

## EDITORIAL COMMENT

### THE STATE TREATY WITH AUSTRIA

By the signature of the State Treaty with Austria in the Belvedere Palace at Vienna on May 15, 1955, the pledge given by the "Big Three" in the Moscow Declaration of November 1, 1943, has finally been redeemed. It was a long and hard road which led to this treaty. Nearly three hundred fruitless negotiation sessions had been held since 1946, although a draft treaty had been ready since 1949. The Berlin Conference, held at the beginning of 1954, led to a new deadlock, due to the insistence by the Soviet Union on continued occupation. The situation looked rather gloomy.<sup>1</sup> At the Berlin Conference Mr. Molotov had asked for a new article, providing effective measures against "anschluss" and prohibiting Austria from entering any coalition or military alliance with any state which had fought Hitlerite Germany.

It was the Austrian Government, bent as always on making use of any chance, which took the initiative. Chancellor Julius Raab visited Washington from November 22 to 26, 1954, where he was received in a friendly manner,<sup>2</sup> and also had talks with Great Britain and France. After a corresponding declaration by Mr. Molotov in Moscow and preliminary negotiations with the Austrian Ambassador in Moscow, the Soviet Union invited the Austrian Chancellor on March 24, 1955, to come to Moscow. There Soviet-Austrian negotiations took place, and on April 15, 1955, a Soviet-Austrian understanding<sup>3</sup> was signed in the Kremlin. A Soviet note of April 19, 1955,<sup>4</sup> proposed to the West a Foreign Ministers' meeting in Vienna for the purpose of signing the treaty. The West wanted first a conference of ambassadors and the Soviet Union agreed. This conference took place in Vienna from May 1 to 13, 1955, and was followed on May 15 by the signature of the treaty by the five Foreign Ministers. The treaty went into force on July 27, 1955, upon completion of ratification by the five signatories.

The treaty<sup>5</sup> consists of a preamble and nine parts in thirty-eight articles.<sup>6</sup> There can be no doubt that the terms of this treaty are much more favorable to Austria than those of the draft treaty, for it embodies the Soviet concessions contained in the Soviet-Austrian understanding of April

<sup>1</sup> See this writer's editorial, "Infelix Austria," 48 A.J.I.L. 453-458 (1954).

<sup>2</sup> See text of U. S.-Austrian Statement in *New York Times*, Nov. 27, 1954, p. 3. The United States recognized the "courage, resourcefulness and fortitude of the Austrian Government and its people."

<sup>3</sup> Text in Sen. Exec. G, 84th Cong., 1st Sess., p. 40; Supplement to this JOURNAL, p. 191 below.

<sup>4</sup> Text in 32 Dept. of State Bulletin 734 (1955); *New York Times*, April 20, 1955, p. 4.

<sup>5</sup> Official English text in Sen. Exec. G, 84th Cong., 1st Sess., reprinted in Supplement to this JOURNAL, below, p. 162; see also *New York Times*, May 16, 1955, pp. 6-8.

<sup>6</sup> The draft treaty had fifty-nine articles.

15, 1955. At the Ambassador's Conference in Vienna the Soviet Union wanted, first, the terms of the draft treaty to stand, the Soviet concessions to be contained in a bilateral Soviet-Austrian Protocol. But she accepted the American compromise proposal to leave the old text of Article 35 of the draft treaty<sup>7</sup> and to include the Soviet concessions in Annex II. At the same time, Article 36 of the treaty declares the Annexes to be integral parts of the treaty. Two further concessions were made during the Ambassador's Conference in Vienna: dropping of Article 16 of the draft treaty<sup>8</sup> and of other articles and eliminating from Article 17 the limitation by which the size of the Austrian Army was fixed at 53,000 men. Finally, the Foreign Ministers themselves, at Austria's request, eliminated the partial war-guilt<sup>9</sup> clause from the preamble.

The treaty is a bilateral treaty between Austria and the four Occupying Powers. The latter are referred to as the "Allied and Associated Powers." But whereas this formula, used in the peace treaties concluded after the first World War, meant by "Associated Powers" the United States, it now means probably the Soviet Union. The treaty contains an accession clause.<sup>10</sup> It is in four equally authentic texts: Russian, English, French and German, in that order.

