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MONITORING FOREIGN INVESTMENT IN ENERGY RESOURCES: PROBLEMS AND PROPOSALS†

JAMES J. FRIEDBERG*

I. INTRODUCTION: INDICATIONS OF FOREIGN INVOLVEMENT

In West Virginia, foreign involvement in local natural resources is an issue that generates colorful metaphor and hyperbole.¹ Advocates of limited growth raise the spectre of the state ravaged by neo-colonial foreign interests (often Japanese).² On the other hand, promoters of rapid development often portray unbounded opportunities presented by foreign interest in West Virginia energy,³ with some citing the state's potential for becoming the "Saudi Arabia of coal."⁴ The disparity of views prompts a number of observations: first, that both proponents and opponents of rapid development see the issue as very significant

† This article was written on the heels of the 1979 oil shock. It will be published in the midst (or perhaps at the tail end) of what some have characterized as an energy glut. Such a characterization is misleading. While surpluses of oil and coal may represent a short term "glitch" on the world energy graph, they do not constitute long term energy security. Therefore, we can expect interest in the energy resources discussed in this article to continue and to increase. For a more thorough analysis of the ongoing insecurity of energy supplies, see Yergin, *Awaiting the Next Oil Crisis*, N.Y. Times, July 11, 1982, § 6 (Magazine), at 18.

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¹ See, e.g., E. ZUPNICK, FOREIGN INVESTMENT IN THE U.S. COSTS AND BENEFITS, 3 (Headline Series, Foreign Policy Association No. 249, 1980), wherein a comparison is drawn between reaction to foreign investment in this country and the public panic resulting from Orson Welles' famous radio spoof dramatizing an invasion from Mars. See also FRY, FINANCIAL INVASION OF THE U.S.A., 1-11 (1980).

² See D. Lindberg, *Appalachia: A Colony Within A Colony?*, in COLONIALISM IN MODERN AMERICA 309, 310 (1978). See also J.D. MCATEER, COAL MINE HEALTH AND SAFETY: THE CASE OF WEST VIRGINIA 142, 165 (1973).

³ State governments have a general tendency to seek foreign investment. THE CONFERENCE BOARD, FOREIGN INVESTMENT IN THE U.S.: POLICY, PROBLEMS AND OBSTACLES, 2, 32-40 (1974).

⁴ *Demand for Coal*, Dominion Post, (Morgantown, W. Va.), June 3, 1981, at 4A, col. 1, referring to the United States as the "Saudi Arabia of coal."

to resource-rich states; second, that sufficient data concerning the present amount of foreign involvement is not now available;⁵ third, that absent such data, the debate may be animated chiefly by unsubstantiated hopes or fears; and, finally, that to make intelligent policy decisions, a means for collecting comprehensive information is necessary. United States Senator Howard Metzenbaum, during hearings on the subject of foreign investment, pointed out that "[O]ur government has no way to determine the real extent of foreign investment in America or even to learn the identities of foreign investors. The government does not collect such information systematically, nor does it have the power to do so."⁶

This article is composed of four parts. First, general indications of foreign control of natural resources are identified. Second, the policy considerations illuminating the need for more complete data are analyzed. Third, the present laws which might be used to aid in the collection of such information are discussed. Finally, improved federal monitoring and a model state law are proposed to facilitate the collection of comprehensive and usable data on foreign investment in natural resources in any particular state.

The various news media have brought to public attention growing concern over foreign involvement in American natural resources. Such stories often reflect a reporter's investigation into something which, initially, was a matter of speculation or rumor.⁷ A case on point was the interest generated in foreign ownership of American farmland during the mid-1970's. The press, especially in the mid-western farm states, actively reported and investigated the phenomenon.⁸ The national press also repeated-

⁵ Fry, *supra* note 1, at 5.

⁶ *Foreign Investment Review Act of 1974: Hearings on S. 3955 Before the Subcommittee on Foreign Commerce and Tourism of the Committee on Commerce, U.S. Senate, 93rd Cong., 2d Sess. 18* (statement of Howard Metzenbaum, U.S. Senator) [hereinafter cited as *Foreign Investment Review Act of 1974*]. The problem identified by Senator Metzenbaum in 1974 has continued to exist, as evidenced by the conclusions reached by House Report #96-1216 discussed in the text accompanying note 49, *infra*.

⁷ See, e.g., Greer and Kandel, *Foreigners Buy Bits of U.S.*, *The Washington Star*, Nov. 1, 1976.

⁸ See, e.g., Swegle, *Foreign Land Sales Linked to Secret Membered Trusts*, *The Cedar Rapids Gazette*, March 23, 1975, at 7C; Swegle, *Foreign Investors Hide Buying*, *Cedar Rapids Gazette*, July 4, 1976; Olofson, *Foreign Buying of Real Acres Tough To Trace*, *Omaha World Herald*, Aug. 25, 1974.

ly reported what the OPEC nations might be doing with their surplus money, raising speculation regarding Arabs buying up America.⁹

In West Virginia, the *Huntington Advertiser* and *The Herald Dispatch* ran a series of articles entitled "Who Owns West Virginia?"¹⁰ The articles concluded that more than two-thirds of the non-public land in West Virginia is controlled by outside interests. The "outsiders" were chiefly large American companies headquartered out-of-state. There was no attempt to identify which, if any, of these companies are controlled by nationals of other countries.

Perhaps the most widely-publicized recent indication of foreign control and involvement in American natural resources has been the increase of coal exports. In 1979, about 65 million tons of coal were exported from the United States to foreign countries. West Virginia's share of this export market was about 31 million tons (or 47.3%), making it the largest exporting state.¹¹ Exports from the United States to the European Common Market were 18.1 million tons (126% above 1978 levels); to Japan, 15.7 million tons (+55.4%); to Canada, 19.2 million tons (+25.7%); to South America, 3.8 million tons (+73.7%); and to other countries, 8.0 million tons (+86%).¹²

The issue of inadequate port facilities, specifically at Hampton Roads in Virginia, became the subject of a number of national and West Virginia news stories. Because Hampton Roads has previously handled about 75% of American coal exports (20% of that coming from West Virginia), any increase in coal exports puts additional pressure on that facility. The winter of 1979 saw the beginning of a dramatic upsurge of foreign demand for American coal

⁹ See, e.g., the following string of stories: *Trying to Cope with the Looming Crisis*, TIME MAG., October 14, 1974, at 36; *Sheiks Bearing Gifts*, TIME MAG., Jan. 20, 1975, at 61; *Here Comes the New Optimism*, TIME MAG., Feb. 17, 1975, at 39; *Surplus and Strain in OPEC*, TIME MAG., March 3, 1975, at 27; *OPEC Meets the Customers*, TIME MAG., April 21, 1975, at 72; *Oil—Living with OPEC*, TIME MAG., Jan. 19, 1976, at 54.

