Chapter IX

The Significance of Treaties to the Establishment of Companies

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I. INTRODUCTION

A study by an American lawyer of laws relevant to an American corporate client which is to be established in the Common Market area must take some account of international legislation—the bilateral or multilateral treaties involving the United States and the six members of the European Economic Community, those between or among Community countries, and those involving Community members and third countries other than the United States. A number of the international agreements to which the United States and Common Market countries are parties—the General Agreement on Tariffs and Trade 1 and the International Convention for the Protection of Industrial Property, 2 for example—are discussed in other chapters. The principal treaty among Community members of relevance is, of course, the Treaty establishing the European Economic Community, the central focus of this book. A review of the treaties between or among Community members and non-members other than the United States is generally beyond the scope of this discussion.

Attention will therefore be centered on the effect of “treaties of commerce” 3 between the United States and various Community members, and of the E.E.C. Treaty, on conditions of doing business within the Community. Some areas in which treaties may be signifi-

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1 See Ouin, The Establishment of the Customs Union, Chapter III supra.

2 See Ladas, Industrial Property, Chapter V supra.

3 The phrase “treaties of commerce” has been coined to embrace both the traditional treaties of Friendship, Commerce, and Navigation (F.C.N. treaties) and those exemplified by the Convention of Establishment with France.
cant to an American corporate investor are considered—in general areas not touched on in other chapters of this book. The aims are: (1) to suggest, by a detailed discussion of one treaty of commerce, the potential importance of such treaties to the establishment by an American corporation of branches or subsidiaries in the Community; (2) to point up comparisons between the treaty discussed and the E.E.C. Treaty which are of general relevance; (3) to indicate the interrelationship of the relevant treaties of commerce and the E.E.C. Treaty; and (4) to indicate the possible significance of the E.E.C. Treaty to the subsidiary of an American corporation established in one Community country and doing business in some or all of the other Member States.

II. TREATIES OF COMMERCE

Treaties of commerce between the United States and Italy, the Netherlands, and Germany respectively are already in effect, and the Convention of Establishment between the United States and France was recently signed, although it has not yet been ratified.

A. TREATIES OF COMMERCE IN GENERAL

The basic aim of treaties of commerce is to establish a standard of conduct which each signatory owes to the nationals and companies of the other. "National treatment" is in most provisions the measure of each signatory's duty—neither may discriminate against the nationals or companies of the other state in favor of its own. The "most-favored-nation" clause—neither state may discriminate against the nationals or companies of the other in favor of any other aliens or alien companies—sometimes applies, however,

4 Chapter VIII supra, Organising for Business by Professor Conard (hereinafter cited as Conard, ch. VIII) is sometimes a point of departure, however.


6 Companies are mentioned only in U.S. treaties of commerce concluded since the Second World War. See Walker, Provisions on Companies in United States Commercial Treaties, 50 Am. J. Int'l L. 373 (1956).

7 E.g., with respect to payments, remittances, and transfers of funds or financial instruments between the United States and France. Convention with France, art. X, para. 1.
and, in a few instances, both standards must be met or some third criterion is applicable.\textsuperscript{8}

A number of areas of activity are regulated,\textsuperscript{9} but treaties of commerce "are above all treaties of establishment, concerned with the protection of persons, natural and juridical, and of the property and interests of such persons."\textsuperscript{10}

To indicate the general nature and scope of this protection, but more particularly to suggest some practical differences a treaty of commerce can make, only the Convention with France will be discussed because a full-scale consideration of the four relevant treaties would be both unwieldy and unwarranted. The choice of the Convention with France is essentially arbitrary, although in part dictated by the fact that it was the last of the four to be elaborated.

B. THE CONVENTION WITH FRANCE

The Convention with France is generally representative in content of the three other treaties of commerce here relevant, with one obvious difference which is reflected in its name. It is called "Convention of Establishment" rather than "Treaty of Friendship, Commerce and Navigation" because it excludes rules concerning trade and shipping and focuses on questions of investment or, more broadly, on the protection of persons and property.\textsuperscript{11}

I. THE PROTECTION OF ESTABLISHMENT GENERALLY

By virtue of Article V of the Convention with France, U.S. companies "shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activities for gain" in France "whether directly or through the intermediary of an agent or any other natural or juridical person." Included in the activities of American companies which are accordingly permitted in France are: (1) the establishment and maintenance of "branches . . . and other establishments appropriate to the conduct of their business"; (2) the organization of "com-

\textsuperscript{8}E.g., "fair and equitable treatment" is the enunciated standard of Article 1 of the Dutch F.C.N. Treaty.

\textsuperscript{9}See Walker, Modern Treaties of Friendship, Commerce and Navigation, 42 Minn. L. Rev. 805, 808 (1958) for an outline of their usual content.

\textsuperscript{10}Id. at 806.

\textsuperscript{11}Walker, Convention of Establishment Between the United States and France, 54 Am. J. Int'l L. 393, 394 (1960). In the following discussion only the protection of American companies in France will be referred to although the Convention with France of course protects French companies in the United States and natural as well as juridical persons in both countries.
panies under the general company laws”; (3) the acquisition of “majority interests in [French] companies”; and (4) the control and management “of the enterprises which they have established or acquired.” The Convention further assures American corporations with interests in France: (1) that their property, enterprises, and other interests will be accorded “equitable treatment,” and that they will be granted “full legal and judicial protection” (Article I); (2) that their “lawfully acquired rights and interests . . . [will] not be subjected to impairment [within France] . . . by any measure of a discriminatory character” (Article IV, paragraph 1); (3) that their “offices, warehouses, factories and other premises . . . [located in France] . . . [will] be free from molestation and other unjustifiable measures” (Article IV, paragraph 2); and (4) that they will “not be subject to any form of taxation or any obligation relating thereto . . . [within France], which is more burdensome than that to which . . . companies [of France] . . . in the same situation are or may be subject” (Article IX, paragraph 2 (c)), nor “to any form of taxation [within France] upon capital, income, profits or any other basis, except by reason of the property which they possess within those territories, the income and profits derived from sources therein, the business in which they are engaged, the transactions which they accomplish there, or any other bases of taxation directly related to their activities” within France (Article IX, paragraph 4).

In addition American corporations may claim national treatment in respect: (1) to “leasing and acquiring, by purchase or otherwise, as well as with respect to possessing, personal property of every kind, whether tangible or intangible” (subject to exceptions concerning ships and public safety) (Article VII, paragraph 2); and (2) to “obtaining and maintaining patents of invention and with respect to rights appertaining to trade-marks, trade names and certification marks, or which in any manner relate to industrial property” (Article VIII, paragraph 1).

There are obvious omissions in this general outline of the rights accorded by the Convention with France to an American corporation doing business in France. The most significant omissions will be discussed in some detail because they afford examples of the importance which the Convention may have to the American corporate investor. They will be discussed in a rough chronological order—beginning with those which might first in time be of interest
2. THE COMPANIES PROTECTED

Article XIV, paragraph 5 of the Convention provides: "Companies constituted under the applicable laws and regulations . . . [of one of the states of the United States] shall be deemed companies . . . [of the United States] and shall have their juridical status recognized . . . [in France]."

Under this provision a corporation formed in any state of the United States will be recognized in France as an American company and therefore a juridical entity even if its central office (siège réel) is located in Paris—and this is true despite the French conflict rule under which a company's "nationality" is determined by the location of its central office. In other words, the "Delaware" of France (and of the Common Market countries other than Belgium and Luxembourg) could be—tax and other considerations aside—Delaware.

But the place of formation is not the sole factor determining which companies are to be given protection in France by the Convention. Article V, paragraph 1 (last sentence) provides:

... the enterprises which . . . [American nationals or companies] control . . . whether in the form . . . of a company or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of . . . [France].

This provision means in effect that some French companies—that is, those formed in France by American nationals or corporations—can claim protection under the Convention against discrimination by French laws or administrative acts. Its intent, of course, is to prevent discrimination against those French enterprises in which Americans have invested and which are not protected by the provisions relating to American companies or nationals.

11 This is understood to mean the place where ultimate decisions are made. See Conard, ch. VIII, text at notes 117 and 118, supra.

12 Ibid. Although strictly speaking, a company has no nationality (see e.g., Savatier, COURS DE DROIT INTERNATIONAL PRIVÉ 34 (2d ed. 1953)), that term will be hereinafter used as shorthand to denote the country whose laws determine such things as its validity, whether it has juridical personality, its powers, and the rights of its stockholders.

13 See Italian F.C.N. Treaty, art. II, para. 2; German F.C.N. Treaty, art. XXV, para. 5; Dutch F.C.N. Treaty, art. XXIII, para. 3.
A third criterion, residence, may sometimes be relevant. Article XIV, paragraph 1, in defining "national treatment" limits it to nationals and companies "in like situations," and paragraph 16 of the Protocol to the Convention provides: "Residence criteria may be applied for purposes of determining whether or not nationals and companies . . . are in 'like situations'. . . ."  

In sum, a corporation formed in one of the United States will be recognized in France as American and a juridical entity wherever its central office or center of activity (for example, its main manufacturing plant) is located. It, or its subsidiaries formed in France, may claim national treatment under the Convention, but location of the central office, or of the center of activity, of it or its subsidiary—presumably the "residence criteria" of a company 15—may determine what national treatment means.

3. EMPLOYMENT OF NON-NATIONALS

American corporations or their subsidiaries are generally free to employ non-French personnel in France, but the persons employed are subject to regulations which could result in significant restrictions on them.

