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On November 14, 1990, Poland and Germany concluded a treaty confirming the existing Polish-German border. The document was signed by Foreign Affairs Ministers Krzysztof Skubiszewski and Hans-Dietrich Genscher. The signing of the treaty was linked closely to the German reunification, whose terms were negotiated in the so-called “2+4” Talks that brought together the four former occupying powers, i.e. the United States, the Soviet Union, Great Britain and France, as well as the two German states: the Federal Republic of Germany and the German Democratic Republic. The Polish-German treaty also finally settled a fundamental dispute between the two countries over Germany’s failure to recognize Poland’s western border along the Odra and Nysa Łużycka rivers that the victorious powers had established in the Potsdam Conference on August 2, 1945.

Although Poland and the Federal Republic of Germany signed a treaty concerning the basis for normalizing their mutual relations on December 7, 1970, in which the Federal Republic unequivocally recognized Poland’s western border, in the 1970s the jurisprudence of the Federal Constitutional Court reinterpreted the relevant clauses in line with the so-called legal positions of Germany. In its interpretation, the frontiers of a future reunited Germany would be recognized as permanent under a future peace treaty announced in the Potsdam Agreement. However, Poland’s view was that the Potsdam Agreement had created a sufficient legal basis for the establishment of the border along the Odra and Nysa rivers as sovereignty over the former Reich territories had been transferred by way of assignment (adjudication) by the occupying powers that exercised supremacy over defeated Germany.

The growing popular protests against communist rule that swept East Germany in the autumn of 1989 as well as the opening of borders on November 9 (the fall of the Berlin Wall) created a momentum that eventually returned German reunification to the agenda. The Federal Republic’s reunification plan (the so-called Kohl’s Plan of November 28, 1989), which called for the GDR to be gradually incorporated into West Germany, left out border recognition, a matter of vital importance for Poland. Meanwhile, under the international law principle of border regulation succession, the reunited German sovereign would be obliged to honor all prior commitments, including the Agreement of 1970.

However, early in the process, the German government had no clear vision on how to resolve the border dispute with Poland, which at the time was regaining its independence. The matter turned out to be beyond Chancellor Kohl’s strategic horizon. It was only through a concerted effort by the Tadeusz Mazowiecki administration, which called for a credible approach to recognizing Poland’s western border at the time when



the German reunification was being finalized in 1990, that the issue attracted international attention and was raised to the top of the agenda of “2+4” Talks.

On February 22, 1990, Minister Skubiszewski said this to describe Poland’s stance on the issue: “(...) the reunification of Germany should follow international legal norms and produce guarantees under international law. The German question has had the attention of the international community ever since 1945. The reunification requires a European roof and a stable environment (...). Therefore, we propose that a Polish-German treaty on the frontier be forged in six-state talks and that such a treaty recognize the present border on the Odra and Nysa Łużycka rivers and be afforded the status of a peace settlement. The latter is critical in the absence of a peace treaty. Today Germany seems to have lost its desire to conclude a peace treaty, even though it has always emphasized its importance. We therefore propose that a [border - K.M.] treaty be signed with a reunited German state”. Such a treaty was to be negotiated and initialed by both German states at the start of the reunification process and then signed and ratified by a reunited German Republic.

Under international law, the border issue was automatically linked with the rights of the four powers and their responsibilities for Berlin and Germany as a whole and with the prospect of reunification under the aforementioned peace settlement. The rapidly progressing reunification and negotiations in the “2+4” Talks were expected to produce an autonomous Germany free of any liability derived from the responsibilities of the four powers. It was therefore essential for Poland to have the existing border recognized as permanent in the “peace settlement” thus forever quashing any legal claims of the Federal Republic. Moreover, Poland wished to participate in the part of the “2+4” Talks that was concerned with the external aspects of the reunification. The Federal Republic opposed Poland’s involvement. The Chancellor, who in March 1990 went as far as to demand that border recognition be contingent upon Poland abandoning reparation claims and offering additional guarantees for the rights of the German minority in Poland, ultimately (with the support of the Bundestag resolution of March 8) proposed that the parliaments of both German states declare that the inviolability of Poland’s western border (rather than the legality of the existing border) would be confirmed by a reunited Germany. Moreover, the Federal Republic agreed to have Poland take part in the “2+4” Talks. The Chancellor revised his position under the influence of the Minister of Foreign Affairs H.-D. Genscher, and in view of French support for the Polish stance and a suggestion from US President George Bush that the Chancellor settle the border issue before reunification. Poland submitted a draft of the treaty to both German states in late April. In May, three rounds of talks were held that nevertheless made no headway due to obstruction by the Federal Republic.