¹⁰ Miller, *Who Owns West Virginia?*, *The Herald—Advertiser and Herald-Dispatch* (Huntington, W. Va.), Dec. 22-29, 1974.

¹¹ WEST VIRGINIA COAL ASSOCIATION, COAL FACTS '80. 24 (1980).

¹² *Id.* at 24.

and a bottleneck soon developed at Hampton Roads.¹³ Efforts by West Virginia's governor Jay Rockefeller to help obtain funds for deepening the channel were publicized in West Virginia newspapers.¹⁴ Partly because foreign nations have turned to the United States for coal to replace oil, in May, 1980, the World Coal Study predicted that coal exports will reach between 125 million and 350 million tons by the year 2000.¹⁵ Since even the 1979 demand exceeded current loading capacity, coal producers began to press for appropriation of governmental funds to enlarge port capacities.¹⁶

Coal industry spokesman Bill Mason, president of Island Creek Coal Sales Co., has been quoted in press reports concerning a link between improved port facilities and long-term contracts for coal by foreign buyers. These contracts according to Mason, are "still a chicken and egg situation. The buyer says he'll sign a contract if we can furnish the coal, but given the port situation it is difficult to promise delivery."¹⁷ Some contracts for five to ten year periods have been signed with Denmark, Israel, Italy and France, and Mason saw "tremendous potential" for contracts with the Dutch, Germans, British and Spanish.¹⁸

Evidence beyond that provided by the news media has begun to emerge. Independent researchers, both in the academic and public interest fields, have published articles and studies concerning foreign involvement in American natural resources. Associate Professor Walter C. Labys of the College of Mineral and Energy Resources, West Virginia University, wrote a report that sum-

¹³ See, e.g., Glasser, *Strong Demand for Steam Coal Expected Abroad*, J. COM., Feb. 17, 1981, at 1B, col. 6.

¹⁴ *Jay: Port Likely to be Funded*, The Dominion Post (Morgantown, W. Va.) Sept. 30, 1980, at 3A, col. 4; *Funding Likely for Up-grading of Coal Export Coal Facility, Jay Says*, The Charleston (W. Va.) Gazette, Sept. 30, 1980, at 2A, col. 1; See also *Deeper Ports for Shipping Coal Considered*, The Charleston (W. Va.) Gazette, Sept. 26, 1980, at 5B, col. 3.

¹⁵ Address by Louis H. Meece to the Energy Bureau Conference on Coal Exports in Washington, D.C., (Dec. 15-16, 1980) at 2. [Hereinafter cited as Energy Bureau Conference].

¹⁶ *Coal Export Boom Spurs New Port Projects*, COAL NEWS, Sept. 29, 1980, at 5, 6; see also Address by Gayle P. W. Jackson, Energy Bureau Conference, *supra* note 15, at 5-6.

¹⁷ Glasser, *Strong Demand for Steam Coal Expected Abroad*, J. COM., Feb. 17, 1981, at 19B, col. 2.

¹⁸ *Id.*

marized his study of foreign investment in the United States mineral industry and used the West Virginia coal industry as a case study.¹⁹ Professor Labys compiled a table showing Foreign Investment in West Virginia Coal from 1973-1978, which listed 19 United States coal companies with some foreign investment (including equity acquisitions, joint venture agreements and loans or prepayments). Although Professor Labys collected information from trade associations, government agencies, the railroads and coal industry and public news sources, he found the available information to be limited, and stated, "Without more detailed study, it is difficult to assess the economic impact of foreign investment in West Virginia coal."²⁰ This West Virginia case study evidences the problems encountered in collecting and analyzing data and concludes that "future monitoring of foreign investment in minerals would . . . require data systems superior to those presently available."²¹

Professor Dennis Lindberg, a teacher of sociology at Davis and Elkins College in Elkins, West Virginia, wrote a paper about West Virginia entitled "Surviving in a Colony Within a Colony."²² One of the direct assumptions of his thesis is that there is heavy Japanese involvement in West Virginia coal, and he concludes that "Appalachia is a colony of technological society, first American and now also Japanese."²³

The Appalachian Alliance and the Appalachian Regional Commission jointly released a two-year survey on April 3, 1981, which records county-by-county the names of the largest land owners,

¹⁹ W. C. LABYS, FOREIGN INVESTMENT IN THE U.S. MINERAL INDUSTRY: THE CASE OF WEST VIRGINIA COAL, Rep. No. 127, COAL RESEARCH BUREAUS, WEST VIRGINIA UNIVERSITY (May, 1976).

²⁰ *Id.* at 9.

²¹ *Id.* at 10.

²² Paper by D. Lindberg, *Surviving in a Colony within a Colony* (Oct., 1973). Lindberg states: "There are now dark rumblings in some business and other publications that the Japanese, working through a maze of paper corporations and native front-men, are buying heavily into American resource reserves, agricultural and range land, urban real estate, and those American manufacturing corporations still economically viable. There is no way to really know how much of America they now own. We do know that the Japanese are rich enough to have bought, in competition with the rich of America and Europe, half (by dollar volume) of all the art sold in the U.S. last year." *Id.* at 2.

²³ *Id.* at 9.

the assessed value of the land and the taxes paid.²⁴ Also discussed is the social impact of ownership patterns. For example, among the top surface owners, the second largest holdings were owned by Bowaters Corporation, headquartered in London, England.²⁵

Congressional hearings and committee reports are another source of information about foreign investment. As legislative history, the reports provide courts as well as the public with the rationale for government action. Through hearings, Congress can respond relatively quickly to the needs for more information and/or publicity on some aspect of foreign involvement in the economy. Hearings dramatically can bring issues into the public view.²⁶

Some interested government officials have made random efforts to collect data on foreign investment. However, their individual resources are limited and no coordinating authority consolidates such information. For example, Mr. Roger L. Fortner, the director of the Charleston, West Virginia District Office of the United States Department of Commerce International Trade Administration, supplied a list of foreign direct investors in West Virginia. The list does not purport to be comprehensive, as it was compiled in an open file from time to time as Fortner heard of such investors from the various companies he deals with periodically. Of the twenty-one firms listed, six were substantially involved in the mining of coal and eight foreign countries were listed.²⁷

The most extensive information concerning the increase of foreign involvement is available as a direct result of statutory

²⁴ *Alliance Releases Land Ownership Study Findings*, MOUNTAIN LIFE & WORK 13 (April, 1981).

²⁵ *Id.* at 16, *See also*, Gaventa, *Property, Coal and Theft*, in COLONIALISM IN MODERN AMERICA, 141-57 (1978). Gaventa cites the land ownership of the Anevian Association, Ltd., of London, England, as an example of destructive absentee ownership by a foreign company. *Id.* at 142.

