Michigan Law Review

Volume 42 | Issue 3

1943

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WHEN the United States entered this war and even before, it was evident that the measures and definitions of the Trading with the Enemy Act of October 6, 1917, were obsolete instruments with which to cope, in economic and psychological warfare, with such dangerous enemies as the Axis, particularly Germany. Germany's preparations and planning for the war date back two decades, but took on intensified and conspicuous form only after the access of the Nazis to power.

In all types of warfare numerous weapons, devices and means are openly or secretly used. "Camouflage" is not the exclusive domain of military warfare; it is more frequently and more successfully used in economic and psychological warfare. Various forms—commercial enterprises of many different types, organizations whose names hold them out as pursuing scientific, humanitarian, or other philanthropic or beneficent purposes—are used as cloaks for hostile and subversive activities. Various types of dummies are employed to achieve the end of the real undisclosed principals. Nationality and citizenship are among the most expedient disguises used, the nationality of the adversary being occasionally assumed to shield insidious activities directed against it.

According to census reports filed with the Treasury Department, pursuant to Executive Order 8389 of April 10, 1940, as amended, June 14, 1941, commonly referred to as the "Freezing Order," the total volume of property now frozen and subject to regulation by Foreign Funds Control is about $7,000,000,000. Of this total Germany's property amounts to $100,000,000 or approximately 1.4%; Japan's, $150,000,000 or approximately 2.14%; Italy's, $50,000,000 or approximately .75%.[1] These figures show that Germany succeeded in reducing her investments in this country to a comparatively small amount.[2] However, the above figure does not represent the actual

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[1] Amounts are taken from the Brief of the United States as amicus curiae, p. 4, in Commission for Polish Relief, Ltd. v. Banca Nationala a Rumaniei (National Bank of Rumania), 288 N.Y. 332, 43 N.E. 345 (1943). These figures are slightly higher today.

[2] Included in this amount are also sums belonging to those refugees from Germany whose property was subject to the census.

amount of German property in this country. Various enterprises organized under the law of the United States are German-owned. The shares are held either by American citizens or by citizens of neutral or other countries. The large amounts of Swiss and Netherlands funds reflect to a certain extent German-owned property, as is evidenced by various vesting orders.[3] Racial, family and business friendship ties have been successfully utilized by Germans according to a well-planned scheme for cloaking their objectives. According to the results of investigations by the Temporary National Economic Committee, German interests were mainly in certain chemical, dye, drug and alcohol industries. In addition, Germany had a number of valuable patents and agreements concerning patents in this country.[4]

But these results do not give a complete picture, as they reflect only discernible colors—"legal title," "formal ownership" or the "fronts" —not the "actual ownership" or the actual control. The real situation is disguised by a tangled maze of legal forms.

The important part Germany played in some industrial cartels, and the utilization of its influence through these cartels and through patents is probably well-known from the daily press.[5] The functions of German enterprises and their officials abroad were not limited merely to participation in regular industry or commerce. It was part of their task, too, to acquire the raw materials necessary for war industries and to preseve South American markets for German industry in the postwar period. Furthermore, their positions and contacts enabled them to render other valuable services: spreading Nazi propaganda and obtaining important information. For the achievement of the latter ends the amount of investment is not so important; the chief instruments are key positions in all spheres of American life and the procuring of foreign currency for subversive activities. In this work, a conspicuous role was assigned to shipping and transportation firms.

Not only were German subsidiaries abroad mobilized to serve the gigantic war machine, but foreign and American subsidiaries in Germany were geared into the German war economy. For that purpose various ingenious and unscrupulous devices were used which, at the be-

[3] See U. S. TREASURY DEPT., ADMINISTRATION OF THE WARTIME FINANCIAL AND PROPERTY CONTROLS OF THE UNITED STATES GOVERNMENT 29 ff. (1942) (hereafter referred to as "Foreign Funds Pamphlet").

[4] GILBERT, EXPORT PRICES AND EXPORT CARTELS (1940) (U. S. Temporary National Economic Committee, Monograph No. 6).

[5] See also Kronstein, "The Dynamics of German Cartels and Patents," 9 UNIV. CHI. L. REV. 643, 10 id. 49 (1942); GUENTER REIMANN, PATENTS FOR HITLER (1942).

ginning, appeared to many credulous people to be merely measures dictated by economic necessity. Exchange control, blocked accounts, moratorium agreements, import quotas, clearing and payment agreements, various "domestication" requirements for foreign subsidiaries, pseudo-taxation, etc., are some of the methods successfully employed by the Germans.

The fundamental objective of economic warfare is the reduction of the economic component of the war potential of one belligerent and the increase of the economic component of the war potential of the other belligerent. The achievement of this objective requires devices which can breach the economic fortifications, and penetrate the "camouflage" of the enemy. One such implement is the notion "national" and "enemy national" as developed within the framework of the Trading with the Enemy Act of October 1917,[6] as amended by the First War Powers Act, 1941.[7] The use of this implement is designed ultimately to deprive the enemy of anything which could lend aid or comfort to him in the conduct of war, or which could be used by the United States in its own war effort.

The present paper discusses the determination of enemy character within the framework of the T.E.A. of October, 1917, as amended by the F.W.P.A., 1941, and some problems of public international law in connection therewith.[7a]

I

THE DETERMINATION OF "ENEMY" CHARACTER

The terms "enemy" and "alien enemy" have different meanings in various branches of the law, under common and statutory law, in different statutes, and even within the framework of the same statute. Yet it seems that these distinct meanings have not always been borne in mind.[8]

[6] 40 Stat. L. 411 (1917), 50 U.S.C. (1940), Appendix, § 1 et seq. (hereinafter referred to as "T.E.A.").

[7] 55 Stat. L. 838 (1941), 50 U.S.C. (1940), Appendix, § 1 et seq. (hereinafter referred to as "F.W.P.A. 1941").

[7a] For a discussion of the evolution of the Trading with the Enemy Act through legislative enactments and executive orders, and some problems of constitutional and administrative law raised by the last amendment to this act, see Lourie, "The Trading with the Enemy Act" 42 MICH. L. REV. 205 (1943).

[8] Cf. the meaning of "enemy" as used with reference to the political status of such person, 50 U.S.C. (1940), § 21 ff.; relating to the apprehension, restraint, internment or removal of designated persons, "natives, citizens, denizens or subjects of the hostile nation or government," 40 Stat. L. 531 (1918). The same test is used in the definition of "alien enemy" for the purpose of naturalization laws in the Nationality Act of 1940, as amended December 13, 1941, 54 Stat. L. 1150, § 326 (a). The test here is origin

In the primary meaning of the words, an "alien friend" is the subject of a foreign state at peace with United States; an "alien enemy" is a subject of a foreign state at war with the United States, which meaning must be taken to be the true one unless evidence is at hand that some other meaning is intended. The T.E.A. does not change the legal status of alien enemies; it merely defines "enemy" "for the purpose of such trading [with the enemy] and of the act" and for no other purpose.[9]

A. *In the Trading with the Enemy Act as Originally Enacted*

The principal but not the sole test for determining enemy character within the meaning of the T.E.A. is residence. "Residence" has to be distinguished not only from "domicil" but also from "residence" as used in other acts.

> "The word 'residence' is often but not always used in the sense of domicil, and its meaning in a legal phrase must be determined in each case."[10]

In order to accord the greatest effect to legislative purpose and the context in which the term "residence" is used in the T.E.A., the courts have given to the term a meaning broader than and different from "domicil" but not so broad as to include a place of temporary sojourn; thus, a mere transient is not a resident.[11] The residence has to be a voluntary one.

or citizenship of a country with which the United States is at war. The term is again differently used in connection with the civil status of a person. In using "enemy" in connection with civil rights and disabilities, a distinction must be made between the use of the term in the sense of a definition such as given in the act, or as used in various state statutes relating to acquisition or conveyance of land, limitation, etc., and the term "alien enemy" as used at common law. At common law, in turn, the words "alien enemy" are used in different senses. See, HUBERICH, TRADING WITH THE ENEMY 51 (1918); Sommerich, "Recent Innovations in Legal and Regulatory Concepts as to the Alien and His Property," 37 AM. J. INT. L. 58 (1943); 10 GEO. WASH. L. REV. 851 at 853 (1942); Correa, "The Enemy Alien Problem," 107 N.Y.L.J. 1799 (1942); Steckler and Rosenberg, "Real Property of Enemy Aliens," 107 N.Y.L.J. 1674, 1692, 1710 (1942); Pratt, "Present Alienage Disabilities under New York State Law in Real Property," 12 BKLYN. L. REV. 1 (1942).

