The Trading with the Enemy Act of 1917 and Foreign-Based Subsidiaries of American Multinational Corporations: A Time to Abstain from Restraining

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THE TRADING WITH THE ENEMY ACT OF 1917
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AMERICAN MULTINATIONAL CORPORATIONS:
A TIME TO ABSTAIN FROM RESTRAINING

I say sir, that this is our country and no matter where companies
are owned which are operating in our country, on our natural
resources and on the wealth produced by our people, it must be
made clear, by legislation if necessary, that we in Canada sell
where we desire to sell.*

I. INTRODUCTION

This forceful statement by a member of the Canadian Parlia-
ment may strike one as rather odd. Why can Canadians not sell
where they desire? Who could prevent Canada from going about
her own foreign trade business? When it is learned that the MP
is complaining about the United States and its control over the
export trading practices of a major Canadian corporation, Ford
Ltd., surprise is in order. How, and more interestingly, why would
the United States exercise control over the transactions of a for-

gien corporation? What has become of Canada's national sover-

eignty? The answers concern an explosive and intriguing aspect

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* House of Commons Debates, Speech of Mr. Winch, 19 May 1958,
I, p. 196, as quoted in Corcoran, The Trading with the Enemy Act and the
of multinational corporations, involve a conflict between national and international law and furnish a basis for international dispute. The issue is one of national sovereignty and conflicting attempts at control over foreign subsidiaries of multinational corporations by the “home” and “host” countries. When restrictive legislation of the home nation infringes on the host’s right of self determination, the issue is joined.

The emergence of multinational corporations (MNC’s) has given rise to these problems of extraterritoriality and national sovereignty. The “multinational” aspect of such a corporation defines its characteristic of cutting across traditional national boundaries while the “corporation” aspect requires that “... it must have a single controlling brain and act throughout the world as if it were one company.” Many nations feel that any corporation formed under its laws and doing business within its borders is a citizen of that country and therefore governed by its law. While at times supporting this principle, the United States further asserts it has the right to command allegiance to its law by American citizens, corporate as well as individual, when they venture outside its territory. A subsidiary formed under the laws of a host nation but owned and controlled by a United States corporation can trigger problems of conflicting allegiance.

The Ford Motor Company, for example, is an American corporation and prevented by United States law from trading with Red China. Ford owns and controls Ford Ltd. of Canada, a Canadian

1. Vagts, The Multinational Enterprise: A New Challenge for Transi-

2. In this comment, as in most literature on the subject, “home coun-
try” is defined as the nation wherein the world headquarters of the MNC is located, while “host country” is the nation in which one or more of the MNC’s subsidiaries is incorporated and domiciled.

3. As used in this comment, “extraterritoriality” is to be understood in accordance with BLACK’S LAW DICTIONARY 700-01 (rev. 4th ed. 1968): “The extraterritorial operation of laws; that is, their operation upon persons, rights, or jural relations, existing beyond the limits of the enacting state, but still amenable to its laws.”


6. Vagts, The Corporate Alien: Definitional Questions in Federal Restri-


corporation. Under American law the Detroit-based parent would also be liable if its Canadian subsidiary traded with Red China. In spite of this however, the United States has effectively imposed its will over the Canadian corporation and prevented any Communist dealings. Considering that American MNC's control 97% of the automobile industry in Canada, and that one of every seven Canadian jobs is related to the production of cars, it is easy to appreciate the MP's impassioned statement and understand the problems to be discussed.

As will be seen, the United States is by far the most popular home country for MNC's. From the broad range of U.S. attempts at control, only that aspect concerning American foreign policy, the Trading with the Enemy Act, will be examined in this comment. Using three of our western allies, Canada, France and Great Britain, as focal points, an examination of host country reactions and responses to United States legal controls will be undertaken. Conclusions drawn from this examination will then be used for a look at the future and how the United States in particular should prepare for it.

II. THE PROBLEM: MNC'S AND NATIONAL SOVEREIGNTY

Some understanding of the MNC is necessary before the issue of their control can be discussed. The term 'multinational corporation', as used in this comment, is to be understood as a combination of several companies, each located in and possessing the nationality of different countries, which companies are integrated by means of shareholdings and managerial control into an economic unit possessing centralized decision making control. It has one main headquarters and acts throughout the world as if it were a single corporation. Largely organized after 1955, the MNC is a

13. Some other attempts at control included taxation on subsidiary revenue, enforcement of anti-monopoly legislation and restrictions on direct overseas investments.
15. Rubin, Multinational Enterprise and National Sovereignty: A Skep-
recent creation and has been represented as a "sharp break with the past." This recent development would seem to explain in part why the problem of their control is still open to inquiry. Their youth, however, should not belie their strength. By the 1980's and continuing throughout the remainder of this century, it is estimated that 75% of the world's trade and production will be controlled by 300 or fewer MNC's. Beyond this, however, is the even more remarkable fact that approximately 90% of the MNC's in the world are chartered and headquartered in the United States. This staggering economic power managed from within the United States can be seen as the basis for conflict. As stated by a top authority in the field, Prof. Detlev F. Vagts of Harvard, "[t]here is an obvious temptation for the home country's authorities to attempt to use their situation—possessing authority and power over the nerve center of the enterprise—to extend their control down through the enterprise's links to the subsidiaries in other countries." Further statistics confirm the potential for American control over the economic world.

