No. 03-13

IN THE

Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE THE AUSTRIAN JEWISH COMMUNITY AND THE AMERICAN JEWISH CONGRESS IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

This submission documents the historical events and writings that compel the conclusion that Petitioners may not invoke sovereign immunity for the pre-1952 acts complained of herein. *Amici*, the Austrian Jewish Community and the American Jewish Congress played a significant role in those events. Appendix 1 ("App.") sets forth their interests.

STATEMENT

The question certified by the Court can be answered by comparing the allegations of the Complaint to the language of the second expropriation exception of the Foreign Sovereign Immunities Act of 1976, as amended ("FSIA"), 28 U.S.C. § 1605(a)(3). The Complaint alleges each of the jurisdictional predicates under that exception: (i) each of the Aryanized Klimt paintings at issue "*is* owned" or claimed to be owned by the Republic of Austria or its instrumentality, the Austrian Gallery ("Austria"), (ii) "in issue" are "rights" in property "*taken* in violation of international law" and (iii) Austria "*is* engaged in *a* commercial activity in the United States."[2]

Additionally, viewed from a historical perspective, Austria had no expectation of sovereign immunity for pre-Tate Letter acts and none was warranted, both as a matter of international convention, as well as longstanding principles of international law and American jurisprudence. And that distinguishes Austria from the countries that appear *Amicus* in its support.

A. HISTORICAL FACTS.

1. Background. Prior to 1938, Austrian Jewry was renowned for achievements in the sciences, arts and letters: Freud, Schoenberg, Mahler, and Werfel to name a few. According to Gestapo records, Austrian Jews held real estate,

1. Pursuant to Sup. Ct. R. 37(3)(a) written consents from all parties to the filing of this brief have been filed with the Clerk of the Court. Pursuant to Sup. Ct. R. 37(6), *Amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

2. Jt. App. at 156a-160a, 94a-103a.

business enterprises, securities, and assets worth more than *$1.2 billion* in *1938* values, *without* including the assets of Jewish religious institutions, hospitals, schools, nursing homes or other assets that escaped registration.[3]

With the Nazi takeover of Austria in March 1938 (the "Anschluss"), methodical thievery, termed "Aryanization," targeted Austria's Jews. Justice Jackson's observation is apt: "The magnitude of this planned reversion to barbarism taxes the civilized imagination and the cruelty of its execution taxes credulity."[4] This proceeding focuses upon but one aspect of that barbarism: the Aryanization of works of art, followed by their conversion after the war, and their current and continuing commercial exploitation in the United States by Petitioners.[5] Replevin is sought and fraud is charged.

2. The Anschluss. On March 12, 1938 Hitler's legions entered Austria. Not a shot was fired, not a hand raised, in challenge. Indeed, there was widespread euphoria and jubilation.[6] At first, on March 19, 1938, the United States reacted simply by expressing "concern" and disapproval.[7] On April 5, the U.S. Ambassador delivered a Note to the German Foreign Office acknowledging that "for all practical purposes" the United States was forced to accept the realities

3. Robert Knight, *Restitution and Legitimacy in Post-War Austria, 1945-1953*, Leo Baeck Inst. Yearbook at 413-14 n.10 (1991); Georg Graf, *Aryanization and No Compensation, Critical Remarks with Respect to Recent Austrian Legal History* 1-2 (2001) (Mr. Knight was a Member, and Professor Graf a Reporter, of the Austrian Government's Historical Commission); *see also* Michael J. Bazyler, *Holocaust Justice* 108 (2003) (citing Kenneth Timmerman, *Austria Confronts Its Dark Past (special report)*, Insight on the News, Aug. 12, 2002, at 24); Hal Lehrman, *Austria and the Jews: Struggle for Restitution*, Commentary, Oct. 1954, at 308, 311.

4. Justice Robert Jackson, *Introduction* to Whitney R. Harris, *Tyranny on Trial: The Evidence at Nuremberg* xxxi (1954).

5. *See* Lynn H. Nicholas, *World War II and the Displacement of Art and Cultural Property in the Spoils of War* 39 (Elizabeth Simpson ed., 1997).

6. Hugh Thomas, *Armed Truce: The Beginnings of the Cold War, 1945-46*, at 352 (1987).

7. Department of State, *Press Release* (1938), XVIII, 373.

of the "change of status of Austria."[8] That same day, the Secretary of State formally advised the other departments "that for all practical purposes the disappearance of the Republic of Austria *as an independent state* and its incorporation into the territory of the German Government must be accepted as a matter of fact."[9] The next day President Roosevelt issued an executive order embodying that reality in tariff and trade terms.[10] *De facto* recognition was followed by the Secretary of State's March 27, 1939 notification to the Attorney General that "the United States recognizes that Austria has ceased to exist *as an independent sovereign State* and has been incorporated in the German Reich, and that Germany exercises *de jure* sovereignty over the territory of the former Republic of Austria."[11] Several years later, the Department equivocated.[12]

3. The London Declaration. At the height of the war, on January 5, 1943, the United States and its Allies issued the London Declaration warning that all forced "transfers of, or dealings with property, rights and interests of any description" in any of the Axis countries faced invalidation.[13] The U.S. chief negotiator, Ambassador Winant, advised the Secretary of State that the Declaration meant "that the governments concerned are mutually pledged . . . to examine and if necessary invalidate transfers or dealings with property, rights, et cetera, *which may*

8. Department of State, *Foreign Relations of the United States* [hereinafter "*For. Rel.*"] (1938), II, 483-84.

9. *Id.* at 504 (emphasis added).

10. 3 Fed. Reg. 728, 735 (1938).

11. *See* Marjorie M. Whiteman, 2 Dig. Int'l L. 328 (1963) (quoting March 2 memorandum of Ralph Snowden Hill, quoting letter of Secretary of State Hull, dated March 27, 1939) (emphasis added); *see also Land Oberösterreich v. Gude*, 109 F.2d 635, 637 (2d Cir. 1940) ("the Republic of Austria now knows as its sovereign the Third Reich of Germany"); *United States ex rel. D'Esquiva v. Uhl*, 137 F.2d 903 (2d Cir. 1943).

12. On July 27, 1942 the Secretary of State announced that the United States "has never taken a position that Austria was legally absorbed into the German Reich." 7 *Dep't State Bull.* 660 (1942).

13. 8 *Dep't St. Bull.* 21 (1943).

extend across national frontiers and require action by two or more governments." (App. 10a) (emphasis added).

The London Declaration was later implemented by, *inter alia*, the United States' Gold Declaration and by the United Nations in its Bretton Woods Resolution.[14]

The London Declaration and later proclamations marked the beginning of the United States' concerted efforts to restore property stolen by the Nazis from the Jews of Austria and elsewhere, in violation of international law.[15] Art and cultural property was of particular concern. By late summer 1943, the State Department established a panel to formulate policy for the protection and restitution of art and cultural objects, chaired by Justice Owen Roberts of this Court.[16] The concern was warranted as Nazi-sponsored confiscations of some 600,000 pieces of art and a stream of Nazi registration laws imperiled Austrian art and virtually all Jewish-owned assets.[17] "This was not," to use Justice Jackson's words, "the legitimate

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14. 9 Fed. Reg. 2096 (1944). At the Bretton Woods Conference, the United Nations demanded the return of all stolen assets within "occupied territory," including works of art "looted by the enemy." *Proceedings and Documents of the United Nations Monetary and Financial Conference,* Bretton Woods, New Hampshire, July 1-22, 1944, Vol. II, 939-40 (1948).

