

634 *Trading With the Enemy in World War II*

SPAIN—343, 357.

SPECIAL BLOCKED PROPERTY—47, 111, 112.

STAMPS ON FOREIGN SECURITIES—323.

STATE—*see* government.

STATE OF WAR—15, 19, 21, 24, 165.

STATELESS INDIVIDUALS

in armed forces—89.

apatridas—101.

confiscation of property—86.

domicil—86.

in federal regulations—71, 86, 88.

formerly of enemy nationality—84.

under German law—94.

League of Nations—87.

loss of enemy character—99, 170.

refugees—*see* refugees.

status—86.

under Transportation Regulations—86.

under War Damage Regulations—89.

STATUTE OF LIMITATIONS—234, 298

STATUTORY LIST—*see* blacklist.

STAY OF PROCEEDINGS—23, 132, 180, 201, 228, 242, 246.

STERLING AREA—171, 182.

STOCK CERTIFICATES—143.

see shareholder.

STORTING—348, 353.

SUB-ACCOUNTS UNDER PUB. CIRC. 21—323.

SUBJECT TO LICENSE, JUDGMENT—310.

SUBSIDIARIES OF GERMAN CORPORATIONS—162.

SUBSTITUTION OF ENEMY DEFENDANT BY CUSTODIAN
—236, 240, 241, 248.

SUDAN—16.

SUGGESTION, GOVERNMENTAL TO COURTS—20, 360, 366.

SUITS

adverse claims—179, 241.

against enemies—236.

appeal by enemies—214.

331297

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Freezing Control as a Weapon of Economic Defense

by

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Address delivered before the Committee on Insurance Law

AMERICAN BAR ASSOCIATION — SIXTY-FOURTH ANNUAL MEETING

Lincoln Hotel, Indianapolis, Indiana

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INCREASING public attention is being focused on problems of economic defense as a part of the total program of our national defense effort. Although less dramatic and stirring than military action, a sound and far-reaching policy in the economic and financial area will play a vital role in the weakening and ultimate defeat of the aggressor nations.

It may take us many months to whip into shape an effective army and to increase our production of war materials enough to become the real arsenal of democracy. On the economic defense front, however, there need be no period of preparation preliminary to major action. We are prepared now. We are equipped today with the most powerful economic weapons in the world.

Foreign funds control, or freezing control as it is more popularly called, is one of the most important instruments which this country can employ in its economic defense. This control in effect subjects to regulation and scrutiny all transactions in which blocked countries or their nationals have any type of interest. The control also has those elements of speed and flexibility that make possible the immediate execution of economic programs in the furtherance of this Government's foreign policy.

History

Freezing control was first instituted a year and a half ago when the Germans invaded Norway and Den-

mark. On that day the President, by Executive Order¹ prohibited transactions involving Norwegian and Danish property except as authorized by the Secretary of the Treasury. Thereafter, as other countries were invaded or subjected to the domination of aggressor powers, freezing control was made applicable to them.

On June 14, 1941, a most important extension of freezing control took place. The remaining countries of continental Europe including Germany and Italy were brought under the control. This step changed the emphasis of freezing control from a defensive weapon primarily intended to protect the property of invaded countries, to a frankly aggressive weapon against the Axis.

On July 26, 1941, when Japan over-ran Indo-China, the control was invoked against Japan. The public is becoming increasingly aware that the impact of freezing control on Japan has proved to be the most powerful and decisive action which this country has

¹ Executive Order No. 8389 of April 10, 1940, as amended and the freezing control regulations, as amended, as well as The Proclaimed List Proclamation, together with General Rulings, General Licenses, and Public Circulars issued in the administration of freezing control are published in a pamphlet issued by the Treasury Department entitled "Documents Pertaining to Foreign Funds Control" which pamphlet may be obtained from any Federal Reserve Bank or from the Treasury Department in Washington. All public documents are not only filed with the Federal Register, but are distributed through the Treasury Department and the Federal Reserve Banks to all persons and institutions desiring copies.

as yet taken to curb Japanese aggression. At the same time, freezing control was extended to China at the specific request of Generalissimo Chiang Kai-shek in order to assist China in the control of its economy and in order to prevent Japan from using the occupied areas in China as a loop-hole for evading our freezing control.

On July 17, 1941, a step of a somewhat different order was taken. The President authorized the issuance of The Proclaimed List of Certain Blocked Nationals. This List, better known as the black list, contains the names of about two thousand persons and firms in the American republics whose activities this Government believes are unfriendly to the interests of the United States and hemispheric defense. From time to time names have been added to and deleted from the list. The black list has the effect of extending the freezing control to the listed persons and firms and treating them for all purposes as though they were nationals of Germany or Italy.

Legal Aspects

The freezing control order is based on a section of the 1917 Trading with the Enemy Act.² This section has been held constitutional by the Supreme Court of the United States.³ Apart from the statutory provisions, the President possesses powers conferred upon him directly by the Constitution. Some aspects of these Presidential powers, including his power to control foreign relations, I expect to discuss tomorrow before the Municipal Law Section.

I want to point out that the legality of freezing control has not been challenged in any court or, for that matter, by anyone appearing before the Department. I believe that this is due not merely to the comprehensiveness of the underlying authority, but to the widespread sympathetic understanding by the public of the purposes and aims of freezing control and the methods employed in its administration.

The freezing control order does not exhaust the powers vested in the President by the statute. In view

² Sec. 5(b) of the Trading with the Enemy Act of October 6, 1917, as amended; 40 Stat. 415, 966; 48 Stat. 1; 54 Stat. 179; U. S. C. title 12, sec. 95a.

³ *Norman v. B. & O. R. Co.*, (1935) 294 U. S. 240; *Norris v. United States*, (1935) 294 U. S. 317; *Perry v. United States*, (1935) 294 U. S. 330; *Campbell v. United States*, (D. C. S. D. N. Y., 1936) 5 F. Supp. 156, 167-170, 172-174; *Uebersee Finanz-Korporation, A. G. v. Rosen*, (C. C. A. 2, 1936) 83 F. (2d) 225, 228, *certiorari denied*, 298 U. S. 679; *British-American Tobacco Co. v. Federal Reserve Bank* (C. C. A. 2, 1939) 104 F. (2d) 652, 105 F. (2d) 935, *certiorari denied*, 308 U. S. 600.

of the interrelationships which have long existed between certain persons and concerns in this country and foreign interests and in view of the changing nature of the economic problems to be met from time to time, it is indeed fortunate that the authority vested in the President is sufficiently broad to permit him to apply the freezing control as the situation currently requires.

Purposes

The application of freezing control to an increasingly larger area of the world has greatly increased the effectiveness of the control.

When the control was first invoked it was regarded as a means of insuring that the Danish and Norwegian-owned property in this country would not fall into the hands of Germany. The Government also regarded itself as owing a responsibility to those persons who placed their assets here out of confidence in our strength and fairness. Freezing control also minimized the liabilities of American banks and others against the assertion of conflicting claims to property arising out of invasion and other revolutionary changes in the over-run countries of Europe.

Not only was it necessary to protect property in this country belonging to the invaded areas; it was also necessary to prevent the Axis powers from realizing the full benefits of large amounts of securities and other assets which they had looted in the invaded countries. To this end controls were established over the importation into the United States of securities, diamonds, paintings, and other valuable assets which had fallen into Axis hands.

Had we not imposed freezing control, we would not only have failed in our responsibilities to owners of seven billion dollars of funds in this country, but we would have permitted the Axis countries to have used these billions of dollars to their own very considerable advantage. With such funds the Axis could have drawn on our resources and the resources of the Western Hemisphere to maintain their war effort, to strengthen their economic and financial position, and to acquire those vital and strategic materials both here and abroad which are urgently needed by our country and other friendly countries.

Loss of these dollar assets and the inability of the Axis to acquire other dollar assets have greatly impaired the ability of the Axis powers to finance propaganda, sabotage, and other subversive activities in the United States and in other areas of strategic importance to this country.

331299

Freezing control has prevented the Axis countries and their satellites from using the American dollar, and American banking and financial facilities, for commercial and other activities in the United States and other parts of the world. The American dollar today is the strongest medium of international exchange. It is the most sought after medium in the world for payment for goods and services. The subjection to licensing of all dollar transactions in which the Axis countries are directly or indirectly interested has effectively curtailed Axis use throughout the world of our dollar as a medium of payment.

In considering the effectiveness of freezing control, do not be misled by the fact that the aggressor nations have sought to retaliate against American-owned property abroad. American-owned property in the Axis countries, as well as in other European countries, in most cases was largely given up as lost before freezing control was instituted. Germany, through a gradual system of confiscation and control, left American owners of property with little more than a shell of title, seizing for German purposes the operating use of the American-owned property abroad. Moreover, Germany by seizing American-owned assets abroad can not compensate itself for the dollars which Germany hoped to acquire as a fruit of her conquest. These American-owned assets in Europe will not help Germany buy goods and services throughout the world as Germany would have been able to do had we allowed her to acquire title to any substantial part of the \$7 billion of European-owned assets in this country.

Freezing control has not been confined to the regulation of banking and financial transactions. It also is an instrument for controlling all imports and exports between the United States and the blocked countries.

The most striking and effective application of freezing control occurred in its extension to Japan. The application of the controls effectively stopped all trade with Japan. Freezing control was the instrument employed by the British, Dutch, and ourselves in taking parallel action against Japanese aggression. As a result of this coordinated and concentrated action, the economy of Japan has suffered a profound shock.

We have also eliminated import and export trade between this country and black-listed persons in Latin America. This action which our Government has already taken, as well as the action it is currently initiating, will contribute greatly to the elimination of the black-listed persons from such influence and activities as are hostile to the United States and hemispheric defense.

Paralleling the lease-lend aid which we are extending to those countries whose defense is vital to the defense of the United States, our Government, through the medium of freezing control, is taking effective action in the economic field to bolster the allied economic and financial blockade and to eliminate many of the leaks which have existed in that blockade. Moreover, our strong action has very substantially encouraged many Latin American countries to take measures along comparable lines, thus seriously curbing not only the financial and economic activities of the Axis but also their propaganda and subversive activities in an area in which this nation has a fundamental concern.

Freezing control has been employed to deal with those neutral European countries which, by reason of their proximity to the Axis powers, have been frequently compelled against their will to serve as "fronts" for operations in the economic and financial field. By the extension of freezing control to such neutral countries, it has been possible both to permit the neutral countries to engage in legitimate transactions for their own need and to reduce the possibility of such countries acting as a screen for the Axis powers behind which Axis activities may be continued. The general licenses that were issued to such neutral countries are conditioned on the effective carrying out of the guaranty of the neutral governments that they will not be used as a disguise for Axis or other undesired transactions.

It is well known that there are certain business institutions in this country which are owned or dominated by the Axis and whose activities are contrary to American interests. Through the medium of foreign funds control, the Government can take and is taking appropriate steps to nullify or eliminate such vicious and undesirable influences and to assure the devotion of all American enterprises to the promotion of national interests.

Espionage, sabotage, and propaganda are spectacular forms of Axis subversive activities. Less spectacular, but probably more dangerous and pernicious in its effect, is that form of subversive activity addressed to limiting and curtailing the American productive capacity. Through the medium of patent pooling arrangements, licensing agreements and similar contracts, Germany has been able to put a drag on our national defense production. Through the same medium Germany has been able to secure information which would ordinarily be deemed military secrets. Germany and German interests have also sought to restrict American firms from competing with Axis firms in neutral markets. Needless to say such business

relationships must be dealt with in a manner which will not destroy legitimate American interests. Action will continue to be taken to solve this problem.

The freezing order and regulations provide ample facilities for requiring reports and making investigations to assure the effective functioning of the program. We are now engaged in taking a complete and comprehensive census of every conceivable type of foreign-owned property within the United States, irrespective of whether the owner of such property has been blocked under the freezing order. This census requires precise data as to the identity of the foreign interests and the nature and location of the property. We anticipate that the census will be an invaluable aid in effectively carrying out the many aspects of the program which I have discussed and in assuring the complete protection of American interests as well as of friendly foreign interests.

One aspect of freezing control that I should not omit is its usefulness as a mechanism through which we may provide assistance to friendly countries in their own regulation of finance and trade. As I indicated, freezing control was applied to China at the specific request of Generalissimo Chiang Kai-shek. This action by our Government in conjunction with the British and Dutch is immeasurably strengthening China's ability to acquire and retain much needed foreign exchange and to control China's foreign trade. Our coordination of freezing control with exchange and trade regulation by China reduces evasions of the Chinese control and strengthens China's authority over trade and finance in occupied China and in the international settlements where China would otherwise be largely impotent.

Foreign funds control is so flexible and dynamic an instrument of economic defense that we may reasonably assume its growing usefulness as new situations arise. We may likewise reasonably assume that freezing control will be a most useful instrument in dealing with several of the inevitable post-war economic and financial problems.

Operation

In view of the wide range of functions dealt with by freezing control, it is not surprising that the ad-

ministration of freezing control presents difficulties. The Treasury has constantly sought and adopted methods for simplifying the licensing procedure and the issuance of rulings and other information on questions of public interest.

Policy questions arising under freezing control are considered by an interdepartmental committee consisting of representatives of State, Treasury, and Justice Departments. Liaison is maintained with the recently created Economic Defense Board on which the State, Treasury, and Justice Departments are represented. Activities of freezing control are also coordinated with the functions of other departments and agencies of the Government.

The Treasury has sought to give applicants and their counsel full opportunity to present their case to the Department, both orally and in writing, and to insure the disposition of applications on the basis of equality and defined principles of policy. We have always been prepared to reconsider any denial of an application. In many instances, the Department has granted a previously denied license, upon presentation of additional information or upon further consideration of the case.

It is the desire of the Department to do everything possible to facilitate public understanding of freezing control problems. The Treasury and the Federal Reserve Banks are always available to discuss problems that may arise.

The legal profession can and should play an important role in the administration of freezing control and the Department would welcome suggestions from lawyers and all other groups as to how we can do a better job. You can help the Department by telling us what loopholes we are missing and how we can deal with them, as well as by telling us the areas in which we are unnecessarily strict.

All Americans are anxious to play an active part in this country's defense program. Lawyers, bankers, brokers, and other business and professional groups can make a real contribution to national defense by assisting and cooperating with the Government in the administration of freezing control.

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RULES OF ACCOUNTING FOR
GERMAN EXTERNAL ASSETS

approved by the Assembly
21 November 1947

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INTER ALLIED REPARATION
AGENCY

RULES OF ACCOUNTING FOR
GERMAN EXTERNAL ASSETS

as approved by the Assembly of I. A. R. A.

These rules supersede those given in A

of the Report of the Secretary Gen

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RULES OF ACCOUNTING FOR GERMAN EXTERNAL ASSETS

Approved by the Assembly on 21 November, 1947

PART I

1. The term "Germany" means the territory within the boundaries of that country as of 31 December, 1937.
2. The term "assets" means all property, whether movable or immovable, and any right, title or interest in property. (See paragraph 9 of the Report of the Committee on German External Assets, dated 18 November, 1947).
3. The term "seizure" (or "seized") means placing under custody, sequestration, blocking, vesting or confiscation because of a German interest.
4. The seizure of assets by a Signatory Government shall not be deemed to have relieved the Signatory Government from the obligation to account for such assets, or in the case of liquidation or sale of seized assets, for the proceeds from such assets.

PART II

5. Subject to the other Parts of these Rules, and in conformity with Article 1F (Part I) of the Paris Reparation Agreement, each Signatory Government shall be charged with the estimated value of the assets, referred to in A and B below, which were within its jurisdiction on the 24 January, 1946, and any income from such assets derived by the Signatory Government before or after that date. Each Signatory Government's estimate shall be made on the following basis:

- (1) Assets which have not been sold or liquidated as of the reporting date shall be estimated on the basis of values current on the reporting date. Any income from such assets shall be accounted for.
- (2) If assets have been sold or liquidated by the Signatory Government before or after the 24 January, 1946, but prior to the reporting date, the Signatory Government shall report the proceeds from the sale or liquidation of such assets. Any income from such assets prior to their sale or liquidation shall be accounted for.

331304

(3) Assets seized in the form of monies or bank accounts shall be accounted for together with any income from such assets until invested or reinvested or paid into the public treasury.

(4) When proceeds from assets sold or liquidated or assets in the form of monies or bank accounts or any income are invested or paid into the public treasury, such proceeds, assets and income shall only be accounted for on the basis of the amount invested or paid into the public treasury as of the date of such investment or payment.