Realizing the potential significance of whether the home or host country has control over MNC's, let us consider the legal bases for exerting it, both in national and international law. As a starting point, a basic tenet of international law holds all individuals and property within the territory of a nation to be under its dominion.

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16. Vagts, supra note 1, at 746-47.
17. The author believes this comment to be the first overview of U.S. attempts at foreign strategic export control with emphasis on comparison of varying foreign reactions.
18. Vagts, The Global Corporation and International Law, 6 J. INT'L L. & Econ. 247, 249 (1972), and Schmitthoff, supra note 4, at 103.
19. Vagts, supra note 18, at 250.
20. Id.
21. E.g., at the end of WW II a group of 187 American parent corporations possessed 1,000 foreign subsidiaries. By 1967, however, they controlled over 5,500. Rubin, supra note 15, at 2. In 1970 American MNC's made direct foreign investments of $68 billion, more than the rest of the world combined. Rubin, supra note 15, at 6. In Canada, United States firms account for 75% of all foreign holdings. Corcoran, supra note 10, at 187. Concerning a MNC previously mentioned, the Ford Motor Company controls over 60 corporations, 40 of which are abroad. 36% of Ford's total assets are invested in 27 foreign countries, and of 388,000 employees, 150,000 are located outside the United States. Vagts, supra note 1, at 749.
Foreign citizens and property are therefore under the territorial sovereignty of the state within whose borders they are located.\textsuperscript{23} Such foreign citizens, however, also remain under the personal sovereignty of their home nation and are liable upon return for acts committed abroad that are considered crimes by the country of their nationality.\textsuperscript{24} The United States, recognizing these widely accepted principles,\textsuperscript{25} has also adopted\textsuperscript{26} a minority position\textsuperscript{27} that a nation may have the right of jurisdiction over actions of foreign citizens outside its borders when those acts have a substantial "effect" upon that nation or threaten its security.\textsuperscript{28} Such jurisdiction can, of course, only be exercised when the actor enters its territory.\textsuperscript{29}

Reflection on these principles indicates that control over the same foreign subsidiary could be legally claimed by both the home and host countries. Under the territoriality concept, a host nation under whose law the subsidiary corporation was created and in whose jurisdiction it is domiciled could claim control. This would simply be the power to regulate the activities of one of its own citizens, in exporting as well as numerous other areas. The home country, on the other hand, could claim that the subsidiary is nothing more than one of its citizens abroad. Since the corporation's activities in foreign countries are still subject to the home country's law, enforcing sanctions against it or the parent corporation located within its borders would seem justified. Or if the foreign subsidiary is not looked upon as one of its citizens by the home country, it might still feel justified under the "effects" doctrine, if the subsidiary's actions caused a substantial and threatening effect within its borders, to hold responsible the parent corporation over which it has immediate and undisputed jurisdiction.

A crucial point in all these considerations is the citizenship of the subsidiaries, for this will determine in large measure who will claim what legal justification for control. While many nations, including the United States, view a corporation as a citizen of the

\textsuperscript{23} Id.
\textsuperscript{24} See H. Kelsen, Principles of International Law 309-11 (2d ed. 1966), and Oppenheim, supra note 22, at §§ 124, 145.
\textsuperscript{25} See State of the Netherlands v. Federal Reserve Bank, 201 F.2d 455, 457 (1953), and Restatement (Second) of the Foreign Relations Law of the United States § 30 (1965).
\textsuperscript{26} See Restatement (Second) of the Foreign Relations Law of the United States §§ 18, 33 (1965).
\textsuperscript{27} Oppenheim, supra note 22, at § 147.
\textsuperscript{28} Restatement (Second) of the Foreign Relations Law of the United States § 18 (1965), and Oppenheim, supra note 22, at § 147.
\textsuperscript{29} Id.
jurisdiction which created it, it will probably not be surprising to learn that the U.S. has created an exception for subsidiaries. Corporations organized under a host country's laws, but owned and controlled by a firm of another nation, are not viewed as possessing the host's citizenship.

