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Export Control Laws and Multinational Enterprises

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I. Introduction

The problem of export controls affecting multinational enterprises (hereinafter referred to as "MNEs")[1] as viewed from an international perspective has been the problem of the United States government utilizing its control over the MNE to support United States foreign policy in violation, as other nations see it, of their sovereignty. It has been estimated that the United States is the "home" country, i.e., the nation wherein the parent company is headquartered, of 90 percent of the world MNEs.[2] The problems of export controls from the United States perspective are not peculiar to the MNE and are dealt with in detail in this article to the extent they are pertinent to the conflicting sovereignty problem. The first problem is the prevention of the re-export of goods from the countries to which they have been lawfully exported to countries to which they could not have been lawfully exported. The second and far more significant impediment is that the United States export laws are far more restrictive than those of other countries which have similar goods available for export. Thus, in order to match United States objectives to the existing international environment, there is a need for a rational export policy which recognizes that unless the United States has a monopoly over a product, unilateral export controls, as compared to multinational export controls, are ineffective, detrimental to the United States balance of trade, and in some situations, actually counter-

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*The authors are both attorneys with the General Electric Company. The views expressed herein are their own and not necessarily those of the General Electric Company.

[1]The definition of MNE, which forms the frame of reference for this paper, is a group of corporations which are incorporated under the laws of, and doing business in, various countries, which are under the control of one organization with a central headquarters. The typical arrangement is a "parent" corporation which, through equity ownership, controls "subsidiary" corporations in other nations.

[2]Comment, *The Trading with the Enemy Act of 1919 and Foreign Based Subsidiaries of American Multinational Corporations. A Time to Abstain from Restraining,* 11 SAN DIEGO L. REV. 206.209 (1973) (herein cited as Hodges) citing Vagts. *The Global Corporation and International Law,* 6 J. INT'L L. & ECON. 247, 250 (1972).

productive in that they tend to encourage trade with non-United States interests, thereby further reducing United States ability to control the commodity involved. It is obvious, however, that once United States export control laws are brought into harmony with those countries which form the rest of the free world, the potential problems for both the United States and the MNE diminish considerably. There is, of course, a legitimate need for unilateral controls on certain exports, particularly of goods with military significance, but it is important to maintain a realistic balance. In the past several years, important strides have been made toward an effective rational export control policy in cases other than those in which the export involved has become a political or emotional issue.

At the outset, it should be stressed that there does not appear to be any serious allegation that MNEs are utilizing their multinational character willingly to subvert compliance with any policy of the United States relative to export controls. While it is difficult to establish a negative, neither the authors of this article nor other writers in the field with which they are familiar have found any prosecutions in this area.[3]

The principal target of our inquiry in this paper is the problem of conflicting sovereignty and the maze of export control statutes and regulations relating to the conflicting sovereignty problem, particularly recent changes which attempt to minimize the potential problems. United States efforts toward multinational controls are likewise examined. Finally, the authors review their conclusions concerning the current state of the problem and suggest some directions for future policy.

II. The Problem of Conflicting Sovereignty

A basic conflict arises when the export trade policies of the "host" country, i.e., the country where the subsidiary is incorporated, domiciled, or doing business, are different from the policies of the home country, and the home country seeks to control the activities of foreign subsidiaries of the home country's MNEs.

In some cases, the United States claims the right to assert jurisdiction over foreign subsidiaries on two grounds. First, the United States claims the right to prosecute acts of foreign nationals, committed outside the United States, where such acts affect vital economic or security interests of the United States.[4]

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[3]Hodges at 219 citing Corcoran, *The Trading with the Enemy Act and the Controlled Canadian Corporation*, 14 McGill L.J. 179, 182 (1968) (herein cited as Corcoran).

[4]Hodges, at 210; Craig, *Application of the Trading with the Enemy Act To Foreign Corporations Owned by Americans: Reflections of Fruehauf v. Massardy*, 83 Harv. L. Rev. 579, 589 (1970) (herein cited as Craig) citing Restatement (Second) of the Foreign Relations Law of the United States § 18,33 (1965) (herein cited as Restatement) and 1 L. Openheim, International Law § 124 (8th ed., 1955).

