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IS GEORGIA ON THEIR MINDS?—SOME LEGAL ASPECTS OF INVESTMENT AND TRADE BY FOREIGN BUSINESS ENTERPRISES*

By GABRIEL M. WILNER**

and

TERRY K. SMITH***

I. INTRODUCTION

Traveling north on I-75 through Macon, Georgia, a motorist will pass a billboard, looking much like a zipper, which boasts the name of the world's largest zipper manufacturer. What the sign does not mention is that the company, YKK Zipper Company, Inc., is a subsidiary of Yoshida Kogyo K.K. which is headquartered in Tokyo. This business entity is just one of the many in a growing number of businesses which are presently operating within Georgia and which are established in, or have legal connections with, business entities outside the United States.¹

With the increasing interdependence among nations in a multitude of areas and the desire and need for new and expanded markets for a variety of goods and services, investment and trade among countries have increased.² The term "foreign investment," as used in this article, encompasses any type of investment made in Georgia by a person, natural or legal, who is of another nationality or is established in another country.

As such, foreign investment can be any type of business transaction of a somewhat permanent nature, as opposed to a usual commercial

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1. The International Division of the Georgia Department of Community Development compiles a list of business entities within Georgia that have legal ties with businesses located outside the United States. As of November 1975, the list included 174 names, 37 of which were connected with companies in Great Britain and 35 of which were linked with Japanese firms. GEORGIA DEPARTMENT OF COMMUNITY DEVELOPMENT, INTERNATIONAL COMPANIES WITH FACILITIES IN GEORGIA (November, 1975) [hereinafter cited as INT'L Co.].

2. In regard to investment, see G. REUBER, H. CROOKELL, M. EMERSON, G. GALLAIS-HAMONNO, PRIVATE FOREIGN INVESTMENT IN DEVELOPMENT 1-7 (1973) and STATISTICAL COMPENDIA STAFF, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 778-79 (1974). In regard to trade, see Dep't of Economic and Social Affairs, [1973] 27 *Monthly Bulletin of Statistics* xi, U.N. Doc. ST/STAT/SER.Q./12 (Dec. 1973); *id.* [1974] 28 *Monthly Bulletin of Statistics* xi, U.N. Doc. ST/ESA/STAT/SER.Q./24 (Dec. 1974); *id.* [1975] 29 *Monthly Bulletin of Statistics* xi, U.N. Doc. ST/ESA/STAT/SER.Q./33 (Sept. 1975), and Dep't of Economic and Social Affairs, *Tables*, [1973] Y.B. INT'L TRADE STAT. 14, 22, 30, U.N. DOC. ST/STAT/SER.G/22 (1973).

transaction which would require very little involvement by the foreign entity in the business environment of Georgia. Examples of foreign investment include the capital of a German business invested in the Greenbriar Shopping Center in Atlanta and capital from a Japanese source invested in a new hotel in Atlanta. Additionally, several foreign corporations have either established manufacturing plants³ or sales offices,⁴ or maintain warehouse facilities within the state.⁵ Services such as public warehousing, investment management, and consultation in engineering, corporate development, and marketing are also provided by companies established in, or linked to, enterprises in other countries,⁶ but operating within Georgia.

A type of foreign investment is the joint venture, one business arrangement of at least two persons or legal entities which pool their capital or other assets in order to achieve a profit.⁷ There are currently several joint ventures in Georgia involving Georgian businesses and foreign investors.⁸

In the area of trade, Mitsubishi International Corp. is one of several trading companies⁹ in Georgia which are involved with importing and exporting goods. For example, Mitsubishi exports commodities in large quantities and imports Japanese steel. Expo '75, a sales office in Norcross, handles exports and imports of clothing and jewelry from Asia.

The importance of this investment and trade to Georgia is primarily felt in the economic life of the state, including employment. It is only logical that business investments and transactions help broaden the tax bases of local communities and the State, as well as providing more jobs in manufacturing, agricultural, and service-oriented areas.

3. Air Liquide of Paris has a manufacturing plant in Savannah, Liquid Air, Inc., which produces liquid gases. INT'L Co., *supra* note 1 at 5.

4. Sabena Belgian World Airways in Atlanta serves as a sales office for Sabena Belgian World Airways of Brussels. *Id.* at 2.

5. Dress patterns are stored in Smyrna by Burda Patterns, Inc., a subsidiary of Verlag Aenne Burda of Offenburg, the Federal Republic of Germany. *Id.* at 5.

6. See generally INT'L Co., *supra* note 1.

7. In Georgia, the courts have recognized a joint venture as occurring "when two or more combine their property or labor, or both, in a joint undertaking for profit, with rights of mutual control, provided the arrangement does not establish a partnership." *Atlanta Metallic Casket Co. v. Southeastern Wholesale Furn. Co.*, 82 Ga. App. 353, 358, 61 S.E.2d 196, 199 (1950). This definition has been adopted in other cases, e.g., *Helms v. Young*, 130 Ga. App. 344, 203 S.E.2d 253 (1973) and *Gainesville Carpet Mart v. First Fed. Sav. & Loan Ass'n*, 121 Ga. App. 450, 174 S.E.2d 230 (1970).

8. For example, there have been joint ventures established between Australian and Georgia businesses in order to develop commercial real estate (Hooker Barnes Corporation), between French and American interests to produce cement (Citadel Cement Corporation), and between British and American corporations to produce pens and lighters (Wilkinson Sword, Inc.). INT'L Co., *supra* note 1 at 1, 4, 13.

9. Another trading company, Borneo Sumatra Trading Co., Inc., is located in Savannah and uses those port facilities extensively in its importation of building materials which are resold in the United States.

Each foreign investment was made for particular reasons, of course. Why choose Georgia? Quite obviously there are characteristics and opportunities within Georgia which are attractive to foreign businesses and individuals that wish to invest or trade. When looking at the rosters of international businesses established in other states¹⁰ it is equally obvious that Georgia in a number of cases has not been as alluring as other states.¹¹

In determining what the climate in Georgia has been and will be for particular types of investment and trade, some questions must be raised. Does Georgia want certain types of business? Does the State want to encourage the growth of foreign investment and trade? Finally, what policies could Georgia follow in the future should it decide that it needs further foreign investment and trade?

This article will focus on the legal environment within the State in regard to foreign investment and trade. In making this survey it is also necessary to note briefly the full context in which foreign investment and trade is accomplished. The State cannot act or fail to act in areas dictated by the economic, political, and social philosophies held by its citizens. Likewise, the State cannot act in areas in which the Federal Government has acted pursuant to the United States Constitution.^{11.1} Among the areas in which the State is prohibited or preempted from acting are foreign affairs, especially in regard to concluding agreements between itself and a foreign sovereign,¹² immigration,¹³ customs¹⁴ and other trade barriers, and exchange controls.¹⁵ The Due Process and Equal Protection Clauses of the fourteenth amendment of the Constitution are other powerful limitations

10. For example, South Carolina has 16 textile plants which by December 1975 had invested \$51,555,000 and 15 chemical manufacturing plants which by that same date had invested \$978,000. PLANNING AND RESEARCH DIVISION, S. C. ST. DEV. BD., VALUE OF FOREIGN MANUFACTURING INVESTMENT BY INDUSTRY (Dec. 1975); *id.* FOREIGN MANUFACTURING FIRMS INVESTING IN SOUTH CAROLINA BY INDUSTRY (Jan. 1976).

11. For example, at one point Michelin was considering Georgia as a location for its manufacturing plant. The fact that Georgia at that time lacked freeport legislation was a factor in the company's decision to locate the plant in South Carolina.

11.1. See Maier, *Cooperative Federalism in International Trade: Its Constitutional Parameters*, 27 MERCER L. REV. 391, 399-417 (1976) [hereinafter cited as Maier].

12. U.S. CONST. art. I, §10. (states may not enter any treaty, alliance, or confederation).

13. See U.S. CONST. art. I, §8 (Congress has the power to establish uniform naturalization laws) in conjunction with U.S. CONST. amend. XIV (due process and equal protection are to be accorded to all *persons* by states within the United States).

14. U.S. CONST. art. I, §§8, 10 (Congress has the power to lay and collect taxes, duties, imposts, and excises which are to be uniform throughout the United States; without Congressional approval, no state may lay any imposts or duties on imports or exports, except for purposes of executing inspection laws).