In *Petition of Hines*, a federal district court was faced with a Panamanian corporation that was wholly owned by an American firm. In deciding the case, the court held that one working for the foreign company was actually working for a United States citizen abroad, the corporation being a mere "receptacle" of the American firm's foreign operations. The subsidiary was still an American corporation even though domiciled in Panama. A later case involving a wholly Canadian owned American corporation, *Massey-Ferguson, Ltd. v. Intermountain Ford Tractor Sales Co.*, held that the Canadian parent was subject to United States service of process since it was found to be doing business in the district through its subsidiary. This would be difficult to understand unless approached from the viewpoint that the subsidiary was more Canadian than American in the eyes of the court.

Perhaps most unusual of all is the offering of the American Law Institute in the restatement of American foreign relations law, which discusses the nationality of corporations. The black letter rule states, "[a] corporation or other private legal entity has the nationality of the state which creates it", but an official comment reads:

>d. Corporations owned or controlled by nationals of another state. When the nationality of a corporation is different from the nationality of the persons (individual or corporate) who own or control it, the state of the nationality of such persons has jurisdiction to prescribe and to enforce in its territory, rules of law governing their conduct. It is thus in a position to control the conduct of the corporation even though it does not have jurisdiction to prescribe rules directly applicable to the corporation.

30. *Jessup*, supra note 5 and Vagts, supra note 1, at 740.
32. Id.
33. 325 F.2d 713 (10th Cir. 1963), cert. denied, 377 U.S. 931 (1964).
34. Id. at 714.
The Reporter's Note is even more specific, stating:

Corporations formed under the laws of foreign states but owned or controlled by individuals or corporations who are nationals of the United States, are potentially subject to varying degrees of indirect control by the United States through its capacity to control its own nationals. . . .

It therefore appears that the United States as home country may base control over foreign subsidiaries on one of two legal theories. First, the subsidiary is actually an American citizen since it is entirely owned and controlled by an American firm and it is therefore under the continuing personal jurisdiction of the United States. Second, and in the alternative, while the subsidiary may be a citizen of the foreign host country, it is still owned and operated by American citizens, individual or corporate, and these entities are liable for its actions abroad which violate United States law and/or cause substantial and detrimental effects within the United States.

Many host countries, and in particular Canada and Great Britain, employ the “state of incorporation test” for determining nationality. Being common law countries like the United States, they cling to the traditional rule that the nationality of a corporation is determined from the jurisdiction which chartered it. As an apparent result of the relatively few MNC’s based there, however, these nations do not appear to have created an exception for foreign owned subsidiaries as has the United States. France, on the other hand, determines the nationality of a corporation by location of the siege social (registered head office) selected by the corporation itself. Thus, any corporation having registered its own, and not the multinational parent’s, headquarters as being in France, is governed by French law and generally considered to have French nationality.

Since most MNC’s try to cultivate an image acceptable to the public of the host country, it seems reasonable that American firm’s foreign subsidiaries located in France would register their headquarters in France and become French, if for no other reason

38. Vagts, supra note 1, at 740.
41. Schmitthoff, supra note 4, at 109.
than to prevent alienating their French customers. Or, more than likely, the firm was originally registered there and later acquired by the MNC. These host countries then could claim control over subsidiaries organized and/or located within their border based upon simple citizenship.

International law has, therefore, seemingly provided legal justifications for contradictory theories of control. Concerning the nationality of corporations, it might be best to agree that it is an individual state matter to be internally determined under particular considerations of public policies. Both home and host countries could cite authority for their jurisdiction from international law. Similarly, both countries may have already developed legal precedents within their national law justifying their attempts at control, as evidenced by the United States.

The backdrop for conflict is set. A basic tenet of international law holds that it is the duty of every nation to abstain from any act which constitutes a violation of another nation's territorial or personal sovereignty. The United States has espoused this theory, the Supreme Court holding:

"If another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."

Applying this view to the previously discussed Ford incident, for example, American sanctions on the Ford MNC for an action in Canada and not illegal under Canadian standards would seem to be such "interference" which Canada "justly might resent." It is apparent that,

"one of the most sensitive nerves of a state is its territorial sovereignty. When a foreign government infringes that sovereignty by seeking to control the actions of corporations within that state, contrary to the state's economic and foreign affairs policies, a reaction may be expected."

Foreign governments, rightly or wrongly, see the MNC as a conduit for American governmental decisions, a vehicle for the ex-

42. OPPENHEIM, supra note 22, at § 293 n.3.
43. Id. at § 125.
45. Craig, supra note 40, at 597.
portation of home country law into the affairs of the host nation. In foreign eyes, MNC’s lose their multinational character and become American world wide corporations. The problem becomes even more explosive when the American law given extraterritorial effect is based upon political considerations of the cold war, with which the host country might strongly disagree. This is the area of present concern. The Trading with the Enemy Act and subsequent regulations under it are based on the highly political decision of the United States to deprive Red China and other designated countries of goods and trade. At the same time Canada, France and Great Britain have all allowed or even encouraged trade with Red China.

