

**LAND OWNERSHIP AND
FOREIGNERS:**

**A COMPARATIVE
ANALYSIS OF REGULATORY
APPROACHES TO THE ACQUISITION
AND USE OF LAND BY FOREIGNERS**

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FOREWORD

This study is a revised version of a working document originally prepared for the Development Law Service and Land Tenure Service of FAO in April 1995. The genesis of the document lay in the request of the Government of Lithuania for assistance from FAO in analysing the policy and legal options available for dealing with the sensitive issue of foreign ownership of land. There were concerns at that time that Lithuania's constitutional prohibition on ownership by non-citizens might negatively affect the country's efforts to join the European Union. There were also, however, persisting fears that complete elimination of all restrictions on foreign ownership would result in a loss of control by the nation over its own territory. Consequently, the Government of Lithuania was eager to know how other countries had approached the issue of foreign ownership, and to learn in particular about any intermediate strategies that might have been designed, falling somewhere between complete prohibition and complete liberalisation. The purpose of the 1995 document was to provide an overview of the wide-range of approaches used around the world, in order to help ensure that the ongoing debate in Lithuania was informed by as much comparative experience as possible.¹

Since 1995, it has become increasingly clear that the issue of foreign ownership of land remains high on the agenda of many nations around the world. Indeed, as the pace of economic integration and globalisation accelerates, it can be expected that many existing regulatory approaches will be re-examined. New techniques will be sought that are designed to strike a better balance between a country's perceived interests in regulating foreign investment in land, and the modern imperatives of an international economy.

Because of the widespread and growing interest in this topic, the Development Law Service decided to update the original 1995 document and to make it available to a wider audience.

The study is based on a review, where possible, of relevant legislation and other legal instruments. Given the difficulties of access to many primary sources, however, the survey also relies on foreign investment guides, country summaries in legal yearbooks, short articles from the news sections of legal periodicals, internet databases, and the somewhat limited academic and professional literature directly on the subject.²

The objective of this study is to provide information on the approaches that are, or have been adopted to regulate foreign ownership of land. As such, it aims at providing a framework for analysis and a representative sample of the legal techniques and strategies that have been devised to deal with the issue; it is not intended to be an authoritative summary of the state of the law in this area.

¹ The study was carried out under the FAO Technical Cooperation Programme project *TCP/LIT/2352: Agricultural and Environmental Legislation – Lithuania*. Its findings were presented to a conference jointly convened by UNDP and FAO, and held in the Lithuanian Chamber of Parliament (*Seimas*) on April 26-27, 1995. Over 135 participants were in attendance, including many *Seimas* deputies and the President of Lithuania, who officially opened the conference. In recent years, the restriction has been relaxed with respect to ownership of non-agricultural plots by EU and OECD nationals. See Constitutional Law of the Republic of Lithuania On Subjects, Procedure, Terms and Conditions and Restrictions on the Acquisition into Ownership of Land Plots Provided for in Article 47, Paragraph 2 of the Constitution of the Republic of Lithuania, which came into force on 2 February 1998.

² This literature was described as "scanty", in 1980, and the position has not improved greatly since then. Joshua Weisman, "Restrictions on the Acquisition of Land by Aliens", 28 *Am. J. Comparative L.* 39 (1980).

Moreover, while every effort has been made to refer to the most recent accessible information on the subject, it has not always been possible to ensure that the legal situation described for a given country is up-to-date in all respects. Perhaps because of the fundamental nature of land rights, the laws in this area do not change frequently, as a general rule. Nevertheless, dramatic changes in basic land laws have occurred and are ongoing in a number of places around the world, most notably in the countries of central and eastern Europe and central Asia, as well as in parts of Africa and Latin America. European Union access criteria has prompted attention to the issue of foreign ownership in many countries contemplating future EU membership, and a number of relevant provisions are under discussion at this time.³ It also appears that the economic crisis in Asia has inspired a number of countries, including Korea, Thailand and Philippines, to consider changes to their restrictions on foreign ownership, in order to bolster sagging property markets.⁴

Consequently, it should be noted that the examples used here are presented primarily for their indicative and illustrative value, a value that they retain even as they are, from time to time, revised or discarded by the country in question. Nevertheless, future updates to this paper are planned (including, inter alia, coverage of new developments in Central Asia and Africa), and will be posted on the FAO Legal Office web site as they are completed. A paper version is expected to be published in 2000.

Although restrictions on foreign ownership and use of land are frequently flagged in the literature, if there are no references to restrictions, it does not necessarily follow that no restrictions exist. In such cases, the study follows a cautious approach to characterising states as having no restrictions on foreign land ownership.

The focus of this study is on foreign ownership and use of land. Accordingly, a number of important related issues are not discussed in any detail. In particular, the study does not deal with general restrictions relating to foreign investment and foreign exchange (which may also impact on foreign ownership of land) nor with the issue of mineral and mining rights (some states such as Australia and Brazil regulate the right of foreigners to exploit and mine for minerals and other resources).

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³ See Box 5, below.

⁴ See Note 49, *infra*. See also, "Foreign Ownership of Property: New Laws Help but More Needed," *The Bangkok Post*, Oct 9, 1999 (re: Thailand, Korea and Malaysia); "Limits to Foreign Ownership of Land Criticized by NGO," *Businessworld* (Manila), Sept. 30, 1999.

1. INTRODUCTION

Land is a fundamental resource of the nation state. Without land, without territory, there can be no nation state.⁵ Housing, agriculture, natural resource use, and national security concerns are all based upon land management and use.

As the modern state emerged, those who were not citizens were classified as "foreigners" or "aliens" who, by their very status as such, were deemed not to be appropriate recipients of full rights of land ownership and use.⁶ Over time, in an ever more interdependent world, many attitudes towards "foreigners" have changed, a process assisted by global communications, increases in foreign investment and the growth of international trade. In many areas states mutually accept the rights of each other's citizens to receive the same treatment as their own citizens, and this trend is likely to continue. However as regards land, many states still restrict its ownership and use by foreigners.

This comparative study looks at the legal and administrative techniques which various countries have adopted to prohibit, restrict and regulate the ownership and use of land by foreigners whether they be natural or legal persons.

A number of states such as Germany, France, the United Kingdom, Portugal, the Netherlands, Belgium and Luxembourg, do not have any restrictions on foreigners as regards land ownership or use, in that foreigners are allowed to own land on an equal basis to nationals.⁷ Other countries which apparently also have no specific restrictions on foreign ownership or use of land include Argentina, Chile, Colombia, Paraguay, Uruguay and Venezuela.⁸

The presence or absence of restrictions and regulations designed to limit or control foreign land ownership, may not be the end of the matter. If the purchase of land by a foreigner is for investment purposes, or ancillary to investment, it may be subject to the rules and restrictions set out in a state's foreign investment code. A comparison of foreign investment restrictions is not the subject of this study.⁹ Similarly different tax treatment and foreign exchange restrictions and controls may effectively constitute indirect restrictions on foreign ownership or use of land.¹⁰

⁵ R. Jennings and A. Watts, eds., *Oppenheim's International Law* (London, 1992) (hereafter, "Oppenheim"), at 121.

⁶ For a description of the historical development of foreign land ownership restrictions in England and France, see the introductory chapter Dennis Campbell, ed., *Legal Aspects of Alien Acquisition of Real Property* (Kluwer, 1980).

⁷ In Germany, Article 14(2) of the Grundgesetz provides that there are no distinctions regarding ownership of property between citizens and non-citizens. A similar provision exists in Article 711 of the Civil Code in France. In Belgium, the ownership of property is a fundamental right of both Belgians and non-Belgians. For further information, see J.P. Gardner, ed., *Hallmarks of Citizenship*, Green Paper, London, 1994.

⁸ Martindale- Hubbell *International Law Digest* (New Jersey, 1993) (hereafter "Martindale-Hubbell"). Some caution might be appropriate about Argentina in that Weisman, *supra* note 2, through a postal survey of states in 1976 reported that Argentina had substantial restrictions on foreign ownership.

⁹ Equally a foreigner purchasing land, such as a family home, in the United Kingdom might not necessarily be in a position to use the land for the intended purpose if that individual is unable to satisfy immigration requirements.

¹⁰ For many years foreign land ownership in India was severely affected by the exchange control restrictions in the Foreign Exchange Regulation Act of 1973. Those restrictions have now been significantly liberalised. D.C. Singhania, "India - a Special Report", 12:9 *International Financial Law Review* (1993), Supp. IAB at 17-19. See also the introductory chapter of Campbell, *supra* note 6, for a consideration of the tax treatment issues.

A majority of the states reviewed discriminate against foreign ownership and, less frequently, foreign use of land through various restrictions and regulations. These can range from an outright ban to a simple requirement that notice of foreign ownership be given to the relevant authorities. Such policies can apply to all of the land within a state's boundaries, or only to land in certain areas, of a particular nature or designated for a particular use, or to a combination of these.

This survey begins by considering the fundamental issues of the existing forms of land ownership or tenure; what is meant by "land"; and who or what is a "foreigner". We will then consider the various policy rationales for different approaches to land, before examining the range of techniques and approaches.

2. LEGAL SYSTEMS AND LAND LAW

2.1 International Context

The range of approaches to regulate foreign land ownership is striking. In one sense this should not be surprising given that the issue is largely unregulated by international law, leaving states to legislate in accordance with their own policies and requirements.

Customary international law places no restriction on the right of states to restrict or regulate foreign ownership of land within their territories. States have sovereignty over their natural resources - including their land.¹¹ Equally states are entitled to prevent the entry of foreigners or to allow them entry only on terms - including a term that they may not own or use land or restricting and regulating such use.¹²

International law is primarily concerned with the issue of the expropriation of land already lawfully owned by foreigners. While expropriation itself is not unlawful under international law, the manner in which it takes place is subject to rules of international law.¹³ Although a foreigner deciding whether or not to purchase land in a particular state might well be influenced by that state's attitude to the issue of expropriation, this cannot in itself be considered to constitute a legal restriction.

There are no global multilateral treaties on the issue of foreign land ownership or use. The instrument which comes closest to regulating in this area is the Organisation for Economic Cooperation and Development (OECD) Code of Liberalisation of Capital Movements which imposes a general obligation on each state signatory to liberalise its policies towards transactions and money transfers necessary for direct investment. However its impact on

¹¹ This principle of customary international law was most recently affirmed in Principle 2 of the Rio Declaration at the Earth Summit in 1992.

¹² Oppenheim, *supra* note 5, at 911.

¹³ Various rules relate to the basis and manner for expropriation, including the amount of compensation paid; how that amount is determined; when payable; and the appropriate forum for the assessment of any disputes that may arise. See Oppenheim, *supra* note 5, at 911-927.

foreign ownership of land is minimal. One commentator has noted that it has "only a marginal effect on existing real property law and would not prevent a participant country from enacting new controls on foreign land acquisition".¹⁴

Other related instruments are the draft United Nations Conduct of Transnational Corporations Code, and the draft Multilateral Agreement on Investment, currently being negotiated through the OECD. The former is designed to regulate the conduct of multinational corporations, and the latter to minimise trade barriers to foreign investment. Neither of these draft agreements appears to address directly the issue of foreign land ownership.¹⁵

Regional international treaties can have a more direct bearing on the issue. Until the passing of Decisions 220 and 291 by the Commission of the Cartagena Agreement, members of the Andean Pact (Colombia, Venezuela, Peru, Ecuador and Bolivia) were each bound at national level to severely restrict levels of foreign investment in their economies, and by extension, investment in land.¹⁶ The European Union, on the other hand, effectively circumscribes the right of Member States to restrict or regulate the ownership of land by foreigners who are nationals of other Member States as set out in Box 1.

Other potential restrictions in international law on a state's right to regulate or restrict foreign ownership of land are bilateral Friendship, Commerce and Navigation Treaties or their modern cousins, Bilateral Investment Treaties. As the latter's name suggests, such treaties are more concerned with investment regulation in general, in particular the grant of "national treatment", whereby foreign investors are accorded the same treatment as national investors, or "most favoured nation" status, whereby all foreign investors, regardless of nationality, are treated equally.

Few such treaties, however, grant foreign nationals a right to own property in the host state. While treaties typically provide that each state "shall" admit investments from the other state party, such obligations are frequently qualified by a clause adding words to the effect that the investments shall be admitted "in accordance with the legislation of the host state."¹⁷ Laws restricting foreign ownership of land would therefore still apply. Indeed in a 1976 study of the thirty-six such treaties entered into by the USA, only three guaranteed foreigners the same treatment as nationals in respect of the general acquisition of land, and six in respect of the acquisition of land by inheritance. By far the greatest number gave a time allowance for the disposal of land if foreign status prevented possession.¹⁸

Therefore although the terms of bilateral investment treaties vary considerably, requiring each to be considered on its own terms, in general such treaties have little practical effect on the

¹⁴ Campbell, *supra* note 6, at 8.

¹⁵ See M. Sornorajah, *The International Law on Foreign Investment* (Cambridge University Press, 1994), at 187 for a discussion of the UN Conduct of Transnational Corporations Draft Code.

¹⁶ Carlos Urrutia, "Colombia - A Special Report", 12:9 *International Financial Law Review* (1993), Supp. IAB 17-19.

¹⁷ I. Shihata, "Recent Trends Relating to the Entry of Foreign Direct Investment", *ICSID Review* 47 (1993).

¹⁸ Joshua Morse, "Legal Structures Affecting International Real Estate Transactions", 26 *Am. Univ. L. Review* 34 (1976).

restriction and regulation of foreign ownership of land.

Box 1: The European Union (EU)

The Treaty of Rome, which establishes the European Economic Community, as amended by the Single European Act 1987, the Treaty of European Union 1992, and the Treaty of Amsterdam 1997, does not specifically deal with the issue of foreign land ownership, whether or not the foreigners are nationals of other Member States.

However, treaty provisions prohibiting discrimination on the grounds of nationality, guaranteeing the free movement of goods, persons, services and capital, and freedom of establishment within the European Union, combine to restrict the competence of Member States to limit land acquisition by nationals of other Member States. Foreigners who are not nationals of EU Member States are still subject to the laws of the individual Member States.

Relevant Treaty Provisions

Article 7

Within the scope of application of this Treaty, and without prejudice to any conditions contained therein, any discrimination on the grounds of nationality shall be prohibited ...

Article 8a

The Community shall adopt measures with the aim of progressively establishing the internal market ... The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty.

Article 54

(1) ... the Council shall ... draw up a general programme for the abolition of existing restrictions on freedom of establishment within the Community ...

