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## ESSAY

# U.S.—EU UNDERSTANDING ON HELMS-BURTON: A MISSED OPPORTUNITY TO FIX INTERNATIONAL LAW ON PROPERTY RIGHTS

*Edwin D. Williamson\**

The May 1998 Understanding with Respect to Disciplines for the Strengthening of Investment Protection<sup>1</sup> between the United States and the European Union, designed to settle their differences over the controversial U.S. legislation known generally as “Helms-Burton,” was a missed opportunity to negotiate a treaty that would confirm and clarify internationally recognized rules protecting property rights. Not only could such a treaty confirm the traditional prohibition on confiscation of aliens’ property, but like other human rights treaties, it could also clearly establish states’ obligations in respect of a fundamental human right of their own nationals—the right to own property.

### I. BACKGROUND

In March 1996, the U.S. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996,<sup>2</sup> better known as Helms-Burton, became law. Title III of the law would allow U.S. citizens and corporations whose property was confiscated by the Cuban government any time after January 1, 1959 to bring suits for damages in United States federal courts against anyone “trafficking” in their former property at any time after Novem-

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1. The European Union, Understanding with Respect to Disciplines for the Strengthening of Investment Protection, May 18, 1998, U.S.-EU, (last visited Feb. 3, 1999) <<http://eurunion.org/news/invest.htm>> [hereinafter *Understanding*].

2. 22 U.S.C. §§ 6021-6091 (Supp. II 1997).

ber 1, 1996.<sup>3</sup> Title IV prohibits entry into the United States by persons who traffic in confiscated property after March 12, 1996.<sup>4</sup> The prohibition also applies to the trafficker's family, and where the trafficker is a corporation, its corporate officers, principals and controlling shareholders, and their agents and families.

Since its enactment, Helms-Burton has stirred controversy. Many international public law experts have criticized it as a violation the customary rules of international law. The pronouncements of these experts stand as proof of the low standing of property rights among those members of the community that purport to define those rules. For example, the Inter-America Juridical Committee's opinion on Helms-Burton (sadly joined in by the U.S. member) implicitly held that a confiscating state can pass good title to the confiscated property (including identifiable products produced from the property).<sup>5</sup> The opinion also held that international law does not recognize any right by the former property owner to assert a claim against the confiscating state and that the former property owner's claim can only be asserted through an espousal by his or her state.<sup>6</sup> Furthermore, according to the opinion, the former property owner must have been a national of the espousing state at all times from the time of the expropriation to the assertion of the claim and cannot have been a national of the confiscating state at the time of the confiscation.<sup>7</sup> If this is a correct statement of the customary international law on property rights, one could not find more convincing evidence of the need to change international law on this subject.

More important than the legal controversy has been the fierce policy conflict that Helms-Burton stirred between the United States and its principal trading partners—the members of the EU and Canada. In July 1996, President Clinton announced that he would not exercise his right to suspend the August 1, 1996 effective date of Title III, but that he would exercise his authority to suspend for six months the right of U.S. citizens and corporations to bring suit under Title III. The suspension required a Presidential determination that it was “necessary to the national interests” and would “expedite a transition to democracy in Cuba.”<sup>8</sup> The ef-

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3. *See id.* § 6082(a)(1)(A).

4. *See id.* § 6091(a)(2).

5. *See Opinion of the Inter-America Juridical Committee on Resolution AG/DOC. 3375/96 “Freedom of Trade and Investment in the Hemisphere,”* OEA/ser. G/CP, doc. 2803/96, paras. 5, 6 (Aug. 23, 1996), available in 35 I.L.M. 1322 (1996).

6. *See id.* at para. 5.

7. *See id.*

8. Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, PUB. PAPERS 1136, 1137 (July 16, 1996).

fect of this action was to establish irrevocably the right to assert a claim against anyone “trafficking” in confiscated property after November 1, 1996, but to delay the ability to assert that claim while the United States continued its diplomatic efforts to persuade others to “tak[e] concrete steps to promote democracy in Cuba.”<sup>9</sup>

In October 1996, the EU filed a complaint against the United States in the World Trade Organization (WTO), alleging that Helms-Burton violated the rules of the WTO or was inconsistent with their underlying principles, because of the use of “extra-territorial means” to achieve Helms-Burton’s objectives and the threat and imposition of trade sanctions.<sup>10</sup> Notwithstanding its strong criticism of Helms-Burton and the filing of the WTO proceeding, in early December, 1996, the EU adopted a “common position” toward Cuba,<sup>11</sup> which the United States said “explicitly makes any improvement in [the EU’s] political or economic relations with Cuba contingent on concrete advances in human rights and political freedoms on the island.”<sup>12</sup> This “common position” provided President Clinton with a basis for announcing in January, 1997 that he was suspending the right to bring suits under Title III for another six months.<sup>13</sup>

After intensive diplomatic efforts, on April 11, 1997, then U.S. Undersecretary of Commerce for International Trade Stuart Eizenstat and then European Commission External Affairs Minister Sir Leon Brittan negotiated an agreement pursuant to which the parties undertook to try to “develop agreed disciplines and principles for the strengthening of investment protection” which “inhibit and deter the future acquisition” of property expropriated in violation of international legal principles “and

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9. *Id.*

10. The European Union, Statement by the Representative of the European Communities and Their Member States at the Dispute Settlement Body of the WTO: Request for a Panel on the Helms/Burton Bill (last visited Feb. 3, 1999) [wysiwyg://content.4/http://eurunion.org/legislat/extrel/cuba/panel.htm](http://content.4/http://eurunion.org/legislat/extrel/cuba/panel.htm); see also United States—The Cuban Liberty and Democracy Act: Request for the Establishment of a Panel by the European Communities, para. (a), ET/DS38/2 (October 8, 1996), available at The World Trade Organization, *WT/DS38/2* (last visited Feb. 4, 1999) <<http://www.wto.org/ddf/>> (search for “extraterritorial application” in SEARCH TERMS field of WT/DS38/2 in DOCUMENT SYMBOL field).

