
Expropriation in the Energy Industry: Canada's Crown Share Provision as a Violation of International Law

Cecil J. Olmstead,* Edward J. Krauland**
and Diane F. Orentlicher***

This article considers several aspects of Canada's recent National Energy Program and examines their legality under international law. The authors focus on the controversial "Crown Share" or "back-in" provision which gives to the Canadian Crown the right to take retroactively a twenty-five percent share of existing exploration and production interests. The authors contend that this new measure constitutes expropriation under international law and is therefore subject to the principle of customary international law requiring prompt, adequate and effective compensation for aliens affected. Since the *Canada Oil and Gas Act* provides virtually no recompense to foreign investors, the Crown Share provision stands in violation of international law.

Cet article examine divers aspects du Programme énergétique national en vigueur au Canada à la lumière du droit international. En particulier, les auteurs insistent sur la disposition ayant trait à la « Part de la Couronne » qui octroie rétroactivement à la Couronne fédérale une part de vingt-cinq pour cent des intérêts pétrolier actuellement détenus dans les secteurs de la production et l'exploration. Les auteurs soutiennent que cette mesure équivaut à une expropriation sur le plan international, et serait donc soumis au principe de droit coutumier international qui exige une compensation prompte, adéquate et efficace. Comme la *Loi sur le pétrole et le gaz* ne prévoit aucune indemnité réelle pour les investisseurs étrangers, il faut conclure que la disposition sur la « Part de la Couronne » constitue une expropriation contraire au droit international.

*Member of the District of Columbia Bar, Vice-Chairman of the Executive Council of the International Law Association and Associate Reporter, *Restatement (Second) of the Foreign Relations Law of the United States* (1965).

**Member of the District of Columbia Bar.

***Member of the District of Columbia Bar.

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Introduction

The Canadian government's announcement on October 28, 1980 of its National Energy Program (NEP) sent a series of shock waves throughout the international petroleum industry. This paper considers several of the more controversial elements of the Program, notably the provisions for retroactive Crown ownership, and examines their validity in light of relevant international legal principles.

The NEP is a comprehensive program for restructuring Canada's energy industry and seeks to increase Canadian ownership and control of oil and gas production to a minimum of fifty percent by 1990. When the Canadian government published the broad outlines of the NEP in 1980, the Minister of Energy, Mines and Resources explained the Program's threefold objectives: first, the NEP would promote Canada's independence from the world oil market by allowing Canadians "to seize control of their own energy future through *security* of supply".¹ Second, the program would promote a balanced distribution of the benefits of resource development between the less populated provinces where the resources are found and the more densely populated provinces, through a "petroleum pricing and revenue-sharing regime that recognizes the requirement of *fairness* to all Canadians no matter where they live."² Finally, the NEP would offer Canadians "the real *opportunity* to participate in the energy industry in general and the petroleum industry in particular, and to share in the benefits of industry expansion".³

Pursuant to the NEP, the Canadian Parliament enacted the *Canada Oil and Gas Act*,⁴ which amended Canada's *Oil and Gas Production and Conservation Act*.⁵ Although the *Act* contained a host of new regulatory mechanisms designed to achieve the fifty percent Canadian ownership target by

¹Department of Energy, Mines and Resources, *The National Energy Program, 1980* (1980), 2 [emphasis in original].

²*Ibid.*, 2 [emphasis in original].

³*Ibid.*, 2 [emphasis in original]. For a general treatment of the Program, see also Mendes, *The Canadian National Energy Program: An Example of Assertion of Economic Sovereignty or Creeping Expropriation in International Law* (1981) 14 *Vanderbilt J. Trans. L.* 475.

⁴S.C. 1981, c. 81 [hereinafter referred to as the *Act*].

⁵S.C. 1968-69, c. 48.

1990,⁶ one element in particular attracted considerable attention from various observers, including the oil and gas industry. This was the automatic reservation to the Canadian government of a twenty-five percent "Crown share" in certain exploration, development and production interests in the "Canada lands". Under section 27 of the *Act*, the Canadian government can "back-in"⁷ on all exploration and production fields, and on all of the ownership interests in the oil found on those fields, including those fields in the possession and control of foreign oil producers. The operation and effect of the *Act* raise the serious question of whether the Crown share provisions violate international law by expropriating the property of non-Canadians without providing adequate compensation. Moreover, the operation of the NEP also raises the question of possible discriminatory treatment and a denial of justice under international law.

I. Background and Operation of the *Canada Oil and Gas Act*

A. *Acquired Rights prior to the Act*

Before considering the validity under international law of the Crown share and other provisions, a review of the nature of the pre-existing rights now subject to those provisions is both necessary and helpful. The pre-existing rights were established pursuant to the *Canada Oil and Gas Land Regulations* ("COGL Regulations"),⁸ which have governed oil and gas exploration, development and production activities on the Canada lands since

⁶Various regulatory mechanisms in the NEP are designed to promote "Canadianization" of the energy industry. These include: (1) limitation of production from Canada lands to a company or a group of companies that has a minimum of fifty percent Canadian ownership. See *Canada Oil and Gas Act*, S.C. 1981, c. 81, ss 19-23; (2) adoption of various measures designed to encourage and ensure Canadian participation in the energy industry, such as implementation of a new system of grant incentives for oil and gas exploration and development available only to enterprises with at least fifty percent Canadian ownership. See *The National Energy Program, 1980, supra*, note 1, 39-40; (3) adoption of measures designed to "[e]nsure that a high level of Canadian goods and services is employed in oil and gas activities carried out on Canada Lands". See *The National Energy Program, 1980, supra*, note 1, 47.

⁷"Back-in" is simply a descriptive term referring to the Canadian government's authority, under section 27 of the *Act*, to acquire an interest in any existing exploration, development or production interest on Canada lands by taking a twenty-five percent share of the existing interest of lease or permit holders. The term apparently originates from a statement made during a Parliamentary committee debate on the proposed legislation: "Back-in is a shorthand way of saying that all of the interest holders have to move over proportionately to make some room for the party [*i.e.*, the Government] coming in". See the remarks of D.G. Crosby in House of Commons, *Minutes of Proceedings of the Standing Committee on National Resources and Public Works*, No. 17 (21 January 1981) 19.

⁸C.R.C. (*Consolidated Regulations of Canada*) 1978, c. 1518, *The Canada Oil and Gas Act*, S.C. 1981, c. 81, s. 62(1), provides that these regulations remain in force to the extent they are consistent with the new *Act* and until they are revoked or replaced by regulations made pursuant to the *Act*.

1961.⁹ Those interests included exploration agreements,¹⁰ exploratory permits¹¹ and special renewal permits.¹² The COGL Regulations also provided for a production interest in the form of an oil and gas lease.¹³

Under these Regulations the holder of an exploration interest had an exclusive and automatic right to obtain an oil and gas production lease with respect to the lands covered by his exploration interest.¹⁴ Without this legally protected right, it is unlikely that costly exploration operations would have been undertaken. Thus, holders of exploration interests were guaranteed under law the exclusive right to obtain an oil and gas production lease for up to one-half the land area included in the exploration interest,¹⁵ and were entitled to select the area for the production lease.¹⁶ Unless the exploration permit specified a different term, oil and gas leases were granted for 21 years,¹⁷ renewable for additional 21 year periods.¹⁸ Upon obtaining a production lease, the holder could retain those portions of his exploration interest not included in the oil and gas production lease.¹⁹ The production

⁹The *COGL Regulations*, C.R.C. 1978, c. 1518, were issued under the *Public Lands Grant Act*, R.S.C. 1970, c. P-29, and the *Territorial Lands Act*, R.S.C. 1970, c. T-6. The basic provisions of the *COGL Regulations* were unchanged between 1961 and 1982, with two exceptions relevant to the interests affected by the Crown share provisions. First, provisions governing the scope of a production lease based upon an earlier exploration interest evolved over time. *Infra*, note 15. Second, the *COGL Regulations* were amended in 1977 to establish a new exploration interest — the special renewal permit — which was available under conditions described *infra*, note 20. Neither of these changes affects the basic analysis of this article.

¹⁰*COGL Regulations*, C.R.C. 1978, c. 1518, ss 30-2.

¹¹*COGL Regulations*, C.R.C. 1978, c. 1518.

¹²*COGL Regulations*, C.R.C. 1978, c. 1518, ss 116-7. The *COGL Regulations* also provide for the granting of exploratory licences: ss 24-6. These licences confer no exclusive interests with respect to Canada lands; they merely authorize licence holders to carry out preliminary prospecting.

¹³*COGL Regulations*, C.R.C. 1978, c. 1518.

¹⁴*COGL Regulations*, C.R.C. 1978, c. 1518, ss 32(2), 35(1) and 54(1).

¹⁵*COGL Regulations*, C.R.C. 1978, c. 1518, ss 55(2) and 59(5). The original *COGL Regulations*, promulgated in 1961, required exploration permit holders, prior to obtaining a production interest, to surrender to the Crown one-half of the acreage covered by the permit. To encourage unitary development of discovery fields, the Canadian government issued Land Order No. 1-1961, which offered operators the option of paying a higher royalty in exchange for an exemption from the surrender requirement. Land Order No. 1-1961 remained in effect from 1961 until 1970, when it was revoked. SOR/70-184, *Canada Gazette*, Part 2, vol. 104, No. 9, 13 May 1970.

¹⁶*COGL Regulations*, C.R.C. 1978, c. 1518, s. 55(1)

¹⁷*COGL Regulations*, C.R.C. 1978, c. 1518, ss 61 and 35(1). A shorter initial lease period could apply if an exploratory permit specified a shorter term. This shorter term would, of course, be determined and agreed to in the operator's original interest and thus would not be applied retroactively.

