

Resolving Rival Claims on East German Property Upon German Unification

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One of the most significant problems of German unification is the reinstatement of private property rights in former East Germany. The East German Government and the Soviet occupying authorities who preceded it expropriated much of the country's land from private owners.¹ The state controlled most property, which was considered "*Volkseigentum*," or "the people's property." Because the concept of *Volkseigentum* does not exist in West German law,² which treats property much like the American legal system, the difficulty of merging East Germany into the West German system raises an interesting legal question of how to adapt an entire system of property to a new legal and political system. The question is of tremendous importance, since the settlement of ownership of the properties in question affects over one million claims.³

The separate histories of the two German countries, the Federal Republic of Germany (FRG) and the German Democratic Republic (GDR), have created conflicting sources of claims on properties in former East Germany. The conflicts stem from international and intertemporal legal problems: claims of West Germans oppose claims of East Germans, and claims from the early postwar years oppose present claims.

Former deedholders whose properties were expropriated now want them back. They claim that the takings under the East German Government were illegal and that their property should be returned. Many of these claimants left East Germany after the government took their lands. Other claimants abandoned their properties to flee to the West. The claims of those who left East Germany conflict with the claims of current residents, who may own the houses in which

1. The Soviet military authorities expropriated 3.3 million hectares of land during the occupation of East Germany from 1945 to 1949. Henning Krumrey, *Neue Milliardenlast*, WIRTSCHAFTSWOCHE, June 22, 1990, at 14, 15.

2. The reference to "West German law" rather than "German law" underscores that this law is being newly applied in eastern Germany. This Note refers to East and West Germany in discussing historical development and to eastern and western Germany in discussing the present.

3. Over 1.2 million applications for the return of or compensation for expropriated property have been filed with the agencies responsible for administering the claims. Helmut Schmidt, *Uns Deutsche kann der Teufel holen*, DIE ZEIT, May 24, 1991, at 3.

they live, but were never given title to the land underneath.⁴ The claims of former owners may, in other instances, clash with long-established public use of the land. Many interests are at stake: the interests of former owners who were unfairly dispossessed of their property rights, the interests of current residents who have established homes, and the interests of the public in maintaining the stability of publicly used properties. Quick resolution of the property questions is essential because the reconstruction of the eastern economy requires speedy elimination of all legal obstacles to investment. The administrative bodies responsible for adjudicating property claims will have to balance all of these interests in their decisions.⁵

As part of the Unification Treaty,⁶ the two governments agreed to return property to former owners wherever possible. The most significant agreements on the property question were part of a Joint Declaration (Declaration) between the two governments.⁷ Although these agreements settle much of the conflict, many questions remain unresolved. The local tribunals that will adjudicate the claims will have a great deal of discretion in making their decisions. They will need to determine which ownership claims are legitimate, which properties should remain undisturbed, which can be returned to rightful owners, and how to assess property values in cases awarding compensation.

This Note presents the historical and legal background of the German property question and provides guidance to the administrative decisionmakers. It advocates that the now-unified German Parliament pass legislation specifying the criteria and considerations to be weighed in property decisions so that claims are treated fairly and uniformly throughout the country.⁸ Part I addresses the historical and legal context of the property question. It examines the development of property law and the history of expropriations in East Germany and the current status of West German property law insofar as it is applicable. Part II discusses the terms of unification and the agreements the two countries

4. Under the East German regime, about 40% of the citizens owned their houses, but the property on which the houses stood belonged to the state. Marc Fisher, *East Germans Fear Losing Homes*, WASH. POST, July 25, 1990, at A15, A18. The legal basis for the separation of ownership of land and buildings on the land is in the ZIVILGESETZBUCH [ZGB] [CIVIL CODE] § 295(2) (1988) (G.D.R.).

5. Claims are to be filed at local administrative offices: the *Landratsamt* (office of county administration) in rural areas and the *Stadtverwaltung* (municipal administration) in urban areas. GESETZBLATT DER DDR, TEIL I [GBL. I], No. 44 (1990).

6. Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands: Einigungsvertrag [Treaty between F.R.G. and G.D.R. on the Establishment of German Unity: Unification Treaty], art. 41, Aug. 31, 1990, 30 I.L.M. 457 [hereinafter Unification Treaty] (entered into force Sept. 29, 1991).

7. Gemeinsame Erklärung, BULLETIN, June 19, 1990, at 661 para. 3 [hereinafter Declaration] (West German Government publication). Properties abandoned by East Germans fleeing to the West will be returned unless such properties have been subsequently occupied by new residents or converted to public use. Where return of property is not possible because of an intervening owner or an important public purpose for the land, the government will compensate the former owners. *Id.* para. 3(a)-(b); see also *infra* notes 49-54 and accompanying text.

8. The German Parliament is expected to pass legislation concerning this issue. Immo Stutzbach, Restoration of Previous Ownership Rights in the German Democratic Republic 3 (Aug. 31, 1990) (unpublished memorandum, on file with author).

have already reached concerning property issues.⁹ Part III describes how the property claims should be adjudicated, according to the needs of justice and the public interest. This part first addresses the constitutional questions that have been raised in public debate over existing agreements including constitutional protection of property rights and equal protection claims.¹⁰ Second, Part III argues for a policy that the administrative bodies that adjudicate claims should follow—a policy based on prior international cases involving similar disputes. The most important factors in setting a policy to resolve property claims are fairness, predictability, stability, and the public interest. A just resolution of the property claims according to these criteria is essential to the efficacy and fairness of the German reunification process.

I. PROPERTY LAW IN EAST AND WEST GERMANY

With the division of Germany into occupied zones at the end of World War II, the Soviet territory that became East Germany and the British, American, and French territories that became West Germany began to develop quite differently. The Soviet authorities imposed a property system that, in keeping with the communist program, redistributed almost a third of the Soviet-occupied land during the first four years after the war.¹¹ In the western territories, by contrast, the Allies encouraged the development of a capitalist democracy, which did not materially alter the property system that had existed before the Nazi era.¹² These differences grew more and more pronounced with the development of East and West Germany over the forty years of their separate existences. The German Government must now assign titles to property in a country that previously did not recognize the concept of private ownership.¹³ The history of expropriations of property in East Germany demonstrates how

9. The Unification Treaty, *supra* note 6, and the Declaration, *supra* note 7, are the major sources of law on this issue, as read and interpreted within the context of West German property law and the West German Constitution. They are referred to as the "property agreements" throughout this Note.

10. This public debate includes editorial commentary in the press and articles written by German legal scholars. See *infra* note 45 and accompanying text.

11. Wolfgang Hoffmann, *Sechser im Lotto*, DIE ZEIT, June 8, 1990, at 34.

12. The Nazis grossly abused property rights by expropriating property from Jews and other minorities. The property law of Weimar Germany thus provides a more valid comparison for legal purposes. The protection of property rights under the Weimar Constitution resembles current West German protections. Compare DIE VERFASSUNG DES DEUTSCHEN REICHS art. 153 (1919) with GRUNDGESETZ [Constitution] [GG] art. 14.

