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THE 1970 WARSAW TREATY AND THE CHALLENGES OF INTERPRETATIVE DECLARATIONS IN INTERNATIONAL TREATY LAW

Abstract: *The 1970 Warsaw Treaty lists a number of unilateral declarations, primarily on the part of the Federal Republic of Germany. Nowadays, in view of the fundamentally changed circumstances between Germany and Poland, these declarations no longer play a significant role. Nevertheless, it is interesting to dogmatically examine them, not only for legal historical reasons but also based on the acknowledged principle that the understanding of the present is always shaped by the past. This contribution aims to meet this challenge.*

Keywords: interpretative declarations, reservations, political declarations of intent, declarations on legal safeguards, Oder-Neisse line

INTRODUCTION

In 2020, the Agreement between the Federal Republic of Germany and the People's Republic of Poland concerning the basis for normalization of their mutual relations of 7 December 1970,[1] better known as the Warsaw Treaty, celebrated its 50th anniversary. Anniversaries generally constitute a good opportunity to critically examine and appreciate, in retrospect, the content of a treaty and its importance in

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[1] *Vertrag zwischen der Bundesrepublik Deutschland und der Volksrepublik Polen über die Grundlagen der Norma-lisierung ihrer gegenseitigen Beziehungen*, 7 December 1970, *Bundesgesetzblatt* [Federal Law Gazette] 1972 II, p. 362.

the relationship between the contracting parties. With regard to the Warsaw Treaty, this applies not only to the object and purpose of the treaty, but also to the numerous unilateral interpretative declarations, mainly from the Federal Republic of Germany, which accompany the treaty and which are the focus of this contribution. Based on the general meaning of interpretative declarations in international treaty law, the article examines the content, meaning, and legal consequences of the unilateral declarations made on the occasion of the conclusion of the Warsaw Treaty. As will be shown, most of the formerly controversial debates can now be regarded as settled.

1. GENERAL MEANING OF INTERPRETATIVE DECLARATIONS IN INTERNATIONAL TREATY LAW

Declarations of interpretation are a common instrument in international treaty law. They are unilateral statements made by a State[2] to propose the correct understanding of one or more treaty provisions and are designed to influence the future interpretation of the treaty. Such a declaration, which is usually presented at the time of agreeing to the treaty,[3] aims to specify or clarify the meaning or scope of the treaty or certain of its provisions, but does not fundamentally call into question the binding nature of the treaty rules.[4] Rather, the interpretative declaration is based on the wording of the treaty, does not exclude or modify its legal effect, and remains within its framework. However, it makes clear that either a specific teleological or a general dynamic interpretation of the rules will not be supported by the declarant.[5] Instead, a specific, mostly narrow interpretation is regarded by the declaring state as binding when applying the treaty.[6]

1.1. Distinction Between Interpretative Declarations and Reservations

The practical legal problem associated with a declaration of interpretation is obvious. It is difficult to distinguish an interpretative declaration from a reservation in the

[2] Unilateral statements made by an international organisation are not the subject of this article.

[3] As to exceptions, *see* F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, North-Holland, Amsterdam: 1988, pp. 41-43.

[4] I. Cameron, *Treaties, Declarations of Interpretation*, in: A. Peters (ed.), *Max Planck Encyclopedia of Public International Law [Online]*, Oxford University Press, Oxford: 2020, mns. 1, 2.

[5] *Cf.* C. Tomuschat, *Admissibility and Legal Effects of Reservations to Multilateral Treaties*, 27 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 463 (1967), pp. 464-466; M. Heymann, *Einseitige Interpretationserklärungen zu multilateralen Verträgen*, Duncker & Humblot, Berlin: 2005, pp. 88-92.

[6] *See* A. Verdross, B. Simma, *Universelles Völkerrecht* (3rd ed.), Duncker & Humblot, Berlin: 1984, para. 736; W. Heintschel von Heinegg, *Vorbehalte zu Verträgen*, in: K. Ipsen (ed.), *Völkerrecht* (7th ed.), C.H. Beck, München: 2018, para. 17 mn. 4.

sense of Art. 2.1(d) of the Vienna Convention on the Law of Treaties (VCLT),[7] the main provisions of which reflect customary international law. In contrast to a declaration of interpretation, a reservation excludes the binding nature and legal effect of a treaty rule under all conceivable modalities of interpretation.[8] However, the distinction between genuine reservations and interpretative declarations is fluid.[9] This is true for formal reasons, because a unilateral declaration can, despite its designation as a declaration of interpretation, represent a reservation in the technical sense, often referred to as a "disguised reservation".[10] Furthermore, an interpretative declaration generally excludes interpretations of the treaty provision in question in a manner other than the interpretation submitted, at least for the declaring State. This comes very close to a reservation in substantive terms.[11]

