Foreign Investment in United States Energy and Mining: Crossroads for Policy

I. Introduction*

A new wave of foreign takeover attempts aimed at United States energy and mining concerns has sparked a provocative debate concerning the protection of America's natural resources. Both Congress and the executive branch are presently evaluating current laws and various proposals to restrict foreign investment in United States resource companies. The dilemma confronting lawmakers is whether the United States should continue its traditional policy of permitting unrestricted foreign investment in American resource enterprises or whether, in view of today's unstable resource market, promulgation of protectionist laws is appropriate.

Although foreign investment in the United States is not a new phenomenon, several recent headline-making takeovers and attempted takeovers of energy and mining companies have led to the questioning of the United States' longstanding "open door" policy on resource acquisitions by foreign concerns. The following transactions over the past two years by foreign corporations demonstrate the trend: (1) Societe Nationale Elf Aquitaine, ("Elf"), a company 67% owned by the French government, has acquired Texasgulf, Inc., a large United States resource corporation;[1] (2) Standard Oil of Ohio, which is 53% owned by British Petroleum, has recently bought Kennecott Corp., the largest United States copper producer;[2] (3) Arab investors have purchased a 22% share of Sunshine Mining Co., the operator of the largest American silver mine;[3] (4) Consolidated Gold Fields, Ltd., an English corporation with close

* All documents cited in this note which are not in the public domain or easy to obtain may be found at the offices of the *Columbia Journal of Environmental Law*.

1. This takeover was aided by Elf's cession of Texasgulf's Canadian assets to Canada Development Corporation (49% government owned) in exchange for Canada Development's 37% interest in Texasgulf. Wall Street Journal, Aug. 19, 1981, at 50, col. 1.

2. *Id.*

3. *Id.*

ties to South Africa, has acquired 25% of Newmont Mining Corp. and may acquire more;[4] and (5) the government-owned Kuwait National Petroleum Corp. has announced a friendly merger with Santa Fe International Corp., owner of $10 million of federal oil and gas leases.[5]

While the aforementioned transactions have not gone unnoticed, the main impetus for change has come as a result of actions taken by both the Canadian government and Canadian investors. The attempts by Seagram's, a Canadian company, to acquire two United States firms, first St. Joe Minerals Corp.[6] and then Conoco,[7] may have failed, but they demonstrated the fact that Canadian raiders[8] are heading south for investments even as the Canadian government is making it harder for foreign investments in energy at home. Other recent Canadian purchases include Nu-West Group's acquisition of 7.3% interest in Cities Service Co.,[9] and Hiram Walker Resources' $600 million investment in United States oil properties.[10] Meanwhile, American companies are distressed because of Canada's National Energy Program[11] which, along with the Foreign Investment Review Act,[12] has led to pressure on American energy companies to dispose of their Canadian holdings.

The effect and importance of the recent takeover trend cannot be easily defined. While it is clear that the United States is in no danger of losing control of its natural resources, it is also clear that foreign investment in energy and mining is increasing. Available statistics show that foreign direct investment in the United States petroleum industry increased 58% from 1978[13] to 1980.[14] In the midst of increasing foreign investment, however, the government still has no mechanism for adequately monitoring foreign direct investment in energy and mining.[15] Foreign investment is undoubt-

4. N.Y. Times, Oct. 26, 1981, at D2, col. 1.

5. N.Y. Times, Oct. 23, 1981, at D2, col. 1.

6. BUSINESS WEEK, July 13, 1981, at 21.

7. N.Y. Times, Oct. 23, 1981, at D2, col. 1.

8. "Raider" is a term commonly used to describe a company engaged in a hostile takeover of another company.

9. OIL & GAS J., June 29, 1981, at 63.

10. BUS. WK., July 13, 1981, at 21.

11. *See infra* notes 113-33 and accompanying text.

12. Can. Stat., 1973-74, c. 46, *as amended by* Can. Stat., 1976-77, c. 52, s. 128(2).

13. U.S. DEP'T OF ENERGY, SECRETARY'S ANNUAL REPORT TO CONGRESS at A2 (1980).

14. SURV. OF CURRENT BUS., Aug., 1981, at 47.

15. W. Emerson, U.S. House of Representatives, Statement Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs 7 (May 7, 1981) (hearings on H.R. 2826) [hereinafter cited as Emerson Statement].

edly a growing problem and one which the United States must not ignore.

This note will highlight and analyze current United States law and policy regarding foreign investment in domestic mining and energy (*i.e.*, oil and gas) operations, as well as foreign investment legislation presently pending before Congress. In addition, Canadian restrictions against foreign investments in energy and mining operations will be analyzed as possible prototypes for future United States legislation.

II. Current United States Laws

The United States has traditionally followed a policy of nonintervention with respect to foreign investment within its borders.[16] However, a general increase in foreign investment in recent years has prompted a reexamination of the current statutory regime.[17] During the last year, the pressure for protectionism in the energy and mining fields has significantly increased. It has come primarily from those companies that perceive themselves to be foreign takeover targets and those that believe their resource supplies may be threatened by foreign raiders.[18]

Laws restricting foreign investment in energy and mining in the United States today are few and their impact is negligible. The government's role in limiting foreign investment may be stated succinctly: "The policy of the U.S. has been generally one of noninterference in the flow of capital across international borders except where the national security or sensitive sectors of the economy may be compromised."[19]

A. *The Mineral Lands Leasing Act of 1920*

The most important legislative mechanism for control over alien ownership of mineral or oil and gas rights is the Mineral Lands

16. Letter from Donald Paul Hodel, Under Secretary of Interior, to Representative Manuel Lujan, Jr. (June 20, 1981), *reprinted in* 127 Cong. Rec. E3190 (daily ed. June 25, 1981).

17. *See* House Comm. on Government Operations, The Adequacy of the Federal Response to Foreign Investment in the United States, H.R. Rep. No. 96-1216, 96th Cong., 2nd Sess. (1980). *See also* Congressional Research Service, Library of Congress, A Congressional Handbook on U.S. Materials Import Dependency/Vulnerability, Report to the Subcomm. on Economic Stabilization of the House Comm. on Banking, Finance and Urban Affairs, 97th Cong., 1st Sess. (Comm. Print 1981).

18. Wall Street Journal, Aug. 19, 1981, at 48, col. 1.

19. Letter from Donald Paul Hodel, Under Secretary of Interior, to Representative Manuel Lujan, Jr. (June 20, 1981), *reprinted in* 127 Cong. Rec. E3190 (daily ed. June 25, 1981).

Leasing Act of 1920 ("MLLA").[20] This Act governs rights to oil, gas, coal, and minerals on federal lands. The federal lands covered include both "public lands" and lands the federal government has disposed of subject to its reserved right over mineral content.[21] While the MLLA does not cover national parks, Indian reservations or federally owned lands within incorporated cities and towns,[22] it does apply to most other federally owned land. The MLLA does not apply, however, to any privately held land in the United States.[23]

Section 1 of the MLLA, commonly known as the "nonreciprocal alien" provision,[24] provides that leases for mineral rights on lands covered thereby may be granted only:

> to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities. Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this [Act].[25]

This clause prevents citizens of countries which do not grant reciprocal privileges to United States citizens from owning *any* interest in a federal lease through direct or indirect means, including ownership or control of stock in any corporation holding such a lease.

The Bureau of Land Management ("BLM") of the Department of Interior is responsible for enforcing the MLLA[26] and has issued regulations[27] interpreting the reciprocity provision for mineral leases. The pertinent subsection provides that:

> Aliens may not acquire or hold any direct or indirect interest in leases, except that they may own or control stock in corporations

20. 30 U.S.C. §§ 22, 48, 49, 171, 181-94, 201-09, 211-14, 221, 223-29, 229a, 241, 251, 261-63, 352 (1976 & Supp. II 1978).

