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THE NEP, FIRA, AND THE INTERNATIONAL POLITICO-LEGAL PROCESS: WHY ARE ALL THOSE NICE PEOPLE MAD AT CANADA AND DO THEY HAVE A REASON?

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INTRODUCTION

Canadian "Economic Nationalism" received much attention following proposals to "Canadianize" the oil and gas sector and to revise the existing Foreign Investment Review Act (hereinafter "FIRA")[1] by the Federal government. Much of this attention was from south of the border, providing an already strained bilateral relationship with additional problems. However, there have been negative reactions on both sides of the border as well as from Canada's other trading partners. Much of the reaction might simply be the result of a change in the status quo. Nevertheless, there are some serious political and legal concerns. For example, there were threats of retaliation such as limiting Canadian access to American oil and gas reserves. The Executive Branch of the United States government subsequently ruled that Canada did not discriminate against U.S. citizens wishing to invest in Canada thereby preventing such retaliation (which might not have undesirable to the Canadian Government). As well, there have been proceedings initiated in international trade forums in response to the FIRA changes.[2]

The reaction of the United States, the primary source of investment and major trading partner for Canada, is of serious import. Trade-protectionist initiatives in the United States Congress numbered fifty-three at one point in 1982 and new "Buy America" legislation was eventually enacted providing U.S.

producers with a 25% price preference on steel and cement purchases made in connection with surface-transportation expenditures.[3] It may be trite to say, but protectionism and discrimination lead to like responses in return. During the period 1973 - 1977 there were some 70 foreign investment bills and resolutions introduced in Congress, despite the official U.S. position being contrary to restrictive policies.[4] Clearly Canada, a country that relies heavily on international trade and investment flows, cannot ignore constraints imposed by international law. It must be capable of justifying its actions in the international sphere, both legally and politically.

The focus of this paper is on the impact (both of a strict legal and a normative nature) that international agreements dealing with problems of international investment have on Canadian economic policy. However, it is appropriate to provide some background to the issues involved.

The clash between the national political goal of greater domestic control over the economy and the principles of international law reflects the increasing interdependence of the global economy. The present controversy is centered around the National Energy Program (hereinafter "NEP") and the existing FIRA, as well as proposals by the present federal government to give it more muscle (these proposals have since been designated as requiring "further study"[5] and, in fact, the FIRA process has

been streamlined and given a lower profile). The NEP[6] is directed at the vital oil and gas sector of the economy which at one point was 99% foreign controlled.[7] A major thrust of the program is the "Canadianization" of the industry (the goal is 50% Canadian control by 1990). Key components of the Program include: the replacement of the earned depletion allowance deduction from taxable income with a system of incentive payments that vary in accordance with the proportion of Canadian ownership and control; the re-negotiation of exploration agreements in the off-shore and Arctic (the "Canada Lands" which are within the federal government's jurisdiction); the reservation to the Crown of a 25% carried interest in all development on Canada Lands; and the imposition of a requirement of 50% Canadian ownership before an enterprise may commence production from Canada Lands. The FIRA is of more general appliction and regulates the admission of new foreign direct investment (that is, an initial screening). The controversial proposals, now in limbo, were considered necessary to put more teeth into the Agency set up to administer the Act. They involved the monitoring of existing foreign direct investment by means of performance reviews of major foreign owned firms (to determine if they are still of "significant benefit" to Canada) as well as the providing of information and financial aid to prospective Canadian bidders for such firms.

The extent of foreign control of the Canadian economy has been said to be "unique among the industrialized nations of the world".[8] Canada is host to more foreign direct investment

than any other nation.[9] An OECD study released in 1977 found that foreign controlled enterprises accounted for more than 35% of GNP and over 55 % of sales in the manufacturing sector in 1973.[10] No attempt will be made here of delve into the pros and cons of foreign direct investment,[11] nor into the polemic debate surrounding the effect that multinational enterprises may have on the future existence of Canada as a sovereign and independent State.[12] Canada is not alone in its attempt to control foreign direct investment[13] and the problem posed by the multi-national enterprise is of world wide concern.[14] However, it is of special concern to Canada because of the high level of foreign direct investment and its rapid rate of increase due to the utilization of internal measures such as domestic savings, retained earning and depreciation allowances (there is substantially less inflow of new capital than there is increase in the level of foreign investment[15]).

Maintaining control over an independent economy and the forging of a separate national identity were objectives of Canada's first Prime Minister, Sir John A. MacDonald. Ironically, the introduction of his National Policy, consisting in large part of high tariffs, which was intended to reduce Canada's economic dependence, played a significant role in the resulting level of foreign direct investment. Enterprises sought to avoid the high tariff wall by direct investment in Canada. This brought undoubted benefits, but problems were also perceived. Sensitivity to the influence and level of such

foreign investment in Canada was the focus of the Gordon Report in 1957.[16] The controversial Watkin's Report followed in 1968.[17] The Gray Report in 1972[18] led directly to the FIRA.

However, Canada has a duty as well as an obvious interest in maintaining the international rule of law.[19] Therefore, its actions must be justified in terms of "hard" international law (that which can lead directly to consequences, including litigation, at the international level and possibly at the municipal level against Canadian interests abroad). Such action must also be justified in terms of general international norms (which might be called "soft" international law) as:

> The international legal system is almost exlusively a horizontal system, rather than a hierarchial one ... Failure to justify in terms of international law warrants and legitimizes 'disapproval' and negative responses from other governments participating directly in the process.[20]

Failure to play by the rules could lead to diplomatic, legal and political repercussions. The intention of this paper is to investigate the existence and ambit of any such rules. Constraints stemming from Canada's membership in the international economic organization for developed countries, the Organization for Economic Co-operation and Development (OECD), perhaps best exemplify the normative nature of the international process. They will be examined in detail following a brief review of Canada's bilateral tax treaties, but first some general considerations.

