

State Regulation of Foreign Investment

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Recommended Citation

Barnes, Louie Burton III (1975) "State Regulation of Foreign Investment," *Cornell International Law Journal*: Vol. 9: Iss. 1, Article 4.
Available at: <http://scholarship.law.cornell.edu/cilj/vol9/iss1/4>

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NOTES

STATE REGULATION OF FOREIGN INVESTMENT

Devaluation of the dollar, a general decline in the price of American corporate stock, and a shifting of monetary reserves to other parts of the globe have increased the trend and potential of foreign investment within the United States. Yet numerous states have legislation in force which limits, in one form or another, domestic investment by persons who are not United States citizens. This Note will survey current state regulations in light of both treaty provisions between the United States and various investing countries, and the equal protection clause of the fourteenth amendment. Since a more unified policy towards foreign investment would be in the national interest, this Note proposes that new national treatment treaties of friendship, commerce, and navigation be negotiated with critical trading partners so as to render ineffective certain onerous state regulations and facilitate international monetary recycling.

I

BACKGROUND

In the early years of its economic development, the United States was a major recipient of foreign capital and investment. Much of the capital used to develop our raw wilderness into an industrial power came from foreign sources. As the economic strength of the country grew, however, the flow of capital reversed itself and America came to be considered an exporter of capital.¹ The image of the United States across the world has been cast in the form of great multinational corporations in recent years. Yet there is now a growing trend, once again, of foreign investment within the United States.²

1. Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise*, 74 HARV. L. REV. 1489, 1491-92 (1961). See also E. KIRKLAND, *A HISTORY OF AMERICAN ECONOMIC LIFE* 211, 262, 541 (3d ed. 1951).

2. KIRKLAND, *supra* note 1, at 648-49. See generally, R. BARNET & R. MÜLLER, *GLOBAL REACH* (1974). For a solid study of the genesis of the American capital expansion, see M. WILKINS, *THE EMERGENCE OF MULTINATIONAL ENTERPRISE* 199-219 (1970).

Numerous individual states have mounted intensive drives to lure foreign capital inside their borders. For instance, Georgia, Michigan, New York, South Carolina and Virginia maintain representatives in Brussels and Tokyo. Texas has offices in Mexico, Tokyo and London. Alabama and North Carolina have headquarters in Switzerland. Maine and

The amount of direct foreign investment in the United States has grown from \$6.9 billion in 1960 to \$21.7 billion in 1974. The total amount of foreign holdings of stocks and bonds in the United States is much larger. Figures released by the Treasury Department have been revised to place the value of such holdings as of the end of 1974 at about \$80 to \$85 billion.³ For the most part this phenomenon has been attributed to investment by European citizens and the giant European companies, the investors in America of old.⁴

To this recent historical trend of more foreign investment inside the United States has been added an important new potential source of foreign capital—"oil money."⁵ There is a strong possibility that the riches accumulated by the oil nations may be invested in Western indus-

Wisconsin have offices in Frankfurt. *Foreign Investment in the United States: Policy, Problems and Obstacles*, 11 THE CONFERENCE BOARD RECORD 33-34 (1974).

3. For figures relating to direct foreign investment, see Leftwich, *Foreign Direct Investment in the United States in 1973*, 54 SURVEY OF CURRENT BUS., part 11 at 7, Table I (1974). New foreign direct investments declined slightly in 1974 from their 1973 peak; the inflow of new investments in 1974 was down to \$2.26 billion from \$2.66 billion in 1973, but the reinvestment of the earnings of foreign companies' affiliates in this country brought the total increase to \$3.5 billion, making the new total of direct foreign investment \$21.7 billion. Direct foreign investment figures include ownership of at least 25 percent of the voting shares of U.S. companies or enterprises. Wall St. Journal, Oct. 29, 1975, at 4, col. 3.

When ownership of securities and other long-term financial claims is included, the figures grow much larger, as pointed out in the text. In 1972, for example, there was \$14.4 billion of foreign direct investment, but the figure swelled to \$45.5 billion when these other holdings were included. Bauer, *Foreign Direct Investment in the United States*, 11 THE CONFERENCE BOARD RECORD 23 (1974). For the 1974 figures in the text, see Wall St. Journal, *supra*, at 4, col. 2.

Even though Middle East countries only record a small percentage of foreign holdings, see N.Y. Times, Sept. 25, 1975, at 69, col. 1, government officials acknowledge that "banks and brokerage concerns in Switzerland and other foreign countries may be holding large amounts of U.S. securities for oil nations. Indeed, [a recent] Treasury study shows that more than two-thirds of the recorded foreign holdings of U.S. corporate securities was held by foreign banks and brokers for the account of other persons and institutions." Wall St. Journal, *supra*, at 4, col. 2.

4. Wall St. Journal, June 22, 1973, at 1, col. 6. The newspaper reported that the Japanese had "heretofore shown very little interest in direct U.S. investments" but now "are also said to be exhibiting more 'interest'." This prediction was borne out in the announcements of FOREIGN DIRECT INVESTMENT BY INDUSTRY AND STATE (Mar.-Nov. 1973), in which, of a total of 133 new announcements of United States investments, 45 were made by the Japanese. Bauer, *supra* note 3, at 24-25. See also Wall St. Journal, Jan. 20, 1975, at 6, col. 2; *id.*, Oct. 29, 1975, at 4, col. 2.

5. Hein, *Oil Money and World Payments, The Billion Dollar Unsure Thing*, 11 THE CONFERENCE BOARD RECORD 7 (1974). Hein estimates that of the projected 1974 revenues to members of the Organization of Petroleum Exporting Countries (OPEC) of \$85-100 billion, at least \$50 billion will have to be financed or recycled. *Id.* at 8. See also N.Y. Times, Sept. 7, 1974, at 1, col. 7.

try and real estate. Kuwait⁶ and Iran,⁷ for example, have indicated such interest. Perhaps even more startling and of more concern to many Americans was the purchase by Gaith Pharaon of Saudi Arabia of a one-third ownership in the Bank of Commonwealth in Detroit.⁸ At this stage, however, most Middle East investors still seem more inclined to purchase land or debt securities.⁹

Some commentators have viewed this two-way flow of capital as a healthy financial development. They argue that not only does it promote economic efficiency, but that it also makes for a more truly internationalized business world with resulting higher standards of living and a higher sense of international understanding and unity.¹⁰ In addition, many international experts in global finance and economics see open investment in American companies, securities and real estate as a desirable partial solution to impending monetary recycling problems.¹¹

6. Kuwait has purchased partial ownership of Daimler-Benz. *Wall St. Journal*, Dec. 2, 1974, at 2, col. 3; *id.*, Dec. 3, 1974, at 5, col. 1.