From an Austrian point of view, the very heart of the treaty is Article 20 on evacuation. With the coming into force of the treaty, the Four-Power Agreement on Control of June 28, 1946, terminated and the Inter-Allied Command ceased to exercise any functions with regard to the administration of the City of Vienna. Upon completion of withdrawal of the occupation troops from Austria the agreement on zones of occupation shall terminate. These forces shall be withdrawn from Austria within ninety days of the coming into force of the treaty and, "in so far as possible, not later than December 31, 1955."

Thus, after seven years of annexation by Hitlerite Germany and ten years of occupation by Hitler's conquerors, Austria is re-established as a sovereign, independent and democratic state. This re-establishment is recognized by the Allied and Associated Powers, which declare that "they will respect the independence and territorial integrity of Austria."<sup>11</sup> The frontiers of Austria are the same as those existing on January 1, 1938.<sup>12</sup> By Article 11 Austria undertakes to recognize the Peace Treaties with Italy, Rumania, Bulgaria, Hungary, Finland and Japan, and a peace treaty which might be concluded with Germany.

Austria's sovereignty is limited by her obligations concerning the protection of human rights, by the guarantee of a democratic government, and her obligations concerning the protection of the rights of the Slovene and Croat minorities in Carinthia, Burgenland and Styria.<sup>13</sup> It is highly in-

<sup>7</sup> Now Art. 22 of the treaty.

<sup>8</sup> Art. 16 dealt with the "voluntary repatriation of displaced persons within Austrian territory," an article which might have endangered many refugees in Austria from behind the Iron Curtain. Text of this article in *New York Times*, May 4, 1955, p. 12.

<sup>9</sup> Original text in *New York Times*, May 15, 1955, p. 13.

<sup>10</sup> Art. 37.

<sup>11</sup> Arts. 1 and 2.

<sup>12</sup> Art. 5.

<sup>13</sup> Arts. 6, 7, 8.

teresting to see that, in spite of the disappearance of the minorities treaties concluded after the first World War and in spite of the silence on this problem in the earlier peace treaties, the international protection of minorities again has its place here, as in the Understanding on Trieste.

Under Article 9 of the treaty, Austria is bound to destroy all Nazi organizations. There are, further, two special clauses concerning Austrian legislation: Austria is bound to continue and maintain Austrian laws enacted since May 1, 1945, aimed at the liquidation of the remnants of the Nazi regime, and to maintain the Austrian law of April 3, 1919, concerning the House of Hapsburg-Lorraine.<sup>14</sup> Article 4 contains the prohibition of "anschluss" with "Germany," which probably means the present Federal Republic of Germany as well as a possible reunited Germany. This prohibition is much more detailed than the corresponding Article 88 of the Versailles Treaty and Article 80 of the St. Germain Treaty.

The treaty imposes no limitations on the size of the future Austrian Army. But there are two types of restrictions: first, with respect to the prohibition of certain weapons, and duties as to the disposal of war matériel of Allied and German origin.<sup>15</sup> It is interesting to note that Austria shall not acquire or possess any war matériel of German manufacture, origin or design, nor manufacture war matériel of German design;<sup>15a</sup> and shall not acquire or manufacture civil aircraft of German or Japanese design.<sup>16</sup> Second, certain persons<sup>17</sup> are not permitted to serve in the Austrian armed forces. Austrian prisoners of war shall be repatriated as soon as possible.<sup>18</sup> Allied war graves in Austria will be respected, preserved and maintained by Austria, as well as "the memorials to the military glory of the armies which fought on Austrian territory against Hitlerite Germany."<sup>19</sup> Each of the military clauses remains in force until modified in whole or in part by agreement between the Allied and Associated Powers and Austria, or, after Austria's membership in the United Nations, by agreement between the Security Council and Austria.<sup>20</sup>

The latter clause leads us to remark that the Allied and Associated Powers promise in the preamble "to support Austria's application for admission to the United Nations organization." Austria will, no doubt, apply very soon for admission and, under the treaty, there is little doubt that she will be admitted. Will Austria's admission break the deadlock as to the many other states which have been waiting in vain for years to be admitted?

It will also be interesting to see whether Austria as a permanently neutral state will be granted a special legal position as a Member of the United Nations. For there is a further important limitation of Austria's sovereignty: her permanent neutrality. In Moscow the Austrian Delegation gave assurances that

<sup>14</sup> Art. 10. The Austrian Chancellor, it was reported, regretted this article as a "superfluous limitation of Austrian sovereignty."

<sup>15</sup> Arts. 13 and 14.

<sup>15a</sup> Art. 14.

<sup>16</sup> Art. 16.