11. Common Position of 2 December 1996 Defined by the Council on the Basis of Article J.2 of the Treaty on European Union, on Cuba, 1996 O.J. (L 332) 1, 1, available at The European Union, *EU Legislation Concerning Cuba (Part 3): Common Position on Cuba* (last visited Feb. 3, 1999) <[wysiwyg://content.4/http://eurunion.org/legislat/extrel/cuba/cuba3.htm](http://content.4/http://eurunion.org/legislat/extrel/cuba/cuba3.htm)>.

12. Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 33 WEEKLY COMP. PRES. DOC. 3, 4 (Jan. 3, 1997).

13. See *id.* at 3-4.

subsequent dealings in covered investments.”<sup>14</sup> The United States agreed to continue its suspension of Title III and to seek from Congress a legislative waiver of Title IV of Helms-Burton. The EU agreed to suspend its challenge of Helms-Burton in the WTO.<sup>15</sup>

At the G-8 summit on May 17, 1998, the United States and the EU announced that they had reached the Understanding with Respect to Disciplines for the Strengthening of Investment Protection (“Understanding”).<sup>16</sup> The United States undertook to consult with Congress with a view to obtaining a *permanent* waiver of Title IV. The agreed upon disciplines that would take effect *simultaneously* with the exercise of the waiver authority. The United States also undertook to seek a permanent waiver of Title III, which is less of an issue, because the President can invoke six-month waivers *ad infinitum*.

## II. THE UNDERSTANDING

The Understanding purports to establish “disciplines” that would apply to “expropriated properties.”<sup>17</sup> The disciplines include denial of governmental support and commercial assistance for “covered transactions” in expropriated properties, as well as undertakings to make joint or coordinated representations to the expropriating state and publication of a list of expropriated properties and statements discouraging covered transactions in the listed properties.<sup>18</sup> The Understanding contemplated that the United States and the EU would jointly propose that the disciplines be included in the Multilateral Agreement on Investment<sup>19</sup> (generally referred to as the “MAI”) then being negotiated among the twenty-nine members of the Organization for Economic Cooperation and Development<sup>20</sup> (generally known as the “OECD”), which constitute the most industrialized countries of the world, with participation by important non-OECD members, such as Argentina, Brazil, Chile, Slovakia, Hong Kong-China and the Baltic states, as well as the EU. Prior to the MAI’s entry into force, the Understanding contemplated that the par-

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14. Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act, U.S.-EU, April 11, 1997, 36 I.L.M. 529, 529 (1997).

15. *See id.* at 530.

16. *See Understanding, supra* note 1.

17. *See id.* at para. I.A.5.

18. *Id.* at para. I.A.4.

19. *See id.* at para. II.2.

20. *See* Organisation for Economic Co-operation and Development, *The Multilateral Agreement on Investment: The MAI Negotiating Text and Commentary (as of 24 April 98)* (last visited Feb. 3, 1999) [hereinafter *MAI Negotiations*] <<http://www.oecd.org/daf/cm/mai/negtext.htm>>.

ticipants would apply the disciplines as a matter of policy. Unfortunately, prospects for the successful negotiation of the MAI, which were not good at the time the Understanding was reached, are now almost non-existent, given the December 3, 1998 statement by the OECD that the MAI negotiations “are no longer taking place.”<sup>21</sup>

(a) *Weaknesses in the Understanding.* The Understanding is very weak in a number of respects—the definition of expropriated properties is almost illusory, the definition of “covered transactions” is too narrow, the “disciplines” are too limited in scope, the claims Registry has no legal significance and the Understanding fails to advance the state of customary international law as it applies to expropriations. While the Understanding will not apply to covered transactions occurring prior to its effective date, it will in effect apply to property expropriated prior to its effective date, if as of such date no investment had been made by a national of a participant in the Understanding (*i.e.*, the United States and the EU).

• *Definition of “expropriated properties.”* For a property to fall into this definition, it must come within one of three specified categories:<sup>22</sup>

(A) Property which an international tribunal or a court in the expropriating state has decided has been expropriated in violation of *international law*.<sup>23</sup>

(B) Property as to which, through “modalities to be elaborated” among the participants in the Understanding or the parties to the MAI (if there should ever be an MAI), it has been concluded that the person claiming expropriation has a “claim, well-founded in law and fact, of expropriation in contravention of *international law* and has not been afforded recourse to an adequate judicial or arbitral remedy.”<sup>24</sup>

(C) “Property in respect of which [the participant] . . . has come to the view [under procedures designed to deal with repeat expropriators] . . . that the property has been expropriated in con-

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21. Marc Selinger, *Nations Drop Efforts on Global Investment Deal*, WASH. TIMES, Dec. 5, 1998, at C1; Organisation for Economic Co-operation and Development, *International Investment Rules: Informal Consultations on International Investment* (last visited Feb. 3, 1999) <<http://www.oecd.org/daf/cmisis/mai/mainindex.htm>> (press release from Dec. 3, 1998).

22. See *Understanding*, *supra* note 1, at para. I.B.1.

23. See *id.* at para. I.B.1(a).

24. *Id.* at para. I.B.1(b) (emphasis added).

travention of *international law*.”<sup>25</sup>

Clause A does not provide meaningful protection. The cases in which a court in an expropriating regime reaches a conclusion that its taking of property constitutes an illegal expropriation are rare, and such a law-abiding regime is hardly the typical expropriator that property protection measures, such as those found in bilateral investment treaties (referred to as “BITs”) and the investment chapter of the North American Free Trade Agreement (NAFTA)<sup>26</sup> and proposed in the MAI negotiations,<sup>27</sup> address. Rather, it is the regime that refuses to acknowledge that it has done anything wrong in taking property that creates the concern. Likewise, it is unlikely that such a regime would have entered into an agreement providing for arbitration of expropriation claims or, if it or a predecessor regime had, it is unlikely that it would consider itself to continue to be bound by such an agreement.

Clause B, at least on its face, appears helpful when Clause A is not available, except for one problem—there are no “modalities” in existence of the type referred to in Clause B. The Understanding suggests that such “modalities” could be “elaborated among the participants or under the MAI.” As indicated above, the chance of a successful negotiation of the MAI is almost non-existent.