21. 30 U.S.C. § 182 (1976).

22. *Id. See Foreign Investment in United States Energy Resources*, [3 Monographs] ENERGY L. SERVICE (CALLAGHAN) No. 13A (Apr. 1979).

23. 30 U.S.C. § 181 (1976).

24. Fiske & Meagher, *Alien Ownership of Mineral Interests*, 24 ROCKY MTN. MIN. L. INST. 47, 64 (1978).

25. 30 U.S.C. § 181 (1976).

26. 30 U.S.C. § 189 (1976) gives the Secretary of the Interior authority to administer the MLLA. The Secretary has designated the BLM to regulate the leasing program.

27. *See, e.g.*, 43 C.F.R. §§ 3100, 3400, 3500 (1980).

> holding leases if the laws of their country do not deny similar or like privileges to citizens of the United States. If any *appreciable percentage* of the stock of a corporation is held by aliens who are citizens of a country denying similar or like privileges to U.S. citizens, its application will be denied.[28]

The first sentence of this subsection is more explicit than the Act, in that it disqualifies *any* alien interest in federal leases, direct or indirect, except through corporate stock holdings.[29] However, the "appreciable percentage rule" in the second sentence appears to differ from the criterion established by the language of the Act itself. The MLLA states that nonreciprocal aliens shall not "own any interest" in any lease by "stock ownership, stock holding, or stock control."[30] The regulations, on the other hand, provide that nonreciprocal aliens may not hold "any appreciable percentage" of stock in a corporation holding federal leases.

In order to reconcile the statute with the regulations, the term "appreciable percentage" has been interpreted to mean any amount which may be "recognized or perceived"[31] by the BLM through disclosure mechanisms described below. As little as one share of stock has been construed as an amount "recognized or perceived."[32] Thus, there appears to be no de minimus exception to the appreciable percentage rule. A single share owned by a nonreciprocal alien, if "recognized or perceived," can defeat any application for a mineral lease under the Act.

The Interior Department recognizes the literal character of the statute,[33] but has deliberately adopted a more pragmatic interpretation. The "appreciable percentage rule" apparently represents a compromise necessary to facilitate the practical enforcement of the reciprocal provisions. The Department obviously cannot make an exhaustive search of ownership or control of each share of stock held

28. 43 C.F.R. § 3102.1-1(a) (1980) (emphasis added).

29. Fiske & Meagher, *supra* note 24, at 67.

30. 30 U.S.C. § 181 (1976).

31. Memorandum from Sara Powell, Office of the Solicitor, U.S. Dep't of Interior, to Assistant Solicitor, Branch of Onshore Minerals, U.S. Dep't of Interior 4 (Aug. 10, 1978) [hereinafter cited as 1978 Memo].

32. Letter from William R. Murray, Jr., Acting Associate Solicitor, Division of Energy and Resources, U.S. Dep't of the Interior, to Jack Ellis, Shell Oil Company 1 (July 30, 1980) [hereinafter cited as Murray Letter].

33. Telephonic interview between William R. Murray, Jr., Acting Associate Solicitor, Division of Energy and Resources, U.S. Dep't of the Interior (Nov. 5, 1981). *See also* Fiske & Meagher, *supra* note 24, at 67-68.

in every corporation applying for a lease. Therefore, the use of the "appreciable percentage" language is merely a means to relieve the BLM of the burden of making more than a reasonable effort to determine whether nonreciprocal alien stock ownership or control exists.[34]

To facilitate the search for nonreciprocal alien control, the Department's regulations require that all corporations disclose the percentage of their stock owned by aliens.[35] If more than ten percent of its stock is owned or controlled by aliens, a corporation must disclose additional information, including the names, addresses and citizenship of each alien owner.[36] When alien holdings of ten percent or more are revealed, the BLM makes a more extensive inquiry into the nature of the alien holdings to determine if ownership by nonreciprocal aliens exists.[37]

In the final analysis, the "appreciable percentage rule" can be reconciled with the "any interest" language of the MLLA.[38] However, strict enforcement of the statutory language by the BLM is effectively limited by both the practical problems of strict enforcement and the disclosure regulations.[39]

The MLLA's ownership qualifications are not limited to the original issuance of the lease, but also apply to any subsequent assignment or transfer of the lease interest. The MLLA provides that "[d]eposits of . . . oil . . . gas, and lands containing such deposits. . . , shall be subject to *disposition* . . . to citizens of the United States . . . ."[40] The term "disposition" implies a continuing process. Final disposition does not occur when the lease is issued, but rather when leasable deposits are ultimately extracted.[41] Thus, MLLA ownership qualifications continue for the life of the lease.

34. Memorandum from Associate Solicitor, Division of Public Lands, U.S. Dep't of the Interior, to Assistant Secretary, Public Land Management, U.S. Dep't of the Interior 4 (Nov. 29, 1962).

35. 43 C.F.R. § 3502.4-1(a)(4) (1980).

36. 43 C.F.R. § 3502.4-1(a)(5) (1980).

37. 1978 Memo, *supra* note 31, at 4; Fiske & Meagher, *supra* note 24, at 69.

38. The appreciable percentage rule applies only to mineral leases. A similar provision was recently deleted from oil and gas regulations to eliminate the mistaken belief that a de minimus exception existed for nonreciprocal alien ownership of oil and gas leases. 43 C.F.R § 3102.1(b) (1980). *See also* Murray Letter, *supra* note 32, at 2.

39. *See* 43 C.F.R. §§ 3502.4-1(a)(4), 3502.4-1(a)(5) (1980).

40. 30 U.S.C. § 181 (1976) (emphasis added).

41. 1978 Memo, *supra* note 31, at 5.

Furthermore, the MLLA provides that "any oil or gas lease issued . . . may be assigned or subleased . . . to any person or persons qualified to own a lease under this chapter. . . ."[42] The regulations also state that an assignee or sublessee must be qualified to take and hold a lease.[43] Enforcement of this provision seems easier than enforcement of the provisions dealing with original issuances since all lease assignments must be aproved by the Secretary of the Interior[44] following a disclosure of all interested parties.[45]

B. *Reciprocity Under the MLLA*

The reciprocity provision of the MLLA is based on the granting of "similar or like privileges" by an alien country to United States citizens or corporations.[46] Thus, if the "laws, customs, or regulations" of a foreign country allow American citizens access to mineral interests, the citizens of that foreign country are eligible for reciprocal access to American federal lands. Since aliens may hold United States lease interests only through ownership of stock in corporations,[47] the Interior Department has decided that the "similar or like privileges" referred to are rights to acquire stock interests.[48] In determining reciprocity, then, the current focus is on whether a foreign country denies United States citizens the right to buy or hold stock in its domestic natural resource extraction corporations. The important question in this context, therefore, is how reciprocity, *i.e.*, the existence of "similar or like privileges," is actually to be measured.