GENERAL CONSIDERATIONS

The FIRA as it stands is transparent and open rather than couched behind administrative and technical barriers. Therefore, despite criticism, it cannot be legally impugned in its present form. However, international law does have a role to play with respect to established property rights of aliens. The proposals to bolster FIRA might well have presented some very real problems had they been enacted. There may have been difficulties, at least in theory, arising out of some older F.C.N. (friendship, commerce and navigation) type treaties inherited from Great Britain[21] (although the Jay Treaty of 1794 between the U.S. and Britain, and ultimately Canada, would not appear to be in force despite the official American view to the contrary[22]). There does not appear to be an issue of direct expropriation of existing property rights, however, the proposals to strengthen FIRA would have led to serious concerns of indirect, or so-called "creeping", expropriation.[23] A State's regulation of enterprises within its jurisdiction is a matter for domestic law, but discriminatory treatment (for example, establishing an unrealistic and artificially high performance level) that has the effect of driving foreign enterprises out of the country, or of substantially impairing the operation of such enterprises, may well be contrary to international law.[24]

The provision of the NEP reserving a 25% carried interest in Canada Lands to the Crown would appear to have been a clear violation of international law in its initial form.[25] The question of expropriation in customary international law is not free from controversy, but it would seem to be an accepted principle of the law in its present state that compensation must be paid for the expropriation of alien owned property.[26] The real issue is the quantum and mode of payment. The final version of the legislation provides for a complex formula to determine the compensation to be paid for the Crown's carried interest.[27] There may be some question as to the adequacy of the compensation provided[28] especially in light of Canada's standing in the international arena.[29]

In addition, since this provision applies retroactively it may interfere with outstanding exploration rights or permits on the Canada lands. Application of the proper law governing the situation, as determined by the rules of private international law in effect in the lex situs, to the agreements would seem to be the solution.[30] This would normally be the municipal law of the State concerned meaning that the law could be changed to that State's advantage. Thus, the general view is that a breach of these "public contracts" does not by itself result in international responsibility;[31] different considerations arise if the action is arbitrary, discriminatory, involves the denial of justice or, if in the circumstances, the

action results in an expropriation contrary to international law.

Some recent international arbitrations between States and private persons might suggest an exception where the State can be said to have conferred a limited form of international personality on the private party.[32] The stipulation in the development agreements that the applicable law would be general principles of international law, or some form of non-municipal law, is put forth as support for the argument that the State must comply with the contractual obligations on the basis of pacta sunt servanda as if they were international agreements. The contract is said to be "internationalized" by agreement between the parties.[33] However, these awards seem to be simply an example of arbitral tribunals drawing analogies to principles of public international law, as instructed by the parties, when applying principles of private international law. There would not seem to be an opinio juris in favour of State responsibility for breach of such contracts,[34] nor would such a view appear to represent existing State practice.[35]

As mentioned at the outset, the primary concern of this paper is on the constraints imposed by the modern international agreements, both bilateral and mulilateral, that were designed to deal with problems involving international investment. Canada's bilateral tax conventions will be looked at briefly with respect to the policies under consideration here

(discriminatory provisions of Canadian income tax legislation alone could occupy a substantial paper; for example, the small business deduction for Canadian controlled corporations). The most interesting considerations perhaps arise from the normative political process of the international system. Can the reaction of Canada's trading partners and allies be ignored? In the past a "special relationship" with the U.S. has been alleged to constrain the normal sovereign powers of either party. There would not seem to be any substance to such a "rule", yet there are considerations that arise from being a member of the "club" that Canada runs with. These matters will be discussed in the final section of this paper.

BILATERAL TAX CONVENTIONS

The only matter presently under consideration that would appear to be affected is the NEP provision that provides for a petroleum incentives program (PIP) to replace the earned depletion allowance deduction from income. The PIP consists of direct payments based on exploration and development costs irrespective of whether any tax is payable. A minimum amount is payable to any person developing energy resources, but there is discrimination in favour of Canadian owned and controlled firms. The goal is to encourage development of energy resources, while at the same time promoting Canadian ownership of the resource sector (Canadianization). This might prove to be a difficult

balancing act. However, the issue to be discussed here is whether such a fiscal incentive is prohibited by any of the bilateral tax conventions.

At the present time there are thirty-four such conventions in force, with several about to be replaced by more modern agreements. Generally they contain some form of a non-discrimination clause. Since 1963 the treaties have been based on the OECD Model conventions[36] which contain a comprehensive non-discrimination clause. The 1977 Model was basically a revision of the 1963 Draft; the non-discrimination clause did not undergo any significant changes. It is not binding[37] on members, yet it does represent a consensus of member countries as well as an agreement in principle to "conform to the Model Convention set out in the Annex hereto, as interpreted by the Commentaries thereto and having regard to the reservations and derogations contained in the Report" (Report of the Committee on Fiscal Affairs).[38] However, Canada (along with Australia and New Zealand) reserved its position on the entire Non-Discrimination Article (Article 24). Thus, it is entirely proper (even beyond the strict legal basis) for Canada to derogate from the Article's provisions. Although some commentators wonder why Canada made such a reservation,[39] the reason becomes apparent upon examination of the actual non-discrimination provisions in Canada's tax conventions.[40]

There are three paragraphs in Article 24 of the Model pertinent to our inquiry. Paragraph 1 provides that foreign nationals (by paragraph 2 defined to include all legal persons who derive their status from the laws in force in that contracting State) shall not be subjected to "taxation or any requirement connected therewith" other or more burdensome than that of nationals of the other State "in the same circumstances". Ostensibly, this paragraph would apply to a corporation that is a national of one State with a branch operation (but not an incorporated subsidiary) in the other State. However, paragraph 4 is specifically concerned with this. It provides that taxation of the permanent establishment of an enterprise of one State situated in the other State shall not be less favourable than that levied on enterprises of that other State carrying on the same activities. One might question the need for separate consideration of permanent establishments in paragraph 4 as that would seem to be covered by paragraph 1.[41] Paragraph 6 then deals with the situation of enterprises of a contracting State of which the capital is "wholly or partly owned or controlled directly or indirectly, by one or more residents" of the other State, that is, subsidiaries. It provides that the taxation "or any requirement connected therewith" shall not be other or more burdensome than that to which other similar enterprises of the first-mentioned State are subjected.

For our inquiry, the provision most relevant is paragraph 6 as it would be unusual for foreign controlled

enterprises to operate in the large scale energy industry through a branch; most multi-national integrated oil companies having established either wholly or partly owned subsidiaries.

Canada is in the process of re-negotiating, or negotiating for the first time, many tax conventions as recommended by the OECD Council. Most include a non-discrimination clause, based on paragraph 6 of Article 24, prohibiting discrimination with respect to resident companies that are wholly or partly owned or controlled by non-residents. However, it is only on a most favoured nation basis. That is, it is limited to similar treatment given to enterprises that are owned or controlled by residents of any third state rather than being a national treatment obligation. This would seem to end the matter for present purposes because, as mentioned, firms operate through subsidiary Canadian corporations rather than branches. This is perhaps why Canada could grant national treatment in many of its treaties, in accordance with paragraph 4 of the Model Convention, for permanent establishments (although there is an exception in some treaties for the branch profits tax applied to permanent establishments). However, what would be the result for the NEP if a non-national enterprise were to operate through a branch? That is, are the incentives a form of discrimination prohibited by paragraph 4 of Article 24?

Canadian authorities take the position that the giving of incentives to Canadian residents does not involve discrimination against non-residents.42 Is such a view

compatible with paragraph 4? In order to evaluate that, it is necessary to turn to the fine print, that is, the Commentary to Article 24(4).[43] However, some caution must be followed when utilizing it since the non-discrimination Article is somewhat confusing and thus "the commentary provided by the OECD is itself often ambiguous or cryptic" and "does not always address the critical issues".[44] The potential for dispute over what constitutes discrimination is great and, as the extensive Commentary shows, there are many possible and sometimes conflicting ways to interpret the Article.

