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*Errol P. Mendes**

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I. INTRODUCTION

The scarcity of energy resources in the world today is and will continue to be a major contributor to international conflict and instability. A related issue that has recently divided the international community is the expropriation of alien investors' property and acquired rights. On October 28, 1980, the Government of Canada propounded the National Energy Program,[1] raising profound questions regarding these two international concerns. The focus of the program was to increase public and private Canadian participation in the oil and gas industry within Canada.[2]

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1. CANADIAN DEP'T OF ENERGY, MINES AND RESOURCES, THE NATIONAL ENERGY PROGRAM 1980 (Report No. EP80/4E) (1980) [hereinafter cited as ENERGY PROGRAM].

2. *Id.* at 16-22.

The Government stated that until recently Canadian oil and gas policy was not motivated by the stability of the oil supply. Before the mid-1970s, overseas oil was not only vastly cheaper than domestically produced oil, but also constituted a secure source of oil.[3] Despite a decrease in tax revenues from the domestic oil industry, the instability of the Middle East during the mid-1970s caused the Canadian Government to promote that sector of industry.[4] As a result of this policy, oil and gas revenues rose from 1.2 billion dollars in 1970 to 11.1 billion dollars in 1979.[5] Although the Government claimed that this increase in cash flow was financed by oil consumers and the Canadian taxpayer through the oil and gas pricing regime and taxation policy, it also claimed that the taxation policy tended to favor those already in the industry.[6] Since the overwhelming majority of these entities were subsidiaries of foreign multinationals, especially United States multinationals, the result was the complete domination of the Canadian resource sector by foreign-controlled companies.[7] Of the top twenty-five petroleum companies in Canada, seventeen are more than fifty percent foreign-owned and controlled, accounting for seventy-two percent of Canadian oil and gas sales.[8] Even if the oil and gas industry was more than fifty percent Canadian-owned, the industry could still be foreign-controlled, as firms can be effectively controlled by shareholders with far less than fifty percent of the equity.[9]

The Government has considered the future of the oil and gas industry in Canada and believes that in the future the industry will be dominated by foreign-controlled companies since such companies control the land where exploration for further reserves of oil and gas will take place.[10] Only 110 million of the 290 million acres of frontier lands held under exploration permits are held by Canadian-controlled companies.[11] Moreover, the foreign-controlled companies dominate the equity participation in existing and future oil sands plants, leaving only thirty-four percent of the

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3. *Id.* at 17.
4. *Id.*
5. *Id.*
6. *Id.* at 19.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 21.
11. *Id.*

equity in the syncrude plant to be controlled by Canadians.[12] The Government thus has concluded that future energy supplies will be largely controlled by subsidiaries of foreign multinationals.[13] To provide Canadians with energy security in a world in which there is intense international competition for increasingly scarce energy resources, the Government proposed *inter alia* the following measures.

(1) The Government proposed a new federal tax at the rate of eight percent of net revenues relating to the production of oil and gas royalty interests. Deductions from these net revenues (such as exploration costs, capital cost allowances, and interest) will not be allowed. If the oil and gas price were to rise more than one dollar per barrel every six months, the rate of tax would also be reviewed. The tax applicable to net revenues earned after January 1, 1981 will not be deductible for income tax purposes. The Government stated that the rationale of the tax was to produce a high marginal tax rate for firms that reinvest little of their cash flow. The revenue from such firms would then support cash incentives to more aggressive Canadian-controlled companies.[14]

The Government acknowledged that there will be situations in which firms are exposed to financial hardships due to provincial royalty rates in excess of fifty percent, since the new tax does not allow provincial royalties to be deducted before the federal tax is applied. Thus the Government proposed that the province in such cases should adjust its royalties.

(2) The Government proposed the imposition of a new natural gas tax applicable to all gas sales in Canada, including those to the export market. The immediate effect of the tax would be to reduce exports of natural gas to the United States and other foreign markets from Alberta and British Columbia.[15]

(3) The Government proposed a continuation of the Oil Export Charge. This is a tax levied on oil equal to the difference between the domestic and the export price. The Government's basic rationale of the tax was to hinder provinces or producers from export-

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 35. It is likely, however, that the Government of Canada in the future may have to revise such a tax in the face of intense political pressure and lobbying on the part of the oil industry in Canada and the affected Canadian provinces, especially Alberta.

ing oil from Canada, as long as the country remained a net importer of the precious commodity.[16]

(4) The Government proposed the elimination of the indirect incentives through tax deductions, concentrating instead on incentive payments[17] to increase Canadian participation in the oil and gas industry. The depletion allowance, equivalent to one-third of oil and gas exploration costs outside the Canada lands, will be phased out by 1982. The Government also promised to provide a replacement for the super-depletion allowance for exploration costs on Canada lands, which had expired on April 1, 1980.[18]

The Government realized that the reduction and abolition of the depletion allowance would result in a drastic cutback in exploration activities vital to the achievement of Canadian energy security.[19] This would be due in part to the drastic cutback in the cashflow of both foreign and domestic oil firms.[20] To avoid such a result, the Government created direct incentives for oil and gas exploration and development that would encourage investment by Canadian companies and individuals while discriminating against the foreign-owned firms that benefited from the depletion allowance system.[21] Up to eighty percent of the eligible costs would be covered by incentive payments depending on the percent of Canadian ownership.[22] Only firms with fifty to seventy-five percent Canadian ownership, however, would be eligible for the incentive payments.

(5) The most controversial legislative proposals, however, concerned the Government plan to ensure Canadian participation in the Canada lands, including Canadian control of a significant number of the larger national oil and gas firms. Both objectives would lead to fifty percent Canadian ownership of the entire na-

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16. *Id.* at 36.
17. *Id.* at 39.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 39-41. Subsequently the Government of Canada announced that it would change the NEP to allow corporations at least 65% Canadian-owned to qualify for the highest level of incentive payments available. This would amount to approximately 80% of approved costs in the Canada lands and 35% of approved costs in provincial lands.

tional resource sector by 1990.[23] Under the British North America Act,[24] vast areas of Canada (comprising the Yukon, the Northwest Territories, the Arctic islands, and the offshore continental shelf area) come within federal jurisdiction.[25] Stating that Canadian citizens as owners and taxpayers of these Canada lands should have a stake in decisions concerning oil and gas development in these frontier areas, the Government proposed *inter alia* a legislative measure that reserved a twenty-five percent interest in every right on the Canada lands to the Crown of Canada.[26] This re-

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23. *Id.* at 42-52.

24. The federal jurisdiction over the Yukon and the Northwest Territories is derived from the British North America Act, 1871, 34 & 35 Vict. 6, c.28, § 4: "The Parliament of Canada may from time to time make provisions for the administration, peace, order, and good government of any territory not for the time being included in any Province." The Territorial Councils also have legislative jurisdiction, but they remain subordinate to the Parliament of Canada. *See Northwest Territories Act,* CAN. REV. STAT. N-22 c.331, s.1 (1970), *Yukon Act,* CAN. REV. STAT. Y-2, c.53, s.1 (1952-53). As to the assertion of federal control over the Arctic region, see the extensive literature concerning Canada's extension of sovereignty over the Arctic islands and the Arctic waters: SMITH, THE HISTORICAL AND LEGAL BACKGROUND OF CANADA'S ARCTIC CLAIMS (1952); THE ARCTIC FRONTIER, (R. MacDonald ed. 1966); Green, *Canada and Arctic Sovereignty,* 48 CAN. B. REV. 740 (1970); Head, *Canadian Claims to Territorial Sovereignty in the Arctic Region,* 9 MCGILL L.J. 200 (1963); Inch, *An Examination of Canada's Claim to Sovereignty in the Arctic,* 1 MANITOBA L. SCH. J. 31 (1962); Pharand, *The Arctic Waters in Relation to Canada,* in CANADIAN PERSPECTIVES IN INTERNATIONAL LAW AND ORGANIZATION 434 (R. MacDonald, G. Morris & D. Johnston eds. 1974); Reid, *The Canadian Claim to Sovereignty over the Waters of the Arctic,* 12 CAN. Y.B. INT'L L. 111 (1974); Comment, *Creeping Jurisdiction in the Arctic: Has the Soviet Union Joined Canada?,* 13 HARV. INT'L L.J. 271 (1972).