Typically, the distinction between an interpretative declaration and a reservation only becomes an issue in the case of multilateral agreements. Within the framework of a bilateral agreement, the fact that there are no corresponding declarations of will and intent works against the legal possibility of being able to make a reservation. If a bilateral treaty is to be concluded despite such a dissenting opinion, this is only possible if the other party accepts the declaration of reservation as a new offer to conclude the treaty in a modified version.[12] In any case, it is necessary for bilateral treaties that the recipient of the declaration expressly or implicitly agrees to it in order to establish the necessary consensus.[13] In principle, this applies to both reservations and interpretative declarations. In the opinion of the International Law Commission, only simple declarations of interpretation – unlike qualified, or conditional, declarations of interpretation – should not require any acceptance, not even tacit, by the treaty partner.[14]

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[7] 1155 UNTS 331. The Vienna Convention was concluded on 23 May 1969 and entered into force on 27 January 1980.

[8] *Cf.* B. Kempen, C. Hillgruber, C. Grabenwarter, *Völkerrecht* (3rd ed.), C.H. Beck, München: 2021, para. 13 mn. 25.

[9] *See* A. von Arnauld, *Völkerrecht* (4th ed.), C.F. Müller, Heidelberg: 2019, p. 91.

[10] D.M. McRae, *The Legal Effect of Interpretative Declarations*, 49 British Yearbook of International Law 155 (1978), p. 162; see also Cameron, *supra* note 4, mn. 2.

[11] G. Dahm, J. Delbrück, R. Wolfrum, *Völkerrecht* (2nd ed.), Vol. I/3, De Gruyter, Berlin: 2002, para. 148, p. 577.

[12] *Ibidem*, p. 558.

[13] *See* M. Krajewski, *Völkerrecht* (2nd. ed.), Nomos, Baden-Baden: 2020, para. 4 mn. 52.

[14] *See* Guidelines 1.3 and 1.4 of the International Law Commission's Guide to Practice on Reservations to Treaties, UN Doc. A/66/10/Add.1. Further see the Report of the International Law Commission on the Work of its 63th Session (2011), GAOR 66 Session Supp. 10, UN Doc. A/66/10, pp. 75 et seq. As regards the difficulties in State practice to clearly differentiate between both forms of interpretative declarations, see Cameron, *supra* note 4, mn. 6.

1.2. Distinction Between Interpretative Declarations and Political Declarations of Intent or Legal Safeguards

Interpretative declarations must also be distinguished from political declarations of intent (*politische Absichtserklärungen*) and simple legal safeguards (*Rechtsverwahrungen*). A political declaration of intent usually involves clarifications of political issues that are indirectly related to the treaty, but do not affect its content.[15] For instance, in 1952 the USA declared its approval of the Treaty of Peace with Japan only with the express reference that the treaty did not contain any relinquishment of Japan's territorial claims before the outbreak of war, and that the treaty was not intended to represent recognition of the Yalta Agreement in favour of the USSR.[16] Similarly, on the occasion of the signing of the Moscow Treaty of 1970,[17] the Government of the Federal Republic of Germany (FRG) pointed out in its "Letter on German Unity" (*Brief zur deutschen Einheit*) that the provisions of the treaty neither affect nor undermine the FRG's goal to restore German unity.[18] In such cases, a contracting party to a treaty wishes to rule out any repercussions of the treaty on its positions with regard to other issues or with States not involved in the treaty. Political declarations of this kind do not restrict the obligations of the contracting parties any further than is agreed in the treaty text.

Declarations on legal safeguards point in a similar direction. In this case, the contracting party aims to protect itself against drawing conclusions on other legal questions from the fact of its conclusion of the treaty. It is a form of protective protest on the part of the declaring State against the establishment of an interpretation of the treaty that could be used against it; a declaration that it considers such an interpretation to be inappropriate.[19] For example, such a legal safeguard can consist of the fact that it should not be inferred from the conclusion of the treaty that one contracting party is obliged to recognise the other contracting party as a State.[20] As with a political declaration of intent, a legal safeguard is also about legal consequences that lie outside the treaty, even though they are, in a broad context, connected with the treaty.[21] A practical example of this is again the "Letter on German Unity", this time to the Basic Treaty (*Grundlagenvertrag*) which was concluded between the FRG and the German Democratic Republic (GDR) in

[15] *See* Heintschel von Heinegg, *supra* note 6, para. 17 mn. 3.

[16] American Journal of International Law 46 (1952), Supp. 96.

[17] *Vertrag zwischen der Bundesrepublik Deutschland und der Union der Sozialistischen Sowjetrepubliken* [Treaty between Germany and the Union of Soviet Socialist Republics], 12 August 1970, *Bundesgesetzblatt* [Federal Law Gazette] 1972 II, p. 354.

[18] Bulletin, *Presse- und Informationsamt der Bundesregierung* [Press and Information Office of the Federal Government], 17 August 1970, No. 109, p. 1094.