13. Individuals living in private homes owned them only in the sense that they were permitted to live on property with the understanding that its upkeep was their responsibility. However, there were no titles or guarantees of ownership, and all property ownership was administered by the State. Carl Graf Hohenthal, *Zweifelhafte Geschäfte mit Grundstücken und Häusern*, FRANKFURTER ALLGEMEINE ZEITUNG, May 15, 1990, at 19. The East German Constitution only permitted expropriations of property in the common interest and with compensation. DIE VERFASSUNG DER DDR [VERF.] art. 16 (1968). However, this protection was more nominal than actual, since citizens were not permitted to challenge government expropriations. The first complaint contesting government compensation to be admitted in court was taken on July 1, 1989. Hohenthal, *supra*, at 19.

difficult it will be to implement a private property system after so many years without one.

A. *The Development of Property Law in East Germany*

1. *Historical Background*

According to the Marxist ideology adopted by the East German Government, private ownership of the means of production, including property, is the primary means of oppression.¹⁴ The East German state determined the best use of property for the collective good. Accordingly, much property in East Germany was considered socialist property, or *Volkseigentum*.¹⁵ Through land reforms, expropriations, and forced collectivizations, most property in East Germany became socialist property.¹⁶

The first stage of collectivization began in 1945 when the Soviet military government expropriated all properties larger than 100 hectares.¹⁷ This land reform so dramatically altered the preexisting system of property ownership that it violated the international law of military occupation.¹⁸ According to Article 43 of the Hague Regulations, occupying powers are obliged to respect the laws in force in the occupied territory unless they are "absolutely prevented" from doing so.¹⁹ Because widespread expropriation of land was not a necessary

14. Marx and Engels wrote: "[T]he theory of the Communists may be summed up in the single sentence: Abolition of private property." KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* 27 (Paul M. Sweezy trans., 1964); see also Wolfgang Kilian, *Die Frage Nummer 1 in der DDR: Wem gehören Grund und Boden?*, DIE WELT, May 9, 1990, at 8.

15. Kilian, *supra* note 14, at 8. East German statutes refer to the *Volkseigentum* and cooperative property as the economic basis of the development of socialism in East Germany. GBl. I, No. 140 (1952).

16. Carl Graf Hohenthal, *Unrentable Produktionsgrößen in der Landwirtschaft*, FRANKFURTER ALLGEMEINE ZEITUNG, May 16, 1990, at 19.

17. *Id.*

18. The governing law of military occupation at the end of World War II was the Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 205 Consol. T.S. 277, reprinted in DOCUMENTS ON THE LAWS OF WAR 44 (Adam Roberts & Richard Guelff eds., 1982) [hereinafter Hague Convention], and its accompanying regulations, Annex to the Convention, Oct. 18, 1907, 205 Consol. T.S. 289, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra*, at 48. There is some debate about whether the Allies were subject to the laws of military occupation. Some scholars argue that the total defeat of Germany gave the Allies the status of sovereign authority. Eyal Benvenisti, *Conflict of Laws and Belligerent Occupation: A Study in Comparative and International Law* 206-10 (1990) (unpublished J.S.D. dissertation, Yale Law School). It makes more sense in light of the basic principles of international law, however, to view the Allied presence in the postwar period as military occupation, not sovereign authority. Benvenisti argues persuasively that the Hague Regulations did apply, because the Allies did not automatically assume sovereignty as a result of the military victory. Benvenisti explains: "As sovereignty lies in the people and not in their government, the fact that their army has been totally defeated cannot divest them of their entitlement." *Id.* at 209. Thus, the Hague Regulations did apply to the postwar allied occupations. *Id.* at 208.

19. Article 43 of the Hague Regulations reads as follows: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Hague Convention, *supra* note 18, at 55-56 (emphasis added) (footnote omitted).

reform and clearly violated the system of land ownership that was still in place at the war's end, the expropriation was illegal under the Hague Regulations. This illegality is an important factor in arguments made by those who lost their lands during the Soviet occupation and whose properties were not included in the agreement to return or compensate.²⁰

The East German Government continued to nationalize property by establishing agricultural cooperatives.²¹ Farmers and new settlers were forced into these cooperatives, but had no control over their operations, which were large and inefficient.²² As a result, collectivization had drastic consequences—not only for the individuals who lost their property, but also for the economic development of eastern Germany. Now the new government must dismantle the cooperatives both to reinstate individual citizens' property rights and to reprivatize the eastern economy so that it can compete within the unified German agricultural system. Both of these goals must be considered in the reallocation of property rights.

2. *Status as of November 1989*

The status of property ownership prior to 1989, when the East German Government destabilized and the process of reunification began, is impossible to define clearly in legal terms.²³ Now that private property is being reintroduced, who should be entitled to ownership rights of the many concerns and factories characterized as the "People's Own Business"?²⁴ During East Germany's forty years of existence, almost all of the nation's property ultimately came under state control. Yet state control was often *de jure*, since the residents of the property or operators of farms and businesses had actual responsibility for the property. These responsibilities did not constitute legal property ownership.

Although East German statutes provided laws on property ownership, they were not necessarily followed. While East German civil law, like the West German system, stated that property ownership changed upon entry in the property register, or *Grundbuch*,²⁵ this formal system deteriorated so much during the 1970's that the *Grundbuch* fell into desuetude.²⁶ Similarly, East

20. See discussion *infra* Part III.A.3.

21. The *Landwirtschaftliche Produktionsgenossenschaften*, or agricultural cooperatives, were formed according to a 1952 directive. *Verordnung zur Sicherung von Vermögenswerten* [Decree on the Securing of Assets], July 17, 1952. GBl. I, No.100 (1952).

22. Hohenthal, *supra* note 16, at 19.

23. Kilian, *supra* note 14, at 8.

24. *Volkseigener Betrieb* is the typical nomenclature for businesses in East Germany. Article 25 of the Unification Treaty assigned most of these properties to the *Treuhandanstalt*, the trustee agency now in the process of privatizing these industries. See *Privatisierung durch Treuhandanstalt*, DEUTSCHLAND NACHRICHTEN, Feb. 8, 1991, at 5; *Trustee Agency Branches Privatize 240 Firms*, THE WEEK IN GERMANY, Jan. 25, 1991, at 4.

25. ZGB § 26(2) (1988).

26. Telephone interview with Immo Stutzbach, West German lawyer (Mar. 29, 1991).

German law did not provide the same protections for real estate as it did for movable property, further demonstrating the unimportance of private property within East Germany.²⁷

Without more legal guidance than presently exists, the decisionmaking authorities will have great difficulty resolving claims. Former East German citizens are understandably concerned that without title to the property they have used for years and with all of the country's investment capital flowing from western Germany, they will be bought out by West Germans enforcing prior ownership claims and seeking low cost investments. Thus, resolution of the property problem must respond to the eastern German residents' need for a stable assignment of property ownership.

