U.S RESTATEMENT:

Robert S. Rendell in [February, 1984] International Financial Law Review 20 notes some pertinent issues concerning the US Restatement which is being redrafted with a view to its being finalised in 1986. In particular, he draws attention to Section 403 which introduces the "Principle of Reasonableness" to conflicts of jurisdiction. Jurisdiction is asserted not only in relation to conduct within the territory of the United States, but also conduct outside that territory which has a substantial effect within its territory (the "Effects Doctrine") and the activities of nationals outside its territory (Section 402). In particular, jurisdiction is asserted over foreign subsidiaries of US companies (as exemplified in the Soviet Gas Pipeline Affair: Section 418). An anology to the principle of reasonableness is the use of the balancing test in Timberlane Lumber Co. v. Bank of America 549 F2d 597 (1976). The assertion of this extensive jurisdiction, and the new principle of reasonableness which is to be applied by an American Court is controversial and opposed by other powers, including close allies of the United States.

Another controversial section noted by Mr. Rendell is Section 712 which attempts to move away from "prompt adequate and effective" compensation to "just compensation". This is because of certain well know UN General Assembly Resolutions and the various negotiated settlements which apparently indicate different practice. Section 712 also attempts to deal with the problem of "creeping expropriation" and "stabilisation clauses". Mr. Rendell also deals with Section 428 on Act of State and also notes a number of other issues.

On the controversial issues mentioned above, it would seem that the Tentative Draft supports the US assertion of extraterritorial jurisdiction but seek to attenuate this through a judicially applied principle of reasonableness which would undoubtedly still be seen by other States, including Western States, as an affront to their sovereignty. The approach on nationalisation, on the other hand, seems to move more away from the traditional Western approach and come closer to that taken by many of the capital importing States. In this sense it follows the approach of the Supreme Court itself in Banco Nacional de Cuba v. Sabbatino 376 US 398 (1964).

U.S. RESTATEMENT AND EXPROPRIATION - OPINION OF U.S. DEPARTMENT OF STATE *

April 14, 1983

Professor Louis Henkin
Columbia University Law School
435 West 116th Street
New York, New York 10027

Dear Professor Henkin:

After the ALI annual meeting last year, I agreed to provide you with a detailed statement of our position with regard to the draft *Restatement* language on expropriation. The first attachment to this letter sets forth a paragraph-by-paragraph discussion of the comments to draft section 712, together with an alternative text which, in my view, would better restate both the foreign relations law of the United States and the applicable rules of international law. Portions of that attachment also address related questions. I have not attempted to provide a detailed alternative draft of the Reporters' Notes, but the information supplied here and in the attachments may be of assistance in that regard.

Although the underlying issues are discussed in detail in the attached critique, I believe that it would be useful briefly to review the basis upon which we suggest alternative language and our reasons for concluding that the current draft does not fully reflect international law. *Restatement (2d)* maintained in its black-letter text that "just" compensation is required (§185) and defined this in terms equivalent to "prompt, adequate, and effective" (§187). The new draft retains the first portion of the formulation, but relegates its definition to a Comment, where it is described, not as a rule of law, but as a United States position. While the draft does not reject the existing rule, and suggests no alternative to replace it, it creates uncertainty about the tenor of the applicable law, especially in the formulation of its comments and notes. To the contrary, in our view, events since the adoption of *Restatement (2d)* have reinforced the definition of required compensation set forth there, both as a rule of the foreign relations law of this country and as a generally applicable rule of international law.

The United States Government has consistently maintained that citizens whose property is expropriated by foreign governments are entitled to "prompt, adequate, and effective" compensation. There has been no deviation from this principal in United States practice in decades. Our adherence to it has continued regardless of the administration in power. All three branches of government—executive, legislative, and judicial—have taken a similar stand, to the extent that they have expressed themselves on the issue. When Congress has approached this question, it has applied the traditional standard, not only in the so-called Hickenlooper Amendments to the Foreign Assistance Act of 1961 (22 U.S.C. §2370(e)(1) and (e)(2)), but in other legislation involving U.S. participation in multilateral development banks, as well. See *e.g.*, 22 U.S.C. §§283r, 284j, 290g-8, and 19 U.S.C. §2462(b)(4)(D). The executive branch agencies responsible for the application of those statutes have consistently applied the standard. This Department has maintained that principle in its presentation and espousal of claims. To the extent that the courts of the United States have adjudicated such cases, when they come within an exception to the Act of State Doctrine, the results they have reached are likewise consistent with the traditional standard. On this basis, we conclude that United States law on this question is well established and unambiguous.

The continued validity of the traditional standard is equally clear as a matter of general international law. The rhetorical effect of non-binding resolutions of the United Nations General Assembly, adopted by a majority of newly emergent states, without the support of the countries which are host states to most of the foreign investment and the source for virtually all of it, in no way affects the general international legal standard that "prompt, adequate, and effective" compensation is required in case of expropriation.

