Vanderbilt Journal of Transnational Law

Volume 27
Issue 4 *Issue 4 - November 1994*

Article 3

1994

Privatization in Eastern Germany: A Comprehensive Study

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ABSTRACT

One of the greater problems arising from the reunification of Germany has been the privatization of land in eastern Germany. Initially, the principle that shaped the privatization policies was restitution, the idea that land unlawfully taken by the former East German government should be returned to its rightful owner. A second goal of the privatization program was to stimulate investment in the economy of eastern Germany. These two goals, however, have conflicted. The result has been a policy that has created confusion with regard to the ownership of property and clear title. This Article examines two series of amendments, in 1991 and 1992, that attempted to facilitate investment in eastern Germany.

Despite amendments to the major privatization laws in 1991, the investment in eastern Germany has remained anemic. The 1992 amendments expressly placed the goal of investment before restitution. However, the author concludes that the 1992 amendments have been helpful in only a limited number of cases. The absence of a clear mechanism for compensation of rightful owners continues to impede investment. Legislation proposing such a mechanism has yet to be adopted; more importantly, the legislation may not pass constitutional muster. Accordingly, the author concludes that Germany should employ other short-term remedies until it drafts a constitutionally sound law.

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I. INTRODUCTION

On November 9, 1989, the collapse of the Berlin Wall triggered a process of reunification that culminated in the formal accession of the German Democratic Republic (GDR or East Germany) to the Federal Republic of Germany (FRG or West Germany) on October 3, 1990. However, these dramatic events resulted in only superficial unity. The legal systems under which the people of each state had lived were fundamentally different. Therefore, formal unification was only the beginning of a broader process through which the two states will become a single, integrated entity.

Reunification was largely driven by the desire to extend the rule of law to the territory of the GDR. Expropriations committed in the GDR under communist rule represented an injustice because rightful property owners received little or no compensation in return. Therefore, the two states agreed that those injuries should be redressed by restoring land to the rightful owners through privatization of property controlled by the former East German government.[1] Privatization was also designed to facilitate the economic and social adaptation of the former East Germany to a capitalist society. In advancing the vital transformation from a Marxist command economy to a social market economy, privatization was viewed as necessary to revitalize the economy of the former GDR to a level that would support and drive the less tangible, but equally vital, aspects of true societal unification.

Unfortunately, privatization based upon restoration of land to its rightful owners has created confusion regarding ownership and clear title. The inability to acquire clear title has become a strong disincentive for investment in eastern Germany, which now struggles to overcome forty years of mismanagement. The absence of significant investment has severely retarded the modernization and reorganization of East German enterprises necessary for economic recovery.

This Article presents a comprehensive study of the major issues involved in the privatization of nationalized property in the former East Germany. Part II provides an historical overview of the expropriations conducted in the GDR from 1945 to 1989. Part III briefly describes the process of reunification and the law that applied to eastern Germany. Parts IV and V analyze the initial privatization measures enacted in 1990 and the

1. Decision of Apr. 23, 1991, Entscheidungen des Bundesverfassungsgerichts [BVerfGE], 1BvR 1170/90, 1174/90, 1175/90 (FRG) [hereinafter BVerfGE]. This decision upheld the policy of privatization despite a constitutional challenge.

subsequent continued anemic investment. Part VI then discusses the first series of amendments to the privatization laws enacted in March 1991 and their impact upon efforts to stimulate economic development. Part VII then outlines the most recent privatization-related measures, which were enacted in July 1992 to facilitate investment in the former East Germany. Finally, this Article concludes that while the basic principle adopted in the unification process—that of restoration—is well-suited to redress past wrongs committed through expropriation, it is not well suited to the more urgently needed economic modernization of eastern Germany. However, the most recent amendments made to the privatization and investment legislation offer new hope that real investment may finally begin to take root.

II. HISTORICAL BACKGROUND

Following World War II, eastern Germany witnessed two different periods of expropriations.[2] From 1945 to 1949, the Soviet Military Administration of Germany (SMAG) conducted the first wave of expropriations.[3] A second series of expropriations occurred from 1949 to 1989 under the direction of the GDR government.[4]

A. *Expropriations Committed Under Soviet Authority*

Following World War II, the Allied Powers divided Germany into four zones.[5] Each Allied state[6] occupied one zone and had

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2. The Nazi regime expropriated a substantial amount of property from 1933 to 1945. These takings have not been discussed extensively in this Article because they pre-date the existence of the GDR. For a discussion of the expropriations during this period, see Martin E. Elling, *Privatization in Germany: A Model for Legal and Functional Analysis*, 25 VAND. J. TRANSNAT'L L. 581, 588-90 (1992).

3. *Id.* at 590-93; *see also* Theodor Schweisfurth, *Entschädigungslose Enteignungen von Vermögenswerten (Betrieben) auf besatzungsrechtlicher oder besatzungshoheitlicher Grundlage in der sowjetischen Besatzungszone Deutschlands*, 5 BETRIEBS-BERATER 281-91 (1991) (discussing several of the the SMAG decrees cited in this article).

4. Elling, *supra* note 2, at 594-96.

5. The legal foundation for Soviet control over the former GDR lies in the Potsdam Protocol of August 2, 1945. *See* Protocol of the Proceedings of the Tripartite Conference of Berlin, Aug. 2, 1945, United Kingdom-USSR-United States, 3 Bevans 1207 (1945), 2 FOREIGN RELATIONS OF THE UNITED STATES 1478 (1945).

6. The Allied Powers were France, the Union of Soviet Socialist Republics, the United Kingdom, and the United States.

administrative responsibility for its respective zone. The SMAG[7] and the provisional German government that it controlled conducted sweeping expropriations.[8] These expropriations were based on a dual policy. On the one hand, the expropriations constituted a form of penal action against war criminals and those affiliated with the Nazi party. On the other hand, the expropriations represented a fundamental reorganization of property rights in accordance with the communist principles of Soviet ideology. Through expropriations, the SMAG redistributed property holdings for the general good of the working class. In pursuit of these goals, the SMAG initiated a land reform program that confiscated all real the estate holdings exceeding 250 acres. Property holdings that fell below this threshold were confiscated if the owner was listed either as affiliated with the Nazi party or as a war criminal. These confiscations were all-encompassing and uniformly executed with no pretense of compensation. They applied not only to land, but also to buildings, inventory, business supplies, and sometimes to personal property. Confiscated holdings were transferred to a real estate pool (*Bodenfonds*) from which refugees, poor or landless farmers, and general laborers were allocated plots of land. These plots were no larger than ten to fifteen acres and were subject to significant restrictions on use.[9] Because these new holdings were insufficient for the establishment of individual farming enterprises, this stage of the property reformation was essentially an intermediate step towards the collectivization of agriculture.[10]

In addition to the agricultural reorganization, the banking, insurance, and energy industries were reorganized through a

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7. Anordnung für sowjetische Militäradministraion über die Verwaltung der sowjetischen Bestazungszone in Deutschland (Arrangement for the Soviet Military Administration for the Government of the Soviet Occupation Zone in Germany), June 6, 1945, *reprinted in* GESCHICHTE DES STAATES UND DES RECHTS DER DDR: DOKUMENTE 1945-1949 (Karl Heinz Shöneburg ed., 1984) 31.

8. *See* Befehl Nr. 124 der sowjetischen Militäradministration für Deutschland über die Bildung der sowjetischen Militärverwaltung (Decree No. 124 of the Soviet Military Administration of Germany Concerning the Establishment of the Soviet Military Government), Oct. 30, 1945; Befehl Nr. 64 der sowjetischen Militäradministration für Deutschland (Decree No. 64 of the Soviet Military Administration of Germany), April 17, 1949. For an in-depth discussion of Decrees Nos. 124 and 64, see Schweisfuth, *supra* note 3, at 284-86. The official text of Decree 124 is located in 1945 Verordungsblatt der Provinzialverwaltung Mark Brandenburg [VoBl. Mark Brandenburg] 50. The official text of Decree 64 is located in 1948 Zivilverordungsblatt [ZVOBl.] 140 (GDR).

9. NORBERT HORN, DAS ZIVIL-UND WIRTSCHAFTSRECHT IM NEUEN BUNDESGEBIET 270 (1991).

10. *Id.* at 271.

general decree[11] and subsequent regulations that ordered the expropriation of all public and private enterprises. The decrees likewise barred these industries from resuming business on a private basis and replaced them with state-run monopolies. The SMAG and the provisional East German authorities also ordered extensive expropriations in the areas of health care and the fine arts. The SMAG awarded nominal compensation only under limited circumstances.[12]

B. *Expropriations Committed After 1949 by the German Democratic Republic*

Although the founding of the German Democratic Republic in 1949 marked the formal end of direct Soviet control over affairs in eastern Germany, it did not reduce the speed or scope of expropriations, which continued under East German authority. The formation of the GDR is significant because under the Unification Treaty of both parties to the treaty accepted responsibility for uncompensated takings that have occurred since 1949 in eastern Germany.[13]

Under the GDR, expropriations took a number of forms. One approach placed private businesses under economic pressure in order to strangle successful trade.[14] This practice forced many businesses into bankruptcy, which the government then exploited

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11. Befehl Nr. 1 der sowjetischen Militäradministration für Deutschland über die Bildung der sowjetischen Militärwerwaltung (Decree No. 1 of the Soviet Military Administration of Germany Concerning the Formation of the Soviet Military Government), July 23, 1945, *reprinted in* GESCHICHTE DES STAATES, *supra* note 7, at 31.

12. *See* HORN, *supra* note 9, at 271.

13. Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands—Einigungsvertrag, August 31, 1990, F.R.G.-G.D.R., 1990 BGBl. II 859, *reprinted in* 30 I.L.M. 457 (1991) [hereinafter Unification Treaty].

Upon reunification, the two German states agreed not to reverse expropriations that took place during the Soviet occupation from 1945 to 1949. Gemeinsame Erklärung der Regierungen der Bundesrepublick Deutschland und der Deutschen Demokratischen Republik zur Regelung offener Vermögensfragen vom 15. Juni 1990 (Joint Declaration of the Governments of the Federal Republic of Germany and the German Democractic Republic Concerning Open Property Questions of July 15, 1990), Unification Treaty, *supra*, Annex III, *reprinted in* 2 VERTRÄGE UND RECHTSAKTE ZUR DEUTSCHEN EINHEIT: EINIGUNGSVERTRÄG UND WAHLVERTRAG (Klaus Stern et al., eds., 1990) 823-28 [hereinafter Joint Declaration]. The Treaty Annexes were not reprinted in International Legal Materials. All Annexes appear in German in 2 VERTRÄGE UND RECHTSAKTE ZUR DEUTSCHEN EINHEIT, *supra* note 13. Elling, *supra* note 2, at 592. *See also* Schweisfurth, *supra* note 3, at 281-82 n.4.

14. This economic pressure was exerted, in part, through discriminatory tax rates directed against owners of private enterprises. HORN, *supra* note 9, at 272.

to acquire property.[15] Likewise, this economic pressure forced owners to deed property to the state to relieve outstanding debts owed to the government.[16] Other regulatory tactics that drove private entrepreneurs to economic collapse included the revocation of business licenses, the denial of access to resources necessary for production, and the cancellation of orders.[17] The confiscation of property was also widely used in sentencing under the criminal code.[18]

In July 1952, the GDR passed a statute ordering the formation of agricultural collectives.[19] This law was enforced in part through the criminal code, which allowed for the dispossession of property from estate holders for alleged misdemeanors and felonies. While this statute was superficially founded on the concept of free will, it was enforced through massive use of propaganda and coercion. The end result was the transformation of private property into socialist property of a cooperative in which the original holders held nothing more than titular ownership.[20]

In matters concerning business, industry, and guilds, the government again used economic pressure to coerce the nationalization of enterprises and the formation of craft cooperatives. Initially, the government exerted economic pressure upon small enterprises.[21] Then, beginning in 1956, the GDR offered state shareholdership in private enterprises.[22] Because this hybrid status guaranteed a more favorable level of taxation, the option was widely used by small businessmen to alleviate the economic pressure exerted by the government. Likewise, pursuant to a 1955 regulation,[23] membership in craft cooperatives provided craftsmen with a beneficial tax rate, and the individual master craftsmen found that private enterprises were not feasible. Therefore, they were compelled to join the cooperatives.[24]

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15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. Gesetz über die landwirtschaftlichen Produktionsgenossenschaften (Law on Agricultural Collectives), June 3, 1951, 1951 Gesetzblatt Teil I [GBl. I] 577 (GDR).
20. *See* HORN, *supra* note 9, at 207.
21. *See supra* notes 7-11.
22. Verordnung (Regulation), March 26, 1959, 1959 GBl. I at 253 (GDR).
23. Verordnung über die Bildung halbstaatlicher Betriebe (Regulation on the establishment of partly state controlled enterprises), August 18, 1955, 1959 GBl. I (GDR) (cited in HORN, *supra* note 9, at 271).
24. *Id.; see also* HORN, *supra* note 9, at 272-274; Elling, *supra* note 2, at 594.

The disposition of property abandoned by refugees—those who left the GDR without official permits—varied over the years.[25] Initially, the government registered the property and then placed it under the control of a curator. In the case of businesses and industries, the property was placed under trusteeship. In a short time, this practice was replaced by the simple confiscation of such holdings.[26] Likewise, in the case of agricultural real estate, rightful ownership was not disturbed at first. However, the land was made subject to usufructuary rights on behalf of the collectives, and the owners received no compensation. Thereafter, these holdings were also simply expropriated and placed under the administration of state collectives.[27]

In the case of individuals who either never lived in the GDR or emigrated legally, the disposition of property was different. In 1952, these holdings were placed under the provisional administration of the state. Under this arrangement, the rightful owners retained title but suffered a significant encroachment on their disposition rights. Furthermore, the state retained rent and lease payments to cover maintenance and operational costs, and any surplus was available only on a limited basis. Eventually, even this pretense of private ownership eroded because this method of disposition became de facto expropriation.[28]

III. LEGAL FOUNDATION AND APPLICABLE LAW

In 1989, *glasnost* and related political pressures caused the East German government to open its borders.[29] Thus began the course of events that ultimately led to reunification. The two fundamentally different German legal systems were integrated by two treaties: the Treaty Between the Federal Republic of Germany and the German Democratic Republic Establishing a Monetary, Economic, and Social Union (State Treaty)[30] and the Treaty Between the Federal Republic of Germany and the German

25. *See* Elling, *supra* note 2, at 594.

26. *See id.* at 594-95. In 1952, property owned by refugees was requested but by 1958,uncompensated expropriation was formally adopted.

27. *Id.* at 274.

28. *Id.* at 275.

29. For an in-depth discussion of the political and legal bases behind German unification, see Peter E. Quint, *The Constitutional Law of German Unification*, 50 MD. L. REV. 475 (1991).

30. Vertrag über die Schaffung einer Währungs-, Wirtschafts-, und Sozialunion zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik, May 18, 1990, F.R.G.-G.D.R., 1990 BGBl. II 537 (FRG), *reprinted in* 29 I.L.M. 1108 (1990) [hereinafter State Treaty]. The Annexes to the State Treaty are reprinted in 29 I.L.M. 1009, 1153.

Democratic Republic on the Establishment of German Unity—Unification Treaty (Unification Treaty).[31] These treaties represent a two-step process whereby the two sovereign states and their legal systems were combined. The State Treaty sets forth important West German business laws that apply in the former East Germany. The Unification Treaty establishes transitional regulations controlling the applicability of West German law in the former East Germany, the continued (albeit limited) validity of East German law in the former East Germany, and various guidelines for the transition period.

A. *The State Treaty*

The State Treaty, signed on May 18, 1990, and effective on July 1, 1990, declared as its primary objective the formation of a single German economy based on social market principles.[32] In keeping with this objective, the State Treaty established the rudimentary economic principles required for successful German unification. First, the State Treaty formed a monetary union by declaring the *Deutsche Mark* as the common currency and by establishing the *Deutsche Bundesbank* as the central bank.[33] In creating the monetary union, the State Treaty invalidated the East German Mark (*Ostmark*) as legal tender and set a basic currency conversion rate of two *Ostmarks* to one *Deutsche Mark*.[34] However, in the case of wages, salaries, grants, pensions, rents, leases, and other recurring payments, the conversion rate was set at one-to-one.[35] Personal savings were likewise converted at a rate of one-to-one according to a plan of differentiation based upon the age of the account holder.[36] Furthermore, to secure a sound financial basis and to insure the free circulation of both

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31. Unification Treaty, *supra* note 13.

