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# CONTROL OF FOREIGN INVESTMENT IN FRANCE

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

## I. INTRODUCTION

THE principle of freedom of investment by foreigners in France has, with few statutory exceptions, long been recognized in French law. In practice, however, exchange controls, requiring French government authorization for all foreign exchange transactions within France, have supplied the legal foundation for governmental control of foreign investment. Initiated in 1939 as a wartime measure to stem the outflow of the nation's currency to safer havens,<sup>1</sup> exchange controls were continued in the postwar era to protect a weak currency and were elaborated, in piecemeal fashion, to suit diverse and changing governmental policies. The complex and pervasive regulations provided an instrument which could be used not only to protect France's monetary position but also to safeguard other national interests affected by foreign investment. In fact, exchange controls were used by the government to screen all foreign investment, and to limit those deemed inconsistent with French economic planning or political interests.

As the French economy grew strong and the franc grew stable, the appropriateness of the entire institution of exchange controls became increasingly debatable. The existence of such controls weakened the claim of the franc to a status akin to that of the world's reserve currencies and cast doubt upon the feasibility of making Paris a financial center for Europe. Moreover, at least by the early 1960's, the government had tacitly accepted that foreign payments, trade, and, in large measure, investments would generally be authorized once administrative formalities had been accomplished. These administrative formalities served, however, as a not inconsequential barrier to routine international transactions. The sea of papers to be prepared by industries engaged in international transactions and to be pro-

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1. Decree of Sept. 9, 1939, [1939] J.O. 11266. While the modern history of French exchange control can be said to date from 1939, certain texts, such as the Law of May 31, 1916, [1916] J.O. 4840, which was enacted to control certain stock issues during the First World War, continued in vigor until the present enactments.

cessed by an overburdened administration served an interest of governmental control which was infinitesimal in comparison with the cost in time, delays, and missed opportunities for the French economy engendered by the whole procedure. Exchange control regulation was thus ripe for reform.

When, on December 28, 1966, President de Gaulle signed into law the bill rescinding all the previous laws, decrees, and regulations relating to exchange controls,<sup>2</sup> it seemed as if the millennium had at last been achieved. The law seemed firmly to adhere to the principle of free exchange, the first article stating that "[f]inancial relations between France and other countries are free." The law itself, however, set forth only the barest outline of the future pattern of controls; according to the well-established practice the government and not the parliament determines the methods by which an economic or social program is carried out.<sup>3</sup> Thus, it was only with the subsequent publication, on January 29, 1967, of the regulations under the law that the real content and effect of the new exchange and investment control program was clearly established.<sup>4</sup> Reaction to these new regulations was enthusiastic: government officials announced that a new era of economic freedom in international relations had begun,<sup>5</sup> and various commentators concurred.<sup>6</sup> But while it is true that the new regulations largely abolish control of foreign exchange as such, there has been no substantial liberalization of governmental control over investments by foreigners in France. Indeed, under the new regulations investments are submitted to control procedures which, in certain circumstances, are more rigorous than antecedent measures.

## II. BACKGROUND OF THE NEW LEGISLATION

### A. *Prior Exchange Controls in France*

While exchange controls under prior French law in general,<sup>7</sup> and their application to American investment in particular,<sup>8</sup> have

2. Law No. 66-1008 of Dec. 28, 1966, [1966] J.O. 11621.

3. Article 34 of the Constitution of 1958 explicitly limits the legislative powers of parliament, while art. 37 reserves to the government areas that are outside of parliamentary competence. The practice of the Fifth Republic has been to make maximum use of this constitutional fact to increase government powers. See, e.g., A. HAURIU, *DROIT CONSTITUTIONNEL* 805-06 (1967).

4. Decree No. 67-78 of Jan. 27, 1967, [1967] J.O. 1073.

5. See, e.g., Larre (Financial Minister to the French Embassy, Washington), *The Liberalization of French Exchange Controls: A Step Towards More Freedom for the Movement of Capital*, *FRENCH AM. COMMERCE* 18 (March-April 1967).

6. Urquhart, *France Drops Its Currency Restrictions*, *International Herald Tribune*, Jan. 31, 1967, at 1, col. 1.

7. Jeantet, *Exchange and Control Regulations in France*, in 1 *AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET* 189 (E. Stein & T. Nicholson eds. 1960).

8. Dusart, *The Impact of the French Government on American Investment in*

been treated in depth elsewhere, a brief discussion of the law and regulations until recently in force will give some idea of the extent to which these regulations reached into every aspect of French international life. Studied with data on the dimensions of foreign investment in France, an historical analysis provides a necessary perspective from which to view the changes created by the new rules.

The basic structure of the old system was relatively simple: the laws simply forbade all transactions involving foreign exchange or foreign transfers, except those authorized by regulation.<sup>9</sup> Certain transactions defined in these exchange controls required prior authorization of the Ministry of Finance. In other cases, transfers or investments meeting restricted criteria could be made without specific authorization of the Ministry of Finance upon simple verification by those banks designated as authorized intermediaries (*intermédiaires agréés*)<sup>10</sup> which had accordingly received a limited delegation of authority from the Ministry of Finance. In all cases the old regulations required transactions involving international payments to be effected through such authorized intermediaries. Functionally, the regulations categorized all persons as "residents" or "nonresidents" of France; all transactions between the two groups were subject to control.<sup>11</sup> Reflecting the understanding that exchange controls were to regulate problems involving foreign monies and not foreign influence, nationality of the persons or corporations played no substantial part in the application of controls.<sup>12</sup>

Controls applicable to any one problem had to be ferreted out from a morass of overlapping laws, decrees, regulations, and notices which in total comprised some 750 finely printed pages in one of the service publications designed to collate these disparate texts. In order to describe the over-all purport of these controls, it is perhaps easiest to classify them into three general categories: international payments, international trade, and international investment.

The first category included controls over importation and exportation of gold, importation of foreign currency<sup>13</sup> and exportation of francs, and the use of foreign bank accounts by resident nation-

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France, 7 HARV. INT'L L. CLUB J. 75 (1965). See also A. JOHNSTONE, UNITED STATES DIRECT INVESTMENT IN FRANCE (1965).

9. Decree No. 47-1337 of July 15, 1947, arts. 2, 3, [1947] J.O. 6987.

10. See Avis No. 791 of the Ministry of the Economy and of Finance, Aug. 14, 1966, [1966] J.O. 7175, providing the latest list of "*intermédiaires agréés*."

11. See Arrêté of July 15, 1947, [1947] J.O. 6993.

12. There were, however, some limited advantages to foreign citizenship. Resident aliens in France were exempted from certain requirements which would have required all residents to declare their assets abroad, to repatriate their foreign income, and, in some instances, to repatriate the assets themselves.

13. Decree No. 47-1337 of July 15, 1947, [1947] J.O. 6987.

als<sup>14</sup> and of French bank accounts by nonresidents.<sup>15</sup> This was the literal control of foreign exchange.

The second category dealt mainly with controls over those transactions creating obligations eventually calling for the transfer of foreign exchange. Included here were restrictions affecting all imports and exports, even those made without payment.<sup>16</sup> The mechanism for controlling such transfers of merchandise was a mandatory licensing procedure for all importers and exporters, coupled with a requirement that payment for all such purchases and sales be made through authorized intermediaries.<sup>17</sup> The purpose of the import controls was primarily to protect the French balance of payments position; and when this position improved, controls on imports were relaxed.<sup>18</sup> Control of exports was intended primarily to insure that proceeds of export sales were in fact repatriated to France.<sup>19</sup>

The third category, international investment, included control of French investment abroad and foreign investment in France. Investment abroad by French nationals was tightly controlled: authorization by the Ministry of Finance was needed in order to acquire foreign assets;<sup>20</sup> purchase of foreign stock without specific authorization was permitted only in limited circumstances;<sup>21</sup> and repatriation of all income earned on foreign investments was mandatory.<sup>22</sup> Rules controlling foreign investment in France were highly complex and no less rigorous. Certain transactions—the purchase of French stock on the Bourse,<sup>23</sup> the purchase of real estate or investment in real estate companies,<sup>24</sup> and loans of less than one million francs to residents at

14. While the opening of a foreign bank account as such was not forbidden by the regulations, its use and the failure to repatriate foreign exchange ordinarily constituted an exchange control violation. Arrêté of July 15, 1947, arts. 12, 14, [1947] J.O. 6993; see Ministerial response in the National Assembly to questions posed by a *député* on Jan. 16, 1965, [1965] J.O. (*Débats Parlementaires de l'Assemblée Nationale*) 38 (No. 12461).

15. Arrêté of July 15, 1947, arts. 27-30, [1947] J.O. 6993.

16. See generally Avis of the Ministry of the Economy and of Finance, annxs. I, II, Jan. 30, 1967, [1967] J.O. 1130, 1131, for a complete list of old regulations relating to trade.

17. See Decree of Nov. 30, 1944, published in RECUEIL DES TEXTES DU MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES, LOIS, DÉCRETS, ORDONNANCES ET ARRÊTÉS 18 (3d ed. 1966), setting up a wartime prohibition of imports and exports without individual licenses. This regime was subsequently relaxed by provision for blanket licenses.

18. Avis *aux importateurs* and Avis No. 727 of Nov. 25, 1961, [1961] J.O. 10825.

19. Arrêté of July 15, 1947, arts. 12-18, [1947] J.O. 6993; Avis *aux exportateurs* and Avis No. 783 of Sept. 11, 1965, [1965] J.O. 8108.

20. Decree No. 47-1337 of July 15, 1947, art. 23, [1947] J.O. 6987.

21. See Arrêté of March 16, 1962, art. 7, [1962] J.O. 3055.

22. Arrêté of July 15, 1947, art. 12, [1947] J.O. 6993.

23. Avis No. 762 of Aug. 21, 1963, [1963] J.O. 7730, amending Avis No. 669 of Jan. 21, 1959, tit. I, para. A(1), [1959] J.O. 1130.

24. Decree No. 47-1337 of July 15, 1947, art. 51(1), [1947] J.O. 6987; Avis No. 716 of July 23, 1960, [1960] J.O. 6774, amending Avis No. 669 of Jan. 21, 1959, tit. I, [1959]

a rate of interest not exceeding four per cent—did not require special authorization of the Ministry of Finance but had to be effected, nonetheless, through authorized intermediaries. Other transactions—the formation of French commercial companies, the establishment of branch offices in France,<sup>25</sup> the investment in French companies not listed on the Bourse, and the patent, trademark, or know-how agreements with residents,<sup>26</sup> to name a few—required authorization by the Ministry of Finance, no matter whether the investment was to be made in cash, or contributions in kind; and, once again, all payments had to be made through authorized intermediaries.

### B. *The Dimensions of the Foreign Investment Problem*

Since exchange controls find their justification in the protection of a weak balance of payments and protection against local currency outflows, it is only with great difficulty that the justification for having applied these rules to measure and control foreign investment in France can be found. Foreign investment, financed with capital exported from the investor's own country, has actually strengthened France's balance of payments position.<sup>27</sup> Indeed, even if one accepts the artificial assumption that every foreign investment carries with it the prospect of eventual disinvestment and the conversion of the proceeds into foreign currency, no real balance of payments problem can be found. It was estimated in 1965, by the French, that cumulative foreign investment in France totaled \$5 billion, which may be compared with an unofficial estimate of \$8 billion as the cumulative total of French investment abroad.<sup>28</sup> Total American investment,

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J.O. 1130. See also Note No. 498 of March 19, 1964, from the Minister of Finance and of the Economy to authorized intermediaries.

25. Although technically it was investment in a branch office and not the creation of a branch itself that was subject to prior Ministry of Finance authorization, as a practical matter the establishment of a branch office almost always entails some expenditure, and therefore authorization was usually needed upon creation. The fact that such authorization carried with it the right to disinvest provided an independent interest in making application.

26. Decree No. 47-1337 of July 15, 1947, art. 2, [1947] J.O. 6993.

27. Where foreign investment is financed by money raised in France, a trend which is now well defined in the case of American investment, there is, of course, no positive contribution to the French balance of payments. It has been estimated that fifty-five per cent of American investment in Europe in 1965 was financed on the European capital market, thirty-five per cent by European government subsidies and self-financing, and only ten per cent by transfer of dollars from the United States. See Address by Oliver Guichard, Minister of Industry, to the American Chamber of Commerce in France, COMMERCE IN FRANCE No. 242, at 15 (Dec. 15, 1967).

28. MINISTÈRE DE L'INDUSTRIE, RAPPORT SUR LES INVESTISSEMENTS ÉTRANGERS DANS L'INDUSTRIE FRANÇAISE 3 (1965) (Bockanowski Report). The estimate of French investment abroad is attributed to Marcel Cazes, Directeur Général of the Credit Lyonnais Bank.

which the French consider to be a special problem, amounted to about \$2.5 billion,<sup>29</sup> while French investments in the United States have been unofficially estimated at about \$2 billion.<sup>30</sup>

But if foreign investment does not pose the kind of problem for which exchange controls, as such, are a traditional remedy, still the French consider foreign investment to pose other problems necessitating some kind of government surveillance. Direct investment, involving control by foreigners of French enterprises, is of greatest concern to the French, and foreign, particularly American, investment has in recent years been largely of this sort. While accurate statistics as to the cumulative value of foreign direct investment in France and the American share of this total are difficult to obtain, it is roughly estimated by French sources that \$4 billion of the total \$5 billion foreign investment figure is direct investment,<sup>31</sup> and American sources further estimate that American direct investment constitutes \$1.75 billion.<sup>32</sup>

The impact of such foreign investments on particular industries is demonstrated by a Ministry of Finance study indicating that the following percentages of production in 1962 originated from firms in which foreign investment accounted for ownership of twenty per cent or more of the capital of the firm:<sup>33</sup>

Musical instruments	45.6%
Gasoline and petroleum products	43.0%
Radio and television services	45.7%
Fat products	36.4%
Precision instruments, optics, and watches	34.0%
Rubber and asbestos	24.5%
Film production	16.0%

The Ministry of Industry has made a further study, breaking down the categories into particular products, and has found that companies in which Americans owned at least twenty per cent of the

29. *Id.* at 4.

30. Bojin, *French Investments in the United States*, COMMERCE IN FRANCE No. 219, at ix (1966). Most of this amount is portfolio investment rather than direct investment.

31. MINISTÈRE DE L'INDUSTRIE, *supra* note 28. The statistics appear to be valid as of the end of 1962.

32. U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS 42 (Sept. 1967) (estimate based on situation at the end of 1966). At the end of 1962 the cumulative value of United States investment was \$1.63 billion. The over-all effect of such investment should not be overestimated, however, as foreign investment constitutes only five to eight per cent of total French capital investment. [1966] J.O. (*Avis et Rapports du Conseil Economique et Social*) 11 (May 28, 1966). See also *Le Monde*, Jan. 14-15, 1968, at 7, col. 2 for 1967 statistics.

