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Foreign Direct Investment in The United States: An Overview

by Michael A. Almond*
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I. Introduction

Foreign investment in the United States is not a recent phenomenon. Foreign investors have participated in the American economy since the early days of the Union. For example, European funds aided in the Louisiana Purchase, helped build the Erie Canal, and facilitated the development of the American railroad system.¹ In 1840, foreign investment in the United States exceeded \$260 million.² The level of investment remained steady until the 1860's, when it skyrocketed beyond \$1,252 million by 1870.³ During World War I, however, the United States suffered a massive withdrawal of funds by foreign investors. This divestment occurred once more during the Second World War, leaving the United States in 1946 relatively free of foreign investment.⁴

The modern era of foreign direct investment began in the 1960's, when foreign businessmen began to accumulate American dollars. Foreign funds invested in the United States doubled between 1962 and 1972 to a level of \$14 billion.⁵ Several international financial factors contributed to the sharp growth in foreign investment. Most notably, the depreciation of the dollar beginning in 1971 greatly reduced its value compared with the currencies of such major trading partners and investing nations as Germany, Japan, France, and Switzerland.⁶ Moreover, a sharp decline in U.S. stock prices in 1969-70 and again in 1973-74 left many American companies as attractive targets for acquisitions or mergers involving foreign investors. The energy crisis and sudden drastic shortages of raw materials created an incentive for investment in rela-

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¹ A.B.A., *A Guide to Foreign Investment under United States Law 3* (1979) [hereinafter cited as *A.B.A. Guide*].

² B. Zagaris, *Foreign Investment in the United States 2* (1980).

³ *Id.*

⁴ See *A.B.A.*, *supra* note 1, at 8.

⁵ B. Zagaris, *supra* note 2, at 3.

⁶ *Id.* at 9.

tively cheap, abundant land in the United States. Finally, the relative liberality of the American political system combined with a stable and expanding economy has always appealed to foreign investors accustomed to more pervasive government intervention in business.⁷ The current high level of foreign investment is expected to continue so long as foreign exchange markets reflect favorable, or at least unstable, dollar exchange rates, and the economic and political climates in the United States remain conducive to such investment.⁸

The most recent surge of foreign investment is qualitatively different from that of previous years. Whereas the early investors maintained essentially passive portfolio-type investments, recent technological innovations in travel and communications have enabled the modern investor to take an active managerial role with regard to his investments. For the first time, direct foreign investment and ownership of American enterprises is coupled with active foreign management and supervision.

The current business climate in the United States and the southeastern states in particular is highly conducive to foreign investment.⁹ North Carolina leads the country in obtaining new commitments from foreign firms, with thirty-six during the last year alone.¹⁰ North Carolina now hosts investors from nineteen countries, and is the home of 315 majority-owned foreign firms.¹¹

II. The Legal Basis for Foreign Investment in the United States

The due process and equal protection guarantees of the fifth and fourteenth amendments to the United States Constitution have been interpreted by the Supreme Court to extend not only to citizens but to aliens as well.¹² The Court has also established that classifications based on alienage are inherently suspect and therefore subject to close judicial

⁷ *Id.*

⁸ *Id.* at 12.

⁹ Foreign land holdings and acquisition are concentrated in the South and West. Alabama, Florida, Georgia, North Carolina, South Carolina, Tennessee, and Texas contain 37% of all foreign held agricultural land in the United States. U.S. Dep't of Agric. Econ. and Statistics Service, Agricultural Economic Report No. 447, Foreign Ownership of U.S. Agricultural Land 3, 33 (Feb. 1980).

¹⁰ Information supplied by the N.C. Dep't of Commerce.

