

# Michigan Law Review

---

Volume 70 | Issue 2

---

1971

## Developments in the Control of Foreign Investment in France

Charles Torem

William Laurence Craig

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Comparative and Foreign Law Commons](#)

---

### Recommended Citation

Charles Torem & William L. Craig, *Developments in the Control of Foreign Investment in France*, 70 MICH. L. REV. 285 (1971).

Available at: <https://repository.law.umich.edu/mlr/vol70/iss2/3>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# DEVELOPMENTS IN THE CONTROL OF FOREIGN INVESTMENT IN FRANCE

*Charles Torem\* and William Laurence Craig\*\**

## I. INTRODUCTION

IN February of 1968, the authors described at some length the laws and regulations governing the control of foreign investment in France and the policies of the French government in exercising that control.<sup>1</sup> Since that report, however, a number of dramatic changes have occurred in France. In May 1968, social unrest, starting in the universities and spreading to the labor unions, led to a general strike and a paralysis that threatened to topple the government itself. Despite a dramatic restoration of order by the government, President de Gaulle's bid to obtain a new mandate from the French people in the form of a referendum on the issues of "regionalization" and the reformation of the Senate failed, and thereafter he resigned from office in April 1969. A special presidential election was held and Georges Pompidou, President de Gaulle's Prime Minister from April 14, 1962, to July 10, 1968, became President and formed a new government with Jacques Chaban-Delmas as Prime Minister. The cumulative burden of social upheaval, which had resulted in the effective shutting down of the greater part of France's industrial plant for a period of nearly three months, followed by months of political uncertainty, placed substantial pressure on the French balance-of-payments position. Despite the reinstatement of exchange controls in November 1968, large amounts of capital fled the country for "safer havens." Finally, in August 1969, the franc was devalued twelve per cent.

All these events have had an effect on attitudes toward foreign investment and have led to a policy that is, on the whole, receptive to it. At the same time, the new government has begun to establish guidelines for distinguishing those relatively few investments that it will oppose.<sup>2</sup> This Article will first review the legal provisions for the control of foreign investment in France and then will analyze

---

\* Member of the New York Bar. A.B. 1935, Amherst College; LL.B. 1938, Harvard University.—Ed.

\*\* Member of the New York and District of Columbia Bars. A.B. 1954, Williams College; LL.B. 1957, Harvard University.—Ed.

1. Torem & Craig, *Control of Foreign Investment in France*, 66 MICH. L. REV. 669 (1968).

2. See pt. IV. C. *infra*.

them in light of France's position in the Common Market<sup>3</sup> and its other international obligations. Finally, it will attempt to describe the developing guidelines established by the government for foreign investment and will illustrate the application of these guidelines by a survey of recent investment cases.

## II. THE LEGAL FRAMEWORK OF REGULATION

### A. *Basic Investment Regulations*

The principal elements of the current French legal regime on foreign investment date back to December 1966 and January 1967. A detailed description of this regime, which has been earlier treated at length,<sup>4</sup> will not be repeated here. A brief summary, however, may be useful before proceeding to an examination of more recent developments.

Law Number 66-1008,<sup>5</sup> signed by President de Gaulle on December 28, 1966, abolished a complex structure of exchange control regulations dating from 1939 and dramatically declared that "[f]inancial relations between France and other countries are free."<sup>6</sup> However, this law did give the government power to regulate foreign investments in France, French investments abroad, and exchange operations by decree if necessary to defend national interest.<sup>7</sup> This power was almost immediately invoked to erect an entirely new system for the control of foreign investments in France and French investments abroad. Decree Number 67-78 of January 27, 1967,<sup>8</sup> in setting up this new system, defined the category of "direct investments" to include

[t]he purchase, the creation or the extension of any business, branch or individual enterprise; [and] [a]ll other operations which alone or together with others, concurrently or consecutively, have the effect of permitting a person or persons to *acquire* or *increase* the control of a company . . . , whatever may be its form, or to *assure the expansion* of such company already controlled by them.<sup>9</sup>

Thus the creation of a French corporation, or obtaining or increas-

---

3. The terms "Common Market," "European Economic Community," "EEC," and "Market" are used interchangeably in this Article.

4. See Torem & Craig, *supra* note 1, at 676-96.

5. [1966] J.O. 11621, [1967] D.S.L. 30.

6. *Id.* art. 1.

7. *Id.* art. 3.

8. [1967] J.O. 1073, [1967] D.S.L. 81.

9. *Id.* art. 2(3)(a) & (b) (emphasis added). For further discussion of this definition, see Torem & Craig, *supra* note 1, at 682-87.

ing control of an existing one, by foreigners constituted a "direct investment." Similarly, certain activities of any French corporation already under foreign control, such as the acquisition of a new plant, the establishment of a branch, or the creation or acquisition of another French corporation, also fell within the category of "direct investments."<sup>10</sup> While this hastily drawn decree<sup>11</sup> was silent with respect to what constituted "control," administrative practice has applied a very strict test. Indeed, in some cases, the purchase of only small percentages of the capital of a corporation has been said by the Ministry of Finance to constitute a purchase of control and hence to be a direct investment.<sup>12</sup> Likewise, financial dealings other than the purchase of an equity interest may effectively submit a French company to foreign economic control;<sup>13</sup> thus, these relationships may be classed as "direct investments."

Direct investments were made subject to the filing of a prior declaration with the Ministry of Finance. The Ministry could, within two months after the filing, require a temporary postponement of the investment to allow further study or to permit changes by the applicant in the conditions of the investment in order to meet government objections.<sup>14</sup> In some cases this temporary postponement was permitted by the Ministry to ripen into an *ajournement définitif*, or, in effect, a denial of investment authorization.<sup>15</sup> If the Ministry did not act within two months, or if prior to the expiration of that period it renounced its right to require a postponement, the applicant was free to proceed with the project.<sup>16</sup>

In contrast to foreign direct investments (which were subject to the prior-declaration procedure and the "postponement" mechanism), foreign loans and financings of all other kinds needed prior specific authorization from the Ministry of Finance before a transaction could be executed.<sup>17</sup> This procedure was to be followed for all borrowings from abroad that did not constitute direct investments under the definition of Decree Number 67-78. Three categories of

---

10. Decree No. 67-78 of Jan. 27, 1967, art. 2(3)(a) & (b), [1967] J.O. 1073, [1967] D.S.L. 81.

11. The haste was necessitated by a provision of Law No. 66-1008 of Dec. 28, 1966, [1966] J.O. 11621, [1967] D.S.L. 30, that gave the government only thirty days in which to issue decrees reinstating controls. See Torem & Craig, *supra* note 1, at 678-79.

12. See Torem & Craig, *supra* note 1, at 685.

13. See Torem & Craig, *supra* note 1, at 685 & nn.68-69.

14. See Torem & Craig, *supra* note 1, at 679, 682 & n.58.

15. Decree No. 67-78 of Jan. 27, 1967, art. 4(1), [1967] J.O. 1073, [1967] D.S.L. 81. See Torem & Craig, *supra* note 1, at 682.

16. Decree No. 67-78 of Jan. 27, 1967, art. 4(1), [1967] J.O. 1073, [1967] D.S.L. 81.

17. See Torem & Craig, *supra* note 1, at 687-89.

financing, narrowly defined by the decree, were not subject to the special authorization requirement and were thus free. These special categories included loans from abroad to finance services rendered abroad or commercial transactions between France and foreign countries,<sup>18</sup> loans from abroad to certain banks and finance companies,<sup>19</sup> and loans from abroad to a borrower in France, as long as that borrower's cumulative total of such loans outstanding remained less than 2 million francs.<sup>20</sup>

A parallel regulation, Decree Number 67-82, required the prior submission to the Ministry of Industry of all contracts calling for the acquisition of, or the obtaining of a license for the use of, industrial-property rights by French residents from foreign sources.<sup>21</sup> The Ministry, in turn, was empowered to study the technical and financial terms of the agreement as well as the probable effect on the development of French technology and to render a favorable or unfavorable opinion within forty days. While the legal effect of an unfavorable opinion was never clear—as the decree was not published pursuant to general exchange control regulations, nor were any special sanctions provided—parties acting without the Ministry's approval might anticipate difficulties with tax and customs authorities,<sup>22</sup> who were automatically notified whenever an unfavorable opinion was rendered. The purpose of the decree was not only to ensure that royalty payments abroad were not being made as a device to reduce French taxes but also to put the entire area of the licensing of industrial-property rights by nonresidents under local surveillance and control. It was hoped that French companies could be discouraged from taking foreign licenses—with their adverse effect upon the balance of payments and the development of local technology—when there were alternative French sources of supply.

### B. *Reimposition of Exchange Controls*

In the past three years there have been several modifications in this regulatory scheme. By far the most important of these changes has been the reimposition of exchange controls. Following the financial crisis of 1968 in France, there was fear that devaluation of the

---

18. Decree No. 67-78 of Jan. 27, 1967, art. 6(2), [1967] J.O. 1073, [1967] D.S.L. 81.

19. *Id.* art. 6(3).

20. *Id.* art. 6(4).

21. Decree No. 67-82 of Jan. 27, 1967, [1967] J.O. 1081, [1967] D.S.L. 83, *later implemented by* Arrêté (departmental regulation) of the Ministry of Industry, March 6, 1967, [1967] J.O. 3173, [1967] D.S.L. 173.

22. For further discussion of these difficulties, see Torem & Craig, *supra* note 1, at 691-92.

franc might become necessary. Under this pressure, the government issued Decree Number 68-1021 on November 24, 1968,<sup>23</sup> which reimposed exchange controls in substantially the same form as before 1967.

Once again, all exchange transactions, movements of capital, and payments of all types between residents and nonresidents of France were required to be channeled through *intermédiaires agréés*,<sup>24</sup> or authorized intermediary banks. These banks, which are listed in a Ministry circular,<sup>25</sup> play an essential role in the effectuation of exchange controls since they act as agents of the government pursuant to a delegation of power. They control all transactions that are permitted under a "general authorization." General authorization was given in the decree of November 24, 1968, for certain kinds of current payments for imported goods, services rendered, royalties and license fees, rents, interest, dividends, research and engineering exchanges, medical expenses, wages, insurance, taxes, inheritances, repayments of loans, and the like.<sup>26</sup> All other payments by a resident to a nonresident were prohibited unless specific authorization was obtained from the Ministry of Finance.<sup>27</sup> All imports in excess of 250 francs and all exports in excess of 1,000 francs were required to be registered with an *intermédiaire*.<sup>28</sup> Claims of French residents held abroad or against nonresidents and derived from the export of goods and services, as well as income earned by residents abroad or from nonresidents, had to be repatriated.<sup>29</sup> The amount of money that could be carried by French residents on trips outside France was also strictly limited and policed.<sup>30</sup>

The reimposition of exchange controls was designed as a purely monetary measure to support the currency. It was announced as both extraordinary and temporary,<sup>31</sup> but, as previous exchange controls

---

23. [1968] J.O. 11081, [1968] D.S.L. 325.

24. *Id.* arts. 1-2.

25. Arrêté of the Ministry of Finance, Aug. 26, 1969, [1969] J.O. 8642.

26. Decree No. 68-1021 of Nov. 24, 1968, art. 2, [1968] J.O. 11082, [1968] D.S.L. 325.

27. *Id.* art. 6.

28. Ministry of Finance Circulars of Nov. 24, 1968, [1968] J.O. 11087, [1968] D.S.L. 327; Nov. 25, 1968, [1968] J.O. 11105, [1968] D.S.L. 327; Nov. 27, 1968, [1968] J.O. 11171, [1968] D.S.L. 330.

29. Decree No. 68-1021 of Nov. 24, 1968, art. 6, [1968] J.O. 11082, [1968] D.S.L. 325.

30. Arrêtés of the Ministry of Finance, Nov. 24, 1968, [1968] J.O. 11085, [1968] D.S.L. 327; Dec. 31, 1968, [1969] J.O. 39, [1969] D.S.L. 36; April 11, 1969, [1969] J.O. 3592, [1969] D.S.L. 159; Dec. 23, 1969, [1969] J.O. 12578, [1970] D.S.L. 15; April 28, 1970, [1970] J.O. 4029, [1970] D.S.L. 121; Aug. 4, 1970, [1970] J.O. 7410, [1970] D.S.L. 223.

31. See International Herald Tribune, June 6, 1968, at 9.

lasted for nearly thirty years in France (from 1939 to 1967),<sup>32</sup> it may be doubted whether the new controls will be rapidly dismantled.

### C. *Changes in the Investment and Loan Control Mechanism*

Many of the recent changes in the procedures for clearance of direct investments and loans to borrowers in France are either adaptations related to the reimposition of exchange controls or clarifications required by practical experience with the regime erected in 1967. These changes left the basic dichotomy between direct investments and borrowings<sup>33</sup> intact and constituted, for the most part, refinements of these categories. The impact of the changes has been to subject all foreign direct investments and loans to added exchange control procedures. Loan and guarantee controls were also modified so as to maximize the favorable contribution of foreign loans to the French balance of payments and to minimize the possibility that outstanding foreign loans could be liquidated at times of currency crisis and thus weaken the position of the franc. The direct investment regulations were altered in minor fashion to be consistent with the exchange controls and, in theory, to free from control direct investments originating from other Common Market countries. While this modification was substantial in form, it will be shown that, because of parallel changes in exchange controls, there has been no significant liberation from French government control of direct investments in France—even investments originating from within the Common Market.

#### 1. *Loans and Guarantees*

In October 1969, a Ministry of Finance circular was devoted to clarifying the law on guarantees given in favor of French companies by nonresidents,<sup>34</sup> which have the effect of permitting the French company privileged access to franc-financing on the local French market. The circular deals with guarantees given by related foreign

---

32. Investment controls began with Decree of Sept. 9, 1939, [1939] J.O. 11266, [1939] D.P. IV. 412, and ended (temporarily) with Law No. 66-1008 of Dec. 28, 1966, [1966] J.O. 11621, [1967] D.S.L. 30.

