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The French Response to the Extraterritorial Application of United States Antitrust Laws

France, in response to perceived abuses in the extraterritorial application of United States antitrust laws,[1] enacted on July 16, 1980, Law No. 80-538[2]

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All translations contained in this article, including of the text of the Law, are by the author and are not official.

[1]The extraterritorial application of United States laws, especially of United States antitrust laws, has caused considerable controversy, in particular in the United Kingdom which has also recently enacted protective legislation as described below. Note 12 *infra*. *See* PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS (J. Griffin, ed. 1979); Jones, *Extraterritoriality in U.S. Antitrust: An International "Hot Potato"*, 11 INT'L LAW. 415 (1977); Note, *The Extraterritorial Reach of American Economic Regulation: The Case of Securities Law*, 17 HARV. INT'L L. J. 315 (1976); Note, *Offshore Mutual Funds: Extraterritorial Application of the Securities Exchange Act of 1934*, 13 B.C. IND. & COM. L. REV. 1225 (1972); Note, *Extraterritorial Application of the Export Administration Amendments of 1977*, 8 GA. J. INT'L & COMP. L. 741 (1978); Corcoran, *The Trading With the Enemy Act and the Controlled Canadian Corporation*, 14 MCGILL L.J. 174 (1968); George, *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609 (1966); *Extraterritorial Effects of United States Tax Laws*, 12 INT'L LAW. 581 (1978) (ABA Panel discussion); Special Committee on Commodities Regulation, *The Extraterritorial Implications of the Commodity Exchange Act*, 32 REC. A. BAR CITY OF N.Y. 492 (1977); Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005 (1976); Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*, 1 NW. J. INT'L L. & BUS. 1 (1979); *see generally* K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (1958) (This is the classic writing on the extraterritorial application of United States antitrust laws. Although its citations are now somewhat dated, much of its analysis is still of current value. A new edition is expected soon. *See* note 69 *infra*); notes 3, 4, *infra*.

The United States is, however, not the only nation to enforce its laws extraterritorially. For example, Germany and Australia among other nations apply their competition rules extraterritorially. Hermann, *The Long Arm of German Competition Law*, Financial Times, Oct. 11, 1979 at 22, col. 3; Taylor, *The Extraterritoriality of the Australian Antitrust Law*, 13 J. INT'L LAW. & ECON. 273 (1979). France gives its penal laws extraterritorial effect. *See generally* Notes 35, 36 *infra*. Extraterritorial regulation may also come from multinational organizations, such as the European Economic Community. *See generally* Jacobs, *Extraterritorial Application of Competition Laws: An English View*, 13 INT'L LAW. 645 (1979).

[2][1980] J.O. 1799. The text of the Law, with a translation, is contained in Annex I to this article.

(hereafter referred to as the Law).[3] The Law is a sweeping prohibition of various types of communications and investigations that are typical of administrative antitrust investigations and of antitrust litigation by private parties in the United States, and is intended, in particular, to prevent discovery in France based only on United States law.[4]

Yet although the Law was inspired to impede enforcement of United States antitrust laws, its prohibitions are not so limited. The Law literally applies to forbid most business-related communications, if harmful to France, to foreign public authorities by persons having a presence in France, and to prohibit the gathering in France of business-related information with a view to foreign litigation—without any requirement that an antitrust law be involved. For example, the Law could prohibit a reply by the United States parent of a French company to a United States Commerce Department request for information about reexports from France of United States-origin technology.[5]

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[3]This is not the first time that French law has explicity conflicted with the extraterritorial enforcement of United States law. The most well known instance previously is the decision in Fruehauf v. Massardy, [1968] D.S. Jur. 147, [1965] J.C.P. II 14, 274 *bis* (Cour d'Appel, Paris) (An English language translation of a summary of the decision is found at 5 INT'L LEGAL MATERIALS 476 (1966)). The *Fruehauf* case arose when the United States Department of the Treasury, acting pursuant to the Trading with the Enemy Act, obliged a United States company to order its French subsidiary, Fruehauf France, to refuse to sell trucks under a signed contract with another French company because the ultimate purchaser was the Peoples Republic of China. In response to a suit brought by directors representing the minority French shareholders, the Court of Appeals of Paris affirmed the appointment of a judicial administrator to take-over control of Fruehauf France temporarily in order to fulfill the contract—regardless of any commands to the contrary from the parent company or the Department of the Treasury. *See* Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy*, 83 HARV. L. REV. 579 (1970).

[4]By virtue of the French reservation to the Hague Convention, letters of request in aid of pre-trial discovery are not authorized in France under the procedures of the Convention, however, the Convention does not expressly oblige exclusive use of its procedures either, as is noted below. Although pre-trial discovery based on United States law has been frequently conducted in France in the past, Borel and Boyd claimed; even before the enactment of the Law, that the conduct of such pre-trial discovery was of questionable legality under French law. *See* Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 INT'L LAW. 35, 45 (1979).

[5]United States agencies often attempt to enforce their laws extraterritorially by proceeding in the United States against the United States parent with respect to the activities of its subsidiary abroad. *See* Craig, *supra* note 3, at 579 n. 3; Berman & Garson, *United States Export Controls—Past, Present and Future*, 67 COLUM. L. REV. 791, 866–76 (1967). This practice of holding the parent responsible for its subsidiary is questionable under United States law given the separate incorporation of the parent and subsidiary. *But see* Craig, *supra* (suggesting such regulation be avoided, but concluding it is lawful where intended by Congress). At least so long as the parent does not exceed its role as shareholder and Congress has not explicitly authorized such indirect extraterritorial regulation based on the shareholder relationship alone, the subsidiary's corporate veil should not be pierced. *See* Steven v. Roscoe Turner Aeronautical Corp., 324 F.2d 157, 160 (7th Cir. 1963); Maule Industries Inc. v. Gerstel, 232 F.2d 294 (5th Cir. 1956); Kingston Dry Dock Co. v. Lake Champlain Transportation Co., 31 F.2d 265, 267 (2d Cir. 1929) (L. Hand, J.); American Trading & Production Corp. v. Fischback & Moore, Inc. 311 F. Supp. 412 (N.D. Ill. 1970) (veil not pierced and parent not held liable even though it provided general supervision to protect investment in a subsidiary); Walkovszky v. Carlton, 18 N.Y. 2d 414, 223 N.E.2d 6 (1966); Berkey v. Third Avenue Railway Co., 244

Since the Law reaches many activities that would otherwise be assumed to be lawful, there will likely be many unknowing violations. The purpose of this article is to call attention to the Law and attempt to interpret some of the Law's many ambiguities based on its legislative history. It is as yet too early to conclude how the Law's broad prohibitions will actually be enforced, if at all, by French authorities.[6]

I. The Law's Prohibitions

The Law, in Article 1, provides that French nationals, French residents and other entities present in France are prohibited from communicating anywhere economic, commercial, industrial, financial or technical information to foreign public officials if such communication is harmful to France. Article 1-*bis* of the Law forbids any person in France from requesting, investigating or communicating such information with a view to foreign judicial or administrative proceedings.

Articles 1 and 1-*bis*, the basic prohibitions of the Law, were enacted as amendments to Article 1 of Law No. 68-678 of July 26, 1968[7] (hereafter referred to as the 1968 Law) forbidding certain communications to foreign officials concerning maritime commerce. As will be described, these amendments completely rewrote Article 1 of the 1968 Law. Article 2 of the 1968 Law, which required any person receiving a request for communications prohibited by Article 1 to inform the appropriate ministry, was amended to apply also to requests in violation of Article 1-*bis*. However, Article 2 is not so important since the Law provides no penalties for failure to comply with Article 2's disclosure requirement. The final revisions made

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N.W. 84, 155 N.E. 58 (1926) (Cardozo, J.); note 36 *infra*. *But cf. In re* Investigation of World Arrangements, 13 F.R.D. 280, 385 (D.D.C. 1952) (concerning pre-trial discovery, parent ordered to produce subsidiaries' documents).

From a policy standpoint, such extraterritorial regulation based on shareholder nationality is generally unwise given the resentment it can generate in the nation affected, especially if jobs are threatened as a result and the affected nation can if it wishes render such regulation ineffectual, as shown by the *Fruehauf* litigation. *See* note 3 *supra*.

Assuming a case similar to *Fruehauf* is initiated presently by a request to a United States corporation by the Treasury Department for information concerning the compliance of its French subsidiary with the Trading with the Enemy Act, the case might go no further than a response from the United States parent that transmission of the requested information is prohibited on the basis of the Law.

[6]Whether or not actively enforced, the potential for enforcement of the Law will affect, and has already affected, the conduct of United States and other non-French litigation involving France. Although there have not yet been any prosecutions under the Law, a number of government ministries and institutions have in particular instances advised in writing that proposed communications would violate the Law.

Even if the government is not inclined to enforce the Law, possibly private parties may cause it to do so. In general, under French law private parties suffering particular monetary loss because of a violation of a penal statute may initiate criminal proceedings before a "juge d'instruction," thereby involving the public prosecutor, and may recover civil damages as a result of those proceedings. *See* note 51 *infra*.

[7][1968] J.O. 7267. The 1968 Law was implemented the next year by an order ("arrêté") of the Minister of Transportation. [1969] J.O. 544.

by the Law, to the third of the three articles of the 1968 Law, which provided for penalties, were to roughly double the possible fines in order to account for inflation and to add a reference to Article 1-*bis*. As revised, Article 3 provides penalties for violations of Articles 1 and 1-*bis* of two to six months in prison or fines of 10,000 to 120,000 French francs or both.

The following discussion considers the prohibitions of Articles 1 and 1-*bis*, beginning with a brief outline of their legislative history.[8]

II. The Legislative History

The Law was initially proposed for the government in the French Senate by Joël Le Theule, then Minister of Transportation, on June 30, 1979 as a bill[9] to amend the 1968 Law which prohibited the supplying of certain specified information on maritime transportation to foreign public authorities. The proposed bill would merely have extended these prohibitions to air transportation. The 1968 Law had been adopted as a response to antitrust investigations by the United States Federal Maritime Commission involving French maritime transport companies.[10] The proposed extension of the 1968 Law to aviation was similarly prompted by United States antitrust investigations, in particular by the questioning in the United States of two representatives of Air France, and by the proposal of the United States Civil Aviation Board to withdraw the antitrust immunity granted to the International Air Transport Association, of which France's two leading airlines, Air France and the Union de Transports Aériens, are members.[11]

During consideration of the proposed bill by the Senate on May 29, 1980, the limitation on the bill's scope to transportation was deleted and the bill was amended to apply generally to information on economic, commercial and technical matters. A prohibition on investigations in view of litigation was also added. It appears that these amendments to the bill, proposed on behalf of the government by Joël Le Theule, were inspired by the enactment in the United Kingdom on March 20, 1980 of the Protection of Trading Interests Act 1980 (hereafter referred to as the British Protection Act) which was adopted to deter the extraterritorial enforcement of United

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[8]Reviewing the legislative history (called "travaux préparatoires") of a statute to determine the intent of the draftsmen is one of the recognized methods of statutory interpretation used by French courts. *See* A. WEILL, DROIT CIVIL 173–75 (3d ed. 1973); Capitant, L'Interprétation des Lois d'Après les Travaux Préparatoires, [1935] Recueil Dalloz H. (Chr.) 77; H. DEVRIES, CIVIL LAW AND THE ANGLO-AMERICAN LAWYER 254–55 (1975).