¹⁸*COGL Regulations*, C.R.C. 1978, c. 1518, s. 62.

¹⁹*COGL Regulations*, C.R.C. 1978, c. 1518, s. 60(2).

interest entitled the holder to the full benefit of his production efforts,²⁰ subject to fulfillment of basic obligations such as the payment of rent²¹ and a royalty.²²

B. 50% Minimum Canadian Ownership and a 25% Crown Share

The acquired rights set out above, embodied in legal arrangements between certain operations and the government, were significantly altered by the enactment of the *Canada Oil and Gas Act*. Holders of exploration, development and production interests created under the prior law are required to convert them into new interests. Under section 64 of the *Act*, the owner of a lease, under which no oil or gas has been produced (other than for test purposes), must negotiate an exploration agreement or agree to take a provisional lease.²³ Section 63 requires holders of exploration interests to convert those interests into either an exploration agreement or a provisional lease. These new interests include exploration and development rights, and the exclusive right to obtain a production licence,²⁴ provided the holder, if a corporation or a group of corporations, has at least a fifty percent Canadian ownership rate.²⁵ Interest owners who fail either to enter into negotiations for an exploration agreement or apply for a provisional lease forfeit their

²⁰This statement requires a narrow qualification. Sections 116, 117 and 121 of the *COGL Regulations*, C.R.C., 1978, c. 1518, reflect a 1977 amendment. Sections 116 and 117 authorize certain permit holders, at their own option, to apply for a special renewal permit instead of applying for a lease. If the permit holder exercised that option with respect to lands as to which no declaration of significant discovery was in force, and the holder's Canadian participation rate was not more than 35 percent, Petro-Canada was entitled under section 121 to be granted, at its option, an interest in the special renewal permit ranging from 10 to 25 percent. Companies could avoid this result by applying for a production lease.

Petro-Canada's right to acquire interests pursuant to section 121 of the *COGL Regulations* was abrogated as of the date of the coming into force of the new *Act*. See the *Canada Oil and Gas Act*, S.C. 1981, c. 81, s. 62(3).

²¹*COGL Regulations*, C.R.C. 1978, c. 1518.

²²*COGL Regulations*, C.R.C. 1978, c. 1518, ss 85-87. Those obligations also include an obligation to drill wells if ordered to do so by the responsible Canadian authority at any time except during the three years following issuance of a lease: s. 88.

²³*Canada Oil and Gas Act*, S.C. 1981, c. 81, s. 64(1).

²⁴*Canada Oil and Gas Act*, S.C. 1981, c. 81, ss 9 and 68(1)(d). An additional modification concerns the renewal period. Production licences created under the *Act* have ten year terms (s. 25), while production leases created under the *COGL Regulations* typically had 21 year terms.

²⁵*Canada Oil and Gas Act*, S.C. 1981, c. 81, ss 68(1)(d) and 19(1). This also represents a significant modification. The *COGL Regulations* made production interests available to all corporations in which Canadians participated in financing. See *COGL Regulations*, C.R.C. 1978, c. 1518, s. 54(2)(i)-(ii).

In addition, the *Act* allows the Canadian government to establish terms that may be more onerous than those characterizing the previous interests. See, for example, s. 10.

rights to the government.²⁶ Holders of leases under which oil or gas was first produced (other than for test purposes) after December 31, 1980 but before March 5, 1982, when the *Canada Oil and Gas Act* came into force, are required to apply for a production licence under that *Act*. Failure to apply within 90 days of the coming into force of the *Act* could lead to surrender to the Crown of the Canada lands held under the lease.²⁷ Only one type of interest is exempt: an oil and gas lease, under which oil and gas was first produced (other than for test purposes) before January 1, 1981, is allowed to continue in accordance with its original terms.²⁸ This exception is a very narrow one, since the only Canada lands on which oil or gas was first produced, other than for test purposes, before January 1, 1981 are the Norman Wells, Pointed Mountain and Kotaneelee fields.

As enacted, section 27(2), the basic Crown share provision, operates as a matter of law at the time when a new interest is obtained or an old interest is converted, so as to reserve to the Crown a twenty-five percent share in the new interest. Thus, with regard to existing interests, the Crown share provision allows the Crown to acquire retroactively a portion of the private interests and rights. This Crown share is a twenty-five percent "carried interest", which the Crown may convert to a "working interest" at any time before and no later than thirty days after the government authorizes a system for producing oil or gas from the relevant lands.²⁹

C. *Effect of the Crown Share Provisions on Acquired Rights*

The effect of the Crown share provisions of the *Canada Oil and Gas Act* is to divest holders of production rights that were vested under the earlier law. The *Act* transforms virtually all of those interests into new interests and transfers twenty-five percent of the new interests to the Canadian government. Companies which, prior to passage of the *Act*, expended large

²⁶*Canada Oil and Gas Act*, S.C. 1981, c. 81, ss 63(2) and 64(2).

²⁷*Canada Oil and Gas Act*, S.C. 1981, c. 81, s. 64(6). Production licences obtained under this provision, like other interests created pursuant to the interest-conversion provisions of the *Act*, are subject to the Crown share provisions discussed herein.

²⁸*Canada Oil and Gas Act*, S.C. 1981, c. 81, ss 64(4) and 28. Additionally, the interest-conversion provisions of the *Act* are expressly made inapplicable to the Norman Wells Agreement of 1944: s. 64(5).

²⁹*Canada Oil and Gas Act*, S.C. 1981, c. 81, s. 36(1). A "carried interest" is one whereby the operator carries (*i.e.*, pays) the expenses for exploration and development activities for another participant in the project; a "working interest" would require each such participant to pay its share of the expenses as incurred. Specifically, the conversion is effected by a "designated Crown corporation", to which the Crown share would have been transferred previously. Under s. 36(1) this designated Crown corporation converts the carried interest to a working interest; under s. 35 the Minister of Energy may order that Crown corporation to become "operator" of the *entire* interest. If such an order is made, the corporation *must* make the conversion to a working interest: s. 35(4).

sums on exploration activities, are denied one-quarter of the benefits of their investment — benefits which, protected under the prior legislative regime, were reasonably expected to arise from significant capital expenditures.

Although the *Canada Oil and Gas Act* states clearly that its effect is to displace vested rights, section 61 expressly disclaims any government responsibility to provide compensation for any loss:

61. (1) Subject to subsections 62(2) and 64(5), the interests provided for under this Act replace all oil and gas rights or prospects thereof acquired or vested in relation to Canada lands prior to the coming into force of this Act.

(2) No party shall have any right to claim or receive any compensation, damages, indemnity or other form of relief from Her Majesty in right of Canada or from any servant or agent thereof for any acquired, vested or future right or entitlement or any prospect thereof that is replaced or otherwise affected by this Act, or for any duty or liability imposed on that party by this Act.

The *Act* contains one narrow exception to this provision. The Canadian government must make payments only for certain expenses tied to pre-1981 exploration costs that directly contributed to the drilling of a discovery well or that are associated with development of discovery fields.³⁰ Moreover, the *Act* expressly disclaims any responsibility for exploration or other expenses incurred before conversion of the Crown share to a working interest.³¹

II. The *Canada Oil and Gas Act* and International Law

As the *Canada Oil and Gas Act* represents a bold departure from the pre-existing regime of oil and gas regulation, it is important to consider the retroactive application of the new law to existing investments. While the motives of the Canadian government in enacting the legislation are not to

³⁰*Canada Oil and Gas Act*, S.C. 1981, c. 81, ss 29(2), 29(4), and 41(6). Section 29 provides for the reimbursement of expenses incurred only by holders of a production licence "in relation to which the original discovery of oil or gas was the result of a well on which drilling was commenced on or before December 31, 1980 and that qualified to be declared a significant discovery on or before December 31, 1982": s. 29(4)(a).

³¹*Canada Oil and Gas Act*, S.C. 1981, c. 81, s. 36(3). Since conversion to a working interest can take place at any time during the 30 days after authorization of a production licence (see *supra*, text accompanying note 29) virtually all of the exploration costs could be incurred before the government converts its share to a working interest.

be questioned,³² the validity of this new legal regime under international law should be the object of close examination. Investors interested in entering the Canadian oil industry for the first time may be particularly concerned with what might be unjustified or discriminatory treatment of foreign investors and, moreover, with possible future legislative changes which could adversely affect acquired rights.

A. *Minimum Canadian Ownership as Discriminatory Treatment*

The fifty percent minimum Canadian ownership requirement of the NEP must be considered against a backdrop of relevant international legal principles. As noted above, under the new regime holders of duly converted exploration agreements or provisional leases have an exclusive right to obtain a production licence, *provided that* any such corporate holder is at least fifty percent Canadian-owned.³³ At issue is whether refusal to grant production licences to *foreign-owned* entities, merely on the basis of foreign ownership, violates the principle of "national treatment". This principle

³²Some jurists have stated that "[i]t is an established principle of international law that every state has the right to regulate the condition upon which property within its territory shall be held and transmitted". I. Foighel, *Nationalization and Compensation* (1964) 48. See also *The Panevezys-Saldutiskis Railway* [1939] P.C.I.J., Series A/B, No. 76, 18; L. Oppenheim, *International Law*, 8th ed. (1955) vol. 1, 286. This would suggest that a national government may have considerable leeway to adopt a commercial policy and to enact laws that it deems necessary to effectuate legitimate national objectives. *Ibid.*, 287. H. Lauterpacht, *International Law* (1970) 22. The United Nations General Assembly has passed resolutions which assert:

the right of all countries, and in particular of the developing countries, to secure and increase their share. . . in the advantages and profits derived [from their natural resources] on an equitable basis with due regard to development needs and objectives of the peoples concerned. . . .

