

NYU International Law Course (Kingsbury)

Unit 6: Immunity and Act of State in National Courts

User's Guide

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A. Framework

The issue of sovereign immunity of states is part of the *Transnational Civil Law Responsibility* idea, namely the turn to civil litigation in domestic courts in what are conceivably international legal issues or disputes.¹ In Unit VI we explored the American Courts jurisprudence on tort claims brought by non-American victims to the United States under the ATCA. This Unit turns *away from the individual to the State and later International Organizations* as the actors against which the cases are argued. The theoretical premise underlying this topic is the premise of sovereign equality which is accompanied by a mutual obligation among states not to intervene in the internal affairs of one another and a prohibition on the settlement of disputes without consent. This premise is given effect by the recognition of states' absolute immunity as a preliminary plea against proceedings brought against a foreign state. Similarly, the plea of *Act of State* renders certain disputes non-justiciable in domestic courts. The Unit focuses on the rise of a *restrictive doctrine to state immunity*. We revisit the erosion of absolute immunity as informed by the Military, Markets, and Morals logics. The MMM logics anticipate the American jurisprudence' preference of market based claims as a basis for exceptions to immunity of states. Will the primacy provided in American jurisprudence to market based values (e.g. private property and free trade) in comparison to other human rights, especially ones which are recognized as *ius cogens*, be challenged as we turn to the global governance context? How do the elements of Global Governance engage with these conflicting underlying logics: what is the role of national democracy (should democracies' immunity be privileged?), what role do

¹ In the late 1980's Harold Kongju Koh called attention to the burgeoning of "transnational public litigation": suits brought in United States Court by individual and governmental litigants challenging violations of international law. Later he included in the phenomenon international human rights suits brought by aliens against foreign and United States governments and officials under the Alien Tort Statute, as well as action by foreign governments against individual, American, and corporate defendants. Harold Kongju Koh, *Transnational Public Law Litigation*, 100 YALE L. J. 2372 (1991).

transnational networks play in this context (NGOs, market networks, diplomatic networks)? How is the discourse of the conflicting values involved (e.g. anti-terrorism, jus cogens rights, property rights, free trade etc.) reconfigure in the global context? are few of the queries explored in this unit.

B. Trajectory

The idea of absolute state immunity is a foreign office model doctrine. We begin this unit by exploring its erosion in a *foreign office* context: allowing adjudication against foreign *states* in *state courts*. The first part of the unit focuses on American jurisprudence which exemplifies both a rather elaborated and an innovative approach in the context of immunity of *states*. The unit explores critically the exceptions to immunity of states – most prominently to allow commercial transactions and to fight terrorism – and the challenges these exceptions face in the context of conferring jurisdiction and enforcement. The discussion of the erosion of the foreign office model of states' immunity is then critically analyzed in the world of global governance: the eroding immunity of international organizations.

C. A Foreign State as a Plaintiff

(i) Historical Evolution

In the past foreign states had absolute immunity in another state's courts; exceptions were developed by the mid-1920s, for immovable property, inheritances, and merchant ships (in rem proceedings). However, immunity still existed when a foreign state engaged in commercial acts. The *Tate Letter* suggested that if you could persuade the State Dept. you might be able to get into court. In 1976 Congress sought to solve the diplomatic problems arising from the Tate Letter policy by transferring the primary responsibility for immunity determinations from the Executive to the Judicial Branch. It enacted the ***Foreign Sovereign Immunities Act (FSIA, 1976)*** and codified, as a matter of federal law, *The Restrictive Theory of Sovereign Immunity*. While most states in the world follow a notion of an absolute immunity, the American approach sets forth that immunity of states isn't based upon an

international obligation but is granted as a matter of *comity*.² The *exceptions* to immunity are, themselves, based upon customary international law.