15. For example, direct controls were placed on foreign investment by persons subject to the jurisdiction of the United States during the late 1960's pursuant to the Trading with the Enemy Act, 50 U.S.C.A. App. §5(b) (Rev. 1968), and Exec. Order No. 11387, 12 U.S.C.A. §95a (Supp. 1976). Presidential power to impose such controls could be implied from the exclusive Federal prerogative to conduct foreign affairs granted by the Constitution.

on the legislative power of Georgia. Pursuant to the explicit grants of power to the Federal Government under Constitutional provisions, a large number of statutes have been enacted.¹⁶ For example, there is federal legislation, *inter alia*, concerning antitrust,¹⁷ securities regulations,¹⁸ transportation,¹⁹ and communications,²⁰ all of which are "Commerce Clause" based. Other areas of the economic life of the United States, such as taxation, banking,²¹ and the protection of intellectual property^{21.1} are regulated by both federal and state legislation. Of course, federal legislation, limiting or prohibiting aliens or alien controlled enterprises from engaging

16. See, e.g., Immigration and Nationality Act, 8 U.S.C.A. §1101 *et seq.* (Rev. 1970) (provides for executive, administrative, judicial, and legislative powers); Immigration Act of 1965, 8 U.S.C.A. §1151 *et seq.*, §1181, §1182 (Rev. 1970) (provides for a system of selection). See also Tariff Act of 1930, 19 U.S.C.A. §1500 *et seq.* (Rev. 1965) (provides for appraisement, classification, determination of value, and administrative procedure). In regard to patents, see Patent Act, 35 U.S.C.A. §100 *et seq.* (Rev. 1954 and Supps.) (provides for patentability of inventions and grants of patents as well as protection of such rights). In regard to trademarks, see Trade-Mark Act of 1946, 15 U.S.C.A. §1051 *et seq.* (Rev. 1963) (provides for registration, protection, and administrative matters); and regarding copyrights, see Copyright Act, 17 U.S.C.A. §1 *et seq.* (Rev. 1952 and Supps.) (provides for registration, infringement proceedings, and rules and regulations).

17. See, e.g., Sherman Antitrust Act, 15 U.S.C.A. §1 *et seq.* (Rev. 1973 and Supps.) (provides for illegality of contracts, combinations in restraint of trade among states and with foreign countries and for illegality of monopolies) and Clayton Act, 15 U.S.C.A. §12 *et seq.* (Rev. 1973 and Supps.) (provides for illegality of business arrangements that are in restraint of trade but not yet far advanced to the point of being subject to the Sherman Act).

18. See, e.g., Securities Act of 1933, 15 U.S.C.A. §§77a - 77aa (Rev. 1971) (provides for, *inter alia*, registration of securities and publication of relevant information) and Securities Exchange Act of 1934, 15 U.S.C.A. §78a *et seq.* (Rev. 1971 and Supps.) (provides for regulation and establishes the SEC).

19. See, e.g., Federal Aviation Act of 1958, 49 U.S.C.A. §1301 *et seq.* (Rev. 1963 and Supps.) (provides for regulation of aviation matters and registration of nationality and ownership of aircraft). See also, Shipping Act of 1916, 46 U.S.C.A. §801 *et seq.* (Rev. 1975) (provides for regulation and registration of vessels and for coastwise trade) and Merchant Marine Act of 1920, 46 U.S.C.A. §861 *et seq.* (Rev. 1975) (states the policy of the United States in this area and provides for some regulation).

20. See, e.g., Alien Ownership Act (radio stations), 47 U.S.C.A. §310 (Rev. 1962) (provides for regulation in regard to station licenses, construction permits, etc.) and Merger Act (telephone and telegraph companies), 47 U.S.C.A. §222 (Rev. 1962) (regulates, *inter alia*, mergers, acquisitions of facilities, and alien ownership of capital stock).

21. See, e.g., Bank Holding Company Act of 1956, 12 U.S.C.A. §1841 *et seq.* (Rev. 1969 and Supps.) (provides for, *inter alia*, acquisition of bank shares and assets and administration of regulations and registration) and Federal Reserve Act, 12 U.S.C.A. §321 (Supp. 1976) (provides for application for membership). At the present, there is a bill before the Senate Committee on Banking, Housing and Urban Affairs which proposes to provide federal regulation for foreign banks establishing, acquiring, operating, or controlling banks, branches, or agencies in the United States. S.958, 94th Cong., 1st Sess. (1975). A companion bill was introduced in the House on 26 March 1975. See H.5617, 94th Cong., 1st Sess. (1975).

21.1. U.S. CONST. art. I, §8 (Congress has the power to provide authors and inventors an exclusive right to their respective writings and discoveries for a limited time).

in a certain number of specific types of activities, is a further limitation on the power of the states.²²

Treaties, both bilateral and multilateral, concluded between the United States and other countries, also limit the sphere in which Georgia can act. For example, in the Convention of Establishment between the United States and France,²³ the two contracting parties agree that nationals or companies of one country, established in the other country, are not to be subject to any form of taxation which is more stringent than the form of taxation applied to nationals or companies in a similar situation in the other country.²⁴ By a convention signed in 1900 in the United States and Great Britain,²⁵ an agreement was reached which affects the possession and disposition of personal property held in one country by a citizen of the other. The citizens of either country have full power to own and dispose of any personal property within the territory of the other country; disposition can be made by testament or donation.²⁶ Such a provision prohibits Georgia from enacting inconsistent requirements or restrictions. A veritable network of bilateral treaties are in force between the United States and a substantial number of countries in every region of the world.^{26.1} It must be stressed in this connection that the United States has the exclusive power to enter into any international agreement with a foreign country. This means that while Georgia, like any other state in the Union, can make contacts in other countries through informal trade missions and offices, it cannot enter into international agreements, treaties or similar agreements.^{26.2} The Constitution of the United States prohibits such action.²⁷

The effects of the limitations of the legislative and executive power of Georgia are substantial in that they narrow considerably the scope within

22. See, e.g., Atomic Energy Act of 1954, 42 U.S.C.A. §§2133(d), 2134(d) (Rev. 1973) (prohibits licensing for production of atomic energy either for commercial, medical therapy, research, or development purposes) and Geothermal Steam Act of 1970, 30 U.S.C.A. §1015 (Supp. 1975) (prohibits granting licenses for development of geothermal steam to non-citizens or to entities which are not established domestically). See also, 16 U.S.C.A. §742c(b)(7) (Rev. 1974) (prohibits foreign controlled enterprises from obtaining special government loans for financing the costs of purchasing and operating commercial fishing vessels), 7 U.S.C.A. §1961 (Supp. 1976) (prohibition against acquisition by non-domestic farmers and ranchers or corporations and partnerships with an agricultural purpose of special government emergency loans for agricultural purposes after a natural disaster).

23. [1960] 2 U.S.T. 2398, T.I.A.S. No. 4625.

24. *Id.* art. IX, §1.

25. Treaty with Great Britain on Tenure and Disposition of Property, 31 Stat. 1939, T.S. No. 146 (Effective Aug. 6, 1900).

26. *Id.* at art. II.

26.1. See, e.g., Treaty of Friendship, Commerce, and Navigation with Japan, April 2, 1953, [1953] 2 U.S.T. 2066, T.I.A.S. No. 2863; Treaty of Friendship, Commerce, and Navigation with Israel, August 23, 1951, [1951] 1 U.S.T. 550, T.I.A.S. No. 2948.

26.2. See Maier, *supra* note 11.1, at 411-17.

27. U.S. CONST. art. I, §10 (states may not enter any treaty, alliance, or confederation).

which Georgia may act in regard to foreign investment and trade. Thus, in every case the State legislature and State officials must take these limits of power and authority into account.

II. ESTABLISHING AND TRANSACTING BUSINESS IN GEORGIA

Several forms of establishing business in the State are contemplated by Georgia law. The foreign business enterprise can do business as a corporation, a partnership, or a joint venture. Almost any type of business can be conducted by foreigners, *e.g.*, trade, industrial processing, and sales; however, there are restrictions placed on certain specific areas of business. This section will examine the legal requirements for establishing in Georgia and some of the restrictions presently placed on foreign enterprises.

A. Corporations

Basically, Georgia law allows foreign business entities to establish within the State without significant legal red tape. The prospective foreign investor has two choices as to the method of establishment if the corporate form is desired. One method of establishing is to organize as a domestic corporation;²⁸ a second method is to register with the Secretary of State of Georgia as a foreign corporation.²⁹

Under Georgia law, a domestic corporation is a corporate entity organized for profit³⁰ to perform any lawful purpose which is not specifically prohibited by Georgia law.³¹ There are no requirements that the financing of the corporation be from non-foreign sources; therefore, a foreign investor could, without problem, incorporate in Georgia as long as the normal steps were followed in regard to incorporating.

A foreign corporation is defined under Georgia law as "a corporation for profit organized under laws other than the laws" of Georgia.³² No distinction is made between a corporation organized under the laws of another state of the United States and one organized in another country. The general policy in Georgia is to treat the foreign corporation in the same

28. See GA. CODE ANN. chs. 22-1 through 22-13 and chs. 22-15 through 22-18 (Rev. 1970).

29. See GA. CODE ANN. §§22-1401 through -1421 (Rev. 1970). For a more detailed analysis and description of the Georgia law regarding foreign corporations than that which follows, see McQueen and Tanner, *Foreign Corporations in Georgia*, 10 GA. ST. B.J. 243-63, 270-72 (1973). See also Bowman, *An Introduction to the New Georgia Corporation Law*, 4 GA. ST. B.J. 419, 447-48 (1968) and BOWMAN, *THE NEW GEORGIA CORPORATION LAW: 1969 AMENDMENTS*, 5 GA. ST. B.J. 433, 440 (1969).

30. The *Georgia Code* provides for incorporation of nonprofit corporations in chapters 22-21 through 22-36 (Rev. 1970), but because those provisions are similar to the ones governing corporations for profit, this article will not examine nonprofit corporations.

