

June 4, 1990

U.S. ONE PLUS THREE PAPER ON SEQUENCING/SIMULTANEITY OF UNIFICATION/SETTLEMENT

There are at least three options regarding the sequencing of German unification and a German Settlement. First, Germany could unify, a German-Polish border treaty could be ratified by both parties and the 2 + 4 parties could then sign a German Settlement. Second, Germany could unify and the Parties could sign a German settlement concurrently, to take effect or contingent on the ratification by Poland and Germany of a border treaty. Third, German unification and a German Settlement could take place simultaneously, and Germany and Poland could subsequently ratify a border treaty. The Settlement under either options two or three above could be signed and concluded prior to, rather than at, unification, with the expiration of Four-Power rights and responsibilities to occur at unification or, in the case of option 2, on the entry into force of the German-Polish border treaty. This will permit the "settlement" to be concluded in October or November, before a CSCE Summit, while unification and termination of Four-power rights takes place one or two months later.

The first two options are clearly legally available. Whether the third option is legally viable comes down to the critical question of borders: can the Four Powers' responsibilities regarding Germany's borders be fulfilled prior to or simultaneous with German unity and prior to the formal ratification by Poland and a united Germany of a new border treaty. The U.S. believes the answer is, "yes".

There are at least three post-war documents in which the Allied responsibility for Germany's final borders is reflected. The Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by the Allied Powers, signed in Berlin on June 5, 1945, states that the Four Powers "will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory." The Protocol of the Potsdam Conference states that "the final delimitation of the western frontier of Poland should await the peace settlement". Finally, Article 7 of the Relations Convention states that the "final determination of the boundaries of Germany must await such [peace] settlement."

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These various documents confirm a clear legal basis for an Allied role in affirming a united Germany's final borders. But in none of these documents does it indicate that Allied action on Germany's borders must follow the conclusion by Germany of border treaties with its neighbors. Moreover, at the time, the Allied powers surely intended to act on their own in establishing Germany's final borders and not make such Allied action contingent on the completion of German acts. In fact, in light of the historical context within which this Allied right was acquired, one could well argue that, legally, Allied action in establishing Germany's final borders is a precondition for a united Germany concluding bilateral treaties with its neighbors, not vice versa. If there really was some kind of legal imperative, surely it would include new border treaties with all of a united Germany's neighbors and not just Poland.

At a minimum the legal situation regarding the need for Allied action on the borders prior to German bilateral treaties or German bilateral treaties before Allied is ambiguous. In truth, it comes down to a political question of what is acceptable to the parties.

We believe there are significant disadvantages in requiring either ratification of a Polish-German treaty and/or revision of the German Basic Law prior to a German Settlement. Foremost among them is the time uncertainty involved in predicating a settlement on actions that require independent action by two Parliaments. Moreover, we assume that the united German Parliament will require all German elections prior to its action, which could further draw out a period during which a united Germany is still technically subject to Four-Power limitations on its sovereignty.

At the same time, we recognize that some may object to 2 4 action to affirm a united Germany's borders in the absence of such bilateral treaties. We would argue that this denigrates the legal and political significance of the Four-Power right to affirm Germany's borders. But if it appears necessary to reach agreement among the parties, the second option (the signing of a German Settlement coincident with or prior to German unification, but to take effect at a time when (or contingent on) Germany and Poland ratifying their border treaty (and/or a united German Parliament revising the Basic Law)) would also be a legally viable option. This second option would have the virtue of concluding Allied action and leaving the final disposal of Allied reservations in the hands of the parties concerned. However, option two has the serious disadvantage over option three that it still leaves a united Germany subject to Allied rights, pending the fulfillment of the ratification of the Polish-German border treaty (and/or the revision of the FRG Basic law).

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If we accept that there is no legal reason why a German Settlement must follow reunification, it would seem preferable to have the Settlement coincide with unification such that all Allied reserved rights and responsibilities are exercised and terminated and a united Germany comes into being with full sovereignty, such as every other nation in Europe.

While identifying the precise moment of "unification" is surely a German question, to be elucidated by German legal scholars, we assume that, if as seems likely, article 23 is the chosen path to unity, some time after the submission to the Bundestag of East German petition(s) under article 23 would constitute unification. We would suggest that the parties could sign a German Settlement (including one or multiple documents) coincident with unification.

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