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FIXING INTERNATIONAL LAW OR FIXING CASTRO?

Kenneth J. Vandevelde[*]

Forty years after his rise to power, Fidel Castro continues to preoccupy the minds of American policymakers. This is evidenced by a range of Castro-inspired measures, from the 1962 Hickenlooper Amendment[1] to the 1996 Helms-Burton legislation,[2] many of which have been in reaction to Castro's uncompensated expropriation of American property.[3] Edwin D. Williamson's proposal would be the latest in this series of measures.[4]

The use of treaties to protect property against expropriation by foreign states dates from the early nineteenth century.[5] Such efforts have reached unprecedented magnitude in the late twentieth century as more than 160 states have participated in the negotiation of a network of more than 1300 bilateral investment treaties (BITs)[6] that protect foreign investment against expropriation, currency exchange controls, and discriminatory treatment. Williamson proposes that this network of treaties

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1. Foreign Assistance Act of 1962 § 301(d)(3), 22 U.S.C. § 2370(e) (1994). The Hickenlooper Amendment is one of several U.S. statutes requiring the imposition of various economic sanctions on states that expropriate property owned by U.S. nationals without payment of prompt, adequate, and effective compensation. Enacted in 1962, its purpose was to prevent future uncompensated expropriations; thus, it did not apply to prior Cuban expropriations. *See generally* Kenneth J. Vandevelde, *Reassessing the Hickenlooper Amendment*, 29 VA. J. INT'L L. 115 (1988).

2. U.S. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. §§ 6021-6091 (Supp. 1998) [hereinafter Helms-Burton].

3. *See, e.g.*, Letter from the Department of State to Senator J.W. Fulbright Concerning Expropriation of U.S. Private Investments (May 7, 1962), *reprinted in* 1962 U.S.C.C.A.N. 2078-79. In 1959, Castro initiated a series of expropriations that resulted in the loss of nearly $1 billion in U.S. property, for which compensation has not been paid. *See id.* The figure of approximately $1 billion is an estimate of the book value of the expropriated property. *See id.*

4. *See* Edwin D. Williamson, *U.S.-EU Understanding on Helms-Burton: A Missed Opportunity to Fix International Law on Property Rights*, 48 CATH. U. L. REV. 293 (1999).

5. *See, e.g.*, General Convention of Peace, Amity, Navigation and Commerce, October 3, 1824, U.S.-Colom., 8 Stat. 306. The fifth article prohibits the seizure of certain foreign owned property without "sufficient indemnification." *Id.* at 308.

6. For a listing of the treaties, see U.N. CONFERENCE OF TRADE AND DEVELOPMENT, BILATERAL INVESTMENT TREATIES IN THE MID-1990S at 159-218, U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. 98.II.D.8 (1998).

be supplemented by a multilateral agreement enabling the former owner of expropriated property to file a civil action for compensation against any party that subsequently acquires the expropriated property or products produced therefrom.[7]

Given that the expropriation of foreign-owned property has become a rare occurrence in the last decade,[8] the recent appearance of a proposal for a treaty directed solely at the problem of expropriation is somewhat surprising. The explanation lies in the continuing preoccupation with Castro. Williamson has proposed a treaty that would provide relief to victims of Cuban expropriations similar to that afforded by Helms-Burton,[9] thereby allowing Congress to repeal that highly controversial legislation[10] without diminishing the remedies available to American victims of the Cuban expropriations.

Williamson suggests that the treaty would serve the further purpose of discouraging future expropriations.[11] International law, however, recognizes the legitimate power of states to expropriate foreign-owned property, as long as they pay just compensation,[12] a principle also recognized in the Fifth Amendment to the U.S. Constitution.[13] The problem thus should be seen as one of ensuring compensation, not deterring expropriation.

One objection to Williamson's proposal is the conceptual difficulty involved in defining the term "expropriation." At least two issues can arise. The first is the degree of state interference needed. In other words, at what point does state interference with property (short of a complete confiscation) so intrude on the rights of the owner that the property may be considered to have been expropriated?[14] The second issue is how to define the property interests that are the object of the interference. For example, if the right to extract minerals is property, then

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7. *See* Williamson, *supra* note 4, at 304-05.

8. *See* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 644 (1998).

9. *See* Williamson, *supra* note 4, at 293, 304, 313 (suggesting that the proposed treaty would substitute for Helms-Burton).

10. *See* Ana Julia Jatar-Hausmann, *What Russia Can Learn from Cuba / What Cuba Can Teach Russia*, 113 FOREIGN POLICY 87, 89 (1998-99). Helms-Burton is extremely unpopular with America's allies, who resent American attempts to coerce other countries to support American economic sanctions against Cuba. *See id.*

11. *See* Williamson, *supra* note 4, at 304.

12. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987).

