

“INVIOABILITY” OF ENEMY PRIVATE PROPERTY *

SEYMOUR J. RUBIN†

At the present time, the United States Alien Property Custodian has under his control, mostly “vested,” some \$180,000,000 worth of property of enemy aliens. The United States Treasury has blocked some \$330,000,000 worth of the assets of enemy aliens.¹ There has been considerable discussion in recent months with regard to the ultimate disposition of these properties;² and the approaching end of the war brings closer the necessity for dealing with this question.

I

Article XXIII of the Treaty of 1799, between the United States and Prussia,³ provided:

“If war should arise between the two contracting parties, the merchants of either country, then residing in the other shall be allowed to remain nine months, to collect their debts and settle their affairs, and may depart freely carrying off all their effects, without molestation or hindrance, and all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all others, whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burnt, or otherwise destroyed, nor their fields wasted by the armed force of the enemy, into whose power, by the events of war, they may happen to fall; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price.”

The Treaty also provided:

“. . . And it is declared, that neither the pretense, that war dissolves all treaties, nor any other whatever shall be considered as annulling or suspending this and the next preceding article; but on the contrary that the state of war is precisely that for which

* The views expressed herein are those of the writer, and should not be construed to represent the views of the Department of State, or of any other officer of that Department.

† A.B., 1935, University of Michigan; LL.B., 1938, LL.M., 1939, Harvard University. Member of the Illinois and District of Columbia Bars. Assistant Chief, Division of Financial and Monetary Affairs, Department of State. Contributor to legal periodicals.

¹ These are estimates. Exact figures are difficult to put together because of mixed interests in vested or blocked property, and similar obstacles.

² See, e.g., Dickinson, *Enemy Owned Property: Restitution or Confiscation* (1943) 22 FOREIGN AFFAIRS, 126; CHAMBER OF COMMERCE OF THE UNITED STATES, TREATMENT OF UNITED STATES PROPERTY IN ENEMY COUNTRIES (Sept., 1943). Bills dealing with the subject and sponsored by Representative Gearhart and Senator Glass have been introduced in Congress.

³ 8 STAT. 174; 2 MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS (1910) 1484.

they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature and nations."

During the last war, the Treaty of 1799 was considered to be abrogated because of German violation of the provision guaranteeing freedom of the seas.⁴ There is no doubt, however, that many text writers on international law consider the rule of the Treaty to be also a rule of international law, binding upon nations at war without regard to specific treaty provisions.⁵ Professor Borchard states:⁶

"Probably no rule of international law was regarded in 1914 as more firmly established than the rule that private property within the jurisdiction belonging to citizens of the enemy state is inviolable. The rule was not adopted in any burst of humanitarian sentiment, but was the evolution of centuries. It rests upon a sound development in political and legal theory which was deemed natural and incidental to the evolution of modern civilization, namely, a conviction as to the essential difference between private property and public property, between enemy-owned private property in one's own jurisdiction and in enemy territory, and between non-combatants and combatants, accompanied by the growing realization that the practice of confiscation was reciprocally unwisely destructive and inconsistent with economic common sense. Possibly also the natural law school of jurists in the eighteenth century were not without their influence in emphasizing the conviction, of mutual advantage, that those surviving the devastating effects of unmitigated war should have something left with which to take up again the thread of life."

Notwithstanding the "firmly established" rule of inviolability of enemy private property within the jurisdiction, the framers of the treaties of peace terminating the First World War made specific provision for the retention of such property, either directly as compensation for the claims of nationals of the Allied Nations, or as security for such claims. Article 297 of the Treaty of Versailles reserved to the Allied Powers "the right to retain and liquidate all the property rights and interests" belonging to German nationals in Allied territory. The proceeds were to be applied to certain claims of the Allied nationals against Germany. The surplus, if any, could either be applied against the reparation account or turned back, at the discretion of the individual country. Germany was required to compensate her own nationals for this loss of their property. Although the United States did not ratify the Treaty of Versailles, the Treaty of Berlin, by which the United States ended her war against Germany, contained substantially similar provisions.⁷

The practice after the last war thus made the property of enemy nationals within

⁴ See 55 CONG. REC. 4926-4928 (1917). Article 282 of the Treaty of Versailles, the benefit of which was received by the United States in the Treaty of Berlin, definitely abrogated the Treaty of 1799 by not listing it among those considered by the contracting parties to be still in force.

⁵ E.g., GATHINGS, *INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY* (1940); 2 HYDE, *INTERNATIONAL LAW* (1922) 232 *et seq.* Other authorities are cited by both the above references.

⁶ Borchard, *Enemy Private Property* (1924) 18 AM. J. INT. L. 523.

⁷ The Treaty allowed the retention of the property of German nationals until such time as Germany should have made "suitable provision" for the satisfaction of American claims. See Vol. III of *TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS* (1923) 2597 (SEN. DOC. NO. 348, 67th Cong., 4th Sess.).

allied jurisdiction liable for the claims of allied nationals against Germany. This practice has been assailed as being a departure and a retrogression from a rule assertedly both firmly established and highly civilized. The explanation for this departure, and its implications for the future, will be the subject of this paper.

II

Ancient times recognized few, if any, distinctions between combatants and non-combatants, or private or other property. The rule was one of confiscation of enemy property both within and without the borders—a practice logical in view of the possibility that whole populations might be destroyed or enslaved. It is said that the Greek practice was based on the rule that “Those who in peace come to another nation, if war between the nations suddenly breaks out, become the slaves of those enemies among whom their destiny has thrown them.”⁸

Modification of this harsh rule followed or accompanied the development of international trade. The Magna Carta contained a provision that enemy merchants and their goods should be unharmed until it were known how English merchants and their goods were being treated in the enemy country. Thereafter, from time to time, various countries adopted a practice, perhaps not dependent upon reciprocity, of allowing enemy merchants to depart with their goods in the event of war.