7. Iran attempted to take over Pan American Airways, *N.Y. Times*, Feb. 16, 1975, at 2, col. 5; *Id.*, Feb. 17, 1975, at 1, col. 7, but later dropped its plans. *See N.Y. Times*, Sept. 25, 1975, at 65, col. 3.

President Ford has established an interagency committee to review investment plans in this country by foreign governments. Although the committee has no power to approve or disapprove such investments, it can raise objections. So far its policy has been to welcome foreign investment in the United States. *N.Y. Times*, Sept. 25, 1975, at 65, col. 3.

8. *N.Y. Times*, Feb. 1, 1975, at 1, col. 3. *See also NEWSWEEK*, Feb. 10, 1975, at 58.

Such investment activity is not limited to oil countries. The French firm of Societe Imetal of Paris, controlled by the Paris branch of the Rothschilds, made a \$111 million offer for the Copperweld Corporation of Pittsburgh, but the corporation has been resisting the attempted takeover. *N.Y. Times*, Sept. 25, 1975, at 65, col. 3.

9. Saudi Arabia, for example, recently placed \$200 million into an account managed by the First National City Bank, the Morgan Guaranty Bank and the Bank of America. These monies reportedly were to be used for "more active forms of investment" in American company stocks. In the real estate realm, \$10 million was invested in an Atlanta mall-hotel by Kuwait, the Shah of Iran purchased 642 Fifth Avenue, in New York City, and Kuwait purchased Kiawah Island, 15 miles north of Charleston, S.C. On an individual level, Saudi Arabian Adnan M. Kharsoggi reportedly acquired financial institutions in California valued at nearly \$136 million. *N.Y. Times*, Sept. 7, 1974, at 1, col. 6. *See generally Wall St. Journal*, Mar. 5, 1975, at 21, col. 2.

10. For a statement of this view which predates the arrival of Middle Eastern economic clout and "oil money," see Hein, *Foreign Investment: A Two Way Street*, *WORLD BUS. PERSPECTIVES* No. 3 (May 1971) (unpagged publication of *THE CONFERENCE BOARD RECORD*). Since the influx of "petro-dollars," there have been voices in strong support of foreign investment in the United States. For example, diplomatic sources here have reported that American corporations and banks have made "dozens of approaches" offering the Saudi government private, off-the-market, stock sales and investment opportunities. *N.Y. Times*, Sept. 7, 1974, at 1, col. 7. *See also Wall St. Journal*, Feb. 7, 1975, at 6, col. 1.

11. Farmanfarnainan, Gutowski, Okita, Roose, and Wilson, *How Can the World Afford OPEC Oil?*, 53 *FOREIGN AFF.* 201 (1975).

Some politicians, on the other hand, have strongly resisted the continuation of a national policy allowing free inflow of foreign capital on a number of grounds: national defense and security, retaliation against Arabs for their blacklist and boycott of firms doing business in Israel, and objections based generally on "the national interest."¹²

Although both the United States and its trading partners have restricted investment by foreigners in certain areas of transportation, energy, and communication,¹³ this country as a general rule has followed a policy which strongly supports free investment among nations.¹⁴ Such a policy was nurtured and is partially sustained by the expansion and maintenance of the large United States-based multinational corporations.

A number of studies have recently been made which analyze and criticize the impact of federal regulation on foreign investment.¹⁵ Yet other factors act to hinder foreign investment within the United States as well. One family of restrictions which has gone relatively unnoticed by the commentators and national policy planners is that of state regulation of foreign investment.

12. Wall St. Journal, Mar. 5, 1975, at 8, col. 2. One manifestation of this resistance surfaced during recent congressional debate over H.R. 8951, which sought to limit acquisition by non-citizens of voting securities registered under the Securities Exchange Act of 1934. *Id.*, Mar. 7, 1975, at 4, col. 2. For an appraisal of this type of legislation, see Note, *U.S. Regulation of Foreign Direct Investment: Current Developments and the Congressional Response*, 15 VA. J. INT'L L. 611 (1975).

Another bill which was recently introduced would place restrictions on foreign investors who desire to purchase 5 percent or more of the capital stock of any American corporation with more than \$1 million of assets. S. 425, 94th Cong., 1st Sess. (1975). See Wall St. Journal, Mar. 7, 1975, at 14, col. 2; Note, *An Evaluation of the Need for Further Statutory Controls on Foreign Direct Investment in the United States*, 8 VAND. J. TRANSNAT'L L. 147 (1974).

President Ford has decided to assume the role of determining whether given foreign investments are in the national interest, N.Y. Times, Feb. 9, 1975, at 4E, col. 1, yet his administration has generally opposed bills that move away from the "open door" policy. Wall St. Journal, Mar. 5, 1975, at 8, col. 2.

13. See note 54 *infra* and accompanying text.

14. Assistant Treasury Secretary Gerald Parsky, the Administration's spokesman on such matters, has characterized the possibility of Arab investment in the United States as "an important opportunity" for this country and views restrictions on foreign investment as "unwarranted, potentially harmful to our national interests and in general contrary to our foreign investment policy." NEWSWEEK, Feb. 10, 1975, at 62-63. For examples of the policy of the Ford administration, see notes 7 and 12 *supra*.

15. See, e.g., Note, *The Rising Tide of Reverse Flow: Would a Legislative Breakwater Violate U.S. Treaty Commitments?*, 72 MICH. L. REV. 551 (1974) [hereinafter cited as Note, *The Rising Tide*]; Note, *An Evaluation of the Need for Further Statutory Controls in Foreign Direct Investment in the United States*, *supra* note 12; Note, *U. S. Regulation of Foreign Direct Investment: Current Developments and the Congressional Response*, *supra* note 12.

II

SURVEY OF STATE LAW

State regulations which act to restrict foreign investment exist in great numbers. While there are some state regulations which restrict investment in personalty, much of the standing legislation is aimed at curbing foreign investment in real property.¹⁶ The regulations as they exist are diverse and at times contradictory to the major campaigns which many states mount in order to attract foreign investment.¹⁷ The attempts by states to regulate foreign investment can be classified into types: (1) blanket restrictions against alien investment; (2) varying forms which embody a combination of restrictions; (3) restrictions based on residential status; (4) restrictions based on eligibility for citizenship; (5) restrictions against enemy aliens; (6) the complete absence of restrictions. In order to create an understanding of the extent and diversity of such regulation, a survey and classification of state regulations follows.