[9]The bill was presented as Projet de Loi N°. 469, Sénat Seconde Session Ordinaire de 1978-79.

[10]*See* S. REP. NO. 210, B. Legrand, Reporter for the Commission on Economic Affairs and the Plan 2, 3 (April 17, 1980) [hereafter referred to as the First Senate Report].

[11]*See* First Senate Report at 3–4. Many other examples of extraterritorial "abuses" were cited in the Senate and Assembly debates, such as an antitrust lawsuit brought in the United States against Air France by a United States citizen claiming his ticket for a flight from Paris to Rome cost too much. J.O. Débats Sénat, May 30, 1980 at 2194 [hereafter referred to as the First Senate Debate]. *See also* First Senate Debate at 2195 (criticizing information requests by United States authorities concerning the Airbus sale to Eastern Airlines).

States antitrust laws against British companies.[12]

The bill with these revisions was passed by the Senate on May 29 and promptly considered by the National Assembly on June 24, 1980.[13] The lengthy Assembly Report accompanying the bill also justified its broad reach as a response to the extraterritorial enforcement of United States antitrust laws,[14] necessary in particular to prevent pre-trial discovery in France under United States law by private United States parties.[15] The Assembly

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[12]*See* First Senate Debate at 2196.

The British Protection Act responds to United States antitrust enforcement by authorizing the United Kingdom's Secretary of State to prohibit communications of commercial information prejudicial to the sovereignty of the United Kingdom, and by providing for the recovery in the United Kingdom by the United Kingdom defendant in an "overseas" antitrust action of the non-compensatory portion of treble damages it has paid to the plaintiff. The Act also provides for enforcement, against assets in the United Kingdom, of judgments by courts of other countries for the recovery of such non-compensatory treble damages, but only if the other country in question reciprocally enforces United Kingdom judgments for the recovery of such penalties. *See* ANTITRUST & TRADE REG. REP. (BNA), No. 959, April 10, 1980 at F-1 (reprinting text of British Protection Act); Gordon, *Extraterritorial Application of United States Economic Laws: Britain Draws the Line*, 14 INT'L L. 151, 152, 161–64 (1980); Comment, *Antitrust: British Restriction on Enforcement of Foreign Judgments*, 21 HARV. INT'L L. J. 727 (1980); Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interest Act, 1980*, 75 A.J.I.L. 257 (1981).

The provisions in United States antitrust laws allowing non-compensatory treble damages were especially criticized by the French legislators considering the Law when it was proposed, many of whom recommended that the proposed legislation be amended to allow recovery by French defendants of the non-compensatory portion of treble damages. *See* note 15 *infra*. *See, also*, Press Release of Australian Attorney-General relating to the Westinghouse Suit (October 5, 1980) [hereafter referred to as the Press Release] (noting criticism of United States treble damages remedy by the thirty-eight Commonwealth countries at their Barbados meeting in April 1980)). However, Le Theule acknowledged that to amend the bill proposed to the Senate to include such provisions from the British Protection Act should require further study, and would ordinarily involve consideration over at least one to two years by several ministries. The present amendments were intended, according to Le Theule, as a limited step that could be immediately taken to respond to the antitrust "inquisition" directed against French companies by the United States. First Senate Debate at 2196.

Australian legislation blocking foreign discovery was also cited during the Senate Debate. *See* First Senate Debate at 2196. Many other countries have also introduced legislation limiting foreign discovery, including Canada (with Ontario and Quebec also acting individually), the Netherlands, Norway, Sweden, Denmark, Finland, Germany, Belgium, Switzerland and New Zealand, all acting largely in response to United States litigation. *See* Press Release (citing, in particular, the Evidence Amendment (No. 2) Act enacted by New Zealand on July 18, 1980); D. Hacking, *supra* note 1, at 8 & n. 30 (citing statutes of Canada (including of Quebec), Switzerland and the Netherlands); BREWSTER *supra* note 1, at 47-51.

[13]It was considered as Projet de Loi N° 1771 (which had been introduced on May 30, 1980). J.O. Assemblée Nationale, June 25, 1980 [hereafter referred to as Assembly Debate] at 2231–36.

[14]During the discussions in the legislative history on the extraterritorial enforcement of United States antitrust laws, there were also a few incidental references indicating other possible applications of the Law, and a few brief references to problems caused by other types of United States laws (such as the anti-dumping laws). *See* Assembly Debate at 2231; Assembly Report at 8, 25; Senate Debate at 2194–95.

[15]National Assembly Report No. 1814, A. Mayoud, Reporter for the Commission on Production and Exchanges (June 19, 1980) [hereafter referred to as the Assembly Report].

The non-compensatory portion of treble damages provided for under United States antitrust laws were especially criticized in the Assembly Report and Debates. Assembly Report at 26–27, 30–31 (stating that antitrust penalties are being used in the United States to protect

Report acknowledged that the 1968 Law had had only limited success in protecting French companies and observed that it is uncertain whether United States courts would recognize, as a defense to a discovery order, a claim that compliance with the order would be illegal under French law.[16] Nonetheless, the Report stated that it was hoped that the Law's broad reach would in a sufficient number of instances impede United States antitrust enforcement and thereby prompt negotiations on the governmental level to resolve the disputed extraterritorial reach of United States antitrust laws.[17]

The Assembly, after debate and adoption of several amendments consistent with the Senate revisions, approved the bill.[18] The Senate then briefly considered the bill as passed by the Assembly,[19] and the accompanying Second Senate Report,[20] and adopted the bill on June 30, 1980.[21] This bill was signed by President Giscard d'Estaing and entered into force on July 16, 1980. Significantly, the wide reach of Articles 1 and 1-*bis* of the Law was never debated in the Senate and the Assembly. Instead, the Law was enthusiastically endorsed by both the government and the opposition. The only issue was whether more should be done.[22] Consequently, the subsequent election of Mitterrand as President in May 1981 and of a socialist majority in the Assembly the following month, and the resulting change of government, would not be expected to alter support for the Law. The next two sections of this article consider the limitations to the Law's broad prohibitions.

III. Article 1—Prohibited Communications to Foreign Public Authorities

Article 1 of the Law prohibits the communication by French nationals, persons usually resident in France, and officers, representatives, agents and employees of entities having an office or other establishment[23] in France, of

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domestic industry; proposes study of statutory provisions for the recovery of such treble damages along the lines of the British Protection Act); Assembly Debate at 2232 (statement by Alain Mayoud).

[16]*See, e.g.*, Assembly Report at 34, 39, 46. *See also* Assembly Debate at 2234. For references to some of the United States cases that underlie doubt about the effectiveness of the illegality defense, *see* note 62 *infra*.

[17]*See, e.g.*, Assembly Report at 23, 46; *see also* Senate Report at 4.

[18]Assembly Debate at 2236.

[19]The Assembly passed bill was introduced into the Senate on June 25, 1980 as Projet de Loi N° 339.

[20]Senate REP. No. 352, B. Legrand, Reporter for the Commission on Economic Affairs and the Plan (June 24, 1980) [hereafter referred to as the Second Senate Report].

[21]J.O. Débats Sénat, July 1, 1980 at 3386–87 [hereafter referred to as the Second Senate Debate].

[22]*See, e.g.*, notes 12, 15 *supra*.

[23]The French subsidiary of a foreign company, unlike a branch office, is not ordinarily considered an "office" or "establishment" of the parent majority shareholder, but rather a separately incorporated entity, *see* de Ricci & Tuot, *France: Branch or Subsidiary* in BRANCHES AND SUBSIDIARIES IN THE EUROPEAN COMMON MARKET 57–59 (1973). Such subsidiary would likely not be considered an "establishment" for purposes of the Law. The parent should not, solely because it has a French subsidiary, be subject to the Law's provisions. (This

documents and information on economic, commercial, industrial, financial or technical matters. It applies "anywhere," including extraterritorially, and to all communications, whether in writing, orally, or by any other means (such as by audio-visual transmission, telecommunications or computers).[24]

There are two significant limitations to Article 1's prohibitions. First, it only forbids communications to foreign public authorities. The discussions in the Senate and Assembly Reports and debates concerning United States judicial, congressional and administrative proceedings indicate that this reference to public authorities was intended broadly to refer to communications to any governmental body or forum.[25]

Second, the prohibitions are based on the effects of the communication. The only communications that are prohibited are those capable or likely of harming or prejudicing ("de nature à porter atteinte") the sovereignty, security or essential economic interests of France or public policy ("ordre public"). The limits of this broad criterion are, however, not easily delineated. The legislative history manifests an intent that the provision not be construed narrowly to restrict the Law's reach. For example, the Assembly Report indicates that the term "public policy" is used comprehensively to refer to both French domestic and international public policy, stating:

> [Your Commission] proposes equally to refer to contraventions of public policy because every encroachment on our territorial jurisdiction by a foreign administrative or jurisdictional authority is an affront, not only to domestic public policy, but also to international public policy.[26]

The Assembly Report also observed that the use of the term sovereignty ("souveraineté"), adopted based on the British Protection Act, refers to many different concepts and, consequently, is both comprehensive and ambiguous. After going on to note various aspects of this term, the Report recommended not that the reference to sovereignty be qualified, but rather that this vague reference be retained and additional references be added to make certain that the Law applies in particular to economic and jurisdictional sovereignty. The Report concluded that:

> The reference to the notion of national sovereignty is, thus, indispensable, but the sovereignty in economic and jurisdictional fields being at issue, it is not useless to complete this criterion by making references using a terminology that will remove all ambiguity in this respect. Your Commission therefore proposes to you to

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assumes, of course, that the parent respects the subsidiary's separate incorporation and does not involve the subsidiary as its agent or accomplice in acts prohibited by the Law).

[24] Assembly Report at 42–43.

[25] *See, e.g.*, Assembly Report at 9–10.