Second, the United States claims that foreign subsidiaries of United States corporations are citizens of the United States. Most nations, including the United States, adopt the general rule that a corporation is a citizen of the state under whose laws it was created. The United States appears to have an exception for foreign subsidiaries of United States corporations.[5] Occasionally, the United States has taken the position that the nationality of a corporation is determined by the place where the control of the corporation is exercised.[6] The United States basically has sought to exercise such jurisdiction when it felt its national interests require it to do so.[7] Needless to say, the prudent businessman recognizes that at all times his company must obey the laws of both the home and host countries. Looking at the broad view of United States law, it is not surprising that conflicts have arisen.

Many countries are concerned that the United States-based MNE is a vehicle by which the United States may impose its trade policies upon the host country in disregard of the basic tenet of international law that nations should refrain from acts which violate the sovereignty of another nation.[8] This is especially troubling when the restrictions imposed upon the United States-based MNE foster foreign policies to which the foreign nation does not subscribe.

The most famous case involving MNEs and the export control laws, and the case most illustrative of the conflict problem, is the case of *Fruehauf Corp. v. Massardy.*[9] This case involved a French subsidiary of Fruehauf Corporation, Fruehauf-France S.A., in which Fruehauf held two-thirds of the stock and had designated five of the eight directors. In 1964, the French president of Fruehauf-France entered into a contract with Automobiles Berliet, S.A. (Berliet), France's largest truck manufacturer under which Fruehauf-France would sell Berliet sixty Fruehauf assemblies. The assemblies were to be incorporated into trucks that Berliet was selling to the People's Republic of China. The United States Treasury Department, under regulations issued under the Trading with the Enemy Act,[10] ordered United States-Fruehauf to cancel the Berliet contract. Berliet rejected Fruehauf-France's attempt to negotiate a termination of the contract and threatened to sue for approximately $1,000,000 in damages.

The French directors filed suit in the Commercial Court of Corbeil seeking the appointment of a temporary administrator to run Fruehauf-France and to perform the obligation under the Berliet sales contract. The Commercial Court

[5]Hodges, 211-12; *Petition of Hinds,* 325 F.2d 713 (E.D. N.Y., 1940).

[6]Craig at 589.

[7]Craig at 589.

[8]*See, for example,* Verzijl, *The Controversy Regarding the So-Called Extraterritorial Effect of American Antitrust Laws,* 8 NEDERLAND TIJDSCHRITT VOOR INTERNATIONAL RECHT 3, 4 (1961).

[9][1968] D.S. Jur. 147 [1965] J.C.P. II. An English language report of the case has been published in 5 INTERNATIONAL LEGAL MATERIALS. The case is commented upon in Craig and Hodges. The authors have relied solely upon the secondary sources, primarily the analysis in Craig.

[10]50 U.S.C. App. 5 (b)(1) (1964).

granted the relief requested by the plaintiffs and the Court of Appeals of Paris affirmed. The Court of Appeals, in essence, held that the Court could appoint an administrator when the corporation could no longer function normally and was thus faced with ruin. The Court felt that Fruehauf-France's potential liability and the potential damage to its credit was so great as to jeopardize its corporate existence and the jobs of its 600 employees. The French government intervened in the case, and successfully argued on behalf of the French directors, that the interests of the corporation and society in protecting the French economy and labor force outweighed the private interests of the American directors in avoiding personal legal exposure under United States law.[11]

The basis for the Court's decision was the French concept of *abus de droit*—abuse of a legal right—under which a French court can overrule the management and directors of a French corporation, even when the decision is in accordance with normal corporate procedures, if the Court feels the decision to be contrary to the company's interest. Obviously, this is not a purely objective standard. Ordinarily, a plaintiff must show that the management was acting in violation of minority shareholder's rights or to obtain personal advantage. In the *Fruehauf* case, avoiding liability under United States law was equated with personal financial gain. It is interesting to note that nowhere in its opinion does the Court discuss the doctrine of compulsion of a foreign sovereign. A French commentator on the case has written that the *Fruehauf* case implies that French companies controlled by non-French interests will be subject to greater regulation than the ordinary French company.[12]

Another case in which United States export controls laws came into conflict with the sovereignty of another nation was *American President Lines, Ltd. v. China Mutual Trading Company, Ltd. and The Hong Kong & Kowloon Wharf and Godown Company, Ltd.*,[13] decided by Supreme Court of Hong Kong, Appellate Jurisdiction in 1953. In that case, American President Lines (American) appealed an award of damages for failure to deliver cargo owned by China Mutual Trading Company (China).

