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## A Reply to "Hollow Spaces"

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## RESPONSE

### A Reply to “Hollow Spaces”

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This short essay responds to Chip Brower’s thoughtful and meticulous critique<sup>1</sup> of Tentative Draft No. 2 of the Restatement Third of the U.S. Law of International Commercial Arbitration.<sup>2</sup> While we appreciate the concerns he raises, we disagree with the conclusions he draws both about the Restatement and the drafting process. We address here what we understand to be Professor Brower’s major criticisms of the work.

Professor Brower faults the Tentative Draft for essentially three reasons. First, he deplores what he considers to be its failure to identify a clear path of

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1. Charles H. Brower, *Hollow Spaces*, 61 *BUFF. L. REV.* 731 (2013).
2. The authors are the Reporters for the Restatement (Third) of the U.S. Law of International Arbitration.

navigation among the three perspectives—domestic, foreign, and global—that influence the drafting of a Restatement on an international law subject.<sup>3</sup> This is what he appears to mean by way of the term “drafting standards.”<sup>4</sup> Second, Professor Brower charges the reporters with deviating from proper norms of treaty interpretation.<sup>5</sup> And third, he finds the reporters to have been similarly disrespectful of proper canons of statutory construction.<sup>6</sup> For each of these three critiques, he cites one example in the Tentative Draft.

Before examining Professor Brower’s critique in more detail, a quick update on the status of the Restatement is in order. The ALI Council approved Chapter 1 (definitions) and Chapter 4 (post-award relief) at its meeting in January 2012.<sup>7</sup> The membership of the American Law Institute in turn approved Chapter 1 and topics 1-2 of Chapter 4 (general provisions and grounds for post-award relief) at its annual meeting in May 2012,<sup>8</sup> and the remainder of Chapter 4 (topics 3-4: conduct of post-award actions and correction, modification, and remand of awards) at its annual meeting in May 2013.<sup>9</sup> Accordingly, both chapters now constitute the position of the American Law Institute.<sup>10</sup> A full first draft of Chapter 2 (enforcement of the arbitration agreement), including blackletter, comments, and reporters’ notes, will be laid before the advisers at their April 2014 meeting with the reporters.<sup>11</sup>

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3. Brower, *supra* note 1, at 748.

4. *Id.* at 747.

5. *Id.* at 794.

6. *Id.* at 813-14.

7. RESTATEMENT (THIRD) OF THE U.S. LAW OF INT’L COMMERCIAL ARBITRATION (Tentative Draft No. 2, 2012).

8. *Id.*

9. RESTATEMENT (THIRD) OF THE U.S. LAW OF INT’L COMMERCIAL ARBITRATION (Tentative Draft No. 3, 2013).

10. THE AMERICAN LAW INSTITUTE, BYLAWS, art. 6 (May 2007), available at <http://www.ali.org/index.cfm?fuseaction=about.bylaws>.

11. RESTATEMENT (THIRD) OF THE U.S. LAW OF INT’L COMMERCIAL ARBITRATION, *Meeting Details*, <https://www.ali.org/index.cfm?fuseaction=meetings.detail&meetingid=193> (last visited Nov. 21, 2013).

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To begin with the first critique, we do not share Professor Brower's view that a Restatement of this sort must, or even should, adhere to a preordained pathway in integrating domestic, foreign, and global perspectives on the subject.<sup>12</sup> Each of these perspectives brings something important to bear on a Restatement of the U.S. law of international commercial arbitration, whose sources include international conventions and international law, domestic statutes, and state and federal common law. But different issues treated in the Restatement raise different considerations and touch in differing degrees and ways on these various sources. We anticipated this in embarking on this journey and, in our view, our experience with the Restatement to date only serves to vindicate it. Consequently, we believe the Restatement benefits from avoiding a categorical pre-commitment to any single "pathway."