¹¹ *Id.*

¹² *Graham v. Richardson*, 403 U.S. 365, 371 (1970) (state laws that exclude resident aliens from welfare benefits violate the equal protection principles of the 14th Amendment); *Truax v. Raich*, 239 U.S. 33, 39 (1915) (state laws that discriminate against the employment of aliens violate the 14th Amendment); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1885) (the protection of the 14th Amendment is not confined to citizens, but is to be applied to all persons within the United States). Even those aliens whose presence in the United States is unlawful or transitory are entitled to this constitutional protection. *Matthews v. Diaz*, 426 U.S. 67, 77 (1976) (the 5th and 14th Amendments protect everyone within the United States and not only citizens); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-50 (1950), modified, 339 U.S. 908 (1950) (before an alien can be deported, constitutional due process requires that there be a deportation hearing).

scrutiny.¹³

In addition, the United States is presently a party to more than forty bilateral treaties establishing the right of certain aliens to invest and do business in the United States.¹⁴ These agreements are commonly known as "friendship, commerce, and navigation treaties" (FCN treaties). As a result of FCN treaties, foreign-owned companies are generally permitted to establish branches, offices, and factories in the United States, to form corporations or to acquire majority interests in existing domestic corporations,¹⁵ and most important, to control and manage the businesses they have formed or acquired.¹⁶ FCN treaties typically provide for so-called "national treatment" to foreign businessmen in the host country. This means, for example, that foreign-owned companies operating in the United States are entitled to receive no less favorable treatment than domestic companies.¹⁷

The United States has also entered into a network of bilateral double taxation treaties.¹⁸ These treaties generally provide that industrial income connected with the local operations of a foreign company will not be subjected to taxation by both jurisdictions, subject to certain

¹³ 403 U.S. at 370-71. All restraints imposed by states on aliens are subject to close scrutiny. *Foley v. Connelle*, 435 U.S. 291, 294 (1978).

¹⁴ Telephone conversation with Anne Simons of the U.S. Dep't of State, Treaty Affairs Office, Mar. 22, 1982.

¹⁵ See, e.g., Convention of Establishment, Nov. 25, 1959, United States-France, art. V, § 1, 11 U.S.T. 2398, T.I.A.S. No. 4625.

Nationals and companies of either High Contracting Party [U.S. and France] shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activities for gain within the territories of the other High Contracting Party, whether directly or through the intermediary of an agent or any other natural or juridical person. Accordingly, such nationals and companies be permitted within such territories:

- (a) to establish and to maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business;
- (b) to organize companies under the general company laws of such other High Contracting Party, and to acquire majority interests in companies of such other High Contracting Party;
- (c) to control and manage the enterprises which they have established or acquired.

Moreover, the enterprises which they control, whether in the form of an individual proprietorship, 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 such other High Contracting Party.

See also *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928) (Japanese citizens can organize a corporation in the United States under a U.S.-Japan treaty which gives Japanese citizens the right to do business in the United States).

¹⁶ See *supra* note 15.

¹⁷ See, e.g., Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. XXII, 4 U.S.T. 2063, T.I.A.S. No. 2863. "The term 'national treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other subjects, as the case may be, of such Party." *Id.*

¹⁸ See, e.g., Convention for the Avoidance of Double Taxation, Dec. 13, 1946, United States-South Africa, 3 U.S.T. 3821, T.I.A.S. No. 2510; Convention for the Avoidance of Double Taxation, Mar. 8, 1971, United States-Japan, 23 U.S.T. 967, T.I.A.S. No. 7365.

specified conditions.¹⁹

An attorney advising foreign clients must also be aware of certain other treaties and international conventions which regulate international investment activity and which provide a further basis for foreign investment in the United States. Examples include the International Convention for the Protection of Industrial Property,²⁰ which provides for a system of national treatment for holders of patents, trademarks, and other industrial property; the Organization for Economic Cooperation and Development (OECD) Code of Liberalization of Capital Movements;²¹ and the OECD Declaration on International Investment and Multinational Enterprises.²²

III. Laws Regulating Foreign Investment in General

Numerous federal and state laws are designed to regulate but not necessarily restrict foreign investment activity in the United States. For example, the Currency and Foreign Transactions Reporting Act²³ and the Currency Reporting Act of 1970²⁴ authorize the Treasury Department to impose reporting requirements on corporations engaged in foreign exchange transactions and transfers of credit in and out of the United States.²⁵ The International Investment Survey Act of 1976²⁶ was enacted to facilitate collection of information on international investment, including direct foreign investment in the United States, for governmental and public use. The Act imposes strict reporting requirements on foreign-owned enterprises in the United States.²⁷ The Domestic and Foreign Investment Improved Disclosure Act of 1977²⁸ amended sections 13(d)(1), (9) and 15(d) of the Securities Exchange Act of 1934²⁹ to require more complete disclosure of aliens holding over five percent of any class of security described in section 13(d)(1),³⁰ including the residence and citizenship of the person reporting as well as the nature of his beneficial ownership. The reporting party must also disclose the

¹⁹ For a more detailed discussion of this topic, see Ruchelman, *Principles Relative to Organization and Taxation of Foreign Investment Activity in the United States*, 7 N.C.J. Int'l L. & Com. Reg. 177 (1982).