32. The social market system envisions a combination of socialism and capitalism. This hybrid is designed to combine the allocative efficiency of competitive conditions with welfare, maximum income distribution, and internalization of economic externalities. In its application in the FRG and as described in the State Treaty, the system is characterized by private ownership, competition, free pricing, and complete freedom of movement for labor, capital, and services. The market is organized to allow for the participation of public authorities or other legal entities for the general welfare of society, while protecting private ownership. *See* State Treaty, *supra* note 30, art. 1(3); THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 338 (John Eatwell et al. eds., 1987).

33. State Treaty, *supra* note 30, art. 1(2).

34. *Id.* art. 10(5); Annex I, arts. 1-5.

35. *Id.* art. 10(5).

36. *Id.* art. 10(5); Annex I, art. 6(1). The maximum amounts that could be converted at these one-to-one rate follow: persons under 14 years of age were allocated a ceiling of 2,000 DM; persons between 14 and 59, were limited to 4,000 DM, while those 60 were limited to 6,000 DM.

cash and credit necessary to a capitalist system, the German Federal Reserve assumed control of all banking matters in the new federal territory (*Bundesgebiet*). In accordance with the *Bundesbank*'s autonomous status in the FRG, the *Bundesbank* was authorized to act in East German territory independently of instructions from either government.[37]

Of greater significance than the monetary union for the previously communist East Germany was the adoption of a social market economy as the common economic system. The social market system is defined in the State Treaty as a system that operates on principles of private ownership and competition driven by free pricing and the free movement of labor, capital, goods, and services.[38] This system also allows for the participation of public welfare authorities working for the general social good.[39] The legal basis for economic union is found in Article 3 of the State Treaty, which introduced the commercial code and several other important West German business laws into the former GDR.[40] The State Treaty simultaneously amended or abolished East German laws that conflicted with the market economy.[41] In those areas where an immediate application of FRG law was not feasible, the GDR agreed to enact appropriate legislation in accordance with the basic principles of a social market economy.[42]

The monetary union was formulated in such a manner that it could function only in a social market system. Therefore, the introduction into the GDR of free market principles via the economic union cannot be viewed as an ancillary measure designed only to facilitate the monetary union. Rather, the economic union should be viewed as a prerequisite to a monetary union.

The GDR adopted free market principles by accepting the social market economy defined in Article 1(3) of the State Treaty.[43] This Article represents the cornerstone and primary contribution of the State Treaty to the economic union. The remainder of the articles devoted to the economic union involve the detailed implementation of East Germany's decision to adopt the social market system. The most notable provision is Article

37. *Id.* arts. 3, 10(1), 10(3), 10(4).
38. *Id.* art. 1(3).
39. *Id.* art. 1(3).
40. *Id.* art. 3. *See also id.* Annex II, art. 3 (incorporating West German laws concerning the formation of various forms of corporations such as the Stock Corporations Act (*Aktiengesetz*) and the Limited Liabilities Companies Act (*GmbH-Gesetz*)).
41. *Id.* art. 4(1), Annex III.
42. *Id.* art. 4(1), Annex IV.
43. *See supra* notes 38-42 and accompanying text.

11, which obligates the GDR to pursue an economic and financial policy in keeping with the four objectives of the socialist market system: price stability, a high level of employment, foreign trade equilibrium, and steady and adequate economic growth.[44] Moreover, the GDR must take all legislative and administrative measures to establish the basic conditions necessary to develop market forces.[45]

The State Treaty also created a social union, intended to work in conjunction with the economic union, to realize the principles embodied in the social market system. Accordingly, the social union effected not only "social law," but also employment law. In both areas, a general effort was made to raise and adapt East German law to the standards of the FRG, thereby facilitating eventual political unification.[46]

When the State Treaty entered into force, it produced a variety of legal consequences and imposed duties on both parties. Generally speaking, these effects can be divided into three classes. First, a partial transfer of East German sovereignty to the FRG occurred, generating corresponding alterations in the legal organization of West Germany.[47] Second, self-executing provisions of the Treaty established new societal standards within the former East Germany.[48] Finally, the Treaty created a multitude of obligations on both parties pertaining to its implementation.[49]

Overall, the GDR bore the legal and societal brunt of the State Treaty. The GDR adopted the West German market economy and the necessary monetary conversion, as well as the

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44. State Treaty, *supra* note 30, art. 11(1).

45. *Id.* art. 11(1)(a), (2). The legislative program envisioned for the fulfillment of this obligation is set forth in detail in the State Treaty annexes. These annexes encompass the assumption of FRG law by the GDR (Annex II), the abolition of GDR law (Annex III), and the passage of new GDR law (Annex IV). *See also* Unification Treaty, *supra* note 13, arts. 21-29, in particular art. 25 which lays the foundation for the *Treuhandanstalt.* Gesetz zur Privatisierung und Reorganisation des Volkseigenen Vermögen-Treuhandgesetz (Law Concerning the Privatization and Reorganization of the People's Property), 1990 BGBl. I 776 *reprinted in* DAS DEUTSCHE BUNDESRECHT: SYSTEMATISCHE SAMMLUNG DER GESETZE UND VERORDNUNGEN MIT ERLÄUTERUNGEN (J. Köble ed., 1991), at III L30 [hereinafter Trust Law]. The *Treuhandgesetz* established the mechanisms and guidelines controlling the *Treuhandanstalt,* the governmental agency which oversaw the process of privatizing individual enterprises.

46. Articles 17-25 of the State Treaty cover labor law, social insurance, unemployment insurance and employment promotion, pension insurance, health insurance, public health, accident insurance pensions, social assistance, and initial financing, respectively. State Treaty, *supra* note 30, arts. 17-25.

47. Oliver Dassavant & Gerhard Nösser, *The German Reunification—Legal Implications for Investment in East Germany,* 25 INT'L L. 875, 876-79.

48. *Id.*

49. *Id.*

concomitant legislative alterations. The GDR agreed to adopt West German law rather than attempt to create a compromise body of law that would have proven unworkable, as well as both politically and legally groundless.[50] In exchange for these efforts, the FRG assumed financial responsibility for the modernization of the GDR.[51] More significantly, however, the Treaty established as binding law in the GDR the fundamental constitutional tenets found in the Basic Law of the FRG. Perhaps the greatest contribution to German unification made by the State Treaty is that it opened the way to subsequent unification in keeping with the Preamble and Article 23 of the 1949 Basic Law.[52]

B. *Unification Treaty*

In addition to the monetary, economic, and social union of East and West Germany, the two states entered into a political union through the Unification Treaty (*Einigungsvertrag*) on August 31, 1990, under the authority of Article 23 of the Basic Law.[53] Accordingly, on October 3, 1990, the GDR ceased to exist and acceded to the territory of the FRG.[54]

The Unification Treaty stipulated that West German law was to take effect in its entirety unless otherwise provided in the Treaty itself.[55] The annexes to the Treaty set forth a number of

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50. *Id.*

51. *See, e.g.*, State Treaty, *supra* note 30, art. 28 (providing for FRG funds to be given to the GDR to balance the budget and pay for pension insurance).

52. GRUNDGESETZ [GG] art. 23 (FRG). Upon political unification, Article 23, dealing with the question of unification, was repealed because it had served its purpose. *See* Unification Treaty, *supra* note 13, art. 4(2).

53. As written in 1949, the Basic Law provided two mechanisms for later reunification. Traditionally, Article 146 of the Basic Law was viewed as the better way, if not the only way, to realize German unity. Article 146 provided that upon reunification, the Basic Law would be replaced by a new constitution adopted by a free decision of all German people. However, in light of the direction taken in the State Treaty, it became clear in the summer of 1990 that retention of West Germany's Basic Law was a more practical solution.

Article 23 of the Basic Law sets forth a second mechanism for German reunification by providing a means to extend the jurisdiction of the Basic Law. It provides that the Basic Law would become applicable to other territories upon their accession to the FRG. Precedent for the use of Article 23 in this manner can be found in the accession of the Saarland to the FRG in 1956. In that situation, a plebiscite was held by which it was determined through popular vote that the land should accede to the FRG. Thereafter, Article 23 was invoked as the means by which unification ought to be achieved. Accordingly, to facilitate the implementation of Article 23 and to prepare for the federal structure of the FRG, the GDR reinstated the previously disbanded states. *See* Ländereinführungsgesetz (Act on Re-establishment of Federal States in the GDR), July 22, 1990, 1990 GBl. I 995 (GDR).

54. Unification Treaty, *supra* note 13, arts. 1(1), (2), (3); *id.* art. 45.

55. *Id.* art. 8.

exceptions in detail. Annex I lists FRG laws that do not apply, or apply only in modified form, to the territory of the GDR.[56] Furthermore, the Treaty stipulates that with regard to certain subject matter, the laws of the GDR are to remain in effect.[57] Similarly, certain GDR statutes valid at the time the Treaty was signed remain valid to the extent that they are not inconsistent with the guidelines of the Basic Law.[58] Annex II builds on Annex I and enumerates East German statutes designated as federal law by the Basic Law. These laws may remain in force as state law in the new territory[59] if they are consistent with the Basic Law and pertain to subject matter not yet uniformly regulated by federal FRG law.[60]

Finally, the Unification Treaty itself contains rules of law and constitutional amendments. The Unification Treaty provided that upon the accession of the GDR to the FRG, the Basic Law and the civil rights listed therein would apply throughout the GDR.[61] Of the various newly-enacted statutory provisions found in the Unification Treaty, two are of particular importance: the Law Concerning Open Property Issues (Property Law),[62] and the Law Pertaining to Special Investments in the GDR (Investment Law).[63]

In addition to these two new statutory provisions, the Unification Treaty adopted the Joint Declaration on Open

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56. *Id.* Annex I. *See also* Annex I, art. 231(5). One such modification to West German law is the new permissive stance on certain divisions of ownership of land and the buildings and fixtures found on the land. Such arrangements were common under GDR property law, but prior to unification were disallowed in the FRG. BGB1. § 94.

57. Unification Treaty, *supra* note 13, art. 9.

58. *Id.* art. 9(1).

59. *Id.* art. 9(2).

60. *Id.*

61. *Id.* art. 4(1). Notably, the Basic Law was amended on a limited basis in order to adapt to reunification. Article 146 of the Basic Law was redrafted to reflect Germany's view that reunification was complete and that no further territorial claims beyond its borders were to be made. Similarly, Article 23 of the Basic Law, which called for reunification as a national goal, was repealed pursuant to Article 4(3) of the Unification Treaty.

62. Gesetz zur Regelung öffener Vermögensfragen, 1991 BGB1. I 957. The Property Law is incorporated into the Unification Treaty at Annex II, ch. III(B)(I)(1)-(2). It also appears in an earlier form at 1990 BGBl. II 885 [hereinafter Property Law].

63. Gesetz über besondere Investitionen in dem Artikel 3 des Einigungrvertrages genannten Gebiet, 1991 BGB1. I 994 (FRB) [hereinafter Investment Law]. The Investment Law is incorporated into the Unification Treaty at Annex II, ch. III(B)(I)(4). It also appears at 1990 BGB1. II 885. Although the Property Law and the Investment Law were formulated by the East German Volkskammer (Parliament) prior to the dissolution of the GDR, the Volkskammer was unable to ratify them individually prior to unification. Hence, insofar as they were first ratified as part of the Unification Treaty, they represent new statutes enacted by the treaty. *See* HORN, *supra* note 9, at 51, (1991).

Property Issues of June 15, 1990, (Joint Declaration).[64] The Joint Declaration set forth the basic principles that would guide the privatization process, and establish its scope and mode of operation.[65] The Joint Declaration is not a comprehensive, conclusive statement on property law. Instead, it provides general instructions regarding the legislative steps expected of the GDR.[66] It reserves for later resolution the details of the legislative process.[67]

The Joint Declaration raises a contentious issue by excluding from the privatization effort those expropriations conducted under Soviet authority from 1945 to 1949.[68] This provision was incorporated into Article 143(3) of the Basic Law, which expressly deems these expropriations valid.[69] Those who opposed this policy claimed that it represented a great injustice. As such, even though the expropriations occurred outside the temporal and physical jurisdiction of the German constitution, the government should not ratify such acts under the constitution or through a constitutional amendment.

C. *Legal Challenges to the Joint Declaration*

The constitutionality of excluding expropriations made between 1945 to 1949 from reprivatization has been challenged in three cases.[70] These cases were consolidated because of the similarity of their fact patterns and issues. In 1 BvR 1170/90, the plaintiff was heir to his deceased grandfather's real estate holdings in Sachsen-Anhalt. This property and the commercial

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64. Joint Declaration, *supra* note 13, art. 4(1).

65. *Id.*

66. *Id.* art. 13. Representative of these measures are the Verordnung über die Anmeldung vermögensrechtlicher Ansprüche (Regulation on the Registration of Property Claims), July 11, 1990, 1990 GBl I, 718 (GDR), *reprinted in* DAS DEUTSCHE BUNDESRECHT, *supra* note 45, at VF 53a, and Das Gesetz zur Regelung offener Vermögensfragen (Law Concerning Open Property Issues), October 3, 1990, 1991 BGB1. I 957 (as amended) *incorporated in* Unification Treaty, *supra* note 13, Annex II, ch. III B(I)(1)-(2).

67. Joint Declaration, *supra* note 13, art. 14.

68. *Id.* art. 1. This provision reads as follows:

> The expropriations made based upon the foundation of occupation law or occupation sovereignty (1945-1949) are not to be revoked. The governments of the Soviet Union and the German Democratic Republic see no possibility to revise the measures taken at that time. In light of the historical development, the Federal Republic of Germany takes notice of this position. It [the Federal Republic of Germany] is of the opinion that a final decision on any possible government compensation must be reserved for the future full German Parliament.

69. Unification Treaty, *supra* note 13, art. 4(5).

70. BVerfGE, *supra* note 1.

enterprise that stood upon it had been jointly owned by the plaintiff's father and grandfather. It was expropriated in 1945 pursuant to SMAG Order No. 124 because the plaintiff's father held a commission in the *Sturmabteilung* (*SA*) during World War II.[71] Thereafter, in accordance with SMAG Order No. 64 of April 17, 1948,[72] the entire remaining estate interests held by the grandfather were also confiscated.[73]

The plaintiffs in 1 BvR 1174/90 were either direct holders of or successors in interest to estates exceeding 250 acres.[74] Pursuant to the *Bodenreform*, these estates were expropriated, divided, and then redistributed.[75] Finally, the plaintiff in 1 BvR 1175/90 claimed to have been a holder of an estate exceeding 600 acres that was taken and transformed into people's property under the *Bodenreform*.[76]

In these cases, the government emphasized that during the negotiations with both the GDR and the Soviet Union, it became clear that the issue of reversing the Soviet expropriations was non-negotiable.[77] Convincing the GDR to rescind, to the extent possible, the expropriations that it had effected had proven difficult enough.[78] Both the GDR and the Soviet Union were of the opinion that under principles of public international law, nothing could be done about the Soviet expropriations.[79] Furthermore, because the nature of the compensation had not yet been determined, the government considered any proceeding in that respect premature.[80] Certainly, according to the government, nothing had risen to the level of a constitutional claim.