It would appear that incentives, especially when a replacement for what would otherwise be a deduction from income subject to tax, could be considered discriminatory as they would indirectly create a higher tax burden. The Commentary to Article 24(4) recognizes the difficulty involving incentives and the non-discrimination issue in section 27. Section 28 then states "that it is right that the benefit of them should be extended to permanent establishments of enterprises" of another State once they have been accorded the right of establishment. However, sections 29 and 30 clearly relate this to equality with resident enterprises (whether domestic or foreign controlled) only. Indeed this form of equality (with resident corporations) seems to be the major focus of Article 24(4) as can be seen from the Commentary previously discussed.[45] In addition, section 29 of the Commentary states that permanent establishments may be denied such advantages if they "are unable or refuse to fulfill

the special conditions and requirements attaching to them". This is somewhat cryptic, but it could provide further support to an argument for a limited interpretation of Article 24(4). Perhaps the national treatment accorded by Article 24(4) would not present a problem for the NEP provisions even if it, and not Article 24(6) (most favoured nation treatment only in Canada's treaties), was applicable.

Lack of a comprehensive non-discrimination article is one of the major concerns of the United States regarding ratification of the recently signed, and long awaited, new tax convention with Canada.[46] It is recognized that while it may be undesirable, it is clear that such discrimination[47] would be permitted by the treaty:

> One particular area of concern is Canada's rules that provide incentives to natural resource exploration that are available only to Canadian controlled companies. Some might question the wisdom of entering into a treaty with developed country that permits such a broad form of discrimination.[48]

Thus, there can be adverse consequences on the political level even if Canada is on firm legal ground regarding its non-application of the Model provisions. However, it appears that Canada's double taxation treaties do not provide an impediment to using Canada's internal fiscal system to benefit Canadian controlled companies in this manner (the small business deduction for Canadian controlled corporations is another

example). It would appear to be a legitimate sovereign action to use fiscal incentives to develop a country's energy resource infra-structure as part of the development of its natural resources. The more difficult question is whether the benefits outweigh the costs.

MEMBERSHIP IN THE OECD

There are two important institutions created by multilateral treaties that have bearing on the policies under consideration here. One is The General Agreement on Trade and Tariffs (GATT), which is relevant to the issue of procurement policies. There are complaints that both the NEP and FIRA constitute unfair trade practices, primarily because of perceived pressure to purchase Canadian goods and services. This became the subject of formal complaint by the United States,[49] but is beyond the scope of this paper. The other institution of note is the aforementioned OECD, also created by a multinational convention.

Canada was a founding member of this Organization which was established in 1961 to replace a more limited in scope, but perhaps more powerful in structure, Organization for European Economic Co-operation (OEEC). The OECD is an inter-governmental forum presently consisting of twenty-four members, primarily of the western industrialized nations. The structure[50] is not overly complex and does not contain elements of supranationality.

It is a forum for equals, who retain their full sovereignty, to meet and consider policies necessary to meet the needs of an increasingly interdependant world. The supreme body of the OECD is the Council. It is composed of a representatives from each member country. It can only make decisions unanimously. However, an abstention does not nullify the whole process but rather makes the decision inapplicable to that member. The Council has the power to take decisions which are legally binding on members, to make agreements with other international persons, and to make recommendations (which members are required to consider implementing but are not bound to) along with resolutions (concerning the work of the Organization through its various committees). It oversees the functioning of the Organization and reviews all preparatory studies submitted by the varous bodies of the Organization. There is also a Secretariat (a civil service accountable to the Council) and various committees of experts to deal with areas of concern within the Organization's competence.

The OECD has been characterized as "an institution which civil servants trusted, economists found useful as a source of reliable statistics, and most other people knew nothing about".[51] Yet it plays a prominent role in the area of foreign investment and capital movements, especially since the 1976 Declaration on International Investment by member governments[52] (the primary focus of this section) as well as the earlier Code of Liberalization of Capital Movements.[53] The work

of the OECD is primarily accomplished through co-operation, its aims being achieved through consultations (with the purpose of avoiding the unilateral adoption of policies which may harm the interests of member States).[54] However, the pressure of international opinion and the effectiveness of moral suasion are an important stimulus to and are characteristic of this co-operation.[55]

Indeed, this co-operation has been institutionalized into a formal techique and "it is not easy for a government to hold out against a thoroughly documented and well-reasoned case developed by one of these expert bodies".[56] There is obviously a high degree of interdependence[57] between OECD member countries and this contributes to the need for, and indeed the pressure of, "consultations" which are part of every OECD Instrument, as well as provided for in the OECD Convention itself (Article 3). The very fact it is difficult to distinguish between matters of purely national concern and matters that are of legitimate concern to other member countries (which should depend on the effect of actions, not their intent[58]) requires increasing use of the consultative forum. The structure of the Organization does not readily lend itself to explicit rule making and enforcement measures, although the Liberalization of Capital Movements Code was one of the first such legal instruments by an international organization in that area. Nevertheless, members have agreed, by signing the OECD Convention, to promote policies designed to contribute to the expansion of world trade on a multilateral

non-discriminatory basis is accordance with international obligations (Article 1(c)), and to pursue efforts to maintain and extend the liberalization of capital movements (Article 2(d)). Quaere the effect of this on a member country's obligations to adhere to the provisions of the GATT (which are said to not have independent binding force)?

OECD membership thus presents two considerations in relation to attempts to control FDI. They are: (1) the so-called "hard" international law, arising from commitments made under the aegis of the OECD, that must be honoured; and (2) the principles arising from a consensus of member governments following OECD consideration of a particular area, which might be called "soft" international law. The second consideration cannot be simply ignored and as Canada recently discovered in its own internal constitutional process,[59] "black" letter legality is not the only consideration in policy formulation. Violation of the spirit and intent of the Convention itself, or of particular instruments of the Organization, might well lead to adverse consequences.