15. *See* Hague Convention (IV) on the Laws and Customs of War on Land, Oct. 18, 1907, 1 Bevans 631, 1907 U.S.T. LEXIS 29 and art. 56 thereof. Austria was a party to the Convention.

16. *See Report for the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas* 3 (1946).

17. *See* Jonathan Petropoulos, *German Laws and Directives Bearing on the Appropriation of Cultural Property in the Third Reich, in Spoils of War* 107 (Elizabeth Simpson ed., 1997). Six weeks after the Anschluss, the Völkischer Beobachter, in its Vienna edition of April 26, 1938, wrote: "The Jew must go - and his cash must remain." *Jews, Anti-Semitism and Culture in Vienna* 187 (Ivar Oxaal et al. eds., 1987); *see generally* Simon Wiesenthal, *The Murderers Among Us* 188 (1967); Martin Gilbert, *The Holocaust* (1985); Lucy C. Dawidowicz, *The War Against The Jews* (1986).

activity of a state within its boundaries, but was preparatory to the launching of an international course of aggression."[18]

Austria's own Historical Commission has now confirmed that, in addition to looted art, some 200,000 Austrian Jews were robbed and persecuted after the Anschluss. 18,800 Jewish businesses were Aryanized; the assets of more than 90 Jewish banks seized; and 600 Jewish associations and 325 foundations (including those running hospitals, orphanages, schools and cemeteries of the Austrian Jewish Community) were closed and their assets seized. Austrian and other historians agree that billions were stolen and not returned.[19]

4. The Moscow Declaration. In 1943, with the tide of war turning against the Axis, Allied strategy focused on a psychological effort to undermine Nazi control and arouse resistance. A British Foreign Office official, Geoffrey Harrison, drafted what became the Moscow Declaration. Hoping to encourage resistance to the Nazis, he coined the phrase that Austria was "the first country to fall victim to Nazi aggression." A vital feature of the Declaration was what historians have come to term the "guilt" clause, reminding Austrians of their "responsibility, which [they] cannot evade" in siding with Hitlerite Germany and warning "that in the final settlement account would be taken of the part they play in assisting to expel the German invader." Finally, the Anschluss was declared "null and void," with the Allies expressing the wish to re-establish a "free and independent Austria."[20]

Issued at the Allied Foreign Minister's Conference in October 1943, the Moscow Declaration came to symbolize

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18. *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials,* June 6, 1945, *reprinted in* U.S. Dep't of State, Pub. No. 2420, *Trial of War Criminals* 6 (1945).

19. Final Report at 11, 73-118, *available at* http://www.historikerkommission.gv.at/english_home.html.

20. Günter Bischof, *Austria in the First Cold War, 1945-55,* at 24-25 (1999); *see also* Robert Clute, *The International Legal Status of Austria, 1938-1955, at* 4 (1962); James J. Carafano, *Waltzing Into The Cold War* 25 (2002).

America's commitment to the ultimate re-establishment of Austria as a sovereign.[21]

5. War's End. In 1945 the Allies divided Austria into four military occupation zones (American, British, French and Soviet) with an Allied Council of the four army commanders-in-chief having supreme executive, legislative and judicial authority. [22] Thus, the first Agreement on Control Machinery, concluded July 4, 1945, provided, in Articles 10 to 14, that "ultimate and supreme power" over Austria as a whole was vested in the Allied Council, while each sector would be governed by the occupying commander-in-chief.[23] The boundaries, fixed on July 9, 1945, had all the hallmarks of frontiers and could not be crossed, even by Austrian officials, without a pass from the controlling authority. While some controls were later eased or delegated, the Allies retained "supreme power" and the zonal boundaries and military occupation continued until ratification of the Treaty in 1955.[24]

In April, 1945, the Soviet Union named Dr. Karl Renner, who had enthusiastically endorsed the Anschluss and the "incorporation" of the Sudetenland into the Reich, to head a provisional Austrian government. Approval of Renner's government by the United States and the other powers was withheld until October 1945.[25] The Allied Council and zonal commanders then permitted elections to form a government with sharply limited powers. All laws required prior approval by the Allied Council, and could not contravene laws, directives or policies imposed by military government, with

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21. 9 *Dep't St. Bull.* 310 (1943).

22. Michael Balfour and John Mair, *Four-Power Control in Germany and Austria, 1945-1955 in Survey of International Affairs 1939-1946,* at 312 (Arnold Toynbee ed., 1956).

23. Bischof, *supra* note 20, at 28-29; Clute, *supra* note 20, at 26-27.

24. Clute, *supra* note 20, at 26-27, 32-33; App. 12a; Bischof, *supra* note 20, at 28-29, 45-49.

25. Bischof, *supra* note 20, at 45-49.

the Council retaining throughout supreme legislative, executive and judicial authority.[26]

From the first, Renner and his successors' government espoused the notion that Austria – even its "good Nazis" – were victims, and there followed a carefully orchestrated campaign to advance the "Okkupationstheorie." In Austria, the United States and elsewhere, a full-scale public relations campaign "of selling the 'victim doctrine'" was conducted.[27] Historians maintain that the successful selling of the "first victim" myth shaped Austria, especially its attitude in restitution matters.[28]

It soon became apparent that, even under military occupation, anti-Semitism and pandering to Nazis continued. Thus, in demanding legislation for the return of property of his party comrades, Renner stressed the "Realpolitik" of post-war Austria, stating "[a]fter all it would be quite incomprehensible if every small Jewish salesman or hawker is compensated for his loss" while the Socialist party was not first in line.[29]

As Cold War tensions increased, the confrontations between the Western and Soviet zones escalated,[30] impeding the Treaty negotiations that started in 1947. The United States and its Western Allies initially responded favorably to constant Austrian urgings for a Treaty that would provide sovereignty,

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26. Balfour, *supra* note 22, at 320; App. 12a.

27. Bischof, *supra* note 20, at 58, 61-67; Lehrman, *supra* note 3, at 310; Clute, *supra* note 20, at 12-14. The State Department's office of the Legal Division remained unconvinced, noting that "since Austria was part of Germany, we must therefore at least have been at war with the Austrian territory and inhabitants . . . ." Bischof, *supra* note at 20, at 186 n. 87.

28. *Impasse in Vienna*, N.Y. Times, Dec. 21, 1953, at 30. Knight, *supra* note 3, at 413, 418.