The government took the view that treating the Soviet and East German expropriations differently did not amount to an equal protection violation.[81] Because reversing the Soviet expropriations was non-negotiable, the only way constitutional

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71. *Id.* at 103.
72. SMAG Order No. 124, *supra* note 8.
73. SMAG Order No. 64, *supra* note 8. *See also* HORN, *supra* note 9, at 270-71 (1991).
74. BVerfGE, *supra* note 1, at 103.
75. *Id.*
76. *Id.*
77. *Id.* at 109.
78. *Id.*
79. *Id.* at 122-24. In essence, this principle is a territorial concept similar to the United States Act of State Doctrine, which recognizes the validity of actions undertaken by a foreign sovereign on that sovereign's territory even if those measures conflict with the legal norms of the nation sitting in review. *See also* BARRY E. CARTER & PHILLIP TRIMBLE, INTERNATIONAL LAW 631-96 (1991) (providing a detailed discussion of the United States Act of State Doctrine).
80. BVerfGE, *supra* note 1, at 112.
81. *Id.* at 111-12.

equality could have been achieved would have been to deny rescission to all victims of expropriation.[82] This course of action would have given no benefit to the claimants in the case at issue.[83] Interpreting the equal protection provisions of the Constitution teleologically, the government concluded that equal protection could not be construed so as to prevent the government from trying to achieve an optimal solution, even if not all aggrieved persons could be completely compensated.[84]

The claimants argued that the property provisions of the Joint Declaration deprived them of valuable, constitutionally protected liberty[85] and property rights.[86] Specifically, they argued that they were deprived of their claims as citizens of the FRG for rescission of wrongful expropriations, claims that would terminate once German reunification became effective. Moreover, they claimed that even if the expropriations themselves were left intact, the compensation provision, which stated only that compensation was to be paid but not specifically that full compensation was to be paid, was a clear violation of West German law. Finally, they argued that the provisions unreasonably distinguished between expropriations during the Soviet occupation and those made by the GDR itself and, thus, violated their right to equal protection.[87] In the view of the claimants, the constitutional amendment was impermissible because it violated a basic constitutional right.[88] Given that the Constitution had not been validly amended,[89] the laws and regulations adopted in the context of reunification, which could only be brought into conformity with the Constitution by means of the amendment, could not be constitutional.

In the decision of April 23, 1991, the German Constitutional Court (*Bundesverfassungsgericht*), which has the exclusive power to review the constitutionality of legislation, held that Article 143(3) of the Basic Law was valid.[90] Thus, the court pronounced

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82. *Id.* at 128-29.
83. *Id.*
84. *Id.*
85. GG art. 2(1) (describing the right to personal liberty).
86 GG art. 14(1) (describing the right to hold and inherit property).
87. GG art. 3(1) (describing the right to equal protection before the law).
88. GG art. 19(2) (describing the power to restrict basic rights).
89. GG art. 79 (describing the amendment of the Basic Law).
90. BVerfGE, *supra* note 1. Unlike the common law system in which nearly all cases appear in the first instance before ordinary courts, the civil law system assigns the determination of several important dispute types to one or more hierarchies of special courts. Standing separate from and above all of these is the German Constitutional Court. It alone has the power to decide the constitutionality of statutes. RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW: CASES-TEXT-MATERIALS 358 (4th ed. 1980) (discussing civil law practice).

that recognition of the continued validity of the Soviet expropriations did not violate the Basic Law.[91] The Joint Declaration did not violate the Constitution because the new Article 143(3) explicitly upheld these expropriations.[92] Thus, the only way that the plaintiffs' claims could have been justified would have been if Article 143(3) itself were void.[93]

The court reviewed the procedure by which Article 143 had been adopted and concluded that there had been no procedural violation that might render the provision void.[94] Substantively, the court examined Article 143(3) in light of the standard of Article 79(3), which prohibits constitutional amendments that, *inter alia*, violate Articles 1 or 20 of the Constitution.[95] Articles 1(3) and 20 of the Constitution, respectively, provide for the protection of human rights and the institution of democratic federal institutions. Among the human rights protected are those of equal protection (*Rechtsgleichheit*) and freedom from arbitrary governmental action (*Willkürverbot*).[96] The court stated that the new Article 143(3) would have been void only if it could be interpreted as denying the application of Article 79(3); however,

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There are three different means by which an issue may reach the German Constitutional Court. Upon the request of the federal government, a state government, or a specified number of legislators, the Constitutional Court must determine a statute's constitutionality even when no case or controversy exists—in essence it must render an advisory opinion. *Id.* at 358. An issue may come before the Constitutional Court by way of a judicial referral. *Id.* at 358. When a lower court determines that an issue reserved to the Constitutional Court is important to an instant case, the lower court must refer that issue to the Constitutional Court, which decides that particular issue. Thereafter it returns the record to the referring court which may then proceed to deal with all other matters. An issue may also come before the Constitutional Court via a constitutional complaint. *Id.* at 359. This option, which accounts for the vast majority of the court's case load, may be employed by any person who asserts a claim of injury by unconstitutional official action. However, to invoke this remedy, a person must have first exhausted all other available judicial remedies. *Id.*

91. BVerfGE, *supra* note 1, at 118-119. To be valid, an amendment to the Basic Law must adhere to Article 79(3) which nullifies any amendments that violate certain human rights. The court held that Article 143(3) violated neither the parameters of Article 79(3) nor 79(1), which set forth the formal requirements needed to amend the Basic Law, and was therefore acceptable. *Id.* at 119, 121. *See* Michael Gruson & Georg E. Thoma, *Investments in the Territory of the Former German Democratic Republic: A Change of Direction*, 14 FORDHAM INT'L L. J. 1139 (1991); HORN, *supra* note 9, at 58-61.

92. BVerfGE, *supra* note 1, at 199. Article 143(3) expressly refers to Article 41 of the Unification Treaty, *supra* note 13, which in turn incorporates the Joint Declaration in Annex III thereof.

93. BVerfGE, *supra* note 1, at 188.

94. *Id.* at 119.

95. BVerfGE, *supra* note 1, at 121.

96. *See* GG arts. 3, 20; *see also* BVerfGE, *supra* note 1, at 121.

the court concluded that the article could not be so interpreted.[97] Consequently, the court held that Article 143(3) was acceptable and that the policy of not reversing Soviet expropriation was permissible.[98] However, inasmuch as the Unification Treaty provided for compensation to those whose holdings were taken between 1945 and 1949 on a basis other than occupation law, the Court held that the equality clause of Article 3 of the Constitution required that certain compensatory payments also be made to claimants whose holdings were taken under occupation law in that period.[99]

These cases demonstrate the complexity of the current legal environment in Germany, which is created by the interweaving of GDR, FRG, and treaty law. Its complexity presents a daunting prospect to potential investors, who must conform to provisions stemming from several, varied sources of law; the resulting legal uncertainty is a deterrent to investment.[100] This effect is unfortunate because the basic approach to privatization and the legislation passed in execution thereof are problematic enough.

IV. PRIVATIZATION

A. *Basic Concepts of Private Property Ownership in the FRG*

Most of the civil codes created during the democratic revolutions of the nineteenth century were driven by a desire to strip the landed aristocracy of its power and privileges and to make real property as freely available and marketable as possible.[101] These codes were motivated by the idea that property eventually would find itself in the ablest and most fitting hands.[102] To achieve this goal, the right of private property ownership was separated from the owner's status and office. Influenced by the theory that private property was a natural right rather than a privilege granted by a sovereign—who could at best place limitations on the right—the right of ownership was altered

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97. BVerfGE, *supra* note 1, at 120.

98. *Id.* at 121-22.

99. *Id.* at 129.

100. The four sources of German law governing the behavior of investors are FRG law, FRG law modified by provisions within the Unification Treaty, similarly modified GDR law, and the law of the five new states which basically corresponds to GDR law that survived unification.

101. *See, e.g.*, Max Rheinstein, *Some Fundamental Differences in Real Property Ideas of the 'Civil Law' and the Common Law Systems*, 3 U. CHI. L. REV. 624, 625 (1935-1936); SCHLESINGER, *supra* note 90, at 634.

102. Rheinstein, *supra* note 101, at 625.

to negate any reversionary interest in the overlord.[103] Likewise, most future interests, which originated under feudal regimes, were summarily abolished.[104]

In general, the German Civil Code allows several people to own real property in common or jointly.[105] In some instances, the Civil Code also allows separate ownership of a building and the property on which it stands.[106] Generally, however, ownership interests generally cannot be split into successive estates or divided into legal and equitable interests.[107] All rights granting less than full ownership are viewed as mere restrictions or encumbrances on the title of an owner.[108] As a result, the *numerus clausus*, essentially an exhaustive list of all permissible encumbrances, developed.[109] The *numerus clausus* precludes the creation of rights or interests in property other than those specifically listed.[110] These concepts created a system of real property transfer characterized by fast, secure transfers.[111]

The system's inherent functional qualities were further improved by the introduction of a registration system. This system requires that all transfers in immovable property must be recorded in the Land Registry (*Grundbuch*) either through a new entry or the cancellation of an existing entry.[112] Under this registration system, the parties also must reach an agreement that officially completes the transfer.[113] However, the agreement may be superseded by other legal forms such as court judgments or the doctrine of prescription.[114]

No registration entry is required when rights are transferred by law.[115] In such situations, the new owners acquire title rights automatically, but they must apply to the *Grundbuch* to correct the information in the Land Registry.[116] If a right has been registered in the *Grundbuch* in the name of any person, there is a rebuttable presumption that the right to title exists and the property belongs to the named person.[117] Conversely, if a right in

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103. SCHLESINGER, *supra* note 90, at 634.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 635.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* The *Grundbuch* is not a registry of deeds. Rather, it registers titles and the status of the referenced real property.
113. *Id.* at 636.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*

the *Grundbuch* has been canceled, there is a rebuttable presumption that the right of the named person no longer exists.[118] Additionally, the concept of good or public faith (*öffentlicher Glaube*) gives the purchaser of real immovable property further security.[119] Section 892 of the German Civil Code stipulates that inter vivos transfers of immovable property are deemed valid unless the transferees know of their inaccuracy.[120] This presumption does not depend upon the transferees' reliance on the *Grundbuch* entries.[121] Provided that a transferee knows nothing of the *Grundbuch*'s inaccurate entries, the transferee is in all cases protected. This protection is heavily weighted in the transferees' favor.[122] Accordingly, transferees are protected in all cases in which they were not certain that the entries were false.[123] They have no duty of inquiry and no duty of care.[124] In fact, even when the transferees have no knowledge of the *Grundbuch*'s entries, the transfers are presumed valid.[125]

The proper operation of this registration system relies heavily upon competent and incorruptible notaries and registrars. If fraudulent entries are easily arranged, the presumption of validity of those entries would cause land fraud to proliferate. Strong bulwarks against such fraud are found in the ability to invoke state liability for the intentional or negligent wrongdoing of its officials[126] or to recover from the notaries' liability insurance.[127]

Generally, the property system of the FRG provides a relatively simple mechanism designed to respond swiftly and smoothly to the demands of a free capitalist system. This system was designed, and adopted for, the preservation of absolutely free, yet structured, alienability of real property.

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118. *Id.*
119. *Id.* at 637.
120. *Id.* at 637.
121. *Id.*
122. *Id.* at 638.
123. *Id.*
124. *Id.*
125. *Id.*
126. *See* GG art. 34. When any public officials in performance of their duties violate their official obligations to third parties, the state will be liable. If the officials acted intentionally or negligently, the officials are personally liable, and both the victims and the state may take action against the officials. *See also* SCHLESINGER, *supra* note 90, at 511.
127. Section 19 of the Federal Notary Regulation (*Bundesnotarordnung*) provides an exception to GG Article 34. It requires the notaries themselves to be responsible for their torts and removes any state liability for their torts. *See* SCHLESINGER, *supra* note 90, at 644.

B. *Socialist Concepts of Property Law in the GDR*

Understanding the nature and scope of the privatization effort requires an awareness of the fundamental concepts that formed and supported the old socialist property law in the GDR. According to the old GDR Constitution, means of production could exist only as socialist property, referred to as people's property (*Volkseigenes Vermögen*).[128] Consequently, private trade and entrepreneurial initiative were largely excluded from economic life. Moreover, the GDR Civil Code adopted the same philosophy with regard to property and created a property system hostile to free trade.[129] This system was characterized by the distinct advantages it bestowed on socialist property which, unlike private property, could not be transferred or encumbered and which was immune to bankruptcy.[130] In effect, this system treated all property as state property insofar as the state was the representative of the socialist society.[131] Under this philosophy, "ownership" actually referred to a form of trusteeship. The "trustee" acquired various rights including possession, use, and disposition.[132] However, transfer could occur only if it preserved the socialist nature of the property and the property's assigned function under the planned economy. Consequently, transfer could only take place if the property were deeded to either another socialist economic entity or a governmental office.[133] Property could not be transferred to private individuals.[134]

Two provisions in the GDR Civil Code operated as exceptions to the general rules regarding socialist property. Under East German law, real estate typically included all buildings and fixtures found upon it.[135] However, under certain circumstances, the Civil Code allowed the ownership of buildings and fixtures to be separated from the land upon which they stood.[136] The Code also provided for various easement rights vis-à-vis people's property.[137] These rights existed for an indefinite period and could be transferred by deed or bequest as long as the right-holder paid the appropriate fee and used the property for purely personal purposes.[138] One could acquire these rights either

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128. *See* HORN, *supra* note 9, at 158.
129. *Id.*
130. *Id.* at 158.
131. *Id.* at 157-59.
132. *Id.* at 159.
133. *Id.*
134. *Id.* at 157-59.
135. *Id.* at 160.
136. *Id.* at 160-61.
137. *Id.* at 161.
138. *Id.* at 162.

directly from the government through application or by contract between private parties.[139] Not only did these provisions give many individuals the only chance to acquire their own homes, but they also created the rare instances that tolerated individual private initiatives.[140] Additionally, the government benefited to the extent that the burden on the state housing authority was partially relieved.[141]

When the State Treaty entered into force, the GDR abandoned this system in its entirety (subject only to certain exceptions) and adopted a system based on the right to private property as set forth in Article 14 of the Basic Law.[142] However, the Unification Treaty recognizes that those who had legally acquired the houses in which they lived but not the land on which the houses stood are vulnerable to restitution claims. The Unification Treaty expressly preserves this form of divided real estate ownership.[143]

C. *The Dissolution and Privatization of Socialist Holdings*

The process of privatization in the GDR had already begun prior to unification. Legislation enacted by the East German Parliament (*Volkskammer*) for the purpose of transforming and transferring socialist property dealt primarily with four policies.[144] First, the most pressing task involved creating a system in which socialist property could be transformed into private property under the operation of law. Accordingly, early legislation entailed the recognition of private property holdership and the free alienability of private property wherein the assignee assumed the legal rights, duties, and benefits of the assignor.[145] However, legislation drafted in pursuit of this goal did not address the issues of unjust expropriation or restitution therefor.[146] In fact, Article 24(1) of the Law Concerning the Privatization and Reorganization of People's Property—Trust Act (Trust Act) expressly precludes the issue of restitution from its scope of authority and reserves it for more precise subsequent

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139. *Id.* at 160-63. These rights were not available for business purposes.
140. *Id.* at 164.
141. *Id.*
142. State Treaty, *supra* note 30, Annex IX, art. 2.
143. Unification Treaty, *supra* note 13, Annex I, art. 231(5).
144. These were as follows: transition from Marxist to free market property systems, restitution of certain expropriations, creation of a system for free alienation, and the preservation of certain property rights which were to survive unification—i.e., the split ownership of real estate and the building standing thereon. *See* HORN, *supra* note 9, at 184-85.
145. *Id.* at 184.
146. *Id.* at 185.

legislation.[147] Second, restitution would be addressed on a case-by-case basis, and restitution awards would be the exception rather than the rule.[148] Third, GDR legislation, with the Trust Act at its center, sought to form the foundation for legal transactions and transfers of socialist property to private parties.[149] The problem with this third policy, however, lies in the fact that the restitution issue had not been adequately resolved by GDR legislation. Therefore, a claim for restitution could very well adversely affect either the transferee or the rightful owner.[150] The risk of such a suit generally discouraged land transactions, retarded investment, and slowed economic recovery as well as the transition to a free market economy.[151] Finally, during the transition period, East German legislators wanted to strengthen and clarify certain old socialist property relationships, particularly those stemming from the Land Reform of 1946.[152]

D. *Reconveyance as the Fundamental Principle of Privatization*

Private investment is necessary to generate the amount of capital required to modernize Eastern Germany.[153] However, the basic approach to privatization adopted by East and West Germany has created the danger that former owners whose property was expropriated under the GDR or Third Reich might attempt to reclaim that property or demand compensation. Consequently, the acquisition of clear title is uncertain, and investors are reluctant to risk large sums of capital. Such reluctance to commit capital has stunted investment and significantly impeded economic growth in eastern Germany.