²⁰ Convention of Paris for the Protection of Industrial Property, Oct. 31, 1958, 13 U.S.T. 1, T.I.A.S. No. 4931, as revised by Convention of July 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923, and Proclamation by the President of Oct. 13, 1973, 24 U.S.T. 2140, T.I.A.S. No. 7727.

²¹ Entered into force, Dec. 12, 1961. The United States is not a party to the Code.

²² 15 Int'l Legal Materials 967 (1976). The Declaration provides guidelines for multinational enterprises in the areas of competition, financing, taxation, disclosure of information, employment, and technology.

²³ 31 U.S.C. §§ 1051-1143 (1976).

²⁴ 31 U.S.C. § 1101 (1976).

²⁵ *Id.* § 1121 (1976); 31 C.F.R. § 103.23 (1981).

²⁶ 22 U.S.C. §§ 3101-3108 (1976 & Supp. III 1979).

²⁷ See 15 C.F.R. § 806.1-.17 (1981).

²⁸ Domestic and Foreign Investment Improved Disclosure Act, Pub. L. No. 95-213, 91 Stat. 1494 (1977).

²⁹ Codified at 15 U.S.C. § 78m, o (Supp. IV 1980).

³⁰ *Id.* § 78m(g)(1).

background, identity, residence and citizenship of all associates of such reporting party.³¹

The Foreign Sovereign Immunities Act of 1976³² clarified the U.S. position regarding jurisdiction of U.S. courts over foreign governments and their property in the United States. Of particular importance to the foreign investor who is the agent of a foreign government is section 1605(a)(2), which nullifies the sovereign immunity of a foreign government whenever the action is based upon "commercial activity" carried on inside or outside the United States.³³

Another important statute imposing strict reporting requirements on foreign investors is the Agricultural Foreign Investment Disclosure Act of 1978.³⁴ The Act requires, in part, that any foreigner who acquires an interest in agricultural land file a detailed disclosure report with the Secretary of Agriculture within ninety days of acquisition.³⁵ A foreign investor who fails to comply with the Act is subject to severe civil penalties.³⁶

The Foreign Agents Registration Act³⁷ is of interest to attorneys engaged in the representation of foreign clients. Section 613(g) of the Act exempts from the filing requirement "any person qualified to practice law" who represents a disclosed foreign principal in a U.S. court or government agency. The attorney must be careful to note, however, that this exemption does not extend to lawyers engaged in lobbying activities outside of agency proceedings.³⁸

Two other recent pieces of legislation of interest to foreign investors and their attorneys are the International Banking Act of 1978³⁹ and the Foreign Investment in U.S. Real Property Tax Act of 1980.⁴⁰ The former was enacted to provide a uniform national policy concerning rapidly expanding foreign banking operations in the United States and to provide a framework for the regulation and supervision of their activities.⁴¹ The latter revises the manner in which tax is imposed on capital gains realized by foreign investors from the disposition of U.S. real property. Gains are treated as "effectively connected" with the conduct of a trade

³¹ Id. § 78m(d)(1)(A), (D).

³² 28 U.S.C. §§ 1602-1611 (1976).

³³ The "minimum contacts" requirement set forth in *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945), must also be met in order to subject the foreign sovereign to U.S. jurisdiction. *Carey v. Nat'l Oil Corp.*, 453 F. Supp. 1097, 1101 (S.D.N.Y. 1978), *aff'd*, 592 F.2d 673 (2d Cir. 1979).

³⁴ 7 U.S.C. §§ 3501-3508 (Supp. III 1979).

³⁵ Id. § 3501(a).

³⁶ Id. § 3502.

³⁷ 22 U.S.C. §§ 611-621 (1976).

³⁸ Id. § 613(g).