A. Assets which on 24 January, 1946 were owned (or but for their seizure would have been owned) directly or indirectly by:

1. The German State, Government, municipal and other public authorities and organisations, and the German Nazi Party.
2. 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.
3. Any individual who, as a German national, has been compulsorily repatriated to Germany after 24 January, 1946, or is intended to be compulsorily repatriated to Germany.
4. Any body of persons, corporate or unincorporate, organised in and under the laws of Germany.

B. Assets, other than those mentioned in A, which as of the reporting date (i) have been seized and (ii) have not been released and (iii) are not intended to be released in cases in which:

1. Such assets were on 24 January, 1946 owned (or but for their seizure would have been owned) directly or indirectly by:
 - a) any individual who had German nationality at any time between the date on which the country of the Signatory Government was occupied or annexed by or entered into war against Germany, and 24 January, 1946.
 - b) any body of persons, whether corporate or unincorporate, in which there has been a German interest at any time between the date on which the country of the Signatory Government was occupied or annexed by or entered into war against Germany and 24 January, 1946.
2. Such assets were owned (or but for their seizure would have been owned) directly or indirectly by any individual of German nationality who died before 24 January, 1946.

PART III

6. A Signatory Government shall be entitled to exclude, from the charge to be made under Part II, assets within the following categories if such assets (i) have not been seized, or (ii) have been released, or (iii) will be released:

- A. Patents disposed of or dealt with on the basis of the London Patent Accord of 27 July, 1946, and trademarks, designs and literary and artistic property; provided however that any income or proceeds from all such assets shall be included.
- B. Household goods and limited personal effects which individuals repatriated to Germany are permitted to take with them, and maintenance allowances necessary for the support of such individuals, pending repatriation.
- C. Household goods and limited personal effects of diplomatic and consular officials of the German Governments.
- D. Assets belonging to religious bodies or private charitable institutions and used exclusively for religious or charitable purposes.
- E. Assets of any individual of German nationality who voluntarily entered Germany at the invitation of, and to assist any of the Allied Governments, and whose case merits favourable consideration.
- F. Assets of any individual of German nationality:
 - (1) who was deprived of liberty pursuant to any German law, decree or regulation discriminating against religious or racial groups or other organisations, and
 - (2) who did not enjoy full rights of German citizenship at any time between 1 September, 1939 and the abrogation of such law, decree or regulation, and
 - (3) who has left Germany (or if he has not left Germany at the final accounting under the Paris Agreement, it is proved that he intends to leave Germany within a reasonable time thereafter) to establish his permanent residence outside Germany; and
 - (4) who it is proved did not act against the Allied cause during the war, and
 - (5) whose case merits favourable consideration.
- G. Assets of any individual of German nationality:
 - (1) who is also a national, or was formerly a national of a I.A.R.A. country, and
 - (2) who was formerly a resident of that country, and
 - (3) who has left Germany (or if he has not left Germany at the final accounting under the Paris Agreement, it is proved that he intends to leave Germany within a reasonable time thereafter) to establish his permanent residence in that I.A.R.A. country, and

- (4) who it is proved was loyal to the Allied cause during the war, and
- (5) whose case merits favourable consideration.
- H. Assets which would provide little or not net value because of the costs involved in their seizure, administration or sale.
- I. Assets in a Signatory country owned by any body of persons organised under the laws of another country, other than Germany, in which body the German interest is not a controlling interest.
- J. Assets in a Signatory country owned by any body of persons, organised under the laws of Germany, in which body there are non-German interests, to the extent that such assets proportionate to the non-German interests in the body are released to such non-German interests.
- K. Any other direct or indirect non-German interest in assets which interest has not been seized or which has been or will be released to such non-German interest.

PART IV

A Signatory Government shall exclude, from the charge to be made under Part II, any assets within its jurisdiction which an individual on the 24 January, 1946 directly or indirectly owned (or, but for the placing under custody, sequestration, blocking, vesting or confiscation of the assets, he would have owned) if the individual, at the time of the occupation or annexation by Germany of territory of the country in which he was residing, or at the time at which that country entered into war, was:

- a) a national of that country, and
- b) not a national of Germany, and
- c) did not acquire German nationality by marriage, provided that this provision shall not affect the applicability of Rule 6 G.

PART V

S. Subject to Rule 9,

- A. A Signatory Government shall exclude, from the charge to be made under Part II, assets within its jurisdiction on 24 January, 1946, which, because of an agreement or arrangement with another Government to avoid or resolve a conflict of jurisdiction (i) have not been seized and will not be seized or have been released or will be released or (ii) have been used or will be used to indemnify non-enemy interests.

- B. A Signatory Government may deduct, from the charge to be made under Part II, any reimbursement which that Government has paid or will pay in connection with the non-seizure or release of assets referred to in paragraph A.
 - C. A Signatory Government shall include, in the charge to be made under Part II, any reimbursement which that Government has received, or will receive in connection with the non-seizure or release of assets referred to in paragraph A.
9. Where adjustments referred to in Rule 8 concern assets which have been seized and not yet released but will be released, and
- A. The Governments directly concerned are Signatory Governments such adjustments may not be made by a Signatory Government unless the following conditions apply:
 - 1. The Signatory Government has informed the Secretary General and any other Signatory Government directly concerned,
 - 2. The Signatory Governments directly concerned have agreed as to the deductions and inclusions to be made in the accounts of those Signatory Governments.
 - B. Where one of the Governments directly concerned is not a Signatory Government, such adjustments may not be made by the Signatory Government, without the prior approval of the Secretary General of I.A.R.A. The decision of the Secretary General shall be subject to review by the Assembly within three months.

PART VI

10. For the purpose of this Part VI the term "material date" means the date of invasion or annexation, whichever was the earlier, by Germany of territory of the Signatory Government.
11. A Signatory Government shall be entitled to exclude, from the charge to be made under Part II, assets which were acquired after the material date by the German State or Government or by any individual or body described in Rule 5.
12. A Signatory Government shall, however, be charged for,
- a) assets acquired after the material date by inheritance, and
 - b) except in cases described in (c) and (d), any consideration paid for any assets acquired after the material date, and
 - c) any assets which were brought into or created within the jurisdiction of the Signatory Government after the material date by the German State or Government or by any individual or body described in Rule 5, and

331306

- d) any assets acquired after the material date from a person who at that time was not a resident of a country which had been invaded or annexed by Germany.

13. A Signatory Government shall be entitled to exclude, from the charge to be made under Rule 12 (b), the consideration referred to in Rule 12 (b) to the extent that such consideration was paid:

- a) in reichsmarks, or
- b) in currency issued in the territory of the Signatory Government and obtained after the material date for occupation costs or for reichsmarks, or
- c) in any other counter-value which was obtained after the material date directly or indirectly either in exchange for (a) or (b) or for no consideration except where acquired by inheritance.

14. A Signatory Government shall be entitled to exclude, from the charge to be made under Rule 12 (c), assets referred to in Rule 12 (c) to the extent that such assets were acquired in an occupied or annexed country.

- a) for no consideration, or
- b) for reichsmarks, or
- c) for currency issued in the territory of that occupied or annexed country and obtained after the material date for occupation costs or for reichsmarks, or
- d) for any other counter-value which was obtained after the material date directly or indirectly either in exchange for (b) or (c) or for no consideration except where acquired by inheritance.

15. A Signatory Government shall be entitled to exclude, from the charge to be made under Rule 12 (d), assets referred to in Rule 12 (d) to the extent that such assets were acquired:

- a) for currency issued in the territory of an occupied or annexed country and obtained after the material date for occupation costs or for reichsmarks, or
- b) for any other counter-value which was obtained after the material date directly or indirectly either in exchange for (a) or for no consideration except where acquired by inheritance.

PART VII

16. A Signatory Government may deduct from the value of the assets to be charged any sum which it has paid or intends to pay in the following categories:

- A. Taxes accrued before the reporting date with respect to assets to be reported.
- B. Liens.

C. Expenses of administration incurred before the reporting date with respect to assets to be reported.

D. In rem charges against specific items.

E. Unsecured legitimate contract claims against the German former owner of assets.

17. With respect to items "A", "B", "D" and "E" of Rule 16, a Signatory Government may deduct only to the extent of the value of the particular German owner's specific assets which are to be charged.

18. In addition, with respect to item "E" of Rule 16, unsecured contract claims may be deducted only (a) if paid or to be paid in accordance with the laws or administrative rules of the Signatory Government in force on the reporting date and (b) in respect of which all of the three following provisions apply, namely, that the claims are:-

1. Those of nationals or bodies of persons organised under the laws of the country within whose jurisdiction the assets are situated, or the Government of that country, or to individuals who are and were resident in that country as of its entry into war.
2. Filed with the Signatory Government before 24 January, 1949, or filed within two years after the vesting, sequestration or confiscation of the German assets involved.
3. In respect of contracts with the German former owner of the assets in the Signatory country, entered into before 9 May, 1945, by or on behalf of an individual who was resident in, or by or on behalf of a body of persons which was organised under the laws of, the Signatory country, at the time when the contract was entered into.

PART VIII

19. A Signatory Government shall be entitled to exclude, from the charge to be made under Part II, 50% of the net value of:

A. Assets which on the reporting date are under judicial proceedings the outcome of which will determine whether the assets are subject to Part II;

B. Assets which the Signatory Government and the Secretary General of I. A. R. A. agree:

1. involve special circumstances, and
2. may reasonably be expected to come under judicial proceedings the outcome of which would determine whether the assets are subject to Part II. The decision of the Secretary General shall be subject to review by the Assembly within three months.

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331308

THE UNFREEZING OF FOREIGN FUNDS

RUDOLF M. LITTAUER*

I. STATEMENT OF THE PROBLEM

With the liberation by Allied armies of enemy-occupied countries, demands have become more insistent for the relaxation of American wartime controls over the property of nationals of these and neutral areas. Pressure for such action has come from several sources. Post liberation governments desire the immediate use of American assets of their nationals for the purchase of goods. Individual owners seek to reap the fruits of providential investments. American exporters look to the early reestablishment of stability in their customers' economic condition. Creditors are anxious to obtain satisfaction of claims from American assets of foreign debtors.

American wartime controls have affected no less than \$8,000,000,000 of alien property.¹ An insignificant part of this enormous total is owned by enemy countries. The balance belongs to the governments and central banks and nationals of non-enemy countries. This article will be concerned principally with the release of property owned by the nationals of non-enemy countries. The disposition of enemy property²

* The author is indebted to Murray A. Gordon, Esq. for valuable assistance and criticism.

1. Available figures are somewhat at variance. In June, 1942, the Treasury Department, on the basis of its Census of Foreign Property as of June 14, 1941, stated that the total of frozen funds amounted to \$7,131,000,000. ADMINISTRATION OF THE WARTIME FINANCIAL & PROPERTY CONTROLS OF THE UNITED STATES GOVERNMENT. (U. S. Treas. Dept. 1942) 42. (This publication is hereafter called FINANCIAL & PROPERTY CONTROL.) On subsequent occasions, the Treasury has increased its figure to \$8,000,000,000, e.g., Statement of Ansel F. Luxford, Assistant General Counsel of the Treasury Department, *Hearing before Subcommittee No. 1 of the Committee on the Judiciary on H R 4840 78th Cong., 2nd Sess.* (1944) 71. An independent estimate [Polk, *Freezing Dollars against the Axis* (1941) 20 FOREIGN AFFAIRS 114] arrived at a \$7,123,000,000 estimate.

2. Enemy-owned funds amount to a total of not more than \$464,000,000. FINANCIAL & PROPERTY CONTROL, 42. The ultimate disposal of these funds will depend on factors which cannot yet be established. At the present time, the world does not yet know to what extent a postwar Germany can be entrusted with foreign investments. See Dickinson, *Enemy-Owned Property: Restitution or Confiscation?* (1943) 22 FOREIGN AFFAIRS 126; BORKIN & WALSH, *GERMANY'S MASTER PLAN* (1943); AMERICAN BAR ASSOCIATION, REPORT OF SPECIAL COMMITTEE ON CUSTODY & MANAGEMENT OF ALIEN PROPERTY (1943) 42. Nor are we ready to establish what should be done with the property of enemy nations of minor importance, such as Italy, Bulgaria or Rumania. It will also be necessary to wait for some time after the cessation of hostilities before it can be decided whether special classes of enemies should be exempted from the application of enemy property legislation because their enemy character is a matter of form rather than of substance. Littauer, *Confiscation of the Property of Technical Enemies* (1943) 52 YALE L. J. 739.

and the release of the property of non-enemy governments and their central banks³ are not treated fully.

The property of these nationals has been subjected to two different types of control: "freezing," and "vesting." Freezing involves the prohibition of transfers of American property interests owned by a designated country or by its nationals, unless the transfers are licensed by the Treasury Department.⁴ "Vesting" involves the transfer of title in alien property to the Alien Property Custodian by order of the Custodian himself or by order of the Secretary of the Treasury.⁵ The difference between freezing and vesting is a functional one, since both enemy and non-enemy property can be either frozen or vested. Freezing is employed where it is considered sufficient merely to prevent a use of the property by the owner in a manner detrimental to American interests. Vesting is applied where positive use or direct management of the property by the American government⁶ is considered desirable. So far as the property of non-enemy nationals is concerned, freezing is of far greater importance than vesting, for it is the policy of the Alien Property Custodian to use his vesting powers over non-enemy property only in ex-

3. Funds owned by non-enemy governments and by their central banks have been estimated by Polk, *loc. cit. supra* note 1, to amount to two-thirds of the total. This seems to be a very rough estimate. More reliable figures are available in the case of France where from \$900,000 to \$1,000,000 of a total of \$1,400,000,000 to \$1,500,000,000 is said to be held by such owners. N. Y. Times Oct. 25, 1944, p. 7, col. 5; N. Y. Times November 4, 1944, p. 1, col. 6. The release of these funds involve highly political questions, such as the support of governments in exile, and the recognition of governments on liberated soil. After these political questions have been decided, there will remain little, if any, problem for legal determination, as the funds of recognized governments enjoy sovereign immunity. Deák, *The Plea of Sovereign Immunity* (1940) 40 COLUMBIA LAW REV. 453; but cf. *Matter of Banque de France v. Supreme Court of the State of New York*, 287 N. Y. 483, 41 N. E. (2d) 65 (1942) (attachment suit brought in the New York Courts by the Belgian National Bank against the French National Bank for conversion of the Belgian Gold reserve).

4. E. O. 8389, 5 FED. REG. 1400 (Apr. 10, 1940) as amended by 13 subsequent executive orders. The order, in its present amended form, is reprinted in DOCUMENTS PERTAINING TO FOREIGN FUNDS CONTROL (U. S. Treas. Dept. 1944) 5. (This publication is referred to hereafter as DOCUMENTS.)

5. § 5b, TRADING WITH THE ENEMY ACT, 40 STAT. 411 (1919), 50 U. S. C. App. § 5(b) (1940), amended by § 2 of Act of March 9, 1933, 48 STAT. 1, 12 U. S. C. § 95a (1940), by Joint Resol. of May 7, 1940, 54 STAT. 179 and by the first WAR POWERS ACT, 55 STAT. 839 (1941), 50 U. S. C. § 611 (1941).

6. *Hearing on H R 4840, supra* note 1, at 73. This distinction is borne out by the terms of E. O. 9095, 7 FED. REG. 1971 (Mar. 11, 1942) [as amended by E. O. 9193, 7 FED. REG. 5205 (Jul. 6, 1942)]; by which the President has restricted the exercise of the vesting powers. Under this order business enterprises, patents and similar rights, and ships and vessels owned by alien enemies or friends may be vested, while cash, bullion, foreign exchange, securities or similar liquid assets whether or not owned by alien friends or enemies are only frozen and not vested; except where they are needed for the maintenance of a vested asset of the same owner. Property in the process of administration may be vested if enemy owned. See Diamond, *The Effect of War on Pre-Existing Contracts Involving Enemy Nationals* (1944) 53 YALE L. J. 700, 720 in regard to the vesting of contractual rights.

ceptional cases.⁷ This article accordingly will not deal with the problems arising from the exceptional use of "vesting" powers by the Alien Property Custodian,⁸ but rather will be concerned only with such property of non-enemy nationals as has been frozen.

The American government appears to be willing to free this frozen property from the existing restrictions as rapidly as possible. However, our authorities have already indicated that in their opinion an automatic release of restrictions will not be possible and that there is need for a "defrosting program" which will provide for an "orderly transition" and for the "gradual removal of controls."⁹ The subsequent discussion will show that this position is sound and that the proposed "gradual removal of controls" can be accomplished without too much difficulty. The discussion will be initiated by a description of the American freezing regulations themselves and of certain developments and regulations abroad which have affected frozen funds during the freezing period.

