

PROTECTION OF NON-ENEMY INTERESTS IN ENEMY EXTERNAL ASSETS*

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I

SOURCE OF THE PROBLEM

The Allied countries which took part in World War II have engaged in the blocking and seizure of the external assets of enemy countries. In so doing they have been motivated generally by three objectives.¹ The first objective was that of economic warfare: to prevent the enemy from utilizing any of his assets abroad in furtherance of the enemy war effort and to put the assets to use in furtherance of the Allied war effort. Normally blocking controls were adequate to debar any enemy use, while seizure was necessary for putting the assets to Allied use. The second objective was that of security: to eliminate economic penetration in certain key industries located in Allied territory and to deprive the enemy of the foreign assets which might provide the sinews for a future war. The third objective was that of reparations: to obtain some compensation for the Allies and their nationals for the oftentimes incalculable losses of war.

With the passage of time, the importance of these objectives has changed. When the war ended, economic warfare became no longer applicable. Security measures with relation to enemy external assets loomed small in comparison with security measures to be taken inside the enemy countries and by way of alliances among the victors, especially in view of the emergence of the U.S.S.R. and its satellites as the dominant threat to peace. As for the reparation objective, that still has meaning since countries look to this source to indemnify themselves of their nationals for war losses, especially since there has been a dwindling away of other forms of reparations and the elimination of other avenues for the satisfaction of claims.²

* The opinions expressed in this article are those of the writer, and not necessarily those of the Department of State.

In this article, the United States Treaties and other International Act Series will be referred to as T.I.A.S.

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¹ Clayton, *Security Against Renewed German Aggression*, 13 DEP'T STATE BULL. 12 (1945); Bishop, *Judicial Construction of the Trading With the Enemy Act*, 62 HARV. L. REV. 721, 722, 742-743 (1949); Rubin, *Allied-Swedish Accord on German External Assets, Looted Gold and Other Related Matters*, 17 DEP'T STATE BULL. 155, 157, 161 (1947).

² The United States has not as yet seized the Bulgarian, Hungarian, or Rumanian assets in its jurisdiction as it is entitled to under the Peace Treaties. In view of the failure of these countries to provide compensation to American claimants for war damage it may be necessary to resort to these assets for satisfaction of these claims. With respect to Japan and Germany, where the United States bears the dominant role of supporting their economies, there is a less clear advantage to it in the program of seizure of these countries' external assets. The proceeds of such assets are presently earmarked for the

The amount of enemy external assets subject to seizure is large and embraces the following types: German, Japanese, Bulgarian, Hungarian, Rumanian, and Italian.³ In addition, there are some special provisions concerning certain Austrian external assets. The picture of the seizures of the various types is as follows:

(1). *German*. The Allies during and since the war have proceeded under their internal legislation to seize German assets in their jurisdiction.⁴ Under the Potsdam Agreement⁵ of August 1, 1945 the U.S.S.R. was to secure the appropriate German external assets in Bulgaria, Hungary, Rumania, Finland, and Eastern Austria while the Allies were entitled to the assets elsewhere in the world. Accordingly, the U.S.S.R. secured in the Peace Treaties with Bulgaria, Hungary, Rumania, and Finland⁶ the recognition of its title to all German assets in these countries transferred by the Control Council for Germany. Further the U.S.S.R. appears prepared in the Treaty with Austria, which is still under negotiation, to turn over the German assets in the Eastern Zone of Austria to Austria for liquidation as against compensation and certain special rights as to former German oil lands.⁷ On the other hand, the United States, United Kingdom, and France were confirmed in their authority by the Peace Treaty with Italy to dispose of German assets in Italy,⁸ and have made a memorandum of understanding with Italy for the liquidation of those assets;⁹ they are taking action to liquidate German assets in Japan;¹⁰ and they are prepared to turn over German assets in the Western Zone of Austria to the Austrians for liquidation.¹¹

satisfaction of certain war claims. War Claims Act, 62 STAT. 1247 (1948), 50 U. S. C. App. §2012 (Supp. 1950).

The amount of reparations from Germany and Japan by way of removals of industrial equipment has been reduced considerably from original estimates, thus disappointing countries which were looking to this source for the partial satisfaction of their claims. See, e.g., on the German picture, REPORT OF THE SECRETARY GENERAL FOR 1949, INTER-ALLIED REPARATION AGENCY 11-12 (1950).

³ Although Finland engaged in the war on the side of Germany, provision was made for the restoration of her external assets. Finnish Treaty, Art. 27. See generally, Martin, *The Treatment of Enemy Property under the Peace Treaties of 1947*, 34 TRANSACTIONS OF THE GROTIUS SOCIETY FOR THE YEAR 1948 77 (1949) (article brought up to date of publication).

⁴ See generally, MARTIN DOMKE, *TRADING WITH THE ENEMY IN WORLD WAR II* (1943); and its supplement, *THE CONTROL OF ALIEN PROPERTY* (1947); and symposium, *Enemy Property*, 11 LAW & CONTEMP. PROB. (1945).

⁵ Art. III, pars. 1-3, 8, 9. The text of the Potsdam Agreement is contained in Dep't State Press Release No. 238, March 24, 1947.

⁶ Bulgarian Treaty, Art. 24; Hungarian Treaty, Art. 28; Rumanian Treaty, Art. 26; Finnish Treaty, Art. 26.

⁷ Mosely, *The Treaty With Austria*, 4 INT'L ORG. 219, 230-231 (1950). The discussions of the Western Powers with the U.S.S.R. on the unresolved issues of the Treaty have practically come to a standstill, the Soviet Government apparently not being willing to conclude the Treaty. See Mosely, *supra*, at 219.

⁸ Italian Treaty, Art. 77, par. 5.

⁹ Memorandum of Understanding Between the United States, France, United Kingdom, and Italy on German Assets in Italy of August 14, 1947, T.I.A.S. 1664.

¹⁰ The liquidation is being done by the occupation authorities in Japan, assisted by an advisory committee composed of representatives of the United States, Great Britain, and France. See REPORT OF THE WAR CLAIMS COMMISSION, H. R. DOC. NO. 580, 81st Cong., 2d Sess. 59 (1950).

¹¹ See, e.g., *United States Renunciation of German Assets in Austria*, 15 DEP'T STATE BULL. 123 (1946). The Austrians are at present administering these assets as trustee for the United States in the United States zone in Austria.

Further, under the Paris Reparation Agreement of January 14, 1946 the 18 governments signatory to it, while committing themselves to liquidate German assets in their jurisdictions,¹² empowered the United States, United Kingdom, and France to make agreements with the neutral countries for the liquidation of the German assets within these countries.¹³ Pursuant to this mandate agreements were reached with Switzerland, Sweden, Spain, and Portugal.¹⁴

(2). *Japanese.* The Allies during and since the war have blocked and seized Japanese external assets under their internal legislation.¹⁵ The United States announced that it favors the inclusion of a clause in the Peace Treaty with Japan authorizing the retention of Japanese external assets.¹⁶

(3). *Italian.* By the Peace Treaty with Italy countries which were at war with Italy are entitled to seize Italian assets in their territory¹⁷ and the U.S.S.R. by a special provision became entitled to Italian assets in Bulgaria, Hungary, and Rumania.¹⁸

(4). *Bulgarian, Hungarian, Rumanian.* By the Peace Treaties countries which were at war with Bulgaria, Hungary, and Rumania, are entitled to seize the external assets of these countries.¹⁹

(5). *Austrian.* By reason of the special status of Austria as a victim rather than ally of Germany, no provision is expected to be contained in the Treaty with Austria regarding its external assets, with two exceptions: Yugoslavia will be permitted to retain Austrian assets in its territory and the U.S.S.R., as part compensation for the surrender of German assets in the Eastern Zone of Austria, will receive the assets in Bulgaria, Hungary, and Rumania of the Danube Shipping Company, a corporation organized under Austrian law.²⁰

The widespread seizure of enemy external assets has given rise to serious problems

¹² Pt. I, Art. 6A, T.I.A.S. 1655. The text and a comment on the Paris Reparation Agreement are contained in Howard, *The Paris Agreement on Reparation from Germany* (DEP'T STATE PUB. No. 2584). Pakistan became the 19th signatory after its split from India.

¹³ Pt. I, Art. 6c.

¹⁴ *Allied-Swiss Accord of May 25, 1946*, 14 DEP'T STATE BULL. 1121 (1946); *Allied-Swedish Accord of July 18, 1946*, T.I.A.S. 1657, 1731; *Allied-Spanish Accord of May 10, 1948*, T.I.A.S. 1773. The Allied-Portuguese Accord has not become fully binding because of an outstanding gold problem, and has not been published. Liquidation is, however, proceeding under Portuguese Decree Law No. 37, 377 of April 21, 1949. See also comments in *German Assets in Switzerland*, 14 DEP'T STATE BULL. 1101 (1946); Rubin, *Allied-Swedish Accord on German External Assets, Looted Gold, and Other Related Matters*, 17 DEP'T STATE BULL. 155 (1947); Mann, *German Property in Switzerland*, 23 BRIT. Y. B. INT'L L. 354 (1946).

¹⁵ See note 4 *supra*.

¹⁶ Dep't State Press Release No. 1180, Nov. 24, 1950.

¹⁷ Art. 79. The United States has voluntarily agreed to release the considerable Italian assets in the United States. Memorandum of Understanding of August 14, 1947, Between the United States and Italy on Italian Assets in the United States and Certain Claims of United States Nationals, T.I.A.S. 1757, at 30.

¹⁸ Art. 74, Pt. A, par. 2b.

¹⁹ Bulgarian Treaty, Art. 25; Hungarian Treaty, Art. 29; Rumanian Treaty, Art. 27.

²⁰ Mosely, *supra* note 7, at 225, 231.

concerning the protection of the economic interests of non-enemies,²¹ since enmeshed and intermingled in these enemy assets are substantial values in assets, or interests in assets, belonging in an economic sense directly, indirectly, or beneficially to non-enemies. Thus, the vesting action of Allied authorities has in numerous instances had the curious result of bringing harm to other Allied nationals and giving rise to a war claim. Of course where the non-enemy interest is a direct legal ownership right in the property seized, the remedial provisions of most custodial legislation will permit adequate legal redress. Where, however, the economic interest does not represent such a direct ownership right, solutions on an international level must be found even though such solutions in certain instances might be inconsistent with municipal principles of ownership. For the United States the problem of the protection of non-enemy interests in enemy property is especially important. This derives from the exceedingly large investment of American nationals abroad and from the tieup of immigrant classes in the United States with areas of origin.²²

II

NON-ENEMY

At the threshold of the problem of protecting non-enemy interests is the question of what individuals or enterprises are to be considered non-enemy. In the midst of war, the broadest definitions have been employed of enemy so as to prevent any loopholes.²³ These definitions were based on combinations of factors such as citizenship or nationality, territory in which located, activity in which engaged, persons by whom controlled, etc. Since the war the definitions have been narrowed. Without attempting to be exhaustive, some of the interesting and instructive cases in this field can be touched upon.