[9] Techt v. Hughes, 229 N.Y. 222 at 236, 128 N.E. 185 (1920). A similar opinion was recently expressed by Lord Greene, M.R., in In re an Arbitration between N.V. Gebr. van Udens Scheepvart en Agentuur Maatschappij and Sovfracht, [1941] 3 All. Eng. Rep. 419 at 425, with respect to the English T.E.A. of 1939: "The Trading with the Enemy Act, 1939, does not purport to impose or define enemy status otherwise than for the purposes of the Act. . . ."

[10] CONFLICT OF LAWS RESTATEMENT, § 9, comment e (1934). See also I BEALE, CONFLICT OF LAWS, § 10.14 (1935).

[11] Cf. Stadtmuller v. Miller, (C.C.A. 2d, 1926) 11 F. (2d) 732, 45 A.L.R. 895

The expressions "enemy" and "ally of enemy," as defined by section 2 of the T.E.A., include (paraphrasing the statute):

1. The government of any nation with which the United States is at war or of any nation which is an ally of such nation, or any political or municipal subdivision thereof, or any officer or official agency thereof.

2. An individual, partnership, or other body of individuals of any nationality, resident within enemy or ally of enemy territories (including territory occupied by their military and naval forces).[12]

3. Any individual resident outside the United States and doing business within enemy or ally of enemy territory (or territory occupied by their forces).

4. Corporations incorporated within enemy territory or ally of enemy territory or incorporated within any other country than the United States and doing business within such territory.

5. Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation or an ally of any nation with which the United States is at war, other than citizens of the United States wherever resident or wherever doing business, as the President may proclaim.

In the light of present-day conditions, the inadequacy of the definitions of the terms "enemy" and "ally of enemy" in the original act becomes apparent, when we look at the persons and property *excluded from it:*

1. Corporations organized under the laws of one of the states of this country even if actual control through stock ownership or otherwise lies in the hands of an enemy country or its nationals.[13]

2. Corporations organized under the laws of enemy-occupied territories and not doing business within such territory.[14]

3. Partnerships resident within the United States irrespective of whether the partners are citizens of enemy countries.

4. Enemy citizens or subjects resident in the United States, in the absence of a presidential proclamation.[15]

at 905 (1926), and the cases collected there; Szanti v. Teryazos, (D.C.N.Y. 1942) 45 F. Supp. 618.

[12] Citizens of the United States residing in enemy territory take the status of enemies. Kahn v. Garvan, (D.C.N.Y. 1920) 263 F. 909.

[13] Behn, Meyer & Co. v. Miller, 266 U.S. 457, 45 S. Ct. 165 (1925); Hamburg-American Line Terminal & Navigation Co. v. United States, 277 U.S. 138, 48 S. Ct. 470 (1928); Fritz Shultz, Jr., Co. v. Raimes & Co., 100 Misc. 697, 166 N.Y. S. 567 (1917). See also Toa Kigyo Corp. v. Offenberger, (N.Y. S. Ct., Feb. 14, 1942) 107 N.Y.L.J. 687.

[14] T.E.A., § 2 (1) (a), (2) (a).

[15] Ex Parte Kawato, 317 U.S. 69, 63 S. Ct. 115 (1942).

5. United States citizens resident in the United States, even though acting for the benefit of, on behalf of, or as a cloak for the enemy.

B. *Under the Trading with the Enemy Act as Amended by the First War Powers Act, 1941*

On April 10, 1940, the day following the German invasion of Denmark and Norway, the President issued Executive Order 8389, setting up in the United States a system of control of foreign assets called Foreign Funds Control or Freezing Control. The entry of the United States into the war made it expedient to utilize and synchronize the work of the freezing control apparatus with the entire war mechanism. In this process some tools of the former were taken over and further developed for adjustment to war needs. One such tool is the term "national" (sometimes referred to as "blocked national"). "National," as used in the Freezing Order, has a meaning entirely different from its meaning in international or domestic law or common parlance. With reference to individuals the term "national" includes:[16]

1. An individual who has been domiciled in or has been a subject, citizen or resident of a blocked country at any time on or since the effective date of the order; or

2. An individual who is acting for the benefit of or on behalf of any blocked country or national thereof; or

3. A person whose name appears either on the "Proclaimed List of Certain Blocked Nationals" or on the list of the so-called "*ad hoc* blocked nationals." The Treasury Department distinguishes between these two lists. The former includes only persons outside the United States, is widely published and circulated and is prepared by all the agencies referred to in the President's Proclamation 2497 of July 17, 1941.[17] The "*ad hoc* blocking list" is of persons within the United States, and their names are not published in the Federal Register. Persons are designated as *ad hoc* blocked nationals by action of the Secretary of the Treasury.

With reference to partnerships, associations, corporations or other organizations (hereafter referred to as "organization"), the term "national" includes:

1. An organization organized under the laws of or having had its principal place of business in a blocked country since the effective date of the order; or

[16] Executive Order 8389 of April 10, 1940, as amended, June 14, 1941, § 5(E), 6 FED. REG. 2897 (1941).

[17] 6 FED. REG. 3555 (1941).

2. An organization a substantial part of whose stock, shares, bonds, debentures, notes, drafts or other securities or obligations are owned or controlled (or have been owned or controlled since the effective date of the order) by any blocked country or blocked national; or

3. An organization which, for any other reason, is controlled by any blocked country or national; or

4. An organization which is acting for the benefit of or on behalf of any blocked country or blocked national; or

5. An organization which is included in the "Proclaimed List of Certain Blocked Nationals" or in the list of "*ad hoc* blocked nationals."

For our purposes the following features of the term "national" should be noticed:

1. The test is based on citizenship, domicil, and residence, sometimes used alternatively, sometimes cumulatively.[18] The word "residence" is used in its broadest possible sense or even beyond it, as mere temporary sojourn in a blocked country on or since the so-called "effective date of the order," making a person a "national" or depriving him of being a "generally licensed national."[19]

2. The abandonment of the place of organization as the *sole* test of determining "nationality" of corporations, partnerships, associations, or other organizations, and the introduction of the "principal place of business,"[20] of the "substantial in-

[18] Ex. Ord. 8389, § 5(E) (i); and cf. the general license as it was issued on June 14, 1941; now the license is amended.

[19] This is in accord with the purpose of freezing, as the mere presence in German or German-occupied territory subjects him to the highly probable methods of duress and pressure.

[20] The "principal place of business" has been variously defined. In American law it has been held the place designated in the incorporation papers, the place where the governing power of the corporation is exercised by the corporate directors, or a question of fact, etc. See 9 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, perm. ed., § 4373 (1931), and citation of cases there. In continental law it is frequently used synonymously with "seat" (siège social, Sitz) and may designate the location of "administrative center." According to the "administrative center" doctrine, a corporation is an enemy if its administrative center is in an enemy country. In The Polzeath, [1916] Prob. 117, a prize case, the court held that for the purpose of determining the principal place of business the place of control was decisive.

See also The St. Tudno [1916] P. 291 at 297 and 299; The Hamborn [1919] A.C. 993.