25. At present, the maritime provinces of Canada, especially the province of Newfoundland, dispute the federal jurisdiction over resources in the continental shelf. *See Reference Re Ownership of Offshore Mineral Rights,* 65 D.L.R.2d 353 (1967). *See also* Caplan, *Legal Issues of the Offshore Mineral Rights Dispute in Canada,* 14 MCGILL L.J. 475 (1968); Head, *The Canadian Offshore Mineral Reference: The Application of International Law to a Federal Constitution,* 18 U. TORONTO L.J. 131 (1968).

26. *Id.* at 47. Section 61 of Bill C-48 (First Session, 32d Parliament, 29 Eliz. 11., 1980), which in part will implement the National Energy Program, states:

> 61(1) The interests and rights provided by this Act replace all oil and gas interests and rights or prospects thereof acquired or vested in relation to Canada Lands prior to the coming into force of this Act.
>
> (2) No person shall have any right to claim or receive any compensation, damages, indemnity or other form of relief from the Majesty in right of Canada or from any servant or agent thereof for any acquired, vested or

served interest would be exercised by Petro-Canada, the state-owned oil company, or by some other designated Crown corporation.[27]

Under the proposed legislative measures, the carried interest (which does not burden the Crown with past or present exploration costs) would be converted to a working interest under which the Crown shares the production costs until a particular field[28] receives a production license. The Government defended its controversial proposal as being necessary to protect Canadian ownership of federal resources.[29] The carried interest was also justified by the Government's incentive grants to Canadian-controlled companies of up to eighty percent of approved costs and the Government's past contribution to frontier exploration through tax policies, such as the super depletion allowance.[30] Opponents of this controversial proposal regarded it as retroactive confiscation without compensation, or at least as a retroactive change in the rights and liabilities arising between the Government and the exploration companies.[31] The Government further proposed that a minimum of fifty percent Canadian ownership eventually be required for any production in the Canada lands and that use of a high level of Canadian goods and services be required in the production of oil and gas on the Canada lands.[32]

(6) Finally, the Government evaluated proposals for Canadianizing the oil and gas industry through acquisition of foreign-controlled companies. The Government stated that increased Canadian control of the oil and gas industry was necessary to ensure fair and secure oil and gas production in Canada, and proposed legislative measures in an effort to acquire several of the larger oil

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> future interest or right or any prospect thereof which is replaced or otherwise affected by this Act or for any duty or liability imposed by this Act.

It could be argued that this Sovereign Immunity Section impliedly recognizes that confiscation without compensation is a feature of the National Energy Program, but then attempts to shield the Government from any requirement to compensate individuals and corporations whose interests have been confiscated.

27. ENERGY PROGRAM, *supra* note 1, at 47.

28. *Id.*

29. *Id.* at 44-48.

30. *Id.*

31. *See, e.g., Report on Business*, The Globe and Mail, Dec. 3, 1980, at B5; Mar. 16, 1981, at B19.

32. ENERGY PROGRAM, *supra* note 1, at 47.

and gas firms.[33] Under the proposed legislation, the Government would establish a Canadian Ownership Account to be financed through taxation of all oil and gas consumption in Canada. Petro-Canada would then use the Account to acquire equity shares of the targeted firms in the open market. Once the acquisition program was fully under way, the Government would disperse to one or more new Crown corporations some of the acquired assets to allow Petro-Canada to diversify into other areas of the oil and gas industry.[34] For example, Petrofina Canada, the subsidiary of a Belgian multinational, was acquired under this program.[35] Other proposed legislative measures to Canadianize industry included the preferential treatment accorded by the National Energy Board to Canadian-owned and -controlled firms in granting export licenses for oil and gas sales abroad.[36] The Petroleum Monitoring Agency, founded in 1980, defines the necessary Canadian ownership rates qualifying a firm for payments under the petroleum incentives program.[37]

Predictably, the oil and gas industry reacted angrily to the National Energy Program.[38] Both foreign-controlled and Canadian-owned firms felt that the reduced cash flow from the new taxation and the Canadianizing policies would dry up funds needed for exploration and development.[39] Dome Petroleum, a marginally Canadian-owned company, stated that it planned to "raise hell" about the proposed twenty-five percent carried interest on federal lands because of the serious implications for the company's northern leases.[40] Dome suggested two alternatives: first, the Government could exclude lands on which wells had been discovered; second, the Government could purchase the twenty-five percent interest to contribute to past exploration expenses and to replace some of the lost asset value created from the retroactive change in

33. *Id.* at 9.

34. *Id.* at 51-52.

35. The takeover was announced in February 1981. Petro-Canada bought the shares of Petrofina at slightly above market value.

36. ENERGY PROGRAM, *supra* note 1, at 50.

37. *Id.* at 51.

38. *See, e.g.*, The Financial Post, Mar. 28, 1980, at 8; *Report on Business*, The Globe and Mail, Mar. 27, 1981, at B2.

39. *See, e.g.*, *Report on Business*, The Globe and Mail, Mar. 16, 1981, at B19.

40. *Report on Business*, The Globe and Mail, Dec. 3, 1980.

the rules of frontier exploration.[41] In order to take advantage of the incentive payments offered under the National Energy Program,[42] Dome Petroleum subsequently created a largely Canadian-owned subsidiary, Dome Canada.

The United States headquarters of most of the affected foreign entities also expressed their discontent. The policy of the United States Department of State is to espouse the claims of United States corporations if fifty percent or more of the voting shares are owned by United States citizens. It also considers the claims of United States shareholders in a company incorporated in a foreign state and in which United States nationals hold at least twenty-five percent of the voting shares.[43] Thus, according to statistics in the Canadian National Energy Program, more than fourteen of the largest twenty-five oil and gas firms in Canada can have their claims presented by the Department of State.[44] Arguably, United States espousal of claims based on indirect beneficial interests in foreign companies is contrary to international law and practice. Many countries will present only the claims of companies organized under their own laws.[45]

The 1970 decision of the International Court of Justice in *Bar-*

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41. *Id.*

42. For an analysis of the corporate restructuring see the *Report on Business,* The Globe and Mail, Mar. 14, 1981, at B1.

43. *See* R. LILLICH & G. CHRISTENSON, INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION (1962); H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 238-40 (1976).

44. ENERGY PROGRAM, *supra* note 1, at 19-20.

45. Many of the Latin American and Central American states include in their constitutions and statutes the "Calvo" clause whereby foreign-controlled corporations organized under the laws of the host state are mandated to resolve their disputes with the host state under that state's laws and under the exclusive jurisdiction of the host state's courts. Further, such "Calvo" clauses require the foreign-controlled corporation not to seek diplomatic protection by the government of the foreign-controlled corporation's home state.

The home state of the foreign-controlled corporation is not necessarily bound by such "Calvo" clauses. When a national is injured, the home state has an international claim in its own right and is not bound by its national's submission to the "Calvo" doctrine. For examples, see article 32 of the 1944 (as amended in 1964) Peru Constitution and article 21 of the 1947 Venezuelan Constitution. *See generally* D. SHEA, THE CALVO CLAUSE (1955); F. DAWSON & I. HEAD, INTERNATIONAL LAW, NATIONAL TRIBUNALS AND THE RIGHTS OF ALIENS (1971); Graham, *The Calvo Clause: Its Current Status as a Contractual Renunciation of Diplomatic Protection,* 6 TEX. INT'L L.J. 289 (1971).

celona Traction Light and Power Co. Ltd.[46] may reinforce the belief that espousal of national shareholder claims by a government is not an accepted international legal practice. *Barcelona Traction* involved a 1970 claim by Belgium on behalf of the Belgian shareholders of the Canadian-incorporated Barcelona Traction Company.[47] Through the use of exchange control restrictions, the Spanish Government had made it impossible for the company to pay its debts, causing three Spanish creditors of the company to petition it into bankruptcy. A Spanish court declared the company bankrupt and ordered its assets seized.[48] In addition, the foreign management personnel were dismissed, and the holdings of the foreign shareholders were declared invalid.[49] New shares were issued to a Spanish company which took over the Barcelona Traction group of companies located in Spain.

