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Disclosure of Foreign Direct Investment in United States Agricultural Property

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NOTES

DISCLOSURE OF FOREIGN DIRECT INVESTMENT IN UNITED STATES AGRICULTURAL PROPERTY

I. INTRODUCTION

On October 14, 1978, Congress passed the Agricultural Foreign Investment Disclosure Act,[1] to require reports by foreign persons of their holdings in agricultural property. The Act directs the Secretary of Agriculture to compile data from these reports, and to analyze the effect of foreign investment upon the agricultural economy.[2] In its 1976 survey of foreign direct investment in the United States,[3] the Department of Commerce found that, although sufficient data existed in most areas of the economy to support an assessment of the effect of foreign direct investment, data on foreign ownership of real estate was insufficient.[4] This was attributed primarily to the anonymity of most real estate transactions, and to the limitations of existing recordation and land data systems.[5] Based on limited data, the survey estimated that foreign persons owned 4.9 million acres of real estate in the United States, of which 22 percent, or approximately one million acres, was agricultural

1. Act of Oct. 14, 1978, Pub. L. No. 95-460, 92 Stat. 1263 (to be codified at 7 U.S.C. §§ 3501-3508); *see* H.R. REP. No. 1570, 95th Cong., 2d Sess. 6 (1978).

2. Act of Oct. 14, 1978, Pub. L. No. 95-460, § 5, 92 Stat. 1263 (to be codified at 7 U.S.C. § 3504).

3. The Foreign Investment Study Act authorized the first benchmark survey of foreign investment in the United States since 1959. Act of Oct. 26, 1974, Pub. L. No. 93-479, 88 Stat. 1450 (codified at 15 U.S.C. § 78b note (1976)); *see* H.R. REP. No. 1183, 93d Cong., 2d Sess. 2 (1974). The Department of Commerce conducted the study of direct investment, which was defined as foreign participation in an enterprise of ten percent or more, to permit comparison with United States direct investment abroad. U.S. DEP'T OF COMMERCE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: REPORT TO THE CONGRESS 4-6 (1976) (9 volumes) [hereinafter cited as BENCHMARK SURVEY]. The Department of the Treasury conducted the study of portfolio investment, and reported its findings in a two-volume set. *See* U.S. DEP'T OF THE TREASURY, REPORT TO THE CONGRESS ON FOREIGN PORTFOLIO INVESTMENT IN THE UNITED STATES (1976). *See generally Foreign Investment Study Act of 1974: Hearings Before the Subcomm. on Foreign Commerce and Tourism of the Senate Commerce Comm.*, 94th Cong., 2d Sess. (1976).

4. 1 BENCHMARK SURVEY, *supra* note 3, at 193.

5. *Id.* at 182, 183-84, 193; *see* Cook, *Land Information Systems*, in 8 BENCHMARK SURVEY, *supra* note 3, at L-113.

property.[6] These foreign holdings amounted to 0.1 percent of the 1.1 billion acres of United States farmland.[7]

The Act is one of several responses by Congress to economic conditions in the agricultural sector which are said to threaten the existence of the "family farm," usually defined to include small, owner-operated farms.[8] Congress saw foreign investment in agricultural property as contributing to these problems primarily through rising land prices and absentee ownership of farms.[9] Although the Act may help fill a significant gap in information on foreign investment in agricultural property, it is not clear that it will contribute substantially to solving the current economic problems of small farmers. The information available to Congress suggests that these problems are caused largely by increases in operating costs relative to production prices, the superior economic position of larger farm units,[10] and governmental policies which favor the development of larger farms.[11] The Act also raises the potential for conflict with other countries. Even though it does not impose restrictions upon the right of foreign persons to own real estate, foreign nations may see the Act as a signal that the United States is critically examining its longstanding "open door" policy toward foreign investment,[12] or even as the beginnings of a reversal of that policy. Finally, the Act raises problems of United States jurisdiction to require disclosure by foreign corporations operating in the United States through subsidiaries, as well as potential conflict with foreign secrecy laws. This note will examine the background and operation of the Act in light of these issues, and will address potential conflicts of the Act with state disclosure laws and United States treaty obligations.

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6. 1 BENCHMARK SURVEY, *supra* note 3, at 184. Some private estimates of foreign ownership were higher. *See* Inouye, *Political Implications of Foreign Investment in the United States,* 27 MERCER L. REV. 597 (1976).

7. 1 BENCHMARK SURVEY, *supra* note 3, at 184.

8. *See* CONGRESSIONAL BUDGET OFFICE, U.S. CONGRESS, PUBLIC POLICY AND THE CHANGING STRUCTURE OF AMERICAN AGRICULTURE, at xiii, 4 (1978) [hereinafter cited as CHANGING STRUCTURE].

9. *See* H.R. REP. No. 1570, *supra* note 1, at 7-8.

10. *See* part II.A. *infra.*

11. *See* CHANGING STRUCTURE, *supra* note 8.

12. *See* S. REP. No. 910, 93d Cong., 2d Sess. 2 (1974); *cf.* Press Release 600, 35 DEP'T ST. BULL. 935-36 (1956) (announcing FCN treaty with the Republic of Korea).

II. BACKGROUND OF THE ACT

A. *Economic Pressures on the Family Farm*

Numerous statistics were cited during consideration of the Act which were said to indicate that the existence of the family farm might be threatened. For example, the number of family farms declined 42 percent between 1910 and 1964, and the family farm's share of total acreage fell from more than half to less than 30 percent.[13] Similarly, the total number of farms declined from 6.8 to 2.7 million between the late 1930's and 1977.[14] Notwithstanding this decline in actual numbers, however, in recent years more than 90 percent of all farms have been family farms.[15] These figures reflect the fact that farm size has increased over the years, partly as a result of increased mechanization, which enables an individual farmer to cultivate more land.[16] Some commentators have argued that governmental policies have favored the development of large farms since the late nineteenth century,[17] and that this has contributed to the rise of large agribusiness concerns, which presently own farms averaging seven times larger than those owned by family farms.[18] These commentators argue that the equal application of commodity price support and subsidy policies to large and small farms resulted in disproportionate benefits to the large farms.[19] Other commentators have noted that increased mechanization encouraged larger farms, where machines can be used more efficiently.[20] A study by the Congressional Budget Office reached similar conclusions, noting that price supports, tax policies, and

13. 124 CONG. REC. E3504 (daily ed. June 28, 1978) (remarks of George Rucker). For statistical purposes, a family farm is defined as "any farm that annually uses less than 1.5 man-years of hired labor and is not operated by a hired manager." CHANGING STRUCTURE, *supra* note 8, at xiii.

14. CHANGING STRUCTURE, *supra* note 8, at 1-3.

15. *See id.* at 21-22.

16. *See id.* at 29-31.

17. *See* Heady, *Externalities of American Agricultural Policy*, 7 U. TOL. L. REV. 795 (1976); Scher, Catz & Mathews, *USDA: Agriculture at the Expense of Small Farmers and Farmworkers, id.* at 837.

18. 124 CONG. REC. E3504 (daily ed. June 28, 1978) (remarks of George Rucker).