B. *Relevance of West German Property Laws*

The East German property takings described above would have been illegal under West German law.²⁸ But what relevance does West German property law have to the events in former East Germany? Should West German law have any bearing on the acts of another sovereign state that affected only that state's citizens? One West German lawyer, Klaus Köpp of the Social Democratic Party, argues that when a sovereign government expropriates property from its citizens for political or economic purposes, as was the case in East Germany, other sovereign governments must recognize the expropriations as long as the state acted within the boundaries of its own authority.²⁹ Yet three significant legal and political issues make the severance of West German legal norms from the East German property problem more complex than this argument suggests.

First, the policies underlying the legal principles of state succession support the recognition of property claims in East Germany. If German unification were a simple case of state succession, a doctrine of sovereign immunity, such as Köpp describes, could apply. However, the German situation is atypical. The German Government, in the course of incorporating the former East German states into a unified Germany, has assumed responsibility for the former East German Government's rule.³⁰ Furthermore, the rules of state succession generally apply to a state's obligations to another state, rather than to its own citizens. Therefore, the most important international agreement on state succession,

27. There is no law of estoppel by laches with respect to real estate in East Germany, although an estoppel law does apply to movable property. An owner of movable property loses the ownership right after ten years if someone else has taken possession without knowledge of the prior owner. ZGB § 32(2). West German law recognizes estoppel by laches for real estate, BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 900 (5th ed. 1990) (F.R.G.), but East German law contains no such provision.

28. See *infra* Part III.A.

29. Hoffmann, *supra* note 11, at 34 (quoting statement of Klaus Köpp).

30. The Unification Treaty does permit the new government to reconsider some of the unwanted obligations of the East German Government. For example, Article 12(1) specifies that East Germany's treaty obligations are to be renegotiated by the new government. Unification Treaty, *supra* note 6, art. 12(1).

the Vienna Convention on Succession of States in Respect of Treaties,³¹ does not apply. Nevertheless, the basic policy underlying the Convention, which reflects the general principles of the international law of state succession, may be instructive in this context. Those principles attempt to strike a balance between the need for stability and continuity and the need to promote beneficial change.³²

The settlement of conflicting claims to East German property implicates both of these imperatives. In honoring legitimate claims to property, the new German Government accomplishes both objectives of the law of state succession: it promotes continuity in the international system, and it facilitates needed reforms. By taking on the responsibilities of the East German Government it succeeded, the new German Government performs its obligation under the international laws of state succession. At the same time, by making payments to individuals whose property was taken without just compensation by the East German Government, the new German Government can promote the interests of justice and fairness. Thus, the policies underlying the international law of state succession suggest that the new German Government should not respect the East German Government's expropriations as the valid acts of another sovereign, but should exercise its own control over its land and citizens to rectify the past injustices of the East German Government.

A second justification for the recognition of property claims is that the West German Government never fully accepted the legitimacy of the East German state.³³ The West German Government thus had no obligation to recognize acts of the East German Government, because East Germany was not a sovereign state according to West German policy. The West German Government never abandoned its policy of advocating and striving for the eventual reunification of East and West Germany.³⁴ It worded agreements with the East German Government very carefully so as to grant only the most minimal legal recognition of the East German Government possible.³⁵ West Germany's persistent resistance to recognizing the sovereignty of the East German Govern-

31. Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, 17 I.L.M. 1488 (delineating obligations of successor states to honor treaties of states they succeed). The International Law Commission has drafted articles that would arguably apply to the obligation to former East German citizens because they involve the assumption by successor states of "any . . . financial obligation chargeable to a State." *Report of the International Law Commission on the Work of its 32d Sess.*, U.N. GAOR Int'l L. Comm'n, 35th Sess., Supp. No. 10, at 11, U.N. Doc. A/35/10 (1980). These articles are not yet law, but are valuable as indicators of the future course of the international law on state succession.

32. See MYRES S. MCDUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 1553-54 (1981).

33. Ernest Plock remarks that "Bonn substantially, *but not formally*, extended recognition to the GDR" in signing a significant treaty in 1972. ERNEST D. PLOCK, *THE BASIC TREATY AND THE EVOLUTION OF EAST-WEST GERMAN RELATIONS* 3 (1986) (emphasis added).

34. This policy was manifest in the *Grundgesetz*. GG pmbl., arts. 23, 146 (amended 1990).

35. See PLOCK, *supra* note 33, at 26-27. The nonrecognition policy was so important that for many years the West German Government pursued the "Hallstein Doctrine," whereby West Germany would sever diplomatic relations with any state that recognized the GDR. *Id.* at 10 n.4.

ment relieved it of any obligation to acknowledge the legitimacy of that government's actions.

Finally, and perhaps even more salient than the legal justifications for the recognition of claims, the new German Government would encounter political difficulties if it refused to repair the East German expropriations. West German citizens have demanded that the German Government return their dispossessed properties now that it controls them. Interest groups have lobbied hard to pressure the new German Government to honor these claims.³⁶ Given the already volatile political climate in unified Germany, the politicians negotiating the unification agreement felt significant pressure from these citizens. The interest groups became powerful political actors during the negotiation of the Unification Treaty and forced the government to address the issue of property claims. Thus, the combination of political pressure, international law, and West German law support a policy of recognizing property claims in East Germany.

II. RELEVANT PROVISIONS OF THE UNIFICATION AGREEMENTS

The Declaration, the East and West German Governments' agreement to return property to former owners whenever possible, resolved many of the difficult property questions that arose during the unification process.³⁷ The parties prefaced the Declaration with a statement of the policy justifications underlying their agreement,³⁸ which listed goals of legal clarity, legal certainty, and conformity to preexisting property law principles.³⁹ The preface conceded that the agreement would not fully satisfy the interests of all concerned parties, since that could not be done without "substituting old injustices with new ones."⁴⁰

The negotiators from West and East Germany represented the divergent interests of their respective constituencies. The West German claimants and interest groups wanted as much property as possible to be returned to former owners.⁴¹ East German citizens wanted protection from the loss of their prop-

36. These groups include the *Interessengemeinschaft der DDR-Enteigneten* (Interest Group of Persons Expropriated by the GDR) and the *Arbeitsgemeinschaft für Agrarfragen in der DDR* (Working Group on Agriculture in the GDR). *Eneignungen zwischen 1945 und 1949 überprüfen*, HANDELSBLATT, June 29, 1990, at 8; *Enteignete sind enttäuscht*, FRANKFURTER ALLGEMEINE ZEITUNG, Sept. 5, 1990, at 2.

37. Declaration, *supra* note 7. The Declaration was negotiated primarily by the *Staatssekretäre* of West and East Germany, Dr. Klaus Kinkel and Dr. Gunther Krause, respectively. *Id.* at 661.

