

# Confronting the Nazi Past at the End of the 20th Century: The Austrian Model<sup>†</sup>

By  
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During the past two years, the United States Government facilitated discussions among foreign governments, multinational companies and representatives of Holocaust survivors and their heirs to establish humanitarian foundations that would make payments to certain of those who suffered at the hands of the Nazi regime and private companies during the Nazi era. Agreements have been reached with Germany, France, and Austria. While much attention was paid to the eighteen-month effort to establish the German Foundation “Remembrance, Responsibility, and the Future,” relatively little was given to the negotiations that led to the agreements with Austria.

These agreements will lead to the distribution of more than \$800 million to Nazi era victims and their heirs through the establishment of two different funds: the “General Settlement Fund” and the Austrian Fund: “Reconciliation, Peace and Cooperation.”<sup>1</sup> The latter will provide some \$400 million to Nazi era forced and slave laborers who worked on the territory of present day Austria, while the General Settlement Fund will provide approximately \$360 million to those who suffered losses or damages to property and, in appropriate circumstances, *in rem* restitution of publicly-owned property that was confiscated or “aryanized.”<sup>2</sup> The General Settlement Fund also calls for the amendment of Austrian social

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1. Exchange of Notes Constituting an Agreement between the Government of the United States of America and the Austrian Federal Government, Jan. 23, 2001, Annex A, paras. 1, 2, *available at* [http://www.usembassy-vienna.at/annex\\_a.html](http://www.usembassy-vienna.at/annex_a.html) [hereinafter Exchange of Notes]; Agreement between the Government of the United States of America and the Austrian Federal Government concerning the Austrian Fund “Reconciliation, Peace and Cooperation,” Oct. 24, 2000, *available at* [http://www.usembassy-vienna.at/rest\\_usfinal.html](http://www.usembassy-vienna.at/rest_usfinal.html) [hereinafter Agreement]; Joint Statement on the Occasion of the Signing Ceremony of the Bilateral Agreements Relating to the Austrian Reconciliation Fund, Oct. 24, 2000, para. 4(d), *available at* [http://www.usembassy-vienna.at/rest\\_joint\\_statement.html](http://www.usembassy-vienna.at/rest_joint_statement.html) [hereinafter Labor Joint Statement].

2. Exchange of Notes, *supra* note 1, paras. 1, 2.

benefits laws in order to provide an additional \$112 million in benefits to Holocaust survivors.<sup>3</sup>

With the negotiations now concluded, scholars and commentators will likely focus on the results, that is, the agreements and the benefits that will be made available to Holocaust victims and their heirs. Perhaps the most interesting aspect of this whole process, however, were the negotiations themselves. Conducted during the height of the Haider-phenomenon in Austria, both the current political situation in Austria and Austria's piecemeal post-war efforts to deal with its Nazi past shaped the structure and content of the negotiations. In addition, because Austria never achieved Germany's status as a state that atoned for its Nazi past, it was hoping to use successful resolution of these Nazi era issues as a means toward gaining a certain legitimacy on the international stage.

It is in this context that I will discuss some of the contentious issues that arose during the negotiations and the ways they were resolved, to the extent that they ever were.

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In February 2000, Austrian Chancellor Wolfgang Schuessel announced his intention to establish an Austrian fund to make payments to some 150,000 surviving victims of the Nazi era. Over 80% of these survivors, now residing in Central and Eastern Europe, had performed forced or slave labor on present-day Austrian territory during the war.<sup>4</sup> While Austria had already enacted a number of laws to provide restitution to victims of the Holocaust, this group of victims, as in Germany, had never received any compensation for their labor.<sup>5</sup>

A number of factors influenced Austria's decision to move promptly to establish this fund. First, the Austrian Historical Commission had recently published an interim report on forced and slave labor. This report highlighted the failure of the Austrian government and businesses to accept responsibility for and provide compensation to former Nazi era slave laborers.<sup>6</sup> Second, through the then ongoing negotiations of the German Foundation, which would provide dignified payments to, among others, those who worked as forced or slave laborers during the Nazi era, Germany and German companies were acknowledging moral responsibility for these horrors.<sup>7</sup> Thus, the public would soon be expecting Austria and Austrian companies to do the same. Third, Austria wanted to strengthen relations with its Central and East European neighbors who would

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3. *Id.* at para. 4.