(2)(e) The Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular: ... (e) by enabling the national of one Member State to acquire and use land and buildings situated in the territory of another Member States ...

Also relevant is Regulation 1612/68/EEC granting nationals of Member States equal employment rights and rights of accommodation in connection with their employment (Article 9).

Belgium, Germany, France, Luxembourg, the Netherlands, Portugal and the United Kingdom have no restrictions on foreign ownership of land. In the Republic of Ireland, foreigners (except those with 7 years continuous residence) are required to obtain the permission of the Land Commission to purchase land or hold a lease, mortgage or contractual interest, such as an option, in agricultural land.

Italy and Spain have restrictions on the acquisition of land by foreigners in border areas. In Spain, EU national are exempted from these restrictions, although in Italy, ownership and use of land in border areas by EU nationals and other foreigners must be authorised by the local Prefect of Police. Greece also has special restrictions on the acquisition of land in border areas. EU nationals are subject to the same restrictions and must obtain the same authorisation as Greek citizens. Other foreigners are subject to a different regime.

2.2 General Considerations

Ownership and use rights in relation to land in some legal systems (including most common law systems) are based on a distinction between real property (land and land rights) and personal property. In other legal systems, particularly civil law systems, rights in respect of land are based on distinctions firstly, between immovable things (land and buildings) and movables and secondly, between real rights enforceable against the world and personal rights which are only enforceable against specific parties. In some legal systems, land ownership rights are described as permanent use rights although for practical purposes, the effect of such a right often appears to be much the same as ownership.¹⁹

However there are many variations among countries, even between legal systems from the same "family". For example in most legal systems, particularly those influenced by Roman law, ownership of land includes ownership of the buildings on it,²⁰ yet in a number of countries, there can in certain circumstances be separate ownership of land and any buildings on it.²¹

Furthermore, in addition to the substantive law differences, there are numerous other differences between jurisdictions as to the practicalities and proof of land ownership, notably whether this is by deed or registration. Further, it should be noted that in federal states, land ownership legislation is often left to the provinces or states, which have more direct control over land use.²²

A comparative survey of different legal concepts of, or approaches to, land ownership is beyond the scope of this paper. However, it is important to be aware of the effects which differences in underlying legal concepts can have on the formulation and implications of restrictions on the foreign ownership and use of land.

Despite the many differences between legal systems in this area, broadly speaking notions of land ownership confer similar core rights on the owner.²³ These would usually include the rights of possession, of use and enjoyment, and of alienation (i.e. the right of sale or other disposal). Ownership rights are usually subject to some restrictions in the interests of the community at large. For example, under Roman law (on which the ownership regimes in many civil law systems are based), the general rule that ownership was absolute and conferred upon the owner the right to deal with property in any way whatsoever unless prohibited by law, was tempered by the qualification that in doing so, the legal rights of others must not be infringed.

Not all legal systems, however, admit such a concept of private land ownership. For example in

¹⁹ See for example, Article 7 of the Ukrainian Land Code. Cited in W.E. Butler, M.I. Braginski, and A.A. Rubanov, *Foreign Investment Legislation in the Republics of the Former Soviet Union* (London, 1993), at 191.

²⁰ For example, Article 750 of the Mexican Civil Code defines land - ("Bienes Inmuebles" or real property) - as including the "soil and constructions attached thereto ... plants and trees while united to the ground ... everything which is united to the ground in permanent manner..."

²¹ Dewey Ballantine and Theodore Goddard, *Legal Aspects of Doing Business in Hungary* (1994), at 74.

²² Campbell, *supra* note 6, at 9.

²³ Although there may be significant differences as regards rules on the inheritance of land.

China²⁴ and Vietnam²⁵ (and until recently much of Central and Eastern Europe) private ownership of land is not permitted for ideological reasons - although it may be used or leased by both nationals and foreigners. Some states which were formerly part of the USSR have changed or are in the process of changing the law in this area, although state ownership retains a strong hold in many of these countries.

In many African countries, the notion of land ownership being vested in the state prevails, though private use or occupancy rights based on statute or customary law are recognised in one form or another as existing over land that is technically owned by the state.²⁶ In Nigeria, as result of major reform of the land regime in the 1970s which sought to consolidate and simplify the previous mixture of customary and statute law, nearly all land is vested in the Governor of each state to be held on trust for the citizens of Nigeria. The State Governors have power to grant rights of occupancy over the land, to consent to the alienation of such rights and to override them in the public interest. The licensing of alienation gives the Governors power to veto transactions.²⁷

In Israel, 92 per cent of the land is state owned, and subject to very limited exceptions, the law provides that it cannot be sold. Therefore, apart from the 8 per cent of Israeli territory in which land can be owned privately, land holding takes place on the basis of the grant of long term leases by the state, and there are no restrictions on foreign land holding.²⁸

Although restrictions on the ownership of land by foreigners are more common, some states place restrictions on types of land use. A number of states restrict the rights of foreigners to lease land under long leases, such as Lebanon,²⁹ while others may restrict foreigners from using land for certain purposes. Furthermore, even if a state does not expressly regulate foreign use of land, it may retain the right to approve or grant leases or use rights which means that the state retains an element of control which can be used to regulate foreign land use.

In some parts of the world, such as in substantial portions of many African countries and the South Pacific, land systems are based upon customary land tenure, "... a phrase which is widely used but seems to have no universally accepted definition."³⁰ Simply understood, customary

²⁴ M. Riley, "China - Security for Lending - Land Mortgages", 8 *J. of Int'l Business Law* 6 (1993), at notes 112-113.

²⁵ J. Golin, "Tiger by the Tail", 81 *American Bar Association Journal* 62 (1995).

²⁶ See for example Eritrea, Land Proclamation, 1994; Tanzania, Land Act, 1999.

²⁷ Land Use Act 1978. See Emmanuel Nwabuzor, "Real Property Security Interests in Nigeria: Constraints of the Land Use Act", *J. African Law* 38 (1994).

²⁸ Normally leases are for 49 years with an option to renew for a similar term, to a maximum of 98 years. See Campbell, *supra* note 6, at 97-98; and Dennis Campbell, ed., *Legal Aspects of Doing Business in the Middle East*, (Kluwer, 1992), part on Israel.

²⁹ Martindale-Hubbell, *supra* note 6, at LEB 1.

³⁰ S. Rowton Simpson, *Land Law and Registration* (Cambridge University Press, 1976). Regarding the extent of customary land tenure in the South Pacific, more than 90 per cent of the land in the 22 countries and territories served by the South Pacific Commission is held under customary tenure; *Customary Land Tenure and Sustainable Development: Complementarity or Conflict?* (South Pacific Commission, New Caledonia and University of the South Pacific, Fiji, 1995), at 2.

land tenure is a form of land holding which is based upon the customary laws of the community, which are often unwritten.

The Vanuatu Constitution, for example, states that all land belongs to indigenous customary owners and their descendants, and that only indigenous citizens who have acquired land in accordance with a recognised system of land tenure may have perpetual ownership.³¹ However, customary land holding is permitted for 75 year terms, and foreigners (or persons from other islands in Vanuatu) wishing to acquire land on an island may do so with the permission of the island, village or clan chief.³²

3. WHO, OR, WHAT IS A FOREIGNER?

To regulate ownership of land by foreigners it is essential to define which natural and legal persons (such as companies) are considered "foreigners". This issue may raise complex definitional questions, particularly regarding legal persons, which will be answered in different ways depending on the policy objective that the state concerned seeks to achieve.

Different states use different terminology. For consistency, the terms "foreign" and "foreigner" have been used throughout this study, and may apply to both natural persons and to legal persons, such as companies. These terms have been used instead of words like "national", "citizen", "alien", in order to encompass the wide variety of tests of "foreignness" which are used in the regulation of land ownership and use.

This Part examines three issues: the definition of a foreign natural person (including a member of a foreign partnership); the definition of a foreign company or legal person; and how the issue of ultimate benefit is relevant in respect of both natural and legal persons.

It is important to appreciate from the outset that in most cases the question of whether a person is foreign is raised only once - at the point when, or before, the land in question is purchased or otherwise acquired. Relatively few states regulate the position *after* the purchase, or the grant of a lease, has been completed. One of the few exceptions discussed in the literature is Ireland, where the Land Act provides that where "control" of company with an interest in agricultural land passes to foreigners the company is under a duty to notify the Land Commission within one month.³³

3.1 Individuals

As regards individuals, two main tests are used: nationality/citizenship alone and a combination test of nationality/citizenship and residence. However there is no rigid distinction between the two tests and elements of each may overlap. A third, more infrequent test, makes reference to ethnicity.

³¹ Sections 73 and 75 of the Constitution, *Customary Land Tenure*, supra note 30, at 28.

³² *Customary Land Tenure*, supra note 30, at 24-25.

³³ Land Act 1965, s. 54(5)(a). See also the US International Investment and Trade in Services Survey Act of 1976 which requires notification by foreigners acquiring 10 per cent or more of the shares of US real estate corporations.

3.1.1 A Test of Nationality or Citizenship

International law provides that each state should determine who is and who is not a national according to its internal law.³⁴ Different states have different tests and a detailed discussion of nationality, citizenship and its attendant privileges is beyond our scope. For the purposes of this survey a reference to a person as a national follows the classification adopted by the state in question.³⁵

Although the national/non-national test might seem straightforward, a review of its use in the context of land ownership shows that the notion has a wide variety of applications. A common provision permits only nationals or citizens to own land, either at all, or free from restriction. For example the Constitution of Lithuania originally provided that only the State and natural persons of Lithuanian nationality could own land.³⁶ An almost equally common provision is that foreigners may not own land, or that they are subject to certain restrictions, many of which will be considered below.

Some states differentiate between "types" or classes of foreigner in regulating land ownership or use. Typical examples are legislative provisions that place additional restrictions on enemy aliens in time of war. For instance the US Trading with the Enemy Act 1970 allows the federal government to take control of enemy alien property in times of war or a declared emergency. Further, under the US Foreign Assets Control Regulations, during a state of emergency prior to the outbreak of war aliens from designated states may be required to obtain Treasury Department permission before they can conduct transactions involving "blocked" property.³⁷ Similarly, in the Canadian province of Nova Scotia the relevant statute expressly provides that the general right to hold land does not extend to "alien enemies".³⁸

Other jurisdictions positively discriminate in favour of classes or types of foreigner, the most striking, perhaps, being the concept of the "alien friend" in New Jersey law (see Box 2). Similarly, Saudi Arabia, which otherwise prohibits foreign ownership of land, makes an exception for citizens of other Gulf Co-operation Council states.³⁹

In determining which foreigners will be granted privileged status as regards land rights, the issue of reciprocity is a common criterion. Certain states such as Turkey and El Salvador

³⁴ Oppenheim, *supra* note 5, at 852. Such nationality law must be in accordance with international conventions, international custom, and the principles of international law; Articles 1 and 2 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930.

³⁵ In addition it is accepted under international law that a person may be a stateless person.

³⁶ Article 47(1). These restrictions have been relaxed at least with respect to ownership of non-agricultural plots by nationals of EU and OECD countries. See Box 5, below and *supra* note 1.

³⁷ James R. Mason, "PSSST, Hey Buddy, Wanna Buy a Country? An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate", 27 *Vanderbilt J. Transnational Law* 463 (1994).

³⁷ Martindale-Hubbell, *supra* note 8, at NS-4.

³⁹ Martindale-Hubbell, *supra* note 8, at SaA-1.

generally permit foreigners to hold land on condition that reciprocal rights are granted to their nationals. Taiwan permits the acquisition of land rights by foreigners whose own governments have entered into equal and reciprocal treaties with it - such as a Treaty of Friendship, Commerce and Navigation with the US.⁴⁰ The provisions of the treaties establishing the EU as described in Box 1 are another example of treaty obligations giving rise to a preferential status for some foreigners on the basis of the existence of reciprocal rights (in this case for citizens of other Member States).

Article 16 of the Italian Civil Code on the other hand makes the grant of all civil rights to foreigners, including the right to own land, conditional on reciprocal rights being granted to its nationals.⁴¹

Box 2: The New Jersey Alien Friend

Alien friends shall have the same rights, powers, duties, liabilities and restrictions in respect of real estate situate within this State as native born citizens. Any alien who shall be domiciled and resident in the United States and licensed or permitted by the government of the United States to remain in and engage in business transactions in the United States, and who shall not be arrested or interned or his property taken by the United States shall be considered an alien friend within the meaning of the act.

NJ Stat. Ann. § 46:3-18 (West Supp. 1986), Mason, *supra* note 37, at 468.

Poland has taken the notion of reciprocity further, where, as of January 1997, any EU companies operating in the country are able to purchase real estate and lease natural resources.⁴²

This reciprocity can also apply to the manner of land acquisition. For example the US State of North Carolina permits the acquisition of land rights by succession or testamentary disposition only to those foreigners whose states grant its citizens equal rights.⁴³ In the case of jurisdictions differentiating on the basis of nationality, a further variation relates to an exception based on the intended acquisition of citizenship. Indiana State law requires that aliens not intending to become naturalised citizens must dispose of all property in excess of 320 acres within 5 years of acquisition, failing which the excess land is forfeit to the State.⁴⁴

⁴⁰ Martindale-Hubbell, *supra* note 7, at TAI-1 and TUR-1.

⁴¹ Gardner, *supra* note 7.

⁴² Jolanta Redo, "Real Estate and Foreigners in Poland", 18:3 *International Legal Practitioner* (1993), at 81. This preferential treatment is the result of a bilateral treaty, but may also be a factor in Poland seeking accession to the EU.

⁴³ NC Gen. Stat. § 64-3 (1985), in Mason, *supra* note 37.

⁴⁴ IND. Code Ann. §32-1-8-2 (Burns, 1980), in Mason, *supra* note 37. Similarly, in Kentucky land belonging to an alien not intending to become a citizen escheats after 8 years. KY.Rev. Stat. Ann § 381.300(1) (Michie/Bobbs-Merrill 1970).

Occasionally legislation permits individuals to cure their nationality "deficiency" in the context of land ownership by allowing them become pseudo-citizens in so far as land ownership or holding is concerned. The Mexican Constitution establishes an informal naturalisation process.⁴⁵ Article 27 provides that only Mexicans by birth or naturalisation have the right to own land, but that "the same right may be granted to foreigners, provided they agree before the Minister of Foreign Affairs to consider themselves as nationals and not to invoke the protection of their governments in matters relating thereto" (emphasis added).