(ii) *Sovereign Immunity and the FSIA (1976)*

General Framework: In order to establish jurisdiction under §1330 of FSIA a claimant against a foreign state must assert that her cause of action falls within one of the exceptions to immunity as set forth in §1605. There is no immunity if:

1. there is a waiver or implicit waiver
2. if action is based on commercial activity
 - a. carried on in the US
 - b. based on act performed in the US
 - c. direct effect in the US [*Weltover*]
3. expropriated property (taken in violation of international law)
 - a. *Sabbatino* case (Act of State doctrine)
4. immovable property
5. situations where foreign state is alleged to have committed a tort in the US
 - a. Exceptions to the exception: discretionary function; slander, libel.
6. Arbitration

1605A. Added in 2008; replaced provision (7), which was added in 1996. The change was intended to make it easier for victims of terrorism to sue state sponsors of terrorism. The exception is limited both by a requirement that the defendant state be a designated state sponsor of terrorism and by a requirement that the victim be a US national, member of the armed forces, or employee/contractor of the United States government (or said person's legal representative); or else if it is related to Case Number 1:00CV03110 (EGS) in the federal District Court in D.C. (a case on the Iranian hostage crisis).

Rule: The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country" (*Amerada Hess, U.S. Supreme Court, 1989*).³ Under the act, a foreign state is presumptively immune from the jurisdiction of US courts unless a specified exception applies.

The exceptions to the FSIA: The Act grants federal courts *jurisdiction* over civil actions against foreign states, and over diversity actions in which a foreign state is the plaintiff. The act carves out certain exceptions to its general grant of immunity. §1603 (a) introduces an inclusive definition of the term 'foreign state': it includes federal units or any governmental unit set up in that foreign state. That doesn't necessarily resolve some interesting questions about Native American tribes or Churches. In addition, its definition of 'agency' potentially

² The idea of comity is quite strongly conveyed in Justice Breyer's decision in *Altman v. Austria*: "...the objective of the "sovereign immunity" (in contrast to other *conduct*-related immunity doctrines) is simply to give foreign states and instrumentalities "some protection," at the time of suit, "from inconvenience of suite as a gesture of comity." 541 U.S. 677, 709 (2004).

³ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989).

connects it to state responsibility and the law of attribution and to further questions regarding chains of control. The subject matter jurisdiction of the court is dependent upon the application of one of the exceptions. The exceptions are not very specific or detailed, in part because of the political difficulty to draft such exceptions. Furthermore, this flexibility permits the statute to incorporate future developments in international law.

UUU§ 1605(a)(1) Waiver: The classic form of exception to jurisdictional immunity is *waiver*. There is no sovereign immunity in a case in which the foreign state has waived its immunity either explicitly or by implication. Does the violation of an international preemptory norm amount to a waiver of sovereign immunity? This question was raised in *The Prinz Case (D.C. Circuit 1994)*. Despite the troubling background of the case, the Court decided that the waiver exception to FSIA couldn't be read as broadly and Germany retained immunity there. Judge Wald dissented, arguing that Germany's treatment of Prinz violated jus cogens norms of the law of nations, and that by engaging in such conduct, Germany implicitly waived its immunity for suit within the meaning of the FSIA. More broadly, Wald argued against the idea that "the mantle of sovereign immunity could serve to cloak" an act that constitutes a violation of jus cogens even if that act is confined to the borders of that state. By abdicating its responsibility to act in accordance with such norms Germany consciously waived its right to any and all sovereign immunity. The comity upon which the claim for immunity is based is balanced in her decision with the obligation to protect rights which are recognized as jus cogens. This plausible structure of argument was at the end rejected by the majority.

