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Privatization in Germany: A Model For Legal and Functional Analysis

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ABSTRACT

In this Article, Mr. Elling discusses the efforts to restructure and privatize the eastern German economy. The Article focuses on the work of the Trust Agency, or Treuhandanstalt, the agency primary responsible for privatizing property expropriated by the Nazis, the Soviet occupation forces, and the German Democratic Republic. These three regimes expropriated property under varying circumstances, and the Trust Agency now faces the task of determining the appropriate level of compensation or restitution for each property claimant. While the Trust Agency is concerned with awarding just compensation to the rightful property owners, the author notes that Germany designed the privatization laws to encourage investment, invigorate the depressed eastern German economy, and improve the standard of living among East Germans. Mr. Elling believes that the work of the Trust Agency will become a model for the other eastern European nations if it manages to achieve economic revitalization without compromising just compensation and restitution.

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I. INTRODUCTION: GERMANY PAVES THE WAY

The fall of the Berlin Wall in 1989 did more than usher in the rapid unification of the two German states. It unleashed a torrent of economic and political forces difficult for actors and observers alike to understand. The restructuring and privatization of the eastern German economy is necessarily the keystone of any effort to integrate the five new states, or Länder,[1] into the Federal Republic of Germany (FRG). The Trust Agency, or Treuhandanstalt, stands at the center of these integration efforts and of this analysis of the functional and legal model for privatizing the eastern German economy.

Already over two million claims have been filed for restitution of property expropriated in eastern Germany over the last sixty years, whether by the Nazis, the Soviet occupation forces, or the government of the German Democratic Republic (GDR).[2] Further, the Trust Agency now controls nearly thirteen thousand businesses which it must either privatize, liquidate, or, in a few cases, return to government ownership.[3]

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1. Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt, Thuringia.

2. FRANKFURTER ALLGEMEINE, Jan. 24, 1992, at 13, col. 3.

3. TREUHANDANSTALT, THE CHANCE OF THE 90'S: INVESTING IN EASTERN GER-

The futures of millions of employees and the economic and political landscape of Germany, and indeed of all central Europe, are at stake.

A stable and democratic future for the German people will require the rapid reduction of the economic divide that still separates East and West. Political forces have already made great efforts to remedy this historically unprecedented situation. The German government, for example, has already pumped well over DM 100 billion in investment funds eastward in the past 12 months. The Trust Agency alone spent DM 15 billion in 1991 to modernize and restructure formerly state-owned businesses.[4]

Some projections for the future are finally showing signs for optimism. The Institute of German Business recently reported that western German and foreign businesses plan to invest DM 113 billion in the five new Länder by the end of 1995.[5] Also, economists expect the eastern German economy to grow by 10.5 percent this year—after shrinking 14.4 percent in 1990 and 30.3 percent in 1991.[6]

Despite these herculean efforts and the small signs of positive change, the economic gap between East and West remains unfathomably great. Workers in the five new Länder have been earning only 40 to 63 percent of what their Western colleagues earn.[7] More troubling perhaps is that economists project the unemployment[8] and inflation[9] rates to remain three times as high in the East through 1992. In addition, living conditions for many Easterners are intolerable. Half a million apartments in the East are uninhabitable, while twenty-eight percent have no internal sanitary facilities.[10]

MANY 9 (1991).

4. *Bnevel: Treuhand Invested DM 15 Million in Restrucring in 1991*, THIS WEEK IN GERMANY (German Information Center, New York, N.Y.), Feb. 21, 1992, at 4.

5. *Business Plans to Invest DM 153 Billion in Eastern Germany by 1996*, THIS WEEK IN GERMANY (German Information Center, New York, N.Y.), Feb. 14, 1992, at 4.

6. *Leading Institutions Call for Restraint in Annual Report*, THIS WEEK IN GERMANY (German Information Center, New York, N.Y.), Apr. 17, 1992, at 4.

7. White collar workers have been earning only 40%, industrial workers and bank employees only 47%, retail personnel only 52%, and construction workers only 63% of what their counterparts in western Germany earn. *Wage Gap Between East and West Remains*, THIS WEEK IN GERMANY (German Information Center, New York, N.Y.), Apr. 10, 1992, at 4.

8. The rate in western Germany is projected to be 5.8% while it is expected to remain at 18.1% in eastern Germany. *Leading Institutions Call for Restraint in Annual Report, supra* note 6, at 4.

9. *Id.*

10. Wenhard Möschel, *Wohnungwirtschaft in den Fünf Neuen Bundesländern*, 3

Because of the unprecedented nature of the task and the speed with which Germany has acted to tackle it, the rest of world watches closely. German experience may serve as a road map for similar efforts in the countries of eastern Europe and the Commonwealth of Independent States. In fact, the Trust Agency recently announced the formation of a consulting subsidiary, the Treuhand Advisory Agency for Eastern Europe, which will assist and advise eastern European nations in privatizing their economies and establishing functioning market economic structures.[11]

This Article attempts to develop a functional and legal model for analyzing privatization in eastern Germany. While due regard will be given to the historic antecedents to the challenges facing a unified Germany, this Article primarily emphasizes the recent work of the Trust Agency and the laws that it executes.

II. From Two There Was One: Recent German History

In the past three years, previously inconceivable winds of change have swept and buffeted the German landscape, etching into it a new destiny for nearly eighty million Germans. The forces that have changed forever the course of German history are inextricably linked to the enactment of the privatization and compensation laws, which are the focus of this analysis. A thorough understanding of the meaning and impact of these laws requires a knowledge of the timing and nature of these historic transformations.[12]

The road to German unity was indeed swift. The "beginning of the end" for the East German state might have been September 11, 1989. On that date, the Hungarian government opened its border with Austria, allowing thousands of East German citizens to flee to West Germany. In the weeks that followed, pressure on the SED[13] regime further mounted as East Germans continued to pour through Hungary and to seek asylum at the West German embassies in Prague and Warsaw. For the first

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Deutsch-Deutsche Rechts-Zeitschrift 72, 72 (1991).

11. *Organizations to Help Eastern Europe Toward Market Economy*, This Week in Germany (German Information Center, New York, N.Y.), Apr. 3, 1992, at 5.

12. For an insider's view of the dramatic political events that shaped Germany from the fall of the Berlin Wall on November 9, 1989, to unification on October 3, 1990, see Horst Teltschik, 329 Tage (1991). *See also* Karl Kaiser, *Germany's Unification*, 70 Foreign Aff. 179 (No. 1) (1991).

13. Sozialistische Einheitspartei Deutschlands (Socialist Unity Party of Germany). The Communist Party, with its superficially "independent" sister parties, held complete power throughout the history of the GDR.

time since constructing the Berlin Wall in 1961, the East German leadership had to confront the nightmare vision of a socialist state bled of its most valuable resource—its people.

Weeks of demonstrations in Leipzig and other cities throughout the GDR and the replacement of Erich Honecker and his party left the East German leadership in disarray. A series of misunderstandings in the Politbüro led to the opening of the Berlin Wall and the intra-German border on the night of November 11, 1989. This opening, in turn, unleashed a torrent of emotion and resistance that the East German leadership seemed incapable of rechanneling. Within a month, the amended East German Constitution eliminated the monopoly power of the SED,[14] and within four months, the first free elections for the Volkskammer produced a new Christian Democratic Union (CDU)[15] government under Lothar de Maizière.

Nevertheless, many could not conceive of a unified German state in the near future, because "[t]he differences between both parts of Germany were just as great as the togetherness of the Germans in both parts."[16] To others, especially in the West German leadership, unification appeared nearly at hand. However, the dual herculean tasks of negotiating the terms of unification and securing international acquiescence thereto remained. Interestingly, initial negotiations over the Two-Plus-Four Agreement,[17] the instrument by which the victorious powers of World War II gave their consent to German unification, began before formal negotiations on the Unification Treaty itself. The Two-Plus Four Agreement was finally signed in Moscow on September 12, 1990, paving the way for the two Germanys to unite less than one month later.

On April 27, 1990, the GDR and FRG began negotiations on the forerunner to the actual Unification Treaty which would establish a monetary, economic, and social union. They signed the resulting Staatsvertrag, or State Treaty, three weeks later,[18] and it went into force on July 1, 1990. On that date the often-idolized West German Deutsche Mark replaced the East German Ost Mark throughout the GDR.

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14. December 1, 1989.

15. The Christian Democratic Union is the conservative party headed in West Germany by Chancellor Helmut Kohl.

16. WOLFGANG SCHÄUBLE, DER VERTRAG: WIE ICH ÜBER DIE DEUTSCHE EINHEIT VERHANDELTE 34 (1991).

17. Formally titled the Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 29 I.L.M. 1186 (1990). See Andrea Kupfer, *International Agreements: Treaty on the Final Settlement with Respect to Germany*, 32 HARV. INT'L L.J. 227 (1991), for details regarding the negotiation and provisions of this treaty.

18. May 18, 1990.

Only after the economic union on July 1, 1990, did de Maizière realize that the GDR was wholly incapable of rectifying the wrongs of forty years of communism without direct assistance from the Federal Republic; only then was he willing to begin negotiations toward rapid unification.[19] The negotiations on the Unification Treaty, while rapid, given their complexity and historic singularity and importance, required marathon negotiating sessions at many levels over seven weeks.[20] What began on July 6, 1990 ended on August 31, 1990, when the two Germanys signed the 244-page Unification Treaty,[21] paving the way for the rebirth of a united Germany as of midnight on October 3, 1990. This document initially contained many of the legal attempts to reverse the various property-related injustices perpetrated by the Third Reich, the Soviet occupation authorities, and the government of the German Democratic Republic.

III. The History of Expropriations

One needs a clear understanding of the means by which real and legal persons were dispossessed of their property, whether by the Third Reich, Soviet occupation forces,[22] or the GDR, to understand many of the legal intricacies of the current effort at privatization. In addition, this knowledge is essential in evaluating the difficulties faced and the solutions adopted by those who negotiated the Unification Treaty, those who drafted the privatization laws, and, most importantly, those who have been charged with implementing their ambitious goals in a expeditious and just manner. The privatization laws grant differing rights depending on the timing, means, and extensive nature of the expropriations at issue.

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19. Schäuble, *supra* note 16, at 37.

20. For a detailed portrayal of these historic negotiations through the eyes of the chief West German negotiator, see *id.*

21. Vertrag Zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands—Einigungsvertrag (Treaty on the Establishment of German Unity—Unification Treaty), Aug. 31, 1990, 1990 Bundesgesetzblatt, Teil II [BGBl. II] 877 [hereinafter Unification Treaty].

22. Because current privatization efforts are limited to the territory of the former GDR, a review of the methods of expropriation used by the United States, British, and French occupation forces is beyond the scope of this analysis.

A. *The Third Reich, 1933-1945*

1. Methods of Expropriation

Section 1, paragraph 6 of the Property Law[23] specifically provides that its terms are applicable to property claims made by individuals and groups who lost their property on racial, political, or religious grounds in the period from January 30, 1933, to May 8, 1945. The law applies equally to claims for property lost through forced sales, direct expropriations, or other illegitimate means.

Through a myriad of special legal provisions applicable largely only to Jews, the Nazi dictatorship exerted constant and continually increasing pressure at all levels to drive Jews from their property and from the economy as a whole.[24] Legal limits on Jews' economic and political freedom took many forms and were designed to drive them gradually from the mainstream of the German economy. As time went on, however, the laws limiting the scope and exercise of economic and commercial rights were supplanted with laws authorizing the wholesale confiscation or forced sale of Jewish-owned property, whether real or personal. More often than not, even in the early phases, Jews suffered staggering losses as they scrambled to comply with increasingly restrictive and manifestly unjust legal codes.

In the years preceding the pogrom against the Jews initiated on November 9, 1938,[25] the Nazis made concerted efforts to drive the Jews from Germany's economic life. Thereafter, the Nazis summarily excluded the Jews from the economy entirely. Early limits on the Jews' commercial freedom included the nullification of their driver's licenses[26]

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23. Gesetz zur Regelung Offener Vermögensfragen (Law to Regulate Unresolved Property Issues, 1991 Bundesgesetzblatt, Teil I [BGBl. I] 957 (as amended) [hereinafter Property Law].

24. For a detailed and horrifying look at the legal underpinnings of the Nazi terror against Jews, see JOSEPH WALK, DAS SONDERRECHT FÜR DIE JUDEN IM NS-STAAT (1981). *See also* VERMÖGEN IN DER EHEMALIGEN DDR (Rädler Rapach Bezzenberger ed., 1991) (discussing the principal laws targeted against Jewish-owned property). *See also* INGA MILLER, HILTER'S JUSTICE (Cambridge, 1992) (providing a thorough analysis of the role of the judiciary in supporting the Nazi regime).

25. Jews were required to repair immediately all damage caused to their property during the night of terror. Verordnung zur Wiederherstellung des Straßenbildes bei jüdischen Gewerbebetrieben, 1938 Reichsgesetzblatt, Teil I [RGBl. I] 1581. Additionally, a 20% "atonement tax" on net wealth was levied against all Jews for the damage caused. Verordnung über eine Sühneleistung der Juden deutscher Staatsangehrigkeit, 1938 RGBl. I 1579.

26. WALK, *supra* note 24, at 262.

and the forced sale of their motor vehicles.[27] Despite the hardship wrought by these early limitations, their impact paled in comparison to that of the postpogrom decrees.

The Decree to Exclude Jews from the German Economy[28] and its implementing decree,[29] for instance, forbade Jews from operating individually owned stores or mail-order businesses and excluded them from the practice of crafts or professions and from participation at markets, exhibitions, and trade fairs. Pursuant to the implementing decree, Jews had to terminate and liquidate these businesses or transfer them to Aryan owners if the needs of the people required their continued operation. As mentioned, however, subsequent decrees authorizing the wholesale seizure of Jewish-owned holdings overshadowed these early measures.

The first legal basis for the outright expropriation of property by the Nazis was the Law Concerning the Confiscation of the Property of Enemies of the People and State enacted in July 1933.[30] Although principally designed to allow the confiscation of property owned by communist activists, the Nazis also used the law against other disfavored groups, and against many Jews.[31] The Nazis did not create legal instruments to license the direct wholesale confiscation of Jewish-owned property, however, until 1938.

In 1938 German law required Jews and their non-Jewish spouses to register the entirety of their domestic and foreign property.[32] Failure to comply was punishable by large fines or even imprisonment. A series of laws were subsequently passed in quick succession authorizing the forced sale and confiscation of most Jewish-owned property. Pursuant to the Decree on the Use of Jewish Property,[33] the forced sale and liquidation of real property, securities, jewelry, and art works was authorized.[34] A succession of ordinances enacted over the following years further defined and implemented the outrageous purpose of this decree.[35]

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27. *Id.* at 268.

28. Verordnung zur Ausschaltung der Juden aus dem deutschen Wirtschaftsleben, 1938 RGBl. I 1580.

29. Verordnung zur Durchführung der Verordnung über die Ausschaltung aus dem deutschen Wirtschaftsleben, 1938 RGBl. I 1642.

30. Gesetz über die Einziehung volks- und staatsfeindlichen Vermögens, 1933 RGBl. I 479.

31. VERMÖGEN IN DER EHEMALIGEN DDR, *supra* note 24, at FI-1.

32. Verordnung über die Anmeldung des Vermögens von Juden, 1938 RGBl. I 414.

33. Verordnung über den Einsatz des jüdischen Vermögens, 1938 RGBl. I 1709.

34. VERMÖGEN IN DER EHEMALIGEN DDR, *supra* note 24, at 2.

35. Durchführungsverordnung zur Verordnung über den Einsatz des jüdischen Vermögens, 1939 RGBl. I 37; Anordnung aufgrund der Verordnung über die

2. Current Legal Implications

While expropriation by the Third Reich, regardless of the method used to effect transfer, entitles the former owner or her legal successor to either restitution or compensation, the finder of fact must resolve some extremely difficult issues. For instance, the fact finder must analyze the level of proceeds from a forced sale against data from the period to determine if the sum was indeed so inadequate as to constitute a compensable taking. This type of analysis is extremely difficult for two principal reasons: (1) the profusion of constraints on the functioning of the market during the Third Reich was so distorted that historic market data may be close to meaningless, and (2) the large-scale destruction of records in the intervening years makes even this partially barren data difficult to retrieve. Property transfers effected as fines for criminal convictions also must be scrutinized carefully to determine their legitimacy in the eyes of the successor democracy forty-five years later.