13. U.S. CONST. amend. V.

14. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (classic U.S. constitutional case recognizing this problem).

legislation that prohibits mining, and thus extinguishes that property right, could be an expropriation. If the property right is defined more broadly as the owner's entire interest in the land, then the same prohibition on mining could be said to leave the property largely intact and thus not to constitute an expropriation.[15]

Property protection treaties historically have not defined the term "expropriation." This is attributable perhaps to the fact that the expropriations usually contemplated by those treaties were state seizures by force or decree of large commercial enterprises—situations in which few would contest that an expropriation had occurred.[16] The Multilateral Agreement on Investment (MAI) negotiations described by Williamson, however, involved the developed states of the Organisation for Economic Cooperation and Development (OECD), which have highly regulated economies and whose investors own a broad array of investments in the territories of the other negotiating parties. In the course of the negotiations, it became apparent that a wide range of ordinary regulatory activity could extinguish specific rights and, if each of these rights were protected by the treaty, then much of this regulatory activity could constitute compensable expropriations. As Williamson reports, the vexing problem of how to define expropriation was among the issues that led to the failure of the MAI negotiations.[17]

Williamson suggests that the United States might avoid these problems in his proposed treaty with a reservation that defines the term "expropriation" coextensively with the term "taking" in the Fifth Amendment to the U.S. Constitution.[18] Defining international legal obligations in terms of a party's domestic law, however, is always a troubling practice because the party can change its domestic law, thereby unilaterally modifying its treaty obligations. Those who care about creating an international human rights law (as Williamson does) should be slow to suggest a solution that binds states to no greater obligations than those required by one state's domestic laws. Such a reservation by the United States could prompt other states to define expropriation in problematic ways. Fur-

15. *See* Williamson, *supra* note 4, at 308-09 (addressing this concern surrounding the definition of "expropriation").

16. *See generally* G. C. Christie, *What Constitutes a Taking of Property Under International Law?*, 1962 BRIT. Y.B. INT'L L. 307 (1962) (discussing state seizures of alien enterprises and the definition of expropriation); Burns H. Weston, *"Constructive Takings" Under International Law: A Modest Foray into the Problem of "Creeping Expropriation,"* 16 VA. J. INT'L L. 103 (1975) (analyzing the confusion associated with defining expropriation).

17. *See* Williamson, *supra* note 4, at 297-99, 308.

18. *See id.* at 309.

thermore, how the proposed registry of expropriated property would operate is unclear if states are not using a common definition of expropriation. A better approach than a U.S. reservation may be to address the problem directly in the text of the proposed treaty with careful definitions of the terms "expropriation" and "property." As the MAI negotiations demonstrated, however, this would be no easy task.

Another objection to Williamson's proposal is that the treaty could result in compensation of the expropriated owner in an amount unrelated to the value of the loss. Under the proposed treaty, for example, the former owner of an expropriated automobile manufacturing plant would have a claim for compensation against the new plant owner and anyone who acquired an automobile manufactured in the plant.[19] The perpetual recovery of compensation could result in compensation in excess of the value of the expropriated plant (particularly if the plant was operating at a loss or heavily laden with debt). More to the point, there simply would be no relationship between the owner's loss and the total compensation eventually received. Given that the purpose of the treaty should not be to deter expropriation, but to ensure just compensation, the proposed treaty should permit recovery of only the value of the expropriated property.

Although international law in the past has protected solely foreign owners of property against expropriation, Williamson's proposed treaty would provide domestic owners of expropriated property an international venue in which to assert claims for compensation, drawing an analogy to human rights treaties that protect individuals from their own governments.[20] This is a laudable proposal, not only because it would create symmetry between international treatment of economic and non-economic rights, but also because it would build a domestic constituency in support of liberalism, generally. The proposal would make clear that liberalism is defensible as a matter of principle and not merely as a Trojan horse for the economic interests of developed states.[21]

This brings us to what may be the single greatest problem with Williamson's proposal - its acceptability to other states. To some, the treaty will seem to be less a logical evolution in international human rights law than an attempt to enlist the international community in what many re-

19. *See id.* at 305.

20. *See id.* at 306.

21. My praise of this proposal is not disinterested. I advanced a similar proposal in two essays published last year. *See* Kenneth J. Vandevelde, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT'L L. 373 (1998); Kenneth J. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621 (1998).

gard as an increasingly tiresome American grudge against Castro. The most sympathetic audience for the proposal would be the other OECD countries but, as Williamson notes, the Understanding that the OECD states were considering as part of the MAI negotiations (and which failed along with the MAI negotiations) was weaker than his proposal.[22]

The problem of the uncompensated Cuban expropriations justifiably remains on the American agenda, and attempts to find alternatives to the Helms-Burton legislation are deserving of praise. It increasingly appears, however, that a workable solution to the Cuban expropriations awaits the rejuvenation of the Cuban economy and the restoration of normal relations between the United States and Cuba.[23]

22. *See* Williamson, *supra* note 4, at 296-304 (explaining the provisions and the weaknesses of the Understanding).

23. *See generally* RICHARD B. LILLICH & BURNS H. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS (1975); Richard B. Lillich & Burns H. Weston, *Lump Sum Agreements: Their Continuing Contribution to the Law of International Claims*, 82 AM. J. INT'L L. 69 (1988). Massive expropriations of foreign property under the banner of socialist reform often have taken decades to resolve and frequently have been settled by the expropriating state making lump sum payments to the home states of the victims. *See generally* LILLICH & WESTON, *supra*; Lillich & Weston, *supra*.