4. See Republic of Austria Historical Commission, "Work Programme," available at [http://www.historikerkommission.gv.at/english\\_home.html](http://www.historikerkommission.gv.at/english_home.html) [hereinafter Work Programme].

5. *Id.* See also Martin Eichtinger, *The Reconciliation Fund: Austria's Payments to Former Slave and Forced Laborers of the National Socialists Regime 2-5* (Harold F. Radday trans.) (2001) (unpublished manuscript on file with the Berkeley Journal of International Law) (describing unsuccessful efforts to secure compensation for former laborers) [hereinafter Eichtinger].

6. Eichtinger, *supra* note 5, at 6 (quoting Chancellor Schuessel's government's declaration).

7. These negotiations culminated in the establishment of the German Foundation, "Reconciliation, Responsibility and the Future." See Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Foundation, "Remembrance, Responsibility and the Future," Feb. 16, 1999, available at <http://www.usembassy.de/policy/holocaust/agreement.htm> [hereinafter German Foundation Law].

soon become members of the European Union ("EU"). Such a fund would largely benefit current citizens of these countries.

Beyond these factors, the Austrians had another immediate and practical motivation to establish the fund. A number of class action lawsuits had recently been filed against Austria and Austrian companies in United States courts asserting Nazi era claims.<sup>8</sup> The Austrian Government and companies were eager for the forced and slave labor claims to be dismissed as quickly as possible and recognized that to do so would require establishing an appropriate alternative remedy.

The Austrians sought to adopt the general approach that the German Government and companies followed in their own negotiations. Austria and Austrian companies proposed to contribute a capped sum to a fund, which would distribute the money to various partner organizations. These organizations would then make per capita payments to certain Nazi era victims.<sup>9</sup> In return, Austria and Austrian companies demanded what is often referred to in the agreement texts as "legal peace," that is, an end to litigation in U.S. courts.<sup>10</sup> Plaintiffs' attorneys who had filed forced and slave labor lawsuits against Austria and Austrian companies would agree to dismiss the lawsuits, while the United States would file Statements of Interest in all pending and future cases, indicating its foreign policy support for the Austrian fund as the exclusive remedy for such claims.

The structure of the labor fund was largely modeled on the forced and slave labor component of the German Foundation. The Austrians adopted payment levels for individual slave and forced laborers similar to those adopted by the German Foundation.<sup>11</sup> They also adopted similar distribution mechanisms, using already established organizations in Central and Eastern Europe to distribute the funds to individual victims.

Unlike the German approach, however, which was to address *all* potential Nazi era claims against Germany and German companies under one foundation, the Austrians insisted on initially addressing only those related to labor. For a number of reasons, there appeared to be limited public support in Austria to follow the German model and proceed with a single, comprehensive fund. First, in contrast to the labor issues, the Austrian Historical Commission had not yet prepared a report illuminating the property-related injustices of the Nazi era and the failure of Austria to adequately compensate these injustices. Second, in contrast to forced and slave labor, where it was accepted that those victims had never been compensated, Austria had provided some compensation or restitution for property-related losses.<sup>12</sup> Third, unlike the labor fund, where the vast major-

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8. *Gutwillig v. Steyr-Daimler-Puch*, No. CV98-6336 (E.D.N.Y. filed Oct. 16, 1998).

9. *Eichtinger*, *supra* note 5, at 19, 28.

10. *Agreement*, *supra* note 1, at art. 3(1).

11. Under the Austrian labor fund, slave laborers and forced laborers will each receive the equivalent of ATS 105,000 and ATS 35,000 respectively. *Agreement*, *supra* note 1, at Annex A, para. 4; *German Foundation Law*, *supra* note 7, at para. 9(1).

12. *See* *Survey of Past Austrian Measures of Restitution, Compensation and Social Welfare for Victims of National Socialism*, Oct. 2000, sec. 2, para. 1, available at <http://www.bmaa.gv.at>

ity of benefits would go to non-Jewish Central and Eastern European victims, who had generally never received any payments for their suffering, the vast majority of the beneficiaries of a property fund would be Jewish victims and their heirs, some of whom had already received such payments.<sup>13</sup> In 1995, Austria established the Austrian National Fund, which made payments to many of the same Jewish victims who would stand to benefit from a property fund.<sup>14</sup> It did not matter that those payments were not for property-related losses.