A. CLASSIFICATION OF STATE STATUTES

1. *Blanket Restrictions Against Aliens*

There are a few states which put a general blanket restriction upon alien investment in real estate, without distinguishing whether or not the alien is a resident. A Nebraska statute, for example, states in part that "[a]lliens . . . are prohibited from acquiring title or taking or holding any land, or real estate, or any leasehold interest extending for a period for more than five years . . . by descent, devise, purchase or otherwise. . . ."¹⁸ This type of regulation could prove a real hindrance to foreign corporations wishing to open a manufacturing plant in the United States. Their executives could not purchase or lease land for the plant for more than five years—an impractical commercial situation.

2. *Varying Forms of Restrictions*

Some states provide disabilities in more complex forms, ranging from

16. Both types of restrictions have substantial commercial effect: the former precludes foreign ownership of stocks, bonds and notes, while the latter bars not only foreign investment in real estate *per se* but also the establishment of foreign owned plants and factories in the United States where purchase of the plant real estate may be desirable.

17. See note 2 *supra*.

18. NEB. REV. STAT. § 76-402 (1971). The statute also applies to corporations not incorporated under the laws of the state. South Carolina, another state in this category, has a strange statute which provides that "[n]o alien or corporation controlled by aliens, either in his or its own right or as trustee, cestui que trust or agent, shall own or control within the limits of this State more than five hundred thousand acres of land." S.C. CODE ANN. § 57-103 (1962).

limitations on the manner in which aliens can obtain the land to the manner in which land may be utilized. Even within individual states, these restrictions generate internal confusion as to the policy behind them. For instance, Idaho appears to present an open policy by allowing "[a]ny person, whether citizen or alien, [to] take, hold and dispose of property, real or personal,"¹⁹ yet at the same time providing that all sales of state lands shall be made to citizens of the United States and to those who shall have declared their intention to become citizens.²⁰ Indiana has an even more bifurcated approach to alien land ownership, stating in one statute that aliens may hold and enjoy real estate in the same manner as the state's citizens²¹ but providing in another that only resident aliens who have declared an intention to establish American citizenship may acquire and hold real estate.²²

A few states in this category allow aliens to invest and own land in the state only on the condition that United States citizens, through treaties or otherwise, be given reciprocal treatment in the alien's home country. For instance, Wyoming restricts alien property rights as a general rule, using the residency and eligibility for citizenship technique, but provides an exception for those aliens falling within a reciprocity clause.²³ Kansas provides, in establishing rights as to the transmission or inheritance of real estate, that all aliens not eligible to citizenship shall be able to hold land according to the extent described by treaty between the United States and the nation of which the alien is a citizen or subject.²⁴

19. IDAHO CODE § 55-103 (1947). For similar statutes, see ILL. ANN. STAT. §§ 6-1 to 6-6 (Smith-Hurd 1966); KY. REV. STAT. ANN. § 381-290 (1969); MINN. STAT. ANN. § 500.22 (Supp. 1975); PA. STAT. ANN. tit. 68, §§ 22, 24-25, 28, 53-60 (1965). Oregon limits the purchase of land in the state to citizens or those who have declared their intention to become citizens. ORE. REV. STAT. § 273.255 (1974). Hawaii requires that only citizens of the United States be allowed to participate in disposition of lands in the Oahu Land Development. HAWAII REV. STAT. § 206-19 (Supp. 1974). See also *id.* § 516-33 (Supp. 1974).

20. IDAHO CODE § 58-313 (Supp. 1974).

21. IND. ANN. STAT. § 32-1-8-1 (1973).

22. *Id.* § 32-1-7-1 (1973). The only reconciliation available is the compiler's suggestion that the latter section "would seem to be largely superceded" by the former.

23. WYO. STAT. ANN. § 34-151 (Supp. 1975).

24. KAN. STAT. ANN. § 59-511 (1964). Although reciprocity provisions as to investment have not been tested by the courts, similar provisions in a probate context making the right of nonresident aliens to acquire personal property dependent upon reciprocal rights of American citizens in the aliens' home countries have been held by the Supreme Court *not* to be state infringement of the foreign affairs domain of the federal government. *Clark v. Allen*, 331 U.S. 503, 516-17 (1946). However, the Court has held invalid on this ground an Oregon escheat statute which, in addition to reciprocity, required an evaluation of the right of foreign heirs to receive the proceeds. *Zschernig v. Miller*, 389 U.S. 429 (1967). A District Court, however, has construed a Montana reciprocity clause in light of *Clark* and *Zschernig* and determined that reciprocity statutes are not *per se* unconstitutional. It

3. Restrictions Based on Residential Status

Another category of restrictions centers on the residential status of the alien; that is, whether or not he is a resident of the United States.²⁵ Wisconsin uses this classification to limit land ownership by aliens, corporations not created under the laws of a state of the United States, and corporations or associations of which 20 percent of the stock "is or may be owned" by a nonresident alien.²⁶ Connecticut bases its restrictions on this same theory but words an exception in positive terms for the country of France.²⁷ Connecticut's statutes then branch into other directions, allowing nonresident aliens to hold property for the purposes of "quarrying, mining, dressing or smelting ores on the same or converting the products of such quarries and mines into articles of trade and commerce." If the alien allows such land to be unused for the purposes enumerated, then he will forfeit the land.²⁸

4. Restrictions Based on Eligibility for Citizenship

The eligibility of aliens to become citizens of the United States forms the basis of barriers to alien land ownership in this group of states. This particular type of restriction arose because of discriminatory sentiment against Asian aliens and manifested itself in the Alien Land Laws beginning in 1921.²⁹ California was the first state to enact such measures³⁰ and the states which followed this approach—Arizona, Idaho, Louisiana, Montana and New Mexico—still maintain restrictions based on ineligi-

decided that if the state courts only read the law of a foreign country to determine whether reciprocity exists, then reciprocity does not infringe upon the prerogatives of the federal government. *Gorun v. Fall*, 287 F. Supp. 725 (D. Mont. 1968). See also Comment, *Iron Curtain Statutes — What Is The Standard of Constitutionality?*, 9 DUQUESNE U.L. REV. 242 (1970-71).

