

Penn State International Law Review

Volume 1
Number 1 *Dickinson International Law Annual*

Article 4

1982

Special U.S. Rules Directly Affecting Foreign Investment

C. Tanner Rose Jr.

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>



Part of the [Banking and Finance Law Commons](#), [International Law Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Rose, C. Tanner Jr. (1982) "Special U.S. Rules Directly Affecting Foreign Investment," *Penn State International Law Review*: Vol. 1: No. 1, Article 4.

Available at: <http://elibrary.law.psu.edu/psilr/vol1/iss1/4>

This Article is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

SPECIAL U.S. RULES DIRECTLY AFFECTING FOREIGN INVESTMENT

C. Tanner Rose Jr.*

I. Federal Reporting Requirements

A. Federal Reporting Requirements

1. Purpose.--The purpose of IISA is to provide "clear and unambiguous authority for the President to collect information on international investment and to provide analyses of such information to the Congress, the executive agencies, and the general public."² The purpose is not to "restrain or deter foreign investment in the United States or United States investment abroad."³

2. Agencies, Regulations, and Forms.--By Executive Order, the President delegated responsibility for studying direct investment⁴ to the Commerce Department and portfolio

*C. Tanner Rose presents a survey of federal and state laws which directly affect foreign investment in the United States. Mr. Rose details the intricate federal reporting requirements imposed by International Investment Survey Act of 1976, The Agricultural Foreign Investment Disclosure Act of 1980, The Foreign Investment in Real Property Tax Act of 1980 as well as the Currency and Foreign Transactions Act. The author concludes his article with a national survey of state restrictions on foreign investment and compilation of federal statutes which prohibit foreign investment in specific industries.

1. 22 U.S.C. §§ 3101 to 3108 (1976), as amended by Pub. L. No. 97-33, 95 Stat. 170 (1981) [hereinafter referred to as I.I.S.A.]. For an extensive bibliography on the subject of U.S. laws which directly affect foreign investment see 16 Real Property, Probate and Trust Journal 488 (1981).

2. 22 U.S.C. § 3101(b).

3. *Id.* § 3101(c).

4. *Id.* § 3102(10).

investment⁵ to the Treasury Department. The Commerce Department has promulgated reporting requirements for foreign investors.⁶ Reporting forms are available from the International Investment Division, Bureau of Economic Analysis, U.S. Department of Commerce, Washington D.C. 20230. Treasury Department regulations are in 31 C.F.R. § 129 et seq. Reporting forms are available from the Foreign Portfolio Investment Project, Office of the Assistant Secretary (Economic Policy), U.S. Department of the Treasury, Washington D.C. 20220.

3. Confidentiality.--IISA provides that the collected data are to be used only for statistical and analytical purposes, and that no government employee shall reveal material collected under IISA in such a way that the person described can be identified.⁷

4. Reports.--The Commerce Department regulations⁸ require that a report be filed when a foreign person (or its affiliate) obtains a direct or indirect interest of 10% or more in any business enterprise, including real estate, which is subject to the jurisdiction of the United States. IISA also requires disclosure when the interest is held or acquired by a U.S. intermediary such as a U.S. subsidiary, trust or agent acting on behalf of a foreign beneficial owner.⁹ A "foreign person" is any person resident outside

5. Portfolio investment is defined as any investment which is not direct investment. 22 U.S.C. § 3102(11).

6. 15 C.F.R. § 806, et seq., as supplemental and amended by 43 Fed. Reg. 21 (Jan. 16, 1978), 43 Fed. Reg. 54624 (November 22, 1978), 44 Fed. Reg. 32586 (June 6, 1979), 46 Fed. Reg. 7214 (Jan. 22, 1981), 46 Fed. Reg. 23225 (April 24, 1980), and 46 Fed. Reg. 30336 (June 8, 1981).

7. 22 U.S.C. § 3104(c).

8. 15 C.F.R. § 806.15.