29. Knight, *supra* note 3, at 419.

30. Indeed, kidnappings, border incidents, and military maneuvers were a source of continuing tension. *Carafano, supra* note 20, at 91; *see also Russians Defy U.S. Order to Leave Zone in Austria*, N.Y. Times, June 9, 1951, at 4.

while the Soviets appeared intransigent.[31] However, following the 1948 Czechoslovakian coup d'etat and the Berlin blockade, role reversal occurred. The Joint Chiefs of Staff and the Secretary of Defense persuaded Secretary of State George C. Marshall to defer any action, including the Austrian Treaty discussions, that would undermine the Allies' unencumbered right to maintain American forces and authority in the Western zones of Austria to counter the Soviet threat.[32] Renner agreed, while Austria continued to use the lack of sovereignty as a rallying point and an excuse for failure to make restitution.[33] Thus, on March 7, 1950, Austria delivered a formal note to the Four Powers demanding "[r]emoval of limitations of Austrian sovereignty" and detailing a lengthy list of impediments; later, Chancellor Raab refused restitution based on non-sovereignty.[34]

Escalating Cold War tensions also enabled post-war Austrian governments to seize assets, industries, financial institutions and works of art that had been Aryanized. Commencing in 1945 and escalating in 1946, the Soviet Union conducted extensive property seizures in its zone, claiming they involved so-called "German assets" due it as reparations under the Potsdam Agreement. Citing the London Treaty, the U.S. and its allies protested, but then countered that Austria's government would serve as "Trustee" of "German assets" in their zones. The Trusteeship concept was later extended by the United States to stolen works of art and other valuables, such as those found on the notorious "Werfen Train," with Austria taking custody and assuming responsibility for returning such property to its rightful owners, or their heirs.[35]

31. Barbara Jelavich, *Modern Austria, Empire and Republic 1815-1986,* at 263 (1987).

32. *For. Rel.* (1948) II, 1472.

33. *Austria in Denial of Jewish Charges,* N.Y. Times, Dec. 22, 1953, at 16.

34. Margaret Carlyle, *Documents on International Affairs, 1949-1950,* at 508 (1953); *Aid on Jewish Claims,* N.Y. Times, Jan. 1, 1954, at 34.

35. Balfour, *supra* note 22, at 350-52; Bischof, *supra* note 20, at 20, 85-86; Carafano, *supra* note 20, at 71.

And, on June 28, 1946, Chancellor Figl joined in, first by nullifying all Austrian property transfers to Germans and then on July 26, 1946 and March 26, 1947, seizing the major Austrian financial, industrial and other enterprises (including their Aryanized assets).[36] Thus, soon after war's end, Austria had gained control, as Trustee or in its own right, of much of Nazidom's Aryanized gains.

6. Restitution. Reflecting the London Agreement's restitution mandate, in 1945 the Joint Chiefs of Staff, directed General Mark Clark, the first Commander-in-Chief of United States Forces and High Commissioner for Austria, that "you will ensure that the programs of . . . restitution embodied in Allied agreements are carried out in so far as they are applicable to Austria."[37] However, it soon became apparent that Austria's leadership, while giving lip service to restitution, was determined to delay and dissemble. Successive post-war Austrian governments promised restitution, but then acted, as a matter of official policy, to evade it, while, in their words, seeking to avoid "triggering 'all sorts of claims,' in particular from the Jews."[38] Austria's Foreign Ministry addressed restitution as something that Austria should not legally be required to make as the "First Victim" of Nazism, but cautioned that Jewry not be aroused because "[i]t is not without reason that Jewry has been termed the fifth world power, on whose enmity Hitlerite Germany foundered."[39]

On January 14, 1947, Chancellor Leopold Figl briefed the Cabinet, damning restitution with the statement, "[t]he Jews would like to become too rich too quickly." Vice Chancellor

36. *Clute, supra* note 20, at 38; *Bundesgesetz vom 26 Juli,* 1946 *über die Verstaatlichung von Unternehmungen (Verstaatlichungsgesetz),* Federal Law Gazette No. 168/1946; *Bundesgesetz vom 26 März 1947 über die Verstaatlichung der Elekrizitätswirtschaft Verstaatlichungsgesetz),* Federal Law Gazette No. 81/1947.

37. 8 *Documents on American Foreign Relations* 290, 303 (1945).

38. *See, e.g., Austria Promises Jews Full Rights,* N.Y. Times, Feb. 21, 1946, at 3; *Austria to Curb Returns to Jews,* N.Y. Times, May 16, 1946, at 13; *Austria Prepares To Indemnify Jews,* N.Y. Times, June 6, 1946, at 7; Knight, *supra* note 3, at 420.

39. Knight, *supra* note 3, at 421.

Schärf, later Austria's Federal President, added: "Through the Jews entire regions in Austria have been ruined."[40]

Importantly, recently unearthed Austrian Cabinet minutes reveal that the cycle of promised restitution followed by procrastination was entirely deliberate. On November 9, 1948, following a particularly vituperative assault upon Jewry by various Cabinet Ministers, Interior Minister Oskar Helmer proposed, and the Chancellor and Cabinet approved, Austria's formal policy to delay for so long as possible any restitution to Jews.[41] That policy thereafter guided Austria's formal conduct.[42]

The American Military authorities were forced repeatedly to intervene, demanding, for example, the rescission of a law that undermined Jewish property rights. The Austrian response to restitution demands "became a by-word for corruption." Thus, the much-touted Third Restitution Law – which was premised on the 1943 London Declaration – was so replete with loopholes and discretionary enforcement mechanisms that some of it came to be viewed as actually "favourable towards the 'Aryanizer.'" Austria argued it "had nothing to make good since it had done nothing wrong." Amid cries that the Aryanizers had acquired Jewish property "out of altruistic motives," legislation crippling restitution was proposed by the majority Parliamentary parties in July 1950. America was outraged, the American attaché stating, "if the Austrians were permitted to get away with so brazen a violation of one of the [proposed] Treaty terms it would serve

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40. Dokument 11, Protokoll der 52 Ministerratsitzung vom 14 January 1947, *quoted in Ich bin dafür die Sache in die Länge zu ziehen* 121 (Robert Knight ed., 2000) (literally: "I am in favor of dragging the matter out"); *id.* at 141, citing Dokument 16, Protokoll der 104 Ministerratsitzung vom 16 März 1948.

41. *Id.* at 145, citing Dokument 17, Protokoll der 132 Ministerratsitzung vom 9 November 1948.

42. The Final Report discloses the "non-fulfilment" of Austria's restitution obligations. Final Report, *supra* note 19, at 23.

as an indication of Austrian readiness to violate any other provisions of the Treaty without compunction."[43]

Increasingly, anti-Semitic political rhetoric combined with electoral pandering toward "former" Nazis led to continued Austrian evasion of promised restitution. In June, 1949, the American Jewish Congress documented and the United States Embassy confirmed that Julius Raab, later Austria's Chancellor, had met with high ranking former SS officers - now leaders of a Nazi-oriented party (the VdU) - to work out a covert political arrangement (which, as later appears, directly harmed restitution).[44] In 1952, when the U.S. High Commissioner refused to approve a government-supported amnesty for Austrian Nazis, Chancellor Raab launched an anti-Semitic attack on the "influence" of naturalized American citizens of Austrian Jewish origin (whom he termed "emigrants") employed in the U.S. High Commissioner's office. And the attack was reiterated by the Austrian Cabinet when, in September, 1952, the High Commissioner objected to Nazis being compensated at the expense of their victims.[45]

The United States condemned these and similar actions in stern public and private warnings, the State Department publicly proclaiming that "it is greatly disturbed to have received reports" on Austrian efforts to grant amnesty to and even promoting implicated Nazis, and forcing the reopening of restitution judgments and rescinding restitution decrees.[46]

7. The "Bernstein Letter." The U.S. Occupation Authorities and the U.S. Embassy in Austria had made their point. The State Department was determined to make explicit the U.S. policy. In the "Bernstein Letter," the Executive Branch

43. Knight, *supra* note 3, at 422-27, 432-33.

44. *Vienna Party Aide Had Nazi Dealings,* N.Y. Times, June 11, 1949 at 3; App. 16a-17a.