[19] A. McNair, *The Law of Treaties*, Clarendon, Oxford: 1961, pp. 430-431.

[20] *See* Kempen et al., *supra* note 8, paras. 13 mn. 24.

[21] *See* Verdross, Simma, *supra* note 6, para. 737.

1972.[22] In order to take into account the reunification requirement of its Basic Law, the Government of the Federal Republic of Germany made it clear that, from its point of view, the GDR was viewed as a State and thus as a subject of international law, but not as a foreign country.

1.3. Requirements and Legal Consequences of Unilateral Declarations in International Treaty Law

Regardless of whether a unilateral declaration constitutes a simple or qualified interpretative declaration, a declaration of political intent, a legal safeguard, or a reservation, it is necessary that the other contracting party is aware of it. The requirement of bringing the declaration to the knowledge of the other contracting party (*Empfangsbedürftigkeit*) follows from the principles of legal certainty and legal clarity, which are also relevant in international law.[23] A need for acceptance (*Annahmebedürftigkeit*), meaning the explicit or implicit consent of the other contracting party, is not required in the case of political declarations of intent and legal safeguards, as they are not inherently binding. However, in the case of reservations the other contracting party must either accept the reservation or raise an objection in accordance with the rules of the VCLT. In particular, Art. 20.4(b) VCLT requires States to react to reservations which they deem to be invalid. Otherwise, the rule of tacit acceptance applies (Art. 20.5).[24] For logical reasons, however, the possibility to object only applies to multilateral treaties. In the case of bilateral treaties, as mentioned the consensus between the two contracting parties must be established.[25] Thus a qualified declaration of interpretation within the framework of a bilateral treaty requires at least the tacit consent of the other contracting party, so that the intended binding effect of the declaration can develop and does not become meaningless. To put it in other words: If the other contracting party does not expressly object to the contracting party's unilateral declaration of interpretation, the declaration can be taken into account when interpreting the treaty.[26]

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[22] *Vertrag über die Grundlagen der Beziehungen zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik* [Treaty concerning the basis of relations between the Federal Republic of Germany and the German Democratic Republic], 21 December 1972, *Bundesgesetzblatt* [Federal Law Gazette] 1973 II, p. 425.

[23] *Cf.* Heymann, *supra* note 5, pp. 118-119; Horn, *supra* note 3, p. 44.

[24] Cameron, *supra* note 4, mn. 6.

[25] *See* Verdross, Simma, *supra* note 6, para. 732.

[26] *See* A. Aust, *Modern Treaty Law and Practice* (3rd ed.), Cambridge University Press, Cambridge: 2013, p. 116; Krajewski, *supra* note 13, para. 4 mn. 53.

2. LEGAL CHARACTERIZATION OF THE UNILATERAL DECLARATIONS ON THE OCCASION OF THE 1970 WARSAW TREATY

The Warsaw Treaty of 1970[27] is characterized by numerous unilateral declarations, especially on the part of the Federal Republic of Germany. Nowadays, in view of fundamentally changed circumstances – suffice it to mention here the Two+Four Treaty[28] and Germany's as well as Poland's membership in the European Union[29] – these declarations no longer play a significant role. Nevertheless, not only for legal historical reasons but also because our understanding of the present is always shaped by the past, it is interesting to dogmatically examine these unilateral declarations.

In order to determine the legal nature and effect of a unilateral declaration, the declaration must be interpreted in good faith. In addition, the ordinary meaning of the chosen formulation and the social and political context must be taken into account, as well as the will of the State that made the declaration.[30] It is precisely these contextualizing aspects that are of particular importance when classifying the unilateral declarations made by the Federal Republic of Germany on the occasion of the Warsaw Treaty.

2.1. Content of the Warsaw Treaty

The Warsaw Treaty entered into force with the exchange of the instruments of ratification on June 1972.[31] According to Art. I, para. 1 of the Treaty, the Federal Republic of Germany and the People's Republic of Poland agree that the Oder-Neisse line, as it was established at the Potsdam Conference in 1945,[32] forms the western State frontier of Poland. In Art. I, para. 2 and 3, both parties also reaffirm the inviolability of their existing frontiers, commit themselves to respect each other's territorial integrity, and declare that they have no territorial claims whatsoever against each other.

Since Poland was the first victim of the war of aggression unleashed by the German Reich, the border issue was inevitably the focus of the negotiations on the

[27] *See supra* note 1.

[28] *Vertrag über die abschließende Regelung in bezug auf Deutschland* [Treaty on the Final Settlement with Respect to Germany], 12 September 1990, *Bundesgesetzblatt* [Federal Law Gazette] 1990 II, p. 1318.

[29] While the Federal Republic of Germany was one of the six founding States, Poland joined the European Union in 2004.