The determination of reciprocity under the MLLA has never been governed by regulations or other formal procedures.[49] Reciprocity has generally been determined on a case-by-case basis as the need for consideration has arisen.[50] Requests for reciprocity deter-

42. 30 U.S.C. § 187a (1976).
43. 43 C.F.R. § 3106.1-2 (1980).
44. 30 U.S.C. §§ 187, 187a (1976 & Supp. II 1978).
45. 43 C.F.R. § 3106.1-4 (1980).
46. 30 U.S.C. § 181 (1976). *See supra* text accompanying note 25.
47. 43 C.F.R. § 3102.1(b) (1980).
48. 1978 Memo, *supra* note 31, at 2.
49. Memorandum from William R. Murray, Jr., Acting Associate Solicitor, Division of Energy and Resources, U.S. Dep't of the Interior, to Deputy Director (Senate), Congressional and Legislative Affairs, U.S. Dep't of the Interior, at 1 (April 21, 1981) [hereinafter cited as 1981 Memo].
50. *Id.*

minations have usually come from foreign investors trying to ensure that their investments will not be disallowed.[51]

A procedure for determining reciprocity has evolved from this case-by-case mode of analysis.[52] The BLM requests advice on a particular country from the State Department. The State Department responds with a summary of applicable foreign law and a recommendation on a finding of reciprocity. These recommendations have consistently been adopted by the BLM with little additional analysis of the foreign laws.[53] The legality of this informal procedure has never been tested.[54]

The BLM is in the process of establishing a standard procedure for reciprocity findings. There are two options currently under consideration: a "strict interpretation" standard[55] and a "comparison of the effects" standard.[56] The first option would consist of a strict interpretation of the relevant nation's laws, customs, and regulations to see if they allow an opportunity for foreign investment by American citizens identical to the foreign investment opportunity allowed under United States law. Only the laws, customs, and regulations which directly affect foreign investment in minerals would be considered. This would entail a simplified factual review aimed at ensuring that the letter of the "similar or like" statutory condition be fulfilled.[57]

Under the second option the BLM would compare the practical effects of a variety of the foreign nations' laws, customs, and regulations with the practical effects of similar United States laws. Under this standard, foreign laws, *e.g.*, tax and antitrust, which indirectly affect the ability of American citizens to invest in resources would be analyzed in evaluating reciprocity.[58] Under this "comparison of effects" standard, "similar or like" opportunity would be a key factor in ascertaining the existence of reciprocity. This standard would be more flexible than the "strict interpretation" option.[59]

51. C. Weller, Division of Energy and Mineral Resources, Bureau of Land Management, U.S. Dep't of the Interior, Options for Making Reciprocity Decisions Under the Authority of the Mineral Lands Leasing Act of 1920, at 1 (undated) (unpublished draft) [hereinafter cited as Draft].

52. 1981 Memo, *supra* note 49, at 1.

53. Draft, *supra* note 51, at 1.

54. *Id.*

55. *Id.* at 3.

56. *Id.* at 7.

57. *Id.* at 3-7.

58. *Id.* at 7.

59. *Id.*

Thus, BLM would have substantially greater latitude in making reciprocity decisions.

As of this writing, the Department of Interior has yet to adopt either option for determining reciprocity. The Department is currently conducting a review of foreign mineral law and will not make a decision on the reciprocity standard until that review is completed.[60] It is evident that the "comparison of effects" standard is superior to the "strict interpertation" standard because it encompasses a more comprehensive review of foreign nations' policies toward investment. Under the "strict interpretation" standard the foreign laws must be almost identical to United States laws in order to obtain reciprocity. Few countries could qualify under this rigid and mechanical standard.[61] However, countries could amend their laws to superficially comply with the reciprocity provision even though other laws or regulations would prevent American investments. To gain reciprocity under the "effects" standard, foreign laws need only provide the same investment opportunities for American citizens as the United States grants to aliens. Thus, the "effects" standard is more flexible and more realistic in determining reciprocity.

C. *Sanctions Under the MLLA*

The MLLA provides two sanctions, forfeiture or cancellation of leases, for failure to comply with the leasing provisions.[62] Treatment of nonreciprocal nations under the MLLA remains an unsettled issue. The controversy concerns two main questions: (1) whether these sanctions should be applied retroactively and (2) what sanctions should be applied against a nonreciprocal nation or its citizens.

The Department opposes the notion of applying sanctions to foreign investors who already hold MLLA leases when the nonreciprocal determination is made.[63] Thus citizens of nonreciprocal nations would be denied only the right to acquire future interests in MLLA leases. The Department supports its position by arguing that the MLLA was intended solely as a mechanism for retaliation against foreign governments, not for confiscation of foreign prop-

60. 1981 Memo, *supra* note 49, at 2.
61. Draft, *supra* note 51, at 3.
62. 30 U.S.C. § 188 (1976).
63. Draft, *supra* note 51, at 6.

erty. The Department reasons that foreign corporations should not be punished for a nonreciprocal determination made after they have already invested in the United States.[64]

There appear to be several significant flaws in this rationale. First, continued nonreciprocal alien ownership seems to violate the statutory language that such aliens may not own "any interest in any lease."[65] Neither the MLLA nor its regulations appear to leave room for an exception for interests acquired before a reciprocity determination. Secondly, foreign investors can request a reciprocity determination before acquiring an interest in a lease, and thus it is reasonable that their failure to make such a request should not excuse them from a subsequent determination. It is not unreasonable to expect foreign investors to be aware of the MLLA reciprocity provisions since they form the only real restriction on foreign investment and are known throughout the energy and mining industry. In fact, many of the reciprocity decisions to date have come as a result of requests by foreign corporations investing in the United States.

The Department of Interior is also considering the question of what sanctions should be applied to remedy foreign investment found not to satisfy the reciprocity condition. The legislative history clearly establishes that forfeiture of stock should be the consequence when an alien of a nonreciprocal country acquires an interest in a United States corporation holding an MLLA lease.[66] The alien must dispose of his stock interest as quickly as possible or be subject to forfeiture under the Act.[67]

The Department is currently reviewing three possible courses of action designed to complement this legislatively-mandated stock forfeiture.[68] These sanctions would apply directly to the leaseholding company in which the nonreciprocal aliens hold an interest. The three courses of action are:

1) ordering the MLLA leaseholding company to divest itself of interests held by nonreciprocal aliens;

2) ordering the MLLA leaseholding company to sell its United States leases; and

64. *Id.*

65. 30 U.S.C. § 181 (1976).

66. 58 CONG. REC. 7,528 (1919), *quoted in* 1978 Memo, *supra* note 31, at 6-7.

67. 30 U.S.C. § 188 (1976). This rule is subject to a limited exception for leases acquired by descent, will, judgment or decree. *Id.* § 184(g).

68. Draft, *supra* note 51, at 6.

3) giving notice to show cause why MLLA leases held by a company in which nonreciprocal aliens have an interest should not be cancelled.[69]

These three sanctions would not be mutually exclusive. As currently proposed, each could be used to deal with different situations. For instance,when the percentage of alien ownership is small and the leasehold interest is large, divestiture may be the best remedy since it might be hard to sell a large block of leases. However, when the nonreciprocal alien interest in the leaseholding corporation is large, divestiture of that interest may be unreasonable and unmanageable. In this case, ordering a sale of the leases would be the best sanction. Similarly, there are scenarios where cancellation may offer the best alternative. By providing for all three sanctions, the Department of Interior could take action to enforce the MLLA without imposing unduly harsh sanctions.

D. *Treatment of State-Owned Energy and Mining Industries*

In determining reciprocity, the Department of Interior has not yet adequately resolved the problem of the proper treatment of foreign states that have nationalized their energy or mineral resource industries. This issue first arose with respect to reciprocity afforded by Great Britain. The United Kingdom grants "similar or like privileges" with respect to ownership of oil and gas leases, but does not allow foreign ownership of coal leases due to the nationalization of the British coal industry.[70] The BLM preserved the reciprocity designation for Great Britain because the restriction on Americans owning British coal interests arose not because the laws of Great Britain deny American citizens the right to own stock in British corporations, but because of the British nationalization which prevents British corporations as well from owning coal interests.[71] Thus, discrimination appears to have been a factor in the Department's analysis; that is, Great Britain retained reciprocal status despite the contrast with investment opportunities in America, because it does not discriminate between foreign and domestic investors.