³⁹ 12 U.S.C. §§ 3101-3108 (Supp. IV 1980).

⁴⁰ Pub. L. No. 96-499, 94 Stat. 2682 (1980) (to be codified in scattered sections of 26 U.S.C.).

⁴¹ See S. Rep. No. 1073, 95th Cong., 2d Sess. 2, reprinted in 1978 U.S. Code Cong. & Ad. News 1421, 1422.

or business and taxed accordingly. Foreign investors will also be taxed on gains realized from the sale or exchange of an interest in a real property holding organization which is defined as a "corporation, trust or partnership at least half of the assets of which are U.S. real property interests."⁴² The Act also imposes reporting requirements to identify when taxable transactions have occurred.⁴³

The attorney advising a foreign business client must also be aware of a number of state and federal laws regulating such specialized areas as securities transactions, antitrust and unfair trade practices, immigration, customs, employment discrimination, taxation, and the qualification of foreign corporations to transact business in a particular state. All of these laws will affect, but not necessarily restrict, an alien's ability to engage in commercial or investment activity in the United States.

IV. Laws Restricting Foreign Investment

A different class of foreign and state laws do not merely regulate foreign investment activities in the United States, but actually impose restrictions and prohibitions on such activities. Although these laws are too numerous and varied to treat individually, some of the major restrictions are set forth below. Most FCN treaties permit restrictions in certain sensitive areas in which a nation has a legitimate interest in controlling foreign ownership. These sensitive areas often include communications, air and water transport, banking, defense, exploitation of natural resources and the production of electricity.⁴⁴

Important federal restrictions on foreign investment occur in the areas of maritime activities,⁴⁵ aviation,⁴⁶ radio and television and other communications media,⁴⁷ energy resources including atomic energy, natural gas and thermal energy,⁴⁸ mining and mineral rights including con-

⁴² H.R. Rep. No. 1167, 96th Cong., 2d Sess. 512, reprinted in 1980 U.S. Code Cong. & Ad. News 5526, 5875. See also Ruchelman, *supra* note 19 at 199.

⁴³ Pub. L. No. 96-499, § 1123, 94 Stat. 2682, 2687 (1980) (to be codified at 26 U.S.C. § 6039C).

⁴⁴ See, e.g., Convention of Establishment, United States-France, *supra* note 16, art. V, § 2: Each High Contracting Party reserves the right to determine the extent to which aliens may, within its territories, create, control, manage or acquire interests in, enterprises engaged in communications, air or water transport, banking involving depository or fiduciary functions, exploitation of the soil or other natural resources, and the production of electricity.

⁴⁵ See, e.g., Merchant Marine Act of 1920, 46 U.S.C. § 883 (Supp. III 1979) (regulating the right of noncitizens to engage in coastal shipping).

⁴⁶ See, e.g., Federal Aviation Act of 1958, 49 U.S.C. §§ 1372, 1401, 1508 (1976 & Supp. III 1979) (requiring foreign air carriers to obtain permits authorizing navigation in the United States' airspace).

⁴⁷ See, e.g., Communications Act of 1934, 47 U.S.C. §§ 305(d), 310(a), (b) (1976 & Supp. III 1979) (regulating radio stations operated by foreign governments and prohibiting the granting of a license to any alien); Communications Satellite Act of 1962, 47 U.S.C. § 734(d) (1976) (limiting the alien share of ownership in a communications satellite corporation).

⁴⁸ See, e.g., Natural Gas Act, 15 U.S.C. § 717b (1976 & Supp. III 1979) (requiring authorization from the Federal Power Commission for the exportation or importation of natural gas);

troversial continental shelf and deep seabed mining,⁴⁹ alien access to and use of federal public lands,⁵⁰ banking,⁵¹ investment companies,⁵² and defense.⁵³ Of particular interest to attorneys representing foreign clients is the Federal Election Campaign Act,⁵⁴ which places restrictions on an alien's right to participate in the United States' political processes. Section 441e of the Act prohibits a foreign national⁵⁵ from directly or indirectly making or promising to make a contribution to a candidate for political office. Exempt from section 441e, however, are aliens who have been lawfully admitted for permanent residence.⁵⁶

In addition to federal restrictive legislation, most states have enacted restrictions upon alien investment in such enterprises as insurance and banking, and upon the qualification of foreign corporations to do business in that state.⁵⁷ Of perhaps the greatest concern to foreign investors, however, are state restrictions on alien ownership and commercial exploitation of real property. Since the 1923 Supreme Court decision in *Terrace v. Thompson*,⁵⁸ states have had the absolute power to deny aliens the right to own land within their boundaries. At the present time, approximately half of the states impose constitutional or statutory restrictions on an alien's right to take, hold, or convey real property.⁵⁹

Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2012 (1976) (regulation of atomic energy with respect to foreign commerce is necessary for national defense and security).