The phrases: "principal place of business," "administrative centre" or "place of central management" and "seat of the corporate government" have been referred to as determining the "domicil" and "commercial domicil" of corporations, Wheeling Steel Corporation v. Fox, 298 U.S. 193 at 211, 56 S. Ct. 773 (1935); First Bank Stock Corporation v. Minnesota, 301 U.S. 234 at 237, 57 S. Ct. 677 (1936); DICEY, CONFLICT OF LAWS, 5th ed. by Keith, Rule 19 and p. 163 (1932); CHESIRE, PRIVATE

terest,"[21] control by any blocked country or national[22] "acting for the benefit or on behalf of any 'blocked national',"[23] and "*personne*

INTERNATIONAL LAW, 2d ed., 198-203 (1938); GOODRICH, CONFLICT OF LAWS, 2d ed., 71-72 (1938). However, *stricto sensu*, both "domicil" (meaning "one technically pre-eminent headquarters" [Holmes, J., in Bergner & Engel Brewing Co. v. Dreyfus, 172 Mass. 154 at 157, 51 N.E. 531 (1898)] assigned to the corporation by law) and "commercial domicil" (akin to concept of residence) must be distinguished.

[21] What constitutes "substantial interest" is difficult to define and must be considered to be a question of fact. The order does not provide any definition of "substantial interest." For different suggestions, see Harris and Joseph, "Present Problems Concerning Foreign Funds Control," 105 N.Y.L.J. 336, 354, 372 (1941); 41 COL. L. REV. 1039 at 1047 (1941); and Bloch and Rosenberg, "Current Problems of Freezing Control," 11 FORD. L. REV. 71 at 76 (1942).

[22] The control test or doctrine has been commonly associated with dicta in the famous case of Daimler Co. v. Continental Tyre & Rubber Co., [1916] 2 A.C. 307. Said Lord Parker (344-345): "A company incorporated in the United Kingdom . . . can only act through agents properly authorized and so long as it is carrying on business in this country through agents so authorized and residing in this or a friendly country it is prima facie to be regarded as a friend. . . . Such a company may, however, assume an enemy character . . . if its agents or the persons in de facto control of its affairs, whether authorized or not, are residents in an enemy country. . . ." "Control" can mean the organ in which the controlling power is legally vested or de facto control. The dicta of Lord Parker seems to indicate the latter, though no evidence to this effect was adduced in the case. For a discussion of the Daimler case, see Norem, "Determination of Enemy Character of Corporations," 24 AM. J. INT. L. 310 (1930); FARNSWORTH, THE RESIDENCE AND DOMICIL OF CORPORATIONS 127 ff. (1939). In our case "control" has both meanings in view of the explicit wording of the order. In the United States the doctrine of the Daimler case was rejected during and after the first World War. See cases cited supra, note 13. For another internationally known case coming within the purview of the "control doctrine," see the Lenzbourg case cited infra, note 24. See also infra, note 43. The control test was also adopted by the peace treaties, as e.g., Versailles Treaty, art. 297(b); Treaty of St. Germain, art. 249; Treaty of Trianon, art. 232.

[23] The "*for the benefit of an enemy*" test was already known to the T.E.A. of 1917, not as a test for determining the "enemy" character, but as a test for the unlawfulness of the trading. § 3(a) of the T.E.A. Though the "benefit" test may appear to be a subsidiary or a supplementary test, nevertheless, because of the way in which this test is enumerated, it assumes crucial importance. As a matter of fact, it is the basic test.

The "*acting on behalf of any 'national'*" test was applied in Alexewicz v. General Aniline & Film Corp.,—Misc.—, 43 N.Y.S. (2d) 713 (1943), involving a breach of a written contract of employment between the litigants. Defendant was absolved from liability on the ground that performance was rendered impossible by lawful governmental action consisting of the termination of the contract by the Treasury's representative supervising defendant's business. The court went so far as to find that plaintiff, a naturalized American citizen of German descent, was a "national" of Germany because he was employed by the German-controlled defendant corporation and was therefore "acting in its behalf." Resort to this reasoning was unnecessary, for the determination that plaintiff is a "national" might have been based on § 5E (iv) and on the last sentence of § 5E. This reasoning obviuosly results from confusing two relationships stemming from the employment contract: one between employee and em-

interposee" [24] tests in addition to the "place of organization" test. These tests are not mutually exclusive; they can be used alternatively and cumulatively.[25]

3. The introduction of the principle of "divisibility of 'national' character." A person is a "national" to the extent that he is or has been, since the "effective date," acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such blocked foreign country.[26] This can also be called the "benefit principle."

4. The introduction of "dual" or "multiple" nationality, for a person may be a "national" of more than one designated foreign country.

5. A person is treated, for the purposes of the Freezing Order, as a "national" of Germany or Italy when his name appears on the "Proclaimed List of Certain Blocked Nationals," [27] or is deemed to be a national of any other blocked country determined by the Secretary of the Treasury, or when his name appears on the list of "*ad hoc* blocked nationals."

ployer, and the other between third persons and the employee acting on behalf of the employer. In the external relations the agent is a "national" only to the extent that he is acting on behalf of a "national" [§ 5E (iii)]. The plaintiff, however, in suing in this case as contracting party, acted in his own behalf.

[24] The "*personne interposée*" doctrine can be considered to be enunciated in Societé Conserve Lenzbourg, (Cour de Cassation, July 20, 1915) 42 CLUNET, JOURNAL DE DROIT INTERNATIONAL PRIVÉ 1164 (1915). The court held itself to be entitled "to go to the bottom of things and ascertain whether it was a French company in reality or such only in appearance." If the latter, such a company is merely a "*personne interposée*" and in reality an enemy company. The court went even further, holding that companies of a predominantly enemy character in allied or neutral territory and having branches in France were enemy companies. The gist of the "interposed person" test found its reflection in § 3(a) of the T.E.A., though not for purposes of determining enemy character but for determining the unlawfulness of a trade. This section provides that "It shall be unlawful (a) For any person . . . to trade . . . either directly or indirectly, with, to, or from, or *for, or on account, or on behalf of, or* for the benefit of . . . an enemy or ally of enemy."

[25] Cf. Drewry v. Onassis, 179 Misc. 578, 39 N.Y. S. (2d) 688 (1942), in which the court held that the circumstance that most of the stock in plaintiff corporation—a corporation incorporated in France, having its registered office in Paris (occupied France)—is held by a British subject residing in England, does not cancel the plaintiff's status as an alien enemy. Though the court bases its decision on the definition of "enemy" as given by § 2 of the T.E.A., its result indirectly confirms the nonexclusiveness of the various tests within the T.E.A. Said the court [39 N.Y.S. (2d) at 693]: "Whoever comes within the sweep of the definition is an enemy." The decision was reversed by the Appellate Division, 42 N.Y.S. (2d) 74 at 80 (1943), on the ground that the court found "no authority in statute or precedent to sustain a ruling which grants to a nonresident alien enemy the right to sue upon condition that the avails of his recovery be paid to the alien property custodian."

[26] Cf. Executive Order 8389, § 5(E) (iii).

[27] See Proclamation of the President 2497, July 17, 1941, 6 FED. REG. 3555 (1941).

6. The hardships which have been or might be caused by all-inclusive definitions of "national" are remedied or mitigated by a flexible system of general and special licenses.

7. Finally, the term "national" is a term sui generis, originally designated for the purposes of freezing control only, now used also for purposes of section 5(b) of the T.E.A., as amended by F.W.P.A. 1941, as a pivotal term.

The Executive Order of the President establishing the Office of the Alien Property Custodian and circumscribing its functions, powers and duties defines the terms "designated enemy country" and "nationals of designated enemy countries":[28]

> "The term 'designated enemy country' shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary, and Rumania) and any other country with which the United States is at war in the future. The term 'national' shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, provided, however, that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country."