The Constitution of the Philippines, which prohibits foreign ownership of land, even limiting the rights of occupation of foreign mortgagees, makes an exception for those who acquire lands by hereditary succession.⁴⁶ Swiss law regulating foreign acquisition of land, which does not apply to the devolution of land to foreign statutory heirs who are parents or children of the landowner, makes a similar exception.⁴⁷ The Czech Republic, which prohibits foreign ownership of "immovables", has limited exceptions, and will permit a foreign spouse to own land jointly with his or her Czech nationality spouse.⁴⁸

Not all jurisdictions allow such exceptions. In Thailand, where foreign ownership of land has been severely restricted, a foreigner who inherits land generally has one year to dispose of it.⁴⁹ Article 22(1) of the Bulgarian Constitution also requires that any acquisition of land through legal inheritance be transferred.

Finally there can be links between the concept of citizenship or nationality and residence, such as in the case of Malta where restrictions on land ownership apply to people who are "non-resident", which is in turn defined as a person who is not a citizen of Malta or who is not the spouse of a Maltese citizen.⁵⁰

3.1.2 A Test of Residence

A test of residence is the other most common method of restricting or preventing foreign

⁴⁵ Commonly known as a "Calvo" clause.

⁴⁶ David L. Callies, "Land Ownership, Use and Property Rights: the Balance Between Local Ownership and Foreign Investor Security", 21:11 *International Business Lawyer* 535 (1993).

⁴⁷ Dennis Campbell, ed., *Legal Aspects of Doing Business in Western Europe* (Kluwer, 1990)(hereafter "Campbell Europe"), at 20-25.

⁴⁸ Foreign Currency Act, 219/1995, s. 17.

⁴⁹ Martindale-Hubbell, *supra* note 8, at THA-1. North Carolina and a number of other US States apply similar policies; see Mason, *supra* note 37. Recent changes to Thai law, aimed at spurring the market in the aftermath of the 1998 financial crisis, made some inroads into what has been one of the most restrictive national regimes concerning foreign ownership. The foreign ownership ceiling in condominium projects was raised to 49% from 40%, and to 100% (for five years) if the buildings are located in or near Bangkok; payment terms for foreigners were relaxed, allowing them to pay in baht; foreigners can acquire up to one rai each for residential purposes if he or she brings in at least 40 million baht for investment. K. Parnsoonthorn, "A buyers' market without buyers." *Bangkok Post*, 1999 Economic Review, 1999 Year End Edition.

⁵⁰ Martindale-Hubbell, *supra* note 8, at MLT-6.

ownership of land by individuals who are not nationals or citizens.⁵¹ It seems that a test of residence is used by states partly to ensure that absentee owners, who may be less inclined to use the land productively and contribute to the state economy, do not own land. Trends in this regard relate to the protection of agricultural land for active use, and concerns about absentee landowners on vacation properties. Consequently granting ownership rights only to those foreigners who are resident is seen as being justified (see Part 4).

For example, in Japan, there are no restrictions on land purchases by resident foreigners,⁵² whereas in the Canadian province of Manitoba, non-resident individuals may *not* acquire any interest in farmland that exceeds ten acres in aggregate.⁵³ Similarly in Brazil, foreign individuals may only buy rural property, subject to authorisation and compliance with specified formalities, if they are resident in Brazil.⁵⁴

Some jurisdictions specify residence for a certain period. Irish law provides that a non-Irish citizen who has been ordinarily resident in Ireland for 7 years need not obtain the prior written consent of the Land Commission to purchase, lease, or acquire any interest in rural agricultural land.⁵⁵

Further, satisfying a residence test regarding land purchase may not be sufficient to guarantee unrestricted use of the land. For example, there is no bar to non-residents buying or renting property in Monaco but unless they have a residence permit they may only stay in Monaco for up to 3 months without a break.⁵⁶

In contrast the 1984 Swiss Federal Law on the Acquisition of Real Estate by Persons from Abroad (the "Lex Friedrich") bases its requirements on residency permits. Foreigners with year-round residence permits do not need government authorisation for the real estate they occupy. Those without such a permit must follow the approval procedure in the statute.⁵⁷

If the presence or absence of a residence permit is not the test, and not all states require them, how is residence to be measured for the purpose of land ownership regulation?

The Canadian province of Saskatchewan, which provides that aliens may not hold farmland of

⁵¹ States may have other tests of residence, habitual residence or domicile, often in connection with tax and immigration laws and this survey does not purport to offer a comparative analysis of those concepts - except where they are expressly defined in foreign land ownership legislation.

⁵² Martindale-Hubbell, *supra* note 8, at JPN-1.

⁵³ Farmlands Ownership Act 1984, Martindale-Hubbell, *supra* note 8, at CANADA MAN-3.

⁵⁴ Law Number 5709, 7 October 1971, in Dennis Campbell, ed., *Legal Aspects of Doing Business in Latin America* (Kluwer, 1991) (hereafter "Campbell Latin America"), at 20-24, Brazil.

⁵⁵ The Land Act 1965, s. 45(2)(a).

⁵⁶ Campbell Europe, *supra* note 47. Also note the position in countries like the UK with very liberal foreign land ownership policies (i.e. no restrictions at all), but with increasingly tough immigration and visa policies.

⁵⁷ Campbell Europe, *supra* note 46; Martindale-Hubbell, *supra* note 8. See also "Switzerland: Acquisition of Real Estate", *International Financial Law Review*, October 1997, at 65.

more than a certain value unless they have been "resident farmers" of the land for five years, defines as a resident a person who has lived in Saskatchewan for at least 183 days a year.⁵⁸

The Australian Foreign Takeovers 1975 Act, which requires notification of proposed acquisitions of interests in urban land to be given to the Treasurer, applies, *inter alia*, to foreign persons and ordinarily resident non-citizens. An ordinarily resident non-citizen is defined as someone who has been in Australia for 200 days in the preceding 12 months, and whose presence is not subject to any limitation as to time imposed by law.⁵⁹

What happens if residence is surrendered? Most laws with residence as the test seem to be silent on the point - being concerned with status at the date of acquisition. The US State of Missouri however provides that a resident owner of farmland must dispose of such land within 2 years of losing residency status.⁶⁰

3.1.3 A Test of Ethnicity

Some states apply tests based on ethnic origin due to their unique land holding structures; this situation is most likely to occur in systems of customary land tenure. For example 90 per cent of land in Fiji is held in trust for native Fijians according to native custom and tradition. Such lands cannot be owned by people who are not native Fijians unless a whole community (the beneficiaries) dies out, after which the land reverts to the state. However in certain limited circumstances the Native Lands Commission can lease land to a non-native Fijian. Similar restrictions on non-native ownership apply in Papua New Guinea, where customary groups, according to unwritten rules and principles, own nearly 99 per cent of the territory. "Landowners" within such groups can only sell "their" land to another group member. Foreigners cannot become part of such groups.⁶¹

3.2 Companies and other Legal Persons

Most of the provisions concerning ownership of land by legal persons in various countries' legislation are in respect of companies rather than other legal entities such as trusts or associations. The status of partnerships is usually determined by reference to the status of some or all of the individual partners. For example, to fulfil the requirements of Icelandic Law, all partners must be Icelandic citizens - otherwise the partnership is "foreign".⁶² Similarly in Sweden the presence of one foreign partner is sufficient to render a partnership foreign.⁶³

⁵⁸ Martindale-Hubbell, *supra* note 8, at CANADA-SAS-2. This definition of residency is based upon the residency requirements as outlined in the Canadian Income Tax Act.

⁵⁹ Foreign Takeovers Act 1975, as amended by the Foreign Takeovers (Amendment) Act 1989.

⁶⁰ MO. Ann. Stat. §442.571 (Vernon), in Mason, *supra* note 37.

⁶¹ Callies, *supra* note 46.

⁶² Campbell Europe, *supra* note 47, at 20-25, Iceland.

⁶³ Act on the Control of Acquisitions of Real Property by Persons Residing Abroad and by Foreign Legal Entities (1613/92). The same rule applies in Norway where partnerships are foreign even if only one foreigner participates - including a sleeping partner.

Some countries permit foreign *companies* to buy land, while maintaining prohibitions against foreign individuals. South Korea permits foreign companies to own the land necessary for their operations, with the approval of the Economic Planning Board. A separate approval process operates in South Korea for companies with over 50 per cent foreign equity, which may purchase land, with approval from the Minister of Home Affairs.⁶⁴ In February 1997, the Romanian Senate approved a bill that, for the first time, permits foreign companies, but not foreign individuals, to buy property. Similarly, while Bulgarian law imposes restrictions on foreign individuals, there are no limits on Bulgarian partnerships or companies with foreign participation purchasing land.⁶⁵

A range of tests are applied to determine whether or not a company is foreign for the purpose of limiting or restricting land ownership or use rights. The simplest test is to examine where a company's registered office, head office or *siege sociale*, lies and the laws under which it is incorporated. For example in Bermuda the law simply provides that foreign registered companies may not own land.⁶⁶ With regard to avowedly foreign companies the position is often straightforward.

While such a test of corporate nationality may be simple, however, it may also be misleading. Thus it is common for international treaties to "pierce the corporate veil", and to look beyond these formalities in order to examine the issue of control.⁶⁷

Such "extended" examination is frequently adopted in the context of foreign ownership of land. Indeed it may be very relevant to popular fears of foreign economic domination, particularly in connection with the activities of transnational corporations. Land ownership restrictions based on the narrow test of foreign registration would obviously not apply to locally incorporated subsidiaries of transnational corporations or to other locally incorporated companies controlled by foreigners.

One of the difficulties facing regulators is defining at what stage a national company is to be regarded as controlled by foreigners and therefore subject to land acquisition restrictions. The laws of many states simply require an examination of the share registers to ascertain the proportion of foreign shareholders and the extent of their voting rights. In the Dominican Republic a company is regarded as foreign controlled where foreigners control 51 per cent of the voting rights, as is the case in Nicaragua.⁶⁸ Prior to EU accession, Finland enacted transitional legislation in the early 1990s which provided that foreign legal entities and Finnish

⁶⁴ K. R. Redden and L.L. Schlueter, *Modern Legal Systems Cyclopedia* (Buffalo: William S. Hein and Co., Inc., 1992), at 2A.10.18. There have been some recent moves to liberalise Korea's law concerning foreign ownership. See note 4, *supra*.

⁶⁵ Boris Bogdanov Landjev, "Legislation on Foreign Investments in Bulgaria: Historical Background and Current Developments", 19 *Review of Central and East European Law* 541 (1993).

⁶⁶ But they can own up to 40 per cent of the shares of a Bermudan company which owns land. Campbell *Latin America*, *supra* note 54, at 51.

⁶⁷ Oppenheim, *supra* note 5, at 859.

⁶⁸ Martindale-Hubbell, *supra* note 8.

legal entities controlled by foreigners (where control means having more than 50 per cent of the voting rights) are subject to the restrictions.⁶⁹

In Oman, Royal Decree 24/95 now permits companies with up to 49 per cent foreign ownership to purchase land, a measure likely to encourage foreign investment, but not foreign ownership. In Malta the Immovable Property (Acquisitions by Non-Residents) Act 1974, provides that a Maltese company with 25 per cent of its shares owned by non-residents, as well as one directly or indirectly controlled by non-residents is a non-resident company and is governed by the restrictions on land ownership set out in the Act.⁷⁰

Other states set higher thresholds. Icelandic law provides that in order to qualify as a national company and thereby avoid the somewhat burdensome restrictions on foreign land ownership, a limited company must not only be domiciled and based in Iceland but all the directors must be Icelandic and Icelanders must own 80 per cent of the shares and control the majority of votes at shareholders meetings.⁷¹ It seems that any foreign shareholding is sufficient under Saudi Arabian law to taint a company as "foreign" as regards land ownership. A Saudi entity having non-Saudi shareholders (which must already be licensed under the Foreign Capital Investment Code) may only own real property for corporate purposes if it has obtained a licence from the Ministry of the Interior.⁷²

Similarly the 1976 US Agricultural Foreign Investment Disclosure Act ("AFIDA"), which requires foreigners to register the acquisition of any interest (except a security interest) in agricultural land larger than 10 acres within 90 days, defines a "foreign person" as any "entity that is created or organised within the US, "in which, *inter alia*, any one foreign person holds a 10 per cent or greater interest, or where a "coalition" of such persons owns at least 10 per cent; or if 50 per cent of the entity is owned by a combination of "foreign persons".⁷³

Until the introduction of liberalisation measures in 1990, the issue of foreign control of a company was also extensively defined in the law of Trinidad & Tobago (see Box 9). In addition to considering the amount of shares held by foreigners, regard was had to the size of any dividends they received and the proportion of debentures they owned.⁷⁴

In Ireland, *actual* control of a company is the decisive factor in determining whether a company

⁶⁹ See the Act on the Control of Acquisitions of Real Property by Persons Residing Abroad and by Foreign Legal Entities (1613/92). Marja Tommila, "Finland - Foreign Ownership - Two New Acts", 9 *Int'l Corporate and Commercial L. Rev.* C-135 (1991).

⁷⁰ Martindale-Hubbell, *supra* note 8, at MLT-6.

⁷¹ These conditions can be dispensed with by the relevant ministry - but no dispensation is needed if the lease can be terminated with one year notice; Campbell Europe, *supra* note 47, at 20-24, Iceland. See also Norway, whose regime is nearly as strict. Joint stock companies need concessions, unless the company is registered in Norway, has an entirely Norwegian Board, and at least 2/3 of the stock is Norwegian owned.

⁷² Regulations for non-Saudis taking Possession of Real Property in the Kingdom, Royal Decree No. M/22, 13 September 1970. In practice such licences are infrequently granted. Martindale-Hubbell, *supra* note 8, at SaA-1.

⁷³ 7 USC §3508(2)-(4), 1988; 7 CFR §781.3(b), 1989.