See *e.g.*, G.A. Res. 2158, 21 U.N. GAOR Supp. (No. 16) 29, U.N. Doc. A/6136. Moreover, the *Declaration on the Establishment of a New International Economic Order*, adopted in 1974, recognized the sovereign right of a state to regulate the activities of multinational corporations and to receive the benefits of modern science and technology. See G.A. Res. 3201, S-6 U.N. GAOR Supp. (No. 1), U.N. Doc. A/9559 (1974). However, none of these resolutions goes so far as to imply that such regulation can deviate from established principles of international law. As Commissioner Nielsen stated in *Neer and Neer* (United States v. United Mexican States) (1926) 4 R. Int'l Arb. Awards 60, 77:

Although there is this clear recognition in international law of the scope of sovereign rights relating to matters that are subject of domestic regulation, it is also clear that the domestic law and the measures employed to execute it must conform to the requirements of the supreme law of members of the family of nations which is international law, and that any failure to meet those requirements is a failure to perform a legal duty and as such an international delinquency.

Thus, retroactive action which discriminates against aliens, or expropriation without compensation, is not endorsed by these resolutions. See discussion in text, *infra*, Parts II(A) and II(B).

³³*Canada Oil and Gas Act*, S.C. 1981, c. 81, ss 19-23. See *supra*, Part I(B).

entitles persons or entities of foreign nationality to the same type of legal and regulatory treatment that is accorded to indigenous persons and entities under similar circumstances.³⁴ Apart from treaty or "conventional" international law,³⁵ the principle of national treatment finds its roots in customary international law. The concept of "national treatment" is based on the notion that aliens in foreign countries, outside the protection of their own government, should be assured treatment before the law at least equal to that accorded nationals.³⁶ Although the principle of national treatment admits of certain exceptions,³⁷ it permits no discrimination with respect to the protection of person and property.³⁸

Because the NEP's fifty percent Canadian ownership requirement is applied to all companies located in Canada, it may be argued that it is a general enactment not directed at aliens. This position, however, is open to serious attack given the express purpose of the NEP to divest foreign investors of their ownership interests in favor of enhanced Canadian participation. A more defensible position is that the retroactive application of the minimum Canadian ownership requirement effectively discriminates against aliens and therefore contravenes the principle of national treatment. Indeed, by its very nature, the requirement cannot affect corporate holders that are already at least fifty percent Canadian owned. Moreover, the World Court has stated that a general legislative enactment that has the purpose and effect of discriminating against aliens violates the prohibition against dis-

³⁴See, for example, Oppenheim, *supra*, note 32, 688.

³⁵For example, the United States and other countries have negotiated a series of bilateral commercial treaties (sometimes entitled Friendship, Commerce and Navigation Treaties or Treaties of Amity) which provide for national treatment in the importation of goods, establishment of enterprises and freedom of commercial conduct. Some countries have also concluded a number of bilateral investment protection treaties with developing and developed nations alike. Although Canada and the United States have not entered into a bilateral commercial treaty, the extensive and growing network of treaties demonstrates a predisposition by governments toward the principle of national treatment as a method of safeguarding the investments and other commercial undertakings of entities or persons in foreign territories. See the discussion of the network of treaties in note 107 and accompanying text, *infra*. Moreover, on 9 September 1983, President Reagan issued a statement which urged all countries to accord national treatment to foreign investors in accordance with international law and the principle of national treatment. See Office of the White House Press Secretary, *Statement by the President on International Investment Policy* (1983) 4.

³⁶Oppenheim, *supra*, note 32, 688.

³⁷*Ibid.*, 689. These would include the withholding of certain political rights to aliens, and restrictions on certain types of employment or landholding.

³⁸*Ibid.*

crimination.³⁹ In this regard, the NEP, both in terms of intent and effect, is a discriminatory legislative regime.

Apart from customary international law, Canada's obligation to accord national treatment to alien investors arises from agreements with principal allies to eliminate discriminatory treatment of foreign enterprises. In 1960, twenty nations, including the United States and Canada, signed the Convention which established the Organisation for Economic Cooperation and Development (OECD).⁴⁰ A major objective of this effort was to promote the flow of capital between OECD member states and to eliminate measures that are discriminatory or otherwise prevent international investment.⁴¹

On June 21, 1976, the then twenty-three OECD Member States, including Canada, adopted a comprehensive Declaration on International Investment and Multinational Enterprises.⁴² This Declaration embraces the principle of "national treatment", whereby foreign-owned enterprises of one member country, located in another member country's territory, are to be accorded treatment under the laws and regulations of that government that is no less favorable than that accorded to domestic enterprises. Paragraph II of the Declaration is specific:

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. . . treatment under their laws, regulations and administrative practices, consistent with international law and no less favorable than that accorded in like situations to domestic enterprises. . . .⁴³

Although the Declaration does not create binding obligations upon the OECD member states, it is evident that those states are expected to eliminate discriminatory treatment of foreign investors. Worth noting is that when the Declaration was adopted, the Canadian delegate stated that "Canada will continue to retain its right to take measures affecting foreign investors,

³⁹In the case of *Treatment of Polish Nationals* [1932] P.C.I.J., Series A/B, No. 44, 4, 28, the Court stated:

the prohibition against discrimination, in order to be effective, must insure the absence of discrimination in fact as well as in law. A measure which in terms is of general application, but in fact is directed against Polish nationals and other persons of Polish origin or speech, constitutes a violation of the prohibition.

⁴⁰12 U.S.T. 1728, T.I.A.S. 4891 (14 December 1960) [hereinafter cited as *OECD Convention*].

⁴¹*OECD Convention*, arts 1-2.

⁴²See OECD Committee on Foreign Investment and Multinational Corporations, *Declaration On International Investment and Multinational Enterprises*, (21 June 1976) 20; reprinted at (1976) 15 I.L.M. 967 [hereinafter cited as *OECD Declaration*].

⁴³*Ibid.*, para. 2.

which we believe are necessary. . . .⁴⁴ Whether this can or should be considered a reservation is unclear.⁴⁵ Suffice it to say that since 1976, Canada has joined with other OECD member countries in affirming "the continued commitment of their governments to the 1976 Declaration".⁴⁶ Furthermore, the OECD Council, which can issue binding statements,⁴⁷ rendered a decision which requires members to give notice of any actions taken which constitute an exception to the general principle of national treatment.⁴⁸ No such notice has ever been given by Canada with regard to the NEP and the fifty percent Canadian ownership requirement.

B. *The NEP and Denial of Justice*

As Section 61(2) of the *Canada Oil and Gas Act* denies any right or claim to compensation, damages, or any other form of relief from the operation of the Crown share,⁴⁹ this raises an additional issue under international law, depending upon the interpretation given to its literal language. On its face, section 61 precludes a foreign investor from exercising any procedural rights or from seeking any form of compensation, injunction, or other relief for the taking of an oil exploration or production interest.⁵⁰ The issue is whether such preclusion constitutes a "denial of justice" under international law.

For some time, jurists and arbitral decisions have advanced the concept of a "minimum standard of justice" under international law. Inherent in

⁴⁴Department of External Affairs, Press Office, *Statement: Notes for a Statement made by the Secretary of State for External Affairs, the Honourable Allan J. MacEachen at the O.E.C.D. Ministerial Meeting in Paris, June 21, 1976: Investment Issues and Guidelines for Multinational Enterprises* (1976) 2.

⁴⁵The terms of the *Declaration* do not explicitly permit an OECD member country to deviate from the national treatment standard on the basis of economic concerns or general welfare considerations. The objectives of the NEP indicate that these are the predominant interests of the Canadian government in the oil and gas industry. Thus, Canadianization of the oil and gas industry would not appear to be necessary "to maintain public order, to protect . . . essential security interests and to fulfill commitments relating to international peace and security. . ." (*OECD Declaration*, para. 2). Moreover, the provision that treatment be at least "consistent with international law" would seemingly prohibit discriminatory treatment that resulted in a retroactive divestiture of acquired rights or property without appropriate compensation.

⁴⁶See *Communiqué of the Council Meeting at the Ministerial Level on 13-14 June 1979 relating to International Investment and Multinational Enterprises*, excerpted in OECD, *International Investment and Multinational Enterprises* (1979) 7.

⁴⁷OECD Convention, art. 5.

⁴⁸See OECD, *Decision of the Council on National Treatment* (1976) 15 I.L.M. 978, 979; OECD Council Document No. C(76)117 (21 June 1976).

⁴⁹See *supra*, Part I(C).

⁵⁰Even the computation of *ex gratia* payments for exploration costs under Section 29 of the *Act* does not appear to be open to challenge or modification through administrative or judicial review.

this concept is the notion that a state can be held responsible for a "denial of justice" to an alien.⁵¹ As early as 1932, the term "denial of justice" included both "cases of failure on the part of the legislature to provide a legal remedy where, according to the ordinary standard of civilized countries, legal redress ought to be available, [and] a denial to a foreigner of access to the court".⁵² Others have described a "denial of justice" as the improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures and unjust decisions.⁵³ Even in its narrowest interpretation, the concept of a minimum standard of justice embraces the duty to provide access to an independent judiciary.⁵⁴

In cases concerning the valuation of expropriated property and the payment of compensation, the denial of any form of relief or of judicial review of the uncompensated taking could constitute a denial of justice.⁵⁵ Many countries typically provide both compensation for government takings as well as the opportunity to seek review of the award. Even in the case of the Chilean copper mine expropriations, the Chilean government afforded those affected by the taking the opportunity to have any decision regarding compensation reviewed by a special tribunal. While the purpose of this paper is not to pursue this analysis in detail, it is submitted that Section 61 of the *Canada Oil and Gas Act* is at least open to attack on grounds of denial of justice. Implementation of the apparent restrictions of section 61 would result in an obvious denial to foreign investors of traditional forms of access to justice.