The goods, consisting of sulfa drugs, had been unloaded from American's ship, the *Mount Davis*, to a storage company which held the cargo to American's order for the account of China, which was to be responsible for the storage charges. American refused to endorse the bill of lading, preventing China from obtaining the goods. China filed suit and the storage company intervened.

[11]Craig at p. 581. French law generally provides that corporations have a general duty to the state and society. Craig at page 584.

[12]Craig at 585 citing Contin, *L'Arrêt Fruehauf et L'Évolution du Droit des Sociétés*, [1968] D.S. Chron 51.

[13]1953 American Maritime Cases 1510. The description of the trier of facts' decision is taken solely from the Appellate Court opinion.

While the cargo was en route from the United States to Hong Kong, the United States government had issued two sets of regulations. One was issued under the Defense Production Act and the other under the Foreign Asset Control system. The Defense Production Act Regulations prohibited any United States flagship from carrying or discharging any goods without a validated license if the goods were to be re-exported to the People's Republic of China. The Foreign Assets Control Regulations prohibited, except with specific approval, all transfers of property from or, subject to the jurisdiction of, the United States to, among others, the People's Republic of China.

Introduced into evidence were letters to American from the head of Foreign Assets Control in the United States Treasury Department and a telegram to the United States Consul in Hong Kong from the United States Secretary of State.

The Department of Treasury letter, written after China instituted legal proceedings, advised American that it was prohibited from delivering the cargo to the plaintiff or anyone else without a permit, and that it would be contrary to United States government policy to issue such a permit.

The Secretary of State's telegram was in response to the trial court's request for interpretation of the Regulations. In short, the telegram confirmed that it would be a violation of both the Defense and Foreign Assets Regulations for American to discharge the cargo to plaintiff and such discharge would subject American to penal sanctions.

The defendant argued that: (1) the "restraint of prices" doctrine precluded the plaintiff's recovery, and (2) under the bill of lading it was expressly authorized "to comply with any orders . . . as to loading . . . delivery, surrender . . . disposition . . . given by the Government of any nation . . . or person having, under the terms of the war risk insurance on the ship, the right to give such orders . . ." and (3) the British courts will not enforce a contract if it is illegal under its "proper" law.

With regard to the first defense, the court held that once the cargo had been discharged to the Godown Company, it was no "longer subject to the jurisdiction of the United States," the governing words of the Asset Control Regulation. Since the goods were placed with a bailee, the court held they were no longer subject to United States control. The opinion stressed that the goods were turned over to the bailee at purchaser's cost and gave little or no weight to the requirement that American release the goods. Disregarding the second defense, the lower instance held that the language "must be construed as being limited to the actual voyage and not so as to apply after the goods are discharged at owner's final destination." This finding, it should be noted, was in spite of the words "surrender" and "disposition" in the contractual language. A dictum in the opinion declared, with respect to the third defense, "that United States law applied only to carriage," that the law was not in the form of legislation and

even if it did apply, it was so confiscatory that the court would not enforce it.

This decision was affirmed by the appellate court, but on slightly different grounds. That court held that United States law did apply to the right to withhold delivery as well as carriage of the goods, but that the cargo was no longer subject to United States law.

In addition to these cases, there are two other situations which highlight the problem of the extraterritorial application of United States law.

In 1957, the Treasury Department ordered the Ford Motor Company to require its Canadian subsidiary to repudiate a contract for the delivery of 1000 trucks to The People's Republic of China. The dilemma entailed in this step was a serious one. The order was viewed as an interference with Canadian policy and as an indirect encroachment upon the sovereignty of a friendly foreign power. While the Ford Motor Company did, in fact, repudiate the contract, there was quite an uproar in Canada, including a statement in the Canadian Parliament.[14]

In a more recent incident, the Treasury attempted to frustrate deliveries of Canadian wheat sold to communist China. Here the intention was to prevent ships under Chinese charter from utilizing suction grain loading equipment manufactured in Illinois and needed for the purpose of unloading the shipment at their destination. In the resultant diplomatic furor, President Kennedy revoked the stop-shipment order, thus waiving the purported application of the Trading with the Enemy Act.