To address these concerns, the Joint Declaration provided guidelines for restitution issues.[154] Thereafter, the Unification Treaty sought to implement these policies and to correct oversights in the GDR legislation through the passage of two new statutes: the Law Concerning Open Property Issues (Property

147. Trust Law, *supra* note 45.
148. HORN, *supra* note 9, at 185.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. The term "private investment" represents the process wherein private entrepreneurs commit private funds to a business venture with the ultimate goal of creating a more lucrative enterprise. In the instant case, it entails the purchase of potentially competitive East German concerns and reorganizing their internal operations to match the business tactics of western companies.
154. Joint Declaration, *supra* note 13.

Law)[155] and the Law Pertaining to Special Investments in the GDR (Investment Law).[156]

1. The Property Law: Clearing Title to Real Estate

The driving principle behind the Property Law is restitution—the principle that expropriated property meeting certain qualifications should be reconveyed to the rightful owners or their successors.[157] To qualify, the land must have been taken through official state action and transferred into state ownership or, in the case of refugees, into public administration.[158] State action constituting an expropriation created the following categories of property:

> 1(1)a) Property expropriated for insufficient or no compensation and transferred to state ownership;
> 1(1)b) Property which after transfer to state ownership was then transferred to a third person by the government or a public administrator of the property;
> 1(1)c) Property transferred to state ownership based on the decree of the Council of Ministers of February 9, 1972;[159]
> 1(2) Buildings on real estate transferred to state ownership due to excessive indebtedness resulting from insufficient rent collection;[160] and
> 1(3) Property taken by the government or a third party by means of misuse of power, corruption, duress, or deception.[161]

According to section 2(2) of the Property Law, "property" includes interests such as real estate, rights in real estate (easements and mortgages), chattels, claims against debtors (including credit

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155. Property Law, *supra* note 62.

156. Investment Law, *supra* note 63.

157. Although the possibility for compensation payments exists, the payment of compensation in lieu of restitution is to occur only if restitution is impossible or counterproductive to economic modernization. Joint Declaration, *supra* note 13, art. 3.

158. Property Law, *supra* note 62, § 1(4). Public administration was a means whereby the government denied the owner his absolute property right but technically expropriated nothing.

159. Starting in 1956, many companies were required to change their legal composition and accept the government as a limited partner. The prior owner became the general partner. Regulation of March 26, 1959, *supra* note 22. As the a result of the unpublished 1972 decree mentioned above, the rights of the general partners were taken and transferred to the government. *See* HORN, *supra* note 9, at 273.

160. Rent levels were mandated by the government in furtherance of a general housing policy. *See* HORN, *supra* note 9, at 230.

161. Property Law, *supra* note 62, § 1. Section 1(6) also extends the Property Law's scope to embrace restitution claims founded on expropriations made between 1933 and 1945 as a result of racial, political, ideological, or religious persecution.

balances), and equity interests in corporations.[162] However, the Property Law does not provide restitution for real estate that farmers were required to "contribute" to agricultural collectives in compliance with GDR statutes.[163]

The Property Law generally operates on the principle that expropriated holdings should be returned to the rightful owner. The rightful owners or their successors have a right to reconveyance of any property taken from them as a result of the aforementioned acts. This principle holds true even when expropriated property was later transferred from the East German government to a third party.

While the rightful owner also has the right to choose compensation instead of restitution,[164] several broad exceptions to the reconveyance of property exist. To avoid excessive erosion of the restitution principle, the exceptions were rarely made and compensation payments were awarded only when restitution was impossible or not feasible.[165] Notwithstanding the owners' right to choose restitution as a remedy, such claims were not permitted when:

> 4(1) [R]estitution is excluded by circumstances;
> 4(2) [P]roperty has been acquired, or encumbered with usufructuary rights, by individuals, religious or other nonprofit organizations in good faith;[166]
> 5(1)(a) [R]eal estate or a building has been changed significantly before [September 29, 1990], and it serves a public interest;
> (b) [R]eal estate has been dedicated to the general public for its use;
> (c) [Real estate] has been integrated in a housing development or business before [September 29, 1990]; or

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162. *Id.* § 2(2).

163. The farmer retained title to the land but granted the collective the right to use the land. *See* Gesetz über die Landwirtschaftlichen Produktionsgenossenschaften-Pflichtinventarbeitrag (Law Concerning Agricultural Collectives), July 2, 1982, 1982 GBl. I, 25, 443, *as amended* March 6, 1990, 1990 GBl. I, Nr. 17, 133, and June 28, 1990, 1990 GBl. I, 483, § 19 (GDR). All improvements made by the collective accrued to the benefit of the collective and not the legal land owner. *Id.* § 27. This situation is addressed by the Gesetz zur Anpassung der Landwirtschaft an die soziale Marktwirtschaft, (Law Concerning the Structural Adjustment of Agriculture to the Social Market Economy), June 29, 1990, 1990 GBl. I, at 642 (GDR) *adopted by* Unification Treaty, *supra* note 13, Annex II, ch. IV, II(1). Having survived reunification, this statute re-establishes private ownership of agricultural land. It also permits the farmer to terminate his membership in the collective and to reclaim private ownership of the land that he contributed. *See* Gruson & Thoma, *supra* note 91, at 555. *See also* HORN, *supra* note 9, at 270-74.

164. Property Law, *supra* note 62, § 8.

165. *Id.* §§ 4-5.

166. *Id.* § 4. This exception does not apply to real estate if the transaction occurred before October 18, 1989.

> (d) [T]he premises are used commercially in an enterprise, and reconveyance would have adverse effects upon that enterprise.[167]

Although the use of the term "circumstances" in Section 4(1) is vague, Section 5 circumvents the problem by expressly listing circumstances under which restitution will not be available. Furthermore, a business will not be reconveyed to its former owner if, due to technological and economic advances, the current enterprise is no longer comparable to the business at the time of expropriation.[168] However, if the enterprise is deemed comparable and is reconveyed, but has undergone a change in value, the rightful owner is entitled to receive partial compensation from the secondary owner as an adjustment for any decrease in value. Conversely, if the enterprise has increased in value due to public GDR funding, the rightful owner must pay an adjustment to the Trust Agency.[169]

As stipulated in Section 4(2) of the Property Law, good faith acquisition is a valid defense to restitution claims. In such cases, the rightful owner is entitled either to compensation or to an alternate plot of real estate.[170] The concept of good faith is defined indirectly in Section 4(3), which outlines three sets of circumstances that bar a finding of good faith acquisition. First, good faith is absent if the acquiror "knew or should have known that his acquisition was not in compliance with the regulations, procedures, and orderly administrative practices of the former GDR in effect at the time of the acquisition."[171] Second, a good

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167. *Id.* §§ 4-5.

168. *Id.* § 6.

169. *Id.* § 7. For rules applying to computation of value see *id.* §§ 6, 12.

170. *Id.* §§ 4(2), 9. Section 9(1) refers to compensation in cash, while § 9(2) addresses the question of alternate real estate. According to § 4(2), the good faith defense does not apply to real estate and buildings acquired after October 18, 1989, when the acquisition should not have been approved by virtue of §§ 6(1)-(2) of the Verordnung über die Anmeldung Vermögensrechtlicher Ansprüche (Regulation Concerning the Filing of Property Claims), July 11, 1990, 1990 GBl. I, at 718, *amended by* 2. Verordnung über die Anmeldung vermögensrechtlicher Ansprüche (Second Regulation Concerning the Filing of Property Claims) August 12, 1990, 1990 GBl. at 1260 (GDR), *and* 3. Verordnung über die Anmeldung vermögensrechtlicher Ansprüche, (Third Regulation Concerning the Filing of Property Claims), October 5, 1990, 1990 BGBl. I at 2150 (FRG), *published in* Bekanntmachung der Neufassung der Verordnung über die Anmeldung vermögensrechtlicher Ansprüche, October 11, 1990, 1990 BGBl. I 2162 (FRG) [hereinafter Filing Regulation]. Section 6 provides that consent of the rightful owner is necessary to attain governmental approval for the sale of real estate subject to governmental administration. Section 6(2) of the regulation also stipulates that governmental approval may not be given until the ownership claim of the rightful owner has been resolved. *See* Gruson & Thoma, *supra* note 91, at 555; HORN, *supra* note 9, at 221-25 (1991).

171. Property Law, *supra* note 62, § 4(3)(a).

faith defense is barred when the buyer "influenced the acquisition by corruption or a personal position of influence."[172] Finally, good faith cannot be found if the buyer "took advantage of a situation of coercion or deception of the rightful owner."[173] The Property Law thus indirectly defines good faith by providing examples of activities that preclude a good faith defense. Conspicuously absent from this list is the situation in which the acquiror knew that the property previously belonged to another party and was expropriated by the government. Therefore, the knowing acquisition of expropriated property apparently does not bar a good faith defense.

2. The Investment Law

Another class of exceptions to the principle of restitution was created through the incorporation of the Investment Law in the Unification Treaty. As a general principle, the Investment Law provides that under certain circumstances, formerly state-owned real estate may be sold by the current holder even though restitution claims have been or may still be filed by the rightful owner.[174] The Investment Law creates a preference for the current holder of real estate over any prior holder if the real estate is required: "to ensure or create employment, particularly through the establishment of a business;"[175] "to meet significant housing needs;"[176] or "to develop the infrastructure required" for either of the first two activities.[177]

In order to qualify for the preferential status, the current holder must present a plan outlining the planned investment.[178] The appropriate local administration will examine the plan and determine the ability of the present holder to execute the offered investment plan.[179] If the present holder is deemed reasonably capable of executing the plan, the local administration will issue a certification for special investment purposes.[180] However, before

172. *Id.* § 4(3)(b).
173. *Id.* § 4(3)(c).
174. Investment Law, *supra* note 63.
175. *Id.* § 1(2)(a).
176. *Id.* § 1(2)(b).
177. *Id.* § 1(2)(c).
178. *Id.* § 1(3). The applicant had to apply for the investment certification and submit such a plan by December 31, 1992. However, the deadline for application was extended to December 31, 1993, following the passage of the Das Gesetz zur Beseitigung von Hemmnissen bei der Privatisierung von Unternehmen (Law Governing the Removal of Impediments to the Privatization of Enterprises) March 22, 1991, 1991 BGBl. I at 766 (FRG) [hereinafter Impediments Removal Law]. For a more detailed discussion, see *infra* text notes 240-54.
179. Investment Law, *supra* note 63, § 2(1).
180. *Id.* § 2(1).

issuing the certification, the municipality must hold a hearing if any previous owner presents a claim for restitution.[181] Additionally, a certificate may not be issued if a valid judgment from a competent authority orders restitution.[182] Likewise, the Land Registry may not record a transaction based on such a certification if an administrative or judicial proceeding to nullify the certificate has already commenced.[183]

If the present owner holds a certificate for special investment, the former owner may not prevent the sale or transfer of the land in question. However, the former owner may demand compensation in the amount of the proceeds from the sale or fair market value.[184] While the procedure for acquiring an investment certificate is long and complicated, it does provide potential investors with a fair degree of certainty. If an investor has duly acquired and recorded such a certificate, he may develop the property free from fear of any obligation to return it to a former owner.

3. Compensation in Lieu of Restitution

In certain cases, compensation is the only means available to recover damages for expropriation losses.[185] After the deadlines[186] for the filing of restitution claims have lapsed, property for which no claims have been filed may be sold to third parties, thereby excluding restitution.[187] In such cases, the rightful owner is entitled to cash compensation in the amount of the proceeds from the sale or equal to the property's fair market value.[188] Consequently, even though a deadline may have lapsed, a dispossessed claimant still should file a claim. As long as the property has not been acquired by a third party and an investment certificate has not been issued, a claim for compensation may succeed.[189] Under the Property Law,[190] a

181. *Id.*
182. *Id.*
183. *Id.* § 2(4).
184. *Id.* § 3(1).
185. *Id.* §§ 4-5.
186. The deadline for claim filings based on expropriations made between January 30, 1933, and May 8, 1945, was March 31, 1991. The deadline for all other claim filings was October 13, 1990. *See* Filing Regulation, *supra* note 170, §§ 1(1), 1(2)(a), 3.
187. Property Law, *supra* note 62, § 3(4).
188. *Id.*
189. *Id.*
190. *Id.* §§ 10, 22(2). *See also* Joint Declaration, *supra* note 13, art. 13(c) (announcing the establishment of a compensation fund). Although a compensation fund had not been included in the first version of the Property Law, it has since been established through § 29a(1) of the Impediments Removal Law,

claimant may receive cash compensation even if restitution has been foreclosed.[191]

4. The Assertion of Property Claims: Procedural Aspects

Restitution claimants must file claims in writing with either the Office of the District Magistrate or the City Administration as dictated by the property's location. Each claim must identify the nature, size, value, and location of the property. Furthermore, all heirs and successors to a property must be identified. Filing regulations stipulate two deadlines by which all property claims must have been filed. The first deadline pertained to all claims based upon expropriations committed under the GDR government. It required all filings to be submitted by October 13, 1990. The second deadline referred to all property claims based upon expropriations committed under the Nazi regime and barred any filings after March 31, 1991.[192] Before these deadlines, no one could dispose of illegally acquired holdings without transferring a potential claim for restitution with the property.[193] With the implementation of the deadlines, that is no longer possible unless claims had been timely filed.[194] Nevertheless, current holders have a duty to ascertain whether claims for restitution have been filed regarding their holdings.[195] If a claim has been filed, no transactions may be executed nor may any encumbrances be attached to the property without the approval of the claimant.[196] If such action is taken without the required approval, then any new taker holds an interest subject to any restitution claim.[197] The passage of the deadlines does not necessarily mean that no claim will be filed. Until the current holders have conveyed their holdings to third parties, former owners may still assert rights to compensation or actual

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supra note 178. For a more detailed discussion of the amendments, see *infra* notes 239-53 and accompanying text.

191. For an in-depth study of exceptions to restitution, see HORN, *supra* note 9, at 246-52.

192. Filing Regulation, *supra* note 170, § 2(1) (regarding where claims are to be filed); *id.* § 3 (regarding filing deadlines); *id.* § 4(1) (regarding the content of claims).

193. See Property Law, *supra* note 62, § 3 and the Investment Law, *supra* note 63.

194. Property Law, *supra* note 62, §§ 3(4), 11(2), § 11(4) (pertaining to a claimant's right to the sale proceeds or fair market value).

195. *Id.* § 3(5).

196. *Id.* § 3(3). Note, however, that the Impediments Removal Law, *supra* note 178, § 3(3), has since excepted from this provision those actions necessary for the preservation of the holding.

197. Property Law, *supra* note 62, § 3(1).

restitution.[198] Consequently, current holders are not secure until they have transferred their holdings without contest. Likewise, transferees are secure only if they received the property in question after October 13, 1990, and the transaction were not contested.[199]

E. *The Trust Law: Privatization of Socialist Enterprises*

The Law Concerning the Privatization and Reorganization of People's Property (Trust Law) became effective in the FRG on July 1, 1990, and was based on the economic policies set forth in the Unification Treaty.[200] As its first function, the Trust Law created the Trust Agency—a system of holding corporations designed to administer the people's property during the transformation process.[201] The goals of the Trust Law are: to privatize the people's property as quickly as possible; to establish competitiveness in small and mid-sized enterprises; to make real estate available for business; to secure and create new jobs; to ascertain the financial status of the people's enterprises; and to assess the profitability of the enterprises and their ability to survive in the social market economy.[202] In executing its duties, the Trust Agency may use all commonly available market tactics[203] to establish the enterprises on sound financial bases.

Upon unification, the Trust Agency became a government agency of the united Germany. The Trust Agency was integrated into the federal bureaucracy as a sub-unit of the Ministry of Finance.[204] Operational command of the Trust Agency is divided between an executory board, which is responsible for daily operations, and an administrative board, which guides and supervises the executory board.[205] When the Trust Law became effective in the FRG, the Trust Agency assumed proprietorship

198. *Id.* § 3(4).

199. *See* HORN, *supra* note 9, at 240-45; Gruson & Thoma, *supra* note 91, at 540.

200. Trust Law, *supra* note 45, § 1. *See generally* Elling, *supra* note 2, at 623-39 (discussing the trust law and Trust Agency).