A. Friendly National and Dual National in Enemy Territory

An Australian who spent the war in the heart of Australia, engaging in no action hostile to the Allied cause, is the typical case of a non-enemy. A Frenchman residing during the war in French territory occupied by the Germans and engaging

²¹ These problems, of course, would not exist if all enemy property were freed as has been urged by some writers. Borchard, *The Treatment of Enemy Property*, 34 GEO. L. J. 389 (1946); Sommerich, *A Brief Against Confiscation*, 11 LAW & CONTEMP. PROB. 153 (1945). But there appears to be justification for such seizures. Rubin, "Inviolability" of *Enemy Private Property*, 11 LAW & CONTEMP. PROB. 166 (1945), especially if claims against the enemy state or nationals are to be paid from the proceeds of the seized property, 3 C. C. HYDE, *INTERNATIONAL LAW 1736-1737* (2d. ed. 1947); AMERICAN BAR ASSOCIATION, *REPORT OF COMMITTEE ON ADJUDICATION OF WAR CLAIMS 35* (1945).

²² According to the census taken by the Treasury in 1943, individuals and organizations in the United States reported ownership of 13 1/2 billion dollars in assets abroad. Of the 215,000 reporters, 168,000 were individuals, 27,000 of these were foreign citizens, and 2/3 of these later had come into the country after 1937. Individuals owned the large sum of 3 1/2 billion. *Foreword, CENSUS OF AMERICAN OWNED ASSETS IN FOREIGN COUNTRIES* (U. S. TREASURY DEP'T, 1947). No figures exist of how much property owned by individuals and organizations in the United States is involved in enemy property seizures.

²³ DOMKE, *op. cit. supra* note 4, cc. 3, 9, 10, 11. See generally on enemy character, with emphasis on British practice. Cohn, *German Enemy Property—II*, 3 INT'L L. Q. 530 (1950).

in no action hostile to the Allied cause is another case entitled to protection.²⁴ But what about the British citizen who lived in Germany before the war, and remained there during the war because he had difficulty in getting out, was sick, or had his business in Germany, etc. A strict view can be taken that unless he was involuntarily in Germany he should be considered as having thrown in his lot with the enemy and to be treated as such.²⁵ Another view looks merely to the Allied citizenship and exempts any of his external assets.²⁶ A country taking the strict view may still make an exception for its own citizens living in enemy territory.²⁷ When we come to the case of the dual national, having one enemy nationality, and residing in enemy territory, countries generally seize, relying on the indubitable enemy nationality,²⁸ although here too domestic considerations may lead countries to give favorable status to their own citizen who also has enemy nationality.²⁹

B. Bestowal of Enemy Citizenship

With relation to the important question of citizenship, what effect shall be given to the bestowal of enemy citizenship on populations or groups that had been taken over by the enemy? Examples of this process took place by German action in Austria, Belgium, Czechoslovakia, Luxembourg, Yugoslavia, Danzig, Poland, Alsace Lorraine, and in the Baltic States.³⁰ No question seems to exist with relation to Austria, Belgium, Luxembourg, Yugoslavia, Danzig, Poland, and Alsace Lorraine. The laws changing the citizenship of their populations have been disregarded and assets of their nationals released as non-enemy. This has been done even though

²⁴ In some cases he may find his property vested. Thus the United States seized patents of citizens of France during the war if they were in enemy-occupied territory. These patents are now being returned. Procedures for return of such vested property have been agreed upon with most European countries. See OFFICE OF ALIEN PROPERTY, ANNUAL REPORT FOR FISCAL YEAR ENDING JUNE, 1947-84 (1947); see Alk and Moskovitz, *Removal of United States Controls Over Foreign-Owned Property*, 10 FED. B. J. 3, 28, and n. 41 (1948).

²⁵ Thus §32(a)(2)(C) of the United States Trading With the Enemy Act, 61 STAT. 785, 50 U. S. C. App. §32 (Supp. 1950). A broad claim has been made that paragraph 6 of Art. 79 of the Italian Treaty (and similar provisions in other treaties) authorizes the seizure of property of any person resident in Italy since such a person's property was "subject to control" during the war. Martin, *Private Property, Rights, and Interests in the Paris Peace Treaties*, 24 BRIT. Y. B. INT'L L. 273, 293 (1947). This ignores the fact that paragraph 6 talks of "Italian property" subject to control. Of course an Allied power might seize such a person's property if it could justify such seizure under international law as against the country of the person's nationality.

²⁶ Thus the Allied Accords with the neutrals are limited to persons of German nationality: Allied-Swiss Accord, Art. I(1), Annex, Art. IV(B), 14 DEP'T STATE BULL. 1121, 1124 (1946); Allied-Swedish Accord, T.I.A.S. 1657, p. 17; Allied Spanish Accord, Art. III, T.I.A.S. 1773, p. 4.

²⁷ See sec. 32(a)(2)(c) referred to in note 25, *supra*.

²⁸ Thus Switzerland and the United States at present seize the property of such dual nationals. Rule 6G of the Inter-Allied Reparation Agency, Rules of Accounting for German External Assets (1947) has a limited exception for a person who is expected to leave Germany and was formerly a resident of an Allied country.

²⁹ Thus a recent amendment permits returns to such American citizens, and even to certain women who became Germans by marriage and lost their American citizenship. Pub. L. No. 859, 81st Cong., 2d Sess. 7 (Sept. 29, 1950). A provision in the Allied-Swiss Accord calls for sympathetic consideration for property of Swiss origin belonging to women of Swiss birth married to Germans and residing in Germany, Annex, Art. I (A)(e), 14 DEP'T STATE BULL. 1121, 1122 (1946).

³⁰ See RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 13-14 (1944). See Cohn, *supra* note 23, at 531-537.

some of the inhabitants of these areas doubtless welcomed German citizenship.³¹ A more difficult problem has been posed by the Sudeten Germans of Czechoslovakia, who were, rather indiscriminately, expelled after the war from Czechoslovakia into Germany. It will be recalled that the Sudeten Germans generally welcomed Hitler and German citizenship. Furthermore, in expelling them from Czechoslovakia, the Czech Government deprived them of Czech citizenship. Notwithstanding this, the Czech Government has insisted on its right to the assets of these individuals abroad and has attempted to prevent other countries from seizing these assets as German.³² From the standpoint of the individuals concerned, some could make a good case that they never voluntarily accepted German citizenship nor wanted German domicile and that in fact they were anti-Nazi. These may charge that they should not be considered as German nationals and that it is in violation of democratic tenets to give any recognition to imposition of citizenship by the German Government.³³

With respect to the Baltic States, the United States has continued its blocking controls over the assets of nationals of these countries in the United States, not recognizing the absorption of these countries by the U.S.S.R. For those nationals of so-called "ethnic" German stock upon whom the German Government after its conquest of these areas attempted to impose German citizenship, the precedent of the action taken with respect to Alsace Lorraine and Austria appears relevant. In the event that certain of these individuals may have voluntarily accepted German citizenship and withdrawn back to Germany before the advancing Russians, a case would be posed where seizure of property would appear to be legitimate.³⁴

C. Inhabitants of Territories Separated from the Enemy

In addition to the problem of territories that had been absorbed by enemy coun-

³¹ In some of these cases the property may be withheld because the owners may be guilty of collaboration. It should be noted that the United States Treasury exchanged letters of assurances which permitted countries to certify and secure the release of even the property of their collaborators, the theory being that these countries would deal with their own traitors best. However, the Office of Alien Property construes the Trading With the Enemy Act, under which it grants releases of vested property, to preclude return to collaborators.

³² In the Paris Reparation Agreement of January 24, 1946, T.I.A.S. 1655, the Czech Government secured a clause (Part I, Art. 6D) which enabled it to seize the assets of these people without accounting for them as German assets. In the later working out of the accounting rules, the question arose as to the right of other countries to seize assets of Sudeten Germans in their jurisdiction. No solution was reached and the question was left without prejudice to the opposing views to be settled where necessary by bilateral governmental discussions. Thus Rule 7 of the Rules of Accounting for German External Assets, Inter-Allied Reparation Agency (1947) excludes from assets to be accounted for the assets of individuals who were nationals of an Allied country and not a national of Germany before the war. See, also, Simsarian, *Rules for Accounting for German Assets in Countries Members of the Inter-Allied Reparation Agency*, 18 DEP'T STATE BULL. 227, 229 (1948); and Commentary on the Rules contained in Inter-Allied Reparation Agency Document, I.A.R.A./AS/ Doc. 354 of Nov. 18, 1947.

³³ In cases arising in United States courts involving acquisition of German citizenship by residents in the United States who were citizens of absorbed areas, the courts have refused to place the acquisition of citizenship on the fiat of the German Government, but instead have based it on evidence of voluntary acceptance. U. S. *ex rel.* Reichel v. Carusi, 157 F.2d 732 (3d Cir. 1946), *cert. denied*, 330 U. S. 842 (Czech); United States *ex rel.* Schwarzkopf v. Uhl, 137 F.2d 898 (2d Cir. 1943) (Austrian); United States *ex rel.* D'Esquiva v. Uhl, 137 F. 2d 903 (2d Cir. 1943) (Austrian); Zeller v. Watkins, 167 F. 2d 279 (2d Cir. 1948) (Danziger).

³⁴ See note 33, *supra*.

tries in their aggressive action preceding and during World War II, the question arises as to areas formerly part of the original boundaries of the enemy and now separated therefrom. There would seem little difficulty in principle in seizing the external³⁵ assets of Saarlanders, despite the economic union of the Saar and France, although the French have not been averse to claiming immunity from seizure of the assets elsewhere of Saarlanders. Seizure is more justified with relation to cases where the citizens of the former German territories, as, for example, East Prussia, now under interim Polish and the U.S.S.R. administration, were shipped into the new, constricted German territories. A different problem is raised with respect to inhabitants of former enemy possessions now freed, involving subject populations, for example, Korea and Manchuria. It would not appear proper to seize the external assets of these inhabitants as enemy nationals.³⁶ In this connection the Italian Peace Treaty permitted the seizure of the external assets of Italian nationals who were in ceded territories and opted to remain Italian, exempting from seizure the assets of those who took a new citizenship except if those assets were within Bulgaria, Hungary, and Rumania and thus fell to the U.S.S.R.³⁷

D. Persecutees

Another kind of case, that of persecutees, warrants mention here, although it is the subject of more extended treatment elsewhere in this symposium. Those who were victims of Nazi and Fascist persecution on the bases of racial, religious, or political grounds were treated as enemies by the Axis regimes and it would be a mockery to seize their assets for reparations purposes. In the case of Jews who left Germany before 1941, the German Government took away citizenship and made them stateless.³⁸ In other cases, however, these victims remained the nationals of the countries persecuting them. With respect to German external assets, Rule 6F of the Inter-Allied Reparation Agency Accounting Rules³⁹ permits exemption from seizure of victims of Nazi persecution who are expected to leave Germany in a reasonable time. It appears that the British custodian follows the same rule, *mutatis mutandis*, in the case of Bulgarian, Hungarian, and Rumanian persecutees. The United States custodian operates under Section 32(a)(2)(C) and (D) which

³⁵ It should be noted that the discussion here is about the external assets of the Saarlanders, etc., and does not concern the right to seize the property of Saarlanders in the Saar, etc.

³⁶ Especially is this so in the case of Manchuria, whose seizure by the Japanese was generally not recognized.

³⁷ Italian Treaty, Art. 79, par. 6(g).