By contrast, other countries do not appear to claim sovereignty over the acts of their companies operating abroad.[15] One of the few foreign cases dealing with export control laws was an English House of Lords decision in the case of *Regazzon v. K. C. Sethia [1944] Ltd.*[16] which involved a breach of contract suit brought by a Swiss resident against an English company. The defendant contended, successfully, that its breach was excused by the export control laws of a foreign country—India. The plaintiff had contracted to purchase 500,000 bags of jute originating in India for resale to the Union of South Africa. The India Sea Customs Act of 1878, as modified (including modifications after Indian independence) provided that the Indian government could prohibit, by publication in the "Official Gazette," the import or export of goods of any specified description. In 1946, the Indian government prohibited all exports to the Union of South Africa. Both the plaintiff and defendant were found to have known at the time of the contract that they were acting in violation of Indian law. The question before the House of Lords was whether or not an English

[14]Hodges at 206 citing Corcoran at 195.
[15]Hodges at 212.
[16][1958] A.C. 301.

court would enforce a contract or award damages for breach of contract, the performance of which requires an act in a foreign country in violation of that country's law because "public" policy demands that deference to international comity. The plaintiff which had lost in both the trial court and the court of appeals had argued that English law forbade the enforcement of foreign tax and penal laws. The House of Lords, in upholding the lower court decisions dismissing the plaintiff's case, held that the Indian export law in question barred plaintiff's recovery. The Lords distinguished a breach of contract suit brought by a private party and a suit brought by a foreign government.

The plaintiff also raised an important policy question in that the Indian export law was discriminatory legislation against a friendly commonwealth country. As to the policy question, the Lords felt that English courts should not be called upon to adjudicate political issues between two countries. In the opinion of Lord Keith:

> The Indian law is not a law repugnant to English conceptions of what may be regarded as within the ordinary field of legislation or administrative order even in this country. It is the illegality under foreign law that is to be considered and not the effect of foreign law on another country.

Thus, a British court upheld compliance with a foreign export law which was in conflict with the very fundamental British policy of promoting trade within the British Commonwealth. The case is not entirely in point in that there is no inference in the opinion of whether a British company in India would be free to sell in violation of British export laws.

III. United States Export Control Laws[17]

The legislative basis for United States export control measures is the Trading with the Enemy Act of 1917, the Export Control and Administration Acts, and the Mutual Defense Acts of 1951 (the "Battle Act"). In addition, there is legislation authorizing the President to impose export controls in response to decisions of the United Nations Security Council and the Atomic Energy Act of 1954 and the amendments thereto.

The United States has enacted export control legislation for a variety of reasons.[18] The first, of course, is national security. This rationale, historically, has been most often used. From the end of World War II until quite recently, the U.S. has had a policy of restricting export of "defense"-related materials to the Soviet Union and other communist bloc nations. This policy began with

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[17]The authors have not included a discussion of export controls in regard to nuclear energy as originally planned because of the current changes in this area.

[18]Hardt, J.P. and Holliday, G.D., *Export Controls Issue Brief Number IB75003*, printed in PEACEFUL NUCLEAR EXPORTS AND WEAPONS PROLIFERATION. U.S. Congress Committee on Government Operations, April 1975.

the regulations, implemented under the Export Control Act of 1949, which controlled all exports to communist countries. The fundamental policy continued until the passage of the Export Control Act of 1969, which lessened controls on materials that were available to communist countries from sources other than the United States and goods with no direct military significance. The Export Control Act of 1969 was, in fact, a mandate to promote East-West trade.