§1605(a)(2): Commercial Activity: The most important exception dealt with in this unit is defined in §1605 (a) (2) commercial activity. The sovereign capacity is often called *imperii* and the commercial one *gestionis*. The rationale and reasons which led the US to define commercial activity exception could be attributed to the growth in trade especially in the context of the Cold War. In addition it was considered highly important for creating favorable environment for foreign investors in weaker states. An important feature of this doctrine is its distinction between the nature of the act and its purpose; the focus is only on the nature of the act. In order to argue for a 'commercial activity' one needs to prove it was either carried on *in* the U.S. (by the foreign state); or upon an act performed in the U.S. *in connection* with a commercial activity of a foreign state elsewhere; or upon an act outside U.S. territory in

connection with commercial activity of a foreign state and that act *causes a direct effect* in the U.S.

At the background of the decision in *The Republic of Argentina v. Weltover (Supreme Court, 1992)* was the government of Argentina's lack of sufficient foreign exchange when the bonds ("Bondos") it had issued matured in 1986. Most holders of Argentine debt participated in its proposed rescheduling of its obligations. The plaintiffs – two Panamanian corporations and a private Swiss Bank – refused to go along with the plan. The nature of *what* commercial act should the Court focus on arose as an issue in the case. Is it the issuance of the bond or the sovereign state's attempt to handle an economic crisis? The nature/purpose line doesn't tell us what should be the object of the analysis.

The problem of focusing on the on the *type* of actions by which a private party engages is further illustrated in the case of *Nelson v. Saudi-Arabia (1993)*. The Court declined the assertion of perceiving the tortuous conduct as deriving from the employment contract. Its reasoning is based upon the assertion that an exercise of the powers of police and penal officers is not the sort of action by which private parties could engage in commerce. The sharp line drawn by the court could be problematized: if Nelson's employers were the ones who called the police, why does the fact that the torture was conducted by the police render it outside the scope of the commercial activity exception?

§1605 (a) (3) Property Rights - This potentially would have been the basis for the case of *The Republic of Austria v. Altman (Supreme Court, 2004)* . It further raises the contested issue of the protection of property rights under international law; does international law requires a higher protection than the local one, or should there be a specific standard applied for protection of foreigner's property? The American view states that property of foreigners may only be taken for a public purpose on a non-discriminatory basis and with the payment of prompt, effective and either adequate or full compensation based upon market value. The extent to which this rule reflects customary international law is yet contested. Many third world states claim that compensation needs to be based upon principles of fairness.

§1605A- The Anti-Terrorist exception The exception only applies if certain conditions are met. According to §1605A the foreign state has to be designated as a state sponsor of terrorism when the act occurred, unless so designated later as a result of such act. This second

clause was introduced under the former provision, 1605(a)(7), in 1996 in order to hold Libya liable for its involvement in the 1988 Lockerbie bombing. Related to that is the set of cases which arose from the bombing of a French UTA Flight 772 over Chad in 1989. The exception is limited both to designated countries and to a requirement that the victim is a US national, member of the armed forces, or employee/contractor acting in the scope of employment. Alternatively, the claim can be related to the Iran hostage crisis. Private claimants under this provision are a way of pursuing the foreign policy of the US. The hazards of such privatized foreign policy are exemplified in some of the cases discussed in this unit.

While not discussed here further exceptions are mentioned in §1605 (a) (4) – (6)

(ii) *Immunity from Enforcement*

The exceptions to immunity from *enforcement* are provided in sections 1610 and 1611 to the FSIA. § 1610 is divided to (a) and (b). § 1610 (a) refers to the property *in the United States of a foreign state, used for commercial activity* in the United States. The latter shall not be immune from attachment in aid of execution or from execution upon a judgment *if it falls under the conditions mentioned in § 1610 (a) (1)-(7)*. § 1610 (b) creates a broader exceptions to state immunity from enforcement in relation to property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States. In ***Birch Shipping Corp. v. Embassy of United Republic of Tanzania (1980)*** the court held that while central bank accounts are exempted, it is proper to attach an embassy account even though it is not used solely for commercial activity. In ***Matter of the Republic of the Philippines (1978)*** the German constitutional court held otherwise and retained immunity in order not to preclude the functions of diplomatic immunity.⁴ In ***Alcom Ltd. v. Republic of Columbia (1984)*** the House of Lords reached a similar conclusion.⁵

The decision of ***Letelier v. Republic of Chile (1984)*** dealt with the enforcement of an earlier Court ruling that concluded it had subject matter jurisdiction based upon the exception to immunity found in § 1605 (a) (5) (personal injury and death occurring in the United States

⁴ *Matter of the Republic of the Philippines* (Const'l Ct. December 13, 1977), 46 BverfGE 342m (1978).