These are but a few of the countless issues raised by Nazi expropriations. While Germany can draw on its abundant early postwar treatment of such issues in what was then West Germany, the current privatization laws are substantially different from those then applied. Furthermore, the political environment in which today's laws are to be implemented is radically different from the Adenauer era.

B. *The Soviet Occupation, 1945-1949*

1. Methods of Expropriation

In the fifty-three months between the end of World War II and the founding of the GDR, more extensive changes and disruptions to private property ownership occurred in the Soviet occupation sector than in the following forty years of GDR rule. At both Yalta and Potsdam, the four Allied powers agreed to the extraction of reparations from Germany.[36] At Yalta, for instance, the Allies agreed to a total sum of twenty billion dollars, half of which they earmarked for the disproportionately destroyed Soviet Union. Later, however, they failed to agree on binding final figures. The end result was that they assented to allow each occupation power to exact its own reparations from its respective sector. In

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Anmeldung des Vermögens von Juden, 1939 RGBl. I 282; Anordnung zur Durchführung der Verordnung über den Einsatz des jüdischen Vermögens, 1941 RGBl. I 218; Verfahrensordnung der Reichskammer der Bildenden Künste als Ankaufstelle für Kulturgut, 1941 RGBl. I 245.

36. See VERMÖGEN IN DER EHEMALIGEN DDR, *supra* note 24, at 6-34, for a discussion of Soviet expropriations between 1945 and 1949.

addition, the Soviet Union was to receive a fixed portion of the reparations taken from the three western sectors.[37]

In June 1945 the Soviet Union set up in its sector the Soviet Military Administration in Germany (SMAG), which was assisted in its executive functions by five regional military administrations and countless town and city commanders.[38] These administrative bodies, as well as the Reparations Brigades dispatched to the Soviet occupation zone by the Soviet Ministry of Industry, expropriated vast amounts of property throughout the sector. Often, they utilized nascent German institutions to ratify these seizures.

The process of expropriation began on October 30, 1945 with SMAG Order 124.[39] It did not execute actual expropriation, but it did sequester and provisionally place at the disposal of the SMAG Economics Office a variety of enumerated properties: German government property (national and local); NSDAP property as well as that owned by its officers, principal members, and influential supporters; property owned by groups and groupings already dissolved by the SMAG; property owned by governments and citizens of countries which assisted Germany during the war; and the property of all other persons registered by the SMAG on special lists or through other special means.[40] One day later, SMAG Order 126 finally expropriated all the property of the NSDAP and 61 associated organizations without compensation.

As time went by, the Soviet Union became increasingly desirous that the expropriations appeared to be German-initiated. SMAG Order 97,[41] for example, created a German Commission for Sequestration and Confiscation in order to prepare the property sequestered pursuant to SMAG Order 124[42] for final transfer to the nascent East German administrative apparatus.[43] The Commission exempted certain specific property from expropriation with Soviet approval. The remainder of the vast amount of property sequestered pursuant to SMAG Order 124 was subsequently expropriated through legislation by the German govern-

37. *Id.* at 8-9.

38. *Id.* at FII-8 to FII-10.

39. For a discussion of the principal SMAG Orders, see Theodor Schweisfurth, *Entschädigungslose Enteignungen von Vermögenswerten (Betrieben) auf besatzungsrechtlicher oder besatzungshoheitlicher Grundlage in der sowjetischen Besatzungszone Deutschlands*, 5 BETRIEBS-BERATER 281-291 (1991).

40. *Id.* at 283. SMAG Order 97 (Mar. 29, 1946) made it clear that these "other persons" were to include, but not necessarily be limited to, war criminals. *Id.* at 284.

41. SMAG Order 97 was instituted on March 29, 1946.

42. SMAG Order 124 was instituted on October 30, 1945.

43. VERMÖGEN IN DER EHEMALIGEN DDR, *supra* note 24, at FII-19.

ments in each of the five Länder.[44]

Further mass expropriations occurred pursuant to SMAG Order 167,[45] which mandated that approximately 200 businesses be transferred from German to Soviet government control in order to provide reparations out of ongoing production.[46] In the years that immediately followed, these manufacturing enterprises produced roughly twenty percent of the total output of East Germany's industry.[47]

Land reform policies also led to the summary confiscation of vast amounts of property.[48] Through a variety of legal measures, many of which were designed to make land reform appear a German-initiated program, the Soviets confiscated real property holdings over 250 acres (100 hectares) without compensation. In fact, they often confiscated an individual's entire holdings. In all, the Soviets expropriated almost 8 million acres of agricultural and forestry land and redistributed it to 550,000 landless farmers and refugees from the eastern territories of prewar Germany; this land represented more than one-third of the total Soviet sector.[49]

With the founding of the German Democratic Republic on October 7, 1949, the sole authority of the Soviet occupation forces to seize property in East Germany came to an end. The largely uncompensated seizure of property itself, however, did not end until the fall of the communist East German regime four decades later.

2. Current Legal Implications

The legal treatment of claims based on expropriations carried out under authority of the Soviet occupation forces is unique in the current privatization and compensation scheme and is an area rife with problems of legal interpretation. In the Unification Treaty, the two German governments agreed that "the expropriations which occurred on the basis of occupation law [Besatzungsrecht] or the sovereign will of an occupying power [Besatzungshoheit] from 1945 to 1949 are not to be reversed."[50]

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44. See Schweisfurth, *supra* note 39, at 284-85, for detailed information regarding the expropriation laws in each Land.

45. SMAG Order 167 was implemented June 15, 1946.

46. VERMÖGEN IN DER EHEMALIGEN DDR, *supra* note 24, at FII-2.

47. *Id.* at FII-10c (citing W. KRAUSE, DIE ENTSTEHUNG DES VOLKSEIGENTUMS IN DER INDUSTRIE DER DDR 103 (1958)).

48. *See id.* at FII-12 to FII-14, for a description of the land reform carried out in the first years of Soviet occupation.

49. Gerhard Fieberg & Harald Reichenbach, *Zum Problem der offenen Vermögensfragen*, 6 N.J.W. 321, 322 (1991).

50. "[D]ie Enteignungen auf besatzungsrechtlicher beziehungsweise besatzung-

While this measure precludes any right of restitution, the contracting parties left the Bundestag to decide whether some form of compensation should be provided.[51]

The German Constitutional Court has upheld the legality of this agreement under the German constitution (the Basic Law or Grundgesetz),[52] but complex questions of interpretation remain unresolved. Which expropriations can be said to have occurred on the basis of occupation law or the sovereign will of an occupying power?[53] The interpretation of these terms will determine whether tens of thousands of persons are entitled to restitution, or merely some form of limited compensation,[54] and whether countless thousands of interim owners and tenants shall maintain possession or be evicted.

To illustrate the complexity of these issues, Schweisfurth, citing a case decided by the German Constitutional Court in 1953,[55] points out that at least since that decision German courts have considered acts taken by German authorities, regardless of the occupation politics involved, as purely German acts and not as "indirect" or "hidden" acts of an occupying power.[56] If courts continue to follow this decision, then the expropriation laws enacted after the summer of 1946 cannot be considered occupation laws. Persons who lost their property pursuant to these laws, thus, may be entitled to restitution or, at a minimum, full compensation.

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shoheitlicher Grundlage (1945 bis 1949) sind nicht mehr rückgängig zu machen." This provision originated in a joint declaration of the two German governments dated June 15, 1990. The entire text was, however, later included in the final treaty as annex III. Unification Treaty, *supra* note 21, art. 41 and annex III(1), 1990 BGBl. II at 1119.

51. *Id.*

52. Decision of Apr. 23, 1991, Entscheidungen des Bundesverfassungsgerichts [BVerfGE], 1 BvR 1170/90. For an examination of whether this exclusion is, however, permissible under the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights], see Thomas Arnoldt, *Die Enteignungen in der sowjetischen Besatzungzone (1945 bis 1949) und die Schutzgarantien der Europäischen Menschenrechts konvention*, 18 (BEILAGE 14) BETRIEBS-BERATER 1 (1991).

53. See Schweisfurth, *supra* note 39, at 286-91, for an analysis of the historic and current juridical meaning of these terms.

54. The German Constitutional Court has held that the Bundestag may take into account budgetary constraints as well as other factors in setting the just level of recompense. Decision of Apr. 23, 1991, BVerfGE, 1 BvR 1170/90.

55. Decision of Mar. 18, 1953, 2 BVerfGE 181.

56. Schweisfurth, *supra* note 39, at 287.

C. *The German Democratic Republic, 1949-1989*

1. Methods of Expropriation

Although the 1949 constitution of the GDR was very similar in its formulation to the democratic constitution of the Weimar Republic,[57] its substantive protections became impotent during the early building years of socialist East Germany. A few key statistics illustrate the sweeping transfer of property wrought by the early acts of the GDR government. For example, between 1950 and 1955 the percentage of net production accounted for by nationalized industries (volkseigene Betriebe or VEBs) increased from 57 percent to 72 percent.[58] Sweeping changes also occurred in the agricultural sector. The number of collective farms (landwirtschaftlicher Produktionsgenossenschaften or LPGs) rose from 1,906 in 1952 to 19,345 in 1960. At this later date, they accounted for 92.5 percent of total agricultural production.[59]

This expropriation and transfer of property by the GDR government took a variety of forms. The GDR government, for instance, made it a crime to leave the country without prior permission from the authorities (Republikflucht). Those guilty of this crime were subject to confiscation of their property and any property they might subsequently inherit in the GDR.[60] Initially, the GDR government authorized only the sequestration of this property,[61] but it formally sanctioned complete uncompensated expropriation by 1958.[62]

Forced participation by the state as a limited partner in private businesses was another pervasive form of expropriation. Pursuant to the Decree to Form Half-National Enterprises,[63] the preamble of which explicitly stated that limited state participation was merely an interim measure in the formation of fully socialized enterprises, the government of the GDR claimed 50 percent ownership in countless companies. In addition,

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57. Article 23 provided that private property could only be expropriated with compensation and for a public purpose. VERMÖGEN IN DER EHEMALIGEN DDR, *supra* note 24, at FIII-38 to FIII-39.

58. *Id.* at FIII-35.

59. *Id.* at FIII-35.

60. WILHELM HEBING, ENTEIGNUNG UND RÜCKERWERB VON DDR-VERMÖGEN, *in* INVESTITIONSBEDINGUNGEN UND EIGENTUMSFRAGEN IN DER EHEMALIGEN DDR NACH DEM STAATSVERTRAG 45, 46 (1990).

61. Verordnung zur Sicherung von Vermögenswerten, July 17, 1952, 1952 Gesetzblatt der DDR [GBl.] Nr. 100, 615.

62. Anordnung Nummer 2 zur Verordnung zur Sicherung von Vermögenswerten vom 17.7.1952, Aug. 20, 1958, 1958 Gesetzenblatt der DDR, Teil I [GBl. I] 664.

63. Verordnung über die Bildung halbstaatlicher Betriebe, Mar. 26, 1959, 1959 GBl. I 253.

the ubiquitous restrictions on the free alienation and sale of property forced many owners to take out loans that the government subsequently compelled them to secure through mortgages on the property in question. The varied takings carried out by the GDR government went wholly uncompensated until the passage of the Compensation Law in 1960.[64] At that time, 64,000 property owners received 80 million GDR Ost Marks in back compensation, one-third of which was payable directly to state-owned credit institutions.[65] Needless to say, at an average of 1,250 Ost Marks per claimant, the compensation was unquestionably inadequate by Western market standards.

The final phase of mass expropriation came in 1972 when the GDR government proceeded to nationalize the remaining ownership of those enterprises in which it had already had limited ownership pursuant to the 1959 decree. The government forced sale, with the owners entitled to receive only ten thousand Ost Marks of the "agreed to" price annually.[66] Eleven thousand new VEBs were created out of this wave of expropriations.[67]

2. Current Legal Implications

Again, as in the case of expropriations under the Third Reich, the drafters of the privatization and compensation laws and the administrative agencies now charged with their implementation must disentangle the many elements of creeping expropriation. To what extent must crimes and their penalties, as defined by a then-sovereign state, be respected? At what level is compensation deemed to have been so inadequate so as to have constituted one element in an uncompensated taking?[68] These questions appear virtually unanswerable at times.

Nevertheless, the GDR was notorious for maintaining amazingly detailed records on virtually every aspect of its citizens' lives, and these records have not been destroyed on a large scale by either war or occupation. Furthermore, many of the key actors are still alive. For these reasons, evaluation of these matters should be significantly easier than for cases involving the Third Reich.

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64. Entschädigungsgesetz, Apr. 25, 1960, 1960 GBl. I 257.

65. VERMÖGEN IN DER EHEMALIGEN DDR, *supra* note 24, at FIII-36 to FIII-37.

66. HEBING, *supra* note 60, at 48.

67. VERMÖGEN IN DER EHEMALIGEN DDR, *supra* note 24, at FIII-38.

68. The Bundestag has not yet set the level of compensation to be provided current claimants. Surely, once determined, this standard for compensation will inform any determination regarding the sufficiency of compensation provided during GDR times. See *infra* Part X for a more detailed discussion of the issue of compensation.

IV. Overall Legal Implications of Unification

October 3, 1990 may have brought the christening of a new destiny for the German people, but juridically it did not see the creation of a new state or a fundamentally new legal order. Nevertheless, the complex terms of the Unification Treaty make clear that, at least for a transitional period, Germany has adopted a hybrid legal system to bridge the gulf between the communist East German code and the code of an exemplary market economy—the Federal Republic.

One cannot overstate the importance of this hybrid system to the Trust Agency's efforts at privatization. While details regarding the specific legal regime of privatization and compensation have been left to Part VI of this Article, one must understand and appreciate the overall legal regime in which the Trust Agency and the German courts operate. Much of the uncertainty that exists over privatization directly results from the uncomfortable blend of divergent legal traditions that is the basis of the current hybrid legal order. The changes that have been wrought largely appertain to the domestic legal environment. Internationally, remnants of the GDR have been cast aside as quickly and efficiently as possible.

A. *Domestic Implications—Systems in Transition*

The Basic Law or Grundgesetz has served as the constitution of the FRG since its founding in 1949.[69] Until the unification with the GDR, the Basic Law had provided for the accession of those parts of Germany in which it could not yet be put into effect.[70] On October 3, 1990, the GDR acceded to the Federal Republic pursuant to Article 23 of the Basic Law.[71] While the procedure was relatively simple, its results were rather complex.

The Unification Treaty itself, for example, contains a variety of

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69. For a concise review of Germany's constitutional history, see Bundeszentrale für politische Bildung, Deutsche Verfassungsgeschichte 1849-1919-1949 (1989).

70. The Unification Treaty repealed article 23 of the Grundgesetz expressing unified Germany's conviction that with the accession of the GDR Germany was now whole. Unification Treaty, *supra* note 21, art. 4(2), 1990 BGBl. II at 878. "For the time being, this Basic Law shall apply in the territory of the [West German Länder]. In other parts of Germany it shall be put into force on their accession." Grundgesetz [GG], art. 23.

71. Unification Treaty, *supra* note 21, art. 1(1), 1990 BGBl. II at 877. In a similar fashion, the Grundgesetz became effective in the Saarland by virtue of a federal law. December 23, 1956, § 1(1) 1956 BGBl. I at 1011.

amendments to the Basic Law.[72] Its preamble was amended to make it clear that with the accession of the GDR it became applicable to the "entire German people."[73] As mentioned, the Treaty repealed Article 23 to underscore the point that no further parts of Germany exist to be united at some future date.[74] The Treaty made additional changes to the distribution of voting power in the upper house of the German parliament, the Bundesrat.[75]

While these are important changes, the temporary exceptions to the requirements of the Basic Law, provided for in article 4 of the Unification Treaty, have a far more direct impact upon the process of privatization in eastern Germany. The Treaty amends the Basic Law to provide a transitional period, until December 31, 1992, in which the laws applicable in the territory of the former GDR need not conform fully with the provisions of the Basic Law.[76] This waiver, however, requires that the laws applicable in the five new Länder not encroach upon "the essential content of a basic right."[77] Variances from Sections II,[78] VIII,[79] VIIIa,[80] IX,[81] X,[82] and XI,[83] of the Basic Law, however, are permissible until

72. Unification Treaty, *supra* note 21, art. 4(1)-(6), 1990 BGBl. II at 878.

73. *Id.* art. 4(1), at 878.