<sup>17</sup> Art. 12; it is, in general, an anti-Nazi article.

<sup>18</sup> Art. 18.

<sup>19</sup> Art. 19.

<sup>20</sup> Art. 17.

the Austrian Republic intends not to join any military alliances or permit military bases on her territory, and will pursue a policy of independence in regard to all States.

The treaty contains nothing on Austria's permanent neutrality. In Vienna Mr. Molotov proposed that the four Powers "shall respect and observe a statement of Austria's permanent neutrality of the kind observed by Switzerland." The West had no objection in principle, but preferred to await the form and text of this Austrian declaration. Austria will soon enact a constitutional law declaring Austria's "perpetual neutrality" and will inform all states of this declaration and request its recognition. Austrian permanent neutrality will, therefore, be created by municipal law, although in consequence of the Soviet-Austrian understanding. But Austria will then ask for international recognition and guarantee of her permanent neutrality and of the inviolability of her territory.

As to the economic clauses of the treaty, Austria's status as a liberated country is shown by the fact that no reparations are asked,<sup>21</sup> and Austrian property in Germany is to be returned;<sup>22</sup> equally, all Austrian property in Allied territory is to be returned. Only Yugoslavia shall have the right to seize, retain, or liquidate Austrian property, rights and interests within her territory.<sup>23</sup> But Austria is now negotiating with Yugoslavia for a return of Austrian assets. Whereas Article 22 (Article 35 of the draft treaty) is as it was, Annex II contains the Soviet concessions; the details are not mentioned there, but only in the Soviet-Austrian understanding. Austria will not only regain the other "German assets in Austria," but also her oilfields and the Danube Shipping Company. This means much to Austria not only economically, but also has the important political consequence that there will be no "Soviet enclaves" in independent Austria. With respect to these returned assets Austria is only limited by Article 22, paragraph 13: she is not allowed to pass to foreign ownership rights and properties connected with the concessions regarding extraction and exploitation of oil; and, further, "none of the properties transferred as former German assets shall be returned to ownership of German juridical persons or where the value exceeds 260,000 shillings (ten thousand dollars) to the ownership of German natural persons."

Austria, on the other hand, waives all claims against Germany (except the return of Austrian property), and renounces all claims against the Allies; property of any of the United Nations in Austria must be restored.<sup>24</sup> The property of minority groups in Austria, who have suffered from racial or other persecution since March 13, 1938, is to be restored.<sup>25</sup> Pending the conclusion of commercial treaties, Austria, during a period of eighteen months from the coming into force of the treaty, must not discriminate against any of the United Nations and must grant them national and most-favored-nations treatment, but only on the condition of reciprocity. Austria shall grant to no country exclusive or preferential rights with regard

<sup>21</sup> Art. 21.

<sup>23</sup> Art. 27.

<sup>25</sup> Art. 26.

<sup>22</sup> Art. 23.

<sup>24</sup> Arts. 23, 24, 25.

to the operation of commercial aircraft in international traffic.<sup>26</sup> Navigation on the Danube shall be free for national vessels and goods of all states.<sup>27</sup>

The clauses concerning the interpretation of the treaty and the settlement of disputes contain no reference to the International Court of Justice. There is, first, the organ of the four "Heads of Mission" of the former Occupying Powers. Under Article 34, these Heads of Mission, acting in concert, will, for a period not to exceed eighteen months from the coming into force of the treaty, "represent the Allied and Associated Powers in dealing with the Government of Austria in all matters concerning the execution and interpretation of the Treaty" and will "give guidance, technical advice and clarification." The Heads of Mission also have other functions, not limited to eighteen months, under other articles. According to Article 35, any dispute as to execution or interpretation of the treaty, where not otherwise provided for, and which is not settled by direct diplomatic negotiations, shall be referred to the Heads of Mission. If the latter do not resolve the dispute within two months, the dispute shall, unless another procedure is mutually agreed upon, be referred, at the request of either party, to a Commission of Three, whose decision is binding. The Commission consists of one representative of each party and a third member of a third country, selected by mutual agreement. In case of non-agreement within a month, either party may request the Secretary General of the United Nations to make the appointment. In case property, rights or interests of minority groups are heirless or unclaimed, the Austrian Government, under Article 26, shall transfer these properties to agencies or organizations to be designated by the Heads of Mission by agreement with the Austrian Government. Any dispute concerning United Nations property in Austria (Article 25) shall, under Article 30, be referred to a Conciliation Commission of two members. If within three months no agreement has been reached, either government may ask for the addition of a third member selected by mutual agreement. If no such agreement can be reached within two months, the appointment will be made, at the request of either party, by the Heads of Mission. If the latter cannot agree within one month, the Secretary General of the United Nations may be requested by either party to make the appointment.