31. GA. CODE ANN. §§22-102(a), -201 (Rev. 1970).

32. GA. CODE ANN. §22-102(b) (Rev. 1970).

manner as the domestic corporation with certain exceptions, these being primarily of an administrative nature. The foreign corporation must procure a certificate of authority from the Secretary of State of Georgia³³ in order to transact business within the state.³⁴ Failing to receive such a certificate places the foreign corporation in jeopardy of having penalties imposed upon it, not having standing to bring suit within state courts, and having any contract arising out of business transacted in Georgia declared void at the instance of the other contracting party.³⁵ No foreign corporation can be denied a certificate of authority on the ground that the state or country under which the corporation is organized has laws governing the organization and internal affairs which differ from the laws of Georgia.³⁶

Once the certificate is procured the foreign corporation can pursue the purposes which were listed in the application and can do so as long as the corporation retains its authority to do such business in the jurisdiction in which it was incorporated.³⁷ While doing business within Georgia, the foreign corporation is subject to all licensing and regulatory statutes of Georgia which relate to the particular type of business being transacted.³⁸ Under these conditions the foreign corporation has the same rights and privileges that a domestic corporation of like character enjoys³⁹ and is subject to the same duties, restrictions, penalties, and liabilities as a domestic corporation.⁴⁰ This grant of general powers includes the power to form or acquire control of other corporations.⁴¹

33. GA. CODE ANN. §22-1401(a) (Rev. 1970). The certificate of authority is granted after an application has been filed stating, among other things, the name of the corporation and the jurisdiction under which it was incorporated, the address of its principal office in the jurisdiction where it was incorporated, and the address of its registered office which is to be located within Georgia. *Id.* §22-1405a.

34. For a complete definition of what does *not* constitute transacting business within the State for the purpose of qualifying under the *Code*, see GA. CODE ANN. §22-1401(b) (Rev. 1970). Briefly, a foreign corporation is not doing business within the State if it maintains or defends any suit or proceeding affecting the settlement of claims or disputes in the State, or effects transactions in interstate or foreign commerce, or owns and controls a subsidiary corporation incorporated in or transacting business within the State.

35. GA. CODE ANN. §22-1421 (Rev. 1970).

36. GA. CODE ANN. §22-1401(a) (Rev. 1970).

37. GA. CODE ANN. §22-1401 (Rev. 1970).

38. GA. CODE ANN. §22-1401(a) (Rev. 1970).

39. Domestic corporations have a wide range of general powers granted to them by the State. Included in these general powers are the following: perpetual duration; control of internal affairs; the right to sue and be sued, complain, or defend in all judicial, administrative, or arbitral actions or proceedings; the right to cease activities when desired; the right to acquire, sell, or deal in any personal or real property or any interest in such property wherever such property is located; and the rights to contract, to borrow or lend money, to issue notes, and to secure any obligations through mortgage or pledge of any or all property, franchises, or income. GA. CODE ANN. §§22-1401, -1402, -202 (Rev. 1970).

40. GA. CODE ANN. §22-1402 (Rev. 1970).

41. GA. CODE ANN. §22-202(b)(9) (Rev. 1970).

The authority to do business within the State can be terminated in several ways. The foreign corporation can voluntarily withdraw⁴² by applying to the Secretary of State for a certificate of withdrawal. If the foreign corporation is dissolved, or, if its existence is terminated by the jurisdiction where it was incorporated,⁴³ a certificate of withdrawal is to be issued by the State.⁴⁴ A further method by which authority to transact business can be terminated is the revocation of the certificate of authority.⁴⁵

When comparing these two means of establishing within the State, it appears that either form of establishment (incorporating as a Georgia corporation or registering as a foreign corporation) can be consistent with the purposes and goals of the foreign investor or trader since the immediate distinctions are mainly in administrative procedures. The main disadvantages to the registered foreign corporation under Georgia law are the restrictions on retail banking and insurance activities.⁴⁶

Factors which would be important in making the choice between forms of establishment include tax consequences,⁴⁷ the amount of business to be transacted within the State, and the advantages of incorporating under the laws of other states or countries.⁴⁸

B. Partnerships

In regard to the formation of a partnership, there is no distinction made between parties who are citizens of Georgia and those who are not. Both

42. GA. CODE ANN. §22-1414 (Supp. 1975).

43. GA. CODE ANN. §22-1416(a) (Rev. 1970).

44. GA. CODE ANN. §22-1401(b) (Rev. 1970). Upon the issuance of the certificate for any reason, the foreign corporation's authority to transact business within the State ceases. The Secretary of State becomes the foreign corporation's agent for purposes of receiving process for any action accruing in Georgia prior to the issuance of the certificate. GA. CODE ANN. §22-1416(c) (Rev. 1970).

45. GA. CODE ANN. §22-1417 (Supp. 1975). The Secretary of State can revoke that certificate under certain circumstances such as a case in which the foreign corporation misrepresents any material matter in any application, report, or affidavit submitted to the State pursuant to Code requirements (*e.g.*, filing and annual report, annual license or occupation tax return). Before revocation, the offending corporation must be given a second chance to comply with the requirements. Immediately upon revocation, however, the foreign corporation's authority ceases. GA. CODE ANN. §22-1418(b) (Rev. 1970).

46. See notes 66-93, *infra* and accompanying text.

47. For example, an investor looking at various jurisdictions when deciding on a place to incorporate a manufacturing plant might decide that a state offering a partial exemption on corporate income tax or a moratorium on new equipment for five years after establishment was more beneficial than incorporating in Georgia which offers neither. A warehouse of the corporation organized elsewhere could easily be registered in Georgia where the value of the property to be taxed was less than that used in a manufacturing plant. See note 11, *supra*.

48. Delaware, with its minimal requirements for incorporating, might prove to be a better situs than Georgia for incorporation. Likewise, incorporating in a country where security regulations are less stringent than in the United States also might be of more benefit to the foreign investor.

the chapter of the Georgia Code on partnerships⁴⁹ and the Uniform Limited Partnership Act⁵⁰ have been adopted in Georgia. One specific requirement respecting nonresident partnerships is that when service of process must be made, the agent within the State for the partnership is considered to be authorized to accept service.⁵¹

C. Joint Ventures

The Georgia Code does not contain separate provisions for the formation of a joint venture. This policy is consistent with that of other states and countries. However, such an arrangement has been recognized under Georgia law as enunciated by the court of appeals.⁵² Presumably, the joint venture can consist of any arrangement between two or more legal entities which pool their assets, skills, and efforts to achieve a profit. Mutual control, whether expressed or implied, is an element of this arrangement. There also must be a joint interest in the objects and purposes of the enterprise.⁵³ Establishment is accomplished through the usual forms of incorporation or partnership.

D. Trade

Pursuant to a positive attitude toward foreign trade,⁵⁴ the State has established several trade offices around the world⁵⁵ through the Department of Community Development.

Legal aspects of trade are, of course, numerous and varied. In this connection the primary concern of a trader is with federal law, considerations of customs and other trade barriers must be taken into account.⁵⁶

49. GA. CODE ANN. chs. 75-1 through 75-3 (Rev. 1973).

50. GA. CODE ANN. ch. 75-4 (Rev. 1973).

51. GA. CODE ANN. §81A-104(d)(2) (Rev. 1972). This section also applies to foreign corporations, nonresident individuals, joint stock companies, and associations.

52. See note 7, *supra* and accompanying text.

53. *Helms v. Young*, 130 Ga. App. 344, 203 S.E.2d 253 (1973); *Gainesville Carpet Mart v. First Fed. Sav. & Loan Ass'n*, 121 Ga. App. 450, 174 S.E.2d 230 (1970); *Atlanta Metallic Casket Co. v. Southeastern Wholesale Furn. Co.*, 82 Ga. App. 353, 61 S.E.2d 196 (1950).

54. See, e.g., Hightower, *Busbee to Hunt Japanese Industry*, *Atlanta Journal*, Mar. 7, 1975, at 15D, col. 1 (announcement that Governor George Busbee would visit Japan in an effort to attract Japanese business to Georgia); Brown, *Japanese, U.S. Execs Plan Meet*, *Atlanta Constitution*, Apr. 2, 1976, at 6B, col. 1 (first joint meeting of the Japan—U.S. Southeast Assoc. and the U.S. Southeast—Japan Assoc. for discussion of economic, cultural, and technological factors pertinent to both areas).

55. Trade offices have been established in Brussels and Tokyo; trade missions are located in São Paulo and Toronto. Regarding the State trade office, see Maier, *supra* note 11.1, at note 6; and Allen, *State Government in International Trade*, 27 *MERCER L. REV.* 419, 426-27 (1976). The Georgia Ports Authority is primarily interested in facilitating trade rather than enticing it and operates offices in Bonn and Tokyo where initial contacts could be made.

