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Chapter 20

International Law

LEARNING OBJECTIVES

After reading this chapter, you should understand the following:

1. The concepts of sovereignty, self-determination, failed states, and failing states
2. The sources of international law, and examples of treaties, conventions, and customary international law
3. How civil-law disputes between the parties from different nation-states can be resolved through national court systems or arbitration
4. The well-recognized bases for national jurisdiction over various parties from different nation-states
5. The doctrines of *forum non conveniens*, sovereign immunity, and act of state

20.1 Introduction to International Law

J. L. Austin, the legal realist, famously defined law as “the command of a sovereign.” He had in mind the fact that legal enforcement goes beyond negotiation and goodwill, and may ultimately have to be enforced by some agent of the government. For example, if you fail to answer a summons and complaint, a default judgment will be entered against you; if you fail to pay the judgment, the sheriff (or US marshal) will actually seize assets to pay the judgment, and will come armed with force, if necessary.

The force and authority of a government in any given territory is fundamental to sovereignty. Historically, that was understood to mean a nation’s “right” to issue its own currency, make and enforce laws within its borders without interference from other nations (the “right of self-determination” that is noted in the Charter of the United Nations), and to defend its territory with military force, if necessary. In a nation at relative peace, sovereignty can be exercised without great difficulty. But many countries are in civil war, and others experience “breakaway” areas where force must be used to assert continued sovereignty. In some countries, civil war may lead to the formation of new nation-states, such as in Sudan in 2011.

In the United States, there was a Civil War from 1860 to 1864, and even now, there are separatist movements, groups who refuse to recognize the authority of the local, state, or national governments. From time to time, these groups will declare their independence of the sovereign, raise their own flag, refuse to pay taxes, and resist government authority with arms. In the United States, the federal government typically responds to these “mini-secessionist” movements with force.

In Canada, the province of Quebec has considered separating from Canada, and this came close to reality in 1995 on a referendum vote for secession that gained 49.4 percent of the votes. Away from North America, claims to exclusive political and legal authority within some geographic area are often the stuff of civil and regional wars. Consider Kosovo’s violent secession from Yugoslavia, or Chechnya’s attempted secession from Russia. At stake in all these struggles is the uncontested right to make and enforce laws within a certain territory. In some nation-states, government control has failed to achieve effective control over substantial areas, leaving factions, tribal groups, or armed groups in control. For such nations, the phrase “failed states” or “failing states” has sometimes been used. A **failing state**¹ usually has some combination of lack of control over much of its territory, failure to provide public services, widespread corruption and criminality, and sharp economic decline. Somalia, Chad, and Afghanistan, among others, head the list as of 2011.

1. A nation-state where substantial parts of the geographic territory in that nation are no longer effectively controlled by the central government.

In a functioning state, the right to make and enforce law is not contested or in doubt. But in the international arena, there is no sovereign lawgiver and law enforcer. If a criminal burglarizes your house and is caught, the legal authorities in your state have little difficulty bringing him to justice. But suppose a dictator or military-run government oppresses some of the citizenry, depriving these citizens of the chance to speak freely, to carry on a trade or profession, to own property, to be educated, or to have access to water and a livable environment, or routinely commits various atrocities against ethnic groups (forced labor, rape, pillage, murder, torture). Who will bring the dictator or government to justice, and before what tribunal?

There is still no forum (court or tribunal) that is universally accepted as a place to try to punish such people. The International Criminal Court has wide support and has prosecuted several individuals for crimes, but the United States has still not agreed to its jurisdiction.

During the 1990s, the United States selectively “policed” certain conflicts (Kosovo, Haiti, Somalia), but it cannot consistently serve over a long period of time as the world’s policeman. The United States has often allowed human rights to be violated in many nations without much protest, particularly during the Cold War with the Union of Soviet Socialist Republics (USSR), where alliances with dictatorships and nondemocratic regimes were routinely made for strategic reasons.

Still, international law is no myth. As we shall see, there are enforceable treaties and laws that most nations abide by, even as they are free to defect from these treaties. Yet the recent retreat by the United States from pending international agreements (the Kyoto Protocol, the International Criminal Court, and others) may be a sign that multilateralism is on the wane or that other nations and regional groupings (the European Union, China) will take a more prominent role in developing binding multilateral agreements among nations.

KEY TAKEAWAY

International law is based on the idea of the nation-state that has sovereignty over a population of citizens within a given geographical territory. In theory, at least, this sovereignty means that nation-states should not interfere with legal and political matters within the borders of other nation-states.

EXERCISES

1. Using news sources, find at least one nation in the world where other nations are officially commenting on or objecting to what goes on within that nation's borders. Are such objections or comments amounting to an infringement of the other nation's sovereignty?
2. Using news sources, find at least one nation in the world that is engaged in trying to change the political and legal landscape of another nation. What is it doing, and why? Is this an infringement of the other nation's sovereignty?
3. What is a failed state? What is a failing state? What is the difference? Is either one a candidate for diplomatic recognition of its sovereignty? Discuss.

20.2 Sources and Practice of International Law

LEARNING OBJECTIVES

1. Explain what a treaty is and how it differs from a convention.
2. Understand that a treaty can be a voluntary relinquishment of some aspects of sovereignty.
3. Describe customary international law, and explain how it is different from treaties as a source of international law.
4. Describe some of the difficulties in enforcing one nation's judicial judgments in another nation.

In this section, we shall be looking at a number of different sources of international law. These sources include treaties and conventions, decisions of courts in various countries (including decisions in your own state and nation), decisions of regional courts (such as the European Court of Justice), the World Trade Organization (WTO), resolutions of the United Nations (UN), and decisions by regional trade organizations such as the North American Free Trade Agreement (NAFTA). These sources are different from most of the cases in your textbook, either because they involve parties from different nations or because the rule makers or decision makers affect entities beyond their own borders.