²⁶ *See, e.g.*, the widely publicized remarks of Senator Howard Metzenbaum on the projected size of the OPEC dollar surplus. Based on the closing prices of the New York Stock Exchange for June 24, 1974, 75% of the \$60 billion surplus (about \$46.8 billion) would have been enough to acquire 51% of the voting stock in eleven key American corporations, including such companies as GM, IBM, A.T. & T., and Dow Chemical. *Foreign Investment Review Act of 1974*, *supra* note 6 at 21-22.

²⁷ Telephone interview with Roger L. Fortner, U.S. Dept. of Commerce International Trade Administration (Feb. 1981).

mandates to the executive and to agencies to collect such information. The nine-volume Foreign Direct Investment in the United States²⁸ (Benchmark Survey), brought together information from a large number of government and private sources.

II. WHY COMPREHENSIVE INFORMATION IS DESIRABLE

This article has cited examples of foreign interest in West Virginia resources. Such interest is often reciprocated with certain representatives of government and industry eagerly promoting such foreign contracts.²⁹ Foreign involvement in domestic resources raises controversial public policy choices, and to make such choices intelligently, full information on present and potential foreign involvement in resource control ought to be available. Random media reports and self-serving pronouncements merely lead both the proponents and opponents of such activity to their own desired conclusions. As Senator Inouye of Hawaii observed after hearings on foreign investment:

Too often the debate . . . had political and economic overtones which prevented an objective evaluation of the benefits and drawbacks of foreign investment. Some defenders of foreign direct investment, including some from the Executive, used figures in a manner to minimize and obscure the true impact of such investment in this country. On the other hand, some critics became too emotional and exaggerated the foreign presence here. Both approaches should and can be avoided.³⁰

This article identifies the major areas of public decision-making which require data on foreign investment and commercial involvement. It is too simple to ask whether foreign involvement in domestic energy resources is a good idea, for valid countervailing

²⁸ U.S. Dept. of Commerce, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES (1976) [Hereinafter cited as *Benchmark Survey*]. This study was mandated by the Foreign Investment Study Act of 1974.

²⁹ See memorandum dated April 23, 1980, from Roger L. Fortner to Wanda Ale, describing a conference in Huntington, W. Va., on April 26, 1981, to promote and facilitate the export of West Virginia/Appalachian coal; WEST VIRGINIA COAL ASSOCIATION, COAL FACTS '80 2 (1981); See also address by Louis H. Meece, Energy Bureau Conference, *supra* note 15, at 4; see also address by Thomas B. Graves, Energy Bureau Conference, *supra* note 14, at 8.

³⁰ *Foreign Investment Study Act of 1974: Hearings Before the Subcommittee on Foreign Commerce and Tourism of the Committee on Commerce, U.S. Senate, 94th Cong., 2d Sess. 2 (1976).*

considerations can be cited for either side of the argument. To address fully such considerations comprehensive information must be available; at present it is not. Some of those considerations are outlined below.

A. *Economic Questions*

1. *Compensation.* In addressing questions concerning resource management of federal lands, one of the three chief criteria for gauging the appropriateness of development has been the question of whether the public shall be adequately compensated for its resources by the particular transaction proposed.³¹ This principle should be seen as applicable to all resources within a region, not just those owned by the federal government. The notion is that a region's depletable resources are part of a common heritage which, when removed from the region, should be paid for in full. Just as the private owner is entitled to just compensation for his land, a region should not be impoverished by the selling off of its resources for less than full value. Making the region whole in this regard relates to a number of other issues, such as development goals, tax policy, local control, and the environment.

2. *Development, diversification and the future.* In *Appalachia: A Colony Within A Colony*, Dennis Lindberg depicts America as rich in natural resources but poor in industrial competitiveness, thus becoming the economic colony of more efficient industrial powers, such as Japan.³² Lindberg notes that Appalachia, blessed with resources but behind in development, epitomizes his theory, exporting its wealth not just to other American regions but also abroad. On this basis he finds similarity between Appalachia and the world's less developed nations. Perhaps Lindberg's Third World analogy is not as instructive in its prediction of doom as in its implications of the increasing economic leverage of the region. Perhaps Appalachia can learn lessons from the historic and emerging development patterns of the resource rich portion of the Third World and turn feared exploitation into progress.

Japan, sensitive to its resource dependency on the rest of the world, has taken an enlightened approach in securing raw materials from developing nations on a long-term basis.³³ What is

³¹ See generally, THE FORD FOUNDATION, *A TIME TO CHOOSE*, 276 (1976).

³² Lindberg, *supra* note 2, at 1.

³³ Ozawa, *Japan's New Resource Diplomacy: Government Backed Group Investment*, J. OF WORLD TR. L. 3 (1980).

characterized as the "Asahan Formula" (named after a multipurpose development project in Indonesia) involves Japanese financing of a complex venture which assures Japan of resources for its industry (e.g. power plants, ports, rail transport) in a way that provides the underpinning for the future growth.³⁴ What this suggests for Appalachia is the possibility that resource sales need not represent depletion only. West Virginians must determine who is interested in Appalachia and to what extent are they willing to assist in its development beyond merely buying its coal. The Japanese have demonstrated such willingness to develop in other situations, and analysis is needed to determine to what extent the Appalachian situation is analagous.

3. *Financing needs.* Because financing is critical to economic development, some believe that foreign involvement is the answer to the financing problem facing the coal industry.³⁵ Money is needed to develop both the mines and the system for getting coal to market.³⁶ At a December, 1980, coal exports conference in Washington, D.C., problems with the transportation and port infrastructure were repeatedly cited as the major stumbling block to a rapid increase in United States penetration of world coal markets.³⁷ The railroads blamed the ports,³⁸ the coal operators blamed the government,³⁹ and the bargemen blamed the railroads.⁴⁰ However, clearly, potential foreign purchasers of United States coal have expressed chagrin at the long demurrage lines at Hampton Roads and the general inability of the American coal industry to guarantee reliable delivery of large amounts of coal. The industry, on the other hand, complained that foreign buyers should be more willing to make long term contracts and share development costs in financing increased production capacity and improved transportation infrastructure. One speaker obliquely referred to foreign equity flowing into the United States coal industry, but hard data

³⁴ *Id.* at 4 *et seq.*

³⁵ See Glasser, *supra* note 17.

³⁶ *Id.*

³⁷ See, e.g., address by Gayle P. W. Jackson, Energy Bureau Conference, *supra* note 15, at 2.

³⁸ See, e.g., address by O. W. Cobb, Energy Bureau Conference, *supra* note 15, at 3.

³⁹ See, e.g., address by Gayle P. W. Jackson, Energy Bureau Conference, *supra* note 15, at 2, 10.

⁴⁰ See, e.g., address by John A. Creed, Energy Bureau Conference, *supra* note 15, at 6.