38. *Id.*

39. *Id.*

40. *Id.*

41. With respect to industrial properties, the eastern Germans have a particular interest in preserving jobs in their communities. Western Germans who want business properties returned argue that present business concerns cannot compete in the unified economy and therefore should be given to the entrepreneurs, who can restructure them. While the government must put the eastern economy back on its feet, it also must balance reforms with the soaring unemployment that economic reform may bring. Economic hardship in eastern Germany has increased sharply since reunification, resulting in large demonstrations for more economic assistance to the new German states. *Weiter Unruhe in der Ex-DDR*, DEUTSCHLAND NACHRICHTEN, Mar. 29, 1991, at 1-2.

erty and from the financial hardship threatened by compensatory payments to former owners.⁴² As a result of the agreement, East Germans will have to accept that expropriated properties will be returned to former owners, although some exceptions were negotiated to protect their interests.⁴³

This part of the Note analyzes the provisions of the Declaration and the related portion of the Unification Treaty in greater detail. These provisions resolve many, although not all, of the issues of East German property ownership. Part III of the Note will focus on the unresolved questions.

A. Provisions of the Declaration

1. Properties Expropriated Between 1945 and 1949

The first provision of the Declaration—that none of the lands expropriated by the Soviets between 1945 and 1949 are to be returned⁴⁴—sparked an immediate controversy.⁴⁵ Although the provision excludes claims to Soviet-expropriated lands from those to be redressed,⁴⁶ the Declaration does not render a final decision on the issue. Instead, it provides that the united German parliament will make the final determination on compensating such claims.⁴⁷

42. Although East German support for unification with West Germany was overwhelming, this sentiment was not necessarily an indication of overwhelming support for all aspects of the West German system. The property dispute is one area where the interests of the two populations diverge.

43. While the negotiators considered the interests of East Germans, East Germany's Krause was hardly an equal player in the reunification agreement. The West German treaty proposal was basically the one adopted, and the West German Government clearly dominated the process, both politically and economically. Timothy G. Ash, *Germany Unbound*, N.Y. REV. BOOKS, Nov. 22, 1990, at 11.

44. Declaration, *supra* note 7, para. 1.

45. Two well-known jurists published arguments concerning this provision in the *Frankfurter Allgemeine Zeitung*. See Hans H. von Arnim, *Entzug der Grundrechte aus Opportunität?*, FRANKFURTER ALLGEMEINE ZEITUNG, Sept. 6, 1990, at 8 (attacking provision as violating constitutional rights); Edzard Schmidt-Jortzig, *Sind nicht in Wahrheit bloß Hoffnungen enttäuscht worden?*, FRANKFURTER ALLGEMEINE ZEITUNG, Sept. 22, 1990, at 10 (defending constitutionality of provision and arguing that question is political, not constitutional, issue).

46. The Soviet authorities expropriated over one-third of former East Germany. Because of the size of the takings, resolution of these claims is of great importance. *1945-1949 Nationalization of Property Ruled Constitutional*, THE WEEK IN GERMANY, Apr. 26, 1991, at 4 [hereinafter *1945-1949 Nationalization*].

47. Declaration, *supra* note 7, para. 1. The German Constitutional Court preempted legislative consideration of the Soviet expropriation problem by issuing a decision on April 23, 1991, on the constitutionality of the exclusion of these lands from those to be returned. Judgment of Apr. 23, 1991, BVerfG, 18 Europäische Grundrechte Zeitschrift [EuGRZ] 121 (1991). Fourteen former landowners who lost property during the Soviet occupation sued for the return of their lands. *1945-1949 Nationalization*, *supra* note 46. The court ruled that the claimants to these lands do not have a constitutional right to the return of their properties, but do have the right to compensation for their losses. 18 EuGRZ at 131. The decision effected a compromise: the landowners will be compensated, but the economy will not be shaken by the reallocation of one-third of the territory of eastern Germany. For further discussion of the decision, see *infra* notes 73-94 and accompanying text.

2. *Trustee Holdings Dissolved*

The Declaration provides that all properties currently in state-controlled trusteeships, mostly properties seized after the owners fled East Germany, will be returned to those owners.⁴⁸ The more recently the owners left, the less likely it is that the government has found another use for their land. Therefore, the chances are very high that recently departed owners will repossess their property.

3. *Expropriated Property Returned—With Exceptions*

The West German claimants' key achievement is the provision mandating that property expropriated by the East German Government is to be returned. Yet three significant exceptions dilute the force of this provision.⁴⁹ First, any property that has been altered in the conversion to common use, such as a former single-family home that is now used for community housing or business purposes, cannot be returned to former owners. In these cases, the claimants will receive compensation of an unspecified nature to make up for their losses.⁵⁰

The second exception applies to private, rather than communal, use of property. In cases where East Germans currently live on the property in dispute, the government can offer property of comparable value or compensation rather than return the original property.⁵¹ This is the only reasonable solution to the problem of current occupancy because the East Germans who have settled into the homes of those who abandoned them deserve fair treatment and stability. One twist on this provision is that the current occupants of the property must have obtained the property "by honest means"⁵²—a provision that will be open to a great deal of interpretation by the administrative bodies that adjudicate these claims.⁵³

The final exception provides that any former owner may receive compensation in lieu of her property.⁵⁴ This provision guarantees that former owners who do not wish to regain their property will still be compensated for the loss.

48. Declaration, *supra* note 7, para. 2.

49. *Id.* paras. 3, 4.

50. *Id.* para. 3(a).

51. *Id.* para. 3(b).

52. *Id.* According to one news report, this qualifier was intended in part to throw out all claims to property that was bought up in anticipation of the opening of the Berlin Wall and the real estate boom. *See Gesetz mit vielen Ausnahmen*, DER SPIEGEL, Oct. 8, 1990, at 50. Another possible target of this phrase is property obtained through means popularly considered illegitimate, for example as a reward for spying or other government favors.

53. Declaration, *supra* note 7, para. 3(b). The Declaration specifically states that the particulars of this exception have yet to be settled. *Id.*

54. *Id.* para. 3(c).

4. *Return of Expropriated Businesses*

Former owners of businesses that were nationalized are entitled to the return of their assets or to a portion of the business or its stock, depending on the size of their former ownership share.⁵⁵ They may also elect to receive compensation instead of their properties.⁵⁶ The procedures for applying these provisions, including the arrangements for the sale and privatization of businesses, have yet to be determined.

5. *Corruption or Abuse of Power Annuls Property Rights*

Under this provision, which is similar to the one permitting East German citizens to retain their properties only if they acquired them honestly, claimants from the West are not entitled to property rights if those rights were acquired through dishonest means, such as misuse of power, corruption, coercion, or deception.⁵⁷ This provision both prevents legitimation of property rights wrongly acquired and protects East German citizens who have been cheated, particularly by corrupt government officials.