19. Heady, *supra* note 17, at 811-12.

20. U.S. DEP'T OF AGRICULTURE, FARM REAL ESTATE MARKET DEVELOPMENTS 5 (1978) [hereinafter cited as MARKET DEVELOPMENTS]; MacDonald, *The Family: How Are You Going to Keep Them Down on the Farm?*, 35 MONT. L. REV. 88 (1974).

extension services all benefitted farms in proportion to their size, with the result that large farms were favored.[21]

As a result of the increase in farm size and absentee ownership of farms, demand for local goods and services declined as more agricultural inputs were purchased from wholesalers in larger communities.[22] To reverse the decline of rural communities which followed, in 1972 Congress enacted the Rural Development Act,[23] which provided funding for projects and business loans for rural areas.[24] Both insufficient funding[25] and contrary policies within the Department of Agriculture[26] hampered this program. The effect of large farms upon rural communities is being addressed by a bill introduced in the 96th Congress, the Family Farm Antitrust Act.[27] The bill would prevent ownership or longterm leasing of agricultural property by persons whose non-farming business assets exceed fifteen million dollars.[28]

Numerous relatively short-term economic conditions have been found to have a detrimental effect on the family farm. Among them are high land prices, high taxes, rising costs of agricultural inputs, and low farm product prices.[29] Congress has addressed these problems with several statutes and proposed bills. Estate taxation often makes passing a family farm to the next generation

21. CHANGING STRUCTURE, *supra* note 8, at 45-55.

22. *See* Heady, *supra* note 17, at 812-13.

23. Act of Aug. 30, 1972, Pub. L. No. 92-419, 86 Stat. 657 (codified in scattered sections of 7 U.S.C.).

24. *See* 7 U.S.C. §§ 1926(a)(2), 1933 (1976).

25. *See* Heady, *supra* note 17, at 814-15, 815 n.104.

26. *See* Scher, Catz & Mathews, *supra* note 17.

27. H.R. 1045, 96th Cong., 1st Sess. (1979); S. 334, 96th Cong., 1st Sess. (1979); *see* 125 CONG. REC. H187, E109-10 (daily ed. Jan. 18, 1979) (remarks and statement of Rep. Kastenmeier); *id.* at S1053 (daily ed. Feb. 5, 1979) (remarks of Sen. Bayh and text of S. 334). The bill was first introduced by Senators Abourezk and Nelson, as the Family Farm Antitrust Act of 1973, S. 950, 93d Cong., 1st Sess. (1979). *See* Abourezk, *Agriculture, Antitrust and Agribusiness: A Proposal for Federal Action,* 20 S.D. L. REV. 499 (1975).

28. S. 334, 96th Cong., 1st Sess. § 3(a) (1979). The House version restricts persons with three million dollars in non-farm assets. *See* 125 CONG. REC. E109 (daily ed. Jan. 18, 1979) (statement of Rep. Kastenmeier). *See generally* MacDonald, *supra* note 20, at 89-90; Rosenberg, *Vertical Integration in the Cattle Feeding Industry and the Packers and Stockyards Administration,* 7 U. TOL. L. REV. 935 (1976); *see also* Warlich & Brill, *Cooperatives vis-a-vis Corporations: Size, Antitrust and Immunity,* 23 S.D. L. REV. 561 (1978).

29. H.R. REP. No. 1570, *supra* note 1, at 6.

difficult.[30] This was alleviated to a degree by the Tax Reform Act of 1976,[31] which added sections 2032A, 6166 and 6166A to the Internal Revenue Code. Section 2032A permits a special valuation method for a family farm under certain circumstances;[32] sections 6166 and 6166A provide for deferral of estate tax for fifteen and ten years, respectively.[33] Low farm product prices, alleviated for many years by price supports,[34] have produced several bills in the 96th Congress to raise price supports.[35] Several bills establish cost of production boards, to monitor and study costs of agricultural inputs.[36] Both prices and costs were addressed by enactments in 1977 and 1978.[37]

Land prices doubled in some areas and tripled in others between 1970 and 1977.[38] Average prices nationwide doubled between 1970 and 1977 and tripled between 1965 and 1977; by comparison, the Fortune 500 stock average remained unchanged.[39] Department of Agriculture statistics showed that while the land value of all farmland increased by 339 billion dollars between 1972 and 1976, net

30. *See* Kelley, *Estate Tax Reform and Agriculture,* 7 U. TOL. L. REV. 897, 897 (1976).

31. Act of Oct. 4, 1976, Pub. L. No. 94-455, 90 Stat. 1520 (codified in scattered sections of 26 U.S.C.).

32. *See* I.R.C. § 2032A. *See generally* Bock & McCord, *Estate Tax Valuation of Farmland Under Section 2032A of the Internal Revenue Code,* 1978 S. ILL. U. L.J. 145.

33. I.R.C. §§ 6166(a), 6166A(a). *See generally* Campbell & Carroll, *Section 6166: Preserving the Family Business or Family Farm Through Estate Tax Deferral,* 25 DRAKE L. REV. 521 (1976).

34. *See* Heady, *supra* note 17, at 808; Comment, *Federal Regulation of Agriculture: The Conflict Between Economic Realities and Social Goals,* 5 J. PUB. L. 248, 254 n.38 (1956).

35. *See, e.g.,* H.R. 2416, 96th Cong., 1st Sess. (1979); S. 418, 96th Cong., 1st Sess. (1979) (providing for "flexible parity"); 125 CONG. REC. H897 (daily ed. Feb. 26, 1979); *id.* S1450-51 (daily ed. Feb. 9, 1979).

36. *See, e.g.,* H.R. 2130, 96th Cong., 1st Sess. (1979); S. 1, 96th Cong., 1st Sess. (1979) (also providing for price supports); 125 CONG. REC. H628 (daily ed. Feb. 13, 1979); *id.* at S59 (daily ed. Jan. 15, 1979).

37. Emergency Agricultural Act of 1978, Pub. L. No. 95-279, 92 Stat. 240 (to be codified in scattered sections of 7 U.S.C.); Food and Agriculture Act of 1977, Pub. L. No. 95-113, 91 Stat. 913 (to be codified in scattered sections of 7 U.S.C.).

38. *See* H.R. REP. No. 1570, *supra* note 1, at 6; MARKET DEVELOPMENTS, *supra* note 20, at 18; 124 CONG. REC. H8574 (daily ed. Aug. 14, 1978) (remarks of Rep. Grassley); *id.* at H5925 (daily ed. June 22, 1978) (remarks of Rep. Whitten).

39. *See* H.R. REP. No. 1570, *supra* note 1, at 7, 27; S. REP. No. 1072, 95th Cong., 2d Sess. 5 (1978).

farm income during the same period was 144 billion dollars.[40] These developments raised concern that farmland might have more value as a capital asset than as a means of production.[41] Such economic conditions would mean that investment would be channelled into the agricultural land market; the presence of too much money in land markets has been noted as a possible cause of increased prices. On this premise the Family Farm Antitrust Act, introduced in the 96th Congress, seeks to forbid purchases of agricultural property by large agribusiness concerns.[42]

Inflation has been noted as another possible cause of increased prices due to a view of land as a strong hedge against the declining value of the dollar.[43] Several bills providing for loan programs have been introduced in the 96th Congress to make purchase of land easier for persons entering farming.[44]

B. *Effect of Foreign Purchasers*

Congress saw foreign purchasers as contributing to the problems of the family farm in primarily two ways: as a source of upward pressure on land prices, and as absentee landlords uninterested in local communities. The House report also noted undesirable effects which might result from foreign control of the production and marketing of specialized crops.[45] Conditions affecting foreign investment in agricultural property support the conclusion that land purchases may be attractive to certain investors. In the Federal Republic of Germany, for example, land is very expensive to acquire and to maintain, and land rents are one percent or less of land value per year. United States farmland, relatively inexpensive and appreciating rapidly, rents for approximately five percent

40. *See* S. REP. No. 1072, *supra* note 39, at 4.

41. *See* H.R. REP. No. 1570, *supra* note 1, at 6; S. REP. No. 1072, *supra* note 39, at 4.