The second reason for export control is to prevent the export of scarce materials for economic and military reasons. Controls of scarce materials for military reasons were imposed during the Korean War. The focus of export controls has, in recent years, shifted somewhat from national security to scarce materials. This shift is found in the Export Administration Amendments of 1974. The Executive Branch had sought to limit exports such as soybeans, but the then existing legislation governing such controls was limited to situations where the shortages were the result of abnormally high foreign demand. The 1974 legislation eliminated the abnormally high requirement and authorized the Secretary of Commerce to monitor exports which could adversely affect the domestic economy. A related provision in the 1974 Amendments, prompted by OPEC, authorizes the President to utilize export controls to conduct foreign restrictions on exports to the United States where such restrictions have a serious inflationary impact, cause a serious domestic shortage, or have been imposed to influence United States policy.

The third rationale of export restrictions is the furtherance of United States foreign policy. Examples of this include the Rhodesian embargo, pursuant to a United Nations resolution and the restrictions on trade with Cuba.

The recent trend in regard to export control laws has been to minimize the potential for conflict by providing exemptions in the regulations for certain activities of United States subsidiaries and an expanded effort to reach multilateral agreements restricting the exports of certain items. In addition, the decisions to establish trade-relations with both the Soviet bloc nations and the People's Republic of China has also lessened the possibilities for conflicting sovereignty problems.

The Trading with the Enemy Act provides that the President during any war or national emergency declared by the President, may regulate, control or prohibit any transactions involving a foreign country by any person "subject to the jurisdiction of the United States."

The Act provides for the following penalties:

> Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder shall, upon conviction, be fined not more than $10,000 or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director or agent of any corporation who knowingly participates in such violation may be punished by a like fine or imprisonment, or both.

The principal set of regulations issued under the Trading with the Enemy Act is the Foreign Assets Control Regulations.[19] They are intended to have an extraterritorial effect. The regulations, which place controls upon certain assets of certain nations and their nationals, apply to all persons "subject to the jurisdiction of the United States" and "all transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States."[20]

The Regulations define a person subject to the jurisdiction of the United States as follows:

1. Any person, wheresoever located, who is a citizen or resident 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.[21]

A recent amendment to the regulations[22] provides that certain foreign transactions are authorized, to wit:

> (a) Except as provided in paragraphs (b), (c), (e), and (f) of this section, all transaction [sic] incident to the conduct of business activities abroad engaged in by any individual ordinarily resident in a foreign country in the authorized trade territory, or by any partnership, association, corporation, or other organization which is organized and doing business under the laws of any foreign country in the authorized trade territory, are hereby authorized.

The paragraphs cited contain a variety of exceptions including all transactions involving North Korea, North Vietnam, Cambodia, and South Vietnam; merchandise and equipment which are either identified by the Code Letter (A) or cannot be exported because of the provisions of Section 414 of the Mutual Security Act of 1944 relating to military equipment or the Atomic Energy Act relating to atomic energy facilities or nuclear materials.

The second set of regulations, the Transaction Control Regulations,[23] which restricts exports of certain strategic commodities to certain countries, appears to be in a state of transition. The original regulations were intended to have an extraterritorial effect. In 1970, they were modified to permit certain trading

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[19] 31 C.F.R. 500.101-809 (1976). *See also* Hodges, pp. 215-218.
[20] 31 C.F.R. 500.201 (1976).
[21] 31 C.F.R. 500.330 (1976).
[22] 31 C.F.R. 500.541 (1976). The list of exemptions referred to in the text following the quoted material is not complete.
[23] 31 C.F.R. 505.01-06.

if shipment was made through designated Western countries[24] and later a reference to Section 500.541, discussed *supra,* was included.

The third set of regulations issued under the Trading with the Enemy Act was the Cuban Assets Control Regulations, which represented the first major shift in United States policy away from extraterritorial application of the Trading with the Enemy Act and may have been the result of the hostile foreign reaction to the Foreign Assets Control Regulations and the older versions of "Transactions Regulations" discussed *supra.*[25] The Cuban Regulations impose a blanket prohibition on trade with Cuba. The Regulations state that:

> Specific licenses will be issued in appropriate cases for certain categories of transactions between U.S.-owned or controlled firms in third countries and Cuba, where local law requires, or policy in the third country favors, trade with Cuba.[26]

While the Cuban Regulations contain an exemption for foreign subsidiaries of United States corporations, the former Chief Counsel of the Office of Foreign Assets Control has been quoted as stating that: ". . . 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."[27]

