West German politics that the final settlement of the German question is to be brought about by a peace treaty between the former enemies and “Germany as a whole” which is to be restored by the Four Powers under their post war obligations. The remarks of Brandt and Scheel create the impression that all bilateral settlements may be reversed by a peace treaty. It is now time to dispel this illusion once and for all. Peace in Europe has been established without a treaty. With the exception of the Federal Republic, no power has an interest in changing the consolidated situation in Europe. Therefore, the Federal Republic cannot expect anything but additional restraints and economic obligations from a peace treaty.

Other legal claims of the Brandt government also conflict with political realities. With regard to the Oder-Neisse Frontier, the Federal Republic invites distrust in her reliability by expressing hopes for a change in the status quo. In addition, there should be no illusion that the Soviet Union will use her revoiced responsibility for “Germany as a whole” in order to revive the idea of reunification. Therefore, West German foreign policy must still find a method to deal with the DDR phenomenon. In this context, the pleading for an undoctrinaire approach is of crucial importance.

101 DER SPIEGEL, Oct. 27, 1969, at 34.
103 Consequently each bilateral settlement could only be provisional, as Hoesch points out with regard to the Oder-Neisse Frontier. See Hoesch, Verfassungsrechtliche Aspekte der Deutschland-Politik, 22 EUROPA-ARCHIV 125, 126 (1967). For the problems of a peace treaty, see generally D. Blumenwitz, DIE GRUNDLAGEN EINES FRIEDENSVERTRAGES MIT DEUTSCHLAND (1966).
106 In this sense, see also Oppermann, Deutsche Einheit und europäische Friedensordnung, 26 EUROPA-ARCHIV 83 (1971) drawing noteworthy perspectives for the future.