42. *See* 125 CONG. REC. E109 (daily ed. Jan. 18, 1979) (statement of Rep. Kastenmeier); notes 27-28 & accompanying text *supra.*

43. 124 CONG. REC. H10,758 (daily ed. Sept. 26, 1978) (remarks of Rep. Hagedorn).

44. *See, e.g.,* H.R. 1910, 96th Cong., 1st Sess. (1979); 125 CONG. REC. H470, H554 (daily ed. Feb. 8, 1979).

45. *See* H.R. REP. No. 1570, *supra* note 1, at 7-8; S. REP. No. 1072, *supra* note 39, at 5-6. The findings of the Senate committee are contained in STAFF OF SENATE COMM. ON AGRICULTURE, NUTRITION AND FORESTRY, 95TH CONG., 2D SESS., FOREIGN INVESTMENT IN UNITED STATES AGRICULTURAL LAND (Comm. Print 1979) [hereinafter cited as COMMITTEE PRINT].

of value.[46] For the West German investor, political stability and certainty of land title in the United States make its farmland preferable to that in other countries.[47]

Because of insufficient data, it has been impossible to ascertain the number or effect of foreign purchases in the real estate market.[48] While purchases at prices above market value were reported,[49] no such purchases were documented.[50] The Department of Agriculture stated, on the other hand, that rising land prices may be related more directly to other factors in the land market. Farm enlargement accounted for 63 percent of land sales in 1976 and 1977, while purchases by absentee owners were only fifteen percent in 1977.[51] The Department concluded:

> We do not believe that the amount of farmland owned by foreign investors has had a significant impact on farmers or the agricultural economy at this time. Of greater concern are overall trends in land ownership in the United States, the impact of these trends on the structure of agriculture and the future viability of a family farm system, and the use and distribution of our land.[52]

With regard to the effect of foreign persons as absentee owners the Department concluded that "this problem of absentee ownership is no less severe if the absentee owner is located in Chicago, New York, or Tokyo or Milan."[53]

After the Foreign Investment Study Act of 1974, Congress' first response to the lack of informatin on foreign investment was the International Investment Survey Act of 1976.[54] The 1976 Act provided for benchmark surveys at five-year intervals of United States

46. *See* Paulsen, *Goals and Characteristics of Foreign Purchasers of Farmland in the United States,* in 8 BENCHMARK SURVEY, *supra* note 3, at L-19, L-20 to L-21.

47. *See* H.R. REP. No. 1570, *supra* note 1, at 7; Paulsen, *supra* note 46, at L-21, L-27.

48. S. REP. No. 1072, *supra* note 39, at 6-7 (citing GAO study of June 1978).

49. *See* 124 CONG. REC. S16,869-70 (daily ed. Oct. 2, 1978) (remarks of Sen. Talmadge); WALL ST. J., Aug. 21, 1978, at 18, col. 2.

50. *See* S. REP. No. 1072, *supra* note 39, at 7; 1 BENCHMARK SURVEY, *supra* note 3, at 193; COMMITTEE PRINT, *supra* note 45, at 15.

51. *See* S. REP. No. 1072, *supra* note 39, at 14 (statement of H. Hjort, Director of Economics, Dep't of Agriculture); *id.* at 22 (issue brief by Library of Congress).

52. *Id.* at 13 (statement of H. Hjort, Director of Economics, Dep't of Agriculture).

53. *Id.* at 16.

54. Act of Oct. 11, 1976, Pub. L. No. 94-472, 90 Stat. 2059 (codified at 22 U.S.C. §§ 31-1-3108 (1976)).

investment abroad, and of foreign investment in the United States.[55] It also provided for a feasibility study of a multipurpose land data system "to monitor foreign direct investment in agricultural, rural, and urban real property."[56] This study is presently being conducted by the Department of Agriculture.[57]

Concerned that monitoring efforts under the 1976 Act might not produce sufficient information from exisiting sources on foreign investment in real estate,[58] Congress in 1978 passed the Agricultural Foreign Investment Disclosure Act. While the Act is intended to be "neutral" with regard to foreign investment,[59] two other bills introduced in the 96th Congress are much more restrictive of foreign agricultural investment. The Family Farm Antitrust Act provides that:

> [N]o foreign person may acquire, after the date of enactment of this section, any agricultural land unless such land (A) is acquired by such person for an immediate or future nonfarming use, (B) is used for such nonfarming use within five years after the date of the acquisition of such land by such foreign person, and (C) is leased, within one year after acquisition by such foreign person, to a family farm for use by such family farm until such land is no longer used for farming purposes.[60]

Another bill, the Agricultural Foreign Investment Control Act of 1979, limits ownership of agricultural property by foreign persons to a minority interest in one "family farm unit."[61]

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55. *Id.* § 4(b), (c) (codified at 22 U.S.C. § 3103(b), (c) (1976)); *see* H.R. REP. No. 1490, 94th Cong., 2d Sess. 2-3 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 4663, 4664-65.

56. Act of Oct. 11, 1976, Pub. L. No. 94-472, § 4(d), 90 Stat. 2060 (codified at 22 U.S.C. § 3103(d) (1976)). *See generally International Investment Survey Act of 1975: Hearings Before the Subcomm. on Foreign Commerce and Tourism of the Senate Comm. on Commerce,* 94th Cong., 1st Sess. (1976).

57. *See* 43 Fed. Reg. 53,783 (1978) (Economics, Statistics, and Cooperatives Service). The Department has recently completed a study entitled the Resource Economic Survey of Land Ownership, which has compiled data from which the effect of owner characteristics may be determined. The study does not segregate data on foreign ownership. *See* S. REP. No. 1072, *supra* note 39, at 17.

58. S. REP. No. 1072, *supra* note 39, at 3, 4.

59. H.R. REP. No. 1570, *supra* note 1, at 11-12.

60. S. 334, 96th Cong., 1st Sess. § 3(a)(8A)(c)(1) (1976); *see* 125 CONG. REC. S1053-55 (daily ed. Feb. 5, 1979) (remarks of Sen. Bayh). For a discussion of this bill, see text accompanying notes 27-28, 42 *supra.*

61. S. 194, 96th Cong., 1st Sess. § 4(b) (1979); *see* 125 CONG. REC. S434-36 (daily ed. Jan. 23, 1979) (remarks of Sen. McGovern).

III. Operation of the Act

A. *Generally*

The Act requires a report by any "foreign person" who acquires or transfers an interest in agricultural property, within 90 days of the transaction.[62] The report must contain the name and citizenship of the foreign person, or the name, country of organization, and principal place of business in the case of a corporation or partnership.[63] The type of interest, the legal description and acreage, and the purchase price must be disclosed.[64] If a foreign person transfers agricultural property, the identity of the transferee must be disclosed.[65] The Act requires disclosure of interests in agricultural property currently held by foreign persons; nonforeign persons who subsequently become foreign persons must report their interests. Finally, interests held by a foreign person which are converted to an agricultural use must be reported.[66] An "interest" in agricultural property as defined in the Regulations includes fee interests, leaseholds of ten years or more, and certain noncontingent interests.[67]

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62. Act of Oct. 14, 1978, Pub. L. No. 95-460, § 2(a), 92 Stat. 1263 (to be codified at 7 U.S.C. § 3101(a)).

The first set of regulations under the Act is contained at 44 Fed. Reg. 7115 (1979). The second set, referred to herein as the Regulations, is found at 44 Fed. Reg. 29029 (1979) (to be codified at 7 C.F.R. §§ 781.1-781.4). Corrections and interpretations appear at 44 Fed. Reg. 47526 (1979) (to be codified at 7 C.F.R. §§ 781.2-781.3).