As evidence of what he contends is a lack of consistent perspective, Professor Brower cites the Restatement's treatment of interim measures—and more specifically its position that interim measures should presumptively be treated as partial awards that are enforceable under the conventions.<sup>13</sup> In this connection, he notes, critically, how the Restatement position changed over time.<sup>14</sup> According to his reading, the Restatement not only lacks a clear direction, but in this regard is unduly influenced by a self-interested group of advisers, intent on maximizing arbitration's efficacy at all costs.<sup>15</sup>

That is by no means the case. First, constancy is not an end in itself, particularly in a process that is intentionally designed to be dialogic and to take account of a range of viewpoints. Individual Restatement provisions come before advisers and the ALI's members consultative group on numerous successive occasions, and this is by design. As

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12. See Brower, *supra* note 1, at 748.

13. *Id.* at 754.

14. *Id.* at 749-54.

15. *Id.* at 756.

such, it is not surprising that the positions taken in the successive drafts, and the analysis in support of those positions contained in the reporters' notes, might change over time. It is thought—and in our opinion rightly so—that the iterative process by which Restatements are drafted and approved contributes to their quality. We believe we would be remiss in our duties as reporters if we did not incorporate useful comments—such as those made during the proceedings by Professor Brower—in subsequent drafts.

In considering comments we receive from advisers and others, we do not tally the votes or conduct popularity contests. When a position commands wide support, we necessarily take note, particularly when the support spans a range of the various groups to which it is presented in the drafting process. Above all, however, as reporters we are most attentive to the inherent persuasiveness of particular positions being advanced or rejected. To that end, after every meeting, the reporters evaluate and reflect collectively on the views expressed at the meeting. We inevitably continue this process of assessment as we revise subsequent drafts.

A word in this connection on our advisers: the advisers to ALI projects are generally selected on the basis of their knowledge and experience in the field, so it is only to be expected that prominent international arbitrators and counsel will figure importantly among them.<sup>16</sup> The advisers also importantly include academics and judges who, by no means, let the practitioners run the show at advisers' meetings.<sup>17</sup> We are also counseled throughout the process by those ALI members who participate in the project's members consultative group—a group that draws from an eclectic mix of prominent scholars, judges, and practitioners. And of course nothing becomes final until debated and approved by the Council and the membership, among which international arbitration practitioners represent a tiny number.<sup>18</sup> Both of those bodies act with

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16. *Id.* at 736-37.

17. *Id.* at 737.

18. *See id.*

deliberation to help ensure that the Restatement does not stray too far from a domestic point of view.

Turning back to substance, we note that the position adopted by the Restatement on interim measures is one with which Professor Brower actually appears to agree.<sup>19</sup> Had we not listened over time to as many voices as we did, we may not have reached as sound a final conclusion.

But even though Professor Brower seems to agree with many of the substantive outcomes in the Restatement, he is not indifferent as to which of the three perspectives—domestic, international, or global—should be adopted for this Restatement.<sup>20</sup> He argues for the Restatement to adopt a domestic perspective.<sup>21</sup> In our view, however, the domestic perspective has largely prevailed. It simply has not systematically and completely crowded out other considerations.

In defining what he means by the “domestic” perspective, Professor Brower argues that our positions should in general be those that we anticipate U.S. courts will be most likely to accept.<sup>22</sup> We see things somewhat differently. Of course, on any given issue, the expected response of courts should be gauged and taken very seriously into account. And we hope the final version of the Restatement will be fully embraced and followed by the courts. But we do not reject a position that we determine to be sounder merely because we suspect that courts at the current time might be more likely to adopt a different one. As Professor Brower points out, Restatements should have a long shelf life, and that observation sometimes militates in favor of taking the longer view.<sup>23</sup> The dissenting opinion today that cites the Restatement may well become the majority view tomorrow. As then ALI director Herbert Wechsler wrote in his 1966 Director’s Report, under the

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19. *See id.* at 758.

20. *Id.* at 735.

21. *Id.* at 758.

22. *Id.* at 809.