As the final step in a logical progression, a fear has developed in other countries of complete economic and social dominance by the United States. As warned by a publisher-editor of a French newsmagazine, unless corrective measures are taken by European countries,

[...]he European elite would be trained at Harvard, Stanford, or Berkeley, continuing a precedent that has already begun. This elite would no doubt worm itself into a kind of Atlantic oligarchy, and even gain some influence over its decisions. . . .

A few leading firms, subsidiaries of American corporations, would decide how much European workers would earn and how they would live—work methods, human relations on the job, standards for wages and promotions, and job security. . . .

American capital and American management will not stop short at the gates of our society. No taboo will be too sacred to keep these managers from crossing the threshold of the European sanctuary.

What he fears is more than economic exploitation, it is the complete loss of culture, identity and self-determination.

Intrusion upon the sovereignty of the host country, causing angry reactions and perhaps whispers of fear within them, has followed from American attempts at controlling foreign subsidiaries of United States based MNC’s. Having already seen that the host countries have a legal basis for exerting their own control, it may seem surprising that they have not done so, especially considering

47. Baum, supra note 12, at 419 n.24.
49. 31 C.F.R. §§ 500, 505, 515, 520 (1972).
50. Corcoran, supra note 10, at 184-85.
51. Craig, supra note 40, at 597, and Corcoran, supra note 10, at 192-93.
the immediate jurisdictional and actual physical powers they hold. Taking the host countries' point of view, however, the reasons for their reluctance become apparent. To begin with, the economic power of MNC's is substantial and due to needed investments in their countries, hosts have little desire to antagonize the parent corporation. Besides, there is no real complaint with the MNC, the home country itself is the real target for complaint. It simply does not make good sense for a host country to attenuate its own economic growth by striking at the global corporation under a pretext of national sovereignty. The entity intruding upon that sovereignty is not the company, but in most cases the United States itself. The host country is therefore taking on a somewhat larger adversary if it wishes to correct the problem.

Another difficulty lies in the characteristics of the MNC. If the host country wishes to risk antagonizing the global corporation by adversely controlling a subsidiary located in its jurisdiction, it has in reality grabbed only a single tentacle of the many-armed octopus whose nerve center and other branches are located elsewhere. The MNC would seem to have a number of actions open to it, not the least of which is moving the subsidiary to a more receptive nation. The host country has little effective control over the MNC itself, and even if it nationalized the subsidiary, international law requires that compensation be given. More importantly, what MNC would ever again consider investing in that country?

The result appears to be that the host nation is found tolerating a limited amount of United States infringement on its sovereignty in exchange for the economic benefit derived from having an American based MNC investing and doing business in its country through subsidiaries. Once American control has become too painful however, some nations, as we shall see, have succeeded in breaking this strangle hold. A study of the specific United States laws under which foreign control has been achieved is now in order.

III. United States Attempts at Control

The United States strictly limits trade with Communist countries by regulations issued under the Trading with the Enemy
Act Originally passed in 1917 as a wartime measure, the Act was amended in 1933 to apply also during any other period of Presidential declared national emergency. The current period of emergency commenced in 1950 with the advent of the Korean conflict and has continued uninterrupted to this day. Section 5(b) provides, in part:

During the time of war or any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise . . . (b) investigate, regulate, direct, and compel, nullify, void, prevent or prohibit any acquisition, holding, withholding, use, transfer, withdraw, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States . . . .

Authority under the Act has been delegated by the President to the Department of the Treasury and administered therein by the Office of Foreign Assets Control. Regulations issued by the Treasury are grouped in four sets. The first set is titled Foreign Assets Control Regulations which places a complete trade embargo on dealings with certain "designated nations" by all persons "within" or "subject to the jurisdiction of" the United States. Designated nations as currently listed consist of Red China, North Korea and North Viet-Nam, and persons within or subject to the jurisdiction of the United States are defined as:

(1) Any person, wheresoever located, who is a citizen of the United States;
(2) Any person actually within the United States;
(3) Any corporation organized under the laws of the United States or of any State, Territory, Possession, or district of the United States; and
(4) Any partnership, association, corporation, or other organization, wheresoever organized or doing business, which is owned, or controlled by persons specified in subparagraph (1), (2), or (3) of this paragraph.