56. Regarding customs duties in general, see U.S.C.A. tit. 19 (Rev. 1972 and Supps.)

With respect to the commercial law applicable to trade, Georgia has joined all but one state in adopting the Uniform Commercial Code.⁵⁷

E. Commercial Arbitration And The Enforcement Of Foreign Judgments

The area of commercial arbitration can present a special problem in Georgia. The Georgia Code has merely codified the common law rules which are hostile to the arbitration process. Thus, the enforceability of the arbitration clause is fatally restricted. However, the United States Arbitration Act⁵⁸ will apply wherever interstate or foreign commerce is involved.^{58.1}

In 1975, the Georgia Foreign Money Judgments Recognition Act⁵⁹ was enacted. It provides rules for the recognition and enforcement of money judgments rendered in foreign jurisdictions. The Act requires that any foreign judgment which grants or denies recovery of a sum (exclusive of a judgment for taxes, fines, penalties, or alimony and support payments) be enforced in the courts of Georgia.⁶⁰ The judgment is to be considered conclusive if it is final although ultimate enforcement, if any, is to be accomplished only after available appeals are concluded.⁶¹ There are several grounds for nonrecognition, however. These include situations in which the foreign court lacked jurisdiction or denied the defendant's rights of due process. Moreover, recognition is not granted if the court is part of a system which does not provide impartial courts or procedures compatible with due process requirements or if the foreign judgment is incompatible with the public policy of Georgia.⁶²

III. RESTRICTIONS ON ESTABLISHING AND TRANSACTING BUSINESS IN GEORGIA

There are some legal requirements under Georgia law in regard to establishing and transacting business which are peculiar to certain types of

(provides for collection and enforcement methods, countervailing and discriminating duties, dumping investigations, determination of foreign market values, and methods of appeal). Regarding tariff schedules, see tariff Schedules of the United States, 19 U.S.C.A. §1202 (Rev. 1972 and Supps.). See also Trade Act of 1974, 88 Stat. 1978 (codified in scattered sections of tits. 5, 19, 26 of U.S.C.A.).

57. GA. CODE ANN. tit. 109A (Rev. 1973).

58. 9 U.S.C.A. §1 *et seq.* (Rev. 1970) (provides for, *inter alia*, validity, irrevocability, and enforcement of agreements to arbitrate as well as procedure for arbitration).

58.1. See, e.g., *Prima Paint Corp. v. Flood and Coplin Mfg. Co.*, 388 U.S. 395, ___ S.Ct. ___, ___ L.Ed.2d ___ (1967). See also Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997 (June 10, 1958), for another possible basis for enforcement.

59. Ga. Laws, 1975, p. 479.

60. *Id.* §§2(b), 3, and 4.

61. *Id.* §§3 and 6.

62. *Id.* §4.

business if under at least some foreign ownership or control. The discussion below addresses major distinctions in special areas of regulation of foreign enterprises.

A. *Nonresident Contractors*

Nonresident contractors,⁶³ engaged in the construction business, must register with the State Revenue Commissioner if the total contract price or compensation is to be greater than \$10,000.⁶⁴ The purpose of such registration is to insure that the State and its political subdivisions receive all tax reports and tax payments for which the nonresident contractor is liable. To insure compliance with these state requirements, a bond is required in the amount of 10 percent of the contract price or the compensation to be received. No work may be carried out in Georgia until a satisfactory bond is posted.⁶⁵ There are no similar requirements for resident contractors.

B. *Banking*

In 1975, the International Banking Corporations and Bank Agencies Act became effective.⁶⁶ Under that law, an "international banking corporation" is defined as a banking corporation organized and licensed under the laws of a foreign country or a political subdivision of such a country.⁶⁷ An "international bank agency" is considered to be an international corporation with respect to all business or activities conducted in Georgia or through an office located in the State.⁶⁸

The State regulates the existence and activities of the international banking corporation and its international bank agency. In order to be able to transact business within the State, the corporation in question must obtain a license from the Department of Banking and Finance. The license will be granted if the corporation can show the state that it has authority, through its charter, to transact such business in the country from which it received its charter, and that it has the requisite financial backing required by Georgia law. Such a requirement could be more than that required of a

63. This term is defined in the *Code* as including individuals, partnerships, firms or corporations, or associations which are engaged in any of a multitude of construction projects. Subcontractors are also included. GA. CODE ANN. §92-401 (Rev. 1974). There is no distinction made between a nonresident contractor who is a United States citizen and one who is not.

64. GA. CODE ANN. §92-402 (Rev. 1974).

65. GA. CODE ANN. §92-403 (Rev. 1974).

66. GA. CODE ANN. ch. 41A-33 (Rev. 1974).

67. GA. CODE ANN. §41A-3301 (Rev. 1974). Section 41A-3303 of that same Act qualifies an international banking corporation as a foreign corporation; thus all laws of the Business Corporation title of the Code (title 22) are applicable to the international banking corporation except that the Department of Banking and Finance is to fill the role executed by the Secretary of State under the corporation title.

68. GA. CODE ANN. §41A-3301 (Rev. 1974).

domestic bank, depending on individual circumstances.⁶⁹ A license cannot be issued to an international banking corporation if that corporation is chartered in a country which does not give similar facilities to banks chartered by the United States or by its political subdivisions.⁷⁰

Once a license has been obtained, the banking corporation may transact business for one year. The license may be renewed if the corporation so desires and if the Department of Banking and Finance finds that it is in a safe, satisfactory condition and has complied with regulations concerning international banking.⁷¹ Upon revocation of the license by the Department for failure to meet the above criteria, or upon dissolution or termination of authority of the corporation, all rights and privileges immediately cease.⁷²

The International Bank Agency Act, at first glance, appears to be an example of legislation that encourages the establishment of banking by foreign corporations in Georgia. The properly licensed international corporation and its agency are initially granted banking powers similar to those granted a domestic bank.⁷³ However, this grant is radically circumscribed by the addition of the provision that the international bank agency may not receive deposits or exercise fiduciary powers.⁷⁴ Obviously, this provision is severely restrictive even though an agency is allowed to credit balances for the accounts of others which are incidental to the exercise of its lawful powers.⁷⁵

During the 1976 legislative session, a bill was passed by the General Assembly which partially relaxes this prohibition.⁷⁶ This legislation allows international banking corporations to make loans through their bank agencies. As a result, a potentially wider market from which to borrow is

69. Compare GA. CODE ANN. §41A-3308 (Rev. 1974) with GA. CODE ANN. ch. 41A-19 (Rev. 1974). Briefly, the Code provides that before applying, the corporation's assets must be at least \$50 million in excess of its liabilities (section 41A-3306). While operating, the international banking corporation must hold at its Georgia office currency, notes, bonds or other evidence of indebtedness, and other obligations payable in the United States or in United States funds in an amount not less than 108 percent of the aggregate amount of liability payable at or through its office in Georgia or due as a result of the operations of its international banking agency (section 41A-3308).

70. This reciprocity requirement is found in GA. CODE ANN. §41A-3304(b).

71. GA. CODE ANN. §§41A-3307(a) and -3307(b) (Rev. 1974).

72. GA. CODE ANN. §41A-3307(d) (Rev. 1974).

73. GA. CODE ANN. §§41A-3302, -1301 (Rev. 1974).

74. GA. CODE ANN. §41A-3307(e) (Rev. 1974).

75. GA. CODE ANN. §41A-3307(e) (Rev. 1974).

76. Ga. Laws, 1976, p. ____ (H.B. 1316) states that its purpose is "[t]o amend Code Section 41A-3307 . . . so as to encourage international banking corporations to engage in business in this State; to authorize international banking corporations to make loans in this State. . . ." This bill was introduced in the House on 14 January 1976 and was favorably reported to the floor from the Business and Banking Committee on 23 January. It was signed by the Governor on 16 February 1976.

created and new capital from foreign sources can be tapped more readily.

There are no restrictions on contributions of capital by foreign investors to a bank incorporated in Georgia. If a domestic bank did have foreign sources of capital, it would still retain all the powers and be subject to all the restrictions of any domestic bank. However, a foreign investor cannot be a member of the board of directors of a bank incorporated in the State. Under the law regulating the management of these banks every director must be a citizen of the United States.⁷⁷

Neither of these options in the banking area offers foreign investors much latitude if they desire to become involved in the banking sector. The combination of the allowable but limited activities and the reciprocity requirement probably help to explain why there are no foreign banks presently located in Georgia.⁷⁸

There is a possible third option for foreign investors interested in banking.⁷⁹ A parent bank organized in another country could establish a wholly owned subsidiary in Georgia under the applicable laws. The subsidiary would probably not be considered an international bank agency since the International Bank Agency Act of 1972 stipulates that a foreign corporation is not to be considered transacting business in the State merely because it owns or controls a subsidiary which is either incorporated or transacting business within Georgia.⁸⁰ Following this reasoning, it is likely that the subsidiary of the international banking corporation would not be classified as an international bank agency and, therefore, could assume fiduciary powers. The 1972 revision of the Financial Institution title,⁸¹ does not require owners or shareholders of banks established under Georgia law to have United States citizenship.

Another method for a foreign bank to operate in Georgia is to operate a representative office in the State. These offices would direct banking business to the parent bank in the foreign country.

C. Insurance

A foreign investor wishing to sell insurance in Georgia and who attempts to do so as a foreign business is classified as an alien insurer.⁸² However,

77. GA. CODE ANN. §41A-2201 (Rev. 1974).

78. This absence of foreign banks is especially patent since financial institutions from the United Kingdom, Japan, and Germany (D.B.R.) in the past have expressed an interest in establishing branches in Atlanta, but thus far have not done so.

79. Parks, Georgia's International Bank Agency Act and Suggestions for Revision in the Areas Where International Banking Activities Are Restricted by the Act, 6-7 (unpublished memorandum to John D. Welsh, 1974).

80. GA. CODE ANN. §22-1401(b) (Rev. 1970).

81. GA. CODE ANN. tit. 41A (Rev. 1974).

82. GA. CODE ANN. §56-301 (Rev. 1971).

as indicated below, the option of being chartered as a domestic insurer is available to the foreign investor.