II. AMERICAN FREEZING REGULATIONS AND FOREIGN INFLUENCES UPON FROZEN FUNDS DURING THE FREEZING PERIOD

A. AMERICAN REGULATIONS

1. Purposes of Freezing

The specific purposes which the freezing orders pursue are not recited in the orders themselves, nor in any of the Treasury regulations issued under their authority.¹⁰ They can, however, be clearly ascertained from a number of public statements made on various occasions since the inception of the Foreign Funds Control.

At the outset freezing was directed solely to the end of protecting the rights of foreign owners of American assets. This was clearly stated in May, 1940, during the course of a debate in the Senate.¹¹ At that

7. Patents, patent applications and similar rights owned by non-enemy residents of enemy-occupied territories have been vested. PATENTS AT WORK (U. S. Alien Property Custodian 1943).

8. That question has already been discussed elsewhere. Dulles, *The Vesting Power of the Alien Property Custodian* (1943) 28 CORN. L. Q. 245; Littauer, *loc. cit. supra* note 2.

9. Speech delivered by Orvis A. Schmidt, Acting Director, Foreign Funds Control, before the 31st Nat. Foreign Trade Conv., Hotel Pennsylvania, New York City, Oct. 9, 1944, mimeographed, p. 1.

10. E. O. 8389, *supra* note 4, in its preamble, contains a finding that the Order "is in the public interest and is necessary in the interest of national defense and security."

11. This debate was occasioned by the introduction of a bill for a joint resolution to amend § 5b of the TRADING WITH THE ENEMY ACT of 1917. The first freezing orders had been issued under § 5b, as amended by the Act of March 9, 1933. Subsequently it appeared desirable to broaden the statutory basis for further orders and to ratify the first two orders. This bill was enacted on May 7, 1940.

time this country still adhered to a policy of strict neutrality. Pearl Harbor was more than a year and a half away. Supporters of the neutrality policy in the Senate expressed the fear that the freezing orders might make it possible for the President to exercise economic pressure over the Axis. Other Senators gave assurances that the orders would be used only to protect foreign owners of American assets from any loss caused "by conquest or by any other forcible means." One of them, Senator Connally, in proposing that the freezing orders be sustained on that score, warned his colleagues that if foreigners knew in advance that this country would be indifferent to the sanctity of their property they would no longer send their money to us. He asked the Senate to confirm the "international belief and international faith in the integrity of the United States Government; that it would protect, safeguard and secure the property even of aliens."¹² Similar thoughts were subsequently expressed outside of the Senate by other spokesmen of the Administration. They have stated that with respect to foreign-owned property the United States holds the position of a trustee rather than that of a mere custodian.¹³ They also have emphasized the responsibility with which this country is burdened because of an international confidence in our free institutions and our integrity which will not permit the wresting of such assets from their true owners.¹⁴

The initial policy of protecting foreign owners of American assets contemplated not only protection of the owners themselves from German looting, but also the protection of their creditors. Under the procedural laws of the various States, creditors were in a position to attach the property of non-resident owners and to obtain judgments against them, without any specific regard to the war situation which may have hampered the debtors in the defense of their cases. Creditors were also free to satisfy their judgments from the attached property. Yet the Treasury has consistently prevented creditors from availing themselves unfairly of these procedural advantages. It has permitted the execution of judgments out of frozen assets only where it appeared to the satisfaction of the Treasury that the debtor had been given an opportunity in fact as well as in law to present his case. It has also required proof that satisfaction of a judgment out of frozen assets would not result in giv-

12. 86 CONG. REC. 5006-5008 (1940).

13. See Brief of United States as *amicus curiae* in Commission for Polish Relief, Ltd. v. Banca Nationala a Rumaniei, 288 N. Y. 332, 43 N. E. (2d) 345 (1942).

14. John W. Pehle, Assistant to the Secretary of the Treasury, *Freezing Control, One Phase of National Defense*, Weekly Bulletin No. 1052, FOREIGN CREDIT INTERCHANGE BUREAU OF NATIONAL ASSOCIATION OF CREDIT MEN, March 28, 1941, p. 7.

ing to one creditor a preference over others who, because of the war, did not have the same opportunity to pursue their rights.¹⁵

Freezing acquired a second and entirely different purpose by 1941 when this country became a non-belligerent supporter of Britain. The fears of the Senate in the debate of 1940 were realized since it was soon found that the freezing regulations could serve as an excellent tool for the conduct of economic warfare against the Axis. In June, 1941, additional freezing orders were issued. They applied to American assets owned by the Axis countries and by Continental European neutrals.¹⁶ Freezing was now described as a means of preventing the Axis from drawing on American resources and on those of the Western Hemisphere for the purpose of maintaining its war potential.¹⁷ Freezing sought to prevent the acquisition by the Axis of vital materials needed by the United States and its friends, to curb the financing of Axis propaganda and sabotage, and generally, to curtail the Axis use of dollars as a medium of payment.¹⁸ Furthermore, freezing was to protect American banks and business institutions from the double liability which might result from conflicting instructions given by persons of equal authority in Axis occupied countries and in free territories.¹⁹ Finally, freezing was to enable the American government to facilitate the use of blocked assets by governments in exile and to prevent their use by puppet governments.²⁰

Since the Summer of 1941, a third purpose of freezing gained increasing importance, although it has never been very clearly articulated. This purpose, as described by spokesmen of the Treasury, is the use of freezing regulations to support the position of this country in the postwar negotiations and settlements of matters concerning foreign relations. This policy has several possible implications. It might comprise the use of frozen funds for the collection of debts owed to America or to Americans.²¹ It may also mean the use of the freezing powers "as a

15. See Brief of the United States, *supra* note 13, at 11-14; *Hearings on H. R. 4840*, *supra* note 1, at 85; Pehle, *loc. cit.* *supra* note 14; U. S. Treasury Dept. General Ruling No. 10A of August 12, 1942, providing for a "Moratorium on Obligations of Philippine Companies" and Press Release No. 38 of the same date, published in DOCUMENTS, *supra* note 4, at 33, 126.

16. E. O. 8389, *supra* note 4, as amended.

17. Edward H. Foley, General Counsel for the Treasury Dept. *Freezing Control as a Weapon of Economic Defense*, address delivered on Sept. 29, 1941, before the Committee on Insurance Law of the American Bar Association, published by the U. S. Treasury Department, at 1; Brief of the United States, *supra* note 13, at 6; Treasury Release No. 1, June 14, 1941, reprinted in DOCUMENTS, *supra* note 4, at 103; Pehle, *supra* note 14, at 7.

18. Brief of the United States, *supra* note 13, at 11.

19. *Id.*, at 10; *Hearings on H. R. 4840*, *supra* note 1, at 70.

20. Brief of the United States, *supra* note 13, at 13.

21. Statement of Sec'y. of the Treasury Morgenthau, N. Y. Journal of Commerce, July 19, 1940; see also N. Y. Times, August 9, 1940, p. 1, col. 7. This policy seems to have been abandoned. See *Hearings on H. R. 4840*, *supra* note 1, at 100.

mechanism through which we may provide assistance to friendly countries in their own regulation of finance and trade."²² The latter application of the freezing device is illustrated by the Executive Order of June 14, 1941 which froze the assets of our ally, China.²³ This order was issued upon the request of the Chinese Government to help that Government in its efforts to maintain the value of its currency and to control imports and exports across its boundary lines.²⁴ It is not unlikely that similar applications of the freezing powers after the end of the war are contemplated. In any event, it is apparent that the use of frozen funds for postwar international arrangements may be directly in conflict with the original purpose of freezing, which was the protection of the rights of individual owners. Such a use of frozen funds may mean the confiscation of private property by this country for the purpose of paying debts owed persons completely unrelated to the property owners; it may also mean the enforcement by this country of foreign decrees which may be found to be destructive of the rights of individual owners.

2. Definitions

The prohibitions of the freezing orders are all addressed to persons within the United States.²⁵ These persons are enjoined from taking part in a number of specified types of transfers if such transfers involve property of a designated country, or of its nationals, or if they are made by or on behalf of such country or nationals. Detailed definitions, both of the transfers which are prohibited²⁶ and of the classes of "nationals" who are affected,²⁷ are furnished by the freezing orders themselves and by regulations issued under their authority.

The definitions which establish what transfers are prohibited are designed more with a view toward exploiting fully the powers available to the Administration under the statute than with a view toward making the regulations easily understandable. Several attempts to ascertain their meaning have already been made.²⁸ Those findings will not be repeated

22. Foley, *supra* note 17, at 4.

23. E. O. 8389, *supra* note 4.

24. FINANCIAL & PROPERTY CONTROLS, *supra* note 1, at 15. See also U. S. Treasury Dept. General Ruling No. 10 of January 14, 1942, and No. 10A of August 12, 1942 [DOCUMENTS, at 33] by which a measure of cooperation is furnished to the Philippine Government.

25. E. O. 8389, *supra* note 4, § 1; DOCUMENTS, *supra* note 4, at 36.

26. *Id.*, § 1, sub-secs. A-F.

27. *Id.*, § 5, ¶ E.

28. THIESING, CONTROL OF FOREIGN OWNED PROPERTY IN THE UNITED STATES (1941); Freutel, *Exchange Control and Conflicts of Laws* (1942) 56 HARV. L. REV. 30; Harris and Joseph, *Present Problems Concerning Foreign Funds Control*, N. Y. L. J., Jan. 22, 1941, p. 336, col. 1; Bloch and Rosenberg, *Current Problems of Freezing Control* (1942) 11 FORDHAM L. REV. 71; Note, *Foreign Funds Control by Presidential Freezing Orders* (1941) 41 COLUMBIA LAW REV. 1039.

here. For the purpose of this article it is sufficient to state that all frozen property transfers which in any way involve persons within the United States are covered by the orders and regulations. Thus, the regulations prohibit the transfer of practically all property,²⁹ located in this country, which is affected with a designated interest.³⁰ They also prohibit the transfer of registered American securities which are located in a designated country;³¹ the transfer of securities bearing physical marks which show that they have once been abroad;³² the transfer of securities, currency, gold, foreign exchange, diamonds, or works of art as soon as such assets reach the United States from abroad;³³ and the acquisition of securities which are located abroad by a person who is in the United States.³⁴

The definition of the term "national" is of particular importance because it is the cause of some of the main difficulties which lie in the path of the unfreezing process. Traditionally, the term "national" comprises only citizens or subjects of a country who owe allegiance to that country.³⁵ Under the provisions of the freezing orders, a "national" is also anyone who is domiciled or resides or is only temporarily located in a designated country, as well as anyone who is acting as an agent for such person.³⁶ Hence, the physical presence of a person in the territory of a designated country is a decisive factor, even where he owes no allegiance and has no intention to be or to remain in the country. This singularly wide definition is even further broadened by the fact that the status of a "national," once established, remains unalterable. Thus, anyone who, on the date when the designated country was placed under the freezing orders, was a "national" of that country retains that status for the duration of the freezing orders. Similarly, anyone who subse-

29. Regulation under E. O. 8389, as amended, *supra* note 4, § 130.2 (c) [DOCUMENTS, *supra* note 4, at 16]; U. S. Treasury Dept. General Ruling No. 12, ¶ (5) (b) [DOCUMENTS, *supra* note 4, at 37].

30. E. O. 8389, *supra* note 4, § 1 (i) (ii) [DOCUMENTS, *supra* note 4, at 5].

31. *Id.*, § (1), sub-sec. E.

32. *Id.*, § (2), ¶ A, sub-sec. (1); U. S. Treasury Dept. General Ruling No. 3, [DOCUMENTS, *supra* note 4, at 25].

33. U. S. Treasury Dept. General Rulings Nos. 5, 5a and 6 [DOCUMENTS, *supra* note 4, at 27-31]. Declaration of the United States Treasury Department on Gold Purchases of February 22, 1944 [DOCUMENTS, *supra* note 4, at 15]. Diamonds: *Hearings on H. R. 4840, supra* note 1, at 81. Currency: FINANCIAL AND PROPERTY CONTROLS, *supra* note 1, at 25, 26.

34. E. O. 8389, *supra* note 4, § (2), ¶ A, sub-sec. (2).

35. § 101 (a), NATIONALITY ACT of 1940, 54 STAT. 1137, 8 U. S. C. § 501 (a) (1940). See DOMKE, TRADING WITH THE ENEMY IN WORLD WAR II (1943) 24 *et seq.*; Sommerich, *Recent Innovations in Legal and Regulatory Concepts as to the Alien and His Property* (1943) 37 AM. J. INT. L. 58; Lourie, *The Trading with the Enemy Act* (1943) 42 MICH. L. REV. 205; Note, *New Administrative Definitions of "Enemy" to Supersede the Trading with the Enemy Act* (1942) 51 YALE L. J. 1388.

36. E. O. 8389, *supra* note 4 § 5, ¶ E [DOCUMENTS, *supra* note 4, at 8].

quently acquired the status of a "national" remains a "national" as long as the freezing orders prevail.³⁷ The Treasury Department has so far provided for only two exceptions from this field of control: General License No. 28 exempts citizens of the United States who became "nationals" because of their presence in a designated country but who subsequently resumed their American residence; General License No. 42 exempts any other "nationals" who have resided in the United States at all times since February 23, 1942.³⁸

3. General Ruling No. 12

Since the prohibitions of the freezing orders are directed at persons within the United States, their literal interpretation would appear to permit persons outside of this country to transfer American funds to other persons located abroad. As a result registered securities located in a foreign country could there be endorsed; foreign-held claims against American debtors, custodians or agents could be assigned abroad; while American bearer securities, currency or notes could be transferred as freely as any other personal property provided nobody in the United States is required to participate in the transaction.

Such a construction of the freezing orders may seem to be contradicted by the language of one of the regulations issued by the Treasury Department under the authority of the orders. General Ruling No. 12, which comprises a number of provisions relating to blocked accounts, also states that all transfers of blocked accounts are subject to the licensing requirement "whether or not done or performed within the United States."³⁹ This provision therefore prohibits the transfer abroad of blocked accounts, even though nobody in the United States takes part in such transaction. Moreover, this regulation, by declaring that unlicensed transfers of blocked accounts are "null and void," appears to establish, in advance of unfreezing, that this country will permanently disregard any intermediate transfers which may have taken place at home or abroad, regardless of the manner or the authority by which they may have been effected. The impression that such final determination is intended finds further support in certain additional provisions which exempt from the application of the ruling certain apparently legitimate transfers such as

37. *Ibid.*

38. U. S. Treasury Dept. General License No. 26 of August 8, 1940, as amended [DOCUMENTS, *supra* note 4, at 52]; General License No. 42 of June 14, 1941, as amended [DOCUMENTS, *supra* note 4, at 60]. Persons arriving after February 23, 1942 may receive individual licenses.

39. U. S. Treasury Dept. General Ruling No. 12, ¶ (1) [DOCUMENTS, *supra* note 4, at 36].

transfers arising as a result of the creation or change of the marital status, of intestate succession and of testamentary disposition.⁴⁰

In spite of the unequivocal language of General Ruling No. 12, however, it must be assumed that no final determination of title was intended. No apparent reason exists why such determination should have been made with respect to blocked accounts and not with respect to other kinds of frozen assets. Nor does it seem at all likely that the Treasury should have wanted to close the door, in advance, to any examination into the legitimacy of foreign transfers, even in the case of blocked accounts. Moreover, the Treasury itself has added an argument against the impression of finality by indicating that those transfers which the ruling exempts remain, nevertheless, subject to all licensing requirements.^{40a} All this makes it evident that the language of General Ruling No. 12 cannot be construed literally. A proper interpretation of the ruling should proceed from the assumption it was solely an attempt to discourage the development of foreign markets in American deposits.⁴¹ As a result, the efficacy of the ruling need not extend any further than to reserve to this country the complete freedom to repudiate, at the time of unfreezing, any foreign transfers in blocked accounts which it may then wish to repudiate.

Finally, it should be noted that the language "null and void" must be held to exceed the scope of the delegation of Presidential powers granted in the freezing orders if that language is meant to attack the validity of all unlicensed transfers which were consummated abroad. For in the freezing orders the President has merely prohibited certain persons *within* the United States from doing certain acts, while he has not expressed similar prohibitions with respect to persons without the United States.^{41a}

B. FOREIGN INFLUENCES

Since neither the language of the freezing orders themselves nor the special provisions of General Ruling No. 12 anticipate the ultimate disposition of foreign transfers of frozen funds, it is pertinent to examine the types of foreign transfers which probably occurred while the American freezing restrictions were in force. Three different kinds of such transfers will be distinguished: fair transfers between individuals;

40. *Id.*, ¶ (5), sub-sec. (e).