In brief, the sources of international law include everything that an international tribunal might rely on to decide international disputes. International disputes include arguments between nations, arguments between individuals or companies from different nations, and disputes between individuals or companies and a foreign nation-state. Article 38(1) of the Statute of the International Court of Justice (ICJ) lists four sources of international law: treaties and conventions, custom, general principles of law, and judicial decisions and teachings.

The ICJ only hears lawsuits between nation-states. Its jurisdiction is not compulsory, meaning that both nations in a dispute must agree to have the ICJ hear the dispute.

Treaties and Conventions

Even after signing a treaty or convention, a nation is always free to go it alone and repudiate all regional or international bodies, or refuse to obey the dictates of the United Nations or, more broadly and ambiguously, “the community of nations.” The

United States *could* repudiate NAFTA, *could* withdraw from the UN, and *could* let the WTO know that it would no longer abide by the post–World War II rules of free trade embodied in the General Agreement on Tariffs and Trade (GATT). The United States would be within its rights as a sovereign to do so, since it owes allegiance to no global or international sovereign. Why, however, does it not do so? Why is the United States so involved with the “entangling alliances” that George Washington warned about? Simply put, nations will give away part of their sovereignty if they think it’s in their self-interest to do so. For example, if Latvia joins the European Union (EU), it gives up its right to have its own currency but believes it has more to gain.

A **treaty**² is nothing more than an agreement between two sovereign nations. In international law, a nation is usually called a state or **nation-state**³. This can be confusing, since there are fifty US states, none of which has power to make treaties with other countries. It may be helpful to recall that the thirteen original states under the Articles of Confederation were in fact able to have direct relations with foreign states. Thus New Jersey (for a few brief years) could have had an ambassador to France or made treaties with Spain. Such a decentralized confederation did not last long. Under the present Constitution, states gave up their right to deal directly with other countries and vested that power in the federal government.

There are many treaties to which the United States is a party. Some of these are **conventions**⁴, which are treaties on matters of common concern, usually negotiated on a regional or global basis, sponsored by an international organization, and open to adoption by many nations. For example, as of 2011, there were 192 parties (nation-states) that had signed on to the Charter of the UN, including the United States, Uzbekistan, Ukraine, Uganda, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, and Uruguay (just to name a few of the nations starting with *U*).

The most basic kind of treaty is an agreement between two nation-states on matters of trade and friendly relations. Treaties of friendship, commerce, and navigation (FCN treaties) are fairly common and provide for mutual respect for each nation-state’s citizens in (1) rights of entry, (2) practice of professions, (3) right of navigation, (4) acquisition of property, (5) matters of expropriation or nationalization, (6) access to courts, and (7) protection of patent rights. Bilateral investment treaties (BITs) are similar but are more focused on commerce and investment. The commercial treaties may deal with a specific product or product group, investment, tariffs, or taxation.

2. An agreement between two or more nation-states. In US law, a treaty has the same standing as a federal statute.

3. Under international law, the common term for a country or a nation.

4. Multilateral treaties that are sponsored by an international agency or institution (e.g., the United Nations).

Nation-states customarily enter not only into FCN treaties and BITs but also into peace treaties or weapons limitations treaties, such as the US-Russia Strategic Arms Reduction Talks (START) treaty. Again, treaties are only binding as long as each party continues to recognize their binding effect. In the United States, the procedure for ratifying a treaty is that the Senate must approve it by a two-thirds vote (politically, an especially difficult number to achieve). Once ratified, a treaty has the same force of law within the United States as any statute that Congress might pass.

Custom

Custom between nations is another source of international law. Custom is practice followed by two or more nations in the course of dealing with each other. These practices can be found in diplomatic correspondence, policy statements, or official government statements. To become custom, a consistent and recurring practice must go on over a significant period of time, and nations must recognize that the practice or custom is binding and must follow it because of legal obligation and not mere courtesy. Customs may become codified in treaties.

General Principles of Law, or Customary International Law

Even without treaties, there would be some international law, since not all disputes are confined to the territory of one nation-state. For example, in *In re the Bremen*, a US company's disagreement with a German company was heard in US courts. The US courts had to decide *where* the dispute would properly be heard. In giving full effect to a forum-selection clause, the US Supreme Court set out a principle that it hoped would be honored by courts of other nations—namely, that companies from different states should honor any **forum-selection clause**⁵ in their contract to settle disputes at a specific place or court. (See the *Bremen* case, [Section 20.5.1 "Forum-selection clauses"](#)). If that principle is followed by enough national court systems, it could become a principle of **customary international law**⁶. As an example, consider that for many years, courts in many nations believed that **sovereign immunity**⁷ was an established principle of international law.

Judicial Decisions in International Tribunals; Scholarly Teachings

The Statute of the International Court of Justice recognizes that international tribunals may also refer to the teachings of preeminent scholars on international law. The ICJ, for example, often referred to the scholarly writings of Sir Hersch Lauterpacht in its early decisions. Generally, international tribunals are not bound by *stare decisis* (i.e., they may decide each case on its merits). However, courts such as the ICJ do refer to their own past decisions for guidance.

5. In a contract, national or international, the parties may specify the court where any disputes between the parties will be settled. See the *Bremen* case.
6. Rules of law derived from the consistent conduct of nation-states acting out of the belief that the law required them to act that way.
7. A long-standing doctrine under customary international law that recognizes a nation-state's immunity from legal claims. Although absolute sovereign immunity was widely held through the greater part of the twentieth century, a more restrictive doctrine began to take hold after World War II, one that denied sovereign immunity for a sovereign's commercial or private acts.

There are many international tribunals, including the European Court of Justice, the ICJ, and the International Criminal Court. Typically, however, disputes between corporations or between individuals that cross national boundaries must be resolved in national court systems or in arbitration. In other words, there is no international civil court, and much complexity in international law derives from the fact that national court systems must often choose from different sources of law, using different legal traditions in order to resolve international disputes. For example, a court in one nation may have some difficulty accepting the judgment of a foreign nation's court system, as we see in *Koster v. Automark* (see [Section 20.5.2](#) "Due process in the enforcement of judgments").