33. MINISTÈRE DE L'ECONOMIE ET DES FINANCES, STATISTIQUES ET ETUDES FINANCIERS No. 219, at 326 (March 1967).

capital accounted for the following percentages of 1963 production:<sup>34</sup>

Razor blades and safety razors	87.0%
Adding machines	74.8%
Bottle caps	73.0%
Sewing machines	70.0%
Electric razors	60.0%
Statistical and electronic equipment	42.6%
Telegraph and telephone equipment	42.0%
Tractors and agricultural equipment	35.2%
Refrigerating equipment	25.0%
Industrial furnaces	25.0%

These statistics are indicative of a situation which raises a very real fear in French governmental circles of foreign takeovers of certain key sectors of the French economy. These figures, however, are somewhat out of date and do not illustrate the effect of the most recent boosts in foreign investment; rather, they tell only a very small part of the story. Annual foreign direct investment tripled between 1960 and 1964.<sup>35</sup> Annual American direct investment, which, according to French sources, amounted to twenty-eight per cent of foreign direct investment in 1964,<sup>36</sup> led investment by any other country by a large margin.<sup>37</sup>

American statistics indicate the following progression of United States annual direct investment in France:<sup>38</sup>

(millions of dollars)							
1959	1960	1961	1962	1963	1964	1965	1966
51	53	76	124	164	139	152	93

34. MINISTÈRE DE L'INDUSTRIE, *supra* note 28, at 25, 26.

35. Response in the National Assembly of M. Debré, Ministry of Finance, to question of M. Albert Fouet, *député*, on May 27, 1966, [1966] J.O. 1537. See also MINISTÈRE DE L'ECONOMIE ET DES FINANCES, BALANCE DES PAIEMENTS DE L'ANNÉE 1966, at 122-23 (July 1967) (recapitulating balance of payments position from 1959 to 1966); MINISTÈRE DE L'INDUSTRIE, *supra* note 28, at 3.

36. Response by M. Debré in the National Assembly, *supra* note 35. For a statement that United States direct investment constituted forty-five per cent of the direct investment approved by the Ministry of Industry in 1964, see MINISTÈRE DE L'INDUSTRIE, *supra* note 28, at 4, 9. It should be recalled that not all investment applications submitted to the Ministry of Finance are necessarily referred to the Ministry of Industry. If direct investment and long-term loans are considered together, United States participation was only twenty-five per cent in 1964. [1966] J.O. (*Avis et Rapports du Conseil Economique et Social*) 377, 400 (May 28, 1966).

37. The runners-up are generally considered to be Switzerland, Great Britain, Belgium, and Germany. See MINISTÈRE DE L'INDUSTRIE, *supra* note 28, at 4, 9; [1966] J.O. (*Avis et Rapports du Economique et Social*) 377, 400 (May 28, 1966). The Ministry of Finance statistics, prepared from a balance of payment point of view, probably overvalue investment from Switzerland and Belgium, which are used by third countries as transit points for investment in France.

38. U.S. DEP'T OF COMMERCE, *supra* note 32, at 22 (Aug. 1961), 22 (Aug. 1962), 18 (Aug. 1963), 10 (Aug. 1964), 24 (Sept. 1965), 34 (Sept. 1966), 42 (Sept. 1967).



These figures, based on net capital outflow,<sup>39</sup> indicate United States direct investment from a current balance of payments viewpoint.

Probably of even greater concern to the French is the steady increase in the value of cumulative American investment in France, as illustrated in the chart below:<sup>40</sup>

(millions of dollars)							
1959	1960	1961	1962	1963	1964	1965	1966
640	741	860	1,630	1,240	1,446	1,609	1,758

Since these figures take into account not only additional yearly investments, but also retention of earnings of French subsidiaries of United States companies, they indicate quite accurately the full economic power of the American capital invasion.

The impact of foreign investment on the French economy is accentuated by the concentration of a very high proportion of annual foreign investment in a few large commitments;<sup>41</sup> the large foreign investor undoubtedly has a great deal more influence over the French economy than do the hundreds of small investors who are permitted each year to enter the French economy without much difficulty. Moreover, the companies which attract foreign takeovers are very often in technologically advanced industries, where foreign control is particularly suspect, due to the feeling that foreign ownership leads to dependence on foreign research and development, payment of technical assistance fees abroad, and inhibition of purely French advanced technology.

Considering that France has a planned economy, upon which traditionally controlled foreign investments exert a substantial impact, it was predictable that abolition of the entire exchange control apparatus would not necessarily liberate foreign investment from all control. Examination of the new law and its regulations demonstrates the importance which the French have lent to maintaining and intensifying control of such investment despite the general abolition of exchange controls.

### III. THE NEW REGIME OF FOREIGN INVESTMENT IN FRANCE

#### A. *The Structure of the Law*

The proposed law on foreign economic relations presented to the National Assembly in December 1966 provided both a broad, gen-

39. Both "direct investment" and "net capital outflow" as defined in the Sept. 1967 SURVEY, *supra* note 32, at 46-47, include loans from United States parent companies to subsidiaries and investment in plant and equipment from proceeds of foreign loans or other financing.

40. See authority cited in note 38 *supra*.

41. See, e.g., analysis of foreign investment in the chemical industry, MINISTÈRE DE L'INDUSTRIE, *supra* note 28, at 17-18.

eral outline of the new liberty in international finance and a succinct, clear guide to the powers of the government to impose limits on this freedom.

Article 1 declared: "Financial relations between France and other countries are free," and article 2 went on to list the text of prior exchange control laws and decrees, all of which, together with their implementing regulations, were expressly revoked.<sup>42</sup> It is clear, however, that this freedom was to be of the qualified, relative sort. Thus, article 1 goes on to say that "this liberty shall be exercised in the manner provided by the present law . . ." Moreover, article 3 in effect gave to the executive the power to re-enact by decree—but only in order to assure the defense of national interests—provisions highly similar in nature to the very exchange or investment controls that had just been abrogated. Thus, the government was empowered to:

1° Submit to declaration, prior authorization or control:

- a) Exchange operations, capital movements, and payments of all kinds between France and other countries;
- b) The constitution, transformation of the nature of, and the liquidation of French assets abroad;
- c) The constitution and the liquidation of foreign investments in France;
- d) The importation and exportation of gold as well as all other material movements of securities between France and other countries;

2° Provide for the repatriation of all credits existing abroad arising from the exportation of merchandise, the payment for services rendered, and in a general way, all foreign income or revenues;

3° To empower intermediaries to affect the operations cited in paragraphs (a) and (d) above.

The bill was considered by the Finance Committee of the National Assembly and a report summarizing the purpose of the law was presented by the Committee shortly thereafter, on December 13, 1966, through Louis Vallon, a prominent Gaullist deputy. In this report Michel Debré, Minister of Finance, commented on the new law as follows:

The economic and financial recovery of the country and the new

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42. One of the complaints of practitioners has been that the list of the texts relating to exchange controls which have been repealed is by no means exhaustive, and there remains some question as to whether certain regulations which marginally touch upon exchange controls are still in effect. On this subject, see R. La Claviere, *La Nouvelle Réglementation des Relations Financières avec l'Étranger*, [1967] Sem. Jur. I. 2071, at para. 53. Article 4 of the law provided that prior controls over exports, imports, and insurance were not repealed. They were, however, subsequently revised and relaxed by departmental regulation. Arrêté of the Minister of the Economy and of Finance, Jan. 30, 1967, [1967] J.O. 1108.

orientation of our economic policy arising, in particular from our international agreements, have already permitted a progressive relaxation of exchange controls. In many cases a regime of freedom has been re-established. In law, however, exchange controls remain, which is not without practical disadvantages. Administrative formalities remain numerous. Badly informed as to the present state of complex regulations, parties concerned often do not know whether or not they have committed an infraction. Finally, the maintenance of exchange controls seems scarcely compatible with the orientation of the Brussels negotiations. The return of the liberty of financial relations with other countries must not, however, take away from the government all possibility of action. The French and European conception of liberty in this area must be more restricted than the American conception. The government must maintain a certain control over foreign investments in France or French investments abroad. It must also be able to reestablish controls in certain sectors if exceptional events justify them. The proposed text is not designed to permit the government to enlarge the scope of its interventions, but, on the contrary, to supply more clearly a new legal basis for these interventions.<sup>43</sup>

The bill was passed by the National Assembly on December 14, 1966, and adopted by the Senate with only minor modifications on December 16. On December 28, the bill was signed by the President of the Republic and became Law No. 66-1008.<sup>44</sup>

The law gave the French government thirty days in which to take advantage of the provisions of article 3: if by January 31, 1967—the outside limit for the effective date of the Act—no such regulations as provided for in article 3 had been promulgated, the financial relations between France and foreign nations would indeed have been entirely “free,” for exchange controls having been abolished, no controls of any sort would have existed as to foreign investment in France. The two governmental decrees issued within the thirty-day deadline established, however, an elaborate set of foreign investment controls producing a significant change of emphasis from the law’s concept of freedom.

### B. *Structure of the Enabling Decrees and Regulations*

Based upon the report of the Ministry of Finance on January 27, 1967, the Prime Minister issued Decree No. 67-78<sup>45</sup> prescribing the modes of application of the previously enacted law. The decree was

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43. Rapport No. 2253, *Première Session Ordinaire*, 1966-67, Annex to minutes of session of Dec. 13, 1967, at 33.

44. Law No. 66-1008 of Dec. 28, 1966, [1966] J.O. 11621.

45. Decree No. 67-78 of Jan. 27, 1967, [1967] J.O. 1073.

completed by departmental regulation (*arrêté*) of the same date.<sup>46</sup> The loose draftsmanship of this regulation, which has raised myriad problems of interpretation, was thought by some to bear the marks of a haste necessitated by the thirty-day "statute of limitations." Decree No. 67-78 deals with most major aspects of international finance and investment, including investment abroad by French residents; this Article, however, will basically be limited to a detailed examination of the problem of foreign investment in France.

The decree establishes three major categories of international investment and financing:

1. Direct investments (*investissements directs*), as that term is defined in the decree, in France by nonresidents (or investment abroad by French residents), which investments are subject to a declaration procedure before the Ministry of Finance and which may be blocked by the Ministry;
2. Borrowings from abroad, within limits defined by the decree, by French residents, which borrowings are subject to specific prior authorization by the Ministry of Finance; and
3. Investments not constituting "direct investments" as defined in the decree and foreign financing not specifically subject to the authorization procedure, neither of which are subject to governmental control.

The decree and *arrêté* further require the specific prior authorization by the Minister of Finance before public offerings on the French market of foreign securities will be permitted,<sup>47</sup> a special requirement which is not, however, substantially more rigorous than are the procedural requirements under French law for the public offering of French securities.<sup>48</sup> Special provision is made for the importation and exportation of gold upon declarations with customs after prior report to the Bank of France.<sup>49</sup>

Despite the abolition of exchange controls the decree and *arrêté* provide for reporting by French residents to authorized intermediaries, for statistical purposes, of all financial transactions abroad.<sup>50</sup> The authorized intermediaries must, in turn, report these financial

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46. Arrêté of the Ministry of the Economy and of Finance, Jan. 27, 1967, [1967] J.O. 1074.

47. Decree No. 67-78 of Jan. 27, 1967, art. 5, [1967] J.O. 1073. An exception is made for securities already listed on the "Bourse," and bonds which have been guaranteed by the French government.

48. It may be, however, that authorization for sale of foreign securities will not be liberally granted in view of the capital requirements of the French market. See Brock, *The Reform of French Exchange Controls*, 22 Bus. LAW. 985 (1967).

49. Decree No. 67-78 of Jan. 27, 1967, art. 8, [1967] J.O. 1073.

50. *Id.* art. 9; Arrêté of the Ministry of the Economy and of Finance, Jan. 27, 1967, art. 11, [1967] J.O. 1074.

transactions to the Bank of France, which has the power to request further information regarding the transactions in question.

Alongside this mechanism of control of investments, but not pursuant to the authority of Law No. 66-1008, a separate system of control was established for the acquisition by French domiciliaries of industrial property rights, know-how, and technical assistance from foreign domiciliaries. This field had been previously governed by strict Ministry of Finance controls abolished by the new law; a separate Decree, No. 67-82,<sup>51</sup> issued by the Prime Minister at the same time as the decrees on investment, now requires that contracts providing for such acquisitions be submitted to the Ministry of Industry through a notification procedure (*avis*).

Finally, *arrêtés* of the Ministry of Finance and of the Director of the Customs Service<sup>52</sup> revoked all regulations relating to import and export promulgated pursuant to prior exchange control laws and decrees. Although a restricted number of transactions (such as exportation of items on the forbidden strategic list) are still subject to prior authorization, the new procedures initiated by these *arrêtés* provide substantial liberty of trade.

This collection of laws, decrees, and regulations spans the entire field of international trade and investment as dealt with by the previous French exchange control regulations. In contrast to prior law, however, that which is not expressly forbidden is now permitted; now, in order to block or delay an investment, the government must assume the burden of intervening and expressing its dissatisfaction with a proposed financing arrangement. But the fact remains that the new regime provides a wide-ranging mechanism for the surveillance, control, and, if deemed necessary, the limitation of foreign investment and financing, a mechanism which, if routinely exploited, might well render the new law indistinguishable from the previous regime with its general limiting requirement of prior authorization.

### C. Declaration Procedure for "Direct Investments"

The procedures for control of "direct investments" apply both to French investments abroad and foreign investments in France. With minor difference, the rules which apply to these two classes of investment are the same, and, unless noted otherwise, it may be assumed that what is said here as to foreign investment in France also applies to French investment abroad.<sup>53</sup>

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51. Decree No. 67-82 of Jan. 27, 1967, [1967] J.O. 1081.

52. Avis of the Ministry of the Economy and of Finance, Jan. 30, 1967, [1967] J.O. 1127.

53. No rationalization has been given for subjecting French investment abroad—favored by government policy—to the declaration procedure. It does, however, provide

Unlike the old exchange controls, the present regulations do not require procurement of a government license, as such, to affect a foreign investment in France. However, nonresident individuals or companies must submit a declaration to the Ministry of Finance which details any proposed direct investment.<sup>54</sup> In determining whether a person or company shall be considered as a resident or nonresident, the criterion applied by the decree is habitual residence (*résidence habituelle*) for individuals and the location of the head office (*le siège*) for companies.<sup>55</sup> For the purpose only of the regulation of direct investments, French companies under foreign control are treated as foreign residents and foreign companies under French control are treated as French residents.<sup>56</sup> Direct investments in or from a number of African countries, which are former members of the French *Communauté* and whose currency is tied to the French treasury, are exempted from the declaration procedure.<sup>57</sup>

A nonresident is considered to make an investment in France, subject to declaration, when it acquires a direct investment from another nonresident. For example, if an American corporation wished to acquire from another American corporation all of the stock in its French subsidiary, such an acquisition would have to be submitted to the Ministry of Finance. The same would be true if a foreign corporation having a French subsidiary wishes to merge with another foreign corporation, as the merger would involve a French

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a kind of statutory reciprocity in the treatment of French and foreign investment. Furthermore, the habits of nearly thirty years of exchange control, and the concept of a controlled economy, militate toward making all foreign economic transactions subject to government veto. No instance of a veto of French investment abroad under the new regulations is presently known.