23. *Id.* at 766.

subheading of "On Freedom and Restraint in the Restatements":

In judging what was right, a preponderating balance of authority would normally be given weight, as it no doubt would generally weigh with courts, but it had not been thought to be conclusive. And when the institute's adoption of the view of a minority of courts had helped to shift the balance of authority, it was clear that this was taken as a vindication of the judgment of the institute and proper cause for exultation.<sup>24</sup>

Professor Brower also implies that we show insufficient fidelity to Supreme Court jurisprudence.<sup>25</sup> We agree with him about the importance of fidelity to the Court's decisions, but disagree with his view that the Restatement is insufficiently faithful. On no issue have we taken a position that is contrary to the Court's present position. And on no matter that the Court remains to address have we taken a position that the Court cannot plausibly be expected to take. Professor Brower offers no example that suggests the contrary in either of these respects.

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Professor Brower's second critique is that we have deviated from traditional canons of treaty interpretation.<sup>26</sup> Here the single illustration he identifies is the Restatement position on the availability of forum non conveniens in actions to enforce Convention awards.<sup>27</sup> We believe that, far from acting contrary to the precepts of treaty interpretation set out in the Vienna Convention on Treaties, we have been faithful to that Convention's suggestion that where a clear and unambiguous meaning of a provision cannot be discerned, resort should be had to the treaty's "object and purpose." The Restatement position reflects the belief that it is considerably more in keeping with the object and purpose of the New York Convention, which was to commit

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24. Herbert Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147, 149 (1969).

25. Brower, *supra* note 1, at 808-09.

26. *Id.* at 768-75.

27. *Id.* at 778-79.

States to the recognition and enforcement of foreign awards, to take forum non conveniens off the table than to leave it there.

We do not delve here into all of Professor Brower's arguments about whether forum non conveniens should be available with respect to the enforcement of awards that are subject to the Conventions. Two points need to be made, however.

First, Professor Brower apparently thinks that the award at issue in the *Figueiredo* case, while "foreign," was not genuinely "international" such that its recognition and enforcement should be subject to the Conventions.<sup>28</sup> This perspective is, however, inconsistent with the plain text of the Conventions and their implementing legislation. For better or worse, the drafters of the New York Convention departed from the approach of predecessor conventions and made it apply to "foreign" awards, meaning all awards rendered on the territory of signatory states, irrespective of their national or international character.<sup>29</sup>

Professor Brower notes that the Panama Convention is often interpreted as applying only to "international" not "foreign" awards, and supports his argument for this more narrow interpretation of the Panama Convention by pointing to what he regards as "an anomaly in the Federal Arbitration Act," which extends the New York Convention's broader scope by statute to the Panama Convention awards.<sup>30</sup> But the approach taken by the Restatement is consistent with Professor Brower's own preferred mode of treaty interpretation, which is characterized by high fidelity to the language of the Conventions *and* their implementing legislation.<sup>31</sup> Had the drafters of the New York Convention intended to graft a local contacts requirement onto the Convention's recognition and enforcement obligation to avert the "abuse" that concerns Professor Brower and that forum non conveniens purportedly addresses, they could

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28. *Id.* at 782-85.

29. *Id.* at 828.

30. *Id.* at 787.

31. *Id.* at 768-69.



easily have done so.<sup>32</sup> But they did not. And had Congress wanted to adopt the narrower scope that Professor Brower argues applies under the Panama Convention, it could have.<sup>33</sup> But it did not. Had the Restatement read into the New York Convention such a requirement, it would have deviated both from accepted norms of treaty interpretation and from the domestic perspective Professor Brower elsewhere advocates.

Second, we do not share Professor Brower's view that use of *forum non conveniens* in connection with the enforcement of Convention awards can be justified by analogizing the doctrine to jurisdictional rules, statutes of limitation, or sovereign immunity, which may limit access to national courts for enforcement purposes.<sup>34</sup> We find this analogy to be inapt. Courts cannot and do not function without jurisdictional rules. Statutes of limitations were likely omitted from the Conventions because the drafters expected that States would supply their own. Nor do conventions on the recognition and enforcement of awards necessarily imply complete abandonment of a near-universal and age-old notion of sovereign immunity. Unlike *forum non conveniens*, none of these doctrines contemplates granting a court the discretion to refuse to entertain an enforcement action merely because it finds it opportune to do so.