33. See text accompanying note 17 *supra*.

34. Circular of the Ministry of Finance of Oct. 15, 1969, [1969] J.O. 10662, [1969] D.S.L. 388, *clarifying* Decree No. 69-264 of March 21, 1969, art. 1, [1969] J.O. 3066, [1969] D.S.L. 139, *amending* Decree No. 67-78 of Jan. 27, 1967, art. 3, [1967] J.O. 1073, [1967] D.S.L. 81, and Arrêté of the Ministry of Finance of March 21, 1969, [1969] J.O. 3067, [1969] D.S.L. 140, *amending* art. 1 and *abrogating* art. 2 of Arrêté of Jan. 27, 1967, [1967] J.O. 1074, [1967] D.S.L. 82. See Circular of the Ministry of Finance of March 21, 1969 (relative to investments), tit. I, pt. II, [1969] J.O. 3067, [1969] D.S.L. 140.

corporations (sister and parent) as well as with guarantees by unrelated entities.

The question of the treatment of guarantees by related corporations had earlier been in doubt. These guarantees were not foreign loans and therefore were not subject to the prior-authorization procedure. It could be argued that in many cases such guarantees do not per se constitute an increase of control, and hence should not be subject to direct-investment procedures. The new circular makes clear that all guarantees by related foreign companies (including guarantees by foreign banks based on guarantees by related companies and guarantees by other French related companies) shall be treated as direct investments and shall be subject to the prior-declaration procedure.<sup>35</sup> This means that such guarantees are subject to *ajournement*, or government veto, and that if no action is taken by the Ministry within sixty days the declarant may proceed to make the guarantee in question.

An exception to the direct-investment treatment for related guarantees is provided, however, for guarantees that meet the following three criteria: (1) the loan guaranteed must be motivated by the normal operations of the borrowing concern and must not be used by it for purposes amounting to an investment; (2) the aggregate of all outstanding advances and credits, including the one in question, must not exceed the aggregate of the borrower's stated capital, reserves, undistributed profits, and long-term advances from abroad, repayable after the advances in question; and (3) the aggregate amount of the planned loan, plus all previously guaranteed loans to the same firm, must not exceed 2 million francs.<sup>36</sup> Guarantees meeting these criteria are "free" (*i.e.*, no prior declaration is required), but proof that these conditions are met must be given to an *intermédiaire* before the guarantee is executed and an accounting must be made to the Treasury within twenty days after its execution.<sup>37</sup>

Guarantees given by nonresidents other than corporations of the same group are subject to the requirements for direct investments if such guarantees give control of the borrowing firm to the guarantor.<sup>38</sup> All other guarantees are subject to the rules on loans and

---

35. Circular of the Ministry of Finance of Oct. 15, 1969, tit. II, art. I(1), [1969] J.O. 10662-63, [1969] D.S.L. 388.

36. *Id.* tit. II, art. I(2)(B).

37. *Id.* tit. II, art. I(3).

38. *Id.* tit. II, art. II.



must receive a special authorization, unless the loan itself could be made without authorization, as described below.

As to loans themselves, Decree Number 67-78 had exempted from the prior-authorization procedure those borrowings that amounted to direct investments and were the subject of a prior declaration.<sup>39</sup> In addition, Decree Number 67-78 had exempted from authorization the following transactions: (1) loans from abroad to finance services rendered abroad or commercial transactions between France and foreign countries or between foreign countries; (2) loans to certain banks and finance companies; and (3) loans from abroad, as long as the borrower did not have a cumulative total of more than 2 million francs of such loans outstanding.<sup>40</sup>

Decree Number 69-264 of March 21, 1969, restricted the second category above by requiring that a borrower also be an *intermédiaire agréé* (i.e., an authorized bank) and struck out all the other conditions of exemption, authorizing the Ministry to provide them by circular.<sup>41</sup> The ministerial circular of the same date essentially recreated the exempt categories with modifications.<sup>42</sup> The first category above was limited to loans to industrial enterprises for the financing of operations performed abroad, to enterprises of any kind for the financing of imports into France or exports from France, and to brokerage houses for the financing of international operations.<sup>43</sup> To the 2 million franc maximum of the third category the circular added several new conditions: that the interest not be higher than the normal market rate, that the total amount of the loan be realized from the sale of foreign exchange or from the debit of a foreign franc account, and that full documentation be provided to an *intermédiaire agréé* and forwarded by it to the Treasury, together with a *compte-rendu* (an accounting), within twenty days.<sup>44</sup>

The latter two categories were again modified by circular on July 24, 1970. This circular required for both categories that the loans be expressed in a foreign currency and, when the corresponding franc value of the loan was put at the disposition of the borrower, that an interval of at least one year separate each repayment installment, that prepayment must not be permitted, and that, if renewal is

---

39. Decree No. 67-78 of Jan. 27, 1967, art. 6(1), [1967] J.O. 1074, [1967] D.S.L. 81.

40. *Id.* art. 6(2)-(4).

41. Decree No. 69-264 of March 21, 1969, art. 1, [1969] J.O. 3066, [1969] D.S.L. 139, amending Decree No. 67-78 of Jan. 27, 1967, art. 6, [1967] J.O. 1074, [1967] D.S.L. 81.

42. See Circular of the Ministry of Finance of March 21, 1969 (relative to loans), tit. I, [1969] J.O. 3068, [1969] D.S.L. 140.

43. *Id.* tit. I(A).

44. *Id.* tit. I(B).

allowed, it must be for at least one year.<sup>45</sup> The apparent purpose of these provisions is to encourage—or at least to permit—recourse to the international financial market for relatively long-term loans with stable terms. At the same time, short-term, “call” financing, which may have an unstable effect on the French economy and balance of payments in times of stress, is discouraged. Much financing of subsidiaries by foreign parents takes place pursuant to the provisions of this exception; and when special authorizations are required for larger loans to subsidiaries on conditions similar to those that would qualify a small loan under this exception, the authorization is usually granted. It is realized that such financing frequently takes the place of new contributions to equity and is equally stable. At the same time, these guidelines hinder resort to “thin” capitalization and overreliance on borrowing.

The circular of March 21, 1969, also detailed the duties of *intermédiaires*, pursuant to the 1968 exchange regulations, in handling the repayment of loans.<sup>46</sup> They were instructed to require evidence that the loans in question had been regularly contracted within the requirements of the law and that all the proper documents had been filed before transmitting the repayment. The necessity for a regulated exchange transaction at the time of repayment was thus used to enforce the regulations on loans. This circular further provided that the repayment of loans exempt from authorization could be freely postponed subject only to notification of the Treasury, but that prepayments could not be made without prior approval of the Treasury unless expressly provided for in the loan contract.<sup>47</sup> In the case of loans that required administrative authorization, no changes whatever could be made in the payment schedule without the prior consent of the Treasury.<sup>48</sup>

The March 1969 circular, together with an *arrêté* (departmental regulation) of the same date,<sup>49</sup> made it clear that *comptes-rendus* are required to be furnished to the Treasury within twenty days after

---

45. Circular of the Ministry of Finance of July 24, 1970, [1970] J.O. 7038, [1970] D.S.L. 218, amending Circular of the Ministry of Finance of March 21, 1969 (relative to loans), tit. I(2), [1969] J.O. 3068, [1969] D.S.L. 140.

46. Circular of the Ministry of Finance of March 21, 1969 (relative to loans), tit. II(1), [1969] J.O. 3069, [1969] D.S.L. 140.

47. *Id.* tit. II(2). After the circular of the Ministry of Finance of July 24, 1970, [1970] J.O. 7038, [1970] D.S.L. 218, the loan contract could not contain a prepayment clause and still be exempt from the prior-authorization requirement.

48. Circular of the Ministry of Finance of March 21, 1969, tit. II(2), [1969] J.O. 3069, [1969] D.S.L. 140.

49. Arrêté of the Ministry of Finance, March 21, 1969, [1969] J.O. 3067, [1969] D.S.L. 140.

the execution of all loans exempted from authorization by the terms of ministerial circulars as well as after execution of all loans that required authorization.<sup>50</sup> A *compte-rendu* must also be made within twenty days of the repayment of any loan whatsoever.

## 2. Direct Investments

The first change affecting investments came in March 1969 with a decree making the liquidation of French investments abroad subject to prior declaration and the Ministry's right to require postponement.<sup>51</sup> Prior to this decree, the liquidation of both French investments abroad and foreign investments in France could be carried out freely, with only subsequent notice to the Ministry within twenty days.<sup>52</sup> This rule remains unchanged for foreign investments in France. However, under the exchange control regulations, the funds resulting from the liquidation of a foreign investment in France cannot, in fact, be transferred abroad until supporting documents are presented to the Treasury through the *intermédiaire* and an affirmative response is received.<sup>53</sup> The apparent purpose of this procedure is to verify the "reality of the transaction," *i.e.*, to ensure that it was, in fact, the liquidation of a legitimate prior investment.

In June 1969, a Ministry of Finance circular made a special dispensation for liquidations involving less than 1 million francs.<sup>54</sup> In such cases, the *intermédiaire* would be licensed to transfer the liquidation proceeds without awaiting the Treasury's response to the supporting documents filed with the bank to justify the liquidation.

Although these changes were minor and reflected the necessity of stricter protection of the French balance-of-payments position, a much more drastic change in the fabric of direct-investment controls was made in February 1971 when, in settlement of a 1969 law suit instituted by the EEC Commission against France before the European Court of Justice,<sup>55</sup> France amended its direct-investment

---

50. *Id.*; Circular of the Ministry of Finance of March 21, 1969, tit. I(B)(3), [1969] J.O. 3069, [1969] D.S.L. 140.

51. Decree No. 69-264 of March 21, 1969, art. 1, [1969] J.O. 3066, [1969] D.S.L. 139.

52. *See* Decree No. 67-78 of Jan. 27, 1967, arts. 3(2) & 4(2), [1967] J.O. 1073, [1967] D.S.L. 81.

53. Circular of the Ministry of Finance of March 21, 1969, [1969] J.O. 3067, [1969] D.S.L. 140.

54. Circular of the Ministry of Finance of June 13, 1969, [1969] J.O. 6050, [1969] D.S.L. 260, *as modified*, Circular of the Ministry of Finance of Sept. 8, 1970, [1970] J.O. 8632.

55. *See* pt. III. B. *infra*.

controls to exempt direct investments between France and other Common Market countries. The amending decree stated that the prior-declaration procedures for direct investments shall not apply to

the constitution or the liquidation of direct investments in a member country of the European Economic Community other than France by French domiciliaries [*ressortissants*] whether natural persons, companies or establishments, nor to operations relative to the constitution in France of direct investments by domiciliaries [*ressortissants*] whether physical persons, companies or establishments of a member country of the European Economic Community other than France.<sup>56</sup>

It should be noted that, on its face, this liberalization is vast indeed, for not only does it free direct investment in France by nationals of the other EEC countries, but it also quite clearly frees direct investment made by a corporation duly established in a member country, even though that corporation is itself under foreign—possibly American—control.<sup>57</sup> Since, as will be described below,<sup>58</sup> it is just this “Trojan Horse” problem that has been at the root of France’s prior refusals to relax its direct investment rules with respect to intra-Common Market investments, it might be thought that this modification was significant indeed. Such was not the case, however, for on the same day that it relaxed its intra-EEC direct-investment controls, France tightened its *exchange* controls so as to subject to government authorization practically all the investment operations simultaneously liberated from the direct-investment controls. Under this new exchange control regulation, all direct investments—including those made from within the Common Market—are subject to the making of a prior declaration.<sup>59</sup> Then, the regulation continues, when these operations

are susceptible of causing a movement of capital, their realization requires a prior authorization from the Minister of Finance, and the “prior declaration” shall serve as a request for such an authorization. In other cases, and reserving the provisions of Decree No. 67-78 of January 27, 1967, the declaration serves statistical purposes.<sup>60</sup>

---

56. Decree No. 71-143 of Feb. 22, 1971, [1971] J.O. 1832, [1971] D.S.L. 128.

57. This result is clear from the meaning of the term *ressortissant* as applied to a corporation. See text accompanying notes 84-88 *infra*.

58. See text accompanying notes 85-104 *infra*.

59. Decree No. 71-144 of Feb. 22, 1971, [1971] J.O. 1832, [1971] D.S.L. 128, *modifying* the exchange control regulation, Decree No. 68-1021 of Nov. 24, 1968, [1968] J.O. 11081, [1968] D.S.L. 325.

60. Decree No. 71-144 of Feb. 22, 1971, art. 4, [1971] J.O. 1832, [1971] D.S.L. 128.

The import of these two modifications taken together is that, with respect to intra-Common Market investment, France has given up its specific veto power under the direct-investment regulations only to require a specific government authorization under the exchange control regulations when a direct investment gives rise to a capital movement.<sup>61</sup> Since the essence of foreign direct investment is the transfer of foreign capital, the "liberation" of intra-Community investment is largely illusory.<sup>62</sup> As to direct investments from outside the Common Market, the regime in practice remains the same: either the direct investment gives rise to a movement of capital, in which case it is subject to the requirement of a prior authorization as set forth above, or it does not, in which case the government still retains its right to impose a "postponement" (which can become permanent) pursuant to the provisions on direct investment in Decree Number 67-78.

While the over-all impact of these modifications is not substantial, there are some direct investments not giving rise to capital transfers that, insofar as intra-Common Market investment is concerned, are newly liberated. In particular, the *expansion* of French corporations controlled by domiciliaries of another Common Market country is no longer subject to authorization unless a capital transfer is required. Under prior law, every purchase or creation of a new plant or facility constituted a direct investment subject to government veto.<sup>63</sup> Now it would appear that as long as such French company expansion—including, apparently, even the acquisition of other French corporations—is financed within France, without a capital movement from abroad and without a guarantee given from abroad to French lenders, the government retains no power to impose a veto.<sup>64</sup> All this is, at most, a very small opening in the wall of controls.

It further appears that with respect to third-country investment

---

61. One result of the change of the regulatory basis for controlling foreign investment might be that the specific sixty-day "statute of limitations" given to the government to request an "*ajournement*" of an investment under the foreign investment regulations (Decree No. 67-78 of Jan. 27, 1967, art. (4)(1), [1967] J.O. 1073, [1967] D.S.L. 81) need no longer be respected, and the government may refrain from issuing an authorization for as long as it deems fit.