45. *Vienna is Critical of U.S. "Emigrants,"* N.Y. Times, June 18, 1952, at 14; *Austria Now At Odds With All The Powers,* N.Y. Times, Sept. 7, 1952, at B7.

46. *Austrian Amnesty Facing Veto by U.S.,* N.Y. Times, July 29, 1952, at 6; *see also* Knight, *supra* note 3, at 432-33.

stated that U.S. courts were an appropriate forum to resolve claims to recover property wrongfully taken during World War II, even against protests of interference with another nation's sovereignty. Responding to an inquiry in a Second Circuit Holocaust restitution case, the State Department's Acting Legal Adviser, Jack Tate, advised, on April 27, 1949, that the articulated policy of the Executive Branch

> with respect to claims asserted in the United States for restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution . . . *is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of the Nazi officials.*[47]

The Bernstein Letter stressed that this policy was a reflection of *longstanding* U.S. policy, not some radical departure from prior policy. Mr. Tate listed no less than nine prior declarations, agreements, directives and laws - including especially the London Declaration and Military Law No. 59 - which the U.S. had previously enacted or endorsed, all of which demonstrated not only that "[t]his Government has consistently opposed forcible acts of dispossession," but that it was equally committed to "undoing" the transfers and "restituting the property to persons wrongfully deprived thereof." (App. 31a). *Post hoc* attempts to limit the Bernstein Letter have ignored not just its full text, but its policy antecedents and subsequent State Department reiteration. To minimize repetition, the documented history of the letter appears *infra*, at pp. 21-24.

8. The 1955 Treaty. The clear commitment of the United States Executive Branch to mandate restitution was manifest in the earliest drafts of the 1955 Treaty. These restitution provisions were based on America's bitter experience on this subject. As United States officials noted: "[t]here is every reason to believe that the [Austrian] Government's unconscionable

47. App. 33a. In response, the Second Circuit amended its mandate to permit the litigation to proceed. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954).

procrastination over this long-overdue law is part of its effort to curry the favor of former Nazis for the 1949 elections." (App. 35a). This was repeated in 1953, when Austria's Chancellor Raab again secretly met with the Nazi leadership to construct a further bargain, this time providing, *inter alia*, that restitution would be tied to compensating Nazis for their post-war internment by the Allies as well as other benefits for Nazis.[48] Indeed, Secretary of State Dulles was told on September 11, 1953, by John J. McCloy, former U.S. High Commissioner for Germany, that the "Germans had been doing a good job on reparations claims for Nazi victims, and the Austrians have done nothing. . . ." (App. 39a). Austria procrastinated, pretextually advancing excuses for delay, including Chancellor Raab's proclamation that restitution was not possible absent a treaty, or until Austria finally attained sovereignty:

> *In view* of *the fact that she is not* fully *sovereign* and has therefore been unable to fix a definite date by which restitution claims must be filed . . . . it has been impossible, the communiqué stated, for Austria to do more.[49]

The State Department responded by pledging continued efforts to secure restitution and advising inquiring Senators that it had urged Austria to effectuate restitution before the Treaty reached the Senate.[50] In 1955 the Treaty discussions that had stalled in 1948 were revived because of the Soviet "concern over Western Germany."[51]

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48. *Compare Jewish Congress Sees Vienna Plot,* N.Y. Times Dec. 2, 1954 *with* App. 14a-28a.

49. *Austria in Denial of Jewish Charges, supra* note 33, at 16 (emphasis added).

50. *Aid on Jewish Claims,* N.Y. Times, Jan. 1, 1954, at 34; *U.S. Expresses "Concern" Over Austria's Attitude,* Sentinel, Jan. 1954; *see also Pay Jewish Claims, Austria is Advised,* N.Y. Times, March 9, 1954, at 8.

51. Dean Acheson, *Sketches From Life of Men I Have Known* 181-82 (1959).

Article 1 of the 1955 Treaty "re-established" Austria as "a sovereign, independent and democratic State." Articles 25 and 26(1) directed that Austria would thereafter make full restitution (a) to all nationals (individual or corporate) of any of the United Nations (a defined term including all persons that had been treated as enemies in Austria during the war), and, importantly, (b) to all victims of religious or other persecution of all assets and properties seized, whether through legal artifice or force, on and after March 15, 1938.[52]

In submitting the Treaty to the Senate for ratification, on June 1, 1955, President Eisenhower stressed the Treaty's purpose and effect: "The Treaty provides for the termination of the occupation and the reestablishment of Austria . . . *as a sovereign, independent and democratic state.*" [53] Secretary Dulles, in his Senate testimony urging ratification, added: "Austria lost her independence before we were in the war, and now . . . we are in a position to give Austria back her independence."[54]

The Senate Foreign Relations Committee Report urged ratification, noting that the "main purpose" of the Treaty was to "re-establish Austria as a sovereign, independent, democratic state," and adding, "Austrian independence came to an end on March 13, 1938, when Nazi troops moved in and Hitler proclaimed its union with Germany in the so-called Anschluss."[55]

Secretary Dulles, like the Senate, also made clear that restitution was an integral part of the Treaty (the Treaty

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52. *State Treaty for the Reestablishment of an Independent and Democratic Austria*, May 15, 1949, arts. 25, 26, 6 U.S.T. 2369, 1955 U.S.T. LEXIS *35 [hereinafter "1955 Treaty"].

53. *Public Papers of the Presidents of the United States: Dwight D. Eisenhower, Jan. 1 - Dec. 31, 1955* at 563-64 (emphasis added).

54. Hearing Before the Senate Comm. on Foreign Relations on the Austrian State Treaty, 84th Cong. 11 (June 10, 1955) [hereinafter "Dulles"] (statement of Secretary of State John Foster Dulles).