⁴¹ Oral presentation by Connie Holmes, National Coal Association, Energy Bureau Conference, *supra* note 15.

was not presented.⁴¹ Such expansion financing decision involve exactly the type of choices that should not and need not be made blindly. There is a need for information on what foreign financial backing already exists and what may be available in the future.

4. *Local control over developmental strategy.* Much has been made in recent years of Appalachia's need to control its own destiny, whether that destiny be increased material prosperity, a reassertion of more basic subsistence-culture values, or other goals. Some writers have suggested that a disproportionate percentage of West Virginia land is owned by out-of-state interests.⁴² Such observers might be disturbed even more if it was discovered that a large segment of such owners were non-American, the fear being that even less control could be exercised by local policy makers over foreigners than over out-of-state owners. The paramount interests of such foreigners would not be those of West Virginia but their own private or corporate welfare. On the other hand, it might be argued that the amount of such foreign investment is so minimal that state or regional planning choices are in no way limited by it. However, since there is so little information available on who is investing what in Appalachian energy resources, a fully informed appraisal cannot be made.

5. *Tax policy.* Various tax policies overlap many of the other policy questions. Perhaps taxes should be levied against foreign investors or contractors as compensation for loss of state resources. If any mechanisms for using tax revenues from mineral resources to support economic development exist, we need to determine how much is potentially available and how much is needed. Taxes could be used to either repair environmental damage or to discourage it, depending upon which goal is better advised. Various incentives or disincentives to foreign investment have, historically, resulted from various taxing schemes, and these should be examined for their applicability. However, it is often questioned whether taxes should be used as economic incentives or simply as a revenue tool, and constitutional problems may flow from state involvement in this area (e.g. commerce powers questions).⁴³ To know whether any potential results of tax policy toward

⁴² See *supra* note 4 and *supra* note 10.

⁴³ See Note, *The Effect and Validity of State Taxation of Energy Resources*, 58 WASH. U.L.Q. 345, 348-54 (1980); see generally Note, *Commerce Clause v. Coal Severance Taxation*, *infra* p. 1123.

foreign corporations may be substantial, more information on present and potential future investment and contracting levels is required.

6. *Environment.* Obviously, environment is a factor where resource exploitation is concerned, and the cost of repair and maintenance of the environment is becoming accepted as a major consideration in resource development. The citizenry may have more reason for questioning whether substantial resources are being withdrawn by foreign entities and whether there is any greater danger that coal lands may not be fully reclaimed where a legally unreachable foreign corporation has taken the coal and run. On the other hand, such a concern would be unwarranted if the foreign corporations in question have substantial American assets beyond a single mining operation. Such considerations require a review of presently ungathered data and cannot be answered merely by abstract analysis.

A regional planner would want to consider whether beyond a certain point, any further development of a resource would create environmental strains greater than those the land, air, or water could bear. For instance, an additional increment of coal development for export could burden the environment in a way which would not be the case if coal production was limited to that necessary for domestic needs. Also, the foreign involvement in resources should have some degree of influence upon the already difficult issues concerning the tradeoff between intangible aesthetic values and economic growth.

7. *Political and social.* Some commentators challenge the ideology of progress, saying that the questions to be asked are not "What price fully compensates a region for its resources?" or "What direction should development take to maximize economic growth?" but "Are the goals implicit in such questions worth pursuing?" John Gaventa, referring to the Clear Fork Valley on the Tennessee/Kentucky border writes:

Once a booming mining area, automation and strip mining have left 30 percent of the population unemployed. Mountains are gouged by the relentless blade of the bulldozer and blasts of dynamite. Streams are filled with silt and flooding; timber and wildlife are destroyed.

Not just the land, but a way of life is eroding. Thousands have had to leave to find homes and jobs in the cities of the

North and to make way for the strippers. For those who remain, houses are poor, and incomes for over 70 percent of the population are less than \$4000 annually.⁴⁴

Gaventa charges that absentee ownership of large portions of Appalachian coal lands is linked to environmental damage, unemployment, population displacement, lifestyle destruction, and tax evasion.⁴⁵ His charges are serious, but their factual underpinnings are unclear. He echoes the same Appalachia-as-a-colony theme embraced by Lindberg.⁴⁶ However, before we can make any final judgments concerning the purported colonization of West Virginia, Kentucky or Tennessee by Englishmen, Japanese, or New Yorkers, we must be able to discuss the quantitative dimensions of the phenomenon.

III. PRESENT LEGAL MECHANISMS PROVIDING INFORMATION ABOUT FOREIGN INVOLVEMENT IN WEST VIRGINIA ENERGY RESOURCES

A number of laws, state and federal, require information of different sorts to be provided, some of which might be helpful in revealing the extent of foreign involvement in state energy resources. However, neither individually or in combination do they provide the complete picture necessary to make the policy decision referred to above. Following is a review of the laws that might be expected to provide some useful data in this area.

A. Federal

1. *The Foreign Investment Study Act of 1974*⁴⁷

Except for scattered information collected in connection with larger data gathering efforts unrelated to the foreign investment issue, there was no significant federal agency collection of data on direct investment prior to 1974.⁴⁸

⁴⁴ Gaventa, *supra* note 25, at 142.

⁴⁵ *Id.* at 150-52.

⁴⁶ Lindberg, *supra* note 2.

⁴⁷ Foreign Investment Study Act of 1974, Pub. L. No. 93-479, 88 Stat. 1450 (1974).

⁴⁸ HOUSE COMMITTEE ON GOVERNMENT OPERATIONS, THE ADEQUACY OF THE FEDERAL RESPONSE TO FOREIGN INVESTMENT IN THE UNITED STATES, 96th Cong., 2d Sess. 58-59 (1980) [hereinafter cited as *House Committee*].

When the United States Senate Subcommittee on Foreign Commerce and Tourism of the Committee on Commerce held hearings on September 18, 1974, Senators Inouye and Metzenbaum cited two concerns that led to the consideration of legislation reviewing foreign investment in the United States. One of these concerns was the great increase in volume of such investment just during the 1972-73 period (from \$700 million in 1972 to \$3.5 billion in 1973).⁴⁹ Also noted was the concern that the OPEC nations would have a \$60 billion surplus in 1974 alone, and that "[t]he existence of vast monetary reserves means that certain nations will yield a disproportionate amount of political-economic leverage in world affairs."⁵⁰ When the subcommittee was considering the Foreign Investment Study Act of 1974, Senator Metzenbaum found the need for facts to be the first order of business, and cited the government's failure to monitor foreign investment in this country.⁵¹ The Foreign Investment Study Act of 1974 was designed to alleviate these problems. However, similar concerns about the magnitude and speed of change in international investment were evident in the House Report on the International Survey Act of 1976.⁵² As background, that report cited United States Department of Commerce sources finding that from 1970 to 1974 the overseas private investment of the United States increased from \$105 billion to \$169.1 billion, a 60% increase in four years. During that same time, the private investment position in the United States of foreign persons went from \$51 billion to \$93.6 billion, an increase of over 80%.⁵³ Clearly, there were indications of increasing foreign involvement in land ownership and corporate interests.