These developments, and the authorities cited for the proposition that the rule of immunity of enemy private property within the jurisdiction became a rule of international law, have been described fully elsewhere.⁹ It is sufficient, for a study of modern practice and modern needs, to note here only two points:

1. The growth of international trade marked a strong modification of the ancient practice of seizure and enslavement. Just as the law of commercial instruments responded to new needs, so the practice of commerce-minded nations, responding to the pressure of the newly developed mercantile interests, changed in order to give protection to the new commerce. Had the situation been otherwise, international trade in a world full of extraordinary risks could hardly have been feasible. War was a more usual than unusual way of life among nations; and internationally-minded merchants, in a Europe which was in many respects a more closely-knit community than the Europe of the nineteenth and twentieth centuries, needed some assurance that their business would not be jeopardized by the struggles of princes over successions, territorial aspirations, and the like.¹⁰ And, though the economic

⁸ The historical background is treated in various writings. E.g., MOORE, *INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS* (1924) *passim*.

⁹ E.g., GATHINGS, *op. cit. supra* footnote 5, at 1 *et seq.*

¹⁰ England, for example, engaged in the following wars between 1700 and 1850: War of the Spanish Succession, 1701-1713; War of Jenkins' Ear, 1739-1740; War with Spain, 1739-1748; War of the Austrian Succession, 1740-1748; French and Indian War, 1754-1760; Seven Years' War, 1756-1763; American Revolution and related wars, 1775-1783; Napoleonic Wars, 1773-1802, 1803-1814, April-June, 1815; War of 1812 as well as numerous campaigns in India, Burma, Afghanistan. It should be noted, however, lest this itemization indicate that pre-twentieth-century wars were casual affairs, that even old-fashioned warfare, unaided by gas, rocket bombs and similar devices for dealing out wholesale death, could affect peoples as well as princes. See MOORE, *op. cit. supra* footnote 8, at 1, 10, 12: “When the Thirty Years' War, which gradually embroiled the continent of Europe, opened in 1618, the population

basis of the war-making power was as clear then as now, investments in the enemy country were less likely then to strengthen materially that economic foundation of the power to wage war.

2. The rules of international law are often expressions of hope as well as statements of history. The transmutation of the asserted rule from the practice of one or of several nations, undertaken independently or by bilateral treaty, into a rule of international law, binding upon all countries regardless of treaty or local action, is an obscure process in a field characterized by no mathematical preciseness. It seems clear that many nations from time to time thought it best in particular situations to be lenient with enemy merchants or enemy private property within their jurisdictions. But bilateral and cautiously reciprocal treaties as, for example, the Treaty of 1799 with Prussia would seem to be different from rules of law having universal application. The transition from a policy, generally recognized as desirable, which might be applied or rejected, to a rule which binds without regard to national discretion is the point at which the analysis of several writers on the subject is most unsatisfactory. One writer states, for example: "Since nations express policies through treaties and since treaties constitute one of the sources of international law, it would appear that during these centuries the countries of the world recognized that private property of aliens within their jurisdiction should be protected during war."¹¹ But the policy expressed in the treaties was one of reciprocity; and it would seem logical that the derivative rule of international law was also one based either upon reciprocity, or, where a nation chose to make such a rule for itself without regard to its enemy's action, upon the free choice of the nation concerned. A policy of protection upon certain prerequisites (reciprocity) can hardly be stated to be an unconditional rule of protection, regardless of prerequisites, especially if the new rule is asserted to be merely a codification of the previously stated policy.

Especially does the asserted rule of international law, binding on all nations, become doubtful when courts fail to recognize the asserted rule, and when the practice of nations contains so many violations that it may be questioned whether the violation is not itself the rule.¹² The English courts have said that: "If the property appears to be in the Crown, it becomes a case of generosity whether the Crown will take advantage of that *summum jus* which undoubtedly gives all enemies' property coming into this kingdom to the King, or whether in this, a case of calam-

of the old German Empire was between 16 and 17 millions; in 1648, when it closed, the population was about 4,000,000. . . . In the brief but culminating Russian Campaign, in 1812, in spite of the previous twenty lugubrious and exhausting years, more than a million men confronted one another in battle. Of these more than a half perished." But compare the words of former Secretary of State Lansing: "In the past . . . the non-combatants of the populations have formed a class which was without military value and which was on that account free from hostile attack. . . . This Great War has been a war of peoples, and not a war of armies and navies alone." Lansing, *Some Legal Questions of the Peace Conference* (1919) 44 AM. BAR ASS'N REP. 238, 245.

¹¹ GATHINGS, *op. cit. supra* footnote 5, at 5.