40a. See, for example, U. S. Treasury Dept. General License No. 30A of Oct. 25, 1942, reprinted in DOCUMENTS, *supra* note 4, at 54.

41. Note, *Foreign Funds Control by Presidential Freezing Orders* (1941) 41 COLUMBIA LAW REV. 1039, 1053.

41a. It should be noted, however, that the last paragraph of U. S. Treasury Dept. General Ruling No. 12 contains the language: "By direction of the President. . . ."

transfers resulting from enemy activity during the time of occupation; and transfers brought about by sovereign foreign countries within their own territories.

1. Fair Transfers between Individuals

The most obvious likelihood is that honest transactions in frozen assets continued to take place abroad after the effective date of freezing. Individuals, dealing at arm's length with each other, may have brought about such transfers for regular commercial purposes without even knowing of the American freezing regulations.⁴² Many other transfers will have been made with full cognizance of these regulations and in contemplation of the ultimate release of frozen funds by this country. The transferees in such transactions may have acted to accommodate owners who needed cash; or they may have wanted to speculate; or they may have endeavored to acquire set-off claims against their American creditors.

2. Transfers Resulting from Enemy Activity during Occupation

The results of the enemy's activities in occupied territories, calculated to bring about transfers of frozen funds, are not yet known in detail. The enemy undoubtedly coveted American assets since they made available to him several lucrative prospects: The enemy could take them to neutral speculators who were willing to pay a purchase price in neutral currency, thus furnishing him with free foreign exchange; or he could hold on to such assets in order to establish caches for use after the war as a means of financing underground activity or as a reserve for enemy leaders forced to flee from their own country.

The enemy must have used many methods, varying with the different occupied territories, to obtain frozen funds for these purposes. Thus in Poland,⁴³ where Germany pursued a policy of national extermination, German Ordinances authorized the confiscation by various agencies of almost every kind of Polish property, including, of course, whatever

42. See N. Y. Herald Tribune, Aug. 6, 1944, § 2, p. 8, col. 1: *Frozen Assets of Dutch May Be Freed First*. This report emphasizes the uninterrupted contacts between the Dutch Government in exile and Dutch patriotic movements in the home country. Apparently, as a result of these contacts, the Dutch take the position that "While there have been many illicit changes of ownership and outright confiscation of property, it is felt that thousands of people dead or, still alive, sold their holdings to others legitimately. . . . For this and other valid reasons, the Dutch authorities intend to go easy and make a thorough survey of the situation before taking decisive action. . . . a census of all property changes since May 10, 1940, will be held in the Netherlands and . . . on the basis of the findings other measures will be decided upon."

43. LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* (1944) 37.

American holdings may have been available.⁴⁴ In countries like France and Belgium, less obvious measures were employed. Property owners were offered high prices in local currency for the sale of their possessions and the prices were then paid in notes acquired by the Germans to cover imaginary costs of occupation.⁴⁵ In all occupied countries the device of appointing administrators was freely applied to the property of refugees, and of anyone who was subjected to police action.⁴⁶ Administrators were also appointed for enterprises whose managements failed to act in accordance with the instructions of the occupying authorities.⁴⁷ These administrators were then in a position to sell the property held by them for any price and to any purchaser who was acceptable to them. Moreover, in all occupied countries, the Germans adopted foreign exchange laws which demanded the declaration and sale to the German authorities of any foreign investments.⁴⁸ Finally, enemy property decrees of the occupying authorities ordering the delivery of Allied property probably included American securities and other investments.⁴⁹

We do not know as yet how far the enemy succeeded in acquiring frozen American assets by the use of these various expropriatory measures. The State Department has indicated that during the course of 1944 German Embassies in neutral countries were "loaded down" with looted securities, currency and gold, and that the Nazis were working full time to put these assets under cover.⁵⁰ On the other hand, there are certain indications that at least in some cases the counter measures taken by this country have deterred the enemy from even attempting to acquire frozen funds. Thus it seems that the Germans in Holland demanded

44. German Ordinance of January 24, 1940, *Governing the Seizure of Private Property in Occupied Poland*, POLISH WHITE BOOK (London, 1942) 124 *et seq.*; LEMKIN, *op. cit. supra*, note 43, at 223, 227.

45. N. Y. Times, October 11, 1944, p. 10, col. 4; LEMKIN, *op. cit. supra* note 43, at 39.

46. France: Statute of September 10, 1940, Journal Officiel of October 26, 1940, and Decree of January 16, 1941, Journal Officiel of January 17, 1941, as amended August 18, 1941, Journal Officiel of August 21, 1941; see also LEMKIN, *op. cit. supra* note 43, at 37, 223.

47. See, e.g., Decree of Reich Commissioner for Norway, August 17, 1940, Art. 13, ¶1, reprinted in C. C. H. War Law Serv., Foreign Supp., ¶65883; Decree of May 20, 1940, of the Military Commander for the French Occupied Territories, Concerning the Management and Administration of Enterprises in Occupied Territory of Netherlands, Belgium, Luxembourg, and France, C. C. H., *supra*, ¶67786.

48. LEMKIN, *op. cit. supra* note 43, at 57.

49. See, e.g., Regulations of Norges Bank, of July 17, 1940, as amended August 26, 1942, C. C. H., *supra* note 47, ¶66727; Decree on Enemy Property in the Occupied Territories of Netherlands, Belgium, Luxembourg and France, of the Chief Commander of the Army, Supreme Headquarters, of May 23, 1940, C. C. H., *supra* note 47, ¶65786.

50. N. Y. Times, Oct. 6, 1944, p. 7, col. 1.

the reporting of holdings in American securities, but failed to take them over if they bore stamps or seals which would indicate that they had been held outside of the United States.⁵¹ Similarly, it now appears that the contents of safe deposit boxes of some or all American banks and nationals in France and Belgium have not been touched.^{51a}

3. Transfers Brought about by Sovereign Foreign Countries within Their Territories:

The only transfers of this sort which are material to this discussion⁵² are those brought about by specific post-occupation laws of the governments which are now being established or will hereafter be established in formerly occupied countries. Sufficient evidence is already available to indicate that there will be several types of post-occupation laws in liberated countries which will affect frozen funds. In general, such laws will follow three main purposes: the restitution of looted property to its former owner; the confiscation of enemy property; and confiscation in the course of the economic and social reconstruction of the liberated country.

Restitution of Looted Property: The restitution of looted property has been promised by all the governments of the United Nations, including all governments in exile then existing, and the Provisional French Government, in a Declaration dated January 5, 1943.⁵³ These governments have reserved all their rights to declare unlawful any property transfers in occupied territories where such transfers "have taken the form of loot or plunder or of transactions apparently legal in form, even when they purport to be voluntarily effected."⁵⁴ Several of the

51. FINANCIAL & PROPERTY CONTROLS, *supra* note 1, at 22.

51a. This information is based on recent unpublished reports.

52. Transfers under the ordinary laws of blocked countries, such as transfers by inheritance or as a result of the establishment of marital status, or under bankruptcy laws and the like, do not pose any unfreezing problems. See U. S. Treasury Dept. General Ruling No. 12, ¶¶ (4) and (5) (e) [DOCUMENTS, *supra* note 4, at 36].

Transfers in accordance with the decrees of recognized puppet governments, such as that of Vichy, France [see *Bollack v. Société Generale*, 263 App. Div. 601, 33 N. Y. S. (2d) 986 (1942)], will hardly be of any significance for the unfreezing problems since these decrees can be presumed to have been superseded at the time of unfreezing by the laws of a post-liberation government.

53. Declaration of January 5, 1943, Regarding Forced Transfers of Property in Enemy-Controlled Territory [DOCUMENTS, *supra* note 4, at 15].

54. The entire question of restitution should be considered also from the viewpoint of international law and in particular from the viewpoint of the Hague Convention Respecting the Laws and Customs of War on Land of October 18, 1907 (36 STAT. 2227). That Convention, in Section III of its Annex, defines the limits of "Military Authority over the Territory of the Hostile State." Articles 46 and 53 prohibit the confiscation of private property. Title acquired by the occupying power, or by others through that power, in violation of the provisions of the Convention, may be considered invalid. See *Bisschop, London Int. Law Conference* (1943) 9

governments in exile have gone farther and have formulated detailed provisions. Belgium, Luxemburg, Poland and Greece propose to restore all property to the original owner wherever a transfer was brought about "by force,"⁵⁵ "under direct or indirect pressure,"⁵⁶ or by "confiscation."⁵⁷ These governments have also stated that they would not respect any intervening rights of third parties even where such rights may have been acquired in good faith and for value. Czechoslovakia and Yugoslavia have stated that they will void transfers made "under pressure of enemy occupation or under exceptional political circumstances"⁵⁸ or "without the true and free will"⁵⁹ of the transferor; but these two governments have not as yet taken any position with respect to the validity of rights of intervening purchasers. Finally, Norway⁶⁰ has indicated that its courts may, upon application, invalidate transactions caused by illegal compulsion or undue influence or other circumstances which would make it unreasonable to uphold them, and it has stated that intervening rights may be adjudicated from case to case in an equitable manner.⁶¹

Confiscation of Enemy Property: The probability of confiscation of enemy property by post-liberation governments should be a foregone conclusion.⁶² Such property will be confiscated if it was owned by the enemy or by his agents before he occupied the country in question. In cases where the enemy acquired property during the time of occupation,

LONDON QUARTERLY OF WORLD AFFAIRS 73-77; LEMKIN, *op. cit. supra* note 43, at 43. Similarly, title to property of the occupied state, acquired through the enemy, may be invalid, if such property was taken in violation of Articles 53, 55 and 56. See, in particular, Article 53, which permits the taking of funds and of realizable securities which are strictly the property of the state. This should not include American funds and securities, since they were frozen and, therefore, not "realizable."

55. Belgium: Decree-Law, dated London, January 10, 1941, Art. 2, 3 Monitor Belge, 1941, p. 46, reprinted in C. C. H., *supra* note 47, ¶ 67762; Luxembourg: Grand Ducal Decree of April 22, 1941, Arts. 2, 3, as published by the Luxembourg Minister to the United States on June 23, 1941, C. C. H., *supra* note 47, ¶ 65430.

56. Decree of November 30, 1939, of the President of the Republic of Poland, Art. 7, unofficial translation reprinted in C. C. H., *supra* note 47, ¶ 67751.

57. Greece: Royal Emergency Law No. 3066 of October 22, 1941, Art. 4, reprinted in C. C. H., *supra* note 47, ¶ 67781.

58. Statement of the Czechoslovak Government in London, December 19, 1941, reprinted in C. C. H., *supra* note 47, ¶ 67784.

59. Yugoslavia: Royal Decree of May 28, 1942, Arts. 2 and 5, reprinted in C. C. H., *supra* note 47, ¶ 67539.

60. Provisional Regulation of Invalidity of Transactions Connected with the Occupation, December 18, 1942, reprinted in C. C. H., *supra* note 47, ¶ 67782.

61. For the Dutch attitude, see note 42 *supra*.

62. See, e.g., Ordinance of the French Committee of National Liberation of October 6, 1941, Concerning Trading with the Enemy and Sequestration of Enemy Property, reprinted in C. C. H., *supra* note 47, ¶ 65937; and Ordinance of the Provisional Government of the French Republic, Concerning the Sequestration of Property Owned by the Enemy, Journal Officiel of October 7, 1944, p. 885, reprinted in C. C. H., *supra* note 47, ¶ 65972.

confiscation will be necessary only if the property restitution laws have not already brought about an effective invalidation of the transfer.

Confiscation in the Course of Economic and Social Reconstruction: More complex is the effect on frozen funds of post-occupation laws designed by the liberated countries for their economic and social reconstruction. These laws will entail many revolutionary changes, and drastic encroachments upon property rights will follow in the wake of these changes. Three of the blocked countries have already been incorporated into the Soviet Union.⁶³ Frozen funds held by the nationals of these countries will presumably be subjected to nationalization under Russian laws.⁶⁴ Similar measures may be taken in other countries which come to view Russian economic principles with sympathy. The proposals of some French and Netherlands groups⁶⁵ for the socialization of certain sectors of the economic life of the nation and particularly of banking and foreign trade, may also affect owners of large holdings in frozen funds. Furthermore, capital levies or compulsory loans may be imposed upon property owners in general or owners of foreign holdings in particular, in order to achieve the deflation of national currencies,⁶⁶ or for the purpose of having the rich sacrifice part of their wealth for the common good.⁶⁷ Other countries may, upon being confronted with situations where the Germans have disturbed property holding to such an extent that it is difficult or impossible to trace original ownership, wipe the slate clean by ordering the confiscation of the looted property rather than attempting to

63. Estonia, Latvia, Lithuania.

64. See, e.g., an Estonian Proclamation of the Chamber of Deputies of July 23, 1940, proclaiming the nationalization of banks and large industrial enterprises as of July 23, 1940, quoted in *Silberberg v. The Kotkas*, 35 F. Supp. 983, 984 (E. D. N. Y. 1940). Cases involving the confiscation of ships owned by nationals of these countries have already occupied our courts. See Briggs, *Non-recognition in The Courts: The Ships of the Baltic Republics* (1943) 37 AM. J. INT. L. 585.

65. See "Joint Manifesto representing both the 'leftist' and 'rightist' elements of the Dutch People and setting forth agreed upon principles for the social, political and economic reconstruction of a liberated Netherlands," published by the Press Agency of the Royal Netherlands Government in London (Aneta) on July 31, 1944.

66. N. Y. Times, October 29, 1944, p. 8, col. 1; N. Y. Times, November 18, 1944, p. 4, col. 1.

67. See N. Y. Times, January 6, 1945, p. 4, col. 6: *Pleven Indicates France May Impose Levy on All Classes to Finance Costs of War*; N. Y. Times, January 11, 1945, p. 7, col. 3: *France May Draft Foreign Holdings*; N. Y. Times, February 6, 1945, p. 10, col. 3: *French to Track Down Capital Sent to Britain*. See the French Ordinances Nos. 45-86 of Jan. 16th, 1945, concerning the census of funds abroad (Journal Officiel, Jan. 19, 1945). Articles 1 and 7 require all residents of France, as of Jan. 1st, 1945, and every French corporation, to declare their foreign holdings. Article 6 prohibits any transfers of declared holdings. Article 7 permits any Frenchman who resides abroad "to declare and to assign to the French Government, as voluntary contribution" all foreign exchange or negotiable assets in exchange for certain other funds.

restore it to its former owners.⁶⁸ Finally, foreign exchange decrees can be expected in all those liberated countries which possess only limited holdings in much needed foreign currency.⁶⁹ These decrees, in order to be effective, will combine provisions for the forced sale of foreign holdings against local currency, with provisions that such local currency, if held by nonresidents, be more or less completely blocked.⁷⁰ Hence, where rights of non-residents are concerned, these decrees, in spite of the salutary effect which they will have upon the economy of the country which issues them, should be regarded as confiscatory in character, and they will be so regarded throughout this article.

III. UNFREEZING

A. THE NEED FOR AN AMERICAN UNFREEZING PROGRAM

The various official formulations of the freezing purposes all take pains to mention one point: that freezing, apart from being a measure of protection against wartime dangers, also reserves for this country an opportunity for a considered and systematic settlement of those problems which will arise after the end of the war. Accordingly, the Treasury has decided to make use of this opportunity.⁷¹

There are many reasons which support this decision of the Treasury. A lack of safeguards at the time of the lifting of freezing restrictions would cause serious harm to many legitimate interests. American financial institutions and business men, in their capacities as custodians of frozen assets, as transfer agents for frozen securities, or as debtors for blocked accounts, would otherwise be exposed to the risk of double liability. They would be immediately faced by conflicting instructions emanating on the one hand from those whose title derives from wartime transfers or post-war decrees, and on the other hand from those who deny the validity of such transfers and decrees. American courts would find their dockets unduly burdened with a very considerable amount of new legal business involving problems which lie outside of their usual fields of consideration. Disputes between conflicting claimants would be governed

68. N. Y. World Telegram, May 20, 1944 (2d ed.) p. 1, col. 3, where a French government representative is reported to have stated that DeGaulle may decide to "wipe the slate clean in France, confiscating all property except the millions of 20 to 30 acre farms held by peasants," adding that this was done after the French Revolution and may be necessary now as the Germans have so involved "the paper work" concealing the real control of French production that only confiscation by the government and redistribution "can restore order."

69. The agreement reached at the International Monetary Conference at Bretton Woods, N. H. on July 22, 1944 [C. C. H., *supra* note 47, ¶70569 *et seq.*] will not eliminate the need for foreign exchange control. See Williams, *International Monetary Plans: After Bretton Woods* (1944) 23 FOREIGN AFFAIRS 38, 49.