62. This is true even without considering the expansive interpretations that could conceivably be given by the Ministry of Finance to the term, "*susceptible of causing a movement of capital*," in the regulation.

63. Decree No. 67-78 of Jan. 27, 1967, art. 2(3)(B), [1967] J.O. 1073, [1967] D.S.L. 81. See Torem & Craig, *supra* note 1, at 686.

64. Note, however, that if local expansion is financed either by foreign loans, or by foreign loans or local loans guaranteed by nonresidents, the transaction is subject to regulation. See pt. II. C. 1. *supra*.

the government has reserved the right to apply the *ajournement* powers of direct investment Decree Number 67-78 even in those cases in which the direct investment does not cause a capital flow, or in which the extension of a controlled French corporation is financed locally or out of earnings. This is because, in the case of extra-Community investments, the government can rely on its direct-investment *ajournement* procedure as well as on the power to deny exchange control authorization.

#### D. Industrial Property Rights Contracts

Decree Number 67-82 of January 27, 1967,<sup>65</sup> which provided for the prior submission of all contracts with nonresidents involving the assignment of any industrial property rights, including technical, scientific, and engineering assistance, for ministerial review and opinion, was abrogated and replaced on May 26, 1970, by Decree Number 70-441.<sup>66</sup> The new decree makes no provision for an opinion or other expression of approval or disapproval on the part of the Ministry of Industry; rather it simply requires the filing of all such contracts with the Ministry after they have been executed. A number is then assigned to each contract; this number is to be used by the *intermédiaire* in clearing license fees or royalties for transactions abroad. The immediate reason for this change was the objection by the EEC Commission<sup>67</sup> that this French control of contracts involving industrial property rights contravened the provisions of the Treaty of Rome (EEC Treaty)<sup>68</sup> when applied to intra-Common Market contracts. After receiving a formal complaint by the Commission, France decided to liberalize the regulations for all, including American and other third-country licensors. On a broader plane, the revision represents a retreat from the attempts to regulate and influence private industry in acquiring foreign licenses and technology. It may be surmised that the prior efforts of the government to influence industrial policy by this contract mechanism were not sufficiently rewarded by positive results. The present filing procedure provides a mechanism that will permit the government to verify that royalty or other such payments made abroad are

---

65. [1967] J.O. 1081, [1967] D.S.L. 83, later implemented by Arrêté of the Ministry of Industry, March 6, 1967, [1967] J.O. 3173, [1967] D.S.L. 173.

66. [1970] J.O. 4991, [1970] D.S.L. 129.

67. 13 E.E.C. J.O. No. C 3/3 (1970) (response of Dec. 8, 1969, to a Parliamentary question of Nov. 13, 1967).

68. Treaty Establishing the European Economic Community, Done at Rome March 25, 1957, 298 U.N.T.S. 3 [hereinafter EEC Treaty].

bona fide and to ensure that neither exchange controls nor taxes are evaded.

E. *Monetary Regulations Affecting Investment and Financing*

The modifications of French exchange and investment controls during the period 1968 through 1970 as described above reflected in large part a desire to protect the franc from stronger currencies, particularly the American dollar. By August 1971, however, the dollar itself was in difficulty because of the ever increasing United States balance-of-payments deficit. In order to avoid outright dollar devaluation, on August 15 President Nixon imposed a ten per cent supplemental duty on all imports into the United States<sup>69</sup> and denied any further obligation to convert dollars into gold at the demand of foreign holders.<sup>70</sup> United States government representatives intimated a willingness to negotiate removal of the ten per cent surcharge on a selective basis with foreign governments that "co-operated" in solving the international monetary crisis.<sup>71</sup> It was the intention of this American policy to force selective revaluation of stronger currencies, while leaving intact the exchange ratios between the dollar and weaker currencies.<sup>72</sup>

The flow of more and more dollars into a few strong currency countries brought about significant pressures for revaluation. In most European countries, as well as in Japan, these pressures succeeded in causing the governments to permit their currencies to "float" in relation to the dollar.<sup>73</sup> The initial upward movement of these strong currencies in relation to the dollar, if not constituting a definitive revaluation, did momentarily ease the pressure for outright devaluation of the dollar.

France, however, was not ready to permit the general float or revaluation of the franc that could have impaired its long struggle

---

69. Presidential Proclamation No. 4074 of Aug. 16, 1971, CCH BALANCE OF PAYMENTS REP., ¶ 9070 (1971).

70. See Policy Guideline in President's Economic Program, released by White House Press Secretary, Aug. 15, 1971, CCH BALANCE OF PAYMENTS REP., ¶ 9073 (1971); Press Conference of Treasury Secretary John M. Connally of Aug. 15, 1971, CCH BALANCE OF PAYMENTS REP., ¶ 9072 (1971) [hereinafter Press Conference].

71. See Press Conference, *supra* note 70, at 9149.

72. The policy has proven in part to be successful. On December 19, 1971, the International Monetary Fund approved a new set of exchange rates negotiated by the Group of Ten, which effectuate a devaluation of the dollar and a revaluation of most of the other leading currencies. In addition the United States agreed to remove the 10% import surcharge. N.Y. Times, Dec. 20, 1971, at 1, col. 8.

73. See International Herald Tribune, Aug. 21-22, 1971, at 1, cols. 7-8 ("float" of currencies of Germany, Belgium, Netherlands); Aug. 23, at 1, col. 8 (Italy and U.K.); Aug. 27, at 7, col. 2 (Switzerland); Aug. 30, at 1, col. 8 (Japan).

to attain a positive trade balance. Accordingly, it instituted a complicated double exchange market made up of the "commercial franc," with an official dollar parity maintained by the government, and the "financial franc," which was to be allowed to float.<sup>74</sup> The commercial franc was basically to be used for the payment of imports and exports,<sup>75</sup> and by maintaining the existing parity it was intended that French exports should not become more expensive to foreign buyers. The financial franc was intended to cover all other transactions in France, including investments and financings by foreign residents as well as tourist expenditures.

The initial results were satisfactory from the French point of view. While the commercial franc remained pegged at 5.5 francs to the dollar, the financial franc floated and in the first few months of liberation the effective revaluation never exceeded three to four per cent. The complexity of the double exchange system was such that only France, with its long tradition of exchange and investment controls, attempted to use it as a method of preventing a general revaluation that would have hurt its trade position. The two-tiered system—and the very narrow uses of the commercial franc—had the effect of making foreign expenditures in France, such as investment, financing and even tourism, more expensive and hence, to some degree, less attractive.

The success of this system depended in part on limitation of the differential between the commercial franc and the financial franc. Accordingly, parallel measures were taken to limit—at least temporarily—the accumulation of dollars in France. These ad hoc measures, adopted informally in early November 1971, included the application of existing investment controls so as to limit foreign investments that would require the input of large amounts of dollars on the French exchange markets,<sup>76</sup> and the modification of existing trade controls so as to require the rapid payment for imports, thus forcing importers to purchase dollars and other foreign currencies to pay trade balances.<sup>77</sup> This latter provision was intended to prevent

---

74. International Herald Tribune, Aug. 21-22, 1971, at 1, cols. 7-8; at 9, cols. 2-4.

75. Circular of the Ministry of Finance of Aug. 20, 1971, [1971] J.O. 8313 ("Circulaire relative à l'exécution des transferts à destination de l'étranger"), [1971] D.S.L. 349 (payment for imports at commercial franc exchange rate); Circular of the Ministry of Finance of Aug. 20, 1971, [1971] J.O. 8313 ("Circulaire relative au rapatriement et à la cession sur les marchés des changes de créances sur l'étranger ou sur des non-résidents détenues par des résidents et à la cession du produit d'opérations en capital ou d'emprunt avec l'étranger"), [1971] D.S.L. 349 (procedure for repatriating proceeds of export sales).

76. See pt. IV. C. 1. a. *infra*.

77. Circular of the Ministry of Finance of Aug. 20, 1971, [1971] J.O. 8314, [1971] D.S.L. 349 (time delays for payments of imports).



speculation by importers on the eventual revaluation of the franc that would itself cause a pressure for revaluation. The regulation required not only payment for all imports within ninety days of the merchandise clearing customs, but also the immediate payment of all past due import balances.<sup>78</sup> This last provision had particular effect on French subsidiaries of foreign companies that had over long periods built up large balances owing to parent companies from which the subsidiaries had imported merchandise. These unpaid balances really amounted to long term debts, which were frequently replaced by the subsidiaries with local franc financing. The purchase of dollars resulting from implementation of the regulation temporarily mitigated pressures for further increases in the value of the floating franc. The fate of these informal measures is less clear now that a major monetary agreement has been reached.

### III. FRENCH INVESTMENT CONTROLS IN THE COMMON MARKET CONTEXT

#### A. *General Considerations*

French direct-investment regulations, as supplemented by the exchange controls and the recent modifications described above, are the most severe of any country in the Common Market. Indeed, the formal structure of foreign-investment regulations may constitute the highwater mark of regulation of foreign investment in the developed countries, with the exception of Japan. Such a structure causes stresses within the Common Market, which is dedicated to complete freedom of intra-Community investment and which, until now, has had a very liberal policy toward receiving third-country investment within the Market. We will examine first the problems created by the application by France of its controls to investments in France by other member countries, and then, more generally, the political and economic forces at work within the Common Market in developing a joint policy toward third-country foreign investment.

#### B. *Intra-Common Market Investment*

The basic economic principle of the Common Market is the elimination of barriers to the flow of goods, workers, services, and capital among the member countries.<sup>79</sup> Although the abolition of

---

78. *Id.*, art. 4 B. The payment for materials imported in the past was to be made within thirty days of publication of the circular.

79. See EEC Treaty arts. 9-37 (goods); arts. 48-51 (workers); arts. 52-66 (establishment and supply of services); arts. 67-73 (capital).

such barriers was envisioned to take place over a period of years, the end of the transitional period was formally fixed as December 31, 1969;<sup>80</sup> by that date freedom from customs barriers and residence formalities had largely been achieved.<sup>81</sup>

Article 67 of the EEC Treaty provides:

During the transitional period, Member States shall, insofar as may be necessary to ensure the proper functioning of the Common Market, progressively abolish between themselves restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or the place of residence of the parties or on the place where such capital is invested.

While directives issued under the Treaty permit the use of exchange controls and the verification of monetary flows between member countries, they contemplate that such verifications shall be routine and shall not constitute an occasion for the exercise of discretion by the receiving country in determining whether or not to permit the investment.<sup>82</sup>

It is obvious that the basic French investment controls, which are based not on the control of foreign exchange but on the control of foreign investment itself, contradict these directives. Further, and more importantly, the French regulations contravene the basic rights of establishment guaranteed by the EEC Treaty.<sup>83</sup>

Despite lengthy negotiations between the French government and the EEC Commission, France continued to insist on its right to impose the 1967 investment procedures on investments entering from member countries, although it did concede that it did not have the right to refuse investments originating from bona fide domiciliaries of member countries.<sup>84</sup> Failing satisfactory resolution of the problem, the Commission served on the French government, on April 17, 1969, an *avis motivé*, or formal complaint, requesting the termination of the application of direct-investment procedures to

---

80. Article 8 of the Treaty fixed a period of twelve years as the transitional period, with a possible extension for three additional years. See Rambow, *The End of the Transitional Period*, 6 COMMON MKT. L. REV. 434 (1969).

81. See [COMMUNITIES] COMMISSION, THIRD GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITIES 1969, at 15-17 (1970); [COMMUNITIES] COMMISSION, SECOND GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITIES 1968, at 21-22 (1969); ter Heide, *The Free Movement of Workers in the Final Phase*, 6 COMMON MKT. L. REV. 466 (1969).

82. As of 1960, Member States were to "grant all exchange authorizations required for the completion or execution of direct investments." First and Second Directives for Implementation of Treaty, art. 67, 1 CCH COMM. MKT. REP. ¶¶ 1651-67 (May 11, 1960).

83. See EEC Treaty arts. 52-53, 67.

84. Letter from French Government to EEC Commission of July 10, 1968, cited in "Affaire 66/69: Rapport d'Audience par le Juge Rapporteur Riccardo Monaco" (Luxembourg, Oct. 14, 1970 (mimeo)).

member countries.<sup>85</sup> Compliance was requested within forty-five days, with the proviso that extensions could be granted, upon request, if needed to obtain the necessary Parliamentary authorizations. France did not comply with the Commission's request and, on November 10, 1969, the Commission took the procedural steps required by Article 169 of the EEC Treaty to bring litigation before the European Court of Justice.

In the proceedings before that Court the Commission attacked—without too much opposition—the mechanism of the French direct-investment regulations that required the filing of a declaration for intra-Community direct investment in France even when there was no movement of capital.<sup>86</sup> It likewise attacked the reserved veto power—the *droit d'ajournement*—which was alleged to constitute an unlawful discrimination against nationals and domiciliaries of member countries other than France, since this veto power was not applicable to investments in France made by French nationals and domiciliaries.<sup>87</sup>

The key issue of the proceeding, however, turned on the correct interpretation of Article 221 of the Treaty, which provides:

Within three years of this treaty coming into force, Member States shall permit the nationals [*ressortissants*] of other Member States to participate financially in the capital of firms or companies, as defined in Article 58, in the same manner as their own nationals. This shall be without prejudice to the other provisions of this Treaty.

In its *avis motivé*, and in its pleadings before the Court of Justice, the Commission took the position that the right of establishment is given by the Treaty to corporations constituted under the law of other member countries and that a host country has no right to investigate the control of that corporation from the point of view of either the origin of its capital or the nationality of its management.<sup>88</sup> Finally, the Commission argued that the origin of the capital that is to be transferred may not itself be investigated

---

85. EUROPE, No. 319 (n.s.), April 22, 1969, at 7. See also E.E.C. J.O. No. C 3/14 (1970) (Commission response to a Parliamentary question of Oct. 27, 1969).