74. *Id.* art. 4(2), at 878.

75. *Id.* art. 4(3), at 878.

76. *Id.* art. 4(5)(1), at 878.

77. GG art. 19(2).

78. Section II is entitled "The Federation and the Constituent States (Länder)." This section of the Grundgesetz regulates such important matters as, inter alia, international law an integral part of federal (art. 25); the federal guarantee of the Länder constitutions (art. 28); reorganization of the federal territory (art. 29); functions of the Länder (art. 30); priority of federal law (art. 31); foreign relations (art. 32); equal political status of all Germans (art. 33); legal, administrative, and police assistance (art. 35); and federal enforcement (art. 37).

79. Section VIII is entitled "The Execution of Federal Laws and the Federal Administration." It regulates such vital matters as: the execution of federal laws by the Länder (art. 83); land administration and federal government supervision (art. 84); direct federal administration (art. 86); build-up, strength, use, and functions of the armed forces and their administration (arts. 87a & 87b); federal bank (art. 88); and federal infrastructure projects (arts. 89 & 90).

80. Section VIIIa is entitled "Joint Tasks" and regulates the areas where both the federation and the Länder share competence (arts. 91a, 91b).

81. Section IX is entitled "The Administration of Justice" and is critical to the process of privatization. The areas it addresses include: the organization of the court system (art. 92); the competency and composition of the Federal Constitutional Court (arts. 93, 94); federal courts (art. 96); independence of judges (art. 97); assignment of competencies to the Federal Constitutional Court and highest federal courts in matters involving Land law (art. 99); compatibility of statutory law with the Grundgesetz (art. 100); ban on extraordinary courts (art. 101); abolition of capital punishment (art. 102); basic rights in

December 31, 1995.[84] This partially qualified but sweeping waiver was designed to provide the necessary time in which to examine and amend the laws of the GDR without risking the creation of a legal vacuum. These waivers, however, simultaneously have created prodigious legal uncertainties. This uncertainty will undoubtedly continue until the waiver expires on January 1, 1996.

Article 8 of the Unification Treaty provides that West German law will become applicable in the five new Länder upon unification, unless otherwise provided in annex I.[85] Annex I, for its part, consists of 174 pages of exceptions and modifications to West German law.[86] Provisions include, for example, major exceptions to FRG legislation in such areas as the form and functioning of the justice system,[87] the substantive provisions of FRG labor law,[88] and general traffic regulations.[89]

To complicate legal matters further, article 9 of the Unification Treaty provides that GDR law valid at the time of signing of the treaty will continue in force, until repealed or amended, to the extent that it does not conflict with the Basic Law, directly applicable European Community law, or specific provisions of the Treaty,[90] and to the extent it is required to fill gaps in federal and state law.[91] Annex II of the Treaty

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the courts (art. 103); and legal guarantees in the event of deprivation of liberty (art. 104).

82. Section X is entitled "Finance." It encompasses such topics as: apportionment of expenditures, financial assistance (art. 104a); customs duties and monopolies (art. 105); apportionment of tax revenues (art. 106); financial equalization (art. 107); fiscal administration (art. 108); separate budgets for the Federation and Länder (art. 109); and rendering of accounts, Audit Office (art. 114).

83. Section XI is entitled "Transitional and Concluding Provisions." This portion of the Grundgesetz includes articles relating to these topics: definition of "German" for citizenship purposes (art. 116); refugees and expellees (art. 119); occupation costs and burdens as a consequence of World War II (art. 120); implementation of equalization of wartime burdens legislation (art. 120a); continued validity of old law and old treaties (art. 123); corporate bodies under public law (art. 130); property in the event of territorial changes (art. 135); validity of certain articles of the Weimar Constitution (art. 140); and duration of validity of the Grundgesetz (art. 146).

84. Unification Treaty, *supra* note 21, art. 4(5)(2), 1990 BGBl. II at 878.

85. *Id.* art. 8, at 879.

86. *Id.* annex 1, at 890-1064.

87. *Id.* annex 1, ch. III, topic A, at 899-913.

88. *Id.* annex 1, ch. V, topic B, at 956-58; annex 1, ch. VIII, topic A, at 971-74.

89. *Id.* annex 1, ch. XI, topic B, at 1032-37.

90. *Id.* art. 9(1), at 879.

91. *See* Paul Stelkens, *Fragen zum Verwaltungsverfahrensgesetz nach dem Einigungsvertrag*, 8 DEUTSCH-DEUTSCHE RECHTS-ZEITSCHRIFT 264, 264 (1991).

contains 54 pages of clarifications and modifications pursuant to article 9.[92]

The Trust Agency and the judges to which its decisions are appealed have the difficult task of interpreting a deluge of new legislation in a legal environment in which basic principles and provisions are in constant flux. For instance, until the Federal Constitutional Court approves a new abortion law recently passed by the Bundestag, the two halves of Germany will have greatly differing laws regarding the criminalization of abortion. In addition, the two halves of Germany have fundamentally different standards regarding permissible behavior on the streets and highways of the land,[93] the rights of employees, and countless other issues of fundamental concern in a modern democratic industrial society.

B. *International Implications—State Succession*[94]

Chapter IV (comprised of articles 11 and 12) of the Unification Treaty,[95] entitled "Treaties and Agreements Under International Law," makes it apparent that treaties of the Federal Republic shall, after unification, have precedence over treaties concluded by the former GDR.[96] Article 12, on the other hand, states that international treaties and agreements to which the GDR had been a party will be checked to determine whether they shall continue to be valid in their entirety, whether they must be amended, or whether they must be nullified.[97] This review must consider the treaty obligations of the Federal Republic, any applicable requirements of European Community law, the basic principles of a

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92. Unification Treaty, *supra* note 21, annex II, 1990 BGBl. II at 1065-1119.

93. For example, the five new Länder have speed limits on their Autobahn. This stands in sharp contrast to their western counterparts, where the sky is the limit.

94. A discussion of the return to full German sovereignty effected by the Two-Plus-Four Agreement is beyond the scope of this analysis. Nevertheless, by its terms the four victorious powers from World War II relinquished all their special occupation privileges. For more specific information, see Kupfer, *supra* note 17.

95. Unification Treaty, *supra* note 21, art. 11, 1990 BGBl. II at 880.

96. Ulrich Drobnig, *Das Schicksal der Staatsverträge der DDR nach dem Einigungsvertrag*, 3 DEUTSCH-DEUTSCHE RECHTS-ZEITSCHRIFT 76, 77 (1991). Article 11 states, in part,

> The parties to this treaty assume that the treaties and agreements under international law to which the Federal Republic of Germany is a party, . . . will retain their validity and that the rights and duties which stem therefrom . . . will now also be applicable . . . to the territory [of the former GDR].

Unification Treaty, *supra* note 21, art. 11, 1990 BGBl. II at 880.

97. *Id.* art. 11, at 880. Several commentators have maintained that GDR treaty obligations remain in force, unaffected by unification. *See, e.g.*, Graefrath, *Was wird aus den völkerrechtlichen Verträgen der DDR?* NEUES DEUTSCHLAND, Apr. 5, 1990, at 5.

democratic legal order, and the legitimate interests of the GDR's treaty partners.[98]

The desire, stated in article 11, that the treaties and agreements to which the FRG is a party shall now apply to the territory of the former GDR, seems to be in accord with the generally accepted principles of international law. Drobnig, for instance, demonstrates that article 11 is in full harmony with the historically accepted axiom of "movable treaty boundaries."[99] Further, European Community law is immediately applicable to the territory of the former GDR through precisely this mechanism.[100] Article 227 of the Treaty of Rome provides that EC law is directly binding upon the Federal Republic, whatever its borders.[101]

Because of its special importance to issues of privatization, no analysis of the international ramifications of German unification would be complete without considering article 29 of the Unification Treaty.[102] Article 29 provides that the existing international trade relations of the GDR, especially those with other Council for Mutual Economic Assistance (COMECON) members, will be developed further, taking into consideration the interests of all parties concerned, the principles of a market economy, and the authority of the European Community in such matters.[103] Germany further agrees to seek from the European Community certain transitional exemptions for the existing foreign trade relations of the GDR.[104] While these provisions have lost some of their consequence due to the dissolution of COMECON, existing foreign contract relations continue to present problems to the Trust Agency's privatization efforts.

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98. Unification Treaty, *supra* note 21, art. 12(1), 1990 BGBl. II at 880.

99. Drobnig, *supra* note 96, at 77; Kay Hailbronner, *Das vereinte Deutschland in der Europäischen Gemeinschaft*, 9 DEUTSCH-DEUTSCHE RECHTS-ZEITSCHRIFT 321 (1991).

100. As Hailbronner notes:

> [The Federal Republic's] juridical identity remains unaltered by unification. No new "United Germany" is acceding to the European Community, but rather the territory of one of its members simply has been altered. This legal identity is the result of the thesis continuously maintained by the Federal Republic that it is identical under international law to the Third Reich which as a matter of law did not cease to exist in 1945.

Hailbronner, *supra* note 99, at 321.

101. *See* TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY], art. 227.

102. Unification Treaty, *supra* note 21, art. 29, 1990 BGBl. II at 884.

103. *Id.*, art. 29(1), at 884.

104. *Id.*, art. 29(2), at 884.

V. Ownership and Trusteeship of Former Volkseigentum

The current regime for privatizing former GDR state property empowers a variety of administrative bodies to take part in this vast effort. Each administrative body is responsible for the supervision and eventual privatization of a specific category of formerly state-owned property. To understand this division of responsibilities, one must have a grasp of the types of property which legally existed in the GDR and knowledge of the manner in which they were categorized and transferred to different agents within the public sector.

A. *Property in the German Democratic Republic*

While, as previously noted, the GDR Constitution of 1949 guaranteed the right of private property, its 1974 replacement visibly shifted the overall emphasis toward state-owned property forms. The 1974 Constitution[105] and the East German civil code[106] both provided for three types of socialist property.[107] The most important enumerated form was people's property (Volkseigentum). This category included the vast majority of East Germany's companies and businesses. The second most important form encompassed the property of socialist co-operatives (sozialistische Genossenschaften). Into this category fell, for instance, the property held by the collective farms. The third form was the property of citizens' social organizations. This category included the property owned by the SED and its sister parties as well as property owned by other mass organizations such as the communist youth movement.

In addition to these forms of socialist property, East German law continued to recognize private property. The law explicitly protected personal property necessary to satisfy the individual citizen's need for living quarters and appropriate rest and relaxation.[108] In sharp contrast to its Western analogue, GDR law allowed for separate ownership of real estate and the buildings and installations built thereupon.[109] Understandably, this aspect of GDR law has led to many difficulties in the ongoing privatization efforts.

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105. Die Verfassung der DDR [Verf] art. 10I.

106. Zivilgesetzbuch [ZGB] § 18.

107. *See* Götz von Craushaar, *Grundstückseigentum in den neuen Bundesländern,* 10 Deutsch-Deutsche Rechts-Zeitschrift 359, 360 (1991).

108. ZGB §§ 22, 23, 295.

109. *Id.* § 295 II. *See* von Craushaar, *supra* note 107, at 360-61.

B. *Division and Transfer to Public Authorities of the Federal Republic of Germany*

Policy-makers on both sides of the intra-German border were involved in the decision to partition and transfer former GDR state-owned property to different public authorities of the FRG. For example, a number of laws passed by the first democratically elected Volkskammer began the process of assigning state-owned property to different public authorities within the GDR.[110] The Trust Law transferred ownership of all VEBs and other state-owned business enterprises to the Trust Agency, which was therein established.[111] It specifically excluded from this transfer the property of the state (the parliament building, the courts, etc.), the post office, and the property of individual political divisions of the country.[112] The Community Property Law provided that political subdivisions of the GDR would receive the public property directly necessary for the performance of their official duties.[113] This provision did not cover property that did not serve a direct administrative function, but rather served the public good through the economic benefit it provided.[114]

In general, the intricate scheme of transfer laws provided that property with a particular administrative function would continue to have that function.[115] The FRG government received property formerly a part of the national administrative apparatus, except where the Basic Law required other political subdivisions to carry out the functions for which the property had been formerly used.[116] Thus, for instance, the FRG military (Bundeswehr) received installations of the GDR People's Army (Volksarmee). Property formerly used by the Secret Police (Stasi) was

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110. *See, e.g.*, Gesetz zur Privatisierung und Reorganization des volkseigenen Vermögens (Treuhandgesetz or Trust Law), 1990 GBl. I 300; Gesetz über das Vermögen der Gemeinden, Städte und Landkreise, 1990 GBl. I Nr. 42, at 660 [hereinafter Kommunalvermögensgesetz or Community Property Law].

111. Gesetz zur Privatisierung und Reorganisation des Volkseigenen Vermögen—Treuhandgesetz (Law Regarding the Privatization and Reorganization of the People's Property), art. 1(4), 1990 BGBl. I 766 [hereinafter Trust Law].

112. *Id.* art. 1(5), 1990 GBl. I at 300.

113. Community Property Law, *supra* note 110, 1990 GBl. I, Nr. 42, at 660.

114. Manfred Lange, *Wem gehört das ehemalige Volkseigentum?—Grundfragen der Art. 21 und 22 Einigungs V*, 9 DEUTSCH-DEUTSCHE RECHTS-ZEITSCHRIFT 329 (1991).

115. Article 22 of the Unification Treaty provided that nonadministrative property be placed in trust, either with the Trust Agency or a special federal trust office, until privatized or put to another public use. Unification Treaty, *supra* note 21, art. 22, 1990 BGBl. II at 881.

116. Lange, *supra* note 114, at 331. *See also* Unification Treaty, *supra* note 21, art. 21(1)-(2), 1990 BGBl. II at 881.

transferred to the Trust Agency for privatization.[117] But who should receive the Brandenburg Gate and the many vacation hotels of the Stasi?

Though the property transfer laws adopted by the GDR were largely converted into FRG law through inclusion in the Unification Treaty, their interpretation continued to vex those charged with the administration and privatization of this property. In order to resolve the many divisive disputes which arose between public-sector entities over their implementation, the Bundestag passed the Property Assignment Law.[118]

The Property Assignment Law provides procedural guidelines for final determination of the proper recipient of former GDR state-owned property. The president of the Trust Agency, for instance, may determine which property belongs to each of the business entities it has received.[119] Further, the Oberfinanzpräsident, or her special appointee, may determine the proper division of property among federal government agencies.[120] While some questions remain, the status of much of the former holdings of the GDR government appears settled, at least for the time being.

VI. The Legal Regime For Privatization

Perhaps the most contentious issues surrounding the negotiations regarding the unification of Germany were those related to state-owned property. Many debates focused upon the future rights of former owners of property now either in state hands or resold by the state into private hands. The tension between the desire to guarantee a right of restitution for former owners and the dramatic need for rapid investment in eastern Germany pervaded the negotiations. While a variety of laws deal with this general subject, the Property Law[121] is without question at the heart of the entire restitution-compensation-privatization legal regime.

As originally enacted, the Property Law provided for the preeminence of restitution. Several months later, after it became clear that a largely unrestricted guarantee of restitution was incompatible with rapid investment and privatization, Bonn lawmakers authored significant amend-

117. Unification Treaty, *supra* note 21, art. 21(1), 1990 BGBl. II at 881.

118. Gesetz über die Feststellung der Zuordnung von ehemals volkseigenem Vermögen—Vermögenszuordnungsgesetz [hereinafter VZOG], which comprises article 7 of the Gesetz zur Beseitigung von Hemmnissen bei der Privatisierung von Unternehmen und zur Förderung von Investitionen—Hemmnissbeseitigungsgesetz, Mar. 22, 1991, 1991 BGBl. I 766.

119. Hemmnissbeseitigungsgesetz, art. 7, § 1(1)1, 1991 BGBl. I at 784.

120. *Id.* art. 7, § 1(1)2, at 784.

121. Property Law, *supra* note 23, 1991 BGBl. I 957.

ments to the Property Law. These amendments were contained in the so-called Impediments Removal Law.[122]

After analyzing the provisions of the Property Law as originally enacted in order to understand the overall framework for restitution and compensation, this Article will review the amendments enacted in the Impediments Removal Law. These changes have been especially important to the work of the Trust Agency.