[26] Assembly Report at 43 (translated from French). The French text states, "[Votre Commission] propose également de faire référence à des atteintes à l'ordre public car tout empiètement sur notre compétence territoriale par une autorité administrative ou juridictionnelle étrangère est une atteinte non seulement à notre ordre public interne, mais aussi à l'ordre public international."

> complete the text of the 1968 Law by a reference to harms to the security and essential economic interest of France.[27]

One issue which might be raised concerning Article 1's prohibitions is whether their apparent breadth and vagueness indicate that they must be administratively defined by a ministerial order before becoming enforceable, as is often the case for French legislation. Putting constitutional issues aside,[28] however, it is clear from the legislative history that although implementing regulations were anticipated, the Law was intended to be immediately self-executing. The Law in the form initially adopted by the Senate, like the 1968 Law, provided that the communications that would be prohibited would be only those specified beforehand by ministerial orders ("arrêtés"), but this explicit requirement for administrative implementation was deleted by the National Assembly. Instead, the Law as enacted only contains, at the end of Article 1, the phrase "specified by the administrative authorities as necessary" ("précisés par l'autorité administrative en tant que de besoin"). While this phrase might otherwise be arguably ambiguous, a review of the legislative history reveals that the phrase was added not to require administrative implementation generally, but rather to provide expressly that the appropriate ministry could additionally, for a particular case "as needed," specify communications to which Article 1 would definitely apply. The phrase was intended to show that the Law enters into force immediately upon its enactment.[29]

As the Assembly Report explains:

> Your Commission has moved to the end of Article 1 the reference to texts which can be issued by the administrative authority in order to delineate the reach and breadth of the first article. It appeared to it more logical to define, in the text of the Law, those documents or information that could not be communicated and then to leave to the texts of implementation, issued as necessary, the specifications that could appear useful to the administrative authority.[30]

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[27] Assembly Report at 43 (translated from French). The French text reads: "La référence à la notion de souveraineté nationale est, certes, indispensable, mais la souveraineté dans les domaines économique et juridictionnel étant en cause, il n'est pas inutile de compléter ce critère en faisant appel à une terminologie levant toute ambiguité à cet égard. Votre Commission vous propose donc de compléter le texte de la loi de 1968 par une référence à des atteintes à la sécurité et aux intérêts économiques essentiels de la France." *Id.* at 37, 39.

[28] Arguable constitutional issues with respect to the Law are relatively unimportant because the Law has been promulgated without challenge in the Conseil Constitutionnel, the French constitutional court. Constitutional issues can only be raised before the Conseil Constitutionnel by the President of the Republic or the Prime Minister or by the President or sixty members of either the Assembly or the Senate, prior to the Law's promulgation. No other court can hold a law unconstitutional. CONST. arts. 34, 38, 41, 54, 61 (Fr.); CON. CONST., [1961] J.O. 8631. *See* Beardsley, *Constitutional Review in France*, 1975 SUP. CT. REV. 189, at 244–45; H. DEVRIES, *supra* note 8, at 105–16; C. FRANCK, DROIT CONSTITUTIONNEL, 298–308 (1978).

[29] *See* Assembly Report at 36, 44; Assembly Debate at 2235 col. 2; Second Senate Report at 4; Second Senate Debate at 3386.

[30] Assembly Report at 44 (translated from French). The French text states: "[V]otre commission a renvoyé à la fin de l'article premier la référence aux textes qui pourront être pris par l'autorité administrative afin de préciser la portée et l'étendue de l'article premier. Il lui est en effet apparu plus logique de définir, dans le texte de la loi, quels documents ou renseignements

Along these lines, Alain Mayoud, Reporter for the National Assembly Commission for Production and Exchanges, stated:

> the formula "as necessary" has as its goal to make the law immediately applicable.[31]

Article 1 also provides that its provisions are subject to ("sous réserve des") treaties and international agreements. The legislative history shows that this provision was added in order to permit ordinary governmental information transfers regulated by treaty (such as of customs information)[32] and to allow discovery pursuant to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (hereafter referred to as the Hague Convention).[33] This provision is repeated in Article 1-*bis*, and its significance is considered below in the discussion concerning the limitations on discovery in France created by Article 1-*bis*.

IV. Article 1-*bis*—Prohibited Communications and Investigations in France

Article 1-*bis*, like Article 1, applies to documents and information relating to economic, commercial, industrial, financial or technical matters, whether written, oral or in any other form. Article 1-*bis*, however, prohibits not just communicating, but also requesting and investigating such information and documents. Furthermore, its prohibitions are based on the function rather than the effect of the act in question. Article 1-*bis* applies only to actions taken leading to the establishment of proof with a view to foreign administrative or judicial "procédures" and does not specify that the likely effect of such use must be to harm France or contravene public policy.

The use in Article 1-*bis* of the word "procédures" arguably gives Article 1-*bis* an extremely broad scope, since this French term can mean, in English, procedures as well as proceedings. For this reason, it could be

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ne pourront être communiqués puis de renvoyer à des textes d'application pris en tant que de besoin les précisions qui pourront paraître utiles à l'autorité administrative." *See* Assembly Debate at 2234.

[31] Assembly Debate at 2231, col. 2 (translation from French). The French text states, "la formule 'en tant que de besoin' ayant pour but de rendre la loi immédiatement applicable."

[32] *See* Assembly Report at 42. *Id.* at 35 (concerning patent information). Under the French Constitution, treaties (even if previously adopted) prevail over conflicting laws, but the Assembly Report states that it wanted to make this clear regarding the Hague Convention in particular (perhaps because the French constitution requires, as a condition of such effect, that the treaty be reciprocally applied by the other party to it). Assembly Report at 41; CONST. art. 55 (Fr.); C. FRANCK, *supra* note 28, at 242-55; Beardsley, *supra* note 28, at 252.

The 1968 Law achieved the same result by limiting its prohibitions to communications by private, as opposed to public, law entities (using the phrase "une personne morale de droit privé"), however, this approach was not followed by the Assembly when it considered the bill that was adopted as the Law because it was feared that United States courts might characterize French government-owned companies as not being private law entities (and therefore not recognize an illegality defense based on the Law). *See* Assembly Report at 42.

[33] Hague Convention 23 U.S.T. 2555; T.I.A.S. No. 744. *See* Assembly Report at 41-44; Second Senate Report at 3; Second Senate Debate at 2231; *see* note 32 *supra*.

claimed that Article 1-*bis* applies to almost any communication if related to any administrative or judicial procedure. Yet the legislative history shows that the Law's sponsors were concerned not with communications pursuant to procedures per se, but rather with the gathering of evidence for trial-type proceedings. Thus, the French term "procédure" is used in the text of Article 1-*bis* with reference to proof for such "procédures" which indicates it should be read as meaning proceedings.[34]

Unlike Article 1, Article 1-*bis* applies to all persons ("toute personne"), whether or not having significant connections with France. The reach of Article 1-*bis* is, however, probably limited territorially since the maximum imprisonment for violations of the Law is six months. Ordinarily a French penal law providing for imprisonment of less than five years[35] applies to acts committed outside of French territory only if those acts are also punishable in the country where committed (and, in such case, only for the acts

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[34]The Assembly Report, when discussing the reach of the Law, often uses the word "procédure" in contexts where it can only mean proceedings, such as "recherche à l'occasion d 'une procédure étrangère" (inquiry at the occasion of a foreign proceeding), "recherche en vue d'une procédure non engagée ou même éventuelle, donc hors convention" (inquiry in view of a proceeding not instituted or even possible, thus outside of the [Hague] Convention), or "le texte interdit . . . à l'occasion ou en vue d'une procédure administrative" (the text prohibits . . . at the occasion of or in view of an administrative proceeding). Assembly Report at 45. The legislative history demonstrates only an intent to force parties to "proceedings" to use the Hague Convention. *See* Assembly Report at 10–11. Certainly, the Hague Convention procedures were not drafted to provide a means for complying with all procedures by which facts are submitted to agencies, such as tax returns, and nothing in the legislative history indicates the French legislators were disturbed by compliance with such foreign procedures. The Assembly Report, while acknowledging the possible vagueness in the language used, stressed the intent that the prohibition be construed with reference to the establishment of proof for "procédures" (presumably meaning proof for trial-like proceedings), so as to limit the arguable ambiguity in the language used in Article 1-*bis*, stating:

> Inquiries or communications of documents or information will be *prohibited if the inquiries lead to the establishment of proof*. This reference to the establishment of evidence appears to [the Assembly Commission] in effect necessary in order to tone down the very general character of the prohibition which could be taken to absurd lengths.

Assembly Report at 46 (translated from French). The French text states, "les recherches ou communications de documents ou renseignements seront *interdites si les recherches tendent à la constitution de preuves*. Cette référence à la constitution de preuves lui apparaît en effet nécessaire pour atténuer le caractère très général de l'interdiction qui pourrait aller jusqu'à l'absurde." The reference to proof for "procèdures" indicates that even if one reads the French term "procedures" to refer in English also to procedure, this should refer only to procedure for those trial-like proceedings at which evidence is submitted. *But cf.* Guillerm-Kirk & Batailion, *France: Tax Implications of Confidentiality Law*, 7 TAX PLANNING INT'L 8 (1981) (translates "procédure" as proceeding, but applies Article 1-*bis* broadly to communications of corporate tax information, *see* note 52 *infra*).

[35]*See* Code pénal (C. PEN.), arts. 1, 8, 9 (Fr.). Violation of a penal law providing for imprisonment of less than five years constitutes a "délit," whereas if the law is punishable by imprisonment of five or more years or death, its violation constitutes a "crime." The generally applicable rules for applying French penal laws extraterritorially provide for different results depending on this distinction. *See* Code de procédure pénale (C. PR. PEN.) arts. 689–96 (Fr.). For example, penal laws providing for "crimes," unlike those providing for "délits," generally apply extraterritorially with respect to acts by French citizens and to acts where a victim is French, regardless of whether the act is also unlawful under the laws of the country where the act is committed. C. PR. PEN. art. 689 (Fr.).

of French citizens), unless the prohibition in question provides otherwise.[36] Article 1-*bis* gives no indication that it is intended to apply outside of France, and the activities it prohibits are in general lawful in the United States and, following local procedures, in most other countries. The fact that Article 1-*bis* applies to all persons, whether or not French, further indicates that its reach was intended to be limited to French territory. By comparison, Article 1, which applies only to French nationals and others with a presence in France, contains the phrase "en quelque lieu que ce soit" mean-

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[36] Article 689 of the Code of Penal Procedure provides that penal laws punishable by imprisonment for less than five years ("délits") apply extraterritorially to acts by French citizens, but only if the acts are also punishable in the country where committed. *See* C. PR. PEN. art. 689 (Fr.); C. LOMBOIS, DROIT PENAL INTERNATIONAL 375 (1979); J. Bigay, *Les Dispositions Nouvelles de Compétence des Juridictions Françaises à l'Egard des Infractions Commises à l'Etranger*, [1976] Recueil Dalloz Sirey (Chr.) 51–53; G. STEFANI & G. LEVASSEUR, PROCEDURE PENALE 363–418 (11 ed. 1980). Consequently, so long as investigations and other discovery abroad are legal under the laws of the country in which carried out, Article 1-*bis* could not be applied extraterritorially based on Article 689.