Due Process and Recognition of Foreign Judgments

Issues surrounding recognition of foreign judgments arise when one nation's courts have questions about the fairness of procedures used in foreign courts to acquire the judgment. Perhaps the defendant was not notified or did not have ample time in which to prepare a defense, or perhaps some measure of damages was assessed that seemed distinctly unfair. If a foreign state makes a judgment against a US company, the judgment will not be recognized and enforced in the United States unless the US court believes that the foreign judgment provided the US company with due process. But skepticism about a foreign judgment works the other way, as well. For example, if a US court were to assess punitive damages against a Belgian company, and the successful plaintiff were to ask for enforcement of the US judgment in Belgium, the Belgian court would reject that portion of the award based on punitive damages. Compensatory damages would be allowed, but as Belgian law does not recognize punitive damages, it might not recognize that portion of the US court's award.

Concerns about notice, service of process, and the ability to present certain defenses are evident in *Koster v. Automark*. Many such concerns are eliminated with the use of forum-selection clauses. The classic case in US jurisprudence is the *Bremen* case, which resolves difficult questions of where the case should be tried between a US and German company by approving the use of a forum-selection clause indicating that a court in the United Kingdom would be the only forum that could hear the dispute.

Part of what is going on in *Bremen* is the Supreme Court's concern that due process should be provided to the US company. What is fair (procedurally) is the dominant question in this case. One clear lesson is that issues of fairness regarding personal jurisdiction can be resolved with a forum-selection clause—if both parties agree to a forum that would have subject matter jurisdiction, at least minimal fairness is evident, because both parties have “consented” to have the forum decide the case.

Arbitration

The idea that a forum-selection clause could, by agreement of the parties, take a dispute out of one national court system and into another court system is just one step removed from the idea that the parties can select a fair resolution process that does not directly involve national court systems. In international arbitration, parties can select, either before or after a dispute arises, an arbitrator or arbitral panel that will hear the dispute. As in all arbitration, the parties agree that the arbitrator's decision will be final and binding. Arbitration is generally faster, can be less expensive, and is always private, being a proceeding not open to media scrutiny.

Typically, an arbitration clause in the contract will specify the arbitrator or the means of selecting the arbitrator. For that purpose, there are many organizations that conduct international arbitrations, including the American Arbitration Association, the International Chamber of Commerce, the International Centre for Settlement of Investment Disputes, and the United Nations Commission on International Trade Law. Arbitrators need not be judges or lawyers; they are usually business people, lawyers, or judges who are experienced in global commercial transactions. The arbitration clause is thus in essence a forum-selection clause and usually includes a choice of law for the arbitrator or arbitral panel to follow.

An arbitral award is not a judgment. If the losing party refuses to pay the award, the winning party must petition a court somewhere to enforce it. Fortunately, almost every country that is engaged in international commerce has ratified the United Nations Convention on the Recognition and Enforcement of Arbitral Awards, sometimes known as the New York Convention. The United States adopted this convention in 1970 and has amended the Federal Arbitration Act accordingly. Anyone who has an arbitral award subject to the convention can attach property of the loser located in any country that has signed the convention.

KEY TAKEAWAY

Treaties and conventions, along with customary international law, are the primary sources of what we call international law. Disputes involving parties from different nation-states are resolved in national (federal) court systems, and one nation's recognition and enforcement of another nation's judicial orders or judgments will require reciprocal treaties or some review that the order or judgment was fairly obtained (that there was due process in the determination of the order or judgment).

EXERCISES

1. At the US Senate website, read about the history of treaties in the United States. What is an “executive agreement,” and why has the use of executive agreements grown so fast since World War II?
2. Is NAFTA a treaty or an executive agreement? What practical difference does it make if it is one rather than the other?

20.3 Important Doctrines of Nation-State Judicial Decisions

LEARNING OBJECTIVES

1. Define and describe the three traditional bases for a nation's jurisdiction over those individuals and entities from other nation-states.
2. Explain *forum non conveniens* and be able to apply that in a case involving citizens from two different nation-states.
3. Describe and explain the origins of both sovereign immunity and the act-of-state doctrine, and be able to distinguish between the two.

Bases for National Jurisdiction under International Law

A nation-state has jurisdiction to make and enforce laws (1) within its own borders, (2) with respect to its citizens (nationals") wherever they might be, and (3) with respect to actions taking place outside the territory but having an objective or direct impact within the territory. In the Restatement (Third) of Foreign Relations Law, these three jurisdictional bases are known as (1) the territorial principle, (2) the nationality principle, and (3) the objective territoriality principle.

As we have already seen, many difficult legal issues involve jurisdictional problems. When can a court assert authority over a person? (That's the personal jurisdiction question.) When can a court apply its own law rather than the law of another state? When is it obligated to respect the legal decisions of other states? All these problems have been noted in the context of US domestic law, with its state-federal system; the resolution of similar problems on a global scale are only slightly more complicated.

The **territorial principle**⁸ is fairly simple. Anything that happens within a nation's borders is subject to its laws. A German company that makes direct investment in a plant in Spartanburg, South Carolina, is subject to South Carolina law and US law as well.

Nationality jurisdiction⁹ often raises problems. The citizens of a nation-state are subject to its laws while within the nation and beyond. The United States has passed several laws that govern the conduct of US nationals abroad. United States companies may not, for example, bribe public officials of foreign countries in order to get contracts (Foreign Corrupt Practices Act of 1976). Title VII of the Civil Rights

8. A nation-state has the power to make and enforce laws with regard to events taking place within its political/geographic territory.

9. Under customary international law, nation-states may exercise jurisdiction over their citizens (nationals) even when the citizens' actions in question take place beyond their borders.

Act also applies extraterritorially—where a US citizen is employed abroad by a US company.