⁵¹One of the more notable arbitral decisions to discuss this type of liability under international law was *B.E. Chattin (U.S.A.) v. United Mexican States* (United States v. Mexico) (1927) 4 R. Int'l Arb. Awards 282. In that decision Commissioner Van Vollenhoven found that the Mexican system of criminal justice, as applied to aliens, was "far below international standards", and that the treatment of the alien amounted "to an outrage, to bad faith, to wilful neglect of duty". The tribunal recited numerous instances of *pro forma* proceedings, ineffective legal assistance or procedures, and the absence of necessary investigative actions to confirm the charges.

⁵²Fitzmaurice, *The Meaning of the Term "Denial of Justice"* (1932) 12 Brit. Y.B. Int'l L. 93, 104.

⁵³See, e.g., Sohn & Baxter, *Draft Convention on the International Responsibility of States for Injuries to Aliens* (1961) 55 Am. J. Int'l L. 548, 550-1, arts 6-9.

⁵⁴See, for example, C. Amerasinghe, *State Responsibility for Injuries to Aliens* (1967) 98-9; F. Garcia-Amador, L. Sohn & R. Baxter, *Recent Codifications of the Law of State Responsibility For Injuries to Aliens* (1974) 180.

⁵⁵See Brower, "The Future of Foreign Investment — Recent Developments in the International Law of Expropriation and Compensation" in Southwest Legal Foundation, *Symposium on International Business: Private Investors Abroad* (V. Cameron, ed., 1975) 93, 152.

C. *The Crown Share Provisions as Expropriation under International Law*

1. The Crown Share Provisions as Expropriation

There is little doubt that the Crown share provisions constitute a form of taking of existing, legally protected rights. To decide whether the provisions constitute an expropriation for the purpose of international law, it is necessary to determine whether the rights affected by the *Canada Oil and Gas Act* constitute property rights which are accorded protection under international law. Perhaps most telling in this regard is the *Act* itself, which recognizes that interests subject to operation of the Crown share provisions include "acquired" and "vested" rights in Canada lands.⁵⁶ International tribunals have consistently held that the duty to compensate, which is considered in greater detail below, applies to property interests that "have the character of acquired rights".⁵⁷ It has also been recognized that "the principle of respect for vested rights . . . forms part of generally accepted international law".⁵⁸

International arbitrators have, moreover, given broad effect to the rule of international law protecting acquired and vested rights. Arbitral awards frequently refer to the international rule of compensation as covering "property rights and interests",⁵⁹ and arbitrators have emphatically rejected efforts to confine the operation of the rule to takings of physical property.⁶⁰ Similarly, it is generally recognized that patents are a type of property⁶¹ that can be the object of an expropriation with a concomitant duty to compensate. Thus, the view has developed that the taking of an alien's intangible property rights, just as with the taking of physical property, triggers the obligation under international law to provide compensation. "[A]ccording

⁵⁶*Canada Oil and Gas Act* S.C. 1981, c. 81, s. 61.

⁵⁷See, for example, *Saudi Arabia v. Arabian American Oil Company* (1958) 27 I.L.R. 117, 168; see also *Sapphire International Petroleum Ltd. v. National Iranian Oil Company* (1963) 35 I.L.R. 136, 184 [hereinafter *Sapphire Arbitration*] "the respect for acquired rights. . . is undoubtedly one of the general principles of law recognized by international tribunals."

⁵⁸*Certain German Interests in Polish Upper Silesia (Merits)* (Germany v. Poland) [1926] P.C.I.J., Ser. A, No. 7, 42.

⁵⁹See, for example, *Factory at Chorzow (Merits)*, (Germany v. Poland) [1928] P.C.I.J., Ser. A, No. 17, 46; *BP Exploration Co. (Libya) v. Government of the Libyan Arab Republic (Merits)* (1974) 53 I.L.R. 297, 329.

⁶⁰See, for example, *Norwegian Shipowners' Claims* (Norway v. United States) (1922) 1 R. Int'l Arb. Awards 307, 334. See also *Starrett Housing Corp. v. The Islamic Republic of Iran* [1983] Iran. Assets Lit. Rep. 7,685 (Award No. ITL 32-24-1), (the Tribunal held that the "property" interests that had been taken included the physical plant as well as the *rights* to manage the project, to complete the project construction and to collect proceeds from the sale of the apartments being constructed).

⁶¹See S. Ladas, *Patents, Trademarks and Related Rights: National and International Protection* (1975) 11-3; M. Bogdan, *Expropriation in Private International Law* (1975) 71.

to a great array of diplomatic and judicial cases and the great majority of authors, [the concept of property] comprises rights as well as tangible property", such as rights arising from concession agreements.⁶² "[T]he loss of anything of value may be deemed a loss of property and *prima facie* to be restored or to be the subject of compensation."⁶³ In its definition of "property" subject to the international rule of compensation, the *Restatement (Second) of Foreign Relations Law of the United States* (1965) includes intangible property,⁶⁴ "interests" in property that have a reasonably ascertainable value,⁶⁵ partial interests in property,⁶⁶ and the benefits of an interest in property.⁶⁷ In short, the great weight of scholarly opinion endorses the views that property protected under international law includes assets both tangible and intangible in nature.

Furthermore, there can be no doubt that the Crown share taking constitutes an expropriation. During the post-World War II period, international tribunals frequently concluded that nationalizing governments were obliged to provide compensation for acts that adversely affected property rights similar to those subject to nationalization under the Canadian Crown share provisions. For example, arbitrators consistently described the abrogation of concession rights during a process of nationalization as an expropriation of property.⁶⁸ The concession rights recognized as being protected in these decisions are essentially the same as the interests subject to the Crown share provisions. Under a concession agreement, the government typically grants to the concessionaire for a specified term "certain rights relating to the exploitation of the public domain, such as mining or mineral rights over state property".⁶⁹ "A particular concession may be found to be essentially

⁶²Herz, *Expropriation of Foreign Property* (1941) 35 Am. J. Int'l L. 243, 244-5.

⁶³See B. Wortley, *Expropriation in Public International Law* (1959) 8-12.

⁶⁴American Law Institute, *Restatement (Second) of Foreign Relations Law of the United States* (1965) § 191. While cast as a restatement of United States law, the Restatement approach is to articulate rules of general international law and indicate how the United States adheres to and applies that law.

⁶⁵*Ibid.*

⁶⁶*Ibid.*, § 192, Comment c. Thus, the mere fact that only twenty-five percent of exploration and production interests is taken does not make operation of the Crown share provisions any less a "taking" under international law.

⁶⁷*Ibid.*, § 192.

⁶⁸See, for example, *Libyan American Oil Company v. Government of the Libyan Arab Republic* (1977) reprinted in (1982) 20 I.L.M. 1, 53: "Concession rights, as those of the present dispute, may be included under the class of incorporeal property"; see also *Sapphire Arbitration*, *supra*, note 57, 183-4: "[T]he respect for rights acquired under concessions is only one aspect of the respect for acquired rights, with is undoubtedly one of the general principles of law recognized by international tribunals"; *U.S. v. Guatemala* (1930) 2 R. Int'l Arb. Awards 1080, 1097 [hereinafter *Shufeldt Claim*]: concession creates property rights protected by international law.

⁶⁹G. White, *Nationalisation of Foreign Property* (1961) 83.

a licence from the State to carry on certain activities. . . .”⁷⁰ The same characteristics were present in the exploration, development and production interests created under the COGL Regulations. Interest holders under the Regulations were granted acquired rights for a specified term of years. Thus, existing authority reinforces the position that the rights and interests affected by the Crown share provisions constitute property protected by international law against expropriation.⁷¹

The Canadian government, moreover, would be hard-pressed to sustain a claim that it is making proper use of its taxing authority, or that the Crown share provisions merely amount to a justifiable “creeping” expropriation. A taxation provision typically exacts a portion of the revenues or profits of an enterprise,⁷² whereas the Crown share provisions create a form of state ownership.⁷³ Furthermore, taxation in Canada is administered by the Minister of National Revenue,⁷⁴ whereas the Department of Energy, Mines and Resources governs all aspects of oil and gas exploration and development in Canada. Notably, the twenty-five percent Crown share is to be vested in a “designated Crown corporation”, which is most likely to be Petro-Canada, a Crown corporation created under the auspices of the Department of Energy, Mines and Resources.⁷⁵ In any event, an attempt by the government

⁷⁰*Ibid.*, 84.

⁷¹Some authorities have taken the view that if an alien’s right is *recognized as property* by the law of the country where the right is located, and that concept of property is more extensive than that recognized under international law, then compensation is due when that alien “is subjected to expropriatory measures which infringe the law in force at the time of the acquisition of his property.” See, for example, International Law Commission, *Fourth Report* [1959] 2 Y.B. Int’l L. Comm’n 1, 18-19, U.N. Doc. A/CN.4/119, quoted in M. Whiteman, *Digest of International Law* (1967) vol. 8, 1098. The conclusion that the acquired rights affected by the Crown share provisions are entitled to protection under international law is not altered by the 1977 amendment to the *COGL Regulations*. This amendment allowed Petro-Canada to obtain a partial interest in certain special renewal permits. Thus it merely created a new right — the right to obtain a special renewal permit subject to a possible interest held by Petro-Canada — and did not diminish existing rights. Indeed, the 1977 amendment states that it creates “additional rights”: *COGL Regulations*, C.R.C. 1978, c. 1518, s. 114. Moreover, the decision to obtain a special renewal permit resided with the applicant, and was purely voluntary in nature. In other words, foreign interest holders were free to choose the special renewal permit with full knowledge that Petro-Canada would receive a partial interest if that choice were made. Thus, the Canadian government could not be charged with expropriating an existing interest.