From the above definition it follows that, without special determination by the Alien Property Custodian, mere residence in *enemy-occupied territory* does not make a person a "national of a designated enemy country," and in this respect the term is different from and narrower than the term "enemy" or "ally of enemy" as defined in section 2 of the T.E.A. It differs further from and is broader than "enemy" in that a person in nonenemy or nonenemy-occupied territory can be determined to be a "national of a designated enemy country" by the Alien Property Custodian not only if doing business within

[28] Executive Order 9095, March 11, 1942, as amended by Executive Order 9193, July 7, 1942 (hereinafter referred to as Alien Property Order), § 10(a), 7 FED. REG. 5205 (1942). For judicial reference to the term "national of a designated enemy country" see Stein v. Newton et al., 39 N.Y.S. (2d) 593 (1943).

enemy territory or if a native, citizen, or subject of the enemy, as was the case under section 2, but also if such person is controlled by or acts for the enemy, or if the national interest so requires.

Thus it can be stated that the term "national of a designated enemy country" is generally broader and more flexible than "enemy" in section 2 of the T.E.A. But it is narrower than the term "blocked national," for "national of a designated enemy country" is necessarily a "blocked national" but a "blocked national" is not necessarily a "national of a designated enemy country."

A very important term describing enemy character appears in General Ruling No. 11 of the Treasury Department,[29] which relates to trade or communication with or by "enemy nationals." This term "enemy national" is defined to include besides the governments of enemy countries and their agents wherever situated and the governments of any other blocked country having its seat within enemy territory: (a) *any individual within enemy territory* and any partnership, association, corporation or other organization, to the extent that it is *actually situated within enemy territory;* and (b) any person whose name appears on the "Proclaimed List of Certain Blocked Nationals" and any other person to the extent that he is acting directly or indirectly for the benefit or on behalf of any such person.

As the same ruling describes "enemy territory" as including also enemy-occupied or controlled territory, it follows that the definition is in this respect (territorial) broader than "national of a designated country" as the latter includes persons within enemy-occupied territory only after certain specific determinations of the Alien Property

[29] March 18, 1942, 7 FED. REG. 2168 (1942); U.S. Treasury Department Release, March 18, 1942, as amended Sept. 22, 1942, Nov. 8, 1942 (No. 31, 40, 42) and Sept. 3, 1943, 8 FED. REG. 12287 (1943). The definition of Ruling No. 11 as it was prior to the last amendment was adopted by the Censorship Regulations, 8 FED. REG. 1644 (1943).

It may be of interest to note that the last amendment to General Ruling No. 11 made important changes. Among them, the one which is relevant to our discussion is summarized as follows: The subdivision of § 4, dealing with the definition of an "enemy national," is supplemented by a new clause (vi). As a result of this addition, the scope of the definition of an "enemy national" is extended to include any person to the extent that he is acting for the benefit or on behalf of an "enemy national" (a) who is within an enemy country, or (b) whose name appears on the "Proclaimed List of Certain Blocked Nationals." The acting on behalf of any person whose name appears on the Proclaimed List was also within the scope of the old definition but the latter did not have the "extent" limitation. This new clause (vi) of subdivision 4a refers to presence within "country against which the United States have declared war," while other clauses, except clause (i), refer to "enemy territory" which includes enemy-controlled or occupied territory.

Custodian mentioned above. Again, in this respect it corresponds more closely to the definition of "enemy" in section 2 of the T.E.A., with the difference that a partnership, corporation or association is an "enemy national" only to the extent that it is *actually situated* within enemy territory, not merely "*doing business*" there as in section 2. In view of the use of the description "any individual within enemy territory" and "actually situated within enemy territory," the term "enemy national" appears to be narrower than the terms "national of designated enemy country" and "enemy" as it requires actual presence within enemy territory. However, it may be in fact broader because of the wide range of possible application of the "black-list" device.

The definitions of "enemy national" were designed as substitutes for the concepts "enemy" and "ally of enemy" of the last war.[80]

> "...This change was made so that the public might be afforded a more precise understanding of the restrictions on trade and communications under wartime conditions. At the same time it also permitted an effective adaptation of these restrictions to the pattern of the present war."[81]

Finally, there is a very broad term, "designated national," used by the Alien Property Custodian in certain general orders to cover "any person in any place under the control of a designated enemy country or in any place with which, by reason of the existence of a state of war, the United States does not maintain postal communication."[82]

By way of brief recapitulation it might be stated that the following terms describing "persons" in a broader sense (including both physical and juridical) are now used within the framework of the T.E.A. of October 6, 1917 as amended:

1. "National of any foreign country" used in section 5(b) of the T.E.A. as amended by the F.W.P.A. 1941.

2. "Blocked national" or "national" used in and for purposes of freezing regulations.

3. "National of designated enemy country" used in and for purposes of the Alien Property Order and authorizing the vesting of foreign property in him.

4. "Enemy national" used in and for purposes of General Ruling No. 11 of the Treasury Department.

[80] See 51 YALE L. J. 1388 (1942). But see infra, note 33.

[81] U.S. Treasury Department Press Release No. 31, March 19, 1942.

[82] General Order No. 5 of the A.P.C., § 3 (c), August 3, 1942, 7 FED. REG. 6199 (1942).

5. "Designated national" appearing in certain general orders of the Alien Property Custodian.

6. "Enemy" and "ally of enemy" defined in section 2 of the T.E.A. of 1917 for the purposes of the act and largely superseded by "enemy national" and "national of designated enemy country."[33]

II

PROBLEMS OF INTERNATIONAL LAW

It is evident from the discussion of the definitions of the terms "national," "national of designated enemy country," "enemy national," "enemy," "ally of enemy," and "designated national," that these definitions may encompass citizens of the United States as well as foreigners. The terms designed to indicate enemy character may include not only citizens and subjects of the enemy but also citizens and subjects of a United Nation and of a neutral country. As section 5(b) of T.E.A., as amended, grants broad powers to the President with respect to all *foreign-owned* (not merely *enemy-owned*) property within the jurisdiction of the United States, the use of these powers with respect to nationals of allied and neutral and even enemy countries may give rise to problems of public international law. The actions of the officers entrusted with the enforcement of the T.E.A. of October 1917, as amended, manifest their awareness of these problems.

A. *'Enemy' under T.E.A. and in International Law*

While subdivision (A) of section 5(b) of T.E.A., as amended by the F.W.P.A. 1941, deals with American and foreign-owned property, subdivision (B) of the same section extends only to foreign-owned property. The authority which subdivision (A) confers upon the President can be briefly described as an authority for the exercise of "exchange control" in the broader sense of this term.[34] The section affects

[33] In cases decided in the courts recently the definition of "enemy" as given by § 2 is still referred to. Ex parte Colonna, 314 U.S. 510, 62 S. Ct. 373 (1942); Ex parte Kawato, 317 U.S. 69, 63 S. Ct. 115 (1942); Kaufman v. Eisenberg, 177 Misc. 939, 32 N.Y.S. (2d) 450 (1942); The Pietro Campanella, (D.C. Md. 1942) 47 F. Supp. 374; Drewry v. Onassis, 179 Misc. 578, 39 N.Y.S. (2d) 688 (1942); Draeger Shipping Co. v. Crowley, (D.C. N.Y. 1943) 49 F. Supp. 215. The continued reference to terms defined by § 2 is due mainly to uncertainty as to the extent of the effectiveness of the old provisions of the T.E.A. of October 1917, in view of the amendment to § 5(b) contained in title III of the F.W.P.A. 1941.

[34] For different meanings of the term "exchange control," see LOURIE, FREEZING OF FOREIGN ASSETS IN THE UNITED STATES, c. 5, "Exchange Control and Freezing" (1941) (unpublished Master's Essay, Burgess Library, Columbia University); PAUL

not only property subject to the jurisdiction of the United States,[35] but also property beyond this jurisdiction to the extent that its provisions are effective with respect to persons subject to the jurisdiction of the United States. Subdivision (B) of the present section 5(b) authorizes the President not only to "freeze" foreign property as did section 5(b) before its last amendment but also to vest it in such agency or person as the President may, from time to time, designate. It authorizes the President to order that such foreign property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest and for the benefit of the United States.