An alien insurer (formed under the laws of a foreign country) must meet the general qualifications for all insurers whether domestic (formed under the laws of Georgia) or foreign (formed under the laws of another state). The alien insurer must comply with the various provisions of title 56 of the Georgia Code and it must comply with the powers granted to it by its charter. It must also be organized under any of the same general types of legal forms in which a domestic insurer can be organized.⁸³ If all these qualifications are fulfilled and all financial obligations, as described below, are met, the alien insurer can engage in the same activities that are open to other domestic and foreign insurers.⁸⁴

The differences in threshold requirements for establishment by alien insurers, and those for the other two classes of insurers, are found in application requirements and procedures and in fiscal matters. A certificate of authority must be obtained by any insurer in order to offer insurance to the public. To procure such a certificate, the alien insurer must file with the Insurance Commissioner all documents required of the other categories of insurers.⁸⁵ In addition, the alien insurer must submit a copy of its annual statement of transactions within the United States,⁸⁶ a copy of its appointment of the Commissioner as its attorney to receive service of legal process, and a notation on the certificate application of the location of its home or principal office in the United States.⁸⁷ Since there is no provision for exception to this last requirement of the location of a principal office within the United States, it would seem that an alien insurer would have to be established previously within the United States. Thus, this stipulation becomes a hurdle to alien insurers who are considering establishing within Georgia but who are not yet established in the United States.

The basic capital funds, plus the expendable surplus required of new

83. These are as follows: incorporated stock insurer, incorporated mutual insurer, fraternal benefit society, hospital nonprofit corporation, nonprofit medical service corporation, a farmers' mutual fire insurance company, a Lloyd association, or a reciprocal insurer. GA. CODE ANN. §56-303(1) (Rev. 1971).

84. The kinds of insurance which can be offered are as follows: (1) life, (2) accident and sickness, (3) property, (4) marine and transportation, (5) casualty, (6) surety, and (7) title. GA. CODE ANN. §56-305 (Rev. 1971).

85. These include a copy of its corporate charter and amendments, a copy of its bylaws and amendments, and a copy of the report of the last examination made of the insurer and certified by the insurance supervisory official of its state or domicile or entry into the United States. GA. CODE ANN. §56-312 (Supp. 1975).

86. This is qualified by the phrase "unless the commissioner requires otherwise." GA. CODE ANN. §56-312 (Supp. 1975).

87. See GA. CODE ANN. §56-312 (Supp. 1975) for the complete list of submission requirements.

insurers, are the same for domestic, foreign, and alien insurers.⁸⁸ In regard to deposit requirements, however, there are substantial differences between the requirements for domestic and alien insurers, and between foreign and alien insurers. Domestic insurers must deposit, in trust, securities available for investment valued to a maximum of \$200,000; the actual amount depends on the number of classes of insurance being transacted.⁸⁹ The foreign insurer may, in lieu of all or part of that maximum amount, present certification from officials of another state where it is transacting business that the requisite amounts are deposited in that other state.⁹⁰ The alien insurer, other than the alien title insurer, may present similar certification; however, the certification must be to the effect that the insurer can discharge all its obligations in the United States through assets which, at the very minimum, equal its outstanding liabilities in the United States *and* it must have available the larger of either the largest deposit required by the Insurance title for any type of domestic insurer transacting similar kinds of insurance or \$300,000.⁹¹

In addition to these deposits, the alien insurer must deposit securities which can be invested in capital funds in an amount between \$10,000 and \$25,000, depending on the decision of the Commissioner. Moreover, the Commissioner is prohibited from issuing or renewing any certificate of authority unless an additional amount of securities, determined by the Commissioner, is deposited. The combination of the last two amounts can never exceed \$100,000.⁹²

Besides these capital fund and deposit requirements that an alien insurer must satisfy, it is possible that an alien insurer would also have to pay taxes and fees and meet obligations which the domestic insurer would not have to consider. The Insurance title contains a provision for retaliation whereby an alien insurer would be subject to any monetary requirements or other restrictions that are imposed in the alien insurer's country on an insurer chartered in Georgia, or its agents, but which were not imposed on an insurer chartered in the domicile of the alien insurer.⁹³

A foreign investor, wishing to avoid these added capital fund and deposit requirements, may consider becoming a domestic insurer. This form of establishment presents fewer administrative and financial obligations. Since there are no restrictions as to the ultimate source of capital funds and deposit securities, a foreign investor could import the necessary capital to buy the requisite amount of securities and supply the capital funds to

88. GA. CODE ANN. §§53-306, -307 (Rev. 1971).

89. GA. CODE ANN. §56-309(2)(a) (Rev. 1971).

90. GA. CODE ANN. §56-309(2)(b) (Rev. 1971).

91. GA. CODE ANN. §56-309(2)(c) (Rev. 1971).

92. GA. CODE ANN. §56-310 (Rev. 1971).

93. GA. CODE ANN. §56-321 (Rev. 1971).

be held within the State. The remaining major step to doing business as a domestic insurer is to be chartered under Georgia law.

IV. TAXATION

A. *The Power To Tax And Its Limitations*

Pursuant to its taxing power,⁹⁴ the State levies several types of taxes⁹⁵ and provides certain exemptions and incentives.⁹⁶ In general, a foreign business in Georgia will be responsible for meeting the same tax burden as that of Georgia businesses. The same incentives and exemptions are also offered. This tax policy of the State thus represents what is known as "national treatment" of foreign business, that is, foreign business suffers no discrimination in fiscal matters.

B. *Types Of Taxes Imposed*

Georgia's tax structure includes a modest property tax on both real and personal property. However, if a foreign corporation wishes to avoid paying property tax on its stock, it may pay three other assessments: (a) an intangible property tax on its property, irrespective of its physical location; (b) an income tax on the proportionate part of income earned in the State; and (c) a franchise tax on the entire capital stock.⁹⁷

The elective intangible property tax on the corporation's intangible property, irrespective of its physical location, has been held constitutional by a Georgia appeals court in *National Linen Service Corp. v. Thompson*.⁹⁸ The court held that the General Assembly could impose a tax on such

94. GA. CODE ANN. §§2-5401, 5402, 5501 (Rev. and Supp. 1973).

95. The following taxes are levied in Georgia on foreign business; they are also levied with some variations on domestic businesses:

- (a) real or personal property—§92-101;
- (b) ad valorem—§92-111;
- (c) income tax—§92-3002;
- (d) license, occupation, or corporate franchise—§§92-2401, -2403; and
- (e) sales and use—§92-3402.

Local taxes levied by political subdivisions of the State are also applicable in some localities. For a discussion of several of these taxes, see McQueen and Tanner, *Foreign Corporations in Georgia*, 10 GA. ST. B.J. 243, 263-70 (1973).

96. See notes 105-113.1, *infra* and accompanying text.

97. GA. CODE ANN. §92-117.2 (Rev. 1974). For parallel exemptions provided to domestic businesses, see §§92-130 through -132.

98. 103 Ga. App. 786, 120 S.E.2d 779, *cert. denied*, 216 Ga. 550, 118 S.E.2d 486 (1961). National Linen, a Delaware corporation domiciled in Georgia, held cash and accounts receivable in Alabama and Texas on which the State of Georgia assessed an intangible property tax under section 92-117.2. National Linen refused to pay tax on these properties, arguing unsuccessfully at trial level that such levies were unconstitutional under the fourteenth amendment of the United States Constitution and article 1, section 1, paragraph 3 of the Georgia Constitution.

property in cases in which the foreign corporation was domiciled in the State and where the tangible property in question had not been subject to ad valorem taxation in another jurisdiction. It was immaterial that the intangible property had been a basis for levying a franchise tax in that foreign jurisdiction.

The intangible property tax levied in Georgia cannot be considered burdensome.⁹⁹ Whether or not the tax would be a disincentive for businesses which are considering establishing in Georgia depends upon the intangible property held by such business enterprises. For example, companies with assets falling within certain categories of intangible property are granted exemptions for such property;¹⁰⁰ this may be an incentive for such businesses.

The rates for ad valorem taxes are applied annually on an equal basis to any business possessing inventory within the state as of 31 December of each year.¹⁰¹

The corporate income tax rate is 6 percent per year and is applied to both domestic and foreign legal entities against an adjusted net income earned in Georgia. The Code provides that "Georgia taxable net income which shall be as taxable income from property owned or from business done in Georgia, which shall consist of its taxable income as defined in the Internal Revenue Code of 1954" ¹⁰²

Another annual tax, the license or corporate franchise tax, is imposed on the net worth of any profit-making corporation legally organized or operated under Georgia law. It is levied against income derived from business transacted in Georgia or from property located within the state.¹⁰³

The sales and use rate is 3 percent which is levied against the fair market value or price of all retail purchases, retail sales, rentals, storage, and use or consumption of tangible personal property and services.¹⁰⁴

99. The tax rate is applied to intangible property depending upon the class in which the property is categorized. The range of the tax rate is 10 cents to three dollars per \$1000 of fair market value. There are seven basic taxable categories of intangible property which are as follows:

- (a) shares of stock;
- (b) money on hand and on deposit;
- (c) certain notes and accounts receivable;
- (d) short term mortgage notes secured by real estate;
- (e) patents, copyrights, etc.; and
- (f) bonds.