A. *The Property Law*[123]

1. Legislative History

The cornerstone of the legal regime adopted by East and West Germany to provide restitution or compensation to former owners of expropriated property in the territory of the GDR and to provide the basis for rapid privatization of state industries and farms is the Law to Regulate Unresolved Property Issues (Property Law).[124] The Property Law had its origins in the Joint Declaration of the Two German Governments with Respect to the Regulation of Unresolved Property Issues (Joint Declaration), dated June 15, 1990.[125]

For example, the Joint Declaration established that former owners of businesses expropriated in the last wave of communist confiscations in 1972 had a right to repurchase their portion of their business for an amount roughly equal to the compensation they had been provided in 1972.[126] In addition, the governments agreed that those who had lost their property through expropriation between 1949 and 1972 had a right to restitution or, at their choice, compensation.[127] Annex III of the Unification Treaty made the Joint Declaration binding upon the Federal

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122. Gesetz zur Beseitigung von Hemmnissen bei der Privatisierung von Unternehmen und zur Förderung von Investitionen (Law to Remove Impediments to the Privatization of Businesses and the Support of Investment), Mar. 22, 1991, 1991 BGBl. I 766. Hereinafter citations to this law will be made using citations to the amended version of the Property Law, *supra* note 23, 1991 BGBl. I 957.

123. For an excellent overview of the provisions and interpretation of the amended Property Law, see BEATE CZERWENKA, RÜCKGABE ENTEIGNETER UNTERNEHMEN IN DEN NEUEN BUNDESLÄNDERN (1991).

124. Gesetz zur Regelung offener Vermgensfragen (Vermgensgesetz—VermG), 1991 BGBl. I 957 (as amended).

125. *Gemeinsame Erklärung der Regierungen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik zur Regelung offener Vermögensfragen, in Presse- und Informationsamt der Bundesregierung*, BULLETIN DER BUNDESREGIERUNG 1119 (1990).

126. CZERWENKA, *supra* note 123, at 7.

127. *Id.*

Republic.[128]

The two governments drafted the Property Law in order to give specific legal form to the general principles of the Joint Declaration. Like the Joint Declaration, the Property Law was incorporated into the Unification Treaty.[129] The authors of the Property Law largely held to the task of giving life to the principles of the Joint Declaration. Contrary to the Joint Declaration, however, they agreed to repeal large portions of the East German Law Regarding the Establishment and Activity of Private Businesses[130] and its implementing regulations.[131]

2. Major Provisions

a. Jurisdictional Issues

The Property Law applies to several principal kinds of property. Article 1(6) makes the Law applicable to restitution or compensation claims for property effectively seized by the Third Reich on racial, political, or religious grounds through forced sales, expropriation, or other illegal means.[132] The Property Law also applies to claims resulting from six principal types of property loss occurring during the GDR regime: uncompensated expropriations ending in state ownership;[133] inadequately compensated expropriations;[134] unauthorized sales to third parties or to the state by state-appointed administrators or trustees;[135] expropriations carried out pursuant to the confiscation decision of the GDR government dated February 9, 1972;[136] property losses resulting from inadequate

128. Article 41(1) of the Unification Treaty incorporates the Joint Declaration, published as annex III, as a part of the Treaty itself. Unification Treaty, *supra* note 21, art. 41 and annex III, 1990 BGBl. II at 888, 1119.

129. *Id.* annex II, ch. III, topic B, § 1(5), at 1071.

130. Gesetz über die Gründung und Tätigkeit privater Unternehmen und über Unternehmensbeteiligungen, 1990 GBl. I 141. For other early GDR legislation opening business to private participation, see Regulation Concerning the Establishment and Business Activity of Companies with Foreign Participation in the GDR (Jan. 25, 1990) (Verordnung ber die Gründung und Tätigkeit von Unternehmen mit ausländischer Beteiligung in der DDR), 1990 GBl. I, Nr. 4, *reprinted in Regulation of Foreign Investment in the GDR*, 24 INT'L LAW. 803 (Donna Shook-Wiercimok & Rainer Velten trans., 1990).

131. Property Law, *supra* note 23, art. 39(10), 1991 BGBl. at 1077.

132. *Id.* art. 1(6), at 958.

133. *Id.* art. 1(1)a, at 958.

134. *Id.* art. 1(1)b, at 958.

135. *Id.* art. 1(1)c, at 958.

136. *Id.* art. 1(1)d, at 958.

rents whether through expropriation, renunciation, or gift;[137] and forced sales resulting from coercion, corruption, or fraud on the part of the purchaser, the GDR government, or other third parties.[138] As explained in subpart III(B) of this Article, the Property Law specifically does not apply to expropriations carried out directly or indirectly by the Soviet occupation powers.[139]

Entitled claimants include natural and legal persons, as well as their legal successors, who lost their property through one of the enumerated acts.[140] The Property Law provides for restitution or compensation for the loss of a wide variety of property rights. For example, interests in real and personal property, as well as in copyrights, patents, trademarks, bank accounts, and stocks are all protected.[141]

b. Substantive Provisions

Given the unimaginable wrongs of the Third Reich, which still lay unrighted, and the tremendous property interests held by many West German voters, the Property Law's drafters from both East and West Germany easily agreed on restitution as the new law's fundament.[142] Article 3 enshrined the preeminence of restitution.[143]

Article 3(1) provides that property transferred to state ownership or sold to third parties through one of the enumerated mechanisms, with limited exceptions to be discussed below,[144] shall be restored to its original owner or their legal successors.[145] This right to restitution may be mortgaged, assigned, transferred, or sold.[146] If more than one claimant exists for a given property, the claimant who first lost the property through one of the enumerated mechanisms is entitled to restitution.

Subsections 3, 4, and 5 of article 3 provide the chief mechanisms to

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137. *Id.* art. 2, at 958.
138. *Id.* art. 3, at 958.
139. *Id.* art. 8, at 958.
140. *Id.* art. 2(1), at 958.
141. *Id.* art. 2(2), at 958.
142. CZERWENKA, *supra* note 123, at 9.
143. Property Law, *supra* note 23, art. 3, 1991 BGBl. I at 959. The reader should note that section 2 of the Investment Priority Law has replaced article 3 of the Property Law and that section 2 now contains the single remaining right of way. *See infra* subpart VI(C) for a more complete discussion.
144. Property Law, *supra* note 23, arts. 4 & 5, 1991 BGBl. I at 960-61.
145. *Id.* art. 3(1), at 959.
146. *Id.* This provision has been hotly debated. Sources at a German law firm recently disclosed that one claimant transferred his interest in dozens of claims in central Berlin to a consortium of investors for "several hundreds of millions of dollars."

guarantee restitution and have thus been the prime focus of attempts to amend the Property Law to provide quicker investment and to protect the interests of current renters and lessees. Article 3(3), for instance, prohibits the current possessor of a property against which a claim has been filed from entering into long-term contractual obligation or settling legal claims against the property without the claimant's authorization.[147] The article permits such action, however, when absolutely necessary to fulfill the legal obligations of the actual owner of the property, or when the preservation of the property itself is threatened.[148] Article 3(4) allows a late claimant to prevent the current possessor from entering any further contractual or legal obligations.[149]

Articles 4 and 5 provide for limited, but in practice extremely important, exceptions to the principle of restitution. When, "from the nature of things," restitution is impossible, these articles provide for compensation instead.[150] An amended version of this general formulation provides that, under this article, businesses cannot be restored to their former owners if they already have been liquidated according to proper business considerations.[151] The article further provides that property bought in good faith by natural persons, religious institutions, or nonprofit foundations cannot be restored to former owners.[152] Article 5 further clarifies the general formulation of article 4(1): restitution of real estate and buildings shall be precluded if the real estate has been altered to serve a public need at great cost, if it has been incorporated into apartment or other living complexes, or if it has been merged into a unitary business and its removal would cause great harm to the ongoing operations.[153]

Article 6 is especially important for the privatization work of the Trust Agency and will be analyzed in greater detail in later sections. Article 6 stipulates that a business shall be restored to its former owners if still comparable or substantially similar to its condition at the time of expropriation, "taking into consideration technical advancements and general economic developments."[154] The business is comparable if its product or service is largely unchanged or if it has been replaced by a

147. Property Law, *supra* note 23, art. 3(3), 1991 BGBl. I at 959.
148. *Id.*
149. *Id.* art. 3(4), at 959.
150. *Id.* art. 4(1), at 960.
151. *Id.* art. 4(1), at 960-61.
152. *Id.* art. 4(2), at 961. Good-faith purchases do not include those which contravened GDR law in effect at the time or those which resulted from misuse of official positions or fraud. *Id.* art. 4(3), at 961.
153. *Id.* art. 5, at 961.
154. *Id.* art. 6(1), at 961.

reasonable substitute.[155] Significant increases or decreases in the value of a business or its business potential must be balanced out.[156]

If the property no longer constitutes a business in the legal form in which it existed at the time of expropriation, the former owner may require that it be reconstituted in its prior form before ownership is transferred.[157] In addition, where the business has been incorporated into a larger concern, the authorities have wide discretion to give the former owner shares in the larger concern, shares in a subsidiary, assets of the former business, or other appropriate compensation or restitution.[158]

Before turning to the procedural and systemic provisions of the Property Law, a further substantive area deserves mention. Section III of the Property Law regulates the lifting of state administration of businesses and other properties.[159] While not unrelated to the overall subject of this Article, this topic does not warrant the level of detailed review which has been provided for other substantive provisions. The sections of this Article dedicated to investigating the work of the Trust Agency will refer to provisions regarding the lifting of state administration where necessary.

c. Procedural and Organizational Provisions

Sections V and VI of the Property Law deal with the organizational and procedural issues involved in the restitution of property in the five new Länder. The new states are responsible under the Property Law for its enforcement and administration.[160] When making decisions regarding compensation or sale price equalization, however, the Länder act on behalf of the federal government.[161] The Property Law mandates that each of the five new Länder establish an extensive system of local and state Offices for the Settlement of Unresolved Property Issues (Claims Offices).[162] Decisions under article 3(6) and 3(7), which might limit the possibility of restitution, and decisions regarding the reconveyance of

155. *Id.*

156. *Id.* This section provides elaborate formulae for the evaluation of the increase or decrease in business values or business potentials. *Id.* art. 6(2)-(4), at 961-62. See Robert Weimar, *Aktuelle Fragen zur Restitution von Unternehmen in den neuen Bundesländern nach der Unternehmensrückgabeverordnung*, 2 DER BETRIEB 77 (1992), for an analysis of such evaluations pursuant to the Deutsche Mark Balance Sheet Act.

157. Property Law, *supra* note 23, art. 6(5), 1991 BGBl. I at 962.

158. *Id.*

159. *Id.* arts. 11-21, at 965-67.

160. *Id.* art. 22, at 967.

161. *Id.*

162. *Id.* arts. 23, 24, at 967.

businesses pursuant to article 6, may be made only by the State Claims Office.[163] Each Claims Office has one or more Appeals Boards that operate independent of outside influence.[164] The Claims Offices are entitled to unrestricted administrative and judicial assistance from all public authorities and courts.[165]

To promote the uniform administration of the Property Law, its authors provided in article 29 for the establishment of a Federal Claims Office.[166] An Advisory Board, comprised of representatives from each of the five new Länder, four experts, and four representatives from select interest groups is attached to the Federal Claims Office.[167]

The Property Law also provides for a special unincorporated federal fund to finance compensation and sale price equalizations.[168] The Federal Claims Office administers this compensation fund at the direction of the Federal Minister of Finance.[169]

Claimants begin applications for restitution or compensation by filing a timely claim with the appropriate Claims Office.[170] In general, when property is under state administration or has been transferred to state ownership,[171] the Claims Office in whose jurisdiction the claimant or the claimant's heir(s) last resided shall have jurisdiction.[172] In other instances, the Claims Office in whose jurisdiction the property at issue is located shall have the authority to decide.[173] The Property Law requires all Claims Offices to forward applications to the Claims Office of proper jurisdiction.[174]

The Property Law rules of procedure are similar to those made directly applicable to the Trust Agency through other laws. Article 31 requires the Claims Offices to inform affected persons of right, state administrators, and potentially affected third parties that an application has been filed.[175] The Claims Office must provide these parties with a copy of the application and all supporting documentation, and must give

163. *Id.* art. 25, at 967.
164. *Id.* art. 26, at 967.
165. *Id.* art. 27, at 967.
166. *Id.* art. 29, at 968.
167. *Id.*
168. *Id.* art. 29a(1), at 968.
169. *Id.* art. 29a(2), at 968.
170. *Id.* art. 30(1), at 968.
171. This is most often the case when the Trust Agency is involved.
172. Property Law, *supra* note 23, art. 35(1), 1991 BGBl, I at 969.
173. *Id.* art. 35(2), at 969.
174. *Id.* art. 35(4), at 969.
175. *Id.* art. 31(2), at 968.

them an opportunity to be heard before a decision is reached.[176] The Property Law also grants claimants extensive rights of information gathering, both in written form and through on-site inspection.[177] The Property Law also provides the right to contest a proposed ruling[178] and the right to receive the final ruling with a full factual and legal opinion in written form.[179]

The law also guarantees the right to appeal. Article 36 stipulates that claimants and other affected parties may object within one month to a Claims Office about a decision rendered.[180] If the objection is not granted, either in whole or in part, the Claims Office must submit the objection to its Appeals Board for review. Potentially affected third parties may appear before the Appeals Board before it renders a decision.[181] Decisions of the State Claims Offices pursuant to article 25 are not reviewable by an Appeals Board.[182] Decisions of the Appeals Board or of the State Claims Office—where review by an Appeals Board is precluded—is immediately appealable to the courts.[183] Administrative proceedings are free of charge, and parties victorious before the Appeals Boards may even have their fees for legal representation reimbursed in appropriate circumstances.[184]

The procedural provisions of the Property Law thus demonstrate a desire for amicable and efficient resolution of the many claims outstanding. Article 31(5) specifically provides that "[t]he Claims Office shall at all stages of the proceedings seek a voluntary settlement between the current possessor and the claimant . . .[and] [i]f the Claims Office learns that these parties are working toward a voluntary settlement, it shall suspend its proceedings."[185] Of course, the Property Law also provides procedural protection of the rights of affected third parties. In addition, article 38a provides for arbitral resolution of several types of claims if the current possessor and claimant so agree.[186]

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176. *Id.*

177. *Id.* art. 31(3), at 968.

178. *Id.* art. 32, at 968.

179. *Id.* art. 33(3), at 969.

180. *Id.* art. 36(1), at 969.

181. *Id.* art. 36(2), at 969.

182. *Id.* art. 36(4), at 969. For reasons already stated, this applies to many of the cases in which the Trustee Agency is directly involved.

183. *Id.* art. 37(1), at 969.

184. *Id.* art. 38, at 969.

185. *Id.* art. 31(5), at 968.

186. *Id.* art. 38a, at 970. This section applies to claims under article 6(1) and article 6b. *Id.*

B. *The Impediments Removal Law*

1. Legislative History

After ongoing criticism of the Property Law and the sizeable delays in privatization and investment resulting from its virtually unrestricted guarantee of restitution, the federal government initiated its amendment in late 1990.[187] The amendment process proceeded rapidly considering the importance and complexity of the issues involved. In December 1990 the Federal Justice Minister formed a working group to draft proposed improvements to the Property Law. On February 6, 1991, after review by the representatives of various interest groups, the federal cabinet approved the revisions. By March 22, 1991, both chambers of the federal parliament had approved the amendments in the form of the Impediments Removal Law.[188] The Bundespräsident immediately signed it into law.

The Impediments Removal Law has dramatically reshaped the legal environment in which the Trust Agency must carry out its privatization mandate. Many of the specific amendments enacted stem from suggestions by the Trust Agency's own officials.[189]

2. Major Provisions

While the Impediments Removal Law made countless minor revisions and clarifications to the Property Law, its revolutionary thrust was aimed at the diminution of the principle of restitution. The main amendments to the Property Law give de facto, if not de jure, priority to investment and economic development. The Property Law virtually precludes former owners from standing in the way of investment proposals involving their property. In addition, the Property Law has been amended to allow for greater use of temporary measures to break the investment deadlock prior to reaching a final decision regarding proper title.