86. All information regarding the proceedings in the European Court of Justice are taken from the official document of the European Court of Justice entitled "Affaire 66/69: Rapport d'Audience par le Juge Rapporteur Riccardo Monaco" (Luxembourg, Oct. 14, 1970 (mimeo)) [hereinafter *Rapport*].

87. *Rapport*, *supra* note 86, at 3.

88. The Commission based its argument on the EEC Treaty, art. 58, which provides: Companies and firms [*sociétés*] formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purpose of applying the provisions of this chapter, be treated in the same way as individual nationals of Member States.

since it is the intention of the Treaty to favor the free transfer of capital within the Community in the same manner as it favors the transfer of goods and services.<sup>89</sup>

The French defense was based upon its consistent diplomatic position: while it was willing to receive freely investment from member countries, it was not willing to consider as a member-country investment one that comes through a Dutch, German, or Italian corporation dominated by interests from outside the Community.<sup>90</sup> France thus retains the right to scrutinize the pedigree of the corporate investor and to decide whether it should be treated as a national of a member country. The French government has even suggested that a common Community policy toward the problem of corporate control be adopted in order to trace more effectively the movements of capital from third countries, including capital that transits through a member country before being invested in another member country.<sup>91</sup>

In the proceedings before the European Court of Justice, therefore, the French government contested the Commission's application of the term "nationals [*ressortissants*] of other Member States" to corporations that might be formed in accordance with the law of a Member State and have their registered offices or places of business within such state, as set forth in Article 58, but that might in fact only be subsidiaries of foreign (third-country) corporations. It pointed out that a Treaty interpretation that would require a Member State to give "national" treatment to such a corporation was unacceptable to a Member State that might feel itself menaced by third-country investment.<sup>92</sup> In such cases, the Member State would be forced into a position of either complete *laissez-faire* on the one hand or total economic *dirigisme* on the other hand (*i.e.*, to control the investments of its own nationals and only then to be able to control that of foreigners as well). Accordingly, the French argued that the rights of such corporations must be limited to the narrowest right of establishment (as provided in Article 52)<sup>93</sup> and could not be extended to the right to invest.

---

89. The Commission here relied on art. 67 of the EEC Treaty, set out in text following note 81 *supra*.

90. During the negotiation of the EEC Treaty, France had apparently wanted to put into the Treaty provisions covering third-country controlled corporations, but nothing was done about the French proposal. See Scholten, *Company Law in Europe*, 4 COMMON MKT. L. REV. 377, 386 (1967).

91. *Rapport*, *supra* note 86, at 8.

92. *Id.* at 7.

93. Art. 52 provides:

In fact, the definition of Community corporations entitled to national treatment, as required by Article 58,<sup>94</sup> has long bothered French jurists. As early as 1959, Professor Loussouarn, a leading French expert on international corporate law, wrote:

It is thus seen that Article 58 of the Treaty of Rome seems to show a too great liberalism. Its application to the letter risks considering as nationals of the Community companies which, while having their registered head office in the interior of the Community, are in reality controlled by managers who are nationals of countries which are not signatories of the Treaty of Rome. This danger can be avoided only if the application of the text is coordinated with existing national systems relative to the determination of the nationality of corporations.<sup>95</sup>

Other commentators have tried by various far-fetched interpretations to establish that Article 58, when taken in conjunction with other provisions of the Treaty,<sup>96</sup> only applies to corporations that are established under the laws of a member country *and* that have a central place of business in such country.<sup>97</sup> However, Article 58 states that companies should be entitled to national treatment when they are formed in accordance with the law of a Member State and have "their registered head office, central administration *or* principal place of business within the Community."<sup>98</sup> As Loussouarn points out in dismissing the subtle interpretation thus attempted: "When, in the French language, three words are separated—the first two by a comma and the second and third by the conjunction 'or'—that

---

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period. Such progressive abolition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to engage in and carry on non-wage earning activities, to set up and manage undertakings and, in particular, firms and companies [*sociétés*] within the meaning of Article 58(2), under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

It is difficult to see how any effective right of establishment can exist without a right to invest.

94. See note 88 *supra*.

95. Loussouarn, *La condition des personnes morales en droit international privé*, 96 RECUEIL DES COURS 447, 489 (1959).

96. Notably art. 52, set out in note 93 *supra*.

97. See Chesne, *L'Établissement des Étrangers en France et la Communauté Économique Européenne*, in REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ at 283 (1959); Savatier, *Le Marché Commun au Regard du Droit International Privé*, in *id.* at 241.

98. See art. 58, set out in note 88 *supra* (emphasis added).

excludes any possibility that two of the three terms may be required cumulatively."<sup>99</sup>

Nevertheless, the French government had already officially adopted, in another context, the position that something in addition to a registered head office is required for a corporation established under the laws of a Member State to be able to claim Treaty rights. The government took this position with respect to the issuance of the *carte de commerçant*, or commercial trader's card, required for foreigners to engage personally in business, to serve as the director of a foreign branch in France, or to serve as chairman or president of a French corporation.<sup>100</sup> The necessity of obtaining this government authorization, which has been alleged by some to serve as a discouragement to certain foreign implantations,<sup>101</sup> would violate the Treaty's free-establishment provisions if applied to nationals of Member States. A number of Commission directives have required the abrogation of such provisions.<sup>102</sup> By Décret Number 69-815, France exempted nationals of Member States from the requirement of obtaining such an authorization for most kinds of commerce.<sup>103</sup> This decree provided, however, that with respect to performing commercial services in France either for his own account, or for the account of another Common Market *ressortissant* (whether a corporation or a natural person), the exemption was available to a natural person only if he was a national of a Member State *and was domiciled* in the territory of a Member State.<sup>104</sup> A corporation having only a registered head office in the Community qualified for the exemption only if it "exercised an activity having an effective and continued connection with the economy of a Member State."<sup>105</sup> The exact nature of this effective economic link with a Member State has not as yet been defined, either by statute or by case law. It would appear that, at the very least, this requirement would permit France to deny the *carte de commerçant* exemption to a "post office box" corporation of a Member State.

---

99. Loussouarn, *Les Sociétés et la Communauté Economique Européenne*, 140 REVUE DU MARCHÉ COMMUN 59, 62 (1971).

100. See E. STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS 35 (1971).

101. See Frank, *La Carte de Commerçant: An Example of Legal Restrictions on American Investment in France*, 5 HARV. INTL. L. CLUB J. 1 (1963).

102. First, Second & Proposed Third Directives of the Council of the EEC, 1 CCH COMM. MKT. REP. ¶¶ 1651-82 (May 11, 1960).

103. Decree No. 69-815 of Aug. 28, 1969, [1969] J.O. 8927, [1969] D.S.L. 335.

104. *Id.* art. 1. This means, for instance, that a Belgian citizen, domiciled in the United States, is not entitled to the exemption and would have to obtain a *carte de commerçant* like any extra-Community national.

105. Decree No. 69-815 of Aug. 28, 1969, art. 2, [1969] J.O. 8927, [1969] D.S.L. 335.

These concepts arguably could have been written into the direct-investment regulations in issue before the European Court of Justice, and France could have attempted to deny Treaty benefits to a "post office box" corporation being used as a simple device for the creation of a French subsidiary of a third-country corporation and the transfer of capital from that corporation. Indeed, the Common Market Commission itself had, on another occasion, taken the position that Treaty benefits should be granted only to corporations with a bona fide Community connection.<sup>106</sup> The fact is, however, that France desired a much more effective screen than the Commission's position offered. The system of direct-investment regulations, as applied by France, preserved its freedom to reject investments not only from the foreign-controlled "post office box" corporation within the Community but also from any Community corporation under foreign control, even though, for example, the Belgian or German corporation in question might have extensive operations within its home country. For this reason, France was forced to defend its regulations on the broad—and weak—grounds that the treatment of corporations as citizens of Member States entitled to national treatment pursuant to the Treaty should not be extended to the right to invest and transfer capital. At the same time, France wished to be able to use its application procedure to obtain full information and disclosure, even regarding strictly intra-Community investment having no ties to third countries.

Although the legal grounds of France's defense were weak, the wide scope of the political questions raised in fact became a strength. One sensed a certain hesitancy among Community officials to proceed to final judgment in a case in which the important issue of the status of Community corporations under foreign control would be adjudicated, and which might serve as a precedent limiting the Community's freedom to develop its own Community-wide policy toward third-country investment. With neither side very anxious to proceed to judgment, the scene was set for some sort of compromise. After the case had been briefed and argued before the European Court of Justice, France enacted, on February 23, 1971, the modified direct-investment and exchange control regulations, analyzed above.<sup>107</sup> It may be expected, therefore, that there will be no

---

106. See Council Directive of Dec. 18, 1961, 5 E.E.C. J.O. 36 (1962) (General Program for Suppressing Restrictions of Free Establishment).

107. See pt. II. C. 2. *supra*.

judicial resolution of the problems raised, and that, as a practical matter, the dispute has been settled.<sup>108</sup> The net result is that France, while formally complying with the Commission's request, has maintained practically intact its power to compel all direct investments to be made the subject of an application for authorization, as well as those veto powers earlier possessed. The Commission, on the other hand, has gained a formal victory over a recalcitrant Member State and has maintained its freedom of action to develop a Community policy toward third-country investment.

### *C. Investment from Outside the Common Market*

From the outset, the Community's outlook has been one of openness to third-country investment (which as we shall see, means largely American investment), with this approach being challenged frequently by France. The issue was first brought to light at the initial meeting of the European Parliamentary Assembly in 1958. In these proceedings, the French Prime Minister, Michel Debré, asked whether the Commission had taken a position on third-country—and particularly American—investment and suggested that a common Community policy should be taken toward any such investment that posed dangers to the Member States.<sup>109</sup> In its reply, the Commission showed itself to be entirely favorable to third-country investment within the Community and discouraged the attempt to establish an exclusionary Community policy.<sup>110</sup> It did state, however, that it was aware of specific problems that might result from overconcentration of foreign investment in certain industries and that it would hold itself ready to consult with Member States and to receive and disseminate information about such investments.<sup>111</sup>

In subsequent responses to Parliamentary questions, the Commission took the position, in 1962, that there were no provisions in the EEC Treaty enabling the Commission to oppose third-country investment,<sup>112</sup> and, in 1964, that the Commission would continue

---

108. It is not certain that the EEC Court would always decline to decide such issues, despite the apparent settlement reached by the parties. Cf. *Acciaierie e Tubificio di Brescia c. Hohe Behörde*, No. 31/59 (Eur. Ct. J. June 26, 1959).

109. 1 E.E.C. J.O. 25 (1958).

110. *Id.* at 25-26.

111. *Id.* at 25-26.

112. 5 E.E.C. J.O. 894 (1962). This early opinion seems to have been confirmed recently in the statement by the Commission, made in response to a Parliamentary question, that the proposed purchase by Litton Industries, a U.S. conglomerate, of a German typewriter manufacturer would not prima facie violate any EEC antitrust



to follow the situation carefully.<sup>113</sup> While noting that statistics available from Member States had not been sufficient to permit the formation of solid conclusions, the Commission suggested that third-country investment had aided Community growth.<sup>114</sup> The Commission could be said to have made the tentative conclusion that Community enterprises would be able to react successfully to foreign investment without changing the framework of the EEC Treaty.<sup>115</sup>

Since 1965, however, the Commission's response to specific third-country investment problems has in some cases been more reserved, although in no case has there been any effective action at the Commission level to bar a particular foreign investment. In 1969 the Commission requested an independent study of the effect of American investment in the Common Market electronics industry. The report from the study generally opposed continued expansion of any American investment that threatened the existence or impeded the formation of European enterprises within the electronics industry.<sup>116</sup> The report is still under study by the Commission. Also in 1969 the Commission, in response to a Parliamentary question, opposed the further expansion in Europe of Westinghouse by its proposed takeover of the Belgian company, Ateliers de Construction Electronique de Charleroi, as part of an over-all European expansion move.<sup>117</sup> Finally, with respect to the proposed 1970 takeover by the American company, International Telephone and Telegraph

---

provisions, and that, in any event, alleged antitrust violations could be investigated only in accordance with the procedure set forth in Council Regulation No. 17/62. See *New Developments*, 2 CCH COMM. MKT. REP. ¶ 9342 (1970) (reply to written question No. 344/69).

113. 7 E.E.C. J.O. 3725 (1964).

114. *Id.* at 3725-26. The Commission's conclusion that it has inadequate statistical information on which to base an opinion appears to continue. See 13 E.E.C. J.O. No. C 13/5 (1970) (response of Jan. 21, 1970, to a Parliamentary question of Oct. 27, 1969).

115. An over-all review of the Community's attitude toward third-country investment during the period 1958-1965 is found in W. BALEKJIAN, *LEGAL ASPECTS OF FOREIGN INVESTMENT IN THE EUROPEAN COMMUNITY* (1967).

116. *New Developments*, 2 CCH COMM. MKT. REP. ¶ 9326 (1969) (summary of 170-page report, *The Electronic Industry of the Common Market and American Investment*.)

117. *Id.*, ¶ 9327 (1969) (translation of Commission response, 12 E.E.C. J.O. No. C 129/1 (1969)). The response stated in part:

In the Westinghouse case, one may well ask whether reciprocal holdings by European firms, which would also help to overcome the present isolation of the national markets and preserve genuine competition in these markets would not be preferable to a reorganization of the electrical industry under American leadership . . . . Furthermore, the Commission believes that a Community policy is needed and that the solution to the problem of striking a balance between Community and foreign capital lies in the very dynamism of European industry itself . . . . In the Commission's view, there is no question of conflict between Member States and the institutions of the Community over the goals to be pursued in the matter of foreign investments.