9. Id. § 806(11).

the United States or subject to the jurisdiction of a country other than the United States.¹⁰ An "affiliate" is any business enterprise located in one country which is directly or indirectly owned or controlled by a person of another country to the extent of 10 percent or more of its voting stock or an equivalent interest for an unincorporated business.¹¹ "Direct investment" means the ownership or control, directly or indirectly, by one person of 10% or more of the voting securities of an incorporated U.S. business enterprise.¹² A "U.S. affiliate" is an affiliate located in the United States in which a foreign person has a direct investment.¹³

(i) Periodic Reports

(A) Forms

1. BE-12: IISA requires that a comprehensive benchmark survey of foreign direct investment in the U.S. be conducted every 4 years.¹⁴ The last benchmark survey was conducted for the year 1980. A BE-12 was required to be filed by August 15, 1981 for each U.S. affiliate (each U.S. business enterprise in which one foreign person owned or controlled, directly or indirectly, 10% or more of the voting securities or an equivalent interest) for calendar year 1980.¹⁵ If a U.S. affiliate is not required to file a complete BE-12, it must then file a Claim for Not Filing a Form BE-12, which is the last page of the BE-12. The next benchmark survey will be conducted for calendar

10. 22 U.S.C. § 3101(5).

11. Id. § 3102(8).

12. Id. § 3102(10).

13. 15 C.F.R. § 806.15(a)(b).

14. 22 U.S.C. § 3103(b).

15. 46 Fed. Reg. 30036, et seq. (June 8, 1981).

year 1987 and thereafter a benchmark survey will be conducted every fifth year.¹⁶

2. BE-15: To update each benchmark survey, IISA requires that each U.S. affiliate (other than a bank) file an Interim Survey.¹⁷

3. BE-605: A quarterly report must be filed by a U.S. affiliate, except an unincorporated bank.¹⁸

4. BE-606B: A quarterly report must be filed by U.S. banking branches or agencies in which foreign persons have direct investments.¹⁹

(B) Exemptions

1. Periodic reporting requirements are not required of a U.S. affiliate if total assets, sales or gross revenues excluding sales taxes, and net income (after taxes) were each between +\$5,000,000 and \$5,000,000 during the reporting period; except a U.S. affiliate owning 200 acres or more of U.S. land must nonetheless file a BE-12 and a BE-15.²⁰

2. Real estate held exclusively for personal use and not for profit making purposes is not subject to periodic reporting requirements.²¹

3. Real estate investments that are foreign direct investments in the U.S. must be aggregated in applying the exemption levels.²²

(ii) Special Reports

(A) Forms

1. BE-13A: A BE-13A must be filed (i) by

16. 22 U.S.C. § 3103(b).
17. 15 C.F.R. § 806.15(i).
18. Id. § 806.15(b)(1).
19. Id. § 806.15(b)(2).
20. Id. § 806.15(g)(h)(i).
21. Id. § 806.15(d).
22. Id.

a U.S. business enterprise within 45 days after a foreign person establishes or acquires directly, or indirectly through an existing U.S. affiliate, a 10% or more voting interest in that enterprise, and (ii) by the existing U.S. affiliate of a foreign person within 45 days after it acquires a U.S. business enterprise which the existing U.S. affiliate merges into its own operation rather than continuing or organizing as separate legal entity.²³ BE-13A collects identification type of information and selected financial and operating data, including equity ownership, about the U.S. business enterprise acquired or established.