Article 3a, entitled "Suspension of the Limits on Possession," revised the Property Law the most dramatically.[190] Article 3a creates a large exception to article 3's restrictions on disposition of property against which a claim has been filed. If a public authority (öffentlich-rechtliche Gebietskörperschaft) or the Trust Agency currently possesses property, it

187. CZERWENKA, *supra* note 123, at 7.

188. Gesetz zur Beseitigung von Hemmnissen bei der Privatisierung von Unternehmen und zur Förderung von Investitionen, 1991 BGBl. I 766.

189. Interview with Martin Keil, Abteilungsleiter, PR5, Direktorat Recht, Treuhandanstalt Berlin, in Berlin, Germany (Jan. 23, 1992).

190. Property Law, *supra* note 23, art. 3a, 1991 BGBl. I at 960.

may sell or lease it to a third party, despite the presence of claims filed against it, provided investment will be furthered.[191] The Trust Agency demanded this dramatic revision to carry out its mandate for rapid privatization. Because it has significantly increased the pace of privatization, this new rule—termed the right-of-way rule or Vorfahrtreglung—has been called the "super right of way" or "investment Autobahn."[192]

Pursuant to the right-of-way rule, investment will be furthered in the case of real estate and buildings when their sale or lease creates or preserves jobs (especially through the establishment of a commercial or service business), provides for needed living quarters, or furthers the infrastructure necessary for these two goals.[193] Investment will be furthered in the case of businesses when their sale or lease creates or preserves jobs[194] or facilitates investments likely to improve the overall competitive posture of the business.[195] In addition, investment in businesses is deemed to be furthered through sale or lease if the former owner cannot guarantee its continued operation.[196] Article 3a(2) does, however, prevent the sale or lease of property that has already been returned by a Claims Office to its former owner(s).[197] Nevertheless, pursuant to article 30 of the Property Law, the Claims Office can only reach a final decision if the current possessor and the claimant are unable to reach an amicable agreement on their own.[198]

Article 3 contains a variety of procedural requirements that are directly binding upon the Trust Agency, many of which parallel those applicable to the Claims Offices. The public authority possessing property must inform the appropriate Claims Office as well as all registered claimants of its intended action—sale or lease.[199] Claimants must have the opportunity to protest the proposed decision and to propose their own investment plan, which need only be "equal or nearly equal" to

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191. *Id.* art. 3a(1), at 960.

192. Hubertus Leo, *§ 3a Vermögensgesetz—Vorfahrt für Investitionen?*, 29 DER BETRIEB 1505, 1505 (1991).

193. Property Law, *supra* note 23, art. 3a(1), 1991 BGBl. I at 960.

194. In keeping with basic free-market principles, the fact that other businesses or industries will lose jobs is not a factor for consideration. Robert Weimar, *Der Vorrang der Investition und seine Grenzen*, 49 DER BETRIEB 2527, 2528 (1991).

195. Property Law, *supra* note 23, art. 3a(1)2a, 1991 BGBl. I at 960.

196. *Id.* art. 3a(1)2b, at 960.

197. *Id.* art. 3a(2), at 960.

198. CZERWENKA, *supra* note 123, at 9.

199. Property Law, *supra* note 23, art. 3a(3), 1991 BGBl. I at 960.

that proposed by third-party investors.[200]

Sale or lease contracts concluded by the Trust Agency or other public authorities are only legally binding if the purchaser or lessee is contractually bound to return the property if she fails to carry out the investments promised for the first two years after purchase.[201] As an exception to the Grundstückverkehrsverordnung, the public authorities seeking to sell or lease property in their jurisdiction do not require the approval of the land registry offices.[202] Decisions of these public authorities—including the Trust Agency—may be appealed.[203] Appeals do not, however, have any temporary injunctive effect.

One other area of major change deserves brief mention. The Impediments Removal Law also added article 6a, entitled "Provisional Assignment," to the Property Law.[204] This article allows the appropriate Claims Office to assign businesses to apparently legitimate claimants.[205] Article 6a demonstrates that restitution has not been abandoned completely in favor of new investment; one might say this article provides for "rapid restitution."[206]

The Claims Office must have proof that the claimants are capable of carrying on the business or, when appropriate, liquidating it.[207] In fact, the presumption is in favor of provisional assignment, including automatic assignment if the Claims Office fails to reach a contrary decision within three months of an application's filing.[208] Objections to or appeals of such assignments have no temporary injunctive effect.[209] Finally, the claimant has a right to immediate payment of the sums needed to compensate for the decreased value of the property, if the ongoing operation of the business demands such payment.[210]

3. Relationship to the Investment Law

The right of way provided for in article 3a was originally only to apply to sale and lease contracts concluded before December 31, 1992.[211]

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200. *Id.* art. 3a(3), at 960.
201. *Id.* art. 3a(7), at 960.
202. *Id.* art. 3a(8), at 960.
203. *Id.* art. 3a(4), at 960.
204. *Id.* art. 6a(1)1-2, at 963.
205. *Id.* art. 6a(1), at 963.
206. Weimar, *supra* note 194, at 2530.
207. Property Law, *supra* note 23, art. 6a(1)1-2, 1991 BGBl. I at 963.
208. *Id.* art. 6a(2), at 963.
209. *Id.* art. 6a(2), at 964.
210. *Id.* art. 6a(3), at 964.
211. *Id.* art. 3a(9), at 960. It should be noted that the new Investment Priority Law

Thereafter, and until its planned expiration on December 31, 1993,[212] the provisions of the Investment Law were to apply.[213] The Investment Law, however, was repealed on July 14, 1992. The drafters had conceived of the Investment Law, like the Impediments Removal Law, as a mechanism for removing hindrances to economic development in the five new Länder, especially by freeing up the property market.[214] The debate on the Investment Law had led to the polarization of opinion with claimants arrayed against the Trust Agency, local governments, and potential investors.[215]

The Investment Law provided several important mechanisms for promoting rapid economic development in eastern Germany. For instance, it provided, in a manner similar to the Impediments Removal Law, for investment proposals to take priority over the rights of former owners.[216] It did not, however, provide as streamlined a process for decision-making.[217]

Article 2 of the Investment Law allowed local and regional administrative authorities to give permission for investors to take title to property against which claims had already been filed.[218] Article 1 outlined the principal bases for permitting such investment. These bases were virtually identical to those provided for in article 3a of the Property Law.[219] The Investment Law provided clearer direction as to what evidence a potential investor must provide of her ability to complete the project as proposed.[220]

These provisions of the Investment Law applied to all property not held by the Trust Agency or another public authority and were originally intended to apply as well to all property still held by the Trust Agency after December 31, 1992.[221] Thus, when one of the companies owned by the Trust Agency wanted to sell some of its property, and the Trust Agency, for whatever reason, did not wish to act as its legal repre-

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extends its validity through December 31, 1995. *See infra* section VI(C)(1).

212. *Gesetz über besondere Investitionen in dem in Artikel 3 des Einigungsvertrages gennanten Gebiet* [hereinafter Investment Law], art. 2(2), 1991 BGBl. I 994, 997.

213. Property Law, *supra* note 23, art. 3a(9), 1991 BGBl. I at 960.

214. Jürgen Hübner, *Das Gesetz ber besondere Investitionen in der DDR und seine Novellierung*, 5 DEUTSCH-DEUTSCHE RECHTS-ZEITSCHRIFT 161, 161 (1991).

215. *Id.* at 161.

216. Investment Law, *supra* note 212, art. 2, 1991 BGBl. I at 996.

217. *See id.* arts. 2, 4, 5, at 996-97.

218. *Id.* art. 2(1), at 996.

219. *Id.* art. 1(1), at 995.

220. *Id.* art. 1(3), at 995.

221. *Id.* art. 1(1), at 995.

sentative, the provisions of the Investment Law applied as opposed to those of the Property Law.[222] These overlapping competencies and multi-tiered decision-making processes led to significant delays and bureaucratic costs, and together were one of the principal focuses of the most recent effort to amend and streamline the property laws.

C. *Second Property Law Revision Act*

On July 14, 1992, before going into summer recess, the Bundestag, with prior approval from the Bundesrat, undertook yet another revision of the property and privatization laws. In a further concession to reality, German lawmakers undertook a variety of revisions designed to hasten the process of privatization and the flow of in-bound investment into the five new Länder. Through the Second Property Law Revision Act (the Revision Act),[223] German lawmakers on the one hand sought simply to rationalize and clarify the existing procedural provisions of the property and privatization laws, while on the other hand they sought to quicken the entire privatization process by altering the substantive provisions of the laws.

The Revision Act does not purport to make major changes to the existing privatization regime, but the sum total of its clarifications and minor revisions will likely yield a more rapid and less bureaucratic privatization process. While the principal changes affecting the present analysis deserve mention, a complete review of the many subtle changes wrought by the Revision Act are beyond the scope of this Article.

1. Procedural Changes

In an effort to rationalize the entire privatization regime, the Bundestag repealed the Investment Law[224] and combined its right-of-way provisions with those of the Property Law.[225] The subtle differences that previously existed between the two right-of-way regimes have been eliminated in favor of the provisions as previously contained in article 3a of the Property Law. The single remaining right of way is contained in section 2 of the Investment Priority Law, which in turn comprises article 6 of the Revision Act.[226]

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222. Weimar, *supra* note 194, at 2527. *See also* CZERWENKA, *supra* note 123, at 18.

223. Gesetz zur Änderung des Vermögengesetzes und anderer Vorschriften (Zweites Vermögensrechständerungsgesetz—2. VermRndG), 1992 BGBl. I 1257 [hereinafter Revision Act].

224. *Id.* art. 3, at 1266.

225. *Id.* art. 1(4), at 1258 (repealing Property Law art. 3a).

226. *Id.* art. 6, § 2, at 1270 [hereinafter Investment Priority Law].

Previously, if the Trust Agency wished to privatize a company that happened to own real property for which separate former owners had filed a claim, two separate right-of-way decisions were necessary. The Trust Agency would reach a decision with regard to the company pursuant to article 3a of the Property Law while the appropriate Claims Office would reach a decision with regard to the real property pursuant to the Investment Law. Now the Trust Agency can combine the two matters and decide them together according to the unified right-of-way provisions contained in section 2 of the Investment Priority Law.

In addition, the duration of the right-of-way provision has been extended to December 31, 1995, from December 31, 1992, and December 31, 1993, for cases decided under the Property and Investment Laws respectively. This extension acknowledges the fact that the privatization process in eastern Germany remains incomplete and that some major decisions still may be outstanding three years from now.

The Revision Act also speeds up the overall decision-making process by codifying previous Trust Agency practice; now former owners legally have only two weeks in which to make their view of a proposed privatization known[227] and six weeks in which to submit their own counterproposal.[228] In addition, the Trust Agency can disregard this notice and hearing requirement entirely if the delay caused could put "at risk" the planned investment.[229] Practice makes it clear that this very limited right to be heard does little to protect the right of former owners to restitution of their property.

To make more efficient use of existing bureaucratic decision-making potential, towns and cities that are overtaxed by the flood of right-of-way examinations now have the option to transfer cases to the appropriate federal agency for decision. Subsequent to transfer, decision by the agency is compulsory.[230] Through this measure small agencies can also relieve themselves of the necessity to decide politically sensitive cases.

Perhaps the most dramatic procedural change, however, is a new provision which gives the Trust Agency the authority to take over, from these other local and regional agencies, cases that "in any manner" affect Trust Agency property.[231] This provision applies even if the process of decision has already been initiated. The Trust Agency can now intervene to avoid certain politically motivated decisions or simply to speed up the

227. Investment Priority Law, *supra* note 226, § 5(2), 1992 BGBl. I at 1269.
228. *Id.* § 5(3), at 1270.
229. *Id.* § 5(4), at 1270.
230. *Id.* § 24, at 1274.
231. *Id.* § 25(2), at 1274.

entire decision-making process. In this manner, lawmakers have in a limited regard placed the Trust Agency above all the democratically accountable eastern German agencies otherwise entrusted with making property decisions within their jurisdiction.

The original notice provisions of the Property Law have been weakened further by section 9 of the Investment Priority Law. It is now legally sufficient if the Trust Agency notifies the Claim Office either in whose jurisdiction the property lies or in whose jurisdiction the company has its headquarters.[232] Because the Claims Office actually charged with making a determination with regard to a given claim may be an entirely different one, this provision allows for mere constructive notice.

To terminate the open-ended nature of the property claims process, German lawmakers have set a final date by which all claims must be registered to require the Trust Agency to undertake a right-of-way analysis before transferring title to an investor. The claims deadline is December 1, 1992.[233]

2. Substantive Changes

Both the Property and Investment Laws provided that the right of former owners to restitution could be abridged through transfer to an investor only where "special" investments were proposed. While the Investment Priority Law maintains this "specialness" requirement, it expands the definition of those forms of investment that are sufficient to trump restitution claims. The Property Law allowed investment to take priority, for example, where through the proposed investment "a great need for living quarters [was] met."[234] This formulation has now been replaced by the far more flexible requirement that investment "either create new living quarters or renovate inhabitable living quarters which are actually uninhabited."[235] Both the quantitative and qualitative requirements largely have been eliminated. One unit of housing is of sufficient value now to trump a restitution claim. In addition, whereas previously only the creation of new living quarters enjoyed priority, now even the renovation of living quarters is sufficiently "special." This latter revision was primarily designed to allow for the rapid renovation of the beautiful historic inner cities of eastern Germany.[236]

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232. *Id.* § 9(1), at 1270.

233. Revision Act, *supra* note 223, art. 1, § 3c(dd), 1992 BGBl. I at 1258.

234. Property Law, *supra* note 23, 1991 BGBl. I at 960.

235. Investment Priority Law, *supra* note 226, § 3(1)2, 1992 BGBl. I at 1269.

236. *Gesetz Entwurf der Fraktionen der CDU/CSU und FDP*, DEUTSCHER BUNDESTAG, Drucksache 12/2480, at 65 (Apr. 28, 1992).

Formerly, investment that created infrastructure necessary for the two primary purposes of the right of way—the creation of jobs and living quarters—was given priority.[237] This basis for right of way has been expanded to allow priority over restitution claims for any form of infrastructure, whether required or simply "useful" to a primary investment project.[238] These two substantive revisions give the Trust Agency far greater leeway in structuring and approving investment projects.

The Revision Act also severely limits the legal remedies available to injured parties. Previously, judges had believed that German administrative law prevented them from nullifying already completed investment projects even where these projects had been carried out pursuant to an invalid right-of-way decision.[239] Recent court decisions, however, demonstrated that German judges have authority under general administrative law to reverse even completed investment projects themselves.[240] These holdings led to extreme uncertainty among potential investors and were seen as a major obstacle to further rapid privatization. Thus, in the Revision Act, the Bundestag specifically provided that where an investment project has been started courts no longer have the power to nullify the right-of-way determination.[241] Compensation, not restitution, remains the only remedy for wronged claimants.

VII. Conversion and Division of State-Owned Businesses

A. *Conversion*

As discussed earlier, East German law provided for a system of property and corporate law foreign to that known in western capitalist systems. With few exceptions, East Germany tailored all business forms to facilitate state ownership and absolute and direct state control, regardless of business size. It became clear to decision makers on both sides of the intra-German border that, in preparation for reorganization and privatization, East German businesses would have to be converted to forms paralleling those provided for under West German law. While conversion could be legislated, the actual transformation would take time and much creative energy.

The East German Volkskammer initiated the conversion of East Ger-

237. Property Law, *supra* note 23, art. 3a(1)1, 1991 BGBl. I at 960.

238. Investment Priority Law, *supra* note 226, § 3, 1992 BGBl. I at 1269.

239. *See Gesetz Entwurf der Fraktionen der CDU/CSU und FDP*, *supra* note 236, at 61-62.

240. *Id.* at 61.

241. Revision Act, *supra* note 223, § 20, 1992 BGBl. I at 1267.

man businesses into corporate forms recognized under West German law long before unification. In March 1990 East Germany enacted the Ordinance to Convert People's Combines, Businesses, and Facilities into Joint-Stock Companies[242] to begin the process of conversion. Subsequently, article 11 of the Trust Act[243] provided that all business entities not already converted pursuant to the Ordinance by July 1, 1990 would be converted automatically by act of law.[244] The Trust Act provided[245] that state-owned holding companies would be transformed into stock companies (Aktiengesellschaft, or AG),[246] and that holding-company subsidiaries and other business entities would be transformed primarily into corporations (Gesellschaft mit beschränkter Haftung, or GmbH).[247]

The new stock companies created by the Trust Act may technically own the shares of the businesses that they controlled before and that have subsequently been converted into GmbHs.[248] Because the Trust Agency, however, almost always holds all the shares of the new AGs and can direct their actions, this layered structure has little substantive impact on the reorganization and privatization efforts of the Agency.[249]

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242. Verordnung zur Umwandlung von volkseigenen Kombinate, Betrieben und Einrichtungen in Kapitalgesellschaften, Mar. 1, 1990.