³⁸ Salwin, *Nationality Status of German Refugees*, 30 MINN. L. REV. 372, 374 (1945). Some decisions have been rendered in the United Kingdom which reach the curious result that the German Reich could not denationalize its subjects located abroad by the 1941 decree, these decisions thus subjecting them to the disabilities of German citizens. See Salwin, *supra*, at 392 n. 60. For criticism of these and other decisions, see Lauterpacht, *Nationality of Denationalized Persons*, JEWISH YEARBOOK OF INTERNATIONAL LAW (1949).

³⁹ See note 28, *supra*. Article 5 of the London Patent Accord on German Patents of July 27, 1946, signed by numerous countries, permits the exemption of patents owned by German refugees. See text, 15 DEP'T STATE BULL. 300 (1946).

permits release of the assets of Nazi and Fascist victims wherever resident.⁴⁰ It should be pointed out that although articles in the Italian, Bulgarian, Hungarian, and Rumanian Peace Treaties⁴¹ permit the seizure of the external assets of their nationals, without excluding therefrom Nazi or Fascist victims, these articles should be read in conjunction (1) with the article in all these Treaties dealing with the restoration of rights and interests of Allied nationals, which includes therein the rights and interests of individuals who were treated as enemy,⁴² and (2) with the special articles in the Hungarian and Rumanian Treaties which speak of the restoration of the rights and interests of those who were the objects of racial or religious persecution.⁴³ It is illogical for the Allies to have required that the assets of these victims be restored in the country of their nationality, and yet be seized outside such country. Further, under several agreements on the liquidation of German external assets, exemptions have been granted to the property of persecutees.⁴⁴

E. Enemy Citizen Resident Outside Enemy Territory

Most countries have exempted from seizure the assets of the Milwaukee German, that is, the enemy national who has been residing for a long time in the jurisdiction or in the territory of other friendly countries, has not taken out citizenship papers, but has not been guilty of any acts hostile to the Allied cause. The Inter-Allied Reparation Accounting Rules for German assets and the London Patent Accord permit the exemption of the assets of Germans based on residence outside of Germany.⁴⁵ Similarly the various neutral accords are directed at Germans in Germany with the addition that Germans outside Germany who are repatriated may have their property seized.⁴⁶ A similar exemption is made in the Memorandum of Understanding with Italy with respect to German assets.⁴⁷ With respect to seizure of Italian, Bulgarian, Hungarian, and Rumanian assets in Allied jurisdictions there is also an

⁴⁰ Section 32(a)(2)(C) and (D), 61 STAT. 785, 50 U. S. C. App. §32 (Supp. 1950). Congress recently passed legislation requiring the Executive to seek in intercustodial agreements the protection on a par with United States nationals of persecutees who had become permanent residents and citizens of the United States before the effective date of any agreement. Condition 3, Pub. L. No. 857, 81st Cong., 2d Sess., approved Sept. 28, 1950. For comparison of British and American practice, see Martin, *supra* note 3, at 94-96; Cohn, *German Enemy Property*—III, 4 INT'L L. Q. 60, 72-77 (1951).

⁴¹ E.g., Italian Treaty, Art. 79.

⁴² E.g., Italian Treaty, Art. 78, par. 9(a).

⁴³ E.g., Hungarian Treaty, Art. 27; Rumanian Treaty, Art. 25.

⁴⁴ E.g., Allied-Swedish Accord, *supra* note 14, at 17 ("persons whose case merits exceptional treatment") and *id.* at 22 ("proceeds of property found in Sweden which belong to victims of Nazi action who have died without heirs"); Memorandum of Understanding with Italy, *supra* note 9, at 1 ("assets of individuals deprived of life or substantially deprived of liberty").

The Swiss have heretofore not allowed an exception for persecutees under the Allied-Swiss Accord, *supra* note 14. At the present time this Accord is not being implemented. It is hoped to take up this issue in the event of general discussions on outstanding problems.

⁴⁵ Rule 5(A)(2) of *Rules of Accounting*, *supra* note 32, exempts assets of "any individual who had German nationality on 24 January 1946 and who on that date was physically inside Germany or had his residence in Germany." London Patent Accord, *supra* note 39.

⁴⁶ See references in note 26, *supra*, to Allied-Swiss, Allied-Swedish, and Allied-Spanish Accords. The Allied-Spanish Accord, however, embraces all Germans not resident in Spain or who are expelled from Spain.

⁴⁷ Par. 2 of Memorandum, *supra* note 9.

exemption for the property of nationals of those countries permitted to reside in United Nations territory where the property was not subject to special restrictions because of the owner's hostile attitude and potential danger to the Allied cause.⁴⁸

F. Enterprises in Enemy Territory

It is with respect to enterprises located in enemy countries that some of the major difficulties have arisen. If the enterprise is merely a firm or individual proprietorship doing business under some trade name, it is generally not given a nationality independent of the nationality of its proprietor. Cases where this is put to the test are apt to be rare. Thus, a case may show up of accounts receivable originating before the war owing to a firm in Germany, where the firm owner left Germany as a persecutee and has now become a citizen of an Allied country. In most cases individual proprietorships in enemy territory are apt to be small, do a local business, and be owned by an enemy national. More difficult is the case of partnerships which are in some cases considered as having an independent juristic personality and thus a national of the country under whose laws they have been organized, despite the nationality of the partners. The general rule, however, independent of enemy property matters, seems to be to ignore the partnership form and deal with the property involved on the basis of the nationality of the partners.⁴⁹ When we come to corporations organized under enemy laws, these have juristic personality and would for ordinary purposes be considered as having the nationality of the country in which they are organized. The harsh effect of such a conclusion has in some cases been obviated by the doctrine that if the corporation is controlled by certain nationals it should be considered as having their nationality. Further than this, however, international law furnishes numerous instances where protection has been sought by a country with respect to the property of such a corporation if in the corporation there is a substantial ownership by citizens of that country. Generally this is based, not on a negation that the corporation is a "national" of the offending country or of a third country or of an enemy country, but on the ground of harm to the property

⁴⁸ Art. 79, par. 6(c), Italian Treaty. Similar clauses are in the other treaties. The United States suggested the language which was adopted and had in mind not to affect the property of all Italians who were subject generally to some mild restrictions in the United States, but only the property of those who were interned or more narrowly restricted because of their Fascist views and activities. See, however, interpretation in Mann, *Enemy Property and the Paris Peace Treaties*, 64 L. Q. REV. 492, 507-508 (1948).

⁴⁹ EDWIN M. BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 613-615 (1925); 2 C. C. HYDE, *INTERNATIONAL LAW* 900-901 (2d. ed. 1947); 5 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 827 (1937). Thus where legislation calls for the payment of debts out of vested assets to American nationals the Office of Alien Property has made payment to an American partner in a foreign partnership. Mason and Efron, *Payment of American Creditors from Vested Assets*, 9 FED. B. J. 233, 236 (1948).

Under the Brussels Intercustodial Agreement of December 5, 1947, discussed in III(G)(1) below, firms and partnerships are lumped with corporations under the term "enterprise organized under the laws" of another country. Annex, Arts. 11, 21. The text of the agreement is given in Maurer and Simsarian, *Agreement Relating to the Resolution of Conflicting Claims to German Enemy Assets*, 18 DEP'T STATE BULL. 3, 6 (1948). No harm will be done by this lumping, except in a rare case of a small partnership interest, as protection is accorded non-enemy interests by the Brussels Intercustodial Agreement.

interests of nationals of the protesting country.⁵⁰ It may be advisable thus to discuss this type of case in the next part as involving property in which Allied nationals have interests.⁵¹

G. Enterprises Outside Enemy Territory but Enemy Controlled

Paralleling the above cases of a firm, partnership, or corporation in enemy territory are the cases of enterprises outside enemy territory but controlled by enemy individuals. Generally, enemy property custodians, who now uniformly look behind the corporate or enterprise veil, would ascribe to these enterprises an enemy character.⁵² While the enemy property custodian of the corporate domicile may seize the enemy stock without disturbing the non-enemy stock interests, for the custodian of another state having jurisdiction over the property of the corporation the problem of protecting the investment of the non-enemy stockholders is complicated by the fact that such stockholders would have no interest in the property to be recognized as a matter of municipal law.⁵³ In this respect the problem is very similar to that previously discussed involving corporations organized under enemy laws, and it will be more profitable to consider this type of case also in the next part.

III

NON-ENEMY INTERESTS

This subdivision deals with the case of property belonging to or in the name of an enemy, but with which there is involved property, rights, or interests of a non-enemy which raise a question of protection.⁵⁴

A. Split Ownerships

The obvious kind of case which does not present much difficulty concerns a split ownership dependent on the duration of the interest, such as a leasehold, a term for years, a life estate, a remainder estate, a license right in a patent, a ship charter. Where one of these belongs to a non-enemy and the residual proprietary interest belongs to an enemy, protection would generally be accorded to the non-enemy, al-

⁵⁰ 2 HYDE, *op. cit. supra* note 49, at 904, 905; BORCHARD, *op. cit. supra* note 49, at 622; 5 HACKWORTH, *op. cit. supra* note 49, at 840. See interesting recent article, Jones, *Claims on Behalf of Nationals Who Are Shareholders in Foreign Companies*, 26 BRIT. Y. B. INT'L L. 225 (1949).

⁵¹ Just as it is possible to label a German citizen in Germany as a non-enemy (*e.g.*, persecuttee), it should be possible to label a corporation in Germany owned by Americans, non-enemy. It should also be possible to label a corporation partly owned by Americans and partly by Germans as partly enemy and partly non-enemy. If this mode of reasoning were adopted, it would not be necessary to consider the protection of non-enemy shareholders in the next part on the basis of their interests in the property owned by an enemy.

⁵² DOMKE, *op. cit. supra* note 4, c. 9. To be completely logical, as far as vesting for reparations after the war is concerned, if a country vests the property of a corporation organized outside of enemy territory as being enemy controlled, it should exempt the property of a corporation organized in enemy territory, if non-enemy controlled. Countries have, however, pursued a policy of vesting in both cases, as a hangover from dragnet blocking controls and as a way to maximize vested assets.

⁵³ A country may allege that the corporation being organized in friendly territory is a non-enemy national, but in view of the general practice of piercing the corporate veil, this is not apt to receive much attention.

⁵⁴ Here, again, no attempt is being made to be exhaustive.

though vesting procedures may sometimes permit the seizure of the complete title to be followed later by according protection in compensation to the non-enemy. Similar protection would appear warranted with regard to split ownerships such as tenancies in common, joint tenancies, tenancies by the entirety, etc., where a non-enemy is joined with an enemy in ownership. Here it should be proper and fair to divide between non-enemy and enemy, although difficulties may arise as for example in bank accounts where both parties have the power to draw out and expend the entire account.⁵⁵

B. Nominees, etc.

Cases will also exist where the non-enemy has employed an enemy as nominee, agent, dummy, or cloak to hold the title. Vesting countries have never hesitated to look behind such façades to seize property as being owned by an enemy and so should reciprocally give protection to a non-enemy in this kind of case.⁵⁶

C. Trusts

Another kind of case is that of trusts in which the trustee may be an enemy while the beneficiary may be a non-enemy, or vice versa, or different combinations of enemy and non-enemy trustees and beneficiaries. It would be inappropriate to seize the corpus of the estate if the trustee is an enemy, even though the property of a trust is held in his name:⁵⁷ protection should be afforded the non-enemy equitable interest. Some difficulty may arise where the corpus of the trust is located in different vesting jurisdictions and where there are mixed enemy and non-enemy beneficiaries, since each custodian will want to vest the enemy equitable interest and to shift the responsibility for discharging the obligation to the non-enemy beneficiary to another jurisdiction. The fair solution would be for each custodian to vest the equitable enemy interest and satisfy the equitable non-enemy interest in the ratio that the assets in the jurisdiction bear to the assets everywhere. Another possibility is for one of the two enemy property custodians to agree to release assets in his jurisdiction to the other if that is the place of principal administration. This will serve for ease of administration, protect the non-enemy interests, and perhaps will work out be-

⁵⁵ See *e.g.*, *Commercial Trust Co. v. Miller*, 262 U. S. 51 (1923).