There are several OECD instruments that touch on the area of domestic treatment of foreign investment. There is the Model Double Taxation Convention on Income and Capital[60] which, as previously discussed, contains a non-discrimination clause aimed at ensuring equality of tax treatment for foreign owned enterprises. There is also an OECD Draft Convention on the Protection of Foreign Property[61] which was directed at trying to

ensure "fair and equitable treatment" so as to prevent unreasonable or discriminatory measures with respect to foreign investment once it is established. Its purpose was to impose minimum standards for State responsibility. However, it did not go beyond the draft stage and was not endorsed by the OECD or by the member countries and, as such, will not be considered here, although it might have some evidentiary value with respect to the customary international law of expropriation. The most important OECD provision in this area is the 1976 Declaration and the related Decisions of the Council.[62] However, there is also the aforementioned Capital Liberalization Code.[63]

The Code of Liberalization of Capital is a legally binding commitment to liberalize direct investment flows for member States adhering to it. Such members "have undertaken, inter alia, to liberalize the entry of direct investment"...((i) investments that offer the possibility of exercising an effective infuluence on the management of a new existing enterprise, or (ii) a long term loan which means over five years)..."subject to the qualification contained in the Code and reservations lodged or derogations taken with respect to this item".[64] Thus, a major aspect of it deals with the right of establishment of foreign investment and would have presented a serious impediment to the existing FIRA, unless Canada made a reservation thereto. However, Canada abstained from the Decision promulgating the Code and thus is not affected by it. The subsequent 1976 Declaration on National Treatment is intended to be a complementary

instrument to the Code since it deals with the treatment of direct investment after its establishment. It is interesting to observe that the existence of the Code will have a bearing on any attempt by the United States to create foreign investment controls similar to FIRA (under consideration recently[65]).

Many countries made reservations at the time of their submission, in accordance with Article 2(b) of the Code, thereby limiting their commitment to such liberalization. For example, Australia reserved the right to control inward direct investment; therefore, it still complies with the Code despite its restrictive controls on the establishment of foreign direct investment. However, additional reservations may not be lodged after submission to the Code.[66] Since the United States only made certain specific reservations pertaining to a few "key" industries, it is precluded from implementing any general controls. France did not make any reservations under Article 2(b) with respect to inward direct investment either. Therefore, pursuant to article 2(a), France should not place any impediments in the way of such transactions; yet France appears to impose restrictive controls[67] (albeit in an administrative non-transparent fashion, and officially states that it welcomes direct investment). One country's violations do not of course justify another country's violation with respect to other member countries, but it does perhaps terminate obligations owed to that first country. At the very least it does not lie in the mouth of

such a country to complain about the actions of another country in violation of OECD provisions.

The 1976 Declaration on International Investment and Multinational Enterprises by the Governments of OECD Member Countries[68] and the related Council Decisions[69] are of principal concern. The Declaration, a non-binding commitment entered into by all Member States (except Turkey), is an act of Member governments within the framework of the OECD, but is not an "Act" of the Organization itself. It consists of three interrelated instruments. Part I contains Guidelines for Mulinational Enterprises (MNE). Part II provides for "National Treatment" of foreign owned enterprises operating within a Member State's territory. Part III deals with International Investment Incentives and Disincentives to direct investment. Together they form an "agreement" by member countries to "intensify their co-operation and consultation on issues relating to international investment and multinational enterprises through inter-related instruments"[70] and constitute a framework for OECD action.

Part III consists of a "commitment" to give due weight to the interests of Member countries affected by "measures (laws or administative practices) designed to provide official incentives and disincentives to direct investment, and to "endeavour to make such measures as transparent as possible". It would seem that the proposed policies (the NEP and the changes to the FIRA) meet this latter requirement of the commitment as they

are transparent with their aims and methods quite explicit, especially that of the NEP. Canada is certainly not trying to hide its policies behind administration smoke-screens. The official Commentary[71] by the Committee on International Investment and Multinational Enterprises (hereinafter referred to as "CIME") does not clearly explain what is meant by "interests" of member countries. However, significantly it does not refer to the interests of nationals of member countries. Rather it concentrates on the increasing competition of investment incentives (which is perhaps the only way interests of Member countries could be significantly affected). Canadian policies certainly do not present a problem if that is the concern. However, even if the wording could be interpreted to refer to the policies, it simply requires member countries to give "due weight" to the interests of other countries and Canada could make a very good argument that such interests are outweighed given the level of foreign ownership and control in Canada which is unparalleled in other OECD countries. This is especially true in the energy resource industry to which the NEP is addressed. It is difficult to construe this Part as being more than a mere aspiration for co-operation among the Member countries.

Part II is of direct concern and provides the most serious implication for the new policies. It states that Member countries "should accord to foreign controlled enterprises" ... which are those operating in a Member's territory that are owned or controlled directly or indirectly (no additional elaboration)

by nationals of another Member country ..." treatment consistent with international law and no less favourable than that accorded in like situations to domestic enterprises" (hereinafter referred to as "National Treatment"). This would seem to apply to the "Canadianization" policy of the NEP and also to the proposed FIRA changes which by definition treat established foreign controlled enterprises differently from similar domestically controlled enterprises. The Commentary specifically enumerates discrimination through taxation and restrictions on new investments by established enterprises as being in the category of exceptions to the National Treatment principle.[72] However, discriminatory measures that are "consistent with their needs to maintain public order, to protect their essential security interests and to fulfill commitments relating to international peace and security" are condoned and exempted from the National Treatment principle.

The meaning of this "defence" to any allegation of breach of the National Treatment principle is not clear and is not dealt with in the Commentary. Thus it appears to be left to practice or experience to provide substance. This might be due to the difficulty of obtaining a consensus among twenty-four countries or, perhaps, because of the non-legally binding nature of the Declaration, it was not thought necessary to make it more explicit with the intention of relying on the consultative process to provide the needed clarification. However, it could provide a plausible method for Canada to justify its actions, if

any "defence" is necessary (see below). The NEP concerns the key sector of energy development, the single most important resource in Canada and probably in the world. It might well fit within the ambit of protecting "essential security interests". Energy supply is now quite obviously an international political question, moreso than an economic question. The power of OPEC interventions in the mid-1970's speaks for itself as do the upheavals following the Iranian revolution and the outbreak of war between Iran and Iraq. It would be absurd to say that the protection of an orderly development of energy resources, not to mention the goal of independence from an erratic world market, is not an essential security interest of an independent sovereign State.

This is clearly one of the primary reasons for the NEP.[73] Control over foreign investment in the energy sector is an integral part of national economic policy in OPEC and non-OPEC countries. Mexico is an example of probably the most rigorous system. Australia requires a certain level of domestic ownership and control before allowing development of energy resources. In Great Britain and Norway the national oil companies control all projects which in the case of the latter involves taking a fifty per cent interest after a find is delineated, without payment for past exploration expenditures. There would certainly seem to be a good argument that the NEP fits within this "defence". The case is much weaker for the proposed changes to FIRA which apply across the board, although the need to protect "essential

security interests" or to "maintain public order" could conceivably be used in certain areas. One need only consider the well-publicized incidents in the early 1970's where the United States tried to enforce its Trading with the Enemy Act on Canadian subsidiaries to stop Canadian companies from concluding contracts with Cuba and China to realize a case could possibly be made, at least in the areas where there is absolute foreign dominance.