54. Decree No. 67-78 of Jan. 27, 1967, [1967] J.O. 1073.

55. Arrêté of the Minister of Finance of July 15, 1947, tit. I, arts. 1-3, [1947] J.O. 6993, sets forth the criteria of habitual residence found in prior law. Nonetheless, departmental regulations had established a rule of thumb that a foreigner would not ordinarily acquire a French residence, nor a French citizen a foreign residence, without two years of effective residence. Avis No. 767 of March 19, 1964, [1964] J.O. 2572. It would appear that under the new law French residence can be claimed as soon as any documentary evidence, notably a French residence and "*carte de séjour*" have been acquired. It should be noted that "France" is defined in art. 2 of Decree No. 67-78 of Jan. 27, 1967, [1967] J.O. 1073, to include metropolitan France, Corsica, France's overseas departments (Guadeloupe, Guiana, Martinique, and Réunion), the overseas territories other than the French Somali Coast (Comores, New Caledonia and dependencies, Wallis, and Futuna, French Polynesia, St.-Pierre and Miquelon), and the Principality of Monaco.

56. Decree No. 67-78 of Jan. 27, 1967, arts. 3-1(b), 4-1, [1967] J.O. 1073. See also discussion of companies under foreign control in text accompanying note 95 *infra* and *passim*.

57. *Id.* art. 7 which exempts from the declaration procedure relations with countries "*dont l'institut d'émission est lié au Trésor français par une convention de compte d'opérations.*" These countries are presently: The Ivory Coast, Dahomey, Niger, Senegal, Mauritania, Upper Volta, Congo, Central African Republic, Chad, Gabon, Togo, Cameroun, and Madagascar.

direct investment by the acquiring corporation. The old exchange controls law did not affect such transactions, which, as there was no exchange of foreign currencies, were not subject to Ministry of Finance authorization.

The declaration is made by letter, or preferably on the form supplied by the government. The procedure following this first step is then described by the decree:

During a period of two months following the reception of the declaration, the Minister of Finance may request the postponement [*ajournement*] of the operations contemplated. He may, nevertheless, prior to the expiration of the two months period, renounce his right to request postponement.<sup>58</sup>

Although a study of the text alone does not immediately reveal the consequence of a postponement, in fact the Ministry of Finance has the legal power to play the same role that it played under the authorization procedure of the old exchange control regulations. The Ministry may request temporary postponement (*ajournement provisoire*) of the investment in order to allow time for further study or to permit the applicant to modify its application along the lines suggested by the government. If the investment is considered unsatisfactory, and if the applicant is unwilling or unable to modify its application to meet government objections, a permanent postponement (*ajournement définitif*) may be anticipated. Such an action would, in practice, only be taken upon the personal determination of the Minister himself. The primary difference between the present and prior procedures is that if no action is now taken by the government within sixty days of the receipt of the declaration, the investment is automatically acceptable.

Article 4 of the decree also provides for declaration by a foreign resident (or by a French company under foreign control) of the liquidation of any direct investment. However, the decree does not specifically provide that the Minister of Finance has the right to request postponement in such a case, and the regulations provide, in fact, that declaration of the liquidation of an investment must be made within twenty days *after* the termination of the operation.<sup>59</sup>

#### D. "Direct Investment" Defined

Article 2(3) of the decree supplies the key definition of "direct investments":

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58. *Id.* art. 4-1.

59. Arrêté of the Ministry of the Economy and Finance, Jan. 27, 1967, art. 4, [1967] J.O. 1074. Article 4 of the decree provides that the declaration of the liquidation may be dispensed with when stock in a French corporation is transferred between foreign residents after a declaration of investment, subject to the postponement procedure, has been made by the transferee.

- (a) The purchase, the creation or the extension of any business [*fonds de commerce*], branch or individual enterprise.
- (b) All 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 engaged in industrial, agricultural, commercial, financial or realty operations, whatever may be its form, or to assure the expansion [*extension*] of such company already controlled by them.

However, the sole acquisition of a participation not exceeding 20% of the capital of a company quoted on the stock exchange shall in no case be considered as a direct investment.

Subparagraph (a) of article 2(3) deals primarily with the creation or acquisition of personal enterprises or business not organized in the form of companies. Such creation or acquisition on behalf of a nonresident is subject to the declaration procedure. It is noteworthy, moreover, that the creation of a branch (*succursale*) is specifically defined as direct investment and hence is in all cases subject to the declaration procedure. By contrast, prior exchange controls did not require prior authorization for the opening of a branch if no foreign investment was necessary for its creation.

Subparagraph (b) of article 2(3) deals with direct investment in companies (*sociétés*). The term "*société*" includes every type of *société* which may be formed under the French Company Law of July 24, 1966.<sup>60</sup> These include commercial companies such as the corporation (*société anonyme*), the limited liability company (*société à responsabilité limitée*), and the limited partnership (*société en nom collectif*). Article 2(3)(b) also appears to include civil companies as provided for under articles 1832-34 of the Civil Code, and in particular civil companies formed for realty exploitation (*sociétés civiles immobilières*). In this context, it is interesting to note that prior law permitted investment by nonresidents in such *sociétés civiles immobilières* without intervention by the Ministry of Finance as long as payment of the purchase price was arranged through a *notaire*.<sup>61</sup> By including the heretofore substantial foreign investments in this type of French realty company, the new law may well exert a significant practical effect.

As defined in article 2(3)(b), an investment is a direct investment and hence subject to the declaration procedure if the investor acquires control of a French company; or increases its pre-existing control of a French company; or finances the expansion of a company already under its control.

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60. Law No. 66-537 of July 24, 1966, [1966] J.O. 6402.

61. See Avis No. 767 of March 19, 1964, [1964] J.O. 2572; Note No. 498 of the Director of Foreign Finances, March 19, 1964.



What constitutes control? The decree is silent as to this. Yet this determination is a familiar corporate law exercise, in France as well as in the United States; it is a question of fact not adapted to precise definition. It seems certain, consequently, that the failure to define the term was intentional. It would, of course, be impossible to enumerate all of the factual circumstances which would constitute control—clearly it can be acquired by devices other than stock ownership—and an attempt to draft a comprehensive text would only lead to loopholes and abuses.<sup>62</sup> Therefore, the French lawmakers, utilizing a technique often seen in the United States, left the term without statutory definition.<sup>63</sup>

Perhaps some guidelines do exist, however, since French courts have defined *foreign* control of a French company. The issue arose under World War I laws providing for the sequestration of French companies under enemy control, and the test was said to be whether "the management or capital are known to be in totality or in major part in the hands of the enemy subjects."<sup>64</sup> The courts have applied these criteria to various fact situations,<sup>65</sup> and their approach appears to indicate that they would determine the factual issue of control in the same way as an American court in like circumstances.

The percentage of capital ownership constituting control is likely to vary according to the situation of the company and the provisions of its bylaws, depending, for example, upon whether or not the company is closely held or whether the shares are in nominative or bearer form. One thing seems relatively clear. If the notion of control is to make any sense at all, no shareholder or group of shareholders may be held to have acquired control of a French company, whatever his or its percentage of stock ownership, if another share-

62. It is interesting to note, however, that a number of French treaties attempt to define control. *See, e.g.*, the Franco-Algerian Convention of August 28, 1962, dealing with the exploitation of minerals in the Sahara and defining control of a company.

Control will be considered to be exercised by French persons or companies—when non-French persons of companies do not hold, either directly or indirectly, a determining power in the direction and management of the enterprise, either by the possession of more than one-half of the votes of the shares of the company, or by any other means.

Decree No. 62-1020, Convention for the Application of para. 8 of tit. I of the Declaration of Principles Concerning Cooperation in the Exploitation of Sub-Saharan Wealth, art. 6, [1962] J.O. 577.

63. *See, e.g.*, Securities Exchange Act of 1934, 15 U.S.C. §§ 78aa to h-1 (1964), the legislative history of which clearly indicates that it was thought undesirable to attempt to define the term "control." H.R. REP. NO. 1383, 73d Cong., 2d Sess. 26 (1934), quoted in 2 L. LOSS, SECURITIES REGULATIONS 772 (2d ed. 1962).

64. Regulations of the Ministry of Justice of Feb. 29, 1916, [1916] J.O. 1658, [1916] J. DROIT INT'L 701.

65. *See, e.g.*, Widow Reifenberg, [1923] J. DROIT INT'L 322 (Cass. req.); for a fuller description of the sequestration cases, *see* H. BATTIFOL, DROIT INTERNATIONAL PRIVÉ 227-34 (4th ed. 1967).

holder or group of shareholders enjoys a dominant influence in the actual management and direction of the company. Unfortunately for the practitioner, however, it is impossible to be more precise than this.

The only guide provided by the decree itself as to the percentage of stock ownership that might amount to control is the provision of article 3 stating that in no event will the sole acquisition of less than twenty per cent of the stock of a company quoted on the French stock exchange constitute a direct investment.<sup>66</sup> By inference, therefore, there is no assumption of control in such an acquisition. This provision is designed to permit portfolio investments without submission to Ministry of Finance regulations. The percentage was intentionally set low to guard against the possibility that a relatively small holding of shares in a large publicly owned corporation might carry control with it. It is submitted, however, that this exception can in no logical way be read to imply the converse proposition: that the ownership of twenty per cent or more of the capital of a company *not* quoted on the exchange *does* constitute control. Nonetheless, some knowledgeable French officials seem to have inferred such a conclusion, at least as a rule of thumb.<sup>67</sup>

Factors other than the percentage of capital ownership must also be considered in resolving the factual issue of control. These other factors<sup>68</sup> include the following elements listed by the Ministry of Finance in its notice regarding declarations of direct investments: loans or debt instruments held by the investor, real property rights, leases and mining rights, technical assistance agreements, and licenses of industrial property rights.<sup>69</sup> In theory, these factors alone, without any capital ownership, could constitute an acquisition of control. In the ordinary case, however, such agreements would be

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66. Under prior law, acquisitions of stock listed on the stock exchange could be engaged in without specific authorization by the Ministry of Finance only if purchased at the price quoted on the exchange. Apparently under the new controls acquisition of up to twenty per cent of the stock of a listed company may be made at any price, without the necessity of making a declaration.

67. The only investments subject to declaration are those giving control over a French company to a non-resident. As a rule, participations of less than 20% of the capital are not considered as giving a controlling interest; conversely participations of more than 20% are considered as giving such control. But there may be exceptions: what is important is the notion of a controlling interest and not the actual percentage.

Larre, *The Liberalization of French Exchange Controls: A Step Toward More Freedom of Movement of Capital*, FRENCH AM. COMMERCE 18, 19 (March-April 1967).

68. See Pinto, *Le Régime Juridique des Investissements Etrangers en France*, [1967] J. DROIT INT'L 235, 248.

69. Notice of the Ministry of the Economy and of Finance Regarding Declarations of Direct Investments Made in France, April 18, 1967.

held to constitute an acquisition or increase of control only in conjunction with a certain degree of capital ownership.

Article 2 of the decree provides that a nonresident makes a direct investment requiring a declaration not only by acquiring control of a French enterprise but also by increasing pre-existing control or expanding the activities of a French company already under control. An increase in control may be accomplished either by increasing capital participation, giving the controlling shareholder a higher percentage in the equity, or by any of the other methods mentioned above. Loans must also be scrutinized if either the terms or the amounts are unusual, lest they give the lender additional influence in the control of the borrowing company. If taken literally, the text of the decree would appear to require resort to the declaration procedure even when the foreign shareholder merely purchases an additional one or two shares of the controlled company, but a more intelligent interpretation would require declaration of only those increases in control which have some practical significance.

The notion of expansion (*extension*) of a controlled French company raises certain difficulties. It would be entirely reasonable to define such expansion as including only the addition of new activities not included in the original corporate purposes or not previously exploited by the company;<sup>70</sup> under this definition, foreign prorata participation in the increase of the capital of a controlled corporation (or loans to such a company) for the purpose of increasing production or adding to the existing means of production would not constitute a direct investment. However, early indications from government representatives seem to indicate that a much broader interpretation of the term "*extension*" is to be applied, so as to include mere increases in the size of the company, particularly in productive capacity and purchase of new plant, equipment, and assets. Under this definition, additional financing of a controlled company could escape the declaration procedure only if its purpose were to meet the requirements of current day to day operations.

Since a capital increase, by its nature, implies long-term expansion, investment by way of subscription to an increase of capital of a controlled company is, as a general rule, subject to control procedures even though all shareholders retain the same percentage of stock ownership. However, where the purpose of the capital increase is to refinance an existing debt structure, there is no expansion. Furthermore, the *arrêté* specifically provides that increasing capital

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70. Pinto, *supra* note 68, at 249.

out of undistributed profit is not subject to declaration procedures.<sup>71</sup>

When an investment is made by way of loans to a controlled company, the presumption is that this does not constitute an *extension* and that the investment regulations are not applicable. Loans are the businessman's usual way of assuring the financing of current operations. This presumption is rebutted, however, when loans are used to assure long-range expansion, the addition of productive capacity, or the financing of new ventures. Of course, when a loan financing the expansion of a controlled company does in fact constitute a direct investment, it is subject to the normal declaration procedures rather than the special authorization procedure applicable to foreign loans.

Determination of whether a given financing is a direct investment or just a loan poses perhaps the principal problem in the interpretation of the new foreign investment regime. When in doubt, the investor may always confer informally with the Ministry of Finance to obtain the advice of the civil servants concerned.

#### E. Prior Authorization Procedure for Foreign Loans

Section IV of the decree provides that all borrowings by individuals or companies resident in France from international institutions or from individuals or companies resident abroad are subject to the prior authorization (*autorisation préalable*) of the Ministry of Finance. There is no parallel requirement for loans by French residents to foreign borrowers. In contrast to the provisions controlling direct investment, foreign-controlled French companies and French branches of foreign companies are treated as French residents and thus must also seek authorization if they borrow from foreign sources.<sup>72</sup>

The mechanism is precisely the same as that provided by the old exchange control law, and should be contrasted with the new declaration procedure for direct investments. An application is made to the Ministry of Finance, and the operation may not be undertaken until authorization has been granted. Although there is no fixed period of time within which the Ministry of Finance must make its decision, in fact the ministry may generally be expected to act within a two-month period.