⁴⁹ See, e.g., Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1976 & Supp. III 1979) (prohibiting citizens of foreign countries from obtaining leases under this Act if United States citizens would be unable to obtain a similar interest in the respective foreign country).

⁵⁰ See, e.g., 43 U.S.C. § 161 (repealed 1976) (limiting entry to unappropriated public lands to citizens of the United States or to aliens who have filed declaration of intention to become a citizen).

⁵¹ See, e.g., 12 U.S.C. § 72 (1976 & Supp. III 1979) (requiring that every director of a national bank must be a citizen of the United States during his entire term of service); International Banking Act of 1978, 12 U.S.C. § 3102 (Supp. IV 1980) (setting out the regulations applicable to establishment of federal branches and agencies by foreign banks).

⁵² See, e.g., Investment Company Act of 1940, 15 U.S.C. § 80a-7, -8 (1976) (restricting the use of interstate commerce to investment companies organized or created under the laws of the United States or of a state and having a board of directors).

⁵³ See, e.g., Industrial Personnel Security Clearance Program, 32 C.F.R. § 155.3(c) (1981) (making security provisions applicable to foreign contractors).

⁵⁴ 2 U.S.C. § 431 (Supp. IV 1980).

⁵⁵ Id. § 441e(b) (1976 & Supp. IV 1980) defines a foreign national as:

- (1) a foreign principal, as such term is defined by section 611(b) of title 22, except that the term "foreign national" shall not include any individual who is a citizen of the United States; or
- (2) an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence, as defined by section 1101(a)(20) of title 8.

⁵⁶ Id. § 441e(b)(2).

⁵⁷ See, e.g., N.Y. Ins. Law § 325 (McKinney 1966) (insurance restrictions); S.C. Code § 33-23-10 to -160 (1976) (authorization to do business); Ill. Ann. Stat. ch. 17, § 315 (Smith-Hurd 1981) (banking law). For an example from North Carolina law, see *infra* note 67.

⁵⁸ 263 U.S. 197 (1923). See also the earlier cases of *Blythe v. Hinckley*, 180 U.S. 333, 340-41 (1900); *Hauenstein v. Lynham*, 100 U.S. 483, 484 (1879).

⁵⁹ Each of these states has a distinctive scheme of restrictions. See, e.g., the Illinois statute allowing an alien to hold title to property for six years before being compelled by law to sell it. Ill. Ann. Stat. ch. 6, §§ 1, 2 (Smith-Hurd 1975 & Supp. 1981). The Supreme Court of

Moreover, a number of states have compulsory reporting provisions with regard to alien ownership of land.⁶⁰

North Carolina places very few restrictions on ownership of real property by aliens and therefore has attracted a large number of foreign firms and investors.⁶¹ An alien's rights to take, hold, and convey real property are the same as any North Carolina citizen, with no additional restrictions.⁶² N.C. Gen. Stat. § 64-1.1 authorizes the Secretary of State to collect all information reported by aliens to the federal government with regard to real property ownership in North Carolina and to maintain a file containing this information. The file is to be updated every three months and is to be open for public inspection. Other North Carolina statutes of interest to foreign businessmen include certain provisions of the Business Corporation Act,⁶³ which provide that alien corporations are to be treated the same as corporations organized under the laws of another state of the United States,⁶⁴ and the chapter dealing with discrimination in business,⁶⁵ which prohibits discrimination by a corporation doing business in North Carolina against another business or person in the state, as a result of a business arrangement with any "foreign government, foreign person, or international organization."⁶⁶ Finally, article 7 of chapter 58 establishes very strict requirements for an alien insurance company to do business in North Carolina.⁶⁷ Certain other

Oklahoma, a state that bans ownership of land by aliens who are not bona fide residents, has held that an alien corporation that has complied with the state "domestication" statute is permitted to own real property in the state. *State ex rel. Cartwright v. Hillcrest, Ltd.*, 630 P.2d 1253 (Okla. 1981). The dissent argued that domestication to do business does not change an alien corporation's legal residence. The case may indicate a trend toward a more lenient standard to encourage foreign investment in that state.