⁷⁴ See Box 9.

is foreign controlled. The Land Act 1965, which applies to agricultural land, provides that a person will be regarded as controlling a company or body corporate if the articles of association or similar document confers powers of control upon them and the affairs of the company are conducted in accordance with their wishes. If that person is a non-resident foreigner, then the restrictions on foreign ownership apply.⁷⁵

The Swiss Lex Friedrich also takes a broad approach to the issue. Permission to acquire land is required not only by companies which are not domiciled in Switzerland but also by Swiss companies controlled by non-residents. To determine the issue of control the law examines whether or not non-residents have a "dominant position" in the company. There is a presumption of such a dominant position if more than one third of its shares are held by non-residents, if the management is substantially non-resident or if according to a special statutory formula the company has been substantially financed with foreign assistance.⁷⁶ It should be noted that the Swiss government recently sought to revoke the Lex Friedrich, but Swiss citizens voted against this in a referendum. Instead, certain amendments took effect in 1997.⁷⁷

Finally some states, usually those which restrict direct foreign land holding, do permit joint ventures to own land even though they might otherwise have foreign status by reason of the participation of foreign venture members. An example is Latvia where in December 1994 the Parliament approved an amendment to the land law which allows the purchase of land by joint ventures with foreign participation provided that Latvian citizens hold the majority stakes and by foreign companies from countries with which Latvia has agreements protecting foreign investments, provided they are registered with the Latvian authorities.⁷⁸ Indonesia, on the other hand, prohibits even joint venture companies from owning land - although they may acquire lesser land use rights and can also rent land. Since 1980, the grant of "cultivation titles" in respect of agricultural land to foreign investment companies has been prohibited. Title is granted to the local joint venture partner who can rent, but not sell, the land to the joint venture foreign investment company.⁷⁹

3.3 The Issue of Ultimate Benefit

Even if an individual or company does satisfy the relevant tests, it may not be the ultimate beneficiary of the land, or any other assets, which it legally owns or is entitled to use. Ownership of such rights may be a mere front. As a result some states seek to determine the

⁷⁵ Land Act 1965, s. 54(5)(b).

⁷⁶ Pestalozzi, Gmuer and Heiz, *Business Guide to Switzerland* (Wiesbaden, 1991), at 1710.

⁷⁷ Some amendments to the Lex Friedrich are that: companies no longer need authorization to purchase real estate for trading, manufacturing or any other commercial business (though approval is still required for companies trading only in real estate); authorisation is no longer required where the foreign acquirer does not intend to use the property directly, but rents to a third party for a commercial purpose. In relation to natural persons, those with a year round residence permit no longer need authorisation to buy the real estate they occupy; also those employed in international organisations or engaged in diplomatic missions no longer need approval; and the net size of properties requiring approval has dropped. Holiday properties are still subject to approval. "Switzerland: Acquisition of Real Estate", *International Financial Law Review*, October 1997, at 65.

⁷⁸ A. Peterson, "Latvia authorises the sale of land to foreigners" NOVECON, 19 December 1994.

⁷⁹ Robert Hornick and Mark Nelson, "Foreign Investment in Indonesia", 11 *Fordham Int'l L. J.* (1988)

status of the party which ultimately derives the economic benefit from the land

In New York State, the law provides that restrictions on foreign ownership apply to the person who actually receives the benefit of the land.⁸⁰ Restrictions in the Bahamas also apply to persons holding land on trust for a foreign person.⁸¹ Similarly, under the Australian Foreign Takeovers Act 1975, a "foreign person" includes the trustee of a trust estate, in which a natural person or persons not ordinarily resident in Australia or a foreign corporation or corporations, hold a substantial or aggregated substantial interest".⁸²

In contrast, the use of trust provisions in Mexico offered a government sanctioned device for foreigners to get around the prohibition of foreign ownership in border and coastal areas (see Box 3).

Box 3: Mexico – The Forbidden Zones

Pursuant to Article 27 of the Mexican Constitution, foreigners cannot own land within the strip of land 100 kilometres wide along the borders and 50 kilometres wide along the country's beaches. Since the issuing of a 1971 Decree, however, the Ministry of Commerce and Industrial Development has been able to authorise foreign investors and Mexican companies with foreign shareholders to obtain beneficial rights in Mexican trusts owning property in the zones. Legal title is held by a financial institution, the trustee, and the trust interests are marketed by a means of trust participation certificates. These beneficial interests, which are lawful because they are personal rather than real, may last up to 30 years after which new trusts can be granted on the same terms and conditions if the same foreign investor appears as beneficiary of the new trust.

Vilaplana, *infra* note 89.

Some regimes specifically prohibit the use of the trust to get around land ownership restrictions. A US state of Missouri statute prohibits foreign individuals and companies from owning agricultural land and expressly prohibits persons acting as their trustees and fiduciaries, from holding such land.⁸³

Even where a state devises comprehensive legal tests to determine whether a person or legal entity is a foreigner; is controlled by a foreigner; or seeks to hold land for the benefit of a foreigner, the laws establishing those tests will only be effective to the extent that they are implemented. There is very little reference in the literature as to implementation in this regard. What seems reasonably clear is that the more complex the law is the more costly it will be to apply, even if the burden of proof is placed on the suspected foreigner. One author refers to the "very tedious enquiries" which are often necessary in Switzerland in order to determine whether

⁸⁰ NY Surrogate Court Proceedings Act (McKinney Supp. 1986), in Mason, *supra* note 37, at 469.

⁸¹ Campbell Latin America, *supra* note 54, at 42.

⁸² William C. Brown, "The Foreign Takeovers Amendment Bill 1988", *Law Institute Journal*, July 1989, at 596.

⁸³ MO Ann. Stat. §442.571 (Vernon 1986), in Mason, *supra* note 37.

or not non-residents hold a "dominant position" in a Swiss registered company.⁸⁴ Switzerland may be able to afford to pay for such enquiries but for poorer countries, if laws on this issue are to be applied then a balance arguably has to be struck between the degree of complexity of its tests and the amount of resources it is politically prudent to allocate to implementation.

In any event it seems likely that no test is absolutely guaranteed to address all eventualities. One author has noted that "the struggle between those applying the tests and foreigners trying to mask themselves demonstrates that no single test nor any combination of tests can hermetically seal off foreign infiltration".⁸⁵ The problem of foreign owners hiding their identities by establishing several layers of ostensible owners was noted in the 1979 US Federal Regulations under AFIDA. While these regulations initially appeared to establish no limit for proving the ultimate level of ownership, a subsequent cut-off point was decided: ownership was to be traced to the third level, or the true owners of company C, which owns company B, which owns company A, the owner of the land, would not be enquired into. Even this level is admitted to be somewhat arbitrary and while it is more stringent than most of the tests of "foreignness" considered, would not prevent a determined foreigner from avoiding compliance with AFIDA's reporting requirements.⁸⁶

Perhaps unsurprisingly, the literature does not reveal the extent to which foreigners do successfully mask their purchases of land. If, as seems the case, foreigners can often manage somehow or other to get around foreign ownership restrictions through the use of trusts and holding companies the question remains as to the purpose of such restrictions. Are they designed to regulate and restrict foreign ownership of land - or is their purpose to appear to do so? Tests that claim to examine the issue of ultimate benefit will be of little effect unless they can actually be applied.

⁸⁴ Pestalozzi, Gmuer and Heiz, *supra* note 76, 1712.

⁸⁵ Weisman, *supra* note 2, at 54.

⁸⁶ See T.L. Schmidt, "Closing the Barn Door: A Suggested United States Response to International Restrictions on Foreign Acquisition of Agricultural Land", 10 *California Western Int'l L.J.* 536 (1980), for a critique of the inadequacies of AFIDA.

Box 4: AFIDA - A Comprehensive Test?

The US Agricultural Foreign Investment Disclosure Act defines a “foreign person” as:

- (A) any individual:
 - (i) who is not a citizen or national of the United States;
 - (ii) who is not a citizen of the Northern Mariana Islands or the Trust Territory of the Pacific Islands; or
 - (iii) who is not lawfully admitted to the United States for permanent residence, or paroled into the United States, under the Immigration and Nationality Act ...
- (B) any person, other than an individual or a government, which is created or organized under the laws of a foreign government or which has its principal place of business located outside of all the States;
- (C) any person, other than an individual or government,
 - (i) which is created or organized under the laws of any State; and
 - (ii) in which, as determined by the Secretary under regulations which the Secretary shall prescribe, a significant interest or substantial control is directly or indirectly held – (I) by any individual referred to in subparagraph (A); (II) by any person referred to in subparagraph (B); by any foreign government; or (IV) by any combination of such individuals, persons and governments; and
- (D) any foreign government.

7 USC § 3508(3) (1988).

4. POLICY CONSIDERATIONS

A number of different possible policy reasons exist for restricting and regulating foreign ownership and use of land - and for adopting different techniques. An understanding of the various policy rationales will better inform our consideration of the techniques for controlling foreign land ownership.

A number of possible policy objectives are set out below, but these headings tend to overlap. For example restrictions on foreign ownership of agricultural land might conceivably be justified under a number of policy headings, all or only some of which may be invoked in a given situation, including the protection of national security, the prevention of speculation, the prevention of foreign economic domination and the protection of rural communities.

Nevertheless a review of the topic and literature suggests that the various techniques adopted seek to implement the following policy objectives:

- *Protect National Security.*
Border area restrictions on foreign land ownership - and in the case of Peru in restrictions in areas around military bases⁸⁷ - would seem to have been put in place as part of states' policies on military security. Arguably measures to protect food security and to prevent economic domination could also be included under this heading.
- *Prevent general foreign economic domination.*
Fears of foreigners "taking over" the US has led to various restrictive measures at both state and federal levels.⁸⁸ While the US is a unique example, given its economic power, such concerns may be more common in states with weak or undervalued currencies. The border protection measures in Mexico may fulfil national security objectives, but more directly address concerns about the creation of foreign enclaves in the border areas with Mexicans having only subservient roles.⁸⁹
- *Prevent or restrict foreign-based speculation in land.*
Some governments, such as that of Hungary, have expressly included restrictions on foreign ownership to deal with this perceived threat in a time when demand exceeds supply. Again measures to prevent land speculation on the basis of rising prices could also be grouped under the next heading.
- *Preserve the social fabric of the nation.*
Examples include restrictions to protect village life,⁹⁰ to ensure sufficient recreational land is available,⁹¹ and to ensure an adequate supply of affordable housing.⁹² Residence requirements may also be designed to prevent extensive absentee ownership where the landowner has no connection with the community.
- *Indirectly control immigration.*
Earlier this century, various US West Coast states used land ownership restrictions to indirectly reduce immigration from the Far East.⁹³
- *Control the amount of direct foreign investment.*
An example is the Australian Foreign Takeovers Act 1975, which restricts acquisitions by foreigners of urban land.
- *Control the direction of foreign investment.*
Examples include those states that severely limit the purposes for which land may be

⁸⁷ See Box 8.

⁸⁸ Mason, *supra* note 37, at 475.

⁸⁹ Victor A. Vilaplana, "The Forbidden Zones in Mexico", 10 *California Western L. Rev.* 47 (1973), at 50.

⁹⁰ Turkey.

⁹¹ Tommila, *supra* note 69, at C-135.

⁹² Malta.

⁹³ Charles H. Sullivan, "Alien Land Laws: A Re-evaluation", 36 *Temple Law Q.* 15 (1962). See discussion, *infra*.

purchased, such as Thailand and Malta, to ensure that such land holdings are in accordance with national economic development aims and objectives.

- *Ensure control over food production.*
Examples include Morocco where only Moroccans can own agricultural land,⁹⁴ and a number of Canadian and US states that also restrict or forbid foreign ownership of farmland.⁹⁵ Again policies under this heading may overlap with policies to prevent speculation in agricultural land and to preserve the social fabric of rural areas.
- *Gather information on levels of foreign ownership of land.*
Perhaps the best example is the US where extensive reporting requirements were implemented precisely so that such information could be ascertained. For example, in 1995, foreign persons owned 15.1 million acres of US agricultural land, and Maine has more foreign owned land than any other state.⁹⁶

Restrictions on foreign ownership of land may also be in accordance with other stated, or express, policy objectives not listed above.⁹⁷ However, as one commentator has noted, there is a problem in that the "reasons formally advanced are not necessarily identical with those which actually operate below the surface."⁹⁸ Other motives may play an equally important role - but by their very nature remain unacknowledged. These might include nationalism, racism, and xenophobia.⁹⁹ Others have observed that the extent and scope of restrictions on foreign ownership and use of land will depend in each case on the historical, political and economic context.

One author has traced various stages in the history of the restriction of foreign land ownership in the US. Sullivan describes how concern in the late nineteenth century at the size of holdings of agricultural land by British companies, and also the activities of one Irish absentee landlord, in a time of rural depression led to restrictions on foreign ownership being introduced by a number of states. He then considers the restrictions imposed on foreign land holding by a number of West

⁹⁴ Country Profile: Morocco (London: Foreign and Commonwealth Office and Department of Trade & Industry, 1992).

⁹⁵ Similarly Missouri forbids non-resident alien ownership of farmland. Resident aliens may own farmland but must dispose of it within 2 years after losing residency status MO. Ann. Stat. §442.5719 (Vernon), in Mason, *supra* note 36. In Iowa aliens can own all types of state land except agricultural lands IOWA Code Ann. § 567.3(1)(1992). The term "alien" includes corporations or other entities where non-resident aliens own a majority interest § 567.3(3), 4, 5 (1992).

⁹⁶ USDA, Economic Research Service, Internet: www.econ.ag.gov/epubs.

⁹⁷ Political ideology might supply reasons for such a policy. However of the Socialist and former Socialist states considered it would seem more accurate to say that objections to private ownership of land are ideological, and not reflective of a bias against foreigners

⁹⁸ Weisman, *supra* note 2, at 42.

⁹⁹ Regarding US concern about perceived rises in levels of petro-dollar funded acquisitions of US land by Middle East buyers in the 1970s, Schmidt notes, "(t)he threat perceived from OPEC investment rests a good deal on racial, and recently, political grounds"; *supra* note 86, at 566. See also comments below on US responses to Japanese immigration. It is not suggested that the US has any monopoly on such attitudes - simply most of the source material on policy issues is to be found in US periodicals.

Coast states in the early part of this century, and then again around the time of the Second World War, in an effort to deter immigration from Japan and the Far East.¹⁰⁰

Sullivan argues that the absentee landlords may have become a focus, and personification even, of the hardships caused by rural economic recession, as these landlords were not enduring in the same manner as their tenants; and that although the restrictions on Japanese immigrants were adopted with an economic justification, that they were essentially racist in character.¹⁰¹

History does sometimes repeat itself. More recently, another author has observed that a fear of Japan taking over has sparked off concern about Japanese land purchases in the US. Despite the fact that the Japanese have made a number of high profile acquisitions, they are not the "big buyers" of US land. Foreign investors of a number of other nations own property portfolios of equal or greater size.¹⁰²

The US is not alone in fearing or having feared foreign "takeover".¹⁰³ In Switzerland during the inflationary period of the 1970s such fears, together with fears of land shortages, led to foreigners being temporarily banned from acquiring land, and restrictions have been in place since.¹⁰⁴

Other unacknowledged motives may include fear of an economically or militarily more powerful neighbour. It is possible that the conditions justifying such restrictions may shift with time, but the restrictions remain, as in the case of Mexico. The Mexican border restriction and its predecessors (see Box 3) were originally designed to protect Mexico from a perceived northern military threat, particularly from Texas. This threat clearly receded long ago. However the land ownership restrictions now provide a means of controlling foreign development in the area south of the border with the US, an issue even more significant in view of the conclusion of the North American Free Trade Agreement in 1992.¹⁰⁵

Elsewhere, Callies has suggested that in the context of colonial and other foreign domination, "the rational basis for restricting rights to native peoples is easy to discern. The literature -

¹⁰⁰ Sullivan, *supra* note 93.