55. The Austrian State Treaty: Report of the Committee on Foreign Relations, 84th Cong. 2 (June 15, 1955).

mandates that "Austria will make restoration or provide compensation to victims of Nazism, who were largely of the Jewish faith").[56]

As for Austria's view of what the Treaty achieved, Austrian Historical Commission Member Robert Knight opined: "[t]he State Treaty brought Austria the restoration of sovereignty and the departure of Allied Authorities."[57] The President of Austria's Constitutional Court and former President Kurt Waldheim both agree.[58]

9. The 1958 Dulles-Raab Agreement. When Austria subsequently failed to meet its restitution obligations, notwithstanding its Treaty commitments, members of the Senate interceded. To illustrate, Senator Ives wrote Secretary Dulles protesting Austria's refusal to make restitution, notwithstanding the demands of Article 26, and asked the Secretary to intervene, which Secretary Dulles agreed to do at a forthcoming meeting with Chancellor Raab.[59] On that occasion, Chancellor Raab asked the Secretary whether for a payment of some $200 per person Austria could expect to buy legal peace. Secretary Dulles responded by cautioning Chancellor Raab that he could not thus purchase "an end to Jewish claims"; neither would the United States Government "prevent private persons from advancing [restitution] claims or arguing with the Austrian Government."[60] The United States thus refused Austria's request for waiver of compliance with Article 26 and, as in the Bernstein Letter, reiterated that it was

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56. Dulles, *supra* note 54, at 4.

57. Knight, *supra* note 3, at 439.

58. Ludwig Adamovich, *Handbuch des Österreichischen Verfassungsrechts* 35 (1971); Kurt Waldheim, *The Austrian Example* 186 (Ewald Osers trans., 1973).

59. App. 41a-44a. In their meeting of May 19, 1958 Chancellor Raab gave the Secretary personal assurances "that Austria would meet its obligations." *Id.*

60. App. 45a.

Executive Branch policy not to stand in the way of actions to enforce claims arising out of Nazi takings.[61]

B. AUSTRIA AND THE ARTS.

Following the war, Aryanized art generally met one of the following fates: (i) that which found its way into one or another of Austria's wholly-owned museums or galleries or was turned over by the Allies to Austria as "Trustee" with a promise of restitution[62] tended to remain in the custody of Austrian instrumentalities and in later years was exhibited in the United States and, as here, became a source of commercial revenue (*e.g.*, catalogue sales and inter-gallery exchange or reciprocal exhibitions); (ii) that which found its way into the hands of Austrian "collectors" frequently ended up in the hands of government-owned entities with the same ultimate U.S. commercial results,[63] and (iii) that which mysteriously surfaced in the hands of Austria's wholly-owned auction house, the Dorotheum, has regularly, continuously and,

61. In the 1959 official Exchange of Notes between the United States and Austria confirming agreements reached in the May 1958 Dulles-Raab meeting, *Austria was required to omit the clause it had sought to incorporate waiving its compliance with Article 26 of the 1955 Treaty mandating restitution.* Indeed, the United States Note, in paragraph 3, added that "nothing in your note affects the provisions of the second sentence of paragraph 1, Article 26 of the State Treaty in respect of any future measures." The sentence referred to was a Treaty undertaking by Austria that, "where return or restoration is impossible," Austria would accord "compensation." Settlement of Certain Claims Under Article 26 of the Austrian State Treaty, Agreement effected by exchange of notes, May 1959, U.S. - Aus., 10 U.S.T. 1158, 1959 WL 59955.

62. Presidential Advisory Commission on Holocaust Assets in the United States, *Plunder and Restitution: The U.S. and Holocaust Victims Assets* 10, SR-160-62 (2002). The Commission reported that more than 90% of the recovered art was turned over to Austria. *Id.*

63. *See United States v. Portrait of Wally*, No. 99 Civ. 9940, 2002 WL 553532, at *8 (S.D.N.Y. April 12, 2002). That proceeding, *initiated by the United States*, concerns an Aryanized Schiele masterpiece that was in some fashion acquired by a Dr. Leopold, an Austrian who had amassed a significant collection. In 1994, Leopold was persuaded to create the Leopold Foundation, which came under the ownership and control of the Austrian government, and this painting and others were then assigned to the Foundation. *Portrait of Wally* thereafter entered the United States for exhibition and was later seized by the United States.

indeed, recently been offered for sale in the United States and elsewhere.[64]

The U.S. Presidential Commission examining looted art and assets confirmed in its 2000 report that post-war Austrian authorities were directed to and promised in the 1955 Treaty to return art and other plundered property, but that Austria's "restrictive restitution process impeded the return of assets to victims."[65] That violated the 1907 Hague Convention, to which both Austria and the U.S. were parties, as well as other explicit international covenants. *See* discussion *infra* notes 78-79 and accompanying text.

DISCUSSION

1. The Second Expropriation Exception is Dispositive. By its terms, the second FSIA expropriation exception applies to confer jurisdiction in this case without regard to retroactivity.[66] The causes of action here pleaded are in the nature of replevin or fraud, i.e., to recover property that is *today* wrongfully held by Austria. The statute of limitations is not a concern.[67] Indeed, trafficking in and knowing retention of

64. The Dorotheum's catalogues show that its U.S. "partner" galleries in California and New York participated in the sale. App. 70a.

65. Presidential Advisory Commission, *supra* note 62, at SR-160-61.

66. The second clause of the FSIA expropriation exception (28 U.S.C. § 1605(a)(3)) provides that immunity shall not be granted in any case:

> in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

See United States App. at 1a.

67. The Complaint alleges that the claims accrued in 1999 on discovery of deception. Jt. App. at 200a, 203a. This action was commenced within the three-year claim and delivery prescription (i.e., replevin). Cal. Civ. Proc. Code § 511.010, *et seq*. Under Austrian law, where a stolen painting is in the hands of one who cannot show good faith acquisition at a public auction (Cont'd)

stolen property are currently actionable under both U.S. and Austrian law.[68]

The FSIA, as this Court has suggested, may not be a model of clarity, but, as demonstrated in *Weltover*, it can be parsed, particularly when viewed in context.[69]

- The first requirement of the second expropriation exception is that the "property" at issue "*is owned*" by a sovereign or sovereign entity asserting the immunity - note the present tense "*is owned.*"

There can be no doubt that that requirement is here met; indeed, Petitioners proclaim current ownership (Pet. Br. at 5).

- The next requirement of that exception is that "in issue" are "rights in property *taken* in violation of international law." That phrase contains no temporal limitation, simply that it shall have at some point been "*taken.*"[70]

Certainly, there can be no doubt - and the foregoing historical discussion makes clear in context - that the Klimt paintings at

(Cont'd)

("öffentliche Versteigerung") or from a businessman authorized to sell the painting under the trade law ("befügter Gewerbsmann") the owner may sue for restitution ("Eigentumsklage/rei vindicatio") without being subject to any period of limitation. § 1459 ABGB. Austria agrees, *see* Jt. App. at 245a - 246a.

68. *Id.*; *see also* Strafgesetzbuch § 164 (1)-(2), Leukauf/Steininger, Kommentar zum Strafgesetzbuch (1992), Rz 13, Fabrizy, St. GB (2002), § 164 Rz 2; 18 U.S.C. § 2314.

69. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612-13 (1992).