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We turn finally to Professor Brower's third critique that the Restatement has also deviated from proper modes of statutory construction.<sup>35</sup> The reporters, it is claimed, have substituted what they thought Congress would have wanted for what Congress actually said.<sup>36</sup> Here, too, he gives a single example, namely the Restatement's subjecting the vacatur of Convention awards to the Convention grounds in

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32. *Id.* at 806.

33. *Id.* at 787.

34. *Id.* at 803.

35. *Id.* at 827-29.

36. *Id.* at 828-29.

lieu of the Federal Arbitration Act (FAA) Chapter One grounds.<sup>37</sup> As to that issue, according to Professor Brower, the reporters paid “scant attention to text and extratextual evidence of Congress’s intent” and instead relied “almost entirely on policy arguments.”<sup>38</sup>

We consider that assertion to be unfounded. It is not enough to say, as Professor Brower does, that the New York Convention does not itself address vacatur.<sup>39</sup> That much is conceded. What we are obliged to examine is what Congress said when it implemented the Convention. The textual basis for the Restatement’s position is straightforward and explained clearly in the reporters’ notes: that FAA section 207, by requiring a court to “confirm” an award unless it finds one of the grounds in Article V of the New York Convention,<sup>40</sup> uses exactly the terminology that the FAA uses when addressing the grounds for vacatur.<sup>41</sup>

The reporters’ notes also rely on the structure of the statute as a whole (what Professor Brower calls the statute’s “context”),<sup>42</sup> a similarly standard interpretative source. And, as explained in the reporters’ notes, the scant legislative history of section 207 cannot bear the weight Professor Brower seems to give to it. To assert, as he does, that the Restatement’s position has a “complete absence of grounding in textual or extratextual sources”<sup>43</sup> is in our view not a fair reading of the document. In concluding on this point, we note that Professor Brower fails to acknowledge that this issue has little practical significance under the

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37. *Id.* at 829-30.

38. *Id.* at 814.

39. *Id.* at 815.

40. 9 U.S.C. § 207 (2012) (“The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.”).

41. *Id.* § 9 (“[T]he court must grant such an order [confirming the award] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.”).

42. *Id.* at 822.

43. Brower, *supra* note 1, at 823.

Restatement because it interprets the Convention grounds as coterminous with the FAA Chapter One grounds.

In our judgment—and evidently also in the ALI Council's and ALI membership's (as well as the Eleventh Circuit's) judgment—reading the implementing legislation as extending the Convention grounds to vacatur is for these reasons consistent with the text and structure of the FAA, even though it is not the only available reading or the one most popular with the courts. Only recently, a panel of the Seventh Circuit appears to have rallied to the same view.<sup>44</sup> While we of course cannot know how Congress would resolve this particular question if it were to do so today (and Professor Brower tells us not even to inquire), we do know from the unambiguous statutory language that Congress used in 1925 that it deliberately constructed the statute so as to make confirmation and vacatur grounds mirror-images of each other. That is precisely what the Restatement position achieves for Convention awards made in the United States. This does not amount to the mere guessing at what Congress would have wanted that the Court ostensibly condemned in the *Weltover*<sup>45</sup> and *Morrison*<sup>46</sup> cases.

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In conclusion, let us be clear. We do not maintain that the positions taken by the Restatement on the three issues on which Professor Brower bases his critiques are the only ones that could reasonably have been taken. Certainly, unlike him, we avoid labeling the positions taken by other legal scholars as “incorrect” or “mistaken” or “wrong,” though we may regard as such certain of the legal authorities upon which they rely. We began this essay simply by contesting Professor Brower's view that the Restatement can and must follow a fixed analytic pathway, a view we would regard as dogmatic. Similarly, while we do not in principle quarrel with his depiction of the proper modes of treaty or statutory construction, we do reject his

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44. *Johnson Controls, Inc. v. Edman Controls, Inc.*, 712 F.3d 1021, 1025 (7th Cir. 2013).

45. *Weltover, Inc. v. Republic of Arg.*, 504 U.S. 607 (1992).

46. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010).

apparent belief that a correct exercise of them can properly lead to only one—typically strict and, in our view, narrow—reading.