There are two other generally applicable provisions of the Code of Penal Procedure pursuant to which "délits" may be prosecuted extraterritorially. To begin with, Article 694 states that if the "délit" defined by the penal law is "attentoire à la sûreté de l'Etat," meaning that the act prohibited is detrimental to the security of France, then the penal law applies extraterritorially to all persons, whether French or of any other nationality. Such jurisdiction, based on the nature of the infraction, is referred to as "compétence réelle." Article 694 is generally interpreted to refer to the section of the Penal Code on "crimes et délits contre la sûreté de l'Etat" (C. PEN. arts. 70–130 (Fr.)), however, such "juridiction réelle" may apply for other infractions against French security. *See* LOMBOIS, *supra*, at 387–406. Although Article 1 might be considered as creating extraterritorial jurisdiction based on "compétence réelle," Article 1-*bis* should have no such extraterritorial reach since harm to France is not an element of Article 1-*bis*'s prohibitions.

A "délit" may nonetheless be prohibited extraterritorially depending on the factual circumstances since Article 693 of the Code of Penal Procedure provides that if any act constituting an element of the infraction occurs in France, then the infraction is considered to have occurred on French territory. The penal law in question would therefore apply to both French citizens and other nationals. LOMBOIS, *supra*, at 302–18. (Since "effects" may therefore be a basis of jurisdiction, this rule parallels the "objective territorial principle" which as applied by United States courts in antitrust cases has been criticized in France. *See also* note 69 *infra*). Article 1-*bis* could on this basis be applied to foreign discovery if any "act" involved in such discovery occurs in France.

The only other basis for prosecuting such a "délit" extraterritorially is if the penal prohibition in question itself provides for its extraterritorial application, as is the case for Article 1. Such express derogation in a statute from the generally applicable statutes defining jurisdictional reach is rare. *See* LOMBOIS, *supra*, at 297–99, 300 n. 247; Simon-Depitre, *Les Règles Matérielles dans le Conflit de Lois*, [1974], REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 591–606.

Under United States law, it is well established that a statute should not be given extraterritorial effect absent a clear Congressional mandate otherwise, unless the nature of the statute requires its extraterritorial application. *See* United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977); Blackmer v. United States, 284 U.S. 421 (1932); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES § 38 (1965). However, several statutes, such as the Trading with the Enemy Act (as amended), were intended to be and are applied extraterritorially. *See* notes 1, 3 *supra*. A recent example is the application of the International Emergency Economic Powers Act during the freeze of Iranian assets in branches of United States banks in the United Kingdom, France and other foreign countries.

ing "in any place wherever" or "anywhere" and consequently should apply extraterritorially.[37]

Article 1-*bis* states that its provisions are subject to treaties and international agreements, like Article 1 provides, and also that they are subject to laws and regulations in force. As observed in the preceding review of Article 1, one of the purposes of the reference to international agreements is to except from the Law's prohibitions inquiries pursuant to the Hague Convention.[38] The reference to laws was added to Article 1-*bis* because the French Code of Civil Procedure also applies to define the communications or investigations permitted in France under the Hague Convention.[39]

The legislative history makes clear that the Law is intended to require exclusive use of the Hague Convention procedures and forbid pre-trial discovery in France based only on United States legal procedures.[40] The Assembly Report noted critically that although both France and the United States are signatories of the Hague Convention, it has been neglected by many United States plaintiffs[41] who have instead obliged French persons with interests in the United States to submit to discovery in France based only on United States legal procedures.[42] The Assembly Report was especially hostile towards the ability of parties under United States law to obtain pre-trial discovery without direct judicial supervision, a procedure totally contrary to French precepts for procedure.[43]

The neglect of the Hague Convention was attributed in the Assembly Report to its cumbersome, time-consuming procedures, which do not work

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[37]There is some irony in Article 1's special extraterritorial application, since the Law's enactment was prompted by the extraterritorial enforcement of United States laws which is perceived in France as being unjustified.

[38]*See* note 33 *supra*.

[39]*See* Assembly Report at 33, 45; C. PR. CIV. arts. 733-48 (Fr.) (for example, C. PR. CIV. art. 740 (Fr.)) permits the parties to participate directly in proceeding pursuant to "letters of request" (but only if not "pre-trial"). Assembly Debate at 2234, col. 2.

[40]For a concise description of the procedures for discovery by foreign lawyers in France under the Hague Convention and the French Code of Civil Procedure, *see* Borel & Boyd, *supra* note 4. *See generally Report on the Work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (June 12-15, 1978), *reprinted in* 17 INT'L LEGAL MATERIALS 1425 (1978); *see also* Horlick, *A Practical Guide to Service of United States Process Abroad*, 14 INT'L LAW. 637 (1980).

[41]Based on information obtained from the French Ministry of Justice and the United States Consulate General, there were less than twenty-five "letters of request" (the principal means by which discovery may be compelled in France during a foreign trial) during the period from October 6, 1974, when the Hague Convention became effective in France, to mid-1978. Of these letters of request, only one pertained to a commercial matter. *See* Borel & Boyd, *supra*, note 4, at 45. Instead, as Borel & Boyd describe, United States lawyers had preferred to ignore the Hague Convention and had instead engaged in what is characterized in the Assembly Report as "fishing expeditions" or "tourisme juridique" (legal tourism). *See* Assembly Report at 10, 17. Since passage of the Law, there has been greatly increased use of the Hague Convention provisions for the non-compulsory taking of evidence before consular officials.

[42]*See* Assembly Report at 17.

[43]*See* Assembly Report at 10, 11; Borel & Boyd, note 4 *supra*, at 36–37 (concise description of discovery in French litigation). *See also* Assembly Debate at 2233 (criticism of wide scope possible under United States law for discovery requests, citing example of a French company being asked for all of its correspondence since 1954 as well as all of its research budgets).

well in commercial contexts, and to the French reservation[44] to the Convention preventing the use of letters of request in aid of pre-trial discovery in France. The Hague Convention also fails to provide for discovery by administrative agencies.[45] However, the Convention does not state that its procedures for discovery are to be exclusive. The Assembly Report declared that the Law would remedy this omission by prohibiting all discovery not expressly permitted by the Hague Convention as accepted by France,[46] thereby prohibiting all compulsory pre-trial discovery by letters

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[44]Assembly Report at 12, 18. [1975] J.O. at 3980–85 (Declaration stating text of the Hague Convention as ratified, together with France's reservations); *see* Conférence de La Haye de Droit International Privé, [1979] REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 247–48. As of June 1978, all of the other contracting states, except the United States, had taken the reservation preventing letters of request for pre-trial discovery, which reservation is permitted by Article 23 of the Hague Convention. However, the United Kingdom, while declaring in 1976 that it would not execute "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents," also declared that it "understood" such phrase as including any request which requires a person:

> (a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or (b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power.

Ministry of Foreign Affairs of the Netherlands, Convention on the Taking of Evidence Abroad in Civil or Commercial Matters-Notification (of the United Kingdom) (1976). This "understanding" has been interpreted by the United Kingdom's experts to the Special Commission (who initially proposed the Article 23 reservation power when the Convention was drafted) as limiting the United Kingdom's reservation to only those non-specific types of requests to which clauses (a) and (b) apply, thereby permitting pre-trial requests for "particular documents." *See* Permanent Bureau, Report on the Work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (1978), *reprinted in* 17 INT'L LEGAL MATERIALS 1425, 1427–28 (1978).

After the June 1978 meeting of the Special Commission on the Operation of the Hague Convention, the United States delegation reported that the unqualified reservations by the civil law nations were based in part upon their mistaken belief that pre-trial discovery could be had under United States law merely to develop a lawsuit (for "fishing expeditions") rather than only to obtain evidence for a lawsuit that has already begun in earnest. *See* Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (June 1978), *reprinted in* 17 INT'L LEGAL MATERIALS 1417, 1421–24 (1978); Borel & Boyd, *supra* note 4, at 43–44. The United States delegation expressed hope that these reservations would be reconsidered and withdrawn or else limited as the United Kingdom had done, and the Special Commission concurred. Since then, Sweden, Denmark and Norway have made declarations similar to that of the United Kingdom limiting their pre-trial discovery reservations to non-specific letters of request. *See* Submission of the United States (to Hague Conference on Private International Law) regarding Recent Developments Relative to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (October 8, 1980) (also containing 1980 draft clause approved by Organization of American States Meeting of Experts to allow pre-trial discovery of specific documents despite Article 9 of the Inter-American Convention on the Taking of Evidence Abroad which authorizes signatories to refuse pre-trial discovery of documents).

Nonetheless, in view of the enactment of the Law and the extensive criticism of substantive assertions of extraterritorial jurisdiction and of pre-trial discovery for United States litigation revealed in the legislative history of the Law, it appears unlikely that France will soon withdraw or limit its reservation prohibiting pre-trial letters of request.

[45]Assembly Report at 11, 18, 27–28; Assembly Debate at 2231.

[46]Assembly Report at 17, 18, 45.

of request.[47]

By its terms, Article 1-*bis* literally applies to any investigations, requests or communications of the types of information or documents specified in the Law by anyone while in France if "leading to the establishment of proof with a view to foreign administrative or judicial proceedings or as a part of such proceeding." Since this prohibition does not depend upon harm to French interests, it could be applied to communications and investigations made for the defense of French interests and not just to the activities of plaintiffs and prosecutors. Yet the legislative history shows only that the Law was adopted to protect French interests from abusive foreign discovery procedures and excessive assertions of extraterritorial jurisdiction.[48] Nowhere is there an indication that the Law was to impede litigation preparations by French companies, either for their own defense or to institute lawsuits abroad to protect their interests, and arguably such applications were unintended. On the other hand, it could be claimed that the purpose of Article 1-*bis* was to oblige all discovery for foreign proceedings to follow the Hague Convention procedures, and that such purpose is served by applying Article 1-*bis* to French defendants as well as to foreign prosecutors and plaintiffs.