Every foreigner who wishes to remain more than three months in France must have the authorization of the Ministry of Interior. 16 In addition, if he wishes to act as President of the supervisory board (Président de Conseil d'administration) of a stock company, as manager (gérant) of a limited liability company, or as the manager (directeur) of an agency or branch of a foreign company, he must have a carte d'identité de commerçant (hereinafter "foreign merchant's identity card"). 17

This foreign merchant's identity card is: (1) good only for the occupations authorized and only for the departments (départements) of France mentioned therein; (2) temporary, being limited in duration by the duration of the authorization to remain in France; (3) a concession of the state, which the administration may refuse
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in its discretion, not a right (and if the identity card is refused, the applicant has no recourse); (4) renewable; and (5) subject to cancellation under certain conditions (bankruptcy, conviction of a crime, false declarations).\(^\text{18}\)

Moreover, failure to obtain the required foreign merchant’s identity card can result in fines, the closing of the enterprise involved, and even, apparently, the nullity of certain acts (for example, the formation of a limited liability company with alien gérants who have no foreign merchant’s identity card may be held null and void).\(^\text{19}\)

The reason for the existence of identity cards has been indicated by Professor Savatier of the Paris Law Faculty:

\[\text{[I]}t \text{soon [in the 1930’s] became clear that workers were not alone in demanding protection against all excessive foreign competition. The principal occupations [professions] were no doubt already reserved to Frenchmen by more or less strict monopolies. . . . But it was necessary, outside this restricted area, to give thought to the protection of Frenchmen against various foreign heads of business enterprises [chefs d’entreprises].}\(^\text{20}\)

If one adds the fact that local chambers of commerce and professional organizations play an advisory role in the issuance of foreign merchants’ identity cards,\(^\text{21}\) it is clear that the position of U.S. corporations which desire to put Americans in charge of their French operations could be a difficult one. In fact, it apparently has not been; and their legal position will be significantly improved once the Convention with France has gone into effect.

The Convention contains a number of provisions which are relevant. Article II, paragraph 1(a) and (b) create a “treaty trader” and a “treaty investor” class of American nationals who must be permitted to enter and remain in France\(^\text{22}\) for the purpose of carrying on trade between the two countries or of “developing and


\(^{19}\) Id. at 188.


\(^{21}\) Decree of Feb. 2, 1939, art. 8, [Feb. 4, 1939] J.O.

\(^{22}\) Subject to the “laws relating to the entry and sojourn of aliens” (art. II, para. 1) (\(e.g.,\) to the requirement in France that aliens obtain an authorization to remain) and to measures of public order, health, morals, and safety (art. II, para. 3). As to “treaty traders and investors,” see Wilson, “Treaty-Investor” Clauses in Commercial Treaties of the United States, 49 AM. J. INT’L L. 366 (1955).
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directing the operations of an enterprise in which they have in-
vested, or in which they are actively in the process of investing, a
substantial amount of capital." Moreover, by virtue of Paragraph
2 (c) of the Protocol, Americans proceeding to France "for the
purpose of occupying a position of responsibility in an enterprise"
on behalf of "treaty investors" must also be permitted to enter and
remain in France.

The significant point here is contained in paragraph 2 (a) and
(b) of the Protocol. Under paragraph 2 (a) "the laws and regula-
tions in force . . . [in France] which govern the access of aliens
to the professions and occupations, as well as the exercise of such
callings and other activities by them, remain applicable . . . [to
American nationals and companies]." Under paragraph 2 (b), how-
ever, "the procedures provided for by the above-mentioned laws
and regulations, as well as those provided for by laws and regula-
tions governing entry and sojourn of aliens, must not have the effect
of impairing the substance of the rights set forth in Article II, para-
graph 1 (a) and (b)" (that is, of the rights of "treaty traders"
and "investors" or of Americans going to France to occupy posi-
tions of responsibility in the enterprises of "treaty traders" or
"treaty investors").

The result of these provisions is threefold: (1) authorizations
to remain in France and foreign merchants' identity cards will still
be required; (2) the issuance and renewal of foreign merchants'
identity cards to American nationals wishing to exercise a company
function for which such identity cards are required will no longer
be subject to the discretion of the competent prefects—or to the
adverse recommendations of competitors: qualifying Americans
will have a right to identity cards; (3) in cases of abuse, American
nationals will have recourse to French administrative tribunals,
and should their decisions, in the view of the United States govern-
ment, violate the Convention with France, the United States State
Department may make complaint to the French Government, and,
if need be, the United States may bring action against France in
the International Court of Justice.

Other American personnel to be employed in France—whether
technicians or executives—must have a work permit,28 and if they

28 Carte d'identité professionelle de travailleur or carte de travail, see Order No.
J.O. 5018–19.
are accountants, technical experts, or lawyers, they must, subject to one exception, have fulfilled the conditions “necessary to the exercise of their calling under the applicable [French] legislation.” 24 The exception is stated in the succeeding paragraph which will permit:

... [American] companies ... to engage accountants and other technical experts, who are not nationals of ... [France], without regard to their having qualified to practice a profession within the territories of ... [France], but exclusively for conducting studies and examinations for internal purposes on behalf of such ... companies. 25

The significance of this provision is emphasized by the fact that Article II of the French Civil Code permits nationals of another country to exercise rights in France only to the extent that Frenchmen are permitted to exercise similar rights in that country. Moreover, a Joint Declaration appended to the Convention states the intention of the United States and France to facilitate “to the greatest possible extent and on a basis of real and effective reciprocity ... the establishment of ... qualified personnel who are indispensable to the conduct of the enterprises created by nationals and companies” of either country within the territory of the other.

4. OWNERSHIP OF REAL PROPERTY

Article VII, paragraph 1 of the Convention with France guarantees national treatment to American nationals and companies “with respect to leasing, utilizing and occupying real property of all kinds appropriate to the exercise of the rights” accorded them by the Convention.

This will have at least one consequence of significance. A concept of “commercial property” (propriété commerciale) has developed in French law according to which the lessee of commercial property has a right to an eviction indemnification if renewal of his lease is refused by the lessor. The applicable law 26 has the effect of denying this renewal right to foreigners unless, inter alia, they enjoy national treatment by virtue of an international treaty. 27 Article VII

24 Convention with France, art. VI, para. 1.
25 Id., para. 2. Paragraph 9 of the Protocol to the Convention adds that the provisions of paragraph 2 are adopted “until such time as it may have become possible to conclude an agreement concerning the exercise of ... [accountancy].”
27 See Richemont, Les Ressortissants des pays, faisant partie du Marché Commun,
5. RIGHT TO SUE IN FRENCH COURTS

Article III, paragraph 1 of the Convention with France ensures American nationals and companies national treatment with respect to access to French "courts of justice as well as to administrative tribunals and agencies." This provision will not affect, however, the duty of American corporate or individual plaintiffs as aliens to post bond (donner caution) to guarantee the payment of costs and damages assessed against them in actions they initiate.

6. VOLUNTARY TERMINATION OF BUSINESS ACTIVITY

An American company which decides to terminate its activities in France is guaranteed by the Convention with France national treatment in regard to the right to dispose of property of all kinds and to taxation. More importantly, the Convention subjects France to four duties concerning repatriation of funds: (1) it must accord to an American company the same treatment with respect to payments, remittances, and transfers of funds or financial instruments between France and the United States or any third country as it would to a French company in a like situation (that is, for example, to one "residing" in the United States); (2) it must accord to an American company the same treatment in this respect as it would to the company of any third country in a like situation; (3) it must make "reasonable provision for the withdrawal of earnings"; and (4) it must "make every effort to accord in the greatest possible measure . . . [to an American company] the oppor-
tunity . . . to repatriate the proceeds of the liquidation . . . [of its branches in France].” 36

These four duties are subject to three limitations. France may: (1) impose exchange restrictions “to the extent necessary to prevent its monetary reserves from falling to a very low level or to effect a moderate increase in very low monetary reserves”; 37 (2) impose “particular restrictions whenever the [International Monetary] Fund specifically authorizes or requests” 38 it to do so; and (3) treat different currencies differently as may be required by the state of its balance of payments. 39

An American company which liquidates a branch or subsidiary in France will be able, in summary, to count with some certainty on a repatriation of its earnings, and it will have important guarantees that repatriation of its capital will also be possible.

7. EXPROPRIATION

The Convention with France will also afford significant protection to American corporate branches and subsidiaries in France against expropriation of their property. Expropriation is prohibited by Article IV, paragraph 3 “except for a public purpose and with payment of just compensation.” More importantly, just compensation is defined as “the equivalent of the property taken . . . in an effectively realizable form.” Compensation must be accorded “without needless delay,” and “adequate provision for the determination and payment of the said compensation must have been made no later than the time of the taking.” If compensation so measured is less than that afforded French nationals whose property has been similarly expropriated, or if payment to them is more prompt, American companies may invoke the national treatment clause of paragraph 4 of Article IV; they may, in short, invoke whichever of two standards is, in fact, the more advantageous. France is, furthermore, again under a duty “to make every effort to accord in the greatest possible measure the opportunity . . . to repatriate the proceeds. . . .” 40

The Protocol adds two important clarifications. Paragraph 5 states that “expropriation” means, inter alia, “nationalization”; and paragraph 6 extends the protection of Article IV, paragraph 3 to

36 Ibid.
37 Art. X, para. 2.
38 Ibid.
40 Art. X, para. 3.
interests held directly or indirectly by American companies in expropriated property.

III. THE CONVENTION WITH FRANCE AND THE E.E.C. TREATY COMPARED

At this point the perspective of the discussion shifts: the assumption is that the American parent company has formed a Common Market subsidiary; for the sake of example and to facilitate comparisons with the Convention with France, it is further assumed that the subsidiary is located not in France but in Belgium (hereinafter this assumed company will sometimes be referred to simply as the "Belgian subsidiary"). Most of the questions considered relate to treaty protection of the operations and branches of this assumed Belgian subsidiary in other Common Market countries and usually in France.