⁵⁶ In this kind of case where a non-enemy acts as a façade, a question sometimes arises of protecting a property interest he may have in the corpus belonging to the enemy national. Whether such protection should be accorded would seem to be dependent on the guilt involved in acting as cloak or nominee. See Bishop, *supra* note 1, at 755-757.

In some cases the relationship involved is more comparable to a trustee, which is discussed in the next subdivision C. In some cases the titleholder might be a corporation organized specially for this purpose, or one already in existence which enters into the conspiracy of concealment.

It would appear to do violence to the intention of the treaties and agreements dealing with external assets seizures to construe "property belonging to" or "property owned by" an enemy national to cover cases where the enemy national holds the title as nominee, agent, dummy, etc. See Mann, *German External Assets*, 24 BRIT. Y. B. INT'L L. 238, 252 (1947).

⁵⁷ See, however, Mann, *supra* note 48, at 513. It seems proper as in note 56 *supra* not to construe "belonging to" or "property owned by" as covering simple legal title.

tween the two custodians from a money standpoint so that little loss is suffered.⁵⁸

D. Decedents' Estates

Problems similar to those in trusts crop up in decedents' estates. In Anglo Saxon jurisprudence, except for real estate which descends directly to heir or legatee, the estate passes to the executor or administrator. A non-enemy heir to the real estate or to specific personalty would appear to have a legal or equitable estate which would be entitled to protection. Under continental law all property descends immediately to the heirs or legatees, so that non-enemies would appear to have a legal estate entitled to protection and the enemy a legal state which would be subject to vesting.⁵⁹ In so far as there are no bequests or devolutions of specific property in an estate involving enemies and non-enemies, but general bequests or devolutions of sums of money, say, the question arises here, as in a trust, as to which custodian shall vest the enemy right and which shall satisfy the non-enemy right. The solutions suggested above for trust cases would appear applicable here.⁶⁰ However, it should be noted that in the case of decedents' estates there is also apt to be involved the matter of the protection of non-enemy creditors or the defeat of enemy creditors. It will be more convenient to take up creditors' rights in subdivision *F* below.

E. Foreign Currency Cover Accounts

The case of foreign currency cover accounts taken out by a non-enemy through an enemy bank presents interesting problems, which are more capable of simple solution by international agreement or as a result of diplomatic intervention by devices which are not restricted to the legal pattern of ownership rights under municipal law. Suppose an American citizen requested a German owned bank in the Netherlands or a bank organized under the laws of Germany to set up an account for him in the amount of 1,000 British pounds. In some cases the bank might cover this obligation by requesting a British bank to open an account on

⁵⁸ Annex, Arts. 8 and 9 of the Brussels Intercustodial Agreement, *supra* note 49, provides for such a solution in certain types of trust cases.

It is appreciated that the hypothetical in the text is a simple one and that trusts may be very complex giving rise to serious difficulties in weeding out the enemy from the non-enemy interests.

⁵⁹ See Mann, *supra* note 48, at 514.

⁶⁰ The kind of case under discussion is where a testator leaves \$20,000 to X, an enemy national, and \$20,000 to Y, a non-enemy, and the testator's whole property consists of jewelry worth \$15,000 located in a safe deposit box in the United States and jewelry worth \$25,000 located in a safe deposit box in France. It would seem fair that the American custodian should be able to seize 1/2 of the \$15,000 as enemy, releasing the other half to the non-enemy national Y. Or if it be assumed that the deceased died domiciled in France the United States custodian could agree to the rule of release of assets to the domiciliary administration, so that France would vest the complete enemy interest while releasing the non-enemy interest. The United States custodian would hope that things might balance out by property being released in some cases to the United States as the place of domiciliary administration. Subject to certain exceptions, the solution of release to the domiciliary administration is the one set forth in the Annex, Arts. 7 and 9 of Brussels Intercustodial Agreement; *supra* note 49. See Mason, *Conflicting Claims to German External Assets*, 38 Geo. L. J. 171, 178 (1950). A practically identical text on trusts and decedents estates is contained in the United Kingdom-France Intercustodial Agreement of July 15, 1948, Treaty Series No. 74, CMD. 7551 (1948), and the United Kingdom-Netherlands Intercustodial Agreement of September 20, 1949, Netherlands No. 1 (1949), CMD. 7803 (1949).

its books with a sub-designation in the name of the American citizen or with a sub-designation by some special letter or number. In such a situation it could be argued that the enemy bank is not the real owner of the account in the British bank but merely a trustee for the non-enemy who has the equitable interest and who as in the trust cases previously discussed would be entitled to protection. A more difficult case is presented when the enemy bank covers its indebtedness to the American citizen, not by the specially designated account described above, but by some "omnibus" account in the British bank. This is an account which is in the amount of, say 10,000 pounds and is designed by the enemy bank to cover not only the 1,000 pounds owing to the American national but the pounds owing to all other individuals having pound accounts with it.⁶¹ The omnibus account is merely described on the books of the British bank as belonging to the enemy bank. It has been argued that the owner of the account is the enemy bank and that therefore a custodian may vest it no matter whether or not it is cover for non-enemy accounts. The non-enemies, the argument goes further, have their rights against the enemy bank and have no specific interest in the British cover account. The fault in this argument lies in the fact that it is the banking practice to require the person opening the account in a foreign currency to take the risk of any loss that may occur. Thus, in the example given, if the British custodian seized the account on the books of the British bank as being enemy this would constitute a defense to any suit by the American citizen against the German bank. In other words, the real loss by reason of the British custodian's action would fall upon the American national. In this case, if it be considered that the account in the British bank belongs to the enemy bank, the American citizen is, as it were, an insurer against the suffering of any loss by the enemy bank and should be considered as having a protectible interest in the account. The problem becomes quite similar to that which has concerned writers in the insurance field, that is, whether an individual has such an interest in property as to permit insurance of it, the courts generally striving to reach the conclusion that there is an "insurable" interest where proximate loss would result from the happening of the insured-against event.⁶³

It should be pointed out that, under the letters of assurances entered into by the United States Treasury with various European governments permitting them to certify out non-enemy assets in the United States, permission was given to certify out amounts in omnibus accounts in the United States of German owned banks in their jurisdictions to the extent these accounts served as cover for non-enemy nationals accounts, leaving, however, enough in such accounts to cover the obligation

⁶¹ This is an oversimplified picture, since the cover of the enemy banks for all its pound obligations might be through several British banks, or intermediate non-British banks might be used, or the cover might be in bond accounts rather than currency accounts. Further a bank might not cover all its accounts 100 per cent but keep only 80 per cent cover. In so far as protection is accorded where there is less than 100 per cent cover, it should be to the extent of the cover.

⁶³ See Harnett and Thornton, *Insurable Interest in Property: A Socio-Economic Reevaluation of a Legal Concept*, 48 COL. L. REV. 1162, *passim* (1948).

to enemies. The matter of foreign currency cover accounts of enemies is covered in the Brussels Intercustodial Agreement.⁶⁴ The parties thereto not being able to reach agreement on the location of the property interest in foreign currency cover accounts of enemies decided to lump all kinds of enemy foreign currency accounts and divide the proceeds of vesting equally between the two custodians concerned.⁶⁵ No specific provision was included covering foreign currency cover accounts of non-enemy nationals, except that provision was made in the Brussels Intercustodial Agreement that left their solution unprejudiced.⁶⁶

F. Creditors

The protection of non-enemy creditors of an enemy raises a series of problems. In the simple case where there is enemy property in the jurisdiction with respect to which a non-enemy creditor has some kind of lien, *e.g.*, as a pledge or mortgage, the lien would doubtless secure protection in most jurisdictions as a proprietary legal interest.⁶⁷ In the United States this protection is afforded to both American and other non-enemy nationals.⁶⁸

In the case of a decedent's estate, having an enemy heir or legatee, there may be a non-enemy creditor of the decedent or of the enemy heir or legatee. In the former case the United States law appears to recognize that the title of the enemy heir or legatee is subject to the non-enemy creditor's rights. Creditors would be recognized during the period of administration who are American nationals or nationals of non-enemy countries.⁶⁹ In the second case, of a creditor of the enemy heir or legatee, the question appears to be of the general type involving any unsecured non-enemy creditor of an enemy individual having property in the vesting jurisdiction.

In the case of such an unsecured creditor, the United States law permits an American national,⁷⁰ but not a foreign national, to seek payment from these assets. This can be explained as a concession to reduce the loss of American creditors who may have relied on the assets of the enemy debtor in the jurisdiction in extending the original credit. Also, in discriminating against foreign creditors it has the effect

⁶⁴ Annex, Art. 5 of Agreement, *supra* note 49.

⁶⁵ See Mason, *supra* note 60, at 177.

⁶⁶ Annex, last sentence of Art. 11 A of Agreement, *supra* note 49. This sentence left undetermined whether the cover account was to be considered the property of the bank or the depositor. It should be pointed out that the United Kingdom-France and United Kingdom-Netherlands Intercustodial Agreements adopt the rule of releasing all cover accounts to the bank which requested the opening of the account. Annex, Art. 5 of the Agreements, *supra* note 60.

⁶⁷ See Macon and Efron, *supra* note 49, at 240. Part I, Art. 6A of the Paris Reparation Agreement, *supra* note 12, speaks generally of liens and other "in rem" charges as being entitled to subtraction in accounting for German assets. This is confirmed by Rule 16 B of the Inter-Allied Reparation Agency Accounting Rules, *supra* note 32. Art. 26 E, Annex, Brussels Intercustodial Agreement *supra* note 49, recognizes bona fide liens of non-enemy nationals which originated before blocking dates.

⁶⁸ See *Silesian American Corp. v. Clark*, 332 U. S. 469 (1947).

⁶⁹ Some few states may discriminate against foreign creditors. The Office of Alien Property would generally not vest until creditors had been satisfied.