Meanwhile, the prospect of an upcoming third round of the “2+4” Talks scheduled for July 17 in Paris, led to the adoption, on June 21, by the Bundestag and the GDR’s People’s Chamber, of commitments on behalf of the future reunited Germany to conclude an agreement under international law that would recognize the border established under previous covenants, including under the agreement between the Republic of Poland and



Germany of December 7, 1970. This was the biggest concession yet made to Poland, although Bonn continued to refuse to negotiate the treaty prior to reunification.

The “2+4” conference in Paris, which was attended by a Polish delegation headed by Minister Skubiszewski, was to provide Poland with binding commitments to conclude a treaty, link the border treaty with the peace settlement to avert the aforementioned claims based on the West German legal doctrine, and declarations to uphold a broader friendly-cooperation agreement in addition to the border treaty and amend the German constitution and other laws affecting Poland as a result of the reunification (including an article on citizenship). The minutes of the meeting of six foreign ministers (which in addition to K. Skubiszewski and H.-D. Genscher, was attended by James Baker, Douglas Hurd, Roland Dumas and Markus Meckel) read that Poland failed to convince the other parties to link the Polish-German border issue with the determinations of the Potsdam Conference. However, the minutes did state that: “The recognition of the frontiers as permanent is key to the European peace order”, which also satisfied Poland. In addition, the four powers declared that “the borders of reunited Germany [were] final and [that] no external events or circumstances [could] change that.” They also assured that “a reunited Germany and the Republic of Poland [would] confirm their existing border in a treaty that [would] be binding under international law.” In the said minutes, Minister Genscher reassured that “the treaty on the German-Polish frontier [would] be signed and submitted for ratification to the pan-German parliament as soon as possible after the German reunification and the restoration of Germany’s sovereignty”. It should also be noted that the “2+4” Treaty constituting the final regulation for Germany, made on September 12, 1990, also contained binding provisions on the border in its Art. I, which recognized the frontier between the reunited Germany and Poland.

Meanwhile, in the autumn of 1990, tensions between the Chancellor and the expellee community over Germany’s commitment to recognize the border prompted Helmut Kohl to prepare to postpone negotiations on both treaties until the completion of the first all-German Bundestag elections on December 2, 1990 and to ratify them jointly thereafter. However, during a November 8 meeting with Prime Minister Mazowiecki in Frankfurt (Oder), Kohl agreed not to conclude the two treaties simultaneously and to sign the border treaty on November 14. Undoubtedly, Poland’s renewed commitment to apply European standards in its approach to the German minority issue helped hammer out the compromise. In addition, the surprising date was to prevent giving the impression that the U.S.S.R. treaty of November 6, 1990 was of greater importance than that with Poland, as - after all - the treaty with Poland was expected to close a key contentious chapter in mutual relations. The hope was that the expedited signing of the treaty would generate sufficient good will to conclude a broad-based treaty and, in particular, resolve the German minority issue. In addition, the prospect of a new historic reset on the scale of the German-French agreement was becoming increasingly more real.

The treaty of November 14, 1990 was signed in Warsaw by both ministers of foreign affairs. Two of its features deserve to be noted. One is the reference made in the instrument to the recognition of the existing border. The other is the mention it makes to



the prior treaty between GDR and Poland of July 26, 1950 along with its implementing and amending agreements, i.e. the Act of January 27, 1951, the agreement on the delimitation of sea areas in the Pomeranian Bay of May 22, 1989, and the agreement of December 7, 1970. The implication was that Germany believed that sovereignty over the former eastern territories of the Reich had already been relinquished, which would mean that Germany had accepted the aforementioned legal position of Warsaw. However, the absence of a reference to the Potsdam Agreement seems to suggest that the new treaty left open an interpretation that was convenient for Germany, which saw the treaty of November 14, 1990 as being the first instrument of international law that had Germany transfer the territories. Evidently, it was out of the question for Germany to mention the Potsdam Agreement as this would mean disavowing West Germany's legal doctrine. Thus, by virtue of its design, the confirmation of the existing border stopped short of determining whether the treaty was declarative or constitutive, allowing both parties to interpret it in keeping with their own legal doctrines.

Presumably, were it not for the diplomatic offensive by the Polish government, which was mounted as the country was reemerging as an independent state and which forced the Federal Republic to change its course, the border issue would have been resolved differently. By their involvement, Prime Minister Mazowiecki and Minister Skubiszewski demonstrated not only that Poland was asserting a more empowered role in the international arena but also that its foreign policy had become markedly pro-Western as it set its sights on settling historic disputes with Germany all the while laying the groundwork for lasting cooperation with its western neighbor, as evidenced by the treaty on good neighborship and friendly cooperation concluded soon afterwards, in June 1991, that set the stage for developing mutual relations in the European context.

Written by dr hab. Krzysztof Malinowski