⁷²See, for example, *Income Tax Act*, R.S.C. 1952, c. 148, as amended, s. 3 (tax on annual income); *Customs Tariff*, R.S.C. 1970, c. C-41, s. 8 (*ad valorem* taxation); *Excise Tax Act*, R.S.C. 1970, c. E-13, s. 10 (tax on amounts payable).

⁷³*Canada Oil and Gas Act*, S.C. 1981, c. 81, ss 27 and 31. The Crown share is reserved to the Minister of Energy, Mines and Resources on behalf of Her Majesty in right of Canada (s. 27), and may be transferred to a designated Crown corporation (s. 31).

⁷⁴See, for example, *Income Tax Act*, R.S.C. 1952, c. 148, as amended, s. 220(1); *Customs Tariff*, R.S.C. 1970, c. C-41, ss 2, 15-20; *Excise Tax Act*, R.S.C. 1970, c. E-13, s. 2; *Estate Tax Act*, R.S.C. 1970, c. E-9, s. 62.

⁷⁵*Petro Canada Act*, S.C. 1974-75-76, c. 101.

to use its regulatory or tax powers "for the purpose of depriving an alien of his property" would also amount to a taking under international law.⁷⁶

It is also of no import that the expropriation is only partial. The Crown has reserved to itself a twenty-five percent interest in each right created under the *Canada Oil and Gas Act* and has refused compensation. Such a reservation is identical to "classic" expropriation in that property is taken and no compensation is to be paid. Nor can it be argued, on the ground that foreign investors can sell their interests, that this form of taking does not amount to "compulsory" expropriation. Should the foreign-owned enterprise sell its acquired rights under the law of Canada, or should the shareholder decide to divest himself of his interest, experience indicates that it would be at a significant loss precisely *because of* the Crown share requirement.⁷⁷ Further, this alternative would mean relinquishing rights to future profits and failing to recoup past expenditures. Therefore, the foreign-owned enterprise or foreign investor is faced with either a loss through a sale or a loss through the direct taking by the Crown of a twenty-five percent interest.

Finally, it is well settled that a state cannot escape liability or responsibility under its international legal obligations by enacting inconsistent municipal laws.⁷⁸ The mere fact that the Canadian Parliament has enacted a national policy inconsistent with its international legal responsibilities is of no consequence; Canada remains obligated under international law.⁷⁹

2. The Duty to Compensate under International Law

The question is now whether the taking effected by the Crown share provisions violates international law. As a general rule the taking of an alien's property without provision for just compensation is wrongful under

⁷⁶Sohn & Baxter, *Draft Convention on State Responsibility*, *supra*, note 53, 553 (art. 10).

⁷⁷The NEP had a depressing effect upon the value of interests held by non-Canadians. Immediately following announcement of the NEP, the share prices for firms with clear majority foreign-ownership dropped sharply. (Information based on comparison of Toronto Globe and Mail closing prices for 16 October 1980 and 31 December 1980, Toronto Stock Exchange).

⁷⁸Oppenheim, *supra*, note 32, vol. 1, 37, 350. "It is a well-established principle that a state cannot invoke its municipal legislation as a reason for avoiding its international obligations." See also G. Schwarzenberger, *A Manual of International Law*, 5th ed. (1967) 48-9; *Vienna Convention on the Law of Treaties*, U.N. Doc. A/Conf. 39/27 (23 May 1969) art. 27; *Advisory Opinion on Southwest Africa* [1971] I.C.J. 16, 47.

⁷⁹See *Texas Overseas Petroleum Co. v. Government of the Libyan Arab Republic (Merits)* (1977) 17 I.L.M. 3, para. 75 ("the act of a state which is irregular internationally cannot be affected by its legal character under municipal law within which the state acted.") [hereinafter cited as *TOPCO Arbitration*]; *Free Zones of Upper Savoy* [1932] P.C.I.J., Ser. A/B, No. 46, 508, 561 ("it is certain that France cannot rely on her own legislation to limit the scope of her international obligations").

international law, even if the taking does not otherwise violate international law.⁸⁰ The duty of a State to pay compensation for an expropriation under international law is derived from the traditional principle of according international protection to the acquired rights of aliens.⁸¹ Moreover, this duty has also been recognized as a corollary of the basic theory of justice that a state should pay for what it takes.⁸² This principle is accepted in virtually

⁸⁰See *American Insurance Group, Inc. v. The Islamic Republic of Iran* [1983] Iran. Assets Lit. Rep. 7,744, 7,478 (Award No. 92-2-3); *Banco Nacional De Cuba v. Chase Manhattan Bank*, 658 F.2d 875 (2d Cir. 1982); Domke, *Foreign Nationalizations* (1961) 55 Am. J. Int'l L. 555, 603; G. Von Glahn, *Law Among Nations*, 3rd ed. (1976) 233-4. Some writers have suggested that restrictions on the use of economic assets and opportunities to invest are not compensable takings even if they result in a loss of profits for the affected entity. See H. Steiner & D. Vagts, *Transnational Legal Problems* (1976) 488-90. For example, takings of property that result from tax laws or government regulations for the public order and welfare may not be viewed by some as compensable takings. See *Draft Convention on the International Responsibility of States for Injuries to Aliens*, Article 10(5), *supra*, note 53, 554. In *Kugele v. Polish State* (1932) 6 Ann. Dig. 69 (Upper Silesian Arbitral Tribunal), it was held that government taxation which forced the closing of a company did not constitute a compensable taking. Moreover, it is generally accepted that a sovereign can confiscate the property of those who commit unlawful acts without incurring liability under traditional notions of expropriation and compensation. S. Friedman, *Expropriation in International Law* (1953) vols 1-2; *Kugele v. Polish State*, *supra*.

However, the key factor is either (1) that the State is taking action to enforce its criminal or civil laws, or (2) the taking is an indirect and remote result of otherwise legitimate governmental regulation taken to advance the public welfare without an intent to expropriate. The Canadian NEP does not fall within these strictures since it is a direct taking of property with the very purpose of divesting foreign ownership in favor of nationals. Furthermore, there is increasing support for the notion that regulation of economic opportunity or property rights which interferes significantly with ownership or results in significant loss of value is tantamount to an expropriation. See Steiner & Vagts, *supra*, note 80, 490-92; Creel, *Mexicanization: A Case of Creeping Expropriation*, (1968) 22 Sw. L.J. 281; Weston, "Constructive Takings" Under International Law: A Modest Foray Into the Problem of Creeping Expropriation (1975) 16 Va J. Int'l L. 103. In some instances, state regulation has been considered a *de facto* expropriation subject to the rules of international law. G. Schwarzenberger, *Foreign Investments and International Law* (1969) 91-102.

⁸¹Early international judicial decisions examined the obligation of states to pay compensation for expropriated property. See *Factory at Chorzow (Merits)* (Germany v. Poland) [1928] P.C.I.J., Ser. A., No. 17, 47; *Oscar Chinn Case* (United Kingdom v. Belgium) [1934] P.C.I.J., Ser. A/B, No. 63, 81; *Certain German Interests in Polish Upper Silesia (Merits)*, *supra*, note 58; *Anglo-Iranian Oil Co. (Merits)* (United Kingdom v. Iran) [1952] I.C.J. 93, 159-60 (*per* Carneiro J., dissenting).

⁸²But see *Florence Mining Co. v. Cobalt Lake Mining Co.* (1909) 18 O.L.R. 275, 279 (C. A.), *aff'd* (1910) 43 O.L.R. 474 (P.C.). ("The prohibition 'Thou shall not steal' has no legal force upon a sovereign body and there would be no necessity for compensation to be given"). Indeed, in contrast to the United States and Australia, Canada has no explicit constitutional guarantee that there be compensation when the federal government expropriates private property. See Hogg, *Constitutional Law of Canada* (1977) 397; B. Laskin, *Canadian Constitutional Law*, 4th ed., 1975, 537-8. Of course, a state cannot exonerate or exempt itself from its international obligations by way of conflicting or inconsistent national laws or obligations. See *supra*, note 78, and accompanying text.

all legal systems.⁸³ Indeed, it has been observed that “[t]his obligation [to compensate] has now become a principle of customary international law.”⁸⁴ Some international arbitration tribunals have referred to the rule as being “axiomatic,”⁸⁵ and publicists have commented that “[t]he duty of a government to compensate in case of nationalization is almost universally recognized.”⁸⁶

Several theoretical bases for the international rule have been identified. Some attribute the rule to the need to prevent a state that has taken the property of an alien from being unjustly enriched.⁸⁷ Unjust enrichment formed the basis of the arbitral award in *Lena Goldfields, Ltd. v. Government of Russia*.⁸⁸ Moreover, failure to compensate an alien whose property has been taken is said to be an abuse of a government’s power to expropriate.⁸⁹

⁸³See, for example, *Benvenuti et Bonfant v. Peoples' Republic of the Congo*, (1980) 21 I.L.M. 740, 758: “[The] principle of compensation in the event of nationalization is in accordance with the Congolese Constitution and is one of the generally recognized principles of international law as well as of equity.” See also, Foighel, *supra*, note 32; B. Wortley, *Expropriation in Public International Law* (1959) 12; Mintz, “An Economic Analysis of International Expropriation of Property”, in R. Lillich, *The Valuation of Nationalized Property In International Law* (1973) vol. 2, 18.