For example, suppose Jennifer Stanley (a US citizen) is discriminated against on the basis of gender by Aramco (a US-based company) in Saudi Arabia, and she seeks to sue under Title VII of the Civil rights Act of 1964. The extraterritorial reach of US law seems odd, especially if Saudi Arabian law or custom conflicts with US law. Indeed, in *EEOC v. Arabian American Oil Co.*, the Supreme Court was hesitant to say that US law would “reach” across the globe to dictate proper corporate conduct. *EEOC v. Arabian American Oil Co.* 499 U.S. 244 (1991). Later that year, Congress made it clear by amending Title VII so that its rules would in fact reach that far, at least where US citizens were the parties to a dispute. But if Saudi Arabian law directly conflicted with US law, principles of customary international law would require that territorial jurisdiction would trump nationality jurisdiction.

Note that where the US laws conflict with local or host country laws, we have potential conflict in the extraterritorial application of US law to activities in a foreign land. See, for example, *Kern v. Dynalelectron*. *Kern v. Dynalelectron*, 746 F.2d 810 (1984). In *Kern*, a Baptist pilot (US citizen) wanted to work for a company that provided emergency services to those Muslims who were on a pilgrimage to Mecca. The job required helicopter pilots to occasionally land to provide emergency services. However, Saudi law required that all who set foot in Mecca must be Muslim. Saudi law provided for death to violators. Kern (wanting the job) tried to convert but couldn't give up his Baptist roots. He sued Dynalelectron (a US company) for discrimination under Title VII, claiming that he was denied the job because of his religion. Dynalelectron did not deny that they had discriminated on the basis of his religion but argued that because of the Saudi law, they had no viable choice. Kern lost on the Title VII claim (his religion was a bona fide occupational qualification). The court understood that US law would apply extraterritorially because of his nationality and the US nationality of his employer.

The principle of **objective territoriality**¹⁰ is fairly simple: acts taking place within the borders of one nation can have a direct and foreseeable impact in another nation. International law recognizes that nation-states act appropriately when they make and enforce law against actors whose conduct has such direct effects. A lawsuit in the United States against Osama bin Laden and his relatives in the Middle East was based on objective territoriality. (Based in Afghanistan, the Al Qaeda leader who claimed credit for attacks on the United States on September 11, 2001.)

10. Under customary international law, nation-states may exercise jurisdiction over noncitizens when the actions of those noncitizens have a direct and foreseeable impact on the nation-state claiming jurisdiction.

Where a defendant is not a US national or is not located in the United States when prosecution or a civil complaint is filed, there may be conflicts between the United States and the country of the defendant's nationality. One of the functions of

treaties is to map out areas of agreement between nation-states so that when these kinds of conflicts arise, there is a clear choice of which law will govern. For example, in an extradition treaty, two nation-states will set forth rules to apply when one country wants to prosecute someone who is present in the other country. In general, these treaties will try to give priority to whichever country has the greater interest in taking jurisdiction over the person to be prosecuted.

Once jurisdiction is established in US courts in cases involving parties from two different nations, there are some important limiting doctrines that business leaders should be aware of. These are **forum non conveniens**¹¹, sovereign immunity, and the **act-of-state doctrine**¹². Just as conflicts arise over the proper venue in US court cases where two states' courts may claim jurisdiction, so do conflicts occur over the proper forum when the court systems of two nation-states have the right to hear the case.

Forum Non Conveniens; Forum-Selection Clauses

Forum non conveniens is a judicial doctrine that tries to determine the proper forum when the courts of two different nation-states can claim jurisdiction. For example, when Union Carbide's plant in Bhopal, India, exploded and killed or injured thousands of workers and local citizens, the injured Indian plaintiffs could sue Union Carbide in India (since Indian negligence law had territorial effect in Bhopal and Union Carbide was doing business in India) or Union Carbide in the United States (since Union Carbide was organized and incorporated in the United States, which would thus have both territorial and nationality bases for jurisdiction over Union Carbide). Which nation's courts should take a primary role? Note that *forum non conveniens* comes into play when courts in two different nation-states both have subject matter and personal jurisdiction over the matter. Which nation's court system should take the case? That, in essence, is the question that the *forum non conveniens* doctrine tries to answer.

11. A common-law doctrine used in cases where two different federal court systems have both subject matter jurisdiction and personal jurisdiction over the parties. Using *forum non conveniens*, a court may refuse to hear a case if there is an alternative forum that is available and adequate and if public and private interest factors point to the other nation's legal system as the proper venue.
12. A US judicial doctrine that avoids making any determination on the merits of the case if doing so would cause the court to sit in judgment of the legal validity of public acts by a foreign sovereign.

In the *Bremen* case (Section 20.5.1 "Forum-selection clauses"), the German contractor (Unterweser) had agreed to tow a drilling rig owned by Zapata from Galveston, Texas, to the Adriatic Sea. The drilling rig was towed by Unterweser's vessel, The Bremen. An accident in the Gulf damaged the drilling rig, and Zapata sued in US district court in Florida. Unterweser argued that London was a "better," or more convenient, forum for the resolution of Zapata's claim against Unterweser, but the district court rejected that claim. Had it not been for the forum-selection clause, the claim would have been resolved in Tampa, Florida. The *Bremen* case, although it does have a *forum non conveniens* analysis, is better known for its holding that in cases where sophisticated parties engage in arms-length bargaining and select a forum in which to settle their disputes, the courts will not second-guess

that selection unless there is fraud or unless one party has overwhelming bargaining power over the other.

In short, parties to an international contract can select a forum (a national court system and even a specific court within that system, or an arbitral forum) to resolve any disputes that might arise. In the *Bremen* case, Zapata was held to its choice; this tells you that international contracting requires careful attention to the forum-selection clause. Since the *Bremen* case, the use of arbitration clauses in international contracting has grown exponentially. The arbitration clause is just like a forum-selection clause; instead of the party's selecting a judicial forum, the arbitration clause points to resolution of the dispute by an arbitrator or an arbitral panel.

Where there is no forum-selection clause, as in most tort cases, corporate defendants often find it useful to invoke *forum non conveniens* to avoid a lawsuit in the United States, knowing that the lawsuit elsewhere cannot as easily result in a dollar-value judgment. Consider the case of *Gonzalez v. Chrysler Corporation* (see [Section 20.5.3 "Forum non conveniens"](#)).