The question of nationalization has arisen again in light of the proposed Santa Fe acquisition by the Kuwait National Petroleum

69. *Id.*
70. 1978 Memo, *supra* note 31, at 2.
71. *Id.* at 3.

Company.[72] Kuwait applied for reciprocal status in May, 1981,[73] but, as of this writing, no formal decision has been made.

The Reagan Administration is "favorably inclined" to grant reciprocal status to Kuwait despite the fact that it does not offer "similar or like privileges" to American citizens.[74] The rationale behind this position is that granting reciprocal status to Kuwait would help encourage foreign investment.[75] But this stance directly contradicts the statutory mandate restricting alien investment where the alien country does not afford equal investment opportunities to U.S. citizens.[76] The Administration's position cannot be reconciled with the decision that would result from a proper determination using current standards or the procedures proposed by the BLM.[77] Granting reciprocal status to Kuwait in order to encourage foreign investment despite the fact that it does not offer "similar or like privileges" would render the MLLA virtually meaningless since any nation could request similar treatment. The Administration's position is even less defensible since it comes at a time when the Department of Interior is reviewing reciprocity standards and procedures and Congress is looking favorably toward protectionist legislation.[78]

E. *Other Restrictions on Foreign Investment*

1. The Outer Continental Shelf Lands Act

Another statute, the Outer Continental Shelf Lands Act,[79] also limits aliens' ability to acquire interests in federal lands. In this

72. *See supra* text accompanying note 5.

73. N.Y. Times, Oct. 23, 1981, at D2, col. 1.

74. *Id.*

75. *Id.*

76. 30 U.S.C. § 181 (1976).

77. Under current standards or proposed BLM procedures the reciprocity determination would start with an analysis of relevant Kuwaiti law to determine if they offer similar or like privileges. The Interior Department has found that Kuwait does not grant reciprocal privileges since their oil production industry must be completely state-owned. Thus, under a proper determination arrived at by comparing American and Kuwaiti law, Kuwait would be nonreciprocal. N.Y. Times, Nov. 5, 1981, at D2, col. 1.

78. If the Administration were to approve reciprocity for Kuwait, it would be hard to challenge since there are no clear standards for the determination and no mechanism for review of reciprocity decisions. Neither the current reciprocity procedure nor any specific reciprocity determination has ever been tested in court. Any plaintiff willing to test a reciprocity determination would find little precedent to help define "similar or like privileges." Only the past reciprocity determinations, derived without a well-defined standard or procedure, could guide the court.

79. 43 U.S.C. §§ 1331-1343 (1976 & Supp. II 1978).

instance, the limitation applies to leasehold interests in offshore energy or mineral deposits. Although the statute provides that the lease be granted to the highest bidder with no reference to citizenship,[80] the accompanying regulations provide that leases may be held only by United States citizens and nationals, aliens lawfully admitted for permanent residence, or any corporation organized under the laws of the United States or any state or territory.[81] Thus nonresident aliens and foreign corporations may not directly hold leases. However, they may effectively obtain a leasehold interest by establishing an American corporation to acquire the lease. The restrictions on outer continental shelf leasing are clearly, then, less restrictive than for land leases under the MLLA and are quite easily circumvented.

The aforementioned statutory restrictions apply only to federally owned land leased for mineral or oil extraction. The leases governed thereby represent only a small fraction of the energy and mineral producing land in the United States.[82] A majority of the mineral or energy rich land is in private hands.[83]

2. State Law Controls

The only restrictions on alien rights over private lands are those state laws regarding foreign ownership of real property. A few states restrict the right of nonresident aliens to own or transfer real property.[84] Other states, most notably Alaska and California, limit the right of aliens to acquire oil, gas, or mineral rights or leases on state lands.[85] However, a majority of states have no significant restrictions on foreign ownership of property or mineral rights and leases and the limitations imposed by the other states do not pose major barriers to foreign investment.

80. *Id.* § 1337(a).

81. 43 C.F.R. § 3316.1(b)(1980).

82. U.S. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 121-23 (1970).

83. *Id.*

84. *See, e.g.*, 1 KAN. STAT. ANN. § 59-511 (1976); WYO. STAT. ANN. § 34-15-101 (1977).

85. *See, e.g.*, ALASKA STAT. § 38.05.190(a)(4) (1962); CAL. PUB. RES. CODE § 6801 (West 1977); OR. REV. STAT. § 517.010 (1979); UTAH CODE ANN. § 40-1-13 (1953). Alaska and California expressly limit alien ownership of mineral rights on state lands to aliens whose countries afford reciprocal status to United States citizens. Oregon and Utah, on the other hand, simply prescribe procedures only for claims by United States citizens.

III. CANADIAN POLICY

Canada faces a much different problem than the United States in regard to protecting its natural resources. Instead of seeking to stabilize current levels of foreign investment, the government is trying to increase Canadian ownership of energy and mining resources by discouraging foreign investors. The two main vehicles for accomplishing "Canadianization" of the oil and gas industry are the Foreign Investment Review Act ("FIRA")[86] and the National Energy Program ("NEP").[87]

A. *The Foreign Investment Review Act*

The FIRA was enacted in 1973 to provide a mechanism to screen foreign direct investment proposals to determine whether those investments are likely to benefit Canada.[88] The Act established the Foreign Investment Review Agency which is responsible for assisting the Minister of Industry, Trade and Commerce in reviewing individual investment proposals and issuing guidelines to interpret the various provisions of the Act.[89] The FIRA review encompasses both foreign acquisitions of Canadian businesses as well as the establishment of new businesses in Canada by foreigners.[90] The FIRA is applicable in all areas and can be an effective tool for limiting undesirable foreign intrusions.

The review process entails a number of determinations. First, the Agency must determine whether the investor is eligible to invest or, instead, is a "non-eligible person."[91] Only "non-eligible persons" are subject to the review procedure. Next, the foreign investor may be exempt from the review if he establishes that the new business or acquisition is related to an existing business.[92] Finally, the review itself is based on an assessment of business criteria[93] to determine whether the investment is of "significant benefit" to Canada.[94] Investments that fail to meet these criteria are disallowed.

86. Can. Stat., 1973-74, c. 46, *as amended by* Can. Stat., 1976-77, c. 52, s. 128(2).

87. DEPARTMENT OF ENERGY, MINES AND RESOURCES, THE NATIONAL ENERGY PROGRAM (1980) [hereinafter cited as NEP].

88. FOREIGN INVESTMENT REVIEW AGENCY, FOREIGN INVESTMENT REVIEW ACT, BUSINESSMAN'S GUIDE 10 (undated) [hereinafter cited as BUSINESSMAN'S GUIDE].

89. *Id.* at 11.

90. *Id.* at 10.

91. *Id.* at 11.

92. *Id.*

93. *See infra* text accompanying note 102.

94. *Id.* at 10-12.