201. Trust Law, *supra* note 45, § 2.

202. *Id.* pmbl., § 11.

203. *Id.* §§ 2(7), 8, 9(4). The suggested tactics include raising credit, issuing bonds, and selling interests.

204. Unification Treaty, *supra* note 13, art. 25(1). The Ministry of Finance works closely with the Ministry of Commerce and other appropriate governmental bodies.

205. *Id.* art. 25(2). *See also* Trust Law, *supra* note 45, §§ 4(1), 3(1)-(2). The administrative board consists of twenty members; fifteen are appointed by the government and the five new states each send one delegate. The executory board is staffed by the president of the Trust Institution and four other members appointed by the administrative board.

over all people's property that had begun privatization under earlier GDR law.[206] Additionally, the Trust Agency automatically acquired control over all people's property that the GDR had begun to privatize under its own law.[207]

Thereafter, the Trust Agency placed all the people's enterprises under the supervision of holding companies.[208] These holding companies were responsible for the actual restructuring of the enterprises[209] and recreated the enterprises as "corporations under construction."[210] This designation is necessary because the corporations were created by act of law rather than through the registration of incorporation documents. Sections 19 to 22 of the Trust Law are designed to compensate for this fact by requiring incorporation documents to be filed retroactively.[211] According to these provisions, the corporations under construction were required to submit drafts of the following papers to the Trust Agency: documents of association, the closing and opening balance sheets from the date of conversion, a financial statement, a status report, and a report on real estate held by the company.[212] Thereafter, the corporations under construction had to register the final documents of incorporation[213] with the commercial registry before June 30, 1991.[214] Once these papers have been submitted, the designation "under construction" is removed, and the corporations are deemed fully privatized.[215]

During this initial phase, the Trust Agency, as legal owner of the new corporations,[216] is required to prepare the corporations for entry into the competitive market. If necessary to do so, the

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206. Beschluß vom. 1. März 1990 zur Gründung der Anstalt zur treuhänderischen Verwaltung des Volkseigentums (Decree of March 1, 1990 Concerning the Establishment of the Institute for the Trustee Administration of People's Property) 1990 GBl. I 107 (GDR) [hereinafter Trustee Administration Decree].

207. Trust Law, *supra* note 45, § 11(2).

208. *Id.* § 1(4).

209. *Id.* § 6.

210. *Id.* §§ 11(1), 14. According to section 11(1), the conglomerates (*Kombinate*) were to be classified as stock corporations (*Aktiengsellschaften*), while individual companies within the conglomerates were classified as limited liability companies (*Gesellschaft mit beschränkter Haftung—GmbH*). Section 14 mandates the designation as "corporations under construction." *Id.* § 14.

211. *Id.* § 19. *See also id.* §§ 20-21.

212. *Id.* § 20

213. *Id.* § 21. These documents must include the shareholders' charter, an opening balance, a financial report, and an auditor's report.

214. *Id.* § 22. If the measures had not been taken and the final incorporation documents had not been submitted by this deadline, the corporation faced dissolution.

215. *Id.* § 21(3).

216. *Id.* § 1(4).

Agency will dismantle the conglomerates, thereby allowing the salvageable sub-units to become independent economic units and facilitating the liquidation of unprofitable sectors.[217] This process contributes to capitalization, that occurs primarily through the transfer of assets held by the conglomerate's sub-units to the new limited liability companies into which the sub-units were transformed.[218] Additionally, the Trust Law provides for capital to be generated through the sale of shares or interests in the enterprise.[219]

A problem arises, however, with respect to the question of capitalization. In many instances, these two sources of capital are inadequate to meet the start-up needs of the new corporation. When a new corporation has a balance sheet showing more liabilities than assets, the corporation would normally be required to declare bankruptcy. However, because a bankruptcy filing would defeat the purpose of privatization, the legislature has created an exception. The Deutsche Mark Opening Balance Sheet Law[220] provides that a company may adjust its opening balance sheet with an interest-bearing adjustment claim against the owner of the company—generally the Trust Agency.[221] This claim must equal the amount of the capital deficiency. However, it creates no new equity. The award of such a claim to the applicant company depends upon the company's prospects for survival.[222] If the Trust Agency determines that the company's prospects for rehabilitation are weak, it must deny the application.[223]

Conscientious observance of these guidelines and full compliance with the statutory requirements result in the creation of new enterprises capable of functioning in a free market system. Thus, a technically complete transformation of socialist property is envisioned by the Unification Treaty and implemented by the

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217. *Id.* § 2(6). *See also id.* § 8(l) (regarding liquidation of unprofitable or unsalvageable enterprises). For a discussion of this process, see HORN, *supra* note 9, at 376-77.

218. Trust Law, *supra* note 45, § 11(2). However, this transfer does not effect any subsequent restitution claims. *Id.* § 24(1).

219. *Id.* § 8(1).

220. Gesetz über die Eröffnungsbilanz in Deutscher Mark und die Kapitalneufestsetzung (D-Markbilanzgesetz) (Law on Opening Balance Sheet in Deutsch Mark and the New Determination of Capital), September 23, 1990, 1990 BGBl. II at 885 (FRG), *amended by* Gesetz zur Beseitigung von Hemmnissen bei der Privatisierung von Untenrehmen und zur Fördering von Investitionen, BGBl. I 776 (Impediments Removal Law), April 18, 1991, 1991 BGBl. I 1971 (FRG) [hereinafter Opening Balance Sheet Law].

221. *Id.* § 24(1).

222. *Id.* § 6(1).

223. *Id.* § 24(1). The decision of the owner must be based upon an examination of the applicant's economic condition and potential for improvement.

Trust Law. However, this statutory transformation does not conclude the overall privatization effort. These newly-formed companies must still be placed in the private sector. Indeed, the concept of privatization presented in the Unification Treaty and the Trust Law[224] foresees placement in the private sector as the ultimate goal; such placement provides the only means of guaranteeing the autonomy of entrepreneurial decisionmaking. Because the formal restructuring of the socialist enterprises in no way affects the restitution claims of prior owners, the Trust Law circumvents only one of the obstacles to economic recovery in the former GDR—structural adaptation. Unless the more daunting question of true ownership is resolved, the Trust Agency will not be able to attract investors to the new, capital-hungry corporations it has created.

V. AMENDMENTS OF 1991

Shortly after the Unification Treaty and the accompanying laws went into effect, it became clear that investment in the former GDR was not occurring at a level necessary for rapid modernization of the economy.[225] The anemic investment primarily resulted from confusion surrounding the acquisition of clear title to real estate. The difficulty of obtaining clear title and the resulting weak investment were exacerbated by the labyrinthine body of legislation which was poorly designed and set conflicting goals. These factors impaired the ability of the Trust Agency to perform its assigned task of privatization.[226]

The provisions of the Investment Law were inadequate to stimulate investment, particularly by current holders of real estate subject to restitution claims. The Property Law also contained several weaknesses. Most notably, it required the suspension of all dealings concerning any property once a claim for restitution had been filed against it.[227] This moratorium on post-claim dealings proved detrimental to investment activity. Moreover, the exceptions provided in the Investment Law were too narrowly defined and restrictive.[228]

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224. *See* Unification Treaty, *supra* note 13, art. 25(1); *see also* Trust Law, *supra* note 45, pmbl., § 1(1) (sentence 1) (linking the goal of privatization with the concept of independence in economic competition).

225. REGELUNGEN OFFENER VERMÖGENSFRAGEN IN DEN NEUEN BUNDESLÄNDERN: RÜCKGABE, ENTSCHÄDIGUNG, INVESTITIONSFÖRDERUNG, (Verlag für die Rechts-und Anwaltspraxis ed., 1991) 5 [hereinafter REGELUNGEN OFFENER VERMÖGENSFRAGEN].

226. *Id.*

227. Property Law, *supra* note 62, § 3(3).

228. Investment Law, *supra* note 63, § 1(1).

Consequently, in March 1991 several statutes were passed to compensate for the shortcomings of the original legislation. The Law Concerning the Partition of Trust Agency Administered Enterprises (Enterprise Partition Law)[229] and the Law Concerning the Removal of Impediments to Privatization and the Promotion of Investment (Impediments Removal Law) comprised the most significant amendments.[230]

A. *Enterprise Partition Law*

The Enterprise Partition Law was designed to simplify and accelerate the operation of the Trust Agency.[231] The law improved the process by which conglomerates under Trust Agency administration were divided and transformed into smaller, more competitive entities. It established clearer, more precise guidelines for this task than those in the Trust Law's statement of general principles.[232]

The Enterprise Partition Law establishes two primary means for dissolving a conglomerate. One option allows a separation of sub-units from the parent company and the dissolution of the parent (*Abspaltung*). The other option permits the preservation of the original corporation and the creation of semi-autonomous divisions that remain tied to the original corporation (*Aufspaltung*). Under the first option, the newly formed companies created through secession acquire equal shares of the conglomerate's assets.[233] Under the second option, the new corporations are capitalized through the transfer of an equal, undivided share of the conglomerate's asset pool.[234]

The Enterprise Partition Law stipulates that a partition plan must be submitted which presents the details of the plan and its effectuation/execution.[235] This law offers an important

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229. Gesetz über die Spaltung der von der Treuhandanstalt verwalteten Unternehmen (Law Concerning the Partition of Trust Agency Administered Enterprises), April 5, 1991, 1991 BGBl. I 854 (FRG) [hereinafter Enterprise Partition Law].

230. Impediments Removal Law, *supra* note 178.

231. Enterprise Partition Law, *supra* note 229.

232. Trust Law, *supra* note 45, §§ 2(6), 12(3).

233. Enterprise Partition Law, *supra* note 229, § 1(1).

234. *Id.* § 1(2).

235. *Id.* §§ 6-10. Section 2 requires the partition plan to provide the following information: the name and location of the conglomerate to be divided as well as the corporations that are to be created, details clearly describing the division of assets, details on the transfer of these assets, and the incorporation documents. According to Sections 6 and 7, the partition becomes effective when the agreement stemming from the plan is approved by the officers of the conglomerate and notarized. Sections 8-10 address registration with the Commercial Registry.

simplification of the Trust Agency's responsibility regarding the dissolution of conglomerates. It creates the possibility that assets may be collectively transferred to the new corporations rather than adhering to the concept of single succession.[236] The statute also eases the process by which productive assets are culled from unproductive property and corporate divisions are prepared for partition.[237] Thus, new, smaller, more viable, independent entities are more easily created. Moreover, the Enterprise Partition Law simplifies the question of restitution in the sense that it separates and disperses claims, thereby freeing unencumbered portions of a conglomerate from the burden of claims that another division may carry. Now claimants may directly attach those specific parts of a conglomerate against which they have claims without affecting the entire conglomerate.[238] This new option expedites the resolution of restitution claims, which is the subject matter of the Impediments Removal Law, the second law adopted in 1991.

B. *Impediments Removal Law*

1. Amended Property Law

The Impediments Removal Law primarily addresses the shortcomings of the Property Law and the Investment Law.[239] It introduces a marked departure from, but not an abandonment of, earlier policy regarding protection of the interests of restitution claimants. The Impediments Removal Law is primarily concerned with improving the status of investors to the extent that they should now enjoy an advantage over restitution claimants. This policy is executed chiefly through three amendments to the Property Law.[240] First, the Amended Property Law removed the moratorium (activated upon claim filing) on real estate transactions imposed by Section 3(3) of the original Property Law if the current owner is a governmental entity[241] or the Trust Agency.[242] In so doing, Section 3a of the Amended Property Law—the "super-

236. HORN, *supra* note 9, at 379.
237. *Id.*
238. *Id.* at 376-79.
239. Impediments Removal Law, *supra* note 178.
240. Property Law, *supra* note 62, *as amended*, April 18, 1991 BGBl. I S. 957 [hereinafter Amended Property Law].
241. *Id.* § 7.
242. *Id.* § 3a(1). In this case or in the case of a governmental agency, the moratorium on disposition does not apply.

priority regulation" (*Super-Vorfahrt Regelung*)[243]—liberalized the original rules and modified them to allow the current holders to dispose of their property. In the future, the Trust Agency may transfer or lease real estate holdings regardless of restitution claims so long as it promotes healthy investment.[244] Likewise, the rights of a claimant have been subordinated to a third party interested in acquiring the contested property, provided that the third-party proves to be the more capable investor. However, the third-party investor must still abide by the restrictions imposed by the Investment Law.[245]

Similarly, the present holder may commence investment in the real estate without regard to potential claims for restitution if the proposed investment satisfies the special purposes set forth in the Investment Law. Investment programs that are particularly encouraged are those which either preserve or create employment.[246] In such cases, the restitution claimant has a right to compensation in the form of either proceeds from the sale of the contested property or at least the fair market value.[247] Investors in business enterprises are further protected from restitution claims. They are immune from attack if they have acquired a holding pursuant to legislation passed before unification.[248] Moreover, if a former owner challenges the decision of the convening governmental body to sell or lease property, execution of that decision is no longer suspended pending a hearing. Lengthy and laborious administrative hearings have been streamlined, and the transaction serving investment purposes may proceed. Commencement of proceedings contesting a decision will no longer postpone the disposition of property.[249]

To the extent that the restitution hearing and other procedural matters consumed excessive amounts of time, the Impediments Removal Law also introduced new provisions or amended old provisions of the Property Law in an effort to accelerate resolution of the proceedings. Section 6a of the Property Law contains the first of these amendments and allows

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243. Horst Buchwald, *Die Blockierte 'super-Vorfahrt' zum Aufschwung: Investoren in Ostdeutschland fordern Entschädigung statt Rückgabe bei Immobilen*, SÜDDEUTSCHE ZEITUNG, March 10, 1992 *available in* LEXIS, News Library, SDZ File.

244. Amended Property Law, *supra* note 240, §§ 3a(1), No. 1; *id.* 3a(2). The investment purposes contemplated here are those established by the Investment Law, *supra* note 63.

245. Amended Property Law, *supra* note 240, §§ 3(6)-(7).

246. *Id.*

247. *Id.*

248. *Id.* § 4(1).

249. *Id.* § 3a(4).

for a "preliminary assignment."[250] This provision permits the rightful owner of an enterprise to immediately re-acquire the contested property even before the resolution of all matters such as compensation. This measure also simultaneously precludes transfer of the property to third parties.[251] Likewise, the reconveyance of independent enterprises that were integrated into a conglomerate following expropriation is promoted and accelerated through a special partition hearing. In such cases, the appropriate convening authority decides the matter.[252] Additionally, instead of referring to a state authority, the parties may now elect to take the matter to arbitration in order to substantially shorten the process.[253]

2. Amended Investment Law

The original Property Law was based on the principle that expropriated property must be restored to the rightful owner.[254] To protect restitution claims, it bars real estate transactions regarding contested land until a decision is rendered.[255] The Investment Law provides certain exceptions to this general rule as necessary to stimulate investment.[256] However, under the original Investment Law, the special investment purposes were too limited because they applied only to real estate and buildings. A wide range of important investment concerns was thereby left

250. *Id.* Sections 6a(1)-(2) establish the conditions for the preliminary assignment regarding the acquiror's ability to rehabilitate and operate the enterprise successfully.

251. *Id.* § 6a(2).

252. *Id.* § 6b.

253. *Id.* § 38a. The arbitration process begins when both parties—the current holder and the rightful owner—agree in writing to take the matter to arbitration. Each party may select one representative. These two representatives then name an additional person to serve as chairman of the arbitration panel. The proposed chairman must be qualified to serve as a fully endowed judge. The arbitration hearing is quasi-judicial in nature pursuant to sections 1025, 1045, and 1047 of the German Code of Civil Procedure (*Zivilprozeßordnung*). After a decision has been rendered, either party may appeal the arbitration decision to any of the courts listed in section 37 of the Amended Property Law if such appeal is made within four weeks. If no appeal is timely made, if an appeal is refused by the court, or if the parties have agreed not to appeal, the appropriate authority will issue a notice (in accordance with § 33(3) and the transfer protocol of § 33(4)) confirming the decision of the arbitration board. The arbitration decision becomes binding pursuant to § 34 immediately upon issuance of this notice.