Section IV of the decree, however, exempts two categories of financing from the prior authorization procedure: loans which con-

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71. Arrêté of the Ministry of the Economy and of Finance of Jan. 27, 1967, art. 3(3) [1967] J.O. 1074.

72. Foreign branches of French companies are treated as foreign residents.

stitute direct investments, and loans which meet restrictive criteria supplied by the decree. If a foreign loan is a device to acquire control of a French company, to increase a pre-existing prior control, or to assure the expansion of a company already under foreign control, and is therefore a direct investment, the declaration procedures apply rather than the prior authorization procedures. In practice, the foreign parent company engaged in financing a French subsidiary is most likely to be affected by this provision. In each case, a judgment will have to be made whether the loan is to be considered as financing an expansion of the subsidiary or as merely taking the place of routine financing of current operations which ordinarily would be available from local financing institutions. In the case of an already wholly owned French subsidiary,<sup>73</sup> it is difficult to see how there could be a further increase of the parent's control such as to make the declaration procedure applicable (assuming no expansion of the subsidiary's actual operations). While one can conceive of one hundred per cent equity control being increased by further control as a creditor, it is suggested that the French government already having been consulted, and having interposed no objection to foreign shareholder domination of the company, should have no interest in applying, as to loans by the foreign parent, the special declaration procedures designed to prevent uncontrolled foreign takeovers. In such circumstances, consequently, the loan should not be subject to the declaration procedure; depending upon the amount involved, it would either be subject to the prior authorization procedure of section IV, or it would be free from all formalities. Where, on the other hand, ownership of the corporation is split between a minority shareholder group and the majority shareholder, it is, of course, easy to see how a loan by the majority shareholder to its subsidiary could serve to increase its control, thus constituting a direct investment subject to the declaration procedure. This could be true even where the majority shareholder did not make the loan itself, but merely guaranteed a loan by a foreign bank to the French company.

A more delicate question arises where a loan to a foreign-controlled French company by a local bank in France is guaranteed by the foreign parent company. It is submitted that such a loan, taking place between two resident French companies, would not be subject to the prior authorization procedure. Since the French banking insti-

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73. Although many French subsidiaries are considered to be "wholly owned" by foreign parent companies, the parent never owns one hundred per cent of the outstanding stock since French company law requires that there be a minimum of seven shareholders and that each director owns a number of shares of company stock specified in the articles of incorporation and bylaws.

tution would already be subject to all the applicable credit controls of internal French law,<sup>74</sup> there would be no need to add the authorization procedure appropriate to foreign loans. On the other hand, if the loan served to increase or extend a foreign shareholder's control, then the foreign shareholder would have participated in a direct investment and would have to make a declaration.<sup>75</sup>

Two types of loans are exempted from the prior authorization procedure and may be contracted freely: (a) loans from abroad to finance services rendered abroad or commercial transactions between France and foreign countries,<sup>76</sup> and (b) loans from abroad as long as the borrower does not have a cumulative total of more than two million francs (about \$400,000) of such loans outstanding.<sup>77</sup> The former exception is intended to recognize the necessities of normal international trade; the latter represents a considerable relaxation from prior rules which permitted French companies to contract foreign loans up to a cumulative total of one million francs without prior authorization, but only on condition that the loan did not exceed two years in duration and the maximum rate of interest did not exceed four per cent.<sup>78</sup> It should be stressed, however, that even loans which do not cause the borrower's foreign indebtedness to exceed the two million franc ceiling, will be subject to the declaration procedure if they constitute a direct investment.<sup>79</sup>

#### F. Criminal Penalties

Article 5 of the new law provides criminal penalties for violation of the law, as well as for violation of those decrees issued in conformity with article 3 of the law. The penalties include imprisonment from one to three months, confiscation of the corpus delicti, and imposition of a fine of at least one-half, but not more than twice, the amount of the infraction. No other sanctions are provided.

Enforcement of economic regulations by criminal sanctions is

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74. These are established by the *Conseil National des Credit* and are obligatory on banks in France, whether domestic or branches of foreign banks.

75. Many such loans are financed by French branches of foreign (frequently American) banks. The branch is considered as a French resident for these purposes and it need in no event request authorization. Decree No. 67-78 of Jan. 27, 1967, § II, art 6(3), [1967] J.O. 1023. If such a bank operated as an investment bank, and acquired control of French companies, however, it would presumably be subject to investment procedures.

76. *Id.* § IV, art. 6(2).

77. *Id.* § IV, art. 6(4).

78. Avis No. 762 of the Ministry of the Economy and of Finance, Aug. 7, 1963, tit. I, [1963] J.O. 7340, replacing Avis No. 669 of the Ministry of the Economy and of Finance of Jan. 21, 1959, tit. I(A)(5)(b), [1959] J.O. 1130.

79. Decree No. 67-78 of Jan. 27, 1967, § IV, art. 6(1), [1967] J.O. 1073.

not particularly surprising, but the vagueness of the regulatory criteria could well lead to inequities. A leading member of the Paris bar has commented that the vagueness of such key concepts as "control" abandons the definition to "the discretion of the administration at first and the criminal court afterwards."<sup>80</sup> One might guess that in practice most prudent businessmen will avoid possible criminal penalties by complying with the procedures set forth in the regulations, as interpreted by the administration in the informal conferences mentioned above, even in those cases where it is extremely doubtful that a court would find the regulations applicable. In the absence of judicial interpretation, the interpretation urged by the administration will be accepted. This was already the established practice under prior law.<sup>81</sup>

It should be noted that this is not solely a French phenomenon: distortions in the interpretation of economic regulations brought about the threat of criminal prosecutions and by the absence of judicial interpretation in noncriminal cases has been noted and criticized in regard to the enforcement of American regulatory legislation.<sup>82</sup> The complexity of the regulations under United States statutes, such as the Export Control Act,<sup>83</sup> which are also enforced by criminal sanctions, has given rise to a similar pattern of informal consultations with the concerned agency and usual acceptance of its interpretation.

The provisions for institution of criminal proceedings<sup>84</sup> appear to leave considerable discretion with the Minister of Finance in the commencement and settlement of actions based on violations of investment controls. Thus, although little flexibility in the prosecution of criminal violations of the new law is evident from its text, in practice, such flexibility will probably exist.

### G. *Industrial Property Rights and Know-How*

Control by the Minister of Finance over agreements with foreign residents relating to industrial property rights, know-how, and technical assistance, traditionally exercised within the scope of exchange

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80. Monneray, *Le Nouveau Régime des Changes et des Investissements Etrangers*, *Le Monde*, Feb. 5-6, 1967, at 9, col. 2.

81. Jeantet, *Exchange and Control Regulations in France* in 1 *AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET* 197, 224 (E. Stein & T. Nicholson eds. 1960).

82. Austern, *Sanctions in Silhouette: An Inquiry Into the Enforcement of the Federal Food, Drug, and Cosmetic Act*, 51 *CALIF. L. REV.* 38 (1963).

83. 50 U.S.C. app. §§ 2021-32 (1964). The regulations are found at 15 C.F.R. § 368-99 (1967).

84. Law No. 66-1008 of Dec. 28, 1966, art. 5(II), [1966] *J.O.* 11621 (incorporating by reference provisions of the Customs Code giving the Minister of Finance discretionary powers in the institution of proceedings).

controls, was terminated with the abolition of those controls by Law No. 66-1008. The law made no provision for new controls in this area. However, a decree transferred responsibility to the Minister of Industry and empowered him to give an *avis*, or opinion, on such agreements.<sup>85</sup> While this decree was issued on the same day as the Ministry of Finance decree implementing Law No. 66-1008, it is not based upon that law and makes no reference to it.<sup>86</sup> It differs in a number of significant ways from the Ministry of Finance regulations.

Unlike the regulations providing for control both over French investments abroad and foreign investment in France, the Ministry of Industry decree applies only to the acquisition by French domiciliaries of industrial property rights, know-how, and technical assistance from abroad. The unilateral nature of the control illustrates a French policy decision that the primary concern of the government is to protect French industry against such weakening or stagnation of its technical competence as might arise through excessive reliance and expenditure on foreign industrial property rights and techniques.

The decree provides that the French domiciliary shall deposit the proposed agreement, together with a dossier of supporting documents and explanations, with the Ministry.<sup>87</sup> Within forty days after the completed dossier has been received, the Ministry must render a favorable or unfavorable opinion on the agreement. The Ministry's examination spans the technical and financial terms of the agreement and takes into account national defense requirements, if applicable.<sup>88</sup> It may consult with the contracting party to determine whether available French resources have been utilized and may propose and discuss modifications of the agreement. Presumably, it can refuse to render a favorable opinion if proposed modifications are not accepted.<sup>89</sup>

Since the Ministry of Industry decree is not based on the new

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85. Decree No. 67-82 of Jan. 27, 1967, [1967] J.O. 1081. The decree was later implemented by departmental regulation. Arrêté of the Ministry of Industry, March 6, 1967, [1967] J.O. 3173.

86. The only authority cited in the decree is Decree No. 65-586 of July 15, 1965, [1965] J.O. 6215, relating to the organization of the Ministry of Industry.

87. Unlike Decree No. 67-78, [1967] J.O. 1073, which uses the test of habitual residence, Decree No. 67-82, art. 1, [1967] J.O. 1080, refers to contracts between persons domiciled in France and persons domiciled abroad. The reason for this differentiation is not apparent.

88. Arrêté of the Ministry of Industry, March 6, 1967, arts. 1, 3, n.64, [1967] J.O. 3173.

89. Decree No. 67-82 of Jan. 27, 1967, art. 2, [1967] J.O. 1081. In the opinion of one writer the contracting party need only consider the technical suggestions of the Ministry and is not obliged to accept these or any other modifications. See Pinto, *supra* note 68, at 260-61.



law governing foreign investments, the effect of an unfavorable opinion rendered by the Ministry is uncertain. It is quite clear that the criminal penalties of Law No. 66-1008 are not applicable.<sup>90</sup> Furthermore, as the decree itself imposes no penalties, criminal or otherwise, it may be argued that even if the parties disregard the opinion of the Ministry, the contract would nevertheless remain valid.<sup>91</sup> Notwithstanding this apparent lack of enforcement remedies, the departmental *arrêté*, issued by the Ministry of Industry on March 6, 1967, to complete the provisions of the January decree, provides that the decision of the Ministry will be communicated to the tax authorities and to customs authorities.<sup>92</sup> This raises the possibility that indirect pressures may be applied to coerce compliance with the Ministry's proposals. To pose one possibility, deductions taken by a licensee for royalty payments under a license which had received an unfavorable opinion by the Ministry might well be disallowed by the tax authorities. Thus, while it is doubtful that legal authority exists for the taking of prejudicial tax or customs action based solely on the unfavorable opinion of the Ministry regarding a licensing agreement, it may be expected that the mere expression of an official opinion as to the undesirability of an agreement, together with the communication of this opinion to the interested agencies, will dissuade the parties from putting their agreement into effect without inclusion of the Ministry's "suggestions."

The other principal requirement contained in the Ministry of Industry decree is that of making annual reports of receipts and expenses under agreements covered by the decree.<sup>93</sup> Since the only contracts covered by such agreements are those which would generally call for payments, but not receipts, by the French party, the reason for requiring the latter in the annual report is unclear. It seems quite probable that the language was drafted in expectation that the decree would be bilateral in nature. In fact, a later circular of the Ministry of Industry, while recognizing that there is no obligation to do so, has requested that contracts transferring or licensing industrial property rights abroad should likewise be filed with the Ministry.<sup>94</sup> Indeed, the Ministry of Industry has in some cases formally requested reports as to the receipts by the French contract-

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90. See Monneray, *supra* note 80, at 12. Professor Pinto is also of the same opinion. Pinto, *supra* note 68, at 263.

91. Pinto, *supra* note 68, at 263.

92. Arrêté of the Ministry of Industry, March 6, 1967, art. 6, [1967] J.O. 3173.

93. Decree No. 67-82 of Jan. 27, 1967, art. 3, [1967] J.O. 1081; Arrêté of the Ministry of Industry, March 6, 1967, art. 8, [1967] J.O. 3173.

94. Ministry of Industry Circular, April 13, 1967, at 2.

ing party from foreign licensing agreements, maintaining its request despite objection by the party. As there would appear to be no present legal basis for such requests, it may be expected that further regulations will be issued, or that administrative practice will be conformed to the contents of the present regulations.

#### IV. THE NEW LEGAL REGIME OF FRENCH COMPANIES UNDER FOREIGN CONTROL

The most important novelty in the new foreign investment regulations is the discriminatory legal treatment of French companies under foreign control. A French company under foreign control must make a declaration of all intended direct investments in France and such investments are subject to the refusal of the Ministry of Finance. Similar investments by French-owned French companies are, of course, free of such obligations.

Prior law, based as it was on the control of foreign exchange, imposed barriers only on the original investment from abroad. Once a subsidiary had been established or control of an existing company had been acquired by the investment of foreign capital, the subsidiary's subsequent dealings in France were not subject to regulation. A company established under French law and having its head office in France was considered to be French and was treated as a resident.<sup>95</sup>

The mechanism for applying the new restrictions is found in article 4(1) of the Ministry of Finance decree, which states that the declaration procedure is applicable to direct investments made by companies in France under foreign control ("*sociétés en France sous contrôle étranger*"). If the framework of the decree and the teaching of prior exchange control law, both of which are based on the concept of residence, are to be respected, the phrase "foreign control" must be read to refer to companies in France under control of persons resident abroad. Article 3(1)(b) of the decree, relating to the corollary situation of investment by French-controlled companies abroad, more clearly refers to French residence, requiring declaration of direct investments abroad by companies under the control of persons in France ("*sous contrôle de personnes en France*"). Basing his argument on the difference in language between article 4(1) and

95. Avis No. 619 of Sept. 18, 1956, [1956] J.O. 8817. See also the definition supplied by the "Office des Changes" in response to a questionnaire: "*La législation des changes considère comme françaises les sociétés constituées suivant la loi française et dont le siège social est situé en France. C'est le critère du siège social qui a été adopté pour l'assujettissement à la législation des changes.*" J. HAMEL, LE CONTRÔLE DES CHANGES 191 (1955).

article 3(1)(b), Professor Pinto, in his interesting article on the new law, has stated that the decree intends to utilize the test of nationality and not of residence in determining what constitutes "foreign control" of companies in France.<sup>96</sup> Such an interpretation would be inconsistent with the residence test set up by article 4(1) in defining the flow of foreign capital into first tier investments in France subject to the declaration procedure. Thus, the substitution of a nationality test in determining those second tier investments (investments in France by a foreign-controlled French company) subject to the declaration procedure does not seem to be required by the decree's language or its purposes.<sup>97</sup>

The residence test, which is quite clearly adopted in referring to direct investments abroad by foreign companies under control of persons in France, does cause certain anomalies in extreme cases. Thus, for example, a Delaware corporation owned by a French citizen resident in the United States would be free to make direct investments in the United States without first making a declaration to the Ministry of Finance. If, however, the owner resided in France, the very same investment would be subject to the declaration procedure. Even more bizarre would be the case of a Delaware corporation owned by an American citizen resident in France. Following the test of article 3(1)(b), this American firm would be *sous contrôle de personnes en France* and would, consequently, be subject to the declaration procedures even if it made a direct investment in the United States having no relationship with France—as, for example, the establishment of a United States subsidiary or branch, or the acquisition of the assets of another United States business. In view of the seeming lack of French jurisdiction, or legislative interest, in such exclusively American affairs, it is doubtful whether such a result is intended.