What is the legal effect of this Declaration? It refers to "further international arrangements and agreements" in the preamble, thus implying that it is itself some sort of international arrangement or agreement. However, the language used in the Declaration is non-legal in form and in effect. It speaks of "jointly recommending" or that Member countries "should accord" National Treatment. As well, it is not an "Act" of the OECD as such. There does not seem to be an intention to legally bind which is necessary element of a binding international commitment. The most that can be said is an that it is unilateral declaration of policy or a statement of intention, neither of which normally give rise to obligations (and there is nothing that points to the existence of a binding obligation, nor is there any State practice that would support a contrary view). That they "do not prescribe legally enforceable rules"[74] is certainly the general consensus. This is borne out by the related Decisions of the Council which quite clearly contemplate that Members may take measures contrary to the provisions

(notification of such contrary measures, along with reasons in support of, is required and a consultative procedure is established to review departures from the provisions). That they lack a legally binding nature is also the view within the administration of the Organization itself as it is recognized that the National Treatment instruments have a different legal nature from that of the binding Code of Liberalization of Capital.[75]

One writer, when considering the effect of the Guidelines for MNE's (Part I), suggested that as the Declaration was made by Ministers on behalf of their Governments it, in effect, amounts to a high level pronouncement of policy; therefore, legal consequences might well result based on the Eastern Greenland case and the Nuclear Tests cases.[76] However, he was referring to the possible "legitimization" of the transformation of the content of codes of conduct for MNE's into enforceable domestic law[77] and was not referring to the creation of international obligations for States. It should also be noted that the Statement made by the Canadian Minister (discussed below) would negate any such result for Canada. In any event, considerable doubt was cast upon such a view by the Commentary to it,[78] where it was suggested that the cases relied upon were very specific on their facts and dealt with particular occasions and subjects, thus making it difficult to use them for a general proposition as such. The general rule is that acquiescence by the State to the acceptance of the alleged legal principle is

necessary to create a binding obligation. The Declaration may possibly evolve into customary international law in some form for MNE's and perhaps even for States, however, such a situation cannot be said to exist today.

Therefore, OECD Membership does not directly provide any "hard" legal constraints. Nevertheless, the Declaration represents a form of commitment and might be said to be "soft" international law. There were not any negative votes[79] (other than Turkery's abstention) with respect to the three inter-related Parts that make up the Declaration. Governments in subscribing to it made a form of political commitment to the underlying principles, even if it is not a binding international obligation. This might involve adverse consequences for Canada as discussed in the following paragraphs. However, two things must be kept in mind. One is the justification or "defence" arising from the words of the National Treatment clause itself which, as previously discussed, provides a plausible argument that Canada would not in fact be in breach of the National Treatment principle (at least with respect to the NEP). The second is the Statement made by Canada when the Declaration was adopted. As will be seen (infra) this mitigates considerably the scope of any political commitment made by Canada.

However, there is a legally binding aspect to the 1976 Declaration. It arises out of the Decisions of the Council[80] that accompany the Declaration which to a degree integrate it

into the normal structure of the OECD. There is a Decision on Inter-Governmental Consultation Procedures for the Guidelines for MNE's and also one with respect to International Investment Incentives and Disincentives (which provides for consultations within the framework of CIME). However, the most pertinent for the present purposes is the Decision on National Treatment. Its purpose is "to establish within the Organization suitable procedures for reviewing measures"... (laws and administrative practices) ... "which depart from National Treatment" and to review new measures that depart from the principle.

It essentially consists of two conditions. One is the commitment to notify the Organization of exceptions to National Treatment including all relevant information pertaining thereto. The second is that CIME "shall act as a forum for consultations at the request of a Member country" with respect to the issue. The implicit assumption seems to be that exceptions to National Treatment will be made transparent, thereby countries that pursue such policies will be subjected to political pressure, both within and without the consultative forum, that will force them to honour their political commitments. As outlined previously, such pressure cannot be easily ignored if there is an actual breach of a commitment, especially by Canada which is considered to be one of the "seven countries that carry the most economic weight in the OECD area.[81] Therefore, the impact of the Decision could be potentially more widespread than the simple disclosure requirement would indicate.

A different type of consideration arises from the "inter-related" aspect of the three instruments (Parts I to III) which, according to the preamble to the Declaration "together constitute a framework within which the OECD will consider these issues". This complementary nature is of special significance to Canada as a major host country to MNE's. Presumably it wants them to comply with the Guidelines which are also not legally binding (although one might want to ask the executives involved in the Badger case[82] just how "voluntary" they are) and, as such, would seemingly be required to honour its commitments made in the Declaration.

It has been said that "The OECD Guidelines...are not devoid of legal significance; they state broad equitable principles and standards to be observed by all the parties."[83] Whilst that statement referred specifically to the Guidelines, it might be expanded to encompass the larger overall package of complementary "obligations" that arise from the three inter-related instruments. If Canada could be said to be in default of its "obligations" as set out in the Declaration, then it would be difficult for it to insist that the MNE's observe the Guidelines strictly. Every State retains "the right to prescribe the conditions under which MNE's operate within its jurisdiction subject to international law and to the international agreements to which it has subscribed;[84] yet the Guidelines are predicated on the understanding "that member countries will fulfill their

responsibilities to treat enterprises equitably and in accordance with international law and international agreements".[85] Even though this latter phrase does not refer directly to the other two parts of the Declaration, the word "equitably" could be interpreted to refer to them, and accordingly, could be said to express:

> a principle, which, although not meant as a counterpart for the observance of the Guidelines by MNE's, may play an important role in determining to what extent MNE's are morally bound to respect the provisions of the Guidelines in a country which treats them in violation of that principle.[86]

Thus it may be interpreted as "implying treatment of MNE's in conformity with the objective of the OECD."[87] This would be significant if Canada became engaged in a dispute similar to that of the Belgian government in the Badger case.[88]

There, in attempting to apply pressure by utilizing the Guidelines and the Consultative procedure, that government was careful to point out its adherence to the National Treatment principle and the non-discriminatory nature of the case.[89] It was not a case in the juridical sense, but it does illustrate the ambiguous nature of the "voluntary" Guidelines and of the Declaration itself. It concerned a directly controlled and one hundred per cent owned subsidiary that was shut down by the American parent MNE. Proper notice, as required by Belgian law, was not given to the employees which made the Belgian company responsible for financial payments. That, in turn, would lead to

bankruptcy and a significant shortfall in the required payments. The trade unions together with the Belgian government demanded that the parent MNE make up the difference and alleged a violation of the Guidelines. The parent MNE resisted, but Belgium kept up the pressure and finally requested "an exchange of views" before CIME pursuant to the Decision on Inter-Governmental Consultation Procedures on the Guidelines for MNE's. Using "hypothetical" facts it asked for an interpretation. The Committee discussed the Guidelines generally and gave a "clarification". It could not rule on the specific case, but it did give broad hints of its position (not favourable to the MNE).