The facts of *Barcelona Traction* illustrated the workings of an illegitimate form of creeping expropriation, but the International Court of Justice did not declare the merits of the case.[50] Spain's preliminary objection—that Belgium had no *locus standi* to espouse the claims of shareholders in a company incorporated in Canada—was upheld by the World Court.[51] The court held, however, that while only the national state of the company could espouse claims concerning the company under international law, Belgium might have maintained an independent cause of action had it argued that the actions of the Spanish authorities directly infringed upon the rights of the foreign shareholders.[52] Moreover, the right of Belgium to espouse the claims of the Belgian shareholders would arise also if the company ceased to exist.[53] A counterargument that could be presented by the United States or

46. [1970] I.C.J. 3.
47. *Id.* at 7.
48. *Id.* at 8-9.
49. *Id.* at 9.
50. *Id.* at 50. Two of the Justices Fitzmaurice and Gros, stated in obiter that Spain's action did amount to a disguised expropriation or confiscation of the undertaking. *Id.* at 106, 273 (separate opinions). Another Justice, Tanaka, concluded in obiter, however, that Belgium had failed to prove bad faith on the part of the Spanish authorities. *Id.* at 159 (separate opinion).
51. For a critical analysis of *Barcelona Traction*, see Higgins, *Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.*, VA. J. INT'L L. 327 (1971); Lillich & Metzger, *Two Perspectives on the Barcelona Traction Case*, 65 AM. J. INT'L L. 522 (1971).
52. [1970] I.C.J. at 37.
53. *Id.* at 42.

similarly situated nations is that *Barcelona Traction* was wrongly decided or is inapplicable today in view of the practice of incorporating in a country with which the company has no ties at all. A company registered in Delaware, consequently, could be entirely owned by non-United States nationals and carry on its activities outside the United States. Even the United States Government would not espouse the claims of such a company. Thus, the place of incorporation should not be the most important factor in determining which government has the right to espouse the corporate claims.

II. EXPROPRIATION OF ALIEN INVESTORS' PROPERTY

Until World War I, the global community was in basic agreement that a state's taking of alien-owned property imposed an obligation on that state to provide some form of compensation.[54] Expropriation was permissible only if undertaken on a non-discriminatory basis for reasons of public utility.[55] This global consensus was due largely to the fact that until the end of World War I international legal disputes still could be legitimately settled by the use or the threat of force.[56] The first sign in the disruption of this global consensus occurred as a result of the Soviet revolution in 1917, in which the Marxist regime issued expropriatory decrees abolishing private ownership of the resource and industry sectors in the Soviet Union.[57] The Soviets refused to

54. *See* J. KUNZ, THE MEXICAN EXPROPRIATIONS 3-4 (1940). On one of the very rare occasions that a World Court has had to pronounce on the legal consequences of illegitimate expropriation, the principles were enunciated very clearly. In Chorzow Factory, [1928] P.C.I.J., ser. A, No. 17, the Permanent Court of International Justice had to rule on the legality of Poland's expropriations of certain German interests including the Chorzow Factory after the Treaty of Versailles had ceded Upper Silesia to Poland: "It is a principle of international law that reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law. . . ." *Id.* at 27-28.

55. *Id.* at 4. See also specific instances of expropriation outlined in S. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW ch.3 (1953); The Case of Jonas King (1853), *reprinted in* 6 J. MOORE, INTERNATIONAL LAW DIGEST § 913, at 262-64 (1906); The Expropriated Religious Properties Case [1920] 1 R.I.A.A. 7, *reprinted in* FRIEDMAN, at 68-71.

56. The threat or use of force would include political and economic sanctions in addition to the use of the military. *See* J. KUNZ, *supra* note 54.

57. For a detailed account of the Soviet dispute with the West over the expropriations, see G. KENNAN, RUSSIA AND THE WEST UNDER LENIN AND STALIN

pay any compensation,[58] and the United States retaliated by refusing to recognize the Soviet Union, thus terminating Soviet commercial and trade relations.[59] Under the Litvinov Assignment, the Soviets compensated United States nationals for confiscated property in return for diplomatic recognition by the United States and resumption of trade and commercial intercourse.[60] The aliens whose property had been confiscated also protested retroactive imposition of responsibility upon them to contribute towards the satisfaction of foreign debts amassed by the previous Tsarist regime and provisional government in 1917.[61] Even in these instances of early uncompensated expropriation, retroactive imposition of liability was bitterly attacked.

Since the Russian revolution, and notably since World War II, two conflicting trends have divided the global community on the issue of expropriation of alien investors' property. The first trend is the recognition that a transfer of technology, capital, know-how, and services must occur between the industrialized world and the developing countries in order to supply the populations of those latter countries with sufficient resources and wealth to satisfy fundamental human needs.[62] The only feasible mechanism to achieve such a transfer or creation of wealth and resources was the multinational or transnational corporate form. These entities operated either through direct investment (establishing a branch of the company in the host state), or by incorporating a subsidiary in the host state according to that state's laws.[63] It was never

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(1960).

58. *Id.* at 190. *See also* FRIEDMAN, *supra* note 55, at 22; 28 AM. J. INT'L L. 139 (Supp. at 2); K. GRZYBOWSKI, SOVIET PUBLIC INTERNATIONAL LAW, 97, 354 (1970).

59. K. GRZYBOWSKI, SOVIET PUBLIC INTERNATIONAL LAW 97, 354 (1970).

60. *Id.*

61. For the legal issues arising out of the Litvinov Assignment, see United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

62. *See, e.g.,* The Report of the Group of Eminent Persons on the Role of Multinational Corporations on Development and on International Relations, U.N. Doc. E/5500/Add. 1 (Part 1)(1974), *reprinted in* 13 INT'L LEGAL MATERIALS 800, 809 (1974) [hereinafter cited as Report].

63. *See* Transnational Corporations in World Development: A Re-Examination, U.N. Doc. E/C/10/38/158-67 (1978). *See also* Multinational Corporations in World Development, U.N. Doc. ST/ECA/190/5 (1973), when the term multinational corporation is used to cover "all entities which control assets, factories, mines, sales offices and the like, in two or more countries." *Id.*

postulated, however, that they would act altruistically in the host state. Virtually all corporate entities exist to make profits, to create revenues, and to expand operations in the interests of the company. Ideally the multinational corporation would benefit the host country while serving its own interests at the same time.[64] The second trend is the desire of newly emerging states to assert economic sovereignty by expropriating or nationalizing the foreign-controlled companies dominating major sources of their economies. Corporate assets would be either dispersed to their own nationals or transferred to state agencies or corporations.[65]

The result of these two conflicting trends is illustrated by the following events:[66] (1) the Mexican expropriations of foreign-owned lands and companies; (2) the Iranian expropriations of foreign oil company assets; (3) the Egyptian expropriations of the Suez properties; (4) the Indonesian expropriation of the Dutch-owned properties; (5) the Brazilian expropriation of the American-controlled telephone utility services; (6) the Chilean expropriation of United States mining interests; (7) the Cuban expropriation of United States interests; (8) the Arab expropriations of foreign multinational oil interests; and (9) the Canadian provincial expropriation of the potash industry in Saskatchewan.[67]

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64. Various attempts have been made to settle the conflict of interests by international instruments. *See, e.g.*, INTERNATIONAL CHAMBER OF COMMERCE, GUIDELINES FOR INTERNATIONAL INVESTMENT (1972); OECD DECLARATION ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES (1976), *reprinted in* 15 INT'L LEGAL MATERIALS 967 (1976). *See also* Oliver, *The Andean Foreign Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment*, 66 AM. J. INT'L L. 763 (1972); Rubin, *Reflections Concerning the United Nations Commission on Transnational Corporations*, 70 AM. J. INT'L L. 73 (1976).