Sovereign Immunity

For many years, sovereigns enjoyed complete immunity for their own acts. A king who established courts for citizens (subjects) to resolve their disputes would generally not approve of judges who allowed subjects to sue the king (the sovereign) and collect money from the treasury of the realm. If a subject sued a foreign sovereign, any judgment would have to be collectible in the foreign realm, and no king would allow another king's subjects to collect on his treasury, either. In effect, claims against sovereigns, domestic or foreign (at home or abroad), just didn't get very far. Judges, seeing a case against a sovereign, would generally dismiss it on the basis of "sovereign immunity." This became customary international law.

In the twentieth century, the rise of communism led to state-owned companies that began trading across national borders. But when a state-owned company failed to deliver the quantity or quality of goods agreed upon, could the disappointed buyer sue? Many tried, but sovereign immunity was often invoked as a reason why the court should dismiss the lawsuit. Indeed, most lawsuits were dismissed on this basis. Gradually, however, a few courts began distinguishing between governmental acts and commercial acts: where a state-owned company was acting like a private, commercial entity, the court would not grant immunity. This became known as the "restrictive" version of sovereign immunity, in contrast to "absolute" sovereign immunity. In US courts, decisions as to sovereign immunity after World War II were

often political in nature, with the US State Department giving advisory letters on a case-by-case basis, recommending (or not recommending) that the court grant immunity to the foreign state. Congress moved to clarify matters in 1976 by passing the Foreign Sovereign Immunities Act, which legislatively recognized the restrictive theory. Note, especially, Section 1605(a)(2).

Jurisdictional Immunities of Foreign States

28 USCS § 1602 (1998)

§ 1602. *Findings and declaration of purpose*

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter [28 USCS §§ 1602 et seq.].

§ 1603. *Definitions*

For purposes of this chapter [28 USCS §§ 1602 et seq.]—

(a) A “foreign state”, except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An “agency or instrumentality of a foreign state” means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country.

(c) The “United States” includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A “commercial activity” means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A “commercial activity carried on in the United States by a foreign state” means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. *Immunity of a foreign state from jurisdiction*

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. *General exceptions to the jurisdictional immunity of a foreign state*

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

Act of State

A foreign country may expropriate private property and be immune from suit in the United States by the former owners, who might wish to sue the country directly or seek an order of attachment against property in the United States owned by the foreign country. In the United States, the government may constitutionally seize private property under certain circumstances, but under the Fifth Amendment, it must pay “just compensation” for any property so taken. Frequently, however, foreign governments have seized the assets of US corporations without recompensing them for the loss. Sometimes the foreign government seizes all private property in a certain industry, sometimes only the property of US citizens. If the seizure violates the standards of international law—as, for example, by failing to pay just compensation—the question arises whether the former owners may sue in US courts. One problem with permitting the courts to hear such claims is that by

time of suit, the property may have passed into the hands of bona fide purchasers, perhaps even in other countries.

The Supreme Court has enunciated a doctrine governing claims to recover for acts of expropriation. This is known as the act-of-state doctrine. As the Supreme Court put it in 1897, “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...[and thereby adjudicate the legal validity of] the acts of the government of another done within its own territory.” *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). This means that US courts will “reject private claims based on the contention that the damaging act of another nation violates either US or international law.” *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). Sovereign immunity and the act-of-state doctrine rest on different legal principles and have different legal consequences. The doctrine of sovereign immunity bars a suit altogether: once a foreign-government defendant shows that sovereign immunity applies to the claims the plaintiff has raised, the court has no jurisdiction even to consider them and must dismiss the case. By contrast, the act-of-state doctrine does not require dismissal in a case properly before a court; indeed, the doctrine may be invoked by plaintiffs as well as defendants. Instead, it precludes anyone from arguing against the legal validity of an act of a foreign government. In a simple example, suppose a widow living in the United States is sued by her late husband’s family to prevent her from inheriting his estate. They claim she was never married to the deceased. She shows that while citizens of another country, they were married by proclamation of that country’s legislature. Although legislatures do not marry people in the United States, the act-of-state doctrine would bar a court from denying the legal validity of the marriage entered into in their home country.

The Supreme Court’s clearest statement came in a case growing out of the 1960 expropriation of US sugar companies operating in Cuba. A sugar broker had entered into contracts with a wholly owned subsidiary of *Compania Azucarera Vertientes-Camaguey de Cuba (C.A.V.)*, whose stock was principally owned by US residents. When the company was nationalized, sugar sold pursuant to these contracts had been loaded onto a German vessel still in Cuban waters. To sail, the skipper needed the consent of the Cuban government. That was forthcoming when the broker agreed to sign contracts with the government that provided for payment to a Cuban bank rather than to C.A.V. The Cuban bank assigned the contracts to *Banco Nacional de Cuba*, an arm of the Cuban government. However, when C.A.V. notified the broker that in its opinion, C.A.V. still owned the sugar, the broker agreed to turn the process of the sale over to Sabbatino, appointed under New York law as receiver of C.A.V.’s assets in the state. *Banco Nacional de Cuba* then sued Sabbatino, alleging that the broker’s refusal to pay Banco the proceeds amounted to common-law conversion.

The federal district court held for Sabbatino, ruling that if Cuba had simply failed to abide by its own law, C.A.V.'s stockholders would have been entitled to no relief. But because Cuba had violated international law, the federal courts did not need to respect its act of appropriation. The violation of international law, the court said, lay in Cuba's motive for the expropriation, which was retaliation for President Eisenhower's decision to lower the quota of sugar that could be imported into the United States, and not for any public purpose that would benefit the Cuban people; moreover, the expropriation did not provide for adequate compensation and was aimed at US interests only, not those of other foreign nationals operating in Cuba. The US court of appeals affirmed the lower court's decision, holding that federal courts may always examine the validity of a foreign country's acts.