63. Act of Oct. 14, 1978, Pub. L. No. 95-460, § 2(a)(1)-(3), 92 Stat. 1263 (to be codified at 7 U.S.C. § 3501(a)(1)-(3)).

64. *Id.* § 2(a)(4)-(6) (to be codified at 7 U.S.C. § 3501(a)(4)-(6)).

65. *Id.* § 2(a)(7) (to be codified at 7 U.S.C. § 3501(a)(7)).

66. *Id.* § 2(b)-(d), 90 Stat. 1264 (to be codified at 7 U.S.C. § 3501(b)-(d)).

67. 44 Fed. Reg. 29031 (1979) (to be codified at 7 C.F.R. § 781.2(c)). The term "interests" includes beneficial as well as legal interests. *See* 124 Cong. Rec. H10,763 (daily ed. Sept. 26, 1978) (remarks of Rep. Glickmen). *See generally* Morrison, *Legal Regulation of Alien Land Ownership in the United States,* in 8 Benchmark Survey, *supra* note 3, at M-40 to M-41. Security interests are not required to be reported. Act of Oct. 14, 1978, Pub. L. No. 95-460, § 2(a), 92 Stat. 1263 (to be codified at 7 U.S.C. § 3501(a)).

The inclusion of a reporting requirement of leasehold interests in the Regulations is not clearly supported by the legislative history and background of the Act. Language in the Senate version specifically required reporting of leaseholds, but this language was deleted in the statute. *Compare* Act of Oct. 14, 1978, Pub. L. No. 94-460, § 2, 90 Stat. 1263 (to be codified at 7 U.S.C. § 3501) *with* S. 3384, § 3, 95th Cong., 2d Sess. (1978). The Department of Agriculture itself had requested that reports of leaseholds not be required under the Act because of the difficulty

To prevent concealment of ultimate ownership through a corporate structure, the Act requires disclosure of the second and third tier of ownership. The entity owning the land is required to disclose the identity of its shareholders. Entities in the second tier, in turn, may be required to disclose the identites of shareholders in the third tier.[68]

The Act gives a broad definition to the term "foreign person,"[69] including non-resident aliens, foreign governments, any entity organized under the laws of a foreign country, and any United States entity in which a non-resident alien owns directly or indirectly, "a significant interest or substantial control."[70] This is defined in the

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of administration. *See* Letter of Sept. 7, 1978 from Bob Bergland, Secretary of Agriculture, to Hon. Thomas Foley, House Committee on Agriculture, *reprinted in* H.R. REP. No. 1570, *supra* note 1, at 24 [hereinafter cited as Agriculture Letter]. Congress, apparently, therefore, considered and rejected requiring such disclosure. The background of the Act likewise suggests that there should be no requirement to report leasehold interests. Foreign investors are seeking to take advantage of capital appreciation on farmland, which requires a purchase rather than a lease. *See* H.R. REP. No. 1570, *supra* note 1, at 11. Leasing by foreign investors has been described as of "relatively small importance." Agriculture Letter, *supra,* at 24.

The Department's position on leaseholds, on the other hand, is not totally unjustified. First, the language deleted from the Senate bill was "leaseholds of five or more years." *See* S. 3354, § 3, 95th Cong., 2d Sess. (1978). The deletion could be construed as merely giving the Department more discretion to determine which leases should be reported. Second, to the extent that foreign investors compete with local farmers in leasing farmland, the cost of leasing should tend to increase; the effect on the farmer's cost of doing business would be similar to the effect of sales of farmland.

68. Act of Oct. 14, 1978, Pub. L. No. 94-460 § 2(e), (f), 90 Stat. 1264-65 (to be codified at 7 U.S.C. § 3501(e)(f)). Under the Regulations, disclosure by the second tier is not automatic, but is to be made "upon request." 44 Fed. Reg. 29033 (1979) (to be codified at 7 C.F.R. § 781.3(g)).

The definition of "foreign person" as applied to United States entities ensures that the reporting obligation may not be evaded by setting up a string of subsidiaries. Although a report is required of only three tiers of ownership, *see* Act of Oct. 14, 1978, Pub. L. No. 95-460, § 2(e), (f), 90 Stat. 1264-65 (to be codified at 7 U.S.C. § 3501(e), (f)), a third tier subsidiary would be defined as a "foreign person" if a five percent interest is held by another foreign person, *see* 44 Fed. Reg. 29032 (1979) (to be codified at 7 C.F.R. § 781.2(1)). Assuming that each subsidiary owns at least five percent of the next lower tier, each entity, including finally the landowner, would be required to report. *See id.* at 47526 (to be codified at 7 C.F.R. § 781.2 (Interpretation)).

69. Act of Oct. 14, 1978, Pub. L. No. 95-460, § 9(3), 90 Stat. 1266-67 (to be codified at 7 U.S.C. § 3508(3)).

70. *Id.* § 9(3)(C)(ii), 90 Stat. 1267 (to be codified at 7 U.S.C. § 3508(3)(C)(ii)).

Regulations as ownership by a foreign person of five percent or more of the entity.[71]

A penalty of up to 25 percent of the fair market value of the land may be assessed for failure to submit a report, for knowingly omitting required information, or for knowingly submitting false or misleading information.[72] The penalty is an amount "appropriate to carry out the purposes of the Act";[73] no standard for determining the amount of the penalty is stated in the regulations.[74]

B. *Application to Corporations*

The ability of investors to erect a "chain" of corporations raises the possibility that the reporting requirements with regard to sec-

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Resident aliens and entities in which they hold an interest are not required to report. *See* S. REP. No. 1072, *supra* note 39, at 12.

71. 44 Fed. Reg. 29032 (1979) (to be codified at 7 C.F.R. § 781.2(1)). The determination that five percent ownership would constitute a "significant interest" reflects an attempt to gather as much data as possible without creating an undue burden for United States corporations, which might have difficulty determining whether small shareholders are foreign persons. This is reflected in the Regulations, which provide that, while five percent ownership by any number of foreign persons will trigger the reporting requirement, only the identities of shareholders who individually own a five percent interest must be reported. *See* 44 Fed. Reg. 29030 (1979).

For statistical purposes, it will be necessary for the Department of Agriculture to segregate its data into direct and portfolio investment as defined by the International Investment Study Act of 1976. That Act defines "direct investment" as a ten percent interest or greater in an entity, and "portfolio investment" as all other investment, 22 U.S.C. § 3102(10), (11) (1976); the reports to Congress under the Foreign Investment Study Act of 1974 were divided in the same manner. *See* BENCHMARK SURVEY, *supra* note 3, at 1, 4-6.

72. Act of Oct. 14, 1978, Pub. L. No. 95-460, § 3(a), 90 Stat. 1265 (to be codified at 7 U.S.C. § 3502(a)).

73. *Id.* § 3(b) (to be codified at 7 U.S.C. § 3502(b)).

74. 44 Fed. Reg. 29033 (1979) (to be codified at 7 C.F.R. § 781.4(b)). Remarks in the House indicate that the penalty is to be determined by the degree of willfullness of the failure to report as required. 124 CONG. REC. H10,760 (daily ed. Sept. 26, 1978) (remarks of Rep. Foley); *but see id.* at H12,374 (daily ed. Oct. 11, 1978) (remarks of Rep. Grassley, noting that "knowingly" does not include "has reason to know").