¹⁰¹ Sullivan, *supra* note 93.

¹⁰² Mason, *supra* note 37, at 484, writing in 1994.

¹⁰³ In the US context, "[t]hat alien land ownership poses a serious threat to national well-being is doubtful." Statistics showing that foreign direct investment in US farmland represents slightly less than 1 per cent of privately owned farmland and less than 0.5 per cent of all land in the US; see James A. Frechter, "Alien Landownership in the United States: A Matter of State Control", 14 *Brooklyn J. Int'l Law* 147 (1988).

¹⁰⁴ See also Campbell, *supra* note 6, at 141. The question of foreign land ownership has recently emerged as a major political issue in Hungary in light of that country's aspirations to join the EU. Foreign ownership of agricultural land has largely been prohibited since 1994: farmers in particular are concerned about possible amendments to this regime. See *Financial Times*, 4 November 1997.

¹⁰⁵ Vilaplana, *supra* note 89. Other continuing restrictions can seem more anachronistic. Apart from the territories in North Africa and the short border with Andorra, all of Spain's land borders are with EU States and in any event the restrictions on foreign land ownership do not apply to citizens of Member States.

historic, legal, political, geographic - is filled with tales of economic dispossession by invaders, whether armed or economic." The extent to which the Maori in New Zealand have lost their land is just such an example, and he states that "... it is equally clear that when a legally-enlightened indigenous people are able to gain control of sufficient government machinery, among the first laws passed are those which severely restrict or forbid foreign ownership of land."¹⁰⁶

While Callies sees the logic behind such restrictions as "largely unimpeachable", these landholding regimes do present challenges in reconciling them with the need to attract foreign investment. In Vanuatu, all freehold land was taken over by the government, and handed back to the descendants of the former customary owners in 1980 without compensation. While this was justified in light of the way in which the land was initially taken from its customary owners, the impact of this event has likely been a great deterrent to foreign investment.¹⁰⁷

Another example of restriction being introduced in a specific historical context is again provided by the US. A number of states introduced so-called reciprocal inheritance statutes in the 1940s and 1950s allowing foreigners to inherit property, including land, in their jurisdiction only if reciprocal rights were afforded to US citizens. This was apparently a form of retaliation for the practical inability of US beneficiaries to receive their share of estates of deceased citizens of Eastern bloc states.¹⁰⁸

One more factor that should not be overlooked is the importance of land within a country's economic structure. The importance of land in a largely agricultural economy is obvious, and indeed in North America it is the farming states of the US, which have been at the forefront of measures to restrict foreign ownership of agricultural land. But again, care should be taken to avoid reaching hasty conclusions in this regard. For example if one were to simply consider the economic importance of land, one might expect to find a correlation between the scarcity of land in a country and its tendency to restrict foreign land ownership, with smaller and more populous states tending to restrict foreign land ownership more. Yet the variety of approaches adopted in small states indicates that this factor is by no means decisive. For example in the Caribbean islands some states such as Trinidad and Tobago restrict foreign land ownership while other (even smaller) islands, such as the Turks and Caicos and the Cayman Islands, do not.

Finally mention must be made of the policy reasons why some states do *not* restrict foreign ownership or use of land.

The literature reviewed suggests that the main policy objective of complete deregulation of foreign land ownership (or at least a reduction in levels of restriction) is to create an environment favourable to foreign investment. Such policies may be freely chosen or in response to external pressures to liberalise the foreign investment regime (for example under a structural adjustment programme). They may seek to specifically encourage investment in land, but more frequently land ownership will be ancillary to industrial or agricultural investment. In this context it can be important for a foreign investor to own the land on which their investment is sited, not only to acquire the benefits of use which ownership affords, but also to use the land

¹⁰⁶ Callies, *supra* note 46, at 535.

¹⁰⁷ *Customary Land Tenure*, *supra* note 28, at 19 and 35.

¹⁰⁸ Sullivan, *supra* note 93, at 42.

as security to raise capital by way of charge or mortgage.¹⁰⁹ Consequently the ability to own land, and the ease with which such ownership can be acquired may be a factor in investment decisions.

The extent to which foreign investment can benefit a country and the extent to which it is affected by restrictions on the ownership and use of land by foreigners, is beyond the scope of this paper. However, the balancing of this objective against those stated and unspoken policy motives described above, forms the basis of government decisions regarding foreign land ownership and use.

The most active example of this occurrence is found in Eastern Europe, where states have moved to embrace free market economies. As can be seen from the brief summaries in Box 6, the variety of approaches is wide, and it is clear that a number of states are still in transition. A further factor to bear in mind is that while in the former Czechoslovakia private land ownership has been permitted under the present code since the 1950s, a number of former Soviet Union states have had to re-introduce the concept of private land ownership. Another problem in certain states is that both land and foreign investment laws are still in the process of being developed and they may even contradict each other.¹¹⁰

Regarding future developments in Eastern Europe, it is clear that while often the stated policy considerations will be invoked, the unstated motives are likely to play a significant role. In a number of states in the former Soviet Union "(p)roponents of Communist fundamentalism have opposed giving to foreign citizens and especially to foreign juridical persons the right to own land privately. Their aim is to preserve land in State ownership in order to avoid what they call the 'sale of the Motherland' to foreign juridical persons."¹¹¹

Equally, while historical factors and perspectives may well play an important role in the development of legal techniques to restrict and/or regulate foreign ownership, they may also be a factor in the manner in which such techniques are implemented. In 1995, calls were made by the Polish Minister of Internal Affairs to liberalise the rules on foreign land ownership due to the number of applications relating to agricultural land being refused by the Minister of Agriculture. Specifically the latter Minister was reported to have consistently refused requests for permits to acquire agricultural land over one hectare. One can only guess at the motives behind this pattern of refusals.¹¹² Equally, in Estonia, where foreigners are allowed to own land, the Government was facing a political backlash at that time due to the scale of foreign investment.¹¹³

¹⁰⁹ In this context the lack of ownership rights in Vietnam and the consequent inability of foreign investors to secure loans may pose potential problems for future investment growth. Golin, *supra* note 24, at 62.

¹¹⁰ Butler, *supra* note 19, at 185.

¹¹¹ *Ibid.*, at 185.

¹¹² M. Jakubowski, "Moves to Relax Foreign Ownership Rules" *Financial Times East European Business Law*, May 1994, at 10.

¹¹³ *The Financial Times* (London), 15 March 1995.

BOX 5: REGULATION OF FOREIGN LAND OWNERSHIP IN SELECTED COUNTRIES OF CENTRAL AND EASTERN EUROPE	
Albania	<p>Foreigners are permitted to lease land but cannot own it.</p> <p><i>Campbell Europe, supra note 47, at 19 Albania.</i></p>
Belarus	<p>Foreigners may not own land although they may lease it for terms of up to 99 years. The Foreign Investment Law does acknowledge the possibility that foreigners may be granted the right to buy land in the future. In September 1998, a Presidential Edict was signed allowing legal entities, including foreign entities, to apply for ownership of the land on which their service or manufacturing facilities are located. The approval of such applications requires, <i>inter alia</i>, presidential consent.</p> <p><i>Economist Intelligence Unit, 16 September 1994; BBC Monitoring Summary of World Broadcasts, ITAR-TAS News Agency broadcast, 21 March 1994; Report, Business Information Service for the Newly Independent States (BISNIS), 30 September 1998.</i></p>
Bulgaria	<p>Article 5(1) of the Encouragement and Protection of Foreign Investments Acts allows foreign persons to acquire ownership rights in buildings as well as other real property rights, except the ownership of land. However, foreigners can acquire use rights. Also, these limitations do not apply to Bulgarian partnerships or companies with foreign participation, or to companies with majority foreign ownership registered in Bulgaria. Recent changes allow such entities even to purchase agricultural land. Special permissions are required for border areas or where other security interests are involved.</p> <p><i>Boris Bogdanov Landjev, "Legislation on Foreign Investments in Bulgaria: Historical Background and Current Developments", 19 Review of Central and East European Law 541 (1993); U.S. Foreign and Commercial Service, Bulgaria: Country Commercial Guide (1999); European Commission, Regular Report on Bulgaria's Progress Towards Accession (1999).</i></p>
Croatia	<p>The Law on Property permits land ownership by foreigners (including foreign-owned businesses incorporated as Croatian entities) with approval from the Ministry of Foreign Affairs, although not in certain geographically-designated areas due to national security concerns.</p> <p><i>U.S. Foreign and Commercial Service, Croatia: 1999 Investment Climate Statement.</i></p>
Czech Republic	<p>Section 17 of the Foreign Currency Act establishes limitations on foreign ownership of immovables (land). The law distinguishes between "foreign exchange foreigners" and "foreign exchange nationals". The latter (Czech registered companies and permanently resident individuals) can freely rent and buy land but "foreign exchange foreigners" can only acquire land in limited circumstances such as inheritance or restitution. Czech companies with foreign participators may have to pay a higher price.</p>

	<p>Among the exceptions are that foreigners and foreign companies may only acquire land through inheritance; as part of a diplomatic mission; or, rather uniquely, for a foreign spouse in the joint acquisition of property where the other spouse is a Czech national.</p> <p><i>Stephen Denyer and Peta Wilson, Legal Aspects of Doing Business in the Czech and Slovak Republics (London, 1993). See also Campbell Europe, supra note 47, at 18.</i></p>
<p>Estonia</p>	<p>Section 6(3) of The Law of Property Act (15 February 1995), states that the acquisition of property by foreign legal persons and citizens may be restricted by law "in the public interest". These restrictions are found in the Republic of Estonia Land Reform Act (30 April 1996) which deals with the return of and compensation for the return of land. The Act provides that only foreign natural persons may privatise land granted to him or her for perpetual use, pursuant to the Estonian SSR Farm Act, or the land necessary for servicing a building owned by him or her (ss. 20, 21(2)). Foreign legal entities may privatise the land necessary for such purposes with the permission of the county governor. The Act establishes a hearing process, whereby the governor hears the opinion of the local government, and grants permission if it is not contrary to public interest or state security (ss. 21(3) and (5)). Finally, no aliens, foreign states, or foreign legal persons may participate in the privatisation of land by auction (s. 21(7)), and foreigners (natural persons and legal persons whose share capital is more than 50 per cent held by foreign legal persons), are not entitled to use the voucher system for payment, and must pay for privatised land in money, and not in instalments (s. 22(5)).</p>
<p>Hungary</p>	<p>Under the Land Law (Act VI of 1994) foreigners may acquire land, except agricultural land, with the permission of the Ministry of Finance according to set criteria, though a resident foreigner with a Hungarian ID card does not require such permission. Purchase of land by foreigners is limited to 6,000 square meters; leases may be granted for 10 years for up 300 hectares. A Hungarian company with foreign participation can own land with the prior permission of the Ministry of Finance. Generally no permission is needed for a lease.</p> <p>The Land Law prohibits foreigners from purchasing agricultural land, due to concerns about foreigners taking excessive control over agriculture. Efforts to liberalise restrictions on arable land ownership were derailed – at least temporarily – in 1997.</p> <p><i>Martindale-Hubbell, supra note 8, at HGRY-10; Dewey Ballantine, supra note 21, at 74. See also Daily Telegraph, 2 November 1996, Financial Times, 4 November 1997; The Independent, 23 November 1997; U.S. Foreign and Commercial Service, Country Commercial Guide 1999.</i></p>

<p>Latvia</p>	<p>After independence foreigners were not allowed to own land. A December 1994 law permitted land ownership by joint ventures with foreign participation (provided that Latvian citizens hold the majority stakes), and registered foreign companies registered from countries with which Latvia has agreements protecting foreign investments.</p> <p><i>Financial Times East European Business Law, October 1994, at 19; NOVECON, 19 December 1994; European Commission, Regular Report on Latvia's Progress Towards Accession (1998).</i></p>
<p>Lithuania</p>	<p>The Constitution provided that only the State and natural persons of Lithuania can own land, although foreign investors can rent land for 99 years with a priority right to extend that term. The Land Act of 26 April 1994 expressly provided that companies whether foreign or Lithuanian, are prohibited from owning land and that individuals are prohibited from concluding transactions with them. Companies and foreigners could only acquire land use rights over land owned by a Lithuanian citizen or the state by way of lease or a special land use agreement.</p> <p>The government has approved a constitutional law that came into effect in 1998 that permits EU and OECD foreigners meeting European and Transatlantic integration criteria to own non-agricultural land. The acquired land must be land designated for construction of buildings and facilities required for commercial activities, or land beneath existing buildings and facilities.</p> <p><i>Pakalniskis, Financial Times East European Business Law, June 1994; Campbell Europe, supra note 47, at 41; Constitutional Law re: Article 47(2), supra note 1; International Market Insight Reports, May 14, 1999.</i></p>
<p>Poland</p>	<p>Foreign individuals and companies registered abroad or controlled by foreigners can buy land with the permission of the Minister of Internal Affairs and, depending on the location of the land, consent of the Ministers of Defence and Agriculture. Applicants are required: to prove their ties with Poland (not a formal requirement); that they are licensed to do business in Poland; and the acquisition of the property must be justified by "actual needs". Under liberalised requirements passed in 1996, foreign individuals and firms may own an apartment, 0.4 hectares of urban land or up to one hectare of agricultural land without the need for a permit. These provisions are independent of the special regime in place for EU companies.</p> <p><i>NOVECOM COMMERSANT 1994; M. Barbier, "Joint Ventures in Poland", 22:5 International Business Lawyer 206 (1994); U.S. Foreign and Commercial Service, Country Commercial Guide 1999.</i></p>
<p>Romania</p>	<p>In April 1997, Law 35/1991 was modified to clearly stipulate that a Romanian legal entity with partial or total foreign capital can acquire ownership over land.</p> <p><i>U.S. Foreign and Commercial Service, Country Commercial Guide 1999.</i></p>