Section 5(b) does not distinguish between enemy and non-enemy property, and does not provide a standard for this differentiation. Nevertheless, a differentiation is made in the administration and enforcement of the act. The principal means by which this differentiation is effected are the various definitions designed to determine the character of the "foreign" person and his property. These definitions, being the creation of municipal law, do not necessarily coincide with corresponding definitions in international law.[36] It may be argued that to the extent that these definitions are broader than those of international law and include or affect persons and property belonging to a category to which the rules of international law extend different treatment (e.g., nationals of allied or neutral countries), there will arise possibilities of infringing upon rights protected by these rules. Thus, nationals of a United Nation or neutral country may become subject

EINZIG, EXCHANGE CONTROL (1934); HEILPERIN, INTERNATIONAL MONETARY ECONOMICS 237 (1939); E. B. DIETRICH, WORLD TRADE 125 (1939); NUSSBAUM, MONEY IN THE LAW 475 (1939); HOWARD S. ELLIS, EXCHANGE CONTROL IN CENTRAL EUROPE (1941); L. of N. 1938. II. A. 10 (II. Economic and Financial, Report on Exchange Control).

[35] This follows from the text of § 5(b) as amended by F.W.P.A., 1941. The new text reads: "by any person, or with respect to any property, subject to the jurisdiction of the United States. . . ." The old text read: "by any person within the United States or any place subject to the jurisdiction thereof. . . ." The old text, found to be a restrictive limitation, could have been construed not to contemplate assignments made abroad with respect to frozen assets in the United States. Kalnin v. Kleewen, (N.Y. City Ct., (Nov. 15, 1941) 106 N.Y.L.J. 1515 (freezing order held not to affect an assignment made in Latvia).

[36] It seems that logically the same problem presents itself here as that known in private international law as "qualification" or "characterization." On the problem of "characterization" in general, see ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS (1940); CHESHIRE, PRIVATE INTERNATIONAL LAW, 2d. ed., 24-25 (1938); Lorenzen, "The Qualification, Classification or Characterization Problem in the Conflict of Laws," 50 YALE L. J. 743 (1941); NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW, § 9 (1943).

to a kind of treatment to which only nationals and a certain category of residents of an enemy state may be subjected under international law.[37]

In considering this possibility, it is well to bear in mind the following points. First of all, the question of enemy character is to a great extent unsettled in international law. Enemy character is not identical with enemy nationality, though nationality may be one of the factors which determine enemy character. A number of other circumstances may be considered to constitute actual connection between the individual and the enemy: residence or commercial domicil within enemy territory; voluntary support of the enemy; and acting for the benefit of, on behalf of, or as a cloak for the enemy.

The unsettled nature of enemy character in international law is particularly evident with respect to corporations.[38] The question of enemy character of a corporation was obscured and unnecessarily complicated by the introduction of the vexed controversy concerning the "nationality" of corporations. Failure to realize that the relative importance of the concepts of "nationality," "domicil," and "residence" for the purpose of determining the enemy character of a corporation depends on the content given to them has largely contributed to the confusion. For instance, if the "nationality" of a corporation (assuming such a thing exists) [39] is determined by the place of incorporation, then the mere incorporation in one of the United States of a German-controlled company has little significance for the determination of the enemy character of the company. On the other hand, if "nationality" is determined by the domicil of the corporation, and its domicil is determined by the place of residence, and that, in turn, by the residence of the officers in control of the corporation, then the term "nationality" assumes decisive importance as a shorthand statement that the enemy character of corporations is determined by the residence of persons in control of the corporation. But such dialectics presume a set of peculiar equations between concepts which should be distinguished.[40] Not only

[37] See FOREIGN FUNDS PAMPHLET 29 ff. (1942), mentioning holdings in the names of Swiss and Dutch companies and companies of other neutral countries which were vested by this government.

[38] See 2 OPPENHEIM, INTERNATIONAL LAW, 5th (Lauterpacht) ed., 215, 220 (1935).

[39] See note, 43 COL. L. REV. 364 (1943), contributed by M. Meyer and H. Torczyner. But see 2 NIBOYET, TRAITÉ DE DROIT INTERNATIONAL PRIVÉ FRANÇAIS 255 ff. (1938). Cf. also NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 147 (1943).

[40] Cf. Merrick Dodd, Jr.'s review of FARNSWORTH, THE RESIDENCE AND DOMICIL OF CORPORATIONS (1939), in 53 HARV. L. REV. 508 (1940).

are these generalized symbols and their indiscriminate use a constant source of fallacies, since there are varying differences *between* the terms and various nuances *within* each of them, but they are also a stimulus for the type of dialectics demonstrated above. The differences existing between and within such terms as "domicil" and "residence" derive not only from the person, natural or juristic, in reference to which any of the terms are used, but also from the *connection* in which they are used and the *purpose* of the use.[41]

Corporations can never be "enemy persons."[42] Only the human activities carried on in the corporate name can make the so-called corporate property and activities serve the war effort of the enemy and hamper our own, and thus necessitate the treatment of the corporation as an enemy corporation. Where there is reasonable cause to believe that the corporate property and activities are, or may be, used in a manner detrimental to the United States, there is justification for appropriate measures to be taken in order to remedy the situation. Reasonable cause for such a belief may be found not only in the place of incorporation but in the "principal place of business"; in the character of persons having a substantial interest in the corporation, or in a nominal or *de facto* control of the corporation, and so forth.[42a]

[41] "I do not believe you can determine the exact scope of any legal concept unless you know what you are trying to do with it, because, as I said at the beginning, it is a tool which we use in order to make up our mind what we ought to do under the circumstances." Remark by Professor Walter W. Cook in 3 AM. L. INST. PROC. 226-227 (1925). See also COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 194-210, esp. 208 ff. (1942).

[42] See Lord Parker in Daimler Co. v. Continental Tyre Co., [1916] 2 A. C. 307 at 345: "It is not a natural person with mind and conscience . . . 'it can be neither loyal nor disloyal. It can be neither friend nor enemy'."

[42a] The shift of emphasis, in fixing enemy status, from "nationality" of corporations, when determined by the place of incorporation, to other tests is illustrated by the following: On the one hand, a corporation organized under American law, when owned or controlled by persons designated as enemies, may have enemy character attached to it; on the other hand, a corporation incorporated in territory now enemy-occupied may, under certain conditions, by moving its domicil to unoccupied territory or to an Allied or neutral country, remove the stigma of "enemy."

The latter proposition is exemplified by recent American and English decisions. In Chemacid Société Anonyme v. Ferrotar Corp., ———F. Supp.———(D.C.S.D. N.Y., Sept. 15, 1943), C.C.H. WAR LAW SERVICE, Foreign Supp., ¶ 66,155, it was held that a corporation organized under the laws of Belgium, which moved its seat ("siege social") to New York City in accordance with the Belgian Decree-Law of Feb. 2, 1940, as amended, particularly on Feb. 19, 1942, is to be considered as a resident alien corporation and not as a non-resident enemy alien, and may bring suit in American courts. The court referred to Owners of M.S. "Lubrafol" v. S.S. "Pamia," 1943, 1 All Eng. Rep. 269; and distinguished Drewry v. Onassis 266 App. Div. 292, 42 N.Y.S. (2d) 74 (1943), see supra, note 25, which relied on the House of Lords deci-

The principal aim of the definitions discussed above is to supply the government with a flexible device which will enable it to get to the bottom of things and ascertain whether this or other property or activity lends aid or comfort to the enemy, or represents an increment to the enemy war potential or, conversely, diminution of our own war potential.

The fact that the flexible device of "blacklisting," used widely by various powers in World War I, made possible the elastic extension of the category of persons defined as enemies, indicates that the adoption of the broadened scope of the present definitions is not a novel measure.