The publicity and pressure resulted in a settlement with the parent MNE making up the difference. This was due largely to the international support for the OECD process. The "case" is very specific to its facts as it involved a subsidiary lacking independent operating control, as well as corporation rather than a sovereign nation. In addition, the consultation procedure regarding the Guidelines for MNE's differs considerably from that concerning National Treatment (which has much less scope for the role of CIME, thus removing the potential for the quasi-judicial role exhibited, rightly or wrongly, in the Badger case). Nevertheless, it cannot be dismissed out of hand as there is a forum for consultations and, as noted earlier,[90] it is not an easy task for a government to hold out against a well reasoned and documented case if it has acted inconsistent to OECD policy.

Other than the commitment to notify and consult, there is not any "hard" international law; but, as outlined, there are considerations of "soft" international law arising from the Declaration and related Decisions. "Soft law" has a way of penetrating law and there is not always a sharp line between hard law and other things, even if the distinction should not be completely forgotten.[91] The Declaration does not legally commit governments, yet it does contain "elements which they are bound to take to heart and cannot disavow later on".[92] Hence, the possible "defence" that arises from the wording of the National Treatment clause of the Declaration,[93] and the Statement[94] made by Canada at the time of its adoption of the Declaration in 1976 (and repeated upon reaffirmation of the Declaration in 1979) are of great importance. There is a very good argument that the former has the result, especially in relation to the NEP, of removing the policies under consideration here from the realm of the OECD "National Treatment" principle. The latter, while technically not a reservation (as used in the traditional sense in international agreements since the instrument is not legally binding), does have a similar function with respect to the political commitment involved in the National Treatment principle.

The Statement directly addresses the political commitment after noting the unique problem of FDI in Canada and

states "for the record" Canada's "understanding" of the impact the National Treatment principle has on domestic policies:

> In this connection I note that Canada will continue to retain its right to take measures, affecting foreign investors, which we believe are necessary given our particular circumstances.

It goes on to say that Canada considers that the Declaration and related Decisions will contribute to closer international co-operation in an area of increasing importance and, therefore, in the light of the understanding outlined Canada is "in a position to accept the Declaration and the commitments to notify and consult". This would seem to drastically reduce the scope of any political commitment if Canada genuinely believes such policies are necessary in its particular circumstances (perhaps not difficult to make such a case in the situation of the NEP). This Statement also has the effect of providing evidence of the persistent objector status that would allow Canada to refute the opinio juris required to bind Canada if customary international law were to develop in this context. It is not impossible that certain provisions of the Declaration might become binding norms. That is, a so-called "Zebra Code"[95] (an instrument that is composed of binding as well as non-binding rules) could develop.

There is increasing emphasis on this area by the OECD. As discussed earlier, this Declaration is only the latest in a line of instruments or working papers of the OECD that attempt to

expand foreign investment by removing national barriers. Is Canada going against a trend which might result in a certain degree of exclusion from the "club"? Perhaps this is not perceived as a problem (and perhaps the trend itself will change in light of changing economic circumstances), yet it is something that clearly has to be taken into consideration when developing policies regarding foreign direct investment. This applies even moreso to policies such as the proposed changes to the FIRA which would have a very broad effect and are not easily defended.

Footnotes

1. Foreign Investment Review Act, S.C., 1973-74, c.46, am. 1976-77, c.52.

2. For example, the United States, supported by Western Europe and Japan, formally submitted a complaint to a GATT Panel of Experts pursuant to Article XXIII procedures. The complaint concerned Article III (National Treatment) with respect to Canadian sourcing undertakings extracted by the FIRA process and Article XVII with respect to export undertakings. The Panel recently decided that the sourcing requirements violated Article III (see The Globe and Mail, Wednesday, July 13, 1983, P. 1). It is expected that the GATT Council will give its formal approval, thus leading to the possibility of retalitory actions should Canadian policy not change.

3. "Portents Troubling on U.S. Trade Policy", in Canada's National Journal of Business Investment and Public Affairs, January 8, 1983.

4. Wilson, "Foreign Investment in U.S. Industry" (1980), p.5 (U.S. Congress; Congressional Research Service -- Major Issues System). A reaction of country with an economy over 10 times the size of Canada, yet with a level of foreign

investment equal to or less than that of Canada (see n.9 infra).

5. Budget Paper on Economic Development in the 80's (excerpts published in The Globe and Mail, Nov. 13, 1981, p. A12).

6. National Energy Program, Energy Mines and Resources, Canada (1980) and UPDATE (1982). The details involved are beyond the scope of this paper, although the author has available an Appendix explaining the Program and its implementation. For detailed information see the Canadian Energy Program Reporter, CCH Canada limited (Don Mills, Ontario, 1982).

7. Henry Steiner & Detlev F. Vagts, Transnational Legal Problems (2nd ed.) (Mineolo N.Y., 1976) at 45. In 1980, the figure is 82% (N.Y. Times, January 28, 1983, D13 - speech of Canadian Ambassador Allan Gotlieb).

8. Task Force on the Structure of Canadian Industry, Foreign Ownership and the Structure of Canadian Industry (The Watkins Report) (Ottawa, 1968) at 1.

9. Note, "FDI in the U.S." (1976-77), 26 Am. U.L.R. 109 at 121. In the publication "Survey of Current Business", Bureau of Economic Analysis (August, 1981) it appears that the U.S. has barely edged out Canada for top place overall,

but Canadian threshold requirements are 50 per cent foreign ownership whereas the U.S. uses a ten per cent ownership level.

10. O.E.C.D. Penetration of Multinational Enterprises (in the manufacturing industry in member countries) (Paris, 1977).

11. For example, lack of research and development resulting from the branch plant nature of the economy. Canada has a lower research and development level than that of any other major industrialized nation (O.E.C.D., Trends in Industrial Research and Development 1967 -1975 (Paris, 1979), using table 1.2 on p.102 which compares total intramural expenditures to the domestic product of industries). Another problem is use of foreign suppliers (hence the FIRA sourcing requirement).

12. Kari Levitt, Silent Surrender: The Multinational Corporation in Canada (Toronto, 1970). For additional views see Gordon, A Choice for Canada (Toronto, 1966); A.E. Safarian, Foreign Ownership of Canadian Industry (Toronto, 1966) a study on the performance of Canadian subsidiaries. See Harry G. Johnson, The Canadian Quandry (Toronto, 1963), for a contrary look at nationalist aspirations. See also Livtak & Maule, "The Multinational Firm and Conflicting National Interests" (1969), 3 J. of World Trade L. 309 concerning the responsiveness of foreign owned subsidiaries to Canadian government policy.

13. For example the efforts of the OECD member countries France and Japan, see American Bar Association Guide to Foreign Investment (New York, 1979) at 260-77. For an excellent study of French system of administrative discretion as to whether to authorize foreign investment see Torem & Craig. "Foreign Investment in France" (1971), 70 Mich. L.R. 283.

14. Such as evidenced by the proposed U.N. "Code of Conduct for Transnational Corporations" or the OECD Guidelines for MNE's (infra n. 68 and following).