Corporation (ITT), of General Biscuit (a European enterprise formed in 1965 by the pooling of assets of two German, five Belgian, four French, one Italian, and two Dutch companies), the Commission suggested, after observing that the takeover bid had not, after all, been successful, that General Biscuit had developed to the point that outside financing or technical help was no longer needed. Accordingly, it concluded:

[T]he acquisition by ITT of an enterprise that was already an outgrowth of a merger of Community firms would have offered none of the advantages with regard to strengthening the European industrial structure which can sometimes be used to justify similar operations.<sup>118</sup>

It thus appears that the Commission has begun to develop opinions regarding third-country investment not so much in terms of hostility to foreign investment as such but rather in relation to the impact of such investment on the "European industrial structure." This approach implies a theoretical basis of the ideal development of industry within the Common Market. While no agreement has as yet been reached among the Member States on this subject, the Commission's thinking is revealed in its 1970 study, *La Politique Industrielle de la Communauté*.<sup>119</sup> In this interesting document, the Commission finds that while it is absolutely necessary for industrial concentration to take place on a Community level, *i.e.*, to create *European* enterprises, in fact the only significant concentrations by Europeans have been on the national level within single Member States. As the Commission found:

The only international liaisons which are developing at a relatively rapid rhythm are those which unite community enterprises and those of third countries in general from the United States. They consist most often in the purchase or the taking over of control by a more powerful enterprise from a third country. While admitting the great interest which ties with firms from third countries may present, the Commission believes that the search for a better equilibrium in this domain must become an objective of the Community.<sup>120</sup>

It has thus become the policy of the Commission to favor the formation of "European enterprises"—whose capital and management will come from member countries and whose center of decision will

---

118. *New Developments*, 2 CCH COMM. MKT. REP., ¶ 9389 (1970) (Commission's answer to a written question).

119. COMMON MARKET COMMN., *LA POLITIQUE INDUSTRIELLE DE LA COMMUNAUTÉ* (1970).

120. *Id.* at 27.

be in Europe—of sufficient dimensions to meet the competitive challenge of “giant enterprises from the other side of the Atlantic.”<sup>121</sup>

Statistics furnished by the Commission in its study tend to prove the conclusion that third-country enterprises have made better use of the opportunities for concentration offered by the union of the six than have the enterprises of the Community countries themselves. From 1961 through 1969, third-country enterprises established over 3,500 new subsidiaries within the Community; during the same period Community enterprises created only 2,300 new subsidiaries in other Community countries.<sup>122</sup> Third-country enterprises also were more active in taking over a controlling interest in existing corporations in member countries. The statistics show 820 such takeovers (or mergers) during the period, compared with 257 takeovers of corporations in member countries by enterprises in other member countries during the same period.<sup>123</sup>

The Commission, in its report, refers to the valuable contribution of foreign investment to growth and innovation and denies any thought of reacting to the problem by a policy of narrow protectionism.<sup>124</sup> The report goes on to state:

The very rapid development of foreign investment in the community over the last ten years can, however, for certain sectors of the economy, pose difficult political and economic problems, as is witnessed by the attitude of member states at the time of one or another particular foreign investment operation.

....

This problem is posed, above all, in sectors where, because of the present weakness of European industry, these purchases threaten to prevent, for a long period of time, the birth and development of European transnational industries. The consequences which result . . . show the complementary nature of a program of industrial structures and a policy adopted towards foreign takeovers. A Com-

---

121. *Id.* at 27.

122. *Id.* at 92.

123. *Id.* at 92. The complete statistics (based on a private firm's survey) are as follows for the period 1961-1966 (first six months only): Unilateral Establishment:

From member country to member country	2300
From third country to member country	3546
From member country to third country	1158

Cooperation—Minority Participations—Cross Interests—Joint Subsidiaries:

Between enterprises in same country	1352
Between enterprises in Common Market	1001
Between member country enterprises and third countries	2797

Mergers and Takeovers of Control:

Within same member countries	1861
Between different member countries	257
From a member country to a third country	215
From a third country to a member country	820

124. *Id.* at 169.

munity policy towards industrial structures would be in fact very difficult to effect if common attitudes towards takeovers were not developed.

In the view of the Commission, such a concert of purpose need not be reflected at all by a general restrictive policy in regards to purchases or takeovers by third country enterprises. But in cases where these takeovers go against objectives pursued by the governments—objectives which may be not only economic, but may also be tied to notions of national security—and which have motivated the public powers to make important financial and economic sacrifices, the Commission believes that a common policy must be found. In effect, it appears necessary that the member states henceforth pursue on a Community level the program which they have followed on a national level, now put into question by the narrowness of the national dimension. This drawing together would permit the adoption of a common position for the few sectors where the purchase of enterprises of significant dimensions imperils the legitimate objectives pursued by member states or defined by the Community.<sup>125</sup>

It remains to be seen whether the ideas developed in this document will grow into a realistic program for the development of "European" enterprises and whether this in turn will lead to a formal Community policy on third-country investment. Any such policy will necessarily draw much from the French legislation and policy with regard to foreign investment, for its controls are the most developed, and the Community can learn from their successes and failures. France will continue to apply the greatest pressure for adoption of such a Community policy, for it is well aware that the effectiveness of its foreign investment policy will be severely limited as long as a foreign investment denied approval in France is welcome in the neighboring Common Market countries.

#### IV. CURRENT TRENDS IN THE EXERCISE OF FRENCH CONTROLS

##### A. *The Dimension of the Foreign Investment Problem*

The problem of foreign investment in France, and the French reaction to it, can be best understood by first examining the amount of such investment, its growth, and the degree of foreign control of certain sectors of the French economy. Precise examination of these matters is made difficult by the fact that statistics on direct investment are to some extent inaccurate. Published French statistics, although kept in great detail, are reported on a balance-of-payments basis, so that real increases in control, or in the growth of controlled capital assets, may be hidden by money transfers back

---

125. *Id.* at 171-72.

to the controlling countries as dividends or long-term loans. Furthermore, the French statistics frequently credit foreign investments to such transfer countries as Switzerland, Luxembourg, or sometimes Belgium without revealing the true identity of the investor. For this reason, most economists in France rely to a great degree on United States Department of Commerce statistics—which are based on a survey and reporting basis—to detail the amount of American investment in France; these figures, supplemented by French Ministry of Finance and Ministry of Industry statistics, give a reasonably complete picture.

American statistics indicate the following progression of United States annual direct investment in France on a net capital outflow basis:<sup>126</sup>

(millions of dollars)

1960	1961	1962	1963	1964	1965	1966	1967	1968	1969
53	76	124	164	139	152	93	138	-27	83

These statistics are roughly confirmed by French Ministry of Finance figures for the same period, which likewise show that annual American investment grew only moderately from 1962 to 1967, with a sharp cutback in 1968.<sup>127</sup> These Ministry of Finance statistics show that during this same period investment from other EEC countries grew more rapidly, continuing without decrease even through 1968.<sup>128</sup>

The United States statistics on net capital outflow, while including loans from United States parent companies to subsidiaries and investment in plant and equipment of the proceeds of foreign loans or other financing, still reflect money movements more than they reflect the permanent impact of American investment. The most important statistics from this latter point of view are the following figures, which reflect the growth of *cumulative* investment in France and the revaluation of controlled assets through currency revaluation and include retained earnings and royalties.<sup>129</sup>

126. U.S. DEPT. OF COMMERCE, SURVEY OF CURRENT BUSINESS 29 (Oct. 1970), 24 (Oct. 1968), 42 (Sept. 1967), 34 (Sept. 1966), 24 (Sept. 1965), 10 (Aug. 1964), 18 (Aug. 1963), 22 (Aug. 1962), 22 (Aug. 1961) [hereinafter SURVEY].

127. MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES, ÉVOLUTION DES MOUVEMENTS DE CAPITAUX PRIVÉS ENTRE LA FRANCE ET L'ÉTRANGER 1962-1968, at 3, 5 (1970).

128. *Id.* at 3.

129. SURVEY, *supra* note 126, at 28 (Oct. 1970), 24 (Oct. 1968), 42 (Sept. 1967), 34 (Sept. 1966), 24 (Sept. 1965), 10 (Aug. 1964), 18 (Aug. 1963), 22 (Aug. 1962), 22 (Aug. 1961).

(millions of dollars)

1960	1961	1962	1963	1964	1965	1966	1967	1968	1969
741	860	1630	1240	1446	1609	1758	1904	1904	2091

Even these statistics, based on the value of controlled assets, do not tell the full story because the accounting principles involved tend to understate value.<sup>130</sup> Moreover, in the case of a French corporation controlled by an American corporation, but with French minority shareholders, only the value of the percentage of shares actually owned by the American corporation is included in the above statistics. From the French point of view, the entire corporate value should be shown as under foreign control.

The value of cumulative American direct investment in France has regularly been estimated to constitute between forty and fifty per cent of all foreign direct investment in France.<sup>131</sup> Since, on the basis of income tax returns, the total net asset value of French enterprise is said to be approximately 56 billion dollars,<sup>132</sup> foreign investment is seven per cent,<sup>133</sup> and American investment is 3.5 per cent of that total value.

These figures cannot in themselves be alarming to even the most fervent French proponents of protectionism. American investment in France is, in absolute figures, half of what it is in Germany and a third of what it is in the United Kingdom.<sup>134</sup> Furthermore, in terms of American investment per capita, France has one of the lowest figures of the countries in the EEC,<sup>135</sup> as the following data indicate:

Belgium-Luxembourg	\$76 per capita
Netherlands	\$69 per capita
Germany	\$52 per capita
France	\$36 per capita

Yet behind these figures lies the real fear of French advocates of control of foreign investment: the specter of the giant corporation

130. The distortion is due to the use of historical costs to derive the figures. Such figures rarely represent the current value of the underlying asset or investment; the distortion gets worse over time with persistent inflation.

131. MINISTÈRE DE L'INDUSTRIE, RAPPORT SUR LES INVESTISSEMENTS ÉTRANGERS DANS L'INDUSTRIE FRANÇAISE 3 (1965) (Bockanowski Report); Rivoire, *Investissements Internationaux, Étrangers en France, Français à l'Étranger*, L'ECONOMIE 22 (No. 1.104, Feb. 14, 1970).

132. Rivoire, *Le Dossier des Investissements Étrangers* (No. 1, Jan. 19, 1970) (Mimeograph, Crédit Lyonnais).

133. *Id.* at 2.

134. See SURVEY, *supra* note 126, at 28 (Oct. 1970).

135. See *Les Investissements Américains dans la CEE*, in DOCUMENTATION EUROPÉENNE 1970 (Série Syndicale Européenne No. 9, Aug. 18, 1970).

under foreign control exercising disproportionate influence over certain sectors of the economy. If it be true that cumulative foreign investment represents only seven per cent of French commercial assets, it is also true that very little of this investment is devoted to agriculture, transportation, public services, construction, the retail trade, and ship-building. Foreign investment is localized in industry, and here French corporations under foreign control represent not seven per cent, but at least ten to fifteen per cent of asset value.<sup>136</sup> The theory that foreign investment tends to concentrate in large blocs with potential influence over key sectors of the economy seems to be confirmed by the observation that, of 110 French corporations reporting sales of more than 100 million dollars annually, 22 are foreign controlled.<sup>137</sup>

American investment in France is certainly not limited to giant enterprises, however, and Department of Commerce statistics indicate that there are 528 American companies doing business in France through branches, subsidiaries, or joint ventures.<sup>138</sup> Of these, 160 companies have more than 200 employees and 43 have more than 1,000. Chrysler's subsidiary, SIMCA, with 21,000 employees, is the largest.

The domination of certain key sectors of the economy by foreign interests has long been a fear of the government.<sup>139</sup> According to the most recent unofficial estimates, foreign-controlled corporations now account for fifty per cent or more of French production in the following sectors: metals and machinery (zinc metallurgy, tractors, printing presses and equipment, office equipment, ball bearings, and razor blades); electrical equipment and electronics (heavy electrical motors, elevators, telephone equipment, computers and peripheral

136. See Rivoire, *supra* note 132, at 2. (These figures are computed by including the entire value of the corporate assets when foreign interests have majority control of the corporation.)

137. *Id.* The companies were identified as follows:

American: Bull-General Electric, Esso Standard, General Motors France, I.B.M. France, Ideal Standard, International Harvester France, Kodak Pathé, L.M.T.-C.G.C.T., Mobil Oil Française, SIMCA.

Belgian: Jeumont-Schenider, Solvays, S.P.I.E.-Batignolles.

Dutch: Phillips-Radiotechnique Group.

Anglo-Dutch: Lever-Astra Group, Shell.

British: BP, Dunlop.

Swiss: Compagnie Electro-Mécanique, SOPAD.

Italian: F.F.S.A.

Canadian: Massey-Ferguson.

138. AMERICAN FIRMS, SUBSIDIARIES AND AFFILIATES—FRANCE, U.S. DEPT. OF COMMERCE, BUREAU OF INTL. COMMERCE (1970).

139. For official, if now out-of-date, statistics on such sectors of the economy, see the summaries of the 1962 Ministry of Finance and 1963 Ministry of Industry reports in Torem & Craig, *supra* note 1, at 674-75.

equipment, semi-conductors, cathode tubes, recording tape, records, and electric razors); chemical products (abrasives, detergents, synthetic rubber, carbon black, and photographic equipment); and food products (biscuits, margarine, concentrated milk, instant coffee, and powdered soup).<sup>140</sup>

It is such examples of the penetration and control of specific industries, rather than the level of foreign investment itself, that provide the basis for government policy toward foreign investments. As the French government has pointed out, the continued expansion of the French economy has resulted in annual foreign investment representing a progressively smaller percentage of annual productive investment in France.<sup>141</sup> Therefore, one could expect the government's policy toward foreign investment to be highly selective. After some general reaction against American and other foreign investment in the earliest years of foreign penetration, French policy has evolved toward a generally favorable reaction to foreign investment with opposition reserved to selective cases of foreign control.

#### B. *The Background of Foreign Investment Policy and Latest Official Pronouncements*

The authors have earlier described the French government policy toward foreign investment prior to 1968.<sup>142</sup> It can be summarized briefly as extremely receptive through mid-1964, at which time a definite chill set in through the actions of the then Minister of Finance, Valéry Giscard d'Estaing, who was acting under the aegis of President de Gaulle. During the period 1964-1965, a number of investment applications were denied, and the government failed to act on a number of others for sufficiently long periods of time that some of the investors eventually went elsewhere. These policies resulted in a substantial drop in foreign, and particularly American, investment, the effect of which was felt in 1966. However, no generalized set of investment criteria was established during this period.