25. D.C. CODE ANN. § 45-1501 (1973); N.C. GEN. STAT. §§ 64-1, 64-3 (1975). Mississippi's Constitution provides that "[t]he legislature shall enact laws to limit, restrict, or prevent the acquiring and holding of land in this state by non-resident aliens, and may limit or restrict the acquiring or holding of lands by corporations." MISS. CONST., art. 4, § 84 (1890). See also NEV. REV. STAT. §§ 134.230, 134.250 (1973).

26. WIS. STAT. ANN. § 710.02 (1974).

27. CONN. GEN. STAT. ANN. § 47-57 (Supp. 1975). *Quaere* as to the impact of this provision on nations which have unconditional "most favored nation" treaties with the United States.

28. *Id.* § 47-58 (1960). This approach, which allows nonresident aliens the right to mine, quarry and smelt ores, is in direct contrast with an Alaska statute which allows only an alien protected by a reciprocal treaty or who has declared his intention to become a United States citizen to acquire mining or exploration rights. ALASKA STAT. § 38.05.190(a)(3)-(4) (1974).

29. R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 106, at 396-97 (complete ed. 1973).

30. *Id.*

bility for citizenship.³¹ New Mexico, a prime example, originally based its restrictions on alien land ownership solely on residency.³² In 1921, however, New Mexico amended its Constitution to forbid aliens "ineligible to citizenship under the laws of the United States" and corporations, copartnerships and associations, a majority of which are owned by aliens, from acquiring title or leasehold interests in New Mexico real estate.³³ Kansas also maintains restrictions on this theory but states them in positive terms, granting aliens "eligible for citizenship" the same rights of real estate ownership possessed by citizens.³⁴ Then it establishes rights of "all other aliens" under a reciprocity clause.³⁵ Although the racially based rationale for this type of restriction is now passe, its products, these existing restrictions, continue to survive.

5. *Restrictions Against Alien Enemies*

Some states have removed all restrictions against investments by "alien friends" and have left standing or have imposed restrictions against "alien enemies." Virginia's Code, for example, provides that "[a]ny alien, not an enemy, may acquire by purchase or descent and hold real estate in this State. . . ."³⁶ Georgia uses a variation of the same principle and requires the alien's government to be "at peace" with the United States before he can purchase, hold, and convey real estate.³⁷ The difference between the two could prove significant in this age of conflict without declaration of war. For more important reasons, however, the entire category should be abolished. It is the role of the federal government, and not the states, to engage in policies of war and peace. Furthermore, this category has importance only when the United States is at war. Accordingly, any restrictions based upon these categories should be left to the discretion of the federal policy-making apparatus.

In whatever form presented by the several states, these regulations act

31. ARIZ. REV. STAT. ANN. § 33-1201 (1974); IDAHO CODE §§ 55-103, 58-313 (1948); LA. CONST. art. 19, § 21; MONT. REV. CODES ANN. § 91-520 (Supp. 1974); N.M. CONST. art. II, § 22.

32. The New Mexico Constitution contained a clause which prohibited distinctions "between resident aliens and citizens" regarding the ownership or descent of property. Comment to N.M. CONST. art. II, § 22.

33. N.M. CONST. art II, § 22.

34. KAN. STAT. ANN. § 59-511 (1964).

35. *Id.* See text accompanying note 24 *supra*.

36. VA. CODE ANN. § 55-1 (1974).

37. GA. CODE ANN. §§ 79-303, 79-304 (1973). While Alaska has an alien enemy exclusion clause, it also has restrictions against the percentage of alien stockholder ownership in corporations which might acquire exploration and mining rights in the state. ALASKA STAT. § 38.05.190(a)(6) (1974).

to discourage foreign investment. At the very outset, the statutes *per se* erect some restrictions, whether they forbid nonresident aliens from investing, base their restrictions on eligibility for citizenship, or whether the restrictions are based on a combination of theories. Furthermore, in broader perspective, the mere existence of such regulations by so many states automatically acts to chill open and free investment. The burden is placed squarely on the foreign investor, forcing him to scrutinize state laws to see where and how he can invest. The burden is even greater if the investor finds a good investment opportunity that is forbidden by a state having regulations which violate treaty and constitutional protections. This situation acts as a severe deterrent to investment in that it places the burden of court contest and legal challenge on the would-be investor. An example of how such state regulations can act to hinder foreign investment comes clear in a recent tender offer by a Canadian company for a Texas corporation.

B. RECENT DEVELOPMENTS

The *Texasgulf, Inc. v. Canada Development Corporation* (C.D.C.) case³⁸ arose when C.D.C. attempted acquisition of Texasgulf through a tender offer. One of the defenses Texasgulf attempted to use in seeking a permanent injunction restraining C.D.C. from proceeding with and consummating the tender offer of stock purchase was that the attempt violated Article 1527, Texas Revised Civil Statutes.³⁹ Article 1527 required that the majority of the stock of international trading corporations be owned by citizens of the United States and furthermore that control of these corporations must be vested only in citizens of the United States and of the state of Texas. The District Court determined that Texasgulf was not an international trading corporation and, therefore, that Article 1527 did not apply.

While the court's decision turned on narrow, definitional grounds, a far deeper policy decision seems to have been the true rationale. The court noted that "[i]f Texasgulf's argument prevailed, there would be

38. 366 F. Supp. 374 (S.D. Tex. 1973).

39. TEX. REV. CIV. STAT. ANN. art. 1527 (1962) provides in part:

A majority of the stock [of international trading corporations] shall in all instances be owned by citizens of the United States, and a majority of the officers and directors thereof shall in all instances be citizens of the United States and of this State. Nothing in this article shall prevent citizens of foreign countries from becoming stockholders in such corporations, but the control of such corporations shall never in any instance be vested in citizens of other countries than the United States. Violation of any provision herein as to the control of stock of such corporation shall be sufficient for the Secretary of State to cancel the charter of said corporation and same shall be placed in the hands of a receiver as provided by law.

a flight of Texas corporations to Delaware and other states, especially those Texas subsidiaries of many foreign-owned companies,"⁴⁰ seemingly implying that, although the state has restrictions, they are not in the interest of the state and therefore should be construed most narrowly.