The Export Adminstration Act of 1969, which took effect upon the expiration of the Export Control Act of 1949, and 1972 and 1974 Amendments to the 1969 Act were important milestones in the process of a rational export control policy. In the Act, the Congress made the following findings:

1. The quantity and composition of United States exports may affect both the domestic economy and United States foreign policy.
2. Unrestricted exports "may make a significant contribution to the military potential of any nation or . . . adversely affect [United States] national security . . ."
3. The "unwarranted restriction of exports . . . has a serious adverse effect on our balance of payments, particularly when export restrictions applied by the United States are more extensive than export restrictions imposed by countries with which the United States has defense treaty commitments."
4. "The uncertainty of policy towards certain categories of exports has curtailed the efforts of American business in those categories to the detriment of the overall attempt to improve the trade balance of the United States."
5. Unreasonable restrictions on access to world supplies can cause worldwide political and economic instability, interfere with free international trade, and retard the growth and development of nations.

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[24]31 C.F.R. 505.31 (1972).

[25]Hodges, page 218.

[26]31 C.F.R. 515.55 (1976).

[27]Hodges at 219, citing Sommerfield, *Treasury Regulations Affecting Trade with the Sino-Soviet Bloc and Cuba,* 19 Bus. Law 861, 868 (1964).

In accordance with these findings, the Act made the following declarations of congressional policy:

1. To encourage international trade except where the President determines that such trade is against the national security and to restrict the flow of goods and technology which would significantly contribute to the military potential of any nation to the detriment of United States national security.
2. Export controls should be used to (a) protect the United States economy from excessive drain of scarce materials and reduce the inflationary impact of foreign demand; (b) further United States foreign policy, and (c) protect the national security.
3. To formulate export controls to the maximum extent possible, in cooperation with and observance by all nations.
4. That export controls should be used to further the stability and growth of the economy as well as for national security and foreign policy objectives.
5. It is the policy of the United States to oppose restrictive trade boycotts imposed by other countries against the United States or countries friendly to the United States.
6. That it is desirable for both appropriate government agencies and experts from private industry to have a role in the formulation of export control policy.
7. Export controls are to be used to "secure the removal by foreign countries of restrictions on access to supplies where restriction may have an inflationary impact, cause a serious domestic shortage or are aimed at influencing United States policy." The Executive Branch is directed to negotiate the removal of such restrictions before utilizing export control and there were to be no restrictions on medical supplies.

The actual authority to effectuate the policies was delegated to the Secretary of Commerce. The Secretary was directed to review the list of restricted items and technology to make changes in accordance with the revised United States policy and to make periodic progress reports in that regard to Congress. The Secretary was authorized to prohibit or curtail the exports of goods, technical data or financing. In cases of national security, the Secretary was authorized to prohibit exports regardless of availability from our allies, but whenever "considerations of national security override considerations of foreign availability," the reasons were to be reported to Congress. Notwithstanding the previous sentence, the President was ordered to "remove unilateral export controls [on items] which he determines are available without restriction from sources outside the United States in significant quantities and comparable in quality to those produced in the United States except that any such control may remain in effect if the President determines that adequate evidence has been presented to him demonstrating that the absence of such control would prove detrimental to the national security of the United States." The Secretary was also directed to study the differences between the export control lists and procedures utilized by allies of the United States.

The Secretary was directed to monitor exports continually to prevent exports from creating a domestic shortage or contributing to inflation.

The time for approval or disapproval of any request for an export license was limited to 90 days. The Secretaries of Agriculture and Defense were given

authority in their respective areas of interests. The Secretary of Defense's powers are very broad with regard to "controlled countries" which, as defined by the Act, include the communist bloc countries "and such other countries as may be designated by the Secretary of Defense." Briefly, if the Secretary of Defense believes that any export would increase the military potential of any controlled country, he may recommend denial of an export license. If the President disagrees with the Secretary of Defense, their recommendations must be before Congress for 60 legislative days, and the President's recommendation becomes effective unless overruled by concurrent resolution of both Houses.

The legislation contains a provision for application for hardship relief from United States exports controls, *viz.*, where a domestic business utilizes a foreign product produced all or in part from a commodity historically obtained from the United States.