As can readily be seen, subparagraph (4) is of paramount im-

57. Congress possesses this authority under the Commerce Clause, U.S. Const. art. I, § 8.
62. 31 C.F.R. § 500.201 (1972).
63. Id.
portance since it allows the United States to assume jurisdiction over the foreign subsidiaries of American MNC's irrespective of nationality. This is the language used to impose sanctions, thereby influencing the export dealings of foreign subsidiaries. Any person defined in these regulations must seek a license from the Treasury Department if he wants to deal with the designated nations. Following the warming of relations between Washington and Peking, these restrictions have been loosened with respect to Red China and now allow automatic licensing for nearly all goods not originating in North Korea or North Viet-Nam. In regard to those two countries, however, the complete embargo is still in effect. Penalties imposed for willful violations are criminal in nature and as defined in the Trading with the Enemy Act constitute up to ten years imprisonment or a $10,000 fine, or both.

The second set of regulations issued by the Treasury is entitled Regulations Prohibiting Transactions Involving the Shipment of Certain Merchandise Between Foreign Countries, and generally limits the trading of certain strategic commodities to all Communist countries excepting Cuba and Yugoslavia. A 1970 amendment loosened these restrictions to all nations but Red China, North Korea, North Viet-Nam and Tibet, and allows trading of those commodities to all other Communist nations if shipment is made via certain Western countries.

In conformity with the Assets Control Regulations, these regulations also apply to all persons "within" or subject to the jurisdiction of the United States, thereby asserting U.S. authority over the foreign subsidiaries of American MNC's. Penalties are the same.

A third set of controls is the Cuban Assets Control Regulations, which places a complete trade embargo on Cuba. There is a substantial difference in its application, for it does not purport

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65. 31 C.F.R. § 500.547 (1972).
67. 31 C.F.R. §§ 505.01-.60 (1972).
68. The strategic items are listed in the Commerce Department's Commodity Control List, identified by the letter "A", 15 C.F.R. § 399 (1973).
69. 31 C.F.R. § 505.31 (1972).
70. 31 C.F.R. § 505.10 (1972).
71. 31 C.F.R. § 505.50 (1972).
72. 31 C.F.R. §§ 515.101-.809 (1972).
to bind "... any non-banking association, corporation, or other organization, which is organized and doing business under the laws of any foreign country...". Just as surprisingly, no person will be deemed engaged in trade with Cuba merely because he has a financial interest in a foreign corporation that is involved in such trade. This apparent retreat from former assertions of the United States is of particular importance since the Cuban regulations were not promulgated until 1963, after foreign discontent with the extraterritorial application of the first two sets of regulations had been registered. It may be that the change was a direct response to unpleasant experience with the earlier controls. If this is true, the United States may have turned the corner in its attempted controls in the future. One wonders, however, whether other informal controls, which will be examined shortly, have lessened the necessity for these highly visible and antagonistic statutes. In other respects the Cuban controls follow the other regulations. Licenses are still required for trading, and the same penalties are imposed.

The fourth and final set of regulations, the Rhodesian Sanctions Regulations, imposes a general embargo on trading with Southern Rhodesia. These regulations are not based on the Trading with the Enemy Act, but instead find their authority in a statute authorizing the President to impose trade restrictions in response to decisions of the United Nations Security Council. The important point of these controls is that they also fail to include American owned or controlled foreign based corporations within their jurisdiction. The implications are the same as those drawn from the Cuban Regulations.

At this point it should be noted that other, non-official, forms of persuasion are present. The United States attempts to secure compliance with its embargoes by use of informal pressures on the American parent companies. These include threats of adverse publicity against the parent in the United States. In this regard it is understandable that an American corporation would prefer

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73. 31 C.F.R. § 515.541(a) (1972).
74. 31 C.F.R. § 515.541(e) (1972).
76. 31 C.F.R. § 515.201 (1972).
77. 31 C.F.R. § 515.701 (1972).
78. 31 C.F.R. §§ 530.101-.809 (1972).
80. 31 C.F.R. § 530.307(4) (1972).
81. Corcoran, supra note 10, at 181.
the American purchasing public not know its foreign subsidiary has been trading with North Viet-Nam or North Korea. Sales are likely to take a sharp drop. Similarly, the authorities may threaten future difficulties in securing governmental contracts.\textsuperscript{82} Considering the size of the Federal budget, this could be a harsh blow to any corporation used to a share of the pie. While both these methods are non-statutory, the strength of the pressure they exert for compliance must be recognized.\textsuperscript{83} As a former Chief Counsel for the Office of Foreign Assets Control has said, "... the United States has been quite successful so far in persuading American parent firms to take steps on a voluntary basis to ensure that their foreign affiliates did not trade with Cuba."	extsuperscript{84} There is no reason to believe his statement would not apply equally to any country currently on the United States' blacklist.