[30] *See* Kempen et al., *supra* note 8, para. 13 mn. 27.

[31] *Bundesgesetzblatt* [Federal Law Gazette] 1972 II, p. 361; pronouncement in: *Bundesgesetzblatt* [Federal Law Gazette] 1972 II, p. 651.

[32] *Amtsblatt des Alliierten Kontrollrats in Deutschland, Ergänzungsblatt* Nr. 1 [Official Journal of the Allied Control Council in Germany, Supplement No. 1], pp. 17-18. For details on the negotiations and results of the Potsdam Conference, *cf.* G. Gornig, *Der völkerrechtliche Status Deutschlands zwischen 1945 und 1990: Auch ein Beitrag zu Problemen der Staatensukzession*, Wilhelm Fink Verlag, München: 2007, pp. 49 et seq.

Warsaw Treaty. Without an agreement on this issue, it would not have been possible for the Federal Republic of Germany and Poland to relax tensions and enter into good relations between themselves.[33] Art. I of the Warsaw Treaty therefore clearly establishes both parties' recognition of the western boundary line of Poland and its competence over the territories under its administration, as well as the obligation of the Federal Republic of Germany not to contest the legality of Poland's exercise of sovereign power (*Gebietshoheit*) therein.[34]

2.2. Reference to the Exchange of Notes Between the Federal Republic of Germany and the Three Western Powers in the Act of Approval by the German Bundestag

However, the Warsaw Treaty did not constitute a final ruling on the territorial status of the areas located east of the Oder-Neisse line.[35] Before the signing of the Warsaw Treaty, the Federal Government of Germany had exchanged notes with the three Western Powers, which were published in the Federal Law Gazette together with the Act of Approval by the German Bundestag.[36] Also, in the ratification document, which was handed over to the Polish Government on 3 June 1972, explicit reference is made to the Act of Approval with the attached notes.[37] The exchange of notes, which was important for the conclusion of the Warsaw Treaty, stipulates that the Federal Republic of Germany only acts in its own name and does not affect the rights and responsibilities of the Four Powers with regard to Germany, as expressed in the Berlin Declaration of 5 June 1945.[38]

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[33] *Cf. Denkschrift der Bundesregierung* [Memorandum of the Federal Government], *Bundestags-Drucksache* [Bundestag printed matter] VI/3157, at 10.

[34] *See* O. Luchterhand, *Die staatliche Teilung Deutschlands*, in: J. Isensee, P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (3rd ed.), Vol. I, C.F. Müller, Heidelberg: 2003, para. 10 mn. 76; J.A. Frowein, *Zur verfassungsrechtlichen Beurteilung des Warschauer Vertrages*, 18 Jahrbuch für Internationales Recht 11 (1975), pp. 38 et seq. In a similar vein, *see also* W. Kewenig, *Die deutsche Ostpolitik und das Grundgesetz*, 26 Europa-Archiv 469 (1971), p. 478.

[35] *See* E. Klein, *Zur Rechtslage Deutschlands und der Deutschen nach dem Beschluß des Bundesverfassungsgerichts zu den Ostverträgen*, 25 Jahrbuch der Albertus-Universität zu Königsberg/Preußen 23 (1977), pp. 31-32; B. Zündorf, *Die Ostverträge: Moskau, Warschau, Prag. Das Berlin-Abkommen. Die Verträge mit der DDR*, C.H. Beck, München: 1979, p. 76. A different assessment is offered by J.A. Frowein, *Die deutschen Grenzen in völkerrechtlicher Sicht*, 34 Europa-Archiv 591 (1979), pp. 592-593, according to which territorial sovereignty is said to have passed to Poland under the condition subsequent of a peace treaty.

[36] *Bundesgesetzblatt* [Federal Law Gazette] 1972 II, p. 361, at 364-368; *cf. also Denkschrift der Bundesregierung* [Memorandum of the Federal Government], *Bundestags-Drucksache* [Bundestag printed matter] VI/3157, p. 10, at 10.

[37] *See* *Bundesverfassungsgericht* [Federal Constitutional Court], Decision of 7 July 1975, 1 BvR 274, 209/72, 195, 194, 184/73 and 247/72, *BVerfGE* 40, 141 (149). *Further see* Zündorf, *supra* note 35, p. 274.

[38] The text of the 1945 Berlin Declaration is reprinted in: I. von Münch (ed.), *Dokumente des geteilten Deutschlands: Quellentexte zur Rechtslage des Deutschen Reiches, der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik*, Kröner, Stuttgart: 1968, pp. 19 et seq.