In so holding, the court enumerated C.D.C.'s arguments for the contention that Article 1527 could not serve as the basis for a preliminary injunction, and wrote that "[t]hey are recited here merely to illustrate the serious hurdles which would have to be cleared before Article 1527 could pose a real threat." The contentions, *inter alia*, were that (1) the control provision of Article 1527 was unconstitutional because it was in contravention of the fourteenth amendment rights of aliens, and (2) that it conflicted with United States treaty provisions.⁴¹ The litigation in the *Texasgulf* case which resulted from attempted state regulation of foreign investment demonstrates that such legislation, where it exists, can pose real problems to the foreign or alien investor.

III

THE TREATY BARRIER

According to the United States Constitution:

[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.⁴²

Any state statute, and particularly a statute which limits the freedom of aliens, can only be valid insofar as it remains consistent with United States treaties. Just as the types of state restrictions on foreign investment are numerous, so are the types of treaty relationships the United States maintains with its partners regarding trade, commerce and investment. Varying answers about the extent of investment permitted citizens of a nation result from the operation of these diverse treaties. Accordingly, each type of treaty must be considered individually to determine its particular effect on a given nation's citizens' freedom to invest in the United States. This outcome is complicated further still when the impact of state regulation is considered in the total analysis. It is, therefore, appropriate that a general survey of existing treaty regulations be made.

40. *Texasgulf, Inc. v. Canada Development Corporation*, 366 F. Supp. 374, 416 n.61 (S.D. Tex. 1973).

41. *Id.* at 415.

42. U.S. CONST., art. VI.

A. SURVEY OF TREATIES OF FRIENDSHIP, COMMERCE AND NAVIGATION

1. *National Treatment Treaties*

In recent years the United States has extended "national treatment" to a number of its investment partners through treaties of friendship, commerce and navigation (F.C.N.).⁴³ This genre of treaty contains the most liberal provisions this country affords a foreign nation. "National treatment" as used in these F.C.N. treaties means that a contracting party must be treated no less favorably "than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be . . ." of the other contracting party.⁴⁴ A clause in one of our treaties with Luxembourg, for instance, provides for "national treatment" with respect to business activities within the territory of the other country, and specifically permits nationals and companies of the other party to establish branch agencies and factories, to organize corporations within the other nation's territory, and to "control or manage enterprises which they have established or acquired" in the other country.⁴⁵ Such a treaty in effect affords citizens of the party nation the same rights a citizen of Texas would have if he were to attempt to invest in California. There is almost no limit to the type of commercial activity they can engage in: they can organize or create new industry or an industrial plant, and can purchase or hold real estate as easily as any American citizen, regardless of state statutory language to the contrary. There is no numerical limitation as to percentage of control or absolute acreage to limit their holding. The investment freedom is almost complete.

43. Treaty of Amity and Economic Relations with Thailand, May 29, 1966, art. IV, paras. 1 and 5, [1968] 5 U.S.T. 5843, T.I.A.S. No. 6540; Treaty of Amity and Economic Relations with Togo, Feb. 8, 1966, art. V, para. 1, [1967] 1 U.S.T. 1, T.I.A.S. No. 6193; Treaty of Friendship, Establishment and Navigation with Luxembourg, Feb. 23, 1962, art. VI, para. 1, [1963] 1 U.S.T. 251, T.I.A.S. No. 5306; Convention of Establishment with France, Nov. 25, 1959, [1960] 2 U.S.T. 2398, T.I.A.S. No. 4625; Treaty of Amity, Economic Relations and Consular Rights with Muscat and Oman, December 20, 1958, art. V, para. 1, [1960] 2 U.S.T. 1835, T.I.A.S. No. 4530; Treaty of Friendship, Commerce and Navigation with the Republic of Korea, Nov. 28, 1956, art. VII, para. 1, [1957] 2 U.S.T. 2217, T.I.A.S. No. 3947; Treaty of Friendship, Commerce and Navigation with The Netherlands, March 27, 1956, art. VII, para. 1 [1957] 2 U.S.T. 2043, T.I.A.S. No. 3942; Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, Oct. 29, 1954, art. VII, para. 1, [1956] 2 U.S.T. 1839, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation with Japan, April 2, 1953, art. VII, para. 1, [1953] 2 U.S.T. 2063, T.I.A.S. No. 2863; Treaty of Friendship, Commerce and Navigation with Israel, Aug. 23, 1951, art. VII, para. 1, [1954] 1 U.S.T. 550, T.I.A.S. No. 2948. See Note, *The Rising Tide* 568.

44. Treaty of Friendship, Establishment and Navigation with Luxembourg, Feb. 23, 1962, art. XV para. 1, [1963] 1 U.S.T. 251, T.I.A.S. No. 5306.

45. *Id.* art. VI, para. 1.

2. Most Favored Nation Treaties

A second type of treaty grants to the contracting parties "most favored nation" status in specific commercial areas such as investment status, organization of companies, holding of executive position, and acquisition of shares.⁴⁶ For instance, under the United States' most favored nation treaty with Belgium,⁴⁷ if Belgium were to grant to Egypt a reduction in the import tariff on cotton, then this special rate would also

46. "A most-favored-nation clause between two states merely stipulates that each state will grant the other commercial rights equal to the most favorable rights granted to any state." H. JACOBINI, *INTERNATIONAL LAW* 188 (rev. ed. 1968). For a contrast between "national treatment" and "most favored nation" treaties, see L. McNAIR, *THE LAW OF TREATIES* 273 (1961).