243. Trust Law, *supra* note 111, art. 11, 1990 BGBl. I at 768.

244. *Id.*

245. *Id.* art. 11(1), at 768.

246. Oliver Passavant & Gerhard Nösser, *The German Reunification—Legal Implications for Investment in East Germany*, 25 INT'L LAW. 875, 891 (1991). The authors note:

> Under German law, the *Aktiengesellschaft* (AG) is the corporate form traditionally used for large corporations whose shares can be publicly traded on a stock exchange. Presently, less than 20% of the approximately 2000 AGs in Germany have their stocks publicly traded. The minimum stated capital is DM 100,000. Since, prior to the recent harmonization of European accounting laws, AGs were subject to more rigid procedures and disclosure requirements than other companies, the use of this form was limited to a small number of large corporations.

Id.

247. *Id.* The authors continue:

> The *Gesellschaft mit beschränkter Haftung* (GmbH) on the other hand is the traditional corporate structure for small and medium-sized companies, although it can be and is also used for large enterprises whose shares are not publicly traded. Unlike the various partnership structures available under German law . . . the GmbH has advantages similar to those of a U.S. corporation. In principle, once the stated capital has been paid in (the required minimum is DM 50,000), the shareholders are separated from the liability of the GmbH and have limited their risk to the amount of the actual investment.

Id.

248. Trust Law, *supra* note 111, art. 12(1), 1990 BGBl. I at 768.

249. Passavant & Nösser, *supra* note 246, at 892.

The Agency possesses all the rights and responsibilities of other stockholders.[250]

As part of their transformation, all the converted businesses had to file for inclusion in the Commercial Register,[251] and each had to provide a copy of its agreement of association or statutes. Most importantly, however, the new companies had to provide their revised opening balance sheets.

Pursuant to the Deutsche Mark Balance Sheet Act,[252] companies were to prepare these opening balance sheets in accordance with general West German accounting principles, and the sheets had to be reviewed or audited by a West German certified public accountant.[253] Because the former East German businesses had used only rudimentary accounting principles to book transactions between them, this has been one of the most difficult and controversial tasks associated with the reorganization and privatization program.

The most difficult task has been the valuation of plant, property, and debt obligations. In a country with neither functioning property nor capital markets, such valuation has been difficult at best, and illusory at worst. As one critic stated, "Count Potemkin must have guided the lawmakers' hands in the drafting of this law."[254] The results of the GDR-planned economy compel the conclusion that the value of plant and property will be more heavily devalued under the law than the value of debt obligations.[255]

While a detailed analysis of the accounting procedures mandated is beyond the scope of the present Article, it should be noted that the Deutsche Mark Balance Sheet Act has a double nature. On the one hand it is a traditional balance-sheet convertor; on the other hand it is a rather esoteric debt-reduction mechanism.[256] A complex debt-equalization system primarily performs this latter function. The business organization that resulted after the conversion of East German businesses to West

250. Robert Weimar, *Zum Wirkungsbereich der Treuhandanstalt gegenüber ihren Gesellschaften*, 4 DEUTSCH-DEUTSCHE RECHTS-ZEITSCHRIFT 105, 108 (1991).

251. This act is largely equivalent to a U.S. company registering with the secretary of state in the state of incorporation.

252. Gesetz über die Eröffnungsbilanz in Deutscher Mark und die Kapitalneufestsetzung—D-Markbilanzgesetz, 1990 BGBl. II 1169 [hereinafter Deutsche Mark Balance Sheet Act].

253. *Id.* art. 5, at 1170.

254. Joachim Ströfer, *Das D-Markbilanzgesetz—Ein überblick*, 3 DEUTSCH-DEUTSCHE RECHTS-ZEITSCHRIFT 68, 70 (1991).

255. *Id.* at 69.

256. *Id.*

German forms had a multi-tiered structure, with AGs owning some or many GmbHs. The Deutsche Mark Balance Sheet Act provides that at each level of this hierarchy debt shall be equalized among affiliated members of one corporate family.[257] Thus, financial demands against the Trust Agency can only arise if an AG—taken as a whole—is in debt.

B. *Division*

To pursue administrative and perceived market efficiencies, the East German government continually sought to aggregate business concerns throughout the country in ever larger holding companies (Kombinate). Thus, a personal products holding company might have had fifty factories scattered throughout the GDR producing such diverse products as twine and thread, ladies' undergarments, rubber bands, children's shoes, feminine hygiene products, and furniture. As the Trust Agency began the process of reorganization and privatization, it became immediately apparent that the businesses, in their existing conglomerated forms, were unsalable. It also became evident that the laws on property transfer did not provide the appropriate level of flexibility to allow the Trust Agency to divide these holding companies into logical and marketable components.[258]

West German property law provided that a business entity could only be split into component parts and title thereto transferred if title to each individual item (real property, debt, securities, buildings, company vehicles, labor contracts, etc.) was transferred in accordance with the laws relating to that specific type of property.[259] Title to an entire business entity could not be transferred in one unified act. Needless to say, the Trust Agency and lawmakers in Bonn perceived these legal requirements as major hindrances to the rapid privatization of constituent parts of the large East German holding companies.

The Bundestag acted quickly, passing the Division Law (Spaltungsgesetz) on April 5, 1991.[260] By its terms, the Division Law's significantly liberalized procedures only apply to businesses in the hands—either directly or through ownership by one of its wholly owned businesses—of the Trust Agency.[261] In a major departure from German

257. *Id.* at 70.

258. Robert Weimar, *Spaltung von Treuhandunternehmen*, 5 DEUTSCH-DEUTSCHE RECHTS-ZEITSCHRIFT 182 (1991).

259. *Id.*

260. Gesetz über die Spaltung der von der Treuhandanstalt verwalteten Unternehmen, 1991 BGBl. I 854 [hereinafter Division Law].

261. *Id.* art. 1, at 854.

civil-law traditions, the Division Law enables the shareholders of a holding company or other business entity to transfer title to entire constituent parts to newly formed joint-stock companies.[262] In one simplified act, the Trust Agency, as sole shareholder, can create new business entities and transfer to them title to component parts of holding companies or other overly large business structures.[263] This ability to split or divide companies in a single act is a completely new legal instrument under German law.[264]

The Division Law provides for two distinct types of business division: the business may be split up (aufspalten)[265] among newly created successor concerns with the original business thereupon ceasing to exist, or one or more parts of a business may be split off (abspalten)[266] from the original and existing business. In either case, the shareholders or their legal representative must draft a detailed plan of division (Spaltungsplan) which must be notarized[267] and entered into the commercial register.[268] The plan must include exact details regarding the specific types of property to be transferred to each new business entity, the timing of the transfer, the bookkeeping methods to be used for transfer and tax purposes, and any other provisions that should apply to the new business entities.[269] In addition, the Division Law protects the rights of creditors of the original business by guaranteeing them recourse to the assets of all new business entities.[270]

Because this law represented a radical departure from German legal traditions, its drafters attempted to make the process of dividing the holding companies—a process usually affecting thousands of employees and potential investors—sufficiently transparent[271] to be politically acceptable. The law itself provides a well-honed mechanism for dividing

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262. Weimar, *supra* note 258, at 182.

263. Division Law, *supra* note 260, art. 10, 1991 BGBl. I at 856. In January 1992, the Trustee Agency controlled over 200 holding companies, of which 107 had already drafted a plan of division. Trust Agency (unpublished).

264. Weimar, *supra* note 258, at 182.

265. Division Law, *supra* note 260, art. 1(1), 1990 BGBl. I at 854. Interestingly, the GDR Volkskammer enacted a legal forerunner to this form of division, shortly before unification. *See* Gesetz über die strukturelle Anpassung der Landwirtschaft an die soziale und ökologische Marktwirtschaft in der DDR, 1990 GBl. I 642.

266. Division Law, *supra* note 260, art. 1(2), 1991 BGBl. I at 854.

267. *Id.* art. 2(2), at 855.

268. *Id.* art. 2(3), at 855.

269. *Id.* art. 2(1), at 854.

270. *Id.* art. 11, at 856. *See also id.* art. 10(3), at 856 (addressing assets and debts that are not specifically carried over in the plan to a named business entity).

271. Weimar, *supra* note 258, at 183.

the gargantuan businesses left behind by the GDR into marketable component parts.[272] As a final note, because the Trust Agency continues to hold full ownership in the new business entities created, the division of a business concern has no immediate privatizing effect. It merely prepares a business for easier sale.

VIII. THE TRUST AGENCY (TREUHANDANSTALT)

The Trust Agency is the largest holding company in the world. It has held as many as 13,000 companies with millions of employees. The governments of the two Germanys conferred upon the Trust Agency the central role in the efforts to privatize the economies of the five new Länder. In meeting this vast challenge, the Agency has grown into a far-flung bureaucracy with over 3,000 employees, domestic and foreign, as well as offices in several countries.[273]

The last East German Volkskammer established the Trust Agency on July 1, 1990.[274] The preamble to the Trust Law states that the Trust Agency has the following purposes: to reduce the economic involvement of the government through privatization as fast and as far as possible; to render as many companies as competitive as possible and to secure existing and new employment; to make real property available for economic development; and to liquidate businesses that cannot be restructured into competitive enterprises.[275] While originally a product of the former East German government, the Unification Treaty specifically provided for the Trust Agency to continue in existence to carry out its important mission of privatizing the economies of the five new Länder.[276]

A. *Relation to the Federal Government*

Before turning to the specifics of the Trust Act and the structure and functioning of the Trust Agency, one must note that the Trust Agency reports to the Federal Minister of Finance, who cooperates in substantive matters with the Federal Minister of Economics and other relevant ministers.[277] An administrative board oversees the work of the Agency. Each of the five new Länder has one representative member with the

272. *Id.* at 184.
273. TREUHANDANSTALT, PROMOTING THE NEW GERMANY 17 (1991).
274. Trust Law, *supra* note 111, 1990 BGBl. I at 766.
275. *Id.* pmbl., at 766.
276. Unification Treaty, *supra* note 21, art. 25, 1990 BGBl. II at 897.
277. *Id.* art. 25(1), at 883.

remaining fifteen members appointed by the federal government.[278] According to article 4 of the Trust Act, this administrative board guides and supervises the day-to-day work of the governing board of the Agency.[279]

The Trust Agency is thus directly linked to the political authorities of the German government. The oversight role provided to the Federal Minister of Finance as well as that given to the administrative board, three quarters of whose members are federal government appointees, ensures that the Trust Agency makes decisions informed by the political values of the Bonn government and the political imperatives of the moment. At times, the closeness of the Agency to the Bonn government has cost it much credibility. Those charged with privatizing the eastern German economy find it difficult to claim that the often unpopular decisions they reach are purely the product of objective analysis when every citizen can plainly see the formal and informal channels through which the Bonn government can exert its influence over such determinations.

B. *Structure and Organization*

A governing board presides over the Agency. This board consists of the president of the Agency[280] and at least four other members appointed by the administrative board.[281] The Trust Act provides for a decentralized structure for the Agency,[282] with headquarters in Berlin[283] and regional field offices throughout the five new Länder.[284] The legislators originally believed that these regional offices could act on a largely independent basis, but they soon recognized that too many decisions in each matter required centralized handling and coordination.[285] Now the fifteen regional field offices work very closely with the headquarters in Berlin. Nevertheless, it is the field offices that maintain the vital day-to-

278. *Id.* art. 25(2), at 883.

279. Trust Law, *supra* note 111, art. 4(1), 1990 BGBl. I at 767.

280. The president is currently Birgit Breuel who was appointed by Chancellor Helmut Kohl after her predecessor was brutally assassinated.

281. Trust Law, *supra* note 111, arts. 3(1)-(2), 1990 BGBl. I at 767.

282. *See id.* art. 7(1), at 767.

283. The Agency's headquarters are in the former Air Ministry of the Third Reich.

284. Berlin, Chemnitz, Cottbus, Dresden, Erfurt, Frankfurt am Oder, Gera, Halle, Leipzig, Magdeburg, Neubrandenburg, Potsdam, Rostock, Schwerin, and Suhl. It should be noted, though, that the Agency plans to close two or three of these offices by the end of 1992 because their remaining caseload can be more efficiently handled from Berlin. Interview with Hans Peter Haubold, Executive Assistant to the President, Treuhandanstalt Berlin, in Berlin, Germany (Jan. 23, 1992).

285. Passavant & Nösser, *supra* note 246, at 882.

day contacts with the businesses under Trust Agency administration.

Internally, in addition to departments handling traditional administrative functions such as personnel and finances, the Trust Agency has divided its functions among a number of divisions each charged with overseeing and privatizing businesses in a specific group of industries. For instance, one of these so-called Business Divisions (Unternehmensbereich) consists of manufacturing industries producing heavy machinery, machine tools, factory components, and special machines.[286] Another Business Division consists of agricultural and food production, as well as a wide variety of mining industries.[287]

In addition, the Trust Agency has created a subsidiary (Treuhand-Liegenschaftsgesellschaft, or TLG) to handle commercially non-necessary real property formerly held by businesses under Trust Agency control.[288] Because of the East German government's penchant for aggregating dissimilar or wholly unrelated businesses, many business entities possessed valuable real property unnecessary for their ongoing or future production. The Trust Agency, using the Division Law as well as traditional property law mechanisms, split off many pieces of commercially non-necessary real property in order to privatize them separately. This division should allow rapid new investment, especially in old industrial areas.[289] Through December 31, 1991, the TLG had privatized 6,052 pieces of property at its disposal.[290]

Finally, the Trust Agency's Law Division, an agency attached to the office of the president, is responsible for the interpretation and enforcement of, among others, the property and privatization laws. The Law Division carries out all the right-of-way procedures and scrutinizes all sales contracts for compliance with the myriad applicable legal provisions. The Division also represents the Trust Agency before the courts and other administrative tribunals.

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286. Business Division 1.

287. Business Division 3.

288. Horst Buchwald, *Unendliche Flächen*, 48 WIRTSCHAFTS WOCHE 149, 149 (1991).

289. *Id.* at 150.

290. TRUEHANDANSTALT, PRIVATISIERUNG 11 (Dec. 12, 1991) (a statistical annual report of the Trustee Agency). The TLG originally had between 25,000 and 30,000 pieces of real estate—making it by far the world's most important real estate agency. Buchwald, *supra* note 288, at 149.

C. *Nature of Trust Agency Decisions*

As discussed above, the Trust Agency and its operating subsidiaries are governmental entities hierarchically integrated into the German federal government. Nevertheless, the German government modeled the basic structure of the Agency after the traditional German forms of corporate governance. The hybrid nature of Agency decisions, which combine elements of private ownership and administrative responsibility, parallels this mixed structure.[291] Like other private economic actors, the Agency attempts to maximize the proceeds from the sale of its wholly owned businesses. In choosing the actual purchaser, however, the Agency must balance this goal against the legal and administrative factors prescribed in the various property and privatization laws.

The sale of companies by the Agency occurs in a two-tiered process.[292] The first step, largely administrative in nature, encompasses the choice of the proper buyer. The second step, implemented through customary private law instruments, encompasses financing, sale, and final transfer. The most important issue in assessing the nature of Trust Agency decisions is the nature of the first step, the administrative choice of a purchaser. To what extent does German administrative law apply to oversee this decision-making process?[293] Fahrenbach argues that the "subjection theory" (Subjektionstheorie) must be applied in order to properly answer this question.[294] This theory instructs one to determine whether the various parties to an act concluded by the government share a relationship of equality or whether the facts show a hierarchical relationship. In the latter case, a public act, subject to the provisions of German administrative law, is at issue. The Trust Agency acts alone in evaluating competing bids for a business and clearly holds a superior position with respect to the potential purchasers. Thus, the decision to whom to sell a given business is an administrative act subject to German administrative law.[295]

The Agency, when making sales decisions, must take into consideration all legally prescribed norms relevant to its decision, whether pro-

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291. Passavant & Nösser, *supra* note 246, at 886.