140. Rivoire, *supra* note 132, at 4.

141. MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES, *supra* note 127, at 3. The figures show the following relation of gross foreign annual investment in France:

1962	4.8%
1963	4.3%
1964	5.3%
1965	4.9%
1966	4.0%
1967	4.2%
1968	3.2%

142. See Torem & Craig, *supra* note 1, at 701-03.



In January 1966, with the appointment of Michel Debré as Minister of Finance, a period of relaxation set in, and the general policy reflected a presumption in favor of foreign—including American—investment with the possible exception of cases in which sensitive national interests were involved.<sup>143</sup> This has continued to be French policy, but events since 1968 have led not only to modification in the investment control regulations themselves, as described earlier,<sup>144</sup> but also to some rethinking of investment criteria.

The general approach toward foreign investment—and, once again, it should be stressed that the principal problem is seen as being American investment—was spelled out in speeches given by President Pompidou and Prime Minister Chaban-Delmas in early 1970. Prior to departing for an official visit to the United States, during which he was to visit with President Nixon, President Pompidou called a cabinet meeting (*Conseil Interministériel*) to consider the problem of foreign investment. The highlights of this meeting, as released to the press, were as follows: (1) foreign investments were to be considered favorably as long as French national interests were respected; (2) the formation of the Institut de Développement Industriel (a government organization designed to provide selected French enterprises with refinancing, recapitalization and, in some cases, merger with other French companies, in order to provide a French industrial solution in certain key areas and to serve as a positive counterbalance to foreign takeover bids) was announced; and (3) greater favor was to be shown to foreign investors who create a new company, and new productive capacity, rather than simply take over existing French companies.<sup>145</sup>

President Pompidou developed his thoughts on the subject in a speech given at the Waldorf Astoria in New York on March 2, 1970, in the following terms:

Not only do we not refuse American investments, but we are disposed to favor them. Nothing, in my view, would be more prejudicial to French interests than to see American companies establish themselves only in the other countries of the Common Market. If Great Britain becomes a member of the Community, this position of principle would become even more marked, I will say even determinative for the future of the Common Market. We will not accept being considered only as a "consumer market." This leads us to desire "production," that is the establishment of factories.

---

143. *Id.* at 703.

144. See pt. II. C. 2. *supra*.

145. *Le Monde*, Feb. 21, 1970, at 22, col. 3.

This is what I have had the occasion to say, for example, to Henry Ford or David Rockefeller.

But it is true that our industry is in full transformation, that it sometimes only finds with difficulty the necessary capital, and that its organization, frequently still family structured, raises obstacles to concentration. The state thus can not take a hands off attitude. It must aid and encourage concentration, and it must, during this period of change, protect. That is why we are entirely open to the implantation in France of American corporations, but we adopt a selective attitude towards the takeover of French enterprises by foreign groups of whatever nature.

We wish to avoid having sectors of industry fall under foreign control under conditions which would, moreover, frequently violate your own anti-trust legislation. We seek to prevent this type of operation from impeding earlier concentrations on the national level, and we insist that these takeovers, when they do take place be accompanied by a real enrichment of our economy, notably in the area of research, and the prospection of the entire European market. It is in this spirit that I was led, for example, to oppose the purchase of Jeumont-Schneider by Westinghouse, but I would not be at all opposed to cooperation between the French group, which will, I hope, concentrate and rationalize this entire sector of our heavy electrical equipment industry, and a European or American group, whether it be Westinghouse or another.<sup>146</sup>

These same points were further developed in a speech by Prime Minister Chaban-Delmas before the Franco-American Chamber of Commerce in New York on April 6, 1970. The Prime Minister emphasized that France would adopt a selective attitude toward American takeovers of French companies and would authorize those "which have positive advantages in terms of employment, research and development and exports, provided that they do not adversely affect the industrial reorganization going on in France."<sup>147</sup> As proof of France's positive attitude toward American investment, the Prime Minister pointed to the opening in New York of the office of the French Industrial Development Agency created by DATAR.<sup>148</sup> This new agency was created to inform Americans of possible investment

---

146. *Id.*, March 4, 1970, at 2, col. 1.

147. *Id.*, April 17, 1970, at 20, col. 1.

148. The *Délégation à l'Aménagement du Territoire et à l'Action Régionale* [hereinafter DATAR] is the agency charged with industrial area planning and regional development, whose principal purpose is to effect decentralization and to encourage investment in underdeveloped areas of France, all within the framework of the government economic plan. With regard to both foreign and domestic investment, DATAR grants important investment incentives, including grants and tax reliefs, to investments complying with the established criteria. DATAR also has a voice on the Interministerial Council, which finally decides on the authorization of foreign investments, and may seek to oppose investment proposals not complying with its goals.

opportunities in France and of the possibility of obtaining French government subsidies or tax relief for investments that promote decentralization and aid to certain regions of France in accordance with the government's economic plans. In addition, the Prime Minister stated that new implantations (as opposed to takeovers) would generally be favored and that French corporations under foreign control would not suffer discriminatory treatment.

### C. *Investment Criteria*

In determining what investments will be welcome in France, the Ministry of Finance and the Interministerial Council have applied broad and flexible criteria. Because of the nature of the political and economic factors involved in the determinations, these criteria cannot be anything but guidelines. They are informal and are not published. Nevertheless, certain issues appear to be regularly taken into consideration.

#### 1. *Factors Favorable to the Granting of Investment Authorization*

a. *Positive contribution to French balance of payments.* Ordinarily, acquisitions or implantations by foreign companies in France will be accomplished by the transfer of substantial capital from abroad, which must be converted into French francs on the official exchange market, and will have a favorable effect on the balance of payments. This would not be the case, however, if the foreign investor were permitted to finance the investment by franc-borrowing. Accordingly, it is virtually impossible to get government approval of a foreign takeover that is to be funded by franc-financing on the French market. Similarly, an investment will not be approved if the financial plans call for a small contribution of foreign capital followed by large borrowing in francs. The general rule is that at least fifty per cent of the foreign investment, whether takeover, implantation, or extension of an existing French subsidiary, be financed by transfer of foreign exchange from abroad. Finally, it is difficult, if not impossible, to obtain authorization for the purchase of stock in a French company in exchange for stock of the investing foreign company since such stock-for-stock deals are not helpful to the balance of payments.

In addition to the requirement of a one-to-one ratio between foreign financing and French financing of direct investments, there

is a further government preference that a company under foreign control maintain a reasonable "equilibrium" between equity and debt. While there is no fixed capital-to-debt ratio, the Ministry will not approve a direct investment application that calls for "thin incorporation" and a very high debt structure. This preference applies, in principle, even when the debt is incurred from a foreign source, for while recourse to foreign borrowing is favored over franc-financing, the government also prefers that the foreign-exchange contribution come in the form of sunken capital. Thus, substantial foreign or domestic borrowing is a negative factor. The existence of a very large foreign debt may serve as a force toward future currency speculation, and large domestic debt is a strain on the French financial market. Moreover, the government's interest in requiring the maintenance of a reasonable equity-to-debt ratio continues after the investment has been effected, and if the annual reports filed with the Ministry show a substantial imbalance in favor of borrowings, the Ministry may request the capitalization of loans or undistributed earnings.

These requirements of a positive contribution to the French balance of payments have been imposed to a lesser or greater degree since the reimposition of foreign investment controls in 1967. An unannounced suspension of these criteria by the Ministry of Finance, commencing in November 1971, was occasioned by the pressures for revaluation of the franc, following upon defensive monetary measures taken by the United States.<sup>149</sup> It became a part of the French international monetary position to discourage the accumulation of dollars (and other foreign currencies) in its central banks. Instead of requiring an input of foreign exchange as a condition of permitting foreign investment, the Ministry, in an heretical about-face, has required resort to those devices—stock swaps, local franc borrowings for investment, deferred contribution to capital increases—which had so recently been forbidden.

For the moment, the French strategy is to defer by all reasonable devices any import of dollars so that the franc maintains a low profile vis-à-vis the dollar and therefore as a less rich country the revaluation of the franc will be smaller than might be required of the richer dollar possessors such as Japan and Germany. These new criteria, which constitute a dramatic departure from past French policy, will probably only be applied as a short-term measure during a period of monetary instability. In the long run it will continue to

---

149. See pt. II. E. *supra*.

be to France's advantage to seek, in most cases, to require a positive contribution to its balance of payments as a price of foreign investment authorization.

b. *Establishment of a new company as opposed to a takeover.* The idea of encouraging foreign interests to create new companies rather than to take control of an existing French company is appealing. The establishment of a new enterprise often results in the infusion of new productive capital and new plant and equipment. On the other hand, in a takeover, frequently the purchase price paid to the owners (often a controlling family) is used in passive investment instead of being reinvested in new industrial projects. In practice, the takeover has been difficult to discourage and the government has realized that denying authorization for a foreign takeover of a failing corporation will not necessarily preserve that company for the economy, particularly if a new and dynamic competitive foreign implantation is permitted. Nevertheless, when there is a choice between competing foreign investments, the one that proposes establishment of a new company and new industrial plant will ordinarily be preferred.

c. *Technical contribution to the French economy.* The French government realizes that in certain industries—particularly those based on the newest scientific developments—foreign industry may be in advance of French industry and that in some cases foreign investment is the only practical way of bringing these developments rapidly to France. As a price for permitting such investment, however, the government is anxious to assure that the technical developments and the ongoing improvements benefit the French economy. What it wishes to guard against is the takeover of an existing commercial network in order to sell items that will be imported in whole or in part from abroad, thus leading to the exploitation of France as a mere consumer market. By the same token, the government would disfavor the installation in France of already depreciated industrial equipment that will soon be outmoded by newer developments taking place abroad. In order to advance French interests, the government may frequently require, as the price of authorizing an industrial implantation, that the company make a commitment to install a research facility in France. It is hoped that by this device new developments will originate in France and that French personnel will be in the *avant-garde* of technological and industrial developments rather than simply in the position of applying techniques developed abroad.

d. *Competition in a sector of the economy suffering from lack of competition.* The French economy is in many sectors characterized by small units, frequently family structured, which may require some protection during the present period of reorganization and concentration.<sup>150</sup> At the same time, there are a few areas of industry, frequently those requiring a very large capital investment, in which the relatively small size of the French market has led to virtual single-company monopolies. When these conditions exist, the French government will favor the entry of competition even if foreign companies are the only effective possibility. An example of the application of this policy was the authorization given to Alcoa to establish an aluminum extrusion facility in France at Châteauroux in l'Indre.<sup>151</sup> Alcoa constituted welcome competition for Pechiney, a giant company that engaged in all facets of the aluminum industry throughout the world and controlled about ninety per cent of the French aluminum industry.

e. *Aiding France's over-all economic plan and decentralization policy.* A study of the French attitude toward foreign investment cannot be understood without considering the French government's role in directing economic growth in general and decentralization from the Paris region in particular. Economic goals for the French economy are established in an over-all five year plan (Le Plan) that the government seeks to implement, on the one hand, by its control of public expenditures and the management of the large sectors of the economy dominated by government-owned corporations (the aviation industry, insurance companies, some banks, and some automobile companies) and, on the other hand, by offering incentives or imposing penalties for certain activities of privately owned concerns. The decentralization program is a specific instance of this guidance: substantial subsidies and tax-saving programs are available for new industrial implantation in depressed areas. Foreign companies seeking to invest in France are entitled to obtain such subsidies on the same footing as local companies. Investment applications will tend to be favored if they will result in creating new jobs in zones designated by the government; by the same token, insistence on implantation in an area considered to be overcrowded—notably the Paris region—may result in a refusal.

f. *French participation in the corporate decision-making process.* One of the greatest fears engendered by foreign investment is

---

150. See text accompanying note 146 *supra*.

151. R. DICKIE, *FOREIGN INVESTMENT: FRANCE* 86 (1970).

that important management decisions about investment, development, and operations will be made not in France but abroad at the headquarters of a parent company, where French interests will not be sufficiently considered. Even though management of the local subsidiary may be confided largely to French personnel this local influence is not a full solution to the problem, because key decisions will necessarily be made by those who have the ultimate control of the subsidiary. Put another way, the problem of the so-called multinational company is that the power of control is exercised neither by the nationals of the country where a subsidiary is established nor by a mixed group of nationals from a number of countries where operations are conducted. Rather, the control is exercised exclusively by the key members of the management and board of directors of the foreign parent company, who have the nationality of the country where the parent company is located. Thus, key decisions affecting French subsidiaries are very frequently made in the United States by Americans, who may be more concerned about what is good for the entire multinational group than what is good for the French subsidiary. Not all decisions favor the American parent, but they may favor one country over another instead of letting each foreign affiliate do what is best for itself. Hence, unfairness to local interests can, and sometimes does, result. A few multinational companies—particularly those in highly developed technological industries—are responding to this psychological problem by naming foreign personnel to key positions in the parent company itself. Thus, the president of IBM World Trade Corporation is a Frenchman, Jacques Maisonrouge, and there are a number of other foreigners on the board of directors. Another company in the computer industry, Control Data Corporation, has named as its vice-president in charge of international operations a Frenchman, Gérard Beaugonin. Other examples abound. These experiments are still in their infancy, but a multinational company whose organization has been designed to permit management personnel from foreign subsidiaries to succeed to decision-making posts in the parent company will be looked on with favor when it seeks to establish itself in France.