Consequently, the allocation of territory was only provisional, as a final settlement was reserved for a peace treaty regarding Germany as a whole. This was especially true because the three Western Powers had not approved a final assignment in the form of a forced cession or adjudication[39] of the former German eastern territories to Poland, either in the Potsdam Protocol or in the 1945 Berlin Declaration.[40] The legal disposition that was made in the Potsdam Agreement with regard to the Oder-Neisse areas can therefore only be characterized as an "administrative assignment", which the victorious powers were entitled to under international law even without the involvement of the defeated (German) State.[41] Basically, the Soviet Union and the People's Republic of Poland seem to have accepted this characterization, as Poland not only concluded the Görlitz/Gorlice Treaty with the GDR to establish the Oder-Neisse line as the State frontier in 1950,[42] but also called for a similar legal act from the FRG, namely what was to become the Warsaw Treaty.[43]

The Federal Republic of Germany could not recognize the final sovereignty of Poland over the areas in question in the Warsaw Treaty due to its lack of a power of disposal.[44] However, it was already clear at the time that even a reunified Germany would have to take into account the situation on which the Warsaw Treaty was based.[45] This is supported, firstly, by the fact that any other interpretation would have completely invalidated the Warsaw Treaty, the central subject of which was

[39] This was, however, the opinion of the Polish Government at the time, *cf*. K. Skubiszewski, *La frontière polono-allemande en droit international*, 61 Revue Générale de Droit International Public 242 (1957), pp. 254-255; M. Lachs, *The Polish-German Frontier: Law, Life and Logic of History*, PWN, Warszawa: 1964, p. 33.

[40] *See Bundesverfassungsgericht* [Federal Constitutional Court], Decision of 7 July 1975, 1 BvR 274, 209/72, 195, 194, 184/73 and 247/72, *BVerfGE* 40, 141 (158). *Further see* E. Klein, *Völkerrechtliche Aspekte des deutsch-polnischen Verhältnisses*, in: H. Unverricht, G. Keil (eds.), *De Ecclesia Silesiae: Festschrift zum 25jährigen Bestehen der Apostolischen Visitatur Breslau*, Jan Thorbecke Verlag, Sigmaringen: 1997, p. 117, at 118; S. Krülle, *Die völkerrechtlichen Aspekte des Oder-Neiße-Problems*, Duncker & Humblot, Berlin: 1970, pp. 242 et seq. Different assessment by E. Menzel, *Die Ostverträge von 1970 und der „Deutschland"-Begriff des Grundgesetzes*, 26 Die Öffentliche Verwaltung 1 (1973), pp. 2-3.

[41] *See* O. Kimminich, *Der Warschauer Vertrag – Grundlage oder Vernichtung privater Entschädigungsforderungen?*, 26 JuristenZeitung 485 (1971), p. 486; Gornig, *supra* note 32, pp. 60-61.

[42] *Abkommen zwischen der Volksrepublik Polen und der Deutschen Demokratischen Republik über die Markierungen der festgelegten und bestehenden polnisch-deutschen Staatsgrenze* [Agreement between the People's Republic of Poland and the German Democratic Republic concerning the demarcation of the established and existing Polish-German State frontier], 6 July 1950, *Gesetzblatt der DDR* [Law Gazette of the GDR] 1950, p. 1205.

[43] *See* O. Kimminich, *Ungelöste Rechtsprobleme der deutsch-polnischen Beziehungen*, 18(4) Zeitschrift für Politik 333 (1971), p. 334.

[44] *Cf*. Krülle, *supra* note 40, pp. 161 et seq. *Contra* A. Uschakow, *Die polnische Auslegung des Warschauer Vertrags*, in: *Auslegung der Ostverträge und gesamtdeutsche Staatsangehörigkeit*, Kulturstiftung der Deutschen Vertriebenen Verlag, Bonn: 1980, p. 49, pp. 53-65.

[45] See *Denkschrift der Bundesregierung* [Memorandum of the Federal Government], *Bundestags-Drucksache* [Bundestag printed matter] VI/3157, p. 10, at 10; *see also* Kimminich, *supra* note 43, pp. 345-346. Different assessment by Zündorf, *supra* note 35, p. 68; H. Steinberger, *Völkerrechtliche Aspekte des deutsch-sowjetischen Vertragswerkes vom 12. August 1970*, 31 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 63 (1971), pp. 72, 109.

the recognition of the Oder-Neisse line as a frontier. Secondly, the Estoppel principle under international law supported the assumption that any later peace treaty must be based, among other things, on the provisions of the Warsaw Treaty.[46] This finding was flanked by the Görlitz/Gorlice Treaty, in which the GDR accepted the Oder-Neisse line towards Poland as the existing State frontier. However, the problem was that the GDR claimed full identity with the former German Reich in this respect, which was in clear contradiction to international law.[47]