<p>Russia</p>	<p>The state of land law in Russia remained confused as of 1999. A 1996 presidential decree purported to allow the ownership and sale of land, including agricultural land, but its constitutionality is questioned. It appears that both law and practice restrict foreign ownership of land. A 1993 presidential decree appears to bestow rights of real property ownership on joint ventures with foreign participants, and a 1994 decree permits foreign owners to receive title to enterprise land that has been privatised. In both cases, these decrees have not yet been codified. Most foreign investors use long term leases with an option to buy as a mechanism of real estate development. In the meantime, there is a strong current of political sentiment against foreign ownership, as evidenced by debate in the Duma of new draft legislation that would ban sale of land to foreigners.</p> <p><i>Decree 1767, 23 October 1993 on the Regulation of Land Reforms and the Development of Agrarian Reform in the Russian Federation; No. 631, 1994, Confirming the Procedure for the Sale of Plots of Land During Privatisation of State and Municipal Enterprises; U.S. Foreign and Commercial Service, Country Commercial Guide, 1999; ITAR-TASS news agency, "Russian PM orders drafting of law banning sale of land to foreigners," 6 July 1999.</i></p>
<p>Slovak Republic</p>	<p>Under the Foreign Exchange Act, only Slovak legal persons may own real estate, though foreign persons or business entities may own real estate through establishment of a legally-registered Slovak company.</p> <p><i>U.S. Foreign and Commercial Service, Country Commercial Guide, 1999.</i></p>
<p>Slovenia</p>	<p>Article 68(2) of the Constitution originally stated that foreigners may not acquire title to land except by inheritance "in circumstances where reciprocity of such rights of acquisition are recognized." This restriction has received a significant amount of attention during the EU pre-accession process. Paragraph 2 of Annex XIII of the Europe Agreement commits Slovenia "to take the measures necessary to allow the citizens of the Member States of the European Union, on a reciprocal basis, the right to purchase property in Slovenia on a non-discriminatory basis by the end of the fourth year from the entry into force of the Association Agreement; and to grant to the citizens of the EU Member States, having permanently resided on the present territory of the Republic of Slovenia for a period of three years, on a reciprocal basis, the right to purchase property from the entry into force of the Association Agreement." Pursuant to this obligation, Article 68 was amended in 1997 to state that foreigners can acquire title to land under such conditions are determined by international agreement, ratified by the National Assembly, in circumstances where reciprocity of such rights of acquisition are recognised. A new law to define reciprocity, and the Rules to establish permanent residence were adopted in February 1999.</p> <p><i>U.S. Foreign and Commercial Service, Country Commercial Guide 1999; European Commission, Regular Report on Slovenia's Progress Towards Accession, 1999.</i></p>

Ukraine	<p>The 1992 Land Code states that only citizens of Ukraine may own private land, and only for private residences or agricultural use. Legal entities, whether Ukrainian or not (with the exception of Ukrainian agricultural entities) are not allowed to own land. Ownership of land by foreigners is prohibited, though foreigners may lease land. Following a Presidential decree in 1992, foreigners are permitted to purchase buildings, apartments and offices in major cities.</p> <p><i>Central and East European Business Law Bulletin, March 1994; U.S. Foreign and Commercial Service, 2000 Country Commercial Guide, 1999. Lee, Foreign Ownership of Agricultural Land – Is It Bad?, Bulletin of the Agricultural Land Share Project, 1997.</i></p>
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5. SOURCES

The range of sources for restrictions on land ownership is also very broad. Although most restrictions result from legislation, other legal authority includes constitutions, administrative regulations, and even judicial decisions.¹¹⁴

In Italy the source of restriction is the general civil code, which grants civil rights to foreigners on the basis of reciprocity - not just regarding land ownership.¹¹⁵ In other countries restrictions are contained in specific laws, in the general land law or code, in investment laws and in laws restricting the rights of foreigners in general. Some relevant provisions are to be found in laws on privatisation, especially in Eastern Europe. Elsewhere restrictions are contained in regulations¹¹⁶ - especially in times of perceived emergency, and in three examples they are found in Royal Decrees.¹¹⁷

Again it should not be forgotten that there may be other *de facto* restrictions on ownership or use of land by foreigners - such as restrictions on specific foreign investments, immigration and residence.

5.1 A Comment on Constitutions

There is no consistent method by which constitutions deal with the issue of land and foreign land ownership. Generally, constitutions may address the matter in one of a number of ways. First, there may be no reference whatsoever to land or foreign land ownership. Second, they may address the issue of compensation for expropriation, which is more of a fundamental rights issue than a land management concern. Third, constitutions may provide that foreign states

¹¹⁴ Campbell, *supra* note 6, at 8.

¹¹⁵ Gardner, *supra* note 7, at 80.

¹¹⁶ Section 15 of the Land Acquisition Act 1992 of Zimbabwe gives the Minister of Lands power to make regulations to prohibit or restrict the rights of non-residents to own, lease or occupy land; Simon Coldham, "The Land Acquisition Act 1992 of Zimbabwe", *J. African Law* 37 (1993) 82.

¹¹⁷ Spain, Saudi Arabia and Oman.

can only acquire land for diplomatic and consular purposes, as is the case with Costa Rica, Western Samoa, and (prior to the 1997 amendments) Lithuania.¹¹⁸

Finally, a constitution may contain restrictions or even outright prohibitions on foreign ownership of land. Examples include Mexico, Honduras and Guatemala, whose constitutions limit the areas in which foreigners can own land.

In some countries, the constitution imposes a total ban on foreign land ownership, such as Cambodia, which restricts the right to land ownership to Khmer citizens and Khmer legal entities (Article 44(1)). Bulgaria also provides an absolute prohibition, as even property acquisitions through legal inheritance must be transferred (Article 22(1)). In a similar situation however, the Philippines appears to permit those who acquire land by hereditary succession to keep it.¹¹⁹

Liberia's Constitution prohibits foreigners from owning real property in fee simple and leaseholds for long terms, but does permit lease arrangements for limited terms, and foreigners may be granted concessions which confer extensive rights of easement and land use (Article 57).

Slovenia's Constitution provided that foreigners may not acquire title to land except by inheritance "in circumstances where reciprocity of such rights of acquisition are recognized" (Article 68(2)). This provision was changed in connection with Slovenia's efforts to join the EU.¹²⁰

While it is questionable whether the location of such a restriction in a country's constitution will affect its normative strength, it certainly may affect the chance of it being amended. A regulation, for example, is easier to amend than a restriction entrenched in a state's constitution.

Morse argues that the possibility of Article 27 of the Mexican Constitution being amended to remove the ban on foreign ownership in the border areas (see Box 4) has proved to be politically impossible due to the symbolic importance of that document in confirming the land reform gains of the 1910 revolution.¹²¹

The Constitutional arrangements of a state may also have other implications as regards restrictions on foreign ownership, especially in federal states. In Canada and Nigeria restrictions on foreign ownership and use of land are set at the provincial and state level, while in the US there are both federal and state regulations on foreign ownership, with the state regulations reflecting a broad range of possible regulatory techniques.

¹¹⁸ Article 8, Costa Rica Constitution; for Western Samoa see Redden, *supra* note 64, at 2A.100.14; Lithuania, Article 47(1). Of the countries which ban foreign ownership, it is not uncommon to find an exception for foreign diplomatic missions.

¹¹⁹ Callies, *supra* note 46, 535.

¹²⁰ See Box 5, above. The original wording of Article 68 can be found at www.uni-wuerzburg.de/law/. The revised wording may be found at www.sigov.si/us/eus-usta.html.

¹²¹ Morse, *supra* note 18, at 53.

6. TECHNIQUES

Having considered to whom they might apply, the policy reasons and their sources, the various legal and administrative techniques for restricting foreign ownership of land will now be considered.

The wide variety of techniques applied around the world is striking. Differing approaches adopted by otherwise similar countries (in terms of stage of development, location, resource base, etc.) seems to suggest that more subjective factors, such as public opinion, play a role in determining certain measures. It has been difficult to ascertain from the literature the practical effects and aspects of implementation.

In attempting to categorise the various approaches we have borrowed from the classifications suggested by Morse, in a 1976 article, amending them as necessary to keep pace with current developments.¹²² It is difficult to generalise about state practice beyond these general categories, as the policy reasons for these laws, even in similarly situated states, can be radically different.

Box 6: Loopholes

While restrictions on foreign land ownership do exist in many states, there are ways to avoid them, based upon loopholes in certain country practice and legislation.

First, the legal framework may be incomplete, resulting in legitimate “loopholes”. For example, in one state, foreigners are prohibited from purchasing agricultural land. However, they are not prohibited from purchasing shares in existing companies which already own agricultural land. The result has been that foreign investors have been able to legitimately acquire effective control over large areas of agricultural land.

Elsewhere, more complex and arguably more devious approaches are necessary. For example, in another country, neither foreign individuals nor companies may own land, subject to governmental discretion regarding certain classes of investment. To bypass such procedural requirements, the necessary land is routinely acquired on behalf of foreign investors by locally registered companies, that have local directors on their boards, and whose shares are entirely owned by local nominees. However, to retain control, the foreign investor first requires each nominee shareholder to sign a stock transfer form, and each director to sign a letter of resignation. These documents are left undated and kept secret, to be used in the event that the “shareholders” and “directors” do not comply with foreign investor’s wishes.

It is questionable whether a test of “ultimate benefit”, as described in Part 3.3, would be able to perceive such arrangements.

¹²² *Ibid.*

6.1 The Outright Ban

Relatively few countries surveyed have an outright ban on foreign ownership or use of land. Some countries such as China, Vietnam, Ethiopia and a number of others form a distinct category in that nationals are not permitted to own land outright either.¹²³ China grants "equal treatment" to foreigners in that they too may be granted land use rights. In Zambia, the Land (Conversion of Titles) Act provides that all land vests absolutely in the President, "and shall be held by him in perpetuity for and on behalf of the people of Zambia", and that no person shall be granted land except for a specified term of up to 100 years.¹²⁴ Such a provision, not unusual in the African context, does not in itself preclude foreigners from acquiring land rights as strong as any national might acquire. Such land rights may in practice be tantamount to ownership, though subject to a superior *de jure* right held by the state or the President.

Even fewer countries have an outright ban on foreigners leasing land. One example where long leases to foreigners are prohibited is the Commonwealth of the Northern Mariana Islands. Foreigners may not own "long term" interests in land. This provision has been held to prevent the granting of a 55 year lease.¹²⁵

Most of the other countries which prohibit foreign ownership outright are economies in transition in Eastern Europe and the former Soviet Union, and even the practice of many of these states are becoming more liberal, as in the case of Slovenia and Lithuania (see Box 5, above).¹²⁶ In Albania foreigners are not yet entitled to own land although they can enter into leases.¹²⁷ In Armenia it appears that while the issue of foreign ownership has not yet been resolved, foreigners may not own land, but foreign joint ventures may enter into land-use agreements.¹²⁸

The original ban on foreign land ownership in the Constitution of Lithuania was reinforced by the Land Act of April 1994, which prohibited foreign or Lithuanian companies from owning land, and prohibits individuals from concluding transactions with them. Companies and foreigners could only acquire land use rights over land owned by a Lithuanian citizen or the state by way of lease or a special land use agreement.¹²⁹ The law on foreign investment also provided that foreign

¹²³ Article 40.3 of the Ethiopian Constitution (Proclamation No. 1/1995), vests all rural and urban land, as well as all natural resources, in the State and in the peoples of Ethiopia, and states that "[l]and is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange."

¹²⁴ Sections 4 and 12, Chapter 289, 19 August 1975.

¹²⁵ Callies, *supra* note 46, at 535.

¹²⁶ For a non-European example, see Law No. 5/1960 (24 September 1960), which forbids foreign ownership of land in Indonesia. Foreign investment companies may own land with right of building title (*hak guna bangunan*), for industrial and real estate projects, for up to 30 years. A foreign investment company can also acquire a lesser right of use title, which is not mortgageable, for an unlimited duration. Such companies can also rent land. Hornick and Nelson, *supra* note 79, at 746.

¹²⁷ Campbell Europe, *supra* note 47, at 9.

¹²⁸ Euromoney Publications, 1 October 1994.

¹²⁹ Pakalniski, *Financial Times East European Business Law*, June 1994.

investors can be allowed to rent land for 99 years with a priority right to extend that term.¹³⁰ The constitutional law of 1997, referred to in Box 5, now allows foreigners meeting European and Transatlantic integration criteria to own non-agricultural land. The acquired land must be land designated for construction of buildings and facilities required for commercial activities, or land beneath existing buildings and facilities.¹³¹

Saudi Arabia's approach is so restrictive as to effectively prevent foreign land ownership. A Royal Decree provides that: "Only citizens and in certain limited exceptions citizens of other Gulf Co-operation Council states are allowed to own real property."¹³²

6.2 Intermediate Restrictions

Of the countries considered, the majority adopt an intermediate approach to foreign land ownership, in that foreign land use is permitted, but subject to regulation and various restrictions. It is difficult to categorise the various techniques due to the wide range of approaches. Further, the types of restrictions may themselves overlap. For example as regards land in specific areas there may be either a total prohibition or restrictions/regulations on foreign ownership or use, such as the need for prior permission. If ownership is permitted there may also be further types of restrictions, for example a limit on the number of foreigners allowed to own land in that area.

Box 7: Hong Kong – Sovereignty and Foreign Land Ownership

Prior to its reversion to Chinese rule in 1997, all land belonged to the (British) Crown, and was sold primarily at auctions on renewable 75 year leases. No restrictions were placed on the acquisition by foreigners of such leases. Since June 1997, this reversionary title has now passed over to the Chinese government. In order to preserve investor confidence in the real estate market, China and Britain agreed to continue to recognise all existing leases which extend beyond 30 June 1997, and all those expiring before this date without a right of renewal could be extended until 30 June 2047 without the payment of an additional premium. While this Agreement effectively maintains the status quo for the next 50 years, it does not specify what will happen to these land leases after 2047.

Redden, *supra* note 64, at 2.40.46 and 2.50.8.

¹³⁰ Campbell Europe, *supra* note 47, at 41.

¹³¹ See Box 5, above. See also Resolution No. 1423 on The Procedure for Submission, Examination and Issuance of Permissions for the Established National and Foreign Entities with respect to the Applications for Allowance of Acquisition into Ownership of Land Plots of Non-Agricultural Purpose, December 1998, in Law Update Bulletin, http://www.lpvp.litex.lt/trib/1998/98_12/eng/.

¹³² Royal Decree No. M/22, 1970, "Regulations for non-Saudis taking Possession of Real Property in the Kingdom". Martindale-Hubbell, *supra* note 8, at SaA-1.

6.2.1 The "Key Sector" Approach

States use this approach to restrict foreign land ownership, or use of types of land (such as agricultural and industrial land) or areas of land within their borders. Foreign ownership of land in such sectors may be prohibited, regulated or restricted, or such sectors might be the only areas in which foreigners may own or use land.