2. BE-13B: A BE-13B must be filed (i) by a foreign person within 45 days after it establishes or acquires a direct voting interest of 10% or more in a U.S. business enterprise that becomes its U.S. affiliate, or for such foreign person by the established or acquired U.S. business enterprise to the extent such enterprise has or can secure the information, (ii) by an existing U.S. affiliate of a foreign person within 45 days after the U.S. affiliate establishes or acquires a direct voting interest in a U.S. business enterprise to such an extent that the foreign person thereby acquires a voting interest of 10% or more of the established or acquired U.S. business enterprise, and (iii) by an existing U.S. affiliate of a foreign person within 45 days after it acquires a U.S. business enterprise, and merges it into its own operations.²⁴ BE-13B requires the disclosure of the "ultimate

23. Id. § 806.15(j)(3)(i).

24. Id. § 806.15(j)(3)(l).

beneficial owner", that is, the person proceeding up the ownership chain beginning with and including the foreign parent that is not more than 50% owned or controlled by another person.²⁵ However, in those cases where a U.S. affiliate is also required to identify the ultimate beneficial owner of the foreign investment, if the ultimate beneficial owner is an individual, only the country of location of the individual must be given.²⁶ BE-13B collects identifying information about the person acquiring or establishing the U.S. business enterprise, and the cost of the investment and the source of financing for the investment.

3. BE-14: A BE-14 must be filed (i) by a U.S. person assisting or intervening in a sale to, or purchase by, a foreign person or a U.S. affiliate of a foreign person, of 10% or more voting interest in a U.S. business enterprise, including real estate, or (ii) by a U.S. person who enters into a joint venture with a foreign person to create a U.S. business enterprise.²⁷

4. BE-607: A BE-607 Industrial Classification Questionnaire must be filed with a BE-13A or at any time the industrial classification as set forth in a BE-12 or a prior BE-607 has changed.²⁸

(B) Exemptions

1. A BE-13A need not be filed if total assets or acquisition costs, as the case may be, are \$1,000,000

25. Id. § 806.15(a)(6).
26. Id. § 806.15(b).
27. Id. § 806.15(j)(4).
28. Id. § 806.15(g).

or less and less than 200 acres are involved. However, an Exemption Claim, Form BE-13A, must be filed.²⁹

3. Real estate held exclusively for personal use and not for profit making purposes is not subject to the special reporting requirements.³⁰

4. Real estate investments that are foreign direct investments in the U.S. must be aggregated in applying the exemption level tests.³¹

(III) Reports for Portfolio Investment. A survey of foreign portfolio investment in U.S. securities was conducted in 1979 covering foreign ownership as of December 31, 1978. Certain issuers of securities and holders of record were required to file reports with the Treasury Department. It should be noted that a limited partnership interest is considered to be a portfolio investment.

(iv) Enforcement. IISA provides for civil and criminal penalties for failure to furnish reports.³²

B. The Agricultural Foreign Investment Disclosure Act of 1978 ("AFICA")³³

1. Coverage.--AFIDA covers any "foreign person"³⁴ who acquires or transfers any "interest",³⁵ other than a security interest, in "agricultural land"³⁶ after February 2, 1979, or any foreign person who held such interest on February 1,

29. Id. § 806.15(J)(3)(i).

30. Id.

31. Id. § 806.15(6)(e).

32. 22 U.S.C. § 3105.

33. 7 U.S.C. §§ 3501 to 3508.

34. 7 C.F.R. § 781.2(g).

35. Id. § 781.2(c).

36. Id. § 781.2(b).

1979. The Agriculture Department promulgated regulations in early 1979.³⁷

"Foreign person" includes individuals who are not citizens or permanent residents of U.S., corporations and other legal entities organized under the laws of foreign countries or which have their principle place of business located outside of the U.S., and foreign governments. It also includes U.S. corporations in which foreign individuals, entities or governments hold a 5% or more interest.³⁸ "Interest" includes both ownership interests and leaseholds of ten years or more. It does not include mortgages or similar interests designed to secure a debt.³⁹ "Agricultural land" means land which is presently used for agriculture, forestry or timber production, or, if the land is now idle, which was used within the last five years for those purposes. The only exception is land of less than one acre which produces less than \$1,000 worth of agricultural or timber products per year for the personal use of the owners.⁴⁰ If land held by a foreign person subsequently becomes "agricultural land" or if a person holding agricultural land subsequently becomes a "foreign person", AFIDA automatically applies.⁴¹

2. Reporting Requirements.⁴²--Any person or entity covered by AFIDA must submit a report to the Department of Agriculture including, among other information, the name, address and citizenship of the foreign person, type and legal

37. Id. § 781 et seq., as supplemented by 44 Fed. Reg. 47526 (August 14, 1979), and 45 Fed. Reg. 7775 (February 5, 1980).