65. For a discussion by the Group of Eminent Persons on how foreign-controlled corporations affect the development process, see Report, *supra* note 62, at 809-19.

66. Most of the factual details surrounding these expropriations are found in HOUSE STAFF COMM. ON FOREIGN AFFAIRS, 88TH CONG., 1ST SESS., EXPROPRIATION OF AMERICAN OWNED PROPERTY BY FOREIGN GOVERNMENTS IN THE TWENTIETH CENTURY (Comm. Print 1963), *reprinted in* 2 INT'L LEGAL MATERIALS 1066 (1963); BUREAU OF INTELLIGENCE AND RESEARCH, U.S. DEPARTMENT OF STATE REPORT ON NATIONALIZATION, EXPROPRIATION, AND OTHER TAKINGS OF UNITED STATES AND CERTAIN FOREIGN PROPERTY SINCE 1960, *reprinted in* 11 INT'L LEGAL MATERIALS 84 (1971).

67. For an account of the details involved in the Saskatchewan expropriation of the potash industry, see Molot & Laux, *The Politics of Nationalization*, 12 CAN. J. POL. SCI. 2 (1972). The power of a Canadian province to expropriate

Some form of compensation was ultimately paid to the aliens whose property had been confiscated in each of these expropriations.[68] This indicates that the global utilitarian mathematical formula may favor one basic limitation on a government's right to interfere with private property rights—there must by some form of compensation, regardless of the reasons for government expropriation.

The activities of the United Nations General Assembly reinforce international recognition that expropriations must be compensated. In 1952 the General Assembly passed a resolution entitled "The Right to Exploit Freely Natural Wealth and Resources."[69] This resolution, while not expressly stating the duty to compensate, recommended that

> all member states, in the exercise of their right freely to use or exploit their natural wealth and resources whenever deemed desirable by them for their own progress and economic development, to have due regard, consistent with their sovereignty, to the need for maintaining the flow of capital in conditions of security, mutual confidence and economic cooperation amongst nations.[70]

The United States predictably voted against the resolution. Although the resolution expressed a desire to maintain the flow of capital in a secure, confident, and cooperative environment, the resolution failed to recognize the rights of private investors under international law.[71]

In 1962, eighty-seven United Nations member states, including most of the major industrialized nations and the Third World countries, voted in favor of a resolution entitled "Permanent Sovereignty Over Natural Resources."[72] There were twelve abstentions, including the Soviet Union and other Eastern bloc

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derives from § 92(13) of the British North America Act, 1871, 34 & 35 Vict. 6, c.28, § 4, which gives the provinces the power to legislate on all matters of "Property and Civil Rights." In R. v. Stanley, [1936] 1 D.L.R. 100, the Appellate Division of the Supreme Court of Alberta held that confiscatory legislation would be valid if the subject matter of such legislation came within the "civil and property rights" jurisdiction of the province. *Id.* at 103.

68. *See* Molot & Laux, *supra* note 67.

69. G.A. Res. 626, 7 U.N. GAOR, Supp. (No. 20) 18, U.N. Doc. A/2361 (1952).

70. *Id.*

71. *See* H. STEINER & D. VAGTS, *supra* note 43, at 463.

72. G.A. Res. 1803, 17 U.N. GAOR, Plenary (Agenda Item 62), U.N. Doc. A/5344/Add.1,A/L.412/Rev.2 (1962).

countries. Only two countries opposed the resolution.[73] The resolution declared in part:

> 1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must by exercised in the interest of their national developments and of the well-being of the people of the state concerned.
> 2. The exploitation, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, shall be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.
> 3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the term thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient state. . . .
> 4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules and force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the state taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute shall be made through arbitration or international adjudication. . . .[74]

The United States voted in favor of the resolution because it requires adequate compensation for the expropriation of alien investors' property.[75]

The 1962 resolution casts doubt upon the legitimacy of two areas of the National Energy Program. First, the express requirement for compensation in paragraph four may require Canada to compensate the foreign-controlled companies for the twenty-five percent carried interest in the Canada lands.[76] Second, this car-

73. *See* H. STEINER & D. VAGTS, *supra* note 43, at 464.
74. *See* G.A. Res. 1803, *supra* note 72.
75. *See* HARRIS, CASES AND MATERIALS IN INTERNATIONAL LAW 457 (1979).
76. *See* note 64 *supra*.

ried interest scheme arguably violates the principle that profits derived from the exploitation of natural resources in the host country must by shared in proportions freely agreed upon.[77] The Canadian Government would undoubtedly respond to such criticism by stating that the overriding principle in this important resolution is the right to assert state sovereignty over natural resources.

In 1966, another General Assembly resolution, also entitled "Permanent Sovereignty Over Natural Resources," was passed[78] by an overwhelming majority of 104 countries. Conspicuous among the six countries abstaining was the United States,[79] which was strongly opposed to paragraph five which

> [r]ecognize[d] the right of all countries, and in particular of the developing countries, to secure and increase their share in the administration of enterprises which are fully or partly operated by foreign capital and to have a greater share in the advantages and profits derived therefrom on an equitable basis, with due regard to the development needs and objectives of the peoples concerned and to mutually acceptable contractual practices, and calls upon the countries on which such capital originates to refrain from any action which would hinder the exercise of that right. . . .[80]

This global consensus would have great significance for the legitimacy of Canadian nationalization under the National Energy Program. The principles enunciated in the resolution could justify virtually all of the Canadian proposals, including the carried interest scheme. The scheme was passed to secure and increase the control by the host country over the administration of enterprises operated with foreign capital. The objective of this plan was to increase the Canadian profits derived from resource exploitation on federal lands. The next question is whether economic sovereignty was equitably asserted. The United States reaction to the National Energy Program was a predictable consequence of its strong protest against the 1966 United Nations resolution:

> The United States abstained . . . although [the resolution] contains much with which we agree . . . [A]t the same time, there are elements of the resolution with which the United States does not

77. *Id.*
78. G.A. Res. 2158 (XXI), 21 U.N. GAOR, Supp. (No. 16) 29, U.N. Doc. A/6316 (1966).
79. *See* H. Steiner & D. Vagts, *supra* note 43, at 466.
80. G.A. Res. 2158 (XXI), *supra* note 78.

fully agree. National participation in the administration of foreign enterprises is desirable in principle and is generally desirable in practice. However it would be a mistake to state that there is a right to secure an increased share in the administration of an enterprise regardless of the practical considerations, the contractual obligations and the equities of the case. Similarly it is impossible for us to agree that under all circumstances there is a right of countries to secure an increase of their share in the advantages and profits derived from the exploitation of their natural resources when it is fully or partly carried out by foreign capital. . . . [Paragraph 5] does not state with sufficient clarity the fact that no country can escape the obligations arising out of international law and economic cooperation and out of contractual arrangements which have been mutually accepted. . . .[81]

In 1973 the General Assembly passed yet another resolution entitled "Permanent Sovereignty Over Natural Resources," which reaffirmed the rights of all states to assert their economic sovereignty over their natural resources.[82] Paragraph three, which dealt with the measure of compensation, provides the only novel addition to this resolution:

[T]he application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation, and the mode of payment, and that any disputes which might arise should be settled in accordance with a national legislation of each State carrying out such measures. . . .[83]

Eighty-six countries approved of the principles in this paragraph, eleven countries dissented, and twenty-eight countries abstained.[84]

In May 1974 the General Assembly adopted a resolution, without a vote, entitled "Declaration on the Establishment of a New International Economic Order."[85] Although the bulk of the resolution was devoted to narrowing the gap between the wealth of

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81. Statement by Ambassador Roosevelt, *reprinted in* H. STEINER & D. VAGTS, *supra* note 43, at 466.

82. G.A. Res. 3171 (XXVIII), 28 U.N. GAOR, Supp. (No. 30) 52, U.N. Doc. A/9030 (1973).

83. *Id.*

84. *See* H. STEINER & VAGTS, *supra* note 43, at 467.