292. Ralf-Friedrich Fahrenbach, *Das Privatisierungsverfahren nach dem Treuhandgesetz*, 8 DEUTSCH-DEUTSCHE RECHTS-ZEITSCHRIFT 268, 268 (1990).

293. Until December 31, 1992, the provisions of West German federal administrative law apply equally to the actions of state and local administrative bodies in the five new Länder. Thereafter, their own—as yet to be enacted fully—administrative law provisions shall apply. Stelkens, *supra* note 91, at 265.

294. *Id.* at 269.

295. *Id.*; Passavant & Nösser, *supra* note 246, at 886; Leo, *supra* note 192, at 1507.

vided for by general administrative law or the property and privatization laws. Article 3 of the Agency bylaws dictates that foreign and domestic applicants be treated equally.[296] The traditional requirement of confidentiality also applies. Hence, Agency decisions are neither published nor reported.

IX. Privatization by the Trust Agency

A. *Preparation for Sale*

In first preparing to sell the companies at its disposal, the Trust Agency faced the monumental task of determining exactly which companies were in its possession. The Property Assignment Law assigned the entirety of East German state-owned property in one transaction to the Trust Agency or another public administrative body.[297] In March 1991 the Trust Agency finally produced its first comprehensive listing of the companies available for purchase.[298] At that time, 6,000 businesses, many of which were giant holding companies subsequently divided, were available for purchase.[299]

Preparing this list of property, of course, is only the first step if a purchaser is not immediately available. As discussed previously, before the Trust Agency can contemplate selling many of its holdings, it must divide them into marketable units using the mechanism provided by the Division Law.[300] This requires agreement by the Agency-appointed directors as well as by various divisions within the Agency itself. In the case of very large or strategically or politically key industries, the board of directors of the Trust Agency itself may have to make the final decision.

Finally, the Agency must ensure that the companies it wishes to privatize, including those newly created through the division of a holding company, have successfully drawn up a beginning balance sheet in accordance with the prescription of the Deutsche Mark Balance Sheet Act.[301] In most instances this is far from being a minor task. Drawing up this balance sheet is especially difficult where a former holding company has been divided into a number of spin-off concerns. Furthermore, the

296. Trust Agency Bylaws, art. III, *cited in* Fahrenbach, *supra* note 292, at 269.

297. *See supra* subpart V(B).

298. Treuhandanstalt, Offizielles Firmenverzeichnis der Treuhandanstalt (1991). This official catalog of Trust Agency holdings is periodically updated and has been issued in several languages other than German.

299. *See supra* subpart V(B).

300. *See infra* Part VII.

301. *See infra* notes 252-53 and accompanying text.

Agency will decide whether to privatize a business or whether to liquidate it based on this balance sheet.

B. *Finding a Buyer*

After having decided which businesses to privatize and which to liquidate, the Agency must go about the usually difficult task of finding and matching companies with buyers. In the early days of its work, the Agency could in part rely on interested buyers to come forward to bid for the crown jewels of the East German economy. With 7,613 (from a total of well over 8,000) privatizations already approved by June 1, 1992,[302] this task has become increasingly difficult. Much of what remains to be privatized are the oldest, least efficient, most redundant, and most environmentally damaging industrial plants.

The Trust Agency has become much more aggressive in its efforts to seek out buyers for its companies. It has opened offices in New York and Tokyo and has individuals in numerous foreign states who act as initial contacts and advisors (Auslandsbeauftragte). The responsibilities of these offices include disseminating information regarding the remaining businesses for sale as well as assisting potential bidders in drafting their investment proposals. In addition, the Agency has established an Investor Relations department to help foreign investors bridge cultural, linguistic, and legal gaps.[303] The Agency's Investor Services Directorate coordinates all these efforts, inside and outside of Germany. The duties of the Investor Services Directorate include concluding assistance agreements with investment banks; arranging for management-buy-outs (MBOs) and management-buy-ins (MBIs);[304] holding meetings for investors from throughout a specific business sector; and designing and implementing direct mail solicitations.

Perhaps the most important and most recent addition to this palate of aggressive marketing tools is what has been termed the Ausschreibung. According to Agency officials, an Ausschreibung (merely the term for an announcement) is the bundling of associated businesses, either in a simi-

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302. TREUHANDANSTALT, INFORMATIONEN 1 (June 14, 1992).

303. The Agency established the Investor Relations groups after widespread criticism of the Agency's inability to attract more foreign purchasers. Telephone Interview with Margaret Knudson, Referentin, Investor Relations, Investor Services Division, Treuhandanstalt Berlin, in Berlin, Germany (Sept. 22, 1992).

304. For more information regarding these means of purchasing business concerns held by the Trust Agency and the policy reasons for their approval, see BUNDESMINISTERIUM FÜR WIRTSCHAFT, MANAGEMENT BUY-OUT IN DEN NEUEN BUNDESLÄNDERN ALS WEG ZUR PRIVATISIERUNG (1991).

lar line of commerce or in the same geographic area, for sale. The Agency places advertisements in a variety of print media announcing its intention to sell the enumerated businesses by a certain date. Subsequently, investors may submit bids to a special office in Berlin that coordinates these quasi-auctions. Interested purchasers must provide, in addition to their bid, a detailed investment concept and an analysis of the jobs that would be preserved and those that would be lost. In addition, bidders must provide a funds guarantee covering five percent of their bid. The final sales decision depends upon a detailed description of the investor, its financial position, and its management potential.[305] The Trust Agency typically announces that it will reach a decision on the bids within ninety days, but it always makes clear that it is not required to accept the highest offer or any offer at all.[306]

An Agency report lists some of the perceived benefits of using this method of sale: transparency of action and the ability to guarantee follow-through; ability to reach most potential investors at one time; internationalization of the privatization process; improved sale prices through heightened competition; speeding up the entire sales process; and decision by the free market whether individual business enterprises should survive or be liquidated.[307] These are clearly important benefits and largely explain why the Ausschreibung has come to dominate the Agency's most recent marketing efforts.

Pursuant to a decision of the governing board of the Agency dated March 19, 1991,[308] the Investor Services Directorate may contract with investment banks or consulting firms to assist in or assume such responsibilities with regard to specific groups of businesses. These contractors may be given the exclusive right to seek buyers for particular businesses for a limited time and to receive a portion of the proceeds from a sale. The contractors may also analyze the various bids they receive on behalf of the Agency.

C. *Choosing a Buyer*

1. Valuing the Object of Sale and the Bid

The most important precondition for a choice between competing bidders or acceptance of a unitary bid is a full understanding of the current and potential value of the object of sale. According to an Agency docu-

305. Passavant & Nösser, *supra* note 246, at 885.
306. Trust Agency (unpublished).
307. *Id.*
308. *Id.*

ment, each Business Division must calculate the value and cost of the best alternative to sale.[309] This represents the purchase price floor, and frequently equals the liquidation value. The Agency also calculates the value as viewed from the purchaser's perspective, and the bookkeeping effect of various alternatives. Finally, the Business Divisions must calculate the net-cash-value of each offer as a key basis for comparison. The Agency will only conclude a sale if the net-cash-value is greater than the value of the best alternative to sale.

The net-cash-value of a given offer depends upon the type of assistance requested by given bidders. Experience demonstrates a range of possible assistance by the Agency. It may, for example, assume the debt responsibilities, environmental clean-up costs, or the ongoing losses for a specified time period.

2. Evaluating the Investment Proposal

In addition to valuing the object of sale and the bids themselves, the Agency must evaluate both the benefits of competing investment proposals and the likelihood of their realization. Agency documents indicate that the factors assessed include the number and type of jobs that will be maintained or added, the amount and type of investment promised, the willingness and ability to remove past environmental damage, and the overall dependability and reputability of the bidder. The significance of each of these criteria varies from case to case. The Agency specifically acknowledges that their relative importance depends upon the overall economic condition, the condition of the enterprise's region, the employment situation, and the intensity of competition among purchasers. Further, the winning investment plan must balance the value of real property to be acquired along with an enterprise against positive factors such as additional job guarantees, higher technology development, or something else.

One of the key remaining issues is how the Trust Agency balances investment Deutsche Marks and jobs. How many Marks of promised investment are necessary to compensate for the guarantee of one less job? While some individuals at the Agency have spoken of a fixed jobs-to-investment ratio,[310] Klemens Molinari, Department Head for Service Industries, stated that no such fixed ratio exists, but the Agency sometimes

309. *Id.*

310. One member of the Law Division stated that the correlation seems to be that DM 50,000 invested equal one less job guaranteed. Interview with Angela Rapp, Referentin, PR5, Direktorat Recht, Treuhandanstalt Berlin, in Berlin, Germany (Jan. 14, 1992).

uses employee values for specific industries as an evaluative measure.[311] In the sales contracts which it concludes, the Agency provides a penalty of DM 30,000-40,000 for each promised workplace that is not preserved.[312] This, perhaps, gives potential bidders a more general indication of the value of each workplace guaranteed. Herr Molinari also pointed out that the exact number of jobs guaranteed is often the deciding factor when firms are sold for a nominal value.

Given the political accountability of the Trust Agency,[313] purely social and political considerations ultimately affect many of these decisions. Industries of great historical significance, for instance, are more likely to be saved from liquidation, either through privatization or continued public ownership, than those with no natural constituency. The fact that the Agency has agreed to hand over, in some cases without receiving any payment, a variety of businesses to state and local authorities demonstrates this political reality.[314] The following historically important industries have been transferred in this manner: the 200-year-old Meißen porcelain factory has been given to the State of Saxony; the famous Lepizig Fair Co. is now in the hands of the City of Leipzig; the world-renowned Carl Zeiss Jena optical works are now owned by the State of Thuringia; and the seaports in Rostock, Stralsund, and Wismar have been conveyed to the respective cities and/or states.[315]

D. *Negotiating the Contract*

Once the Trust Agency decides to sell rather than liquidate or lease a business and choses the likely buyer, it must begin the arduous task of negotiating the contract language. The web of legal provisions makes these negotiations time-consuming and difficult. A complete analysis of the many options and considerations generally at issue is beyond the scope of this Article. Nevertheless, understanding a couple of key considerations will clarify the process of privatization.

1. Share v. Asset Deals

One of the principal decisions to be made by both parties is whether the business enterprise should be purchased through a share or asset

311. Interview with Klemens Molinari, Abteilungsleiter, Direktorat U4 DL—Dienstleistungen, Treuhandanstalt Berlin, in Berlin, Germany (Jan. 23, 1992).

312. *Id.*

313. See *supra* subpart VIII(C) for a discussion of the position of the Agency within the German federal government.

314. TREUHANDANSTALT, *supra* note 298, at xix.

315. *Id.*

deal.[316] While it is unclear whether the drafters of the property and privatization laws were aware of these two distinct methods of sale,[317] Agency documents indicate that the Trust Agency considers both methods possible options. The two forms of sale have radically different legal effects. In an asset deal, the purchaser acquires title to the property holdings of an enterprise, leaving behind its legal identity and its legal obligations. This "outer shell" may include voluminous debt, legal obligations to clean up years of environmental damage, and various obligations to employees. Clearly, the Trust Agency prefers share deals in which the buyer assumes all such legal obligations.[318] But when only one interested buyer exists, as is apparently often the case, the Agency may accept a pure asset deal.

2. Revaluation Subsequent to Sale

In January 1992 the Trust Agency adopted a new general requirement for all sales contracts.[319] Because of the volatility of the real estate market in eastern Germany, new sales contracts must include a clause allowing for revaluation of real property acquired within some reasonable period following final transfer of title. The purchaser must pay any increase in value to the Agency or the former owners.[320] In addition, in order to prevent real estate speculation, if the purchaser of an enterprise sells any portion of the real property therewith acquired within an agreed time period, the purchaser must reimburse the Agency for all or part of the proceeds above valuation at the time of sale by the Agency. Thus, each sales contract must give the assessed value for each piece of real property sold.

3. Section 2 Clauses

Because the parties usually conclude sales contracts before the Law Division has reached a final decision under section 2's right-of-way rule, the contracts contain a standard "escape" clause.[321] The purchaser states her understanding that the contract does not guarantee section 2 approval; she waves her rights to any reliance damages if approval is not granted; and she agrees that if new claimants later appear, the Trust

316. Leo, *supra* note 192, at 1505.
317. *Id.* at 1507.
318. *Id.*
319. Trust Agency (unpublished).
320. Bernd Scheifele, *Zur Anwendung des § 3a Vermögensgesetz durch die Treuhandanstalt*, 20 BETRIEBS-BERATER 1350, 1353 (1991).
321. *Id.* at 1352.

Agency will again undertake a de novo section 2 review.[322] These provisions have made many potential purchasers reluctant to proceed until the claims filing deadline of December 1, 1992 has passed.

It appears that concluding an agreement with the Agency gives purchasers little or no legal protection. In fact, as discussed below,[323] the Law Division rarely denies approval under section 2. Thus, even subsequent de novo review poses little or no threat. Because the requirements of the Investment Priority Law are clear in this regard, the Agency has no choice but to leave open the possibility for further review.

4. Guaranteeing Performance

Because the provisions of the Property Law and its amendments bind the Trust Agency and not purchasers,[324] contractual methods have been developed to guarantee performance of the promised investment. As mentioned earlier, for instance, contracts routinely provide penalties for failure to maintain as many employees as promised.[325] In addition, sale contracts entered into by the Agency generally contain a clause permitting the Agency to demand the return of the purchased enterprise if the purchaser fails to carry out the promised investments within two years.[326] Article 3 of the Property Law, in fact, has required the Agency to secure the return of the property or enterprise under specific circumstances.[327] Three conditions must be met for this requirement to apply. First, the purchaser must default on the investment promises; second, there must be no compelling changed circumstances that excuse this default; and third, the former owner of the property must demand its return. Because these mechanisms cannot, of course, guarantee performance, the Agency must provide external oversight and internal approval mechanisms to ensure that only financially and technically capable buyers are approved.

5. External Checks—The Berliner Modell

Because investment proposals often require regulatory approval, the Agency must often consult with other public offices before giving approval. A given piece of property may only be sold under the Property

322. *Id.* at 1353.
323. *See infra* section IX(E)(1).
324. Weimar, *supra* note 194, at 2528.
325. *See id.* at 2528 n.23.
326. Trust Agency (unpublished).
327. Property Law, *supra* note 23, art. 3(6), 1991 BGBl. I at 959.

and Investment Laws to a nonclaimant if she guarantees investment. The Agency's approach in the area of real property sales illustrates one method of streamlining this task.

Especially in the case of real property, the Agency thought it imperative to bring all regulatory agencies into the evaluation process at an early stage to guarantee the completion of the approved investment proposal.[328] Thus, the Trust Agency developed an interesting consociational model (Berliner Modell),[329] designed to speed up the sale of real property for investment purposes.[330] State and city officials meet with the Agency before it puts property on the market to determine the permissible types of investment.[331] Once the agencies reach a binding agreement, the Trust Agency will initiate the normal sales process. It will only select from among the bids that clearly lie within the agreed-upon regulatory requirements.

6. Internal Checks

A variety of internal checks exist within the Agency. The Agency requires the Law Division to review each sales contract for compatibility with the requirements of the right of way for investment contained in section 2 of the Investment Priority Law. In addition, the Agency has set up internal guidelines for the approval of sales.

These unpublished guidelines require that one member of the governing board of the Agency and the director of the responsible Business Division approve a sale involving less than 500 employees, a company valued at less than DM 25 million, or a company with turnover of less than DM 75 million. At the next level (up to 1,500 employees, a value of DM 75 million, or a turnover of DM 200 million), the guidelines require approval by two members of the governing board. For any company that exceeds these parameters, the approval of the entire governing board is required. If, however, the sale involves more than 2,000 jobs, a company valued at more than DM 100 million, or a turnover greater than DM 300 million, the guidelines require approval of the Federal Minister of Finance and the administrative board of the Agency. At these top values, the political oversight of the Agency becomes most evident.

Finally, at each stage of the approval process, the Trust Agency has

328. TREUHAND-LIEGENSCHAFTSGESELLSCHAFT, TLG-VERKAUFSHANDBUCH 1 (Merkblatt zur Berliner Modell) (Sept. 23, 1991).

329. Buchwald, *supra* note 288, at 149.

330. TREUHAND-LIEGENSCHAFTSGESELLSCHAFT, *supra* note 328, at 3.

331. Buchwald, *supra* note 288, at 150.

developed elaborate certification checklists to ensure that the requirements of all laws and policies have been considered and met. These forms can contain more than fifteen pages of questions that must be answered prior to submission to higher bureaucratic levels.