Clause C, at best, reflects a political understanding, not a legal agreement. The Understanding contemplates that when one participant (*e.g.*, the United States) “is of the view” that a particular country has a record of “repeated expropriations in violation of international law” (*e.g.*, Cuba), it will inform the other participant (*e.g.*, the EU) of this view and provide information, *et cetera*.<sup>28</sup> The other participant (the EU in this example) will make that information available to its agencies that decide on government support and commercial assistance (as well to its investors who so request), will “expeditiously” evaluate and take into account the information so furnished in reviewing individual requests for commercial assistance for covered transactions, and “will give proper consideration to the question whether there has been an expropriation in contravention of international law before taking a decision on such requests.”<sup>29</sup> If following that “proper consideration” this participant (the EU in this example) comes to the view that an expropriation in contra-

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25. *Id.* at para. I.B.1(c) (emphasis added).

26. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., ch. 11, 32 I.L.M. 605, 639-49 (1993) (entered into force Jan. 1, 1994) [hereinafter NAFTA].

27. See MAI Negotiations, *supra* note 20.

28. *Understanding*, *supra* note 1, at para. I.B.3.

29. *Id.* at para. I.B.3(c).

vention of international law has occurred, the property falls within Clause C and this participant is obligated to apply the disciplines. Given the discretion of the participant who receives the information from the other participant in reaching a conclusion as to expropriation, it is unlikely that such a conclusion would be reached in respect of a politically popular expropriator, as Cuban Premier Fidel Castro is in France. As discussed below under “Acceptance of the Understanding by Congress,” the European Commission did, however, review “a small number” of claims that had been certified by the U.S. Foreign Claims Settlement Commission (FCSC), and in an Annex to the Understanding (and repeated in a letter from Sir Leon Brittan to U.S. Secretary of State Madeleine Albright), the EU confirmed that “it is reasonable to assume” that the EU would have come to the view that those claims were based on expropriations in contravention of international law.<sup>30</sup> The Annex (and the letter) went on to state that if, “as the United States indicates,” the eight cases were “typical” of the remaining FCSC-certified claims and those claims were also reviewed, “it is reasonable to assume” that the EU would come to the same view.<sup>31</sup>

In summary, the definition of “expropriated properties” is illusory, because, as a practical matter, no property is likely to fall within Clause A; Clause B contemplates “modalities” for the determination of expropriated properties that do not exist; and whether properties fall within Clause C is left to the judgement of each participant.

- *Definition of “covered transactions.”* This definition covers any future transaction that gives rise to direct ownership in, or control of, expropriated property or an entity owning or controlling expropriated property, if the expropriated property is a significant portion of its assets or is a fundamental element of the transaction.<sup>32</sup> “Covered transaction” does not include transactions in goods or services produced on or from expropriated property nor does it include the provision of goods or services to the investor in the expropriated property.<sup>33</sup>

- *Definition of “disciplines.”* The Understanding sets forth “general” and “specific” disciplines. General disciplines include a “commitment to strengthen the international protection of property rights in the

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30. *Id.* at Annex D.

31. *Id.*

32. *See id.* at Annex C, para. 1.

33. *See id.*



context of investment protection,” an agreement to make “joint or coordinated exhortations, diplomatic efforts and declarations on the observance of international law standards of expropriation,” the establishment of a Registry of claims (which is discussed in the next bullet point), and an agreement to “urge” international financial institutions to adopt policies and programs that “promote a favorable investment climate by encouraging resolution of expropriation claims and discouraging covered transactions in expropriated properties.”<sup>34</sup>

Specific disciplines include “joint or coordinated diplomatic representation to the expropriating state,” denial of “government support” (*i.e.*, “the forms of support normally performed by embassies and commercial, foreign and trade ministries”) and “government commercial assistance” (*i.e.*, “assistance such as equity participation, loans, grants, subsidies, fiscal advantages, guarantees and insurance”) and publication of a list of expropriated properties and statements discouraging covered transactions in such properties.<sup>35</sup> The specific disciplines include the procedure outlined above for determining whether a property falls within Clause C of the definition of “expropriated properties.”<sup>36</sup>

It is important to note that not included in the “disciplines” are those measures that would be highly effective in discouraging investments in expropriated property, such as an undertaking to adopt legislation prohibiting such investments and the establishment of an obligation on the part of a participant to pursue, or to give the former owner of expropriated property the ability to pursue, a claim against such an investor in expropriated property.

- *Registry of Claims.* The Understanding does provide, as one of the general disciplines, for the establishment of a Registry of claims that property has been expropriated “in contravention of international law.”<sup>37</sup> The inclusion of a claim in the Registry does not, however, “imply any judgement as to the validity of the claim.”<sup>38</sup> Each participant does, however, undertake to assess and take “appropriate” account of information that appears in the Registry in considering requests for government support or applications for commercial assistance with respect to covered transactions in registered properties.<sup>39</sup> Registry claims must be updated

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34. *Id.* at para. I.A.

35. *Id.* at para. I.B.2, and Annex C, paras. 2,3.

36. *See id.* at para. I.B.3.

37. *Id.* at para. I.A.3.

38. *Id.*

39. *See id.* at I.A.4.

annually, and claims with respect to property allegedly expropriated prior to the effective date of the disciplines must be registered within one year of the establishment of the Registry.<sup>40</sup>

While the Registry will be helpful in giving notice of an outstanding claim in respect of a particular property, the placement of a claim on the Registry does not create any legal obligation on the part of a participant with respect to that property.

- *No Change in International Law.* The Understanding is clearly limited to expropriations “in contravention of international law” and, implicitly, the Understanding adopts the generally accepted view that customary international law only applies to the expropriation of aliens’ property and does not apply to the confiscation by a government of property of its nationals. In other words, the Understanding would not apply to the property of Cuban Americans who had not become U.S. nationals at the time the Castro regime confiscated their property.