Thus, Austria agreed to commence negotiations on a companion property fund only after it realized that many of the victims' groups would support the labor fund and dismiss their labor-related claims, and under the condition that property issues be addressed in an expedited fashion, i.e., by the summer of 2000.<sup>15</sup>

Two significant issues arose during the labor negotiations that threatened to derail the whole process. Both related to the victims' representatives' insistence that Austria acknowledge moral responsibility for the totality of the wrongs committed during the Nazi era on present-day Austrian territory. The first issue concerned the treatment of slave laborers. The second, as already noted, concerned obtaining sufficient assurances from the Austrian government that it would not neglect the remaining Nazi era issues, such as those related to property.

With respect to the treatment of slave laborers, the Austrian government did not want the labor fund to make payments to slave laborers who worked on the territory of present-day Austria. It argued that under the terms of the German Foundation Law that was being drafted (and was subsequently passed by the German Bundestag), those eligible included persons who were held in a concentration camp as defined in the German Indemnification Law.<sup>16</sup> This included camps on the territory of what is now the Republic of Austria, for example Mathausen, its sub-camps, and certain Dachau sub-camps. Therefore, the

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[oesterreich/restitution/past\\_measures.html.en](http://www.austro.org/victims.html) [hereinafter Past Measures]. It is worth noting that the Austrian Ministry of Foreign Affairs' compilation of all of Austria's legislative efforts to provide compensation or restitution to victims of the Nazi era does not include any mention of compensation for victims of forced or slave labor.

13. Since Jewish residents were the primary victims of the "aryanization" (which by definition involves the taking of Jewish property) campaign, it stands to figure that they would be the largest beneficiaries from any property fund designed to address such takings. Eichtinger, *supra* note 5, at 8; Work Programme, *supra* note 4.

14. The National Fund provides benefits to people who were persecuted by the National Socialist regime on the basis of race, religion, national origin, sexual orientation, politics, physical or mental handicap, asocial behavior, or who in other ways became victims of National Socialist wrongdoing, or who left the country to avoid such persecution. The Fund made lump sum payments to victims in amounts between ATS 70,000 and ATS 210,000. BG über den Nationalfonds der Republik Österreich für Opfer des Nationalsozialismus BGBl 432/1995. See also Victims of the National Socialist Terror in Austria, available at <http://www.austro.org/victims.html>.

15. Bericht und Antrag des Verfassungsausschusses betreffend den Entwurf eines Bundesgesetzes über die Einrichtung eines Allgemeinen Entschädigungsfonds für Opfer des Nationalsozialismus und über Restitutionsmassnahmen, Beilagen zu den stenographischen Protokollen des Nationalrates 476/2001, available at <http://www.parlinkom.gov.at/pd/pn/XXI/1/texte/004/100476.doc>.

16. German Foundation Law, *supra* note 7, at para. 11(1); See also Eichtinger, *supra* note 5, at 13.

Austrian government argued, the primary responsibility for paying these slave laborers should rest with the German Foundation, rather than the Austrian Reconciliation Fund. A number of victims' representatives in the negotiations, however, insisted that Austrian, rather than German, companies bore responsibility for these victims, since it was Austrian, and not German, companies that benefited from the work of this group of laborers.<sup>17</sup> They refused to support an agreement unless the Austrian side in some way acknowledged this responsibility.