85. G.A. Res. 3201 (S-VI), S-5 U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/9556 (1974).

the developed and developing countries, one paragraph addressed the matter of expropriation. Paragraph 4(e) of the Declaration stated that the right of each state to nationalize natural resources was an expression of the full permanent sovereignty of that state. The Declaration did not expressly mention any requirement of compensation.[86] The United States once again made a reservation to the Declaration, stating that it conflicted with international law because it failed to mandate compensation for the confiscation or expropriation of alien property.[87]

Finally, in December 1974 the General Assembly adopted another resolution entitled "The Charter of Economic Rights and Duties of States."[88] The United States and the other major Western industrialized countries voted against the resolution. The Charter was approved by a vote of one hundred twenty in favor to six votes in opposition, with Canada notably among the abstentions.[89] Perhaps Canada's abstention indicates that its resource industry and the level of foreign control of its resource industry make Canada one of the seven major industrialized countries in the world; nonetheless, it is still very much a developing country. The Charter expressly required appropriate compensation for nationalization, expropriation, or transfer of ownership of foreign property, but only after

> taking into account its relevant laws and regulations and all circumstances that the state considers relevant. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of free choice of means.[90]

If the laws of the expropriating state stipulated that only nominal compensation was appropriate (*e.g.*, when the host country

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86. *Id.*

87. *See* Statement by Ambassador Scali, *reprinted in* H. STEINER & D. VAGTS, *supra* note 43, at 467, and 13 INT'L LEGAL MATERIALS 744 (1974).

88. G.A. Res. 3281 (XXIX), 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974). The resolution is most often cited by the developing nations at the United Nations who claim that economic sovereignty takes precedence over private property rights in international law.

89. *See* H. STEINER & D. VAGTS, *supra* note 43, at 467.

90. G.A. Res. 3171 (XXVIII), *supra* note 82.

claimed the foreign company had made excessive profits), the Charter presumably would sanction such compensation. Perhaps the Charter would also sanction the retroactive twenty-five percent carried interest by the federal government under the National Energy Program on the basis that such action is justifed by prior government tax incentives and payments to the foreign exploration companies. The suggestion that disputes regarding compensation be settled by only the domestic tribunals of the expropriating state pursuant to its laws *prima facie* would forbid the government of the alien investors' home state from presenting their claims under a domestic foreign investment guarantee program such as that of the United States.[91] The United States again objected to the Charter because the principles contained therein did not fully recognize "respect for agreements and international obligations, and the endorsement of concepts of producer cartels and indexation of prices."[92]

The voting pattern of the General Assembly makes it clear that from 1952 to the present date there has been a major split between the Western capital-exporting countries and the Soviet bloc and Third World countries as to the method and measure of compensation for expropriated property.[93] No resolution of the General Assembly, however, has ever expressly denied that compensation must be given by a state that expropriates alien investors' property in its territory. Traditionally, resolutions of the General Assembly are not viewed as a source of international law or as legally binding precedents on the member nations.[94] This is

91. The Overseas Private Investment Corporation, a United States Government agency, provides investment insurance to United States corporations for the risk of expropriation by the host country. *See* 22 U.S.C. §§ 2191-2200 (1976 & Supp. III 1979). *See also* 73 AM. J. INT'L L. 104 (1979).

92. *See* DEP'T STATE BULL. 146 (1975). Excerpts are reprinted in H. STEINER & D. VAGTS, *supra* note 43, at 468.

93. The Group of Eminent Persons recognizes this principle: "The right of every country to nationalize the assets of any company should not be questioned. The real bone of contention is the amount to be paid, the manner in which it should be determined, and the extent to which the home countries should involve themselves in the issue." Report, *supra* note 62, at 826.

94. See the impact of Judge Lauterpacht of the International Court of Justice on this issue in Fitzmaurice, *Hersch Lauterpacht—the Scholar as Judge,* Part II, 38 BRIT. Y.B. INT'L L. 1 (1962). *See also* Haight, *The New International Economic Order and the Charter of Economic Rights and Duties of States,* 9 INT'L LAW 591, 597 (1975): "Under the United Nations Charter the General Assembly may discuss and make recommendations, but it is not a lawmaking body

especially important to the capital-exporting members of the United Nations since without the consent of these states, resolutions concerning expropriation would be meaningless. When there seems to be global consensus on a principle or a series of resolutions, however, General Assembly declarations will inevitably affect the attitude and actions of the global community and may evolve into customary law.[95]

Recent case law from international tribunals and domestic courts seems to reinforce the thesis that a state must pay some form of compensation for expropriated property. In *Texaco Overseas Petroleum v. Libya,* [96] a case arising following the Libyan expropriation of the assets of two United States oil companies operating under government concession agreements, the arbitration tribunal held that "by expressing an *opinio communis,* Resolution 1803 (XVII) [*i.e.,* the 1962 General Assembly resolution] seems to this tribunal to reflect the state of customary law in this field."[97] The arbitration tribunal found that subsequent conflicting resolutions did not affect the 1962 resolution which evidenced a norm of customary international law. The conflicting resolutions were not supported "by any of the developed countries with market economies which carry on the largest part of international trade."[98] The tribunal went on to hold that "international law may operate as a factor limiting the freedom of the state should

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and its Resolutions, no matter how solemnly expressed or characterized, nor how often repeated, do not make law or have binding effect."

95. For eminent jurists supporting this view, see Schacter, *The Relation of Law, Politics and Action in the United Nations,* 109 ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 165, 181-84 (1963); R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 5 (1963); White, *A New International Economic Order?,* 16 VA. J. INT'L L. 323, 330 (1976); J. CASTANEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS (1969); Falk, *The Quasi-Legislative Competence of the General Assembly,* 60 AM. J. INT'L L. 702 (1966). In 1974 the General Assembly also passed a resolution which declared that "the development of International Law may be reflected, inter alia by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice. . . ." 29 U.N. GAOR, Supp. (No. 31) 141, U.N. Doc. A/9631 (1974), *reprinted in* 69 AM. J. INT'L L. 249 (1975).

96. Texaco Overseas Petroleum Co. (Libya)(Int'l Arbitral Tribunal 1977), *reprinted in* 17 INT'L LEGAL MATERIALS 3 (1978). The Arbitral Tribunal consisted of a single arbitrator—Professor Dupuy.

97. *Id.* at 30.

98. *Id.* at 31.

foreign interest be affected, even though Article 2 [of the Charter of Economic Rights and Duties of States] does not state this explicitly."[99] And the United States District Court for the Central District of California recently cited the 1962 General Assembly resolution as being one of "the standards recognized under international law."[100]

The United States position regarding the method and measure of compensation was first formulated by United States Secretary of State Hull in a letter to the Mexican ambassador during the 1940 negotiations concerning Mexican expropriations:[101] "[T]he right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement."[102] A further definition of such compensation can be found in the Harvard Draft Convention on State Responsibility:

> The taking, under the authority of the State, of any property of any alien, or the use thereof, for a public purpose clearly recognized as such by a law of general application in effect at the time of the taking is wrongful if not accompanied by prompt payment of compensation in accordance with the highest of the following standards:
>
> (a) Compensation which is no less favorable than that granted to nationals of such State; or
> (b) just compensation in terms of the fair market value of the property or the use thereof unaffected by this or other takings or by conduct attributable to the State and designed to depress the value of the property in anticipation of the taking; or
> (c) if no fair market exists, just compensation in terms of the fair market value of such property or of the use thereof. If a treaty requires a special standard of compensation, then the compensation shall be paid in accordance with the treaty.[103]

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99. *Id.*

100. *International Association of Machinists and Aerospace Workers v. The Organization of Petroleum Exporting Countries*, 477 F. Supp. 533, 567 (C.D. Cal. 1979).

101. Excerpts of the notes sent by Secretary of State Hull to the Mexican Ambassador in Washington and the Minister of Foreign Affairs are reprinted in 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 655-66 (1942).