15. The Foreign Investment Review Agency "Foreign Investment Review" Spring 1980 at 13 and Winter 1977-78 at 20.

16. Final Report of the Royal Commission Canada's Economic Prospects, Ch. 18 (Ottawa, 1958).

17. Supra n. 8. It was never given official recognition and status, although it was commissioned by the Government.

18. Foreign Direct Investment in Canada (Ottawa, 1972).

19. Canada extensively uses the international legal process. For example: expansion of territorial fishing zones; protection of Arctic and marine environments; the east coast boundary dispute (George's Bank); complaints of extraterritorial application of national laws of some

countries. In the words of the present Prime Minister, "Canada strongly supports the rule of law in international affairs," H.C. Deb. (Canada) 1970, Apr. 8 at 5623-24.

20. Chayes, Abram, The Cuban Missile Crisis (New York, 1974) at 44.

21. There would appear to be some seventeen such treaties still in force (from correspondence with the Economic Law and Treaty Division, Department of External Affairs, Canada). The principal one of interest is the treaty with Spain negotiated between 1922 and 1927. Canada also entered into a FCN treaty with France in 1936 that may be of interest. They have both been enacted into legislation (S.C. 1928, c. 49 and S.C. 1932-33 respectively) and accordingly are part of the domestic law of Canada should they be of benefit to any person. It seems to be accepted that Canada inherited the rights and obligations of the British FCN treaties (see 15 Cdn. Y.B. Int'l. Law at 339-340 (1976)); the peculiar circumstances in which Canada and the other dominions evolved into independent states over a relatively long time period might explain this (see W.P.M. Kennedy, The Consitution of Canada: An Introduction to its Development and Law (2nd ed.) (1938, Reprint New York, 1973)).

22. The view of the U.S. State Department. Britain and Canada never recognized it as being in force after the War of 1812

(see British and Foreign State Papers, Vol. 7 at 94 in Treaties and Agreements Affecting Canada in Force Between His Majesty and the United States of Canada, 1814-1925, Department of External Affairs (Ottawa 1927) at vii). In any event, the doctrine of desuetude would seem to have application.

23. See Weston, "Constructive Takings Under International Law: A Modest Foray into the Problem of Creeping Expropriations" (1975-76), 16 Va. J. Int'l L. 103 at 113; Christie, "What Constitutes A taking of Property Under International Law" (1962), 38 Brit. Y.B. Int'l L. 307; Vagts, "Coercion and Foreign Investment Rearrangement" (1978), 72 Am. J. of Int'l L. 17.

24. Ibid.; for example, see The Norwegian Claims (Norway v. U.S.) case cited in Christie; c.f. Sohn & Baxter, "Draft Convention of State Responsibility for Injuries to the Economic Interests of Aliens (1961), 55 A.J.I.L. at 545. See the opinions of Judges Fitzmaurice and Gros in the Barcelona Traction case, [1970] I.C.J. Rep. 4 , as well as those of the majority (at p.51) who did not reach the merits of the case.

25. "No person shall have any right to ... compensation, damages or indemnity ... for any acquired, vested or future interest ... replaced or otherwise affected by this Act (ss. 61 (2),

Bill C-48, first, session, 32nd Parliament, 29 Eliz. II, 1980).

26. A comprehensive review of the evidence in the area is provided by Dolzer, "New Foundations of Expropriation Law" (1981), 75 A.J.I.L. 553 at 553-72. Dawson & Weston, "Prompt, Adequate and Effective: A Universal Standard of Compensation" (1961-62), 30 Fordham L.R. 727 and Lapres, "Principles of compensation for Nationalized Property" (1977), 26 Int'l and Comp. L.Q. 97 are examples of the myriad of law review articles in the area; c.f. Arechaga, "State Responsibility for Nationalization of Foreign Owned Property" (1979), 11 N.Y.U. J. Int'l L. and Pol. 179, for a third world view accepting the basic principle. This position would certainly seem to be supported by Canadian practice (see J.G. Castel, International Law (3rd ed.) (Toronto, 1976) at 1153) in taking advantage of such a rule. For a recent illustration consider the potash industry takeover by the Saskatchewan provincial government in the mid 1970's (analysed in John Richards and Lawrence Pratt, Prairie Capitalism: Power and Influence in the New West (Toronto, 1979) where appropriate compensation was negotiated.

27. Canada Oil & Gas Act, S.C. 1980-81-82, c. 81, s. 29 provides for compensation of past exploration costs, based on a complex formula, to be paid out of the Crown's share of future production.

28. It is too early to assess, but there are suggestions that the formula does not provide adequate compensation.

29. Perhaps it can be said a "non-universal" customary international law rule has developed (see Jessup, "Non-Universal International Law" (1973), 12 Col. J. Trans. L. 418). Canadian practice (supra n. 26) and the practice of other Western industrialized nations (for example see Castel, supra n. 26 at 1123-25) might provide evidence of such a rule.

30. Georg Schwarzenberger, A Manual of International Law (6th ed.) (Milton near Abington Oxon, 1976), at 123. There is no explicit constitutional protection of property rights in Canada.

31. Schwarzenberger, ibid. 3, 7, 123; F.A. Mann, "State Contracts and State Responsibility" (1960), 54 A.J.I.L. 572 at 587 maintains this is the position in international law even if a state has undertaken not to terminate or change the contract.

32. Saudi Arabia v. Arabian American Oil Company (Aramco Arbitration Tribunal, August 23, 1958, 27 Int'l. L. Rep. 117. More recently, see Texaco Overseas Petroleum Co./California Asiatic Oil Co v. Government of Libyan Arab Republic Geneva, January 19, 1978 (1978) 17 I.L.M.1.

33. Ibid.

34. Despite Professor Jenning's arguments for such a rule in "State Contracts in International Law" (1961) 37 Brit. Y.B. Int'l L. at 156, it would seem that the question is really whether one should be created (Mann, supra n. 31 at 588).

35. For example, the existence of the "Calvo Clause" doctrine; c.f. Mann supra n. 31 at 577-80 and Ian Brownlie, Principles of Public International Law (3rd ed.) (New York, 1979) at 549.

36. Butterworths, Canada's Tax Treaties, vol. 1 at 203 (reproducing excerpts from the 1969 Government White Paper on Tax Reform). The Model Conventions are; the Draft Double Taxation Convention on Income and Capital, (O.E.C.D., Paris; and since 1977, the Model Double Taxation Convention on Income and Capital, (O.E.C.D., Paris, 1977). Text and official commentary is provided in the Butterworths service.

37. It is the subject of a Recommendation, rather than a Decision which is binding (Article 5 of the O.E.C.D. Convention).

38. Recommendation of the Council, Concerning the Avoidance of Double Taxation, 11th April, 1977 (see supra n. 36, Canada's Tax Treaties, at 1501.