38. 7 C.F.R. § 781.2(g).

39. Id. § 781.2(c).

40. Id. § 781.2(b).

41. Id. § 781.3(d)(e).

42. Id. § 781.3.

description of land and purchase price paid for the interest held.⁴³ Foreign corporations or partnerships must also report information on persons holding a 5% or more interest therein, and in any case in which such holder is not an individual or a government, the nature and name of the person holding the interest.⁴⁴ The required reports are to be filed with the office of the Agricultural Stabilization and Conservation Service in the county in which the land is located within 90 days after the transaction takes place. Such reports are available for public inspection.⁴⁵

3. Enforcement.--Any person who fails to file a required report or who knowingly files an inaccurate report will be subject to a fine, to be determined on a case-by-case basis by a board appointed by the Secretary of Agriculture. The fine can be up to 25% of the value of the interest involved.⁴⁶

C. Foreign Investment in Real Property Tax Act of 1980
("Firpta") (§ 897 IRC) - Reporting Requirements (§ 6039C
IRC)

1. Legislative History.--FIRPTA, signed into law on December 5, 1980 (as amended by § 831 of the Economic Recovery Tax Act of 1981), was structured to close "loopholes" by which foreign investors avoided capital gains tax on the sale or other disposition of "U.S. real property interests". The Senate version of FIRPTA placed withholding requirements on the purchaser. The House's version contained no such requirements, being concerned with the disruptive effect of

43. Id. § 781.3(b).

44. Id. § 781.3 3(e)(iii).

45. Id. § 781.3(a).

46. 7 U.S.C. § 3502, 7 C.F.R. § 781.4.

withholding provisions on the U.S. real estate market and the exposure of buyers to liability. The House bill contained extensive reporting requirements in substitution for withholding. The conference agreement follows the House bill.⁴⁷

2. Reporting Requirements.--Section 6039C IRC sets forth the reports and returns required to be filed. The reporting requirements are applicable for 1980 and subsequent years although the regulations have not been issued.⁴⁸ Generally, the reporting requirements of FIRPTA are applicable to certain "United States real property holding corporations" and foreign corporations, partnerships, trusts, estates and certain foreign persons who hold a "United States real property interest".⁴⁹ A "United States real property interest" (USRPI) means an interest in real property (including an interest in a mine, well, or other natural deposit) located in the U.S. or the Virgin Islands and any interest in any domestic corporation unless the taxpayer establishes that such corporation was not at any time a "United States real property holding corporation" during the shorter of the period after June 18, 1980, during which the taxpayer held such interest, or the five year period ending on the date of the disposition of such interest.⁵⁰ "Interest in real property" includes fee ownership and co-ownership of land or improvements, leaseholds and options.⁵¹ A United States real property holding corporation) (USRPHC) means any corporation if the fair market value of its USRPI equals or

47. Id.

48. Pub. L. No. 96-499 § 1125(B).

49. I.R.C. § 897(c)(1)(a).

50. Id. § 897(c)(1).

51. Id. § 897(c)(6)(a).

exceeds 50% of the fair market value of (i) its USRPI, (ii) its interest in real property located outside of the United States, plus (iii) any other assets which are used or held for use in a trade or business.⁵²

There are three basic informational returns:

(i) Return of Certain Domestic Corporations Having Foreign Shareholders.⁵³ A domestic corporation which is a USRPHC or was during any of the last four years must file a return setting forth, among other things, the name and address of each person who was a shareholder at any time during the calendar year. The section does not apply to a corporation the stock of which is regularly traded on an established securities market at any time during the calendar year.⁵⁴ A nominee who holds stock for a foreign person who does not furnish the corporation with the necessary information is required to file a return with respect to such stock.⁵⁵

(ii) Returns of Certain Persons Holding USRPI: Any entity (partnership, trust, estate or foreign corporation) which has a "substantial investor in U.S. real property" must file a return setting forth among other things, the name and address of each substantial investor.⁵⁶ The term "substantial investor in U.S. real property" means any foreign person who at any time during the calendar year held an interest in the entity but only if the fair market value of such person's pro rata share of USRPI held by such

52 . Id. § 897(c)(2).

53 . Id. § 6093C(a).

54 . Id. § 6093(a)(2).

55 . Id. § 6093(a)(2)(A)(B).

56 . Id. § 6039C(b).

entity exceeds \$50,000.⁵⁷ Statements must be furnished to each substantial investor setting forth the name and address of the entity and the substantial investor's pro rata share of the USRPI held by the entity.⁵⁸ In computing a substantial investor's pro rata share of USRPI, the entity is treated as owning its pro rata share of USRPI held by any corporation in which the entity itself is a substantial investor.⁵⁹ If security is furnished, then a return need not be filed under § 6039C(b) IRS. The regulations should clarify what types of security will be acceptable.

(iii) Return of Certain Foreign Persons Holding Direct Investments in USRPI. Any foreign person holding a USRPI which equals or exceeds \$50,000 who does not engage in a trade or business at any time during the calendar year and is not required to file a return pursuant to § 6039C(b) for such year shall file a return setting forth the name and address of such person and a description of the USRPI held by such person at any time during the calendar year.⁶⁰

3. Penalties.--Failure to file the returns required by §§ 6039C(a), (b) or to send the annual statements to a substantial investor required by § 6039C(b) IRC will result in a penalty of \$25 per day up to a maximum of \$25,000. Failure to file pursuant to § 6039C(c) IRC will result in a penalty of \$25 per day up to a maximum of \$25,000. Failure to file pursuant to § 6039C(c) IRC will result in a penalty equal to the lesser of \$25,000 or 5% of the fair market value of USRPI held during the year.⁶¹

57. Id. § 6039C(b)(4)(B)(i).

58. Id. § 6039C(b)(3).

59. Id. § 6039C(b)(4)(C).

60. Id. § 6039C(c).

61. Pub. L. No. 96-499 § 1123, 94 Stat. 2690.

D. Currency and Foreign Transactions Reporting Act ("Foreign Bank Secrecy Act")⁶²

The Foreign Bank Secrecy Act requires each person who "physically transports, mails or ships . . . currency or other monetary instruments in an aggregate amount exceeding \$5,000" in or out of the United States to make a report thereof at such time.⁶³ The report is filed with the Bureau of Customs on Customs Form 4790. "Monetary instruments" is defined to include bearer negotiable instruments and bearer securities.⁶⁴

II. State Restrictions and Reporting Requirements

A. State Restrictions

1. National Survey⁶⁵

(i) As of July 1, 1981, the following twenty-nine states had no significant restrictions on real property ownership by foreign individuals: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and West Virginia.

62. 31 U.S.C. § 1051 et seq.

63. 31 C.F.R. § 103.23(a).

64. 31 U.S.C. § 1052.

65. For a concise summary of state laws affecting foreign ownership of real property see: "Foreign Investment in U.S. Real Estate: Federal and State Law Affecting the Foreign Investor", 14 Real Property, Probate and Trust Journal 1 (1979) and "Foreign Investment in U.S. Real Estate: Federal and State Laws Affecting the Foreign Investor -- an Update." 16 Real Property, Probate and Trust Journal 465 (1981).