As a result of the Foreign Investment Study Act of 1974, the United States Department of Commerce, in April, 1976, presented to Congress the Benchmark Survey,⁵⁴ a nine-volume report of the Secretary of Commerce to the Congress in compliance with the Foreign Investment Study Act of 1974. A Benchmark Survey table

⁴⁹ *Foreign Investment Review Act of 1974*, *supra* note 6, at 1.

⁵⁰ *Id.* See generally Healy, *Oil, Money and Recession*, 58 FOREIGN AFF. 217 (1979-80).

⁵¹ *Foreign Investment Review Act of 1974*, *supra* note 6, at 18.

⁵² H. R. REP. NO. 1490, 94th Cong., 2d Sess., reprinted in [1976] U.S. CODE CONG. & AD. NEWS 4663.

⁵³ *Id.* at 4664.

⁵⁴ *Benchmark Survey*, *supra* note 28.

listed West Virginia as having a total of \$528 million invested by foreigners in property, plants and equipment. Of that total, \$153 million was in natural resources, \$367 million was in the industrial area and \$8 million was listed under "other." The fixed assets related to natural resources included agriculture production and services, timberland, and the extraction and production of crude petroleum, natural gas, and other minerals.⁵⁵ The report noted that "[c]oal mining in the United States has attracted increased foreign interest in recent years. . . . Recently. . . several of the large steel companies from France, Germany, Italy and Japan have either made loans or obtained equity in United States companies in return for long-term supply contracts."⁵⁶ Along with actual direct foreign investments, the reports examined supply contracts which involve major debt financing and those involving related equity participation "since [contracts] may have a significant element of control."⁵⁷ The Benchmark Study found that there were twenty-one identified associations between foreign and United States companies involved in the operation of coal mines, and that the mine sites are known to be in at least eight states—including Alabama, Kentucky, West Virginia, Pennsylvania, Illinois, Indiana and Montana.⁵⁸

The fourth volume of the Benchmark Survey contains a report submitted by the Federal Energy Administration (FEA)⁵⁹ to the Department of Commerce concerning the foreign ownership of, influence on, and control of domestic energy sources and supply. The report⁶⁰ was in response to the proposed Section 26 of the Federal Energy Administration Act of 1974,⁶¹ which mandated an initial review and continuing monitoring thereafter of such ownership, influence and control. The report is limited to foreign direct investment (not portfolio investment) and it identifies domestic subsidiaries and affiliates of foreign companies (not unincorporated affiliates).⁶²

⁵⁵ 1 *Benchmark Survey*, *supra* note 28, at 52-53.

⁵⁶ *Id.* at 74.

⁵⁷ *Id.*

⁵⁸ *Id.* at 75-76.

⁵⁹ All functions of the Federal Energy Administration were transferred to the Department of Energy following the Energy Reorganization Act of 1977, 42 U.S.C.A. § 7101 (1977). See W. RODGERS, ENERGY AND NATURAL RESOURCES LAW 21-22 (1979).

⁶⁰ 4 *Benchmark Survey*, *supra* note 28, at B1.

⁶¹ Pub. L. 93-275, now 15 U.S.C. § 785 (1976).

⁶² 4 *Benchmark Survey*, *supra* note 28, at B1.

The FEA could not obtain disaggregated company statistics or names and addresses collected by the Internal Revenue Service and the Department of Commerce because these items are confidential. "Therefore, there is no systematic way to identify *all* foreign ownership of, influence on, and control of domestic energy sources and supplies. Moreover, because there are no standards for reporting in public sources, many statistics in this report have been derived from incomplete and inconsistent data."⁶³ Nevertheless, the FEA believed that the report contained all significant foreign sources.⁶⁴

Concerning petroleum, the FEA report states that in 1974 the total book value of foreign direct investment, as reported by the Department of Commerce, was \$5.9 billion, compared to \$4.6 billion in 1973. The average annual rate of increase of such investment has been 12% since 1960. Foreign ownership of petroleum is dominated by companies from the Netherlands, the United Kingdom, Belgium and Canada.⁶⁵

Eight companies with foreign ownership were identified as owning coal mines in the United States, and six of these eight companies together produced approximately 2.5% of total United States coal production.⁶⁶ Specifically, Standard Oil of Ohio, through its wholly-owned subsidiary, The Old Ben Coal Corporation, is one of the top fifty coal producers of bituminous coal.⁶⁷

Six companies were identified as owning West Virginia coal mines: Algoma Steel Corporation Ltd. of Canada owns four Cannelton Coal Company mines; Steel Company of Canada Ltd. owns Madison mine; Hawley Charbon Company of France owns 80% equity interest in the Hawley Coal Mines (Blue Boy, Beards Fork, Empire, Jacobs Fork, Raleigh, Red Ash, Willis Branch); Italian Company has made loans to the Coal Mine of Eastern Gas and Fuel Association; and Anker Kolen, of the Netherlands, has an equity interest in the King Knob Coal Company, which is the operation for surface mines of Consolidated Coal Company⁶⁸

⁶³ *Id.* at B2.

⁶⁴ *Id.*

⁶⁵ *Id.* at B3.

⁶⁶ *Id.* at B11, B13. These companies are: Standard Oil of Ohio; Steel Co. of Canada; Algoma Steel Corporation; Hawley Coal Mining Co.; King Knob Co.; Al-Aquitave Exploration Ltd.; Appalachian Resources Co.; and Shell Oil Co.

⁶⁷ *Id.* at B13.

⁶⁸ *Id.* at B14-15.

As the report noted, foreign influence and control also exists through long-term coal supply contracts. Japan, Canada, Brazil, Belgium, France, West Germany, Italy, The Netherlands and Spain are the principal foreign buyers of United States coal. In 1974, approximately 10% of the U.S. total bituminous and lignite coal was exported to foreign nations.⁶⁹ The report concluded, "Since coal and nuclear power represent the only alternatives to imported oil for nearly all of the industrialized nations, it is anticipated that there will be a rising foreign interest in investing in future coal production capacity in the United States."⁷⁰

Concerning foreign direct investment in United States land, the Benchmark Survey shows that "as of the end of 1974 . . . 4.9 million acres of land were foreign-owned."⁷¹ (However, property held exclusively for private use, holdings of 200 acres or less, and land held by business enterprises with both total assets and total revenue of less than \$100,000 were not required to be reported). Of the reported real estate, 22% of the holdings was in farm lands; 27% was held by manufacturing companies; 17% was held by real estate firms; 11% was held by petroleum companies; and 23% came under the category of "other" which included mining, transportation, wholesale trade, etc. 74% of the foreign owned lands was located in the Rocky Mountain, southeast and southwest states.⁷²

Concerning leases, the Benchmark Survey reported that mineral lands are usually leased (rather than purchased) and that "foreign firms had about sixty-three million acres under lease, 93% of which is leased by affiliates in the petroleum industry."⁷³ However, of this leased land, approximately one-half was located abroad, and a significant proportion of the remainder consisted of offshore mineral rights.⁷⁴

The Federal Energy Administration also studied United States forest resources—specifically, the removal and export of unprocessed logs by foreign investors in United States timber. The five largest foreign companies with operations in the forest in-

⁶⁹ *Id.* at B13.