A. General Comparisons

Before comparing in detail the provisions of the Convention with France with their counterparts in the E.E.C. Treaty some general comparisons are useful.

(1) The provisions of the Convention with France are in the main self-executing and will therefore become applicable in France without legislation or executive action as soon as the Convention goes into effect. The right-of-establishment provisions of the E.E.C. Treaty with few exceptions require implementation by directives, and by a general program to be given effect by directives, adopted by the Council before December 31, 1961.

(2) The Convention with France spells out a number of specific rights which American companies will enjoy in France. The E.E.C. Treaty is directed at protection of the "freedom of establishment," defined in very general terms and illustrated by only some specific examples. This difference may result in broader—although perhaps less certain—protection under the E.E.C. Treaty.

(3) National treatment in regard to the establishment of an American enterprise in France may be claimed under the Convention with France only where it is provided for specifically. National treatment under the E.E.C. Treaty may be claimed not only in

41 Arts. 52-58.
42 E.g., arts. 53 and 58.
43 See Stein, The New Institutions, Chapter II supra.
areas where it is guaranteed by the relevant right-of-establishment provisions, but also, subject to special provisions, within the area of application of the entire Treaty. The first paragraph of Article 7 of the E.E.C. Treaty provides:

Within the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall hereby be prohibited.

(4) Rights arising under the Convention with France may be vindicated in domestic French courts or, by the United States government, in the International Court of Justice. Rights arising under the E.E.C. Treaty may be vindicated in domestic courts of the Member States or, in some circumstances, in the Community Court of Justice. In addition, a supranational administrative agency—the Commission—is obligated to supervise the application of the provisions of the Treaty and to bring Member States who persist in violating a Treaty obligation before the Community Court of Justice.

(5) The Convention with France will have an initial term of ten years and is subject to termination thereafter on one year's notice. The E.E.C. Treaty is of unlimited duration and makes no provision for termination. It may even be questionable that the Member States have a legal right of unilateral withdrawal from the Community, however unlikely an armed struggle to preserve the union might be.

The provisions of the E.E.C. Treaty which are comparable to those, discussed in detail above, of the Convention with France are with a few exceptions contained in Articles 52-58 of the Treaty. These provisions will first be considered separately; they and their counterparts in the Convention with France will be compared in a concluding section.

B. THE COMPARABLE PROVISIONS OF THE E.E.C. TREATY

Articles 52-58 concern the right of establishment of Community country nationals and companies in countries other than their own; the basic purpose of these provisions is to remove legal discrimination in each of the Six against economic activities of nationals of Member States, other than wage-earning activities.

44 See Stein and Hay, Chapter VII supra, New Legal Remedies of Enterprises: A Survey.
45 Art. 155.
46 Art. 169.
47 Art. 240.
I. THE COMPANIES PROTECTED

Article 58, defining the companies protected, provides in part:

Companies constituted in accordance with the law of a Member State and having their registered office, central management or principal establishment within the Community . . . shall be assimilated to physical persons being nationals of Member States. . . .

The essential element is that the company be constituted in accordance with the laws of a Member State. In addition, one of three additional requirements must be met: (1) its registered office, (2) its central management, or (3) its principal establishment must be located within the Community.

Another international agreement in this area of law is helpful in understanding the significance of this rule. All of the Common Market countries, along with some others, were parties to the negotiations relative to the Convention Concerning the Recognition of the Juridical Personality of Foreign Companies, Associations and Foundations elaborated at the Hague in 1951.48 Moreover, it could be argued that Article 220 of the E.E.C. Treaty implicitly recognizes the existence of this Convention in providing for negotiations to ensure mutual recognition of companies "in so far as necessary." If the Convention is signed and ratified by all Member States, such negotiations will be unnecessary (Germany, Italy, and Luxembourg have not signed, and Belgium, France, and the Netherlands have signed but not ratified).

Article 1 of the Hague Recognition Convention provides in part:

The juridical personality acquired by a company . . . by virtue of the law of the Contracting States where formalities of registration or publicity have been fulfilled and where the registered office (siège statutaire) is located, will be recognized as a matter of right (de plein droit), provided that it has, in addition to the capacity to sue and be sued (ester en justice), at least the capacity to own property and to make contracts [and] to perform other juridical acts.

Article 2 adds:

Nonetheless, the personality, acquired in conformity with the provisions of Article 1, may be denied recognition

48 See Dölle, Die 7. Haager Konferenz, 17 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 161, 185 ff. (1952). This Convention is hereinafter referred to as the "Hague Recognition Convention."
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(pourra ne pas être reconnue) in another contracting state whose law takes the true central office (sûge réel) into consideration, if the true central office is deemed to be located on its territory. . . .

The company . . . is deemed to have its true central office at the place where its central administration (administration centrale) is established. . . .

For the immediate purposes of this discussion, the provisions of the Hague Recognition Convention are significant in three respects: (1) they recognize the possibility of a geographical divorce between the registered office (sûge statutaire) and the true central office (sûge réel); (2) they make clear that sûge statutaire (the term used in Article 58 of the E.E.C. Treaty) means "registered office"; and (3) they define "true central office" (sûge réel) as the place where the central administration (administration centrale—another term which Article 58 uses) is located.

Since all Six took part in the Hague Recognition Convention negotiations, the terms used presumably mean the same in both instruments. If they do, two questions about Article 58 arise.

1) Will Companies with only a Registered Office Within the Community Qualify Under Article 58? Article 58 seems to make possible the creation by third-country nationals or companies (and this, of course, means nationals and companies of Eastern as well as Western countries) of Community companies which will qualify under Article 58 although they have no substantial material connection with the Community; that is, it seems to recognize as beneficiaries of the right-of-establishment provisions companies which are formed under the law of a Member State even though they have only a registered office within the Community. This prospect is so distasteful that one commentator has suggested that Article 58 should be understood to create three rather than two requirements for a qualifying company: (1) it must be formed according to the laws of a Member State; and (2) it must have its registered office (sûge statutaire) in the Community; and (3) it must have either its central management (administration centrale) or its central establishment (principal établissement) within the Community.49 (Central establishment means, presumably, and among other things, the main store of a retail business or the main plant of a manufacturing concern.)

Another commentator, Mr. Hubert Ehring, a legal counsellor of the E.E.C. Commission, pointing to the fact that Article 52 provides for abolition of the restrictions on the establishment of agencies, branches, or subsidiaries by nationals of any Member State “established in the territory of any Member State,” argues:

A company which has only its registered office within the territory of a Member State, while its administration and plants are located within the territory of a third country, is no less to be considered a part of the economy of this third country than is an enterprise situated in that third country whose owner is a national of a Member State (dessen Inhaber eine die Staatsangehörigkeit eines Mitgliedstaates besitzende natürliche Person ist), and, [such a company] should therefore be treated in the same way. 50

Mr. Ehring therefore concludes that companies must also be established in a Member State. He suggests further that this requirement is fulfilled “when the central management of a company, but not when its registered office alone, is located in a Member State.” 51

Other commentators, although they accept the necessity that companies be established in the Community, interpret “establishment” somewhat differently. In their view a company need have neither its central administration nor its central establishment in the Community, provided a substantial part of its business is carried on in the Common Market and that it therefore has meaningful connections with the Community. 52

2) May One of the Six Become the “Delaware” of the Community? The first requirement of Article 58 is that a company be constituted under the law of one of the Member States. A first question in determining whether a “Delaware” of the Community is a possibility is, therefore: What is a validly constituted company under the company laws of each of the Six? More specifically, the question is whether or not the domestic company laws of each Community country require that the true central office of companies constituted thereunder be situated within its territory.

This is not, apparently, a requirement of Dutch law, 53 and Section 5 of the German Stock Company Law provides:

50 Ehring, Das Niederlassungsrecht, in Groeben, Boeckh, Kommentar zum EWG-Vertrag (hereinafter cited as Kommentar) 183. (Translation by this author.)
51 Ibid. (Translation by this author.)
53 See Kollewijn, American-Dutch Private International Law, No. 3 Bilateral Studies in Private International Law 16 (1955); and, generally, Conard, ch. VIII, text at note 122 supra.
The place where the company has an office is as a rule to be designated as the seat, or the place from which the business is directed or the place where the central management is carried on.\textsuperscript{54}

This at least makes clear that the seat \textsuperscript{55} need not be at the place where the central management (and therefore the true central office) is located,\textsuperscript{56} although it also indicates that there must "as a rule" be at least an office at the place designated by the charter as the seat. From Section 5 it seems possible to conclude that the Stock Company Law of Germany in itself does not require that the true central office or main establishment be located in Germany.\textsuperscript{57}

The company laws of the other four Member States do not define seat as explicitly as Section 5 of the German Stock Company Law, and, although each of the laws requires the designation and registration of a seat located within the country, none of them in itself requires a domestic location for the true central office of a company constituted pursuant to it.

The conflict rule which determines the law governing companies in four of the Six does, however, impose such a requirement; according to this rule, the law governing the status of a company is the law of the place where the true central office is located. If, for example, the Belgian subsidiary has its true central office in France, its juridical personality will not be recognized by either country, if it has not complied with the law (French) which each recognizes as governing its status.

The Netherlands again provides the one clear exception, and the rule in Germany is apparently not settled. The majority of the German authorities appear to favor the rule which looks to the location of the true central office.\textsuperscript{58} On the other hand, others maintain that Germany determines the status of German companies which have only a registered office in Germany in accordance with German law.\textsuperscript{59}

\textsuperscript{54} "Als der Sitz der Aktiengesellschaft ist in der Regel der Ort, wo die Gesellschaft einen Betrieb hat, oder der Ort zu bestimmen, wo sich die Geschäftsführung befindet oder die Verwaltung geführt wird." (Translation by this author.)