Apart from the regulations themselves is the manner of their implementation. In this area the Treasury Department has performed something akin to wizardry. To begin with, it has been careful to keep its enforcement and license application procedures within the United States borders, even though the language of the regulations asserts global jurisdiction.\textsuperscript{85} This procedure is advantageous because it prevents the highly visible and assuredly antagonistic spectacle of a foreign corporation dealing directly with the United States government in order to carry on its export business. The Treasury still retains tight control, however, for it exercises authority instead on those over whom it has clear jurisdiction—U.S. citizens and corporations who own and control the foreign firms.\textsuperscript{86} It seems certain that threats of criminal penalties against American directors or shareholders of foreign firms will suffice to assure these firms' compliance with the United States trade embargo.\textsuperscript{87}

In furtherance of this almost conspiratorial arrangement, parent firms often demand original receipt of all incoming orders and

\begin{itemize}
\item \textsuperscript{82} Id.
\item \textsuperscript{83} Id. at 199.
\item \textsuperscript{84} Sommerfield, \textit{Treasury Regulations Affecting Trade with the Sino-Soviet Bloc and Cuba}, 19 BUS. LAW \textbf{861}, \textbf{868} (1964).
\item \textsuperscript{85} Corcoran, \textit{supra} note 10, at 184.
\item \textsuperscript{86} See Vagts, \textit{supra} note 18, at 251.
\item \textsuperscript{87} No actual prosecutions have been sought. Corcoran, \textit{supra} note 10, at 182.
\end{itemize}
subsequently screen them before they are ever seen by the subsidiaries. This prevents the host country from knowing orders have even been offered one of its corporations, for the firm itself may never learn of it. Professor Vagts has said that only "a low profile and quick footwork" will prevent this extraterritorial assertion of authority from making trouble for the United States. The Treasury Department has done an admirable job of accomplishing just that. It would be misleading to imply no foreign opposition exists, however. Substantial resistance and direct action have already resulted.

IV. Response of Various Nations to United States Attempts at Control

Reaction to United States enforcement of the control regulations has varied with the country whose sovereignty has been threatened. In some instances vigorous opposition has been voiced, in others there have been quiet and unpublished diplomatic protests, and in at least one country legal institutions may have developed to counteract the regulations. The Treasury Department has admitted itself that enforcement is impossible without raising many foreign policy issues with our allies, and discussions of the problem have resulted in governmental reports as well as private books. Concentrating on three of our largest allies, then, an examination of governmental responses will be made, attempting to develop a generalized statement concerning each individual country.

As might be expected from frequent disagreements with the United States over foreign policy, the French reaction has been strong. Aside from a best selling book forecasting doom unless American influence in French and European affairs is met and turned back, a classic episode of conflict resulted in a remarkable decision in the French courts. In late 1964, the French pres-

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88. Id. at 199.
89. Vagts, supra note 18, at 252.
90. Craig, supra note 40, at 593.
91. Berman & Garson, supra note 75.
92. Craig, supra note 40, at 580.
94. See, e.g., the Watkins Report, supra note 11.
96. J. SERVAN-SCHREBER, supra note 52, at 414. The book sold over 500,000 copies in Europe its first three months, more than any other book since WW II, Baum, supra note 12, at 412.
ident of Fruehauf-France, S. A., a French corporation in which the Fruehauf Corporation of the United States held a two-thirds stock interest and five of eight seats on the board of directors, entered into a contract with Automobiles Berliet, S. A., France's largest manufacturer of trucks. The contract called for delivery of sixty Fruehauf vans, valued at 1,785,310 francs, which would be integrated with Berliet trucks for eventual delivery to Red China. The United States Treasury subsequently ordered the American parent to suspend execution of the contract as a violation of its regulations, and the American corporation instructed Fruehauf-France to cancel.

Fruehauf-France approached Berliet about rescinding, but the latter refused and threatened to sue for approximately $1 million in damages if Fruehauf breached. The French directors of Fruehauf-France, maintaining they were responsible for the welfare of the company to all of its shareholders, then acted independently.

Alleging that failure to perform the contract would weaken the company's ability to obtain further contracts with Berliet, which with 40 percent of its business was Fruehauf-France's largest customer, and citing the potential damage to the company by the threatened $1 million action, the directors brought suit against the American directors of the company and its American parent. Their motion for appointment of a judicial administrator to head Fruehauf-France for three months and execute the Berliet contract was granted by the trial court and affirmed by the Court of Appeals of Paris.

The court's ruling appears to have been based on use of the French concept of abus de droits (abuse of a legal right) to reverse the corporate decision which, though promulgated by a majority of directors, was contrary to the corporate interest. Under this theory, directors must exercise corporate power within limits of the "contract" under which the shareholders were united. This contract calls, basically, for joint pursuit of the common good.