⁷⁰ Sec. 34(a) of the Trading with the Enemy Act, 60 STAT. 925-926 (1945), 50 U. S. C. App. §34 (a) (Supp. 1950). There are also included residents in the United States since the beginning of the war and by way of special exception Philippine citizens.

of maximizing the amount of reparations receivable by the vesting jurisdiction, relegating the non-enemy foreign creditor to the assets in his jurisdiction for satisfaction of his debt. Even if no assets exist in the other jurisdiction, the debt will doubtless continue unimpaired,⁷¹ and recourse may be had by the foreign creditor against the debtor himself at his domicile in the enemy state, although one disadvantage of this is that the creditor may have to be satisfied with an inferior and non-convertible currency. Of course cases may exist where the property in one vesting jurisdiction is the only property of the debtor and the probability of the debtor acquiring any more property is so remote that the vesting of the property in that jurisdiction and the barring of a foreign creditor's claim will result in economic loss. This seems a non-proximate effect for which no special provision need be made.⁷²

Thus far we have been discussing the situation of a non-enemy creditor of an individual enemy debtor. In the case of creditor of a corporation organized in the jurisdiction which is owned wholly or partly by the enemy, the normal practice of enemy property custodians is to vest the enemy owned shares of the corporation and permit the corporation to pay off any non-enemy creditors, local or foreign.⁷³ In the case of the creditor of a corporation organized in non-enemy territory but owned or controlled by enemies, or in the case of a creditor of a corporation organized under enemy laws, the United States Trading with the Enemy Act permits satisfaction from assets here of the debts of American creditors only, and does not permit satisfaction of foreign creditors.⁷⁴ The arguments for this practice which are put forth in the case of the individual enemy debtor apply here, namely, that the national of the vesting jurisdiction has relied on the assets here in extending credit, and the foreign creditor can seek out assets in his own jurisdiction or in any event can seek satisfaction in the jurisdiction of the corporation's organization. It can be argued that only in the event that the seizure of the assets is of such importance in comparison with the global assets of the corporation as to cause the bankruptcy or insolvency of the corporation, has the foreign creditor been really harmed. In the case of liquidation because of insolvency this will mean a permanent inability to secure satisfaction of the indebtedness. If the corporation continues operation, though technically insolvent, there is some possibility of course that future earnings will enable satisfaction of the obligation.⁷⁵

⁷¹ The Peace Treaties heretofore have continued obligations by enemy nationals to non-enemy creditors. *E.g.*, Italian Treaty, Art. 81.

⁷² Part I, Art. 6A of the Paris Reparation Agreement, *supra* note 12, permits payment for accounting purposes to any non-enemy creditor of the particular German debtor from the assets of the debtor in a country's jurisdiction. By rule 18 of the Accounting Rules, *supra*, note 32, this was restricted to creditors of the jurisdiction.

⁷³ One of the bitter complaints made against the U.S.S.R. was its refusal to recognize the liabilities of enterprises which it took over in the Eastern Zone of Austria. See Mosely, *supra* note 7, at 232.

⁷⁴ See note 70, *supra*.

⁷⁵ Hyde states that the United States would probably not be reluctant to seek the protection of American bondholders or stockholders in a foreign corporation if a foreign government were irreparably injuring their interests. 2 HYDE, *op. cit.* *supra* note 49, at 906. It has been noted that there is a tendency to protect ownership interests and overlook creditor interests. Rubin, *Nationalization and Com-*

It should be pointed out that even where a jurisdiction may be prepared to recognize the interest of the foreign creditor in assets, it may prefer to do so by agreement assuring reciprocal treatment and a fair application of assets everywhere to the indebtedness.⁷⁶ Another complexity is introduced when non-enemy shareholders as well as creditors are involved. This is considered in *G 4* below.

G. Shareholders

One of the major problems in the field of protection of non-enemy individuals arises from shareholdings in corporations which are organized under enemy law or are enemy controlled.⁷⁷ These shareholders may find they have suffered a real loss by vesting of the assets of the corporation as being enemy, and their loss would be almost irremediable without diplomatic intervention since they cannot plead under the municipal custodian laws that type of direct ownership interest in the property which under those laws would qualify them to assert a claim based on title to the property. In this instance, particularly, international law devices for protection of interests may well cut across accepted doctrines of corporate law in order to prevent a real injury.

One situation may be distinguished at the outset. When a corporation is organized under the laws of a vesting jurisdiction, even though there is a controlling enemy share interest, the enemy property custodian normally only seizes the enemy shares and leaves untouched the non-enemy shares. But when the corporation is organized in a foreign jurisdiction and is enemy controlled, the practice of custodians

penation: A Comparative Approach, 17 U. OF CHI. L. REV. 458, 472 (1950). This may be explained in part because harm to creditors is often of a contingent nature. See also on creditor protection, Jones, *supra* note 50, at 246-247, 252, 257.

Umpire Parker in the United States-German Mixed Claims Commission did not hesitate to interpret that section 5 of the Treaty of Berlin called for the protection of bondholders of German corporations having property which was lost or damaged. CONSOLIDATED EDITION OF DECISIONS AND OPINIONS, 1925-1926 324-325 (1928):

"Through the much-misunderstood clause of section 5 dealing with claims of American nationals for 'loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise,' provision was made for the protection of all interests of American nationals in both domestic and foreign corporations, where such American nationals had indirectly suffered damage through the ownership of shares of stock in such corporations, or of bonds thereof, or otherwise." (Emphasis supplied.)

In the American Mexican Claims Commission Report a case is given of American nationals having a 28 per cent bond and a 50 per cent stock interest in a Mexican corporation whose entire property was seized by the Mexican Government. Since the property seized was worth less than the outstanding bonds the claimants were held entitled to 28 per cent of the value of the property seized, but received nothing by reason of their share interest. REPORT TO SEC'Y OF STATE, AMERICAN MEXICAN CLAIMS COMMISSION 546 (1948). It should be noted that the statute under which the claim was allowed followed the language of prior conventions between the United States and Mexico.

⁷⁶ The Brussels Intercustodial Agreement, *supra* note 49, in Annex Parts III and IV assures such reciprocal treatment and the sharing of the burden of meeting indebtedness by the countries involved. See Mason, *supra* note 60, at 181-182. The term "interest" in Parts III and IV was meant to be broad enough to include a creditor interest.

⁷⁷ The following discussion on corporations is applicable to firms or partnerships, which contrary to the view put forward in Part II F and G, are assimilated to juristic personalities and treated as enemy by vesting jurisdictions.

has been to seize and retain the entire assets of such corporation organized in their jurisdiction and it is this action which causes loss to the innocent non-enemy shareholder.

The vesting of all assets of enemy controlled corporations and corporations organized in enemy territory has been influenced by blocking controls to which these corporations were justifiably subject. The attitude has been sometimes justified on the basis of the supposed guilt of non-enemy nationals in associating as stockholders with enemy-to-be shareholders or just for investing as shareholders in corporations in enemy-to-be countries. Of course this justification is true only when it can be shown that the interests of the non-enemy shareholders were integral parts of a general scheme to cloak the existence of the enemy interests in contemplation of war, a scheme deliberately made at a time when war was probable or overt. Or it is alleged that the risk of war and of seizure as enemy is one of the risks a non-enemy corporate shareholder assumes when he invests in a corporation. Neither of these arguments is convincing and protection of these shareholders seems warranted.⁷⁸

What are the international law precedents before World War II? Numerous instances exist where protection has been sought for a country's shareholders in a foreign corporation where some action against the property of that corporation has been taken by a foreign government.⁷⁹ However under Article 297b of the Versailles Treaty, the external assets belonging to German nationals or companies controlled by them could be seized. But, despite this provision, in several instances Allied countries took action according protection to property beneficially owned by Allied shareholders⁸⁰ while several Allied countries made a general turn back of a good part

⁷⁸ Hyde, *Protection by the United States of American-Owned Property in War-Stricken Areas*, 46 COL. L. REV. 519, 521-522 and n. 8 (1946); Mason, *supra* note 60, at 183-185; Cohn, *supra* note 23, at 542-551, and especially n. 54; Jones, *supra* note 50, at 254.

⁷⁹ See references, *supra* note 50. Kiesselbach, who was the German agent in the German American Claims Commission, mentions the numerous conventions made by the United States for such protection. KIESELBACH, PROBLEMS OF THE GERMAN AMERICAN CLAIMS COMMISSION 75-76 (1930). One of these conventions was with Mexico. It was paralleled by conventions made by Mexico with Great Britain, France, Spain, Germany, and Italy which likewise protected shareholders of these countries. One difference was that the United States convention called for protection of any "substantial" interest while the European conventions required the interest to exceed 50 per cent of the total capital. A. H. FELLER, THE MEXICAN CLAIMS COMMISSION 1923-34 117 (1935). In 1941 the United States concluded a further convention with Mexico providing for Mexico to pay to the United States a lump sum amount. Congress then enacted legislation setting up an American-Mexican Claims Commission which passed, *inter alia*, on claims of American nationals for loss suffered to their property, including loss "suffered by any foreign corporation, company, association or partnership in which such nationals have, or had, a substantial and bona fide interest." See REPORT TO SEC'Y OF STATE, AMERICAN-MEXICAN CLAIMS COMMISSION 8 (1948). As stated before, the statute followed the language of earlier conventions.

⁸⁰ See references to certain instances in the dissenting opinion in the arbitration of the claim of the Standard Oil Company to Certain Tankers, 8 BRIT. Y. B. INT'L L. 156, 170 (1927). The arbitral tribunal permitted certain tankers owned by a wholly owned German subsidiary of Standard Oil to be turned over as reparations. Although literally correct if the principles of domestic corporate law were meant to be involved, the decision expresses a very questionable view of the intent of the provisions of the Treaty under discussion. In any event, the practice has been different after World War II, in accordance with Resolution 3, Annex, Paris Reparation Agreement, *supra* note 12, which calls for the exemption from reparation use of property of Allied nationals, whether "wholly owned or in the form of a shareholding of more than 48 per cent." See also comment, Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 COL. L. REV. 1125, 1135 n. 31 (1948).

of the assets, thus eliminating or reducing harm to non-enemy stockholders.⁸¹ Further, Article 297c of the Versailles Treaty and the Treaty of Berlin, which accorded the United States the rights of the Treaty of Versailles, incorporated the principle of protection for non-enemy shareholders, direct or indirect, of corporations organized in Germany with respect to corporate property damaged as a result of wartime action. Thus regarding American stockholders in American or foreign corporations whose property was destroyed, Umpire Parker of the United States-Germany Mixed Claims Commission had this noteworthy statement to make about the international law principal referred to under the Versailles Treaty:

American nationals who had an interest in property destroyed and who suffered through its destruction, no matter in what capacity they suffered, whether directly or indirectly, are protected to the extent of their interest. *Thus construed, this clause of section 5 is in harmony with the established policy of the American Government to look behind forms and to the substance in discovering and protecting the interests of American nationals.* It did not have the effect of broadening the terms of the Treaty of Versailles, but was a declaration of a rule which the United States would have invoked in construing that treaty in the absence of any such express provision.⁸² [Emphasis supplied.]

What is the situation with respect to the protection of non-enemy shareholders as to World War II? It may be helpful to divide the subject into the following sections.

1. *German External Assets.* As stated before, with respect to German external assets the Allies are pursuing generally a policy of vesting all property in the jurisdiction owned or controlled by German nationals, including as a German national any enterprise organized under German law. The Potsdam Agreement and the Paris Reparation Agreement which gave international sanction to seizures do not purport to define what may or may not be seized, the Potsdam Agreement merely speaking of "appropriate external assets"⁸³ and the Paris Reparation Agreement laying down a mandate that assets of a German enemy in the jurisdiction of a signatory should be disposed of to preclude return to "German ownership or control."⁸⁴ In both cases it was appreciated there was need of further clarification.

⁸¹ Borchard, *Introduction*, to GATHINGS, *INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY IX* (1940).