⁷⁰ *Id.*

⁷¹ 1 *Benchmark Survey*, *supra* note 28, at 184.

⁷² *Id.*

⁷³ *Id.* at 187.

⁷⁴ *Id.*

dustry (three Canadian, one British and one Japanese) together represent ownership in a little less than 3% of the sixty-seven million acres held in 1970 by the United States forest industry.⁷⁵ While there was little evidence of direct investment for timber, "access to United States supply is accomplished by other means . . . through long-term supply contracts and large scale public sales of timber."⁷⁶ However, "[t]he extent of foreign participation in supply contracts is difficult to trace since not systematic reporting exists which specifically distinguishes foreign from United States participants."⁷⁷ Still, less than 5% of the total United States log output in recent years was exported, and it appears that foreign interests do not exert extensive influence in divesting timber resources from domestic consumption.⁷⁸ However, the report speculated that "[t]he long-term record of capital appreciation for timberland in the United States has generally been good. In the future, foreign investors seeking a safe haven for funds may find forest land attractive, including some investors not directly concerned with the forestry industry."⁷⁹

The report concluded that foreign "investments in the United States are significant in size and scope, but are a relatively small factor in the nation's overall economy."⁸⁰ Seven percent of the 1974 United States petroleum production and 4% of natural gas production were accounted for by foreign-owned firms.⁸¹ "Foreign ownership of land, for which no adequate estimates are possible, appears to be small."⁸²

Although over twenty federal agencies collected data of foreign investments, neither the gathering or dissemination of this information was systematic or standardized. In its report to Congress, the Commerce Department recommended this situation be remedied, concluding, "[A]dditional regular statistical surveys which require mandatory reporting and a regular statistical collection program not now possible under present legislative authority are needed to provide continuing current data."⁸³ Responding to such

⁷⁵ 4 *Benchmark Survey*, *supra* note 28, at C14.

⁷⁶ *Id.* at C10, C13.

⁷⁷ *Id.* at C14.

⁷⁸ *Id.* at C15, C19.

⁷⁹ 1 *Benchmark Survey*, *supra* note 28, at 188.

⁸⁰ *Id.* at 233.

⁸¹ *Id.*

⁸² *Id.* at 234.

⁸³ *Id.* at 238-39.

conclusions, Congress enacted the International Investment Survey Act of 1976.

2. *The International Investment Survey Act of 1976*⁸⁴

In enacting the 1976 law, Congress declared its purpose to be "[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."⁸⁵ The Act relates to both foreign investment in the United States and to United States investment abroad, and requires a comprehensive "Benchmark Survey" every five years,⁸⁶ presumably to follow the pattern set by the original 1975 study mandated by the Foreign Investment Study Act of 1974. Presidential authority under the 1976 Act has been delegated to the Treasury Department for matters regarding portfolio investment, to the Commerce Department for matters regarding direct foreign investment, and to the Agriculture Department to determine the feasibility of a monitoring system for foreign investment in real property.⁸⁷

The Commerce Department's Bureau of Economic Analysis (BEA) collects data on direct foreign investment by the following means: (1) the comprehensive Benchmark Survey of all foreign investment; (2) the on-time BEA reports on foreign acquisitions of United States business or real estate; and (3) a survey of foreign-owned United States businesses with assets, net sales, or net income exceeding \$5 million.⁸⁸

The Department of Agriculture submitted its study of the feasibility of a system to monitor foreign ownership of United States land to the Office of Management and Budget for clearance (prior to release to Congress). However, the OMB has never released the report.⁸⁹

3. *Office of Foreign Investment in the United States (OFIUS)*

As a result of Executive Order 11858 promulgated on May 7, 1975, the Office of Foreign Investment in the United States

⁸⁴ 22 U.S.C. §§ 3101-3108 (1976).

⁸⁵ *Id.* at § 3101(b).

⁸⁶ *Id.* at § 3103(b).

⁸⁷ *House Committee, supra* note 48, at 60.

⁸⁸ *Id.*

⁸⁹ *Id.*

was created within the Commerce Department, to collect data and perform analysis and research concerning foreign investment. Assembled from public sources, the data collected is incomplete and therefore not as comprehensive as the BEA's. On the other hand, BEA publishes only aggregate data months after the investments occur, whereas regular OFIUS reports identify the specific investment transaction—the firms involved, the transaction price, the industry affected, and the asset and sale information.

4. *The Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA)*⁹⁰

The AFIDA requires any foreign person who buys, sells or owns an interest in agricultural land to report such fact to the Secretary of Agriculture. The Secretary is directed by the law to analyze the reported data and determine the effects of such investment, especially on family farms and rural communities. The data and conclusions generated so far have been equivocal.⁹¹ In any case, the Act's usefulness in discovering foreign impact on domestic energy resources is slight, as it focuses only on farmland, and any information obtained thereunder concerning energy resources would be incidental.

5. *The Domestic and Foreign Investment Improved Disclosure Act of 1977*⁹²

This 1977 act, together with other Securities Exchange Commission legislation, requires the reporting of the following information where five percent or more of the stock of a publicly-traded corporation has been acquired: (1) identity of the beneficial owner; (2) citizenship; (3) residence; (4) the source of funds for the purchase; (5) purpose of the purchase (*e.g.*, merger); (6) number of shares owned; and (7) a description of the purchase agreement.⁹³

The reports filed by the companies are public information, and presumably, the information which the SEC tabulates from the reports is also public. The five percent ownership threshold contrasts with a ten percent threshold under the 1976 Act.⁹⁴ demon-

⁹⁰ 7 U.S.C. § 3501-3508 (Supp. III 1979).

⁹¹ *House Committee, supra* note 48, at 60.

⁹² 15 U.S.C. § 78m (Supp. II 1978). This act amended the Securities Exchange Act of 1934.

⁹³ *House Committee, supra* note 48, at 60.

⁹⁴ *Id.*

strating the nonuniformity among the various reporting tools.