Determining when to graduate the penalty may be difficult if negligent or reckless conduct does not result in a penalty under the Act. *See id.* The Department might in appropriate cases look to surrounding circumstances such as the experience of the investor, the effectiveness or ability of counsel, or willingness to cooperate upon being notified by the Department that a penalty might be assessed.

ond—and third-tier parents, while disclosing the fact that land is foreign owned, may not disclose ultimate ownership by foreign persons.[75] For corporate chains composed entirely of United States entities, this may be accomplished by a four-tier arrangement; for chains where two or more of the entities are foreign corporations, there may be no jurisdiction to compel disclosure of even second- and third-tier entities in certain instances.[76]

1. United States Corporations

The Act does not require disclosure of a fourth tier of ownership;[77] thus, such an arrangement could theoretically hide the identity of foreign owners. Multi-tier corporate structures are frequently employed by foreign persons investing in the United States in order to take advantage of favorable tax treatment under United States tax treaties;[78] these arrangements often involve four or more levels of ownership.[79] By the time three entities have been set up, however, a good deal of time and money will have been consumed.[80] Further, the corporations may lack any business purpose apart from evading the requirements of the Act. In such a case the Department of Agriculture may be able to disregard intermediate entities and compel disclosure by persons farther up the chain.

Although the rule is applied sparingly, a corporate entity may be disregarded where its sole purpose is to avoid the effect of a statute.[81] It has been held that an administrative agency must be

75. Where interests in a corporation are held in bearer shares, it may be impossible to know whether any interest is held by a foreign person. The Regulations take this into consideration by providing that the identities of interest holders must be disclosed only if their individual interests are five percent or greater. *See* 44 Fed. Reg. 29030 (1979). Further, the investigatory power given to the Department of Agriculture by section 4 of the Act should be adequate to discover most attempts to evade the reporting requirement.

76. *See* LEGAL ENVIRONMENT FOR FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 24 (R. Rosendahl ed. 1972) ("The real issue will be the extent to which a foreign *parent* corporation may be subject to liability in the United States . . . .").

77. Act of Oct. 14, 1978, Pub. L. No. 95-460, § 2, 90 Stat. 1263-65 (to be codified at 7 U.S.C. § 3501); *see* 44 Fed. Reg. 29030 (1979).

78. *See generally* Knight, *Planning for Foreign Investments in U.S. Real Estate,* 36 N.Y.U. INST. FED. TAX. 1081 (1978).

79. *See, e.g.,* I.R.S. Private Letter Ruling 7731043 (May 6, 1977).

80. *See* DeVos, *Foreign Entities Investing in the United States,* 37 N.Y.U. INST. FED. TAX. § 23.09, at 23-25 to 23-26 (1979).

81. *See* Moline Properties, Inc. v. Commissioner, 319 U.S. 436, 439 (1943); 18 AM. JUR. 2D, CORPORATIONS, §§ 14, 15 at 559-62 (1965).

delegated the power to do so;[82] the question has arisen for a federal agency with regard to radio station licensing by the Federal Communications Commission. In *General Telephone Co. v. United States,*[83] the court held that the FCC had the power to disregard a corporate entity in denying a licensing petition, stating:

> To hold otherwise would balk the Commission in the exercise of its statutory duties . . . . Where the statutory purpose could thus be easily frustrated through the use of separate corporate entities, the Commission is entitled to look through corporate form and treat the separate entities as one and the same for purposes of regulation.[84]

While the Act does not state specifically that the Secretary of Agriculture may disregard an entity and require disclosure by its parents, there is broad language in the Act concerning the Secretary's powers to investigate reports. Section four states that:

> The Secretary may take such actions as the Secretary considers necessary to monitor compliance with the provisions of this Act and to determine whether the information contained in any report submitted under section 2 accurately and fully reveals the ownership interest of all foreign persons in any foreign person who is required to submit a report under such section.[85]

Whether the Department will test the limits of this section remains to be seen. The Regulations suggest that the determination that a foreign person has invested in agricultural property may be sufficient for statistical purposes, without an inquiry into ultimate ownership,[86] and do not address the question of sham corporations.[87]

2. Foreign Corporations

When a corporate chain involves foreign entities, two problems

82. Fireman's Fund Ins. Co. v. Rich, 220 So.2d 371 (Fla. 1969); Roberts' Fish Farm v. Spencer, 153 So.2d 718, 720 (Fla. 1963).

83. 449 F.2d 846, 855 (5th Cir. 1971).

84. *Id.* (citing Mansfield Journal Co. v. FCC, 86 U.S. App. D.C. 102, 180 F.2d 28 (1950)). The court in *Mansfield Journal* noted that the Commissioner was empowered to consider the conduct and history of the applicant. 180 F.2d at 32-33; *see* 47 U.S.C. § 308(b) (1976).

85. Act of Oct. 14, 1978, Pub. L. No. 95-460, § 4, 92 Stat. 1265 (to be codified at 7 U.S.C. § 3503).

86. *See* 44 Fed. Reg. 29030 (1979).

87. *See id.* at 29031-33 (to be codified at 7 C.F.R. § 781.1-781.3).

may arise. First, ultimate ownership may be hidden in a fourth tier of ownership, as in the case of a domestic corporate chain. Second, the United States may not have jurisdiction to require a report by the second-tier entity. When the first-tier entity is a domestic corporation, owned by a foreign (second-tier) entity, the creation of a domestic corporation should be an act sufficient to subject the foreign, second-tier entity to United States jurisdiction under the rule of section 17(a) of the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW. Where the first-tier entity is created under the laws of a foreign country, however, the second-tier entity cannot be said to have acted in the United States within the meaning of the RESTATEMENT rule. That section reads: "A state has jurisdiction to prescribe a rule of law (a) attaching legal consequences to conduct that occurs within its territory . . . ."[88] Similarly, while § 17(b) of the RESTATEMENT provides that a state may prescribe the legal consequences of conduct "relating to a thing located, or a status or other interest localized, in its territory,"[89] it would appear that the parent's interest in its subsidiary is located in the state of the subsidiary's incorporation.

Two theories might be employed to require a report by the second-tier entity in such a situation. The corporation entity may be disregarded as a sham; in many cases, however, the first-tier entity is created by two or more co-venturers, for various independent business reasons. When this occurs, the limitations on the sham corporation theory may preclude its use to require disclosure. Further, the use of the theory against entities organized under the laws of a foreign country might result in protests by that country's government.[90]

Alternatively, a report might be required utilizing the "effects" test of section 18(b) of the RESTATEMENT, which provides that a state may prescribe legal consequence to extraterritorial conduct where:

88. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17(a) (1965) [hereinafter cited as RESTATEMENT].

89. *Id.*

90. *See* part IV.A. *infra.* The Internal Revenue Service has declined to employ the sham corporation theory against foreign investors even where it is clear that an intermediate entity is being employed for the purpose of taking advantage of a favorable tax treaty by non-residents of the treaty country. *See* Rev. Rul. 75-23, 1975-1 C.B.290; IRS Private Letter Ruling 7809024 (Nov. 29, 1977). *But cf.* Rev. Rul. 79-65, 1979-8 I.R.B. 48 (sham corporation theory applied where treaty permits).

> (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.[91]

This section, however, has usually been applied to conduct violative of United States antitrust or securities laws, where an economic injury occurs as a result of an act in a foreign country.[92] It is difficult to say whether creating a corporation under foreign law has any effect in the United States, because it is the subsidiary which decides to invest in the United States, not the parent. It may be more analytically sound, therefore, to apply the sham corporation theory in this case.

IV. CONFLICTS OF THE ACT WITH OTHER LAWS

A. *Foreign Law*

Efforts by the United States to obtain information from foreign entities have occasionally met with resistance from foreign governments. For example, Swiss law strictly limits disclosure to officials, and attempts to obtain information have resulted in diplomatic tensions between the two countires.[93] The Canadian province of Ontario passed an act making removal of business records from the

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91. RESTATEMENT, *supra* note 88, § 18(b).