⁸⁴*State Responsibility, Summary Records of the Eleventh Session* [1959] 2 Y.B. Int’l L. Comm’n 1, 18, U.N. Doc. A/CN.4/119/1959. See also the *David Goldenberg Case* (Germany v. Roumania) (1949) 2 R. Int’l Arb. Awards 903, 909, wherein the Tribunal noted: “if international law authorizes a State, for motives of public utility, to derogate from the principle of respect for the private property of aliens, it is on the condition *sine qua non* that the expropriated or requisitioned property will be paid for as quickly as possible” [translated].

⁸⁵“It is axiomatic that acts of government in depriving an alien of his property without compensation impose international responsibility.” *De Sabla Claim* (United States-Panama Claims Comm’n 1933) [1933-1934] Ann. Dig. 241, 243. See also *Anglo-Iranian Oil Co. Case* [1952] I.C.J. 93, 159-60 (Carneiro J., dissenting *re jurisdiction*); *Upton Case* (U.S. v. Venezuela) (1903) 9 R. Int’l Arb. Awards 234, 235. (“The seizure of the launch may have been justified by the necessities of the state, but it was a taking of private property for public use and involved the obligation of just compensation to the owner.”); *Norwegian Shipowners' Claims* (1922) 1 R. Int’l Arb. Awards 307, 334 (involving the taking of private contracts, “just compensation is due. . .based upon the respect for private property.”); *Delagoa Bay & East African Railway* (Great Britain and United States v. Portugal) (1900), summarized in M. Whiteman, *Damages in International Law 1694-1703* (1943) vol. 3; *Palestine Railway Case* (France v. United Kingdom) (1922), summarized in Wetter & Schwebel, *Some Little-Known Cases on Concessions* (1964) 40 Brit. Y.B. Int’l L. 183, 222; *Benvenuti et Bonfant v. People's Republic of the Congo*, *supra*, note 83.

⁸⁶See, for example, Domke, *supra*, note 82, 603. See also Wortley, *supra*, note 83, 152-3.

⁸⁷See McNair, *The Seizure of Property and Enterprises in Indonesia* (1959) 6 *Nederlands Tijdschrift voor International Recht* 219, 240; also quoted in M. Whiteman, *Digest of International Law* (1967) vol. 8, 1035.

⁸⁸(1929-30) 1 Ann. Dig. 426 (No. 258).

⁸⁹See Whiteman, *supra*, note 87, 1033-4, where the author discusses the *Fifth Report on International Responsibility* [1960] 2 Y.B. Int’l L. Comm’n 42, 60, U.N. Doc. A/CN. 4/125 (Garcia-Amador, Special Rapporteur).

Whatever theory is relied upon to explain the duty to provide compensation, the existence of the duty itself is firmly established in international law. The obligation is not affected by recent United Nations General Assembly Resolutions reaffirming the sovereignty of nations over their resources. While these Resolutions may appear to cast uncertainty upon the traditional view of the duty to compensate, such developments have not altered Canada's duty⁹⁰ to compensate foreign investors adversely affected by the Crown share provisions. Indeed, the Canadian positions taken on these Resolutions confirm this obligation.

In 1962 the General Assembly adopted Resolution No. 1803 (XVII), "Permanent Sovereignty Over Natural Resources", which recognized and reinforced the strict duty to compensate.⁹¹ Paragraph four provided that "Nationalization, expropriation or requisitioning [of property requires] appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and *in accordance with international law*."⁹²

While two subsequent Resolutions possibly shifted away from the traditional view,⁹³ the more significant Declarations were adopted in 1974. On May 1, 1974, the General Assembly adopted, without a vote, Resolution

⁹⁰Nor, it could be observed, have these developments altered any nation's duty under international law to provide compensation.

⁹¹Ten years earlier, on 21 December 1952, the General Assembly had adopted Resolution No. 626 (VII), "Right to Exploit Freely Natural Wealth Resources", which recognized that all nations can freely "use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development". G.A. Res. 626, 7 U.N. GAOR Supp. (No. 20), U.N. Doc. A/2361 (1952) 18. The United States objected to this resolution since it failed to recognize the rights of private investors under international law to hold and acquire property.

⁹²G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17), U.N. Doc. A/5217 (1962) 15 [emphasis added].

⁹³On 25 November 1966, the General Assembly passed Resolution No. 2158 (XXI), "Permanent Sovereignty Over Natural Resources". The United States abstained. See G.A. Res. 2158, 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966). Although the Resolution reaffirmed Resolution 1803 (XVII), it failed to address directly the limitations under international law on states to increase their share in the advantages and profits derived from the exploitation of natural resources.

When the General Assembly voted Resolution No. 3171 (XXVIII) on 17 December 1973, sixteen nations abstained, including ten West European nations and the United States. This resolution represented a somewhat radical departure inasmuch as it stated the "principle of nationalization. . . implied 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 the national legislation of each State carrying out such measures". G.A. Res. 3171, 28 U.N. GAOR Supp. (No. 30), U.N. Doc. A/9030 (1973) 52. This language not only suggested a departure from established rules of international law regarding the standard of compensation but also seemed to question the right and the amount of compensation. See *infra*, text accompanying note 95 and following.

3201 (S-VI), the "Declaration on the Establishment of a New International Economic Order".⁹⁴ The Declaration noted the widening gap between developed and developing nations and, without any mention of the requirement of compensation, stressed the sovereign right of each nation to nationalize its natural resources. Further, all nations that suffered from colonial domination had the right "to restitution and full compensation for the exploitation and depletion" of their natural resources. That no vote was taken, however, seriously eroded the influence or relevance of the Resolution regarding the development of rules of law, and suggests that ideological motivations rather than legal considerations may have been decisive.

On December 12, 1974, the General Assembly adopted Resolution No. 3281 (XXIX), the "Charter of Economic Rights and Duties of States".⁹⁵ Article 2(c) of the Charter pays little heed to the laws of expropriation as developed over time; rather, it provides that any nation could freely expropriate foreign property "in which case appropriate compensation *should be paid*. . . taking into account [the nation's] relevant laws and regulations and all circumstances that the State considers pertinent."⁹⁶ Were such a provision to be considered binding, the obligation to provide compensation would admittedly be less strict.

The question is whether these recent developments have altered Canada's obligations. It can be seen that the Canadian government has consistently supported expressions of international law to the effect that states must provide compensation when they take the property of aliens. Canada voted in favour of Resolution 1803,⁹⁷ thereby endorsing the rule that compensation must be provided in "accordance with international law".⁹⁸

In General Assembly debate on the proposed *U. N. Charter of Economic Rights and Duties of States*, Canada specifically objected to the wording of Article 2(c) and therefore abstained. The objection was based upon the realization that the proposed article failed to provide for a duty to compensate in accordance with international law. The Canadian position was later stated clearly:

Canada. . . did take the view that, when a host state takes measures against foreign investment, it should not discriminate against foreign investment from one country in relation to foreign investment from other sources, and the

⁹⁴G.A. Res. 3201, S-6 U.N. GAOR Supp. (No. 1), U.N. Doc. A/9559 (1974).

⁹⁵G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31), U.N. Doc. A/9631 (1974) 52.

⁹⁶*Ibid.* [Emphasis added].

⁹⁷While not of a binding nature and not law-making instruments, United Nations General Assembly resolutions *can* reflect the view of international law of the countries that support them. See *TOPCO Arbitration*, *supra*, note 79, paras 83-8.

⁹⁸*Supra*, note 92, 15.

measures which it applies to all foreign investment should be in accordance with its international obligations.

... The Canadian position was not only that the right of nationalization was conditional upon payment of compensation, but that the whole of Article 2 was defective because of the absence of any reference in the Article to the applicability of international law.⁹⁹

It is evident, then, that Resolution No. 3281, adopted in 1974, does not affect Canada's obligation under international law to provide compensation. If anything, the reasons for Canada's abstention confirm these obligations. In any case, U.N. General Assembly Resolutions are not sources of international law. Indeed, a recent international arbitral decision concerning the duty to compensate explicitly rejected the argument that these resolutions had created a new customary rule of expropriation and compensation under international law.¹⁰⁰

The United States government has also consistently endorsed the rule of international law requiring compensation for the expropriation of the property of aliens. The United States supported U.N. Resolution 1803, and has opposed all later efforts to dilute its force. The position of the United States, viewed as consistent with international law, was stated in 1940 by Secretary of State Hull in a note to the Mexican Ambassador: "the 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."¹⁰¹ In 1976 President Nixon made a similar declaration,¹⁰² and more recently President Reagan has reiterated that:

Under international law, no U.S. investment should be expropriated unless the taking (a) is done for a public purpose; (b) is accomplished under due

⁹⁹Department of External Affairs, Legal Bureau, *Canada and the U.N. Charter of Economic Rights and Duties of States*, (October, 1975; Mimeograph). In the words of the Canadian delegate, the provision could not be accepted because of "the absence of any references in Article 2 to the applicability of international law to the treatment of foreign investment". Statement by the delegate of Canada, 29 U.N. GAOR, C-2 (1649th mtg.) 446, U.S. Doc. A/C.2/SR. 1649 (1974).

¹⁰⁰*TOPCO Arbitration*, *supra*, note 79, para. 86. This is even more apparent given the recent political "polarization" of the U.N. General Assembly and the absence of any consistent state practice endorsing these recent resolutions. See *The Asylum Case* [1950] I.C.J. 266, 276 (the party seeking to establish a new rule of customary international law "must prove it is in accordance with a constant and uniform usage").

¹⁰¹MS. Department of State, file 812.6363/6659A, quoted in M. Whiteman, *supra*, note 87, 1020.