6. *Administrative Provisions*

The agreement includes several administrative provisions to facilitate the processing of claims and to ensure fairness. The Declaration requires that the GDR set a deadline for filing claims.⁵⁸ It also mandates the creation of a special fund for compensation payments that is separate from the regular government budget.⁵⁹ Finally, the Declaration provides that any properties for which ownership rights are in dispute may not be sold until the question of ownership is resolved.⁶⁰

B. *Provisions Added to Declaration By Unification Treaty*

Article 41 of the Unification Treaty incorporates all of the provisions of the Declaration. As part of the treaty, the provisions have more legal authority than they had as part of a joint declaration.⁶¹ In an effort to ensure that the

55. *Id.* paras. 6, 7.

56. *Id.*

57. *Id.* para. 8.

58. *Id.* para. 13(b). This deadline was originally set for January 31, 1991, but in order to encourage investment as rapidly as possible, the East German Government moved it to October 13, 1990. Thomas Thierau & Albrecht Tintelnot, *Unklarheiten und Verwirrende Regelungen bei Rückgewähr enteigneten Vermögens*, *HANDELSBLATT*, Aug. 20, 1990, at 12.

59. Declaration, *supra* note 7, para. 13(c).

60. *Id.* para. 13(d). This provision ensures that the processing of claims will not be further complicated by transactions that occur while ownership rights are being settled.

61. *Eigenum, Finanzen, Privatisierung*, *DIE ZEIT*, Sept. 5, 1990, at B1.

settlement of property questions will not interfere with urgently needed investment in the East German economy, Article 41 adds an important qualification to the agreement by creating an exception to the basic policy favoring the return of property.

The exception in Article 41 provides that real estate or buildings will not be returned if they are required for urgent investment purposes, particularly for the establishment of an industrial enterprise that creates or safeguards jobs.⁶² This provision has generated a great deal of controversy because it potentially jeopardizes all property claims. One commentator has called the provision a "license for dubious profiteers,"⁶³ asserting that any investor could feign an intention to create jobs with a new business while actually intending nothing more than a profitable real estate deal. Others have criticized the provision for pulling the rug out from under legitimate claimants.⁶⁴ In order to safeguard against such behavior, a magistrate must hear the objections of property claimants before approving any investment proposal made under this clause. A hearing does not eliminate uncertainty, however, as it is difficult to predict how lenient the magistrates will be with potential investment claims. The investment provision exemplifies the sharp conflict between two of the basic goals in settling the property questions: the need to foster rapid investment and the need to preserve individual rights.

C. *Subsequent Legislation*

Article 41 specifies that the investment exception will be delineated in subsequent legislation. The resultant law has recently been ratified, and it extends the investment exception even further.⁶⁵ The new law restricts the policy favoring the return of properties over compensation. Under the new provisions, compensation will be preferred if the use of the property in question will secure or create jobs, provide housing, or serve to build up the economic infrastructure of the region.⁶⁶

The passage of this legislation has rekindled the debate that surrounded the investment exception to Article 41. On the one hand, the escalating crisis in eastern Germany, which indicates a dire need for swift economic improvement in the region, has bolstered the arguments for laws encouraging investment.⁶⁷

62. Unification Treaty, *supra* note 6, art. 41, para. 2.

63. *Gesetz mit vielen Ausnahmen*, *supra* note 52, at 71.

64. Telephone interview with Hans Bertram-Nothnagel, lawyer representing West German client whose claim is currently jeopardized by potential investor (Nov. 18, 1990).

65. *Beigelegt*, *DIE ZEIT*, Mar. 22, 1991, at 1; *Bundestag erleichtert Privatisierung im Osten*, *DEUTSCHLAND NACHRICHTEN*, Mar. 22, 1991, at 5.

66. *New Law on Ownership to Spur Investments in Ex-GDR*, *THE WEEK IN GERMANY*, Mar. 29, 1991, at 4.

67. There have been large protests in eastern German industrial areas, *see supra* note 41, and violence over the government's economic policies has increased, as reflected by the recent assassination of Detlev Rohwedder, head of the *Treuhandanstalt*. The Red Army Faction, a left wing terrorist organization, took

The situation has become so severe that the Minister of Economics, Jürgen Möllemann, has waged a public campaign against the property agreements, arguing that the threat of economic collapse in eastern Germany is of greater public importance than the return of property.⁶⁸ On the other hand, the Minister of Justice, Dr. Klaus Kinkel, has emphasized the need for justice for former owners.⁶⁹ Ultimately, the German Parliament compromised between the positions of the two ministers by augmenting Article 41. Additional investment-spurring exceptions to the return policy have been legislated, but the government continues to adhere to the basic policy of favoring return over compensation.⁷⁰

III. RESOLVING OPEN PROPERTY QUESTIONS

Despite the agreements described in Part II, several property issues remain unresolved. Commentators, jurists, and others involved in public debate over the Unification Treaty have challenged the constitutionality of several aspects of the agreement. They have particularly objected to the exclusion of properties expropriated between 1945 and 1949⁷¹ and to the early deadline of October 13, 1990, that was set for the filing of claims.⁷² The decision of the *Bundesverfassungsgericht*⁷³ resolved some of these issues, but failed to address all of the constitutional arguments. The first section of this part argues that these constitutional challenges are legally unfounded and that policy justifications support most of the challenged provisions.

In addition to claims concerning the legitimacy of the Declaration, unresolved questions concerning the implementation of the compensation system still remain. It is unclear how a claim will be compensated if it is valid, but the property cannot be returned. Given the numerous exceptions to the policy favoring return of property, many claims will fall into this category. The second section of this part presents policy justifications and recommendations for the German Government in setting forth guidelines for the adjudication of these claims.

responsibility for the killing. Stephen Kinzer, *Red Army Faction is Suspected in German Killing*, N.Y. TIMES, Apr. 3, 1991, at A5.

68. *Drohung mit dem Rücktritt*, DIE ZEIT, Mar. 15, 1991, at 9.

69. *Id.*

70. *Id.* at 10.

71. See, e.g., von Arnim, *supra* note 45.

72. Some claimants may have missed this deadline, particularly foreigners who were not following the progress of the agreements. Telephone interview with Immo Stutzbach, West German lawyer (Nov. 16, 1990).

73. Judgment of Apr. 23, 1991, BVerfG 18 EuGrZ 121 (1991) (F.R.G.). See discussion *supra* note 47 and accompanying text.

A. *Challenges to Property Agreements*

Constitutional challenges to the property agreements are principally based on two articles of the *Grundgesetz*: Article 3 (“Equality”)⁷⁴ and Article 14 (“Guarantee of Property Rights”).⁷⁵

1. *Equality*

Article 3(1) provides that all persons shall be equal before the law.⁷⁶ Those claimants whose properties were expropriated between 1945 and 1949 have argued that their exclusion from the provisions of the Declaration is a denial of equality under Article 3(1). The *Bundesverfassungsgericht* heard this argument and decided that although the denial of return of the properties expropriated before 1949 is lawful, failure to compensate these claimants would constitute a denial of equality.⁷⁷

The *Bundesverfassungsgericht* based its decision largely on the political framework surrounding the challenged provision of the Unification Treaty. The court fully recognized the constraints hampering the West German Government during the negotiation of the Unification Treaty.⁷⁸ The court explained that the Unification Treaty was the product of the so-called “2+4” negotiations,⁷⁹ which essentially took place between the two Germanies but were contingent upon the consent of the four occupying powers. During these negotiations, the East German and Soviet Governments refused to permit the return of properties expropriated during the Soviet occupation. Because they presented this condition as nonnegotiable, the West German Government had to accede to their wishes to achieve unification.