But in *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court reversed, relying on the act-of-state doctrine. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). This doctrine refers, in the words of the Court, to the "validity of the public acts a recognized foreign sovereign power commit[s] within its own territory." If the foreign state exercises its own jurisdiction to give effect to its public interests, however the government defines them, the expropriated property will be held to belong to that country or to bona fide purchasers. For the act-of-state doctrine to be invoked, the act of the foreign government must have been completely executed within the country—for example, by having enacted legislation expropriating the property. The Supreme Court said that the act-of-state doctrine applies even though the United States had severed diplomatic relations with Cuba and even though Cuba would not reciprocally apply the act-of-state doctrine in its own courts.

Despite its consequences in cases of expropriations, the act-of-state doctrine is relatively narrow. As *W. S. Kirkpatrick Co., Inc. v. Environmental Tectonics Co.* ([Section 20.5.4 "Act of State"](#)) shows, it does not apply merely because a judicial inquiry in the United States might embarrass a foreign country or even interfere politically in the conduct of US foreign policy.

KEY TAKEAWAY

Each nation-state has several bases of jurisdiction to make and enforce laws, including the territorial principle, nationality jurisdiction, and objective territoriality. However, nation-states will not always choose to exercise their jurisdiction: the doctrines of *forum non conveniens*, sovereign immunity, and act of state limit the amount and nature of judicial activity in one nation that would affect nonresident parties and foreign sovereigns.

EXERCISES

1. Argentina sells bonds on the open market, and buyers all around the world buy them. Five years later, Argentina declares that it will default on paying interest or principal on these bonds. Assume that Argentina has assets in the United States. Is it likely that a bondholder in the United States can bring an action in US courts that will not be dismissed for lack of subject matter jurisdiction?
2. During the Falkland Island war between Argentina and Great Britain, neutral tanker traffic was at risk of being involved in hostilities. Despite diplomatic cables from the United States assuring Argentina of the vessels' neutrality, an oil tanker leased by Amerada Hess, traveling from Puerto Rico to Valdez, Alaska, was repeatedly bombed by the Argentine air force. The ship had to be scuttled, along with its contents. Will a claim by Amerada Hess be recognized in US courts?

20.4 Regulating Trade

LEARNING OBJECTIVES

1. Understand why nation-states have sometimes limited imports but not exports.
2. Explain why nation-states have given up some of their sovereignty by lowering tariffs in agreement with other nation-states.

Before globalization, nation-states traded with one another, but they did so with a significant degree of protectiveness. For example, one nation might have imposed very high tariffs (taxes on imports from other countries) while not taxing exports in order to encourage a favorable “balance of trade.” The balance of trade is an important statistic for many countries; for many years, the US balance of trade has been negative because it imports far more than it exports (even though the United States, with its very large farms, is the world’s largest exporter of agricultural products). This section will explore import and export controls in the context of the global agreement to reduce import controls in the name of free trade.

Export Controls

The United States maintains restrictions on certain kinds of products being sold to other nations and to individuals and firms within those nations. For example, the Export Administration Act of 1985 has controlled certain exports that would endanger national security, drain scarce materials from the US economy, or harm foreign policy goals. The US secretary of commerce has a list of controlled commodities that meet any of these criteria.

More specifically, the Arms Export Control Act permits the president to create a list of controlled goods related to military weaponry, and no person or firm subject to US law can export any listed item without a license. When the United States has imposed sanctions, the International Emergency Economic Powers Act (IEEPA) has often been the legislative basis; and the act gives the president considerable power to impose limitations on trade. For example, in 1979, President Carter, using IEEPA, was able to impose sanctions on Iran after the diplomatic hostage crisis. The United States still imposes travel restrictions and other sanctions on Cuba, North Korea, and many other countries.

Import Controls and Free Trade

Nation-states naturally wish to protect their domestic industries. Historically, protectionism has come in the form of import taxes, or tariffs, also called duties. The tariff is simply a tax imposed on goods when they enter a country. Tariffs change often and vary from one nation-state to another. Efforts to implement free trade began with the General Agreement on Tariffs and Trade (GATT) and are now enforced through the World Trade Organization (WTO); the GATT and the WTO have sought, through successive rounds of trade talks, to decrease the number and extent of tariffs that would hinder the free flow of commerce from one nation-state to another. The theory of comparative advantage espoused by David Ricardo is the basis for the gradual but steady of tariffs, from early rounds of talks under the GATT to the Uruguay Round, which established the WTO.

The GATT was a huge multilateral treaty negotiated after World War II and signed in 1947. After various “rounds” of re-negotiation, the Uruguay Round ended in 1994 with the United States and 125 other nation-states signing the treaty that established the WTO. In 1948, the worldwide average tariff on industrial goods was around 40 percent. That number is now more like 4 percent as globalization has taken root. Free-trade proponents claim that globalization has increased general well-being, while opponents claim that free trade has brought outsourcing, industrial decline, and the hollowing-out of the US manufacturing base. The same kinds of criticisms have been directed at the North American Free Trade Agreement (NAFTA).

The Uruguay Round was to be succeeded by the Doha Round. But that round has not concluded because developing countries have not been satisfied with the proposed reductions in agricultural tariffs imposed by the more developed economies; developing countries have been resistant to further agreements unless and until the United States and the European Union lower their agricultural tariffs.

There are a number of regional trade agreements other than NAFTA. The European Union, formerly the Common Market, provides for the free movement of member nations’ citizens throughout the European Union (EU) and sets union-wide standards for tariffs, subsidies, transportation, human rights, and many other issues. Another regional trade agreement is Mercosur—an organization formed by Brazil, Argentina, Uruguay, and Paraguay to improve trade and commerce among those South American nations. Almost all trade barriers between the four nations have been eliminated, and the organization has also established a broad social agenda focusing on education, culture, the environment, and consumer protection.