The practical effect of subjecting French companies under foreign control to the investment regulations is that a foreign-controlled subsidiary may not itself acquire a French company or even increase its control over its own subsidiary without the blessing of the Ministry of Finance. Nor may it set up branch offices or acquire a *fonds de commerce*, or business concern, without Ministry approval. This prohibition would seem to bring under governmental control a rather broad range of activities. Any time that a foreign-controlled French company in a service industry (for example, the

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96. Pinto, *supra* note 68, at 252.

97. Accord R. & J. LEFEBVRE, *LE NOUVEAU RÉGIME DES RELATIONS FINANCIERS ENTRE LA FRANCE ET L'ÉTRANGER* 12-13 (Mimeo 1967).

automatic car wash or laundromat industries) wishes to open a new operation to exploit a new clientele, it appears that a new declaration will have to be made to the Ministry. The same would be true for the establishment of additional sales points by any sales organization. Finally, the notion of "*fonds de commerce*" (roughly translated as a business or "going concern") is sufficiently broad to cause uncertainty as to whether investment regulations apply in a wide variety of situations, such as the purchase of premises or the purchase of a commercial lease or assets of another company. The practitioner faced with the problem of determining whether a particular transaction will be deemed to involve a *fonds de commerce* for investment purposes should, perhaps, refer to the definitions of this well-developed concept in French tax law.

Another effect of requiring French subsidiaries to declare direct investments—in view of the very broad scope of the term—is seemingly to subject self-financed expansion to government control.<sup>98</sup> The typical case is where a foreign-controlled French subsidiary builds a new plant for new activities, raising the money by itself borrowing from French sources. While the commentators hesitate to conclude that such a transaction is subject to the control procedures,<sup>99</sup> and indeed a close reading of the decree permits the argument that the situation is not covered,<sup>100</sup> indications from informed sources are that government authorities would subject such expansion activity to control.<sup>101</sup>

While the new regulations constitute a profound change in the treatment of companies owned by foreign capital, the argument that they further constitute a profound modification of the French theory of nationality of companies is less supportable.<sup>102</sup> While French case law has flirted from time to time with the notion of control as a test of nationality,<sup>103</sup> the accepted theory is that certain restricted statu-

98. Brock, *supra* note 48, at 988.

99. Pinto, *supra* note 68, at 250.

100. Article 4(1) of Decree No. 67-68, [1967] J.O. 1073, provides that a declaration must be filed for any direct investment made by foreign residents or by a French company under foreign control. However, in the case of "extension" art. 2(3)(b) defines direct investment as: "All other operations which . . . tend to permit one or several persons . . . to insure the extension of a company *already under their control*." (Emphasis added.) It can be argued that in the case of local financing no declaration need be filed by the foreign parent which has engaged in no investment activity, nor need it be filed by the subsidiary which has not engaged in an operation to insure the "extension" of a company *already under its control*.

101. A specific exception is made in the case of an increase in capital from retained earnings of the French company, which is not subject to declaration. Arrêté of the Ministry of the Economy and of Finance, Jan. 27, 1967, [1967] J.O. 1073.

102. La Clavière, *La Nouvelle Réglementation des Relations Financières avec l'Étranger*, [1967] Sem. Jur. I. 2071, at para. 28.

103. See, e.g., Remington Typewriter, [1936] D.P. I. 121 (Cass. req.).

tory discriminations against French corporations owned by foreign shareholders do not change the French nationality of companies having their *siège* in France.<sup>104</sup> The new regulations would seem to conform to this principle. Their main novelty is that in the past special treatment of French corporations controlled by foreign shareholders has either been exceptional (such as the seizure of companies under enemy control as a war measure),<sup>105</sup> in the nature of denial of special government benefits,<sup>106</sup> or in support of national security;<sup>107</sup> the new rules, however, seem to provide for surveillance in France of French companies controlled by foreign residents as a permanent measure and as part of a general control of the role of foreigners in the domestic economy.

## V. ADMINISTRATION OF THE NEW LAW— PROCEDURE AND POLICY

### A. *The Elements of Decision*

The preceding study of the new foreign investment law and regulations leaves little doubt that the structure for rigid control of foreign direct investment in France now exists. The use the government will make of the available controls is not, however, fully known. The first indications are, perhaps, contained in the information which the administration demands from foreigners intending to effect direct investments in France, the information upon which, presumably, the administration's decision will be based. The suggested contents of the declaration of direct investment are set forth in a notice issued by the Ministry of Finance.<sup>108</sup> While this notice does not have the force of law, it does represent the point of view of the governmental agency in charge of foreign investments; consequently, substantial compliance with it is both expected and in the interest of the potential investor.

104. See H. BATTIFOL, *DROIT INTERNATIONAL PRIVÉ* 231 (4th ed. 1967).

105. *Id.* at 228.

106. *J.J. Rozendaël Co. v. Minister of Public Works*, [1933] D.H. Jur. 489 (Cass. civ.) (government award of war damages).

107. Decree of August 17, 1936, [1936] J.O. 8888 (requiring at least half of the capital in defense industry corporations to be owned by French nationals); other legislation provides that the management or board of directors must be French, see Law of May 31, 1924, [1924] J.O. 5046 (companies engaged in air transportation); Law of April 7, 1902, art. 7, [1902] J.O. 2626 (subsidies for merchant marine).

108. Ministère de l'Économie et des Finances, Direction du Trésor, *Notice relative aux conditions d'établissement des déclarations préalables d'investissements directs opérés en France par des personnes physiques ou morales à l'étranger ou par des entreprises ou sociétés en France sous contrôle étranger* (April 1967), published in *RECUEIL DES TEXTES DU MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES, INVESTISSEMENT 1* (1967). The *Notice* is accompanied by a printed form upon which the declaration of direct investment may be made.

The first category of information concerns the investor himself. Nationality of an individual investor must be specified. For a corporation, not only is the address of the head office demanded, but also the identity of its principal shareholders and their respective percentage shares of ownership of the company. The administration thus is interested less in the legal nationality of a corporation than in the nationality of the controlling shareholders. Certainly an investment made by the Belgian subsidiary of an American company will be considered as an American, and not a Belgian, investment. Financial information as to the investing corporation must also be made known, including its stated capital and its annual financial statements for the past three years. If the company is itself a subsidiary or part of a related group of companies, some information as to the related companies is also required. Finally, technical and trade information regarding the investor must be supplied: the nature of its activities, its volume of trade by product, its investment in plant and equipment, and its distribution arrangements. As a practical matter, it is frequently best to supplement this information by attaching examples of technical brochures which describe in detail the investor's products.

The second category of information concerns the French company in which the direct investment is to be made, and serves clearly to identify this entity, its legal form and its address, as well as its principal managers.

In the third category, the investor is required to describe the nature of the contemplated investment. Where capital is to be subscribed in kind rather than in cash or where a direct investment<sup>109</sup> is to be made by a financial transaction other than purchase of a capital interest, full disclosure of the transaction and the nature of the contribution is necessary. The total amount of the investment as well as the timetable for its full realization must be supplied. Most important, the distribution of the capital contribution between foreign and French shareholders must be set forth in full detail.

The required information differs somewhat depending upon whether investment in an existing company or the creation of a new company is contemplated. In the former situation, the investor must supply the company's articles of incorporation and bylaws, a list of its shareholders (insofar as possible), an indication of its stated capital, and its financial statements for the previous three years, as well

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109. Direct investments, as described in the *Notice* (note 108 *supra*), may include: loans or guarantees of loans, purchase of debt instruments of all kinds, acquisition of rights in real property or of mining rights, technical or commercial assistance contracts, and patent and trademark licenses.

as a statement and justification of the purchase price per share. The latter situation requires submission of the proposed articles of incorporation and bylaws, as well as a financial plan breaking down into various categories (incorporation expenses, real estate, plant, equipment, housing, and so forth) the capital to be invested and the proposed method of realization of this investment. In both cases, a proposed financial plan for the next four years must be supplied, indicating the relation of debt to equity and whether the financing is to be obtained in France or abroad.

The fourth category is entitled "motives and effects of the planned investment,"<sup>110</sup> and the information demanded here is apparently intended to aid economic planners in predicting the long-range effect of the investment on France's economy. Two issues stand out: the contribution to France's technical development and the effect of the investment on its balance of payments.

The investor is required to analyze and describe its plans for production in France, including the nature of goods to be produced, the volume and value of production, the type of plant to be acquired or built, and the equipment to be utilized. In particular, the declaration should state "if the project involves the creation of a center of technical research."<sup>111</sup> If so, details as to its proposed operations should be set out.

In order to show the effect on the balance of payments, the declaration should describe the equipment to be imported, its price, and terms of payment. An estimate must be made of export production and export destinations and the declaration must indicate "if certain countries or certain zones will be contractually excluded from the market for the production of the French enterprise or company, or if certain countries or certain zones will, on the contrary, be reserved to it, or if no agreements of this nature are foreseen between the French company and its foreign shareholders or other companies of the same group."<sup>112</sup> Finally, proposed commercial agreements between the foreign shareholder and the French company must be set forth.

When the declaration of direct investment has been made according to the strictures of the administration, the elements for decision are assembled.

#### B. *The Procedure of Decision*

The Ministry of Finance, which is granted the power to veto foreign loans and direct investment, is divided into four depart-

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110. *Notice*, *supra* note 108, at 8.

111. *Id.* at 9.

112. *Id.*

ments: budget, taxes, economy, and treasury. The Department of the Treasury (*Direction du Trésor*) has been assigned the duty of processing declarations of direct investments and applications for approval of foreign loans.<sup>113</sup> The Minister of Finance himself, however, has the ultimate responsibility for decision and, in important cases, may consider the proposed investment personally. He is aided by the Interministerial Committee on Foreign Investment (*Le Comité Interministériel des Investissements Etrangers*) over which he presides.<sup>114</sup> The thirteen other members of the Committee are a cross section of the government and represent the various interests which may be affected by foreign investments.<sup>115</sup> The most important members of the Committee, in reference to particular investment applications, are the Minister of Industry and the Delegate for Regional Planning, since the agencies which they represent are vitally concerned with the effect of new investments. The Interministerial Committee not only studies the general problems of French investment abroad and foreign investment in France, but also gives its opinion on particular projects which "present an exceptional importance because of their amount and characteristics."<sup>116</sup> In practice it considers all investments amounting to more than 500,000 francs.<sup>117</sup>

Even if the investment is not presented to the Interministerial Committee, it is the internal procedure of the Ministry of Finance to refer specific investment projects to those ministries representing interests which may be affected. Thus, all applications of any significance are subjected to the scrutiny of departments other than the Ministry of Finance. A declaration of a proposed investment which will result either in the acquisition of control of an existing French company, or in the establishment of a new one, will ordinarily be

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113. Arrêté of Jan. 27, 1967, arts. 3, 7, [1967] J.O. 1074.

114. The committee as presently constituted was created under the prior exchange control regime in 1966 as a successor to a similar committee in existence since 1945. Arrêté of May 4, 1966, [1966] J.O. 3605, as modified by Arrêté of June 14, 1966, [1966] J.O. 5012. While the committee is not mentioned in the new law and regulations, it in fact continues to operate as in the past.

115. The members are the Minister of Justice, the Minister of Foreign Affairs, the Minister of Agriculture, the Minister of Equipment, the Minister of Industry (who exercises functions comparable to those of the United States Secretary of Commerce), the Minister of Social Affairs (including labor and public health), the Minister in charge of Scientific Research, Atomic Energy and Space, the Secretary of State for Foreign Commerce, the Secretary General for National Defense, the Secretary General of the Inter-Departmental Committee for Questions Relating to European Economic Cooperation, the Commissioner in charge of the Economic Plan, the Delegate for Regional Planning ("*le délégué à l'aménagement du territoire et à l'action régionale*"), and the Governor of the Bank of France.

116. Arrêté of May 4, 1966, art. 2, [1966] J.O. 3605.

117. MINISTÈRE DE L'INDUSTRIE, RAPPORT SUR LES INVESTISSEMENT ETRANGERS DANS L'INDUSTRIES FRANÇAISES (Bockanowski Report) 14 (1965); [1966] J.O. (*Avis et Rapports du Conseil Economique et Social*) 377, 386 (May 28, 1966).



referred by the Ministry of Finance (Treasury Department) to the technical staff of the Ministry of Industry. After analyzing the effect of the investment on French industry, this staff will then give its opinion, which will be relayed in turn to the Ministry of Finance. Similarly, where a new plant is to be built, the advice of the Regional Planning Department will be sought. The proposed location of the plant site will be considered in relation to the government's goal of decentralization and creation of new industry in regions of France which have traditionally been underdeveloped and which have not shared in France's current prosperity.

As the declaration is processed by the various technical services, it is possible, especially in cases involving difficult issues, that the applicant will be called upon by the interested service to supply further information, or to explain its position. Although the purpose of these meetings or communications with the ministries involved may frequently be simply to obtain informal clarification as to the details of the investment, in some cases the ministries may ask for amendments of the planned investment so as to bring it more in line with government goals. Where conflict exists among various ministries,<sup>118</sup> modification of the application to meet the objections of an intransigent department may bring about harmony and approval. Concessions which might be requested could include, for example, renunciation of rights to certain government subsidies ordinarily accorded to investments<sup>119</sup> meeting criteria set forth in the government's economic program (*le Plan*).<sup>120</sup>

If the processing is not completed within the sixty-day limit provided by the decree,<sup>121</sup> the Ministry will demand a postponement (*ajournement*) of the investment. Its letter will, however, stipulate that the postponement is only provisional and is intended to permit the various services to have time to process the declaration. Thus, administrative practice has, in fact, turned the sixty-day limit of the decree, which at first view seems to be a rigid statute of limitations,

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118. It is not infrequent that the interest of different ministries are in conflict. For example, Regional Planning might welcome a new investment which plans to locate in Brittany, which is industrially underdeveloped, but the Ministry of Industry might fear the impact of a highly developed industry in a field where the entry of new competitors may adversely affect budding French development.