\textsuperscript{55} "Seat" is here used as the neutral term to avoid use of "registered office" or "true central office." The German equivalent of "seat" is Sitz, of registered office satzungsmässiger Sitz, and of true central office effektiver or tatsächlicher Sitz.

\textsuperscript{56} See generally Beitzke, Juristische Personen im Internationalen Privatrecht und Fremdenrecht 104 ff. (1938).

\textsuperscript{57} The German Limited Liability Company Law has no provision comparable to Section 5.

\textsuperscript{58} See, e.g., Schilling, Note 47 of Allgemeine Einleitung in Hachenburg, Kommentar zum Gesetz Betreffend die G.M.B.H. (1956) at 92.

\textsuperscript{59} Schmidt, Note 7 to Section 5, in Grosskommentar, Aktiengesetz (1957) at 40: "... the Sitztheorie can be deemed correct, if it is satisfied by a nominal, statutory seat,
A second question in determining whether a Common Market "Delaware" is a possibility is, then, this: Does Article 58 directly affect the conflict rules of the Six?

Article 58 requires only that companies qualifying under it shall be treated as Community nationals for defined purposes. Nothing is said in Article 58, or elsewhere in the right-of-establishment chapter, about the recognition of the juridical personality of companies. On the other hand, it seems clear enough that Article 58 would be partially meaningless if the Member States were not obligated to recognize the juridical personality of the companies qualifying under it.60

If, however, Article 58 has created a rule which derogates from conflict rules of some of the Six,61 another problem arises. So understood, Article 58 would seem to render meaningless the part of Article 220 of the Treaty which provides:

Member States shall, in so far as necessary, engage in negotiations with each other with a view to ensuring for the benefit of their nationals: . . . the mutual recognition of companies within the meaning of Article 58, second paragraph. . . .

No such negotiations would be necessary if Article 58 of itself requires recognition of the juridical personality of the companies qualifying under it.

It follows that Article 58 probably should not be understood to affect of itself the conflict rules of the Six which are not consonant with it. On the other hand, Article 58 in tandem with Article 220 obligates the Member States to negotiate with each other to conform these rules with Article 58—in order to ensure, for example, that the juridical personality of a company formed in Belgium, with only a registered office there and with its true central office somewhere in the Community (in France, for example) will be recognized in the other five Member States. Moreover, these negotiations, if their timing is not to negate in part the force of Article 58, must take account of the timing of directives to be issued and of the

that is a fictitious seat, and does not require an 'effective domestic seat.'" (Translation by this author.) See also Beitzke, op. cit. supra note 56, at 104A.
general program to be established by the Council for the removal of restrictions on freedom of establishment (Article 54).

Timely ratification by the Six of the Hague Recognition Convention plus one additional agreement among the Six would meet these obligations. Article 1 of the Convention provides that the juridical personality acquired by a company by virtue of the law of a signatory state where, inter alia, its registered office (siège statutaire) is located shall be recognized by the other signatory states (subject to other conditions not here relevant). Article 2 provides, however, that a signatory state may (pourra) refuse such recognition if the true central office (siège réel) is located within its territory (or that of another state) and if it (or the other state) "takes the true central office into consideration."

Since the provisions of Article 2 are not compulsory, the Member States could, after ratifying the Convention, agree among themselves that they would recognize the juridical personality of any company constituted according to the laws of any of the others and having its registered office there, provided it is deemed to be "established" in the Community within the meaning of Article 52. This would be in keeping with the Convention and would fulfill the obligations arising from Articles 58 and 220. At the same time it would avoid the possibility that companies with no material connection with the Community could claim to be beneficiaries of the right-of-establishment provisions of the Treaty.

Some commentators have denied, expressly or implicitly, that recognition of the companies referred to in Article 58 depends on negotiations pursuant to Article 220. None of them has, however, suggested a reason for the reference in Article 220 to negotiations to ensure "the mutual recognition of companies within the meaning of Article 58, second paragraph" if their view is adopted.

Regardless of the view that finally prevails, the result should ultimately be that companies in the Six will enjoy more flexibility of organization than has heretofore been possible. It would be a mistake, however, to conclude that a "Delaware" of the Community—in the American sense—may develop. The idea that it is impermissible to form a company in one country to avoid more onerous laws in another is too firmly embedded in the legal thought of the Six to be discarded. If, however, there are business reasons for form-

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62 See text supra at notes 51 and 52.
63 See, e.g., WOHLFARTH, DIE EWG at 190; Thibierge, op. cit. supra note 61, at 333-337.
64 See, e.g., Dölle, op. cit. supra note 48, at 188; and WOHLFARTH, DIE EWG at 188.
ing a company under Belgian law, for example, although it is to have its true central office in France, the Treaty should ultimately make it possible to do so, despite conflict rules which have heretofore made such an organizational plan perilous.

These conclusions relating to Article 58 seem possible:

1) No company can be a beneficiary of the right-of-establishment provisions if it has no substantial connection with a Community country; “shell” subsidiaries of third-country companies will not be deemed qualifying under Article 58, whatever the reason given for this conclusion.

2) It will ultimately be possible to form a company in one of the Six and locate only its registered office there, provided it is “established” in the Community and provided the avoidance of onerous laws in another of the Six is not the sole reason for such an organizational plan.

3) Article 58 probably has no direct effect on the conflict rules of the Six concerning the recognition of the juridical personality of companies.

4) Articles 58 and 220 obligate the Member States to negotiate with each other to ensure that the juridical personality of the companies qualifying under Article 58 will be recognized throughout the Community. Moreover, the timing of these negotiations will be imposed by the timing of the directives issued and the general program established by the Council pursuant to Article 54.

5) The Hague Recognition Convention, which three of the Six have already signed, offers an ideal vehicle for the fulfillment of these obligations.

2. EMPLOYMENT OF NON-NATIONALS

Freedom of establishment without discrimination based on nationality is to be achieved under the E.E.C. Treaty by, inter alia,

... applying the progressive abolition of restrictions on freedom of establishment ... in respect of the conditions governing the entry of personnel of the main establishment into the managerial or supervisory organs of ... agencies, branches and subsidiaries. ... 65

There seems to be general agreement that this provision will require the abolition of foreign merchants' identity cards in France as far as Community nationals and companies are concerned.66 The ques-

65 Art. 54(f).
66 Loussouarn, op. cit. supra note 60, at 253; Chaine, op. cit. supra note 18, at 237;
tion, then, is what effect this result will have on the employment of non-French personnel by a French branch of the Belgian subsidiary.

It will plainly mean, first of all, that employees of the French branch can work in France without the foreign merchant's identity card heretofore required, if they are Community (for example, Belgian) nationals. What, however, of an American national who has been employed in the Belgian subsidiary? Can he be appointed manager of the French branch and act in this capacity without an identity card? Although the answer to this question must await decision by the competent authorities, three factors suggest that it will be an affirmative one.

One is the fact that Article 54(f) speaks only of "personnel of the main establishment"—there is no limitation in regard to nationality. More convincing, however, is the second factor. This is the fact that, although the foreign nationality of the manager (gérant) of the branch of a foreign corporation is not irrelevant (if he is French, he will not be required to obtain an identity card), it is nonetheless the foreign status of the company at which these regulations are directed (if the branch manager is French, the identity card must still be obtained, but it is issued to the directors of the foreign company rather than the branch manager). Under the right-of-establishment chapter of the Treaty, however, France will be prevented from taking the foreign status of a Belgian company into account. Finally, it should be noted that "merchant" (commerce) is a legal term of art, and that a branch manager is not, as that term is defined, in fact a "merchant." 67

Article 48, paragraph 2 should also force elimination of the labor permit (carte de travail) heretofore required of Community nationals (in others of the Six as well as in France). Since, however, the authorization to remain in France (carte de séjour) is a public safety measure, the requirement of this authorization is probably permitted by Article 56. 68

3. OWNERSHIP OF REAL PROPERTY

Measures are to be taken under the Treaty "... enabling a national of one Member State to acquire and exploit real property

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67a See Chaine, op. cit. supra note 18, at 183.
situating in the territory of another Member State. ... .” 69 These measures will not guarantee to Community nationals the right which French nationals enjoy to renew commercial leases (propriété commerciale), but they will enjoy such a right by virtue of the general definition of freedom of establishment contained in Article 52, paragraph 2 (and of the relevant provisions of French law). 70

4. ACCESS TO THE COURTS

Under Article 52, paragraph 2, one of the essential conditions of freedom of establishment is plainly the right to judicial protection. 71 Indeed, Article 52 will force France to exempt Community nationals and companies qualifying under Article 58 from the requirement that foreign plaintiffs post bonds (donner caution) to guarantee payment of costs and damages. 72 This requirement clearly constitutes a discrimination based on nationality.

5. VOLUNTARY TERMINATION OF BUSINESS ACTIVITY

The right-of-establishment chapter says nothing about the right of the owners of an enterprise to cease operations, sell its assets, and leave the country with the proceeds, although this right has been termed a necessary part of the freedom of establishment. 73 The most important aspect of this problem is almost certainly the ability to transfer assets. If the Belgian subsidiary liquidates its French branch, for example, will it be able to transfer the resultant assets from France to Belgium? This depends on French exchange controls. As Mr. Jeantet has indicated, assets could be freely transferred to Belgium under present French exchange regulations. Two questions therefore arise: (1) does the Treaty limit France’s power to institute new controls in regard to the other Member States; and (2) if France instituted new controls, could they, without violating the Treaty, discriminate against companies like the Belgian subsidiary because control is in the hands of non-Community nationals or companies?

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69 Art. 54(e).