⁵ *Alcom v. Republic of Columbia* [1984] AC 580.

and caused by the tortuous act of its officials or employees). This decision dealt with the enforcement aspect. It raised the question of whether the assets of a foreign state's wholly owned airline (LAN) are subject to execution to satisfy the default judgment obtained against a foreign state; more specifically, whether the Court should ignore the separate judicial status of LAN from the state as a corporate actor. It concluded that the evidence did not reveal *an abuse of the corporate form* of the nature or degree that would be sufficient to overcome the presumption of separate entities. The court further held that Chile lost its immunity because of the "tortious activity" exception and therefore LAN's assets couldn't be stripped of immunity based upon the *commercial exception*. Indeed, the decision left the judgment with no remedy. This led the American administration to pressure the Chilean authorities to exempt the Letelier case from the comprehensive amnesty law passed in Chile.

To Conclude, The reality of global markets led to the erosion of state immunity that embodies a *Foreign Office* model. However, challenges to the foreign office model could similarly derive from the growing convergence and influence of human rights. Accordingly, the problem raised in Letelier of *right without remedy* could be further argued as a human rights claim favoring enforcement in such cases. An intermediate claim would be to provide such enforcement only in states which concede to such protection of property rights; a separate zone of law to liberal democracies. The foreign office view would oppose such claim *because* of sovereign equality and the need to *protect* liberal democracies. Further argument in support of the foreign office model would address the importance of subordinating public power to its own courts. The decentralized nature of the system could expose it to politicization and abuse we ought to consider when weighing between the different approaches.

(iv) *Act of State Doctrine*

According to *The Act of State* doctrine, "every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."⁶ The defense of *Act of State* provides an application of those principles to legislative or

⁶ Chief Justice Fuller in *Underhill v. Hernandez*, 168 I.S. 250, 252.

governmental acts affecting title to private property, moveable or immovable, located within the territory of another state.⁷ While deriving from the principle of sovereign equality, the doctrine *isn't* required under international law. In *Banco National v. Sabbatino (1963)* the United States Supreme Court decided that American courts must enforce a recognized foreign government's expropriation decree even though it violated international law. The Court based its decision on the Act of State doctrine.

Indeed, the doctrine is not absolute and in the case of *Bernstein (1954)* an exception to it was made for cases involving a gross violation of United States public policy *and* where the State Department expresses its approval of judicial review of the foreign state's act.⁸ The American jurisprudential rationale is to prevent courts from disrupting foreign relations. One could problematize the desirability of subjecting the courts to the executive branch.

If perceived as a *choice of law* problem the Act of State doctrine would be subject to the exception of *public policy*, namely the court will not enforce a foreign government act if it is contrary to public policy. One way to reconcile between the problems arising from the Sabbatino decision would be to read it as informed by the political circumstances of decolonization and the Cold War. In the aftermath of decolonization many states nationalized private property of firms operating in their territories. Exposing the newly established governments to litigation could lead them to tip towards the USSR. It would further frustrate the potential of establishing liberal capitalist markets in Latin America. Despite the shift in policy towards broader protection under the Act of State Doctrine, the tensions between Cuba and the U.S. led to the enactment of the *Sabbatino Amendment (1964)*.