¹² This is not to say that violations of international law negate the existence of rules of international law. But in a field built largely upon customs and usage, the establishment of widespread "violations" may bring into question the very existence of the "rule."

ity, it shall be restored to the owner."¹³ In *Ware v. Hylton*,¹⁴ Mr. Justice Chase, speaking for the Supreme Court of the United States, said: "It appears to me that every nation at war with another is justifiable, by the general and strict law of nations, to seize and confiscate all movable property of its enemy (of any kind or nature whatsoever) wherever found, whether within its territory or not." In dealing with the question under international law, the consistent doctrine of the Supreme Court has been that any inviolability which might be granted to enemy private property within the jurisdiction was due merely, as Lord Mansfield had said, to the generosity of the sovereign.¹⁵

On the side of practice,¹⁶ enemy private property was taken by some of the states during the Revolutionary War, pursuant to recommendations of the Continental Congress; property was taken over during the Civil War and again after World War I. In each case some arrangements for return of at least part were made: In the case of the Revolutionary War by the Treaty of Paris and the Jay Treaty, and in the case of World War I by various acts of Congress. Restraint appears to have been practiced during the Wars of 1812, 1848, and 1898. In view of the strong holdings of the Supreme Court, the nonconfiscation of enemy private property can hardly be considered proof of the existence of a binding rule. Restraint was equally consistent with the existence either of such a rule, or of the doctrine asserted by the Court, that the country could exercise restraint or not, as it chose. On the other hand, the instances of taking over enemy property were at variance with the asserted rule, but consistent with the Court's doctrine. Practice in the United States (and in other countries as well), thus seems based upon the theory: (1) that no rule existed except that of the right of the sovereign to deal with enemy private property as the sovereign willed; and (2) a recognition that it might be desirable, for many reasons, to give a measure of immunity to enemy private property.

Adequate analysis of the treatment of enemy private property depends upon

¹³ Lord Mansfield in *Land v. North*, 4 Doug. 266, 274 (1785). But cf. *Wolff v. Oxholm*, 6 Mau. & Sel. 91 (1817), in which the English courts refused to recognize the discharge of a debt to a British subject by payment made by the Danish debtor to a Danish enemy property commission, during war between England and Denmark.

¹⁴ 3 Dall. 199 (U. S. 1796). No attempt to list the American cases is made here. Representative cases are: *Brown v. United States*, 8 Cranch 110 (U. S. 1814); *United States v. Percheman*, 7 Pet. 51 (U. S. 1833); *Stoehr v. Wallace*, 255 U. S. 239 (1920); *United States v. Chemical Foundation, Inc.*, 272 U. S. 1 (1926).

¹⁵ See Turlington, *Treatment of Enemy Private Property in the United States Before the World War* (1928) 22 AM. J. INT. L. 270; but cf. Borchard, *Treatment of Enemy Private Property in the United States Before the World War* (1928) 22 AM. J. INT. L. 636. The assertion of Borchard that the political as well as the legal branch of government makes international law seems clearly correct, but has a somewhat misty relevance to a problem in which neither the executive nor the legislative branch has exercised what may be its power to establish doctrine other than that previously followed by the judicial branch. Supreme Court doctrine, of course, recognizes the policy-making function of the political branch in this field; and follows somewhat reluctantly, rather than leads, when the taking over of private enemy property is in question. Cf. *Brown v. United States*, 8 Cranch. 110 (U. S. 1814).

¹⁶ A résumé is given in GATHINGS, *op. cit. supra* footnote 5. Previous practice, however, is variously pictured. Precedent in this situation seems to lie principally in the eye of the beholder. Contrast the interpretations of Turlington and Borchard (1928) 22 AM. J. INT. L. 270; (1924) 18 AM. J. INT. L. 523.

separation of two problems which are often merged under the general term "treatment": administration of the property during time of war; and disposition of the property (or its proceeds) after the war.

III

Substantial expert opinion holds that international law sanctions or should sanction the use during war of enemy private property in a manner consistent with the wartime needs of the nation.¹⁷ The necessity for such use is hardly deniable. The annual report of the Alien Property Custodian for 1919 stated that: "When the armistice was signed the Alien Property Custodian was supplying the Government with magnetos for aeroplane and automobile motors, with cloth to make uniforms for soldiers and the dyes with which the cloth was dyed, with medicines, surgical instruments and dressings, with musical instruments, with ball bearings, telescopes, optical instruments and engineering instruments, with cocoanut charcoal for the making of gas masks, with glycerin for the making of high explosives, and a large number of other varied products." A similar situation obtains in this war. The Custodian controls General Aniline & Film Corporation, one of the largest concerns in the country in both the dye and film fields; Schering Corporation, an important pharmaceutical company; and substantial interests in other industrial concerns. It is property of this sort that is meant when the necessity is conceded of "sequestering certain kinds of enemy property—not necessarily all—during the period of hostilities and turning it over to Americans for use and management."¹⁸ On the other hand, Gathings submits that "the rules of international law must be modified to permit a state to sequester private property of enemies or allies of enemies when it goes to war,"¹⁹ and thus implies that even the right of sequestration does not now exist.

A second phase of administration, shading off perhaps into questions of ultimate disposition, arises when sale of property "vested" by the Custodian is made. Such assets as bank credits, securities in safe deposit vaults, and the like are, in general, merely blocked by the Treasury Department, and no question of sale at the behest of the government need arise. However, a going concern requires management. It is the view of the Custodian that efficient management of an ordinary industrial concern may best be found in private enterprise, which will have the ability to expand the business, to increase its capital, and to take other decisions from which the Custodian would be barred. The Custodian, therefore, may be expected to and often does sell business enterprises to which he holds title. Such sales are defended as measures of conservation by the Custodian, but attacked by some as wasteful and destructive spoliation of the assets of the enemy national. It has been stated that "the good name of the United States was used by an admin-

¹⁷ E.g., MOORE, *op. cit. supra* footnote 8, at 22. For discussion of the acquisition of enemy private property within the context of wartime acquisitions generally, see U. S. DEP'T OF JUSTICE, ACQUISITION OF PROPERTY FOR WAR PURPOSES (1944) 84 *et seq.*