The Act designates the following as "non-eligible" persons: 1) individuals who are neither Canadian citizens nor permanent residents; 2) foreign governments and their agents; and 3) corporations, whether incorporated in Canada or elsewhere, that are controlled by non-eligible persons.[95] The key to whether the FIRA applies to a given corporation is control in fact, not majority control. Any corporation will be presumed to be non-eligible if a single non-eligible individual owns 5% or more of its voting shares. A corporation will also be presumed non-eligible if the shares owned by non-eligible individuals amount, in the aggregate, to 25% or more of the voting shares of a publicly traded corporation or 40% or more of the voting shares of a privately held corporation.[96] A corporation may rebut the presumption of foreign control by showing that actual control rests in Canadian hands.[97]

The FIRA does not regulate foreign investment in all Canadian businesses. Its scope is limited to "Canadian business enterprises"[98] whose gross assets exceed $C250,000 or whose gross revenues exceed $C3 million in the latest year.[99] The Act also applies to establishment of new businesses in Canada unless the new business is in a field related to an existing business controlled by the same foreign group.[100] A foreign investor wishing to establish a business in Canada must submit the investment to the Agency for a determination of whether the investment "is or is likely to be of significant

95. Can. Stat., 1973-74, c. 46, s. 3(1), *as amended by* Can. Stat., 1976-77, c. 52, s. 128(2).

96. Can. Stat., 1973-74, c. 46, s. 3(2).

97. BUSINESSMAN'S GUIDE, *supra* note 8, at 15-16.

98. A Canadian business enterprise is a business carried on by a Canadian citizen or resident or a Canadian or foreign corporation that maintains one or more establishments in Canada to which employees of the corporation in connection with the business ordinarily report for work. Can. Stat., 1973-74, c. 46, s. 3(1), *as amended by* Can. Stat., 1976-77, c. 52, s. 128(2).

99. Can. Stat., 1973-74, c. 46, s. 5(1)(c).

100. New activities may be exempt from FIRA review if they are related to an existing business. This related business exemption has been defined broadly to include: (1) vertical integration from an established business; (2) production of a product or service that may be directly substituted for the product or service of the existing business; (3) production of a product by essentially the same technology and production process; (4) production of a product which results from research and development in Canada; or (5) new business that has the same industrial classification as the existing business. Foreign Investment Review Agency, Guidelines Concerning Related Business, at Guideline 4 (undated), *reprinted in* Ministry of Supply and Services, Office Consolidation, Foreign Investment Review Act 77 (1980); BUSINESSMAN'S GUIDE, *supra* note 88, at 17.

benefit to Canada."[101] The following factors are taken into account in determining "significant benefit":

> a) the effect of the investment on the level and nature of economic activity in Canada, including the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada;
> b) the degree and significance of participation by Canadians in the business enterprise and in the industry sector to which the enterprise belongs;
> c) the effect on productivity, industrial efficiency, technological development, innovation and product variety in Canada;
> d) the effect on competition within any industry or industries in Canada; and
> e) the compatibility of the investment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by a province likely to be significantly affected by the proposed investment.[102]

The FIRA has an extraterritorial reach. Takeover of a foreign parent of a Canadian company might trigger the review process.[103] For instance, when Great Basins Petroleum Company and Phillips Petroleum, both United States corporations, tried to merge, Phillips retreated because the FIRA would have required them to sell half of Great Basin's Canadian oil and gas holdings to Canadians.[104] Clearly, the FIRA's impact may extend well beyond Canada's boundaries, thus affecting a multitude of American investments.

The Foreign Investment Review Agency has published guidelines concerning the acquisition of oil and gas rights.[105] These regulations distinguish between the exploration and development phases, on the one hand, and full-scale resource extraction on the other. Acquisition of oil and gas exploration rights under grants by way of permit, license, reservation, lease or otherwise is not an "acquisition of a business" within the meaning of the Act.[106] If development

101. Can. Stat., 1973-74, c. 46, s. 2(2).

102. BUSINESSMAN'S GUIDE, *supra* note 88, at 10-11.

103. *Id.* at 18.

104. Glynn, *Why U.S. Resource Companies Are So Steamed Up Over The National Energy Program*, CANADIAN BUS., Aug., 1981, at 22.

105. Foreign Investment Review Agency, Guidelines Concerning Acquisitions of Interests in Oil and Gas Rights (Jan. 5, 1976) [hereinafter cited as Guidelines], *reprinted in* Ministry of Supply and Services, Office Consolidation, Foreign Investment Review Act 71-72 (1980).

106. *Id.*; Olson, *Foreign Investment Restrictions on Canadian Energy Resources*, 14 INT'L LAW. 579, 589 (1980).

of exploration rights leads to oil or gas production it would probably be exempt under the FIRA's related business exemption.[107]

Acquisition of an interest in oil and gas producing properties, on the other hand, will be viewed as an acquisition of a Canadian business if the acquired property comprised all or substantially all of the producer's business or if the purchased interest can reasonably be expected to sustain a separate business.[108] The Act is applicable only when "substantially all of the property" of the producer has been acquired.[109] However, it is unclear whether "substantially all of the property" means one hundred percent, or something less.[110]

Although the FIRA seems to be a potent weapon for screening out unwanted foreign investment, until recently it has been essentially a "toothless tiger."[111] As of April, 1980, eighty-six percent of the applications for acquisition of control of businesses involving energy resource exploration or production were approved. Ninety-five percent of the requests for establishment of businesses in the energy resource field were also granted.[112] Nevertheless, the FIRA remains a significant source of legal authority for safeguarding Canada's natural resources from foreign control. By using the significant benefit test, the Act may effectively prohibit foreign purchases of oil and gas producing properites, and yet at the same time foster those transactions that lead to further exploration and development. Through the FIRA, Canada has put in place the scales for balancing the benefits of domestic ownership with the perceived need for foreign capital.

B. *The National Energy Program*

The NEP is a set of governmental decisions designed to produce a long-range energy policy for Canada. It embodies both legislative proposals and administrative decisions. The NEP is guided by three broad precepts of federal action: (1) to seek Canadian energy independence by controlling the nation's energy supplies; (2) to offer all Canadians an opportunity to participate in the energy

107. *See supra* text accompanying note 92.
108. Guidelines, *supra* note 105.
109. Can. Stat., 1973-74, c. 46, s. 3(3)(a)(i)(B).
110. Olson, *supra* note 106, at 590-91.
111. Glynn, *supra* note 104, at 22.
112. Olson, *supra* note 106, at 596-97.

industry; and (3) to establish a petroleum pricing and revenue regime that is fair to all Canadians.[113] The program deals with a wide range of Canadian energy issues including oil and natural gas pricing, energy taxes, exploration and development incentives, renewable energy resources, and conservation.

When the NEP was announced at the end of October, 1980, Canadian ownership of domestic oil and gas production amounted to only 28%.[114] Moreover, United States companies owned over half of Canada's oil and gas properties.[115] The goal of the NEP is to reach at least 50% Canadian ownership of oil and gas production by 1990.[116] Today, little more than a year after announcing this goal, Canadian ownership has already increased to 35%.[117]

The NEP contains several specific proposals that encourage Canadian ownership of energy resources. The current energy depletion allowance will be phased out and replaced by the "Petroleum Incentives Program."[118] This program will provide government incentive payments for exploration and development to Canadian-owned companies.[119] Enterprises making capital expenditures for oil and gas development anywhere in Canada will qualify for an incentive payment of 10% of the costs incurred if the company is at least 50% Canadian-owned and controlled.[120] Enterprises that are more than 75% Canadian-owned are eligible for 20% incentive payments for development costs.[121] The incentive payments for exploration costs are even higher, 35% for companies at least 75% Canadian-owned and (after 1983) 15% for 50% Canadian-owned operations.[122] The incentives are greater for exploration in the Canada Lands (federally owned land primarily located in the northern territories and offshore areas), ranging from 25 to 80% of costs depending on the level of Canadian ownership.[123] Furthermore, the government will reserve a 25% interest in all development of the Canada Lands and require a minimum 50% Canadian ownership

113. NEP, *supra* note 87, at 2.
114. N.Y. Times, Nov. 5, 1981, at D6, col. 1.
115. Glynn, *supra* note 104, at 22.
116. NEP. *supra* note 87, at 49.
117. N.Y. Times, Nov. 5, 1981, at D6, col. 1.
118. NEP, *supra* note 87, at 39.
119. N.Y. Times, Nov. 5, 1981, at D6, col. 1.
120. NEP, *supra* note 87, at 40.
121. *Id.*
122. *Id.* at 41.
123. *Id.* at 42.

of production (but not exploration or development) in the Canada Lands.[124]

In addition to these restrictions, Canada will use the newly established Petroleum Monitoring Agency to scrutinize the behavior of all foreign and domestic companies and determine eligibility for incentives under the Petroleum Incentives Program.[125] Canadian ownership will also be taken into account when the National Energy Board considers export licenses for energy products.[126] Finally, the new program will use the FIRA to vigorously enforce its investment criteria in the energy sector.[127]

Canada's NEP will continue to play a major role in reducing foreign interests and increasing the level of Canadian ownership of energy resources. Since the announcement of the program, Canadian companies have spent over $6 billion to acquire foreign-owned energy assets.[128] The Canadian government, through Petro-Canada and other government corporations, has pledged that it will continue its attempts to buy out large foreign-owned energy operations.[129] Canada is rapidly approaching its goal of 50% ownership by 1990.