2.3. Information Letter by the Government of the People's Republic of Poland

In connection with the conclusion of the Warsaw Treaty, the Polish Government forwarded a comprehensive information letter to the Federal Republic of Germany in which it informed the Federal Government of Germany about, *inter alia*, measures to resolve the humanitarian problems with regard to family reunification and the departure of persons of German ethnicity.[48] However, the information letter does not deal with the exchange of notes between the Federal Government of Germany and the three Western Powers. The same applies to the published Act of Approval of the Polish Council of State to the Warsaw Treaty of 26 May 1972.[49] It can therefore be assumed that Poland implicitly approved the declaration of interpretation submitted by the Federal Government. This is all the more so because the Warsaw Treaty aimed to create a political climate of détente, but did not contain any detailed regulations on the ultimate transfer of territorial sovereignty.[50]

2.4. Final Communiqué of the Federal Government of Germany on the Warsaw Treaty

Nor does the Warsaw Treaty contain any provision relating to questions of nationality. The fact that the will of the Federal Republic of Germany was not directed

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[46] Rightly so according to K. Skubiszewski, *Poland's Western Frontier and the 1970 Treaties*, 67 American Journal of International Law 23 (1973), pp. 30-31; Frowein, *supra* note 34, p. 49.

[47] *See* E. Klein, *Wiedervereinigungsklauseln in Verträgen der Bundesrepublik Deutschland*, in: G. Brunner, T. Schweisfurth, A. Uschakow, K. Westen (eds.), *Sowjetsystem und Ostrecht*, Duncker & Humblot, Berlin: 1985, at 784-785, 789; *idem*, *An der Schwelle zur Wiedervereinigung Deutschlands*, 43 Neue Juristische Wochenschrift 1065 (1990), p. 1072; D. Colard, *Considérations sur les "traités de normalisation" signés par la R.F.A. avec l'U.R.S.S. et la Pologne*, 75 Revue Générale de Droit International Public 333 (1971), p. 350.

[48] *See Information der Regierung der Volksrepublik Polen* [Information by the Government of the People's Republic of Poland], *Bundestags-Drucksache* [Bundestag printed matter], p. 13, at 13-14. *Cf. also* E. Schmidt-Jortzig, *Der verfassungsrechtliche Gehalt des Warschauer Vertrages vom 7.12.1970 und seine völkerrechtlichen Bezüge*, 10 Der Staat 311 (1971), p. 334.

[49] *Cf. Bundesverfassungsgericht* [Federal Constitutional Court], Decision of 7 July 1975, 1 BvR 274, 209/72, 195, 194, 184/73 and 247/72, *BVerfGE* 40, 141 (149-150).

[50] For more details, see *Bundesverfassungsgericht* [Federal Constitutional Court], Decision of 7 July 1975, 1 BvR 274, 209/72, 195, 194, 184/73 and 247/72, BVerfGE 40, 141 (164-165).

towards a change of nationality emerges from the declarations made by the Federal Government to its Polish partner. The declaration of the then Federal Minister for Foreign Affairs, printed in the final communiqué of the Federal Government of Germany on the Warsaw Treaty, states that the Federal Government emphasized at the conclusion of the negotiations that "*durch den Vertrag niemandem Rechte verloren gehen, die ihm nach unseren Gesetzen zustehen*" ("as a result of the treaty, nobody loses rights to which they are entitled under our laws").[51] The main focus of the declaration was undoubtedly on the former Citizenship Act of the German Reich (*Reichs- und Staatsangehörigkeitsgesetz*).[52]

The Federal Government of Germany therefore assumed, in a way that was recognizable for the Polish partner, that it was not authorized to make a significant substantial disposition on the legal status of (the divided) Germany, which also included the continuation or possible loss of German citizenship.[53] In doing so, as with the question of the Oder-Neisse line it referred to the overall responsibility that the Four Powers had for Germany as a whole. The three Western Powers also alluded to this overall responsibility in their notes on the Warsaw Treaty.[54] In the negotiations on the Warsaw Treaty, the Federal Government of Germany further affirmed that it could only act in its own name and that it would not be able to bind a reunified Germany. This view arises both from the Federal Government's memorandum on the Warsaw Treaty (*Denkschrift der Bundesregierung zum Warschauer Vertrag*)[55] and from the official final communiqué already mentioned.[56]

The declarations in the final communiqué represent unilateral declarations on the part of the Federal Republic of Germany. However, during the negotiations, the Polish contracting party assured itself of the background and legal significance of the declarations and received explanations from the German side, which it accepted without contradiction.[57] The Polish Government was therefore aware of the content and scope of the declarations and it did not trigger any protest. Hence, the

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[51] Bulletin, *Presse- und Informationsamt der Bundesregierung* [Press and Information Office of the Federal Government], 8 December 1970, No. 171, p. 1818, at 1819 [English translation by the author].