(ii) As of July 1, 1981, the following twenty states had various types of restrictions on ownership of real property by foreign individuals: Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, Montana, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Wisconsin and Wyoming.

(iii) As of July 1, 1981, the following fifteen states had restrictions on ownership of real property by foreign governments or corporations, whether domestic or foreign: Iowa, Kansas, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, Montana, Oklahoma, Oregon, Pennsylvania, North Dakota, South Dakota, West Virginia and Wisconsin.

(iv) As of July 1, 1981, the following four states have reporting requirements similar to those imposed by AFIDA: Arkansas, Illinois, Missouri and Virginia.

2. Pennsylvania.--The Act of April 26, 1855, P.L. 328 (the "1855 Act") prohibited foreign governments and foreign corporations from acquiring and holding any real estate in Pennsylvania. The Act of May 1, 1861,⁶⁶ authorized aliens to hold real property not exceeding 5,000 acres or producing income in excess of \$20,000 per year. The 1855 Act was repealed absolutely and the 1861 Act was repealed insofar as it applied to for-profit and not-for-profit corporations.⁶⁷ The Pennsylvania Corporations Not-for-Profit Code defines the term "foreign corporation" as including "a government or other sovereign (other than the Commonwealth) and any governmental corporation, agency, or entity thereof", and

66. Pub. L. No. 433, 68 Pa. Stat. Ann. § 32.

67. Id.

authorized both qualified and non-qualified foreign corporations to acquire real property interests in Pennsylvania.⁶⁸ Based on the absolute repeal of the 1855 Act, the partial repeal of the 1861 Act and the definition of foreign corporation, a strong argument can be made that foreign governments may acquire, own and dispose of real property or any interest therein, regardless of the quantity or value of the real property or the amount of income derived therefrom. Some Pennsylvania title insurance companies take a conservative view with regard to investment by foreign governments and as a general rule will not insure purchases of Pennsylvania real estate to foreign governments.

However, foreign governments and aliens who are not residents of a state or territory of the United States or the District of Columbia are prohibited from acquiring interests exceeding 100 acres in lands which may be used for agricultural production, except as acquired by demise or inheritance or as may be held as security for indebtedness.⁶⁹ These provisions limiting the acquisition of agricultural lands became effective April 6, 1980.⁷⁰ The inclusion of foreign governments in these recent provisions lends support to the position mentioned above that foreign governments are not otherwise prohibited from investing in Pennsylvania real estate.

68 . Pennsylvania Corporation Not for Profit Code, 15 Pa. Con. Stat. §§ 8101, 8142-43.

69 . 68 Pa. Stat. Ann. § 41 et seq.

70 . Id.

III. Prohibitions in Special Fields

A. Communications

1. The 1934 Federal Communications Act.⁷¹ --This act, administered by the Federal Communications Commission, provides in part as follows:

(i) Foreign operation of a radio or a television station is prohibited;⁷²

(ii) A foreign government cannot hold a station license;⁷³

(iii) Direct or indirect (through a representative or a corporation) foreign holding of certain station licenses is also prohibited;⁷⁴ and

(iv) Any merger among telegraph carriers which may result in direct or indirect foreign ownership of telegraph carriers is also prohibited.⁷⁵ The exceptions to these prohibitions are foreign pilots,⁷⁶ safety, special and experimental radio systems,⁷⁷ amateur radio operators,⁷⁸ and embassies.⁷⁷

2. The Communications Satellite Act of 1962.⁷⁹ --The Act authorized the creation of a private corporation to develop commercial communications satellite systems.⁸⁰ It prohibits ownership by foreign individuals or corporations

71. Act of June 19, 1934, 48 Stat. 1064.

72. 47 U.S.C. § 303(L)(1).