The Canadian energy program has been attacked by United States companies who fear that their Canadian energy assets are threatened.[130] The exploration incentives make energy assets far less valuable to Americans and significantly more attractive to Canadians. Thus, the values of American holdings in Canada have been relatively depressed.[131] Consequently, there have been numerous Canadian takeovers at "fire sale" prices.[132] United States companies have claimed that the NEP "[r]etroactively affects investments developed by American companies when there was little or no Canadian capital available."[133]

The effect of the NEP, combined with the use of the FIRA in the energy sector, will be to permit foreign investment only where the government determines it will be necessary for facilitating Canada's

124. *Id.* at 47.
125. *Id.* at 51.
126. *Id.* at 50.
127. *Id.*
128. N.Y. Times, Nov. 5, 1981, at D6, col. 1.
129. NEP, *supra* note 87, at 49.
130. Wall Street Journal, May 26, 1981, at 12, col. 2; Glynn, *supra* note 104, at 22.
131. Wall Street Journal, May 26, 1981, at 12, col. 2.
132. Glynn, *supra* note 104, at 22.
133. N.Y. Times, Nov. 5, 1981, at D6, col. 1.

continuing energy development. At the same time, the program will increase Canadian control of the production of oil and gas where the capital and technological needs are not as great.

Overall, the Canadian approach toward limiting foreign investment in energy is moderate. It does not purport to eliminate all foreign investment in energy. Neither does it acquiesce to continuing foreign domination of its energy industry. Its goal is a rapid relaxation of foreign control over the key production sector through outright purchases of foreign-owned energy companies, while maintaining foreign investment in exploration and development. Most important for this analysis, Canada has a strong coherent national policy regarding the ownership of energy-producing and mineral assets. The United States, which lacks such a program, can benefit from the example of Canadian purposiveness and follow-through.

IV. LEGISLATIVE PROPOSALS AND POLICY ALTERNATIVES FOR THE UNITED STATES

In the previous sections this note has focused on current American and Canadian laws limiting foreign investment in domestic energy and mining concerns. In this section, various proposals for changing United States law in this area will be examined.

A. *The Need for a Unified Policy*

The discussion thus far has led to a basic question. Should the United States continue its current ad hoc policy on foreign investment or should it adopt a coherent policy to deal with foreign investment in its energy and mining industries? Adopting a definite policy does not necessarily imply restricting foreign investment, rather it means the government should be able to respond to current and future foreign investment problems consistently in concert with defined goals. The policy options range from continuation of a complete "open door" to foreign investment in energy and mining, to a complete ban on incoming investment in those sectors. A coherent policy should provide guidelines for enforcement of current laws as well as proposals for change to foster the policy goals embraced.

There can be little doubt that there is a need for a strong coherent policy regarding foreign investment in energy and mining, regardless of whether America's goal is to foster or restrict such investment. Current policy is not well thought out or enforced. Even the Department of Interior, reponsible for enforcing the investment restrictions, admits that enforcement of the MLLA has been "somewhat lax."[134] Some basic policy is needed to set direction in this area. The decision as to whether the United States should continue to allow the free flow of investment or whether it should impose limitations on certain investments or countries should be made only after examining the situation in depth.

Traditional American policy has been to neither promote nor discourage inward or outward capital flows and related commercial activities. The United States has encouraged the maximum feasible flow of international investment by minimizing government intervention in private investment and trying to promote similar open treatment by other governments.[135]

This general policy underlies current United States law, especially the MLLA, which seeks to promote open trade through the reciprocity provisions. However, by itself the MLLA does not provide an adequate framework for a comprehensive energy and minerals policy. As was previously indicated, the regulations and definitions surrounding the Act are confusing and inconsistent. Under current reciprocity definitions, alien corporations may be able to purchase interests in United States corporations with federal leases even though their country's energy and mining industries are state-owned. Under current free trade policy and reciprocity provisions, even the Soviet Union or other socialist nations could invest in American energy or mineral resources and indirectly own federal leases because of the lack of restrictions and confusing policy of the MLLA.

Since the need for a unified policy is evident, the crucial question is: what should that policy be? The key factor in determining this policy should be a balancing of the advantages of America's traditional free trade policy against the advantages of protecting United States natural resources and retaining American control of them. There are appealing arguments on both sides. The Reagan Administration appears to favor continuing the current open door pol-

134. Draft, *supra* note 51, at 1.

135. W. Pendley, Deputy Assistant Secretary for Energy and Minerals, U.S. Dep't of Interior, Statement Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs 3 (May 7, 1981) (hearings on H.R. 2826) [hereinafter cited as Pendley Statement].

icy.[136] Congress, however, seems to be inclined toward a protectionist stance.[137]

The United States benefits from trying to maintain a free trade position worldwide as it is the largest single investor in foreign countries[138] and the largest investor in foreign mineral development.[139] Its outgoing foreign investment in minerals outweighs incoming foreign investment. American direct investment in foreign petroleum stood at $46.9 billion in 1980[140] while foreign direct investment in American petroleum amounted to $12.25 billion.[141] The United States would obviously suffer if restrictions on foreign investment in American resources led to the enactment of similar restrictions abroad.

Though possible retaliation is an important factor, the United States cannot ignore the number of developed[142] and developing[143] nations that have already moved in the direction of restricting or at least reviewing foreign investment in their natural resource industries. By implication, concern over foreign domination of key resources should therefore be seen as legitimate even in the United States.[144] Foreign investors, especially foreign governments, may have interests inconsistent with American policy and may be unwilling to make the large capital investments normally associated with developing energy or mining projects. By permitting virtually unlimited access to its resources, the United States not only hinders

136. J. McCarthy, Acting Assistant Secretary for International Finance and Development, U.S. State Dep't, Statement Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs 8-10 (May 7, 1981) (hearings on H.R. 2826) [hereinafter cited as McCarthy Statement]; Pendley Statement, *supra* note 135, at 4-5.

137. *See infra* text accompanying notes 146-66.

138. McCarthy Statement, *supra* note 136, at 7.

139. Pendley Statement, *supra* note 135, at 4.

140. SURV. OF CURRENT BUS., Aug., 1981, at 32.

141. *Id.* at 47.

142. For example Australia, Canada, France and Japan all restrict foreign investment in energy or mining. *Reciprocity in Investment: Hearings on H.R. 7791 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 145-70 (1980) (statement of Vincent D. Travaglini, Acting Deputy Assistant Secretary for Finance, Investment and Services, International Trade Administration).