14,274 bis (cour d'appel, Paris). An English language report of the case can be found in 5 INTERNATIONAL LEGAL MATERIALS: CURRENT DOCUMENTS 476 (1966) and in Craig, supra note 40, at 580-82. The author's version of the facts are based entirely upon these sources.

98. Equivalent to approximately $358,000 at 1965 values.

99. 31 C.F.R. § 505.01-.60 (1972).

100. Craig, supra note 40, at 581-82.
Differences of opinion as to where the “common good” lies are to be expected however and the search for it is acceptable if made in good faith, personal interests of the directors giving way to the corporate interest. Use of the theory is limited to cases where it can be shown the majority intended to prejudice the minority’s rights or to obtain personal advantage, and due to difficulty in proof had previously been applied to only the most flagrant cases of bad faith.

In Fruehauf the court apparently viewed the decision to cancel the contract as motivated solely by a desire of the American majority directors to avoid personal liability under the Trading with the Enemy Act. This move was illegal since such motivation was extraneous to the corporate interest. The real importance of the decision, however lies in its implication that greater French regulation of foreign controlled corporations is now possible and will be exercised in the future. This innovative application of a principle of French law to prevent American control of the subsidiary may well point the way to the abandonment of future attempts at regulation under the Trading with the Enemy Act. France not only has a viable and legally based method for curtailing United States sanctions in cases such as this, its use may secretly be welcomed by MNC’s such as Fruehauf for promoting business with Communist countries and preventing the resulting personal liability.

Examining next the reaction of Great Britain, it becomes apparent that its legal institutions are not as well developed in their dealings with MNC’s as those of France. Two cases decided in 1971 were only the first instances in which MNC’s had been before the English courts. Though the cases do not completely determine how Great Britain will react to American regulations controlling subsidiaries domiciled there, they are the foundation upon which the English equivalent to Fruehauf may someday be based and for that reason deserve study.

In Decro-Wall, S. A., v. Marketing, Ltd., the plaintiff was a French company with head offices in Paris, half of whose stock was owned by another French firm, the balance held by an American corporation. The defendant on the other hand, was an English

1 Id.
2 Id.
3 Schmitthoff, supra note 4, at 107.
4 [1971] 1 W.L.R. 361 as reported in Schmitthoff, supra note 4, at 106-07. The author’s version of the facts is based entirely upon this report of the case.

222
company importing and selling Decro's goods in the United Kingdom. Decro sued in the English courts on matters relating to an alleged repudiation and termination of contract, but failed to achieve the relief it sought.

The case shows that English courts will assume jurisdiction over foreign subsidiaries of MNC's who seek the benefit of English law. Beyond that, the author also suggests that the court's willingness to treat Decro as the sole entity involved rather than seek the appearance of its French and American parents could be used as precedent for the future holding of an American subsidiary in England to be fully English and thereby not bound by laws of the United States.

The second case, Acrow Automation Ltd., v. Rex Chainbelt, Inc. and Another,105 concerns two American MNC's and their dealings with a British firm. The case's importance lies in the manner in which the English courts exerted jurisdiction over the foreign corporations and their subsidiaries. As to one MNC the problem was solved because the firm had registered in England as an overseas company and provided an address there for service of process. The other American MNC, while apparently not so registering, conveniently stipulated the proper law of the licensing agreement it had entered into with the local firm to be English. The courts based their jurisdiction on this fortuitous circumstance.

The meaning of these two decisions for the future is not altogether clear. What would happen to an American subsidiary in England whose parents had not registered as an overseas company? Would the courts hold that subsidiary English under the Decro decision? If not, would they be able to claim jurisdiction over it if its contracts did not provide for construction under English law?

Doubts in this regard have led to a call for new legislation that would merely require a corporation to carry on substantial business in Great Britain for the courts to gain jurisdiction.106 Whatever the outcome of this suggestion, however, it appears certain

105. [1971] 1 W.L.R. 1676 as reported in Schmitthoff, supra note 4, at 107-08. The author's version of the facts is based entirely upon this report of the case.
106. Id. at 109-10.
England is on the way to development of legal doctrines for combating foreign control of subsidiaries located and doing business within Great Britain.

In comparison to France and England, Canada has taken relatively little action in the area, and case law is similarly lacking. The Ford incident in early 1958 first brought the Trading with the Enemy Act to public and, apparently, governmental attention in Canada, and its impact, while vocal, produced no legislation to deal with the problem. This is surprising, for it is from Canada that most reported incidents of direct United States control over subsidiaries have emerged.