See GA. CODE ANN. §§2-5403, 92-113, 92-114, 92-161 and 92-162 regarding classification. See GA. CODE ANN. §§92-116 through -118, 92-161, 92-162 regarding rates.

100. These categories include bonds of the State of Georgia and its subdivisions, intangible property belonging to the federal or state government, money belonging to persons residing outside Georgia, and the common voting stock of a subsidiary corporation not transacting business in Georgia. See GA. CODE ANN. §§92-123, -130 (Rev. 1974) for the exact criteria the property must meet in order to be exempted.

101. GA. CODE ANN. §92-111 (Rev. 1974).

102. GA. CODE ANN. §92-3002 (Supp. 1975). See also GA. CODE ANN. §92-3102(a) (Rev. 1973). For a detailed description of the criteria for determining the bases of taxable income in Georgia, see GA. CODE ANN. §92-3113 (Rev. 1973).

103. GA. CODE ANN. §§92-2401, -2403 (Rev. 1974).

104. GA. CODE ANN. §92-3402(a) (Rev. 1974).

C. Tax Exemptions Or Deductions

Besides the possible avoidance of paying property tax on the stock of a foreign business, discussed above,¹⁰⁵ the State offers a no-situs property tax exemption¹⁰⁶ which is an incentive to those businesses desiring to transact business involving the transit of goods through the State into another jurisdiction. Normally, foreign merchandise brought into Georgia is subject to a property tax. However, such merchandise will not acquire any situs for taxation purposes if the merchandise is in transit through the State.¹⁰⁷ Additionally, the property will not acquire situs for taxation purposes if it is assembled, processed, broken in bulk, repackaged, or in any way changed while it is in a warehouse in the State.¹⁰⁸ These applicable statutes also state that the requirements for the in-transit status are to be liberally construed so as to effect the purposes of the law.

An exemption to Georgia's ad valorem tax was adopted in 1974 by means of an amendment to the Georgia Constitution. The amendment exempts

harvested agricultural products which have a planting-to-harvest cycle of 12 months or less, which are customarily cured and aged for a period in excess of one year after harvesting, and before manufacturing, and which are held in this State for manufacturing or processing purposes. . . .¹⁰⁹

This amendment is of the nature of freeport legislation.¹¹⁰

105. See note 97, *supra* and accompanying text.

106. GA. CODE ANN. §92-186 (Rev. 1974).

107. GA. CODE ANN. §92-187 defines foreign merchandise in transit as being personal property of every description which originates outside the customs territory of the United States and is imported into the country by waterborne commerce through any port located in Georgia and on which United States customs duties are paid in any customs district in the State. The definition also includes the requirements that the merchandise be moving in foreign or interstate commerce through Georgia or be consigned to a warehouse for storage while in transit to its final destination. The law does not apply except to situs within the political subdivision of this State in which the port of original entry of such property is located.

108. GA. CODE ANN. §92-186 (Rev. 1974).

109. GA. CODE ANN. §2-5404 (Supp. 1975). At least one corporation with legal connections to a foreign business entity uses one of the harvested agricultural products contemplated by the amendment. The Brown and Williamson Tobacco Corp., which is a subsidiary of the British American Tobacco Co., Ltd. in London, has a manufacturing plant in Macon and produces cigarettes there. INT'L Co., *supra* note 1 at 11.

110. Freeport legislation is termed by some as providing an exemption from taxes on goods en route from one location to another location. In the case of Georgia the other location must be outside the State.

A previous freeport bill was introduced in the 1974 General Assembly. That piece of legislation was much wider in scope than the adopted amendment in that it would have involved more categories of goods which could be used for the ad valorem exemption. However, it failed to receive sufficient support. Another attempt at broadening the coverage of the tax benefit was made in the 1975 General Assembly, but it did not successfully complete the steps within

Probably the most far-reaching tax exemption offered by the State is the exemption from paying sales/use tax on goods qualifying under specific categories.¹¹¹ The sales/use tax structure is itself some incentive to foreign businesses locating in the State because of the low rate levied.¹¹²

A further property tax deduction is granted by the State for any facilities installed which will eliminate or reduce water or air pollution.¹¹³ Thus the state allows the company a tax break for what the business is required to do under normal circumstances, *i.e.*, comply with environmental pollution standards.^{113.1} This merely helps to neutralize the added cost of doing business which results from pollution control.

D. Enforcement And Penalties

The State Revenue Commissioner is given the power to issue an execution for the tax liability due when a corporation fails to make a return on taxable property or to pay the annual tax for which it is liable. The Commissioner may also include any expenses or penalties incurred because of the execution order.¹¹⁴

Specific provision within the Code is made for foreign insurance companies, bank agencies, and express companies in regard to penalties for delinquent tax payments. Such insurance companies are penalized \$500; foreign bank agencies, \$2,000; and express companies, \$10,000.¹¹⁵

the General Assembly. The ill-fated 1975 version was to provide an income tax credit against the state corporate or personal income tax liability on in-transit inventory of certain industries, *e.g.*, all economic activities except mining; all transportation, communications, electric, gas, and sanitary services except motor freight transportation and warehousing; and retail trade. This same bill (H.B. 866) was reintroduced in the 1976 General Assembly and was pazed. It will appear as a proposed constitutional amendment on a referendum ballot in November, 1976.

111. GA. CODE ANN. §92-3403aC(2)(n) and (o) (Rev. 1974) provides five categories:

- (a) machinery which is directly used in manufacturing tangible personal property when it is incorporated into a new manufacturing plant or when additional machinery is incorporated into a present manufacturing plant in this State, provided that these purchases are approved by the Commissioner of Revenue;
- (b) machinery and equipment that is purchased for reducing water and air pollution if, again, these acquisitions have been approved by the Commissioner of Revenue;
- (c) industrial materials which will be a component part of a finished product for sale or which are coated with or impregnated into the product at any stage of its manufacture;
- (d) packaging materials which have not been bought for reuse; and
- (e) sales in interstate commerce when delivered outside the State by the U.S. Post Office, common carrier, the seller, or a trucker hired by the seller.

112. See note 104, *supra* and accompanying text.

113. GA. CODE ANN. §92-201.1 (Rev. 1974).

113.1. See, *e.g.*, note 151 *infra*; Air Pollution Control Act, 42 U.S.C.A. §1857 *et seq.* (Supp. 1976); and Water Pollution Control Act, 33 U.S.C.A. §1151 *et seq.* (Rev. 1970).

114. GA. CODE ANN. §92-7302 (Rev. 1974).

115. GA. CODE ANN. §92-7406 (Rev. 1974).

V. LAW AND POLICY ON LABOR ISSUES

A. *Training For Employment*

Foreign investors have been able to benefit from the availability of a significant labor force in Georgia.¹¹⁶ The State has 25 area vocational-technical schools scattered strategically throughout the State. Over 90 percent of the population is within commuting distance of at least one of these schools which are capable of providing necessary training in most skills that an industry or business might require. By a program known as Quick Start, these vocational training schools, in conjunction with any interested business, can quickly train Georgians. By means of careful planning the State can reduce the expense of on-the-job training incurred by these businesses when beginning or expanding production within the State.

In many cases, the foreign investor desires to bring into the State a certain number of employees from the investor's country or from elsewhere. There are no restrictions to such practices under Georgia law. However, it must be recalled that all aliens must comply with appropriate federal legislation.

B. *Conditions Of Employment*

The State minimum wage law¹¹⁷ applies to every employer except, *inter alia*, those subject to federal minimum wage provisions,¹¹⁸ farm owners,¹¹⁹ employers having sales of \$40,000 or less per year, and employers who hire employees whose compensation consists wholly or partially of gratuities.¹²⁰

Despite the low minimum wage rate, the availability of low wages has not been emphasized as an incentive for attracting investment. Nevertheless, the wage rates in Georgia have been lower than rates in most other states. The average weekly earnings of all manufacturing jobs in 1972 was \$124.03 for an average work week of 40.8 hours, or approximately \$3.04 per hour.¹²¹ The national manufacturing hourly wage was \$3.81.¹²²

The Georgia right to work law prohibits closed shops.¹²³ This right to

116. In January 1975, the Georgia Department of Labor estimated that the civilian labor force was composed of 2,170,900 persons. GA. DEP'T OF LABOR, EMPLOYMENT & EARNINGS 19 (1975).

117. The state minimum wage is \$1.25 per hour. GA. CODE ANN. §54-1202 (Rev. 1974).

118. GA. CODE ANN. §54-1206 (Rev. 1974).

119. GA. CODE ANN. §54-1202 (Rev. 1974).

120. GA. CODE ANN. §54-1208 (Rev. 1974).

121. U. OF GA. DIV. OF RESEARCH: COLLEGE OF BUS. ADM., GEORGIA STATISTICAL ABSTRACT 1974 at 75, 76 (1974).

122. This translates into a national average weekly earning for manufacturing jobs in 1972 to \$154.69 for approximately the same amount of time. STATISTICAL COMPENDIA STAFF, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 360 (1974).

123. GA. CODE ANN. §54-902 (Rev. 1974).

work-open shop policy has been considered by many to constitute an incentive for non-Georgia business enterprises to establish in the State.