39 Canada's Tax Treaties, supra n. 36 at 315.

40. For a detailed review see Robertson & Bissett, "Non-Discrimination (Article 24)" (1979), IFA Canada Seminar at 304-311.

41. The explanation seemingly provided by the Commentary to Article 24(4) is that it also provides for a situation where an enterprise of a contracting state is not a national of that state (which is possible given that the definition of national in paragraph 2 refers to the place of organization of the company rather than its residence):

> "Strictly speaking ... designed to end ... discrimination based not on nationality, but on the actual situs of an enterprise."

Perhaps it is simply to ensure that the treatment of permanent establishment is equivalent to that accorded to resident corporations, that is, those organized under the laws of the State concerned. Support for this is found in the Article 24(4) Commentary. For example, section 25 states "the purpose is to end all discrimination in the treatment of permanent establishments as compared with resident enterprises belonging to the same sector of activities" as regards taxes on business profits. Sections 25, 26 and 29 specifically refer to providing treatment equal to that of resident enterprises. Section 22 states

that "less favourably levied" allows for different modes of taxation as long as the result overall, is not more burdensome "than that on resident enterprises". Such discrimination can be a real issue; for example, the branch profits tax levied by some countries (including Canada) in the absence of contrary treaty provisions.

42. Supra n. 40 at 304.

43. The Commentary does not become part of the resulting treaty based on the Model, yet is is "of special importance in the development of international fiscal law" (Report of the Committee on Fiscal Affairs, adopted in the Recommendation, supra n. 38) even if it is not officially part of the "preparatory work" which is an aid in the interpretation of treaties (Vienna Convention on the Law of Treaties, Article 32, U.N. Doc. A Conf. 39/27). As it is a clarification by those who drafted the Article, it is of assistance in the settlement of disputes (Model Convention and Commentary thereto, supra n. 36).

44. O'Brien, "The Nondiscrimination Article in Tax Treaties" (1979), 10 Law and Policy in International Business 545 at 612.

45. See supra n. 41.

46. Paper by R.J. Patrick Jr. in "The Canada-U.S. Income Tax Treaty III" (1980), 32 Canadian Tax Foundation Rep. of Proc. 648 at 735.

47. If it is actually discriminatory. The United States Executive branch has ruled that Canada does not discriminate against U.S. citizens wishing to invest in Canadian energy companies, thus allowing Canadian access to mineral land leases on U.S. Federal Lands (N.Y. Times, Thurs., Feb. 11, 1982, A24).

48. Excerpt from the Statement of Staff of Joint Committee on Taxation, Hearings on Various Tax Treaties, Senate Foreign Relations Committes, Sept. 24, 1981.

49. Supra n. 2.

50. The following discussion relies on The O.E.C.D. History, Aims Structure, O.E.C.D. (Paris, 1963) which also contains the text of the Convention establishing the Organization.

51. Miriam Camps, "First World" Relationships: The Role of the O.E.C.D. (The Atlantic Institute for International Affairs, Paris, 1975) at 47.

52. Infra n. 68 and text thereto.

53. O.E.C.D., 1978 (reprint of the 1973 edition). First adopted December 12, 1961.

54. Australian Foreign Affairs Record, 672 at 573 (1976).

55. Henry G. Aubrey, Atlantic Economic Cooperation, The Case of the O.E.C.D (New York, 1967), at 6 and at 145-47; he concludes the "prodding effect" of the O.E.C.D. forum is something to reckon with.

56. Gordon, "The O.E.E.C." (Feb. 1956), International Organization quoted in Aubrey, ibid. at 28.

57. The recognition of this, coupled with the need for co-operation, together form integral parts of the O.E.C.D. aims and purposes; these are referred to specifically in the preamble to the O.E.C.D. Convention (supra n. 50 at 43).

58. Supra n. 51 at 25 and 28.

59. The recent constitutional crisis in Canada spawned by the Federal government's threat to unilaterally repatriate the Constitution (from Britain), which was only settled by a subsequent agreement with the Provinces (except Quebec).

60. Supra n. 36.

61. O.E.C.D. (Paris, 1967). It did not come into force and was not made the subject of a Decision of the O.E.C.D.

62. Infra n. 68 and following text.

63. Supra n. 53.

64. O.E.C.D., International Investment and Multinational Enterprises: Review of the 1976 Declaration and Decisions (Paris, 1979) at 45.

65. Supra n. 4 and text thereto.

66. Supra. n. 53, Annex B, p.39.

67. See Torem & Craig, "Foreign Investment in France" (1971-72), 70 Mich. L.R. 285, even though there is not a formal statutory mechanism.

68. Adopted by the Governments of O.E.C.D. Member countries on the 21st of June, 1976. Reference to a complete text is provided in supra n. 64.

69. Supra n. 64, Appendices I, II and III for the Decisions as revised in 1979.

70. From the preamble to the Declaration, supra n. 64.

71. Supra n. 64 at 55-57.

72. Ibid. at 45-52.

73. The National Energy Program, supra n. 6, devoted a chapter (The Problems) to this issue; c.f. Gerard Mangone, (ed.) Energy Policies of the World, Vol. II (New York, 1971). These sources provide the basis for the examples following in the text.

74. Theo. W. Vogelaar, "The O.E.C.D. Guidelines" 127 at 135 in Norbert Horn (ed.), Legal Problems of Codes of Conduct for Mulinational Enterprises (Deventer, Netherlands, 1980).

75. The Report of the Committee on International Investment and Multinational Enterprises (CIME Report endorsed by the Council), supra n. 64.

76. Hans W. Baade, "Legal Effects of Codes of Conduct" 3 at 10-18 in Horn, supra n. 74.

77. Ibid. at 10.

78. Ian Brownlie, "Legal Effects of Codes of Conduct Commentary" at 38 in Horn, supra n. 74.

79. Supra n. 74 at 133.

80. Supra n. 69 and text thereto.

81. Supra n. 51 at 20.

82. See text accompanying n. 88, infra.

83. Supra n. 74 at 135.

84. Paragraph 7 of the introductory considerations and understandings to the Guidelines for MNE's as set out in the Annex to the Declaration. The Declaration itself states that they are an integral part of the Guidelines.

85. Ibid. in the "HAVING REGARD" clause.

86. Supra n. 74 at 134.

87. Ibid.

88. Prof. Dr. R. Blanpain, The Badger Case and the O.E.C.D. Guidelines for Multinational Enterprises (Deventer, Netherlands, 1977).

89. Ibid. at 115.

90. Supra n. 56.

91. Supra n. 78 at 42.

92. Supra n. 74 at 134.

93. As discussed in the text accompanying n. 73, supra.

94. Statement made by the Secretary of State for External Affairs at the O.E.C.D. Ministerial meetings adopting and affirming the Declaration. The full text of this Statement is available from the Department of External Affairs, Canada. The relevant passage is set out below.

95. Supra n. 76 at 14.