No new standard has achieved the kind of consensus necessary for the establishment of a new norm of international law or the displacement of an old rule. The present draft, like the *Restatement (2d)*, recognizes the historic status of the "prompt, adequate, and effective" standard as the "traditional" rule of international law. Applying the rules of recognition of new standards of international law of section 102(2) of your draft, none of the proffered alternatives has achieved that degree of widespread and consistent support by state practice necessary for its recognition as a new rule of general international law. Nor has such widespread and consistent support for the negation of the traditional rule been established. The draft seems to suggest that a few states, by objecting to a recognized rule of international law, may displace it without meeting the standards for creation of a new rule. If this be the case, there can be no enduring international law, only temporary common interest.

* [Davis R. Robinson, Legal Adviser of the Department of State, wrote this letter to Professor Lewis Henkin on the Restatement mentioned in the previous item. The letter comments upon the text and commentary to Section 712 of tentative draft No. 3 dealing with standards of compensation for expropriation of alien owned property. The letter was first published in the Department of State Bulletin June 1983 at 52, 53.] (The attachments referred to in the letter were not available as we went to press. We are seeking copies of these to determine whether it would be appropriate to publish these separately.)

The heavy reliance of the draft on the non-binding declarations and resolutions of the United Nations General Assembly in this context is particularly troublesome. Attachment 2 addresses this question in more detail. The General Assembly is not a legislative organ and its declarations are not international legislation in this context. The fact that most of the resolutions in question were adopted by the General Assembly over the dissent of a significant number of states with substantial interests demonstrates the absence of the necessary widespread and consistent practice. Even those resolutions which were adopted without vote, which have not received acceptance through state practice, have little claim to credence as true declarations of international law. As the distinguished arbitrator in the *Topco* case recognized, these resolutions are essentially political declarations, lacking the jurisprudential support necessary for them to become part of the body of international law. Indeed, many of the same developing nations which supported these declarations as political statements have, in their actual practice, signed bilateral investment treaties reaffirming their support for the traditional standard as a legal rule. (See Attachment 4.)

The emphasis in the establishment of new customary law should be on actual state practice, not the rhetorical posturing of debate. Two aspects of that practice illustrate the continuing vitality of the traditional standard for compensation: treaty practice and arbitral awards.

The state practice establishing a network of international treaties is discussed in Attachments 3 and 4. As you are aware, provisions controlling compensation in expropriations are contained in many bilateral Friendship, Commerce, and Navigation (FCN) treaties. In the case of the United States, many of these are with developing nations, as well as with developed nations. These treaties contain provisions calling for compensation in terms equivalent to the traditional standard, although there are slight drafting variations. Attachment 3 sets forth the relevant texts. The history of these agreements indicates that the parties recognized that they were thereby making explicit in the treaty language the customary rule of international law and reaffirming its effect.

Of more recent significance is the emergence of a new type of treaty, the Bilateral Investment Treaty (BIT). European nations, in particular, have negotiated a number of these treaties with developing nations. Attachment 4 contains a summary of more than 150 of these treaties and of their compensation provisions. These treaties reflect actual state practice applying the appropriate international standard for compensation. They reinforce the traditional standard. The United States is itself a participant in the Bilateral Investment Treaty process. Our own negotiation of such treaties, however, commenced only in late 1981; two have been signed, with Panama and Egypt. Each of them contains a rule for compensation consistent with the traditional standard which the draft *Restatement* questions.

Finally, international arbitral awards reinforce the application of the traditional standard as the governing rule of general international law. Distinguished international arbitrators have examined expropriation and related issues carefully. Although the linguistic formulation varies, in result they have rejected attempts to dilute the protection which international law affords to all.

The absence of a clear reaffirmation of the legal standard in the new draft is also contrary to broad international policy objectives. There is now an increasing recognition of the importance of private equity flows to developing countries as an essential part of their development. Private equity is particularly important at the present moment when there are severe limits on public and private funds to support such development. Failure to adhere to a clear standard will stifle such investment by increasing the risk associated with it, with the result either of reducing its flow or of increasing the needed rate of earnings to cover the added risk. Neither is a desirable outcome.

The retreat from the recognized standards of international law in the draft *Restatement Revised* is thus inconsistent with the policy as well as with the law of the United States. I am writing on behalf of the Department of State to confirm that in our view a sufficient case has not been made to recognize such a change as a matter of law nor would any such change be desirable as a matter of policy. Indeed, we believe that the experience of recent years generally supports the traditional standard rather than calling it into question.

Sincerely yours,

DAVIS R. ROBINSON

[1]The attachments referred to in this letter are available from the Office of the Legal Adviser, Department of State, Washington, D.C. 20520. ■