⁸² CONSOLIDATED EDITION OF DECISIONS AND OPINIONS, *op. cit. supra* note 75, at 325, and similar statement, HYDE, *supra* note 78, at 522; Cohn, *supra* note 50, at 251-252. See also, Hanna, *Nationality and War Claims*, 45 *COL. L. REV.* 301, 327-328 (1945). The section 5 to which reference is made in the text was set forth in the Joint Resolution of the United States Congress declaring the end of the war with Germany and was also set forth and accepted by Germany in the Treaty of Berlin. The significant portion of section 5 is included in note 75, *supra*.

Art. 297b and Art. 297c of the Versailles Treaty may be considered as representative of the two streams of precedents in the international field, one of seizure of property owned or controlled by enemy nationals, the other of protection of non-enemy interests, there being a conflict and overlap in certain cases. International agreements, such as the Brussels Intercustodial Agreement, *supra* note 49, confirm the primacy of the principle of non-enemy protection in such cases.

⁸³ See note 5, *supra*. Mosely describes as part of a "feverish compromise" the division of German assets, *supra* note 7, at 229.

⁸⁴ See note 12, *supra*.

After the Potsdam Agreement the occupying powers in Germany passed Allied Control Council Law No. 5⁸⁵ which vested every conceivable and arguable type of German external asset and set up a German External Property Commission which was designed to define what was the property to remain seized. On the breakup of quadripartite government in Germany the GEPC became defunct. Under the Paris Reparation Agreement, Part I, Article 6F, a Committee of Experts was created which then discussed the question, *inter alia*, of the protection of friendly shareholders. After the discussion they recommended the calling of a conference to write a multilateral convention which would cover these and other subjects.⁸⁶

(a) *Intercustodial Agreements.* A conference was called and this led eventually to the Brussels Intercustodial Agreement of December 5, 1947 which has been signed by the United States, Belgium, Canada, Denmark, Luxembourg, and the Netherlands and which became effective January 24, 1951.⁸⁷ Part III and Part IV of the Annex of this Agreement are important here. Part III concerns the case of property in one Allied country (secondary country) belonging to an enterprise organized under the laws of another Allied country (primary country), which enterprise is German enemy controlled. Instead of seizing all the property of the enterprise, provision is made for the secondary country to secure only that proportion of the property in its jurisdiction corresponding to the enemy interest while the part corresponding to the non-enemy interest is to enure to the benefit of such interest.⁸⁸

⁸⁵ 14 DEP'T STATE BULL. 283 (1946).

⁸⁶ The Committee of Experts, while intercustodial discussions were taking place, formulated the Rules of Accounting, *supra* note 32, which permit a country to release non-enemy direct or indirect interests in German assets. See Rule 6 J and K and Rule 8 A.

⁸⁷ Agreement, *supra* note 49. For discussion of Agreement see Mason, *supra* note 60; Maurer and Simsarian, *supra* note 49; DIDISHEIM, LES CONFLITS INTERSEQUESTRES (I.A.R.A. 1949); Mann, *supra* note 56, at 245-247; Cohen, *German Enemy Property*, 3 INT'L LAW Q. 391, 396 (1950). This Agreement is the first comprehensive multilateral agreement on the subject of conflicting claims to enemy assets. These conflicting claims involve disputes between enemy property custodians of two Allied countries as to which is entitled to seize certain property, as well as certain disputes between an alien property custodian of one country and a non-enemy individual as to whether a certain property or interest should be considered as non-enemy. It is this latter kind of conflict which is relevant for this article.

The Agreement is open for accession to other members of the Inter-Allied Reparation Agency as well as under certain circumstances to non-members of the Inter-Allied Reparation Agency (Art. 5).

The Agreement failed to go into effect earlier because of the lack of Congressional authorization. This was given by Pub. L. No. 857, 81st Cong. 2d. Sess. (Sept. 28, 1950) which empowers the executive branch to enter into and give effect to agreements on conflicting claims to enemy property, provided such agreement, *inter alia*, provides for the protection of American and other non-enemy interests. H. R. REP. No. 2770, 81st Cong., 2d Sess., has instructive material on the background of the Agreement.

For entry into force of the Agreement and the related call for submission of claims, Dep't State Press Releases Nos. 92, 93, February 6, 1951. Press Release No. 92 erroneously gives February 1, 1951 as the effective date of the Agreement.

⁸⁸ The method by which this is to be done is generally by release of all the property by the secondary country to the primary country, the primary country then to reimburse the secondary country to the extent of the enemy interest in the released property. If release does take place, the non-enemy interests are automatically protected. In case, in certain circumstances, the secondary country seizes its proportion of the property corresponding to the enemy interests, precautions have to be taken that the residue enure only to the benefit of the non-enemy interest in the corporation, as returning it to the corporation will obviously not be adequate since the non-enemy interests will not be the sole beneficiaries of such an action. For discussion of cases under Parts III and IV of the Brussels Intercustodial Agreement see Maurer and Simsarian, *Agreement to Resolve Conflicting Claims to German Enemy Assets Outside Germany*, 42 AM. J. INT'L L. 157-162 (1948); Mason, *supra* note 60, at 179-185.

Part IV concerns property in an Allied country belonging to an enterprise organized under the laws of Germany, in which enterprise there is a 25 per cent shareholding of nationals of signatory countries.⁸⁹ In such a case the interests of the non-enemy nationals in such property were to be protected to the extent of such interests. It should be pointed out that the 25 per cent requirement was imposed not on the basis of principle but as a concession to administrative practicality.

Other intercustodial agreements have been made between Allied governments which are relevant.⁹⁰ The French and the British who participated in the discussions leading to the Brussels Intercustodial Agreement have thus far been unwilling to sign it, but entered into a bilateral agreement whose terms duplicated in great part the Brussels Intercustodial Agreement. This agreement contains a Part III which covers the same subject as the Part III of the Brussels Intercustodial Agreement. However, it permits seizure of the property by the secondary country where the enterprise in the primary country is German enemy controlled. The parties state they recognize such seizure may be prejudicial to the non-enemy interests in the enterprise but "express their willingness to enter into special agreements to mitigate the consequences."⁹¹ This Agreement does not contain a Part IV dealing with enterprises organized under German law but the United Kingdom and France signed a contemporaneous declaration stating that each was willing to negotiate with other governments an agreement for the protection of "substantial" interests of non-enemy nationals in enterprises organized under German law with respect to "capital assets" of such enterprises outside Germany.⁹² The Agreement and Declaration do not give the same protection to non-enemy interests as does the Brussels Intercustodial Agreement, although it is not known how the provisions of these documents have worked out in practice.⁹³ The United Kingdom-Netherlands Intercustodial Agreement has a Part III similar to the United Kingdom-France Part III but the Netherlands

⁸⁹ Annex, Arts. 21, 22. It will be noted that these articles are restricted to nationals as of 1939. The United States delegation attempted but was unable to secure a broader coverage. Under Pub. L. No. 857 of September 28, *supra* note 87, Congress authorized the executive in future agreements to seek protection for those non-citizens who were permanent residents at the time of this legislation and had become citizens at the time of the effective date of such agreement. Further, the Brussels Intercustodial Agreement does not shut the door to diplomatic representations for meritorious cases not covered. See Mason, *supra* note 60, at 185.

⁹⁰ In addition to the United Kingdom-France and United Kingdom-Netherlands Agreements discussed in the text, there appears to be a United Kingdom-Denmark Agreement which has not yet been published.

There was also an intercustodial agreement of limited scope entered into by the United States, the United Kingdom, and Canada in 1945, which has not yet been published. See Mason, *Settling Intercustodial Claims to Vested Property*, N. Y. Law Journal, May 23, 1950.

Several unpublished agreements have been made by the authorities in Germany with Allied countries which provide, *inter alia*, for the release by those countries of rolling stock in their territories owned by corporations in Germany in turn owned by Allied nationals.

⁹¹ Annex, Art. 14 of the Agreement, *supra* note 60. There is at the end of Art. 14 an ambiguous sentence that discussions on protection of non-enemy interests shall be without prejudice to Arts. 12 and 13(a) which deal with seizures.

⁹² See text of Declaration at end of United Kingdom-France Agreement, *supra* note 60.

⁹³ The British had been unwilling to accept a definite commitment of protection in the Brussels Intercustodial Agreement and this was one of the main reasons for their failure to participate therein.

secured significantly strengthened provisions for the protection of non-enemy share interests, so that the result may be the same as the Brussels Intercustodial Agreement Part III. Thus the Agreement recognizes that seizures may be prejudicial to non-enemy interests but goes on to state that a government shall only be entitled to the enemy interests and that the Agreement shall be carried out in such a way as to avoid harming non-enemy interests.⁹⁴ With respect to non-enemy interests, the Agreement contains as its last provision, Article 26, which is almost identical in wording with the United Kingdom-France Declaration, except that the Parties affirm their willingness to negotiate with each other. The form of the Article appears to make it more of a commitment than the Declaration.

(b) *Neutral Accords.* The general effect of the Allied-Swiss Accord, the Allied-Swedish Accord, the Allied-Spanish Accord, as far as relevant here, is to permit the seizure by the countries of property in their territory which is owned by corporations organized under German law or by German controlled corporations.⁹⁵ However the Swiss-Allied Accord has a special clause which provides for exemption of property of enterprises organized under German law which are controlled by non-German nationals, and even in the case where property is permitted to be seized, protection shall be afforded to substantial interests of non-German nationals which would otherwise be injured.⁹⁶ The particular language involved is subject to controversy but it is considered that this clause requires protection for cases involving substantial non-enemy interests, say, 25 per cent or more. However, this and other matters have been the subject of a tentative agreement between the United States and Switzerland on conflicting claims to German assets of July 19, 1949. This agreement has not become effective and has not been published. It is understood that the Swiss have reached agreements of an intercustodial nature, in a tentative or final form, with Great Britain, France, the Netherlands, Denmark, and Norway. With relation to Sweden and Spain no clause exists for the protection of non-enemy nationals but provision was inserted that permitted these countries to extend protection to their own nationals owning interests through foreign corporations and then to extend the same protection to nationals of other non-enemy countries.⁹⁷ This was designed to supply an opening for later approaches to these countries for the protection of such interests. The United States Government did in fact have discussions with the Swedish custodian in 1948 which, however, did not materialize in any agreement. Further discussions are planned.⁹⁸

⁹⁴ Arts. 14, 19 of the Agreement, *supra* note 60.

⁹⁵ See references note 26, *supra*, plus Arts. I and II of Allied-Spanish Accord. The Swiss Accord covers "property owned or controlled"; the Swedish Accord, "owned or controlled, directly or indirectly"; the Spanish Accord covers property "belonging to." Some question may exist in the Spanish Accord about the power to seize property indirectly owned and property controlled by the Germans.

⁹⁶ Annex, Article IV B, Allied-Swiss Accord, *supra* note 26.

⁹⁷ Allied-Swedish Accord, *supra* note 26, at 17; Allied-Spanish Accord, *supra* note 26, at 53. These provisions refer to protection of direct or indirect non-enemy interests, to the same extent as Swedish (Spanish) nationals, on condition of reciprocity by the country of the non-enemy. *Cf.* Mann, *supra* note 56, at 250.