- *Effective Date.* On the whole, the United States negotiated a reasonable effective date for the Understanding (assuming that it ever goes into effect). It is unfortunate that the Understanding will not apply to covered transactions related to an expropriated property (or right thereto) acquired by an investor of a participant prior to May 18, 1998, or to covered transactions by other investors of a participant that subsequently acquire that property or right.<sup>41</sup> On the other hand, implicit in this formulation is the good news that the disciplines would apply to covered transactions (e.g., a new investment) entered into subsequent to May 18, 1998, even though the property was expropriated prior to May 18, 1998, if no rights to the property had been acquired by an investor of a participant prior to that date. A footnote to the Understanding notes that the disciplines would also apply to covered transactions after May 18, 1998 that are “related to property that has been reacquired by the expropriated state” or related to additional property acquired after May 18, 1998.<sup>42</sup> The footnote goes on to state “for example, the disciplines would apply to a renewal of rights, . . . if such renewal . . . is additional to the rights acquired from the state prior to May 18.”<sup>43</sup> This appears to mean that where a right to invest in property expires after May 18, 1998 and

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40. *See id.* at Annex A, paras. 2, 3.

41. *See id.* at para. I.C.

42. *Id.* at para. I.C.2 n.3.

43. *Id.*

the extension of that right requires the agreement of the expropriating government (as opposed to an extension that is entirely in the discretion of the investor), the disciplines would be applicable to investments made under the extension.

(b) *Acceptance of the Understanding by Congress.* The real question is whether the Understanding would sufficiently accomplish the purposes of Helms-Burton; to give Congress an incentive to amend Helms-Burton; to provide for a permanent waiver of Title IV; and to refrain from attempting to restrict the President's unlimited ability to grant six-month waivers of Title III.<sup>44</sup> In my view, it does not.

I understand that one of the key elements for an acceptable deal is the recognition by the EU of the validity of the claims that have been certified by the U.S. Foreign Claims Settlement Commission (FCSC). I understand (although I have seen no authoritative data) that the aggregate certified value of these 5,911 claims was around \$1.8 billion, which with interest at modest rate would now exceed \$6 billion. One estimate has the current value of the property at about \$12 billion. As indicated above under "Definition of 'Expropriated Properties,'" the Understanding does this in a very peculiar way—an annex to the Understanding prepared by the European Commission notes that the Commission examined "a small number" of the certified claims and identified some cases where, "having regard to the discriminatory provisions of Cuban Law 851, it appears that the expropriations were contrary to international law."<sup>45</sup> (Law 851 was one of the primary tools that the Castro regime used to expropriate U.S. property.) The United States interprets this as "an important EU acknowledgment of the illegal nature of the expropriation policy of the Castro regime."<sup>46</sup> I understand that the

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44. See Letter from Benjamin A. Gilman, Chairman, House Committee on International Relations, to Sir Leon Brittan, Vice President, The European Commission (Jan. 8, 1999) in *INSIDE U.S. TRADE*, Jan. 22, 1999, at 21 (expressing his "concerns about the likely effectiveness of the Understanding in deterring investment in unlawfully expropriated property"). In an attempt to clarify some of the ambiguous provisions in the Understanding, Chairman Gilman submitted a detailed list of questions, many of which raise the same issues posed in this Article: whether the EU will apply the disciplines to investments in Cuba; whether all FCSC-certified claims will be recognized by the EU; and what protection, if any, the Understanding affords to nationals of an expropriating state. See *id.* at 21-23. Chairman Gilman also asked for information about investments in Cuba that would benefit from the formulation of the effective date of the Understanding. In his letter, Chairman Gilman told Sir Leon that "a reassuring response [from the EU] could go a long way toward relieving the apprehensions of some of our Members." *Id.* at 21.

45. See *Understanding*, *supra* note 1, at Annex D.

46. The White House, Office of the Press Secretary, *Fact Sheet: U.S.-EU Summit* (last visited Feb. 5, 1999) <[http://www.state.gov/www/issues/economic/980517\\_fs\\_USEU\\_Summit.html](http://www.state.gov/www/issues/economic/980517_fs_USEU_Summit.html)>.

Commission looked at ten claims, found that eight probably involved an expropriation in contravention of international law, and claimed not to have enough information about the other two. This is pretty weak evidence on which to make a prediction of 80% acceptance by the EU of the certified claims.

Yet to be tested is the importance to Congress of addressing the claims of the Cuban Americans who were not U.S. nationals at the time their property was confiscated by the Castro regime. Because their claims would not be recognized under the prevailing view of international law, the Understanding's continuing reference to expropriations in violation of international law means that they are not covered. (A puzzling aspect of the whole controversy over Helms-Burton is that apparently no one knows, in the case of the FCSC-certified claims, how much investment has been made in the subject properties or in the case of the Cuban American claims, how much property is subject to such claims or how much investment has been made.)

Furthermore, there is empirical evidence that the threat of claims under Title III (even if the ability to bring them has been suspended) has deterred investment in Cuba. The impact of Helms-Burton was further seen in a transaction between STET, the Italian telephone company, and ITT, pursuant to which STET is rumored to have paid ITT about \$25 million, under circumstances encouraged by Helms-Burton, to permit it to use ITT's expropriated property without fear of a Title III action by ITT. Therefore, it is difficult to see Congress agreeing, in effect, to repeal Helms-Burton without something similar to the highly effective Title III being implemented.

In summary, it is hard to imagine Congressional acceptance of a deal with the EU that falls short of establishing binding rules protecting property rights, does not provide an equivalent to Title III, provides very little concrete promise of settling (or at least recognizing) the FCSC-certified claims against Cuba, and totally ignores those claims by those U.S. citizens who were not U.S. nationals at the time their property was confiscated by the Castro regime.

It is worth noting that there are two groups in Congress who support Helms-Burton—those who are primarily interested in protecting property rights and those who are primarily interested in getting rid of Castro. The policy difference between these two groups was seen in connection with the STET-ITT transaction referred to above. Senator Helms hailed the transaction as evidence that Helms-Burton was working well, while Congresswoman Ileana Ros-Leithenen called for closing the loophole in Helms-Burton exposed by the transaction through which hard currency

would find its way to the Castro regime.

### III. THE ALTERNATIVE—A TREATY ON PROPERTY RIGHTS

The April 1997 Eizenstat-Brittan agreement provided a splendid—even unique—opportunity to establish, clearly and conclusively, in the form of a binding international agreement among the major industrialized countries of the world, international legal rules recognizing and protecting property rights. This is sorely needed, because notwithstanding the fact that most countries whose laws we respect protect property rights domestically, the international recognition of property rights lags behind the recognition of other human rights. By concluding an agreement confirming property rights, not only would future expropriations in violation of international law be discouraged, a framework would be established for working out the existing claims involving Cuban property.