Whereas all agreements on West Germany, including the latest Paris Agreements, are (because of the remaining problems of a German peace treaty, Germany's frontiers and her reunification) provisional only, the State Treaty with Austria gives the impression of a treaty destined to form the basis of the international position of Austria for a long time to come. On the other hand, as the Austrian Treaty, although signed in 1955, dates back to the draft of 1949, in some ways it gives a curious impression in its clauses concerning Germany, signed at a time when West Germany had already become a sovereign state, an ally in NATO, and on the way to re-  
armament. Apart from the anti-anschluss clauses and from Article 22,

<sup>26</sup> Art. 29.

<sup>27</sup> And not only for all of the United Nations (Art. 31).

paragraph 13, already mentioned, we can point to Article 15 which obliges Austria to co-operate in the prevention of German rearmament outside of German territory.

Although the State Treaty is much more favorable to Austria than the draft treaty, it still imposes heavy burdens on Austria. She must deliver each year for ten years one million tons of oil to the Soviet Union.<sup>28</sup> She has to pay in the next six years one hundred and fifty million dollars in goods<sup>29</sup> for the German assets in Austria held by the Soviet Union and to be returned to Austria under the treaty. This is no small burden. Austria has to pay two million dollars for the return of the Danube Shipping Company. But the Austrian Chancellor declared that Austria will be able to carry these burdens without having to lower her standard of living. The returned German assets in Austria—about 340 enterprises, one hundred agrarian, two hundred and forty industrial—will create many problems. Perhaps one hundred enterprises, originally “aryanized” by Hitlerite Germany, have to be restored under the treaty. There are difficult problems concerning returned agrarian enterprises.<sup>30</sup> Many of the returned industrial enterprises are facing bankruptcy; all of them require much new capital for modernization. The evacuation of occupation troops, so highly welcomed, means, on the other hand, a yearly loss of sixty million dollars in foreign currency. The creation of an Austrian Army strong enough to protect her permanent neutrality, involves, of course, high costs. Negotiations are going on, as mentioned, with Yugoslavia. There will be negotiations with the holders of American oil concessions in Austria. Negotiations are pending with the Committee of Jewish Claims against Austria for the compensation of victims of Nazism. There is the problem, arising out of Article 22, paragraph 13, against which West Germany has protested both to the West and to Austria. But Chancellor Raab declared that the question of honestly acquired property of German citizens might lend itself to negotiations.

There will be, further, the many and often delicate problems of Austria's new permanent neutrality. There is the problem of the five-year commercial treaty to be concluded with the Soviet Union. There is need to remain in the best relations with the United States, which, up to now, has alone furnished Austria with capital. Notwithstanding the anti-German features of the treaty, Austria needs good relations with West Germany; these relations as to trade, capital, and tourist traffic are extremely important to Austria.

<sup>28</sup> Austria's oil production was three million tons in 1954.

<sup>29</sup> This latter concession was already made by the Soviet Union at the Berlin Conference in 1954.

<sup>30</sup> *E.g.*, those originally belonging to Jewish owners, but where for fifteen years small farmers have been compulsorily settled; or those still belonging to German nationals. A special case is that of the latifundia of Prince Esterházy in the Burgenland which certainly do not constitute “German assets,” but were long ago confiscated by the Soviet Union. Later, Prince Esterházy, a Hungarian citizen, together with Cardinal Mindszenty, was condemned by Communist Hungary and all his property declared confiscated.