254. Unification Treaty, *supra* note 13, arts. 41, 47. *See also* Joint Declaration, *supra* note 13, art. 3, and Amended Property Law, *supra* note 240, §§ 1 & 3.

255. Amended Property Law, *supra* note 240, § 3(3).

256. Investment Law, *supra* note 63, §§ 1(1)-(2).

unprotected.[257] Thus, the Investment Law failed to maximize the full investment potential of the GDR economy.[258] Accordingly, the amendments were drafted to expand the class of undertakings that qualify for certification as special investment purposes.[259] Broadening these exceptions necessarily encroached on the principle of restitution. However, both the Unification Treaty[260] and the Basic Law[261] permitted the limitation of restitution rights if required to satisfy more immediate investment needs.

While these principles permit differentiation among property holders, Article 3 of the Basic Law requires that restitution claims be afforded equal treatment under the law.[262] Nevertheless, Article 135a of the Basic Law allows for differentiation under certain circumstances if the legislature determines that there is a corresponding vital, practical ground for it.[263] The reunification of Germany[264] and the concurrent stimulation of the GDR economy constitutes such a ground.[265] Only through these measures can equality between the eastern and western parts of the country be attained. Hence, encroachment upon the rights of former owners for the benefit of more capable investors will be tolerated as long as the encroachment upon these rights is controlled by the principles established in Article 41(2) of the Unification Treaty.

The original Investment Law restricted its subject matter to the sale of property, established a complicated process whereby one might acquire special investment purpose status, and lacked sufficient investment incentives to present property holders.[266] The revisions made through the Impediments Removal Law expanded the sphere of the law's operation to provide a hereditary building right (*Erbbaurecht*)[267] and long-term leases that may last

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257. *See* REGELUNG OFFENER VERMÖGENSFRAGEN, *supra* note 225, at 9. Matters left unprotected by the exception in the Investment Law included the transfer or sale of entire enterprises, the rent and lease of real estate and buildings, the assumption of special investment purposes by the current holder, and the establishment of part ownership rights and hereditary lease rights. *Id.*

258. *Id.*

259. Investment Law, *supra* note 63, *as amended* BGBl. I 1991 at 994 [hereinafter Amended Investment Law].

260. Unification Treaty, *supra* note 13, art. 41(2).

261. GG art. 143(3).

262. BVerfGE, *supra* note 1, at 127-29 (as was held in the April 23, 1991, decision of the Constitutional Court).

263. GG art. 135a(1), (2), 143(3). *See also* Joint Declaration, *supra* note 13, art. 1 (4th sentence).

264. Reunification was a constitutionally established objective as set forth in GG art. 23. *See also* BVerfGE, *supra* note 1, at 127.

265. BVerfGE, *supra* note 1, at 127.

266. HORN, *supra* note 9, at 273.

267. Amended Investment Law, *supra* note 259, § 1(4). A hereditary building right (*Erbbaurecht*) is defined as an encumbrance upon real estate

for up to twelve years.[268] The use of such leases, easements, or other encumbrances could proceed, but such use did not bar restitution claims.[269] Rather, the property was reconveyed, and the rightful owner took the property subject to the obligations created by the current holder.[270]

The amendments to the Investment Law also streamlined the previously cumbersome certification process in two respects. First, the certificate obviated the need for separate approval under the Regulation on the Transfer of Real Property.[271] Simultaneously, it allowed the current holders to proceed with their investments regardless of proceedings instituted by the prior holders challenging the issuing authority's decision.[272] Second, the amendments expanded the scope of the certificate's power to include even current holders, who were then allowed to execute investment plans on contested property themselves.[273] Such investment projects on the part of the current holders precluded reconveyance to the prior owners if the current holder completed the project in the period and manner specified in the certificate.[274] In such cases, the prior owners were limited to compensation in the amount of the property's market value when the project commenced or the proceeds from the property's sale.[275] If the conditions of the certificate regarding the nature and duration of the investment purpose were violated, the certificate would be revoked.[276]

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consisting of a transferable and an inheritable right to build or develop the land above or below the surface. When the hereditary building right expires, ownership of the structure passes automatically to the owner of the land. However, the hereditary building right holder is entitled to compensation. *See* CLARA-ERIKA DIETL ET AL., 1 THE DICTIONARY OF LEGAL, COMMERCIAL AND POLITICAL TERMS 240 (3d ed. 1988).

268. Amended Investment Law, *supra* note 259, § 1a. Section 1a(4) extends the applicability of this special investment purpose to agricultural land.

269. *Id.* § 1a(6).

270. *Id.* §§ 1a(5), 3(1).

271. *Id.* § 2(3). The approval required under the Grundstücksverkehrsordnung (Regulation Concerning the Transfer of Real Property), December 15, 1977, 1978 GBl. I 73 (GDR) was mandated by the Investment Law, *supra* note 63, § 2(1). Accordingly, a license was required from the land registry when applying for a special investment purpose certificate. See Gruson & Thoma, *supra* note 91, at 540, and REGELUNGEN OFFENER VERMÖGENSFRAGEN IN DEN NEUEN BUNDESLÄNDERN, *supra* note 225, at 71-74.

272. Amended Investment Law, *supra* note 259, § 4(3).

273. *Id.* § 1c.

274. *Id.* § 1c(2).

275. *Id.* § 3(1a).

276. *Id.* § 1d(2).

C. *Amendments Regarding the Transfer of Business Enterprises*

The scope of the Amended Property Law in allowing greater freedom of property disposition for governmental agencies also extends to the realm of business enterprises.[277] By applying the approach of the Investment Law (and thereafter the Amended Investment Law) and working in tandem with the Enterprise Partition Law,[278] Section 3(a) of the Amended Property Law allows a governmental agency to overrule restitution claims and to transfer an enterprise to third parties if doing so will stimulate the economy.[279] As with real property, the Trust Agency may act as the representative for its subsidiaries.[280] Therefore, in terms of companies owned by the subsidiaries, the Trust Agency may sell or lease them directly under Section 3(a), or the parent company itself may do so under Section 3(6) of the Amended Property Law. The Trust Agency should obtain the consent of the subsidiary prior to its sale to protect the Agency from potential liability resulting from the sale.[281] However, an action on the part of the subsidiary will not affect the validity of the sale to a third-party buyer or lessee.[282]

The new freedom given to governmental agencies (including the Trust Agency) to dispose of contested enterprises is further manifested in the new autonomy they have in decisionmaking.[283] For example, the Trust Agency now possesses authority to determine the sufficiency of proposed investment plans for purposes of certification. The only restriction imposed upon the Agency in this regard is that it is required to notify the local authorities and known prior owners.[284]

The limited scope of the special powers given to governmental agencies by Section 3(a) of the Amended Property Law operates as another limitation on the power of the Trust Agency. The special powers apply only to agreements entered into before December 31, 1992.[285] For all agreements made in 1993, the governmental agencies must abide by Section 3(6) of the Amended Property Law.[286] On December 31, 1993, the special provisions of the

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277. Amended Property Law, *supra* note 240. *See also supra* notes 239-53 and accompanying text.

278. *See supra* notes 232-38 and accompanying text.

279. Amended Property Law, *supra* note 240, § 3a(1)(2).

280. *Id.* §§ 3a(1), 2(3).

281. *Id.* § 3a(1).

282. *Id.*

283. *Id.*

284. *Id.* § 3a(3).

285. *Id.* § 3a(9).

286. *Id.* § 3(6). This section allows for the transfer of property to third-party investors regardless of restitution claims if the third party investor proposes plans

Amended Property Law lapse, and the rights and status enjoyed by the claimants prior to the adoption of the Impediments Removal Law are returned.[287] In addition, as with the Enterprise Partition Law, these transactions are contingent upon the transferee's agreement to, and observance of, certain investment purposes, plans, and duties.[288] A failure to observe these duties will result in the return of the enterprise to the selling government agency.[289] Section 3(a)(5) likewise entitles the former owner to recover either the proceeds of the sale or the fair market value of the enterprise appraised at the time of sale. In keeping with the streamlined procedure, proceedings challenging such a transfer will not delay the transfer's entry into effect.[290]

Section 3(6) of the Amended Property Law further advances the sale of enterprises by allowing private-party current owners to conduct sale transactions regardless of filed restitution claims if the sale will promote economic growth. Generally speaking, private party current owners must adhere to a more restrictive set of guidelines. Although the government agency itself has the power to assess the viability of the proposed investment plan when conducting sales, private party sales are subject to approval from the Trust Agency. If the Agency denies approval, the enterprise will be reconveyed to the restitution claimant.[291] Moreover, while the mere intention to sell property for the advancement of an investment purpose suffices to allow valid disposition by the government, private parties must demonstrate that the proposed plan is objectively feasible and that it will actually advance the stated goals.[292] Simultaneously, the acquiror must show that he is realistically in a position to achieve the objectives of the offered plan.[293] Like the other transaction scenarios, the authorities must order the return of the property to the rightful owner if the acquirors are unable to fulfill their obligations.[294] Current owners themselves may also undertake to improve property.[295] If their activity is designed to, and realistically capable of, promoting investment purposes, they may

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suited to the creation of employment or the execution of measures designed to improve competitive operation. Additionally, the third party investor has priority if the claimant cannot guarantee continued operation or renovation of the enterprise in question. *Id.*

287. See *supra* part IV.

288. *Id.*

289. Amended Property Law, *supra* note 240, § 3a(7). *See* Gruson & Thoma, *supra* note 91, at 1151.

290. Amended Property Law, *supra* note 240, § 3a(4).

291. *Id.* § 3a(1).

292. *Id.* § 3(6).

293. *Id.*

294. *Id.*

295. *Id.* § 3(7).

implement such plans and thereby exclude any restitution claims.[296] However, if the current owner/investor is incapable of generating the necessary capital or fails to realize the stated goals within two years, the enterprise is reconveyed to the former owner.[297]

Passage of the Impediments Removal Law in 1991 was intended to spark healthy investment in eastern Germany. The "Super-Priority Regulation" in the Amended Property Law,[298] working in coordination with the Enterprise Partition Law and the Amended Investment Law, sought to simplify and accelerate the procedure, expand the scope of exceptions to the Section 3(3) moratorium on property transactions, and increase the use of compensation over reconveyance. These measures were expected to increase the pace and scale of investment.

VI. AMENDMENTS OF 1992

Despite the 1991 legislation, the investment situation improved only marginally and the economy in eastern Germany continued to languish the next year.[299] According to rough estimates, the total blocked investment capital amounted to nearly one hundred billion *Deutsch Marks*.[300] Consequently, the government once again amended the appropriate legislation in hope of improving the situation. As a result, in July 1992 the German government adopted the Second Amendment Law. This law amended the Property Law for a second time and replaced the Amended Investment Law with the Investments Priority Law.[301]

296. *Id.*
297. *Id.* §§ 3(6)-(7).
298. *Id.* §§ 3(a).
299. Buchwald, *supra* note 243.
300. *Id.*
301. Das zweite Vermögensrechtsänderungsgesezt (The Second Property Law Amendment Law) July 21, 1992, 1992 BGBl. I, 1257 (FRG) [hereinafter Second Amendment Law] also repealed the Amended Investment Law, *supra* note 259, replacing it with the Das Investitionsvorranggesetz, July 21, 1992, BGBl. 1268 (FRG) [hereinafter Investment Priority Law].

A. *The Twice-Revised Property Law*

Despite increased criticism, the Twice-Revised Property Law retained the fundamental principle of "restitution over compensation."[302] However, this principle was diluted by the introduction of the concept of "investment before restitution."[303] To further the goal of increased investment, the primary policies of the Second Amendment Law are as follows: tightening priority regulations to favor investors, improving investor status, simplifying the application of the Twice-Revised Property Law, and protecting private homeowner interests.[304]

To simplify procedures, an effort was made to shorten the length of proceedings. To provide more certainty for potential investors, the law imposed final filing deadlines. After the deadlines have passed, all holders of uncontested property are deemed to possess clear title.[305] Any claim for restitution or cash compensation—whether for real estate or confiscated cash assets[306]—that was not filed by the December 31, 1992 deadline is now excluded. After this deadline, only chattel claims could be filed; such claims had to be filed by June 30, 1993. Any unfiled claims became void.[307] The finality of these deadlines contrasts sharply with prior practice. Previously, failure to comply with deadlines did not result in a forfeiture of claims; however, under the 1992 amendments, unfiled claims were forfeited. Thus, the Twice-Revised Property Law appears to be a serious legislative attempt to establish closure and to free uncontested property holdings for unencumbered investment.

Additionally, in the interest of procedural simplicity, state administration of certain properties automatically lapses on December 31, 1992.[308] After this deadline, there will be no application requirement to bring about the cessation of state administration and to allow for holdings free of restitution claims.[309] The end of government administration is long overdue, as it has usually slowed, rather than expedited, proceedings. Furthermore, those persons interested in cash compensation,

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302. Amended Property Law, *supra* note 240, *as amended by* the Second Property Law Amendment Law, August 11, 1992, 1992 BGBl. I, 1446 (FRG) § 3 [hereinafter Twice-Revised Property Law].

303. *Id.* §§ 3, 4. Consequently, one sees a newly altered principle which provides for "investment over restitution over compensation."

304. Hans Korner, *Vermögensgesetz: Lösung mit Fallstricken*, SÜDDEUTSCHE ZEITUNG, July 30, 1992 *available in* LEXIS, News Library, SDZ File.

305. Twice-Revised Property Law, *supra* note 302, § 30a.

306. *Id.*

307. *Id.* § 30a.

308 *Id.* §§ 11-15.

309. *Id.* § 11a.

rather than the lapse of state administration and the return of title, would face a deadline of September 22, 1992.[310] If no formal request was filed by that deadline, the claimant automatically became subject to the rights and duties of clear ownership. The extremely short advance notice of two months suggests that the lawmakers sought to resolve ownership title as expeditiously and inexpensively as possible.[311]

To accelerate general resolution of the proceedings, advance warnings regarding requests for information have been shortened and fewer extensions for acquisition of information were given. Consequently, the Twice-Revised Property Law now includes a series of sections related to the submission of records.[312] Claimants who fear an unfavorable decision regarding restitution[313] but who do not want cash compensation may, as a preemptive move, seek to enforce their right to substitute real estate.[314] Such moves may be more valuable now that the exceptions blocking restitution in favor of investment have been further expanded.[315]

Because the likelihood that claimants will receive restitution has been reduced, many claimants have transferred their claims to third-party investors who are more likely to succeed.[316] To prevent such tactics and thereby reduce complications in proceedings, the Second Amendment Law incorporates into the Twice-Revised Property Law new formal requirements and deadlines that are hostile to claim assignments.[317] These preemptive measures should not be interpreted as representing a new general hostility toward the rights of third parties. On the

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310. *Id.* § 11a(1).

311. *Id.* §§ 11 & 11a.

312. Section § 5(1) of the Investment Priority Law, *supra* note 301, grants the claimants only two weeks to reply officially to notice of investment certification hearings, forcing claimants to have already gathered all pertinent information if they are to succeed. Claimants' abilities to do so are greatly enhanced by their right to demand all official information regarding the contested property pursuant to Sections 31(3) and (4).

313. The Twice-Revised Property Law, *supra* note 302, § 4(2), excludes restitution in cases where property was acquired in good faith after May 8, 1945.

314. *Id.* §§ 9(2), 21.

315. *Id.* § 4(2).

316. See generally H.G. Strohm, *Beratungspraxis zu Ost-Immobilien nach dem zweiten Vermögensrechtsänderungsgesetz*, 45 NEUE JURISTISCHE WOCHENSCHRIFT 2849 (1992).