73. Id. § 310(a).

74. Id. § 310(b).

75. Id. § 222(d).

76. Id. § 303(L)(1).

77. Id. §§ 301(L)(1), 310.

78. Id. §§ 301, 310.

79. Id. § 305(d).

80. Id. § 701-744.

81. Id. § 701(c).

of more than 20 percent of the shares of the corporation.⁸²
For this purpose, foreign corporations consist of those corporations which are prohibited from receiving radio licenses under the 1934 Federal Communications Act, as well as those which may be denied licenses by the FCC.⁸³

B. Energy and Natural Resources

1. The Federal Power Act.⁸⁴ --The Act authorizes the Federal Energy Regulatory Commission to issue licenses for the construction, operation or maintenance of facilities for the "development, transmission, and utilization of power" on land and water over which the Federal Government has control.⁸⁵ Licenses may be granted only to United States citizens and domestic corporations.⁸⁶

2. The Atomic Energy Act of 1954.⁸⁷ --The Act forbids foreigners from acquiring a license for nuclear facilities. The Nuclear regulatory Commission is also prohibited from issuing such a license to "any corporation or entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government."⁸⁸

3. Natural Gas Act.⁸⁹ --The Act prohibits the import or export of natural gas by any person unless authorization is first secured from the Department of Energy. Although citizenship is not a requirement for authorization, approval is

82. Id. § 734(d).

83. Id.

84. 16 U.S.C. §§ 791a-829

85. Id. § 797a.

86. Id. § 797e.

87. 42 U.S.C. § 2011, et seq.

88. 42 U.S.C. § 2133(d).

89. 15 U.S.C. § 717.

to be granted only if consistent with the "public interest."⁹⁰ The Federal Power Commission, which had the power to authorize imports or exports of natural gas prior to the Department of Energy Reorganization Act of 1977, has required applications to include information concerning the formation of a corporation and the citizenship of its officers, directors and shareholders.⁹¹

4. Mineral Leasing Act of 1920 and the Mineral Lands Leasing Act.⁹² --Under the Act, leases on government land to explore and develop deposits of certain minerals may be obtained only by citizens of the United States or by domestic corporations. Citizens of a foreign country may own an interest in a domestic corporation which acquires such a lease only if that country allows reciprocal privileges to United States citizens.⁹³

5. Mining of Mineral Deposits.⁹⁴ --Foreigners are not allowed to explore for, or extract, mineral deposits on federal lands, unless they have declared their intention to become United States citizens.⁹⁵ Mineral deposits may, in general, be explored and developed by domestic corporations owned or controlled by foreigners.⁹⁶

6. Outer Continental Shelf Lands Act.⁹⁷ --The Act allows for the leasing of oil, natural gas and other mineral deposits in the submerged lands of the continental shelf.

90. Id. § 717b.

91. 18 C.F.R. § 153.11.

92. 30 U.S.C. §§ 181-263.

93. Id. § 181.

94. 30 U.S.C. § 21, et seq.

95. Id. § 22.

96. Id. § 24.

97. 43 U.S.C. §§ 1331-1343.

The Act itself contains no citizenship requirement for lessees. Regulations promulgated by the Department of the Interior, however, provide that leases may be issued only to United States citizens, residents aliens or domestic corporations.⁹⁸

7. Geothermal Steam Act of 1970.⁹⁹ --The Secretary of Interior is empowered to issue leases for the development and utilization of geothermal steam and associated resources. Only United States citizens and domestic corporations are eligible to apply for such leases.¹⁰⁰

C. Transportation

1. Aviation.--Under the Federal Aviation Act of 1958,¹⁰¹ domestic air transit is limited to aircraft registered in the United States.¹⁰² Only "United States citizens" can register aircraft.¹⁰³ A "United States citizen" is an individual United States citizen, a partnership of which each member is a U.S. citizen or a domestic corporation of which the president and two-thirds or more of the board are citizens and 75% of which stock is owned by U.S. citizens.¹⁰⁴ Foreign air carriers cannot acquire control of United States air carriers unless approved by the Civil Aeronautics Board.¹⁰⁵