70. Freutel, *loc. cit. supra* note 28; DOMKE, *op. cit. supra* note 35, 314 *et seq.*

71. *Supra*, pp. 134-137.

by the traditional rules of law; and these rules would make the validity of foreign transfers and foreign decrees dependent on the situs of the asset, the place of its transfer, the method of transfer employed, the commercial character of the asset,⁷² or other similar factors which have been developed in the course of peaceful economic relations, and which fail to consider the social and political conflicts arising from war and revolutionary times.⁷³ Creditors would be placed in a highly undesirable position; for they might find that their debtors, acting on their own volition or on the orders of their government, immediately withdrew their unfrozen American funds from this country. Above all, the unqualified release of frozen funds would result in the abandonment of vital public interests of this country; for such release might easily result in the surrender of frozen funds to the enemy and, even worse, to those adherents of the enemy's cause who will seek to continue their warfare into the postwar period.⁷⁴

B. RESPECTIVE ROLES OF THE UNITED STATES AND OF FOREIGN JURISDICTIONS

The recognition that there is need for an American unfreezing procedure does not imply that this country should now proceed to decide any and all disputes with respect to frozen assets under its laws and that it should take independent action to resolve fully the unfreezing situation. A completely autonomous American regulation of this kind cannot be seriously considered. From the viewpoint of efficiency much of the necessary work can be performed by the affected foreign jurisdiction far better than by this country. Authorities of the affected country possess a direct knowledge of the social, economic and psychological background of the foreign transfers, and they can properly appraise the special difficulties created by the recent sufferings of their countries and their peoples; they are the best judges of the adequacy of

72. *E.g.*, *Corn Exchange Bank v. Coler*, 280 U. S. 218 (1930); *Dougherty v. The Equitable Life Assurance Society*, 266 N. Y. 71 193, N. E. 897 (1934); *In re Lyons' Estate*, 175 Wash. 115, 26 P.(2d) 615 (1933); *Stimson, Law Governing Title to Intangibles* (1938) 15 N. Y. U. L. Q. Rev. 536; Carnahan, *Tangible Property and the Conflict of Laws* (1935) 2 U. OF CHI. L. REV. 345; Note, *Conflict of Laws, Nationalization of Foreign Corporations, Effect on Local Assets* (1943) CONTEMPORARY LAW PAMPHLETS, Series 9, No. 1; Note, *What Law Governs the Assignment of a Bank Account* (1927) 40 HARV. L. REV. 989, 991.

73. The language of Mr. Justice Frankfurter in *United States v. Pink*, 315 U. S. 203, 204 (1942) is most pertinent: "... concepts like 'situs', 'jurisdiction', and 'comity' summarize views evolved by the judicial process, in the absence of controlled legislation for the settlement of domestic issues. To utilize such concepts for the solution of controversies international in nature, even though they are presented to the courts in the form of a private litigation, is to invoke a narrow and inadmissible frame of reference."

74. Speech of Orvis A. Schmidt, *loc. cit. supra* note 9.

proposed remedies, and their responsibility, in case of a failure to find adequate solutions, is much more immediate than that of the United States. Finally, we cannot disregard one of the established principles of the American school of international law, which considers it presumptuous and impolitic to interfere in those matters that concern a foreign country more critically than the United States.⁷⁵

For all these reasons, a proper unfreezing program will have to distinguish carefully between two separate principles. In all situations in which American and foreign unfreezing policies are identical, or similar, deference should be given to the wisdom and practicability of the foreign regulation. In such cases, this country should not attempt to use its power over frozen funds to support its own judgment of the administrative requirements of the situation, but should restrict itself to supplementing these foreign measures wherever necessary. On the other hand, where American and foreign unfreezing policies are in conflict or where the foreign jurisdiction fails to take adequate measures in pursuance of joint policies, there is no reason why this country should not employ its powers to enforce its own policies.

With these two principles in mind, the various foreign measures relating to frozen funds must now be examined more closely in order to define in detail the proper scope of an American unfreezing program.

C. INTERACTION OF AMERICAN AND FOREIGN UNFREEZING MEASURES

1. *Laws Providing for the Confiscation of Enemy Property*

The enemy has had at his disposal the extensive experience in the technique of cloaking of the actual facts of ownership which is available to lawyers and bankers on the European continent. They have learned during the past decades how to hide assets from the attacks of extensive taxation and socialization and from the dangers of war and political confiscation. Chains of holding corporations as well as corporate foundations which have no stockholders have been organized under various accommodating laws to insure complete anonymity of the investing interests. A regular process of setting up individual dummies which guarantees successful concealment under all circumstances has been developed. Banking laws, particularly those of Switzerland, have been adapted to the purpose by providing that the identities of owners of anonymous accounts may be kept from all persons, even the local tax authorities.⁷⁶ As a consequence of these developments, Germany was

75. Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws* (1940) 49 *YALE L. J.* 1027, 1047 *et seq.*

76. Archawski, *Switzerland: Foster Mother of Cartels* (Sept. 1943) *HARPER'S MAGAZINE* 304; *N. Y. Times*, Nov. 14, 1944, p. 29, col. 4: *Grand Jury Finds Swiss Laws Enable Germans to Hide Assets.*

in a position to act, even before the outbreak of the war, in order to hide considerable assets in neutral countries in anticipation of anti-German war measures, and German holdings in this country could be elaborately cloaked by the use of neutral intermediaries. Similarly, Germany was able, after the outbreak of the war, to use neutral countries for the secret deposit of loot assembled by it during the course of the war.⁷⁷ Finally, the same kind of technique could have been applied when the Germans were expelled from the occupied countries and had to leave behind them possessions which they acquired during the period of occupation. Hence, it must be assumed that the frozen funds of neutrals, as well as those of the liberated countries, include enemy holdings, and that persons who claim such funds, whether they had title at the time of freezing or whether their title derives from subsequent transfers, will in many cases be found to be agents and stakeholders of the enemy.

This country will have to use any opportunity which may possibly offer itself in the course of the unfreezing process to discover and neutralize all enemy holdings in frozen funds. Those who are presently in power in Germany are undoubtedly determined to use whatever foreign caches they can get hold of for the persistent continuation of their warfare, above ground or under ground, anywhere in the world. The first requisite of an unfreezing program, therefore, should be that the real interests behind every claimant be established before anything is released to him.

Fortunately, most of the affected countries can be relied upon to devote themselves wholeheartedly to this task. They can be expected to make full use of their powers to force persons and business institutions within their territories to disclose all significant data concerning any principals and clients for whose accounts frozen funds are held. Hence, this country will not run any unreasonable risk if, instead of investigating the status of an individual foreign claimant, it places his funds at the disposal of his government, and thereby imposes the burden of making

77. It should be noted that at least two of the neutral countries, Switzerland and Argentina, strongly deny the existence of large German caches in their countries. *N. Y. Post*, Nov. 16, 1944, p. 6, col. 1. This is a report on statements made by the Chairmen of the Swiss and Argentine Delegations to the International Business Conference at Rye, N. Y. in November, 1944. These men are said to have insisted that enemy assets in their country were "meager" and almost "negligible." The Swiss problem has been brought nearer to a solution by a decree of the Swiss Federal Council of Feb. 18th., 1945, which freezes assets belonging to persons domiciled in Germany "or their mandated representatives in Switzerland." An accompanying Swiss communiqué says that the measures taken under the decree "will permit verification of charges from abroad that Switzerland has for some time served as a safe repository for capital and other hoardings belonging to nationals of invaded countries." See *N. Y. Times*, Feb. 18, 1945, p. 16, col. 3.

all necessary inquiries upon that government. Of course, wherever sufficient sources of information are available to the American authorities, nothing should prevent them from establishing the enemy character of a claimant on their own initiative. However, it is conceivable that the affected country may be inefficient or even recalcitrant because of a measure of sympathy for the enemy; or such a country may decide that it prefers to maintain its business reputation as a neutral banker instead of cooperating with this country and its allies.⁷⁸ In cases of this kind, the United States alone will bear the responsibility of preventing the delivery of frozen funds to the enemy. Obviously, this responsibility would entail difficult, but not insuperable problems. Demands for information could be addressed to those agents or custodians who are subject to the American jurisdiction and such demands could be supported by special banking laws or special tax provisions which would impose burdens upon the recalcitrant agent or custodian and his own property.⁷⁹ Moreover this country could assert that as long as its most vital unfreezing policies cannot be accomplished, the need for freezing continues. As a result all funds held by any national of the uncooperative country would remain subject to strict control. Such a decision on the part of the United States would contribute directly to the ultimate discovery of enemy interests, since it would permit this country to await the availability of German witnesses and of archives on German soil. In addition, it would serve as an inducement to the affected country to reverse its policies. Finally, America's over-all political position after the war will undoubtedly make available other international sanctions against recalcitrant nations.

Upon the discovery of enemy interests in frozen assets, there arises the additional problem of their permanent disposition. There can be no doubt that this country has the power to capture any enemy interests in frozen assets which may be discovered.⁸⁰ However, it is equally certain

78. See note 77, *supra*. The Swiss representative is reported to have said: "Giving up funds entrusted to us to anyone but the owner, would be an insult, degrading and unthinkable." The Argentine representative said: "The only action we can take . . . must be within the framework of our laws and Constitution, and obviously such a demand from the United Nations would not meet the qualification."

79. The Treasury regulations already contain a provision of this kind: General Ruling No. 17 of Oct. 20, 1943 [DOCUMENTS, *supra* note 4, at 40] requires all banks and financial institutions which are located in a blocked country, as a condition of their buying and selling securities held in an account in their names and of their collecting interest thereon, to furnish on demand made not later than one year after the termination of the war to the United States Consular authorities, information concerning all persons who have an interest in such securities: This General Ruling should be read in conjunction with the penalty provision (§ 8) of E. O. 8389 [DOCUMENTS, *supra* note 4, at 8].

80. *Miller v. United States*, 11 Wall 268 (U. S. 1870).

that other foreign governments which also enjoy contacts with the same frozen assets are in possession of similar powers.⁸¹ A conflict between these powers will be averted only where one of the countries concerned has failed to exercise its powers.⁸² There may also be exceptional cases in which the contacts of one of the confiscating jurisdictions are so tenuous that they will permit a judicial resolution of the conflict.⁸³ In most cases, however, the choice will depend upon the existence of political factors which may induce the United States to forego its own right of capture.

Thus, where the conflict is between a liberated country and the United States, the former will advance the argument that the frozen asset constitutes an investment in American funds made with means which were taken from its economy. The asset will be characterized by the liberated country as part of its patrimony which should be retained by such country once the enemy's interest therein is eliminated. This argument may well be looked upon with favor from the American viewpoint. This country has an interest in furthering the endeavors of the liberated countries to get hold of as much of their American funds as possible so that they will be able to reconstruct their suffering economy and revive their foreign trade with the United States.⁸⁴ As against these arguments, many will seriously consider the fact that this country will have need of preserving, for the satisfaction of its creditors, the very limited amount of enemy funds within our reach.

There is no unequivocal indication of how the United States will resolve this conflict. However, there can be little doubt that in one specific situation at least, the rights of the American custodian should be fully enforced and all claims of foreign governments should be rejected. This situation arises wherever the enemy, after having acquired American assets with funds coming from the enemy's own patrimony, employs an agent domiciled in another country as a mere intermediary or conduit. Thus the nominal owner of the American subsidiary of the German Dye Trust may have been a Dutch subsidiary of that trust. Yet, a claim by the Netherlands that its country and not the American custodian should capture this German property would hardly be justified.⁸⁵

81. GATHINGS, *INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY* (1940) 102 *et seq.*

82. *E.g.*, *Direction der Disconto-Gesellschaft v. U. S. Steel Corporation*, 267 U. S. 22 (1924).

83. *E.g.*, *Ingenohl v. Olsen & Co.*, 273 U. S. 541 (1927).

84. For a good exposition of the American interests favoring the surrender to the blocked countries of as much American funds as possible, see Polk, *The Future of Frozen Funds* (1942) 32 *AMERICAN ECON. REV.* 255.

85. See reports on an action brought by the Netherlands Government in London and the courts of Delaware in 1941 for an order to compel the election of di-

In other cases, the United States may be induced by political considerations of a different kind to surrender its right of capture to other countries. If, for example, a hesitant neutral country is urged to discover and segregate German owned frozen funds held by its nationals, a waiver of American rights to these assets might help to win the neutral's cooperation.

Finally, there are certain indications of a surrender of American rights of confiscation to the United Nations. These indications appear in a resolution adopted, with the concurrence of this country, at the Bretton-Woods Conference of 1944. In it the United Nations invite neutral countries to discover and segregate German owned funds found in their territories and to hold such funds for the post-armistice United Nations authorities in Germany.⁸⁶ This resolution seems to be another attempt to induce neutral countries to take appropriate measures. Thus governments of neutral countries who may find it difficult to recognize acts of confiscation on the part of Allied enemy property custodians may be more willing to recognize the title of an Allied agency which could call itself the successor in interest of the government of Germany.

2. Laws Providing for Restitution of Loot

We have already observed that the post-liberations laws of formerly occupied countries can be expected to take sweeping measures for the undoing of the harm perpetrated by the enemy.⁸⁷ The United Nations should accept measures of this kind without modification. It would be particularly inappropriate for this country to determine independently which of the transfers carried out abroad during the period of occupation were made under pressure and to what extent the rights of purchasers in good faith should be preserved.⁸⁸

rectors of General Aniline & Film Corporation nominated by that Government. The Netherlands claim was based on the Royal Decree of May 24, 1940 [Circular of Fed. Res. Bk. of N. Y. No. 2091 of July 2, 1940] and on the assertion that the controlling interest in the General Aniline & Film Corporation is owned by three Netherlands companies. Compare this with the reference in FINANCIAL AND PROPERTY CONTROLS, *supra* note 1, at 35, to the fact that 97% of the stock of General Aniline & Film Corporation is owned by I. G. Farbenindustrie A. G. "through nominal Swiss ownership." Finally, see Vesting Order No. 1 of the U. S. Secretary of the Treas. [7 FED. REG. 10403 (1942)]. These conflicting claims have been discussed by Turlington, *Vesting Orders Under The First War Powers Act* (1942) 36 AM. J. INT. L. 460, 465, and by DOMKE, *op. cit. supra*, note 35, at 371 *et seq.*

86. See Resolution VI adopted by the delegates assembled at the United Nations Monetary & Financial Conference at Bretton-Woods, N. H., Release No. 467, Oct. 4, 1944.

87. Notes 55-61, *supra*.

88. Compare the serious difficulties which the French Government has to overcome in its first attempts at restitution of property confiscated by the Vichy authorities. N. Y. Times, Oct. 13, 1944, p. 7, col. 4; N. Y. Post, Oct. 31, 1944, p. 4, col. 1.

Independent American action will be required only where frozen assets have been taken from an occupied country and brought into Germany or into neutral territories. Laws of the liberated country, ordering the restoration of the looted property to the original owner, might not be recognized in the country in which the present holder is domiciled. However, America's jurisdiction over these assets is not affected by their transfer from one foreign country to another, and this American jurisdiction can be used to provide that the validity of transfers will be determined under the laws of the liberated country whence the property came.

D. AUTONOMOUS AMERICAN ACTION IN THE INSTANCE OF A FOREIGN CONFISCATORY DECREE

1. Policy Considerations

There are definite factual limitations to the enforcement of an American public policy which would oppose the confiscation of property in the United States under the decrees of foreign governments. This country possesses no actual power to disregard such decrees insofar as they apply to the rights of those who now live in the territory of the confiscating country.⁸⁹ Whatever the United States may mean to do for the protection of the interests of these owners can be frustrated by the command of their foreign sovereign. Thus American refusal to recognize a transfer by operation of the foreign law could be undone by a foreign law ordering the transferor to execute his written assignment and to deliver it to the American custodian of his property.⁹⁰ In those cases, however, in which rights of owners other than residents of the confiscating country are concerned, an American anti-confiscatory policy would have a good chance of asserting itself. There

89. The only protection of foreign residents which could even be considered as being practicable would be the safekeeping of their frozen property for an indefinite period of time in the expectation that some day they might be able to leave their country and call for their American property. See Part E, 2nd sentence of The Program *infra*, pp. 173-174.