Thus, the negotiators were faced with a practical problem: how to obtain the support of all the victims' representatives, i.e., Claims Conference and the plaintiffs' lawyers, without Austria having to pay slave laborers covered under the German Foundation, but who worked on present-day Austrian territory. The Austrian side was only prepared to contribute six billion Austrian schillings to the labor fund and this amount was not sufficient to pay this group as well as those forced laborers from Central and Eastern Europe.<sup>18</sup> Fortunately, a last-minute compromise was reached. The Austrians agreed to provide \$15 million to the Conference on Jewish Material Claims for, among other things, "payments for Jewish slave laborers, including former slave laborers of concentration camps, which the National Socialist regime had established on the territory of the present-day Republic of Austria."<sup>19</sup> These funds were to be used, *inter alia*, to complement German Foundation funds to ensure that all such slave laborers received the full DM 15,000 provided for under the German Foundation law.<sup>20</sup>

For different reasons, both the class action attorneys and the Jewish organizations insisted that Austria make certain commitments on the property side of the equation before they would agree to support the labor deal. The class action lawyers had filed a number of cases, which included both labor and property claims.<sup>21</sup> The Austrians wanted the plaintiffs' attorneys to bifurcate their claims, and dismiss those related to labor, before any payments would be made by the labor fund. The plaintiffs' attorneys, however, would only agree to take such steps if Austria agreed to address property issues on an expedited, albeit separate track.<sup>22</sup> They knew they could use their labor claims as leverage against an Austrian side that was most anxious to dispose of those claims.

For the Jewish organizations, the basis for controversy over the labor fund was simple. The labor fund would benefit mostly non-Jewish victims, whereas a property fund, if established, would largely benefit Jewish ones. As Chancellor Schuessel's Government was "reaffirming [its] commitment to a self-critical

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17. Author Eric Rosand was intimately involved in the negotiations described. Many of the factual assertions in this article are based upon conversations Rosand had with the various participants in the negotiations.

18. Labor Joint Statement, *supra* note 1, at para. 4(d).

19. Letter from Dr. Maria Schaumayer, Special Representative of the Austrian Federal Government, to Stuart E. Eizenstat, Deputy Secretary of the U.S. Treasury (Oct. 24, 2000) (on file with the Berkeley Journal of International Law).

20. Interview with Gideon Taylor, Executive Director of the Claims Conference (October 2000).

21. See, e.g., Kluge v. Raiffeisen, No. CV-2851 (S.D.N.Y. filed Apr. 13, 2000).

22. Rosand, *supra* note 17.

scrutiny of the National Socialist past” and acknowledging its moral responsibility for what took place during the Nazi era, these groups did not want to allow Austria to ignore Jewish victims, particularly given the presence of Haider’s nationalistic Freedom Party in the government.<sup>23</sup> Moreover, with Holocaust survivors dying at a rate of 12% a year, these organizations insisted that Austria not only agree to address property issues, but make an immediate contribution to a property fund, which could be distributed on an expedited basis to each Holocaust survivor living in or originating from Austria.<sup>24</sup> It was generally agreed that nearly all such Holocaust survivors had lived in apartments in or around Vienna under long-term leases. These leases were confiscated by the Nazis and the Austrians had never provided restitution or compensation for these seizures, despite their apparent treaty obligation to do so.<sup>25</sup> Thus, both the victims’ and Austrian representatives agreed that this initial \$150 million payment could be viewed as final “compensation” for these losses.<sup>26</sup>

Because of the close relationship between the members of the Claims Conference and a number of the class action attorneys, some attorneys would not agree to dismiss their labor claims absent Claims Conference support for the labor deal. For its part, as was the case in the German negotiations, the United States was only prepared to support the deal if there was broad-based support from the victims’ representatives.<sup>27</sup> Thus, it became quite clear to all those involved that the deal would not be completed without an Austrian commitment to move on property issues.

While this issue was repeatedly discussed during the first six months of the negotiations, it was not until October 2000, the seventh and final month, that it was finally resolved. The United States and Austrian Governments, as well as the class action lawyers, the Claims Conference, and the Austrian Jewish Community, reached agreement on the text of a political document titled the “Framework Concerning Austrian Negotiations Regarding Austrian Nazi Era Property/Aryanization Issues.”<sup>28</sup> Here, all participants agreed to support the labor deal and the prompt dismissal of all labor claims in U.S. courts.<sup>29</sup> In return, Austria agreed to make a \$150 million down-payment to a fund, which would be distributed on a per capita basis “to all Holocaust survivors originating from or living