102. *Id.*

103. Art. 10, para. 2, The Draft Convention, *reprinted in* Sohn & Baxter,

The *Restatement (Second) of United States Foreign Relations Law* states that just compensation must be "adequate in amount, paid with reasonable promptness, and paid in a form that is effectively realizable by the alien."[104] Effective payment would probably necessitate that compensation be in an easily convertible currency. Many Congressional acts permit United States retaliation against countries expropriating United States investors' property without prompt payment of adequate compensation.[105] Using this analysis, the United States Government could assert that Canada's charge of twenty-five percent carried interest is a retroactive form of uncompensated confiscation. The Canadian Government could counter such allegations with the following arguments: (1) the twenty-five percent carried interest in the Canada lands is justified in view of the high revenues of foreign-controlled multinational oil companies caused by past government taxation incentives; and (2) future tax policy for sufficiently Canadian-controlled companies continues to provide adequate compensation for the twenty-five percent carried interest.[106]

Expropriation without lump sum compensation is a novel idea that has not been tested in international courts and tribunals. There are arguments for and against the legitimacy of such a scheme. It cannot be denied that compensation through future taxation and incentive policies may be superior to a lump sum settlement that may not accurately represent the lost value of the asset and that may not take into account future profits. Allowing a partly expropriated foreign interest to continue business in the host state under an advantageous taxation policy may in time allow the entity to recoup its lost assets and profits. This might be especially true in the resource section when the exploration and development costs are admittedly enormous, yet revenues from

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Responsibility of States for Injuries to the Economic Interest of Aliens, 55 Am. J. Int'l L. 545, 553 (1961).

104. Restatement (Second) of Foreign Relations Law of the United States § 187 (1965).

105. The most important are: The Trade Act of 1974, 19 U.S.C. § 2101 (1974); The Inter-American Development Bank Act, 22 U.S.C. § 28 (1976); The International Development Association Act, 22 U.S.C. § 284 (1976); The Asian Development Bank Act, 22 U.S.C. § 285 (1976); The Africa Development Fund Act, 22 U.S.C. § 290(g) (1976); The Hickenlooper Amendment to the Foreign Assistance Act of 1961, 22 U.S.C. § 2370(e) (1976).

106. For the precise taxation implications of the National Energy Program, see Price Waterhouse & Co. Tax Bull. (Oct. 1980).

production are eventually perhaps even greater. On the other hand, the favorable taxation policies would possibly have been instituted even if the assets had not been expropriated.

It could be argued that justifying a scheme of compensation on past taxation policies is totally unacceptable because it is a retroactive measure. Thus, in the analogous situation of Chile's expropriation of the United States mining interest, the Allende regime ordered the Chilean Comptroller General to deduct the past excess profits of the United States companies in computing compensation, or to give special consideration to the normal profitability that such companies would have obtained in general international operations.[107] The expropriated United States mining companies and the United States Government were outraged by this retroactive measure of compensation. President Nixon described the measure as an ex post facto application of unprecedented legal rules.[108] In response, the Chileans argued that the assertion of a state's economic sovereignty includes remedying past exploitation and domination by foreign interests, even if this necessitates retroactive legislation. This reflects the Chileans' adoption of the traditional Latin American legal principle that ownership of natural wealth resources can never be alienated from the state in which they are found, and that foreign interests have only a right to extract such resources.[109] Such foreign interests are, therefore, entitled only to compensation for plants and equipment, and the profits belong to the people. Any excessive share in the profits by the foreign firms requires repayment to the people.[110] The Chileans also pointed out that many United States laws were retroactive, including personal and property taxation laws and contractual rights imposed by the Government.[111]

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107. The Chilean Law No. 17, 450 of July 15, 1971, is translated in English in 10 INT'L LEGAL MATERIALS 1067 (1971). *See generally* H. STEINER & D. VAGTS, *supra* note 43, at 444-58.

108. *See* H. STEINER & D. VAGTS, *supra* note 43, at 452.

109. *Id.* at 451. The Chileans also based their arguments on the principle of unjust enrichment found both in domestic and international law. As one eminent jurist points out, however, it could be argued that the principle of unjust enrichment could be used to assert the requirement of compensation for expropriated property. *See* Arechaga, *State Responsibility for the Nationalization of the Foreign Owned Property*, 11 N.Y.U.J. INT'L L. & POL. 179 (1978). *See also* H. STEINER & D. VAGTS, *supra* note 43, at 454.

110. *Id.*

111. *Id.* at 454.

In any debate on the validity of its scheme Canada could also argue that the international legal standard under which a state is required to treat an alien investor is the same as the standard by which it is legally bound to treat its own nationals. This is known as the national treatment standard.[112] The Latin American states are the chief adherents to this standard.[113] The Canadian Government could argue that it has applied the twenty-five percent carried interest even to its national companies (*e.g.*, Dome Petroleum) and has therefore satisfied the national treatment standard. In the dispute over the Mexican expropriation, the Mexican Government asserted that its expropriations involved confiscation of Mexican property as well as foreign property in the pursuit of agrarian reform.[114] The United States Government replied in these terms:

> [T]he statement in your Government's note to the effect that the foreigners who voluntarily moved to the country not their own . . . are not entitled to better treatment than nationals of the country, presupposes the maintenance of law and order consistent with principles of international law; that is to say, when aliens are admitted into a country, that country is obligated to accord them that degree of protection of life and property consistent with the standards of justice recognized by the law of nations. . . .[115]

The application of the national treatment standard to expropriation of alien investors' property is usually regarded as unacceptable. If a state's treatment of its own nationals does not conform with basic norms of civilization and justice, it should not be allowed to extend the same treatment to aliens. Most Western democracies have argued that aliens must be treated according to an international minimum standard.[116] This standard has been described by an arbitral tribunal in the following manner: "The

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112. See the reports cited in note 113 *infra*.

113. For a discussion of the "national treatment" standard and other issues in the area of international responsibility of states, see First Report on the Request of General Assembly for the Codification of the Principles of International Law Governing State Responsibility, U.N. Doc. A/CN4/96 (1956); Second Report, U.N. Doc. A/CN4/106 (1957); Third Report, U.N. Doc. A/CN4/111 (1958); Fourth Report, U.N. Doc. A/CN4/119 (1959); Fifth Report, U.N. Doc. A/CN3/125 (1960); Sixth Report, U.N. Doc. A/CN4/134/Add. 1 (1961).

114. *See* H. STEINER & D. VAGTS, *supra* note 43, at 420.

115. *Id.* at 422.

116. See the work of the International Law Commission on this doctrine in the reports cited in note 113 *supra*.

treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or an insufficiency of governmental actions so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[117]

III. The National Energy Program: Creeping Expropriation?

If expropriation is governmental activity resulting in the deprivation of the wealth of an alien investor, new terminology such as "de facto expropriation," "disguised expropriation," or "creeping expropriation" must be introduced.[118] Such indirect expropriation generally is achieved through restrictions and infringements upon: (1) the entry of foreign wealth into the country; (2) the use of foreign wealth; and (3) the revenues produced from the investment of that wealth.[119] Within the first category are situations in which the host country prohibits the entry of foreign capital into certain sectors of industry, or the expansion of foreign capital from one sector of industry to another or within one particular sector of the industry. In the National Energy Program, the Government stated:

> [T]he Foreign Investment Review Act (FIRA) would also continue to play a key role in ensuring the Government's Canadianization goals. Firms that are foreign-controlled will continue to be non-eligible firms for FIRA purposes. Moreover, the Foreign Investment Review Agency will vigorously enforce its investment criteria in the energy sector. The Government does not want to see the oil companies use their cash flow to expand into the non-energy part of the economy. Nor does it want foreign-controlled firms to buy already-discovered oil and gas reserves.[120]

The second category involves situations in which the host state decreases the use of foreign wealth by increasing public sector

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117. The Neer Claim, 4 R. Int'l Arb. Awards 60, 61-62 (1926).