¹⁰²"Under international law, the United States has a right to expect [that when American private property is taken by a foreign government, the U.S.] citizens will receive prompt, adequate, and effective compensation from the expropriating country." Dept. of State, *Bulletin*, vol. 74, no. 1910 (2 February 1976) 138, quoted in E. McDowell, *Digest of United States Practice in International Law* (1975) 489.

process of law; (c) is non-discriminatory; (d) does not violate any previous contractual arrangements between the national or company concerned and the government making the expropriation; (e) is accompanied by prompt, adequate and effective compensation.¹⁰³

In summary, both the Canadian and U.S. governments continue to recognize the duty under international law to compensate for expropriation.

3. The Standard of Compensation

Presuming Canada's reservation of a twenty-five percent interest in exploration and production rights of aliens constitutes a taking of property which under international law must be accompanied by compensation, the question of an appropriate standard of compensation arises. The classic formulation of the measure of compensation is "prompt, adequate and effective" payment.¹⁰⁴ The *Restatement (Second) Foreign Relations Law of the United States* provides that failure to pay "just compensation" for an expropriation is wrongful.¹⁰⁵ Just compensation is defined as "adequate in

¹⁰³Statement by the President on International Investment Policy, *supra*, note 35, 5.

¹⁰⁴See I. Brownlie, *Principles of Public International Law*, 3rd ed. (1979) 533 *et seq.*; B. Wortley, *Expropriation in Public International Law* (1959) 33-4; Weigel and Weston, *Valuation Upon the Deprivation of Foreign Enterprise*, in Lillich, *supra*, note 83, vol. 1, 7-8. I. Foighel, *Nationalization and Compensation* (1964) 103, 141 and 147; *Restatement (Second) of Foreign Relations Law of the United States*, *supra*, note 64, § 187.

The standard of compensation for expropriation has engendered considerable debate and some confusion. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Supreme Court of the United States reviewed state practice in paying compensation for expropriation and concluded that there was no clearly defined standard. *Ibid.*, 429-31. In some instances, compensation has been paid but only after considerable effort to effect payment. See the *Sicilian Monopoly* case (settlement reached under threat of imminent arrival of British warships in Sicily); post war dispute between Yugoslavia and the United States (settlement on \$12 million in claims achieved after U.S. attached \$47 million in Yugoslavian gold); Chilean expropriation of copper mines (settlement obtained after suits brought against Chile in European courts).

Moreover, it has been argued that there is a practical limitation on the amount of compensation — *i.e.*, the state's ability to pay or to cope with the resultant economic burden. See Murphy, *Limitations Upon the Power of a State to determine the Amount of Compensation Payable to an Alien Upon Nationalization*, in Lillich, *supra*, note 83, vol. 3, 49, 52-3; Dawson and Weston, *Prompt, Adequate and Effective: a Universal Standard of Compensation?* (1962) 30 *Fordham L. Rev.* 727, 734. Some states have demonstrated a willingness to accept less than full compensation in recognition of the limited financial resources of the expropriating state. Brower, *supra*, note 55, 144. Of course, the *ability* of a state to pay and the *willingness* of a state to accept less than full compensation do not indicate any change in the basic rule requiring that a state make full compensation. Indeed, claims in all areas of the law have been settled for reasons known only to the parties, and such settlements have had no effect on the applicable rules of law.

¹⁰⁵*Restatement (Second) of Foreign Relations Law of the United States*, *supra*, note 64, § 186.

amount, paid with reasonable promptness, and paid in a form that is effectively realizable by the alien, to the fullest extent that circumstances permit."¹⁰⁶

International acceptance of this standard is evidenced by its incorporation into a growing network of bilateral treaties between capital-investing and capital-receiving countries.¹⁰⁷ These treaties, with the requirement of the traditional standard of full compensation, serve to encourage the flow of capital and technology by providing reasonable assurance and security to investors. With the foreign debt of some countries reaching alarming heights, the importance of equity investment by foreign companies, particularly in developing countries, has taken on added significance.

Turning to the specific elements of this standard, "adequacy" has generally been held to mean that compensation should reflect the full market value of the property rights taken, together with interest,¹⁰⁸ without taking account of the diminution in value occasioned by the expropriation. In applying the "full value" standard in particular cases, tribunals have taken a variety of factors into account. Such factors have included expected future

¹⁰⁶*Ibid.*, § 187.

¹⁰⁷See, for example, *Agreement on Protection of Investments*, 15 January 1970, Belgium-Indonesia, art. 5, paras 1-2, *Moniteur Belge*, No. 168, 31 August 1972, 9449 (Belgium), 843 U.N.T.S. 1921; *Agreement on Commerce*, 10 May 1960, Japan-Malaysia, art. 4, (1961) 5 Japanese Ann. Int'l Law 211-3, 383 U.N.T.S. 293-8; *Agreement on Protection of Investments*, 11 June 1975, United Kingdom-Egypt, art. 5, para. 2, 1976 U.K.T.S. 97 (Cmd 6638), 1032 U.N.T.S. (to be published) (U.N. Reg. No. 15181); *Treaty on Protection of Investments*, 10 December 1966, Federal Republic of Germany-Zambia, art. 3, para. 2, 1968 Bundesgesetzblatt [BGB] II, No. 3, 33 (West Germany). Each of these provisions is reprinted in International Chamber of Commerce, *Bilateral Treaties for International Investment* (1980).

¹⁰⁸See, for example, *Factory at Chorzow (Merits)* [1928] P.C.I.J., Ser. A, No. 17, 46 (compensation due for otherwise lawful expropriation is "not limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment"). The general rule in international law is that interest shall be allowed. As stated by one authority, "Interest, according to the usage of nations, is a necessary part of a just national indemnification." See Moore, *International Law Digest* (1906) vol. 6, § 1059. The *Restatement* provides that adequate compensation "must be equivalent to the full value of the property taken, together with interest to the date of payment when the taking involves rights acquired under a licence or commission." *Restatement (Second) of Foreign Relations Law of the United States*, *supra*, note 64, § 188(a).

The legal adviser of the U.S. Department of State has argued that the amount of compensation due to owners of operating enterprises that were expropriated by Iran should be based on the "going concern" value. This should reflect the property's income producing capacity, not just the book value or replacement costs of the expropriated enterprise. Legal Adviser, U.S. Department of State, *Application of Treaty of Amity to Expropriations in Iran*, 129 *Cong. Rec.* (14 November 1983, daily ed.) S 16055.

profits where concession rights are taken,¹⁰⁹ purchase and investment costs¹¹⁰ and valuation of physical assets and other elements of a going concern.¹¹¹ Another valuation method is based on the dollar amount of investment made by the expropriated entity (reduced by appropriate depreciation where necessary) and the present capitalized value of projected future earnings.¹¹²

Applying these standards of adequate compensation to the present case, it is evident that Canada's taking of a twenty-five percent share in exploration and production interests held by aliens is unlawful unless accom-

¹⁰⁹See, for example, *Award in the Matter of an Arbitration Between Kuwait and the American Independent Oil Co.* (1982) 21 I.L.M. 976 (Arb. Trib.) (depreciated value of fixed assets plus the owner's legitimate expectations of a reasonable rate of return); *Award in the Case of AGIP Company v. Popular Republic of the Congo* (1979) 21 I.L.M. 726 (ICSID Arb.) (award included actual losses plus expected profits); *Benvenuti et Bonfant, supra*, note 83, (award included expected lost profits); *Shufeldt Claim* (U.S. v. Guatemala) (1930) 2 R. Int'l Arb. Awards 1080, 1097. See also G. White, *supra*, note 69, (several cases have awarded compensation for loss of future profits during unexpired term of concession agreement).

¹¹⁰See American Mexican Claims Comm'n, *Report to the Secretary of State* (1948) (Dept't of State publication) 2859; *Claim of Mexico Diversified Land Co.* (Decision No. 33-C, General Docket No. 3006), discussed in Whiteman, *supra*, note 87, 1146.

¹¹¹See *Claim of Amerikansko Jugoslovensko Elektricno Drustvo* (Foreign Claims Settlement Comm'n) (Docket No. Y-252, Decision No. 1485, Proposed Decision, 10 November 1954; Final Decision, 30 December 1954) discussed in Whiteman, *supra*, note 87, 1147.

¹¹²See, for example, *Starrett Housing Corp. v. The Islamic Republic of Iran* (1983) Iran. Assets Lit. Rep. 7,685 (Award No. ITL 32-24-1) (Tribunal appointed expert to consider the discounted cash flow method of valuation); *Mobil Corporation v. Marathon Oil Co.* (1981) Fed. Sec. L. Rep. para. 98,375 (S.D. Ohio) (discounted cash flow analysis of oil field).

Other methods exist such as the replacement value of the expropriated property plus interest. This, however, could result in an inflationary windfall to the expropriated investor, but at the same time, would not include any compensation for expected future earnings. A more amorphous measure would be the "value" to the expropriating government of the property, but such a subjective standard does not lend itself to easy application or mutually agreeable results.