These use of this approach "... limits or excludes aliens' rights in real property that affect certain economic areas of particular importance to a nation", some examples being "... land for essential economic purposes such as agriculture or mining, and designated strategic sections of a country such as land along borders and coasts."¹³³

Perhaps the most obvious example of a "key sector" restriction is in states that prohibit land ownership by foreign individuals, but not by foreign companies for business related purposes, such as Oman and Romania. The economic rationale here is obvious.

What is striking about "key sector" restrictions is the variety of types of land subject to such restrictions, including rural or agricultural land, land in urban areas or in villages, environmentally sensitive areas, land for recreational purposes and land in border areas.

A number of states place restrictions on the acquisition by foreigners of rural and agricultural land. As mentioned above, in the Republic of Ireland foreigners who are resident in the country for less than 7 years may not purchase, lease or acquire interests in rural land save with the permission of the Land Commission and subject to compliance with any conditions attached to that consent.¹³⁴ Similarly, in Brazil restrictions are placed on the rights of foreign individuals and companies to purchase and rent rural land.¹³⁵

In New Zealand the prior approval of the Land Valuation Tribunal is required in respect of the purchase (or leasing for over 3 years) by foreigners of land zoned as a "public reserve or amenity" or land above a certain size which is not zoned for commercial, residential or industrial purposes.¹³⁶ Hungary prohibits the sale to foreigners of farmland, and unique to this survey, environmentally sensitive land.¹³⁷ A number of US states and Canadian provinces also restrict or prohibit the sale of farmland to foreigners.¹³⁸

While foreigners may generally buy land in Turkey they are not permitted to buy land in villages.¹³⁹ In Finland, the provisional regime introduced in the early 1990s prohibited foreigners

¹³³ Morse, *supra* note 18, at 49.

¹³⁴ Land Act 1965, s. 45(2)(a).

¹³⁵ "Legal Brief", *International Business Lawyer*, (1993) 307.

¹³⁶ Land Settlement Promotion and Land Acquisition Amendment Act 1968, Martindale-Hubbell, *supra* note 8, NZ-1.

¹³⁷ Law on Land Ownership. BBC Monitoring Service, 7 April 1994.

¹³⁸ Martindale-Hubbell, *supra* note 8, see CANADA: MANITOBA, ONTARIO, SASKATCHEWAN, and US: MISSOURI, ARKANSAS, IOWA, ILLINOIS.

¹³⁹ Martindale-Hubbell, *supra* note 8, at TUR-1.

from owning land for recreational purposes to preserve the integrity of the Finnish countryside.¹⁴⁰

By contrast, in Australia restrictions apply to acquisitions by foreigners of urban land (defined as land not used wholly or exclusively for carrying on a business of primary production¹⁴¹) and interests therein.¹⁴² The term "interest in urban land" is very broad, and includes: an interest as a lessee or licensee which gives such a person the right to occupy urban land for more than five years, an interest in an arrangement for the sharing of profits or income from dealings in or use of urban land, and an interest in an Australian urban land corporation. The Canadian province of Alberta also is concerned about ownership of urban land. It limits the foreign ownership of "controlled lands", which include crown lands, lands with mines and minerals, and land within the boundaries of a city or town to two parcels not exceeding 20 acres in total.¹⁴³

Other sectors that are regulated - or rather specified - relate to housing. In Bermuda foreigners can only purchase residential property with an "Annual Rental Value" (as defined) which is equivalent to or greater than a specified amount. Similar restrictions are applied in Malta to ensure that foreigners do not buy cheaper housing.¹⁴⁴ The Singapore 1973 Residential Properties Act places restrictions on the acquisition of residential property by foreigners, but no such restrictions exist in relation to non-residential land. In Thailand, the Land Code is so explicit as to only permit foreigners to own condominiums, and then foreign ownership of the units in a condominium is limited to 40 per cent.¹⁴⁵

In a sense, by specifying what foreigners may not buy and directing them to what the state deems that they may purchase, these restrictions could be described as "reverse key sector restrictions". For example in Egypt foreigners generally may not buy land, but by Investment Law 230 of 1989 foreign investors were granted the right to buy land and property necessary for their businesses.¹⁴⁶ With respect to urban lands, Law 56 of 1988 prohibits non-Egyptians from owning land with certain exceptions, including diplomatic missions, land acquired through inheritance, and some other conditions such the size of the property, and provided that it is not jointly owned with an Egyptian.¹⁴⁷

¹⁴⁰ Act on the Control of Acquisitions of Real Property by Persons Residing Abroad and by Foreign Legal Entities (1613/92); Tommila, *supra* note 69.

¹⁴¹ Foreign Takeovers (Amendment) Act 1989, s. 6(e).

¹⁴² Foreign Takeovers Act 1975; Brown, *supra* note 82.

¹⁴³ Agricultural and Recreational Land Ownership Act and Regulations, internet site www.gov.ab.ca

¹⁴⁴ Martindale-Hubbell, *supra* note 8, at MLT-1.

¹⁴⁵ Thailand, *International Financial Law Review*, January 1997, at 38. See, however, a description of recent changes to Thai regulations at note 49, *supra*.

¹⁴⁶ Investment Law 230 of 1989; *Egypt Industrial Development Review* - Economist Intelligence Report and UNIDO (1994).

¹⁴⁷ Dr. Naim Attia, "Ownership of Urban Realty by Non-Egyptians" 4 *Arab L.Q.* 235 (1989), at 237.

In Malta foreigners may only purchase land if it is for an approved tourist, industrial purpose or project which contributes towards Maltese economic growth.¹⁴⁸ Similarly in Thailand the general prohibition on foreign ownership can be waived if the land is needed for petroleum exploitation or relates to and is necessary for a commercial activity which is the subject of an existing investment licence. These provisions imply a degree of discretion, which can be exercised by the governmental authority.¹⁴⁹ In Bermuda foreigners may not purchase undeveloped residential land.¹⁵⁰

Finally another common key sector restriction applies to restrictions and prohibitions on foreign ownership in border areas. Such restrictions are found in the laws of a number of countries in Europe and Central and South America (see Box 8). Restrictions apply in respect of border areas in Greece, Spain, Italy (to foreigners who are not EU nationals, see Box 1), and Finland.¹⁵¹

While it seems that in European states, such border areas are defined by county or region, Central and South American states frequently specify that the restricted area is a strip of land x kilometres wide. The range of limits is set out in the table in Box 8. A final comment on border restrictions is that the areas involved can be substantial. Some 51 per cent of Greek territory is subject to the border areas regime while the figure for Mexico is 43 per cent of national territory.¹⁵²

6.2.2 Land Quantity Restrictions

Percentage restrictions on the total amount of land foreigners can own are a feature of a number of schemes. In September 1994, the Latvian Parliament passed a land ownership bill that was to allow the ownership of land by legal entities and foreigners. It was anticipated that a requirement that at least 50 per cent of rural land would be owned by Latvians was to be introduced.¹⁵³

Such restrictions may limit either the total proportion of land owned by foreigners (usually expressed as a percentage)¹⁵⁴ or the maximum area of land which each foreigner may own.

The Spanish border area restrictions mentioned above also require that the amount of real

¹⁴⁸ Martindale-Hubbell, *supra* note 8, at MLT-1.

¹⁴⁹ Martindale-Hubbell, *supra* note 8, at THAI-2. See also, Thailand, *International Financial Law Review*, January 1997, at 38.

¹⁵⁰ Campbell Latin America, *supra* note 54, at 51.

¹⁵¹ Tommila, *supra* note 69, at C-135.

¹⁵² Vilaplana, *supra* note 89.

¹⁵³ "Latvia: Law Watch" *Financial Times East European Business Law*, October 1994, at 19.

¹⁵⁴ Morse discusses the issue of percentage restrictions on the size of foreign holdings in national corporations pursuant to regional treaties and regulations, in particular Decision 24 of Andean Pact. Such limits would by extension limit foreign land ownership rights; Morse, *supra* note 18, at 49.

property in border areas owned by non-EU foreigners may not exceed 15 per cent.¹⁵⁵ As mentioned above, Thailand's limitations on condominium ownership were set at 40 per cent of the units in a condominium complex (though, as noted, this was broadened in 1999 to 49 per cent, and for 5-years, up to 100 in Bangkok and vicinity).

Box 9: Restrictions in Border Areas in Central and South America	
Bolivia	<p>Foreign natural or juridical persons cannot hold any title to soil or subsoil within 50 kilometres of the national boundaries, except in case of national necessity declared by law.</p> <p>Constitution, Articles 18, 19, 23-25; Decree-laws of 2 August 1937 and 13344 of 30 Jan 1976; Law 1243 of 11 April 1991. Martindale-Hubbell, <i>supra</i> note 8, at BOL-6.</p>
Brazil	<p>Foreigners are only entitled to purchase property located in border areas considered essential for national security, a strip of land 150 kilometres wide, after prior approval from the Government.</p> <p>Campbell Latin America, <i>supra</i> note 54, at 20-24 Brazil.</p>
Guatemala	<p>Article 122 of the Constitution provides that all land within 3 kilometres of the ocean, 200 metres from lakes, 100 metres from navigable rivers, and 50 metres from springs is government property, except for land situated in urban areas and/or registered as private property before 1956. Foreigners need special permission to acquire properties in these exempt areas. Article 123 stipulates that only Guatemalans and corporations owned by Guatemalans can own land within a band 15 kilometres wide along the Guatemalan border – except for real estate situated in urban areas and/or registered as private property before 1956. Foreigners already owning such property can only sell it to Guatemalans.</p> <p>Martindale-Hubbell, <i>supra</i> note 8, at GUA-1.</p>
Honduras	<p>Foreigners may not own land in a 40 kilometre strip around the borders and lands in islands, cays, reefs, cliffs, rocks, shoals, and sandbanks except in urban areas. Otherwise there are no restrictions and no need for prior approval.</p> <p>Martindale-Hubbell, <i>supra</i> note 8, at HON-1.</p>
Mexico	<p>Foreigners cannot own land within a zone 100 kilometres along the borders and 50 kilometres along the country's beaches.</p>
Nicaragua	<p>Only Nicaraguans and corporations in which more than 51 per cent of the capital belongs to Nicaraguans can own property within an area 20 kilometres from the borders.</p> <p>Martindale-Hubbell, <i>supra</i> note 8, at NIC-5.</p>

¹⁵⁵ Gardner, *supra* note 5.

Panama	By Article 286 of the Constitution foreigners may not own land within 10 kilometres of the national borders. Martindale-Hubbell, <i>supra</i> note 8, at PAN-1.
Peru	Aliens may not own land, waters and mines etc within 50 kilometres of the borders. Martindale-Hubbell, <i>supra</i> note 8, at PER-1.

In Brazil there are limits on the amount of rural land which foreign individuals resident in Brazil can own (non-resident foreigners may not own rural land). The maximum holding per individual must not exceed 50 "modules" (defined for each region by the Ministry of Agriculture and Land Reform), taken separately or together and the acquisition of between 3 and 50 modules requires preliminary government authorisation.¹⁵⁶ These restrictions also apply to land leased to foreigners.¹⁵⁷ Further, the total proportion of rural areas owned by foreign individuals or legal entities must not exceed 25 per cent of the land area of each municipality and individuals of the same nationality must not hold more than 10 per cent of that land area - presumably to prevent the creation of foreign enclaves.

Another type of restriction is on the amount of land that each foreigner may own. A limit may be set on the amount of land a foreigner may own without needing prior authority as in the cases of Trinidad. Alternatively, as in the case of the US under AFIDA, the size of the land holding may trigger reporting requirements. Such restrictions may apply to all types of land or only to specific types of land, as in the case of New Zealand described above.

6.2.3 Prior Authorisation

In cases where foreign ownership is not prohibited, either state-wide or in specific sectors, a requirement for prior authorisation is a common method of ensuring its restriction and regulation. One author has suggested that this approach may be chosen by states that intend to prohibit foreign land ownership or use but are concerned about their image.¹⁵⁸ There is generally little information as to the proportion of applications by foreigners for permission to buy or use land which are successful.

Again a wide variety of approaches are adopted. This Part addresses the questions of: who decides the application; what must be supplied; on what basis is the decision made; and what other restrictions or requirements may be imposed?

¹⁵⁶ "Legal Brief", *supra* note 135.

¹⁵⁷ Law Number 8269, 25 February 1993, dealing primarily with land reform, also provides that Law 5709 also applies to the leasing of rural land by aliens.

¹⁵⁸ Weisman, *supra* note 2, at 57.

6.2.3.1 Who Decides the Application?

The survey shows that applications for such authorisation are made to a wide variety of bodies with nearly every level of government being represented.

For example, in Italy applications by non-EU nationals to live in the border areas are made to the prefect of police.¹⁵⁹ Yet in Finland such applications are made to the county council. In Greece applications to rent or buy land in the border areas by Greek and EU nationals are required to be made to the local prefecture, for evaluation by an ad-hoc committee, but to the Ministry of Defence by other foreigners.¹⁶⁰ In Poland, the joint approval of the Minister of Interior and the Minister of Defence is required for foreign land purchases.¹⁶¹

Applications under the Lex Friedrich by non-residents and corporate foreigners for land purchase and long leases in Switzerland are made to the Cantonal authorities. In the Bahamas applications for permission to acquire land, or "immovable property", are made to the Foreign Investment Board.¹⁶²

In Liechtenstein applications by resident and non-resident foreigners, or by legal entities in which foreigners have a majority interest to buy land have to be licensed by a special commission (*Grundverkehrskommission*).¹⁶³ Mention has already been made of the role of the Land Commission in Ireland and the Land Valuation Tribunal in New Zealand. And, as mentioned earlier, land acquisition by foreigners must have the approval of the island, village or clan chiefs in Vanuatu.

Applications to own land in Denmark are addressed to the Ministry of Justice while in order to own land in Norway foreigners require a concession from the Minister of Agriculture/Industry.¹⁶⁴ In Cyprus land purchases require the approval of the Council of Ministers.¹⁶⁵ Finally, recent legislation specifically provides that only the Congress of Brazil, and no longer the President alone, is authorised to permit foreigners to exceed the statutory limits on ownership of rural land.¹⁶⁶

¹⁵⁹ Gardner, *supra* note 7, at 80.

¹⁶⁰ Athanassios Vamvoukos, "Greece - a Special Report", 12:9 *International Financial Law Review* (1993), Supp IAB, at 17-19.

¹⁶¹ See Box 5, above.

¹⁶² Campbell Latin America, *supra* note 54, at 49, Bahamas.