47. Treaty of Friendship, Establishment and Navigation with Belgium, Feb. 21, 1961, art. VI, paras. 1-2, [1963] 2 U.S.T. 1284, T.I.A.S. No. 5432. Other treaties of this genre are as follows: Treaty of Friendship and Commerce with Pakistan, Nov. 12, 1959, art. VII, [1961] 1 U.S.T. 110, T.I.A.S. No. 4683; Treaty of Friendship, Commerce and Navigation with Denmark, Oct. 1, 1951, art. VIII, para. 1, [1961] 1 U.S.T. 908, T.I.A.S. No. 4797; Treaty of Amity, Economic Relations and Consular Rights with Iran, Aug. 15, 1955, art. V, [1957] 1 U.S.T. 899, T.I.A.S. No. 3853; Treaty of Amity and Economic Relations with Ethiopia, Sept. 7, 1951, art. IX, [1953] 2 U.S.T. 2134, T.I.A.S. No. 2864; Treaty of Friendship, Commerce and Navigation with Ireland, Jan. 21, 1950, art. VI, para. 2 [1950] 1 U.S.T. 785, T.I.A.S. No. 2155; Treaty of Friendship, Commerce and Navigation with Italy, Feb. 2, 1948, art. III, 63 Stat. 2255 (1949), T.I.A.S. No. 1965; Treaty of Friendship, Commerce and Navigation with China (Republic of China), Nov. 4, 1946, art. IV, 63 Stat. 1299 (1949), T.I.A.S. No. 1871; Treaty of Friendship, Commerce and Navigation with Liberia, Aug. 8, 1938, art. XVIII, 54 Stat. 1739 (1941), T.S. No. 956; Treaty of Friendship, Commerce and Consular Rights with Finland, Feb. 13, 1934, art. XVII, 49 Stat. 2659 (1936), T.S. No. 868; Treaty of Friendship, Commerce and Navigation with Austria, June 19, 1928, art. X, 47 Stat. 1876 (1933), T.S. No. 838; Treaty of Friendship, Commerce and Consular Rights with Norway, June 5, 1928, art. XIII, 47 Stat. 2135 (1933), T.S. No. 852; Treaty of Friendship, Commerce and Consular Rights with Latvia, April 20, 1928, art. XIV, 45 Stat. 2641 (1929), T.S. No. 765 [by a note to the Secretary of State dated July 11, 1951, the Charge d'Affaires of Latvia in Washington acquiesced in the application of controls to trade between the United States and Latvia while Latvia is under Soviet influence; see U.S. DEPT. OF STATE, *TREATIES IN FORCE* 151 (1973)]; Treaty of Friendship, Commerce and Consular Rights with Honduras, Dec. 7, 1927, art. XIV, 45 Stat. 2618 (1929), T.S. No. 764; Treaty of Friendship, Commerce and Consular Rights with Estonia, Dec. 23, 1925, art. XIII, 44 Stat. 2379 (1926), T.S. No. 736 [by a note to the Secretary of State dated July 16, 1951, the Acting Consul General of Estonia in Charge of the Estonian Legation in New York acquiesced in the application of controls to trade between the United States and Estonia while Estonia is under Soviet domination or control. U.S. DEPT. OF STATE, *supra*, at 75]; Treaty of Commercial Relations with Serbia (Yugoslavia), Oct. 2 and 14, 1881, art. II, 22 Stat. 963 (1883), T.S. No. 319; Treaty of Friendship, Reciprocal Establishments, Commerce and Surrender of Fugitive Criminals with Switzerland, Nov. 25, 1859, art. I, 11 Stat. 587 (1859), T.S. No. 353. See Note, *The Rising Tide* 568, 573, 575-76.

For a comparison of investment protection provisions of two of these treaties, see Treaty with Liberia, text accompanying note 56 *infra*, and Treaty with Italy, *infra* note 57.

apply to cotton coming from the United States.⁴⁸ Historically, the United States only granted conditional most favored nation treaties, but in 1922 the United States began to grant unconditional most favored nation commerce treaties whereby "most favored nation treatment was not to be conditioned upon meeting special concessions."⁴⁹ Presently some seventeen treaties between the United States and other countries fit this general category.

3. *Earlier Treaties*

The remainder of the F.C.N. treaties which are in force were negotiated during a period of American history in which there was little concern with regulation of investment activities between the contracting parties. However, these treaties are still in force and thus still may present barriers to state regulation.⁵⁰ An example of such a treaty, providing only very limited rights to the parties, is a treaty with Yemen which provides that within the other country, nationals of each party

shall enjoy the fullest protection of the laws and authorities of the country, and shall not be treated in any manner less favorable than the nationals of any third country.⁵¹

This type of provision covers only personal rights of the citizens and does not touch upon commerce; apparently no provisions respecting investment were even contemplated. Such treaties, with their total lack of commercial and investment provisions, do not fit the present commercial world but reflect the times in which they arose: the mid-19th and early 20th centuries. Some of the nations involved, of course, may have little interchange with the United States, but in light of trading economics, at the least, these treaties should be individually examined.

48. McNAIR, *supra* note 46, at 273-305. Under conditional "most favored nation" treaties, contracting parties do not automatically receive favors bestowed upon others, but must promise reciprocal treatment in order to receive the benefit.

49. JACOBINI, *supra* note 46, at 153.

50. Agreement Respecting Friendship and Commerce with Yemen, May 4, 1946, art. III, 60 Stat. 1782 (1946), T.I.A.S. No. 1535; Treaty of Friendship and General Relations with Spain, July 3, 1902, art. II, 33 Stat. 2105 (1905), T.S. No. 422; Treaty of Friendship, Commerce and Navigation with Paraguay, Feb. 4, 1859, art. III, 12 Stat. 1091 (1863), T.S. No. 272; Treaty of Friendship, Commerce and Navigation with Argentina, July 27, 1853, art. III, 10 Stat. 1005 (1855), T.S. No. 4; Treaty of Friendship, Commerce and Navigation with Costa Rica, July 10, 1851, art. III, 10 Stat. 916 (1855), T.S. No. 62; Treaty of Peace, Friendship, Commerce and Navigation with Bruni, June 23, 1850, art. II, 10 Stat. 909 (1855), T.S. No. 33; Treaty of Peace, Amity, Navigation and Commerce with Colombia, Dec. 12, 1846, art. II, 9 Stat. 881 (1851), T.S. No. 54. *See also* Note, *The Rising Tide* 576 n.96.

51. Agreement Respecting Friendship and Commerce with Yemen, May 4, 1946, art. III, 60 Stat. 1782 (1946), T.I.A.S. No. 1535.

B. IMPACT OF TREATIES ON STATE REGULATION

In general, as to those nations with whom the United States has existing treaties granting national treatment in matters of commerce and industry, state discriminatory regulations against aliens must fall since treaties which grant aliens rights equal to those enjoyed by American citizens are the supreme law of the land.⁵² This outcome seems clear regardless of whether the theory of restriction is based on enemy alienage, residential status or eligibility for citizenship. Should a given state decide to impose investment restrictions on citizens and corporations of both foreign nations and sister states, however, the discrimination against all investors would be mutual and, in the absence of a discrimination between aliens and persons from other states, would not be a violation of these treaties.⁵³ However, no state is likely to exclude investment by citizens of its sister states, and therefore state restrictions on alien investment are likely to remain unconstitutional. Moreover, investment in certain areas is covered by special federal legislation,⁵⁴ and the doctrine of federal preemption will invalidate state regulations in those areas.