Article 1-*bis* could literally be read to prohibit even communications between a lawyer and his French client if the communications concern proof for a foreign proceeding. However, in a written response published on January 26, 1981 to a question posed in the National Assembly on the effect of Article 1-*bis* on lawyers, the Minister of Justice stated that "the law obviously does not have as a purpose . . . the limiting or controlling of the relations of international lawyers with their clients."[49] The Minister, in making this observation, emphasized that Article 1-*bis* was intended to oblige parties to foreign litigation to comply with the Hague Convention and applicable French laws. Presumably, his statement on the Law's effect on lawyer-client relations reflects the view that the Law was only intended to reach communications between unrelated persons, such as witnesses and

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[47]The Assembly Report, elaborating on the Law's investigatory prohibition, asserted that Article 1-*bis* applies not just to pre-trial discovery, but also prior to the pre-trial stage, stating that the Law forbids "investigations in all directions led by corporate law firms in search of clients." Assembly Report at 45 (translated from French). The French text states, in full: "Cette interdiction couvre la phase préjudiciaire dite 'pre-trial discovery of documents' tout autant que la recherche tous azimut menée par des cabinets d'affaires en quête de clients." (citations omitted). *See also* Assembly Debate at 2231 (Investigations by administrative agencies are prohibited in France by the Law.)

[48]*See* Assembly Report at 17, 18, 45; Second Senate Report at 4.

[49]J.O. Assemblée Nationale—Questions et Résponses, January 26, 1981 at 373 (translated from French). The French text states, "la loi n'a-t-elle évidemment pour objet . . . ni de limiter ou de contrôler les relations des avocats internationaux avec leurs clients." More complete excerpts from the Minister's response and from the question posed to him (with translations) are contained in Annex B to this article. *See* Herzog, *The 1980 French Law on Documents and Information*, 75 A. J. I. L. 382, 384 (1981) (Law not intended to interfere with lawyer-client communications, but would apply to conversations with witnesses and adverse parties).

other parties to a litigation. Assuming so, it should follow that communications and investigations within a French company by its employees and lawyers and other agents to gather evidence were not intended to be prohibited either. Although a ministerial interpretation made in a response to an Assembly question has no formal legal effect and is thus not binding on the courts, because the government sponsored the Law such statement would be considered persuasive evidence of the legislative intent behind the Law.[50]

V. Possible Applications of the Law

In advance of administrative implementation or informal interpretations by the new French government, it is difficult to predict how the prohibitions of Articles 1 and 1-*bis* will actually be enforced by it or construed by French courts.[51] The possible reach of these articles, read literally, is extremely broad.

For instance, Article 1 could be applied to any communication anywhere to foreign public authorities by companies having an office in France, if the communication is found to be harmful to France. As indicated, the term "public authorities" refers not just to national governments and their agen-

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[50]*See* notes 51, 66 *infra*. The Minister's response would be especially persuasive evidence of the legislative intent since the Law was sponsored by the government and this interpretation follows the Law's enactment by only about six months.

[51]The express non-enforcement by the previous government of the French anti-boycott law with respect to the Arab boycott of Israel presents an example of how "interpretations" can reformulate and weaken laws. *See* Directive of May 9, 1980 Concerning Application of Article 32 of Law No. 77-574 of June 7, 1977, [1980] J.O. 1174 (the "Directive"), interpreting the prohibition of discrimination based on "origine nationale" to be intended to forbid only racial discrimination against ethnic minorities within a nation and not to forbid discrimination against a nation (*e.g.* Israel), an interpretation apparently motivated by the French government's foreign trade objectives with respect to Arab countries. *See* Opinion Concerning Application of Article 32 of Law No. 77-574 of June 7, 1977, [1977] J.O. 4360 N.C. This circular, which excepted Mid-Eastern trade from the anti-boycott law on the basis of the importance of this trade, was annulled by the Conseil d'Etat (Cons. D'Etat, Ass. 18 avril 1980, req. No. 9643 et 9644, [1981] Recueil Dalloz Sirey (Jur.) 3-4. Société Maxi-Librati création et autres), but its effect was reestablished by the subsequent Directive reinterpreting the anti-boycott law. *See* Bismuth, *Annulation de l'Avis du Premier Ministre du 24 juill. 1977 et Résurrection de la Loi Pénale "Antiboycottage,"* [1981] Recueil Dalloz Sirey (Jur.) 4. *See* note 66 *infra*. In a "Circulaire" dated July 17, 1981 concerning Law No. 77-574, the Prime Minister of the new government, Pierre Mauroy, repealed the Directive. [1981] J.O. 2002.

Concerning possible litigation, it should be recognized that even if the government did not bring a prosecution under the Law, this would not necessarily be the end of a matter since, under French law, private parties suffering particular monetary damage because of a violation of a penal law may initiate criminal proceedings. As civil parties to a criminal prosecution, they may recover civil damages (alternatively, they may bring their own civil suit separately from any criminal action). *See* C. PR. PEN. arts. 1-20, 85-91 (Fr.); G. Stefani & G. Levasseur, *supra* note 36, at 449-51. This right to be part of the criminal action is subject to the qualification that if the penal law is construed to be only for the general benefit of the public, and the plaintiff has only suffered as an ordinary member of the public, then a court may find that no private right of action can be based on the violations of the penal law (as has been held in suits based on violations of French competition laws and health regulations)). *See* C. PR. PEN. arts. 85-91 (Fr.); note 35 *supra* (defining "délit"); H. DEVRIES, *supra* note 8, at 226-27; Larguier, *Civil Action for Damages in French Criminal Procedure*, 39 TUL. L. REV. 686 (1965).

cies, but also to local governments and agencies (and arguably to international organizations and agencies). The Law does not specify that the information or documents must originate in France or that they must necessarily pertain to activities in France.

Article 1 could possibly be held to reach pre-merger notifications to the Federal Trade Commission of the United States and similar antitrust filings. Among other applications, the Law might be applied to information provided to banking authorities, documents filed with the United States Securities and Exchange Commission or Department of Commerce (such as to affirm compliance with foreign boycotts) and any other transmission of facts to a foreign government entity that may result in an inquiry by a foreign government or in litigation or may otherwise be acted upon to the detriment of French interests. Application of the Law in these contexts will likely depend on the facts of the particular case.

There is little guidance given as to what constitutes harm for purposes of Article 1, and whether some meaningful harm is required. Arguably, if the communicated information results in a foreign administrative investigation requiring the French party to spend funds and efforts in defense, then the type of harm this legislation was intended to protect against would have occurred. Probably almost any lawsuit brought against a French party by a United States company having a French presence would involve some communications in violation of the literal terms of the Law.

Article 1-*bis* is also loosely written and can be literally read to apply to a great variety of activities never considered by the Senate or the Assembly. Since it uses the general verb "rechercher," meaning "to investigate" or "to inquire into" to define prohibited acts, Article 1-*bis* could be construed to apply to most intellectual activities in France, whether or not involving any communication with any person, done with a view to foreign litigation.[52]

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[52]For example, one recent article by two French lawyers has interpreted 1-*bis* broadly to prohibit the communication of financial and commercial information abroad, by French subsidiaries and divisions of multinationals, for tax audits and the preparation of foreign tax returns. *See* Guillerm-Kirk & Batailion, *supra*, note 34. The authors construe the phrase "tendant à la constitution de preuves" as used in Article 1-*bis* to mean that all communications, requests and research of the specified types of information are prohibited if the information "*could constitute evidence to be used in present or future* foreign administrative or judicial proceedings." *Id.* (emphasis added).

The Assembly Report, however, indicates that Article 1-*bis* applies, not based on whether evidence could be used for such a proceeding, but rather on whether the evidence is actually obtained within the framework of, or in view of, such a proceeding (including, with respect to any person who researched information in good faith (in other words, not for such a proceeding), to apply Article 1-*bis* once it is known that this information is used for such proceedings). As the Assembly Report states:

> In effect, article one *bis* forbids the research and the communication of documents or information [not only] within the framework of a foreign judicial or administrative proceeding, but also *in view of* such a proceeding. The sanction with respect to any person making investigations will therefore apply once it is known what usage is made of the information or documents which had been communicated to him in good faith.

Assembly Report 45. (The French text states: "En effet, l'article premier *bis* interdit la recherche et la communication de documents ou renseignements dans le cadre d'une procé-

Some comfort is derived, however, from the former Minister of Justice's response, discussed above, to the National Assembly question in which he observed that the Law was not intended to reach relations between a lawyer and his client. This indicated that the Ministry of Justice was interpreting the Law reasonably with reference to the legislative intent which was concerned with foreign discovery in France, rather than by playing on ambiguities to construe the Law to its literal limits in order to impede foreign proceedings as much as possible.[53] Hopefully, the new French government will do likewise.

One other possible ambiguity in the Law's reach is whether it applies to arbitration proceedings. Presumably it does not unless the arbitration is so regulated under local law as to be considered a part of a nation's judicial process. The legislative history refers only to the Law's effect on judicial proceedings in government courts and never discusses arbitration.

VI. Defenses

As a defense to a prosecution under the Law, one could attempt to limit the reach of Articles 1 and 1-*bis* to just those activities necessarily reached by the Law. The legislative history contains few statements limiting the Law's scope, but does emphasize certain activities as being targets of the Law's prohibitions, such as formal discovery proceedings in France that do not follow the Hague Convention procedures. One could claim that Article 1-*bis* only prohibits such formal questioning of another party or of a witness, of the kind that produces a transcript which can be introduced as evidence in foreign proceedings, and does not reach either informal inquiries intended to gather background information or off-the-record conversations among the parties.[54]

Both Articles 1 and 1-*bis* could also be distinguished based on the type of information sought. Arguably, the "economic, commercial, industrial, financial and technical" information these articles apply to is only that type of economic and technical data which is used as evidence as such. For example, the commercial data upon which economic analysis for an antitrust action is typically based. So construed, the Law would not apply to information that is "economic" or "commercial" only incidentally because it involves business activities. On this basis, the Law would not reach, for

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dure judiciaire ou administrative étrangère, mais aussi *en vue* d'une telle procédure. La sanction à l'égard de toute personne se livrant à des recherches pourra donc intervenir une fois connu l'usage fait des renseignements ou documents qui lui auraient été communiqués en toute bonne foi.")

[53] *See also* Address by Gilbert Guillaume, Director of Legal Affairs, Ministry of Foreign Affairs (May 21, 1981) (believes that Law not applicable to routine administrative inquiries not having a pre-trial character or to information volunteered by French companies to foreign courts to support lawsuits brought by such companies to maintain their rights, such as to protect patents).