70. This FSIA exception does not fix the identity of the "taker" (i.e., that it must have been the claimant to sovereignty); although it stands to reason that a nexus must be shown. And here that nexus, as Chief Justice Taft made clear decades ago in *Arbitration (Great Britain v. Costa Rica)*, 18 Am. J. Int'l L. 147 (1923), is at the very least, successor liability on the part of the claimant to sovereignty in whose hands the ill-gotten gains reside. *See Lighthouse Arbitration (France v. Greece)*, 12 R.I.A.A. 155; 23 I.L.R. 659 (Perm. Ct. Arb. 1956), *see also* J.L. Brierly, *The Law of Nations, An Introduction to the Law of Peace* 156-57 (1963).

issue here were among the many *"taken in violation of international law"* and the Complaint makes that claim.[71]

> • What remains is the requirement that the entity asserting sovereignty *"is* engaged in *a* commercial activity in the United States" – again note the use of the present tense *"is"* and the requirement that it simply be *"a"* commercial activity.

There can be no doubt that Austria "*is engaged in a* commercial activity in the United States" – note also that the reference here is not to any particularized commercial activity (e.g., one related to the subject matter of the claim or the property in issue) but simply to *"a commercial activity."* The Complaint alleges in fulfillment of this requirement that Austria has, *inter alia,* sold in the United States to U.S. citizens guidebooks and other publications prominently displaying one of the subject paintings, publishes tourist advertising through a wholly-owned entity that maintains offices in various U.S. cities, exchanges works of art with U.S. Galleries for exhibition in the U.S. and Austria in return for admission fees, and has exhibited in the U.S. at least one of the paintings at issue here, not to mention the ownership of U.S. real estate which is used for the promotion of Austrian business interests.[72] Indeed, the United States recently seized one Aryanized Schiele painting shipped into the United States by Austria's government-owned Leopold Foundation[73] and another Austrian instrumentality (the Dorotheum) has repeatedly and recently offered for sale, through "partners" in the United States, Aryanized art and valuables, including Schiele paintings, Bloch-Bauer porcelains and Rothschild china.

The analytical approach used in *Weltover*[74] answers the Court's inquiry: Jurisdiction is present and, within the framework of the FSIA's expropriation exception, it really

71. *See, e.g.,* Hague Convention, *supra* note 15; Jt. App. at 203a-205a. At the very least, the issue of violation is one for the trier of fact.

72. Jt. App. at 157a-159a.

73. *See Portrait of Wally,* 2002 WL 553532, at *8.

74. *Weltover,* 504 U.S. at 611-14.

makes no difference when the taking or other relevant facts occurred – cognizability is not retrospective. The inquiry should end here.

2. Austria's Immunity Expectations. Whether viewed in terms of "expectation of sovereign immunity," as Austria would have it, or "notice" as this Court stated it almost 200 years ago,[75] Austria knew before and during the war (e.g., under the London Declaration) that it was the policy of the United States that all forced "transfers of, or dealings with property, rights and interests of any description" in any of the Axis countries faced invalidation, and further knew, as substquently expressed in the Bernstein Letter, that the United States would not prevent U.S. courts from asserting jurisdiction.[76] And when the years passed and Austria's repeated promises to make restitution were shown to be illusory, the Secretary of State warned Austria's Chancellor that Austria could not expect to "prevent private persons from advancing [restitution] claims."[77]

(a) 1907 Hague Convention. Notice that restitution was mandated as a matter of international law can be found in the Hague Convention of 1907, to which Austria and the United States were parties.[78] Indeed, well before that, art restitution had been prescribed and the Hague Convention simply expanded and made universal the imperative that seizures of art "should be made the subject of legal proceedings."[79]

75. Pet. Br. 12-13, 31, 35; *The Schooner Exchange v. M'Faddon*, 11 U.S. 116, 146 (1812).

76. 8 *Dep't St. Bull.* 21-22 (1943); App. 29a.

77. App. 45a.

78. Hague Convention, *supra* note 15, at *40. Article 56 of the Hague Convention expressly forbids any "seizure of . . . works of art," as well as numerous other cultural objects, and specifically states that that such seizures "should be made the subject of legal proceedings." What's more, Article 3 of the Hague Convention states that "[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." *Id.* at *17-18.

79. The international community first condemned wartime looting of art and other cultural property and commanded restitution at the 1815 (Cont'd)

(b) Bernstein, its Antecedents and Progeny. Perhaps the most telling event within this historical record, both as to notice and purpose, are the series of Executive Branch policy statements and directives nullifying Holocaust-era seizures, commanding restitution and articulating U.S. policy as being not merely to encourage other nations to effect restitution, but "to relieve American courts from any restraint upon their jurisdiction to pass upon the validity of the acts of the Nazi officials" in Holocaust-related litigations. (App. 29a).

Petitioners argue that the Bernstein Letter was intended to be limited to the Act of State defense and to Germany (because that was the issue in *Bernstein*) and that it had no application to Austria. Petitioners omit, however, to mention State Department records that show otherwise. As the State Department Legal Adviser charged with restitution and art issues, Ely Maurer, noted in his departmental background summary, the Bernstein Letter was not issued in a vacuum, nor was it limited to Act of State or to Germany; rather, it "was issued as the culmination of an already

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Convention of Paris. Lawrence M. Kaye, *Laws in Force at the Dawn of World War II: International Conventions and National Laws, in The Spoils of War* 101 (citing Alan Marchisotto, *The Protection of Art in Transnational Law*, 7 Vand. J. Transnat'l L. 689, 693, 697 (1974)). These principles were also incorporated into the Lieber Code in 1863. *Id.* at 101 (citing George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field*, 1 Am. J. Int'l L. 13 (1907)). The Lieber Code, Washington, D.C., Apr. 24, 1863, art. 35, *reprinted in* 1 *The Law of War: A Documentary History* 165 (Leon Friedman ed., 1972). In 1874, the Lieber Code served as the basis for the Declaration of the Conference of Brussels, which prohibited wartime seizure or destruction of works of art and, in 1880, it was used by the Institute of International Law in formulating the rules for land warfare known as the Oxford Manual. Project of an International Declaration Concerning the Laws and Customs of War, *adopted by* the Conference of Brussels, Aug. 27, 1874, art. 8, *reprinted in* 1 Am. J. Int'l L. 96 (Supp. 1907); Kaye, *supra* at 101-02 (citing James Brown Scott, 1 *The Hague Peace Conferences: A Series of Lectures Delivered Before the Johns Hopkins University in the Year 1908*, at 526 (1909)). In 1907, these efforts culminated in the Hague Convention. Michael J. Kurtz, *American Cultural Restitution Policy in Germany During the Occupation, 1945-1949*, at 2-3 (1982).

matured and enunciated Department policy which had been developing over a period of years . . . ." (App. 48a). Maurer continued:

> The Executive Branch had participated in or issued, during the period 1943 to 1947, a number of declarations, statements, directives and military government laws condemning the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their control.

(App. 48a-49a). Among the policy statements of the United States, cited both in the Maurer memorandum and in the Bernstein Letter, were the London Agreement (which related to *all* "Axis" and occupied lands) and Military Government Law No. 59 on the Restitution of Identifiable Property (which was to serve as the model for Austrian restitution).[80] Thereafter, as Mr. Maurer noted, the issue arose in 1945 in the context of the return of vested property held by the Office of Alien Property ("OAP"). The Chair of the House Judiciary Committee, introduced legislation, *at the request of the Administration,* ultimately enacted as P.L. 322, 79th Cong., 2d Sess., C. 83, authorizing return of property where, as the legislative history made clear, there were involved "acts of enemy governments which sought to divest nonenemies of their property rights, either directly or by purported confiscation . . . ." Then Under Secretary of State Acheson confirmed that this reflected the Department's policy. (App. 53a).