⁶⁰ Examples of state reporting requirements include the Agricultural Foreign Investment Disclosure Act, Ill. Ann. Stat. ch. 5, §§ 601-607 (Smith-Hurd Supp. 1981), requiring any foreign person who acquires or transfers any of the included interests in Illinois agricultural land to file a report with the Director of Agriculture within 90 days of acquisition or transfer; Minn. Stat. Ann. § 500.221(4) (West Supp. 1982) permitting nonresident aliens holding title to agricultural land prior to June 1, 1981, to retain their titles, but requiring them to file an annual report with the Commissioner of Agriculture; and Alaska Stat. § 22.15.110(4) (1976) which requires magistrates and district judges to file copies of conveyances to nonresident aliens with the Commissioner of Commerce. For a more detailed discussion, see Azevedo, *Foreign Investment in U.S. Real Estate: A Survey of Federal and State Law*, 7 N.C.J. Int'l L. & Com. Reg. 27 (1982).

⁶¹ See *supra* notes 10, 11, and accompanying text.

⁶² N.C. Gen. Stat. § 64-1 (1981). See generally §§ 64-1 to 64-5.

⁶³ Id. §§ 55-1 to 55-175 (1981).

⁶⁴ Id. §§ 55-138(a)(1) (in order to procure a certificate of authority to transact business in North Carolina, a foreign corporation must submit an application to the Secretary of State setting forth "[t]he name of the corporation and the state or country under the laws of which it is incorporated." Id. § 55-139(a) (1981) requires the application to be accompanied by certain documents, all "duly authenticated by the proper officer of the state or country under the laws of which it is incorporated." Statutes generally covering the operation of foreign corporations in North Carolina can be found at article 10 of the Business Corporation Act, N.C. Gen. Stat. §§ 55-131 to 55-154 (1975 & Supp. 1981). See also N.C. Gen. Stat. § 55-2(4) (1975).

⁶⁵ Id. ch. 75B.

⁶⁶ Id. § 75B-2(3).

⁶⁷ Id. §§ 58-150 to 58-155 (dealing generally with the conditions upon which alien insurance companies may be admitted to transact business in N.C.).

alien-related statutes deal with proceedings involving insanity of aliens,⁶⁸ restrict granting of licenses for retail or wholesale sales of beer or wine to U.S. citizens and bona fide residents of North Carolina,⁶⁹ toll the statute of limitations against alien enemies during wartime,⁷⁰ and permit intestate succession by aliens or persons who trace their inheritance through aliens.⁷¹

V. Recent Developments

Two recent legislative developments impact directly on the conduct of foreign investment in North Carolina. The first is a proposed bill that did not pass, but which would have placed serious restrictions on alien ownership of agricultural land in North Carolina.⁷² Entitled "An Act to Restrict the Acquisition of Interests in North Carolina Agricultural Land by Nonresident Aliens," the bill would have prohibited aliens from acquiring any interest in "any tract of real property . . . capable . . . of supporting an agricultural enterprise,"⁷³ a notably broad definition.

A second bill, which was passed into law,⁷⁴ amends the tax law in relation to international banking facilities⁷⁵ to provide an exemption for such facilities from state and local taxation, in order to encourage their establishment in the state.⁷⁶

Several recent court decisions have important implications for foreign investors. In *Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd.*,⁷⁷ the District Court for the Eastern District of New York discussed the amenability of wholly-owned subsidiaries of foreign corporations to jurisdiction in U.S. courts, in the context of an unfair competition claim. The court held that, under the circumstances of this case, the Japanese parent was subject to suit in the United States.⁷⁸ The court refused to regard the duly-organized American subsidiary as a separate and independent legal entity, but rather viewed it as merely one "spoke" of a wheel with the Japanese parent company at its hub. The court stated that it is "appropriate . . . to look to the center of the wheel in Japan when the spokes

⁶⁸ Id. § 122-40.1 (1981).