143. Such developing nations as Mexico, Philippines, Brazil and India restrict investment in their natural resource industries. *Id.*

144. For example, Elf's purchase of Texasgulf will give it control over a major American sulphur and phosphate producer. K. Burns, International Minerals & Chemical Corp., Statement Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs (July 16, 1981) (hearings on H.R. 2826).

access by domestic investors, but also creates a danger of losing control of those resources to foreign corporations which are subject to potential pressure to manage those resources for their own governments' ultimate benefit.[145]

The United States should strive to establish a policy approach in the middle ground between unlimited alien access to resources and a total bar on foreign investment in energy and mining. In forming this new policy on investment, the United States must: (1) balance the possible benefits and detriments of foreign investment; (2) recognize reciprocity in allowing foreign investment, thereby encouraging other nations to open their doors to American investment; and (3) recognize the political and economic importance of its natural resources. By using these three policy goals as a foundation, we can attempt to formulate some policy options. First, however, it is helpful to look at some of the congressional proposals offered to date.

B. *Legislative Proposals*

In recent years, Congress has become increasingly sensitive to the problems of foreign investment in the United States.[146] Three bills currently before the Ninety-Seventh Congress deal directly with foreign investment in energy and mining. These proposals show that Congress is aware of the possible problem of increasing foreign investment and that it may be willing to act to tighten restrictions.

H.R. 4186[147] proposes to amend the MLLA to provide for a moratorium on foreign purchases of United States mineral resource corporations and a review of mineral leasing policy. The bill, which has passed the House Subcommittee on Mines and Mining[148] and is awaiting action by the House Committee on Interior and Insular Affairs, is a moderate response to the current wave of foreign acquisitions. It would provide for a nine-month moratorium on the purchase by any foreigner of more than five percent of the stock of any "United States mineral resource corporation."[149] The bill defines a United States mineral resource corporation as any corporation organized under United States or state law which has an

145. Emerson Statement, *supra* note 15, at 4.
146. *See supra* note 17.
147. H.R. 4186, 97th Cong., 1st Sess. (1981).
148. Wall Street Journal, Aug. 19, 1981, at 48, col. 1.
149. H.R. 4186, 97th Cong., 1st Sess. § 3 (1981).

"aggregate market value" of more than $50 million and a "net worth" exceeding $100 million.[150] Violation of this moratorium would void all leases held under the MLLA or the Outer Continental Shelf Act by the corporation and could render the violator ineligible to hold such leases for ten years.[151]

During the moratorium period, the Secretary of Interior would be directed to undertake a comprehensive study of indirect foreign investment in mineral resources on federal lands.[152] The following factors would be considered and evaluated in the study:

> (1) the effects on the United States economy and United States mineral policy of the acquisition and control of United States mineral resources on lands owned by the United States by foreign persons;
> (2) the relationship between mineral resources on lands owned by the United States and whether indirect foreign ownership of such mineral resources may adversely affect United States national security;
> (3) the consequences of the acquisition and control of mineral resources on lands owned by the United States by foreign persons on the conduct of United States foreign policy; and
> (4) the degree to which foreign countries permit nonnational ownership and control of their mineral resources and grant reciprocal privileges.[153]

The review embodied in H.R. 4186 would not be a continuing process but rather would consist of a one-time survey of the amount of foreign investment and its effects. This review process would be but a stepping stone for the enunciation of a long-term policy on foreign investment in the energy and mining sectors. The nine-month moratorium is designed to give the Interior Department time to carry out the study and formulate policy recommendations. Thus, H.R. 4186 is merely designed to temporarily freeze the current level of investment and will not by itself change the procedures for obtaining leases under the MLLA or make it more difficult for foreigners to invest in American resource companies.

The second bill, S. 1429,[154] is more of a direct response to Canadian takeover attempts. This bill seeks to put foreign investors on a

150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. S. 1429, 97th Cong., 1st Sess. (1981), 127 CONG. REC. S7107 (daily ed. June 25, 1981). The companion House bill, introduced by Representatives Whittaker and Synar, is H.R. 4033, 97th Cong., 1st Sess. (1981).

par with domestic corporations by extending margin regulations to foreign investors.[155] As the law now stands, foreign corporations may borrow all the funds necessary to buy American securities because margin regulations do not apply to foreign investors using foreign financing.[156] Under S. 1429, margin regulations would apply to foreign borrowers, limiting the amount of loans to 50% of the market value of their stock purchases.[157] This measure would close a loophole in the securities laws, one which has given foreign investors an advantage over their American counterparts in financing stock purchases and takeovers. This margin provision would effect a modest non-protectionist change designed to eliminate a foreign advantage.

Another aspect of S. 1429, the bill's moratorium provision, is very similar to that of H.R. 4186, with one major qualification. S. 1429 would impose a nine-month moratorium on purchases of more than five percent of the securities of any United States energy resource corporation.[158] This moratorium, however, would be applicable only to purchases of securities by Canadian citizens.[159] Like H.R. 4186, S. 1429 would provide for a study on direct and indirect investment in American energy resource corporations,[160] but S. 1429 puts particular emphasis on Canadian investment. By singling out Canada, this legislation (whether or not it becomes law) is designed to send a message to the Canadians: in effect, it would warn that Canada cannot tighten its controls on foreign investment in energy and still expect the United States to welcome unrestricted Canadian investment. Thus, S. 1429 would be, in part, a direct congressional response to Canada's increasingly restrictive energy policy.

155. S. 1429 would amend section 7 of the Securities Exchange Act of 1934, 15 U.S.C. § 78g (1976).

156. N. Kassenbaum, U.S. Senate, Statement Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs 3 (July 8, 1980) (hearings on S. 1429).

157. *Id.* at 2-3. Regulation U, 12 C.F.R. § 221 (1980), requires that persons borrowing funds to purchase securities offer collateral equal to twice the market value of the securities. Thus, if the securities themselves are the collateral, the loan cannot exceed 50% of the market value of the securities.

158. A United States energy resource enterprise is defined as a company with over $100,000,000 in assets which engages in (1) the exploration for, or development, production, or transmission of, crude oil or natural gas, (2) the refining of petroleum products, or (3) the development of alternative fuels. S. 1429, 97th Cong. 1st Sess. § 204(3) (1981). Note that this would not be applied to mineral resource corporations.

159. *Id.* § 202(a).

160. *Id.* § 203.

Unfortunately, neither H.R. 4186 nor S. 1429 would provide the framework for implementing the policy goals suggested above. Neither bill would greatly clarify or invigorate United States regulatory policy. Granted, the review of foreign investment and imposition of margin requirements are necessary. However, beyond these small steps, the two bills would do little to establish a coherent policy on foreign investment in energy and mining. At best, these bills could serve as useful additions to one or more of the more comprehensive policy options discussed below.

In contrast to the stress in the aforementioned bills on temporary moratoriums, studies, and minor changes in current laws, H.R. 3310[161] would attempt to provide a sweeping solution to the problems of foreign investment in certain critical industries. H.R. 3310 would establish a National Foreign Investment Control Commission to prohibit or restrict foreign ownership or control of domestic corporations or industries in areas deemed to be vital to economic security or national defense.[162] The Commission[163] would be empowered to prohibit any person who is not a United States citizen, or any corporation which is owned or controlled by aliens, from acquiring, directly or indirectly, an interest in a corporation which is substantially involved in any area essential to national defense or economic security. Such areas could include petroleum, hydrocarbons and other strategic minerals and resources.[164] The Commission would determine what strategic minerals and other resources or industries are essential. Aliens would be barred from the purchase of a controlling interest[165] in a corporation involved in these essential areas. While the Commission would apparently have discretion in determining what fields are important to national defense or economic security, once this determination was made, the Commission would be unable to review individual transactions in these areas since a blanket prohibition is contemplated. Furthermore, the legislation would be retroactive so that corporations involved in security areas would be required to divest themselves of

161. H.R. 3310, 97th Cong., 1st Sess. (1981).

162. *Id.* §§ 3,4.