90. An interesting example is furnished by a French decree of July 28, 1944, concerning the requisition of United States Dollar accounts [Journal Officiel, Algiers issue of July 29, 1944, reprinted in C. C. H., *supra* note 47, ¶ 67759]. This decree provides that residents of Algiers who are the owners of American dollar accounts opened in their name, either in the United States or in a foreign country, "shall give to their correspondents the necessary orders in order to have those funds transferred into an account opened in the United States in the name of the exchange office of the territory where they reside." A like duty is laid upon agents where the owner of the account "is absent or unable to act." Forms are provided for the giving of the "necessary orders." Banks are ordered to give cable orders to their correspondents in the United States. Banks have this duty regardless of whether their accounts are opened by themselves or form the counterpart of accounts in American dollars opened on their books in the name of clients.

are two groups of such owners of frozen property who could be protected. The first group consists of owners who, at the time of freezing, lived in the confiscating country and who thereafter, at the time of unfreezing, have acquired a different domicile. The second group comprises foreign investors who were never residents of the confiscating countries, but who employed agents in those countries through whom they held their American assets on the effective date of the freezing orders.

Having an opportunity to protect these groups of owners from foreign confiscatory decrees, we are still confronted by the question whether we should make use of this opportunity. The confiscating government will strongly oppose any such American decision. Its representatives will argue that a country which has gone through the agonies of German occupation should be entitled to take whatever property the United States has frozen, because of its contacts with that country. It will be asserted that those who were fortunate enough to live outside the country instead of sharing the suffering of those who stayed on, should be happy to be given an opportunity to participate, at least financially, in the material sacrifices of the nation. ~~It will be said that no absentee owner should insist on depriving the economy of his devastated country of the wealth to which he claims title. It will be argued that frozen funds should be considered as part of the patrimony of the liberated country, thus permitting that country, as a sovereign nation, to adopt any measures it deems proper with respect to this American hoard.~~

We may admit that this line of reasoning is quite appealing. It presents a social attitude which is addressed to our better instincts, while its implicit accusation of those who shirk their presumed duty towards a devastated country arouses our moral sensibilities. Moreover, American economic interests appear to be in favor of making available to the liberated countries all frozen assets within their reach, for these assets will enable them to buy and pay for their supplies on our market without requiring American loans. Such purchases would contribute substantially to the reorganization of international trade and international monetary relations.

Yet, tempting as the arguments in favor of recognizing wholesale foreign confiscation may seem, they do not withstand closer analysis. In the first place, they are unpersuasive in regard to the owner of frozen funds who has never had anything but a business connection with the confiscating country. His political or economic relation to the country which lodges his financial agent is certainly too tenuous to warrant his forced participation in the latter's reconstruction efforts. He has merely

employed the business institutions of that country as custodians of his American assets. Nor can his investments be properly called a part of the patrimony of the confiscating country. Patrimony may reasonably include only property which was created within the economy of the country; but it cannot extend to property which was imported from the outside and then invested in United States property. Any attempt by a foreign government to reach this kind of property would proceed from the fallacy that contacts between the foreign country and property, located in the United States, which were sufficient to permit the United States to freeze the property during the war, as an American emergency measure, are equally sufficient to permit its confiscation by the foreign country.

A closer question is presented in the case of property rights of a former domiciliary of the confiscating country. We cannot overlook the fact that at the time of freezing the contacts between the expropriating jurisdiction and the former domiciliary were far more significant than those existing between that jurisdiction and a foreign investor. However, it must be appreciated that after our freezing regulations came into force these contacts were completely terminated. The question presented in the case of a former domiciliary, then, is whether he owes any permanent duties to his former country which survive the actual termination of their contacts and which follow him to his new domicile. The United States has never accepted such a principle. In matters concerning the freedom of the individual, we have always recognized that he may permanently sever his old allegiances and that this country will protect him from any continued claims of his former sovereign.⁹¹ Neither has such change of allegiance ever been considered by this country as evidencing a failure to fulfill the social responsibilities owed to the old community, or as indicating a lack of loyalty and patriotism. The American attitude is based on an understanding of the ethical, political and social cleavages which prevail in Europe and of the oppressive measures frequently employed by European governments against minor-

91. "Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic." REV. STAT. § 1999 (1875), 38 U. S. C. § 800 (1940).

ities. Hence, one who decides to leave his old country and to settle elsewhere is presumed to follow a justifiable desire to free himself from the social and political powers of the Old World. A consistent and equitable application of this policy would require the United States to reject all attempts of former sovereigns to withhold the property of former domiciliaries. To hold otherwise, and to affirm the existence of a continuing duty to the foreign country may, in many cases, permit foreign injustice and discrimination to follow their victims throughout the world.

The incompatibility of foreign confiscatory decrees and sound American policies also results from an affirmative duty which this country owes to owners of frozen property to protect their rights. Unlike the Russian owners of American property at the time of the Soviet Confiscation Decrees,⁹² the present day owners of frozen property have been prevented from obtaining these funds by the intervention of the freezing orders. Such intervention was necessary and proper in view of the exigencies created by the world situation after 1940. But, by its intervention, America has made itself the trustee of these assets.⁹³ This fact has been fully recognized from the inception of the freezing control. For when freezing was initiated, this country was still strictly neutral and freezing protection was, therefore, adopted solely in recognition of "an international belief and international faith" in the willingness of the United States to "protect, safeguard and secure"⁹⁴ alien property from any acts of confiscation whether or not they emanated from the enemy. Moreover, the Administration has specifically stated that the United States, in freezing foreign property, was acting in the capacity of a trustee.^{94a} Under these circumstances, it would be anomalous to permit such a trust relation to serve as a medium for putting owners in a worse position than that which they enjoyed at the time when the relationship was created. This distortion of American trust obligations would be particularly odious since, by the intervention of its trusteeship, America kept owners of property from employing measures of self help in the safeguarding of their property.

92. Only property of corporations which was taken over by a statutory successor [United States v. Pink, 315 U. S. 203 (1942)], or property for which no claimant appeared outside of Russia [United States v. Belmont, 301 U. S. 324 (1937)], was still available when, in 1933, the Soviet Union assigned to the United States all its claims against American nationals. (Dept. of State, Eastern European Series, No. 1 (1933) 28 AM. J. INT. L. SUPP. 1).

93. See note 13 *supra*.

94. See notes 12-14 *supra*.

94a. See note 13 *supra*.

2. Administrative Considerations

As a matter of administrative technique, a resolution by us to refuse to apply foreign confiscatory decrees to owners who are beyond the reach of the confiscating jurisdiction, will require this country to release frozen funds directly to their owners instead of turning such assets over to the confiscating country. In some cases, this result can be easily accomplished; in others, its realization will face considerable difficulties.

a. Individual Owners and Principals: The surrender of frozen funds to individuals in whose name the funds were frozen has already been accomplished under General Licenses Nos. 28 and 42⁹⁵ in the case of American citizens who now reside in the United States and in the case of non-American citizens who have resided in this country since before February 23, 1942. Similar measures should now be taken for the benefit of all other persons who have severed their allegiance to the confiscating country, whether or not they live in the United States. For all arguments which have been advanced in support of the protection of American owners of frozen funds apply with equal forces to the case of any other owner of such property. Of course, it will be necessary to establish definite criteria in order to determine in what situations allegiance to the confiscating country has actually been severed and no intention of returning to that country exists. In the case of residents of the United States, for example, the taking out of first citizenship papers or any other expression of intention to remain in this country permanently, will be an important factor. Finally, the rights of the individual owner should also be recognized and no withdrawal of frozen funds should be permitted where the American assets of such individual are held in the name of banks or other agents domiciled in the confiscating country.

b. Stockholders: Once the right of an individual property owner to protection from confiscatory decree is admitted, it becomes necessary to examine to what extent his rights should be protected if his frozen assets are held through the intermediary of a blocked corporation. In such cases, the property right consists of an equity of a stockholder in frozen American holdings of his corporation. Here a distinction should be made between different types of blocked corporations. Where the corporate intermediary is the personal holding company of the equity owner, it would appear unrealistic to deprive him of his rights in the American assets of the corporation. Any withdrawal of frozen funds by such corporation should be prevented and it should be made possible for the owner to gain possession of his equity. However, where frozen assets are held through other corporations which are actually engaged in business

95. DOCUMENTS, *supra* note 4, at 53, 60.

in the confiscating country, the surrender of their American assets to the owners of equity interests might be objectionable. For such action would threaten the existence of enterprises which form an integral part of the economy of the confiscating country. These objections to the destruction of the foreign corporation would, however, become pointless in all those cases in which the equity owner, under the laws of the country of incorporation, had the power to dissolve the corporate entity.

c. Split Ownership: The freezing orders provide for their application "to any interest of any nature whatsoever"⁹⁶ of an affected national. The words have been interpreted to provide that assets are frozen not only where they are wholly owned by a blocked national, but also where a blocked national owns a mere limited interest in them. As a consequence, there will be many cases in which frozen assets are owned in part by persons who are within the jurisdiction of the affected country and in part by others who are located beyond the reach of that country and particularly in the United States.

The existence of these complementary interests in frozen assets may easily become the cause for additional conflicts of policies. The key to the attitude of the affected countries in this, as in all other questions relating to blocked assets, is their need for foreign exchange and particularly for American funds. Because of that need, they will exercise pressure upon their nationals to liquidate whatever American investments can be liquidated, so as to make them available to their governments. Hence, wherever such investments consist of limited interests in frozen assets, there will be a general move for the institution of proceedings to separate these interests either by way of partition, or by the foreclosure of liens, or by the settlement of beneficial interests, or the establishment of distributive shares.

From the American viewpoint, this tendency, in itself, is in no way objectionable. We should merely be concerned with the manner in which the necessary splitting of interests will be accomplished. Thus we should here, too, take into account the influence that foreign confiscatory decrees will have upon the situation. The foreign country may be in possession of frozen property which is partly owned by non-domiciliary claimants or it may acquire possession of such frozen property in the course of proceedings instituted in its courts or before its administrative agencies. In such cases the foreign country may well be tempted to apply its confiscatory decrees to the foreign property as a whole without exempting the claim of non-domiciliaries. This temptation will be particularly great where the non-domiciliary claimant is a former resident

of the confiscating country. Finally, the foreign country may decree that all claimants, including those who have always been domiciled in the United States, shall be forced to take payment in local currency of the foreign forum and subject to local laws which, in turn, may effectively block the use of such currency by non-residents.

In all cases of this kind, the protection of those owners of a limited interest who are not domiciled in the affected country requires the withholding of the entire undivided asset from that country. Of course, such withholding in itself is only a temporary measure which will have to be followed by proceedings for the actual division of the various limited interests in such assets owned by residents and non-residents of the affected country. A high degree of elasticity appears advisable. In some cases, as in the case of the settlement of foreign estates, proceedings abroad will be the only efficient method and such foreign procedure should be permitted wherever assurance can be obtained that claims will be paid to non-domiciliaries and that payment will be made in unblocked currency. In other cases, as for example, where it is necessary to foreclose a lien, it may be possible to have an American agency terminate the interrelation of interests and to make the required awards. The choice between these possible modes of procedure will best be left to an American public representative of those claimants who are the objects of American protection.

d. Creditors: In the case of these claims, two converging American policies require consideration. One derives from the general duty of our government to protect domestic creditors and to assist them in collecting their claims from foreign debtors. The other is based on the same arguments which have led us to the conclusion that this country should protect the owners of frozen assets insofar as they are domiciled outside of the affected countries.⁹⁷

The preceding discussion has made it apparent that limited claims to frozen assets require protection from the application of foreign confiscatory decrees and exchange regulations. It is obvious that such decrees and regulations would be just as damaging in the case of the settlement of creditors' claims. Therefore the same kind of protection should be granted to such claims.

In the case of creditors' claims, however, there is the additional need

97. The various formulations of freezing purposes which have been made known have always placed creditors rights along side with those of owners of frozen funds. Moreover, the existence of freezing orders preventing owners from obtaining possession of their property, thereby imposing a duty upon our authorities to return the property to these owners upon unfreezing, has equally prevented creditors from gaining their satisfaction during the freezing period and has thereby imposed a similar duty for their protection at the time of unfreezing.

96. E. O. 8389, § 1 (ii) [DOCUMENTS, *supra* note 4, at 5].

to provide for a pro rata distribution wherever the debtor's assets are insufficient to cover his liabilities. Where, in such cases, the insolvent debtor has American creditors, this country will have to decide whether frozen funds should be used to satisfy all creditors or whether it should provide for priorities to guarantee the full satisfaction of local creditors. It is our contention that no local priorities of this kind should be given. International equality among creditors has long been recognized, almost everywhere, as a sound international policy.⁹⁸ While the freezing orders have been in effect, this principle has been strictly adhered to and the Treasury Department has consistently refused to permit the satisfaction of local creditors if such satisfaction might jeopardize the concurrent rights of other creditors and particularly those of foreign creditors. However, this position does not exclude the possibility of granting another kind of preference to local creditors. It may be advisable to provide that after the pro rata share of each creditor in the debtor's entire estate has been established abroad, the American creditors shall have preference in satisfying their full pro rata share out of the debtor's frozen assets.

All this can be accomplished by placing all frozen assets of the same insolvent debtor in the hands of a public receiver. If the debtor-owner is not domiciled in this country, then the receivership will be ancillary in nature; otherwise, the receiver may institute insolvency proceedings under American law. In either case, it will be possible for the receiver to provide for the satisfaction of the pro rata share of American claimants out of frozen assets if such measure appears advisable.

IV. FOREIGN CONFISCATORY DECREES AND THE CONSTITUTION

There are some indications that the United States Government will not agree with the proposal made herein that owners of frozen funds be protected from foreign confiscation.⁹⁹ Hence, it seems appropriate to consider how American courts would react to a surrender of such funds to the expropriating country.

From the viewpoint of the courts, the effectiveness of the foreign decrees would depend, above all, on the willingness of the courts to apply the decrees to the facts presented in terms of jurisdiction and choice of law.¹⁰⁰ Moreover, if a decree is thus found to be applicable, the courts

98. See Nadelmann, *Foreign & Domestic Creditors in Bankruptcy Proceedings: Remnants of Discrimination?* (1943) 91 U. of PA. L. REV. 601.

99. See *supra*, pp. 153-156. For indications of a similar attitude on the part of the British Government, see N. Y. Times, Feb. 6, 1945, p. 10, col. 3.

100. Legislative jurisdiction is a due process requirement even in an international situation. *Home Insurance Co. v. Dick*, 281 U. S. 397 (1930); cf. *Pacific Em-*

would still be in a position to reject it as contrary to the public policy of the forum.¹⁰¹ With respect to both of these questions, the decisions rendered with relation to the Soviet Nationalization Decrees are pertinent. These decisions have shown that the American courts, just as those of foreign countries, are reluctant to give extra territorial effect to foreign confiscatory decrees.¹⁰²

To overcome the opposition of the courts, the American government may act as it did in the case of the Russian Decrees. Thus, instead of merely surrendering frozen assets to a foreign government, it may enter into a treaty or executive agreement with the expropriating country, which provides for such surrender. Once the federal government entered into such treaty or executive agreement, the courts, on the authority of *United States v. Pink*,¹⁰³ could no longer consider any public policy of the local forum which might be contrary to the public policy pursued by the federal government. However, it is here submitted that even such a step would not achieve extraterritorial effect for the foreign

ployers Insurance Co. v. Industrial Accident Commission, 306 U. S. 493 (1939); *Alaska Packers Association v. Industrial Accident Commission*, 294 U. S. 532 (1935); *New York Life Insurance Company v. Head*, 234 U. S. 149 (1914).

101. See, generally, Lorenzen, *Territoriality, Public Policy, and the Conflict of Laws* (1924), 33 YALE L. J. 736; Nussbaum, *Public Policy in the Conflict of Laws* (1940) 49 YALE L. J. 1027.