## 2. *Factors Unfavorable to the Granting of Investment Authorization*

Obviously, the principal factor weighing against investment approval is the failure to meet the positive criteria described above. But the following special situations, which may lead to refusal of authorization, also merit consideration.

a. *Domination of a sector of the economy.* As pointed out earlier,

there are a number of sectors of the French economy in which foreign-controlled subsidiaries already account for more than fifty per cent of the sector's production.<sup>152</sup> That an entire area of the French economy might fall under foreign control is a pervading fear in certain government circles. The reaction is to preserve the French elements in the area by refusing authorization for a takeover or for the installation of a new enterprise if either would result in a foreign firm dominating the activity. It is also true that domination most frequently arises in an area where the foreign company's technological advances permit it to attain a position of control that mere size and economic strength alone could not have attained. An example would be the semi-conductor industry in France, which is dominated by American subsidiaries. In this area, the government had a difficult decision to make, because a refusal to permit foreign investment might have prevented the French economy as a whole from profiting by the new developments.

b. *Interference with an officially sponsored "privileged field."* The government response to the threat of foreign domination has been to sponsor, in certain key areas, a "French" solution. This has been accomplished by applying incentives to induce mergers resulting in local entities of dimensions sufficient to meet foreign competition. These companies may then be favored in the awarding of contracts by the government and its nationalized corporations. In the computer "software" field, for example, the *Plan Calcul* was designed to secure a French solution for at least part of the computer industry. (The computer "hardware" sector was already substantially dominated by the foreign-controlled companies, IBM and Bull-General Electric/Honeywell.) If a proposed new foreign investment would jeopardize such a government-sponsored program, it might well be refused. It should be emphasized that the areas in which such government concerns exist are very few indeed.

c. *Excessive "border area" investments.* There is at least one field in which official concern is directed at something other than American investment. The problem exists in the areas of France bordering on Germany—particularly Alsace—where German capital has been invested extensively and at an ever-increasing rate, both in takeovers of companies and in the establishment of new companies. It has been estimated that from 1955 to 1968, thirty per cent of the 30,000 new jobs created in the area have been the result of German investment.<sup>153</sup> While government concern about this growing foreign

---

152. See text accompanying note 140 *supra*.

153. *Les Echos*, April 14, 1969, at 4, col. 3.



influence is real, opposition would be difficult politically because it would necessitate moving against another member of the Common Market, and also because economically the Alsace area desperately needs new investment to replace the dying coal and steel industries. Hence, the latest official position is that no government action will be taken against such foreign investment, but that a special effort now should be made to encourage new and counterbalancing national investment.<sup>154</sup> It is not certain, however, that an attempted investment in a particularly sensitive border area might not meet renewed government opposition today.

It should be made clear that, although these criteria are considered by the government in its decision-making process, they do not constitute hard-and-fast rules. As the authors originally emphasized in 1968, there never have been published any official guidelines for foreign investment.<sup>155</sup> This is still true. The administration continues to reserve the right to weigh each application separately, and deliberately rejects the formulation of a detailed investment code in the interest of preserving its ad hoc administrative discretion. It is therefore more meaningful to consider some of the cases in which the veto power has been exercised, with recognition of the fact that only a handful of cases a year meet with rejection and that hundreds of foreign investments are eventually authorized.

#### D. *Some Examples of Investment Refusals*

##### 1. *Bull—Bull-General Electric—Honeywell-Bull*

No example demonstrates both the concern of the French government toward foreign investment and the practical limits on the power of government intervention better than the complicated history of Compagnie des Machines Bull, the leading French computer company. The story, which has been described in some detail elsewhere,<sup>156</sup> can be divided into three acts.

First, in February 1964, the French government opposed General Electric's (GE) bid to take a minority participation in Bull. Bull, the largest strictly French computer company, had impressive technical qualifications and was commercially well established with an

---

154. *Id.* (remarks of Couve de Murville, then Prime Minister).

155. See Torem & Craig, *supra* note 1, at 702.

156. The most complete version of the first episodes in the Bull saga, including reproduction of the pertinent official government and corporate documents, is found in VEILLARD, *L'AFFAIRE BULL* (S.P.A.G., Paris, 1968). See also R. DICKIE, *FOREIGN INVESTMENT: FRANCE 68-71* (1970).

excellent sales and service network covering Western Europe. However, by 1962 it found itself technically outdistanced in several fields by IBM's French subsidiary. Because of its relatively small size in comparison with the multinational computer giants, its finances were strained to the breaking point by the effort to maintain a competitive budget for ongoing research and development and by the special financial burdens arising from the necessity of marketing computers by means of a self-financed leasing program. In these circumstances, discussions were entered into with GE to make arrangements for that company to take a twenty per cent participation in Bull. Although the final financial terms were not agreed upon, discussions were based upon a proposal calling for the issuance of 700,000 new shares at forty dollars per share, which would have constituted a contribution to capital of 28 million dollars.<sup>157</sup> In addition, GE promised technical assistance to Bull and development of Bull's own research facilities. On February 4, 1964, following lengthy consultations between Bull and the French government, but prior to final agreement between the parties themselves on the precise terms to submit to the government, the Minister of Finance advised Bull that the government would oppose this foreign investment.<sup>158</sup> The government favored a "French" solution and attempted to impose one by withholding government credits and orders from Bull until it was agreed that a new French group would be permitted to take over effective control of Bull. The new group was to be comprised of two technical companies, C.S.F. (Compagnie Générale Télégraphie Sans Fil) and C.G.E. (Compagnie Générale d'Electricité), and two financial groups, Banque de Paris et des Pays Bas and a consortium of French government controlled banks. The new group obtained a twenty per cent participation in Bull for 7 million dollars as the result of the purchase of 700,000 new shares at ten dollars per share. Further increases in capital and further long-term bank financing were acknowledged to be necessary and were envisioned. A remarkable part of the arrangement, sponsored by the Ministry of Finance, was that the new holders of twenty per cent of the equity were to obtain control of two thirds of the board of directors.<sup>159</sup> But while this "fire-brigade" solution secured some interim bank financing for Bull, which was then on the verge of bankruptcy, and responded to some of the concerns of the French government about the manage-

---

157. VEILLARD, *supra* note 156, at 34, 40-41.

158. *Id.* at 62.

159. *Id.* at 145.

ment structure of Bull, it did not solve any of the long-range technological and commercial problems of the company.

It was in these circumstances that new discussions (which may be termed the second act) were undertaken with GE in the interest of responding to the needs of Bull while meeting the objections of the Ministry of Finance. The result was the splitting up of the operating portions of Bull into two parts: Société Industrielle Bull-General Electric (S.I.B.G.E.), the research and production unit, in which Bull retained fifty-one per cent of the shares and GE obtained forty-nine per cent; and Compagnie Bull General Electric (B.G.E.), the sales and service organization, which would be controlled by GE with fifty-one per cent of the shares. GE's payment for these shares amounted to 210 million francs, or approximately 42 million dollars. This participation was equal to a purchase price for Bull shares of approximately fifteen dollars per share. The new arrangement was vastly different and far less desirable to Bull than the original proposal of approximately forty dollars per share for the twenty per cent interest. The new structure became effective in November 1964, after receiving the formal agreement of the Minister of Finance.<sup>160</sup> GE, with government approval, subsequently increased its holdings in these two companies to sixty-six per cent of the shares, because the French interests failed to respond to subsequent calls for increased capital.

If the second act of the Bull drama demonstrated the limitations on the government's ability to utilize its control powers to impose a solution contrary to the commercial forces at play, the third act demonstrated just how volatile those forces could be. After years of struggle to gain a lasting foothold in the computer market, General Electric in 1970 entered into an agreement with its American competitor, Honeywell, to transfer its computer operations throughout the world to a new company that would be dominated by Honeywell. This transfer of control of the Bull subsidiaries from one American company to another required French government authorization. After receiving adequate assurances from Honeywell that the level of local employment would be maintained and that research would continue to be conducted in France, the government granted its authorization and Bull-General Electric became Honeywell-Bull.<sup>161</sup>

## 2. *Westinghouse—Jeumont-Schneider*

If the "Affaire Bull" demonstrated French concern for the key computer sector of the economy, the "Affaire Westinghouse" was

---

160. *Id.* at 178.

161. *International Herald Tribune*, July 30, 1970, at 7, col. 3.

motivated by a similar concern for the heavy electrical equipment sector.<sup>162</sup> The leading French company in this area is Jeumont-Schneider, an affiliate of the famous Schneider complex. Interestingly enough, this company had been partially under foreign control since 1966 when the young Belgian financier and heir to an industrial empire, Baron Empain, took a twenty-five per cent interest in the parent, Schneider S.A., and a sixty-five per cent interest in Jeumont-Schneider itself. In 1968 Westinghouse opened negotiations with the Baron to acquire both his Belgian electrical equipment company, Ateliers de Construction de Charleroi (partially controlled by the Empain Group), and Jeumont-Schneider. The intent of Westinghouse was to create a multinational "European" heavy electrical equipment consortium through the acquisition of its French, Belgian, Spanish, and Italian licensees.

The first request for authorization for the takeover was made in October 1968; the reaction of the de Gaulle government at that time was to withhold authorization pending realization of a hoped-for French solution to the problem. With the change of government following the resignation of President de Gaulle in April 1969, a second attempt to obtain authorization was made. Assurances were expressly given that a research facility would be created in France to ensure French and European participation in the future development of this key industry. On December 5, Xavier Ortoli, Minister of Scientific and Industrial Development, told the Westinghouse executives that the government considered maintenance of the heavy electrical industry in French hands as "a national imperative."<sup>163</sup> Consequently, authorization was denied. The French solution created to offset the proposed Westinghouse takeover was a concentration between the French companies of Alsthom and C.G.E. (Compagnie Générale d'Electricité).<sup>164</sup> What further international alliances this new French group will be required to enter in order to attain the size and stature necessary for further development in this key industry is not yet certain; nor is it certain what larger group Jeumont-Schneider will eventually join, the Westinghouse arrangement having failed. In the meantime, Westinghouse goes forward with its European plan, excluding, for the moment, France.

---

162. The Westinghouse-Jeumont-Schneider case was widely reported in the French and international press. For some of the background, see Bonnot, *Energie: L'Atome aux Mains des Industrielles*, L'Express (Paris) Dec. 1-7, 1969, at 90, 91, col. 1; Enterprise, Dec. 20, 1969, at 53, col. 1.

163. *France Blocks Westinghouse Combine*, International Herald Tribune, Dec. 6, 1969, at 1, col. 5.

164. Le Figaro, Dec. 7, 1969.

### 3. *Leasco—SEMA*

In early 1969, the American company, Leasco, negotiated with the French company, SEMA, to obtain a minority interest in SEMA and further expand its computer software and computer leasing programs in Europe.<sup>165</sup> The SEMA group consisted of a French parent company, SEMA (Metra International), having both French and foreign (German, Belgian, Spanish, British, and Italian) subsidiaries, and having approximately 2,000 employees. Leasco, which had gotten its start in computer leasing in 1961 and had rapidly expanded into "software" activities, employed approximately 8,500. Its shares, first opened to public trading in 1965, had enjoyed a spectacular increase in value through 1969. On February 5, 1969, the presidents of the two companies announced that Leasco, in return for a contribution of 60 million francs, would take a twenty per cent interest in the capital of SEMA and that the entry of other European companies into the group was possible. It was intended, however, that the majority interest would remain in French hands.<sup>166</sup>

The acquisition, which involved both the taking of a substantial equity interest and a program for cooperation with the American company, required the authorization of the Minister of Finance,<sup>167</sup> and an appropriate investment declaration was made. As time passed, the parties began to suspect that the deal could not obtain the requisite approval. Finally, on April 20, Leasco, realizing that its bid was in fact being rejected by the process of delaying tactics, withdrew its offer.<sup>168</sup>

The government's refusal of an American minority acquisition in the computer software field demonstrated its strong intent to preempt for local interests the software field, in which the smaller capital expenses involved do not require the intervention of a huge multinational company as do the greater capital outlays in the computer hardware field. It was reasoned that the taking of a minority interest by a much larger foreign company would lead eventually to an increase in this participation and eventual foreign domination. This is the same thinking that was manifested in the government's "Act I" intervention to prevent General Electric from taking a twenty per cent interest in Bull.

This policy of protectionism toward the fledgling French com-

---

165. *Le Monde*, Feb. 5, 1969, at 26, col. 5.

166. *Id.* (announcement by the management of SEMA).

167. *See* text accompanying notes 9-13 *supra*.

168. *Le Monde*, April 20-21, 1969, at 28, col. 1.

puter software industry had earlier been applied to prevent another American company (Auerback Corporation) from obtaining a forty per cent interest in the French software firm, CEGOS.<sup>169</sup> The policy has not, however, been applied blindly. At the end of 1969, the Minister of Finance authorized the creation of a joint venture between CEGOS (fifty-one per cent), the Crédit Lyonnais (twenty-nine per cent), and the California company, Tymshare (twenty per cent), for the creation of a new telephonic computer time-sharing operation based on the American company's developments and experience.<sup>170</sup> This venture did not create the problem of a takeover of a French activity since it involved the creation of new technical activity through the coordination of the assets of the partners.

#### 4. *ITT—Pompes Guinard*

ITT, today America's eighth largest industrial enterprise,<sup>171</sup> owes its rapid growth over the last ten years to a policy of diversification that has changed it from an electrical and communications manufacturer to a high-flying conglomerate.<sup>172</sup> One of its diverse activities includes the manufacture of pumps, and it is represented on the French market in this activity by its control of Pompes Salmson, a French company acquired in 1962.

In 1968, ITT sought control of a second French company in this sector, Pompes Guinard. Combined with its existing activities, this acquisition would have given ITT forty per cent of the French market. Conscious of the sensitivity of the government to foreign domination of an industrial sector, ITT stressed in its application that the center of the French company's decision-making would remain in France, that the management would remain French, that it would pursue locally industrial research, and that it would develop export markets and create new jobs.<sup>173</sup> It also emphasized that the purchase would be favorable to France's balance of payments, not only because increased exports would be possible through ITT's distribution network, but also because the Guinard factory in Châteauroux could be used to supply electric motors to Salmson, which until then had purchased two thirds of its requirements from abroad.<sup>174</sup>

---

169. *Id.* at col. 2.

170. *Les Echos*, Dec. 5, 1969, at 7, col. 1.

171. *The Fortune Directory of the 500 Largest Industrial Corporations*, FORTUNE, May 1971.

172. See *I.T.T.—A Study in Diversity*, FINANCIAL WORLD, Dec. 10, 1969, at 5.

173. See *International Herald Tribune*, Feb. 6, 1970, at 7, col. 2.

174. *Les Echos*, Oct. 22, 1969, at 2, col. 4.