KEY TAKEAWAY

Historically, import controls were more common than export controls; nation-states would typically impose tariffs (taxes) on goods imported from other nation-states. Some nation-states, such as the United States, nevertheless maintain certain export controls for national security and military purposes. Most nation-states have voluntarily given up some of their sovereignty in order to gain the advantages of bilateral and multilateral trade and investment treaties. The most prominent example of a multilateral trade treaty is the GATT, now administered by the WTO. There are also regional free-trade agreements, such as NAFTA and Mercosur, that provide additional relaxation of tariffs beyond those agreed to under the WTO.

EXERCISES

1. Look at various sources and describe, in one hundred or fewer words, why the Doha Round of WTO negotiations has not been concluded.
2. What is the most recent bilateral investment treaty (BIT) that has been concluded between the United States and another nation-state? What are its key provisions? Which US businesses are most helped by this treaty?

20.5 Cases

Forum-selection clauses

In re the Bremen

407 U.S. 1 (1972)

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit declining to enforce a forum-selection clause governing disputes arising under an international towage contract between petitioners and respondent. The circuits have differed in their approach to such clauses. For the reasons stated hereafter, we vacate the judgment of the Court of Appeals.

In November 1967, respondent Zapata, a Houston-based American corporation, contracted with petitioner Unterweser, a German corporation, to tow Zapata's ocean-going, self-elevating drilling rig Chaparral from Louisiana to a point off Ravenna, Italy, in the Adriatic Sea, where Zapata had agreed to drill certain wells.

Zapata had solicited bids for the towage, and several companies including Unterweser had responded. Unterweser was the low bidder and Zapata requested it to submit a contract, which it did. The contract submitted by Unterweser contained the following provision, which is at issue in this case:

Any dispute arising must be treated before the London Court of Justice.

In addition the contract contained two clauses purporting to exculpate Unterweser from liability for damages to the towed barge. After reviewing the contract and making several changes, but without any alteration in the forum-selection or exculpatory clauses, a Zapata vice president executed the contract and forwarded it to Unterweser in Germany, where Unterweser accepted the changes, and the contract became effective.

On January 5, 1968, Unterweser's deep sea tug Bremen departed Venice, Louisiana, with the Chaparral in tow bound for Italy. On January 9, while the flotilla was in international waters in the middle of the Gulf of Mexico, a severe storm arose. The

sharp roll of the Chaparral in Gulf waters caused its elevator legs, which had been raised for the voyage, to break off and fall into the sea, seriously damaging the Chaparral. In this emergency situation Zapata instructed the Bremen to tow its damaged rig to Tampa, Florida, the nearest port of refuge.

On January 12, Zapata, ignoring its contract promise to litigate “any dispute arising” in the English courts, commenced a suit in admiralty in the United States District Court at Tampa, seeking \$3,500,000 damages against Unterweser in personam and the Bremen *in rem*, alleging negligent towage and breach of contract. Unterweser responded by invoking the forum clause of the towage contract, and moved to dismiss for lack of jurisdiction or on forum non conveniens grounds, or in the alternative to stay the action pending submission of the dispute to the “London Court of Justice.” Shortly thereafter, in February, before the District Court had ruled on its motion to stay or dismiss the United States action, Unterweser commenced an action against Zapata seeking damages for breach of the towage contract in the High Court of Justice in London, as the contract provided. Zapata appeared in that court to contest jurisdiction, but its challenge was rejected, the English courts holding that the contractual forum provision conferred jurisdiction.

In the meantime, Unterweser was faced with a dilemma in the pending action in the United States court at Tampa. The six-month period for filing action to limit its liability to Zapata and other potential claimants was about to expire, but the United States District Court in Tampa had not yet ruled on Unterweser’s motion to dismiss or stay Zapata’s action. On July 2, 1968, confronted with difficult alternatives, Unterweser filed an action to limit its liability in the District Court in Tampa. That court entered the customary injunction against proceedings outside the limitation court, and Zapata refiled its initial claim in the limitation action.

It was only at this juncture, on July 29, after the six-month period for filing the limitation action had run, that the District Court denied Unterweser’s January motion to dismiss or stay Zapata’s initial action. In denying the motion, that court relied on the prior decision of the Court of Appeals in *Carbon Black Export, Inc.* In that case the Court of Appeals had held a forum-selection clause unenforceable, reiterating the traditional view of many American courts that “agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.”

* * *

Thereafter, on January 21, 1969, the District Court denied another motion by Unterweser to stay the limitation action pending determination of the controversy in the High Court of Justice in London and granted Zapata’s motion to restrain

Unterweser from litigating further in the London court. The District Judge ruled that, having taken jurisdiction in the limitation proceeding, he had jurisdiction to determine all matters relating to the controversy. He ruled that Unterweser should be required to “do equity” by refraining from also litigating the controversy in the London court, not only for the reasons he had previously stated for denying Unterweser’s first motion to stay Zapata’s action, but also because Unterweser had invoked the United States court’s jurisdiction to obtain the benefit of the Limitation Act.

On appeal, a divided panel of the Court of Appeals affirmed, and on rehearing *en banc* the panel opinion was adopted, with six of the 14 *en banc* judges dissenting. The term *en banc* means that all the judges of a circuit court of appeals heard oral arguments and voted to decide the outcome of the case. As had the District Court, the majority rested on the *Carbon Black* decision, concluding that “at the very least” that case stood for the proposition that a forum-selection clause “will not be enforced unless the selected state would provide a more convenient forum than the state in which suit is brought.” From that premise the Court of Appeals proceeded to conclude that, apart from the forum-selection clause, the District Court did not abuse its discretion in refusing to decline jurisdiction on the basis of *forum non conveniens*. It noted that (1) the flotilla never “escaped the Fifth Circuit’s mare nostrum, and the casualty occurred in close proximity to the district court”; (2) a considerable number of potential witnesses, including Zapata crewmen, resided in the Gulf Coast area; (3) preparation for the voyage and inspection and repair work had been performed in the Gulf area; (4) the testimony of the Bremen crew was available by way of deposition; (5) England had no interest in or contact with the controversy other than the forum-selection clause. The Court of Appeals majority further noted that Zapata was a United States citizen and “[t]he discretion of the district court to remand the case to a foreign forum was consequently limited”—especially since it appeared likely that the English courts would enforce the exculpatory clauses. In the Court of Appeals’ view, enforcement of such clauses would be contrary to public policy in American courts under *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), and *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963). Therefore, “[t]he district court was entitled to consider that remanding Zapata to a foreign forum, with no practical contact with the controversy, could raise a bar to recovery by a United States citizen which its own convenient courts would not countenance.”