The preceding discussion of the determination of enemy character of persons and property may appear to neglect the *jus protegendi* over its nationals of an allied or neutral power. However, in view of the necessity of permitting flexible devices for the determination of enemy character,[43] the application of *jus protegendi* must be restricted. It is

sion in v/o Sovfracht v. Gebr. van Udens Scheepvaart, 1943, 1 All Eng. Rep. 76. To the same practical effect, though on a different issue (whether managing directors, appointed in accordance with the provisions of decrees, are to be considered as authorized to control accounts held in the name of the corporation by the defendant, an American bank), see Rembours en Industriebank N.V. v. The First National Bank of Boston, —— F. Supp. —— (D.C.D. of Mass., June 8, 1943) C.C.H. WAR LAW SERVICE, Foreign Supp. ¶ 70,545 involving change of seat ("plaats van vestiging") by a Netherlands corporation from the Netherlands to Curacao in accordance with the Netherlands Statute of April 26, 1940, and Royal Netherlands Decree of May 7, 1940.

The doctrine enunciated by the Chemacid and S. S. "Pamia" cases seems to be in accord with the views of both Dicey, supra note 20, and Cheshire, supra note 20, who, following the prevailing English doctrine, maintain that a corporation can change its domicil from the country of incorporation to another country. A contrary inference may be drawn from 1 BEALE, CONFLICT OF LAWS, 228 ff. (1935); RESTATEMENT, CONFLICT OF LAWS, § 41 (1934) and FARNSWORTH, THE RESIDENCE AND DOMICIL OF CORPORATIONS, 217-222 (1939). Farnsworth, while admitting that theoretically a corporation may acquire a domicil of choice, considers it unable in law to change its domicil of origin. In referring to American law for the support of his position, he seems not to have considered the modern American trend of getting away from the traditional concept of corporate domicil for certain purposes, a trend which is exemplified by Wheeling Steel Corp. v. Fox, 298 U. S. 193, 56 S. Ct. 773 (1935); First Bank Stock Corp. v. Minnesota, 301 U. S. 234, 57 S. Ct. 677 (1936); Neibro Co. v. Bethlehem Shipbuilding Corp., Ltd., 308 U. S. 165, 60 S. Ct. 153 (1939), particularly language at p. 169.

[43] This necessity is further evidenced by the use by other countries of tests and devices similar in substance.

England: The Trading with the Enemy Act of 1939, 2 & 3 GEO. 6, c. 89, bases the definition of "enemy," for purposes of the act, on residence in enemy territory for individuals; and for bodies of persons (whether corporate or unincorporated) on the "control" by enemies, "place of incorporation under the laws of a state at war with His Majesty," and "carrying on business in enemy territory"; but does not include any individual by reason only that he is an enemy subject. Sec. 2(1). The blacklisting

submitted that diplomatic intervention by a neutral or allied power would be justified only in the event of a materially erroneous determination of enemy character that actually resulted in damages to its nationals.[44]

Finally, the exigencies of modern total warfare do not permit rigid adherence to legal fictions or notions such as corporate personality or entity, etc., or even to legal rules drafted, in the main, to meet the ideas and conditions prevailing before World War I, when such an adherence could be used by the enemy for shielding or cloaking its hostile activities. The corporate veil has been pierced on various occasions in taxation cases[45] and in private litigations[46] where it would

device is also in use. Sec. 2(2). For a detailed discussion, see Parry, "The Trading with the Enemy Act and the Definition of an Enemy," 4 MOD. L. REV. 161 (1941).

Germany: The definitions of "enemy" for purposes of administration of enemy property are based, for individuals, on principles of nationality, or domicile or residence in any enemy state and, for corporations, on principles of seat ("*Sitz*") or principal office or incorporation in an enemy state. However, the Minister of Justice can provide for exceptions from the provisions establishing these principles. Article 3 of the decree of January 15, 1940 (REICHSGESETZBLATT. 1940. I. 191), as amended June 15, 1940 (R.G.Bl. 1940. I. 888), June 30, 1941 (R.G.Bl. 1941. I. 371) and April 14, 1942 (R.G.Bl. 1942. I. 171); C.C.H., WAR LAW SERVICE, Foreign Supp., ¶ 65,700.

In considering these rules, the overlapping of the comprehensive and rigid provisions of German currency control (*Devisenrecht*) should be borne in mind.

France: (Pre-Armistice) Arts. 2 and 3 of the decree of September 1, 1939 regarding Trading with the Enemy (Dalloz. 1939. IV. 431 at 432), and Art. 1 of the decree of September 1, 1939 dealing with sequestration of enemy property (Dalloz. 1939. IV. 433 at 434).

Belgium: Trading with the Enemy Act, Decree-Law, April 10, 1941, Art. 1. C.C.H., WAR LAW SERVICE, Foreign Supp., ¶ 65,695.

Japan: It is interesting to note that already in the last war the Imperial Ordinance 41, of April 23, 1917, provided as tests for the determination of enemy character, for purposes of trading with the enemy, in addition to the usual ones, the "management" and "influence" tests. C.C.H., WAR LAW SERVICE, Foreign Supp., ¶ 66,122.

[44] In this connection, the fact should not be overlooked that the Treasury considers the vesting of foreign property in the Secretary as merely a sequestration. See Press Release of the Secretary of the Treasury, Feb. 16, 1942, which states: "The question of the ultimate disposition of the property *sequestered* is being left open." (Italics added.)

For a recent judicial pronouncement to the same effect see Delehanty, S., in In re Renard's Estate, 179 Misc. 885, 39 N.Y.S. (2d) 968 at 971 (1943): "The Executive Order [referring to E.O. No. 9193 of July 6, 1942] whether examined alone or considered in the light of existing statutes and court decisions reveals no governmental intention either to confiscate property or to deprive an alien of his rights in property."

[45] For American cases on this point, see Wheeling Steel Corp. v. Fox, 298 U.S. 193, 56 S. Ct. 773 (1936), and First Bank Stock Corp. v. Minnesota, 301 U.S. 234, 57 S. Ct. 677 (1937).

[46] For American practice on this point, see 1 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, perm. ed., §§ 41-46 (1931), and the cases there cited.

serve the ends of justice. There is no reason why it should be preserved intact in times of emergency when lines of concrete and steel fortifications are being pounded and pierced in the struggle of nations for their existence.

B. *International Law and the Treatment of Private Enemy Property*

After the last war, the rule of international law with respect to the treatment of private enemy property was the subject of extensive discussion[47] and litigation. Three principal views were discernible:

a. The right of confiscation or expropriation without paying full or adequate compensation still exists.[48]

b. The opposite view maintained that the right of confiscation does not exist either because the World War did not change prewar rules of international law,[49] or because the right of confiscation is obsolete.[50]

c. It is a matter of controversy to what extent the practice of the nineteenth century has definitely crystallized into a customary rule of international law prohibiting the confiscation of private enemy property.

[47] For a general treatment of the subject, see 2 HYDE, INTERNATIONAL LAW, §§ 621-623 (1922); 2 OPPENHEIM, INTERNATIONAL LAW, 6th (Lauterpacht) ed., §§ 102-102(b) (1940); Borchard, "Treatment of Enemy Private Property in the United States before the World War," 22 AM. J. INT. L. 636 (1928); Borchard, "Reprisals on Private Property," 30 AM. J. INT. L. 108 (1936); MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS (1924); FENWICK, INTERNATIONAL LAW, 2d ed., 463 (1934); KUNZ, KRIEGSRECHT UND NEUTRALITÄTSRECHT (1935); Williams, "International Law and the Property of Aliens," 9 BRITISH YEARBOOK 1 (1928); Fachiri, "International Law and the Property of Aliens," 10 BRITISH YEARBOOK 32 (1929); GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY (1940); Herz, "Expropriation of Foreign Property," 35 AM. J. INT. L. 243 (1941).