The court deferred to the compromise because negotiating the agreement furthered the constitutionally mandated goal of restoring German unity, which was dictated in the preamble of the *Grundgesetz*.⁸⁰ Because the West German Government was constitutionally bound to pursue unification, allowing the Soviet expropriations to stand as lawful was judged to be a necessary sacrifice.⁸¹

Although the West German Government was unable to provide for the return of the Soviet-expropriated properties, it was not precluded from compensating the claims to those properties. The nonnegotiable condition of assent to

74. GG art. 3.

75. GG art. 14.

76. GG art. 3(1).

77. 18 EuGRZ at 131.

78. *Id.* at 126, 131.

79. *Id.* at 131.

80. The preamble called upon the entire German people to pursue the unification of Germany. GG pmb. (repealed Sept. 23, 1990).

81. 18 EuGrZ at 128.

unification was that these properties remain undisturbed, not that they remain uncompensated.⁸² Consequently, the court held that the guarantee of equality required that claimants to properties expropriated before 1949 and claimants to properties expropriated after 1949 be treated alike whenever possible.⁸³

2. *Guarantee of Property Rights*

According to Article 14 of the *Grundgesetz*, the German Government is obligated to protect and guarantee property rights.⁸⁴ Expropriations are permitted only when they serve the general public and when the owner is compensated.⁸⁵ In addition, they are subject to court appeal.⁸⁶ The expropriations carried out by the East German Government violated this article. The constitutional question is whether Article 14 should apply to the events in East Germany.

Several pressing legal arguments demonstrate that Article 14 should not apply to the East German expropriations. First, according to Article 23, the *Grundgesetz* only applies to West German territories. This Article explicitly states that the *Grundgesetz* would apply to other German territories only after their accession.⁸⁷ Second, the *Grundgesetz* did not become valid until May 24, 1949.⁸⁸ This fact provides clear support for the decision not to compensate expropriations by the Soviets, which occurred before the adoption of the *Grundgesetz*.⁸⁹ Those who argue that the constitutional rights of victims of pre-1949 expropriations are not being granted are correct in asserting that these expropriations would have violated the West German Constitution had it applied, but they err in arguing for the application of the *Grundgesetz* in this context.

The decision of the *Bundesverfassungsgericht* offers a different interpretation of the application of Article 14.⁹⁰ The court decided that although the property agreements may have violated Article 14's guarantee of property rights, other constitutional imperatives took precedence over Article 14.⁹¹ The constitutional mandate to pursue restoration of German unity required the government to deny the return of Soviet-expropriated properties.⁹² The court also held that because the government lawfully incorporated the property agreements into Article 143 of the *Grundgesetz*, any resulting conflicts with Article 14 were lawful.⁹³

82. *Id.* at 131.

83. *Id.*

84. GG art. 14(1).

85. GG art. 14(3).

86. *Id.*

87. GG art. 23 (repealed Sept. 23, 1990).

88. See GG art. 145; see also HANS D. JARASS & BODO PIEROTH, *GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND* 752 (1989) (annotated West German Constitution).

89. See Schmidt-Jortzig, *supra* note 45.

90. 18 EuGrZ 121, 121 (1991).

91. *Id.* at 128.

92. See discussion *supra* note 80 and accompanying text.

93. 18 EuGrZ at 128, 129.

The decision of the *Bundesverfassungsgericht* demonstrates that constitutional challenges to the property agreements will not succeed beyond establishing a right to compensation in some form. The court recognized the financial constraints unification has imposed upon the government and therefore left the German legislature much latitude to determine what that compensation should be.⁹⁴ Those claimants who remain unsatisfied with the existing agreements have heard from the court; now they must focus their attention on lobbying the legislature for a high standard of compensation.

3. *Fairness of Property Agreements*

The decision of the *Bundesverfassungsgericht* held that it is unconstitutional for the government to differentiate among various categories of claims when deciding whether to award compensation, yet upheld the return of only one group of claims. Apart from the constitutionality of this structure, a question remains as to whether the measures reached in the agreements best promote a fair and sensible settlement of the property issue.

Because only a quick settlement of property disputes can ensure investors of the stability of property ownership, the government must impose filing requirements so that claims will be processed rapidly. Investors are still hesitant about buying East German businesses and land due to the seeming fragility of any current title. Thus, the prompt filing requirement is necessary to determine which properties are disputed and which are not. For similar reasons, the impetus still exists to adjudicate the filed claims as quickly as possible: this is the main reason for swiftly promulgating guidelines on awarding compensation or returning property.

These efficiency arguments are not, however, persuasive enough to justify the exclusion of the pre-1949 expropriations from those to be redressed. First, distinguishing between the East German and Soviet authorities who carried out the expropriations is not a valid criterion for the government to use in determining which claims to honor.⁹⁵ It may seem reasonable for the consolidated German Government to respond to unlawful actions of the East German Government but not to the actions of the Soviet occupation forces on the grounds that a closer link exists between East Germany and the new German Government than exists between unified Germany and the Soviet occupiers. However, the Soviet expropriations violated the law of military occupation and thus impose an international obligation—of moral, not legal, persuasion—to seek justice for the injured parties. This obligation is just as serious as the obligation to make reparations for the East German expropriations. The decision of the *Bundesverfassungsgericht* brokered an effective compromise between fairness

94. *Id.* at 130.

95. See discussion *supra* text accompanying notes 82-83.

and efficiency considerations in mandating compensation, but not return, for the properties taken during the Soviet occupation.

A practical argument against including the pre-1949 expropriations is that the records of these takings have been destroyed.⁹⁶ In contrast, the East German expropriations are supposedly documented in the records of the land registry. The lack of available records would make adjudicating claims from 1945 to 1949 considerably more difficult than those of later years and would tax the efficiency and timeliness of property reassignment. This argument applies, however, to more of the claims being considered than just the Soviet expropriations. Many entries in the East German records have been falsified, and pages have been torn from the books.⁹⁷ The claims resolution process will be difficult both for claims originating under the East German Government and for those arising under the Soviet occupiers. Yet inadequate records should not justify the exclusion of an entire set of expropriations from reparations. In determining how to compensate these losses, the legislature should anticipate recordkeeping problems and simplify the compensation guidelines in order to minimize the papers necessary for making a claim.

B. *Guidelines for Local Authorities in Adjudicating Claims*

This section delineates the criteria that should be used by local decision-making authorities as they process the claims of former owners. So far, over one million claims have been filed at local and municipal offices.⁹⁸ The duties of local administrative authorities, who had very little responsibility under the East German system, are suddenly increasing exponentially. It will take a long time and a great deal of guidance to overcome the bureaucratic obstacles left by the former East German Government.