6. *Other Federal Activity*

Various federal agencies gather statistics on operations of United States industry, including those businesses that are foreign owned. Specifically, the Census Bureau, the Internal Revenue Service, the Federal Trade Commission and the Department of Energy attempt to identify foreign ownership.⁹⁵ It is not apparent to what extent such data is available or usable for foreign investment in energy resources studies.

B. *West Virginia Laws*

The West Virginia Code sections which are arguably useful in the monitoring of foreign investment in West Virginia provide for the varied registration and disclosure requirements, and are backed by questionable enforcement mechanisms.⁹⁶

1. *Business Registration*

The West Virginia Corporation Act⁹⁷ is applicable to all corporations, including all corporations' commerce with foreign nations (to the extent not prohibited by the United States Constitution or United States treaties).⁹⁸ The Act requires, in the case of a merger of a "domestic" and "foreign" corporation, the filing of an agreement regarding service of process. A confirming deed to real estate must also be executed.⁹⁹ However, since any business or nonprofit corporation organized under laws other than West Virginia's is included in the term "foreign,"¹⁰⁰ the Corporation Act lumps together both United States and non-United States corporations and provides only sparse and random information related to international investment in West Virginia resources.

Foreign corporations are required to obtain a Certificate of

⁹⁵ *Id.*

⁹⁶ The following topics in the index to the West Virginia Code were reviewed for laws that might provide information concerning foreign involvement in state energy resources: *Mine and Minerals; Coal, Oil and Gas; Business and Occupation Tax; Secretary of State; Corporation; Ownership; Foreign; Registration.*

⁹⁷ W. VA. CODE § 31-1-1 (1982).

⁹⁸ W. VA. CODE § 31-1-3 (1982).

⁹⁹ W. VA. CODE § 31-1-38(a)(2) (1982).

¹⁰⁰ W. VA. CODE § 11-13-2(a) (1982).

Authority from the Secretary of State¹⁰¹ before they can transact business in West Virginia¹⁰² although failure to get a certificate does *not* result in invalidation of contracts, nor does it prevent the corporation from defending action in any state court.¹⁰³ Apparently, the only adverse effect of operating without a certificate is payment of back fees, taxes missed and penalties for failure to pay. Therefore, a certified foreign corporation enjoys essentially the same rights as a domestic corporation.¹⁰⁴

2. *Property Ownership*

Ordinarily, when property changes hands only the county land books record the transaction. Unless the name of a party is obviously an international entity, or an international address is listed,¹⁰⁵ there is no way to recognize when land has been transferred or gone to the hands non-United States owners. However, before selling any mine, mineral claim or related interest (the value of which depends on the future discovery, development or production of minerals), the seller must file with the Commissioner of Securities a detailed description of the property.¹⁰⁶ This appears to be an antifraud provision, and at best could only provide sparse and incidental data on foreign involvement.

3. *Business Sales/Production*

Approval must be received from the Director of Department of Mines before any underground mine can be opened or reopened

¹⁰¹ W. VA. CODE § 31-1-67 (1982) gives the Secretary of State authority to promulgate rules and regulations necessary to perform his duties in administering the Code. It is questionable whether such authority would allow him to set special disclosure requirements for non-United States entities.

¹⁰² W. VA. CODE § 31-1-49(a) (1982).

¹⁰³ W. VA. CODE § 31-1-66 (1982).

¹⁰⁴ *See generally id.* at § 31-1-50. If any special limitations or obligations were placed on non-United States corporations, presumably this section would be deemed qualified to the extent of such limitations or obligations, as a later specific statute is controlling over a prior statute of more general applicability.

¹⁰⁵ In each real estate transaction, a "Declaration of Consideration" is required to be affixed to the deed by a party in the transaction. The Declaration is to contain, among other information, the declarer's address. *See Id.* at § 11-22-6. Because the Declaration of Consideration can be signed by the grantor, the grantee, or any other responsible party familiar with the transaction, this address would not be uniformly helpful in identifying foreign interests in West Virginia resources.

¹⁰⁶ W. VA. CODE § 32A-1-1 (1982).

by a mine operator.¹⁰⁷ Unless the operator was also the direct foreign owner, foreign involvement could not be discovered by this certification process.¹⁰⁸

More information, however, is required of surface mining operations. A permit must be obtained and the application calls for the names of the owner(s) of the surface and the mineral rights. Also required is the address of "every officer, partner, resident agent, director, [and] any person owning of record 10% or more of any class of voting stock" of the applicant.¹⁰⁹ While this certification system could conceivably provide some information on foreign control of West Virginia coal reserves, nothing required would reveal foreign control of an intermediary corporation.

A permit is also required from the Department of Mines before any drilling or related activity can be performed at an oil or gas well. The permit's application must include the name and address of the well operator but requires no information concerning ownership of the oil or gas.¹¹⁰ Therefore, this requirement, like the permit for underground mining, is of no help in discovering foreign ownership or control of minerals.

The Business and Occupation Tax applies to every person (natural or legal) engaging in the business of extracting and natural resource within the state.¹¹¹ This is a tax on production, not ownership, and for that reason, as seen in previous instances, is of very limited use in identifying foreign investment.

IV. PROPOSALS

A. *Federal*

The federal government has broad powers under the International Investment Survey Act of 1976 to collect data on foreign investment in the United States. However, up to now, such authority has not been exercised in a way which would provide much useful information. The federal data collection effort has been

¹⁰⁷ W. VA. CODE § 20-6-2(j) (1982).

¹⁰⁸ For example, if the domestic operator was under contract to the foreign owner, the certification process would not identify that involvement. The Definitions provision does not include "Owner." *Id.* at § 22-1-1(a).

¹⁰⁹ W. VA. CODE § 20-6-10(a)(4) (1981).

¹¹⁰ W. VA. CODE § 22-4-1(k) (1981).

¹¹¹ W. VA. CODE § 11-13-2(a) (1974).

characterized by a lack of data and a lack of coordination among those collecting it. As concluded in the House Report, *The Adequacy of the Federal Response to Foreign Investment in the United States*, "Federal efforts to monitor foreign direct investment (FDI) in the U.S. and its impact on America's national interests are so inadequate, disjointed, and poorly implemented that federal estimates of the total amount of FDI constitute little more than guesswork."¹¹² To remedy this situation, the following actions should be taken at the federal level:

— A permanent registration system should be instituted and administered by a single agency, which logically should be the Department of Commerce. All foreign direct investment would be registered.

— Greater detail than was provided for the Commerce Department's "Benchmark Survey" must be gathered. Each investment should be identified in the registration process by the name and address of the foreign company or companies involved (including intermediate and ultimate beneficial owners), the value of the transaction, and the location and nature of the U.S. entities involved in the transaction.

— Confidentiality restrictions must be changed, and may have to be changed by legislative action. The 1976 Investment Survey Act provides that no information collected thereunder may be publicly revealed in a way that might identify the reporting individual or company.¹¹³ This protection goes too far, as the public would probably be better served by reversing the presumption and allowing all information gathered to be made available unless specific harm identified by an interested party would outweigh the general benefit of disclosure. In those cases the information should only be made available to those showing an overriding need and with suitable protections.