¹⁸ Dickinson, *Enemy-Owned Property: Restitution or Confiscation* (1943) 22 FOREIGN AFFAIRS 126

¹⁹ MOORE, *op. cit. supra* footnote 8, at 22.

istrative officer, contrary to the will of Congress, in order practically to despoil the property held in trust."²⁰ On the other hand, the Custodian's report for 1942-43 states that: "The decision to transfer vested properties to private enterprise has been adopted because of the generally accepted advantages of private management. . . . Continued administration of vested properties would involve this Office not only in the selection of management but in continued evaluation of its accomplishments. . . . Activities of this character are foreign to the effective operation of the Custodian's Office as an agency of the Government."²¹

These problems, though troublesome, are relatively minor. The sequestration of at least certain types of enemy private property is probably lawful even under the most stringent rule of international law; it is certainly sanctioned by precedent; and it is argued even by those who do not concede the right to be presently granted by international law that the right should be granted—perhaps with damages to be paid to the enemy owner for any harm or loss. The sale and liquidation of property under his control is as necessary for the Custodian as it is for a trustee, or for a court of bankruptcy; the "despoliation" of enemy assets relates chiefly to the failure to convert one asset into an economically equivalent substitute. The important questions in the administration of enemy private property arise from the policy followed by the present Custodian and the Custodian of the last war—the policy of "Americanization" of properties under their control.

This policy of "Americanization" of the properties (meaning in general their sale to American citizens of proved loyalty and having no previous ties with the former enemy owner) has been violently assailed as being outside the proper sphere of a Custodian's activities, and as being a violation of the Congressional intent that the properties confided to his care be held in trust for the former owners.²² The 1919 report of the Custodian stated that certain German investments in this country were "in a sense hostile. They constituted Germany's great industrial army on American soil. . . . In many cases the factories, warehouses and offices of enemy-owned concerns were mere spy centers before America entered the world war, and would have been nests of sedition if the Alien Property Custodian had not acted promptly in their seizure. As to these no obligation is owed to their private owners to conserve or care for them with a view of ever returning them in kind."²³

Gathings characterizes "this most amazing statement" as "almost . . . without explanation. The Custodian seemed to think it was his duty to punish the individuals whose property he had seized by Americanizing it. . . . On his own authority the Custodian determined that he should not be a mere conservator, but that

²⁰ See BORCHARD, INTRODUCTION TO GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY (1940) *op. cit. supra* footnote 6, at 5.

²¹ ANNUAL REPORT OF ALIEN PROPERTY CUSTODIAN 1942-1943, 69.

²² E.g., MOORE, *op. cit. supra* footnote 8.

²³ ANNUAL REPORT OF ALIEN PROPERTY CUSTODIAN 1918-1919, 13. In time of peace, this statement seems somewhat flamboyant. But the most flamboyant fears of wartime have sometimes proved amply justified; and abundance of caution is a rule that commends itself highly to a nation engaged in a war of the scope which the present century has brought.

he should use the property in his hands as a fighting force against the enemy. The conclusion must be that the act was not administered as Congress had intended."²⁴

The question of what Congress intended cannot be given any clear answer. Congress may, in fact, be argued to have ratified the Custodian's policies by assent. In any case, it is a curious logic to concede that enemy private property may or should be sequestered and put to use for production, in the interests of the state, but that it may not be used "as a fighting force against the enemy." Property within the jurisdiction is properly used in the interests of carrying on the war; and it would be a strange rule that would protect enemy industrial property from such governmental policies as are necessary to put it to full use while at the same time granting to Government sweeping powers, including that of requisition, over similar property of citizens.

Enemy private property may, in many instances, be used during time of war without the necessity arising for Americanization in the sense of transferring the property permanently to American ownership.²⁵ Thus, in the present war, few important industrial properties have been disposed of by the Custodian. But the uses to which these properties have been put makes it highly unlikely that—regardless of disposition of their proceeds—these businesses will ever be returned to their former enemy owners. The companies have been developed and have been given access to important American wartime developments, on the theory that they were to be a part of the American-owned post-war industrial structure. Moreover, these companies have deliberately been used "as a fighting force" in Latin America, where, having been freed by the Custodian of their previous contractual restraints, they have, as American companies, competed with their previously enemy sister companies. The United States was committed to such a program by the necessity of waging economic warfare against both enemy trade with Latin America and enemy-owned companies, sponsors of enemy propaganda and more dangerous activities, in Latin America. The consequence of this wartime necessity was use of former enemy companies in the United States; and full and effective use of their competition against sister enemy-owned Latin-American firms was difficult or impossible unless it were understood that the companies themselves were not to be returned. Emphasis on the American nature of these competing companies was, as a matter of fact, necessary for the obtaining of cooperation by Latin-American consumers, as well as governments, in an effort directed against concerns whose

²⁴ GATHINGS, *op. cit. supra* footnote 5, at 82, 85.