Penalties are provided for violation of any provision of the Act or regulation, licenses or orders issued under the Act. A first offense carries a penalty of a fine of $10,000 and/or one year imprisonment, and subsequent offenses carry a penalty of a fine which is the greater of $20,000 or of *three times* the value of the exports, and/or three years in jail. Willful violation with regard to communist-dominated nations carries stiffer penalties, i.e., a fine which is the greater of five times the value of the exports or $20,000 and/or a jail sentence of five years. The Act also provides for imposition of civil penalties and contains provisions regarding enforcement such as subpoenas, and civil and criminal actions.

IV. United States Participation in Multilateral Export Control

In late 1949, with a view to supplementing the United States export regulations, the United States reached agreement with the nations receiving its aid under the European recovery program on a cooperative scheme of export controls for national security reasons. The organization established for that purpose, the Consultative Group Coordinating Committee (COCOM), began to meet in Paris in early 1950. The number of participating countries was gradually increased until membership reached fifteen: Japan and all of the NATO countries except Iceland.

COCOM is an informal grouping based on a mutual understanding with no direct links to any of the principal military or economic compacts of the West. It has no charter and is based on no treaty. The arrangements concluded within its framework are moral obligations rather than commitments binding under international law. COCOM's basic function is twofold: it maintains a list of strategic items subject to "embargo" and "watch"; and it secures agreements on enforcement measures designed to minimize unauthorized transshipment. The lists are classified as "secret," because knowledge of the list would expose

the areas of Western military advantage. The controls are not classified but they have fluctuated rapidly over the years as a result of changing policies.

The COCOM arrangement was stimulated by a succession of legislative proposals in the United States looking toward the cessation of assistance to countries engaged in uninhibited trading with the Soviet bloc. The Economic Cooperation Act of 1948, in effect, required from countries receiving Marshall Aid assurances against the export to the East of items which the United States considered strategic. The Mutual Assistance Control Act of 1951 (Battle Act) amplified and extended these requirements. The provisions of the Battle Act seek to maintain a cooperative embargo on the export of arms, implements of war, atomic energy materials and other strategic goods; and to withhold United States military, economic or financial assistance from countries which knowingly permit the shipment of such items to nations threatening the security of the United States. Moreover, pursuant to the Foreign Assistance Act of 1961 a prohibition was imposed upon sales of American agricultural commodities under the Food for Peace Act to countries which trade with North Vietnam or sell to Cuba anything other than limited categories of medicines and foods. Similar restrictions have been incorporated into the Foreign Assistance and Related Agencies Appropriation Act of 1968.

The Battle Act itself bans the export to communist nations of strategic goods that are on the unilateral United States embargo lists. Such goods have been divided into Category A (arms, ammunitions, implements of war and atomic energy materials) and Category B (sensitive military-industrial products). In addition, "other materials" of lesser strategic importance are restricted on a classified basis. The COCOM members do not automatically accept this list for embargo. There is a continuing effort to have the COCOM list and the United States list conformed.

Despite its informal nature and the continuing pressure to minimize its strategic list, COCOM continues to provide a method of cooperation among the principal Western allies. It offers the members a forum for considering security trade control matters and machinery to ensure equal treatment of their respective business interests. While continuing to play the leading role in COCOM, however, the United States has shown an unwillingness to accept a negotiated multilateral system of controls.

The United Nations Participation Act of 1945, as amended,[28] provides another legislative basis for United States participation in multination export control efforts. The statute provides:

[28] 22 U.S.C. 287(c) (1970).

> (a) Notwithstanding the provisions of any other law, whenever the United States is called upon by the Security Council to apply measures which said Council has decided, pursuant to article 41 of said Charter, are to be employed to give effect to its decisions under said Charter, the President may, to the extent necessary to apply such measures, through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or prohibit, in whole or in part, economic relations or . . . communication between any foreign country or any national thereof of any person therein and the United States or any person subject to the jurisdiction thereof or involving any property subject to the jurisdiction of the United States.

Substantial penalties (fine and/or imprisonment) are provided for violations of the Act.