317. Second Amendment Law, *supra* note 301, art. 14(2). This provision established that claim assignments made before the passage of the Second Amendment Law must have been documented by a notary by September 22, 1992. Failing to comply with this requirement renders the assignment void. If a claimant failed to do so, the assignment is void. Future transfers of this nature are also void if procedure is not followed.

contrary, Article 8 of the Second Amendment Law[318] expands the protection accorded to rights of lessees. Notably, a moratorium is imposed until December 31, 1994, on any change to the rights of lessees as they existed prior to unification.[319] The underlying theory is that once this period expires, the legal climate will have improved and a full consideration of the rights of lessees will be feasible. However, this regulation includes a provision that the moratorium may be extended if necessary. In the interest of further preserving the rights of third parties, the previously enacted priority purchase option for lessees[320] remains in force, as does their ability under certain circumstances[321] to apply for such an arrangement on behalf of the claimant.[322]

B. *Investment Priority Law*

Perhaps the most helpful change made by the Second Amendment Law is the repeal of the Amended Investment Law and Section 3(a) of the Amended Property Law. The deletion of these provisions left no hierarchy of prioritized exceptions to the transaction moratorium. Through the Investment Priority Law, the legislature essentially created a system to encourage investment pursuant to a general policy of "investment over restitution over compensation." The previously scattered regulations concerning the priority status of investment,[323] which appear throughout the repealed legislation, are collected and presented in a clear, orderly manner in the new Investment Priority Law.[324] These new guidelines apply to all holdings that are not the subject of commenced restitution proceedings. Moreover, the previous legislation's differentiation between enterprises and real estate has ceased. A single procedure now

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318. *Id.* art. 8(2) inserts these measures into the Einführungsgesetz zum Bürgerlichen Gesetzbuch, BGBl. II, at 941. This law incorporates new legislation into the German Civil Code.

319. *Id.* art. 8.

320. Twice-Revised Property Law, *supra* note 302. Section 20 provides lessees with an enhanced opportunity to purchase the land they lease and causes the state to offer a substitute plot to the claimant.

321. As an example, one such circumstance would be personally financed improvements made to the property.

322. Twice-Revised Property Law, *supra* note 302, §§ 20-21. The original sections, which were essentially adopted in their entirety, were modified to the extent that this right remains unaffected by the suspension of state administration.

323. This priority status of investments relates to the investment certificate needed to overcome the provisional moratorium on real property transactions concerning holdings subject to a restitution claim. The guidelines are found in Sections 3(3)-(5) of the Amended Property Law, *supra* note 240.

324. Second Amendment Law, *supra* note 301, art. 6, §§ 1-26.

applies to all real property with one exception—those properties placed on "list C," essentially Jewish holdings and any property held by the GDR government.[325]

Like its precursors, the Investment Priority Law imposes time limits on the filing of claims for the acquisition of investment priority certificates. Accordingly, the deadline has been moved forward two years to December 31, 1995.[326] This new deadline represents the latest date by which an action for the acquisition of an investment certificate may be initiated. To qualify for such a certificate, the potential investor must meet one of the "investment purposes" enumerated in both the Investment Law and the Property Law. In many regards, these purposes remain essentially unchanged. However, some qualifying standards have been expanded in the new Investment Priority Law. Instead of the requirement that an extant housing need be met, an investor may now create new housing. In addition to infrastructure improvements necessary to investment, infrastructure improvements necessitated by investment now qualify. With regard to an enterprise, an investment purpose includes not only plans that create jobs, but also plans that improve economic competitiveness. Moreover, measures designed to forestall either indebtedness or the inability to pay off debt will be permitted.[327]

These new guidelines are neither uniformly applicable nor retroactive. Rather, their applicability depends upon the date an action was commenced. Thus, proceedings concluded under the prior format will continue to operate under those restrictions. Only entirely new proceedings and those still pending upon this law's enactment will be resolved according to these modifications.[328] Similarly significant is the recognition afforded investment certificates granted under prior legislation. The previously issued certificates retain their validity and are considered the equal of certificates issued under the new guidelines.[329]

While the expansion of investment exceptions to the policy of restitution will benefit investors, the new simplified procedure is

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325. Investment Priority Law, *supra* note 301, § 22. List C refers to various classes of property held originally by either the Third Reich or GDR governments, or originally designated Jewish holy ground, such as a synagogue or cemetery. For these types of property, the Revised Property Law and the Amended Investment Law control. This has the effect of preserving the rightful owners' stronger rights to restitution by implication, while it carves out a limited exception to the new, pro-investor policy of the Investment Priority Law. *See generally*, Strohm, *supra* note 316, at 2849.

326. Investment Priority Law, *supra* note 301, § 4(1).

327. *Id.* §§ 3(1)[2]-[3], 3(2)[1], [3].

328. Second Amendment Law, *supra* note 301, art. 14(5).

329. *Id.*

equally helpful. Rather than the complicated proceedings previously required to grant investors investment certificates, now a simple process exists whereby the investors need to make no application themselves. Indeed, the entire process can now be uniformly initiated by the appropriate convening authority once the claimants file for restitution. While this sort of automatic commencement of an action is possible in theory, in reality some participation by the investor will be necessary because the certificate requires a great deal of specificity which only the investor can provide.[330]

When a certification proceeding commences, any reconveyance proceeding concerning the property must be interrupted, and the convening authority is duty bound to notify the claimant.[331] If the claimant's filing lacks sufficient substantiation, the convening authority is not required to notify the claimant.[332] Upon notification, a claimant has two weeks to respond officially[333] and to present a prima facie case in support of his claims.[334] A six-week period begins to run from the date of notification in which the claimants may make counter-proposals detailing investment plans of their own.[335] The hearing allotted to the claimant, however, can be entirely omitted if the duration of the whole proceeding endangers the investor's planned project.[336] The investor has a distinct advantage over the claimant, particularly if the investor has conferred in advance with the current owner (such as the Trust Agency) in the plan's formulation to better prepare for the claimant's hearing.

Depending upon the convening authority's official capacity, after issuance of the certificate to the investor, the claimant has either the right to bring an action in protest or the right to rescission. However, the claimant is granted only a two-week period between the certificate's issuance and its entry into effect. Only during this period may the claimant apply for the official reinstatement of the moratorium that his rights normally impose on disposition.[337] Another procedural simplification manifests itself in the establishment of the "investments certificate" as the only required permit. The other previously mandated licensing is

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330. *See generally*, Strohm, *supra* note 316, at 2849. Typically a certificate must contain the investor's name and address; the contested property; the type, duration, and cost of the proposed measures; and the investment purposes which will be served. Investment Priority Law, *supra* note 301, §§ 4(1)-(3).

331. Investment Priority Law, *supra* note 301, §§ 4(4), 5(1).

332. *Id.* § 5(1).

333. *Id.* § 5(2).

334. *Id.*

335. *Id.*

336. *Id.* § 5(4).

337. *Id.* § 10.

no longer required.[338] On the other hand, the parties (the investor and the current owner) must conclude an "investment contract" that includes the following: a clause stipulating the reconveyance of real property in the event of the investment certificate's revocation; measures concerning contractual penalties in case of breach; and if dealing with private current owners, guarantees of the transfer of compensation to the claimant.[339] Insofar as these requirements demand an exact description of the agreed-upon measures and details concerning execution, the investment certificate should be included in the contract.[340]

The consequences to investors that breach the aforementioned contract indicate their new, special status. In the event that an investor fails to perform under the contract, the Investment Priority Law provides certain consequences, none of which are very harsh.[341] For example, if the investor innocently (free of negligence or malicious intent) exceeds the predetermined performance period, the period may be extended by the authorities upon application by the investor.[342] However, this provision not only requires notice to the claimant once again, but also requires the submission of the extension application prior to lapse of the performance period.[343] If the agreement is breached and the property is no longer used for the established investment purpose, the certificate is revoked. However, this revocation occurs only upon application of the claimant.[344] Even if the claimants apply for revocation, the investors may retain the certificates if they can justify the deviation as necessary due to urgent, operational requirements beyond their control.[345] Even in the case of lessees and tenants, the provisions allowing the claimant to apply for revocation are mildly phrased, using the word "can" rather than "shall."[346] The investor, on the other hand, can easily protect himself against later revocation attempts simply by requesting formal determinations declaring the investment purposes as essentially completed.[347] Once a corresponding decision has been rendered, further attempts to revoke the certificate are precluded.[348]

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338. *Id.* § 11(1).
339. *Id.* § 8.
340. *See generally,* Strohm, *supra* note 316, at 2849.
341. Investment Priority Law, *supra* note 301, §§ 13-15.
342. *Id.* § 14(1).
343. *Id.*
344. *Id.* § 15(1).
345. *Id.* § 1591).
346. *Id.* § 15(2).
347. *Id.* § 13(2).
348. *Id.*

VII. CONCLUSION

The German unification process represents one of the largest and most complex undertakings of its kind in history. Harmonizing such diametrically opposed societies has raised issues that defy simple solutions. Over the past four years, the solution that has developed has been quite complex. To simplify, the legislation is based on the straightforward proposition that property unjustly taken must be returned to its rightful owners or to their heirs and successors. To qualify under the original Property Law, claimants had to show that property to which they once held title was taken through official state action transferring the land into state ownership or, in the case of refugees, public administration. State action constituting an expropriation created the following categories of property:

> —Property expropriated for no or insufficient compensation and transferred to state ownership;
> —Property which, after transfer to state ownership, was then transferred to a third person by the government or a public administrator of the property;
> —Property transferred to state ownership based on the decree of the Council of Ministers of February 9, 1972;
> —Buildings on real estate transferred to state ownership due to over-indebtedness resulting from insufficient rent; and
> —Property taken by the government or third party by means of misuse of power, corruption, duress, or deception.[349]

The scope of the Property Law includes interests such as real estate, rights in real estate (easements and mortgages), chattels, claims against debtors (including credit balances), and equity interests in corporations. However, the Property Law does not include real estate that farmers were required to "contribute" to agricultural collectives in compliance with GDR statutes. Depending on the property's location, restitution claimants must file claims in writing with either the Office of the Rural District Magistrate or the City Administration. Each claim must show with particularity not only that the contested property qualifies in terms of the above mentioned categories, but also that prior ownership was valid. Likewise, each claim must identify the nature, size, value, and location of the property and name all heirs and successors. The Filing Regulation also stipulated two deadlines by which all property claims were required to have been filed.[350] First, all claims based on expropriations committed under the GDR government were required to be submitted by October 13, 1990. Second, all property claims based upon expropriations committed under the Nazi regime were required to

349. Property Law, *supra* note 62.
350. *Id.*

be filed by March 31, 1991.[351] Upon review by the appropriate authority, if the claimants satisfactorily met all requirements, they received certificates that entitle them to the return of their expropriated holdings.[352] The claimants also have the right to choose compensation in lieu of restitution; in such cases, they may use the certificates to obtain cash payments.

However, in the interest of protecting innocent third parties, the Property Law lists certain situations in which restitution is not an available remedy. These situations include: (1) if real estate or a building has been changed significantly before September 29, 1990, and it serves a public interest; (2) if real estate has been dedicated to the general public for its use; (3) if real estate has been integrated into a housing development or business before September 29, 1990; (4) if the premises are used commercially in an enterprise, and reconveyance would have adverse effects upon that enterprise; or (5) if property has been acquired in good faith, or encumbered with usufructuary rights, by individuals, religious organizations, or other nonprofit organizations.[353] Good faith is broadly defined and is assumed to exist unless the rightful owners can prove that the current holders knew or should have known that acquisition was not in compliance with the regulations, procedures, and orderly administrative practices of East Germany in effect at the time of the acquisition; influenced the acquisition by corruption or personal positions of influence; or took advantage of situations of coercion or deception of the rightful owners.[354] When the current holders acquired contested property in good faith, the rightful owners must content themselves with either cash payments in compensation for the property or their choice of alternate plots of land in substitution.

These exceptions to the basic tenet of restitution were broadened by the Investment Law, which was enacted to achieve the other primary goal established in the Unification Treaty—stimulation of economic growth. The Investment Law provided that under certain circumstances formerly state-owned real estate could be sold by the current holders even though restitution claims had been filed by the rightful owners.[355] The Investment Law created a preference for the current holders of real estate over any prior holders if the real estate met any of the investment goals established by the statute including: the preservation or creation of employment, particularly through the

351. *Id.*
352. *Id.*
353. *Id.*
354. *Id.*
355. Investment Law, *supra* note 63.

establishment of a business; the accommodation of significant housing needs; or the development and maintenance of the infrastructure required to achieve the first two goals.[356] In order to qualify for the preferential status, the current holders were required to present plans outlining the intended investment. The appropriate local administration then examined the plan and determined the ability of the current holder to execute it.[357] If the current holders were deemed reasonably capable of executing the plan, certifications for special investment purposes were issued. However, before issuance of the certification, the municipality was required to hold hearings if any previous owners wished to present claims for restitution. Also, if there were a valid judgment from a competent authority ordering restitution, a certificate could not be issued. Likewise, the Land Registry could not record a transaction based on such a certification if, in the interim, an administrative or judicial proceeding to nullify the certificate had commenced. If the current holders satisfied these requirements, a former owner could not prevent the sale or transfer of the land in question. However, the rightful owners could still demand compensation in the amount of the proceeds or fair market value.

The Trust Law was enacted simultaneously with the original Property and Investment Laws. The Trust Law intended to achieve the following goals: to privatize the people's property as quickly as possible; to establish competitiveness in small and mid-sized enterprises; to make real estate available for business; to secure and create new jobs; to ascertain the financial status of people's enterprises; and to assess the profitability of the enterprises and their ability to survive in the social market economy. In pursuit of these goals, the Trust Law created the Trust Agency, which assumed proprietorship over all the people's property that had begun privatizing under earlier GDR law. It automatically acquired control over all people's property that had not yet begun privatization. The Trust Agency then placed all the "people's enterprises" under the supervision of holding companies responsible for the actual restructuring of these enterprises. Conscientious observance of the Trust Law's guidelines and full compliance with the statutory requirements results in the creation of new businesses capable of functioning in a free market system.[358] Thus, one sees the technically complete transformation of socialist property envisioned by the Unification Treaty.

However, these laws have not concluded the overall privatization effort. These newly formed companies still must be

356. *Id.*
357. *Id.*
358. Trust Law, *supra* note 45.

placed in the private sector. Inasmuch as the formal restructuring of the socialist enterprises in no way affects the restitution claims of prior owners, the Trust Law circumvents only one of the obstacles to economic recovery in eastern Germany—structural adaptation. Until the issue of true ownership is resolved, the fledgling companies will not be able to attract the investment vital to their survival.

Shortly after the Unification Treaty and the accompanying laws went into effect, it became clear that investment in eastern Germany was not occurring at the levels necessary for rapid economic modernization.[359] The primary reason for weak investment was the confusion surrounding the acquisition of clear title to real estate. The difficulty of obtaining clear title and the resulting sluggish investment were exacerbated by the labyrinthine body of legislation which proved to be poorly suited to the conflicting goals of investment and restitution. These factors impaired the ability of the Trust Agency to execute its task of privatization.[360] Likewise, the Investment Law was inadequate to stimulate significant investment, particularly by current holders of real estate subject to restitution claims. Additionally, the Property Law contained several weaknesses, created most notably by Section 3(3). This section required the suspension of all dealings concerning any property once a claim for restitution had been filed against it.[361] Not surprisingly, this moratorium was detrimental to investment activity. Additionally, the exceptions to the Investment Law were too narrowly defined and too restrictive to promote investment successfully.[362] As a result, two series of amendments were adopted to correct the flaws of the original legislation. The Impediments Removal Law amended the original Property Law, the original Investment Law, and the Trust Agency Law while simultaneously passing the Enterprise Partition Law.

In 1991, passage of the Impediments Removal Law was intended to spark investment in eastern Germany. This law retained the original principle of the privatization effort; restitution was to remain the primary means of redress for past expropriations. Moreover, the "Super-Priority" regulation in Section 3a of the Amended Property Law, together with the Enterprise Partition Law and the Amended Investment Law, were designed to simplify and accelerate procedure, expand the scope of exceptions to the Section 3(3) moratorium on property

359. REGELUNGEN OFFENER VERMÖGENSFRAGEN IN DEN NEUEN BUNDESLÄNDERN, *supra* note 225, at 5.

360. *Id.*

361. Property Law, *supra* note 63 and Investment Law, *supra* note 63.

362. Investment Law, *supra* note 63.

transactions, and increase the use of compensation over reconveyance. These measures were intended to increase the pace and scale of investment. However, the investment situation improved only marginally and the economy in eastern Germany continued to decline. Indeed, the total amount of blocked investment capital was estimated to be 100 billion *Deutsch Marks*.[363]

The German government once again amended prior legislation in hope of resolving the situation. In July 1992, a second statute amending the Property Law was passed. This statute replaced the Amended Investment Law with the Investments Priority Law.[364] Despite increasing criticism, the Twice-Revised Property Law retained the principle of "restitution over compensation." However, the Twice-Revised Property Law superimposed the doctrine of "investment before restitution" on the original concept.[365] Bearing in mind the primary goal of increased investment, the Twice-Revised Property Law aspires to: tighten priority regulations in favor of investors; improve investor status; simplify the application; and protect private homeowner interests.