The Commissioner of Labor is charged by law to promulgate rules for the prevention of industrial accidents or occupational diseases in every place of employment.¹²⁴ These regulations are published by the Secretary of State¹²⁵ and include such topics as requirements for housekeeping and sanitary conditions,¹²⁶ personal protective apparel and equipment,¹²⁷ and machinery and mechanized equipment.¹²⁸

The State does not permit minors under 16 years of age to be employed in hazardous industries or to use hazardous machines or to be around hazardous processes in an employment situation.¹²⁹ The minimum age as to employment in general is 14 years.¹³⁰ There are also stringent limitations on the maximum hours of work for minors.¹³¹

There is a statute in Georgia prohibiting sex discrimination in hiring policies in private industry or businesses. Any employer engaged in intrastate commerce who employs 10 or more employees cannot practice discrimination on the basis of sex when paying wages. Workers of both sexes must be paid equal wages for comparable work in jobs which require essentially the same knowledge, skill, effort, and responsibilities.¹³²

C. Workmen's Compensation

Under Georgia law, "employer" is defined as "any individual, firm, association, or corporation engaged in any business operated for gain or profit" except as otherwise provided.¹³³ "Employee" is defined as every person who works for another except one whose employment is not in the employer's usual course of business or trade. There are no provisions which would distinguish a foreign employer from a domestic employer or an alien employee from an employee who is a citizen of Georgia or of another state.

124. GA. CODE ANN. §54-122(d) (Rev. 1974).

125. See, e.g., RULES AND REGULATIONS OF THE STATE OF GEORGIA §§300-5-2-.01 through -.23 (Mar. 8, 1971).

126. *Id.* §§300-5-2-.01 through -.23.

127. *Id.* §§300-5-4-.01 through -.10.

128. *Id.* §§300-5-12-.01 through -.06.

129. GA. CODE ANN. §54-304 (Rev. 1974). These areas of prohibition include certain machines, such as those used in picking cotton, wool, or other material and steam boilers; industries such as machine shops or manufacturing establishments; and processes such as those in which dangerous or poisonous acids are used or those which the Commissioner of Labor may declare dangerous to life and limb or injurious to health and morals of children under 16 years of age. The one exception noted in this section is the employment of children during summer months in the peach season in peach packing houses.

130. GA. CODE ANN. §54-301 (Rev. 1974).

131. GA. CODE ANN. §54-308 (Rev. 1974).

132. GA. CODE ANN. §54-1001 (Rev. 1974).

133. GA. CODE ANN. §114-101 (Supp. 1975).

The workmen's compensation plan, in essence, applies both to foreign and domestic employers and employees.

The foreign business enterprise which is interested in establishing in the State should note the exceptions to the coverage of the Georgia workmen's compensation plan; the statutes do not apply to any intrastate common carrier, farm laborers, or any employer with less than three employees regularly employed in the same business within the State unless both the employer and its employees voluntarily elect to utilize the compensation system.¹³⁴

D. Unemployment Insurance

The Georgia Unemployment Compensation Fund is used to provide money to unemployed workers within the State pursuant to sections of Georgia Employment Security Law.¹³⁵ An employee is eligible for such benefits if he or she is unemployed and meets certain requirements, none of which include factors of citizenship.¹³⁶ Unemployment insurance contributions are collected from any company, foreign or domestic, which falls within certain criteria regarding the number of employees and payroll size.¹³⁷

VI. OTHER AREAS OF CONCERN FOR THE FOREIGN INVESTOR OR TRADER

A. Ownership Of Property

There are no restrictions upon aliens who are nationals of countries with which the United States is at peace with respect to the privilege of purchasing, holding, and conveying real estate in this State.¹³⁸

A registered foreign corporation is given the power to acquire, hold, and use any real or personal property or any interest in such property.¹³⁹ It can convey, lease, exchange, transfer, or otherwise dispose of, or incur any or all of the property it owns.¹⁴⁰ The effect of granting these powers is to place the registered foreign corporation on an equal footing with the domestic corporation in the ownership of real and personal property.

134. GA. CODE ANN. §114-107 (Supp. 1975).

135. GA. CODE ANN. §§54-602, -603, -624 (Rev. 1974).

136. GA. CODE ANN. §54-609 (Supp. 1975).

137. GA. CODE ANN. §54-657(g)(9) (Supp. 1975). These criteria are: (a) to employ one individual whether the same person or not for at least one day in each of 20 weeks within the calendar year, or (b) to have a payroll of \$1500 or more in any calendar quarter of either the current or preceding year.

138. GA. CODE ANN. §79-303 (Rev. 1973). Regarding aliens inheriting real estate in Georgia, see *Fehn v. Shaw*, 201 Ga. 517, 40 S.E.2d 547 (1946) and *Shaw v. Fehn*, 196 Ga. 661, 27 S.E.2d 406 (1943).

139. GA. CODE ANN. §§22-1402, -202(b)(5) (Rev. 1970).

140. GA. CODE ANN. §22-202(b)(6) (Rev. 1970).

B. Foreign Trade Zones

Under Georgia¹⁴¹ and Federal law,¹⁴² both public and private corporations may apply to the United States Department of the Treasury for the privilege of establishing a foreign trade zone.¹⁴³ According to the scheme of legislation no customs duties are imposed on goods entering a zone if: (a) the goods are shipped directly from the zone to a place outside the United States or (b) some or all of the goods have become unmarketable either in transit to the zone or while in the zone. Obviously this is a great advantage to the merchant since he may import goods duty-free and pay the tax only on items that leave the foreign trade zone for the purpose of consumption within the United States. The product or material is always readily available, thus avoiding any long delays in delivery or any risk of possible cancellation or loss of orders.

However, Georgia law¹⁴⁴ defines the private corporation to which it grants the privilege to apply for such a zone as a corporation organized under Georgia law. The State does not offer this opportunity to the foreign corporation.

C. Warehousing

Warehousing facilities are available at the Georgia Ports Authorities in Garden City in the Savannah port area and in Atlanta. Other ports besides Savannah offer warehousing, transit sheds, or open storage space with conveyor belts and reclamation facilities.

Under the Georgia State Warehouse Act,¹⁴⁵ any person, including any individual, partnership, firm, corporation, or association with a joint or common interest, may operate a warehouse for storing agricultural products¹⁴⁶ if that person obtains a license to do so.¹⁴⁷ By this definition, no foreign business enterprise or alien is prohibited from operating a warehouse.

As to the operation of warehouses storing products other than those defined as agricultural, there is ambiguity in the law. A bonded warehouseman is defined as any person engaged in the business of a warehouseman, or as any corporation organized under the laws of Georgia if its charter

141. GA. CODE ANN. ch. 98-3 (Rev. 1976).

142. 19 U.S.C.A. §81 (Rev. 1965).

143. These zones are areas within United States territory into which foreign merchandise may be brought and stored, exhibited, broken up, repacked, assembled, sorted, graded, etc. without customs duties being collected until the merchandise leaves the zone and enters a United States custom territory.

144. GA. CODE ANN. §98-303 (Rev. 1976).

145. GA. CODE ANN. ch. 111-5 (Rev. 1973).

146. GA. CODE ANN. §111-502(a) (Rev. 1973).

147. GA. CODE ANN. §111-505 (Rev. 1973).

permits the corporation to engage in that type of business.¹⁴⁸ This would seem to prohibit a foreign enterprise from becoming a bonded warehouseman for the purpose of operating a warehouse for commercial purposes. However, the Uniform Warehouse Receipts Law¹⁴⁹ may well have repealed the sections of the *Georgia Code* defining a bonded warehouseman.¹⁵⁰

VII. A FEW CONCLUDING REMARKS

A complete inventory of the legal system of Georgia as it affects the foreign investor or trader has not been attempted in this article; such an inquiry would be the basis for a longer study which would include detailed analysis of other areas of Georgia law such as environmental law,¹⁵¹ securities law,¹⁵² and industrial property law.¹⁵³ Nevertheless, a pattern of the treatment of foreign investment and trade does appear to emerge from the description of rules and institutions provided in this article.

Georgia has held to general legal policies which, with few exceptions, do not restrict the foreign investor or trader. For example a foreign corporation may register to do business in Georgia even if the country of its origin has laws concerning forms of doing business that differ substantially from those of Georgia. While registered to transact business in Georgia, the foreign corporation has the same powers and obligations as the domestic corporation.

While Georgia offers an even-handed tax policy toward all businesses, whether foreign or domestic, it does not provide many tax incentives to any business. It should be noted that Georgia does not offer any exemption or moratorium on land, capital improvements, or on equipment and machinery; nor does it allow an exemption for the state corporate income

148. GA. CODE ANN. §111-101 (Rev. 1973).

149. GA. CODE ANN. ch. 111-4 (Rev. 1973). This was later repealed by GA. CODE ANN. §109A-10—103 (Rev. 1973).

150. GA. CODE ANN. §2-1916 (Rev. 1973).

151. Georgia is a party to the Interstate Environment Compact which provides for inter-governmental cooperation among the signatory states and the federal government in the area of environmental protection. GA. CODE ANN. ch. 92A-23 (Rev. 1972). The Division of Environmental Protection was created within the Department of Natural Resources in 1972; it is charged with water and air quality control and solid waste management. GA. CODE ANN. §§40-35162, -35145, -35157-59 (Rev. 1975). See also Solid Waste Management Act, GA. CODE ANN. ch. 43-16 (Rev. 1974); Ground Water Use Act of 1972, GA. CODE ANN. ch. 17-11 (Supp. 1975).