118. For a lengthy discussion of this type of expropriation see Weston, *"Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation,"* 16 Va. J. Int'l L. 103 (1975). *See also* Christie, *What Constitutes a Taking of Property Under International Law?* 38 Brit. Y.B. Int'l L. 307 (1962); Vagts, *Coercion and Foreign Investment Rearrangements,* 72 Am. J. Int'l L. 1 (1978).

119. *See* Weston, *supra* note 118, at 154.

120. Energy Program, *supra* note 1, at 50.

ownership in a particular industry. Through taxation and exclusive rights and concessions, the host state gives the public sector an overwhelming and arguably unfair competitive edge in the marketplace. The host government may also provide the same advantage to its nationals. The National Energy Program is replete with these governmental actions.[121] Petro-Canada, the state oil company, already had tremendous competitive advantages and will also benefit from the twenty-five percent carried interest in the federal lands and the requirement of Canadian participation in fifty percent of all oil and gas production in these areas. Petro-Canada is the major beneficiary of the governmental objective to publicly take over several foreign-controlled firms.[122] It is obvious that the National Energy Program is replete with policies using incentive payments and other preferential treatment[123] to give private Canadian companies and individuals a distinct competitive edge over foreign-controlled firms.

Under the last category of methods for achieving indirect expropriation of foreign wealth, the host government can use exorbitant taxation policies or retroactive reevaluation of existing rights and contracts. In response, the foreign-controlled firms could allege that the National Energy Program constitutes creeping expropriation. Through taxation, administrative policies, and other governmental programs that do not require the absolute transfer of foreign wealth to the state or its nationals, a host country can make operating unprofitable by imposing severe burdens and inferior competitive status on foreign corporations, thus creating de facto expropriation. Such governmental regulations could be designed to depress the trading shares of foreign-controlled firms so that a voluntary takeover by the public sector becomes more attractive. There is a lack of global consensus as to whether the use of creeping expropriation breaches the minimum international legal standard and gives rise to a requirement for compensation. Since most of the firms affected by the National Energy Program are controlled by the United States, definitions of expropriation formulated by United States entities are particularly salient. The Overseas Private Investment Corporation (OPIC), which administers the American Foreign Investment Guarantee Program, defines expropriatory action as follows:

121. *Id.* at 38-52.
122. *Id.* at 52.
123. *See* note 121 *supra* and accompanying text.

> The term 'Expropriatory Action' means any action which is taken, authorized, ratified or condoned by the Government of the Project Country commencing during the Insurance Period, with or without compensation therefore, and for a period of one year directly results in preventing:
>
> . . . .
>
> (b) the investor from effectively exercising its fundamental rights with respect to the Foreign Enterprise either as a shareholder or as a creditor, as the case may be, acquired as a result of the investment; provided, however, that rights acquired solely as a result of any undertaking by or agreement with the government of the project country, shall not be considered fundamental rights merely because they are acquired from such undertaking or agreement; or
> (c) the Foreign Enterprise from exercising effective control over the use of disposition of a substantial portion of its property or from constructing their Project or operating the same.[124]

The general terms and conditions of OPIC go on to list exceptions to the above definition of expropriatory action:

> Notwithstanding the foregoing, no such action shall be deemed an expropriatory action, if it occurs or continues in effect, during the aforesaid period, as the result of:
>
> 1) any law, degree, regulation or administrative action of the Government of the Project Country which is not by its express terms for the purpose of nationalization, confiscation or expropriation (including but not limited to intervention, condemnation or other taking), is reasonably related to constitutionally sanctioned governmental objectives, is not arbitrary, is based upon a reasonable classification of entities to which it applies and does not violate generally accepted principles of international law. . . .[125]

Under OPIC's definition, an investor is a multinational parent company or an individual who makes a guaranteed investment in the host country in the form of a subsidiary company organized under the host country's laws.[126] The subsidiary company is re-

124. Art. 1.13 OPIC (234 KGT 12-70), *reprinted in* H. STEINER & D. VAGTS, *supra* note 43, at 474.
125. *Id.*
126. *Id.*

ferred to as the foreign enterprise in OPIC's general terms.[127] Some of the National Energy Program policies may constitute expropriatory actions as defined by OPIC, especially the twenty-five percent carried interest. Additionally, a retroactive interest in oil and gas production in the Canada lands could constitute an infringement of the foreign enterprise's fundamental rights. The federal government could argue, however, that the National Energy Program falls within exceptions to the definition of expropriatory action. Ensuring Canadian participation in the development of the oil and gas industry may be viewed as a constitutionally sanctioned government objective that conforms with international law.

Richard Baxter and Louis Sohn have established guidelines for creeping expropriation in international law. In the Draft Harvard Convention on the International Responsibility of States for Injuries to Aliens, they provide a definition of "the taking of property":

> 3(a) 'A taking of property' includes not only an outright taking of property, but also any such unreasonable interference with the use, enjoyment or the disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference.
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> . . . .
>
> 5. An uncompensated taking of property of an alien which results from the execution of the tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, or morality; or from the valid exercise of their belligerent rights; or is otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful, provided:
>
> (a) It is not a clear and discriminatory violation of the law of the State concerned;
>
> . . . .
>
> (c) It is not an unreasonable departure from the principles of justice recognized by the principle legal systems of the world; and
>
> (d) It is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.[128]

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127. *Id.*

128. Draft Convention, *supra* note 103, art. 10.

Tax laws and other governmental policies involved in the National Energy Program may interfere with the use, enjoyment, and disposal of foreign investment wealth in Canada, thus depriving foreign-controlled firms of their property rights. Canada could justify any interference since most legal systems allow such sovereign assertions of economic sovereignty.

In an analogous domestic situation, the United States Supreme Court has held that a statute violates the fifth amendment protection of private property when it prohibits mining that causes private houses to subside.

> It is our opinion that the Act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. . . . What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.[129]

Under this approach to private property, the exercise of the tax, administrative, and other governmental powers might be an illegal or indirect expropriation of alien investors' property, especially when the host country's regulations eliminate the profits from a United States investment. Undoubtedly, the Canadian Government would vehemently deny that the National Energy Program would make the foreign-controlled oil and gas firms unprofitable.

Decisions from international tribunals and foreign courts have been less severe than the United States approach to creeping expropriation.[130] In *Kugele v. Poland*,[131] the Upper Silesia Arbitral Tribunal dealt with an allegation by a brewer in Polish Upper Silesia that the consistent and exorbitant license fees imposed by the Polish authorities forced his business to liquidate. The Court dismissed the claim, stating:

> The increase of the tax cannot be regarded as a taking away or impairment of the right to engage in trade, for such taxation presupposes the engaging in the trade. It is true that taxation may render the trade less remunerative, or altogether unremunerative.

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129. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 399 (1922).

130. *See, e.g.*, Luther v. Sagor [1921] 3 K.B. 532, 559.

131. Kugele v. State of Poland Upper Silesia Arbitral Tribunal (1932), 34 ANN. DIG. 69 (1931-32), *quoted in* H. STEINER & D. VAGTS, *supra* note 43, at 492.

> However, there is an essential difference between the maintenance of a certain rate of profit in an undertaking and the legal and factual possibility of continuing the undertaking. The trader may feel compelled to close his business because of the new tax. . . . But this does not mean that he has lost the right to engage in the trade. For had he paid the tax, he would be entitled to go on with his business.[132]

In response to similar criticism, the Canadian Government has attempted to justify its taxation and Canadianization policies, including the twenty-five percent carried interest in the Canada lands, by pointing to practices in non-OPEC oil-producing countries.