[48] The United States Supreme Court in various dicta: Stoehr v. Wallace, 255 U.S. 239, 41 S. Ct. 293 (1921); United States v. Chemical Foundation, 272 U.S. 1, 47 S. Ct. 1 (1926); Central Union Trust Co. v. Garvan, 254 U.S. 554, 41 S. Ct. 214 (1920). See also WILLIAMS, CHAPTERS ON CURRENT INTERNATIONAL LAW AND THE LEAGUE OF NATIONS 188-206 (1929); In re Ferdinand, Ex-Tsar of Bulgaria, [1921] 1 Ch. 107.

[49] This attitude is represented by MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS 14-31 (1924); Borchard, "Enemy Private Property," 18 AM. J. INT. L. 523 (1924); KUNZ, KRIEGSRECHT UND NEUTRALITÄTSRECHT 49 (1935).

[50] Lord Parker in The Roumanian, [1916] 1 A.C. 125 at 135; Daimler Co. v. Continental Tyre & Rubber Co., [1916] 2 A.C. 307 at 347; Lord Finlay and Lord Haldane in Hugh Stevenson & Sons v. Aktiengesellschaft für Cartonnagen Industrié, [1918] A.C. 239 at 245 and 247; Lord Birkenhead in Fried Krupp Akt. v. Orconera Iron Ore Co., 88 L.J.(Ch.) 304 at 309 (1919); 2 HYDE, INTERNATIONAL LAW, §§ 621-623 (1922); GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT of ALIEN ENEMY PROPERTY 117 (1940).

on the territory of a belligerent and the annulment of debts due to enemy subjects.[51]

Even those who adhere to the second view (b) admit that the rule of international law protecting private property may be undergoing a change.[52] The writer is of the opinion that since World War I events in the political and economic sphere of international as well as national life are certainly manifesting a changed attitude toward the protection of private property. Confiscation of foreign-owned private property has occurred in various forms: open expropriation of all private property, foreign and national-owned alike, in connection with the abolition of the institution of private property, called, in the case of the U.S.S.R., "nationalization"; concealed and discriminatory confiscation of foreign property through various ingenious devices, such as exchange control, pseudo-taxation, "domestication" requirements for subsidiaries of foreign corporations and business enterprises, loan moratoria, payment agreements, etc. (e.g., Germany); expropriation of certain kinds of property for purposes of general social reform (e.g., Mexican agrarian legislation of 1917, Estonian and Latvian agrarian reforms of 1919-1920), or necessary in the interests of the national economy (e.g., Mexican oil expropriation measures of 1938). In the beginning, the creditor states protested against confiscation, then abstained from intervention in cases of equal "confiscatory" treatment extended to all other foreign citizens, (e.g., in the case of German exchange control), and finally, in some cases, admitted the extraterritorial effectiveness of foreign expropriatory decrees.[53]

Nazi methods of "looting" the occupied territories[54] (wherever possible covered by the thin veil of legality), plus the cloaking of German-controlled interests abroad, will necessarily affect the concept of enemy property. But while the changed attitude toward foreign private property in general and the extended concept of enemy property will influence the methods of treatment of foreign private property,[55] they

[51] 2 OPPENHEIM, INTERNATIONAL LAW, 6th (Lauterpacht) ed., § 102 (1940); FENWICK, INTERNATIONAL LAW, 2d ed., 463 (1934), thinks that it is impossible to state the principle at the present time because the practice of the states during and after the last war threw the entire question into confusion.

[52] E.g., GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY 112 (1940).

[53] Whether confiscatory or conservatory should not make any difference in principle, though admittedly it does in practice.

[54] See Declaration of the United Nations of January 5, 1943, warning the Axis on its seizures of property. N.Y. TIMES, Jan. 6, 1943, p. 7:5.

[55] To what extent such property represents really "private" and not "public" interests can only be determined in each individual case, e.g. Holzer v. Deutsche

have not so far changed the rules of international law with respect to it. It might be further argued that tolerance towards intrusion into private property rights has diminished the "minimum standard" of treatment of aliens, but certainly not beyond the "equality" as understood in this connection.[56] The constitutional guaranty embodied in the Fifth Amendment satisfies the "minimum standard" of general international law; whether section 5(b), as amended by the F.W.P.A. 1941, without the implied accompaniment of that guaranty, does so is arguable, as the act makes no provisions for compensation in cases of divesting of nonenemy property.

Since all requisitioning laws for defense purposes make provision for just compensation, as in every expropriation for public use, the requirement of equal treatment does not adversely affect total mobilization of all available and reasonably necessary means for the war effort. This view will probably be shared even by such publicists as Sir John Fisher Williams, who, along with foreign ministers of expropriating states, denies, in the absence of treaty or other contractual obligation, the existence of a rule of international law against expropriation except on the payment of full or "adequate" compensation.[57]

C. *Effect of War on Treaties and the Protection of Private Property*

Quite aside from obligations imposed by general international law, treaties between the United States and a number of countries, including Germany, Hungary, Finland, Estonia, Latvia, Norway and Poland[58] contain the following provision:

> "The nationals of each high contracting party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this

Reichsbahn-Gesellschaft, 277 N.Y. 474, 14 N.E. (2d) 798 (1938) Government Brief, p. 5, in Draeger Shipping Co. v. Crowley, (D.C. N.Y. 1943) 49 F. Supp. 215.

[56] See Borchard, "The 'Minimum Standard' of the Treatment of Aliens," 38 MICH. L. REV. 445 (1940), and the material there cited. Cf. 1 OPPENHEIM, INTERNATIONAL LAW, 5th (Lauterpacht) ed., 283 (1937), and the material there cited; W. M. GIBSON, ALIENS AND THE LAW (1940). See FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 502 et seq. (1938) for a summary of the evidence on the minimum standard.

[57] Williams, "International Law and Property of Aliens," 9 BRITISH YEARBOOK 1 at 28 (1928). Cf. answer to this article by Fachiri, "International Law and Property of Aliens," 10 BRITISH YEARBOOK 32 (1929), who expresses the view that the expropriating state is liable even if the measure of expropriation applies indiscriminately to nationals and aliens.

[58] 55 Stat. L. 2132, 2379, 2441 (1923) (Germany, Estonia, Hungary); 45 Stat. L. 2641 (1928) (Latvia); 47 Stat. L. 2135 (1928) (Norway); 48 Stat. L. 1507 (1931) (Poland); 49 Stat. L. 2659 (1934) (Finland).

> respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation."

This country is in a state of war with Germany and Hungary; Finland is an ally of the enemy; Estonia, Latvia, Norway and Poland are occupied by the enemy. Whether the provisions in the treaties with Germany and Hungary with respect to action by the United States government affecting their property are still in force is a moot question, as the whole problem of the effect of war on treaties is unsettled in international law.[59] The view has been expressed that in the absence of denunciation, this provision might be deemed to be reconcilable with a state of war, and in view of the enlightened doctrine set forth in *Techt v. Hughes*,[60] it may be considered still in effect.[61]

It seems, however, that the opposite view can be better supported by the various criteria set forth in the *Techt* decision by Judge Cardozo after reviewing various authoritative sources. The provision under consideration in our case is from a treaty with Germany called "Treaty of Friendship, Commerce and Consular Rights" [62] (signed at Washington, December 8, 1923). Concerning treaties of commerce and navigation in general, Cardozo said:

> ". . . Commerce is friendly intercourse. Friendly intercourse between nations is impossible in war. Therefore, treaties regulating such intercourse are not operative in war." [63]

Warning against being misled by labels, he said that the nature and purpose of the specific articles involved should be consulted.

Thus we arrive at the question which represents the test: Is the provision "inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace"? [64] It seems that the whole of article I is inconsistent with the policy of safety as is evident from the first stipulation: "The nationals of each of the High Contracting Parties shall be permitted to enter, travel, and reside in the territories of the other. . . ." But it

[59] See 2 HYDE, INTERNATIONAL LAW, §§ 547-551 (1922); 2 OPPENHEIM, INTERNATIONAL LAW, 6th (Lauterpacht) ed., § 99 (1940), especially pp. 245, 246; MCNAIR, THE LAW OF TREATIES, c. 44 (1938).