119. In principle, the laws granting special benefits do not discriminate against foreign-controlled corporations, and in the past such corporations have profited from subsidies and special loans. See J. GERVAIS, *LA FRANCE FACE AUX INVESTISSEMENTS ETRANGERS* 46-47 (1963).

120. The Plan is a comprehensive set of economic goals for France, which, not having the force of law, is to be attained by voluntary and quasi-voluntary measures in addition to economic incentives. The Fifth Plan covers the period 1966-1970.

121. Decree No. 67-78 of Jan. 27, 1967, art. 4(1), [1967] J.O. 1073.

into a statement of principle from which derogations may now be made at will.

When the Ministry has arrived at a final decision, it will either request the permanent postponement of the investment or will notify the applicant, in a document that has all the attributes of an authorization, that in the circumstances of the investment as set forth the Minister does not choose to exercise his right to demand postponement. Interestingly enough the decree makes no provision for such a document. It only provides that the Minister may, within two months of the declaration, request the postponement of the investment, and that he may, in any event, renounce such right prior to the expiration of the two-month period.<sup>122</sup> Since the Minister's authorization letter often will list the conditions upon which are predicated his agreement not to request postponement of the investment, simple administrative practice is again seen to extend the government powers beyond the scope apparently envisioned by the enabling law. It should be borne in mind that if the investment were subsequently to be effectuated in a manner not contemplated by the Minister's renunciation letter, it could be argued that the investment realized had not been properly declared to the authorities and was thus in violation of foreign investment controls. The Minister's letter thus very closely resembles the authorization letters issued by the Ministry of Finance under the license procedures of wartime and postwar exchange controls, under which all unlicensed transfers or investments were forbidden.

The use of the renunciation letter as a kind of license is indicative of the attitude of the civil servants who are entrusted with the execution of foreign investment controls. Each proposed substantial foreign investment is treated as a case for full study as to its desirability and effect on the French economy. The winds of change of the Law of December 28—"financial relations between France and other countries are free"—have not swept through the halls of *rue de Rivoli* and *rue Clichy*, where the administration continues its study and careful control of foreign investments.

### C. *The Government's Policy and Its Background*

In order to understand the various actions which may be taken by the government on investment declarations submitted to it under the new regime, it is necessary to consider the recent history of the control of foreign investment. In a country known for its emphasis

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122. *Id.*

on theory and abstraction, it is remarkable that the French government has never published criteria by which direct investment applications would be judged. Such a failure was perhaps understandable under the administration of the law in the postwar period: in March 1963 the Ministry of Finance stated that no foreign investment application had been refused in recent years,<sup>123</sup> and this situation continued substantially unchanged through mid-1964.<sup>124</sup> But from this period through 1965, an abrupt shift of emphasis occurred and indefinite delays in processing applications became almost routine. While actual denials of investment applications were exceptional, considerable pressure was put on applicants either voluntarily to withdraw applications for investments deemed unsuitable, or to transmute the proposed investment into a more suitable form. Even so, one author claims that from January to September 1965, 47 out of 138 investment applications were denied outright by the Ministry of Finance.<sup>125</sup>

During this difficult period for foreign investment, it became known that the Ministry was formulating guidelines which would be the "bible" for foreigners seeking to invest in France. These guidelines, however, never appeared. Among the probably numerous reasons for this failure, the two principal ones seem to have been changing governmental attitudes toward the dangers of foreign investment, and internal disputes among the concerned agencies as to criteria for desirable investments.<sup>126</sup>

The first reaction to the ever-increasing volume of foreign investments was thus simply to hinder and delay all substantial (and some not so substantial) investments, in the hopes that investors would become discouraged. Instructions went out from the Minister of Finance to his services to examine each investment application with great care and to make a choice between "good" and "bad" investments.<sup>127</sup> This resulted, in 1965, in a very substantial drop in foreign,

123. See GERVAIS, *supra* note 119, at 39.

124. For a history of this early period see Dusart, *The Impact of the French Government on American Investment in France*, 7 HARV. INT'L L. CLUB J. 75 (1965).

125. L. MANUALI, LA FRANCE À L'IMPLANTATION ÉTRANGÈRE 42 (1967). See also Le Monde, Sept. 16, 1965, at 19, col. 1. Just as the Ministry's statement that as of March 1963 no investment application had been rejected is a bit suspect due to unofficial methods of frustrating investment applications, it may also be wondered whether a number of these forty-seven refusals were not later tempered by authorization of subsequently modified applications.

126. In fact, during this period the only two previously enunciated general theories of investment control—favoring investment in new companies over takeovers and determining favorable and unfavorable sectors of the economy for foreign investment—were abandoned as unworkable. [1966] J.O. (*Avis et Rapports du Conseil Économique et Social*) 377, 395 (May 28, 1966).

127. Le Figaro, Feb. 3, 1966, at 17, col. 2.

and particularly American, investments,<sup>128</sup> which was followed by an even steeper drop in 1966, when the full effect of corporate investment decisions made in 1964 and 1965 was felt.<sup>129</sup> But it soon became apparent that since the foreign investors were perfectly free to establish in a Common Market neighbor and export their products into France, the policy of careful sifting combined with a policy of indiscriminating delay was an ineffective long-range solution to the problem. In fact, during this period American investment in Germany and particularly in Belgium showed a marked increase.<sup>130</sup>

The search for a new policy may be said to date from the replacement, in January 1966, of Valéry Giscard d'Estaing by Michel Debré as Minister of Finance. Debré was responsible for the creation of the Interministerial Investment Committee which was to aid in formulating a policy as to the categories of investments to be limited. It was indicated that the task of the committee was to create "jurisprudence," or case law, rather than "doctrine," or textbook policy.<sup>131</sup> According to the Ministry of Finance, the policy was to embody a presumption that foreign investments would be allowed unless they adversely affected a sensitive national interest.<sup>132</sup> The Minister of Finance has repeated, on several occasions, his reference to the presumption in favor of foreign—including American—investment.<sup>133</sup> And, ever since the extraordinary public announcement by the Ministry on March 24, 1966, that Motorola, a United States corporation, had been authorized to set up a plant in Toulouse for the manufacture of semi-conductors—no announcement of investment authorization is ordinarily given—the approach has been to study foreign investment applications on a case-by-case basis in the light of this favorable presumption.

Action on investment applications is taken within the context of French economic and political goals. Foreign investment in general presents several possible economic advantages: especially in view of the slump in domestic investment,<sup>134</sup> foreign investment in plant and

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128. U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS 34 (Sept. 1966).

129. See MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES, BALANCE DES PAIEMENTS DE L'ANNÉE 1966 (July 1967); U.S. DEP'T OF COMMERCE, *supra* note 128, at 42 (Sept. 1967). See also report of the Minister of Finance to the *Comité Interministériel des Investissements Étrangers*, *Le Monde*, Sept. 21, 1967, at 21, col. 1.

130. U.S. DEP'T OF COMMERCE, *supra* note 128, at 12 (Sept. 1967).

131. Mooney, Investments in France, *New York Times* (International ed.), March 24, 1966, at 1, col. 3.

132. *Le Monde*, Feb. 18, 1966, at 1, col. 5 (statement attributed to Debré).

133. Speech of Minister Debré to the French Chamber of Commerce in the United States, *Paris-Presse—L'Intransigeant—France-Soir*, June 24, 1967, at 5, col. 3; *Address Before National Assembly*, *International Herald Tribune*, June 30, 1967, at 1, col. 3.

134. MINISTÈRE DE L'INDUSTRIE, *supra* note 117, at 2 (increase in investments of 12%

equipment aids in stimulating industrial expansion, competition, and increased employment; foreign investment also improves the commercial balance of payments position, by replacing imports with national production, and furthers French technology through contributions of sophisticated foreign equipment and know-how. Furthermore, the continued surplus of private foreign investment in France over such French investment abroad has in recent years more than covered a persistent balance of payments deficit in the public sector, thus engendering a favorable over-all balance of payments.<sup>135</sup>

However, certain investments present various economic disadvantages which may outweigh such benefits. Among these is the possible domination of a sector of the economy by a giant industrial concern, leading to monopolization and solidification of the price structure rather than to an increase in price competition. More likely is the risk that a foreign-controlled company will fail to respect norms of the Economic Plan. Inflationary pressures may result both from new investments and subsequent financing which, if from foreign sources, may circumvent rigid French credit controls. Also, in some circumstances, foreign investment may even affect adversely the French balance of payments: companies falling under foreign control may increase importations from the foreign parent; payments of royalties and fees for use of foreign industrial property and technical assistance may increase; and the long-term balance of payments may eventually be affected as successful investments begin to pay dividends abroad.

On the political level, the balance is likely to be equally as difficult to draw. There is, of course, a natural resistance against allowing any sector of the economy important to national security and welfare, in their broadest terms, to be dominated by foreign interests. Moreover, as reliance on foreign technology, research, and development is thought to lead to foreign economic domination, the government scrutinizes most carefully applications for investments in industries where new technology and research is of high importance; indeed, authorization may be conditioned upon the research and development taking place in France. Also, there is a fear that practices of foreign-controlled companies in dealing with labor may violate French traditions, particularly in decisions to shut down temporarily or permanently an unprofitable plant. And, whether because of pos-

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in 1960 fell to an increase of 2.4% in 1964, much less than the increase of national production).

135. MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES, *supra* note 129; see also E. SCHMILL, LES INVESTISSEMENTS ÉTRANGERS EN FRANCE 28 (1966).

sible limitation of export trade by a foreign government<sup>136</sup> or because of a desire that important decisions regarding French companies be made in France by Frenchmen pursuant to French practices,<sup>137</sup> there undoubtedly exists generally a diffuse fear of foreign-controlled companies,<sup>138</sup> most recently crystallized in criticisms of the *mainmise*, or takeover, of French industry by Americans.<sup>139</sup> Despite these political fears, however, there are still those in France who see some benefit in the importation of new business ideas and policies from the New World.<sup>140</sup> It has even been stated that if American investment in France had no other justification, the contribution it has made to consistency in accounting and full disclosure to fiscal authorities and shareholders is a welcome innovation to the French economy and one which no doubt have a widespread beneficial effect.

The new investment controls certainly give the French government the tools for dealing with the problems posed by foreign investment. While the tools are new, however, the problems are not, and it is probable that, in the absence of any new decisional guidelines in either the new law or regulations, the policies above described, which may be gleaned from case-by-case studies over the years, will continue to be applied.

In the vast majority of cases under the new law, authorization to make the proposed investment will, after careful study, be granted, either in its original form or as modified to meet administration objections. The conclusion by the administration that a particular

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136. Notably the United States government in applying the prohibitions of the Trading with the Enemy Act to prevent trade by French subsidiaries with Communist China. This limitation led to private litigation in one case in which minority shareholders of an American controlled corporation successfully prevented the majority shareholders from causing the French subsidiary to break its contract for delivery of manufactured products to Communist China. *Sté Fruehauf v. Massardy*, [1965] Sem. Jur. II. 14274 *bis* (Cour d'appel, Paris). This decision was followed by an exchange of diplomatic notes instituted by the government of France, which remain unpublished. The French government was presumably critical of the United States government's extraterritorial application of its regulatory legislation to French corporations. According to one author the example of the *Fruehauf* case was one of the principal reasons for the increased vigor of investment screening in 1965 and 1966. Y. Loussouarn, *Le Régime Juridique des Investissements Etrangers en France*, in *ETUDES DE DROIT CONTEMPORAIN* (Report of the Seventh International Congress of Comparative Law, Uppsala, 1966).

137. See address of Minister Debré to Paris meeting of French Chamber of Commerce in the United States. *International Herald Tribune*, June 23, 1967, at 1, col. 7.

138. For a good review of the political problems of American direct investment abroad, see Model, *The Politics of Private Foreign Investment*, 45 *FOREIGN AFFAIRS Q.* 639-51 (1967).

139. Press Conference of General de Gaulle. *Le Monde*, Nov. 29, 1967, at 2, col. 4. (The criticism was based on an argument that direct investment from American sources in view of the continued deficit in the United States balance of payments was made with "inflated" dollars.)

140. See, e.g., J. SERVAN-SCHREIBER, *LE DEFI AMERICAIN* (1967).

investment presents net economic and political disadvantages will result in disapproval only in aggravated cases. But the fact remains that every proposed investment will be evaluated under the structure and procedures of the new law, and, in particular cases, certain applications may be denied. The question must be asked whether such procedures and actions are consistent with France's treaty obligations.

## VI. CONTROL OF FOREIGN INVESTMENT AND FRANCE'S TREATY OBLIGATIONS

The freedom of France to restrict and control foreign investment may be limited either by its bilateral treaties of establishment with other nations, of which the Franco-American Convention of Establishment is an example,<sup>141</sup> or by the Treaty of Rome, the multilateral treaty establishing the Common Market. The supremacy of treaty provisions over any inconsistent provision of domestic law is not only recognized by the French Constitution, but also is specifically repeated in Law No. 66-1008 itself.<sup>142</sup> We will first examine whether the new foreign investment controls are compatible with each of these treaties and then discuss whether the treaty provisions can serve as a means to eliminate the screening of foreign investments and to review refusals of permission to invest.

### A. *The Franco-American Convention of Establishment*

Article 5 of this treaty provides for national treatment for American investors in the following language:

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.

Moreover, the enterprises which they control . . . shall in all that relates to the conduct of the activities thereof, be accorded treatment

141. [1960] 2 U.S.T. 2398; [1960] J.O. 11220.

142. Law No. 66-1008 of Dec. 28, 1966, art. 1, [1966] J.O. 11622.

no less favorable than that accorded like enterprises controlled by nationals and companies of such other High Contracting Party.

The treaty provisions are quite clearly drafted to protect capital exportation—to protect, that is, the rights of establishment and investment.<sup>143</sup> The broad scope of this protection would seem, on its face, to be inconsistent with the two key provisions of the new law on foreign investment—the right of the government to veto new American direct investments and the new provisions which subject French corporations, owned by Americans, to declaration procedures (and possible veto of expansion or direct investment plans) to which other French corporations are not subjected.

Other articles of the treaty, however, establish exceptions to the general principle of national treatment. The treaty was signed in 1959 in the knowledge that France had a full-fledged system of exchange controls. Such exchange controls were, moreover, consistent with the Articles of Agreement of the International Monetary Fund, of which both parties were signatories.<sup>144</sup> Thus, article X of the Franco-American Treaty recognizes the problem of exchange controls; it provides in paragraph (1) for national treatment as to currency transfers, and, in the succeeding paragraph, limits each party's right to impose exchange controls "to the extent necessary to prevent its monetary reserves from falling to a very low level or to effect a moderate increase in very low monetary reserves."<sup>145</sup> According to article X(3), the two parties, "recognizing that the freedom of movement of investment capital and of the returns thereon would be conducive to the reallocation of the objectives of the present Convention, are agreed that such movements shall not be *unnecessarily hampered*." Each party was to "make every effort to accord, in the greatest possible measure, to nationals and companies of the other High Contracting Party the opportunity to make investments . . ." (Emphasis added.) And, in addition, each nation was permitted by article 14 of the treaty's protocol to "subject to authorization" the making of investments by foreign nationals and companies "with a view to protecting its currency or facilitating the

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143. Thus, there is no specific language to protect the rights of a party to receive investment from the other contracting party. Accordingly, exchange controls to prevent the flight of capital, as in the case of the newly imposed United States regulations on capital transfers abroad (*see* text accompanying note 176 *infra*) are not specifically forbidden.