Treaties in the second category, those containing "most favored nation" clauses as to commerce and investment, must be studied on an individual basis in order to determine whether they protect the contracting party from investment regulations by the states.⁵⁵ For example, the "most favored nation" treaty with Liberia seems expressly to leave latitude for state regulation since an article in that treaty specifies that the right of one country's corporations to exercise their functions in the other country is governed "by the laws and regulations, National, State

52. See note 42 *supra* and accompanying text. One state court long ago held that where an alien is disqualified under state law from taking, holding, or transferring real property, the disqualification is removed if a treaty with the alien's country confers such rights. *Wunderle v. Wunderle*, 144 Ill. 40, 33 N.E. 195 (1893), *error dismissed without opinion*, 154 U.S. 524 (1893). See also Annot., 92 L.Ed. 285 (1947).

53. See Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 818-19 (1958); Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 233 (1956). One author has noted that individual states are "free to discriminate against out-of-state investors as long as they do not distinguish between out-of-state U.S. investors and treaty alien investors." Note, *The Rising Tide* 569. Under this analysis, that portion of the regulation of directors imposed by Article 1527 of the Texas statutes, note 39 *supra*, could stand because it merely required that "a majority of the officers and directors thereof shall in all instances be citizens of the United States and of this State." *Id.* (emphasis added).

54. These areas include the development of water power sites on navigable streams, 16 U.S.C. § 797(e) (1970), fresh water shipping, 46 U.S.C. § 883 (1970), production of atomic energy, 42 U.S.C. § 2133(d) (1970), mining on federal lands, communications, 47 U.S.C. § 319 (1970), and air transport, 49 U.S.C. §§ 1401, 1508 (1970).

55. See note 47 *supra* and accompanying text.

or Provincial, which are in force or may hereafter be established within the territories of the Party. . . ."⁵⁶ On the other hand, the treaty with Italy is clearly akin to the national treatment treaties in its provision that nationals, corporations and association of each party may enjoy in the other country the rights of promotion, incorporation, purchase, ownership and sale of shares.⁵⁷

The third classification of treaties, those concluded during our earlier years, does not seem to have guaranteed freedom of investment between the contracting parties.⁵⁸ In the absence of such a guarantee, attempts by individual states to regulate foreign investment would be enforceable and valid both under the treaty and under federal law.⁵⁹

Once the determination has been made that a given state regulation may stand because there is no overriding treaty obligation, a second major barrier must be crossed: whether or not state regulation of alien investments is a denial of the equal protection clause of the fourteenth amendment of the United States Constitution.⁶⁰

IV

THE EQUAL PROTECTION BARRIER

A. DEVELOPMENT OF THE DOCTRINE

Although in the frontier days of America's development, resident aliens possessed many of the rights and privileges that citizens enjoyed, attitudes toward the alien began to change as the country industrialized and urbanized.⁶¹ In 1889 the Supreme Court first used the equal protec-

56. Treaty of Friendship, Commerce and Navigation with Liberia, Aug. 8, 1938, art. XVIII, 54 Stat. 1739 (1941), T.S. No. 956.

57. Treaty of Friendship, Commerce and Navigation with Italy, Feb. 2, 1948, art. III, para. 2, 63 Stat. 2255 (1949), T.I.A.S. No. 1965 provides in part that "corporations and associations of either High Contracting Party . . . created or organized under the applicable laws and regulations within the territories of the other High Contracting Party, shall be permitted to engage in the aforementioned activities . . . upon terms no less favorable than those now or hereafter accorded to corporations and associations of such other High Contracting Party controlled by its own nationals, corporations and associations."

58. Treaties falling within this category are listed in note 50 *supra*.

59. See note 53 *supra*.

60. The fourteenth amendment to the United States Constitution provides in part: [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. CONST. amend. XIV, § 1.

61. Note, *Equal Protection Review of State Statutes Restricting Alien Employment*, 8 CORNELL INT'L L.J. 92 (1974); Comment, *Equal Protection and Supremacy Clause Limitations on State Legislation Restricting Aliens*, 1970 UTAH L. REV. 136; Note, 5 VAND. J. TRANSNAT'L L. 535 (1972). For an historical summary of discrimination resulting from the

tion clause on behalf of aliens and in the landmark case of *Yick Wo v. Hopkins*⁶² struck down state legislation restricting resident aliens in the area of employment. In a subsequent case, *Truax v. Raich*,⁶³ however, the Court, while striking down a discriminatory statute, nonetheless observed that:

The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to citizens as against both aliens and the citizens of other states.⁶⁴

Thus, some powers for state discriminatory regulations against aliens continued to exist until the Court's 1948 decision in *Takahashi v. Fish & Game Commission*,⁶⁵ which announced that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."⁶⁶ In 1971 the case of *Graham v. Richardson*⁶⁷ advanced even further the broad protection of resident aliens and declared that aliens were a discrete and insular minority, and thus any "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."⁶⁸ This protective rationale seems to be founded in sound policy considerations. Aliens in the United States are bound to give allegiance to the United States while in its boundaries,⁶⁹ must pay income taxes⁷⁰ and are subject to the laws of the United States.⁷¹ Yet the protection offered aliens in *Graham* applies only to those aliens within the territorial

arrivals of large numbers of Orientals in California, see Mr. Justice Murphy's concurring opinion in *Oyama v. California*, 332 U.S. 633, 650-73 (1947).

62. 118 U.S. 356 (1886).

63. 239 U.S. 33 (1915).

64. *Id.* at 39-40. For the rationale behind this holding, see the opinion by Justice Cardozo, then sitting on the New York Court of Appeals, in *People v. Crane*, 214 N.Y. 154, 161, 164, 108 N.E. 427, 429-30 (1915).

65. 334 U.S. 410 (1948).

66. *Id.* at 420. In *Takahashi* the Court invalidated a California statute prohibiting aliens from making a living by fishing in waters off its shores.

67. 403 U.S. 365 (1971).

68. *Id.* at 372. *Graham* held that a state could not constitutionally deny welfare benefits to aliens for reasons of noncitizenship. One commentator observed that "[t]he clear impact of *Graham* is that any state classification based on alienage is not only inherently suspect and must meet a compelling interest standard for its justification but is also probably beyond the state's legislative jurisdiction." Note, 5 N.Y.U.J. INT'L L. & POL. 393, 395 (1972).