70 See text at note 26 supra.

71 See also Treaty, art. 220 (last clause) concerning the recognition of judicial and arbitral awards.

72 See Deletre, op. cit. supra note 68, at 155.

a. The Impact of the Treaty on Exchange Controls

Article 52 guarantees national treatment in regard to the freedom of establishment "subject to the provisions of the Chapter relating to capital." This reservation does not mean, however, that capital movement restrictions may be used to circumvent the right-of-establishment provisions. Exchange controls may be continued or instituted only for the purposes stated in the chapter relating to capital. Moreover, the Community countries, pursuant to directives of the Council, will be obligated to eliminate exchange controls "to the extent necessary for the proper functioning of the common market." 76

These two rules regarding exchange controls mean that such controls may not be used to give competitive advantage, for example, to French enterprises or, more relevantly here, to keep enterprises in France which wish to leave. The Common Market will only function properly if laws and regulations are eliminated which prevent choices based solely on the free play of economic forces, and freedom of establishment will plainly be less meaningful if the right to withdraw is artificially restricted.

But France is authorized to take measures if divergencies between her exchange regulations in regard to non-member countries and those of other Member States prompt persons residing in a Member State to use transfer facilities within the Community to circumvent French controls. Moreover, if France's capital market experiences difficulties she may, on the Commission's authorization or, in urgent cases, on her own initiative, take protective measures.

b. Discrimination Against Community Companies Controlled from Abroad

If France should invoke either of these emergency provisions, could she discriminate against companies like the Belgian subsidiary

74 See WOHLFARTH, DIE EWG, at 175.
75 Art. 69.
76 Art. 67(1).
78 Art. 70(2).
79 Art. 73(2).
80 Ibid.
81 Measures taken on her own initiative will, however, be subject to modification or elimination if the Commission so decides.
because they are under the control of non-Community companies? A prior question—and it probably moots the one stated—is this: Would France so discriminate? Since exchange controls in France are based on residence, such discrimination seems unlikely. Attempted discrimination would nowhere find justification in the Treaty, in any case, since nothing in the two emergency provisions described would authorize France to discriminate against the Belgian subsidiary in favor of other residents of Belgium.

c. Conclusion

The importance of these questions lies in the possibility that France might attempt to re-institute more stringent exchange controls in regard to non-member countries than the Treaty permits in regard to Member States. Should this happen, the Belgian subsidiary would be in the same position as other Belgian residents, which is to say, it would be in a better position to withdraw assets from France than would its American parent. But this does not mean that the assets could in turn be transferred from the Belgian subsidiary to the American parent, nor is it any indication that such assets could ultimately be converted into dollars. In sum, the Belgian subsidiary might, by virtue of the Treaty, be able to obtain the proceeds of the liquidation of its French branch and to use them elsewhere in the Community in situations where it would be unable to remit to United States stockholders.

The significance of Mr. Jeantet’s conclusion—that exchange controls will become a Community, rather than a national, problem—is evident.

6. Expropriation

The Treaty makes no express mention of expropriation. Four general provisions are relevant, however. Article 222 provides: “This Treaty shall in no way prejudice the system existing in Member States in respect of property.” This means that the Treaty in no way affects the power of the Member States to expropriate private property for public use.82 But Article 90(1) subjects “public enterprises and enterprises to which the Member States grant special or exclusive rights” to the rules of the Treaty. In particular it subjects them to Article 7 (prohibiting discrimination based on nationality) and Articles 85–94 (the “antitrust” provisions of the

82 See Thiesing in Kommentar, op. cit. supra note 50, at 64.
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Treaty). Moreover, Article 37 requires the Member States to adjust progressively "any State monopolies of a commercial character in such a manner as will ensure the exclusion, at the date of the expiry of the transitional period, of all discrimination between the nationals of Member States in regard to conditions of supply or marketing of goods." This suggests that, while the expropriating power is unaffected, the ends to which nationalization, for example, can be put have in fact been limited by the Treaty, since state monopolies will not be able to pursue either protectionist or anti-competitive goals. Finally, Article 52 requires that all Community nationals and companies who owned expropriated property be compensated on the same terms that nationals of the expropriating Member State are compensated.

C. THE CONVENTION WITH FRANCE AND THE E.E.C.
TREATY COMPARED IN DETAIL

I. THE COMPANIES PROTECTED

Both the Convention with France and the E.E.C. Treaty require —expressly or in effect—that the law of the place of constitution (and thus of the location of the registered office) should ultimately be determinative of the nationality of companies. Both will require recognition by a signatory of the juridical personality of companies constituted under the laws of another signatory (and therefore having a registered office there), but the E.E.C. Treaty should be interpreted to add one condition: the company must also be "established" in the Community in keeping with Article 52.

This added condition is significant for it will represent a first shift in the law of Community countries concerning companies from a national to a regional perspective; the condition does not require "establishment" in the country where the company is formed but anywhere in the Community. This is to say that the Treaty has taken a step—however limited—towards the recognition of a Community company. In this regard the contrast between the Convention with France and the E.E.C. Treaty is marked.

The criteria determining the companies protected by the E.E.C. Treaty offer, then, a specific instance of the general basic difference

But see art. 90(2).
Ibid. See WOHLFARTH, DIE EWG at 103.
If Article 52 is not applicable, then Article 7 will be and the same result should follow.
between the Treaty and the Convention with France. The perspective of the Convention is that of sovereign states which want close economic ties with each other; that of the E.E.C. Treaty, one of sovereign states which want ever closer economic ties with each other and ultimately economic unification.

2. THE EMPLOYMENT OF NON-NATIONALS

The E.E.C. countries will ultimately be forced to eliminate, as far as Community nationals and companies are concerned, requirements that foreign nationals and companies be authorized to do business within their territories if no such authorization is required of their own nationals and companies. After these requirements have been eliminated, Community nationals will be able to work in France without a foreign merchant’s identity card in situations for which it was heretofore required. Such freedom could extend even to non-Community nationals employed by Community companies.

The Convention with France, on the other hand, does not absolve an American national from obtaining such an identity card, although it does afford protection against its arbitrary refusal.

3. OWNERSHIP OF REAL PROPERTY

Both the Convention with France and the E.E.C. Treaty will guarantee the right of nationals and companies of the, or of any, other signatory to own real property; and both will result, for example, in giving them a right in France to renew commercial leases and, if this renewal right is denied, to demand eviction indemnification.

The two agreements differ in one respect in this area, however, and this is again a specific instance of a general difference between them. The E.E.C. Treaty creates a general right of establishment of which the right to own property is, as Article 54(3)(e) indicates, an element; the Convention creates no general right of establishment but provides for a number of specific rights of which the right to own real property is one. Had no right to own real property been mentioned in the Convention, none would exist under it. Had the Treaty made no specific mention of this right of ownership, the general right of establishment could still be found to imply it. This general difference between the two approaches is important in determining the scope of each.
4. ACCESS TO COURTS

Nationals and companies of the signatories have a right to sue in the courts of the, or of any, other signatory under the Convention with France and the E.E.C. Treaty, respectively. But the E.E.C. Treaty goes further and will, for example, prevent France from requiring Community nationals and companies to post bond to guarantee the payment of costs and damages in actions they initiate.

5. VOLUNTARY TERMINATION OF BUSINESS ACTIVITY

A comparison of the Convention with France and the E.E.C. Treaty in this area is particularly speculative. Both will guarantee certain rights in connection with the withdrawal by a company (of one signatory nation) of its economic activity from the territory of another, but the most significant question—whether the repatriation of assets to the country of origin can be prevented—will be determined in both cases in accordance with as yet undefined criteria. The Convention does, however, give some guarantee that earnings may be repatriated, and both the Convention and the Treaty put some limitation on the freedom of the signatory countries to institute new exchange controls preventing the repatriation of capital assets.

The important difference between the two lies, however, again in their differing basic aims. As economic integration, at which the E.E.C. Treaty aims, proceeds, the feasibility of national exchange controls, which would prevent repatriation from one Community country to another, will diminish. A comparable result, where the United States and France are concerned, will only be achieved through agreements other than the Convention.

6. EXPROPRIATION

Both the Convention and the Treaty guarantee national treatment by the signatories to nationals and companies of the, or of any, other signatory in cases of expropriation. The Convention adds additional requirements—compensation must be the equivalent of the property taken, in effectively realizable form, granted without needless delay, and every effort must be made to accord an opportunity to repatriate the proceeds. The Treaty, on the other hand, specifies some of the conditions under which expropriated enterprises may be operated—and the limitations it imposes may reduce
the possible desirability of expropriation from the point of view of member governments.

IV. THE TREATIES OF COMMERCE AND THE E.E.C. TREATY RELATED

Although the generally applicable criterion in the Italian, German, and Dutch F.C.N. Treaties and in the Convention with France is national treatment, the most-favored-nation clause is also sometimes applicable. All four, for example, guarantee most-favored-nation as well as national treatment in regard to exchange transfers, and all, except the Convention with France, refer inter alia to most-favored-nation treatment in connection with the organization and operation of companies.

A. THE EFFECT OF MOST-FAVORED-NATION CLAUSES

The most-favored-nation clauses raise numerous questions. For example, will companies “residing” in the United States be able to claim the same rights to repatriate assets from France which Community companies “residing” in Luxembourg will have by virtue of the E.E.C. Treaty provisions concerning capital movements? Or, for a second example, will a Delaware corporation be able to assert a right to national treatment in bidding on construction contracts of the German government because Luxembourg companies will have such a right under the services provisions of the E.E.C. Treaty?