[54] *See* note 34 *supra*. There are, however, statements in the legislative history indicating a broad construction. *See* note 47 *supra*.

instance, a party's statements about its intentions or evidence about what it had reason to know when it did an act prohibited by United States law, even if the act in question involved a business activity (such as concerning the reexport of United States-origin goods). For this reason, the Law should not apply to legal advice or discussions about the legal effects of business activities.[55]

Article 1's application to French nationals should also, in practice, be limited to prohibiting communications likely to harm other French nationals. For example, if the information communicated could lead to an antitrust prosecution of other French companies. It would then be easy to claim that French economic interests were jeopardized. However, if the French national transmitting the information is the only one who can be injured, arguably French interests should not be harmed since the French national would not communicate the information unless, taking all its interests into account, it would gain more (or lose less) by communicating than by refusing to do so. Premerger notifications filed with the Federal Trade Commission would be an example of a communication often unlikely to harm other French nationals.[56]

Another possible defense for alleged violations of the Law involving the United States is the argument that the Law is inconsistent with the Convention of Establishment of November 25, 1959 between France and the United States (hereafter referred to as the Establishment Convention)[57] which governs the treatment by France and the United States of their nationals. To the extent conflicts with the Law exist, the Establishment Convention would prevail since the prohibitions of Articles 1 and 1-*bis* were expressly made subject to ("sous réserve des") treaties and international agreements.[58] Such a conflict arguably exists between Article 1 of the Law and Article III.1 of the Establishment Convention. Article III.1 states:

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[55]The text in French is not very precise, using the expression "d'ordre économique . . ." meaning "relating to" or "in the field of economics . . . ," in effect leaving the prosecutors and courts discretion to give the Law a broad or narrow scope. As observed, the former Minister of Justice stated that the Law was not intended to interfere with lawyer-client relations. Similarly, it would appear that the Law was not intended to reach conversations between lawyers on opposing sides, for example to discuss settling issues in a case, since this would not constitute the type of "inquisition" of witnesses with which the legislative history was concerned. Furthermore, the ability to have such discussions is necessary for the lawyer's performance of his professional duties. It could therefore be argued that such essential professional activities are exempt under Article 1-*bis* anyway since Article 1-*bis* is subject to laws and regulations in force and the French legal profession (including both "conseils juridiques" and "avocats") is established by statute. *See generally* Professions Judiciaries et Juridiques—Réforme, J.O. April 30, 1974) (special printing of collected statutes and decrees on "conseils juridiques" and "avocats").

[56]Where the French national is a multi-national, there will exist the risk that one could argue it is favoring its foreign interests over the interests of France.

[57]Establishment Convention, 11 U.S.T. 2398; T.I.A.S. No. 4625. It was adopted by France as Decret N° 1330 of December 7, 1960.

[58]Furthermore, under French law, treaties prevail over inconsistent laws anyway, so long as the other party to the treaty reciprocally upholds its obligations. *See* note 32 *supra*.

> Nationals and companies of either High Contracting Party shall be accorded national treatment with respect to access to the courts of justice as well as to administrative tribunals and agencies, within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. . . .[59]

One could possibly claim that Article III.1 guarantees that the nationals of both France and the United States shall be accorded unrestricted access by both countries to the full judicial and administrative process of both countries on the same basis as the nationals within each of the countries. Arguably, this provision also allows "access" that is compelled by a court or administrative agency. It could similarly be claimed that Article 1-*bis* contradicts the Establishment Convention because it interferes with such "access".[60]

It could be argued in response that this interpretation of Article III.1, although literally possible, is inconsistent with the apparently limited purpose of the Establishment Convention that each country agree to accord equitable treatment to the nationals of the other. Consequently, Article III.1 would be read as requiring only that nationals be accorded national treatment *by the other country* and not as also preventing either country from trying to immunize the activities of its own nationals from litigation abroad.[61] Whether a French court could be persuaded to find a conflict

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[59]Establishment Convention, Art. III.1. The text in French states:

> Les ressortissants et sociétés de chacune des Hautes Parties contractantes bénéficient du traitement national en ce qui concerne l'accès aux tribunaux judiciaires ainsi qu'aux tribunaux et organismes administratifs situés dans les territoires de l'autre Haute Partie contractante à tous les degrès de juridiction en vue de l'exercice tant actif que passif de leurs droits.

[1960] J.O. 11,220. (Article III.1 does not specify, as do most of the other provisions, that it applies only to each nation with respect to the nationals of the other.); *see also* Art. IV (rights of nationals of either country may not "be subjected to impairment, within the territories of the other High Contracting Party, by any measure of a discriminatory character"); Art. VI (on the retaining of lawyers); Art. IX.1 (forbidding discriminatory "obligations"); Art. I. *Cf.* Art. XI which states: "Each High Contracting Party will take the measures it deems appropriate with a view to preventing commercial practices or arrangements . . . which restrain competition, limit access to markets or foster monopolistic control, whenever such practices or arrangements have or might have harmful effects on trade between the two countries."; Nash, *Contemporary Practice of the United States Relating to International Law*, 74 A.J.I.L. 657, 667–68 (1980) (opinion of James R. Atwood, Deputy Legal Adviser to the State Department, that clauses such as Article XI affirm the United States' right to enforce its antitrust laws in extraterritorial contexts).

[60]In addition, Article 1-*bis* of the Law would appear literally to conflict with Article II.2 of the Establishment Convention, which states: "Nationals of each High Contracting Party shall enjoy, within the territories of the other High Contracting Party, *freedom* of conscience, of worship, *of information* and of the press. '(emphasis added)' " However, the United States and France are also parties to the Hague Convention, which they agreed to over ten years after the signing of the Establishment Convention. It can be argued that Article 1-*bis* of the Law simply implements the Hague Convention relating to information for litigation and that, to the extent this implementation is inconsistent with the provisions of the Establishment Convention, the later and more specific provisions of the Hague Convention should have precedence concerning litigation information.

[61]*See also* Walker, *Convention of Establishment Between the United States and France*, 54 A.J.I.L. 393 (1960) (drafters of Establishment Convention primarily concerned with foreign

between the Law and the Establishment Convention would likely depend upon the actual circumstances of the case before it (in particular, on whether the allegedly illegal acts were undertaken for the defense of French interests). The argument that such a conflict exists, even if unlikely to be accepted, might be worth making nonetheless in order, with a view to the Law, to show the limits of literal interpretations of texts that ignore their drafters' intent.

Finally, the legislative history of the Law demonstrates concern that the defense of "excuse légale" (meaning "legal excuse," often referred to in the United States as the illegality defense)[62] will not be upheld by United States courts if asserted by French parties based on the Law to justify failing to comply with a United States discovery order. The Assembly Report recognized that this defense is not absolute in the United States.[63] Yet, the French legislators ignored the other side of this issue—whether a French person could assert the defense of "excuse légale" in French courts to justify complying with a United States discovery order in violation of the Law.[64] Possibly such a defense would be upheld in France, which arguably makes the assertion of the corresponding illegality defense in the United States appear less persuasive.

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investment, apparently by United States companies in France; does not indicate what drafter's intent was regarding Article III).

[62]Courts in the United States have distinguished the issue of whether discovery can be compelled where in contravention of foreign law, from the issue of whether such illegality is a defense to sanctions for non-compliance with a discovery order. To the former issue, United States courts have held that discovery may be compelled, although it has also been held that discretion exists to refuse to compel such discovery. *See* Société Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197 (1958); Arthur Andersen v. Finesilver, 546 F.2d 338 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); Trade Development Bank v. Continental Insurance Co., 469 F.2d 35 (2d Cir. 1972) (affirmed that although the trial court could order discovery, it had discretion to refuse to compel discovery where illegal in the foreign jurisdiction with respect to which discovery was requested).

To the issue of whether remedies should be imposed for non-compliance with a discovery order, courts have generally accepted the defense of illegality, except where the court involved did not believe this defense was raised in good faith. *See*, *e.g.*, *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977) (sanctions not imposed since compliance with discovery order was illegal in foreign jurisdiction where discovery was ordered); State of Ohio v. Arthur Andersen, 570 F.2d 1370 (10th Cir.), *cert. denied*, 439 U.S. 833 (1978) (court considered illegality defense of defendant to be only a diversionary tactic raised afterwards and not made in good faith; sanctions imposed).

[63]*See* Assembly Report at 34, 39, 46 (also observes that United States courts may threaten and impose contempt citations); Assembly Debate at 2234, col. 2.

[64]The Assembly Report may have had this defense of "excuse légale" in mind where it stated concerning Article 1, "these sanctions will only apply in the unlikely case where the firms refuse to use the protective provisions offered to them. In all other cases, these potential sanctions will assure in the eyes of foreign judges the legal foundation of the illegality defense of which the firms will not fail to make use." Assembly Report at 48 (translated from French). The French text states "ces sanctions ne s'appliqueront que dans l'hypothèse peu probable où les entreprises refuseraient d'utiliser les dispositions protectrices qui leur sont offertes. Dans tous les autres cas, ces sanctions potentielles assureront aux yeux des juges étrangers le fondement juridique de l'excuse légale dont les entreprises ne manqueront pas de se prévaloir."

Conclusion

Although the legislative history was concerned with United States antitrust investigations and litigation, both by private and governmental parties, the wording of the Law was not limited to these concerns and therefore its possible application is uncertain. Hopefully, the French government will narrowly interpret the Law's reach by administrative action or definitively limit the Law's scope by prompting legislative revisions. Le Theule, the former Minister of Transportation, stated during the Senate and Assembly debates that administrative orders would be forthcoming.[65] As yet, however, there has been no significant administrative implementation.[66] Nor have any legislative proposals been made or suggested in the Senate or Assembly to define the Law's scope.[67]

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[65]First Senate Debate at 2199 (administrative order ("arrêté") to be promulgated within three months of enactment); Assembly Debate at 2236 (order to be issued by Transportation Ministry soon after enactment of Law); Assembly Report at 36. However, since the Law's reach has been expanded to other areas than just transportation, administrative implementation by the Transportation Ministry only would be of limited usefulness.

[66]The only implementing decree so far is Decree N° 81–550 of May 12, 1981 of former Prime Minister Barre designating the Minister of Foreign Affairs as the repository for notifications under Article 2, while still permitting such notifications to be made to other ministries that may be involved. As observed, failure to make such notification is not punishable. Such notification does provide one method for documenting unlawful requests in order later to contest execution in France of foreign judgments obtained in connection with acts in violation of the Law. *See* Herzog, *supra* note 49, at 385.