69. *Eisler v. United States*, 170 F.2d 273, 279 (D.C. Cir. 1948). See also Comment, *Constitutional Protection of Aliens*, 40 TENN. L. REV. 235, 243 (1973).

70. Treas. Reg. § 1.1-1 (1956).

71. *Eisler v. United States*, 170 F.2d 273, 279 (D.C. Cir. 1948).

boundaries of the United States; the non-resident alien does not benefit from the constitutional protection.⁷²

B. STATE LAWS IN LIGHT OF EQUAL PROTECTION

Resident alien investors who find themselves statutorily barred from certain investment activities may wish to attack the state regulations by means of the equal protection clause. The wording of the statute, under equal protection analysis, may have a considerable impact on the success of such an attempt.

For instance, if an alien were stymied by the statutes of Nebraska or South Carolina,⁷³ where the provision simply regulates against "aliens," the statute would probably be invalidated under the equal protection clause since the use of the term "alien" would discriminate against a category protected by the *Graham* doctrine,⁷⁴ e.g., the resident alien. Similarly, statutes like the Texas statute which speak in terms of "citizens of the United States"⁷⁵ are also subject to attack because they too discriminate against a class of protected individuals. In such circumstances, a state must show a compelling state interest before it can perpetrate discriminatory regulations⁷⁶—a heavy burden to meet.

State statutes discriminating against alien enemies⁷⁷ would also be subject to equal protection challenge since even in time of national conflict resident aliens are protected by the Constitution. The state could argue that it has a "compelling interest" in such a circumstance, but regulation in this area seems more properly to belong to the control of the federal government in the determination of its foreign policy course, coincidentally preempting state regulation through the Supremacy Clause.⁷⁸

State regulations which expressly rest on grounds of non-residential status⁷⁹ avoid the constitutional pitfalls.

72. The Court recently stated that "[t]his protection extends, specifically, . . . to aliens who 'work for a living in the common occupations of the community,'" citing Justice Holmes in *Truax v. Raich*, 293 U.S. 33, 44 (1915). *Sugarman v. Dougall*, 413 U.S. 634, 641 (1973). See also *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950).

73. See note 18 *supra* and accompanying text.

74. See notes 67-68 *supra* and accompanying text.

75. See note 39 *supra*.

76. *Graham v. Richardson*, 403 U.S. 365 *passim*. See Comment, *Constitutional Protection of Aliens*, *supra* note 69, at 240-44. For a discussion of the requirements of a compelling state interest immediately prior to *Graham* see Note, *Protection of Alien Rights Under the Fourteenth Amendment*, 1970 DUKE L.J. 583. For an example of the application of *Graham* and *Sugarman* in the area of compelling interest, see *Jagnandan v. Giles*, 379 F. Supp. 1178, 1184-86 (N.D. Miss. 1974).

77. See notes 36-37 *supra* and accompanying text.

78. U.S. CONST. art. VI.

79. See notes 25-28 and 53 *supra* and accompanying text.

V

A PROPOSAL FOR CHANGE

If a state statute does not contravene a standing treaty and if the particular restriction presented by that statute does not violate the equal protection clause of the United States Constitution, then it may remain as an effective restriction to investment. In any event, among the fifty states there is a wide range of possible outcomes. By the very existence of such diversity, a coherent, defined policy towards international investment is impossible. There seems to be little wisdom in presenting the international financial community with this morass of varied but valid state regulations. The magnitude of the diplomatic and economic problem is such that a unified, liberal economic policy appears in the national interest.⁸⁰ At the very least, some mechanism should be developed or utilized to allow United States policy makers more flexibility in exercise of the national interest.

Outright preemption of states' rights in this area by Congress would pose political problems, yet the need for national control of investment policy presented extends to only a fairly narrow group of countries, *e.g.*, those countries which have no protective treaty agreements and yet provide much of the recent inflow of foreign investments. It is primarily the OPEC countries which fall into this classification.⁸¹

Given the limited yet vastly important nature of the problem, it is not unrealistic to suggest that the United States begin negotiations for new, more appropriate F.C.N. treaties with critical oil exporting nations. Where appropriate, national treatment provisions should be included.⁸² These treaty provisions should preclude state regulations at the most vital points and substitute for diversity a unified policy in the national interest. In this manner, onerous state regulations could be circum-

80. See Note, *An Evaluation of the Need for Further Statutory Controls on Foreign Direct Investment in the United States*, *supra* note 12, at 154-55, 181-87.

81. See note 5 *supra*. There are eleven OPEC countries of which five, Saudi Arabia, Kuwait, Libya, Abu Dhabi and Qatar, have 65 percent of proven reserves and provide 48 percent of the current output. At the same time, these nations have a population of only 12 million people and there are very limited possibilities of absorbing all this incoming capital on internal economic development. Furthermore, although these reserves have a potential of lasting at least 50 years, there are few other national resources in these countries. Chenery, *Restructuring the World Economy*, 53 FOREIGN AFF. 242, 249-53 (1975). Of these five, the United States does not maintain F.C.N. treaties with Kuwait, Libya, Qatar or Abu Dhabi. In addition, the treaty with Saudi Arabia was signed in 1933 and contains no provisions for investment. Provisional Agreement Between the United States of America And The Kingdom of Saudi Arabia In Regard To Diplomatic And Consular Representation, Juridical Protection, Commerce And Navigation, Nov. 7, 1933, 142 L.N.T.S. 329.

82. See notes 43-45 *supra* and accompanying text.

vented and the executive branch would be free to negotiate, on optimal terms, agreements allowing investment access to American markets.

CONCLUSION

A wide variety of statutes are currently in force in a number of the states which restrict, in one form or another, investment in the United States by noncitizens. Such legislation may well fail constitutional standards since it may contravene treaties, which are the supreme law of the land, or the equal protection clause of the United States Constitution. Regardless of whether these statutes are constitutionally valid, they do present a complex web of differing restrictions which will inevitably puzzle, and in some cases may deter, the foreign investor looking for investment opportunities in this country. Since the national economic interest would be furthered if this maze of regulations could be circumvented, this author proposes that the United States begin to negotiate new treaties of Friendship, Commerce, and Navigation with certain key investing nations, providing treaty protection from investment restrictions erected by the several states. In so doing, a national policy of unity in investment control would prevail over the present array of uncohesive diversity.

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