> The control of foreign investment in the energy industry is widely recognized in other countries as an integral part of national economic policy. Great Britain, Norway, Australia and Mexico are four non-OPEC oil producers which have implemented a variety of measures to limit foreign ownership of production and other aspects of industry activity.
>
> In Great Britain and Norway, the national oil companies are assured the major role in development of energy production from the North Sea. The British National Oil Corporation (BNOC) has first claim on a 51% share of oil production, but must negotiate the purchase of this share at market prices. In developing these areas from exploration to production, it may offer participation to joint-venture partners, including foreign-owned firms, but retains control of all projects.
>
> In Norway, the Statoil en Norske Stats Objeselskap A.S. (Statoil) competes aggressively with other firms in the exploration and development of off-shore areas. It is authorized to take up to a 50% interest in any block of land it does not already hold. The company takes this interest after a find has been delineated but before development and makes no payment for past exploration expenditures. It also has the option to increase its interest to 70% at its own discretion. Indeed, Statoil acts as the operator in charge of activities on all properties in which it has an investment, often with a major private oil company acting as a paid adviser.
>
> In Australia, foreign companies are allowed to participate fully at the exploration stage. However, only Australian and "naturalized" foreign investors can produce energy resources. To qualify as "naturalized", a foreign company must have a minimum of 25% of its equity owned by Australians, a majority of Australians on its

132. H. STEINER & D. VAGTS, *supra* note 43, at 492.

> Board of Directors and a public commitment to increase Australian equity to 51%. Access by foreign firms to the Australian debt markets is restricted, and takeovers cannot normally be financed with funds raised there.
>
> Of these four countries, Mexico has the most rigorous system of controls having nationalized the foreign-owned petroleum industry in 1938. The exploration, development and production of petroleum, other hydrocarbons, and electricity is reserved entirely for the Government. Other activities, such as the distribution and marketing of petroleum products, are reserved entirely for Mexican-owned companies.[133]

The Canadian Government virtually copied the Norwegian energy policy in its decision to take a twenty-five percent carried interest in leases on the Canada lands, though the percentage of the carried interest is even greater in the Norwegian policy.[134] These practices in non-OPEC oil-producing countries may express an evolving norm of customary international law under which the resource sector is deemed so important to state security that certain types of indirect or disguised expropriation are permissible. Although such an argument may once have been outrageous, it now seems plausible in light of the scarcity and instability of energy resources in the world today.

In 1975 Canada signed an OECD agreement entitled "Declaration of International Investment and Multinational Enterprises."[135] The Declaration consisted of guidelines governing the relationship between the host country and the multinational firm, and it required that foreign multinationals be accorded national treatment.[136] The Declaration interpreted national treatment to mean

> that Member countries should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfill commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another Member country (hereinafter referred to as 'Foreign-Controlled Enterprises') treatment under their laws, regulations and administrative practices, consistent with international law and no less

133. ENERGY PROGRAM, *supra* note 1, at 21.

134. *Id.*

135. *See* OECD DECLARATION, *supra* note 64.

136. *Id.* at 968.

> favorable than that accorded in like situations to domestic enterprises.
>
> . . . .
>
> [T]his Declaration does not deal with the right of Member countries to regulate the entry of foreign investment or the conditions of establishment of foreign enterprises.[137]

United States officials have argued that the minimum requirement of fifty percent Canadian ownership, the granting of export licenses based on Canadian ownership, and the obligation to buy Canadian goods and services as discussed in the National Energy Program is a breach of the OECD national treatment standard.[138] To rebut such an argument, the Canadian Government could reiterate the statement made to OECD in 1976 by Minister of External Affairs Allan MacEachen, in which he indicated that particular circumstances in Canada regarding foreign investment gave Canada the right to take appropriate measures.[139] It seems that there are no clear principles delineating situations in which creeping expropriation amounts to a breach of the minimum international legal standard. In view of the above discussion, however, the most suspect provision of the National Energy Program is the twenty-five percent carried interest in the federal lands.

IV. Conclusion

The Canadian National Energy Program provides insight into the critical global debate on the expropriation of alien investors' property. Sovereign states can no longer expropriate by forced and outright transfers of an alien's assets without any compensation.[140] States which expropriate in this manner face massive retaliation from the powerful capital-exporting countries through, *inter alia,* the cutting of trade and commercial ties, the freezing of assets, retaliatory diplomatic moves, and court action in the home state of the investors.[141] The principles of international law

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137. *Id.*

138. *See* The Financial Post, Dec. 4, 1980, at 4.

139. *Id.* United States officials have argued, however, that the Minister's statement was not a formal reservation, especially in view of the endorsement of the Declaration of Canada. As to whether the Declaration can be regarded as legally binding in the first place, see Schwartz, *Are the OECD and UNCTAD Codes Legally Binding?*, 11 Int'l Law. 529 (1977).

140. *See* Molot & Laux, *supra* note 67.

141. The freezing of another state's assets is a highly effective device as

and policy concerning expropriation are gradually evolving through diplomatic negotiations, international and domestic courts and tribunals, resolutions at the General Assembly of the United Nations, and through state practice. Although sovereign states must understand and comply with these principles of international law, disguised or creeping expropriation will become more appealing to both developed and developing countries. The use of taxation powers and the voluntary takeover of foreign investment of state enterprises, especially in revenue-rich sectors of industries, will be especially attractive to countries like Canada which face massive national budget deficits. Pressure to depress the value of foreign investment before a public sector takeover will be enormous in countries in which the public purse does not contain the reserves needed for voluntary takeover of foreign-controlled firms. Added to these factors is the inevitability of expropriation of foreign interests in resource industries due to the benefits of national control over energy resources in an energy-starved world. Expropriation will not be a phenomenon limited to developing countries. Many sovereign states will seek to undertake some form of expropriation that falls short of violating their international legal obligations.

The Canadian Government took some of its ideas from non-OPEC oil-producing countries in constructing its National Energy Program.[142] The Canadian National Energy Program may form a prototype that other countries will copy. In this context the question of the legitimacy of Canada's program as an assertion of economic sovereignty or its illegitimacy as creeping expropriation must be discussed. The imposition of taxation policies should not be regarded as amounting to creeping expropriation in international law, unless such taxation measures are directed exclusively against foreign-controlled corporations to render them totally unprofitable in the short and the long term. On the other hand, the use of incentive payment schemes or direct grants by governments to lessen the impact of a nondiscriminatory taxation regime on national corporations should not be regarded as a facet of

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demonstrated during the recent Iran hostage crisis. Likewise, the growing tendency on the part of capital countries to allow foreign sovereigns to be sued in their courts for illegitimate expropriation without compensation is another major deterrent to outright confiscation. *See, e.g.*, the Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 28 U.S.C. § 1602-1611 (1976).

142. *See* ENERGY PROGRAM, *supra* note 1.

creeping expropriation. If the Government is using the incentive payment scheme or direct grants in bad faith to implement a disguised discriminatory taxation regime that would make only the foreign-controlled corporations unprofitable, such measures should be regarded as creeping expropriation. In view of the strategic importance of the natural resources sector of a national economy, this section deserves special reference when determining the legitimacy of governmental action designed to acquire a major percentage interest in the operations of a foreign-controlled corporation without compensation. Based upon state practice, a government may be allowed to acquire a share in the development and exploitation of its natural resources. The arguments of Dome Petroleum seem reasonable and compatible with such assertions of economic sovereignty.[143] Dome Petroleum suggested that if the Government wished to acquire a share in the production of natural resources, it should either exclude preexisting operations (*e.g.*, when the oil- and gas-producing wells have already been discovered) or contribute towards expenses incurred in discovering oil and gas reserves.[144] If governments accepted these guidelines, then the acquisition of a percentage interest in operations of foreign-controlled firms without compensation would be easier to justify as not being a retroactive confiscation of acquired rights.

Even when achieved with public funds, the voluntary takeover of foreign-controlled enterprises does not constitute expropriation in international law. The marketplace must determine the price of such acquisition, however, without government interference. Since a takeover price predetermined by a government would amount to outright confiscation under international law,[145] and would be unacceptable to the home countries of the foreign investors concerned, the observance by governments of such principles could help develop a utilitarian formula whereby economic sovereignty becomes compatible with foreign investment in the strategic natural resources sector of a nation's economy.

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143. *Report on Business*, The Globe and Mail, Dec. 3, 1980, at B5.

144. *Id.*

145. This was the position taken by the United States Government when Chile expropriated the United States copper interests. *See* H. STEINER & D. VAGTS, *supra* note 43, at 444-58.