²⁵ In *PATENTS AT WORK* (U. S. Alien Property Custodian, 1943), the Custodian stated that Americanization of patents would be necessary. Irrespective of confiscation of other property, special treatment of patents would seem indicated from the fact that patents cannot be exploited without investment and that investment will be made only on the basis of long-term licenses or other assurance that the licensee will not have the basis of his investment destroyed. Cf. GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* (1920) 106 ff. It will be noted that under British patent laws (as distinguished from emergency custodial legislation) any patent not being adequately exploited can be licensed. The question of fees for such licenses, whether under British or American law is another matter; here the Custodian's argument would seem to be that exploitation of enemy patents should not be held up pending license fee discussions. See Sargeant and Creamer, *Enemy Patents*, in this symposium, *supra* p. 92 *et seq.*

enemy nature was being emphasized. Should return of these "American" companies be effected, the United States would return to the former enemy owner vastly increased exporting companies, in place of a smaller non-exporting companies;²⁶ the properties would have been vastly increased by reason of strenuous American efforts—not in line with ordinary "trusteeship" functions; and the former enemy would find that his grip on the Latin-American market had been greatly strengthened for him, by American efforts, and largely at the expense of other American companies which might have absorbed part of the market lost by reason of the enemy blockade. These considerations, to say nothing of the effect of such a step on other American republics whose policies have been formulated on the basis of confidence that these companies were American and that the United States intended to carry out its Inter-American commitments on elimination of enemy influence,²⁷ put a return of these particular properties beyond the realm of probability, and certainly beyond the sphere of desirable United States foreign policy. Disposition of proceeds, of course, is another matter.

IV

Putting to one side the asserted compulsion of a rule of international law, arguments may be made on both sides of the question whether enemy private property should be returned.²⁸ On the affirmative, it is said that a policy of return or "inviolability" is civilized and a mark of civilization; that it leaves private citizens of enemy nations something with which to take up once more the thread of life; that the enemy national should not be identified with his government; that a nation in throwing open its ports and territories to foreign commerce in effect invites aliens to do business within its borders, and therefore promises that their property within those borders will be protected; and that a policy of reciprocal protection is one which leads to the development of international trade, and, even apart from humanitarian sentiments, should commend itself especially from the viewpoint of enlightened self-interest to the United States, with its vast foreign investments.²⁹

²⁶ American affiliates of, or parties to contracts with, German companies were generally restricted to the United States (and sometimes the Caribbean market). Note, for example, the allegation in the complaint filed by the Department of Justice against Merck & Co., alleging a "Treaty" with Merck of Darmstadt, Germany.

²⁷ These commitments are chiefly embodied in resolutions adopted at certain hemispheric conferences. See REPORT ON THE THIRD MEETING OF MINISTERS OF FOREIGN AFFAIRS OF THE AMERICAN REPUBLICS, Rio de Janeiro, Jan., 1942 (Pan American Union) Resolution V, p. 38; FINAL ACT OF THE INTER-AMERICAN CONFERENCE ON SYSTEMS OF ECONOMIC AND FINANCIAL CONTROL, Washington, June-July, 1942 (Pan American Union). For comments upon these resolutions, see Domke, *Western Hemisphere Controls Over Enemy Property*, *supra* in this symposium, p. 3, at p. 5 *et seq.*

²⁸ The question is sometimes stated as that of "confiscation" or not—an unfortunate phrasing because the invidious connotations of the word "confiscation" mean generally that the answer has been assumed in the statement of the problem.

²⁹ Apparently this assumption lies behind the report, TREATMENT OF UNITED STATES PROPERTY IN ENEMY COUNTRIES, *supra* footnote 2, approved by the Board of Directors of the Chamber of Commerce of the United States (Sept., 1943). The report states: "The Foreign Commerce Department Committee wishes to emphasize the importance of the policy of keeping enemy private property in time of war immune from confiscation as a precedent in relation to enemy treatment of United States property overseas." In terms of the present war, and present enemies, the value of good example seems to the author somewhat small.

On the other hand, it may persuasively be argued that modern, perhaps unfortunate, tendencies have tended to break down the distinction between combatant and noncombatant, and between state and private property, in time of war. A full discussion of these broad issues is not within the scope of this paper. But on the much more narrow issue of the responsibility of foreign private investment to pay reparation, the rationale for the distinction between enemy private and enemy public assets limps heavily in a world of rigorous state controls over foreign investment, of exchange controls, and, as in Germany since the early 1930's, of complete power to requisition such investment. Since early days, foreign traders have been involved in the affairs of their governments; modern tendencies seem to be to increase that involvement, so that, for governmental purposes, at least in the European states, the line between foreign private and public investment is vague and not always meaningful.³⁰ The application of this point with special cogency to Germany seems clear.

That there is an implied promise of immunity in extending permission to aliens to do business within the country would seem hardly plausible as a matter of fact at this date. Whatever there may have been in the notion when it was put forward by Hamilton,³¹ since then aliens coming into the United States have been amply warned—certainly by judicial decisions from Revolutionary days, and by our practice during and after the first World War—that this country recognized no obligation to treat their property except as it saw fit, should they become enemies. That they have recognized this risk is shown concretely by the trust and other devices which have been used to cloak alien ownership or to insulate the foreign owner from risk of seizure by American custodial authorities. Moreover, the "thread of life" argument works both ways; it may be argued that a government, impoverished by years of war, should compensate those of its nationals who have lost through enemy acts, and should use for that purpose enemy property within its borders. Given the justice of a reparation demand at all, it would seem that as between the citizen who has lost his home in a bombing raid and an enemy who has property within the borders, the citizen should have first claim on whatever is available for reconstruction and for making a fresh start. The issue is really whether the foreign investments of enemy nationals, located in the victor state, should be retained by those enemy nationals or should be used to pay, in part, a reparation claim which (it seems not to be contested) may be justly demanded.³²

The argument that international trade will be hampered if business men realize that their property abroad is subject to seizure and to being held liable for acts of

³⁰ See KEYNES, *THE ECONOMIC CONSEQUENCES OF THE PEACE* (1920) 65, 66: ". . . the sharp distinction . . . between the property and rights of a State and the property and rights of its nationals is an artificial one, which is being rapidly put out of date by many other influences than the Peace Treaty, and is inappropriate to modern socialistic conceptions of the relations between the State and its citizens."