⁶⁹ Id. § 105-113.80 (1979 & Supp. 1981).

⁷⁰ Id. § 1-34.

⁷¹ Id. § 29-11.

⁷² 1981 N.C. Sess. Laws, House Bill 926, Senate Bill 496 [hereinafter cited as House Bill 926].

⁷³ The stated purpose of the Bill was to prevent the "further decline of farming and wise rural development" attributed to "foreign absentee ownership." House Bill 926, *supra* note 72, at 2. Section 64A-6(2) of the Bill defined "agricultural land" as "any tract of real property situated in the State of North Carolina, whether inside or outside the corporate limits of any municipality, that is capable, without substantial modification to the character of the real property, of supporting an agricultural enterprise." Id. at 3.

⁷⁴ 1981 N.C. Sess. Laws, ch. 855, House Bill 1265.

⁷⁵ Specifically, the bill amends N.C. Gen. Stat. §§ 105-130.5, 105-102.3, 105-122 (1981).

⁷⁶ 1981 N.C. Adv. Legis. Serv. 187 (Michie).

⁷⁷ 508 F. Supp. 1322 (E.D.N.Y. 1981).

⁷⁸ Id. at 1341-45.

violate substantive rights in other countries."⁷⁹ The court concluded that the subsidiary's status at the present time is that of an agent, thereby subjecting the parent corporation to U.S. jurisdiction and ultimate responsibility for the conduct of its subsidiary.⁸⁰

Several other recent decisions deal with the potential conflict between the terms of FCN treaties and U.S. employment discrimination laws. The two major cases resulted in conflicting decisions between the Second and Fifth Circuits.⁸¹ In *Avigliano v. Sumitomo Shoji America, Inc.*,⁸² the court affirmed the right of a wholly-owned U.S. subsidiary of a Japanese parent company to invoke the provisions of the U.S.-Japan FCN Treaty.⁸³ The court further held that the provisions of the FCN Treaty allowing the company to hire executives "of its choice" did not exempt it from Title VII of the Civil Rights Act of 1964.⁸⁴ The court did state, however, that "due consideration" should be given to "[t]reaty rights and the unique requirements of a Japanese company doing business in the United States."⁸⁵

The Fifth Circuit in *Spiess v. C. Itoh & Co. (America), Inc.*⁸⁶ came to the opposite conclusion. The court held that under the U.S.-Japan FCN Treaty foreign companies operating in a host country have the absolute right to hire executives and technicians of their choice, without regard to host country laws.⁸⁷ The question of the reach of American anti-discrimination laws therefore remains to be resolved by the Supreme Court in its determination of the pending appeal in *Avigliano*.

VI. Conclusion

Foreign investment in the United States has increased dramatically in the last two decades and shows every sign of continued growth, particularly in the Southeast. More attorneys will find themselves involved in advising foreign business clients than ever before. The articles presented in this issue will familiarize the attorney with the major aspects of foreign investment and the considerations necessary to effectively counsel the foreign client.

⁷⁹ Id. at 1341. An interesting aspect of the decision is the court's extensive reliance upon judicial notice in order to "understand general commercial settings and the particular relationships of the parties." Id. at 1328.

⁸⁰ Id. at 1341.

⁸¹ For related cases in this area, see *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981); *Mas Marques v. Digital Equip. Corp.*, 637 F.2d 24 (1st Cir. 1981); *Linskey v. Heidelberg Eastern, Inc.*, 470 F. Supp. 1181 (E.D.N.Y. 1979).

⁸² 638 F.2d 552 (2d Cir. 1981), cert. granted, 102 S. Ct. 501 (1981).

⁸³ Id. at 555-56.

⁸⁴ Id. at 558.

⁸⁵ Id. at 559.

⁸⁶ 643 F.2d 353 (5th Cir. 1981).

⁸⁷ Id. at 361. A petition for certiorari in *Spiess* has since been dismissed pursuant to agreement by the parties under Fed. R. Civ. P. 53. 50 U.S.L.W. 3550 (Jan. 5, 1982) (No. 81-938).