144. 60 Stat. 1440 (1945).

145. For the view that the decision of a government to impose exchange controls based on low reserves may be attacked as a violation of treaty provisions only if "the judgment is obviously unreasonable or in bad faith," *see* Metzger, *Exchange Controls in International Law*, 1959 U. ILL. L.F. 311.



servicing of the proceeds of investments and the repatriation of capital.”

While this is hardly a ringing declaration of an absolute right to invest in all circumstances, it is nevertheless questionable whether the treaty's derogations from national treatment for investment, added to permit the continuance of exchange controls then needed to prevent France's monetary reserves “from falling to a very low level,” may be used as a justification for control of foreign investment today, in the light of strong monetary reserves and the abolition of exchange controls. Even more pointed is the absence of any monetary justification for regulating the activities of American-controlled French companies, which are to receive national treatment under the treaty, but which are singled out for special treatment by the foreign investment controls.

Another escape clause from the national treatment principle of the treaty may be found in the provision of article XII(d) that “the provisions of the present Convention shall not preclude the application of measures . . . necessary . . . to protect its essential security interests.” But this must be read in the context of the rest of article XII, the subject matter of which is national freedom to regulate questions of traffic in arms and radioactive materials, and to restore peace and security. It is thus highly doubtful that article XII(d) was intended to serve as the basis for an entire system of economic regulation.

The probable French answer to these somewhat legalistic arguments would be one of confession and avoidance. The real point, they would maintain (as indeed the French *Conseil Economique et Social* has),<sup>146</sup> is that the treaty merely “lays down the principle” of equality of investment opportunity. The very general terms of the treaty were not, it would be claimed, intended to be rigorously applied to specific cases; like so many treaty provisions, they were to have the character of exhortation alone, to be resorted to by a rejected investor only in the event of clear bad faith.

An advocate of the French position could even draw an analogy between the national treatment and nondiscrimination provisions of the convention and the equal protection clause of the federal Constitution. The fourteenth amendment, of course, does not proscribe mere differentials in treatment among persons; it is only when such differentials are seen as irrational or irrelevant in terms of legitimate

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<sup>146</sup>. [1966] J.O. (*Avis et Rapports du Conseil Economique et Social*) 11 (May 28, 1966).

national goals that they are struck down.<sup>147</sup> Thus it may be argued that the treaty lays down the principle of equality of investment opportunity in the same sense that the fourteenth amendment establishes the principle of equal protection, a principle subject to adaptation in the light of the needs and the lawful purposes of the nation.

The application of this principle must be measured both against the procedures set up for foreign investment authorizations and the implicitly reserved power of the government to veto undesirable investments.

The French government has consistently taken the position that it has the power, before permitting foreigners to exercise their treaty rights, to subject them to application and licensing procedures. Thus foreign nationals (including Americans)<sup>148</sup> enjoying the treaty right to engage in business in France may nonetheless be required to obtain a *carte de commerçant* before engaging in business. Such a requirement, the government has stated, does not affect the "enjoyment" of the rights granted by the convention, but only "the condition of the exercise of these rights."<sup>149</sup>

The contention that the enjoyment of substantive treaty rights may be conditioned upon the fulfillment of elaborate procedural prerequisites is difficult to defend. Even in the *carte de commerçant* cases—where one may concede as consistent with the treaty the reservation by the state of some police powers to verify the entry and activities of aliens<sup>150</sup>—French courts have found the government's distinction tenuous, and decisions by courts which have considered the issue on the merits may be found both sanctioning and disapproving the government's procedures.<sup>151</sup> The application of declara-

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147. Tussman & tenBrock, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

148. Ministerial response to a written question in parliament, stating that American citizens are required to obtain a *carte de commerçant* prior to engaging in business in France despite the terms of the Treaty of Establishment. Rép. Min. No. 9258, [1961] J.O. (*Débats Parlement. de l'Assemblée Nationale*) 401.

149. Letter of the Minister of Foreign Affairs, April 15, 1957, [1957] J.O. 5235 (interpreting Franco-Spanish Treaty to permit France to require *carte de commerçant* for Spanish citizens engaging in business in France).

150. Compare the requirements of § 221 of the United States Immigration and Nationality Act. 8 U.S.C. § 1201 (1964). For an example of limitations of the police powers under the Rome Treaty, see note 159 *infra*.

151. Compare Coll, [1952] Gaz. du Pal. I 366 (Cour d'Appel de Paris); Sanchez, [1952] Gaz. du Pal. I 142 (Cour d'Appel de Lyon), *rev'd*, [1953] D. Jur. 365 (Cass. crim.); Cot-Riera, [1953] Sem. Jur. II 7379 (Cour d'Appel de Riom); Bruni and Galtier, [1953] D. Jur. 425 (Cass. crim.). More recently, however, the criminal chamber of France's highest court has found that it was bound by a theory of separation of powers to accept the executive department's interpretation of applicable treaty limitations and accordingly has determined that the exercise of commerce by persons not having obtained a *carte de commerçant* constitutes a criminal offense despite the fact that the defendants were entitled to national treatment. See cases cited in note 169 *infra*.

tion and control procedures to Americans of investing in France raises more serious treaty questions, as the police power rationale implicit in the *carte de commerçant* cases has greatly diminished application when the issue is the entry of capital rather the entry and establishment of persons. The extension of these declaration procedures to the economic activities of French companies controlled by foreign shareholders seems even more clearly to conflict with treaty principles, for such companies have French nationality under French internal law<sup>152</sup> and article V of the treaty clearly provides that French companies controlled by Americans shall be accorded treatment "no less favorable than that accorded like enterprises" controlled by French citizens. Thus, in both situations above discussed it is arguable that the imposition of the declaration requirements, even if those procedures were intended only to verify the origin and nature of the investment, is contrary to the treaty.

Even if the validity of the procedural requirements, standing alone, is assumed, the treaty issue is most clearly posed by the power that the new legislation seems to give to the Minister of Finance to veto foreign investments at will and upon grounds limited only by his own discretion. May an investment by American citizens, or by French companies controlled by Americans, be "postponed" forever simply because the government finds it undesirable? Such a result is difficult to admit if establishment treaties are considered to create effectively binding obligations, a concept which France has not denied in the past. In an important case decided by the *Conseil d'Etat*,<sup>153</sup> it was held that while the French government could require a Swiss citizen, entitled to national treatment under the Franco-Swiss Treaty of Establishment, to obtain a *carte de commerçant* before being authorized to sell liquor in France, it could not refuse to grant such a card, even though French internal law forbade foreigners to engage in such activities. The legislation, it was held, could not have been intended to infringe upon a vested treaty right to national treatment.<sup>154</sup> The treaty rights here in question do not seem any less worthy of protection.

The official French position on the relationship between the investment controls established by French law and the Franco-Ameri-

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152. Law No. 66-537 of July 24, 1966, art. 3, [1966] J.O. 6402. See also text accompanying notes 102-07 *infra*.

153. Hurni, [1965] Sem. Jur. II. 14172 *bis* (Conseil d'Etat).

154. This is the traditional French judicial interpretation, which avoids conflict between a treaty and a law, and gives, when possible, predominant effect to the treaty. See H. BATTIFFOL, *DROIT INTERNATIONAL PRIVÉ* 41 (4th ed. 1967).

can and similar treaties of establishment is not yet known. Such an official interpretation could only be given by the Minister of Foreign Affairs upon the request of a tribunal before which the issue had actually been presented. However, the drafting of the foreign investment law and regulations displays a desire to avoid a head-on conflict; not only does the law expressly state that it is subject to the obligations of international treaties, it also avoids granting a direct veto power to the government, by the proviso that it may only "postpone" an undesirable foreign investment. In this way outright conflict between the terms of the treaty and the provisions of the law and regulations is avoided. The French government thus preserves an almost complete freedom of action for its future official interpretation of the treaty on a case-by-case basis. However, because of the nature of the investment rights to be protected and the procedural difficulties in enforcing bilateral treaty provisions, it may be doubted that the executive branch of the French government will be called upon to give its official views as to the compatibility of certain provisions of the foreign investment controls with the treaty. To the extent that treaty provisions of any kind may be brought to bear on the French regulations, it is probable that, whenever possible, the Treaty of Rome, with its more explicit obligations and multinational procedures, will be relied upon in lieu of bilateral treaties.

#### B. *The Treaty of Rome*

The potential American investor in France may well look for protection to the Treaty of Rome, the progenitor of the European Economic Community. Various articles of this treaty look toward the gradual formation of a unified European capital market: article 7 lays down the broad principle that, subject to more specific provisions, "any discrimination on the grounds of nationality shall be prohibited";<sup>155</sup> under article 52, restrictions on freedom of establishment—notably on the right of nationals of member states "to set up and manage undertakings"—"shall be abolished by progressive stages." Article 67, dealing specifically with restrictions on exchange and investment, provides:

During the transitional period, Member States shall, in so far as may be necessary to ensure the proper functioning of the Common Mar-

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155. Despite qualifying language ("within the field of application of this Treaty") art. 7 might be read to reach *all* foreign nationals, not merely nationals of Common Market states; in light of what follows, however, it is most unlikely that this was the intended meaning. *See also* art. 68(2).

ket, 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.

The directives of the Council of Ministers implementing article 67 have clarified and strengthened its rather vague import: as of 1960, for example, member states were to "grant all exchange authorizations required for the completion or execution" of direct investments<sup>156</sup> and to "grant general authorizations" for the acquisition of securities traded on the stock exchange; as to securities not so traded, existing "exchange restrictions on capital movements" might be maintained "if the freedom of these capital movements is of such a nature as to create an obstacle to the realization of the objectives of the economic policy of a Member State . . . ."<sup>157</sup> Existing exchange restrictions on "the issuance and sale of securities of a domestic enterprise on a foreign capital market" are also permitted, subject to the same condition; however, a proposed directive submitted by the Common Market Commission to the Council on February 7, 1967, would require exchange authorizations to be granted for such transactions.<sup>158</sup> And finally, article 221 of the treaty serves as the keystone of the policy of nondiscrimination: within three years after the treaty's effective date, "without prejudice to the other provisions" of the treaty, member states were to allow the nationals of other member states "to participate financially in the capital of firms or companies . . . in the same manner as their own nationals."<sup>159</sup>

Deputies in the European Parliament have already questioned whether the new French regulations are not incompatible with these articles of the Rome Treaty<sup>160</sup> and a formal response by the Commission is awaited. Nor is the French government itself unaware of the potential combined effect of these provisions; the *Conseil Eco-*

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156. "Excepting purely financial investments made only in order to afford the investor indirect access to the monetary or financial market of another country, through the establishment of or participation in an enterprise situated in such country. Annex I, list A to First and Second Directives for the Implementation of Treaty Article 67. 1 CCH COMM. MKT. REP. ¶¶ 1651-67 (May 11, 1960).

157. First and Second Directives for the Implementation of Treaty art. 67, 1 CCH COMM. MKT. REP. ¶¶ 1651-67 (May 11, 1960).

158. *Id.* ¶ 1676.

159. The potential loophole of art. 56, authorizing "special treatment for foreign nationals on the grounds of public policy, public security and public health," has been narrowed by a Counsel directive, restricting the invocation of the article to measures based on the personal conduct of the individual concerned rather than for economic ends. 1 CCH COMM. MKT. REP. ¶ 1412.15 (Feb. 25, 1964).

160. See [1967] JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENES 1652 (*question écrite* No. 1/67, March 15, 1967). See also *id.* at 1022 (*question écrite* No. 152, Feb. 22, 1967).

*nomique et Social* has gone so far as to say that the treaty "renders impossible . . . any limitation of investments made by nationals [ressortissants] of other member states . . . even if they are effectively under the control of a national of a third country."<sup>161</sup> In order to determine whether the treaty may plausibly be invoked by Americans seeking to invest in France, it must be asked whether this assessment by the *Conseil Economique et Social* is to be taken at face value: may, for example, Belgian corporations owned and controlled by Americans profit from the provisions of the treaty to the same extent as wholly Belgian companies? And even if so, is the French requirement of authorization prior to investment in fact incompatible with the treaty?

The treaty itself indicates that in certain cases capital originating outside the Community—which could include American capital—is to be assimilated into Community investment: under article 58, companies "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" are to be treated as "nationals" of that member state. In order for a corporation to benefit from the directives on freedom of establishment, the Council has further required that it "show an effective and continuous link with the economy of a Member State" but has specifically excluded dependence on the nationality of managers or stockholders as a criterion upon which this determination could be based;<sup>162</sup> since article 67 protects "residents" as well as "nationals," substantial business "links," even without incorporation in a member state, would presumably suffice to invoke that article.<sup>163</sup> Therefore, a Belgian corporation, by whomever controlled, doing business in Belgium and not formed merely for the purpose of investing in France, should be able to claim the protection of the treaty. That a corporation organized under Belgian law would be attributed Belgian "nationality" for purposes of diplomatic protection is, in addition, a well-accepted proposition of international law.<sup>164</sup>

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161. [1966] J.O. (*Avis et Rapports du Conseil Economique et Social*) 377, 383 (May 28, 1966) (emphasis added).

162. General Program for the Abolition of Restrictions on Freedom of Establishment, 1 CCH COMM. MKT. REP. ¶¶ 1335, 1336 (1961). See also U. EVERLING, THE RIGHT OF ESTABLISHMENT IN THE COMMON MARKET 74-77 (1964).

163. Cf. 1 CCH COMM. MKT. REP. ¶ 1602.13; EVERLING, *supra* note 162, at 76-77.

164. See *In re Mexico Plantagen G.m.b.H.*, [1931-1932] Ann. Dig. (No. 135) (German-Mexican Claims Comm. 1930); C. HYDE, 2 INTERNATIONAL LAW 902-03 (2d rev. ed. 1945); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 27, 172-73 (1965).