92. *See, e.g.*, United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945) (court of appeals sitting as court of last resort); *cf.* Leaseco Data Processing Equipment Co. v. Maxwell, 319 F. Supp. 1256 (S.D.N.Y. 1970) (judicial jurisdiction).

93. Article 273 of the Swiss secrecy laws provides that:

> Whosoever seeks out a manufacturing or business secret in order to make it available to a foreign authority or to a foreign organization or private enterprise or to their agents,
>
> Whosoever makes available a manufacturing or business secret to a foreign authority or to a foreign organization or to a private enterprise or to their agents,
>
> Shall be punished with imprisonment.

As quoted in Zagaris, *The Agricultural Foreign Investment Disclosure Act of 1978: The First Regulation of Foreign Investment in United States Real Estate,* in FOREIGN TAX PLANNING 1979, at 67, 94 (P.L.I. 1979); *see* Kelly, *United States Foreign Policy: Efforts to Penetrate Bank Secrecy in Switzerland from 1940 to 1975,* 6 CAL. W. INT'L L.J. 211 (1976). *See generally* Farhat, *Le secret bancaire en droit libanais,* 25 TRAVAUX DE L'ASSOCIATION HENRI CAPITANT 283 (1974); Henrion, *Le secret des affaires en droit belge, id.* at 195, 200.

province a crime as a result of United States subpoenas issued to 50 Canadian corporations in an antitrust investigation.[94]

Amendments to the Act in the House committee removed language which would have forbidden the Secretary of Agriculture to require disclosure where disclosure would be violative of foreign law.[95] Assuming that the foreign entity has subjected itself to United States jurisdiction, it is permissible for the United States to require conduct inconsistent with foreign law.[96] Section 40 of the RESTATEMENT OF FOREIGN RELATIONS LAW lists several factors to be considered in enforcing the requirement of disclosure:

> (a) vital national interests of each of the states,
> (b) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person,
> (c) the extent to which the required conduct is to take place in the territory of the other state,
> (d) the nationality of the person, and
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.[97]

Enforcement of disclosure would be permitted by the RESTATEMENT rule. The ownership of land is one of the most vital of national concerns; this principle is universally recognized, both in the laws in foreign countries restricting investment in real property,[98] and in numerous friendship, commerce and navigation (FCN) treaties which make special provision for ownership of real property by foreign nationals.[99] The hardship imposed on foreign entities would be an inability to invest in United States agricultural property; their investment could be made in another area, however, while in the absence of enforcement the United States must do without information about its own land. Finally, enforcement will undoubtedly achieve compliance, as a lien may be placed on the land.

The burden of the conflicting obligations will fall upon the foreign investor who wishes to purchase real estate. The conflict may be avoided by concealing the identity of foreign entities with a

94. *See* 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 167 (1968).
95. H.R. REP. No. 1570, *supra* note 1, at 22.
96. RESTATEMENT, *supra* note 88, § 39(1).
97. *Id.* § 40.
98. *See* Morse, *Legal Structures Affecting International Real Estate Transactions,* 26 AM. U.L. REV. 34, 45-64 (1976).
99. *See* part IV.B. *infra.*

chain of three United States subsidiaries.[100] As the Act does not require disclosure of the identity of a fourth level of ownership, there will be no disclosure of a business secret of the foreign parent.[101] If the Department of Agriculture should vigorously employ a sham corporation theory to penetrate such structures, however, entities in countries with secrecy laws may be precluded from investing in agricultural property in the United States.

B. *United States Treaty Obligations*

United States treaties governing investment by foreign persons are of two types: first, numerous bilateral treaties of friendship, commerce and navigation;[102] second, the Code of Liberalization of Capital Movements drafted by the Organization for Economic Cooperation and Development.[103] The Act does not conflict with existing obligations under FCN treaties. The treaties provide for national and most-favored-nation treatment of foreign persons for several types of investments, but no FCN treaty gives national treatment to aliens with regard to acquisition or ownership of real estate.[104] Some treaties provide for national treatment with regard to leasing of real estate for certain purposes, but provide an exception for agricultural property.[105] The Act will require a reservation

100. *See* text accompanying note 77 *supra.*

101. *See* note 93 supra.

102. In 1979 these treaties affected some 76 states. *See* U.S. DEP'T OF STATE, TREATIES IN FORCE (1979). The treaties provide for the protection of property rights of foreign persons, and preserve the right of the United States to protect its interests in vital sectors of the economy. *See, e.g.,* Treaty of Friendship, Commerce & Navigation, United States-Denmark, arts. VII. IX. Oct. 1, 1981, [1961] 1 U.S.T. 908, T.I.A.S. No. 4797, 421 U.N.T.S. 105 (entered into force July 30, 1961).

103. *See* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, CODE OF LIBERALIZATION OF CAPTIAL MOVEMENTS (1973) (with supplements) [hereinafter cited as OECD CODE]. The OECD Convention has the status of an executive agreement, as it has not been consented to by the Senate. *See* Organization for Economic Cooperation and Development, *opened for signature* Dec. 14, 1960, [1961] 2 U.S.T. 1728, 1751-52, T.I.A.S. No. 4891 (adherence of the United States); Note, *The Rising Tide of Reverse Flow: Would a Legislative Breakwater Violate U.S. Treaty Commitments?,* 72 MICH. L. REV. 551, 577-80 (1974).

104. *See* Morse, *supra* note 98, at 45. While Professor Morse indicates that some FCN treaties provide for national treatment with regard to acquisition, *id.* at 42, the treaties do not bear this out. *See, e.g.,* Treaty of Friendship, Commerce & Navigation, Nov. 28, 1956, United States-Korea, [1957] 2 U.S.T. 2217, T.I.A.S. No. 2217, T.I.A.S. No. 3947, 302 U.N.T.S. 281.

105. *See, e.g.,* Convention of Establishment, Nov. 25, 1959, United States-France, art. VII, para. 2, [1960] 2 U.S.T. 2398, T.I.A.S. No. 4625, 401 U.N.T.S.

to the United States commitment to the OECD Code. The Code provides for abolition of restrictions on movement of capital,[106] but permits reservations at any time with regard to purchase of real estate.[107] The Code further provides that the reasons for a reservation must be given.[108]

C. *State Disclosure Laws*

With the passage of the federal act, the possibility arises that state statutes requiring disclosure of foreign ownership of agricultural property may be preempted. Although restrictions on foreign investment in real estate exist in about 25 states,[109] few state statutes requiring disclosure of foreign ownership of real estate existed until recently, with only Iowa, Nebraska and Minnesota having such statutes.[110] The Iowa statute requires disclosure of agricultural holdings by corporations, partners and fiduciaries, and of the identity of nonresident aliens who hold interests.[111] The Nebraska statute requires disclosure by corporations of their holdings and of the identity of nonresident aliens who hold interests.[112] Bills have been introduced in several states to enact disclosure statutes; a proposed bill in Tennessee is similar to the federal act.[113] The preemption question is of particular importance for a state such as Iowa, whose disclosure statute has existed for some time, and has been administered with a good deal of effort and interest by state officials.[114]

75; Treaty of Friendship, Commerce & Navigation, Apr. 2, 1953, United States-Japan, art. IX, para. 2, [1953] 2 U.S.T. 2063, T.I.A.S. No. 2863, 206 U.N.T.S. 143.

106. OECD CODE, *supra* note 103, art. 1(a).

107. *Id.* art. 2(b)(iv); *id.* Annex A, List B(V)(A)(1).

108. *Id.* art. 12(a); *see* Morrison, *supra* note 67, at M-39.