⁹⁸ It is understood that the British and Swedish custodians have reached an agreement, but this has not yet been published. It is also understood that the Netherlands and Sweden reached an agreement November 14, 1950.

(c) *Agreement with Italy.* The Memorandum of Understanding of the United States, United Kingdom, and France with Italy dated August 14, 1947 provides for the liquidation of assets in Italy belonging directly or indirectly to Germans in Germany or organizations organized under German law. But there is a provision exempting assets of such organizations to the extent that they are not "beneficially German-owned."⁹⁹ Thus there is assured complete protection for indirect non-enemy share interests.¹⁰⁰ This is consistent with Article 78, paragraph 1, of the Italian Treaty which calls for the restoration of all United Nations nationals' interests¹⁰¹ in Italy, and especially paragraph 4(b) which provides for the protection of shareholdings, direct or indirect, of United Nations nationals in German entities having property in Italy.¹⁰²

(d) *Agreements with U.S.S.R.* Under the Potsdam Agreement and the Peace Treaties with Bulgaria, Hungary, Rumania, and Finland, the U.S.S.R. was entitled to appropriate German external assets in these countries or, as further defined by the Peace Treaties, German assets transferred by the Allied Control Council, Germany.¹⁰³ An attempt was made by the Western Powers in the German External Property Commission, a quadripartite agency in Germany, to define what the U.S.S.R. was entitled to. One of the proposals made was that non-enemy direct or indirect interests in these assets should be protected. The GEPC, as stated before, became defunct with the collapse of quadripartite government in Germany and this proposal came to nought. The U.S.S.R. has pursued a policy of securing the transfer to itself from the satellite countries of the German assets, including therein assets owned directly or indirectly by entities organized under German law, regardless of whether these entities were owned by non-enemy nationals. The Western Powers have objected to this action by the U.S.S.R. Thus the United States transmitted a note to the U.S.S.R. stating:¹⁰⁴ "As a general principle, beneficial rights of United Nations countries in any German assets are not to be transferred." The objection can be supported by reference to the Armistice terms with the enemy countries which provided for the restoration of United Nations nationals' interests;¹⁰⁵

⁹⁹ See paragraph 2 of Memorandum, *supra* note 9.

¹⁰⁰ Mann, *supra* note 56, at 253, reaches a different conclusion, relying too heavily on the literalism of the *Standard Oil Company Tankers* case, *supra* note 80. The word "beneficially" was intended to secure protection for non-enemy shareholders in German corporations and the Memorandum has been implemented in that sense. See use of word "beneficial" in par. 4(b), Art. 78, Italian Treaty.

¹⁰¹ It may be argued that this paragraph refers to "legal" interests. However, in international law the concern of a shareholder with the safety of the corporate property is so clearly recognized as a protectible interest, that there is no real doubt that this paragraph should be applied to cover the shareholder's interest. Cf. use of "interests" in pars. 3 and 4(b) of the same article.

¹⁰² If the Memorandum did not exempt from seizure such non-enemy beneficially owned assets, the illogical result would follow that a partly damaged building in Italy (owned by a German corporation, in turn owned by American nationals) would be seized as a German asset and lost to the stockholders, while the stockholders received compensation for the damaged part under par. 4(b).

¹⁰³ See references notes 5 and 6, *supra*.

¹⁰⁴ The text of the note is given in 17 DEP'T STATE BULL. 298 (1947). It is understood similar notes were delivered by the French and British.

¹⁰⁵ E.g., par. 13 of Rumanian Armistice, 11 DEP'T STATE BULL. 289 (1944).

Article XX and Annex II of the Potsdam Agreement which provide that the burden of reparations should not fall on Allied nationals;¹⁰⁶ the provisions of the treaties providing for the restoration and protection of United Nations nationals' interests, direct and indirect;¹⁰⁷ as well as the point that the U.S.S.R. is entitled only to what is transferred by the Allied Control Council, which has not acted. The dispute remains one of the unsettled issues with the Soviet Government. In view of the fact that the countries concerned transferred the assets without awaiting an ACC order, it may be possible to pursue them for indemnity.

(e) *London Patent Accord.* In the field of German assets mention should be made of the London Patent Accord of July 27, 1946¹⁰⁸ under which the Allied countries which have seized German patents in their jurisdiction have agreed to license them out on a non-exclusive, royalty free basis or to put the patents into the public domain. However this obligation only pertains to patents which are 100 per cent German owned. Where the patent is less than completely German owned, the only compulsion is that, in so far as a country may act with respect to such patents, it shall accord the same privileges to nationals of other countries.¹⁰⁹ With respect to patents belonging indirectly to non-enemy interests and with respect to which action has not been taken under the London Patent Accord, provision exists in the Brussels Intercustodial Agreement for handling them similarly to any other kind of property.¹¹⁰ This would mean that non-enemy interests would be protected.

2. *Italian, Bulgarian, Hungarian, and Rumanian External Assets.* These assets are covered by almost identical articles in the Peace Treaties. These clauses permit, subject to certain enumerated exceptions, the seizure and retention of the "property, rights and interests" which "belong" to the enemy government and its nationals,¹¹¹ by the Allied countries in which the assets are. What is the disposition of the external property of corporations organized under enemy laws, but which are owned wholly or in part by Allied shareholders? The detailed nature of the Article in each of the Peace Treaties may be argued to show that the whole subject was meant to be completely covered, leaving no room for further exceptions or qualifications.¹¹²

¹⁰⁶ Paragraph 2 of the Annex states that this principle applies to property wholly or substantially owned by Allied nationals; if the Allied interest is less than substantial, compensation is expected.

¹⁰⁷ E.g., Art. 26, par. 1 and par. 4(b) of the Hungarian Treaty which are identical with the provisions in the Italian Treaty discussed in the text in c above and in notes 101 and 102 *supra*. See also Mann, *supra* note 56, at 241-242. It should be pointed out that at one stage of the Austrian Treaty discussions, representatives of the three Western Powers examined with the U.S.S.R., *inter alia*, the direct and indirect non-enemy interests in properties in Eastern Austria but could not secure Russian acceptance that beneficial interests of Allied nationals were to be excluded from appropriate German external assets under Potsdam.

¹⁰⁸ See text in 15 DEP'T STATE BULL. 300 (1946); Boskey, *The Conference on German-Owned Patents*, 15 DEP'T STATE BULL. 297 (1946).

¹⁰⁹ See Arts. 1 and 2.

¹¹⁰ Annex, Art. 26 I of Agreement, *supra* note 49.

¹¹¹ See references notes 17, 19, *supra*.

¹¹² In this sense the problem may be claimed to be different from that of the construction of "German assets" which the U.S.S.R. obtained in Bulgaria, Hungary, and Rumania and the Allies obtained in Italy, discussed in the text.

On the other hand it can be argued that these very shareholders are protected under the other clauses of the Treaties dealing with the restoration of the rights of Allied nationals or compensation for any damage done to their property;¹¹³ that these clauses should be integrated with the present clauses; and that the present clauses merely confirm the right of the Allies to vest *vis-a-vis* the Italian Government, but were not meant to and do not affect the ability of any Allied country *vis-a-vis* another Allied country to make claims on behalf of citizens who may be the owners in whole or part of the corporations organized in enemy territory. It does not seem inappropriate to say that the protection of such non-enemy nationals is not to be foreclosed but the subject of further discussions.¹¹⁴

The special provision in the Italian Peace Treaty under which the U.S.S.R. is entitled to Italian assets in the Balkans¹¹⁵ leaves an uncertainty similar to, but not as complete as, the clause giving the U.S.S.R. German assets. It is not as complete since there is the incorporation of the exceptions in Article 79. But there still remains the question, discussed above with respect to Article 79, of how much of Article 78, dealing with the protection of the United Nations nationals, is to be integrated with it. Should external assets in the Balkans of corporations in Italy owned by United Nations nationals be considered Italian assets for seizure by the U.S.S.R.?

3. *Special Nationalization Agreements.* In addition to special agreements on enemy assets, many countries have made general nationalization claims settlements with the eastern European countries and such settlements have contained provisions which may cover the protection of the non-enemy interests in German assets.¹¹⁶ The United States made an agreement with Yugoslavia,¹¹⁷ initialed an agreement with Poland which never was put into effect,¹¹⁸ and has carried on discussions thus far unsuccessfully with Czechoslovakia.¹¹⁹ The British, French, and Swiss have each made agreements with one or more of Yugoslavia, Poland, and Czechoslovakia.¹²⁰ In

¹¹³ See notes 101, 102, 107, *supra*, and corresponding text. In addition there is the clause which exists in all the treaties, e.g., par. 9(a), Art. 78, Italian Treaty, defining as a United Nations national all corporations treated as enemy by the enemy country. Are such corporations though owned wholly by Allied shareholders subject to the seizure of assets which they hold outside of the enemy country?

It is also possible to make the argument that "belong" connotes beneficial ownership, just as it will doubtless be interpreted to include "direct or indirect." See note 57, *supra*.

¹¹⁴ This has been the attitude of the United States Government. Thus the United States has expressed a willingness to release the beneficial interests of non-enemy nationals in cases involving Bulgarian, Hungarian, and Rumanian external assets, if reciprocal treatment is accorded American nationals. Cases have come up, involving United States and British nationals and assets in the United States and Great Britain, which it is hoped may be settled by future negotiation.

¹¹⁵ Art. 74, Pt. A, par. 2(b).

¹¹⁶ The nationalization laws often covered German assets. See generally, Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 COL. L. REV. 1125 (1948); Doman, *Compensation for Nationalized Property in Postwar Europe*, 3 INT'L L. Q. 323 (1950); Rubin, *Nationalization and Compensation: A Comparative Approach*, 17 U. OF CHI. L. REV. 458 (1950).

¹¹⁷ UNITED STATES-YUGOSLAVIA AGREEMENT REGARDING PECUNIARY CLAIMS OF THE UNITED STATES AND ITS NATIONALS OF JULY 19, 1948, T.I.A.S. 1803.

¹¹⁸ Dep't State Press Release No. 935 of December 27, 1946, 16 DEP'T STATE BULL. 28 (1947).

¹¹⁹ The Czechs in 1946 gave a general assurance of compensation, 15 DEP'T STATE BULL. 1004 (1946). In 1949 a Czech delegation arrived to carry on discussions, but its chief defected on arrival and assumed the status of a political refugee, so that negotiations were not undertaken.

addition, Switzerland has made an agreement with Hungary.¹²¹ The United States-Yugoslav Agreement provides for protection of direct or indirect interests of United States nationals and was designed to cover assets seized in Yugoslavia belonging to German organized corporations.¹²² Payment of such claims is to be made out of a 17 million dollar fund by the United States International Claims Commission, any residue after the satisfaction of all claims to revert to Yugoslavia. In the United States-Polish agreement provision was made for protection of United States interests in assets in Poland owned through corporations organized under the laws of Germany where the American interests constituted 51 per cent of the voting stock, or if less, were "directed to the control of the enterprise, as evidenced by participation in the management."¹²³

It has not been possible to examine all the nationalization agreements but a sampling appears to show protection of indirect interests apparently going through even enemy intermediate corporations.¹²⁴

4. *Extent of Protection of Shareholders and Creditors.* One further problem should be considered with respect to the protection of non-enemy shareholders. What should be the extent of the protection? The simple rule that suggests itself is to assure protection according to the proportion that the non-enemy shares bear to the total shareholdings. This simple rule seems to have been generally adopted in many situations.¹²⁵ However, on several occasions objection has been raised that account must be taken of the creditor interest, since of course stockholders on a liquidation are entitled to protection only after the payment of debts, so that payment to them without regard to the obligations of the enterprise may give them a windfall.¹²⁶ It is possible that a creditor may pursue such a stockholder as being unjustly enriched. But the main obstacle has been the impracticality or difficulty of taking into account the creditor factor, and instances of previous solutions incorporated in international agreements or in decisions of international arbitral tri-

¹²⁰ See Doman, articles, note 116, *supra*.