Following is a summary of the terms of a treaty that would recognize and protect property rights.

(a) *Basic Terms.* The basic terms would be:

- *A Ban on Confiscations.* The expropriation of property would be prohibited, unless done for a public purpose, without discrimination and with “prompt, adequate and effective” compensation. (A taking of property in violation of these principles is referred to in this paper as an “illegal expropriation” or a “confiscation”.) Parties to the agreement (“contracting parties”), as well as their nationals, would be permitted to institute arbitration proceedings against other contracting parties who violated the rules on expropriation (generally referred to as “state-to-state” and “investor-to-state” proceedings). There is nothing unusual about these principles in the context of investment treaties. They are found in NAFTA and most BITs. In addition, the MAI negotiators essentially agreed to the same principles.

- *Establishment of a Claims Registry.* To provide additional deterrence to those who would seek to gain by the expropriation of property of others, an international Registry would be established for the registration of claims that property had been illegally expropriated (whether by contracting parties or non-contracting parties). Unlike the claims Registry contemplated by the Understanding, the registration of claims on this proposed claims Registry would have legal implications, in that it would provide a warning to prospective investors in the property that they could be subjected to a claim by the previous owner of the property (as

described in the next bullet point); parties to the treaty would be on notice that they had certain obligations (discussed below) with respect to the property.

Claims could be registered by a contracting party or by a national of a contracting party and would have to be registered within two years of the expropriation. Where the expropriating state was a contracting party, the claimant (or the contracting party of which the claimant was a national) could not register the claim unless it pursued the claim through the arbitration procedure provided in the treaty or in the expropriating state's courts. If the claimant were unsuccessful, it would not be permitted to register the claim.

Where the expropriating state was not a contracting party, the claim could be registered whether or not any of the remedies contemplated by the treaty were pursued. Likewise, if the expropriating state was a contracting party, but had reneged on its obligations under treaty, by, for example, indicating an unwillingness to appear in an international arbitration or failing to provide an adequate remedy in its own courts for one of its nationals, the claim could be registered.

The appropriateness of the registration of any claim could be contested in an arbitration proceeding brought by any contracting party or the national of a contracting party. To discourage abuse of the claims process, the loser in a proceeding contesting the validity of a claims registration would be liable for all costs.

- *Recognition of a Right to Pursue a Subsequent Owner of Confiscated Property.* A national of a contracting party whose property had been confiscated and whose claim to that property had been registered would be able to assert a claim against any national of a contracting party who acquired the confiscated property or any product produced from, or containing elements of, the confiscated property. Such claim could be asserted in an arbitration proceeding (*i.e.*, an “investor-to-investor” proceeding), or a proceeding in the courts of the contracting party of which the defendant was a national. The claim would be for the uncompensated value of the property or, in the case of a product produced from the confiscated property, for the value of the product.

Because there would be no right to register a claim for property expropriated by a contracting party (unless the contracting party had reneged on its obligations under the treaty by, for example, refusing to arbitrate or to provide an effective domestic remedy), there would be no rights against subsequent owners of property expropriated by a contracting party (again, unless the contracting party had reneged on its ob-

ligations under the treaty).

- *Recognition of Rights for Nationals of a Confiscating State.* The treaty would establish similar rights for a national of a contracting party who was a national of the confiscating state at the time of the confiscation. When the expropriating state was a contracting party, a claim could not be asserted unless that contracting party had reneged on its obligations under the treaty, by, for example, failing to provide the claimant with an effective domestic remedy or defaulting on a judgment obtained by the claimant in a domestic proceeding. Such a claim could be asserted with respect to property wrongfully expropriated by a non-contracting party, notwithstanding the fact that the claimant was a national of the expropriating state at the time of the expropriation.

This last point—expanding international law to protect the property of nationals of a confiscating state—would be the most significant departure from (and improvement over) existing norms of customary international law applicable to property rights. It would, however, be consistent with the growing trend in human rights law to create international obligations for states in respect of their own nationals. Likewise, permitting a claim to be made against a person who attempts to profit, through the acquisition of confiscated property, from the violation by a state of the property rights of its nationals is a counterpart to states' obligations found in human rights treaties requiring, for example, that terrorists be prosecuted or extradited. The right to assert such a claim would be similar to the right provided in the U.S. Torture Victim Protection Act of 1991<sup>47</sup> to any victim of terrorism, regardless of the victim's nationality, to sue the terrorist (including an official of the victim's own government) in the United States, regardless of where the act of terrorism was committed.

Annex A, following this Article, contains examples of how the foregoing principles would be applied.

(b) *Other Terms.* My proposed treaty would contain the following additional provisions:

- *Confirmation of Basic Property Rights.* My proposed treaty would confirm that everyone enjoys the right to own property and not to be arbitrarily deprived of his or her property. This principle is contained in the Universal Declaration of the Human Rights, and it is recognized in

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47. Pub. L. No. 102-256, 106 Stat. 73 (1991), reprinted in 28 U.S.C. § 1350 notes (1994).

the domestic laws of many countries. Nevertheless, it has not been established as a customary international legal norm, notwithstanding its general acceptance as a principle of law by “civilized nations.”

- *Prohibition on Financial Support.* Contracting parties would agree not to provide financing and other support for the development of property that had been placed on the claims Registry.

- *Provision for Claims in Domestic Courts.* Each contracting party would agree to adopt legislation giving former owners of confiscated property a cause of action in its domestic courts against one of its nationals who acquired the confiscated property or any product produced from, or containing elements of, the confiscated property.

- *Limits on Retaliation.* The treaty or convention would prohibit a host contracting party seeking to retaliate against another contracting party that was violating the agreement from imposing sanctions against innocent investments of nationals of the violating contracting party located in the retaliating contracting party.

- *Determination of the Make-up and Powers of Arbitration Panels.* The arbitration panels established to hear claims would be *ad hoc* panels, consisting of three or five members. Each side would appoint one member (or two, in the case of a five-person panel), and the third (or fifth) member, who would serve as chairman, would be appointed by both sides or, failing agreement, by an appointing authority. The panel would have the power to award damages or order restitution. Each party to the treaty would have to be a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>48</sup> (generally referred to as the “New York Convention”), so that an award could be enforced against any contracting party.