109. *See* Fisch, *State Regulation of Alien Land Ownership,* 43 Mo. L. REV. 407 (1978). *See generally* Note, *State Regulation of Foreign Investment,* 9 CORNELL INT'L L.J. 82 (1975).

110. 10 IOWA CODE ANN. §§ 172C.1 to 172C.15 (West Supp. 1978); 4 NEB. REV. STAT. §§ 76-1501 to 76-1506 (1976); *see* S. REP. No. 1072, *supra* note 39, at 25 (noting Minnesota statute); Harl, *The Iowa Reporting Law and Alien Ownership,* in 8 BENCHMARK SURVEY, *supra* note 3, at L-164; Morrison, *supra* note 67, at M-11 to M-22; Note, *Alien Ownership of South Dakota Farmland: A Menace to the Family Farm?,* 23 S.D. L. REV. 735, 739-41 (1978).

111. 10 IOWA CODE ANN. §§ 172C.5 to 172C.7 (West Supp. 1978).

112. 4 NEB. REV. STAT. § 76-1503 (1976).

113. *See* House Bill No. 273, Tennessee House of Representatives (introduced Feb. 5, 1979).

114. *See* H.R. REP. No. 1570, *supra* note 1, at 20, 25; Harl, *supra* note 110.

A holding that the Act preempts a state disclosure statute might be based upon one of two grounds; the first is that the state statute intrudes upon a field of exclusive federal competence, whether or not a federal statute is present.[115] In his concurring opinion in *Zschernig v. Miller,*[116] Justice Stewart stated that whether a state may legislate in a given field depends upon "the basic allocation of power between the States and the Nation."[117] Because the Oregon statute construed in *Zschernig* involved a state government in "minute inquiries" into the practices of foreign governments,[118] it was relatively simple for the Court to characterize the field as foreign relations. As the foreign relations power is assigned to the federal government, the statute was held unconstitutional.[119] The second ground for preemption is that the state statute conflicts with a federal statute in violation of the supremacy clause of the Constitution.[120] In *Hines v. Davidowitz,*[121] the Court considered the effect of a federal Alien Registration Act upon a Pennsylvania statute requiring registration of aliens present in the state. The Court stated: "[W]here the federal government . . . has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."[122] Whether a state disclosure statute is preempted by the Act therefore involves the questions of whether the states have the power to legislate in the field of the Act, and whether the state statute is consistent with the purpose of the Act. If the answer to either question is no, the state statute would be preempted.

An application of the "basic allocation" test should not result in preemption of a state disclosure statute, even though that statute might "provoke questions in the field of international affairs."[123] First, questions involving land ownership have histori-

115. *See* Zschernig v. Miller, 389 U.S. 429 (1948); Maier, *The Bases and Range of Federal Common Law in Private International Matters,* 5 VAND. J. TRANSNAT'L L. 133 (1971). *See generally Maier, Cooperative Federalism in International Trade: Its Constitutional Parameters,* 27 MERCER L. REV. 391, 402-06 (1976).

116. 389 U.S. at 441.

117. *Id.* at 443 (Stewart, J., concurring).

118. *Id.* at 435.

119. *Id.* at 436.

120. U.S. CONST. art. VI, cl. 2.

121. 312 U.S. 52 (1940).

122. *Id.* at 66-67.

123. *Id.* at 66; *see* Maier, *supra* note 115, 5 VAND. J. TRANSNAT'L L. at 134.

cally been a subject of state regulation, from the colonial period until the present.[124] This may be distinguished from *Hines,* where power over alien registration was expressly allocated to the federal government.[125] Second, disclosure statutes "do not involve a state in scrutiny of particular foreign governments, but treat investors from all nations alike. In *Zschernig,* on the other hand, the Court was concerned with an "intrusion" into the foreign relations field, even where it might be balanced by the state's interest in regulating succession of property.[126] Because of the history of state regulation in the field, and the minimal effect upon foreign relations of state disclosure statutes, a closer inquiry into the purpose and effect of the federal and state statutes is required than was employed in *Zschernig.*

With regard to the test of *Hines v. Davidowitz* for preemption, three issues must be addressed: the purposes of the federal statute, the effect of the state statute upon achieving those purposes, and whether Congress intended to permit regulation by the states.[127] The purposes of the Act here are two: first, to gather statistics on foreign investment in agricultural property;[128] second, to remain neutral with regard to foreign investment. While the former purpose is clear, the latter is less obvious. In considering the purposes of the Act, it is appropriate to look at the other federal statutes involving statistics on foreign investment in the United States, the Foreign Investment Study Act of 1974, and the International Investment Survey Act of 1976.[129] The 1976 Act states that "[n]othing in this chapter is intended to restrain or deter foreign investment in the United States . . . ."[130] The 1978 Act does not state that its purpose is to remain neutral with regard to foreign

124. *See* United States v. Little Lake Misere Land Co., 412 U.S. 580, 605 (1973) (Stewart, J., concurring); United States v. Fox, 94 U.S. 315, 320 (1877); Anderson, *A Survey of Alien Land Investment in the United States, Colonial Times to Present,* in 8 BENCHMARK SURVEY, *supra* note 3, at L-2, L-4. *See generally* Morrison, *supra* note 67.

125. 312 U.S. at 66.

126. 389 U.S. at 440.

127. Act of Oct. 14, 1978, Pub. L. No. 95-460, title, 92 Stat. 1263; *see* H.R. REP. No. 1570, *supra* note 1, at 11-12.

128. *See* 312 U.S. at 66-67, 73-74; *cf.* Maier, *supra* note 115, 5 VAND. J. TRANSNAT'L L. at 151 (construing Clark v. Allen, 331 U.S. 503 (1947)).

129. *See* Pennsylvania v. Nelson, 350 U.S. 497, 502-04 (1956) (construing a series of statutes to determine congressional intent).

130. International Investment Survey Act of 1976, § 2(c), 22 U.S.C. § 3101(c) (1976).

investment, but this purpose appears in the legislative history.[131] Further, the fact that the Act is a part of the system set up under the International Investment Survey Act[132] is convincing evidence that the intent of the 1976 act should affect the interpretation of the 1978 act.

In contributing to information on foreign investment in agricultural property, state disclosure statutes are clearly consistent with the purpose of Congress. Whether state statutes present an additional deterrent to foreign investment, however, depends upon whether the deterrent factor is seen as the very existence of the statute, or the penalty incurred. In *Hines v. Davidowitz,* the Court viewed the existence of the statute as the deterrent, noting the possibility of "repeated interception and interrogation."[133] Once information about a foreign investor has been made public, however, no deterrent effect is likely as a result of having to file a report with another governmental agency.[134] Rather, the additional deterrent factor exists in the possibility that an additional financial penalty may be assessed.

This analysis provides a basis for discriminating among state statutes based upon the size of the penalty assessed, in order to determine whether a state statute contravenes the purpose of Congress to remain neutral with regard to foreign investment. Both the Iowa and Nebraska statutes provide for a penalty not to exceed 1,000 dollars.[135] Such a penalty would be relatively insignificant in large land transactions; in view of the long-standing state interest in regulating land ownership, such a penalty could be viewed as a minor and permissible hindrance to effecting the purpose of the Act. On the other hand, large penalties, such as the flat 25 percent of market value imposed by the Tennessee bill,[136] could have a deterrent effect on investment by foreign persons. By doubling the penalty, such a statute significantly alters the incentive to report thought sufficient by Congress, and could be preempted under the

131. *See* H.R. REP. No. 1570, *supra* note 1, at 11-12; *cf.* 124 CONG. REC. S19,113 (daily ed. Oct. 13, 1978) (remarks of Sen. Percy).