¹²¹ Reported State Dep't in unclassified despatch 169 of August 28, 1950 from Bern.

¹²² See Art. 2(C) of Agreement, *supra* note 117. The agreement speaks of "property, and rights and interests in and with respect to property" "indirectly" owned by United States nationals through interests, direct or indirect, in non-United States juridical persons.

¹²³ Art. II B of Agreement, *supra* note 118.

¹²⁴ E.g., Art. I of the British-Czech Agreement on Nationalization Claims, Treaty Ser. No. 60 (1949), CMD. 7797, states that the agreement applies to "property, rights and interests. . . owned directly or indirectly, in whole or in part, and whether legally or beneficially" by British nationals. Art. 2 of the Swiss-Hungarian Agreement of June 27, 1950, referred to in note 121 *supra*, states that the Agreement covers all property, rights, interests, and claims, belonging directly or indirectly to Swiss natural persons or Swiss juridical persons, in which the controlling interest is owned by Swiss nationals.

¹²⁵ FREDERICK K. NIELSEN, *INTERNATIONAL LAW APPLIED TO RECLAMATIONS* 58-61 (1933); 3 MARJORIE M. WHITEMAN, *DAMAGES IN INTERNATIONAL LAW* 1683 (1943); 2 HYDE, *op. cit. supra* note 49, at 903-904; see GREAT BRITAIN-MEXICAN CLAIMS COMMISSION, *FURTHER DECISIONS AND OPINIONS* 203 (1933).

¹²⁶ FELLER, *op. cit. supra* note 79, at 120-121; Kiesselbach, *op. cit. supra* note 79, at 118-120, 126. The principles laid down for the United States-German Mixed Claims Commission included protection of creditors. See note 75, *supra*.

bunals seem to rest¹²⁷ on a strict share basis.¹²⁸ One way may be to ignore creditor interests unless the other assets of the corporation are inadequate to meet debts. If they are adequate it is only the shareholder that should be protected as his equity is being affected. If the shareholder has no equity, it would appear that only the creditor should be compensated.¹²⁹ Another possibility, even if the enterprise is solvent, is to make a paper liquidation and figure out the proportionate interests of shareholders and creditors in any particular enemy assets.¹³⁰ The problem is a thorny one offering several solutions, none of which is completely satisfactory. The problem was in the minds of those who worked out the Brussels Intercustodial Agreement and interesting questions will doubtless arise in settling the cases under this agreement.

H. Restitution

Although the general problem of restitution is treated elsewhere in this symposium there are some special ramifications in connection with enemy external assets.

By the London Declaration of January 5, 1943 against Acts of Dispossession¹³¹ the Allies stated that they reserved their right to declare invalid acts of looting practiced by the Germans in occupied territory by force, duress, or other more subtle means. For those cases of looting where property was located in Germany at the end of the war, there exist procedures for securing restitution directly from the three Western Powers or by suit under the restitution laws applicable in the three western zones.¹³² For cases where the property has remained outside of Germany and has become the property of another non-enemy national, laws have been enacted in the various occupied countries attempting generally to reconstitute to the original owners.¹³³

¹²⁷ KIESSELBACH, *op. cit. supra* note 79, at 126. Jones, *supra* note 50, at 246-247, 252, 257.

¹²⁸ See *e.g.*, REPORT TO SEC'Y OF STATE, AMERICAN-MEXICAN CLAIMS COMMISSION, *op. cit. supra* note 75, at 500, 523, 560, 610, 638, 649. In the case of a bank, one decision gave a recovery dependent on the impairment of the share value (p. 129). See references notes 125-127, *supra*.

¹²⁹ *Id.* at 546. See note 75, *supra*.

¹³⁰ See possible formula in Mason, *supra* note 60, at 182, 181; for cases without creditor interests, see Maurer and Simsarian, *supra* note 88, at 158-162.

¹³¹ The text is set forth in UNITED STATES ECONOMIC POLICY TOWARD GERMANY, DEP'T STATE PUB. No. 2630, at 52.

Although this declaration applied to territory outside of Germany the Allies have also adopted as their policy the restitution of property taken away from individuals in Germany; Military Government Law 59 in the United States Zone and similar laws in the British and French Zones.

¹³² The three western zones have procedures for restitution of identifiable items to countries of origin if it appears that they were acquired by Germans other than by "normal commercial transfer."

¹³³ See series of articles in 29, 30 and 31 J. COMP. LEG. AND INT'L L. (3rd Ser., Parts III and IV, 1947, 1948 and 1949) on Burma, Philippines, Greece, France, Denmark, Norway, Isle of Jersey, Belgium, Netherlands.

No such laws exist in the United States, but the common law might ordinarily be effective where force or duress had been employed. However, in one case which came to the State Department's attention, involving property in the United States where the court appeared to debar itself from questioning an act of looting in Germany on the basis of the "act of state" doctrine, in the absence of a clear expression of State Department policy, the State Department communicated with the court informing the court that it was this Government's policy to oppose Nazi looting and to permit the courts to pass upon the validity of the acts of Nazi officials. The matter came up in the case of *Bernstein v. Holland-America Line*. The letter is set forth in 20 DEP'T STATE BULL. 592 (1949). The letter is also referred to in 44 AM. J. INT'L L. 132, 183 (1950).

Where the property remained outside of Germany but as the property of a German national there arose the possibility that it might be seized as a German external asset. The most dramatic instance of this occurred in the Austrian Treaty discussions where the U.S.S.R. engaged in a sharp controversy with the Western Powers, refusing to recognize that looted assets do not fall within the scope of the "appropriate German external assets" to which it was entitled under the Potsdam Agreement.¹³⁴ In the United States under the Trading with the Enemy Act and the certification letters of assurances regarding blocked assets, properties seized from victims of Nazi persecution or in violation of the declaration against forced transfers may be released to the original owners.¹³⁵ Similarly in the Brussels Intercustodial Agreement no country is required to recognize loot transactions in conflict with the London Declaration.¹³⁶

The matter of looted property involved in German external assets came up in the drafting of the Inter-Allied Reparation Agency Accounting Rules. It was finally agreed that a country need not account for property as an enemy asset if it had been originally looted,¹³⁷ thus leaving any particular country in a position to make restitution without being prejudiced accountingwise. During the course of the discussion the Netherlands, supported by other occupied countries, insisted that lootings which had taken place through the indirect means of forced loans, removing foreign exchange barriers, excessive occupation costs, and unbalanced clearings imposed by the Germans must be considered on a par with lootings by ordinary force or duress. This was generally agreed upon, however, without prejudice to the position that a country might take with respect to property which has come from such a jurisdiction to its own jurisdiction.¹³⁸

IV

CONCLUSION

The reasons that vesting action has often brought harm to friends are several. Thus, the domestic laws under which seizures have taken place are unusually broad in their scope in order to deal with the many devices by which enemy interests may be represented. Their functions as to enemy national and enemy property served

¹³⁴ Mosely, *supra* note 7, at 229-230.

¹³⁵ Cf. generally sec. 32(a)(2) of the Trading with the Enemy Act, 61 STAT. 754, 756 (1947), 50 U. S. C. App. §32(a)(2) (Supp. 1950). See Alk and Moskovitz, *supra* note 24, at 17-19; Cohn, *supra* note 40, at 62-69, 75, and n. 83.

¹³⁶ Annex, Art. 27 of Agreement, *supra* note 49.

¹³⁷ Rules 11-15 of Accounting Rules, *supra* note 32; Simsarian, *supra* note 32, at 229.

¹³⁸ This reservation was included in the second paragraph of the Commentary on the Rules of Accounting. This Commentary was also approved by the Assembly of IARA on November 21, 1947. Both Rules and Commentary may be found in document IARA/A.S./ Doc. 354 of November 18, 1947.

The countries were fearful that on the Dutch theory all purchases from the Netherlands during the war might be involved and that excessive claims might be made for restitution of goods which had left the Netherlands and had gone into Germany and other territories. There was an argument, too, that this kind of looting by government of government might more properly be made a governmental claim for consideration in any peace settlement. The situation might have one more element of difficulty if the property had come into the hands of a non-enemy national.

well in the era of economic warfare when blocking controls had to be extensive. But their strict application after the cessation of hostilities, when there is time for separating friend from foe or using various devices (legislative amendments, international agreements, etc.) to prevent loss to non-enemy interests, would seem inappropriate. Part of the fault lies, not so much in the lack of refinement of legislation, but in the complexity and richness of the modern system of interests in property which resists and overflows the categories described by legislation. With relation to international treaties and agreements, the impact is also apt to be harsh since the treaties and agreements often use broad terms or only lay down broad policies. This may result from a lack of time for detailed analysis, from difficult bargaining and compromise which show up in the ambiguity of language and intention, or because parties consider the formulation to be only an interim one, to be supplemented by further agreements later on. Further there is a tendency of governments to maximize reparations by vesting on any plausible ground, ignoring the harm to non-enemies unless their own citizens are apt to be affected in similar cases in other countries, and to shift to other jurisdictions, if possible, the duty of remedying the loss involved. In some cases, too, the content of protectible interests in law has been too rigidly restricted and has not taken into account the fact of loss to the persons concerned.

The goal of policy in the present field should be, colloquially speaking, to determine who are *really* non-enemies and to exempt from seizure property, rights, or interests which are *really* theirs.¹³⁸ In labeling what is a property, right, or interest for this purpose the legal conclusions should approximate the economic reality: will the seizure result in economic loss to the non-enemy? The law may attach the limitation that the loss should be proximate and substantial. Legitimate government policy may restrict protection to the range of administrative practicality and make it subject to conditions of reciprocity and equal sharing of burdens among the countries concerned. But these should be about all the qualifications to the principle of protection and these qualifications should not be used to emasculate the principle that non-enemies should not suffer loss from the seizure of enemy property.

For the future, in areas not yet filled, the need is for laws and international agreements which better effectuate the policy of protection. This may, however, as in the past, be a counsel of perfection which ignores the hurly-burly struggle often involved in the adoption of internal legislation and international agreement, when the outcome is not the same as what might be produced in Olympian detachment. For a good part of the enemy external assets field there already are basic texts. It rests with governments of good will not to stick on the letter but to interpret liberally or to agree to modification of letter to conform with the principle of protection. In some cases, the matter may become one for international arbitral or judicial cognizance. It will often then be for the tribunal concerned to engage in that form of judicial legislation which fills in interstices and harmonizes a discordant text. The principle of non-enemy protection should serve as a guiding beacon in this labor.

¹³⁸ Martin, *supra* note 3, at 90; Cohn, *supra* note 23, at 542-551 and n. 54; Jones, *supra* note 50, at 254.