³¹ *WORKS OF ALEXANDER HAMILTON* (Lodge ed., 1904) 405-421.

³² But cf. 2 HYDE, *INTERNATIONAL LAW* (1922) 240. It should be noted that the term "reparation" is used in this article broadly to mean such claims as the United States may have against Germany, and not in a narrow or restrictive sense.

their government, is perhaps balanced by the contention that this realization will bring the business community to work actively for the preservation of peace, and against those acts of their government which might provoke war. The desirability may seriously be questioned of assuring the business community that it need feel no responsibility for the acts of government—that, come war or peace, its investments will be safe—one of the very few things inviolable and apart from the general risks of global warfare.³³ Furthermore, the assurance of the immunity of private enemy property would suggest to the enemy various ingenious devices that would enable it to cash in during the war on American-held assets, to the detriment of the American war effort.

It should be emphasized, too, that American practice has made³⁴ and probably will make a distinction between enemy foreign investments and property of enemy nationals domiciled in the United States. It is the latter class of person, in any case, who seems most analogous to “the merchants of either country, then residing in the other” who under the Treaty of 1799 with Prussia were to be “allowed to remain nine months, to collect their debts and settle their affairs, and . . . depart freely. . . .”³⁵ The Treaty of 1799, contemplating as it does the eviction of resident enemy merchants, is perhaps harsher than present practice; but both the Treaty and present practice seem to treat leniently the resident enemy alien and his property—to whom the argument for inviolability applies most strongly, on both economic and humanitarian grounds³⁶—and to treat as liable for the war debts of their country chiefly the foreign investments of nonresident (in the United States) enemy nationals.

The question may also be raised as to the conclusions which are dictated by enlightened self-interest. So far as this war and American foreign investments are concerned, two things seem certain: (1) that the Allies will win the war, and therefore need not fear what the Axis might have done; (2) that if the Axis were to win, in view of the philosophies, economic, political and moral, of the fascist states, they would do as they pleased with Allied investments. Nor is there reason to believe that they would have been more respectful of Allied foreign investment than they have been of the property—and lives—of nationals of occupied nations. So far as the long-range situation is relevant, it is not cynicism to put more trust in plans for the preservation of peace than in any example which present conduct might set to a hypothetical future victor. Moreover, it would seem unlikely that United States action with respect to enemy-owned property, in connection with a settlement which would be part of a treaty of peace terminating a war, would influence in any substantial degree possible tendencies toward expropriation of foreign-

³³ Compare views of Mr. Claude Mullins, *Private Enemy Property* (1923) 8 TRANSACTIONS OF THE GROTIUS SOCIETY 89, with those of Borchard, *op. cit. supra* footnote 6.

³⁴ GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* (1920) 105: “It does not in fact appear that the property of any German subject residing in the United States, or not actually engaged in making war against the United States or not interned, was seized or sold.”

³⁵ HAYS, *ENEMY PROPERTY IN AMERICA* (1923) 67.

³⁶ It should be pointed out, however, that in the somewhat analogous case of private enemy property in ceded territory, such property was subjected to Allied claims by the Versailles Treaty (Article 297(b)).

owned property in Allied or neutral countries, or toward disrespect for the rights of American property holders in such countries.

The argument is made, finally, that the taking of enemy private assets distributes unfairly the burden of what are really reparation payments, which should be met by the body of the enemy people rather than by an unlucky group of those holding foreign investments.³⁷ On the other hand, it is urged that such provisions as those contained in the Treaty of Versailles, requiring Germany to compensate its nationals, invalidate the argument of unfair distribution of burden.³⁸ The rejoinder is the contention that the defeated power has not the resources to make payment to her nationals;³⁹ to which the reply is that the question of compensation of her nationals and distribution of the burden is one which the defeated country can handle if she will; that is, it is a problem merely of redistribution of wealth within a country. It cannot be argued that the defeated state is unable to distribute the burden of loss of foreign assets equitably, though it may be unwilling to take the tax or other measures necessary to do so.

V

A strong and affirmative reason for the use of enemy assets in the United States to secure or to pay American claims against enemy governments may be found in the existence of two conditions which may well be determinative: (1) the fact that the present war has constituted a tremendous drain upon the foreign assets of all of the Allied governments; and (2) the fact that the enemy countries will almost certainly be in a position analogous to that of a bankrupt against whom claims are being filed in an amount greatly in excess of the bankrupt's assets.

The first consideration becomes relevant and important when it is considered what the relative position would be of an Allied and an enemy government if enemy private foreign holdings (in the United States, in particular) were to be returned. It is well known that in many cases Allied governments have had to liquidate the foreign holdings not only of those governments directly (public property) but also the foreign holdings of their nationals. In order to acquire war materials and other vital necessities in the United States, the British, for example, have for several years taken steps to bring the private United States holdings of British nationals under government control. In many cases these foreign holdings have been liquidated by the British, and, similarly, by other governments, in order to obtain needed foreign exchange to finance British governmental or other war requirements. British foreign investment in the United States and in other countries, which in the past has accounted for a substantial share of the national income, has thus been liquidated, and the foreign exchange thus obtained has been spent for the prosecution of the war.

³⁷ See Dickinson, *op. cit. supra* footnote 18, at 141.

³⁸ Bouvé, *The Confiscation of Alien Property* (1926) PROC. OF AM. SOC. INT. L. 14.