152. *E.g.*, the purchasing of securities which is not regulated by Federal securities laws in regulated primarily by the Georgia Securities Act of 1973, GA. CODE ANN. ch. 97-1 (Rev. 1976) and the UNIFORM COMMERCIAL CODE—Investment Securities, GA. CODE ANN. ch. 109A-8 (Rev. 1973).

153. See, *e.g.*, GA. CODE ANN. chs. 106-1,-3 (Rev. 1968) (provides for trademarks, service marks, labels, advertising, and trade name registration). See also, Fair Trade Act, GA. CODE ANN. ch. 106-4 (Rev. 1968) and GA. CODE ANN. §37-712 (Supp. 1975) (provides equitable relief for fraudulent use of trademark).

tax. The corporate income tax rate, however, is not excessively high at 6 percent.

The freeport legislation, passed during the 1974 General Assembly and ratified by the voters in Georgia,¹⁵⁴ does provide some incentive to a business enterprise whose inventory would be classified as a harvested agricultural product with a planting-to-harvest cycle of 12 months or less. If the more recent freeport bill passed during the 1976 General Assembly is approved during the 1976 general elections, then there will be a further tax incentive available for a broader range of manufacturing enterprises.¹⁵⁵

The exceptions to the general policy in Georgia law of equal treatment¹⁵⁶ are of some importance as they involve the areas of banking and insurance. As described earlier in this article, the foreign banking enterprise and the alien insurer are at a disadvantage regarding establishment and operation in Georgia in comparison with their local counterparts. The foreign banking enterprise possesses abbreviated powers and the alien insurer must meet stricter financial requirements.

If, with a few exceptions, the law of Georgia does not deal specially with foreign investment and trade by way of incentives or disincentives, there are nevertheless a number of extra-legal policies that can make and do make a direct contribution to the foreign investment and trade climate of Georgia. Some policies remain essentially extra-legal; these include the creation and development of official and private agencies and organizations to encourage investment and trade,¹⁵⁷ an aggressive public relations campaign to attract investment and trade, and the demonstration of goodwill by the government at state and local levels¹⁵⁸ regarding the establishment of foreign enterprises in the State. The willingness of Georgia business, including banks and other service enterprises, and the professions, particularly lawyers, to aid in the establishment and expansion of foreign

154. See note 109, *supra* and accompanying text.

155. See note 110, *supra*.

156. This principle is known as "national treatment" in the terminology of international law.

157. At present, both the International Division of the Georgia Department of Community Development and the Georgia Chamber of Commerce have been involved in activities designed to encourage foreign investment and trade in the State. In regard to the work of the International Division of the Georgia Department of Community Development, see Allen, *State Government in International Trade*, 27 *MERCER L. REV.* 419 (1976). The Southern Council on International and Public Affairs, based in Atlanta, facilitates the dissemination of information regarding international affairs and serves as a forum for the exchange of ideas in international aspects of business.

158. Both the Carter and Busbee administrations have sponsored tours to Japan, Western Europe, and elsewhere in order to seek trade and foreign investment for the State. See note 54, *supra*. Local chambers of commerce can and often do inform prospective foreign investors of the resources and services available in their areas.

enterprises and trade relations is very important. Extra-legal services such as educational¹⁵⁹ and transportation¹⁶⁰ facilities are also important in considering what Georgia offers to foreign investors.

Other policies are reflected in laws that are applicable to local and foreign enterprises alike. For example, Georgia statutes provide for relatively low minimum wages¹⁶¹ and "the right to work."¹⁶² Moreover, as previously shown, requirements of employers in regard to employment conditions do not appear to be onerous.

In any review of the responsiveness of the law of Georgia to foreign investment and trade a number of economic and social issues must be examined closely before any substantial legal changes are made. Various approaches to foreign investment and trade are possible, among which are the following: (1) no special restrictions or facilities based on foreign status;¹⁶³ (2) incentives;¹⁶⁴ and (3) disincentives.¹⁶⁵ A mixture of these approaches is, of course, possible and is likely to be desirable. Thus, issue by issue analysis is necessary.

In deciding upon the approach to be taken on particular issues the State must be conscious of its duty to provide for the protection of its citizens and enterprises. It is on this basis that Georgia's regulations in matters of insurance and banking may be justified; it can be argued that such regulation helps to assure that participants in these activities can promptly and effectively meet their obligations. Nevertheless, the essential task of protection to be afforded local persons and industry can, if such is a perceived need, be balanced by the wish to accelerate and enlarge the economic life of the State through the promotion of an influx of foreign investment and the appreciable increase of international trade in order to provide greater economic well-being. Furthermore, in contemplating measures for the expansion of foreign investment and trade in Georgia, account must be taken of whether such expansion from other regions of the United States is desired as well as international trade and investment.

159. Public schools, both on the elementary and high school levels, as well as Georgia colleges and universities may enroll aliens.

160. The transportation network of the State includes particularly fine air facilities in Atlanta as well as normal highway, rail, and water facilities. The federal interstate system, as yet not fully completed. The port facilities of the State are incentives to foreign investors after investors and traders.

161. See note 117, *supra* and accompanying text.

162. See note 123, *supra* and accompanying text.

163. In other words, this is equal or "national treatment."

164. *E.g.*, tax exemptions or moratoria on land and capital improvements, tax exemption on corporate income tax, and tax exemption or moratorium on some, if not a majority of inventories, equipment, machinery, and raw materials used in manufacturing.

165. *E.g.*, prohibition of foreign banks from exercising full retail banking powers, stringent capital and deposit requirements for alien insurer, restrictions on investing in certain types of economic activities such as agribusiness and transportation or the extent to which there can be foreign ownership in a particular industry or business. Such disincentives would have to meet federal and state constitutional criteria for validity.

In deciding on approaches to be taken and specific measures to be adopted, a further element should be the experience of other states, particularly that of states in the southeast region of the United States.¹⁶⁶ The experience of certain other countries, especially those of Western Europe, should also be taken into account.¹⁶⁷

Careful study must also be made of the limitations on the freedom of action of any state by the power of the Federal Government under the Constitution; the numerous areas of limitation were discussed earlier in this article. Many potential areas for incentives such as income taxes and trade barriers are removed partially or totally from the power of the State. Areas of disincentives such as exchange controls and immigration are also outside the purview of State authority. Of special interest are those areas in which there presently is or may in the future be national limitations on the activity of foreigners in the United States, either as investors or traders. Some barriers to foreign investment already exist in a small number of what are considered to be vital industries linked, *inter alia* to communications, transportation, and national security. It should be noted, although not taken too seriously at this time, that bills have been introduced in Congress that provide general limitations on foreign investment.¹⁶⁸ Of course, such legislation would be fully enforceable in Georgia.

When considering the measures to be adopted in order to carry out economic and social policies, careful attention must be given to whether measures should take the form of statutes¹⁶⁹ or whether it is more desirable to shape institutions, facilities, and attitudes to provide incentives or disincentives by nonformal techniques which in their essence do not involve changes in the law to deal specifically with foreign investment or trade.

To the extent that the Georgia Code deals specifically with measures that have an impact on foreign investment and trade, it is desirable that

166. For example, the Georgia Department of Community Development has found in the past that other Southeastern states, such as Florida and North Carolina, have offered more of what the Department calls the ten most attractive plant location incentives (*e.g.*, tax exemption on land and capital improvement, accelerated depreciation of industrial equipment, and tax exemptions on inventories, equipment, machinery, and raw materials). GEORGIA DEPARTMENT OF COMMUNITY DEVELOPMENT, TEN MOST ATTRACTIVE PLANT LOCATION INCENTIVES, (1974); Georgia Knocks at the World's Door, *Atlanta* 58 (Jan. 1974).

167. For example, laws involving exchange controls, taxation, and regional development of countries such as Italy, France, Belgium, and the United Kingdom could be examined. Certain policies of the European Economic Community in areas such as development and trade could also be studied.

168. See, *e.g.*, H.R. 2757, 94th Cong., 1st Sess. (1975) (a bill whose purpose is "to establish a National Foreign Investment Control Commission to prohibit or restrict foreign ownership control or management control, through direct purchase, in whole or in part. . ."). *Id.*

169. For example, a modern arbitration statute, based largely on the Uniform Arbitration Act model, would bring Georgia in line with the leading commercial states and federal legislation. Such a statute would effectively eliminate the problems of enforceability now faced under the common law rules embodied in the *Georgia Code*.

there be clarity and order in the structure of the Code with respect to this area of the law. A study might be undertaken to examine the need for restructuring and to recommend desirable modifications.

It is projected that foreign investment and trade in Georgia will grow appreciably in the years to come. Whatever may be the non-legal measures taken within the State to encourage or discourage investment and trade, the law of Georgia should be made as responsive as possible to the problems that will require legal solutions. The fact that the great influx of foreign investment and trade is relatively recent is reflected in the dearth of cases that have come before the courts in Georgia; this is bound to change. Clarity and ease of comprehension are difficult enough objectives when the purpose of the law is to regulate relations between persons within one legal system. Much care must be given to designing laws that will be applied in transnational commercial and investment situations.