[52] *See* C. Arndt, *Die Verträge von Moskau und Warschau, Politische verfassungsrechtliche und völkerrechtliche Aspekte* (2nd ed.), Verlag Neue Gesellschaft, Bonn: 1982, pp. 187 et seq. As regards the interpretation of Art. 25.1 of the *Reichs- und Staatsangehörigkeitsgesetz* after the Warsaw Treaty came into force *cf.* E. Klein, *Deutsche Staatsangehörigkeit und Inlandbegriff*, 93 Deutsches Verwaltungsblatt 876 (1978), pp. 877-879; O. Kimminich, *Der Warschauer Vertrag und die Staatsangehörigkeit der "Polen-Deutschen"*, 24 Die Öffentliche Verwaltung 577 (1971), pp. 578-579.

[53] *See Bundesverfassungsgericht* [Federal Constitutional Court], Decision of 7 July 1975, 1 BvR 274, 209/72, 195, 194, 184/73 and 247/72, *BVerfGE* 40, 141 (172).

[54] *Bundesgesetzblatt* [Federal Law Gazette] 1972 II, p. 361, at 365-368.

[55] *Denkschrift der Bundesregierung* [Memorandum of the Federal Government], Bundestags-Drucksache [Bundestag printed matter] VI/3157, p. 10, at 11.

[56] Bulletin, *supra* note 51, at 1818-1819.

[57] *Cf.* Arndt, *supra* note 52, p. 187; Frowein, *supra* note 34, p. 27.

Federal Government of Germany could assume that the declarations were accepted as significant instruments in accordance with Art. 31.2 VCLT.[58] Last but not least, this view is also expressed in Art. IV of the Warsaw Treaty, according to which any bilateral or multilateral international arrangements which the contracting parties had previously concluded or which concerned them, remained unaffected. On the part of the Federal Republic of Germany, these treaties include the Germany Treaty (*Deutschlandvertrag*) of 1952/54,[59] which contains a reservation in favour of the Western Powers with regard to Germany as a whole, including a peace treaty regulation.

2.5. Treaty on the Final Settlement with Respect to Germany and Subsequent German-Polish Treaties

Such a regulation of a peace treaty can be seen in the 2+4 Treaty of 1990,[60] which allowed the reunified Germany to regain full sovereignty, but in return demanded the recognition of the existing State frontiers.[61] Against this background, the German-Polish Border Confirmation Treaty of 1990,[62] which came into force in 1992, provides in Arts. 1 and 2 that the contracting parties confirm the Polish western frontier as regulated in the Görlitz/Gorlice Agreement and the Warsaw Treaty. The references to these two agreements are of a technical nature, which means that the frontier border established there is recognized as final.[63] In this case, Germany was fully authorized to act, and as a result there is no doubt that with the entry into force of the Border Confirmation Treaty the designated areas east of the Oder-Neisse line finally came under full Polish sovereignty.[64]

The transfer of sovereignty through the Border Confirmation Treaty did not in itself change the nationality of the German minority living in the Polish Oder-Neisse areas. There is no automatic change of nationality associated with a transfer of territorial sovereignty.[65] However, the Treaty between Germany and Poland of

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[58] *See Bundesverfassungsgericht* [Federal Constitutional Court], Decision of 7 July 1975, 1 BvR 274, 209/72, 195, 194, 184/73 and 247/72, *BVerfGE* 40, 141 (176).

[59] *Vertrag über die Beziehungen zwischen der Bundesrepublik Deutschland und den Drei Mächten* [Convention on Relations between the Three Powers and the Federal Republic of Germany], 26 May 1952, as amended on 23 October 1954, *Bundesgesetzblatt* [Federal Law Gazette] 1955 II, p. 301, at 305.

[60] *See supra* note 28.

[61] For more details, *cf.* Gornig, *supra* note 32, pp. 77 et seq.

[62] *Vertrag zwischen der Bundesrepublik Deutschland und der Republik Polen über die Bestätigung der zwischen ihnen bestehenden Grenze* [Treaty between the Federal Republic of Germany and the Republic of Poland on the confirmation of the frontier between them], 14 November 1990, *Bundesgesetzblatt* [Federal Law Gazette] 1991 II, p. 1329.

[63] Klein, *supra* note 40, p. 120.

[64] The concept of sovereignty was missing from the otherwise identical text of the Warsaw Treaty.

[65] In this regard there is unanimity in legal scholarship, *see e.g.*, Klein, *supra* note 40, p. 125; Frowein, *supra* note 35, p. 594; Kimminich, *supra* note 52, pp. 580-581.

