

RELEASE IN FULL

ALI Restatement Meeting June 12, 2012

The primary objection that has been raised consistently with respect to whether there should be some revision of the *Restatement (Third) of the Foreign Relations Law of the United States* has been that the issues are too controversial, and the law too contested, for a useful revision to be accomplished. (The second most common objection is that it is just too big a job).

Based on suggestions from the ALI Council, the ASIL panel, the State Department Advisory Committee and others, Paul and I therefore thought that the primary goal of the June meeting might be to identify less controversial topics in which the law has evolved significantly over the last quarter century, and to explore how those topics might productively be revised. We thought we could proceed by identifying 4 or 5 such topics in advance, and ask individual participants or pairs of participants to prepare a 5 to 10 page paper on each topic, in advance of the meeting. The papers would address how that section of the Restatement might be revised and the challenges that a revision would pose. These papers would be circulated to the meeting participants in advance, with the expectation that all would be read before the meeting. The bulk of the conversation at the meeting would focus on these papers. Ideally, the goal would be to demonstrate that at least some sections of the Restatement can and should productively be revised, to persuade the skeptics that some form of revision can be accomplished. (Or perhaps even we will be convinced that it cannot be.) The meeting might also start a conversation about how and whether the more controversial topics might be addressed, whether new subjects should be included in a revision, and what form a revision of the Restatement might take.

Based on the above approach, the following would be a possible rough outline for the day:

I. Introduction

Lance, Paul and Sarah address the need for some form of revision of the Restatement, the challenges posed, and the goals for the day

II. Presentation and Discussion of Topics

Presentation of 4-5 previously assigned and distributed papers discussing how particular, less controversial topics from the current Restatement might productively be revised.

Possible topics for the discussion could include:

- a. Status of treaties in US domestic law
- b. Executive and executive/congressional agreements
- c. Federalism and Preemption

- d. Adjudicative jurisdiction, Comity, [Universal Jurisdiction?] and Forum Non Conveniens
- e. State immunities
- f. State responsibility
- g. International trade? Enforcement of foreign judgments? A private international law topic?

III. Discussion of Controversial Topics and Potential for Revision

Controversial topics include:

- a. status of customary international law in domestic law
- b. human rights
- c. rights of aliens
- d. official immunity
- e. prescriptive jurisdiction

IV. New Topics a Revision Might Address?

- a. Presidential-Congressional war powers, AUMFs
- b. Law of armed conflict and post-9/11 issues
(detention, interrogation, habeas)
- c. Sanctions; designation of terrorist organizations
- d. Investment treaty protection
- e. Tax treaties
- f. Corruption
- g. Recognition power
- h. International Criminal Law
- i. International Environmental Law

V. Discussion of the Form a Revision or Supplement Might Take

VI. Next Steps / Further Work