The difficulties in using the decentralized East German bureaucracy suggest that it would have been wiser to create a new administrative body to hear these claims. The advantages of such a system would be managerial simplicity and uniformity of adjudicative processes and decisions. This approach was probably not taken because preexisting local authorities are familiar with the properties at issue and thus are more qualified to weigh the benefits of maintaining the property's current use against those of returning it to the former owners.

It is also possible that keeping the decisionmaking authority local was a negotiated tradeoff. The interests of the two populations are quite different on this issue, so decisionmakers from the two populations would likewise prefer different resolutions. The East German negotiator may have agreed to return legitimately claimed property on the condition that the decisions be made by

96. Kilian, *supra* note 14.

97. *Die Rückgabe ostdeutscher Vermögen stößt auf Schwierigkeiten*, FRANKFURTER ALLGEMEINE ZEITUNG, Dec. 20, 1990, at 19.

98. See Schmidt, *supra* note 3.

local authorities on a case-by-case basis. This system retains some power for the East Germans and includes them in deciding the future of the land they currently occupy. It also addresses the interests of public stability and satisfaction with the property agreements. Tension in the former East German territories would increase if there were no local control over property settlements. Such tension would be harmful not only to current residents, but also to an owner who returned to her former property to confront a hostile neighborhood. Allowing local bodies to make decisions concerning property claims in their districts alleviates this tension.

Nevertheless, the disadvantage of decentralized decisionmaking and the need for maximum stability and predictability suggest that the legislature should provide as much guidance as possible to the local officials. The next two sections will set forth some of the criteria that the legislature should adopt.

1. *Remedy: Return or Compensation?*

The first decision to be made about any legitimate⁹⁹ claim is whether to return the property to the claimant or to maintain its current use and monetarily compensate the claimant. This decision depends entirely on the current use of the property. The decisionmakers should examine the value and legitimacy of the property's current use. A range of typical scenarios will demonstrate the application of these criteria.

There will be many claims by former residents for the return of homes in which former East Germans currently live. Such residential use should be presumed legitimate: these homes should almost never be returned to former owners. Former East German citizens, who never enjoyed protection of property rights from their government, should not have their homes taken by their new democratic government. Because of the fundamental importance of the home, residential use is clearly legitimate and of the highest value.¹⁰⁰ These criteria

99. All claims should be compared with administrative records to ensure that fraudulent claims are not honored. Because these records are kept locally, decisions should be made by the local administrative offices. Fraudulent records present another problem; the extent of tampering in the East German records can be fully assessed only as claims are processed. In delegating so much authority to the local agencies, however, the government must monitor the process to avoid corruption in the processing of claims. Local agencies should be required to document and state reasons for their decisions so that the process can be overseen by disinterested parties.

100. There may be some exceptions to this rule, such as where former government officials or other persons rewarded under the Communist system (such as world-class athletes) have obtained large houses or estates because of their positions. The legitimacy of such use is doubtful, since the property was often obtained through means that the general public considers corrupt. One example of this scenario is the *Wandlitz* settlement, where former East German leaders, such as Erich Honecker, lived. See Adam Pertman, *A German Paradise of Quotable People*, BOSTON GLOBE, Dec. 25, 1989, at 44. The authorities concealed this settlement from the public; the roads leading into the area did not even appear on published maps.

The illegitimacy of this sort of property use can hardly be disputed. There was tremendous outcry when the public learned how well Honecker and his colleagues lived. Admittedly, these officials lived moderately by Western standards, but their lifestyles were lavish in comparison to the rest of the East German population. These individuals deserve due process, but they do not deserve to keep property unjustly

will at times be difficult for decisionmakers to apply, but flexible criteria are important to ensure fairness in each particular situation.

Local administrators will also have to make decisions about property currently in public use. Whether to return the property or compensate the owner depends once again on the value of the use. Property that is heavily and broadly used, such as public roads, beaches, libraries, and local administrative buildings, should remain in current use and claimants should be compensated. However, there may be reasons not to maintain other public uses, such as government agencies that are no longer accepted by the public.¹⁰¹ This property could be either returned to former owners or converted to another public use. Again, the determination should focus on the value of the particular institution to the public and the legitimacy of the current use of the property.

Transferring businesses formerly owned by "the people" to private ownership is a particularly difficult problem. In assigning business ownership, the decisionmakers should consider the value of the business to the East German public. If the business is economically productive and provides jobs for the community, it is worth preserving.¹⁰² In some cases, maintaining the business might be consistent with the interests of property claimants, because the former owners want to keep running the business for their own profit. In other cases, former owners want to convert business property currently contributing to the economy to their own private use, which would reduce the value of the property to the community. A claimant's ownership rights should be honored only if her proposed use of the property is compatible with current use. The claimant could become a partial or total owner of the business, depending on her claim. If she has no interest in participating in the business enterprise, she should receive compensation instead of an ownership share. This solution honors the owners' property rights and maintains the economic stability of the community, preventing businesses that contribute to the economic life of the community from disappearing into private hands.

In addition to requiring that administrators consider the value and legitimacy of property use, any legislation regulating the adjudication of claims should also seek to return property whenever possible. Except for claims to properties used residentially or having very strong public or economic benefits for the community, the policy should be to return property to owners. This must be the rule rather than the exception; otherwise the local authorities, who may

obtained. One possible solution is to subdivide such properties, allowing current residents to remain on part of the property and using the rest for other residences or public lands.

101. The *Staatssicherheitsdienst* (the state security, colloquially known as the *Stasi*) held property, but the public now views this agency as corrupt. In a demonstration against the *Stasi* in January 1990, thousands protested in front of its headquarters. Thomas Kleine-Brockhoff, *Ohne Haß in Abgründe blicken*, DIE ZEIT, June 22, 1990, at 2. This agency has no public value and is not worth protecting against property claims. In fact, some agencies have already vacated their buildings. Robert Leicht & Christian Wernicke, *Das ist der Sinn unserer Sisyphusarbeit*, DIE ZEIT, July 27, 1990, at 4.

102. The *Treuhandanstalt*, or trustee agency, is charged with the responsibility of disposing of such industries, by deciding whether to close them down or sell them to private owners.

consider foreign claimants to be intruders, will be less likely to decide claims in their favor. The emphasis on return of property will be fairer to former owners. Ideally, these criteria will help make the decisions as uniform as possible throughout the country.

2. *Standard of Compensation in Cases of Expropriation*

I advocate a standard of compensation found in customary international law. This standard is used primarily in cases of government expropriation or nationalization of property belonging to citizens of another country.¹⁰³ It also applies to cases in which the government is not the expropriating party, but fails adequately to protect property from a taking. The present situation in Germany does not fit this mold because the government from which compensation is sought is not the same government that expropriated the property. While this standard is not binding in the present German situation, it was developed for reasons which make its application appropriate.