102. *E.g.*, *Vladikavkazsky RR. v. N. Y. Trust Co.*, 263 N. Y. 369, 189 N. E.(2d) 456 (1934); *Bollack v. Société Generale*, 263 App. Div. 601, 33 N. Y. S.(2d) 986 (1st Dep't 1942), *leave to appeal denied*, 264 App. Div. 767, 35 N. Y. S.(2d) 717 (1st Dep't 1942); *Sedgwick Collins & Co. v. Rossia Insurance Co.*, [1926] 1 K. B. 1, *aff'd* [1927] A. C. 95; *The Jupiter* (No. 3) [1927] P. 122, 144-146, *aff'd* [1927] P. 250; cf. *Moscow Fire Insurance Co. v. Bank of New York & Trust Co.*, 280 N. Y. 286, 20 N. E.(2d) 758 (1939). *But cf.* *Anderson v. N. V. Transandine Handelmaatschappij*, 289 N. Y. 9, 43 N. E.(2d) 502 (1942); *N. V. Transandine v. Pink*, 315 U. S. 203, 242, 246-247 (1942). A general discussion of the refusal of foreign courts to accord any extra-territorial effect to Russian confiscatory decrees is to be found in Borchard, *Confiscations: Extraterritorial and Domestic* (1937) 31 AM. J. INT. L. 675; Nebolsme, *The Recovery of the Foreign Assets of Nationalized Russian Corporations* (1930) 39 YALE L. J. 1130, 1155-1162; Trotter, *Extraterritorial Operation and Effect of Confiscatory Decrees of the Soviet Government* (1926) 3 N. C. L. REV. 88. Our courts have been less explicit in their application of public policy doctrines to foreign exchange regulations. Compare *Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft*, 15 F. Supp. 927 (S. D. N. Y. 1936), *aff'd*, 84 F.(2d) 993 (C. C. A. 2d, 1936), *cert. denied*, 299 U. S. 585 (1936); *Goodman v. Deutsche Atlantische Telegraphen Gessellschaft*, 166 Misc. 509, 2 N. Y. S.(2d) 80 (Sup. Ct. 1938) with the foreign cases discussed in NUSSBAUM, *MONEY IN THE LAW* (1939) 448 ff.; Nussbaum, *Public Policy & the Conflict of Laws* (1940) 49 YALE L. J. 1027, 1037-1052. This article assumes that foreign exchange decrees of foreign jurisdictions, insofar as they affect persons outside of the foreign jurisdiction, are confiscatory in nature. See *supra* pages 153-154. A similar position is taken by Dornke, *Foreign Exchange Restrictions* (1939) 21 J. COMP. LEG. & INT. L. 54, 58; Freutel, *loc. cit. supra* note 28; Cohn, *Currency Restrictions and the Conflict of Laws* (1936) 52 L. Q. REV. 474; Nussbaum, *supra*, at 1049.

103. *United States v. Pink*, 315 U. S. 203 (1942).

decree¹⁰⁴ because the Fifth Amendment of the Constitution would serve as a safeguard for the American property rights of the affected owners.¹⁰⁵ Frequent intimations that the Supremacy Clause of the Constitution¹⁰⁶ puts the terms of a treaty beyond constitutional guarantees¹⁰⁷ are not in conflict with this proposition.

The Supremacy Clause establishes the supremacy of acts of the national government over those of the state governments.¹⁰⁸ It specifies

104. Of course, it is not suggested that the Fifth Amendment is a limitation on the activity of a foreign government. *United States v. Curtiss-Wright*, 299 U. S. 304 (1936); see *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 356 (1909); cf. *Downes v. Bidwell*, 182 U. S. 244 (1901). Nor is it suggested that the effect of a foreign decree upon property palpably within the confines of the foreign government need conform to the Constitution [*Oetjen v. Central Leather Co.*, 246 U. S. 297 (1918); *Banque de France v. Equitable Trust Co.* 33 F.(2d) 202 (C. C. A. 2d, 1929); *Salimoff & Co. v. Standard Oil Co.*, 262 N. Y. 220, 186 N. E. 679 (1933)] or even to our public policy [*Luther v. Sagor* [1921] 1 K. B. 456]. This discussion considers foreign decrees only to the extent that their effectiveness depends upon American action, by way of treaty or executive agreement, which affects American property. The fact that the substance of the treaty or agreement derives from foreign legislation should not preclude the applicability of the Constitution to American governmental action affecting property in the United States. Cf. Note, *Confiscations and Corporations in Conflict of Laws* (1939) 5 U. OF CHI. L. REV. 280, 294.

105. See COWLES, TREATIES AND CONSTITUTIONAL LAW: PROPERTY INTERFERENCES AND DUE PROCESSES OF LAW (1941) *passim*; McCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS (1941) 294; BEARD, THE REPUBLIC (1943) 212-220; THE FEDERALIST No. 75 (Hamilton).

106. U. S. CONST. Art. VI, Clause 2:

"This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

107. *Ware v. Hylton*, 3 Dall. 199 (U. S. 1796); see *Missouri v. Holland*, 252 U. S. 416, 433 (1920); *Santovincenzo v. Egan*, 284 U. S. 30, 40 (1931); CORWIN, THE PRESIDENT: OFFICE AND POWERS (2d ed. 1941) 252. It has been suggested [*United States Brief, U. S. v. Pink*, p. 40, note 12] that there is an additional basis, outside of the Supremacy Clause for the exercise of the treaty power:

"It is at least arguable that just as the powers of external sovereignty of the Federal Government do not depend upon a constitutional grant . . . , so the supremacy of any act of the political departments in this field should be implied without regard to the Supremacy Clause."

A reply to this argument, which is also based on extra-constitutional considerations, may be found in *Downes v. Bidwell*, 182 U. S. 244, 294-295 (1901), where it was pointed out that, regardless of the applicability of the Constitution to a specific fact-situation, officers of the American Government lack power to act contrary to certain fundamental human rights at any time. Cf. Note, *The Supreme Court of the United States during the October Term, 1942* (1943) 43 COLUMBIA LAW REV. 837, 842-843.

108. In addition to establishing the supremacy of the National Government, the Supremacy Clause, by its reference to "statutes . . . made in pursuance of the Constitution," is also one of the bases for the doctrine of judicial review. *Marbury v. Madison*, 1 Cranch. 137, 180 (U. S. 1803). If the Supremacy Clause were the sole basis for the doctrine of judicial review, then it might be considered to require the exemption of treaties from judicial review. However, *Marbury v. Madison* derives the power of judicial review from more fundamental grounds, and it cites the Supremacy Clause merely to support the general proposition that judicial review is an essential element of a constitutional government. Therefore, it must be concluded

that a federal statute binds the states only when it is "made in pursuance of the United States Constitution," while a treaty binds the states if made "under the authority of the United States." Thus, the Supremacy Clause insures no more than that a statute "made in pursuance of the United States Constitution" will be superior to any State action.¹⁰⁹ Similarly, the Clause insures no more than that a treaty made "under the authority of the United States", is superior to State action. Therefore, the language of the Supremacy Clause, in respect to treaties, establishes only that the States are bound by them, regardless of whether such treaties conform to the Constitution.¹¹⁰ But the Constitution and its Amendments are devoted to the protection of individual rights as well as to the distribution of powers between the States and the Union. Therefore, it seems to be unwarranted to argue that merely because the Supremacy Clause rejects other constitutional limitations in the course of defining an aspect of the federal system of government,¹¹¹ a treaty may disregard those constitutional limitations which pertain to the rights of individuals. Such a wide construction of the exemptions granted by the Supremacy Clause is particularly objectionable in view of the language of the Fifth Amendment which does not

that treaties are just as subject to judicial review as any statute would be. It is noteworthy that Marshall himself was probably convinced that treaties are subject to judicial review. COWLES, *op. cit. supra* note 105, at 102-103; *but cf.* *United States v. Schooner Peggy*, 1 Cranch. 103, 110 (U. S. 1803) (" . . . and if the nation has given up the vested rights of its citizens, it is not for the court, but the Government, to consider whether it be a case proper for compensation.")

109. It should be noted that the general proposition requiring statutes to conform to the Constitution, is not derived from the Supremacy Clause but from other Constitutional considerations. Thus in *Marbury v. Madison*, 1 Cranch. 137, 180 (U. S. 1803), Marshall, C. J., bases the supremacy of the Constitution over states upon principles intrinsic to government under a written Constitution. The Supremacy Clause is mentioned only at the conclusion of the opinion where Marshall remarks:

"It is also not entirely unworthy of observation, that in declaring what shall be the supreme Law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

"Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

"The rule must be discharged."

110. The only discernible constitutional guaranty protecting the rights of the States from the National Government's exercise of its treaty power would seem to be the provision that the President "shall have Power . . . to make Treaties; provided two-thirds of the Senators present concur. . . ." U. S. CONST., ART. II, § 2, Clause 2; THE FEDERALIST No. 64 (Jay).

111. All of the leading treaty cases involve a conflict between a treaty and state law. *United States v. Pink*, 315 U. S. 203 (1942); *Guaranty Trust Co. v. United States*, 304 U. S. 126 (1938); *United States v. Belmont*, 301 U. S. 324 (1937); *Santovincenzo v. Egan*, 284 U. S. 30 (1931); *Asakura v. Seattle*, 265 U. S. 332 (1924); *Missouri v. Holland*, 252 U. S. 416 (1920); *Hauenstein v. Lynham*, 100 U. S. 483 (1879); *Hopkirk v. Bell*, 3 Cranch. 454 (U. S. 1806); *Ware v. Hylton*, 3 Dall. 199 (U. S. 1796).

allow of any qualification or exception for treaties or executive agreements.

Scholarship in the field of constitutional history and law fully supports the position just taken.¹¹² Discussions at the various State Conventions which met for the adoption of a Federal Constitution indicate the views which the framers of the Constitution had in regard to the Supremacy Clause. They did not think that the Clause would permit the unreasonable deprivation of private rights by the use of the treaty power and they felt that the Fifth Amendment would provide the necessary protection against such a use.¹¹³ Moreover, a careful analysis of the case law¹¹⁴ up to 1941 has revealed that, with the possible exception of *Ware v. Hylton*,¹¹⁵ the Supreme Court can be said to have consistently applied the due process clause to treaties.¹¹⁶

Nor does the decision in *United States v. Pink*,¹¹⁷ warrant the conclusion that there are no due process limitations to the use of the treaty power. In that case, the court expressly recognized that the Fifth Amendment was a limitation to an enforcement by treaty of Russian decrees of confiscation. Mr. Justice Douglas, after specifying that the case involved a contest "between the United States and creditors of the Russian Corporation who, we assume are not citizens of this country and whose claims did not arise out of transactions with the New York branch"¹¹⁸ stated:

"... aliens as well as citizens are entitled to the protection of the Fifth Amendment. . . . A state is not precluded, however, by the Fourteenth Amendment from according priority to local creditors as against creditors who are nationals of foreign countries and whose claims arose abroad. . . . By the same token, the Federal government is not barred by the Fifth Amendment

112. See the careful historical and legal investigation by COWLES, *op. cit. supra* note 105, *passim*.

113. *Id.*, Chap. II; Fiedler & Dwan, *The Extent of the Treaty Making Power* (1939) 28 GEO. L. J. 184, 185.

114. COWLES, *op. cit. supra* note 105, *passim*.

115. 3 Dall. 199 (U. S. 1796).

116. *Scott v. Sanford*, 19 How. 393 (U. S. 1857); *Mayor, Alderman & Inhabitants of New Orleans v. United States*, 10 Pet. 662 (U. S. 1836); *United States v. Pink*, 315 U. S. 203 (1942); *cf. Gray v. United States* 21 Ct. Cl. 340, 392 (1886); *Meade v. United States* 2 Ct. Cl. 224, 275 (1866); 27 OPS. ATT'Y GEN. (1909) 327, 331; *see United States v. Minnesota*, 270 U. S. 181, 208 (1926); *Asakura v. Seattle*, 265 U. S. 332, 341 (1924); *Downes v. Bidwell*, 182 U. S. 244, 294, 298-300, 310-311, 370 (1901); *Geofroy v. Riggs*, 133 U. S. 258, 267 (1870); *Brown v. Duchesne*, 19 How. 183, 197 (U. S. 1856); *Doe v. Braden*, 16 How. 635, 657 (U. S. 1853).

117. *United States v. Pink*, 315 U. S. 203 (1942). *See Borchard, Should the Executive Agreement Replace the Treaty?* (1944) AM. J. INT. L., 637, 641-643; Borchard, *Book Review* (1943) 33 AM. J. INT. L., 179, 180; Borchard, *Extraterritorial Confiscation* (1942) 36 AM. J. INT. L., 275; Jessup, *The Litvinov Assignment and the Pink case* (1942) 36 AM. J. INT. L. 282.

118. 315 U. S. 203, 226 (1942).

from securing for itself and our nationals priority against such creditors. And it matters not that the procedure adopted by the Federal government is global and involves a regrouping of assets."¹¹⁹

Aside from construction, history and precedent, pragmatic considerations also appear to require that the treaty power be limited by the due process clause. There can be no doubt that the national government, in order to effectively prosecute the foreign affairs of a country, requires a certain degree of freedom from the impediments inherent in a federal system. On the other hand, no practical necessity arises from the conduct of our foreign affairs, as distinguished from the conduct of domestic affairs, to require disregard for constitutionally protected private rights and liberties.

It is submitted, therefore, that a treaty purporting to give effect to a foreign decree of confiscation of property in the United States can achieve no more than the overriding of state laws and public policy of a state forum.¹²⁰ Such a treaty would not eliminate the necessity of meeting the due process requirements of the existence of legislative jurisdiction, and of the payment of compensation for any private property which might be taken under the decrees.

Of course, the Administration may proceed to express its recognition of foreign expropriatory decrees in a manner which is less formal than a treaty or executive agreement. For example, such recognition might be incorporated in departmental rules and regulations. Such rules and regulations would probably be accepted by the courts as an executive determination of our foreign policy, particularly in view of the readiness of the courts to accept even less formal expres-

119. *Id.* at 227-228.

120. See note 111, *supra*. Not even the dissent by Chief Justice Stone in *United States v. Pink*, 315 U. S. 203, 242 (1942) denied the power of the National Government to override state laws by treaty or executive agreement. The Chief Justice felt, however, that a clear expression of the intent to override state policy should appear from the acts of the National Government. On the general question of the search by the Court for an expression of an intention by the National Government to occupy a field in which the states might act, see Lyon *Old Statutes and New Constitution* (1944) 44 COLUMBIA LAW REV. 599, 620 *et seq.*

Note that this article does not discuss whether, as a matter of international law, "a State can validly bind itself by treaty to transfer to another State property of any kind belonging to its nationals, whether that property be situate within the territory of the transferor State or not." [McNair, *The Effect of Peace Treaties Upon Private Rights* (1941) 7 CAMB. L. J. 377, 388]. Assuming, for the sake of argument, that international law is in conformity with that statement, the result, as far as American courts are concerned, would only be that the United States Government, having entered into an obligation, valid in international law, has no Constitutional power to carry it out by action against individual property owners within its domain unless it can provide for just compensation. *See Cowles, op. cit. supra* note 105, at 77 *et seq.*, 296 *et seq.*

sions of such determination.¹²¹ However, it is clear that here again fundamental American notions, constitutional or otherwise, of the sanctity of private property, will carry considerable and probably decisive weight for the courts.¹²²

Even if the proposition is accepted that the Fifth Amendment applies to foreign confiscatory decrees, it remains to be considered whether the ordinary definition of "confiscation" can be used as a standard for acts committed in the conduct of American foreign affairs. This question has been raised by those who interpret *United States v. Pink*¹²³ as holding that where the United States, as assignee, and not the confiscating country itself, obtains the benefits of a confiscatory decree, the Fifth Amendment is insufficient as a safeguard for private property.¹²⁴ Such a construction of *United States v. Pink*, however, would fail to appreciate the emphasis which Mr. Justice Douglas laid upon the fact that the United States, as an assignee, was merely achieving the subordina-

121. Judicial deference has been paid to informal, particularized political determinations of the Executive Department in matters of foreign policy. Thus, considerable weight is given to "suggestions" by the Attorney General of the United States or his officers as to the existence of a sovereign interest in a matter for litigation. *Ex parte Republic of Peru*, 318 U. S. 578 (1942); see *Republic of Mexico v. Hoffman*, U. S. Sup. Ct., Jan. 11, 1945; *Compania Espanola de Navegacion Maritima v. The Navemar*, 303 U. S. 68 (1938); *The Schooner Exchange v. McFaddon*, 7 Cranch. 116 (U. S. 1812). *But cf.* *Lamont v. Travelers' Ins. Co.*, 281 N. Y. 362, 372, 24 N. E.(2d) 81 (1939); Deak, *The Plea of Sovereign Immunity and the New York Court of Appeals* (1940) 40 COLUMBIA LAW REV. 453. The courts have also shown some tendency to enforce the public policy implicit in the executive freezing orders. *Feuchtwanger v. Central Hanover Bank*, 288 N. Y. 342, 43 N. E.(2d) 434 (1942) (imposition of a resulting trust on frozen assets by court order was permitted when no objection thereto was set forth by the Treasury); *Polish Relief v. Banca Nationala a Rumaniei*, 288 N. Y. 332, 43 N. E.(2d) 345 (1942) (the policy of the Treasury Department to permit the establishment of jurisdiction in rem by levy of a warrant of attachment on frozen funds was adopted by the court). In the recent case of *Singer v. The Yokohama Specie Bank*, decided by the Court of Appeals of New York on November 30, 1944, the Court granted a claimant the status of a preferred local creditor over the objection of the Treasury Department. It should be noted that there was here involved a debtor whose assets were being liquidated by the New York Superintendent of Banking, so that the freezing system was not in operation. A refusal to admit the claimant in this fact situation would have excluded him permanently. For a similar case see *De Cuevas v. Altschul*, N. Y. L. J., March 15, 1944, p. 1022, col. 6 (Levy, J.). In any event, the outermost limits of judicial deference to informal declarations of policy by the executive branch of the government remains undecided. See *Anderson v. N. V. Transadine Handelmaatschappij*, 289 N. Y. 9, 20, 43 N. E.(2d) 502 (1942); *Kuhn, Effect of a State Department Declaration of Foreign Policy Upon Private Litigation* (1942) 36 AM. J. INT. L. 651; Note, *Conflict of Laws and Nationalization of Foreign Corporations—Effect on Legal Assets* (1943) 9 Contem. L. Pam. 1, 26-27.