The issue next arose in the context of debt claims by successors-in-interest of the former owners of the accounts. In an October 12, 1948, letter "cleared" by Mr. Tate, the State Department advised the OAP that, notwithstanding

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80. The record reflects that the United States insisted that Austria enact similar legislation. *See* Jt. App. at 214a. Thus, the *Nichtigkeitsgesetz* ("Nullity Law") was passed, declaring all transactions that took place as a result of Nazi persecution "null and void." *Nichtigkeitsgesetz*, Federal Law Gazette/ BGB1 No. 106/1946.

Bernstein I (which had declined jurisdiction),[81] "the Department of State is of the view that it is against the policy of this Government to accord any validity to the German confiscatory and discriminatory laws, decrees and acts . . . ." (App. 59a).

Thereafter, on March 4, 1949, Judge David Bazelon, then Assistant Attorney General and Director, OAP, confirmed, following consultation with the State Department and relying on some of the same precedents that Mr. Tate later cited in his Bernstein Letter, that the Justice Department's Office of Alien Property had concluded that no validity should be accorded Holocaust-era confiscatory and discriminatory acts and decrees. (App. 64a-65a).

The Bernstein Letter, issued in connection with *Bernstein II*, followed the Bazelon Letter by some six weeks, on April 27, 1949. There, in a Holocaust-era expropriation litigation, the State Department advised the Second Circuit, that "[a]fter internal discussion" and citing a lengthy series of precedents (which were omitted from later judicial references to the Letter), the articulated policy of the Executive Branch "with respect" to Holocaust-era claims "*is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of the Nazi officials.*" (App. 59a) (emphasis added).

Weeks later, without in any way limiting its force to Act of State defenses (or otherwise) or the locus of Germany's wrongs, the State Department published a separate formal policy statement, reiterating

> this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls

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81. *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246, 252 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947); *Cf. Bernstein, supra* note 47 [hereinafter "*Bernstein II*"].

> . . . that *it is this Government's policy to undo forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and . . . that the policy of the Executive with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.*[82]

Whatever may have been the Executive Branch's *general* policy on applying the comity-based common law doctrine of sovereign immunity, the historical record leaves no doubt that, well before the 1952 Tate Letter, Holocaust-related restitution claims were accorded special treatment, a view that even the dissenters in *Banco Nacional de Cuba,* found "defensible."[83]

(c) Pre-Tate Letter Common Law Afforded Jurisdiction. Viewed from still another perspective, Austria could not have had any expectation that its trafficking in Aryanized property would be immunized. While Petitioners and their *Amici* maintain that prior to the 1952 Tate Letter the United States adhered to the "absolute theory" of immunity, that is not correct as the historical record evidences. Commercial activity, whether by a sovereign or its instrumentality, has not been viewed in the United States as immunized for almost two centuries (irrespective of whether the property was expropriated, seized or lawfully

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82. 20 *Dep't. St. Bull.* 592-93 (1949) (emphasis added). Whether viewed as creating a "Nazi-seizure" exception to the "absolute theory" or as the beginning of the "restrictive theory" beyond simply commercial activity (generally credited to the 1952 Tate Letter), the practical effect here is the same.

83. *First Nat'l City Bank v. Banco Nacional de Cuba,* 406 U.S. 759, 789 n.12 (1964).

at hand). That was the law in Austria since well before the Anschluss and certainly since then.[84]

As Chief Justice Marshall explained in *Planters' Bank* "[i]t is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."[85] More recently, Justice Scalia put it this way in *Weltover*, "when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's acts are 'commercial'. . . ."[86] And if one looks only to Austria's exhibition of paintings in America and its attendant reciprocal agreements and sales activities, "private player" activity becomes evident; they are no different from those of the Guggenheim, the Frick Collection, the J. Paul Getty Museum or the Barnes Foundation.[87] Add to that Austria's other commercial activities and the conclusion is evident.

Preceding and following Chief Justice Marshall's holding in *Planters' Bank*, this Court reiterated the view that where a sovereign or its instrumentality engages in commercial activity of the kind that a private party might engage in it foregoes immunity.[88] Section 69 of the

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84. *See Collision with Foreign Government-Owned Motor Car (Austria) Case* 40 I.L.R. 73 (*Aus. Sup. Ct.* 1961) *cited in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 702 n.5 (1976); *Dralle v. Republic of Czechoslovakia*, 17 I.L.R. 115 (*Aus. Sup. Ct.* 1950).

85. *Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. 904, 907 (1824).

86. *Weltover*, 504 U.S. at 614-15.

87. *Cf. In re Barnes Found.*, 672 A.2d 1364 (Pa. Super. Ct. 1996).

88. *See, e.g., The Santissima Trinidad*, 20 U.S. 283 (1822); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *see also Royal Italian Gov't v. Nat'l Brass & Copper Tube Co.*, 294 F. 23 (2d Cir. 1923), *cert. denied*, 264 U.S. 587 (1924); *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929); *Coale v. Societe Cooperative Suisse des Charbons, Basle*, 21 F.2d 180 (S.D.N.Y. 1921).

Restatement made exactly that point prior to the enactment of the FSIA.[89] True, for a brief period in the 1920s, apparently contrary holdings issued, particularly that of this Court in *Berizzi Bros. Co. v. S.S. Pesaro*.[90] However, *Berizzi*'s holding was soon eroded and then negated by this Court.[91] Indeed, contrary to what Petitioners and their *Amici* have told this Court, the Executive Branch likewise espoused the view we urge.

In 1927 Secretary of State Frank B. Kellogg advised the Attorney General and the Court in *Deutsches Kalisyndikat* that "it has long been the view of the Department of State that agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoy no privileges or immunities. . . ."[92] Secretary Kellogg also transmitted an excerpt from the Final Report of the 1927 World Economic Conference held in Geneva, which concluded that "when a Government carries on or controls any commercial . . . enterprise, it shall not . . . be treated as entitled to any sovereign rights. . . ." (App. 69a).

Indeed, the issue can be resolved by an extant Treaty. The 1921 Treaty of Peace between Austria and the United States incorporated Article 233 of the 1919 Treaty of St. Germain, which provided that "[i]f the Austrian Government engages in international trade, *it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty*". According to the State

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89. Restatement (Second) of Foreign Relations Law of the United States § 69 (1965).

90. *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926).

91. *See Dunhill*, 425 U.S. at 700-02; *Nat'l City Bank v. Republic of China*, 348 U.S. 356, 361 (1955), *reh'g denied*, 349 U.S. 913 (1955); *Hoffman*, 324 U.S. at 30; *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943).