Plainly these and similar questions must first be considered in the light of the wording of all relevant provisions of the applicable treaty of commerce. Paragraph 13 of the Protocol to the Convention with France, which permits differing treatment of different currencies, might resolve the example question concerning repatriation of assets from France. And Article XVII, paragraph 2 of the German F.C.N. Treaty requiring “fair and equitable treatment as compared with that accorded to the ... companies ... of any third country, with respect to ... the awarding of ... government contracts ...” presumably absolves Germany of a duty to accord

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86 Italian F.C.N. Treaty, art. XVII, paras. 2, 3; German F.C.N. Treaty, art. XII, para. 1; Dutch F.C.N. Treaty, art. XII, para. 1; Convention with France, art. X, para. 1.
87 Italian F.C.N. Treaty, art. III, para. 1; German F.C.N. Treaty, art. VII, para. 1; Dutch F.C.N. Treaty, art. VII, para. 4.
88 Arts 59–66. See Part V of this chapter infra.
The significance of treaties

Delaware companies most-favored-nation (as opposed to “fair and equitable”) treatment.

But the general question remains: Where the most-favored-nation clause is applicable in a treaty of commerce between the United States and a Common Market country, can an American company, by virtue thereof, claim the same benefits which that country accords Community companies pursuant to the E.E.C. Treaty?

The answer is clear in the Netherlands—it cannot. Article XXII, paragraph 3 of the Dutch F.C.N. Treaty provides:

The most-favored-nation treatment provisions of the present Treaty shall not apply to advantages accorded by either Party . . . by virtue of a customs union. . . .

Moreover, an exchange of letters makes these additional provisions part of the Treaty:

(1) [The Netherlands] should continue to be able to participate in European regional arrangements . . . even though the Netherlands may thereunder be obliged to grant some reciprocal advantages to other participating countries which it is unable to grant to non-participating countries; [and]

(2) Either Party, notwithstanding . . . [the provision concerning termination of this Treaty after 10 years have passed], shall be entitled to suspend the operation of particular most-favored-nation provisions of the Treaty to the extent deemed appropriate to the situation . . . [if future contingencies arise].

The Italian F.C.N. Treaty, on the other hand, provides that the most-favored-nation provisions shall not apply to “advantages accorded by virtue of a customs union of which either . . . Party may . . . become a member.” A comparable provision in the German Treaty is more explicit; it provides that most-favored-nation treatment “in regard to customs duties and quotas on goods” shall not apply to “advantages accorded by either party by virtue of a customs union or free-trade area.”

I.e., future contingencies which Article XXII, paragraph 4 does not adequately meet. Since the subject of the paragraph from which this second quotation is taken is the reconciliation of the Treaty with then-existing European arrangements (that is, in 1956), and since Article XXII, paragraph 4 refers only to the “treatment of goods” and action required or specifically permitted under the G.A.T.T., there is a question whether suspension of most-favored-nation provisions in connection with “future contingencies” created by the E.E.C. Treaty would be warranted. In the light of the letter as a whole, such a restrictive interpretation seems unlikely, however.

Art. XXIV, para. 3(b).

Art. XIV, para. 6.
“Advantages accorded by virtue of a customs union”—whether implicitly or explicitly—are restricted to questions of tariffs and quotas. The effect of other most-favored-nation provisions of the Italian and German treaties—read in conjunction with the E.E.C. Treaty—remains, therefore, an open question. The authors of the E.E.C. Treaty plainly had this problem in mind in drafting Article 234. Its third paragraph provides that in applying conventions between Member States and third countries the latter shall take into account the fact that the advantages accorded [in the E.E.C. Treaty] by each of the Member States are an integral part of the establishment of the Community and are, because of this fact, inseparably linked to the creation of common institutions, the attribution of powers to them and the granting of the same advantages by all other Member States.

Obviously the drafters intended by this provision to serve notice that the Member States will not grant like advantages to third countries unless the latter offer the same benefits and accept the same burdens—unless, in short, the latter become members of the Community. The justice of this position may be appealing, but it involves in effect a unilateral interpretation by each Member State of its agreements with third countries for which there is no warrant in international law.92

The position of the United States government in regard to its treaties of commerce with Community countries may be foreshadowed by its response to the letter of the government of the Netherlands which became part of the Dutch F.C.N. Treaty. The answer of the U.S. Ambassador to the Netherlands read in part:

As your Excellencies are aware, the United States Government welcomes progress in the development of European cooperation and integration insofar as arrangements for cooperation and integration contribute to a freer flow of trade, a more efficient use of manpower and materials, and greater unity. In this connection, it may be recalled that the United States Government has given concrete support to such organizations as the European Coal and Steel Community and concurred in the waiver relative thereto granted by the CONTRACTING PARTIES to the General Agreement on Tariffs and Trade, bearing in mind the benefits expected to accrue from arrangements designed to create a dynamic competitive common market within the

92Piot, La clause de la nation la plus favorisée, 45 Revue du Droit Privé International 1 (1952).
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Community and to insure sound economic relations between the Community and outside countries. The United States Government is prepared to consider sympathetically in the same spirit other proposals which the Kingdom of the Netherlands might make.

An attempt to assert that the most-favored-nation status of American nationals or companies gives them the Community status created by the E.E.C. Treaty seems, in any case, unlikely to succeed in any Community country.

B. CONCURRENT PROTECTION UNDER DIFFERENT TREATIES

The Common Market subsidiary of an American parent may be in a position to claim concurrent protection under more than one treaty. If the Belgian subsidiary, for example, meets the standards of Article 58, the right-of-establishment provisions of the E.E.C. Treaty are applicable. In addition, it may be able to claim protection under Belgium’s bilateral treaties of commerce—for example, the Franco-Belgian Convention of Establishment. Finally, because the Convention with France recognizes control of companies as decisive for some purposes, the Convention may also apply.

To take only one example, assume that France expropriates property of the Belgian subsidiary’s French branch. Under the E.E.C. Treaty the Belgian subsidiary will be able to claim national treatment in regard to compensation; under the Franco-Belgian Convention of Establishment (Article 6), most-favored-nation treatment; and under the Convention with France also, apparently, the rights it affords in case of expropriation. Paragraph 6 of the Convention’s Protocol provides:

The provisions of Article IV, paragraph 3 providing for the payment of compensation [in case of expropriation] shall extend to interests held directly or indirectly by nationals and companies . . . [of the United States] in property expropriated within the territories of . . . [France]. (Emphasis added.)

V. DOING BUSINESS WITHIN THE COMMUNITY UNDER THE E.E.C. TREATY

The significance of the E.E.C. Treaty to intra-Community operations of American corporate subsidiaries is obviously not limited

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to express protection of the right of establishment. At least three other aspects of the Treaty are important, directly relevant, and generally beyond the scope of other chapters of this book. The first is the “services” provisions of the Treaty (Articles 59–66); the second is the Treaty’s provision for assimilation of the laws of the Six; and the third is the pressure which the Treaty will create to ameliorate investment conditions.

A. THE “SERVICES” PROVISIONS

By virtue of Article 66 a company qualifying under Article 58 may also claim the protection of the “services” chapter of the Treaty (Articles 59–66). The rights which will be created pursuant to this chapter will complement those arising under the “right-of-establishment” provisions of the Treaty. The difference between the two lies in the situation of the persons, or what is more relevant to this discussion, the situation of the companies protected.

The “right-of-establishment” provisions envisage protection of persons and companies of one Member State who desire to establish, or who have already established, in another Member State. The “services” provisions look to protection of those of one Member State who wish to do business in another without establishing there. An important segment of the rights of such a person or company are regulated by the Treaty provisions concerning tariffs, quotas, and capital movements. These provisions, standing alone, are clearly inadequate, however, to achieve the freedom of economic activity among Member States sought by the drafters of the Treaty. The “services” provisions were therefore included to effect an ultimate elimination of those restrictions on economic activity in the Community not otherwise affected by the Treaty.

“Services” are, as a result of this “stop-gap” nature of the relevant provisions, negatively defined. Article 60 provides:

[Within the meaning of the present Treaty services are considered to be any performance normally performed for remuneration to the extent that they are not regulated by the provisions concerning free circulation of goods, of capital and of persons. (This author’s translation.)]

This definition suggests that “services” as used in this chapter means something broader than the term “services” as generally used in the phrase “goods and services.” The French, German, and Italian equivalents of “performance” (if not the Dutch) suggest, in fact, that “services” means “any performance pursuant to contract.”
The essential freedom to be created by the "services" provisions is indicated by Article 59. That Article provides in pertinent part:

[R]estrictions on free performance of services within the Community shall be progressively eliminated during the transitional period in regard to nationals of Member States established in a country of the Community other than that of the recipient of the service. (This author's translation.)

Although there is nothing in Article 59 to indicate as much, the majority opinion apparently is that the "services" provisions envisage only national treatment. The Economic Council of France has, however, taken another view. In its report of January 3, 1959, it stated:

[T]he restriction created by the second line of Article 52 as far as establishment is concerned, which reduced this liberty to one of non-discrimination in regard to foreign nationals of a Member State, does not exist in regard to services. Moreover the drafters of the Treaty used the term "Community" here and not the term "Member States." The problem is, then, one of eliminating the obstacles to the free performance of services within the territory of the Community. . . 94

Despite the Report of the Economic Council of France it will be assumed here that the majority view is correct.

The "services" chapter has three provisions which have no counterparts in the "right-of-establishment" chapter. The first of these, Article 64, provides that Member States are prepared to go further than will be required by directives of the Council in freeing services, if their general economic situations and those in the relevant economic sectors permit them to do so. Article 65 provides that as long as restrictions on free performance of services are not eliminated, each of the Member States will apply them without distinction based on nationality or residence 95 to all performers of services as defined in Article 59, line 1. And finally Article 60 provides:

Without prejudice to the provisions of the chapter concerning the right of establishment, the performer of serv-

95 This provision could mean that France, for example, shall not now distinguish between Frenchmen and Belgians in applying such restrictions. This would be its meaning if the Economic Council has correctly interpreted the meaning of Article 59. If the majority is correct about Article 59, Article 64 means only that France will not discriminate between Belgians and Germans, for example, in applying such restrictions,
ices may, in order to perform them, exercise on a temporary basis his activity in the country where the service is supplied under the same conditions as those which that country imposes on its own nationals. (This author's translation.)