In terms of procedural simplification, an effort was made to shorten the length of proceedings. An effort was also made to introduce more certainty for would-be investors through the imposition of final filing deadlines after which all holders of uncontested property are considered to have clear title. The deadline was set at December 31, 1992, and any claims for restitution or cash compensation that were not formally filed by that time were henceforth excluded. The exclusion of new claims applies not only to interests in real estate and property, but also to confiscated cash assets. Only claims for chattels could still be filed. The deadline for filing "chattel claims" was June 30, 1993, after which time no new claim filings were accepted and any unfiled claims became void. Also, in the interest of procedural simplicity, state administration of certain properties automatically lapsed upon the deadline of December 31, 1992. No application for the cessation of state administration was thereafter required for holdings free of restitution claims. For those interested in cash compensation rather than the return of title, a deadline of September 22, 1992, was set. If no such formal claim was filed by that time, the claimant automatically became subject to the rights and duties of clear ownership.[366]

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363. *See* Buchwald, *supra* note 243.
364. *See* Second Amendment Law, *supra* note 301.
365. *Id.*
366. Twice-Revised Property Law, *supra* note 302.

Perhaps the most helpful changes made by the Second Amendment Law were the repeal of the Amended Investment Law and Section 3a of the Amended Property Law. The simultaneous repeal of both these provisions left no hierarchy of prioritized exceptions to the transaction moratorium. Through the Second Amendment Law , the legislature essentially re-formulated of a system to encourage investment pursuant to the concept of "investment over restitution over compensation." The previously scattered regulations controlling investment priority status have been compiled and presented in a clear and orderly fashion in the new Investment Priority Law.[367] The prior differentiation between enterprises and real estate has been removed. Now a single, coherent procedure applies to all real property. The only exception is for those properties placed on "list C"—essentially former Jewish holdings.[368] As with its precursors, the Investment Priority Law imposes time limits on the filing of claims for the acquisition of investment priority certificates. Accordingly, the deadline has been changed from December 31, 1993, to December 31, 1995. The new deadline represents the latest date by which an action for the acquisition of a certificate may be brought. To qualify for such a certificate, the would-be investor must meet essentially one of the "investment purposes" set forth in the Investment Law and the Property Law, as amended. In many respects, these purposes remain essentially unchanged. However, some qualifying standards have been expanded in the new Investment Priority Law. For example, instead of requiring that an existing housing need be met, it now suffices to create new housing. In addition to infrastructure improvements necessary to investment, infrastructure improvements resulting from investment now qualify. Not only will enterprises' plans to create jobs be accepted, but now plans that improve economic competitiveness are also acceptable. Additionally, measures designed to forestall indebtedness or an inability to pay off debt also qualify.[369]

More than a year has passed since the enactment of the latest amendments. Yet the economic recovery in eastern Germany is still as distant as ever. As the backlog of unresolved restitution claims has grown to over two million, it is clear that even the latest amendments and the new evolution of privatization's fundamental principle—investment over compensation . over restitution—have been only marginally successful. In fact, the 1992 amendments have proven helpful in only a limited number of cases. As before these amendments, the

367. Second Amendment Law, *supra* note 301, art. 6 §§ 1-26.
368. *See supra* note 330.
369. Investment Priority Law, *supra* note 301.

problem continues to be the flawed application of a questionable policy decision to mandate restitution over compensation. All too often under the current situation, execution of valid investment plans is postponed long after the ownership question has been clarified. The primary reason for this result is that, as of yet, there are no adequate guidelines for establishing a mechanism of compensation—that is, the extent to which rightful owners will be compensated if that is the mandated or freely chosen form of redress. In the absence of such guidelines, rightful owners cannot sensibly choose between restitution and compensation. On the one hand, they have no idea how high the compensation payments might be. On the other hand, it is still uncertain as to what extent returned property and enterprises will be taxed. Therefore, many successful claimants postpone the final decision regarding the form of settlement for their claims notwithstanding the fact that their claims have already been awarded to them. Other successful claimants have already received the restitution of expropriated property, yet they hesitate to invest because they too are uncertain about the tax burden accompanying these holdings.[370] In recognition of that fact, there is now a bill under consideration in the German legislature designed to address this problem.

The Compensation Law, as this bill will be known upon its passage, has the goal of equalization and codification of norms to guide and control the grant of compensation. The bill envisions a self-sustaining combination of restitution and compensation intended to free the federal government of any need to subsidize compensation payments. As it stands, the bill will impose a one-time levy on all holdings restored to the rightful owners. These funds will create a trust fund that will be used to make all other compensation payments.[371]

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370. Ralf Neubauer, *Ab nach Karlsruhe: Die geplante Entschädigungsgesetz ist ungerecht*, DIE ZEIT, March 26, 1993, at 12.

371. Rightful owners may choose between the return of their property or cash payments. However, no restitution is available to those whose property was expropriated under the Land Reform during the Soviet Occupation between 1945 and 1949—before the creation of the GDR. The extent of compensation for real estate holdings will be limited to 133% of that real estate's 1935 value; compensation for commercial enterprises will be measured by the simple value of the enterprise in 1935. Rightful owners who have received the return of their property will be required after 1996 to pay into a trust fund a one-time levy on that property. However, those citizens of the GDR who acquired contested property in good faith after October 18, 1989, will be exempted from this provision. These funds will then be used to finance all other compensation payments to those who were denied restitution. The Bill also provides that, once the amount to be paid in compensation surpasses the 10,000 DM level, the standard for measuring compensation will be gradually reduced. The maximum amount that a rightful owner may be awarded is set at 950,000 DM for expropriated property valued in excess of 10,000,000 DM. In its application, the

In its current form, the draft Compensation Law has two major flaws. First, although a compensation trust fund was contemplated in the Joint Declaration,[372] the effort to create it is possibly insufficient and overdue. The proposed system threatens to sap investment money from the very people who would otherwise have been the most likely investors. By imposing more burdens on claimants/investors to whom property has been restored and thus further limiting available capital, the draft Compensation Law could further weaken the economic climate in eastern Germany. Moreover, the standard of compensation is set so low that it deters the claimant from choosing compensation. Consequently, notwithstanding the proposed levies, those claimants to whom property is restored fare much better than those who receive compensation. Thus, by encouraging claimants to choose restitution whenever possible, even the Compensation Law will perpetuate the undesirable policy of restitution over compensation to a certain extent.

In contrast, if compensation had been established as the normal form of redress and restitution had been made the exception, the current problems would be significantly less daunting. After all, funding to finance compensation could have easily been generated by the sale of expropriated real estate. However, it would be unconstitutional to reverse the constitutional guarantee of compensation and restitution. Furthermore, even if repeal of this concept were permissible, it would hardly be practical. To attempt such a move three years after unification would likely prompt disaster and, in the very least, generate bureaucratic chaos.

The Compensation Bill's questionable constitutionality, however, presents a more serious flaw. The Federal Constitutional Court may declare certain portions of the bill unconstitutional on the ground that they violate the requirement set forth in Article 3 of the Basic Law requiring equal treatment before the law. As it now stands, the bill favors those who

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evaluation formula will generally require the restored owner to pay one-third of the property's updated value. This proportional amount is achieved by multiplying the 1935 value of rental property by six and of commercial enterprises by ten. However those rightful owners awarded restitution who invest in the property will be required to pay only one-half of the otherwise mandated levy. Likewise those "East Germans" who invest will benefit from a further reduction in the levy amount. They will be required to pay only one-fourth of the otherwise stipulated levy. As a result of these measures, authorities predict new investment in the housing industry of eastern Germany of nearly 4.5 billion DM. *See generally Entwurf des Entschädigungsgesetzes vom Kabinett verabschiedet*, SÜDDEUTSCHE ZEITUNG, April 2, 1993 *available in* LEXIS, News Library, SDZ File [hereinafter *Entwurf des Eutschädigungsgesetzes*].

372. Joint Declaration, *supra* note 13, art. 13(c)

actually regain possession of contested property.[373] Generally, they will be required to pay no more than half of the property's current value in taxes.[374] In most cases, however, such levies will impose a much smaller burden. In contrast to restitution recipients, those who choose or must accept compensation can expect to receive no more than a mere twenty percent of the contested property's current value. Furthermore, the exceptions to reconveyance in this system, namely those granted to "East Germans" and to various investors/entrepreneurs, seem suspiciously arbitrary and capricious. The end result is that the bill may create a system that results in unequal treatment of equally injured claimants. Thus, the bill may be deemed unconstitutional.

Should passage of the bill be blocked or delayed, other measures could be taken as short-term remedies until the Compensation Bill is reworked. For instance, a tax break (*Abnehmerpräferenz*) for industrial goods or products bought in eastern Germany would allow buyers to reduce the sales tax on goods bought in the east by a fixed percentage. To avert the development of any dependence on this indirect subsidy, the time span of this measure could be limited to perhaps three years. This tax break would equally benefit all concerns—both private and those run by the Trust Agency. Such a move would make eastern products more attractive and less costly, thereby generating more income and promoting investment in eastern Germany. Additionally, a temporary sales tax reduction would benefit all technological levels of industry, not just capital-intensive high technology fields with low labor demands.

Still greater potential for growth lies in the renovation and retention of core industrial centers around which support industries can develop. This policy could best be promoted by limiting subsidies and renovation efforts to those industrial centers capable of development and renovation. By doing so, Germany would not only use its resources most efficiently but also increase its potential for immediate, short-term, local results necessary to spark widespread, long-term growth. These regional centers should be granted certain subsidies and the authority to decide whether to invest those sums either in the "industrial core" or in new satellite plants. Once these support industries develop into new and flexible alternative sources of employment, they will cushion any lay-offs required to renovate the industrial core's primary industries. The key is to ensure that labor reductions do not exceed the new jobs created by the support industries. Once employment increases, the economic situation may improve and

373. *Entwurf des Entschädigungsgesetzes, supra* note 371.
374. *Id.*

thereby spark more local investment. This plan offers commercial enterprises the hope of greater self-sufficiency and less dependence upon foreign investment.[375]

Another worthwhile option aimed at correcting the current malaise in eastern Germany might be further simplification of all procedural aspects of privatization. Apparently, "East German" officials, already heavily burdened by the task of privatization, spend excessive amounts of time and energy in an effort to master the West German administrative mechanisms that were transferred to the former GDR virtually unchanged. A study by the *Institut für Wirtschaftsforschung Halle* estimates the total amount of potential investment caught in the bureaucratic maze as roughly one hundred million *Deutsch Marks* in Berlin alone.[376] Establishing a deregulation zone for a set period of time may possibly accelerate the processing and resolution of property claims. Such a zone would reduce the amount of time devoted to confusing FRG regulations and complex FRG administrative matters. Thus, former East German officials could cope with the pressing problems at hand. If nothing else, a commission might be established to study deregulation with the aim of simplifying privatization from the administrative perspective.

On the other hand, wholesale deregulation would be problematic because it would remove or weaken the legal structure statutorily created to control privatization. Placing the burden of privatization on other more generalized, less capable mechanisms could hinder rather than promote privatization. For example, in lieu of the measures specifically enacted to advance privatization, Germany might apply its version of adverse possession (*Ersitzung/Buchersitzung*).[377] To acquire title to chattels through adverse possession (*Ersitzung*), the possessors must first acquire the property in good faith. They must then hold the chattels for an uninterrupted period of ten years, during

375. Rolf Neubauer, *Wege aus der Krise—Wundern dauern länger*, DIE ZEIT, Apr. 2, 1993, at 7.

376. *Id.*

377. *Ersitzung* applies to the adverse acquisition of chattels. Possessors may gain title to moveable property if, without interruption, they possess a particular object for ten years. BGB § 97. However, acquisition of title is foreclosed if the adverse possessor acts in bad faith or later learns that he has no claim to the property in question. Sections 938 to 945 deal with various other aspects concerning the period of possession, interruption of possession, and third party rights. *Buchersitzung* concerns the acquisition of title to real estate. BGB § 900. It is also controlled by sections 938 to 945. Where parties are registered in the land registry as owners of property for thirty years and maintain possession of the property for that same thirty years, they acquire title to that real estate notwithstanding the fact that they were not the rightful owners. The period may not run so long as counterclaims to the same real estate are registered in the land registry by the title holders.

which time they may not learn that their claims to the property are unfounded. *Buchersitzung*, the means by which one may adversely possess real estate, does not require good faith acquisition. However, the possessors must hold the property for an uninterrupted period of thirty years. The adverse possessors must also simultaneously register their interests in the Land Registry (*Grundbuch*). Should the rightful owners enter counter-claims in the Land Registry, the possession periods are interrupted, and the attempt to take title by adverse possession is defeated.

Given the conditions that must be met to apply these doctrines, neither seems well suited to the current situation. Because of the nature of the expropriations in question, the good faith requirement of *Ersitzung* would serve to bar all but a few of the current holders' claims to adverse possession. The issue of timing also poses serious questions. If the possessory periods of ten and thirty years began upon the date of unification, such a time lapse would hardly serve to expedite privatization and economic recovery. Conversely, if the possessory periods were deemed to have started upon expropriation, a dual problem arises. First, the imposition of FRG law upon the GDR before unification probably would violate the German Territoriality Principle.[378] Second, in many cases, the possessory period might already have run before the rightful owners had the opportunity to contest the adverse possession under FRG law. Application of these doctrines in light of the latter problem would legitimize an unjust taking. Regardless of how such questions are addressed, the resolution would require a great deal of time and regulation, thereby nullifying any benefit from deregulation and making no contribution to the goal of quick privatization.

The alternative measures suggested above vary in their applicability and desirability. They might be most productive if pursued jointly in a combined package to stimulate growth. However, the single most pressing and effective measure that might be now undertaken is the prompt passage of a constitutionally acceptable law governing the mechanism and measurement of compensation. The absence of such a law is the greatest obstacle to German privatization. Although only time will show if the latest amendments and the pending Compensation Law will effectively stimulate investment, the current trend is heading in the right direction and the introduction of simplicity and opportunity will eventually attract capital to eastern Germany.

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378. *See* BVerfGE, *supra* note 1 (discussing territorial principle of FRG).

POSTSCRIPT

As this Article went to press, a letter from former Soviet Premier Mikhail Gorbachev to British historian Norman Stone came to light. In this letter, Gorbachev claimed that the preservation of the 1945-1949 Land Reform conducted by the Soviets in East Germany was never a condition to Russian acceptance and approval of German reunification.

This statement jeopardizes a decision by the German Constitutional Court on April 23, 1991.[379] According to that ruling, the Soviets insisted upon maintaining the inviolability of the Land Reform as a precondition to German reunification. Moreover, the Constitutional Court relied upon precisely this point in upholding Article 41 of the Unification Treaty[380] and the Joint Declaration, which exempt expropriations made pursuant to the Land Reform from reprivatization.[381] If this fundamental premise were removed, the entire privatization effort could be jeopardized and certainly those efforts made regarding the former Agricultural Collectives. Many industrial and agricultural concerns that retained holdings originally derived from expropriations under the Land Reform have managed to regain a modicum of vitality. However, if the roughly five million acres (two million hectare) at stake were reprivatized, a vast number of businesses would face bankruptcy.

While the potential exists for renewed controversy concerning privatization and restitution, few believe that a fundamental reorganization is likely given the wide-ranging consequences which would follow. At a minimum, such a decision would require a new ruling from the Constitutional Court. The Federal High Court has repeatedly stressed the historical uniqueness of reunification as a justification for certain anomalies in its holdings concerning this issue. Nevertheless, the uproar produced by this letter illustrates the dynamism and volatility of German privatization, and strongly suggests that this issue warrants further review.[382]

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379. *See supra* notes 70-100 and accompanying text.

380. *See supra* note 92.

381. *Id.*

382. *See generally* Ralf Neubauer, *Rückkehr der Junker,* DIE ZEIT, Sept. 1994, at 10.