— Information must be aggregated and published in a usable form. The inflow of investment must be classified on a state by state basis, permitting local policy makers to make informed decisions regarding local development and related issues. Classification also should be sufficiently specific on an industry by industry

¹¹² House Committee, *supra* note 48, at § 65.

¹¹³ 22 U.S.C. § 3104(c) (1976).

basis. For instance, if investment in a United States oil company gives a foreign investor interests not only in oil, but in coal and uranium, such interests should be revealed by the respective aggregate investment data for the coal and uranium industries. There was no such classification in the first and only benchmark study.

— Enforcement mechanisms should be strengthened by amending the 1976 Act to provide for the possible forfeiture of assets in the case of nondisclosure. The present \$10,000 fine would represent a mere slap on the wrist in light of the magnitude of some of the investments involved. In any case, apparently little enforcement has been attempted even under the weaker penalties of the present law.

— Standardization in reporting should be sought among agencies. While a primary agency should be assigned the responsibility for regular broad-based foreign investment surveys, there may be certain areas of inquiry that still are best addressed by another agency dealing with that substantive concern. However, in such cases, the primary data collection agency should conduct its regular surveys as thoroughly as possible and bear primary responsibility.

The "Report on the Adequacy of the Federal Response to Foreign Investment in the United States" concluded that actions similar to those just suggested would not deter foreign investment.¹¹⁴ The present United States registration requirements are among the most lax in the world,¹¹⁵ and it is difficult to see why bringing them up to international standards would deter investment that in occurring elsewhere under those same standards. Furthermore, investors tend to make decisions based on likely return and security of investment, not on how much information they must reveal.

B. *State*

West Virginians interested in disclosure of foreign involvement in state energy resources should look toward and lobby for the type of federal program of data collection described above. With sufficient geographical and industry-by-industry specificity,

¹¹⁴ *House Committee*, *supra* note 48, at 140.

¹¹⁵ *Id.* at 141.

such legislation might alleviate the need for any state sponsored data collection effort. However, given the slim chance of such federal action, state legislation should be considered. There is no reason why the state could not institute a program similar to the federal one described which would be more modest in scope and, therefore, less expensive. The provisions could, for instance, be limited to certain industries such as the extractive mineral industry so important to this state, and the problems to overcome would be less imposing than those facing a federal program. Since little data collection has been performed by the state so far, the slate would be relatively clean. There is less problem of consolidation of programs and elimination of duplicate efforts since there have been no major data collection programs and little effort in the past. Some present laws would probably need amending or supplementing, but these could be useful. Penalties for non-registration by foreign corporations would have to be increased, and registration would have to require the revealing of ultimate beneficial ownership, so that corporate veils could not mask foreign involvement. As pointed out by E. H. Fry, specifically referring to foreign ownership of farmland but equally applicable here, "[T]he names on the title deed do not necessarily correspond with the names of those people or groups who actually put up the money."¹¹⁶ A specific mandate to aggregate, analyze, and publish registration would have to be granted to some state agency. Furthermore, there may be some situations (e.g. land ownership) not covered by present corporate registration laws that one might wish to reach by such data collection. However, the problems facing the state in enacting such legislation are almost small compared to those facing the federal government.

A model bill which attempts to achieve the aims just described follows. Without legislation of this type on either the state or federal level, the problems in monitoring foreign investment in energy resource are likely to continue.

MODEL BILL

A BILL to enact sections 1-4, article _____, chapter 20 of the code of West Virginia, one thousand and nine hundred thirty-one, as amended, relating to reporting requirements for foreign investors controlling energy resources in this state.

¹¹⁶ Fry, *supra* note 2 at 111.

Be it enacted by the legislature of West Virginia:

That sections 1-4, article _____, chapter 20 of the code of West Virginia, one one thousand nine hundred thirty-one, as amended be enacted to read as follows:

§ 20- ____ -1. Short title.

This article shall be known as the "Foreign Investment in Energy Resources Reporting Act of 19__."

§ 20- ____ -2. Definitions.

As used in this Act, the term—

- (1) "foreign investor" means an individual who is not a citizen of the United States, and any person or entity which directly or indirectly, is owned or controlled in whole or part by one or more such individuals; and who controls energy resources in this state by whole or partial ownership, by trust, by contract, or by any other means;
- (2) "Secretary" means the Secretary of the Department of Natural Resources;
- (3) "energy resources" means gas, oil, coal, timber, uranium, or other energy producing material found naturally on, in, or under the lands or waters of this state;
- (4) "entity" means any person, business, venture, or organization of any type whatsoever, including but not limited to corporations, trusts, joint ventures, partnerships, and agencies or instrumentalities of any government.

No foreign investor shall be permitted to transact business, have interest in real property or control energy resources in this state unless such foreign investor annually provides the following information to the Secretary:

- (1) name of foreign investor;
- (2) whether foreign investor is a natural person or other entity;
- (3) citizenship if natural person; place of incorporation, charter, or other formative agreement of action, if not a natural person;
- (4) address of principle place of business;
- (5) address of principle place of business or agent in this state;
- (6) if not a natural person, the nature of foreign control of such entity (Describe the amount of equity controlled by

- foreign entities and identify those entities by names, addresses, citizenship and percentage of equity controlled. If a chain of indirect ownership or control exists, provide the information required by the preceding sentence for *all* entities in such positions of intermediate and/or ultimate ownership or control. Provided, however, that where equity ownership is less than 5% by a single foreign entity such ownership may be aggregated with all similarly situated single owners and identified by aggregate amount only. If ownership or control is by means other than equity, fully describe such arrangements.)
- (7) the energy resources controlled (Describe the type of resource, eg. oil, gas, timber, coal, etc. Describe the type of economic interest, e.g. fee simple, mineral rights, lease, contractually dedicated fuel supply. Describe the land involved by county, deedbook page, and acreage. Describe the quantity and dollar value of the resources. Where definite figures are unavailable, provide any estimates that have been made.).

§ 20- ____ -4. Penalties and Enforcement.

Any foreign investor not complying with the provisions of this chapter may be fined up to 10% of the value of the energy resources controlled by such entity within West Virginia but which are not reported in accordance with this chapter. The Secretary shall determine such value and his or her determination shall be binding unless clearly unsupported by the evidence available. In addition such entity shall be enjoined from using, selling, producing, mining, receiving or otherwise benefiting from such natural resource until fully complying with this chapter.

The Secretary shall seek the above-described fine and injunction in the circuit court where the energy resource is located or in the circuit court of the county where the state government is seated.

The Secretary may promulgate such regulations as are necessary to enforce this article.

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