The greater liberality of the "services" chapter, as manifested by these three provisions, is probably explained by the fact that the significance of services in the Community—that is, services within the meaning of the Treaty—is less than that of the economic activity of non-nationals established within each Community country.96 More radical changes therefore seemed possible.

One example must serve to suggest the significance of the "services" chapter. Assume that an American corporation which specializes in the manufacture and construction of pre-fabricated housing is contemplating the establishment of a Belgian subsidiary. Assume further that an important element in this decision is its potential ability to construct such housing for public housing projects. Assume, finally, that German laws, for example, which authorize public housing projects generally restrict bidding to German nationals and companies. Should the American corporation assume that such restrictive laws will, pursuant to the Treaty ultimately be eliminated?

The Member States have not been fully agreed that such laws must be eliminated, but the Commission has assumed that they must be.97 And the Treaty supports the Commission's stand. The construction of housing, as an example, is clearly a service, and it is obvious that the removal of other restrictions on the free performance of services would be meaningless to a company interested in the construction of public housing if it were not free to bid on government contracts.

B. ASSIMILATION OF THE LAWS OF THE SIX

Various provisions of the Treaty will expressly, or in effect, force unification, harmonization, coordination, or approximation of laws of the Six. The term "assimilation" will hereinafter be used to describe these measures in the aggregate, and it will be used in its primary sense—that is, "to make similar."

96 See Ehring, op. cit. supra note 50, at 164.
97 Cf. the discussion of the Commission's proposal pursuant to Art. 54(1) in, Everling, Vorschlag der Kommission der Europäischen Wirtschaftsgemeinschaft zur Regelung des Niederlassungsrechtes, 1960 DER BETRIEBS-BERATER 570.
I. THE ASSIMILATING EFFECT OF ARTICLES 58, 220, AND 221

Reference has already been made to one group of laws—those concerning the recognition of companies—which will in effect be assimilated pursuant to Articles 58 and 220. But Article 220 also provides that the Member States shall negotiate to assure for their nationals:

... the maintenance of juridical personality in case of transfer of the central office (siège) from country to country and the possibility of merger of companies formed under different national laws. . . . (Translation by this author.)

Added to this is the provision of Article 221 which guarantees (as of January 1, 1961) national treatment in respect of participation in the capital of companies of other Member States (in the sense of Article 58).

It is, perhaps, somewhat artificial to view these as provisions directed at assimilation. Nonetheless, it is clear that their effect, at least incidentally, will be to make the laws of the Six more similar to one another, and it is helpful to view them in this light, as should become clear.

2. PROVISIONS IN THE “RIGHT-OF-ESTABLISHMENT” CHAPTER EXPRESSLY REQUIRING ASSIMILATION

Three provisions of the “right-of-establishment” chapter expressly require assimilation of the laws.

a. Article 56(2)

Under Article 56(2) the Council is, prior to the end of the transitional period, to adopt directives in order to bring about coordination of:

legislative provisions and administrative rules and regulations which prescribe a special regime for aliens . . . for reasons of public order, security and health. (This author’s translation.)

Such directives are to be based on Commission proposals and adopted, after consultation with the Assembly, by unanimous vote. (Coordination of administrative rules and regulations are subject to directives adopted by a qualified majority after the end of the
Assimilation in this area of law is of obvious importance; public order, security, and health offer ready justification for the negation of virtually any Treaty provision or administrative act of the institutions (for example, it may well be argued that the requirement of a foreign merchant's identity card is necessitated by public order and security).

b. Article 57(2)

Article 57(2) requires coordination of legislative provisions and administrative rules and regulations of the Member States concerning access to non-salaried activities and their exercise. A proposal of the Commission and consultation with the Assembly are again necessary, and, with certain stated exceptions, the Council is to adopt the required directives unanimously during the first stage and by qualified majority thereafter.

c. Article 54(3)(g)

The provision for assimilation of most direct interest to companies, and the only one to be considered here in some detail, is Article 54(3)(g). It requires the institutions to take action to bring about coordination to the extent . . . necessary and with a view to making them equivalent, (of) the guarantees demanded in Member States from companies within the meaning of Article 58, second paragraph, for the purpose of protecting the interests both of the members of such companies and of third parties. . . . (This author's translation.)

This provision could have far-reaching consequences. A German professor has even suggested that it may outlaw the provisions of the projected reform of German stock company law.

This is an extreme view of the reach of Article 54(3)(g), but the effects it may have are important enough to consider at least some of them in detail. One way of doing this is to list the parties affected by company laws and to ask which aspects of their relationships with each other are governed by rules designed to protect members and third parties. The interested parties—if the discussion is confined to stock companies—are the stockholders, the corporation, the directors and officers, creditors, other third parties, and

98 See Chaine, op. cit. supra note 18, at 195.
the state. Obviously the rules governing corporation-stockholder relations and corporation-creditor relations are of primary relevance. But what of the rules governing other relationships? For example, the provisions in American corporation law permitting derivative suits constitute a clear recognition that harm done by directors of the corporation harms the stockholders. Thus, some rules governing the company-director relationship may require coordination pursuant to Article 54(3)(g).

Or, for a more remote example, take the rules determining when corporate existence begins. They most directly affect the company-state relationship, but it seems clear enough that they are also relevant in defining the protection of stockholders and creditors.

The limits of the area of company law which could be coordinated pursuant to Article 54(3)(g) can, then, be very broadly defined. Within these limits, what—to ask a further question—are some of the presently applicable rules of stock company law which should be coordinated in the interest of Community stockholders and creditors? Two examples of differing rules in some of the six countries which are relevant to the competing claims for protection of stockholders and creditors suggest the kind of answer which can be expected to this question.100

1) Disregard of Corporate Entity. Some of the rules concerning the conditions under which stockholders may be held liable for the debts of the stock company differ in the Six. Specifically, these are the situations in which the corporate entity may be disregarded—the veil "pierced."

Assume, for example, that an American corporation has acquired 80 percent of the stock of a Dutch stock company, the remainder of the shares being in the hands of the American corporation's Dutch partners. Wishing to assign certain markets to the Dutch company and aware of the problems which an agreement to share markets may create under the U.S. antitrust laws if the Dutch company is permitted to hold itself out as a wholly independent entity, the U.S. management adopts the following policy on advice of counsel: Some Western European markets will be left exclusively to the Dutch affiliate (but no agreement to this effect will be adopted);

100 For discussions of the rules which require assimilation under Article 54(3)(g), and under the Treaty generally see, Loussouarn, Le droit international du commerce et le Marché Commun, 12 Revue Trimestrielle du Droit Commercial (Oct.–Dec., 1959); Bärmann, Die Europäischen Gemeinschaften und die Rechtsangleichung, 14 Juristenzeitung 553 (1959); Strauss, Fragen der Rechtsangleichung im Rahmen der Europäischen Gemeinschaften (1959).
the affiliate will, however, be treated wherever possible as if it were simply the overseas division of the American corporation, ultimate control being always in the hands of the U.S. company.

Key executives are thereafter transferred temporarily from the United States to the Netherlands with a view to familiarizing Dutch personnel with American mass market business methods; and personnel of the Dutch company pass freely back and forth between the two companies for training purposes. Transactions are not always at arm’s length; and, because of the pace general economic growth within the Common Market, the business of the Dutch company has developed more quickly than anticipated and this unexpectedly rapid growth has given the Dutch affiliate an appearance of being under-capitalized.

Having first gotten substantial judgments against the Dutch affiliate which it cannot pay, creditors of the affiliate now attempt to obtain payment from the American corporation in the Netherlands, France, and Germany—in each of which the American corporation has assets and in each of which one plaintiff is domiciled. In each case the plaintiff-creditors argue that the Dutch corporate entity should be ignored and the shareholders held liable.

In the Netherlands the U.S. stockholder would not, in all likelihood, be held liable. Disregard of juridical personality is apparently extremely rare. On the other hand, a French court could consider the existence of the affiliate an "abuse of juridical personality" and hold that in France the two companies should be considered as one. Finally, a German court might consider that the juridical personality of the Dutch affiliate should be denied recognition—particularly in view of its capitalization and the complete control exercised by the American company—since

... the legal status of the juridical person cannot be recognized to the extent that the uses to which it is put are contrary to the purposes of the legal order.

In sum, disregard of the corporate entity would be unlikely in the Netherlands, probable in France, and possible in Germany.

Assuming that a German or French court might conclude that the juridical personality of the Dutch affiliate should be disregarded under the law of the forum, a conflict question arises. Under the

101 See Conard, Chapter VIII, section II, A, 6, b, supra.
102 See Legeais, L'Extension de la faillite sociale, 10 REVUE TRIMESTRIELLE DU DROIT COMMERCIAL 289 (1957). (Translation by this author.)
general conflict rule of both Germany and France the law of the Netherlands would determine whether a company with its central office (Sitz, siège) in the Netherlands should be viewed as a juridical entity. But application of this rule, like that of others, is subject to the proviso that its application must not violate the purpose of a German law or French ordre public. A German or French court could, then, conclude that application of the usual rule in the example case would be such a violation; a Belgian court in a like case in fact did so.