[60] 229 N.Y. 222 at 240-247, 128 N.E. 185 (1920).

[61] Turlington, "Vesting Orders Under the First War Powers Act, 1941," 36 AM. J. INT. L. 460 at 464 (1942).

[62] 4 UNITED STATES TREATIES, CONVENTIONS, etc., ed. Malloy, 419 (Supp. 1938).

[63] 229 N.Y. at 245-246.

[64] Id. 243.

might be answered that our provision is a subdivision of article I and can be separated. We can hardly assume that separability goes so far as to uphold a subdivision of an article. In addition, the first stipulation of the provision itself supports our suggestion, for it refers to the standard of general international law. This as we have seen, according to the dicta of some decisions of the Supreme Court of the United States, permits private property of enemy nationals to be held liable to confiscation. Irrespective of these considerations, Cardozo's pragmatic approach must not be overlooked:

> ". . . I am impelled to the belief that until the political departments have acted, the courts, in refusing to give effect to treaties, should limit their refusal to the needs of the occasion. . . ." [65]

It seems that in our case the Congress has spoken by the enactment of section 5(b), as amended by F.W.P.A. 1941. Said Cardozo in the same opinion:

> ". . . To the extent that there is conflict between the treaty and the statute, we have the same situation that arises whenever there is an implied repeal of one law by another." [66]

Apart from these technical points, the main consideration is a political question. It would be an imposition upon the government of the United States to maintain the validity of this provision when it is certain that the German government is not going to abide by it.

The nationals of Estonia, Latvia, Norway, Poland, and other occupied countries, if residing therein, come technically within the compass of the definition of "enemy" given in T.E.A. of 1917, section 2, and are within the definition of "national" set up by the freezing control, and of "national of designated enemy country" of the Alien Property Order (after certain findings), but that does not mean that their property is subject to confiscation as is enemy property. Their property might be sequestered, condemned, or requisitioned with just compensation, but not confiscated.[67] And for purposes of ultimate disposition this clear-cut distinction has to be observed.

D. *American Vesting Orders versus Foreign Expropriatory Decrees*

One more question may be mentioned here. Our courts have recognized and given extraterritorial effect to expropriation decrees of

[65] Id. 247.

[66] Id. 245.

[67] Russian Volunteer Fleet v. United States, 282 U.S. 481 at 489, 51 S. Ct. 229 (1931). Though this case might be decided differently today, its doctrine is nevertheless good law.

friendly nations when they are "conservatory" in purpose rather than "confiscatory," and the decree is in accord with rather than opposed to American public policy. They were upheld in the case[68] involving a decree of the Royal Netherlands Government in exile, dated May 24, 1940, vesting in the Netherlands State title to certain Dutch property interests outside Europe, and in a case[69] involving a decree of the Royal Jugoslav Government. It has been suggested[70] that the situation so created raises possibilities of conflict where the orders of the Alien Property Custodian or of the Secretary of the Treasury vest in them property vested by such decrees in foreign governments. This view is based on the

> "... principle, established by the decision of the Supreme Court in Schooner Exchange v. McFaddon,[71] and consistently recognized since the date of that case, that the property of a foreign state is immune from interference while in the territory of the United States."

In considering this point it is well to remember three things: the libellant in the *Schooner Exchange* case was a private person, the property involved was a "public vessel of war," and the object was in the *actual possession* of a friendly sovereign. In situations where there is a theoretical possibility of conflict between the United States and other friendly governments, as a result of the vesting of property in the former which had previously been vested in the latter by decrees to which extraterritorial effect had been extended by our courts the application of the doctrine of the *Schooner Exchange* case will be limited. Extraterritorial effect was extended to the Dutch decree because its purpose was in harmony with the public policy of the United States government as expressed in freezing control. However, the attitude of the United States courts might very well be different if the enforcement of the Dutch decree were to conflict with the public interests of this country. This is especially to be considered in view of the fact that the statute authorizes the vesting of property of any "foreign country," which the freezing order defines as including "The state and the gov-

[68] Anderson v. N. V. Transandine Handelsmaastschappij, 289 N.Y. 9, 43 N.E. (2d) 502 (1942).

[69] Fields v. Predionicaikanica A.D., 265 App. Div. 132, 37 N.Y.S. (2d) 874 (1942).

[70] Turlington, "Vesting Orders under the First War Powers Act, 1941," 36 AM. J. INT. L. 460 at 465 (1942).

[71] 7 Cranch (11 U.S.) 116 (1812).

ernment thereof."[72] A different attitude might even be taken by the court if the owner of the intangible property, affected by the expropriatory decree, were to contest as an *adverse party* the extension of extraterritorial effect to that decree. Up to the present time this question has not been litigated and judicially determined in such a set-up. It must be conceded, however, that if such a controversy were submitted to international arbitration, it might be considered from a different viewpoint from that which a United States court might be expected to take.

CONCLUSIONS

The exigencies of modern total war, the preparations of the Axis for it and for economic warfare in particular, made it imperative that the government of the United States be equipped with broad powers and flexible instruments for coping with an enemy which had gotten the jump on us.

Some rules of domestic as well as international law, stemming from the different conditions and thoughts prevailing in the nineteenth century and down to World War I, became obsolete and needed readjustment to the changes which had taken place. Moreover, a part of Axis preparation consisted of making arrangements for the circumvention of these rules. Legal notions and fictions, such as "nationality," "corporate entity," "commercial domicil," etc., were extensively used for this purpose.

On the administrative branches of the United States government fell the difficult task of conducting economic warfare in conformity not only with the requirements of constitutional law, but also with those of international law. In order to discharge this duty successfully the administration was provided with broad statutory authority, particularly that contained in section 5(b) of the Trading with the Enemy Act as amended by the First War Powers Act, 1941. Using these powers, the administration created new definitions for the determination of enemy character. These definitions purported to, and to a large extent suc-

[72] Furthermore, in the case of the vesting of shares, the conflict of laws rules as to the situs of shares may eliminate this question entirely as the Dutch decree extends to rights and claims outside the realm of Europe. Cf. CONFLICT OF LAWS RESTATEMENT, §§ 49, 53, 261, 262 (1934); 1 BEALE, CONFLICT OF LAWS, § 53.1 (1935); 2 id., § 262.1; Mills v. Jacobs, 333 Pa. 231, 4 A. (2d) 152 (1939); Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft, (C.C.A. 2d, 1922) 283 F. 146; Direction der Disconto-Gesellschaft v. United States Steel Corp., 267 U. S. 22, 45 S. Ct. 207 (1924); cf. further Sutherland v. Administrator of German Property, [1934] 1 K.B. 423.

ceeded in obviating the abuse of legal notions and fictions originally designed for other purposes and used by the enemy for shielding and cloaking his subversive activities. These definitions seem to bear in mind that legal fictions are expedient as long as they serve the purpose for which they are created; they become obnoxious if they defeat that purpose. *These definitions help to single out the real enemy no matter in what form he may be disguised.*

Though basic terms in a statute are usually uniformly defined for purposes of the statute, we have within the framework of the Trading with the Enemy Act of October 1917, as amended, various definitions of enemy character of persons and property (in addition to the definition of "national"). This is due partly to the legislative history of the act, but mainly to the different purposes of the act. As desirable as is uniformity in definition for all purposes, it cannot at present be achieved even within the one act, without impairing the flexibility of this device.[73]

Broad powers, flexible and sharp tools, and the great number of situations in which they may be applied entail possibilities of transcending in some cases the limits fixed by those rules of international law which can be considered well settled and generally accepted. Though international responsibility will follow only in the case of actual infliction of injury, the conviction is here expressed that, nevertheless, trangressions of limits will occur only in exceptional cases.

[73] This does not mean, however, that such definitions as "enemy" and "ally of enemy" as given by § 2 of the T.E.A. could not be abandoned.