The effect of any such administrative regulations or interpretations may be uncertain for several reasons. To begin with, Article 1 of the Law, the only article expressly authorizing administrative implementation, does not designate any one minister with this responsibility. The legislative history concerning Articles 1 and 1-*bis* contains references to the relevant or competent ministry and to "the different ministerial departments" that will be concerned with the Law. Assembly Debate at 2234; *see* Senate Report at 2197. The legislators apparently anticipated that choice of the competent ministry would depend upon the subject matter of the proceedings. Consequently, no one ministry, such as the Ministry of Transportation, would appear capable of issuing regulations that would be applicable for all cases. (However, Ministry of Justice interpretations could have such effect with regard to its prosecution decisions.)

Second, although the implementing regulations can limit the Law's reach, such regulations and, as noted earlier, some interpretative circulars, may be held by the Conseil d'Etat to be invalid if found to conflict with the underlying statute. *See* note 51 *supra* (opinion limiting anti-boycott law held invalid).

The government might interpret the Law less formally in order to avoid possible invalidation. For example, the interpretation by the government might take the limited form of an interpretation note 51 *supra* (Directive limiting anti-boycott law held invalid).

The government might interpret the Law less formally in order to avoid possible invalidation. For example, the interpretation by the government might take the limited form of an interpretation in a "circulaire" which is not subject to invalidation by the Conseil d'Etat. Another informal method of making an interpretation public without risking invalidation by the Conseil d'Etat is by ministerial response to a question posed by a legislator in the Senate or the Assembly, as exemplified by the Minister of Justice's response concerning lawyer-client relations. However, although any such interpretation would ordinarily be accorded great weight and would provide guidance as to the present government's prosecutorial intentions, it would not be binding on courts in criminal proceeding. *See generally* G. VEDEL & P. DEVOLVE, DROIT ADMINISTRATIF (7 ed. 1980); DEVRIES, *supra* note 8, at 102–103, 254–55.

[67]There are various approaches by which the Law could be revised to serve the goals underlying the Law's adoption while not reaching activities which the legislative history indicates were not intended to be prevented (for example, to ensure that the Law allow preparations for

All that can presently be said for certain is that the Law is most likely to be enforced with respect to actions brought under United States antitrust laws against French parties. One can envision as possible situations resulting in enforcement under Article 1, communications in such antitrust actions in the United States by plaintiffs having an office or other presence in France, and under Article 1-*bis*, the institution of investigations and pretrial discovery in France by the plaintiffs for such antitrust litigation. Whether the Law will in fact be actively enforced and whether its enforcement will be limited to antitrust plaintiffs remains to be seen.

Nonetheless, it would appear in view of this defensive action by France and the responses of the United Kingdom, Australia and other countries[68] to the extraterritorial enforcement of United States laws, that attempts by United States courts and agencies generally to enforce United States laws extraterritorially will be increasingly ineffective and counter-productive until the United States unilaterally adopts a more satisfactory approach or negotiates an acceptable resolution to these jurisdictional conflicts.[69] In the

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the defense of French interests in litigation abroad). One possible revision would be to provide that Article 1-*bis* applies only if French interests may be harmed, as Article 1 states. Article 1-*bis* could be further amended to provide that one of the ministries, such as the Ministry of Justice, can exempt activities from the reach of Article 1-*bis*, either generally or on a case-by-case basis. The provision for administrative implementation in Article 1 could also be re-written to provide expressly that activities can be exempted and to designate a single ministry to handle exemption requests. Alternatively, the Law could be limited to apply only to those activities specified by a particular minister, as the 1968 Law provided and as the British Protection Act provides for several of its prohibitions (for example, by empowering the Secretary of State to prohibit compliance with extraterritorial foreign laws threatening the interests of the United Kingdom). Limiting the Law to those situations specified by a ministry would be satisfactory so long as the persons affected by the extraterritorial application of a foreign law notify the designated ministry of the foreign law's reach (it could even be provided that no communication could be made or other action taken by the persons affected until such notice was given). None of these possible revisions to define the Law's reach would make the Law less effective in protecting those French interests with which the legislators were concerned.

[68] *See, e.g.*, Cheeseright, *Australia May Retaliate on U.S. Antitrust Cases*, Financial Times (Int'l ed.), Sept. 9, 1980, at 1; *see* note 12 *supra*.

[69] With regard to extraterritorial antitrust jurisdiction and discovery, there appears to be greater common agreement on principles and thus potential for negotiated resolution of these jurisdictional conflicts than is generally believed. Many, probably most, countries apply not just the strict territorial and nationality bases for jurisdiction, but also some form of the objective territorial principle. *See* Shenefield, *The Extra-Territorial Impact of U.S. Antitrust Laws: Causes and Consequences*, 4 REV. SUISSE DROIT INT'L CONCURRENCE 59, 62-63 (1978); notes 12, 35, 36 *supra* (French, Australian and German law); Craig, *supra* note 3, at 586 (effects within territory invoke the territoriality principle; cites nationality and other principles as exceptions to the territoriality rule); *Research under the Auspices of the Faculty of the Harvard Law School, Draft Convention on Jurisdiction with Respect to Crime*, 29 A.J.I.L. pt. 2 at 445 (supp. I, 1935); *but see* Jacobs, *supra* note 1 (United Kingdom states that it asserts jurisdiction based only on the territorial and nationality principles).

Problems arise, however, not just because the United States basis for jurisdiction may be contested, but also because of conflicts with nations which claim concurrent jurisdiction based on other recognized jurisdictional principles and which believe their interests are much more significantly affected. The *Fruehauf* case is one example. *See* note 3 *supra*. Other types of conflicts may arise where, for instance, the foreign nation asserts that the acts of one of its instrumentalities are protected by sovereign immunity or that a company subject to its jurisdiction was compelled to do the act complained of because of the nation's laws and policies.

meantime, United States courts and administrative agencies involved in antitrust proceedings in particular would be well advised—in the interest of promoting cooperation in the effective enforcement of United States laws and goodwill generally—to consider at the outset the conflicting interests of the other nations involved. Resort to extraterritorial process and enforce-

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The occurrence and importance of problems such as these with other nations may be lessened if both at the time legal action is initiated and before a judgment is rendered, an assessment is made by United States courts and, in criminal cases, by prosecutors of the relative significance of the United States and the foreign interests, as Brewster recommended. *See* BREWSTER, *supra* note 1, at 444–46. Where jurisdiction is asserted, foreign reaction might be mollified at the outset by a decision or other explanation demonstrating the reasonableness of the United States position. In fact, United States courts are becoming increasingly sensitive to the need to consider foreign interests, at least by weighing foreign policy considerations from a United States viewpoint. *See, e.g.*, Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (1976); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 40 (1965) (listing factors courts should consider to moderate conflicts of jurisdiction); *but see In re* Uranium Antitrust Litigation (Westinghouse Electric Corp. v. Twenty-Nine Foreign & Domestic Uranium Producers), 5 TRADE REG. REP., CCH § 63, 183 (7th Cir. Feb. 15, 1980); Case Note, 21 HARV. INT'L L.J. 515 (1980).

Another proposal of Brewster's which merits further consideration is to require that the Department of State be formally consulted by other agencies, prosecutors and courts prior to or when legal proceedings commence and prior to relief being ordered if significant interests of other nations are involved. *See* BREWSTER *supra*. This practice would encourage a more coherent United States position at the outset, and result in United States foreign policy interests being more accurately assessed by agencies and courts. Hopefully, it would also permit more constructive government to government consultations beforehand rather than only in response to foreign governments that have learned of a problem from their outraged nationals. Such prior consultation may often be appropriate where a United States government agency is directly involved, as in the *Fruehauf* case.

Early resolution of particular jurisdictional conflicts by government to government consultation would be facilitated if a multinational agreement on jurisdictional principles could be negotiated that would emphasize the common interests of all nations in jurisdiction not being strictly limited territorially. At the same time, such an agreement could clarify the principles according to which extraterritorial assertions of jurisdiction should give way.

It is also appropriate for the United States unilaterally to reconsider whether treble damages are always appropriate in multi-national contexts. Based on the principles of law of many other nations, awards so in excess of compensatory damages seem unfair, especially where the jurisdictional bases for these awards are disputable. Should not some discretion be exercisable by courts if compensation seems appropriate, but because of jurisdictional conflicts, penalties are not? As the Australian Attorney General has observed, the concept of the "private attorney general" being encouraged, by the prospect of massive punitive damages, to enforce United States economic policy within the United States may often be inappropriate when most of the activities are by foreign persons on foreign territories. *See* Press Release; notes 12, 15 *supra*.

Finally, concerning discovery, if it is perceived that agreement has been reached on principles for the extraterritorial reach of substantive laws, then it will be more likely that France and other nations will follow the United Kingdom's lead and similarly limit their reservations preventing pre-trial letters of request. *See* note 12 *supra*. A formal policy of unilateral restraint in making discovery requests by United States government entities (including more direct control over discovery and concern for principles of comity by courts) would also encourage the French to permit certain administrative inquiries. (The Justice Department's Antitrust Division has announced that it will exercise such restraint. *See* Shenefield, *supra*, at 67-68). According to the legislative history of the Law, the French are willing to attempt to negotiate a resolution to their differences with the United States over extraterritorial jurisdiction. *See*, *e.g.*, Assembly Report at 42. It would appear that, in view of French law principles on the reach of France's extraterritorial jurisdiction and the current status of foreign discovery in France because of the Law, the United States has much to gain from such negotiations.

ment, despite serious conflicts with the interests of other nations exercising concurrent jurisdiction, should be had only where United States' interests are vitally concerned. The legal jurisdiction and process of other nations should be respected. Forgetting these basic principles of comity will only incite further reactions preventing even the most necessary and justifiable extraterritorial applications of United States law.

Annex I

Text of Law No. 80-538 of July 16, 1980, as published in the Journal Officiel de la République Française on July 17, 1980 at page 1799.

Loi n° 80–538 du 16 juillet 1980 relative à la communication de documents et renseignements d'ordre économique, commercial ou technique à des personnes physiques ou morales étrangères.

L'Assemblée Nationale et le Sénat ont adopté,

Le Président de la République promulgue la loi dont la teneur suit:

Art. 1er.—Le titre de la loi n° 68–678 du 26 juillet 1968 relative à la communication de documents et renseignements à des autorités étrangères dans le domaine du commerce maritime est modifié ainsi qu'il suit:

> Loi relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères.