Returning to the Ford incident, however, it is revealing to study the Canadian response to American control over its automotive industry. It must first be noted that Canada could not realistically nationalize the American auto manufacturing plants. The industry has so developed that not all the required auto parts for assembly are produced in Canada, but rather in other sibling corporations of the American parent. These parts are then distributed at low cost through the MNC itself. For Canada to import those parts on a regular trade basis would render the cost of the finished product prohibitive for the Canadian consumer. Since one of every seven Canadian jobs depends on the automobile industry, the results might well be disastrous.

Long after the Ford incident exploded in 1958, the Canadian government entered into the Canadian Automobile Agreement of 1965. In their negotiations with the American MNC's, the Canadians demanded and received a larger percentage of the total manufacturing operations. Instead of demanding more independence for its subsidiaries then, Canada actually increased its dependence on the American firms by opting for material well being derived from higher employment, lower car prices and better Canadian balance of payments. Indeed, Canada's high standard of living is seen as a direct result of permitting a massive inflow of foreign investment capital to develop resources and industry.

107. See Corcoran, supra note 10, at 190.
108. See, e.g., the opening quotation.
109. Corcoran, supra note 10, at 196.
110. Corcoran, supra note 10, supplies eight reported incidents.
111. Baum, supra note 12, at 422-23.
112. Id. at 421.
113. Id. at 426.
114. See, Baum, supra note 12, at 424-26.
115. Corcoran, supra note 10, at 187.
Sometimes, however, this quest for prosperity has backfired. In 1958 the Aluminum Company of Canada Ltd. (ALCAN) was the sole aluminum reduction and milling entity in Canada. It was owned and controlled by widely held individual American shareholdings. 1958 was also a period of economic recession in Canada, with wide unemployment in the aluminum industry. In spite of this, ALCAN refused a $1 million Red Chinese order for aluminum. Faced with prosecution and discrimination problems in the United States market if it accepted the order, and on the other side of the border, problems in Canada if it applied to the United States Treasury for a license to sell to China, ALCAN chose the path of least resistance and did not accept the order at all. Here Canada's economic well being was actually damaged by the Canadian subsidiary.

In Canada then, even though feelings may run high against the Trading with the Enemy Act as an "offensive piece of legislation," it appears that Canadians are still willing to go along with what they view to be the best solution—continued political and diplomatic pressure on the United States to withdraw the application of the regulations as they apply to controlled Canadian corporations' export business. The dramatic confrontations with the United States possible in France and perhaps England are not likely to occur in Canada. Perhaps "Canada [has] already been integrated economically with the United States."  

V. OUTLOOK FOR THE FUTURE

Multinational corporations have come of age. The economic control they will achieve within the decade is forecast to remain relatively constant throughout the end of the twentieth century, and their concentration in the United States is documented and likely to continue. The same cannot be said, however, for the United States' dominant position in the world. The financial influence that once held the world at bay has lessened, "Sound as a

116. Id. at 180. The following example is based entirely upon this report of the incident.
117. Corcoran, supra note 10, at 208.
118. Id.
119. Baum, supra note 12, at 430.
120. Vagts, supra note 18.
121. Id. at 250.
Dollar” becoming something of a backhanded compliment. Former leadership of the Western Bloc has deteriorated into attempts at cajoling a disarray of independents. Unquestioned American military superiority has lost something in the jungles of Southeast Asia.

Accompanying this decline in the economic and military dominance of the United States has been increased dissatisfaction with American control over foreign subsidiaries. Note that the first major defeat of export controls did not occur until 1968, and several nations are currently in the process of developing or have developed legal institutions to circumvent this infringement upon their sovereignty. The stage therefore appears set for a greater erosion of the extraterritorial effect of the Trading with the Enemy Act in the future.

The current period of “goodwill” between the United States and most Communist countries should be used wisely in Washington. It is during this present lull that a long, hard look should be taken at future attempts to control foreign subsidiaries. Difficult as it is to accept, new hostilities are bound to break out, new enemies certain to take their place in opposition to the United States. America must decide if the risk of alienating such allies as Canada, France and Great Britain is worth depriving such small countries as North Korea, North Viet-Nam and Cuba of our trade. If future attempts at control produce greater opposition, if American influence continues to dwindle, if MNC’s are caught in a bind between conflicting regulations because of American foreign policy, the United States may see not only a loss of allies, but a loss of economically vital MNC’s as well. Perhaps the time has come at last for the United States to “let Canada sell where she wants to sell.”

JACK W. HODGES

122. The author is referring to Freuhauf Corp. v. Massardy (1968), which he feels represents the first successful attempt to curtail the effect of U.S. control. It is important to realize that it was accomplished without any negotiation or dealings with the United States government.

123. See the opening quotation.