Agency for the Settlement of Open Property Issues
Pankow-Weißensee (AROV V)

BERLIN

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Reference number (please always cite!)
AVD

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Date

April 19, 1994

Re.: Claim under property law concerning the real property
<Name of the property>
Your ref.: <Reference>

Dear Madam Attorney:

We want to stress at the outset that we welcome your discussion with [German] Federal Minister of Justice Leutheusser-Schnarrenberger very much because there are uncertainties and a lack of clarity in construing Section 1(8b) VermG [*Vermögensgesetz*; German Act on the Settlement of Open Property Issues].

Regarding your letter of April 13, 1994, we state as follows:

The legal position taken by AROV Section F in Berlin, which previously had jurisdiction over this matter and had issued a notice denying your client's claim of restitution, reasoning that Section 1(8b) VermG also applied to losses of property on account of racism because your client, Ms. <Name>, was mentioned in the exchange of notes on the treaty between the former German Democratic Republic [GDR] and the Republic of Austria, is not shared by AROV V Section D – Foreign Assets – which now has jurisdiction over this matter.

In our view, applicability of the Vermögensgesetz according to Section 1(8b) VermG is not precluded even though your client, Ms. <Name>, and 5 other persons had been identified by name in the exchange of notes concerning the aforementioned treaty.
These cases involve loss of property on account of racism with respect to real estate assets in the period from January 30, 1933, to May 8, 1945, which occurred due to the entry "forfeiture request to the benefit of the German Reich."

Therefore, the factual elements required by Section 1(6) VermG regarding applicability both in terms of the person and the subject matter are present, which gives rise to a claim of restitution under the Vermögensgesetz and cannot be excluded again by Section 1(8b) VermG.
This construction of Section 1(8b) VermG is based in particular on the legislative intent of assigning very special importance in the Vermögensgesetz to the redressing of losses of property under the Nazi tyranny, in that the legislature has created a second restitutional level for these property losses, which are to be determined according to the principle of priority (Section 3(2) VermG).
With respect to redressing Nazi injustice, the legislature consciously refrained from applying the provisions of the restitutional laws of the allied forces to the new German federal states and instead took the approach of treating the victims of the Nazis and the GDR on an equal basis on principle.
This principle of equal treatment intended by the legislature would be violated if those victims of racial persecution who, due to special circumstances, received compensation from the GDR under the interstate agreement for previously suffered Nazi injustices – and not merely for GDR injustices – were to be adjudicated differently from those victims of persecution who were compensated on the basis of the restitutional laws of the allied forces.
In this Agency's view, it would constitute an inexplicable evaluative inconsistency if a loss of property related to persecution as defined in Section 1(6) VermG that was compensated based on the interstate agreement results in the exclusion of the applicability of the Vermögensgesetz under Section 1(8b) VermG.

Unfortunately, in the Second Act Amending the Property Laws [*Vermögensrechtänderungsgesetz*; "VermRÄndG"], the legislature neglected to include the addition that "paragraphs 6 and 7 remain unaffected" also in Section 1(8b) VermG, as had already been done in Section 1(8a) VermG.
The absence of this addition in Section 1(8b) VermG is construed as follows:

It was clear to the legislature that the addition of "paragraphs 6 and 7 remain unaffected" as in Section 1(8a) VermG would not be incorporated for the reason that Section 1(6) VermG must be taken into account in any event irrespective of any other regulations under the treaties, given its ranking as evident from the legislative context.
Or, in the case of the provisions of Section 1(8b) VermG, the legislature neglected to consider the combination of circumstances where the original loss of property on account of racism [sic; "was covered"?][1] by the treaties, and specifically by the exchange of notes on the Austria treaty, as well, and it therefore did not incorporate the priority of Section 1(6) VermG in the legislative text; this would then have been an editorial oversight.

In any event, the viewpoint put forward by Barkam (*Vermögen in der ehemaligen DDR* [Assets in the former GDR], Section 1 VermG, marginal no. 68) that, because of the general wording of Section 1(8), the Vermögensgesetz would not apply to all groups of cases referred to in paragraphs 1 through 7, will not be followed here.

This is because the addition of the half-sentence in Section 1(8a) VermG that "paragraphs 6 and 7 remain unaffected" shows that the legislature wanted to allow exceptions and not generally define exclusionary factual elements.
The reference made in Section 1(8a) VermG to Section 1(6) VermG, too, speaks in favor of the unrestricted special status of the victims of Nazi rule and thus of taking Section 1(6) VermG into account even if provisions have been made for these property claims in interstate treaties that would result in the exclusion of the Vermögensgesetz according to Section 1(8) VermG.

[1] The German source text appears to be missing something here.—*Translator*.

Supplementing Section 1(8b) VermG by way of statutory construction such that Section 1(8b) VermG is to be read with the addition of "paragraphs 6 and 7 remain unaffected" is not readily possible at present because the existing materials permit no unequivocal interpretation of the rules in the aforementioned sense and also because no decisions at the highest judicial level have been handed down yet on this legal issue.
Legislative clarification of Section 1(8b) VermG would therefore be desirable for reasons of legal certainty and would have to be as follows:

The following half-sentence shall be inserted in Section 1(8b) VermG:

"paragraphs 6 and 7 remain unaffected."

Should there be a statutory amendment to Section 1(8b) VermG by incorporating the aforementioned addition, it would also make sense to adopt provisions to the effect that this beneficial rule applies both to proceedings that have already been concluded with legal finality as well as to proceedings that are still pending.

Limiting this statutory amendment to such treaties that had not already been implemented from October 3, 1990, onward (The third and final installment was paid by the Federal Republic of Germany as the legal successor of the GDR only in connection with the treaty that the GDR had entered into with the Republic of Austria.) is not necessary in our view. According to the current state of knowledge, it is most likely that no other persons besides the 6 persons identified by name in the exchange of notes on the treaty between the Republic of Austria and the GDR are affected by the aforementioned set of problems.

It is possible that this statutory amendment may be dispensable, and the goal of uniform redress could be achieved with much less complication and much faster, if the Ministry of Justice were to provide us with materials (e.g., minutes of committee meetings) from which further indications could be ascertained regarding the construction of Section 1(8b) VermG and to which reference could be made in support of this legal position.
Equally helpful would be a statement by the Ministry of Justice that clearly expresses the legislative intent of this rule.

As we intend to have this legal issue clarified by the General Policy Department of the State Agency for the Settlement of Open Property Issues, we would greatly appreciate it if you could inform us of the outcome of your scheduled meeting.

We wish you a pleasant and productive discussion with Minister Leutheusser-Schnarrenberger and remain

Sincerely yours,

[Signature]
<Name>