Art. 2.—I.—L'article ler de la loi n° 68–678 du 26 juillet 1968 susvisée est ainsi rédigé:

> Art. 1er.—Sous réserve des traités ou accords internationaux, il est interdit à toute personne physique de nationalité française ou résidant habituellement sur le territoire français et à tout dirigeant, représentant, agent, ou préposé d'une personne morale y ayant son siège ou un établissement de communiquer par écrit, oralement ou sous toute autre forme, en quelque lieu que ce soit, à des autorités publiques étrangères, les documents ou les renseignements d'ordre économique, commercial, industriel, financier ou technique dont la communication est de nature à porter atteinte à la souveraineté, à la sécurité, aux intérêts économiques essentiels de la France ou à l'ordre public, précisés par l'autorité administrative en tant que de besoin.

II.—Il est inséré, après l'article 1er de la loi n° 68–678 du 26 juillet 1968 susvisée, un article 1er *bis* ainsi rédigé:

> *Art. 1er bis*—Sous réserve des traités ou accords internationaux ct des lois et réglements en vigueur, il est interdit à toute personne de demander, de rechercher ou de communiquer, par écrit, oralement ou sous toute autre forme, des documents ou renseignements d'ordre économique, commercial, industriel, financier ou technique tendant à la constitution de preuves en vue de procédures judiciaires ou administratives étrangères ou dans le cadre de celles-ci.

Art. 3.—L'article 2 de la loi n° 68–678 du 26 juillet 1968 susvisée est ainsi modifié:

> *Art. 2*.—Les personnes visées aux articles 1er et 1er *bis* sont tenues d'informer sans délai le ministre compétent lorsqu'elles se trouvent saisies de toute demande concernant de telles communications.

Art. 4.—L'article 3 de la loi n° 68–678 du 26 juillet 1968 précitée est ainsi modifié:

> *Art. 3*.—Sans préjudice des peines plus lourdes prévues par la loi, toute infraction aux dispositions des articles 1er et 1er *bis* de la présente loi sera punie d'un

emprisonnement de deux mois à six mois et d'une amende de 10,000 F à 120,000 F ou de l'une de ces deux peines seulement.

La présente loi sera exécutée comme loi de l'Etat.

Fait à Paris, le 16 juillet 1980.

Par le Président de la République:
Valéry Giscard d'Estaing

Le Premier Ministre,
Raymond Barre

Le Garde des Sceaux,
Ministre de la Justice,
Alain Peyrefitte

Le Ministre des Affaires Etrangères,
Jean François-Poncet

Le Ministre de l'Economie,
René Monory

Le Ministre de l'Industrie,
André Giraud

Le Ministre des Transports,
Joël Le Theule

Le Ministre du Commerce Extérieur,
Jean-François Deniau

Le Ministre du Commerce et de l'Artisanat,
Maurice Charretier

Translation of the Text of Law No. 80-538 of July 16, 1980

Law No. 80–538 of July 16, 1980 concerning the communication to foreign entities or individuals of documents and information relating to economic, commercial or technical matters.

The National Assembly and the Senate have adopted,

The President of the Republic promulgates a law, the terms of which are the following:

Article 1—The title of Law No. 68–678 of July 26, 1968 concerning the communication to foreign authorities of documents and information in the field of maritime commerce is modified as follows:

> Law concerning the communication to foreign entities or individuals of documents and information relating to economic, commercial, industrial, financial or technical matters.

Article 2—I. Article 1 of Law No. 68–678 of July 26, 1968, referred to above, is worded as follows:

> *Article 1*.—Subject to treaties or international agreements, it is prohibited for any individual of French nationality or who usually resides on French territory and for any officer, representative, agent or employee of an entity having a head office or establishment in France to communicate to foreign public authorities, in writing, orally or by any other means, anywhere, documents or information relating to economic, commercial, industrial, financial or technical matters, the communication of which is capable of harming the sovereignty, security or essential economic interests of France or contravening public policy, specified by the administrative authorities as necessary.

II. It is inserted, after Article 1 of Law No. 68–678 of July 26, 1968, referred to above, an Article 1-*bis* worded as follows:

> *Article 1-bis*. Subject to any treaties or international agreements and the laws and regulations in force, it is prohibited for any person to request, to investigate or to communicate in writing, orally or by any other means, documents or information relating to economic, commercial, industrial, financial or technical matters leading to the establishment of proof with a view to foreign administrative or judicial proceedings or as a part of such proceedings.

Article 3. Article 2 of Law No. 68–678 of July 26, 1968, referred to above, is modified as follows:

> *Article 2*. Persons aimed at by articles 1 and 1-*bis* are required to inform without delay the relevant minister when they are in receipt of any request concerning such communications.

Article 4—Article 3 of Law No. 68–678 of July 26, 1968, cited above, is modified as follows:

> *Article 3*. Without prejudice to any greater penalties provided by law, any violation of the provisions of articles 1 and 1-*bis* of this law will be punished by imprisonment of from two to six months and by a fine of from 10,000 Francs to 120,000 Francs or by only one of these two penalties.

This law will be enforced as a law of the State.

Done in Paris, July 16, 1980.

Annex II

Excerpts from the question on Article 1-*bis* of the Law posed in the National Assembly on September 29, 1980 and from the response of the Minister of Justice, published in the Journal Officiel de la République Française-Assemblée Nationale-Questions et Réponses on January 26, 1981 at page 373 (emphasis added).

Question

35893—29 septembre 1980. M. Roger Chinaud attire l'attention de M. le Ministre de la Justice sur certains problèmes d'interprétation que pose, pour l'activité des cabinets de juristes et d'avocats internationaux, l'Article 1er *bis* . . . Compte tenu du fait qu'une telle disposition ne saurait être interprétée comme s'opposant à l'activité des cabinets d'avocats internationaux, il lui demande si, dans ces conditions, il n'estime pas nécessaire de faire établir à l'usage des membres de cette profession un document d'interprétation destiné à établir clairement les nouvelles règles juridiques dans lesquelles doit désormais s'inscrire leur activité.

Résponse

Les dispositions de l'article 1er *bis* . . . ont pour objet essentiel de faire respecter en France l'application des règles qui définissent le régime de l'obtention des preuves à l'étranger. Ce régime résulte . . . des dispositions du nouveau Code de Procédure Civile . . . et de celle de la Convention de La Haye du 18 mars 1970. . . , assortie de la déclaration faite par le Gouvernement français au moment de sa ratification. . . . Le régime ainsi défini est destiné à donner une pleine efficacité à nos relations de coopération judiciaire internationale en permettant l'exécution sur notre territoire des commissions rogatoires selon des formes particulières (Art. 739 du nouveau Code de Procédure Civile), ainsi que la mise en oeuvre, sous des conditions très précises, de la procédure d'obtention des preuves par commissaires (Convention de La Haye du 18 mars 1970, chap. II). Il permet au surplus aux parquets et à la Chancellerie, selon les cas, de contrôler effectivement le respect des principes directeurs de la procédure française (Art. 744 du nouveau Code de Procédure Civile, Art. 16, 17 et 21 de la Convention de La Haye précitée et Art. 2 et 3 de la déclaration faite par le Gouvernement français). L'article 1er *bis* de la Loi du 16 juillet 1980 est venu sanctionner l'interdiction de procédure sur le territoire français à toute mesure d'instruction ou opération de recherche de preuve, notamment par la voie de commissaires, en dehors du cadre qui a été défini par le nouveau Code de Procédure Civile et par la Convention de La Haye du 18 mars 1970 précitée, plus précisément en dehors du contrôle des parquets et de la Chancellerie. Cet article interdit de plus la communication de documents ou de renseignements lorsque ceux-ci sont demandés ou recherchés hors du cadre fixé par la loi. En revanche, l'article 1er *bis* n'interdit pas la demande, la recherche ou la communication de documents ou renseignements hors du cadre de procédures judiciaires ou administratives étrangères. *Aussi bien la loi n'a-t-elle évidemment pour objet* ni d'entraver les relations d'affaires avec des pays étrangers, *ni de limiter ou de contrôler les relations des avocats internationaux avec leurs clients*. Toutefois, et en application de l'article 1er, la communication de documents ou de renseignements d'ordre

économique, commercial, industriel, financier ou technique à des autorités publiques étrangères n'est possible que si elle n'est pas de nature à porter atteinte à la souveraineté, à la sécurité, aux intérêts économiques essentiels de la France ou à l'ordre public, précisés par l'autorité administrative en tant que de besoin. . . .

Translation of National Assembly Question and the Minister of Justice's Response

Question

35893—September 29, 1980. Mr. Roger Chinaud draws the attention of the Minister of Justice to certain problems of interpretation which are posed by Article 1-*bis* for the activities of law firms and international lawyers . . . . Taking into account the fact that such a provision could not be interpreted as opposing the activities of the international law firms, he asks him if, in these circumstances, he does not regard it necessary to establish for the use of members of this profession an interpretative document aimed at clearly establishing the new rules by which their activities must henceforth be defined.

Response

The provisions of Article 1-*bis* have, as their main purpose, to have observed in France the rules which define the procedures for obtaining evidence abroad. These procedures result from . . . the provisions of the New Code of Civil Procedure . . . and those of the Hague Convention of March 18, 1970. . . , together with the declaration made by the French government at the time of its ratification. . . . The procedures thus defined are aimed at giving full effect to our international relations for judicial cooperation by permitting the carrying out on our territory of letters rogatory (letters of request) according to the special forms (Article 739 of the New Code of Civil Procedure), as well as the putting into effect, according to well specified conditions, of the procedure for obtaining evidence by commissioners (Hague Convention of March 18, 1970, Chapt. II). It permits moreover the offices of the public prosecutor or the Chancellery, depending on the case, to control effectively the observance of the governing principles of French procedure (Art. 744 of the New Code of Civil Procedure, Arts. 16, 17 and 21 of the above-cited Hague Convention and Arts. 2 and 3 of the declaration made by the French government). Article 1-*bis* of the law of July 16, 1980 approves the prohibition concerning procedure on French territory with respect to any investigatory measures or operations searching for evidence, in particular, by means of commissioners, which are outside of the framework which has been defined by the New Code of Civil Procedure and by the above-cited Hague-Convention of March 18, 1970, and in particular, which are outside of the control of the public prosecutor's office or the Chancellery. This Article prohibits in addition the communication of documents or information when these are requested or investigated outside of the framework defined by the law. On the other hand, Article 1-*bis* does not prohibit the requesting, investigating or communicating of documents or information outside of the framework of foreign judicial or administrative proceedings. *Similarly, the law obviously does not have as a purpose* either the hindering of business relations with foreign countries or *the limiting or controlling of the relations of international lawyers with their clients*. Nonetheless, and in accordance with Article 1, the communication of documents or information relating to economic, commercial, industrial, financial or technical matters to foreign public authorities is only possible if it is not capable of harming the sovereignty, security, essential economic interests of France or public policy, specified by the administrative authorities as necessary. . . .