The *Sabbatino* interpretation of the Act of State Doctrine was further narrowed in *Kirkpatrick v. Environmental Tectonics Corp. (1990)*. The petitioner, Kirkpatrick, was allegedly awarded a contract in Nigeria because of a bribe its officers paid to officials of the Nigerian government. The respondent brought a civil action in the U.S. Justice Scalia held that the Court needn't apply the Act of State doctrine because the legality of the contract with the Nigerian government needn't be decided in this case and thus the validity of a foreign state action isn't at issue. The Court doesn't need to decide whether or not the doctrine

⁷ Hazel Fox, International Law and Restraints on Exercise of Jurisdiction by National Courts of States, 361- 383 in INTERNATIONAL LAW (Malcolm Evans., ed, 2006).

⁸ *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d cir. 1954).

applies. In *Buttes Gas v. Hammer (1982)* the House of Lords decided differently in a similar context of concession granted because of bribery and abstained from interfering in order to allow the state to conduct its foreign relations.

The British alternative – to treat this issue as a conflict of laws issue – is further exemplified in the case of *Kuwait Airways v. Iraq Airways*. The American perspective is that the *Act of State* doctrine *isn't* an international law issue but an *American* one. The British position suggests a state judiciary could conceive the issue as governed by *international law* especially in such circumstances where a decision of an international law organization on the matter was given. In this case the House of Lords broadened the public policy exception to include legislation of a foreign state contrary to fundamental and well-established principles of international law.

D. Immunity of International Organizations

The underlying logic governing immunity of International Organizations is that they are created by state consent and thus ought to receive substantial immunity. States legislation deriving from international treaties often insures such immunity is granted to the international organizations established by the treaties. The European Court of Human Rights decision in the case of *Waite v. Kennedy (1994)* challenges this rationale by arguing that the importance of immunities in securing the operation of international organization cannot absolve their responsibility under the convention to protect rights such as *the right of access to court*. Note that immunity has been incredibly important for many international organizations in functioning around the world. Though the old idea of having immunity just by virtue of being an international organization is under threat as the rights of the individual gain more importance, it might also be disruptive not to grant international organizations immunity. Opening up the idea of lifting immunity for human rights purposes raises the risk that these officials will be harassed by states that don't like the work the international organization is doing.

In the memorandum for case of *Cynthia Brzak and Nasr Ishak v. the U.N et al (2007)* the desirability and scope of the immunity granted for United Nations officials is addressed. The memorandum expresses the U.N.'s view of immunity, and represents the arguments it made to the court. The Secretary General determined that the individual defendants in the case of Brzak are immune from proceedings deriving from Brzak's allegations on their

involvement in sexual harassment. The case suggests the importance of distinguishing between the importance of international organizations' immunity and the right to a remedy. Nevertheless, the assertion that sexual harassment could be part of one's official capacity is questionable. Could it ever be someone's official capacity to sexually harass an employee?

The risk of exposing UN officials and the organization itself for law suits in quest for compensation might explain the U.S. position in favor of maintaining the immunity of most defendants in this case (20% of the UN budget is funded by the U.S.). Despite the American interest in maintaining the U.N officials' immunity the letter issued by the U.S. government suggests it will not urge the Court to grant immunity to the sexual harasser, especially when there is no remedy for the woman.

E. Questions to Consider

I. FSIA

Who does state immunity favor? Is there any reason to think *relaxing* immunity would be attractive to foreign states? Is using civil liability to advance foreign policy a good idea? Is it 'privatizing' foreign policy? Does transnational civil responsibility provide a means of enforcing some sort of international values? And what would those values be? Why are we focused on commercial rights? Are we prioritizing capital markets over human rights? Is there any reason to do so?

II. Immunity of International Organizations

How do you think the balance should be struck between immunity of international organizations and the risk of impunity? What are the considerations one has to take into account when designing a policy to address this issue? Are there specific contexts or violations of rights which justify limiting immunity more than others? Do you find the American position sufficiently protective of women's rights? What could be an alternative position advocated by the U.S. government? What are the risks and costs to such alternative position?