E. *Decisions Under Section 2 of the Investment Priority Law*

1. Section 2 and the Work of the Law Division

As discussed, the Impediments Removal Law, by adding article 3a to the Property Law, and its successor, section 2 of the Investment Priority Law, have created a large exception to article 3's restrictions upon disposition of property against which a claim has been filed.[332] This so-called "super right of way" for investment allows the Trust Agency to sell property to investors provided that such a sale meets one of the enumerated goals of the exception. These goals include the maintenance or addition of jobs, the maintenance or creation of housing, or the construction or preservation of infrastructure for these other two purposes.[333] The Trust Agency's Law Division decides whether these requirements have been met in individual cases.

Department 5 (public law) within the Law Division reviews the petitions for waiver under section 2. The Business Divisions submit these waivers to the Law Division upon completion of contract negotiations. Statistics indicate that in 1991 Department 5 received 260 requests for approval under old article 3a.[334] Of these, the Agency disposed of 179 without making a formal decision. Astonishingly, however, the Agency only denied approval under old article 3a in three instances. This statistic indicates that virtually any credible investment plan is sufficient to gain possession of property claimed and filed against former owners. Nevertheless, Department 5 engages in a rigorous process of evaluation to protect the due-process rights of claimants, to ensure that the proposed investment plan meets minimum requirements of credibility, and to ensure that the purchases fully comply with the provisions of section 2 (formerly article 3a).

2. When Is a Decision Necessary?

Upon concluding contract negotiations with a potential buyer, the Business Divisions must next contact the various federal, state, and local

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332. *See supra* subpart VI(B).

333. Property Law, *supra* note 23, art. 3a(1), 1991 BGBl. I at 960.

334. Personal statistics kept by Martin Keil, Abteilungsleiter, PR5, Direktorat Recht, Treuhandanstalt Berlin, Germany.

Claims Offices to determine if there are claimants for the object of sale. If such claimants exist, the Business Division must submit a request for review to Department 5.

The Property Law provides additional instances in which review is unnecessary because the property may not be returned to the former owners. Article 5 of the Property Law, for example, precludes returning property if it has been converted at great cost to serve a public function.[335] Further, the Property Law prohibits return if the property has become part of a housing complex[336] or has been amalgamated into a unitary business concern in which reversal thereof would severely damage ongoing business.[337] In these instances, after complete evaluation, the Business Division may proceed with the sale without seeking review by Department 5.[338]

3. Standard Procedures

Upon receipt of an application for review, Department 5 notifies any known claimants, giving them two weeks to object.[339] While Department 5 may allow more than two weeks for claimants residing abroad, domestic claimants, who face delivery delays, often have less than two weeks to return their comments, objections, or counterproposals to the Agency.

In addition, the Agency must notify the various Claims Offices of the intent to sell and ask for the names of any further claimants. The Agency must notify any such claimants and hear their claims through the above process. There may at times be quite lengthy delays in the issuance of a ruling. Department 5, however, generally issues a final decision pursuant to section 2 within five or six weeks of receipt of the request for review and the contract in its final form.[340]

After all parties have had sufficient time to be heard, and after the Department has satisfied itself of the credibility of the investment plan, Department 5 reaches a decision. If the Department denies a waiver pursuant to section 2, it will not publish a written decision because the

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335. Property Law, *supra* note 23, art. 5(1)a, 1991 BGBl. I at 961.

336. *Id.* art. 5(1)c, at 961.

337. *Id.* art. 5(1)d, at 961.

338. Trust Agency (unpublished).

339. *See* Scheifele, *supra* note 320, for a detailed discussion of the procedures followed by Department 5. *See also* BUNDESMINISTER DES INNERN, INFODIENST KOMMUNAL 33 (1991) (providing concrete examples of how article 3a must be applied, substantively and procedurally); *cf.* Property Law, *supra* note 23, art. 3a(3), 1991 BGBl. I at 960.

340. Interview with Angela Rapp, Referentin, PR5, Direktorat Recht, Treuhandanstalt Berlin, in Berlin, Germany (Jan. 15, 1992).

effects are only internal to the Trust Agency.[341] If, however, Department 5 grants a waiver, German administrative law and the provisions of the Property Law require that a written decision be issued stating the principal facts and the legal reasons for the decision.[342] As mentioned above, objections to and appeal of these decisions have no temporary injunctive effect.[343] While the affected parties (Business Division, investor, and claimants) receive a copy of the written decision, the Department does not otherwise publish the decisions and they are thus generally unavailable.

4. Sample of Cases Decided

The Trust Agency must decide a myriad of problems arising under the Property Law. This Article cannot analyze all these issues in sufficient detail, but a brief look at several representative cases already decided by Department 5 will give the reader a vivid understanding of the complexities of the issues.

a. Case 1

One of the Business Divisions had signed a contract of sale for a pharmacy located in a large residential building on the main square in a provincial town in one of the five new Länder. The pharmacist employed to run this pharmacy by the GDR government purchased this vital monopoly.

Review by Department 5 indicated that the former owner of the pharmacy and his three children (each of them a pharmacist) had filed a claim for restitution. The owner had lost the property and the pharmacy when he fled to West Germany in the early 1960s, and now wished to return to operate his business.

Because it could only grant a waiver under old article 3a if the entitled claimant did not make an investment proposal equal or nearly equal to that of the other investors, Department 5 had hoped to deny the waiver in order to allow the former owner to resume ownership and operation of the pharmacy.

Unfortunately, a separate provision of the Unification Treaty prohibits West Germans from opening pharmacies in the five new Länder for a transitional period. Expressing a desire to protect the "home market," the licensing ministry in the eastern state refused to recognize the Trust

341. Trust Agency (unpublished).
342. Scheifele, *supra* note 320, at 1352.
343. *See supra* subpart VI(A).

Agency's argument that the former owner was not a "westerner" for purposes of this provision of the Treaty. Without a license, the former owner could not make good on his investment proposal.

Unless Department 5 can convince a court to compel the minister to grant a license in the reasonably near-term, the Trust Agency may find itself compelled, in the general interest of the public, to sell the building and pharmacy to the employee. Department 5 may also try to lease the pharmacy to the employee for the transitional period in order to effect "substantive justice."

b. Case 2

One of the Business Divisions had agreed to sell a prominent building on one of East Berlin's principal squares to a West German investor. To avoid the necessity of awaiting decision by the consultative group in accordance with the Berliner Modell,[344] and to guarantee approval in accordance with then article 3a, the investor proposed to either invest DM 20 million in the current structure (DM 3 million in the first two year) or, alternatively, tear the edifice down and build a new one.

In this manner, the necessary approval from the city fathers no longer represented a necessary component in evaluating the feasibility of the investment proposal. Such maneuvers to guarantee purchase have become the rule rather than the exception.

c. Case 3

One of the Business Divisions had planned to sell a building in a small town to one of the new Länder governments to be used for a local branch of the state forestry service. Department 5 had to decide whether use of a building for administrative purposes constituted appropriate grounds for waiver under old article 3a(1). Initially, Department 5 believed that such use did not qualify for waiver because the state was obligated to provide these services in any case, thus purchasers could not argue that jobs were being created as required by old article 3a(1)2. This controversy raised additional questions concerning the alternative use of imminent domain.

On further review, however, and after the state government promised to invest DM 500,000 in renovations, Department 5 ruled that such a use would warrant an article 3a waiver. No appeal has been brought, and thus the courts have not reviewed this matter.

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344. *See supra* at section IX(D)(5).

d. Case 4

A Business Division concluded a sales contract for an automobile repair shop even though the purchaser demonstrated no prior experience in the field. The proposed purchaser did possess, however, management credibility and the financial wherewithal to undertake renovation and expansion of the business.

Department 5 undertook an evaluation of the proposed purchaser's likely true intent. Because the automobile repair shop occupied land in the center of an important city, Department 5 concluded that the true motive in purchasing the shop was to gain valuable land for future development.

In a rare show of opposition, Department 5 denied a waiver under old article 3a, arguing that one of the investors, who was evidently more committed to long term operation of the shop, should have been chosen. In the alternative, the Department suggested that the Business Division could have considered a decision to sell the property as usable land and adjust the price accordingly.

X. COMPENSATION

Because former owners have the right to opt for either restitution or compensation, the latter forms an important part of the legal efforts to make whole former owners as well as part of the efforts to privatize the eastern German economy. If compensation is sufficiently generous and certain, former owners will be more than willing to approve the sale of their property. Such an allowance would render a waiver under section 2 superfluous and would drastically speed the privatization program. Although some compensation is usually assured, the amount is never certain.

When the Agency sells property pursuant to section 2 to someone other than the former owner, the law (at least in principle) entitles that individual or company to the sale price received by the Trust Agency or its fair market value.[345] If return of a business enterprise is impossible for one of the reasons enumerated in article 6(1) of the Property Law, the law entitles the former owner, pursuant to article 6(7), to the value of the property at the time of transfer to state ownership.[346] This right vests whether the former owner initially chooses to seek restitution or immediately settles for compensation.[347] One-half of all monies received

345. Property Law, *supra* note 23, art. 3a(5), 1991 BGBl. I at 960.
346. CZERWENKA, *supra* note 123, at 48.
347. *Id.*

at the time of expropriation shall be deducted from the amount of compensation due.[348] Article 29a of the Property Law makes clear that compensation must be drawn from the special national fund established for that purpose.[349] A Trust Agency document indicates that obligations assumed by the Agency as a condition of sale must be deducted from the sale price. This will "make clear to the former owner that the sale produced no profit because the company had no market value."[350] This scheme, however, does not consider the cost of environmental damage wrought by the GDR regime after the property was seized. Can it be that the former owner may receive no compensation because, through wrongful acts of the GDR, the value of the property had been reduced to zero? This and other questions remain unanswered.

The valuation of compensation raises the most critical and as yet unresolved question. If the former owner will not opt for the sale price received by the Trust Agency or if the property cannot be returned, some standard of valuation is necessary. Article 9(3) of the Property Law simply states: "Further details [regarding compensation] will be regulated by a law."[351] A draft of the compensation law has yet to be submitted to the Bundestag for final review, much less enacted.

Rumors exist, however, of what the compensation law may provide. One proposal of the Finance Ministry would have required those who received their property to pay to the compensation fund a one-time "equalization fee" equivalent to thirty percent of the fair market value.[352] Because of the artificially low prices that prevailed, those who purchased property under the GDR regime would also pay into the fund fifteen percent of the increased value of their property.[353] The Finance Ministry, however, proposed a level of compensation equal to only 1.3 times the 1935 value of the property.[354] This proposal is not yet dead, although seriously wounded. Minister Waigel circulated this proposal again in early November 1991,[355] but it was "ground to bits between the millstones of the Economics Minister and the 'Apostle of Justice,' the

348. Property Law, *supra* note 23, art. 6(7), 1991 BGBl. I at 963. This reduction in value springs from the legal conversion rate of 2 Ost Marks to 1 DM at the time of economic and monetary union.

349. Property Law, *supra* note 23, art. 29a(1), 1991 BGBL. I at 968.

350. Trust Agency (unpublished).

351. Property Law, *supra* note 23, art. 9(3), 1991 BGBl. I at 965.

352. *Vermögensabgaben auf Grundbesitz geplant*, HANDELSBLATT (Dusseldorf and Frankfurt), July 17, 1991, at 2.

353. *Id.*

354. *Id.*

355. *"Das gibt furchtbaren Ärger,"* 2 DER SPIEGEL 67 (1992).

Justice Minister."[356] Such paltry compensation would constitute a de facto second taking.

The driving principle behind this proposal is equalization between those who were fortunate enough to receive their property and those who will only receive compensation. Article 3(1) of the Basic Law states: "All persons shall be equal before the law." Any compensation law that does not provide for roughly equal treatment of those who do and those who do not receive their property will be ruled unconstitutional.[357] It also appears that the due-process requirements of the Basic Law require the use of the last uniform valuation of all property in eastern Germany. This explains the use of the 1935 valuation.

Volker Zimmermann has pointed out that in addition to the equalization fee, other methods may be available to balance the position of the two groups. One could, for instance, limit the right of resale of those who received their property or otherwise cap the immediately available profit.[358] Such measures would, however, have deleterious effects on the overall economy by hindering the free trade in real property.

In any case, Waigel's proposal is not likely to speed the privatization of the eastern German economy. As Martin Keil, head of Department 5, has stated, "If the Waigel plan is adopted there will be no rush by claimants to chose compensation over restitution—in fact, no one will."[359]

XI. Outlook for the Future

The foregoing has been a predominantly functional and legal analysis of the privatization efforts to heal forty years of separation and to prevent the social upheavals recently in evidence in the cities of Rostock and Cottbus. The interplay between the institutional and legal framework erected to carry out privatization and the economic forces generally at work will either consign eastern Germany to permanent second-class status or to a bright future of rapid economic development and potentially positive social change.

While incredible impediments to economic progress exist,[360] Germany

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356. Interview with Volker Zimmermann, Referent, Arbeitsgruppe Recht der CDU/CSU-Bundestagsfraktion, in Bonn, Germany (Jan. 8, 1992).

357. *Id.*

358. *Id.*

359. Interview with Martin Keil, Abteilungsleiter, PR5, Direktorat Recht, Treuhandanstalt Berlin, in Berlin, Germany (Jan. 23, 1992).

360. As recently as a year ago, for instance, the property register held 500,000 unprocessed entries—a necessary component of privatization. Jürgen Schmidt-Räntsch,

also has reasons for optimism. The Trust Agency continues to quicken the pace of its efforts at privatization or liquidation,[361] and an extremely impressive system of investment support programs has been developed at the state and national levels.[362]

The work of the Trust Agency will determine the course of Germany's future. Figures showing how many companies have been privatized or liquidated are insufficient indicators of the success of this privatization model. Only time will tell whether the investors chosen by the Trust Agency can provide the economic lifeline necessary in eastern Germany.[363] Moreover, the means used to carry out this work will determine whether Germans can organically grow together in the political and social sphere. East Germans have already expressed great bitterness toward the results of unification.[364] If the Trust Agency does not decide wisely and rapidly, signs of discontent will spread; from Stralsund to Dresden one will hear, "We expected justice and got the rule of law."[365]

Grundbuchvorfahrt bei Investitionsvorhaben in den neuen Bundesländern: Die Allgemeine Verwaltungsvorschrift zur Grundbuchverfahrensbeschleunigung, 3 DEUTSCH-DEUTSCHE RECHTS-ZEITSCHRIFT 65, 65 (1991); *"Das gibt furchtbaren Ärger," supra* note 355, at 67. For a portrayal of administrative, communications, educational, and other impediments to rapid economic development, see Fieberg & Reichenbach, *supra* note 49.

361. In March 1992 alone 511 businesses had been privatized. THIS WEEK IN GERMANY (German Information Center, New York, N.Y.), Apr. 24, 1992, at 4.

362. For a general survey of these programs, see FEDERAL MINISTRY OF ECONOMICS, ECONOMIC ASSISTANCE IN THE NEW GERMAN LÄNDER (1991); FEDERAL OFFICE OF FOREIGN TRADE INFORMATION, DOING BUSINESS IN GERMANY'S NEW FEDERAL STATES (1991); BUNDESMINISTERIUM FÜR WIRTSCHAFT, EIN INTERNATIONALER STANDORT MIT ZUKUNFT: DIE NEUEN DEUTSCHEN BUNDESLÄNDER (1991).

363. See *2 glorreiche Halunken machten Kasse*, SUPER ILLU., Jan. 9, 1992, at 20, for a popular portrayal of some of the scandalous decisions made by the Trust Agency.

364. For instance, popular displeasure with the word used by the Trust Agency for the process of restructuring and sometimes liquidation prompted it to hold a public contest with a cash prize to seek an alternative. THIS WEEK IN GERMANY (German Information Center, New York, N.Y.), Feb. 7, 1992, at 7.

365. German President Richard von Weizsäcker receiving the Heine Prize, Düsseldorf (Dec. 13, 1991), *in Treland Benefits from "Reconstructive" World Survey*, THIS WEEK IN GERMANY (German Information Center, New York, N.Y.), Dec. 13, 1991, vol. XV, No. 2, at 2 (quoting Bärbel Bohley).