122. See *Anderson v. N. V. Transadine Handelmaatschappij*, 289 N. Y. 9, 20, 43 N. E.(2d) 502 (1942).

123. 315 U. S. 203 (1942).

124. *Borchard, Extraterritorial Confiscation* (1942) 36 AM. J. INT. L. 275, 280-281; cf. *Jessup, supra* note 117, at 286. *But see McClure, op. cit. supra* note 105, at 293-294.

tion of claims of foreign creditors to those of local creditors.¹²⁵ His opinion relied upon *Disconto Gesellschaft v. Umbreit*¹²⁶ for the proposition that a preference for local creditors, as against foreign creditors whose claims arose abroad, is not confiscation prohibited by the Fifth or Fourteenth Amendment.¹²⁷ Hence, *United States v. Pink* goes no further than to permit the American enforcement of foreign confiscatory decrees where such enforcement serves merely to achieve the constitutionally permissible end of subordinating foreign creditors to local creditors.

*United States v. Belmont*¹²⁸ is the basis for the assertion of another limitation upon the effectiveness of the Fifth Amendment as a safeguard for American property.¹²⁹ In that case Mr. Justice Sutherland remarked, by way of dictum, that "whatever another country has done in the way of taking over the property of its nationals, and especially of its corporations, is not a matter for judicial consideration here."¹³⁰

It has already been shown that in *United States v. Pink*, what another country has done "in the way of taking over the property of its nationals" was made a matter for judicial consideration where such action was enforced by the American government.¹³¹ It is, furthermore, well established that non-resident aliens are entitled to the protection of the Fifth Amendment.¹³² Hence, the only doubt raised by the dictum of Mr. Justice Sutherland is whether there is a special reason for denying to the American property of a foreign corporation the protection which is granted to American property of individual alien owners.

Foreign corporations have frequently been treated by our courts as distinct from alien individuals.¹³³ Conceptually, this distinction rests on the notion that a foreign corporation is an indivisible entity which is

125. 315 U. S. 303, 228-229 (1942).

126. 208 U. S. 570 (1908).

127. Cf. *Clark v. Willard*, 294 U. S. 211 (1935); see Note, *supra* note 121, at 21.

"The rationale of the *Umbreit* case and the holding in *United States v. Pink* are that a remedy in American courts and against assets located in this country is not guaranteed by the 'due process clause' to aliens for the satisfaction of foreign rights. Being established under foreign laws, such rights are substantively beyond the reach of legislatures and courts here. The doctrine of *forum non conveniens* thus simply permits impairment of the remedy. The doctrine may be justified on the ground that the parties against whom it may be applied rely on the law of the country where their cause of action accrued and not on the law of the forum."

128. 301 U. S. 324 (1937).

129. See, e.g., Note (1938) 5 U. OF CHI. L. REV. 280, 294-295.

130. 301 U. S. 324, 332 (1937).

131. See pp. 164-165, *supra*.

132. *Russian Volunteer Fleet v. U. S.*, 282 U. S. 481 (1930).

133. See HENDERSON, POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918).

exclusively the creature of the place of its incorporation.¹³⁴ Practically, this distinction rests on considerations of *forum non conveniens*.¹³⁵

But neither of these bases for distinction carries much persuasive force when matters of public policy are at stake. They failed to deter the courts in cases which involved the vigorous prosecution of the war. Thus, "corporations-in-exile" have been considered to be so "disentangled" from the place of their original incorporation as to bring them without the scope of the provisions of the Trading With The Enemy Act.¹³⁶ Similarly, a corporation which changed its seat to a place beyond the frontier of the country of incorporation, has been considered not to be bound by the laws of an enemy who occupied that country.¹³⁷ On the other hand, where the personnel or activity of a corporation shows definite association with the enemy, it is not material that the corporation was incorporated in a friendly country and it is treated as being subject to The Trading With The Enemy Act. Noteworthy, too, is the increasing tendency in our law to "pierce" the "corporate veil"¹³⁸ and to examine the "internal affairs of a foreign corporation."¹³⁹

It seems hardly possible, therefore, that the concept of an impenetrable foreign corporation can be successfully raised to prevent the protection of its stockholders and creditors from foreign confiscatory decrees if such protection appears otherwise to be required under the Fifth Amendment or our public policy. Thus, the fortuitous circumstance that sometime in the past American assets were placed in a personal holding company abroad rather than in an individual account, cannot possibly be of great significance in affording protection under the Fifth Amendment. Not even tax liability is made contingent upon such an inconsequential distinction. On the other hand, it can be expected that most owners of stock in other foreign corporations will be compelled to share in the economic burdens imposed upon them in the course of the reconstruction of the country of incorporation. Evidently the protection of the Fifth Amendment, as well as the enforcement of American public policy, is contingent upon the weight of the economic

134. *E.g.*, *Bank of Augusta v. Earle*, 13 Pet. 519 (U. S. 1839).

135. *E.g.*, *Rogers v. Guaranty Trust Co.*, 288 U. S. 123 (1933); *Travis v. Knox Terpezone Co.* 215 N. Y. 259, 109 N. E. 250 (1915).

136. *Chemacid, S. A. v. Ferrotar Corp.*, 51 F. Supp. 756 (S. D. N. Y. 1943). *But cf. Drewry v. Onassis*, 266 App. Div. 292, 92 N. Y. S. (2d) 74 (1st Dep't 1943). See, generally, Note, *Corporations in Exile* (1943) 43 COLUMBIA LAW REV. 364.

137. See *Chemacid S. A. v. Ferrotar Corp.*, 51 F. Supp. 756, 759 (S. D. N. Y. 1943).

138. See the cases discussed in Note, *Corporations in Exile* (1943) 43 COLUMBIA LAW REV. 364, 373, 374.

139. *E.g.*, *Prudence Realization Corp. v. Geist*, 316 U. S. 89 (1941); *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510 (1940), (1941) 41 COLUMBIA LAW REV. 672.

or political contacts between the frozen asset and its owner and the foreign government. Hence, where the foreign corporation in question forms an integral part of the foreign economy, the contacts between the corporation and the foreign country should outweigh those which the stockholder has established for himself outside of that country. On the other hand, where, under the provisions of the law of the country of incorporation, the stockholder in question has the power to dissolve the corporation, a desire of that country to protect the corporate entity can properly be disregarded and the non-domiciliary stockholder can be permitted to claim his equity in the frozen assets of the corporation.¹⁴⁰

V. SUGGESTED PROGRAM

The following program for an unfreezing order will demonstrate that the conclusions reached in this article can be carried out without serious administrative difficulties.

Provisions will be made for three different proceedings: One proceeding will serve to supplement the terms of treaties which provide for the release *en bloc* of frozen assets belonging to domiciliaries of the treaty making power (Treaty Claims Proceeding). Another proceeding will be applied in all cases in which no release *en bloc* of frozen assets is possible because claims of persons are involved which should be protected from the effects of confiscatory decrees of the treaty-making power. This proceeding will provide for individual adjudication of claims (Individual Claims Proceeding). A third proceeding will be available for the discovery of enemy property among frozen assets (Custodian Claims Proceeding). In connection with the second proceeding, it will be necessary to establish two new agencies within the Treasury Department: One will be a Trustee of Foreign Property who will represent the interests of individual claimants; the other will be a Foreign Property Arbitration Tribunal which will adjudicate conflicting claims of individual claimants whenever necessary. In addition, use will be made of the existing Claims Committee of the Alien Property Custodian for the determination of disputes arising in the course of Custodian Claims Proceedings. The overall administration of unfreezing will remain in the hands of the Foreign Property Control Division of the Treasury Department.

A. TREATY CLAIMS PROCEEDING

1. Upon the conclusion of a treaty with a blocked country, property frozen under the freezing order in which that country is designated (designated country) will be released to the latter if it files with the Foreign

140. See *supra* p. 158.

Property Control Division a certificate stating that upon examination of the facts it has found (a) that the owner of the claimed property as of the effective date of the freezing order ("original owner") was on that date, and is on the date of the filing of the claim, a resident of the designated country, and (b) that on the effective date no other person owned an interest in the property. If on that date one or more other persons did own an interest in the property, then additional certifications will be required stating that the original owners of all interests in the property were, on the effective date, residents of the designated country, and that on the date of the filing of the claim they still are such residents.

2. Simultaneously with the filing of a claim hereunder a notice of claim shall be served upon the American holder, custodian, debtor, or transfer agent as the case may be. (*Cf. B. 2 infra.*)

3. Whenever a claim is filed in an Individual Claims Proceeding (see *infra*), the property affected by such claim will be exempted from the Treaty Claims Proceeding. If such property, at the time of the filing of such claim, has already been released to the designated country in the Treaty Claims Proceeding, that country will be required to make restitution to the successful claimant.

4. Nothing herein shall prevent the institution of Custodian Claims Proceedings with respect to any property which may otherwise be subject to Treaty Claims Proceedings.

B. INDIVIDUAL CLAIMS PROCEEDING

1. Within a certain period of time, individual claims may be filed with the Foreign Property Control Division by any claimant as defined in paragraph "3" hereof who, on the date of filing, is domiciled in a country other than the designated country. Such individual claims may be filed whether or not a treaty has been made with the designated country.

2. Simultaneously with the filing of such claim, a notice of claim shall be served upon the American holder, custodian, debtor or transfer agent, as the case may be. As soon as the latter finds that notices of claims to the same property have been filed, both in a Treaty Claims Proceeding and in an Individual Claims Proceeding, he will notify the Foreign Property Control Division and the latter will thereupon exempt the property from the Treaty Claims Proceeding.

3. The following parties may be claimants in Individual Claims Proceedings:

(a) Individual owners of frozen property who hold such property in their own names (ownership claims).

(b) Persons whose frozen property is not held in their own names and all owners of a limited interest in frozen property, such as co-owners, owners of residuary interests, owners of beneficial interests including redemption interests, and owners of liens except judgment liens of creditors (split interest claims).

(c) Stockholders of a corporate owner of frozen property (stockholders' claims), but only in one of the following two instances:

(i) Where the corporate owner is a personal holding corporation within the meaning of definitions to be established by the regulations.

(ii) Where the claimant, or groups of claimants, under the laws of the country of incorporation, can bring about the liquidation of the corporation. These claims will be recognized to the extent of the equity interest of the claimant in the frozen property of the corporation and to the same extent such property will be subject to a lien in favor of the claimant.

(d) Creditors of the original owner of frozen property including judgment creditors (creditors claims).

4. The Trustee of Foreign Property (the "Trustee") will bring about the settlement of individual claims in the following manner:

(a) *Rejections.* Within a certain period of time, the trustee may reject any individual claim if such claim fails to disclose facts as specified in the regulations concerning the residence, citizenship and political association of and the manner of acquisition of title by the claimant.

(b) *Ownership claims and split interest claims.* Where an uncontested claim to an undivided ownership in a frozen asset has been filed, the Trustee will release the property. Where claims are contested or where split interests exist, the trustee will either submit the case to the Tribunal or he will instruct the parties to litigate their dispute in the courts of the designated country. He will choose the latter alternative in cases in which adjudication abroad, in his opinion, will bring about a more efficient administration of justice, as where frozen property constitutes part of a frozen trust or estate.

(c) *Stockholders claims.* The Trustee will assume the position of an ancillary receiver of the corporate assets. He may await the outcome of a foreign liquidation proceeding and then distribute the frozen property in accordance with due process of law. In cases in which the designated country fails to bring about an equi-

table liquidation of the corporation, he shall proceed to distribute the frozen property among all stockholders in the manner of a statutory successor. He may agree with the designated country on an equitable settlement by the latter of all stockholders' claims for the purpose of avoiding liquidation of the corporation against the wish of that country.

(d) *Creditors Claims Proceeding.* Where creditors claims are contested, they will be adjudicated in a manner corresponding to the adjudication of contested ownership and split ownership claims.

If the debtor is insolvent, then the Trustee shall act as receiver of the debtor's frozen assets. If the debtor is domiciled in this country, insolvency proceedings will be instituted under our laws. Otherwise the Trustee will assume the position of an Ancillary Receiver who will satisfy claimant creditors out of frozen assets to the extent of their pro rata share in the debtor's entire estate, but such shares of American creditors shall be paid first. Where no proceedings are instituted at the debtor's domicile, or where the Trustee finds that the laws of the domicile discriminate against foreign claimants, he may establish the pro rata shares of creditor claimants on the basis of a fair estimate of all assets and all liabilities of the debtor.

The term "American creditors" shall mean and include (aa) all creditors whose claims originated from transactions arising in this country; (bb) all creditors who are citizens of or domiciled in the United States; (cc) all creditors who, prior to a certain date, have obtained a final judgment against the debtor in an American court or who have instituted action against the debtor in such court, if such action has been stayed as a result of the war.

Ownership claims and split interest claims shall be subordinated to creditors' claims.

C. CUSTODIAN CLAIMS PROCEEDING

(1) The Claims Committee of the Alien Property Custodian may determine that an interest in frozen property is enemy owned if it was owned on the effective date by an enemy country or national, or if it was subsequently acquired by such enemy country or national.

(2) Proceedings for such adjudication may be brought by the Alien Property Custodian or the Foreign Property Control Division. They may also be brought by a designated country if a treaty made with that country so provides.

(3) The term "enemy" shall be defined as including:

(i) Any resident of former enemy territory except those belonging to certain classes which may be exempted from time to time by proclamation of the President.

(ii) Other persons, independent of their residence who, by overt or covert acts, have shown their adherence to certain enemy organizations, which organizations shall be determined from time to time by proclamation of the President.

(4) If the Claims Committee shall determine that an interest in frozen property is enemy owned, then such interest shall be released to the designated country if a treaty with that country so provides, except where the Claims Committee finds that such interest did not originate in the economy of the designated country.

(5) In all other cases, interests determined to be enemy owned shall be vested by the Alien Property Custodian pending final disposal by Congress.

(6) Custodian claims take precedence over treaty claims and individual claims. They are subordinated to the rights of any claimant creditor and to the rights of a receiver or trustee in bankruptcy of the property of the owner.

D. SPECIAL PROVISIONS TO APPLY IN THE CASE OF AFFECTED COUNTRIES WITH WHICH NO TREATY IS CONCLUDED

1. Nothing shall prevent the bringing of Individual Claims Proceedings, Creditors Claims Proceedings, and Custodian Claims Proceedings in such cases.

2. The President may, by proclamation, admit the United Nations post-armistice authorities in Germany as parties to proceedings before the Claims Committee. If, as a result of investigations carried on by these authorities, property interests shall be determined to be enemy interests, then such interests shall not be vested in the Alien Property Custodian but shall be turned over to these authorities.

E. UNCLAIMED PROPERTY

Any property interest not released under the treaty claims proceeding or under the Individual Claims Proceeding, nor released or vested in the Custodian Claims Proceeding within a certain period of time, will be considered as enemy property and vested in the Alien Property Custodian pending final disposal by Congress. In exceptional cases to be established by the unfreezing order, individual claims to property

which has been vested may be filed with the Alien Property Custodian after such vesting and within an additional period of years.

F. COURT REVIEW

1. It will be necessary to provide that some of the decisions of the Trustee require confirmation by the Tribunal.

2. From any decision of the Tribunal an appeal may be taken to the Federal Courts. The courts will consider only the record of the Tribunal to discover whether there is sufficient evidence to support the latter's decision.

3. Whenever the Claims Committee has found that a claimant is an enemy within the definitions herein proposed, the latter may apply to the Claims Committee for a review of the facts on which such finding is based, and he may submit additional evidence upon such application; but no proclamation of the President shall be subject to review. From a decision of the Claims Committee made upon such application, an appeal may be taken to the Federal Courts. Such appeal shall be subject to the conditions set forth in subsection "2" hereof.

G. COSTS

Any interest which has been the subject of a proceeding instituted under the proposed unfreezing order, will be assessed for costs in a manner to be determined by the regulations.