³⁹ Borchard, *op. cit. supra* footnote 6, at 526-527. But see Armstrong, *The Confiscation Myth* (1923) 9 A. B. A. J. 484, 488: "We are asked to prevent Germany from breaking its solemn word to compensate its own citizens, by paying them ourselves. . . ."

It has, of course, been impossible since the imposition of freezing controls in the United States for enemy governments to take any similar action, either with respect to their public property or with respect to the private holdings of their nationals. These private holdings therefore constitute a considerable block of investment in American industries. Return of these investments to their enemy owners, if there were no compulsion on the enemy government to use these for war charges, would result, therefore, in the more than curious situation that the British and other Allied countries and their nationals, having expended these "private" holdings for war purposes, would have permanently lost a substantial portion of their foreign investments and sources of foreign exchange, particularly in the United States; whereas a former enemy country would have available to it large foreign investments and sources of foreign exchange which would, of necessity, if the return is to be meaningful, be free from the compulsion of responding to war charges. When the traditional dependence of the British economy on foreign investments is recalled, as contrasted with the place of such investments in such an economy as the German, the situation becomes even more anomalous. In a very real sense it might be argued that the consequence of a return of enemy investment would be to require the Allies to pay for the preservation of the German foreign asset position.

It has already been pointed out that these foreign investments of enemy (as well as other) nationals have lost to a considerable extent their purely private nature in view of foreign exchange and similar controls which have uniformly been applied by the European countries. Clearing balances and related arrangements emphasize the fact that foreign private investments have, in the case of almost all countries except some of the Western Hemisphere, been dealt with as assets of the nation,⁴⁰ at least for the purposes of providing necessary foreign exchange by the nations having jurisdiction over the national who owned the foreign investment.

In this connection a memorandum on treatment of private property prepared by the Allied powers during the negotiations leading toward the Treaty of Versailles is particularly pertinent. That memorandum discusses the German delegation's notes of May 22 and 29, 1919, among which was the following objection to the proposed "Conditions of Peace": "(a) It is not legitimate to use the private property of German nationals to meet the obligations of Germany." To this the Allied and Associated Powers replied as follows:

"(a) As regards the first objection, they [the Allied and Associated Powers] would call attention to the clear acknowledgment by Germany of a pecuniary obligation to the Allied and Associated Powers, and to the further circumstance that the immediate resources of Germany are not adequate to meet that obligation. It is the clear duty of

⁴⁰ This is not to say that the extraterritorial effect of expropriation or similar decrees will inevitably be recognized. Cf. *United States v. Belmont*, 301 U. S. 324 (1937); *United States v. Pink*, 315 U. S. 203 (1942). It should be noted, however, that in most cases the government having jurisdiction over its national (and the bulk of his property) will encounter little practical difficulty in controlling his foreign assets. Cf. *N. Y. Times*, Jan. 11, 1945, p. 2: "France May Draft Foreign Holdings."

Germany to meet the admitted obligation as fully and as promptly as possible and to that end to make use of all available means. The foreign investments of German nationals constitute a class of assets which are readily available. To these investments the treaty simply requires Germany to make prompt resort.

"It is true that, as a general principle, a country should endeavour to avoid making use of the property of a part of its nationals to meet state obligations; but conditions may arise when such a course becomes necessary. In the present war Allied Powers themselves have found it necessary to take over foreign investments of their nationals to meet foreign obligations, and have given their own domestic obligations to the nationals who have been thus called upon to take a share, by this use of their private property, in meeting the obligations of the state.

"The time has arrived when Germany must do what she has forced her opponents to do. The necessity for the adoption of this course by Germany is clearly understood by the German peace delegates, and is accepted by them in the following passage, quoted textually from their note of the 22nd of May:

"The German peace delegation is conscious of the fact that under the pressure of the burden arising from the peace treaty on the whole future of German economic life, German property in foreign countries cannot be maintained to its previous extent. On the contrary, Germany, in order to meet her pecuniary obligations, will have to sacrifice this property abroad in wide measure. She is prepared to do so."

"The fundamental objection mentioned above is completely answered by the note itself."⁴¹

The second compelling present consideration, mentioned in the Allied memorandum above quoted, is the necessity of marshalling enemy foreign assets in order that the enemy countries may make payment on their reparation or other debts. In the past, when the reparation claim against a defeated nation could be raised and paid by that nation itself within a relatively brief period, there was no reason to do anything other than return enemy private assets located abroad. In the last great war before World War I, the Franco-Prussian War of 1870-1871, the unprecedented reparation imposed upon France by Bismarck was raised and paid in a few years. The nation claiming reparation, therefore, was in the position of a creditor taking the unsecured note of a solvent debtor. The present situation, however, is different. The legitimate claims of the Allied nations against the enemy at the conclusion of the present war will be many times in excess of any conceivable assets which the enemy will have available for payments, even over a considerable period of years. The Allies, after scaling down their claims by a very large percentage to reflect a realistic estimate of the enemy capacity to pay, can hardly be expected to return to that enemy one of the chief assets, and perhaps the only large quick asset, which the enemy has available for the payment of its just debts, or, at least, for pledge as security for such payment.⁴²

⁴¹ Cited in BARUCH, THE MAKING OF THE ECONOMIC AND REPARATION SECTIONS OF THE TREATY (1920) 338 *et seq.*

⁴² Several problems involved in such use of enemy private property have, as is apparent, not been treated in this discussion of the basic issue: (a) In view of the ideological nature of the present war, the foreign property of certain "enemies"—refugees, underground fighters, etc., might be exempted; (b) the manner in which enemy property should be applied to Allied claims would need study; (c)