(c) *Effective Date of Treaty.* A treaty embodying these principles should be applicable to any expropriation occurring after the date on which the final terms of the treaty are negotiated *and* in respect of any previously confiscated property interests that remained with the confiscating country as of April 11, 1997. This date is appropriate, because it is

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48. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3; *see also* 9 U.S.C. §§ 201-08 (1994) (implementing legislation).



the date of the U.S.-EU agreement to develop “disciplines and principles for the strengthening of investment protection,” and it is appropriate that they should be enforced against any *transfers* of property expropriated in violation of them. (In order to avoid the coverage of claims that relate to expropriations that occurred so long ago that problems of proof and related matters would make resolution difficult, a cutoff date for expropriations occurring prior to the 1950s might also be appropriate.) Claims in respect of previously confiscated property in which an investment has been made need to be dealt with as suggested below under “Dealing with Existing Claims.”

The date of the May 1998 Understanding also would be an acceptable effective date for my proposed treaty, given that the United States and the EU more or less agreed on that date as the effective date of the Understanding (if it is ever implemented); and notwithstanding the Understanding’s shortcomings. The point is that the effective date of my proposed treaty should be established sooner rather than later, so that no other major expropriation is “grandfathered.”

(d) *Concerns About the Proposed Treaty.* Concerns have been expressed that a treaty that contains the foregoing provisions could be adverse to the interests of the United States. Following is a brief discussion of some of those concerns:

- *Ambiguity of “Expropriation.”* Some worry that environmental, tax or zoning regulations could be challenged as an expropriation. (In fact, this concern was a major contribution to the MAI negotiations’ demise.)

First, if this is an issue, it is an issue under NAFTA, as well the BITs that the United States has ratified. Some would argue that, indeed, this is one of the defects in NAFTA, and cite the case brought against Canada by Ethyl Corporation under NAFTA’s investment chapter, which Canada settled for approximately \$13 million.<sup>49</sup> A careful analysis of the circumstances surrounding the Ethyl proceeding reveals that, in fact, it

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49. See George Monbiot, *Running on MMT: This Butterfly’s Wing Will Cause a Hurricane in Europe*, GUARDIAN (London), Aug. 13, 1998, at 16 (reporting on Ethyl Corporation’s suit against Canada and the \$13 million that Canada agreed to pay). One fact that frustrated the reporter was that the NAFTA tribunal was conducted secretly; that is, no record of the proceeding was published nor was the decision appealable. See *id.*; see also Edward Alden, *Canada Seeks Tighter NAFTA rules to Limit Compensation*, FIN. TIMES (London), Jan. 22, 1999, at 7 (citing Canada’s fear that the Investment chapter was being invoked by companies to “prevent governments from enacting legitimate regulations”).

was a challenge to Canadian regulations that were found to be illegal under Canada's domestic law and hardly an interference with Canada's legitimate exercise of environmental regulation.

Second, language such as that found in NAFTA Article 1114— "[n]othing [in the chapter protecting investments] . . . prevent[s] a Party from . . . enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a matter sensitive to environmental concerns"<sup>50</sup>— should allay these fears, at least as they relate to environmental matters. NAFTA also contains a mechanism for determining when tax measures may constitute an illegal expropriation. It may be possible to develop a similar mechanism for environmental regulations.

Finally, the United States could take a reservation or understanding to the effect that nothing in the treaty gave greater rights against takings than those found in the U.S. Constitution.

- *Difficulty of Deciding and Enforcing Claims Against Products.* Concern has been expressed that allowing claims against those who acquire products from expropriated products will spawn litigation, that such claims will be very difficult to prove and enforce and that they will cast clouds on title to products. It is generally conceded that this is not a problem where the claim is against the owner of an identifiable, raw product from a specific property, such as unrefined copper from a specific mine. More troublesome examples cited are claims against a soft-drink manufacturer for including in its soft drinks sugar from an expropriated property, or claims against a manufacturer of a product that includes refined copper from an expropriated property. While these examples may present some problems of proof, it is not clear why the same procedures that are followed in order to avoid violating the various sanctions regimes administered by the U.S. Office of Foreign Assets Controls<sup>51</sup> (OFAC) could not be followed with respect to products from properties placed on the Registry. As to the concern that this will cast a cloud on the title to products, the answer is that the "cloud" can be removed by contesting the validity of the registration of the claim.

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50. NAFTA, *supra* note 26, art. 1114.

51. See 31 C.F.R. Part 515 (1998) (Cuba); *id.* Part 560 (Iran); *id.* Part 575 (Iraq); see also U.S. Dep't of Treasury, Office of Foreign Assets Control (OFAC), CUBA: WHAT YOU NEED TO KNOW ABOUT THE U.S. EMBARGO (1998) (explaining prohibitions). The explanation by OFAC is available at the Treasury Department's Web-site. See OFAC, *Cuba: What You Need to Know About the U.S. Embargo* (last visited Feb. 1, 1999) <<http://www.ustreas.gov/ofac/tllcuba.pdf>>.

- *Reciprocity.* Some have expressed concerns about having the provisions of the proposed treaty apply to the United States or potentially subjecting U.S. investors to claims. The answers are simply that the United States should not be expropriating property without meeting the agreed upon international standards (indeed, our Constitution requires at least those standards and perhaps even higher standards). Furthermore, it is not unreasonable to ask that U.S. businesses make a reasonable inquiry as to whether a particular property is on the claims Registry before investing in it (or acquiring products from it). U.S. nationals have over \$2 trillion invested in other countries. Removing the temptation of other states to confiscate those investments could only work to the benefit of U.S. investors. Will U.S. investors have to be cautious about investing in allegedly confiscated property of others? Definitely, but it is in our interests to avoid assisting confiscating states in profiting from their wrongful acts.