The treaty creates a sovereign, independent, democratic Austria which is treated as a liberated country. It is very interesting to inquire what the standpoint of the treaty is with regard to the problem of Austria's continuity and identity in law with pre-1938 Austria. We may say that the identity is upheld, without closing one's eyes to realities. First, the German annexation is recognized as a fact. The preamble states that Hitlerite Germany annexed Austria by force on March 13, 1938, and incorporated its territory into the German Reich. The Moscow Declaration is merely quoted as "regarding" the annexation null and void and as "affirming their wish to see Austria re-established as a free and independent State." The preamble expressly speaks of the annexation of Austria and of her "participation in the war as an *integral* part of Germany." Although in one case the phrase "during the German occupation of Austria" is used,<sup>31</sup> the treaty regularly uses the phrase "during the period of the German annexation of Austria," which is counted from March 13, 1938, to May 8, 1945. That is why the Austrian partial war-guilt clause was removed. That is why the treaty always speaks of the "war with Germany" or of "the war in Europe." That is why the treaty in Article 12, paragraph 2, discriminates against Austrian nationals "who were German nationals *before* March 13, 1938." It is also highly interesting to note that, in contrast to the clause concerning Ethiopia in the Peace Treaty of 1947 with Italy, the Allied and Associated Powers promise in Article 3 that they will incorporate into the German peace treaty a clause concerning "the renunciation by Germany of all territorial and political claims in respect of Austria and Austrian territory." This annexation is also the reason why, under Article 28, "interest payments on Austrian Government securities, falling due after March 12, 1938 and before May 8, 1945 constitute a claim on Germany and not on Austria."

Second, an independent and sovereign Austria is, under Articles 1 and 2, only re-established by this treaty. But Austria, even if not sovereign, has existed again since May, 1945. Third, this Austria since 1945, and the sovereign Austria re-established by the treaty, are identical in law with the Republic of Austria of 1918. That this is so, is clearly shown by Article 10, paragraph 2, which obliges Austria to maintain the Austrian law of April 3, 1919. It is clearly shown by Article 28, paragraphs 2 and 4, as to Austrian laws before March 13, 1938, and prewar contracts concluded by the Government of Austria or persons who were nationals of Austria on March 12, 1938.

The treaty, therefore, recognizes Austria's extinction in fact between March 13, 1938, and May 8, 1945, and yet recognizes her identity and continuity. It is therefore a treaty proving Marek's<sup>32</sup> proposed "fourth rule" as to the identity of states: complete but illegal suppression of a state in time of peace, but continuance of a mere "ideal legal notion" of the state in question; identity and continuity, provided this state is re-established in fact within a reasonable time.

<sup>31</sup> Art. 25, par. 4a.

<sup>32</sup> Krystyna Marek, *Identity and Continuity of States in International Law* (Geneva, 1954).

The treaty, of fundamental importance to Austria, also has worldwide political consequences. What will be the results of the Austrian Treaty in world politics remains to be seen. But there is no doubt that Austria will not only solve the economic problems arising from the treaty, but will manage her permanent neutrality successfully and in a manner advantageous for Austria and in the interest of world peace. Austria can in her new task be sure of the continued friendship of the United States, expressed in the message of the President of the United States to the President of Austria.<sup>33</sup> For, as the President said, the "conduct of the Austrian people during the ten long years they have labored under the heavy burden of foreign occupation has commanded the profound respect of all the American people."

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#### END OF THE COLD WAR?

The "Summit" Conference at Geneva,<sup>1</sup> together with arrangements for supplementary meetings, seriously calls for reconsideration of the international situation. Included therein are the pressing problem of armaments and nuclear warfare and the less dramatic but, to readers of this JOURNAL, no less interesting problem of an increased willingness to make use of international law for the disposition of international issues.

An end to the "cold war"—Are we not adopting too many of these journalistic stereotypes?—might, of course, mean the beginning of a hot or shooting war. That is not anticipated. According to all reports, Soviet Russia is not at the present time disposed to launch or to provoke full-scale military hostilities with the United States, and it is certain that the United States is far from any disposition to make war on Soviet Russia. These policy attitudes, if they may be so called, are probably both entirely sound and also reliable.

This leaves the fundamental hypothesis of Soviet Russian policy of world conquest and Communist domination unresolved. According to fundamental Marxist doctrine, this hypothesis would seem to be imperative, and many utterances from Moscow would certainly seem to support this interpretation. On the other hand, there has always run through Marxian and other Communist theory a strain of empiricism and even expediency which permits and even imposes deviation from doctrine when such a course seems desirable. At the least or the most, we simply have no certain answer now.

As for armaments limitation, including nuclear weapons, the problem has to be left to the governments concerned and to the technical experts, in spite of the intense interest in the matter of all students of international relations and the anxieties of the common man. There is some evidence that the leading governments concerned are sufficiently alarmed concerning the potential effects of nuclear and other recently developed weapons to be seriously inhibited in any activities which might, even ac-

<sup>33</sup> 32 Dept. of State Bulletin 873 (1955); New York Times, May 16, 1955, p. 6.

<sup>1</sup> See 33 Dept. of State Bulletin 171-177 (1955).