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23. *Id.*

24. *Id.*

25. *See, e.g.*, HOLOCAUST VICTIMS’ INFORMATION AND SUPPORT CENTER, SUMMARY OF CONFISCATED HOLOCAUST-ERA ASSETS AND AN ASSESSMENT OF SUBSEQUENT RESTITUTION OR COMPENSATION EFFORTS 23-24 (2000) (on file with the Berkeley Journal of International Law) [hereinafter Summary]; State Treaty for the Re-establishment of an Independent and Democratic Austria, May 15, 1955, art. 26(1), 217 U.N.T.S. 223, 279 [hereinafter State Treaty] (“[I]n so far as such action has not already been taken, Austria undertakes that, in all cases where property, legal rights or interests in Austria have since 13th March, 1938, been subject of forced transfer or measures of sequestration, confiscation or control on account of the racial origin or religion of the owner, the said property shall be returned and the said legal rights and interests shall be restored together with their accessories.”).

26. Framework Concerning Austrian Negotiations Regarding Austrian Nazi Era Property/Aryanization Issues, Oct. 6, 2000, para. 4 (on file with the Berkeley Journal of International Law) [hereinafter Framework].

27. Rosand, *supra* note 17.

28. Framework, *supra* note 26.

29. *Id.* at paras. 2, 3.

in Austria.”<sup>30</sup> At the last moment, the Austrian side insisted that this payment should constitute, for Holocaust survivors, the final compensation for the confiscation of apartment and small business leases, household property, and personal effects. Although the victims’ groups initially balked at the idea of expanding the categories of property covered by the Framework beyond apartment leases, they eventually acquiesced to this Austrian demand.<sup>31</sup>

Much of the stimulus for Austria’s willingness to address the apartment lease issue—and the contents of these apartments—in October 2000, was the same as that which led Austria to address labor issues earlier in the year: the Austrian Historians’ Commission was about to release a report which would highlight the losses suffered during the Nazi era. Specifically, that some 70,000 leased apartments were “aryanized” in Austria between 1938 and 1945 and that Austria failed to provide any restitution or compensation.<sup>32</sup> In short, as with forced and slave labor, there would be ample public support in Austria for making such a payment to the victims.

In addition to the \$150 million down-payment, Austria agreed to commence negotiations on the full range of remaining property issues on the evening of October 24, 2000, the day of the signing of the labor agreement, and to make every effort to conclude them by December 31, 2000.<sup>33</sup> Thus, the negotiations would focus on issues such as insurance, banking, real estate, moveable property, discriminatory taxes, and liquidated businesses.<sup>34</sup>

For a number of reasons, these remaining issues proved to be the most difficult to resolve. First, Austria had already passed a number of laws that provided some restitution or compensation for losses of or damage to property. Thus the negotiations focused on the adequacy of these measures, providing the victims’ representatives, long critical of Austria’s efforts to address its Nazi past, a forum for venting frustration and even anger with Austria’s incomplete restitution and compensation efforts. As was to be expected, this produced a defensive reaction from the Austrian side, which responded with an ardent defense of the adequacy of these measures.<sup>35</sup> Second, both Austria and the United States were parties to treaties that explicitly addressed Austria’s obligations to deal with Nazi era property issues.<sup>36</sup> Austria believed that these agreements supported its contention that its post-war measures, although not perfect, were approved by the Western Allies and did provide restitution or compensation for a significant number of properties looted during the Nazi era.

30. *Id.* at para. 4.

31. Thus, the final Framework includes these categories of claims. *Id.* at para. 4.

32. *See, e.g.,* Summary, *supra* note 25, at 1.

33. Framework, *supra* note 26, at para. 4.

34. *Id.*

35. Both the Austrian Foreign Ministry and the victims’ representatives produced lengthy documents supporting their positions. *See, e.g.,* AUSTRIAN MINISTRY OF FOREIGN AFFAIRS, AUSTRIA’S INTERNATIONAL LEGAL STATUS BETWEEN 1938 AND 1945 AND AUSTRIAN RESTITUTION EFFORTS, Sec. B. (Sept. 2000), available at [http://www.bmaa.gv.at/oesterreich/restitution/legal\\_status.html.en](http://www.bmaa.gv.at/oesterreich/restitution/legal_status.html.en) [hereinafter Legal Status]; Past Measures, *supra* note 12; Summary, *supra* note 25.