92. App. 67a; *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d at 200.

Department, *the 1921 Treaty* was still in force when Mrs. Altmann filed her complaint and *is still in force today*.[93]

Several conclusions thus emerge. To whatever extent the so-called absolute theory of immunity obtained in the United States prior to the 1952 Tate Letter, it was by no means absolute when it came to commercial activity. Indeed, that was Austria's view.[94] And where the activity involved expropriated or seized property, such property, this Court held, is "liable to the jurisdiction of our Courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been devested . . . ."[95] Finally, where it comes to art, the restitution obligation existed and was accepted by Austria and the United States long before the Anschluss.

2. Austria was not entitled to Immunity prior to 1955. The *sine qua non* of sovereign immunity is that the claimant be a sovereign[96] at the time of the acts complained of.[97] However, Austria was not a sovereign – at least it was not an unqualified sovereign. More to the point here, Austria had no reasonable expectation to treatment as such for immunity purposes from the March 1938 Anschluss until the 1955 Treaty was ratified. The point was contemporaneously conceded by Austria, first in the formal

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93. Treaty Establishing Friendly Relations, August 24, 1921, U.S. - Aus., art. I, 42 Stat. 1946, T.S. No. 659 (*incorporating* Treaty of St. Germain-en-Laye with Austria, Sept. 10, 1919, art. 233, T.S. No. 11) (emphasis added); U.S. Department of State, Office of Legal Advisor, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force 13 (2003).

94. *See Dralle* and *Collision with Foreign Government-Owned Motor Car (Austria) Case*, *supra* note 84.

95. *The Santissima Trinidad*, 20 U.S. at 354.

96. *Morgan Guar. Trust Co. of N. Y. v. Republic* of *Palau*, 924 F.2d 1237 (2d Cir. 1991); *Klinghoffer v S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991), *remanded to* 795 F. Supp. 112 (S.D.N.Y. 1992).

97. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).

1950 note it delivered to its occupiers imploring grant of sovereignty,[98] and again, in the December 21, 1953, communiqué issued by then Chancellor Julius Raab invoking lack of sovereignty as a "sword" to justify refusing restitution claims for heirless Jewish property.[99] And, as we have previously noted, the United States shared that view.[100] Whether viewed as qualified recognition or otherwise, the reality of the time was clear and need not burden this proceeding unduly - in the real world, Austria had surrendered statehood quite voluntarily to Hitler.[101]

With war's end Austria was not afforded sovereignty or independence. As stressed by the United States, in urging in *United States v. Portrait of Wally* precisely the point we make here: "[u]ntil the signing of the Austrian State Treaty in 1955, the allies would 'sit in judgment' of the Austrian government, in that all official acts required their approval."[102] While the trappings of governmental powers

98. Carlyle, *supra* note 34, at 508-10.

99. *Austria in Denial of Jewish Charges, supra* note 33, at 16.

100. However, it was clear that whatever the *de jure* status of Austria may have been following the Anschluss, it lacked independence. Adamovich, *supra* note *58*, at 35 (President of Austria's Constitutional Court concluding that Austria lacked sovereignty prior to 1955). And Austria, which was soon cast in the role of an enemy, (*see Uhl*, 137 F.2d at 904), was reminded in the Moscow Declaration "that she has a responsibility, which she cannot evade, for participation in the war at the side of Hitlerite Germany . . ." 9 *Dep't St. Bull.* at 310 (1943).

101. Additionally, it defies credulity to suggest that Austria, a wartime enemy of the United States (either as part of Germany or for its own acts) could have had any expectation of immunity for its barbarism. In *The Schooner Exchange,* Justice Marshall made clear that only a "foreign sovereign with whom the government of the United States is at peace . . . and demeaning herself in a friendly manner, should be exempt from the jurisdiction of the [United States]." *See The Schooner Exchange*, 11 U.S. at 147; *Berg v. British & African Steam Nav. Co.*, 243 U.S. 124 (1917); *see also Hoffman*, 324 U.S. at 30; *The Santissima Trinidad*, 20 U.S. at 354. *Amicus*, The United States, dismisses these cases because they involve shipping. *See* United States Br. 25 n.16. That is too simplistic a distinction. The standard was explicit and was reiterated on numerous occasions by this Court. *Id.*

102. *Portrait of Wally*, 2002 WL 553532, at *8.

existed, final authority was in the hands of the Allied Powers. The sovereignty notion also ignores the 1955 Treaty and its expressed affirmation that its purpose and intent was the "re-establishment" of Austria "as a sovereign, independent and democratic state",[103] with which President Eisenhower, Secretary of State Dulles and the Senate contemporaneously concurred. Such recognition was, however, coupled with a moral and legal imperative. Articles 25 and 26(1) directed that Austria would thereafter make full restitution.[104]

The Legislative and Executive branches definitively spoke to Austrian sovereignty when that issue was squarely addressed in 1955: Austria was not a sovereign from 1938 to 1955.[105] That judgment controls.[106]

The analysis set forth above is *not* intended to suggest that the Court should here rule upon sovereignty. Instead, we submit that it is simply too glib and immoral for Austria to say that it may yet again evade promised restitution, previously because it was *not* sovereign[107] and now because it *is* sovereign and assertedly immune. The Treaty that re-established Austrian sovereignty also reiterated its restitution obligation, and whether viewed as a condition subsequent or in the nature of estoppel, the result is the same. More importantly, it simply cannot be said that, prior to the 1952 Tate Letter, Austria had any expectation of

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103. 1955 Treaty, *supra* note 52, at *4.

104. *Id.* at *39-40.

105. "Independence" - i.e., the absence of a "supreme authority above it [the asserted sovereign] that can interfere with its freedom of action within its realm", Steven Lee, *A Puzzle of Sovereignty, Sovereignty Either Is Or Is Not,* 27 Cal. W. Int'l L.J. 241, 252 (1997), - has long been recognized as the *sine qua non* of sovereignty. *See* Rosalyn Cohen, *The Concept of Statehood in United Nations Practice,* 109 U. Pa. L. Rev. 1127, 1139 (1961); *see also Morgan Guar.,* 924 F.2d at 1243.

106. *Jones v. United States,* 137 U.S. 202, 212 (1890), *quoted with approval in Oetjen v Cent. Leather Co.,* 246 U.S. 297, 311 (1918).

107. *See* Chancellor Raab's 1953 quotation, *supra* note 33.

immunity from restitution claims or that the FSIA's expropriation exception retroactively created a liability or imposed an obligation against which Austria had previously been immunized.[108]

Indeed, with the concurrence of the United States, Austria represented in writing to this Respondent in January 2001 that the majesty and force of governmental power would not be wielded to deprive her of a fair measure of Justice.[109] And, again, that promise is betrayed.

The holding below sustaining jurisdiction should be affirmed.

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108. *See Hughes Aircraft Co. v. United States,* 520 U.S. 939 (1997) *on remand,* 119 F.3d 796 (9th Cir. 1997); *Landgraf,* 511 U.S. 244.

109. Jt. App. at 243a. We need not dwell upon the so-called General Settlement Fund agreement of 2001, referred to in that letter. As noted, art, like so many other Aryanized assets (e.g., virtually every asset not exclusively owned by the Austrian Federal Government) is there *excluded.* Suffice it to say, that Bazyler correctly notes that agreement suffered fatal flaws. Bazyler, *supra* note 3, at 108.

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