Consideration of this problem in terms of actual consequences underlines the anomaly of free return of enemy foreign holdings. For it is clear that such a return would mean Allied payment to the enemy to preserve the foreign holdings of enemy nationals, and would mean asking the Allied taxpayer to dig deeper into his pocket in order that the return might be made. The United States, like all of the Allies, will have large expenses arising from the war—pensions, interest charges, etc. These obligations must be met. The funds to meet these obligations will come chiefly from taxation, but they may come partially from the former enemy. It may be recognized, without impairing the force of this statement, that total enemy assets in the United States do not bulk over-large as compared with a wartime American budget. The question is still, however, whether that budget will reflect the available dollars which might be contributed by the former enemy. If the United States holdings of the enemy are considered to be "inviolable," the enemy capacity to pay will be decreased by that much; and the decrease, whatever it is, will be reflected in increased American taxes—or in diminished provision for these obligations. An international law obligation which would thus force the American taxpayer to finance the retention of enemy foreign holdings would seem neither just nor desirable.

The above considerations lead also to the conclusion that it would probably be futile to return enemy private property, and would be merely, so far as the enemy national was concerned, a postponement of the day on which he would lose his dollar holdings and receive marks or yen. It is clear that the reparation demand will be based upon the ability of the enemy nation as a whole to make the requisite payments over whatever period may be eventually determined upon for reparation. In calculating the wealth of the enemy nation, its foreign investments will bulk large, especially since cash payments will depend upon foreign exchange, and such assets will constitute a large, quick source of foreign exchange or the equivalent.⁴³ Even, therefore, should the foreign holdings of enemy nationals be returned to them, their own government would inevitably be faced with the necessity of taking steps (either expropriation or foreign exchange controls) to meet such foreign exchange obligations of that government as reparation debts and to make available foreign exchange for other requisite governmental purposes. Germany, for example, would, by the economic, if not the legal, necessities of the reparation settlement, be forced to liquidate or pledge the foreign holdings of German nationals in order to provide foreign exchange for governmental commitments, either connected with reparation or connected with import-export requirements. Presumably, Germany would compensate its nationals in marks⁴⁴—a step very similar to the procedures of the clearing bal-

whether the Allies shall require the enemy countries to compensate their nationals is perhaps open for discussion; (d) how best to deal with the foreign holdings of enemy nationals who have escaped the enemy jurisdiction may be a problem. These are all, though important, subordinate to the main issue of disposition of enemy private property.

⁴³ See KEYNES, *A REVISION OF THE TREATY* (1922) pp. 77-78.

⁴⁴ It may be appropriate to note once more at this point that such compensation can be made if Germany so desires. In other words, the burden of loss of foreign holdings can be distributed by taxation and other measures designed to spread the loss throughout the nation. No answer to this point is

ance technique generally used in Europe, and almost identical with measures already taken by such nations as Great Britain. From the viewpoint of the German national having foreign holdings, therefore, there would seem to be little to be gained by a return of the properties, since those holdings would then be expropriated by the German government, liquidated or pledged in order to obtain foreign exchange for governmental requirements, and compensation would be paid in German currency. Given the assumption that capacity to pay will be measured by all, rather than less than all, of enemy industrial and other holdings, at home or abroad, the concept of the clean, unconditional return of enemy private property, which would then be held by the owner free from interference either by his own government or the government of the country in which the property was located, has thus a somewhat antiquarian and obsolete flavor.

It may, of course, be urged that the technique of return and later expropriation by the owner's government would be preferable, because of its formal recognition of an international law obligation to return enemy private property. The recognition is so obviously only formal, however, that it might appear hypocritical to make the return while at the same time obligations were laid upon the enemy government which would make the return purely illusory. The political question may also be argued as to whether one technique or the other would be more desirable, with arguments on both sides. But the decision between the two techniques is relatively unimportant. The important and compelling consideration is that no country at the present time considers the foreign investments of its nationals to have a purely private nature, least of all the governments of our present enemies; that each government exerts to some extent jurisdiction over these foreign assets for governmental purposes, and directs the use of the foreign exchange represented by the foreign investments; that Allied governments have been forced to ask their nationals to liquidate foreign investments for wartime purposes; and that no reason exists why enemy countries should escape this equal obligation and should emerge from this war with substantial foreign holdings, while at the same time Allied claims against those governments are scaled down to the extent necessary not only to recognize the impoverished condition of these enemy countries, but also to protect them from the necessity of utilizing their foreign investments.

So stated, the issue becomes one not of whether enemy private property should be confiscated, but of whether enemy nationals are to be accorded more favorable treatment than Allied nationals, and enemy nations than Allied nations; and whether enemy nationals are to retain substantial foreign assets, while at the same time the plea of poverty is used to defeat the justifiable claims of Allied governments acting on behalf of their nationals. The terms, "confiscation," "private enemy property" and similar phraseology are therefore anachronistic and inappropriate,

made by those who advocate return on the ground that reimbursement to the enemy nationals by their own government will be unsatisfactory. See Cohen, *The Obligation of the United States to Return Enemy Alien Property* (1921) 21 COL. L. REV. 666, 678.

as well as misleading, for a discussion of the basic issue—namely, what shall be the foreign asset position of a defeated enemy country and its nationals, particularly in relation to the foreign asset position of the Allies and their nationals; and whether the tax burden of Allied nationals shall be increased, or Allied provisions for obligations arising from war be decreased, in order to permit enemy nationals to regain their foreign holdings. It is suggested that the answer is clear and that the conclusion is compelling that enemy property assets should, not only for reasons of expediency, but also for reasons of justice, be utilized for the payment or the securing of the enemy's reparation or similar debts.