- *Loss of Sovereignty.* Concern is often expressed in connection with international agreements, particularly trade agreements, about giving up “sovereignty.” Aside from the fact that any agreement involves giving up some freedom of action (which is done in exchange for obtaining the benefits from others’ agreeing similarly), it is difficult to see how clarifying and strengthening the rules of property ownership could be adverse to U.S. interests. Domestically, we have, as indicated earlier, embodied in our Constitution a strong prohibition on the taking of property. The proposed treaty would not give any greater rights than what our Constitution provides. Arbitration panels could determine that U.S. governmental action is inconsistent with the standards set forth in the treaty, but this is the case under NAFTA and the WTO rules. Permitting such a decision to be made by a neutral panel is a small price to pay for the added protection that the proposed treaty would provide.

Furthermore, the claims procedures will not necessarily mean that claims by U.S. investors will be decided by international arbitration panels, rather than by U.S. courts. The treaty would not prohibit the creation of causes of action in domestic courts, provided that existing standards of due process are met. For such a cause of action to be meaningful, however, the party against whom suit is brought (or its assets) must be subject to the jurisdiction of the domestic courts. The treaty would provide a very real alternative remedy in situations where the domestic remedy is not meaningful.

- *Use of Government Resources.* Traditionally, international commitments have required the use of government resources in order to enforce the commitments. On the other hand, providing private enforcement actions, both investor-state and investor-investor, should decrease the need to rely on government resources. Furthermore, the use of *ad hoc* arbitration panels, rather than some permanent body, should obviate the need to create one more governmental bureaucracy.

- *Breadth of Potential Defendants.* Many have expressed concerns about the breadth of terms used in Helms-Burton. A treaty will offer an opportunity to clear up some of the overly broad (and vague) language in Helms-Burton. The term “traffics,” as defined in Helms-Burton, could be replaced by a more precise concept of ownership, so that claims would be asserted against those who have established ownership interests in expropriated property and not against those who may have “benefited” or “profited” from expropriated property. The definition of “owner” would include a person “controlling,” directly or indirectly, the immediate owner of confiscated property. Thus, non-controlling shareholders of public companies would not be subject to claims.

- *Appropriate Vehicle for Treaty.* The MAI provided an appropriate vehicle for the embodiment of the “disciplines and principles for the strengthening of investment protection” contemplated by the April 1997 agreement between the United States and the EU, and the May 1998 Understanding between the United States and the EU contemplated the use of the MAI to implement some of its terms. Unfortunately, for a variety of reasons the MAI negotiations have ground to a halt, and with the current political climate in Europe and the lack of leadership on the issue at the high levels of the Clinton administration, it is unlikely that they will be revived, absent some new and dramatic development.

The halt in the MAI negotiations is unfortunate, because the negotiation of the MAI framework agreement had reached its final stages. The basic principles prohibiting expropriation had been agreed to, as well as the procedures for state-to-state and investor-to-state arbitration. All that would have had to be negotiated would have been the establishment of the claims Registry, the expansion of the state-to-state and investor-to-state arbitration proceedings to investor-to-investor arbitration proceedings against those who acquire wrongfully expropriated properties and the matters referred to above under “Other Terms.”

Notwithstanding the current comatose state of the MAI, an agreement between the United States and the EU that embodied acceptable “disci-

plines and principles,” along the lines of my proposed treaty, that would truly strengthen investment protection and inhibit and deter the acquisition of expropriated property, as well as resolve the Helms-Burton controversy, could provide the necessary spark to rekindle the MAI negotiations. While a thorough review of the reasons for the demise of the MAI negotiations is beyond the scope of this paper, one of those reasons was the lack of a compelling need for investment rules among a group of countries which generally protect property and which for the most part have open investment regimes. Using the MAI as the vehicle to resolve the Helms-Burton controversy could provide the needed compelling element for the adoption of the MAI.

(e) *Dealing with Existing Claims.* The proposed effective date of a treaty embodying the principles set forth above would mean that claims in respect of property confiscated by the Cuban government and in which others acquired interests prior to April 11, 1997 would not be covered. One of the problems with such claims is that no one really knows how much property and investments are at stake. Nevertheless, a mechanism for the resolution of such claims, particularly those which relate to property held by U.S. nationals at the time of the confiscation and which have been certified by the FCSC, should be established before Congress is asked, in effect, to repeal Helms-Burton.

A practical solution would be the establishment by the United States and the EU of a joint commission that would first investigate such claims, to determine the nature and extent of the claims asserted, the amount potentially in controversy, the amount subsequently invested by their nationals in the underlying property, and the reasonableness of such investments, particularly in the light of the subsequent investor's knowledge, and assessment of the validity, of such claims. The commission would then make a recommendation to the United States and the EU as to the appropriate disposition of such claims, taking into account the results of its investigation, the principles of international law existing at the time of the alleged expropriations and the disciplines and principles ultimately agreed to between the United States and the EU.

#### IV. CONCLUSION

An agreement confirming high standards of property protection, together with a fair procedure for the settlement or recognition of claims involving Cuban property, would be consistent with the domestic laws of many members of the European Union, as well as the domestic laws of the United States. It would also be an effective deterrent against future

expropriations, because the ability to profit from such unlawful acts would be undercut.

With the negotiation of such an agreement, the United States would no longer need to rely on the overly broad definition of “trafficking” in order to reach those who are profiting from confiscated property. Likewise, Title IV of Helms-Burton, perhaps the biggest thorn in the sides of our trading partners, would no longer be necessary to accomplish the goals of the United States.

## ANNEX A

In each of the following hypothetical examples, the following definitions apply:

- X and Y are contracting parties to my proposed treaty;
- NX and NY are nationals of X and Y, respectively, who either owned property at the time it was confiscated or subsequently acquired such confiscated property;
- Z is not a contracting party to my proposed treaty;
- NZ/Y was a national of Z at the time of a confiscation, but has subsequently become a national of Y.

In the answers in the blocks:

- “Yes” means that the treaty would provide, or require that contracting parties provide, that the claimant has the right of action specified;
- “No” means that the treaty would prohibit contracting parties from providing the specified right of action in the specific circumstances;
- “N/A” means that the treaty would not have an applicable provision (*i.e.*, the treaty would not require or prohibit the remedy);
- “—” means that the treaty would not be applicable to the assumed facts or that a different set of facts is assumed.

The shaded blocks indicate an effective remedy:

- If “N/A” appears in a shaded box, this means that the contracting party would probably provide the right of action specified as part of its domestic law and that such a right of action would probably be an effective remedy.