It should be noted that although compensation for reasonably ascertainable future profits is appropriate, there is some evidence that "excess profits" are non-compensable. United Nations General Assembly Resolution 1710 recognized that a State is entitled to receive only reasonable profits on investments. And in the Chilean expropriation of the Anaconda, Cerro, and Kennecott copper mines in 1971, the Chilean Congress enacted a constitutional amendment which provided that in the "case of the nationalization of mining activities or companies . . . [a]ll or part of the excess profits that nationalized companies have obtained may also be deducted from the compensation". See Law No. 17450 of 15 July 1971, printed in (1971) 10 I.L.M. 1067. Subsequently, the President issued a decree that compensable profits would be determined as 10% of book value of the investment. See *Presidential Decree Concerning Excess Profits of Copper Companies* (1973) 12 I.L.M. 983. The United States objected strenuously to this determination as not having any foundation in international law. See, generally, Steiner & Vagts, *supra*, note 80, 452-5. It should be noted that excess profits were apparently deducted in the Iranian expropriation of the Anglo-American oil company. See Wesley, "A Compensation Framework for Expropriated Property in Developing Countries", in Lillich, *supra*, note 83, vol. 3, § 32, No. 143. The issue of excess profits would not arise in the context of investments that have yet to earn a substantial return. Moreover, the term "excess profits" is not subject to objective definition — what is excessive to one may be normal or reasonable to another. Nor does the term appear in international decisions or writings involving expropriation cases.

panied by payment of the full value of those interests. Any measure of compensation short of this would deprive foreign interest holders of the value of property rights that were vested and protected under the Canadian law that created them. The Crown share provisions do not satisfy the standard of adequate compensation since the *Act* does not even purport to compensate foreign persons for the value of interests which have been transferred to the Canadian government. Indeed, the *Act* expressly denies a right to receive such compensation.¹¹³

Nor can the provisions for the limited expense-related payments satisfy the standard of adequate compensation.¹¹⁴ Those provisions afford no compensation whatsoever to many interest holders whose property is subject to the operation of the Crown share. Moreover, the payments that are available would not even cover exploration and development expenses, let alone the full value of the expropriated property rights.¹¹⁵ The costs that are covered

¹¹³*Canada Oil and Gas Act*, S.C. 1981, c. 81, s. 61(2).

¹¹⁴Indeed, the Canadian government has repeatedly insisted that these *ex gratia* payments "are not to be construed as representing 'financial compensation' for the Crown Interest". See, Memorandum, "Canada Lands and the Crown Interest", attached to Letter to Alexander M. Haig, Jr., U.S. Secretary of State from Mark MacGuigan, Canadian Secretary of State for External Affairs (5 November 1981) 5.

One might suggest that the Petroleum Incentives Program ("PIP"), a separate component of the NEP, should be viewed as compensation for the taking effected by the Crown share law. Under PIP, the Canadian government contributes to expected exploration and development costs. However, the amount of the PIP contribution varies with the rate of Canadian participation in the exploration activity. Indeed, the purported benefits accruing under PIP are in no way related to the value of interests that may be taken by virtue of the Crown share provisions and therefore cannot be regarded as adequate compensation for that taking.

Moreover, PIP clearly is not identified as compensation for persons affected by operation of the Crown share law. The stated purpose of the legislative program including both PIP and the Crown share law was to give the Canadian government a greater share of the benefits of oil and gas production activities. See Memorandum, "Evolution of Crown Participation in Oil and Gas Rights on Canada Lands", attached to Letter to Alexander M. Haig, Jr., U.S. Secretary of State, from Mark MacGuigan, Canadian Secretary of State for External Affairs (5 November 1981). To this end, a whole complex of programs, including the Progressive Incremental Royalties program and the Crown share law, was instituted. Taken in its entirety, this complex operates to the detriment of pre-existing foreign operators when compared with the previous regulatory regime governing oil and gas exploration and production activities in Canada.

¹¹⁵The payments authorized by the *Canada Oil and Gas Act*, S.C. 1981, c. 81, cover 25 percent of two-and-one-half times specified exploration costs incurred by holders of certain production licences. Those payments, which bear no relation to the value of assets taken, are unavailable to holders of any interest other than "a production licence in relation to which the original discovery of oil or gas was the result of a well on which drilling was commenced on or before 31 December 1980 and that qualified to be declared a significant discovery on or before 31 December 1982": s. 29(4)(a). The provision for multiplying eligible costs by two-and-one-half, together with a provision for annual escalation of eligible costs by 15% until 31 December 1980 (s. 29(4)(b)), is apparently designed to ensure that the expense payments retain their real dollar value even if commercial production does not begin for several years. See Memorandum, *supra*, note 114, 5.

by these payment provisions include only pre-1981 exploration costs that contributed directly to the drilling of a discovery well, and pre-1981 costs associated with the development of an actual discovery. This limitation deprives many interest owners of any payment whatsoever for expenses that were incurred in anticipation of enjoying the full benefits of eventual production. Exploration activities preceding the drilling of a discovery well typically span a period of several years,¹¹⁶ and entail millions of dollars in costs. Consequently, the payment provisions in the *Act* can only be described as inadequate.¹¹⁷

Compensation for the taking of an alien's property must also be made promptly or "as quickly as possible".¹¹⁸ This standard has been interpreted

¹¹⁶The length of time typically spent on exploration and development activities prior to commercial production is reflected in the time periods associated with exploration rights created under the *COGL Regulations*. For example, exploration agreements were granted under those regulations for initial terms of up to 10 years, renewable for additional periods of up to 10 years. *COGL Regulations*, C.R.C. 1978, c. 1518, s. 31(1).

¹¹⁷In practical terms, the measure of payment provided in the *Act* covers only a fraction of the costs incurred before oil or gas can be produced in commercial quantities. It completely excludes the overwhelming majority of costs entailed in drilling exploratory wells. Approximately 85 percent of all exploratory wells are "dry". When successful in drilling a discovery well, typically a number of dry holes have preceded the discovery. For example, 46 dry holes were drilled on the North Slope of Alaska before Prudhoe Bay, the largest field in North America, was discovered. See the testimony of William E. Crain before the House Ad Hoc Select Committee on the Outer Continental Shelf (10 May 1977) 8.

Each of these unsuccessful exploration wells costs literally millions of dollars to drill. Under the payment provisions of the *Act*, none of the costs associated with such dry wells would be subject to reimbursement. When the myriad of costs necessary to oil exploration are considered, it is apparent that the payment provisions do not come close to covering the basic costs incident to finding and producing oil even if they were intended to do so. Of course, mere reimbursement of costs would appear to be inadequate under the international standard of compensation.

The inadequacy of the payment provisions of the *Act* is even more apparent when the provisions are viewed in light of the industry practice of paying for unproductive exploration efforts with the revenues attributable to successful ones. A study undertaken by the National Petroleum Council found that only one out of fifty or more leases for exploration and production in frontier areas can be expected to be profitable. National Petroleum Council, *U.S. Arctic Oil and Gas* (1981). This average reflects the fact that exploration activities, by their very nature, entail substantial risks. For this reason, profits from a successful lease are needed to absorb the costs for the vast majority of leases that prove unprofitable. Yet under the *Canada Oil and Gas Act*, twenty-five percent of the petroleum found in productive interest areas is taken without compensation, and no payment is authorized to cover the costs of unproductive exploration activities, even on the same exploration area.

¹¹⁸See *David Goldenberg Case* (Germany v. Roumania), *supra*, note 84, 909.

as requiring payment of full compensation as of the date of effective taking.¹¹⁹ Since the *Canada Oil and Gas Act* prohibits compensation for the taking of acquired rights, then *a fortiori* the legislation fails to meet the standard of prompt compensation. Moreover, even the provisions for expense-related payments do not provide for prompt payment. These payments are to be made "only out of the net proceeds of disposition of the oil and gas produced that is imputable to the Crown share."¹²⁰

Compensation for expropriation must also be in an "effectively realizable form".¹²¹ This standard generally requires that compensation be in the form of cash, or property readily convertible to cash, in the currency of the country of which the alien is a national.¹²² The *Canada Oil and Gas Act* obviously fails to provide effective compensation since it provides neither adequate nor prompt compensation.

Conclusion

The issues, both legal and political, raised by the Canadian National Energy Program are complicated and of considerable import to Canada's external affairs, notably Canada-U.S. relations. This paper has focused on the legal question whether the Program implements its policies of Canadianization in a manner consistent with established rules of international law. Certainly, the Government's desire to encourage Canadian participation in the oil and gas industry should not be subject to criticism. The means to further this goal, however, cannot be discriminatory or unfairly retroactive. In a world of diverse national objectives, where normative judgments regarding those objectives are not universal, the need to protect against unfair and illegal methods is critical. It is the role of international law to ensure that diverse national objectives are not sought or obtained at the expense of fairness or justice.

International law requires full payment for the expropriation of the property of aliens. The generally accepted standard is one that affords prompt,

¹¹⁹See Whiteman, *supra*, note 87, 1171.

¹²⁰*Canada Oil and Gas Act*, S.C. 1981, c. 81, s. 29(3)(b).

¹²¹Restatement (Second) of Foreign Relations Law of the United States, *supra*, note 64, § 190.

¹²²Restatement (Second) of Foreign Relations Law of the United States, *supra*, note 64, § 190. Cf. *Agreement on Protection of Investments*, 16 October 1974, Netherlands-Republic of Korea, art. 5, para. c, 1974 Tractatenblad, No. 220, 973 U.N.T.S. 97-9 (compensation for taking of property of treaty party's nationals, to be effective, must be paid and made transferable to country of which claimants are nationals and in convertible currency); *Agreement on Protection of Investments*, 28 July 1967, Italy-Malta, art. 4, *Gazetta Ufficiale*, No. 216, 22 August 1973, 5803 (Italy) (compensation must be "immediately transferable in convertible currency, without limitation"). These and similar provisions appearing in other bilateral treaties are reprinted in *Bilateral Treaties for International Investment*, *supra*, note 107.

adequate and effective compensation, reflecting the full value of the property that is taken. In this regard Canada has fallen short of its obligations, as Parliament has passed legislation which effects a taking of valuable property rights without meeting the international standard of compensation. Moreover, the legislation deprives the alien of access to any legal or regulatory remedy. As this legislation is uncharacteristic of the Canadian Government's traditional respect for the rule of law, it is hoped that the National Energy Program will be re-evaluated and brought back into step with established rules of international law.