36. State Treaty, *supra* note 25; Exchange of notes constituting an agreement relating to the settlement of certain claims under article 26 of the Austrian State Treaty of May 15, 1955, May 8 - 22, 1959, U.S. - Aus., 347 U.N.T.S. 3 [hereinafter 1959 Exchange of Notes].

In short, because the Austrian Historical Commission had not yet prepared a report on these issues, there was no “objective” source to counter the view held by many Austrians that Austria’s post-war legislation and post-war treaties had already adequately addressed these property losses and confiscations. Thus, there was little public support in Austria for moving forward with any further redress for victims of property-related damages.

With respect to Austria’s post-war restitution and compensation efforts, the participants in the negotiations engaged in heated historical debates concerning the adequacy of the laws Austria had enacted following the war.<sup>37</sup> In the Framework, the participants agreed that such measures would be fully taken into account during the subsequent property negotiations and that the negotiations would only address “the potential gaps and deficiencies” in these prior measures.<sup>38</sup> As might have been predicted, there were extreme differences of opinion between the two sides concerning the magnitude of these gaps and deficiencies.

The Austrian side focused on the text of the laws, noting that restitution or compensation had been possible, at least in theory, after the war for the vast majority of categories of confiscated or otherwise looted property.<sup>39</sup> The victims’ side, on the other hand, referred to the short period for filing claims and the lack of adequate notice provided under these laws, as well as the fact that, for the most part, they allowed only restitution in kind, making no provision for compensation where the property was liquidated or otherwise not traceable.<sup>40</sup> In addition, they focused on the implementation of the laws, noting, among other things, the pervasive anti-semitism in post-war Austria, which included Austrian restitution courts generally favoring the interests of the current possessors of looted property, the “aryanizers.” For example, they asserted that the courts required the victim-claimant to reimburse the “aryanizer” for the latter’s purchase price, even though the proceeds of the Nazi era forced sale had been placed in blocked accounts never accessible to the seller.<sup>41</sup> One likely reason for the contentious debate over these issues was that each side believed the other was going to use its broad or narrow view concerning “gaps and deficiencies” to

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37. Between 1946 and 1949 Austria enacted seven “Restitution Acts,” which laid down specific procedures for the return of various types of property that had been wrongfully taken from its previous owners during the Nazi era. For example, the First Restitution Act concerned the restitution of property seized by the German Reich which was administered after the war by the Republic of Austria or one of its federal states. BG uber die Ruckstellung entzogener Vermogen, die sich in Verwaltung des Bundes oder der Bundeslander befinden (Ertes Ruckstellungsgesetz) BGBl 156/1946. The Third Restitution Act was the general restitution law for the return of property wrongfully taken from its owners which had been transferred to private businesses or individuals. BG uber die Nichtigkeit von Vermogensentziehungen (Drittes Ruckstellungsgesetze) BGBl 54/1947, BGBl 148/1947. See also <http://www.bmaa.gv.at/oesterreich/restitution/rueckstellung.html> for a listing of all post-Second World War compensation and restitution legislation enacted by Austria between 1945 and 1998.

38. Framework, *supra* note 26, at para. 4.

39. Legal Status, *supra* note 35, at sec. B.

40. See Summary, *supra* note 25.

41. *Id.*



justify its high demand or low offer as a final Austrian contribution to a property fund.

Despite these sharp disagreements, a comprehensive resolution of the property issues was reached in January 2001, whereby Austria and Austrian companies agreed, among other things, to contribute an additional \$210 million to the \$150 million already pledged under the Framework.<sup>42</sup> The difference of views concerning the adequacy of Austria's post-war efforts, however, was never, and probably will never be, finally resolved, given the historical and legal complexities involved. The text of the Joint Statement that accompanied the agreement, and was signed by representatives of the United States, Austria, Austrian companies, and the victims, merely recognizes that there *may* have been certain "gaps and deficiencies in the restitution and compensation" legislation, but does not specifically mention any.<sup>43</sup> As expected, once agreement was reached on the capped amount of the Austrian contribution to the property fund, Austria and Austrian companies largely deferred to the victims' representatives wishes for distribution of the funds.