In 1966, the United Nations Security Council adopted a resolution[29] concerning Southern Rhodesia that called upon all member states of the United Nations to prevent "any activities by their nationals or in their territories which promote or are calculated to promote" trade in certain kinds of items to Southern Rhodesia, primarily items of military significance such as arms, ammunition, vehicles, ships and airplanes, both military and non-military. On January 5, 1967, the President, by Executive Order,[30] imposed restrictions on United States exports to Rhodesia. This Order was codified into the Rhodesian Sanctions Regulations.[31] But the provisions regarding extraterritorial application are somewhat confusing. The Regulations define a person subject to the jurisdiction of the United States along the lines of the Foreign Assets Control Regulations, *viz.*, any person who is a citizen of, or resident of, or physically within the United States, any corporation organized under the laws of any state, territory, possession, or district of the United States and any corporation, association, etc. organized under the laws of or having its principal place of business in Southern Rhodesia which is controlled by the persons previously mentioned. It is interesting to note, however, that unlike the Foreign Assets Control Regulations quoted *supra*, this part of the Regulation only applies to Rhodesian corporations rather than corporations "wherever organized or doing business."[32] The Rhodesian Sanctions Regulations also contain the following provision:

> *Officers and Directors of*
> *Foreign Firms*
>
> Section 530.201 prohibits persons subject to the jurisdiction of the United States who are officers, directors, or principal managerial personnel of business enterprises in foreign countries from being involved in transactions when they authorize or permit

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[29]U.N. Security Council Resolution 232 (1966).
[30]Executive Order 11.322.
[31]31 C.F.R. Part 530.
[32]31 C.F.R. 530.307 (1976).

the foreign business enterprise to engage in a transaction subject to § 530.201, even if they do not themselves actively engage in the transaction.[33]

Thus, there is some confusion as to the extent that the Rhodesian Sanction Regulations are intended to have extraterritorial effect. The problem of extraterritorial application of this Regulation should be greatly minimized by the fact that many countries have issued similar regulations.

IV. Conclusions

In recent years, much progress has been made with regard to solving the problem of conflicting sovereignty for the MNE although the potential for conflict still exists. There are several important factors which have caused this trend. First, the great narrowing of the technology gap which has, in all but a few situations, made unilateral export controls futile. Second is the hostile reaction of several of the United States' closest allies to extraterritorial application. Third is the changing nature of United States foreign policy.

The relaxation of the so-called "cold war" and the policy shift to promote East-West trade with the "Soviet bloc" countries and the more recent overtures toward normalizing relations with the People's Republic of China could eliminate many of the potential conflicts, particularly in the trade of goods with little or no strategic value. While the United States has encouraged East-West trade only since the late Sixties, many of our allies had embarked on such policies many years earlier.

The overt adverse reactions of some of our closest allies, particularly Canada, prompted the re-examination of United States policy toward extraterritorial application of United States export control laws. The outcry in Canada became part of a general concern about the entire nature of United States subsidiaries in Canada which threatened their viability. In fact, none of our allies has had export trade controls approaching the breadth and scope of United States controls. This was first recognized in the drafting of the Cuban Assets Control Regulations which had a specific proviso, quoted *supra,* allowing subsidiaries of United States companies to defer to host countries' policies in trading commodities having no effect on United States national security. The more recent provision embodied in 31 C.F.R. 541 represents a continuation of this trend. The areas, particularly in non-strategic commodities, in which the United States has a monopoly are quite limited. It is obvious that if goods are available elsewhere, unilateral export controls will serve no useful purpose except to direct trade elsewhere.

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[33]31 C.F.R. 530.404 (1976).

But areas of potential conflict still remain because the United States export controls list is more expansive than most of the other "free world" countries and because of the remaining blanket restrictions on trade with certain nations prompted by foreign policy considerations.

To complete the process of a rational export control policy for MNEs, two major steps should be taken immediately. First, where restrictions are based solely on foreign policy objectives, a provision similar to the Cuban Assets Control Regulations should be made applicable to all regulations. Second, efforts should be continued to harmonize the COCOM and United States export control lists except in the few cases in which unilateral controls can be effective. These steps can be taken at the same time the United States is engaged in the GATT discussions on elimination of barriers to international trade. Such action would evidence a constructive and positive attitude of the United States government on the question of international trade.