2. Maritime Industries

(i) Coastal and Inland Water Trade ("domestic

98. 43 C.F.R. § 3300.1.
99. 30 U.S.C. §§ 1001-1025.
100. Id. § 1015.
101. 49 U.S.C. §§ 1301-1542.
102. Id. § 1401(a).
103. Id. § 1401(b).
104. Id. § 1301(13).
105. Id. § 1378.

trade"). There are three prerequisites imposed by the Jones Act,¹⁰⁶ the Shipping Act of 1916¹⁰⁷ and the Registry Act¹⁰⁸ for engaging in domestic trade:

(A) Construction requirement: Ships used in domestic trade must be built in the United States.¹⁰⁹ This requirement does not bar foreign investment in the ship construction industry.

(B) Documentation requirement: The Coast Guard maintains and enforces the requirement that any ship engaged in domestic trade must be "documented".¹¹⁰ To be eligible for documentation, a ship must meet certain citizenship requirements.¹¹¹

(B) Ownership requirement: Any ship in domestic trade must be owned by United States citizens.¹¹²

(ii) International Trade. To be registered as a United States ship, the owner must be a citizen.¹¹³ To be eligible for construction-differential subsidies¹¹⁴ and operating-differential subsidies,¹¹⁵ the owner of the ship must be a United States citizen.¹¹⁶ The approval of the Secretary of Transportation must be obtained before a ship can be transferred to a non-citizen.¹¹⁷

D. Defense Production

1. Industrial Security Program.--Access by contractors

-
- 106 . 46 U.S.C. §§ 861-889.
107 . Id. §§ 801-842.
108 . Id. § 11, et seq.
109 . Id. § 883.
110 . Id.
111 . Id. § 11.
112 . Id. § 883.
113 . Id. § 11.
114 . Id. § 1151.
115 . Id. § 1171.
116 . Id. § 802.
117 . Id. §§ 808, 835(b)(e).

and their employees to classified files and documents involved in a classified contract in the federal procurement process is governed by Department of Defense regulations Industrial Security Regulation, Industrial Security Manual and Industrial Security Operation Manual. Sixteen federal agencies (including State, Commerce, Treasury) have authorized the Department of Defense (through the Defense Logistics Agency) to act on their behalf in administering the program. There are two kinds of clearance:

(i) Facility clearance can be granted to domestic plants, laboratories and offices except those under "foreign ownership, control or influence." "Control" is determined on a case-by-case basis. In parent-subsidiary relationships, both the parent and the subsidiary must qualify for site clearances. When a change in conditions of the contractor occurs, its facility clearance must be reprocessed "promptly" to valid status.

(ii) In order to obtain and maintain a facility clearance, a contractor must obtain individual clearances for all day management personnel. Foreign nationals are generally not eligible for individual security clearances.

2. Exemptions from the clearance requirement may be granted in certain circumstances.

(i) Certain companies or individuals receiving special treatment under the Industrial Security Agreements with Canada and United Kingdom;

(ii) A finding of a military department secretary that "an impelling necessity" but "no clearable facility" exists; or

(iii) Corporate insulation by declaration of non-control or voting trust.

IV. CONCLUSION

The purpose of this article was to provide a list of special U.S. rules which guide domestic attorneys in counseling foreign investors on tax and finance consequences of their transactions in the United States. A firm grasp of these rules, as a starting point, enables an attorney to formulate proper suggestions to foreign clients in acquiring property and conducting business without being subject to excessive tax consequences.

There are many intricate tax provisions which afford foreign investors a break on tax liability as an incentive to conduct business in the United States. Ignorance of these provisions could be costly to a foreign client in payment of taxes and loss of income. In the advent of increasing international trade and foreign investment in the United States, these special rules will become increasingly important tools for the practicing attorneys to handle complex foreign investment problems. The present trend indicates an increase in special rules for foreign investors and a growing dependency by domestic attorneys.