Despite ITT's attempts to assuage French fears, Ministry of Finance authorization was postponed temporarily in February 1970. ITT spokesmen declared that the company would protest this refusal of investment authorization to the Nixon Administration and to the State Department.<sup>175</sup> The protest, if in fact officially made, was not effective and the *ajournement* of direct investment authorization became *définitive* in June.<sup>176</sup>

### 5. Fiat—Citroën

French authorities have remained traumatized from the effects of the acquisition in 1963 of the major French automobile manufacturer, SIMCA, by Chrysler.<sup>177</sup> This takeover was effected by the purchase of publicly held shares on the French Bourse by Swiss intermediaries, and was not subject to government veto pursuant to then prevailing exchange control regulations.<sup>178</sup> Since that time the administration has watched closely over the industry, and it is safe to say that any further attempted American penetration by way of a takeover in the basic production area would meet vigorous opposition. At the same time, the other elements of the French national automobile industry, including the state-owned company, Renault, and more particularly the independents, Citroën and Peugeot, have sought to expand their vistas to a European or multinational basis.

Citroën, representing twenty-five per cent of French production, was the most active in seeking an alliance, in part because of its need for outside financing and in part because of its need for commercial outlets for marketing of exports, a field in which it had traditionally lagged behind Renault and Peugeot.<sup>179</sup> The search for such an arrangement was facilitated by the fact that control of Citroën rested largely in the hands of the Michelin family, who also controlled France's largest tire manufacturer.<sup>180</sup> This situation attracted the interest of the giant Italian automobile manufacturer, Fiat. In September of 1968, Fiat and Citroën jointly announced that an

---

175. International Herald Tribune, Feb. 6, 1970, at 7, col. 2.

176. Les Echos, June 19, 1970, at 1, col. 2.

177. For a further discussion of details of the takeover, see R. DICKIE, *supra* note 156, at 71.

178. Present investment controls provide that purchase on the stock exchange of shares is exempt from direct-control procedures only if the purchaser acquires less than 20% of the corporation's outstanding stock in this manner. Decree No. 67-78 of Jan. 27, 1967, art. 2(3)(b), [1967] J.O. 1073, [1967] D.S.L. 81.

179. See Thelier, *Le Gouvernement va se prononcer sur l'opportunité d'un accord entre Citroën et Fiat*, Le Monde, Sept. 27, 1968, at 1, col. 5, and at 22, col. 3.

180. Le Monde, Oct. 1, 1968, at 24, col. 1.

accord in principle had been reached, pursuant to which Fiat would take approximately a thirty per cent interest in Citroën (by the formation of a holding company—to be owned fifty-one per cent by Michelin and forty-nine per cent by Fiat—to acquire Michelin's interest in Citroën), and that a series of joint marketing arrangements would be entered into.<sup>181</sup> The agreement was subject to the obtaining of any required government authorizations.

On October 12, 1968, the office of the Prime Minister announced that the government would not permit the investment, although no objection was voiced to the principle of technical and commercial cooperation. The government's reason was said to be the desire to maintain the "independence of an important French industrial corporation" and to ensure the continued equilibrium of the French automobile industry and the employment situation therein.<sup>182</sup>

The denial of this intra-Common Market investment surely violated the provisions of the EEC Treaty.<sup>183</sup> Nevertheless, the parties were not anxious to raise the legal question,<sup>184</sup> and instead continued to work toward an agreement acceptable to the government. On October 28, 1968, the two firms announced a new agreement pursuant to which the Italian group would acquire only fifteen per cent of the capital of Citroën. This time the French government voiced no objection.<sup>185</sup>

Finally, two years later, in July 1970, Fiat renewed its bid to take a larger interest in the capital and management of Citroën, by the same method of taking a forty-nine per cent share in a company having fifty-three per cent of the shares of Citroën. In a different climate of political opinion, the French government offered no opposition, and Citroën became part of a multinational enterprise.<sup>186</sup>

#### 6. *Perfumes: Helena Rubenstein—Parfums Rochas*

By 1970, a substantial part of the French perfume industry was already under foreign control.<sup>187</sup> The French government had im-

---

181. *Le Monde*, Sept. 29-30, 1968, at 1, col. 5.

182. *Le Monde*, Oct. 12, 1968, at 21, col. 2.

183. EEC Treaty art. 67.

184. A question was raised by a legislator in the European Parliament regarding the Treaty violation, but the Commission's answer, while clearly setting forth the applicable freedom of investment principles, stated that it had no information permitting it to conclude that an investment application had been denied by the operation of a forbidden national investment regulation. This was the result of the French government's making its objection on a political level and presumably not by a written investment refusal. See 12 E.E.C. J.O. No. C 6/3 (1969).

185. *Le Monde*, Oct. 29, 1968, at 25, col. 1.

186. *Le Monde*, July 30, 1970, at 10, col. 1.

187. It has been said that only four of the fifteen major French perfume com-



posed no veto upon the acquisitions of Belmain and Raphael by Revlon, of Coty by Pfizer, of Caron by A.H. Robbins, of Molyneux by Union International Company, of Forvil by Bristol Myers, of Lucien Lelong by Nestlé Lemur, of Lenthéric by Beecham, and of Corday by Max Factor.<sup>188</sup>

Parfums Rochas was a likely candidate for a foreign takeover. It ranked sixth among French perfume manufacturers and, while having a very substantial turnover, had little penetration of the important United States export market.<sup>189</sup> In these circumstances, an American buyer with knowledge of the American market should have been able to give the company its greatest chance for an increase in export sales. At the same time, there were important internal reasons for selling to outside interests. While a substantial interest in the company was owned by the widow of the founder of the company, who also managed the company, there were important minority interests held by active managers within the company. Litigation had developed between the two factions and a receiver had been appointed to manage the business because of the conflict. The Rochas family felt that a sale to a third party would be a solution to the litigation.

The American company, Helena Rubenstein, Inc., which already had substantial interests in the beauty products field in France, made an offer to purchase eighty per cent of the company for 24 million dollars,<sup>190</sup> a figure representing a price/earnings ratio of about twenty-to-one. On June 10, 1970, the Ministry rejected this "American solution" to the problem.<sup>191</sup> The grounds were apparently that although many promises had been made in the past by American purchasers of cosmetic and perfume companies, in fact export targets propounded to induce France to authorize the takeovers had seldom been realized. As no technology was involved in this proposed takeover, there was no special reason for the government to acquiesce in the American bid. Instead, a local solution was favored. The leading French pharmaceutical house, Laboratoires Roussel-Uclaf, concluded

---

panies remain under strictly French control. See R. DICKIE, *supra* note 156, at 76. A distinction should be made, however, between the beauty products and toilet products sector of the industry on the one hand, in which approximately 50% of the industry is under foreign control, and the alcohol-based perfume sector (scent making) on the other hand, in which foreign penetration is only 17%. Les Echos, June 10, 1970, at 4, col. 4.

188. Le Figaro, June 10, 1970, at 16, col. 7.

189. *Id.*

190. Les Echos, June 10, 1970, at 16, col. 7.

191. Le Figaro, June 10, 1970, at 16, col. 7.

a takeover arrangement in October 1970.<sup>192</sup> Oddly enough, a controlling interest in Roussel-Uclaf is held by a German chemical concern. If a strictly French solution was not produced for Rochas, at least a European solution was found.

#### 7. *Food Products: Grey Poupon and Orangina*

It should not be thought that Ministry of Finance disapproval has been reserved solely for foreign investments in key sectors of the economy, such as automobiles, or in highly developed technical areas, such as computers. Recently two foreign investments in the food products field have been vetoed.

On December 8, 1970, the Finance Ministry rejected the H. J. Heinz proposal to acquire a controlling interest in Grey Poupon, an important local Dijon mustard manufacturer with a gross turnover of about 10 million dollars per year.<sup>193</sup> The acquisition of this specialized, one-product company would have given Heinz a toe-hold in France.

Both companies were well known and therefore a capital movement among such prominent parties excited special administrative scrutiny, not of the financial terms and royalties, but of the export potential afforded by Heinz as purchaser balanced against the loss to the French patrimony of a strong, albeit small, piece of its economy. The economic reason for the refusal was that Heinz, which was not essentially in need of a local mustard source, really wanted a strong French distributing organization to market its products produced abroad. Poupon, therefore, would have given a strong distribution network to Heinz and would have made it possible for Heinz to flood France with foreign food imports, thus injuring the struggling and fractionized French food industry. This detrimental effect would have been unaccompanied by any real advance in technology and would have been balanced by only a dubious increase in exports. In this situation, the administration concluded France would be better served by a purchase by a French concern or, failing that, by a Common Market group. Accordingly, it was announced on January 2, 1971, that the French company, Chocolats Poulain, would take over Grey Poupon at the same price that the American company would have paid.<sup>194</sup>

A similar veto was invoked by the Ministry several weeks later

---

192. *Les Echos*, Oct. 9, 1970, at 6, col. 1.

193. *Les Echos*, Dec. 29, 1970, at 6, col. 1.

194. *Les Echos*, Dec. 24, 1970, at 6, col. 1.

in regard to a bid by General Foods Corporation to acquire Orangina, the large French soft drink company.<sup>195</sup> The apparent motivation for the government's refusal was not so much outright opposition to foreign penetration in this nonstrategic sector of the economy as it was a desire to stave off a foreign takeover until it could be determined whether a competing French takeover could be arranged. In the food products industry, as in a number of other industries, there has been a program of incentives to encourage industrial concentrations in the interest of structuring efficient and competitive French industries. In the Orangina case, the tactic worked: a French solution was found when a bid by the French companies, Ricard and Pernod, was forthcoming<sup>196</sup> with the encouragement of the Institut de Développement Industriel.<sup>197</sup>

## V. CONCLUSIONS

The discussion in the preceding section of a few of the more recent negative government actions on foreign-investment proposals illustrates the discretionary powers of the French government in applying its foreign-investment procedure. There are no formal statutory criteria for the granting of foreign-investment authorizations with which the government is required to comply. The law thus provides no limitations on government agency action, but rather a procedure pursuant to which government discretion may be exercised. The discretionary judgment is made on the basis of undefined economic and political factors.

In fact, the reservation of state discretionary powers to deal with special problems that foreign investment may pose is not an unusual occurrence in the world today. In exceptional cases, foreign investment may be thought to impinge on national sovereignty itself, or at least to pose a threat to national goals.<sup>198</sup> In such cases, states can be expected to act in formal or informal ways to oppose the investment.

Occasionally, an investment may be rejected simply as an act of state without reliance on specific statutory authority. At other times, diplomatic or informal channels of communication may be used to inform the interested parties that the investment will not be permitted. Such ad hoc intervention, while reflecting the discretionary

---

195. *Les Echos*, Dec. 29, 1970, at 6, col. 1.

196. *Les Echos*, Dec. 24, 1970, at 6, col. 1.

197. See text accompanying note 145 *supra*.

198. See A. LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 187-88 (W. Surrey & C. Shaw ed. 1963).

powers of the state, can only be used in unusual circumstances and, in the absence of a requirement for notification of foreign investment, there is always the possibility that a government will be faced with the *fait accompli* of a completed foreign investment without having been able to take measures against it.

In contrast to these regimes in which no formal investment control procedures have been established, the French have created a formidable system of exchange and foreign-investment controls that requires notification to and approval by the government of substantially all foreign investments and financings. This procedure has been used less frequently to bar absolutely particular investments than to require that foreign investments meet criteria considered to be favorable to the economy. While foreign investment controls are considered by the government to be only one of its many weapons for attaining a planned economy, it is nevertheless true that the government does not have the same veto power over new investment by domestic corporations that it enjoys over foreign investment.

If it is true that the ultimate weapon of denial of investment authorization is, under French law, a nonreviewable action vested in Ministry discretion,<sup>199</sup> that does not mean that such action might not run counter to international obligations. These obligations are the result either of bilateral treaties—such as the Franco-American Convention of Establishment,<sup>200</sup> which protects both the right of establishment and the right of investment—or of multilateral treaties, of which the most important is the EEC Treaty.

The authors suggested some years ago that the closer relationships established by the EEC Treaty and the international mechanisms available for the enforcement of treaty rights made it likely that a protest would be made against French investment controls pursuant to the EEC Treaty rather than under the looser bilateral treaties.<sup>201</sup> That suggestion apparently was accurate; the direct clash

---

199. See Torem & Craig, *supra* note 1, at 715-17.

200. [1960] 2 U.S.T. 2398; [1960] J.O. 11220. Article 5 of this treaty provides for national treatment:

1. Nationals and companies of either High Contracting Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activities for gain within the territories of the other High Contracting Party . . . . Accordingly, such nationals and companies shall be permitted within such territories:

(b) to organize companies under the general company laws of such other High Contracting Party, and to acquire majority interests in companies of such other High Contracting Party;

(c) to control and manage the enterprises which they have established or acquired.

201. See Torem & Craig, *supra* note 1, at 711.

between the controls and the free-investment and free-establishment provisions of the Treaty resulted in a law suit by the Commission against France in the European Court of Justice. However, that suit was settled by a common agreement that has permitted France to continue its foreign-investment policies and procedures without substantial modification, although France continues to be subject to an obligation to admit investment from other member countries after simple notification to the government about the proposed investment.

For the future, perhaps the most important issue is whether the Common Market will develop a common foreign-investment policy in regard to third-country investment and whether procedures for the regulation of foreign investments in the Common Market will be developed. In this regard, we note that certain French attitudes toward the foreign-investment problem are gaining more Common Market support at the present time than has ever been the case in the past. The EEC Commission might, in special cases, oppose a specific foreign investment on economic or political grounds. However, it seems unlikely that other member countries, which do not have the same tradition of centralized financial power and government economic control that France has, would support the kind of procedures operational in France that require a specific government authorization for every foreign investment. In these circumstances, one can expect that the French foreign-investment controls, with their highly developed filing and authorization procedures, will continue to stand alone in the Common Market. This fact should play a role in support of the continuation of the policies of moderation that have marked application of the French controls in recent years.