163. The Commission would consist of seven members: the Secretaries (or their delegates) of State, Defense, Labor, Commerce, Treasury and Energy, and the Chairman of the Council of Economic Advisors (or his delegate). *Id.* § 5(a).

164. *Id.* § 4.

165. Effective management control would suffice, without 50% stock ownership. *Id.*

foreign ownership if the Commission deemed the corporation to be under foreign control.[166]

H.R. 3310 would result in a radical change in American policy on foreign investment. It would effectively foreclose foreign investment in key sectors of the economy. The approach is inflexible, banning foreign control of corporations involved in natural resources or other strategic areas despite the possible beneficial effects of the individual investment or of foreign investment as a whole. H.R. 3310 is obviously the most extreme measure of the three discussed and as such has the least chance of drawing much support for passage. Nonetheless, it is useful to examine it as an outer boundary on possible policy alternatives.

These congressional proposals are inadequate vehicles for establishing a new moderate policy toward foreign investment. While H.R. 3310 would tilt too far toward preclusion of such investment in energy and mining, H.R. 4186 and S. 1429 would fail to provide the requisite control and policy direction at the outset. Accordingly, the remainder of this note will focus on two further policy options which could provide the United States with a more coherent and flexible energy and minerals policy. The first option is based on Canada's FIRA, with a slightly different focus to meet America's needs. The second option expands on the MLLA to provide a more effective reciprocity mechanism.

C. *New Policy Options*

Canada has apparently succeeded in reducing foreign investment without shutting it off by developing a flexible, well-integrated program. The key to that program has been setting certain policy goals, *e.g.*, fifty percent Canadian ownership, and formulating programs to encourage private business to help government achieve these goals.

The United States could adopt an approach similar to Canada's by establishing an agency, patterned after the Foreign Investment Review Agency, to review all foreign investments in the energy and mining sectors. The FIRA was meant to foster greater Canadian ownership of its own industry and resources. The goal of an American counterpart would be to curb foreign investment in energy and mining. The key to success should be adopting a moderate ap-

166. *Id.* § 8.

proach like that taken by the Canadians, concentrating on the possible benefits of foreign investment when reviewing individual applications. The greatest advantage of the review mechanism is that it can limit foreign involvement while leaving room for foreign capital to flow into projects when and where it is needed.

Because of the slightly different emphasis of an American review agency, different factors would be considered in a review. The following questions might be relevant:

1) Is it likely that the foreign owners will develop United States resources in substantially the same manner as would American investors? Will they be subject to the dictates of a free market in the same manner? Do the foreign investors have the financial strength to develop energy and mineral resources in a timely and beneficial fashion?

2) Have the foreign investors or their governments in the past acted contrary to United States national security or foreign policy objectives?

3) Would the foreign company divert resources from American markets? Would foreign ownership of an American resource company enhance, perhaps indirectly, a foreign cartel?

4) Does the foreign investor's country provide opportunity for American investment in their natural resources? Does that government welcome United States investment, or does it prohibit or discriminate against it?[167]

While somewhat similar to the "significant benefit" test, these factors would place greater emphasis on insuring reciprocity, maintaining free trade, and acting consistently with American foreign and economic policy. The suggested tests would ensure that reciprocity is part of the review decision, thus encouraging other nations to grant like privileges. These criteria would also encourage projects which would benefit the United States and promote development of its natural resources in accordance with energy, environmental and other considerations. Finally, this review would enable the United States to protect against the diversion of its natural resources by politically or economically hostile forces.

In summary, the review approach seems to be a viable method to help control foreign investment in energy and mining.

167. C. Carlisle, St. Joe Minerals Corp., Statement Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs 2-3 (July 16, 1981) (hearings on H.R. 2826).

The major drawback of this approach lies in its probable lack of political appeal to Congress and the American business community. A related issue is whether, once adopted, this approach would lead the United States toward excessive restrictions on incoming foreign investment.

Such a novel approach would probably be looked on skeptically in Congress. Although Congress has become more receptive to protectionism, it is far from clear that the traditional consensus for free trade has evaporated. Within the business community, a split is predictable: those companies that would be protected by such a review would be inclined to favor it; other corporations, with significant foreign investments, might oppose it for fear of retaliation by foreign governments. Perhaps a more serious worry is the risk of setting in motion a protectionist juggernaut: both in the United States and abroad, enactment of a limited set of additional controls might prompt a clamor for more, across industrial sectors and national boundaries.

The MLLA needs some major changes if it is to continue to function as the cornerstone of our policy toward foreign investment in oil, gas and mining. If the review option discussed above is discarded, an effective option would be to apply the reciprocity provisions of the MLLA to all mining and energy projects whether on public or private land. This would encourage free trade by prompting other countries to open their doors in order to get reciprocal privileges. Additionally, this change would provide a stronger incentive for "nonreciprocal" nationals to invest here, at the same time preserving opportunities for other free trade countries. Nonreciprocal nations would be effectively barred from investments in these sectors while other nations would be subject to the same minimal restrictions as are currently in force.

A major weakness that would have to be corrected is the lack of a standard for determining reciprocity. The "comparison of effects" standard being considered by the Department of Interior is a flexible, objective standard.[168] The enforcement provisions suggested will also help make the MLLA more effective.[169] A periodic review of countries on the reciprocal list to ensure changes in their reciprocal status would also be necessary. Furthermore, the Department should seek clarification on the status of countries with nationalized

168. *See supra* text accompanying notes 56, 58-59.
169. *See supra* text accompanying notes 68-69.

resource industries. Continuing a policy of reciprocity for these countries may lead to later problems of increasing investment from undesirable sources. Other minor changes such as equalizing margin requirements and providing a continuing study of foreign investment in energy and mining would enhance the desirability of this option.

A major drawback to extending the MLLA reciprocity provisions to private land would be the need for a major bureaucracy to enforce the new regulations. The regulations themselves would have to be more explicit and, therefore, much more complex. Private property owners would probably oppose a plan that would place limits on their ability to sell or lease their land to whomever they please. Indeed, the regulations would require careful drafting to avoid built-in risks of fifth amendment "takings" problems.[170]

V. CONCLUSION

The recent wave of foreign takeover attempts has stimulated American awareness of foreign investment in domestic energy and mining companies. In light of recent developments, this note has analyzed current United States law and policy in this area, possible legislative alternatives being considered by Congress, and an approach recently adopted in Canada.

American policy has long favored free trade, and to this end the United States government has imposed only minor ad hoc limitations on energy and mining investment. The main conceptual basis for these controls is found in the reciprocity provisions of the Mineral Lands Leasing Act of 1920. Nevertheless, because of the radical shift in the world's balance of economic power, it may now be appropriate for the government to seriously confront the ramifications of increasing foreign investment in American energy and mining operations. Congress and the executive branch could take steps to strengthen the sole existing limitation on investment, the MLLA. Perhaps an entirely new philosophy, such as the sternly protectionist impulse underlying H.R. 3310, will be deemed appropriate to protect American resources. On the other hand, Congress and American business might profit more from emulation of the Canadian model of balanced review, simultaneously embracing reduced foreign influence in production and lures for energy exploration and development capital.

170. *See generally* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

In sum, America needs to plan coherently for the future ownership and use of its natural resources. An important part of this plan must be control of foreign investment in energy and mining resources. The options recommended in this note need not be implemented immediately, but they should be studied now. Either of these options, the review or the extension of the MLLA, can be implemented only if the political climate is right. Either would entail significant new restrictions on foreign investment, which the United States has heretofore been reluctant to invoke. However, if current investment trends continue, the United States should adopt reforms on the order of those prescribed here, in order to meet the nation's energy requirements and to provide better for its overall security.

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