¹⁶³ Campbell Europe, *supra* note 47.

¹⁶⁴ Norway Concession Act 1917 & 1974. *Ibid.*, at 17.

¹⁶⁵ Campbell Europe, *supra* note 47, at 7, Cyprus.

¹⁶⁶ Law Number 8269, 25 February 1993, which modified law 5709.

6.2.3.2 What Must Be Supplied?

Examples of the types of information that must be supplied include the following.

In Bermuda, under the Immigration and Protection Act 1956 foreigners, who require a permit to buy land and leases for more than five years must supply a bankers reference and two personal references in support of their application.¹⁶⁷ In the Bahamas an application by a foreigner for a permit to buy land must be made on the prescribed form accompanied by character references, a police certificate, a financial reference and details of the agreement for sale.¹⁶⁸

In Poland, a foreign individual seeking permission to acquire land must include specified information in their application including full personal details (including details of their citizenship) a description of the land, the legal form the transaction will take and details of their ties with Poland. They must attach to the application copies of: documents proving those ties, a written declaration from the seller confirming willingness to sell and the price, land registry entries, a certified valuation and revenue stamps for a prescribed fee for the application and each enclosure. A similar procedure applies to companies.¹⁶⁹

It seems logical that the relative complexity of different states application procedures, and the bureaucratic obstacles, will act as a deterrent to some potential investors, although the literature does not deal with this.

6.2.3.3 What is the basis of the decision?

The literature available only refers to clearly stipulated approval criteria in a few states. It would appear that in many others the authorisation process is less transparent although guidelines may exist even if these are not made public.

Factors taken into account in Sweden when deciding whether or not to authorise a foreigner to purchase land are the benefit to the State of the purchase; the personal state of affairs of the applicant; the purpose for which the land is intended to be used; whether the applicant has been permanently resident in Sweden for 2 years or has some connection with Sweden; and whether the applicant has a family relationship with the owner of the land. If any one of the foregoing apply the County administration can grant permission, if not the Government must do so.¹⁷⁰

The Swedish scheme sets out different criteria for different types of property, such as one and two family dwellings, summerhouses, farming property apartment buildings and real property for business interests.¹⁷¹

¹⁶⁷ Campbell Latin America, *supra* note 54, at 51.

¹⁶⁸ Campbell Latin America, *supra* note 54, at 49.

¹⁶⁷ NOVECOM COMMERSANT 1994.

¹⁷⁰ Weisman, *supra* note 2, at 58.

¹⁷¹ Campbell, *supra* note 6, at 129.

In Hungary various criteria are specified in the Government Decree on the Acquisition of Real Estate by Foreigners, the most important of which is the preservation of the national or local interests. There is no appeal against a refusal.¹⁷² The Estonian Land Reform Act requires that in the limited instances where foreigners may purchase land, a hearing be held where the local government in which the land is situate present the case to the governor, who may then grant permission provided that such ownership is not contrary to the public interest or state security.¹⁷³

The Swiss Lex Friedrich permission will only be granted to foreigners (non-residents and foreign companies as described above) if one of the grounds set out in the law is fulfilled, and none of the grounds for refusal apply. Examples of the latter include the prevention of mere capital investments, protection of military safety and the political interests of the country. The most frequent ground for granting permission is for the purpose of setting up a permanent establishment for trade and manufacture or any other business.¹⁷⁴

Under Finland's transitional law, foreigners (defined as persons residing abroad), required a permit to purchase land for recreational purposes. The law provided that such a permit may be refused if there was a danger that widespread foreign ownership would prevent residents from acquiring recreational homes.¹⁷⁵

¹⁷⁰ Dewey Ballantine, *supra* note 21.

¹⁷³ Land Reform Act, 30 April 1996, s. 21.

¹⁷⁴ Campbell Europe, *supra* note 47, at 25, Switzerland.

¹⁷⁵ Tommila, *supra* note 68, at C-136.

Box 9: Trinidad and Tobago

The Aliens (Landholding) Act of 1921 set out a comprehensive and potentially restrictive scheme for the regulation of foreign land ownership. The Act applied to “aliens” defined as individuals who were not citizens; partnerships containing one or more non-citizen; and companies either not incorporated in Trinidad and Tobago, or if incorporated there, were under “alien control”.

Aliens could only own, rent, or be the mortgagee of land, if they held a licence granted at the President’s discretion, which could be subject to conditions. The licence was not operative until registered with the Registrar General, and if any of its conditions were breached, the land or interest was forfeit to the state. To prevent trusts as a means of evading the license requirement, trustees also had to obtain a licence if they held land in trust for an alien. Unlicensed aliens could rent 5 acres of land or less annually for residence purposes, trade or business. If they inherited land, they had one year, or such extended time as the President considered reasonable, to dispose of it.

A company was under “alien control” if, *inter alia*, any of its directors was an unlicensed alien; more than 2/3 of votes eligible to be cast at a general meeting of the company were held by unlicensed aliens; if in its share capital more than 2/3 of the votes were held by unlicensed aliens; and if no share capital, 2/3 of its members were unlicensed aliens. Further, if unlicensed aliens received more than 1/3 of the total value of dividends paid or payable, or held more than 1/3 of the nominal value of outstanding debentures or interest in the debentures, the company was also under “alien control”. Aliens also had to obtain a general licence renewable annually to hold as mortgagee land held as security for funds lent. Such acquisitions were also subject to conditions.

In 1990, under pressure from the World Bank to liberalise the investment regime, the Act was repealed by the Foreign Investment Act, which allows foreigners to acquire land of less than one acre for residential purposes without the need for a licence. Similarly, the licence requirement was dispensed with for land under 5 acres acquired for a trade or business. Such acquisitions must be paid for in foreign currency.

6.2.3.4 What Other Restrictions or Requirements May Be Imposed?

In some jurisdictions where administrative authority is required for foreigners to purchase land, even if consent is granted it may be subject to additional conditions. Under the Swiss Lex Friedrich, where permission is granted it is generally subject to further conditions including: that the land be used for the purpose specified in the application, that where the land has been acquired for business operations there be no sale for a 10 year period and that shares in real estate companies (the purchase of which also require prior permission) are not sold or encumbered for 10 years and be deposited with a bank.¹⁷⁶

In Iceland conditions attached to a authorisation granted to a foreigner are even more onerous. The basic prohibition on foreign ownership under the Act on the Right to Own or Lease Real Estate (1966) can be dispensed with by the relevant Minister, but on condition that a power of attorney is granted to an Icelander living in the area of jurisdiction in which the property is situated. That person, whose details must be notified to the local court, must represent the

¹⁷⁶ Campbell Europe, *supra* note 47, at 25, Switzerland. Some of these provisions may have changed as a result of recent amendments to the Lex Friedrich.

foreigner in all matters relating to the land and their decisions regarding the land are binding on the (foreign) owner.¹⁷⁷

6.2.4 Registration and Notification

In cases where no prior authorisation is required, a number of states nevertheless require foreigners to register landholdings or to notify the authorities of their acquisition, either before or after it has been completed. These requirements are in addition to any land registration formalities applicable to nationals as well.

Specific requirements that foreigners register or give notice of land transactions can be regarded as a form of restriction, in that they deny foreigners who acquire land the confidentiality they might seek. Further, if a government has information about the extent of foreign ownership of land it will be better placed to regulate such use. The Canadian province of Ontario provides an example of a registration requirement where foreigners acquiring farmland must file a registration report.¹⁷⁸

Recent changes in Latvia permit the purchase of land by joint ventures with foreign participation (provided that Latvian citizens hold a majority stake) and by foreign companies from countries with which Latvia has agreements protecting foreign investments, would require such purchases to be registered with the Latvian authorities.¹⁷⁹

Registration and *ex post facto* notification requirements can be important in that they allow a government to keep a record of the extent of foreign ownership of land. If not combined with a requirement for prior authorisation they may only amount to information gathering exercises. It was partly the perception in the US during the 1970s that the Federal Government simply did not know the extent of foreign ownership which led Congress to introduce legislation requiring notification of by foreigners of land acquisitions. The International Investment Survey Act of 1976 (IISA)¹⁸⁰ and the AFIDA mentioned above.¹⁸¹ Interesting features of IISA, which is concerned with foreign direct investment in respect of any business enterprise, including land, are the provisions for benchmark surveys, every five years, and for any US citizens who have participated in a relevant transaction ("whistle-blowers") to file a special report form unless they are certain that the foreign investor has duly notified the authorities of the transaction.

Other states require notification prior to the conclusion of a foreign purchase. For example, Japanese law requires foreigners to give prior notification to the authorities before any acquisition of land, or rights relating thereto, except in the case of property for office, factory, residential or certain other uses. In "extraordinary circumstances" the authorities then have the power to make the acquisition subject to extraordinary approval.¹⁸²

¹⁷⁷ Campbell Europe, *supra* note 47, at 20-24 Iceland.

¹⁷⁶ Martindale-Hubbell, *supra* note 8, at CANADA ONT-3.

¹⁷⁹ *Financial Times East European Business Law*, October 1994, at 19.

¹⁸⁰ IISA § 2 USC 3101-3108 (1988), as amended; Mason, *supra* note 37.

¹⁸¹ 7 USC § § 3501-3508 (1988).

¹⁸² Martindale-Hubbell, *supra* note 8, at JPN-1.

Similarly, the Australian Foreign Takeovers Act 1975, which applies to investments and urban land, requires prior notice of proposed acquisitions by foreigners/non-residents to be given to the Treasurer who can examine proposals and, if they are deemed to be "contrary to the national interest", make a prohibition order.¹⁸³ Otherwise if no such decision is notified within 40 days the transaction can proceed. Obviously this type of prior notification is in many ways a form of default prior authorisation.

6.3 How Are State Requirements Enforced?

A wide variety of sanctions are provided for to ensure compliance with techniques adopted, although the literature does not reveal the extent to which such sanctions are relied upon.

A common legal response to unauthorised or prohibited transactions is for them to be deemed to be void *ab initio*, in other words to treat them as never having had legal effect. This is the case in the Bahamas where a transfer without permission is void, although retrospective validation may be granted.¹⁸⁴

In Switzerland a transaction not carried out in accordance with the Lex Friedrich is voidable. There is a risk that a sale of land without authorisation will be declared null and void. Further, the authorities may seek orders for the restoration of land to its previous state, and for any legal entity involved in an unauthorised transaction to be dissolved and have its funds confiscated if the only purpose of creating the entity was to circumvent the law.¹⁸⁵

Some states, such as Peru, provide that land unlawfully held by foreigners is simply forfeit to the government.¹⁸⁶

Elsewhere the foreign owner may dispose of their land or may cure their "deficient" status to prevent its forfeiture. In the US state of Indiana, foreigners not intending to become naturalised citizens must dispose of all property in excess of 320 acres within 5 years of acquisition failing which the excess will escheat to the state.¹⁸⁷ Similarly, Kentucky land belonging to a foreigner who does not intend to become a citizen escheats after 8 years.¹⁸⁸

A number of states also provide for criminal sanctions in the case of non-compliance. In Switzerland, fines or imprisonment can punish a party to an unauthorised transaction.¹⁸⁹ In the

¹⁸³ Martindale-Hubbell, *supra* note 8, at AUS-2.

¹⁸⁴ Campbell Latin America, *supra* note 54, at 49.

¹⁸⁵ Campbell Europe, *supra* note 47, at 26, Switzerland.

¹⁸⁶ Martindale-Hubbell, *supra* note 8, at PER-1.

¹⁸⁷ IND. Code Ann. § 32-1-8-2 (Burns 1980), Mason, *supra* note 37.

¹⁸⁸ KY. Rev. Stat. Ann. § 381.300(1) (Michie/Bobbs-Merrill 1970), Mason, *supra* note 37.

¹⁸⁹ Campbell Europe, *supra* note 47, at 42, Switzerland.

US the IISA also provides for fines and imprisonment for failure to comply with reporting and disclosure requirements.¹⁹⁰ Similarly, it is an offence in Australia not to comply with the reporting requirements of the Foreign Takeovers Act 1975.

What of the case of an innocent acquisition of land by an un-authorized person, such as a donee or a beneficiary under a will or intestacy?¹⁹¹ In Thailand where foreign land ownership has been largely prohibited, such a beneficiary must dispose of the land within one year or else it is forfeit.¹⁹²

7. CONCLUSION

Given the disparate range of practices and techniques undertaken by states in relation to foreign land ownership, perhaps the only conclusion one may draw is that there is no direct correlation between the nature and extent of restrictions on foreign ownership of land and a country's economic strength; stage of development; political system and constitutional arrangements; size; or history of colonisation or foreign domination.

Legal restrictions on ownership and use of land by foreigners are designed to achieve a variety of policy objectives unique to the circumstances of each state, and may also be expressions of other unexpressed motives. Regardless of the implications of foreign land ownership, it is an issue that strikes at the heart of the nation state, and can evoke nationalist and protective sentiments. Public perceptions frequently play a significant role in determining the nature and extent of the restrictions imposed.

Once a decision is made to regulate foreign ownership or use of land the first issue to be addressed is who or what is a foreigner. The exact definition adopted may depend on the policy objectives which are sought to be achieved.

Thereafter, a variety of techniques are theoretically available to regulate in this area, ranging from outright prohibition of foreign land ownership, to requirements that prior authorisation be obtained, that foreign land acquisitions be registered, that prior notice of transactions be given or, that post acquisition notice be given or the transaction registered. These could be applied to all the land within the national borders or be based upon the:

- type of land (agricultural or recreational);
- type of use for which land is designated (residential);
- location of the land (border or urban areas);
- purpose for which the land is required (such as implementing an approved investment);
- quantity of the land (either per foreigner or the total amount available for foreign ownership).

¹⁹⁰ Mason, *supra* note 37. The extent to which these provisions have actually been invoked is not known.

¹⁹¹ Compare with the Philippines where this is the only exception admitted to the general prohibition on foreign land ownership.

¹⁹² Martindale-Hubbell, *supra* note 8, at THAI-2.

However the choice of technique does not take place in a vacuum, and the range of options may be restricted because responses will be determined by the political pressures of the day. Frequently, different restrictions will be employed concurrently, resulting in vague justifications and policy rationales, possibly shielding less laudable motives. The literature is surprisingly sparse as to the extent to which compliance with such restrictions is actually ensured or monitored. This may be an area of law where the mere existence of legislation may be more important, for its political message, than for ensuring compliance.

What seems most certain is that despite pressures leading towards the globalisation of markets and investments and in increasingly internationalist world community a uniform approach is unlikely for the foreseeable future.

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