- If the box in which “N/A” appears is not shaded, this means that the remedy probably would not exist, or if the contracting party of which the owner of the confiscated property is a national attempts to provide a right of action in its domestic courts, this right of action would probably be ineffective, because of sovereign immunity (in the case of a claim against a state) or because of a lack of jurisdiction over the defendant (in the case of a claim against a subsequent owner of the confiscated property).
- “Yes” in a shaded block means that the right of action would probably be an effective remedy;
- “Yes” in a block that is not shaded means that the right of action would probably be meaningless, because the basic facts that have been assumed would suggest that the defendant state would not appear.



CASE I: This first example shows the result reached under NAFTA, most BITs and the draft of the MAI at the time negotiations ceased. The example assumes the following facts: Y (*e.g.*, the United States) confiscates NX's (*e.g.*, a Frenchman's) property in Y; NY (*e.g.*, an American) acquires it.

	Registration of Claim		International Arbitration	Right of Action in courts of X	Right of Action in courts of Y
	During Litigation	Without Litigation			
X v. Y	N/A	N/A	Yes	N/A	N/A
NX v. Y			Yes*	N/A	N/A**
NX v. NY			N/A	N/A	N/A

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\* NX may be required to choose at some point between arbitration and the courts of Y (generally referred to as the "fork in the road").

\*\* The United States Constitution's protection against takings would apply to a non-U.S. national.

CASE IA: This case shows how the same set of facts case would be handled under my suggested treaty. The facts are the same as Case I (Y (*e.g.*, the United States) confiscates NX's (*e.g.*, a Frenchman's) property in Y; NY (*e.g.*, an American) acquires it) but in Case IA, Y (*e.g.*, the United States) gives NX (*e.g.*, the Frenchman) an effective remedy in the courts of Y (*e.g.*, the United States), even though not required to do so under the treaty.

	Registration of Claim		International Arbitration	Right of Action in courts of X	Right of Action in courts of Y
	During Litigation	Without Litigation			
X v. Y	Yes	No*	Yes	No	N/A
NX v. Y			Yes**	No	N/A***
NX v. NY			No	No	No

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\* Because NX has an effective remedy against a contracting party *and* the contracting state was the expropriating state, NX must exercise that remedy and cannot use the Registry.

\*\* Where the expropriating state is a contracting party and is complying with the treaty, NX should be required to choose between arbitration and the courts of Y at an early stage.

\*\*\* This hypothetical example, of course, assumes that the expropriating state provides an effective remedy (*e.g.*, the protection against takings found in the U.S. Constitution).

CASE IB: Assume the same facts as in Case IA, except assume that Y does not give NX an effective remedy in the courts of Y (e.g., there has been a revolution in Y, and the new government of Y confiscates all private property):

	Registration of Claim		International Arbitration	Right of Action in courts of X	Right of Action in courts of Y
	During Litigation	Without Litigation			
X v. Y	Yes	Yes	Yes	Yes	Yes
NX v. Y			Yes	Yes	Yes
NX v. NY			Yes*	Yes	Yes

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\* Because NX has no effective remedy against the expropriating contracting party, NX should not be required to choose between arbitration and the courts of X (or Y).

CASE II: This case is quite different from the other cases. It assumes: Z confiscates NX's property in Z; NY acquires it; NX does not have an effective remedy against Z in an international forum or Z defaults in its obligation under another treaty to appear in an international forum:

	Registration of Claim		International Arbitration	Right of Action in courts of X	Right of Action in courts of Y
	During Litigation	Without Litigation			
X v. Z	Yes	Yes	—	N/A	Yes
NX v. Z			—	Yes	Yes
NX v. NY			Yes*	Yes	Yes
X v. Y			Yes	No	
NX v. Y			Yes	No	N/A

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\* Because NX (in Case II) and NZ/X (in Case III) have no effective remedy against an expropriating contracting party, they should not be required to choose between arbitration and the courts of X (or Y), even if the courts of Y may provide an effective remedy. Neither NX nor NZ/X may, of course, recover twice, but they would get "two bites at the apple."

CASE III: This case assumes the same facts as Case II, except that the owner of the property confiscated by Z is NZ, who subsequently becomes a national of X (*i.e.*, NZ/X).

	Registration of Claim		International Arbitration	Right of Action in courts of X	Right of Action in courts of Y
	During Litigation	Without Litigation			
X v. Z	Yes	Yes	—	N/A	Yes
NZ/X v. Z			—	Yes	Yes
NZ/X v. NY			Yes	Yes	Yes
X v. Y			Yes	No	N/A
NZ/X v. Y			Yes	No	N/A

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\* Because NX (in Case II) and NZ/X (in Case III) have no effective remedy against an expropriating contracting party, they should not be required to choose between arbitration and the courts of X (or Y), even if the courts of Y may provide an effective remedy. Neither NX nor NZ/X may, of course, recover twice, but they would get “two bites at the apple.”

CASES IV(A) AND IV(B). These two cases are similar to Cases I(B) and III, except the expropriating state is not Z (a non-contracting party), but rather Y (a contracting party), and the owner of the property is not a foreign national, but NY. It makes no difference whether the subsequent owner of the confiscated property is a national of Y or of another contracting party, but the table indicates that NX is the subsequent acquirer. In Case IV(A), it is assumed that Y (*e.g.*, the United States), after expropriating NY's (*e.g.*, an American's) property in Y, gives NY an effective remedy in the courts of Y. In Case IV(B), it is assumed that Y does not give NY an effective remedy in the courts of Y.

Case IV(A):

	Registration of Claim		International Arbitration	Right of Action in courts of X	Right of Action in courts of Y
	During Litigation	Without Litigation			
X v. Y	Yes	No	—	—	—
NY v. Y			No	No	Yes
NY v. NX			No	No	No

## Case IV(B):

	Registration of Claim		International Arbitration	Right of Action in courts of X	Right of Action in courts of Y
	During Litigation	Without Litigation			
X v. Y	Yes	Yes	---	---	---
NY v. Y			Yes	Yes	Yes
NY v. NX			Yes*	Yes	Yes

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\* For the reasons set forth in the previous note to the table under Case II, NY should not have to choose between arbitration and the courts of X (or Y).