132. *See* H.R. REP. No. 1570, *supra* note 1, at 9-10; S. REP. No. 1072, *supra* note 35, at 4.

133. 312 U.S. at 66.

134. *See* G. WUNDERLICH, SUMMARY OF THE REPORT: FOREIGN INVESTMENT IN U.S. REAL ESTATE 8 (Agric. Info. Bull. No. 400, 1976).

135. 10 IOWA CODE ANN. § 172C.11 (West Supp. 1978); 4 NEB. REV. STAT. § 76-1506 (1976).

136. House Bill No. 273, Tennessee House of Representatives (introduced Feb. 5, 1979).

Hines rationale.

With regard to Congress' intent to preempt state statutes, the Court in *Hines* noted that a comprehensive federal statute is one indication that preemption is intended.[137] It has been noted, however, that comprehensiveness "may show only that a problem is so complex that federal agencies must work along with state agencies to solve it."[138] Several factors suggest that Congress considered foreign investment in agricultural property such a problem. First, section six of the Act requires the Secretary of Agriculture to transmit reports by foreign persons to state agencies.[139] Second, the House Report notes the need for state participation in analyzing data.[140] Representative Grassley noted that "[c]lose cooperation with the States in the administration of this new program will be necessary . . . . Such cooperation and exchange of information will aid the effectiveness of this new program and assist the States in decisionmaking on issues relating to foreign investment within their borders."[141] For these reasons, state statutes found not to be undue deterrents to foreign investment should not be preempted by the Act.

V. CONCLUSION

The primary benefit of the Agricultural Foreign Investment Disclosure Act of 1978 will be the completion of the data base for benchmark surveys under the International Investment Survey Act of 1976.[142] In controlling and directing foreign direct investment, Congress needs information on the effect of investment in each sector of the economy, as investment in one sector may be more beneficial for the United States economy than investment in another.[143] If foreign direct investment in agricultural property is found to be less beneficial to the United States than investment in other sectors of the economy, then that investment should be

137. Hines v. Davidowitz, 312 U.S. at 69, 74.

138. Note, *A Framework for Preemption Analysis,* 88 YALE L.J. 363, 369 (1978).

139. Act of Oct. 14, 1978, Pub. L. No. 95-460, § 6, 92 Stat. 1266.

140. *See* H.R. REP. No. 1570, *supra* note 1, at 11.

141. *Id.* at 30.

142. *See* text accompanying notes 54-58, *supra.*

143. *See* H.R. REP. No. 1570, *supra* note 1, at 7; 124 CONG. REC. H8574 (daily ed. Aug. 14, 1978) (remarks of Rep. Grassley); G. WUNDERLICH, *supra* note 134, at 2-3, 9-12; Gaffney, *Social and Economic Impacts of Foreign Investment in United States Land,* 17 NAT. RESOURCES J. 377, 377-78, 382 (1977); Inouye, *supra* note 6, at 598-99, 602.

channeled into those other sectors.

The effect of foreign direct investment in agricultural property cannot be understood in isolation from other forces at work in that sector of the economy. This was clear to the legislatures of Iowa and Nebraska, whose disclosure systems monitor all large agricultural investments. The decline in the family farm has been evident for too long to be blamed in any significant measure on foreign direct investment; the effect of absentee landlords is the same regardless of their nationality. These facts were brought out by the Department of Agriculture several times during consideration of the Act.[144] That they were ignored suggests that the Act's goal of saving the family farm may have been compromised, either by a narrow view of current agricultural problems, which is unlikely,[145] or by political forces that would have prevented the passage of a statute requiring disclosure by domestic as well as foreign entities. The limitations upon farm ownership by large agribusiness concerns in the Family Farm Antitrust Act are one step toward remedying this deficiency in the Act, to the extent that those limitations are justified by findings on the effect of large farms in the agricultural sector. The more stringent limitations placed upon foreign agricultural investment by that act and the Agricultural Foreign Investment Control Act,[146] however, are indefensible in the absence of proof that such investment has a detrimental effect on the agricultural economy.

Although logically the Act should not have a detrimental effect upon the United States position as an advocate of free trade, it conveys an unmistakable signal that the longstanding "open door" policy to foreign investment is being critically reexamined. The United States has had restrictions on alien ownership in "key sectors" for some time,[147] and the general practice among nations suggests that real estate is regarded as a sector where special restrictions may be appropriate.[148] Many foreign investors already will be familiar with disclosure statutes in the United States; the Securities Exchange Act requires registration by beneficial owners

144. *See* text accompanying notes 51-53 *supra.*

145. *See* part II.B. *supra.*

146. *See* text accompanying note 61 *supra.*

147. *See, e.g.,* 30 U.S.C. §§ 22, 24, 72, 181, 352 (1976) (mineral rights on federal lands); 46 U.S.C. §§ 289, 808, 865, 883 (1976) (coastal and internal fisheries).

148. *See* U.S. Dep't of Commerce, *Policies, Laws and Regulations of Other Major Industrialized Nations Concerning Inward Investment,* in 9 BENCHMARK SURVEY, *supra* note 1, at N-1; text accompanying notes 97-98 *supra.*

of ten percent of a corporation, and by certain persons acquiring stock in a takeover bid.[149] These requirements, however, apply to domestic as well as foreign investors. The Act is not a dramatic reversal in policy, as it seeks only information; although the Family Farm Antitrust Act is a reversal in policy, it is not yet law and such bills have failed to pass several recent sessions of Congress.[150] If the United States is to continue to declare itself a proponent of free trade in order to ensure the freedom of its own citizens to invest abroad[151] it may not be sufficient to argue to other nations that they also have key sector restrictions. This is to admit that such restrictions are in some cases in the best interests of the host country, a position that the United States has historically rejected.[152] Such an argument also leaves the United States open to the charge that it advocates free trade only so long as it is in its own interest to do so. In view of the current economic problems of the agricultural sector, the protection of a land data system might have been worth the risk that such a charge will be made. There was, however, no explicit consideration of this trade off in the legislative history. Further, it is likely that the Act will produce information on land ownership which will require supplementation by data on domestic landowners, making additional legislation necessary before meaningful results can be obtained.

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149. *See* Securities Exchange Act of 1934, §§ 13(d), 16(a), 15 U.S.C. §§ 78m(d), 78p(a) (1976).

150. *See, e.g.*, H.R. 13, 183, 95th Cong., 2d Sess. (1978) (to prohibit purchase of agricultural land by foreign persons); Note, *U.S. Regulation of Foreign Direct Investment: Current Developments and the Congressional Response*, 15 VA. J. INT'L L. 611 (1975).

151. *See Hearings Before the Subcomm. of the Senate Comm. on Foreign Relations on Executives R (82d Cong., 1st Sess.), F (82d Cong., 2d Sess.), H (82d Cong., 2d Sess.), I (82d Cong., 2d Sess.), J (82d Cong., 2d Sess.), C (83d Cong., 1st Sess.): Treaties of Friendship, Commerce and Navigation with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany, and Japan, Respectively*, 83d Cong., 2d Sess. 2,3 (1953); *Hearings Before a Subcomm. of the Senate Comm. on Foreign Relations on Treaties of Friendship, Commerce and Navigation Between the United States and Colombia, Israel, Ethopia, Italy, Denmark, and Greece: Executives M and R, Eighty-Second Congress, First Session, and Executives F, H, I, and J, Eighty-Second Congress, Second Session*, 82d Cong., 2d Sess. 3-8, 15 (1952); Press Release 600, *supra* note 12.

152. *See* S. REP. No. 910, *supra* note 12, at 2.