Note that this American recourse to foreign incorporation might also be possible under establishment treaties similar to that between France and the Togolese Repub-

Whether corporations under the protection of the treaty may nevertheless be obliged to obtain at least the authorization of a state before engaging in investment activities is a more difficult question. The rules of the Community in analogous areas present no clear picture. In implementing article 48 of the treaty providing for the "free movement of labor" without "discrimination based on nationality," the Council has not gone so far as to abolish the requirement of work and residence permits for foreign laborers—although it is clear that nationals of member states have the *right* to be *issued* such permits.<sup>165</sup> On the other hand, the Council's "general program" for the abolition of restrictions on freedom of establishment specifically requires the ending of restrictions which "condition access" to business "on an authorization or on the issuance of a document, such as a foreign merchant's card."<sup>166</sup> As to capital movements, the Council's directive implementing article 67 does, it is true, require "general" and presumably blanket "authorizations" for certain types of investment transactions.<sup>167</sup> But this is restricted essentially to the acquisition of listed securities, and in any event the directive preserves the right of states "to verify the nature and authenticity of the transactions . . . [and] to take the measures essential for the prevention of infringements of their laws and regulations."<sup>168</sup>

Even under the Rome Treaty, then, at its present stage of implementation, it is possible that an authorization mechanism for direct investments is permissible, when that mechanism does no more than permit a state to assure itself that the proposed investment in fact qualifies under the treaty and does not endanger essential security interests. However, due to the universally held view that Commu-

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lic, under which corporations "constituted in conformity with the laws of one of the parties and having their *siège social* on its territory" were given the same rights as individual nationals of the country. Convention of Establishment between France and the Togolese Republic, art. 13, June 5, 1964. Decree No. 67-82, [1967] J.O. 1081 specifically exempts from the declaration procedures investments from countries "*dont l'institut d'émission est lié au Trésor français par une convention d'opération*"—these countries, which include Togo, were part of France's colonial empire. Contrary to the treaty provision, the decree excludes investments by companies of these countries if they are under foreign control (art. V). Cf. art. 13 of the Franco-American Treaty, under which France could deny the advantages of the treaty "to any company in the ownership or direction of which nationals of a third country . . . have directly or indirectly a controlling interest . . . ."

165. Regulation No. 38/64, art. 22, 1 CCH COMM. MKT. REP. ¶ 1053 (March 25, 1964); "Residence Permit," Verwaltungsgericht (Administrative Court) Berlin, Case No. VG.I A 98/62, Oct. 26, 1962; Council Directive, March 25, 1964, arts. 3-5, 1 CCH COMM. MKT. REP. ¶¶ 1098-100 (March 25, 1964).

166. General Program, *supra* note 162, at 1115. However, the "right of permanent residence" was still to be "evidenced by a residence permit," to be granted except for "reasons of public order, safety or health." Council Directive of Feb. 25, 1964, 1 CCH COMM. MKT. REP. ¶ 1349.17. See also note 149 *supra*.

167. Article 2, 1 CCH COMM. MKT. REP. ¶ 1653.

168. Article 5(1), 1 CCH COMM. MKT. REP. ¶ 1656.

nity members have a treaty right to invest in France, the use of such procedures either to delay or to deny particular qualified investments might well bring into play Community action.

### C. Enforcement of Treaty Obligations

While objective analysis of both the bi-national and multinational treaty provisions casts some doubt on the validity of the entire system of foreign investment controls and leads to the conclusion that in most circumstances denial of authorization of foreign investment would constitute a violation of treaty obligations, there may be no manner of practical recourse for the rejected investor, since it is possible that no mechanism exists by which the legal rights created by the treaty could be effectively enforced. A strictly legal analysis of the remedies available quickly reveals the difficulty of securing judicial vindication of a treaty right in private litigation. The *Chambre Criminelle* of the French *Cour de Cassation*, to which criminal prosecutions for violation of the investment regulations would be referred, continues to adhere to the principle that only the executive branch of the government is competent to interpret treaties of establishment.<sup>169</sup> Hence, the court would postpone ruling on a question involving the interpretation of treaties and would solicit the binding advice of the Ministry of Foreign Affairs. The views of the Ministry of Foreign Affairs, delivered after consultation with the Ministry of Finance, would, it may be thought, reject any proposed treaty interpretation which would have the result of nullifying the government's investment control program. An investor who failed to comply with procedures called for by the foreign investment regulations would then be subject to criminal penalties applied by a court, despite the fact that he could not obtain a judicial determination as to treaty defenses he might raise. Review of administrative decisions by administrative tribunals would encounter a similar deference to government interpretations<sup>170</sup> and would face the further difficulty that only in situations of outright denial or, perhaps, in

169. *Femme Aschbacher and Lertola*, [1963] D. Jur. 531 (Cass. crim.); *Coll*, [1959] Bull. Crim. 7, n.5; [1961] Rev. Crit. D.I.P. 136 (Cass. crim.); *Proc. Gen. Colmar v. Mongeluzzo*, [1958] Bull. Crim. No. 632, at 1118, [1961] Rev. Crit. D.I.P. 136 (Cass. crim.). The criminal chamber's renunciation of judicial interpretation of provisions of international treaties, and its acceptance of the government's views, is not shared by the First Section of the Civil Chamber which maintains its right to interpret treaties except on questions of "public international law." *Receveur-percepteur de Paris v. Chassagne* [1963] D. Jur. 529 (Cass. Civ. 1er Sect.). However, as questions of failure to obtain *cartes de commerçant* or to obey foreign investment controls call forth criminal penalties, the views of the criminal chamber seem pertinent.

170. See, e.g., *Hurni*, [1965] Sem. Jur. II. 14172 bis (Conseil d'Etat); *Soc. Commentry, Fourchambault & Decazeville*, [1952] D. Jur. 454 (Conseil d'Etat); *Union Régionale Algérienne de la C.F.T.C.* [1963] J. DROIT INT'L 402 (Conseil d'Etat).



aggravated cases of delay would reviewable action have occurred.<sup>171</sup>

Litigation brought by an individual to enforce rights under the Treaty of Rome might well be determined entirely under French procedures. The European Court of Justice is only competent to hear suits brought by the Commission or by a member state; while under article 177 of the Rome Treaty national courts of last resort are "bound," in private litigations, to refer interpretations of the treaty to the court, there is no possibility of an appeal to the court if this reference is not made. In a recent notable case before the *Conseil d'Etat* dealing with difficult questions under the Rome Treaty, the *Conseil* retained for itself the power of final decision by holding that the treaty provision was clear on its face and was thus a question of "application" rather than "interpretation."<sup>172</sup> Of course, where a French court finds that a treaty provision is clear on its face so as to avoid reference to the Luxembourg court, the case would seem to call for direct judicial "application" of the terms of the treaty without taking cognizance of the executive's interpretation. This seems, however, to offer but a scant hope of breaking the closed interpretive loop, and the prospects of success in private litigation are not bright.

Evaluation of the prospects of success in litigation is, moreover, largely a theoretical exercise, for a disappointed investor is not often a potential litigator. Under the old exchange control laws, no suit was ever brought to review the denial of a foreign investment application. A survey taken of American businesses in France during the restrictive investment period of 1965 shows that among companies which considered themselves subject to discrimination or treatment contrary to the spirit of the Establishment Treaty, no thought was given to seeking diplomatic intervention, let alone a battle in the French courts.<sup>173</sup> The investor simply has no desire to antagonize the government of the country in which he wishes to operate.

This apparent lack of desire to seek judicial determination of foreign investment questions demonstrates that it may well be misleading to approach the problem in terms of a traditional legal analysis of rights and remedies. To some extent, all treaties—treaties of alliance are the most extreme example—represent merely an indica-

171. See M. WALINE, *DROIT ADMINISTRATIF* 207-14 (9th ed. 1963). The "adjournment" mechanism of Law No. 66-1008, [1966] J.O. 11621, might be interpreted as constituting a statutory exception to the "implicit rejection" which French law presumes after a four-month silence on the part of the administration.

172. *Société des Pétroles Shell-Berre*, (Conseil d'Etat), 1 CCH COMM. MKT. REP. ¶ 4656.55 (1964), [1964] J. DROIT INT'L 794.

173. See REPORT OF THE COMM. ON COMMERCIAL TREATIES, ABA SECTION OF INT'L & COMP. LAW 18 (1965).

tion of present willingness, a sign of a present climate. Conceptions of national purpose and of the proper direction of the national economy may change, and, as to matters which it conceives to be closely tied to its essential interests, it is ultimately impossible to force a nation to acquiesce in past perspectives. Furthermore, it can only be shortsighted to attempt to impose capital investment on any nation against its will; whatever "success" is gained by diplomatic or judicial agitation can only be short-lived, given a state's ability to take, perhaps without possibility of recourse, punitive measures against enterprises once they have built up a substantial investment. Encouragement of international trade and investment, however desirable, is not accomplished through insistence on supposed treaty rights which another nation is no longer willing to recognize. Should an investing country insist on the recognition of its supposed treaty rights in circumstances which the recipient country viewed as inimical to its national security or well-being, the only foreseeable result would be the modification of the treaty. As the Franco-American Treaty may, by its terms, be terminated in 1969, the American government has, no doubt, taken this factor into account in determining its actions.

While the Rome Treaty offers additional guarantees of freedom of investment, it is the economic conditions of the Community and the political pressures by other member states for freedom of trade within the Community, rather than appeals to judicial determination of treaty rights, that may be expected to limit the use by France of its investment controls. Investors of states not members of the Community may be expected to profit less from the opportunity to assert against France legal benefits arising under the treaty by reason of an establishment in another Community country than from the opportunity to use such an establishment as an alternative to investment in France.<sup>174</sup>

## VII. PERSPECTIVES

The reservation by France of the right to screen foreign investments should not come as a surprise. While the language of the 1959 Franco-American Treaty may be antipathetic to such screening, it is clear that changes in the amount and method of foreign, and particularly American, investment have caused the French government to conclude that such control is essential to its national interest. In this

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174. For a full exposé of how American companies have made use of EEC investment opportunities, as well as of problems of American investment, see SERVANSCHREIBER, *supra* note 140.

limited way, France is espousing a position that has been adopted by many less-developed countries since World War II, a position which has made it nearly impossible for the United States to negotiate treaties of establishment permitting complete freedom of investment with such countries.<sup>175</sup>

The extent of these reservations should not be exaggerated. The conclusion that a particular investment presents net economic and political disadvantages will, it is to be expected, result in disapproval only in aggravated cases. There is no reason, for example, for screening to have any effect on the hundreds of routine foreign investments annually made in France. The decision of an American to set up a small service company, a retail store, or a distribution outlet in France would warrant but little concern in terms of that conception of the national interest which motivates the investment controls. The investments which may affect such interests are those made by such corporations as International Business Machines, General Electric, or General Motors. Here, the economic, social, and political impacts are so great as to require careful governmental study. But even in such cases, the likely result will be approval of the investment. Perhaps one may also anticipate that the extraordinary veto power will be applied with diminishing frequency as the French economy integrates with that of the other members of the European Economic Community and larger European-owned industries are created, thereby lessening the fear of American domination.

New and more rigid applications of France's investment controls may be occasioned by the recently instituted American controls on capital transfers abroad.<sup>176</sup> The new American measures affect the French economy in three ways: they practically declare a moratorium on new direct investment in France through the exportation of capital from the United States;<sup>177</sup> they limit the amount of earnings of French subsidiaries that may be reinvested in Western Europe;<sup>178</sup> and they require the repatriation of a portion of the earnings of French subsidiaries of American companies.<sup>179</sup> While this moratorium seems, at first glance, to limit drastically, if not to curtail fully, the number of new declarations of United States' direct investments which will be made in France, in fact this may not be the final

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175. See Metzger, *The Individual and International Law: Property Interests* [Summer Conference on Int'l Law, Cornell University (1964)], in 1 S. METZGER, *LAW OF INTERNATIONAL TRADE* 102 (1966).

176. Executive Order No. 11387, 15 C.F.R. pt. 1000 (1968).

177. 15 C.F.R. §§ 1000.503 & .504(a)(3) (1968) (a basic \$100,000 limit).

178. 15 C.F.R. § 1000.504(a)(3) (1968).

179. 15 C.F.R. § 1000.202 (1968).

result. A noteworthy exception to the new United States Department of Commerce regulations permits American companies and their foreign subsidiaries to raise money abroad (including Euro-Dollars) for foreign direct investments;<sup>180</sup> thus, it may be assumed that United States' investment in France will not be totally prevented, even though financing will be more costly if new pressures on the European capital market drive interest rates up. But this dual United States' policy of prohibiting American dollars from leaving the country, while permitting foreign investment through foreign borrowing, might make it increasingly difficult for French companies to raise money at reasonable rates and consequently may encounter resistance in France. The French government, under the broad powers granted by the new law, in pursuance of its own economic and political goals, including a desire to strengthen its balance of payments, could well decide to impose special restrictions on recourse by foreign companies to the French capital market. This could effectively be accomplished by requiring foreign investments in France to be made only with capital imported from abroad, a requirement which had been imposed in every investment license under the pre-1967 exchange controls and which had been imposed to some degree in investments processed under the 1967 procedures even prior to the new United States' controls.<sup>181</sup> Moreover, as the Ministry of Finance apparently finds "discriminatory" the newly enacted United States' regulations requiring foreign subsidiaries of American firms to repatriate earnings, further actions, such as the re-evaluation of the status of these French companies, and the conditions of their access to the financial market and terms of bank credit, may be considered.<sup>182</sup>

Despite the prospect of continuing and even expanding application of French foreign investment controls it may be hoped that, as to American investment, these controls will be applied in the spirit in which, as expressed by Foreign Minister Couve de Murville, the 1959 treaty was signed:

Henceforth, when substantial amounts of capital are to be invested

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180. 15 C.F.R. § 1000.504(b) (1968).

181. In some cases, the Ministry of Finance has required direct investors to modify their proposed investments to increase the percentage of capital obtained from foreign sources and to reduce, consequently, contemplated local borrowings. In certain other cases the Ministry has required that increases in a French subsidiary's capital structure be accomplished with money exported by the foreign parent.

182. Statement attributed to Minister of Finance Michel Debré. *Le Monde*, Jan. 9, 1968, at 15, col. 3; *International Herald Tribune*, Jan. 8, 1968, at 1, col. 5. One of the reasons which might lead to such actions would be excessive demands by those French subsidiaries on the French money market in view of their need to repatriate earnings.

in either country or enterprises established for export-import, those concerned will receive without difficulty the necessary authorizations for admission, residence and establishment. In general, requests from citizens wishing to establish themselves in the other country will be considered favorably. Companies, subsidiaries, branches and agencies from the other country will receive the same treatment as nationals.<sup>183</sup>

The greatest barrier to the realization of these hopes is the very concrete possibility that the new controls will be considered by their administrators to be permanent and not temporary in nature, and that their full exercise will be considered to be normal rather than unusual. Unless the French authorities guard against this, the administration of "screening" apparatus may soon resemble the edifice of exchange controls which was so recently and welcomely demolished.

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183. Remarks of Foreign Minister Couve de Murville to the Annual Meeting of the American Chamber of Commerce in France, Jan. 19, 1960, *quoted in* *COMMERCE IN FRANCE* No. 238, at 2 (1967).