The principles of international law are helpful because the interests of German claimants are close enough to those of plaintiffs in international expropriation cases to warrant similar compensation standards. International law protects citizens of one state from the unjust acts of another state. The goal in resolving German property claims is to rectify the past injustices of the East German Government. Now that the new German Government has the capacity to compensate those who lost properties, fairness dictates that it do so. International law standards of compensation, which are based on doing justice while preserving stability, are well-suited to this situation.

There is some disagreement concerning the current international law standard of compensation for expropriation. While some commentators argue that the standard requires full compensation for expropriated property,¹⁰⁴ others view the standard as more flexible, requiring merely "appropriate," and in some cases only partial, compensation.¹⁰⁵

103. See M.H. Mendelson, *Agora: What Price Expropriation? Compensation for Expropriation: The Case Law*, 79 AM. J. INT'L L. 414 (1985) (discussing standard of compensation for expropriation of alien property).

104. See Charles N. Brower, *Current Developments in the Law of Expropriation and Compensation: A Preliminary Survey of Awards of the Iran-United States Claims Tribunal*, 21 INT'L LAW. 639, 658-664 (1987); Davis R. Robinson, Note and Comment, *Expropriation in the Restatement (Revised)*, 78 AM. J. INT'L L. 176 (1984); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712 (1)(c) (1990).

105. See Oscar Schachter, Comment, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121 (1984). The case law does not definitively support either standard. Some decisions clearly adhere to the standard of full compensation. See *SEDCO, Inc. v. National Iranian Oil Co.*, 10 Iran-U.S. Cl. Trib. Rep. 180 (1986); *Norwegian Shipowners' Claims (Nor. v. U.S.)*, 1 R.I.A.A. 307, 339-40 (Perm. Ct. Arb. 1922). Other decisions have stated that partial compensation is appropriate under international law. *INA Corp. v. Islamic Republic of Iran*, 8 Iran-U.S. Cl. Trib. Rep. 373 (1985) (traditional standard of full compensation has eroded). Still other decisions are interpreted differently by different commentators to support either standard. Schachter, *supra* (arguing for appropriateness standard), and Mendelson, *supra* note 103 (arguing for full compensation standard), interpret the Case Concerning Factory at Chorzow (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13), to support their opposite conclusions.

An alternative that bridges the gap between these two views is the hybrid approach employed in *Kuwait v. American Independent Oil Co. (Aminoil)*.¹⁰⁶ The *Aminoil* tribunal argued that "the determination of the amount of an award of 'appropriate' compensation is better carried out by means of an enquiry into all the circumstances relevant to the particular concrete case than through abstract theoretical discussion."¹⁰⁷ The *Aminoil* tribunal found that the legitimate expectations of the investor (*Aminoil*) and the need to preserve incentives for foreign investment justified full compensation of the value of the company as a going concern, rather than the less generous book value.¹⁰⁸ According to the logic of the *Aminoil* award, full compensation is appropriate when circumstances and legitimate expectations support such a standard.

Following the guidelines set by the *Aminoil* award, it is not necessary for purposes of compensation in the German situation to choose between the two competing standards of compensation. The appropriate level of compensation for claims on East German property is full compensation because of the nature of the relief offered to former property owners. Only through such a compensation scheme can claimants whose properties cannot be returned be placed on equal footing with those who regain ownership of their properties. Claimants whose properties are returned can sell the property and receive full compensation in the form of current fair market value. It would therefore be unfair to pay those claimants whose property cannot be returned anything less than the fair market value of their lost property. The forms of relief should be as equal as circumstances permit.

Ideally, the government should award all claimants full compensation. However, because the German Government does not have unlimited resources to devote to compensation, it may have to sacrifice the value of full compensation for equitable concerns and compensate all legitimate claims at less than fair market value.¹⁰⁹ The limitations of the compensation fund might also be addressed by awarding compensation in bonds that will take a number of years to mature. In this way, the government would be able to award less than full value for all claims and avoid a sudden financial drain from paying all claims at once. More importantly, this approach avoids perpetuating past injustices by compensating all claimants without exclusions.

In order to equalize the relief offered to those claimants receiving return of their property and the relief offered to those receiving compensation, the

The case law weighs more heavily on the full compensation side of the scale, but some scholars insist that there is not enough agreement in international case law decisions to support the requirement of full compensation in every case. Schachter, *supra*, at 122.

106. 21 I.L.M. 976 (1982).

107. *Id.* at 1033. Note that the *Aminoil* tribunal's use of the term "appropriate" compensation means compensation that is called for by the relevant circumstances. This meaning differs from the use of "appropriate" as a code word for partial compensation. See *supra* note 105 and accompanying text.

108. 21 I.L.M. at 1033-34, 1041.

109. Marie-Luise Hauch-Fleck, *Endspurt der Eigentümer*, DIE ZEIT, Oct. 26, 1990, at 7.

ideal measure of compensation would be current fair market value. Current fair market value would reflect the present economic worth of the property, which is what the claimants would have now if their property had never been taken. Assessing fair market value, however, presents a considerable problem particularly with the German economy in its present state of flux.¹¹⁰ It will be very difficult for local authorities adjudicating claims to determine compensation with the market so unstable.

This difficulty can best be overcome by the local authorities who have the power to adjudicate claims. These authorities are most attuned to the local markets, because they are responsible for keeping records on property values. Their assessments are most likely to take current market fluctuations into account. No authority could easily determine the market value of German property at present, but these administrators are best equipped to make such findings. As long as the government provides fairly specific guidelines¹¹¹ for them to follow in determining the economic value of property, these local authorities will be able to facilitate the process.

If property cannot be returned according to these criteria, compensation of claims is the best solution. When claimants receive compensation, they receive the recognition of their rights that they deserve. Compensation of claims also resolves the legal dilemmas of a claimant's entitlement to ownership, so that the community in which the property is located can be certain that the property will not be taken away in a legal proceeding. Resolving claims in this manner, as expeditiously as possible, is the only way to ensure stability in an economically fragile eastern Germany while also doing justice to former East German citizens whose properties were unfairly taken.

CONCLUSION

The policy recommendations of this Note are intended to describe how the new German Government can best pursue the goals of justice, public stability, and smooth unification. These goals are tremendously important for the development of a healthy unified Germany. Balancing the rights of individuals with the interests of the community as a whole is always difficult, but when two systems with as radically different notions of this balance as those of East and West Germany merge, thorny legal underbrush is inevitable. Despite the difficulties, the government must develop a fair and efficient system of resolving rival claims. Certainty is fundamental to political development, particularly for a country with a capitalist private property system. Newly unified Germany has the basic requirements of such a system already in place. Quick and fair

110. For example, a claimant with property near the Berlin Wall might own a piece of property that is currently in the middle of an abandoned area, but will probably be in the heart of the city in 10 or more years.

111. Providing such detailed economic data is beyond the scope of this Note.

resolution of disputed property claims will be an essential ingredient in bonding the country together and securing the benefits of justice and public order for all its citizens.