If we assume a wholly-owned subsidiary of an American corporation, the problem is even more complex. There is no apparent objection, or penalty attached, to the ultimate concentration of all shares in the hands of one shareholder in the Netherlands or in Germany. In France, Belgium, and Luxembourg, on the other hand, ultimate single ownership of all the shares results in dissolution of the company. Some—for example a Belgian commercial court—have concluded that dissolution is automatic, and that liquidation is not, therefore, a prerequisite of the personal liability of a sole stockholder. And “strawmen” will provide no insulation against this liability in Belgium, for example. In Italy, single ownership of all the shares will not dissolve the company, but the single shareholder is liable for the debts of the company contracted during the period of single ownership should the company become insolvent.

2) Powers of the Heads of Companies to Bind Them. A second example of rules of company law of the Six which should be coordinated in keeping with Article 54(3) (g) was suggested by a French notary in a particularly able discussion of the status of foreign corporations in Common Market countries. It concerns the power of the heads of companies to bind the company.

In France there is, according to Mr. Thibièrge, a difference between their powers to bind the stock company—the société anonyme—and those to bind the limited liability company—the société à responsabilité limitée. Under French stock company laws their powers are defined in the charter, or confirmed by subsequent action or decision. Heads of the stock company obligate the company,

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104 See, e.g., Einführungsgesetz zum Bürgerlichen Gesetzbuch § 30: Die Anwendung eines ausländischen Gesetzes ist ausgeschlossen, wenn die Anwendung gegen die guten Sitten oder gegen den Zweck eines deutschen Gesetzes verstossen würde.
105 Judgment of Jan. 5, 1911, Cour de Cassation, Pasicrisie II 68 (1911).
107 Art. 2362, Cod. Civ.
108 Thibièrge, op. cit. supra note 61 at 344 ff.
therefore, only if they have express authority to do so, unless the action taken concerns usual every-day company transactions which it may be expected all company heads are authorized to carry out. If real estate is to be sold, or money borrowed, however, company heads have only the power expressly conferred on them, and third parties fail to verify this power at their peril.

Under the French limited liability company act, on the other hand, the heads of the company are granted powers by law which third parties may rely on even if the charter limits them. Such limitations will render the company heads liable to the stockholders if they are transgressed, but that is their only potential effect. These legal powers are, in short, granted as a matter of public policy.

The rules pertaining to limited liability companies in France were borrowed from the German limited-liability-company law. Under German law, however, the heads of German stock companies also have powers which the law grants as a matter of public policy and which are unalterable by charter.

In Italy company heads have all powers to obligate the company, but limitations on their powers are binding on third parties if they have been recorded in the public register of enterprises or if the company can prove such third persons knew of the restrictions.

Finally, in Belgium the powers of the heads of the limited liability company as well as of those of stock companies can be restricted in the company charter to the detriment of third parties, even parties who have no knowledge of the restrictions.

3. ASSIMILATION UNDER THE TREATY SUMMARIZED

Three instances of assimilation in the Six have here been suggested. Their possible significance is worth consideration at this point.

The three instances were—to re-order them: (1) assimilation of laws to the principle of non-discrimination (Article 221, for example, which eliminates discrimination against the participation of non-nationals in the capital of companies) ; (2) assimilation with one another of the laws protecting stockholders and creditors (Article 54(3)(g)) ; and (3) assimilation of the conflict rules determining the nationality of corporations (Articles 58 and 220).

The first of these may be most significant in eliminating legal obstacles to Community-wide operations—present governmental discrimination based on nationality will be removed and future discrimination is prohibited. The second may be most important in
eliminating *economic* obstacles stemming from differences of the laws: If creditors can be certain that their protection will be essentially the same regardless of the place of formation of a company within the Community, Community-wide transactions will be facilitated. And if stockholders can be sure of like protection regardless of the laws within the Community under which a company is formed, they may be more willing to approve Community-wide ventures. More important, companies may find it easier to raise capital on a Community rather than country basis.

The third instance of assimilation discussed—that to be effected by Articles 58 and 220—may be most significant as first attack on *psychological* obstacles to Community-wide company operation. Because Article 58 (read with Article 52) looks to location of any two of the three elements (the registered office, the central management, and the central establishment) not in the country where the company is formed but *anywhere* in the Community, it contains an invitation to view the Six as a whole, to substitute a Community for a national perspective.

Such a shift in perspective, if it became general, would be important not only to the Community company which desires to operate on a Community-wide basis. The extent of legislative assimilation in the Six will be determined by the extent to which such a shift occurs. Coordination of the laws is possible now, but the extent of unification would seem to depend on the extent to which a Community consciousness replaces the present sense of allegiance solely to the six nation-states.

4. FURTHER PROPOSALS FOR ASSIMILATION

Three suggestions have already been publicly made which are relevant to the Community-wide operation of companies, which seem feasible, and which may be the next logical steps, departing from Article 58, in the progression towards a Community viewpoint and unification.

The first of these suggested changes is the institution by treaty of a Community companies register.¹⁰⁹ No Common Market company would be required to register but advantages of registration would be substantial. For example, limitations of the powers of company heads would be effective against third parties from the date of their publication in the register—but only then. Moreover, registration could be accompanied by the issuance of a European

¹⁰⁹ Id. at 352.
License of Establishment, which would result in simultaneous registration of the company in the commercial registers of each of the Six.

The second suggested change—and this obviously goes considerably further in the direction of a unified Community company law—has been to create a Common Market Securities Exchange Commission. The argument is that some such central regulation of the issuance of shares is necessary if investors are to be attracted in any numbers to Community companies established in other countries. An intermediate step in this direction—a uniform prospectus which could effect the listing of stock with all of the exchanges in the Six—has also been discussed by the exchanges.

Professor Tunc, of the Faculty of Law of Paris, in an article on the United States S.E.C. had already recommended in 1952 that French legislators might take inspiration from the various U.S. federal laws controlling corporations and their issuance of shares. Something comparable to the S.E.C. has also been urged in Holland, and in Belgium a Banking Commission already exists which plays a role similar to that of the S.E.C.

The final suggestion has come—with only minor variations—from a number of sources—a secretary of state of the German Ministry of Justice, from the French notary already quoted, and from a Dutch professor. It has also been the basis of an international congress convened by the Paris bar on June 16, 17, 18, 1960. The proposal is that a Common Market stock companies law should be created which organizers could, but need not, choose. Professor Sanders of Holland has suggested as a model the Canadian Dominion Companies Act. The purport of this analogy is indicated by these sentences from Fraser's HANDBOOK ON CANADIAN COMPANY LAW:

Each province in Canada has a Companies Act of its own, under which companies may be incorporated, and there is also a Dominion Companies Act under which companies

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110 Id. at 354.
113 See Conard, Chapter VIII at V, D, 4, supra.
114 Strauss, op. cit. supra note 100, at 24 ff.
115 Thibierge, op. cit. supra note 61.
116 Sanders, Vers une société anonyme européenne? 1960 Le Droit Européen 9 (No. 16, Jan.).
may be formed with power to carry on business throughout the Dominion. (p. xix)

Dominion companies have a status and powers entitling them to carry on business throughout Canada which no provincial legislature is entitled to destroy. (p. 7)

Both Professor Sanders and Dr. Strauss of the German Ministry of Justice point to the fact that European states have already created by convention a number of international public companies. "Eurofima"—a company formed to finance the renewal of railroad equipment—is one. Moreover Articles 45 and following of the Euratom Treaty set a precedent in providing for Community Joint Enterprises to foster undertakings of outstanding importance to the development of atomic industry. Euratom Joint Enterprises will be constituted by a decision of the Euratom Council.

To the proposals of Professor Sanders and Dr. Strauss, Notary Thibierge adds the suggestion that a Community Arbitral Tribunal be created. Parties to disputes concerning the treaty law creating Common Market stock companies could refer to this tribunal by agreement. Mr. Thibierge thereby emphasizes the fact—which the Common Market Treaty recognizes in granting the Court of Justice sovereign jurisdiction in interpretation of the Treaty—that common rules require uniform interpretation.

5. CONCLUSIONS

The three instances of legislative assimilation discussed, when completed by the three proposals alluded to, would form a program of progressive assimilation of laws affecting companies.

Beginning with adherence to the principle of non-discrimination, it adds coordination of the laws protecting shareholders and creditors. The perspective in both instances is the nation-state. Unification of the conflict rule determining company nationality—Articles 58 and 220—is strikingly different in viewpoint: the six countries are seen as an entity.

The proposal to create a Common Market companies register would entail a modest step toward unification involving the creation of a minor supranational agency. The Common Market S.E.C. proposal would, if realized, represent a far more significant piece of international legislation and would create a major supranational administrative agency. Finally, the proposal to create a Community Stock Companies Law by treaty under which companies could, but
C. The Pressure to Ameliorate Investment Conditions

It is obviously difficult to isolate the causes for the efforts of the Common Market countries, with the exception of Germany, to attract foreign investment. Some, if not all, would no doubt have been made even if the Common Market had not come into existence.

But the creation of the Common Market has plainly increased the interest of the foreign investor in the Six, and thereby the stakes for which the individual countries are striving. The important point is that such efforts are being made both by the individual countries of the Six and by non-member countries, notably Great Britain. The importance of this fact lies in the pressure which it generates to ameliorate investment conditions. The existence of this pressure must be taken into account in assessing the effective significance of the Treaty.

It has been suggested, for example, that restrictions on the right of aliens to exercise non-wage-earning activities will not be eliminated but simply extended to apply to nationals as well. It is also possible to assimilate laws and regulations by adopting the most restrictive standards applied by any of the Six (for example, those concerning access to non-wage-earning activities (Article 57(2))). The desire to attract foreign capital will be an important factor countering the inevitable pressures to move in such directions, and the Treaty will do much to increase it.