Good Neighbourliness and Friendly Cooperation of 17 June 1991[66] indirectly addressed this question by establishing provisions on the protection of minorities. In addition, both States agreed that the Treaty of Good Neighbourliness does not deal with citizenship issues, as evidenced in and by an exchange of letters when the treaty was signed.[67]

CONCLUSIONS AND OUTLOOK

Overall, while the Warsaw Treaty had a rather limited normative effect it proved to be of eminent political importance for both States.[68] The interpretative declarations and notes of the Federal Government did not meet with opposition on the part of the Polish Government. A legal disagreement or dissent with respect to the scope of Art. I of the Warsaw Treaty can therefore not be assumed.[69] Nevertheless, for a long time, the treaty proved to be politically explosive, because according to the official German view territorial sovereignty was only transferred with the Border Confirmation Treaty of 1990, while according to the Polish official view this area had been under Polish sovereignty since 1945, or at the latest since the entry into force of the Warsaw Treaty in 1972. There was no agreement on the question of whether the Border Confirmation Treaty had a constitutive or only a declaratory effect. Under these circumstances, in 1990 the dilatory formula compromise was used, stating that for the future there is no question that the area east of the Oder--Neisse line is Polish, but that insofar as concerns the past both States remain free to represent their own opinion.[70] Via this clever trick the negotiators aimed to pave a way so as not to let the German-Polish relations fail because of disputes from the past. With regard to the question of territorial sovereignty, this goal has undeniably been achieved.

With regard to compensation issues, the bilateral debates sometimes boil up again.[71] However, these disputes do not fall under the aegis of the Warsaw Treaty,

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[66] *Vertrag zwischen der Bundesrepublik Deutschland und der Republik Polen über gute Nachbarschaft und freundschaftliche Zusammenarbeit*, 17 June 1991, *Bundesgesetzblatt* [Federal Law Gazette] 1991 II, p. 1314.

[67] *Cf.* J. Barcz, J. Frowein, *Gutachten zu Ansprüchen aus Deutschland gegen Polen im Zusammenhang mit dem Zweiten Weltkrieg*, 65 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 625 (2005), pp. 633-634.

[68] *Cf.* Colard, *supra* note 47, p. 353.

[69] Kimminich, *supra* note 43, p. 337.

[70] *See* Klein, *supra* note 40, p. 121.

[71] *Cf.* R. Müller, *Wird Deutschlands Schuld immer größer?*, Frankfurter Allgemeine Zeitung, 2 October 2019, p. 10; J. Kranz, *Kriegsbedingte Reparationen und individuelle Entschädigungsansprüche im Kontext der deutsch-polnischen Beziehungen*, 80 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 325 (2020), pp. 325-326.

which is silent about both, the Polish confiscations on the one hand[72] and the German reparation and compensation payments to Poland on the other.[73] The official communiqué of the Federal Government of Germany on the Warsaw Treaty merely states that the Federal Government, by concluding this treaty, does not recognize the expulsion of the German population and the associated measures as lawful.[74] However, this finding is not to be seen as a declaration of interpretation, but only as a legal safeguard. The Federal Republic of Germany has only protected itself against Poland drawing conclusions from the Warsaw Treaty on the assertion of restitution or compensation claims.[75] Another statement in the communiqué points in a similar direction, according to which the Polish delegation at the conclusion of the Warsaw Treaty confirmed the declaration of August 1953,[76] in which Poland had expressly waived further reparation payments from Germany as a whole.[77] This does not necessarily answer the question of what consequences this declaration has for individual compensation claims by victims of National Socialist crimes.[78] What is certain however is that a unilateral declaration, in whatever form, would be neither suitable nor appropriate for dealing with this delicate and complex issue.

[72] On this issue, *cf. e.g.*, O. Kimminich, *Die Menschenrechte in der Friedensregelung nach dem Zweiten Weltkrieg*, Gebr. Mann, Berlin: 1990, pp. 102 et seq.; *E. Klein*, *Diplomatischer Schutz im Hinblick auf Konfiskationen deutschen Vermögens durch Polen*, Kulturstiftung der Deutschen Vertriebenen Verlag, Bonn: 1992, pp. 47 et seq.

[73] On this topic, *cf. e.g.*, T. Irmscher, *Deutsch-polnische Vermögensfragen: Eine deutsche Sicht*, 3 WeltTrends Papiere 5 (2007), p. 20.

[74] Bulletin, *supra* note 51, at 1819.

[75] Frowein, *supra* note 34, p. 24.

[76] Declaration of the Government of the People's Republic of Poland on 23 August 1953, Zbiór Dokumentow, 1953, No. 9, p. 1830. For more details, see S. Żerko, *Reparationen und Entschädigungen in den Beziehungen zwischen Polen und der Bundesrepublik Deutschland (ein historischer Überblick)*, Instytut Zachodni Policy Papers No. 22, 2018, pp. 17-19.

[77] Bulletin, *supra* note 51, at 1819.

[78] With respect to this problem, *see* O. Dörr, *Offene Vermögensfragen zwischen Deutschland und Polen?*, in: M. Ludwigs, S. Schmahl (eds.), *30 Jahre Deutsche Einheit*, Recht und Politik, Beiheft 8, Duncker & Humblot, Berlin: 2021, pp. 127-139, with further references.