As with Austria's post-war restitution and compensation legislation, the existence of language addressing these property issues in Austria's post-war treaties complicated the negotiations. Both the 1955 State Treaty for the Re-establishment of an Independent and Democratic Austria ("State Treaty") and a subsequent 1959 Exchange of Notes between the United States and Austria ("1959 Exchange of Notes") contain provisions dealing with Austria's obligations to provide restitution or compensation for confiscated or otherwise looted property.<sup>44</sup>

In Article 26(1) of the State Treaty, Austria undertook, "[i]n so far as such action has not already been taken," to provide restitution or compensation to those who, after March 13, 1938, had property confiscated or otherwise taken on account of the racial origin or religion of the owner.<sup>45</sup> As this language indicates, it was understood by all parties to the State Treaty, of which the United States was one, that the return of property to persecuted persons had already been, or would be, made according to the restitution laws passed since 1946. In addition, in the 1959 Exchange of Notes, Austria agreed to establish a Compensation Fund, which would make payments for confiscated bank accounts, securities, mortgages, money, and payment of discriminatory taxes.<sup>46</sup> In return, the United States agreed that it would "neither advance nor support through diplomatic channels against the Austrian Federal Government, any further [Nazi era] claims of persecutees [concerning these categories of properties, legal rights and interests] based on Article 26 of the State Treaty."<sup>47</sup> Thus, not only did the

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42. Exchange of Notes, *supra* note 1, at paras. 1, 2.

43. Labor Joint Statement, *supra* note 1.

44. State Treaty, *supra* note 25, at art. 23; 1959 Exchange of Notes, *supra* note 36, at art. 3, sec. 1.

45. State Treaty *supra* note 25, at 279.

46. 1959 Exchange of Notes, *supra* note 36, at 9.

47. *Id.* at 22 (Diplomatic Note of May 16, 1959 from the American Ambassador to the Austrian Minister of Foreign Affairs).

United States and the other Western Allies approve of Austria's post-war restitution and compensation laws, regardless of their adequacy, but they even agreed not to present numerous categories of claims to Austria. Moreover, it appears that the United States has never formally asserted to Austria that it failed to abide by its commitments under these treaties.

As a legal matter, the treaty provisions had no impact on the property negotiations. Although the 1959 Exchange of Notes does constitute a waiver by the United States of its rights under Article 26 to support certain categories of private claims by diplomatic means, it does not affect the ability of victims to pursue their claims directly against the Austrians, for example, in U.S. courts. Moreover, it does not affect the ability of the United States to facilitate discussions between victims' representatives and the Austrians concerning the establishment of a humanitarian fund, particularly where the Austrians themselves requested the United States to assume this role.

Despite having no legal effect on the negotiations, the provisions of these treaties nevertheless did affect the negotiations in an important way. The Austrians invoked them to support their arguments concerning the adequacy of its post-war legislative efforts.<sup>48</sup> They frequently referred to the Allies' approval and commitment not to espouse a number of categories of property claims to support their contention that the gaps and deficiencies were not as significant as the representatives of the victims asserted. Otherwise, they argued, the Allies would not have given their approval and made such a commitment.<sup>49</sup> The victims' representatives responded by noting that, as the Austrian side often stated publicly, the present negotiations were focused solely on the moral, rather than the legal, responsibility of Austria and Austrian companies.<sup>50</sup> The magnitude of the Austrian response, the victims' representatives argued, had been inadequate acknowledgment of that responsibility and the negotiations were aimed at addressing this lacuna.

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As this recounting of the recently concluded negotiations has shown, throughout the process, the Austrian Government moved forward very cautiously: first addressing labor, then apartment leases, and finally the remaining property issues. At each step in the process, the Austrian government was careful to ensure sufficient public support. This incremental approach resulted from an effort to balance the interests of two domestic political constituencies with divergent interests: the Chancellor's coalition partner, Haider's Freedom Party, which was reluctant to support any additional Austrian efforts to confront its Nazi past and those in Austria who were ashamed of their country's failure to fully address this dark chapter in its history.

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48. Rosand, *supra* note 17; See also Ernst Sucharipa, Austria's Measures of Restitution and Compensation for Holocaust Victims: Recent Negotiations and their Background 10 (2001) (unpublished manuscript on file with the Berkeley Journal of International Law).

49. Rosand, *supra* note 17.

50. *Id.*