We hold, with the six dissenting members of the Court of Appeals, that far too little weight and effect were given to the forum clause in resolving this controversy. For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so. Here we see an American company with special expertise contracting with a

foreign company to tow a complex machine thousands of miles across seas and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. Absent a contract forum, the considerations relied on by the Court of Appeals would be persuasive reasons for holding an American forum convenient in the traditional sense, but in an era of expanding world trade and commerce, the absolute aspects of the doctrine of the *Carbon Black* case have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

Forum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were “contrary to public policy,” or that their effect was to “oust the jurisdiction” of the court. Although this view apparently still has considerable acceptance, other courts are tending to adopt a more hospitable attitude toward forum-selection clauses. This view...is that such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be “unreasonable” under the circumstances.

We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty. It is merely the other side of the proposition recognized by this Court in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964), holding that in federal courts a party may validly consent to be sued in a jurisdiction where he cannot be found for service of process through contractual designation of an “agent” for receipt of process in that jurisdiction. In so holding, the Court stated: “[I]t is settled...that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether.”

This approach is substantially that followed in other common-law countries including England. It is the view advanced by noted scholars and that adopted by the Restatement of the Conflict of Laws. It accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world. Not surprisingly, foreign businessmen prefer, as do we, to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter. Plainly, the courts of England meet the standards of neutrality and long experience in admiralty litigation. The choice of that forum was made in an arm’s-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.

* * *

The judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion.

Vacated and remanded.

MR. JUSTICE DOUGLAS, dissenting.

* * *

The Limitation Court is a court of equity and traditionally an equity court may enjoin litigation in another court where equitable considerations indicate that the other litigation might prejudice the proceedings in the Limitation Court. Petitioners' petition for limitation [407 U.S. 1, 23] subjects them to the full equitable powers of the Limitation Court.

Respondent is a citizen of this country. Moreover, if it were remitted to the English court, its substantive rights would be adversely affected. Exculpatory provisions in the towage control provide (1) that petitioners, the masters and the crews "are not responsible for defaults and/or errors in the navigation of the tow" and (2) that "[d]amages suffered by the towed object are in any case for account of its Owners." Under our decision in *Dixilyn Drilling Corp v. Crescent Towing & Salvage Co.*, 372 U.S. 697, 698, "a contract which exempts the tower from liability for its own negligence" is not enforceable, though there is evidence in the present record that it is enforceable in England. That policy was first announced in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85; and followed in *Boston Metals Co. v. The Winding Gulf*, 349 U.S. 122.

* * *

Moreover, the casualty occurred close to the District Court, a number of potential witnesses, including respondent's crewmen, reside in that area, and the inspection and repair work were done there. The testimony of the tower's crewmen, residing in Germany, is already available by way of depositions taken in the proceedings. [407 U.S. 1, 24]

All in all, the District Court judge exercised his discretion wisely in enjoining petitioners from pursuing the litigation in England.

I would affirm the judgment below.

CASE QUESTIONS

1. Without a forum-selection clause, would the court in England have personal jurisdiction over either party?
2. Under *forum non conveniens*, there will be two courts, both of which have subject matter and personal jurisdiction—and the court will defer jurisdiction to the more “convenient” forum. If there were no forum-selection clause here, could the US court defer jurisdiction to the court in London?
3. Will Zapata recover anything if the case is heard in London?
4. Is it “fair” to let Unterweser excuse itself from liability? If not, under what ethical perspective does it “make sense” or “seem reasonable” for the court to allow Zapata to go to London and recover very little or nothing?

Due process in the enforcement of judgments

Koster v. Automark

640 F.2d 77 (N.D. Ill. 1980)

MARVIN E. ASPEN, District Judge:

On November 23, 1970, plaintiff Koster and defendant Automark Industries Incorporated (“Automark”) consummated a five-month course of negotiation by entering into an agreement whereby Automark promised to purchase 600,000 valve cap gauges during 1971. As a result of Automark’s alleged breach of this agreement, plaintiff brought an action for damages in the District Court in Amsterdam, 3rd Lower Chamber A. On October 16, 1974, plaintiff obtained a default judgment in the amount of Dutch Florins 214,747,50—\$66,000 in American currency at the rate of exchange prevailing on December 31, 1971—plus costs and interest. Plaintiff filed this diversity action on January 27, 1978, to enforce that foreign judgment.

The case now is before the Court on plaintiff’s motion for summary judgment pursuant to Federal Rules of Civil Procedure (Fed.R.Civ.P) 56(a). Defendant contests this motion on three grounds: (1) that service was inadequate, (2) that defendant lacked the minimum contacts necessary to render it subject to in personam jurisdiction in Amsterdam, and (3) that defendant has meritorious defenses to the

action which it could not present in the foreign proceeding. For the reasons that follow, however, the Court finds defendant's contentions unavailing.

[Note: The discussion on inadequate service has been omitted from what follows.]

As the court noted in *Walters*...service of process cannot confer personal jurisdiction upon a court in the absence of minimum contacts. The requirement of minimum contacts is designed to ensure that it is reasonable to compel a party to appear in a particular forum to defend against an action. *Shaffer v. Heitner*, 433 U.S. 186 (1977); *International Shoe Co. v. Washington*, 326 U.S. 317 (1945). Here, it is undisputed that Automark initiated the negotiations by a letter to plaintiff dated June 25, 1970. The five-month period of negotiations, during which time defendant sent several letters and telegrams to plaintiff in Amsterdam, led to the agreement of November 23, 1970. Moreover, although there is no evidence as to the contemplated place of performance, plaintiff attests—without contradiction—that the payment was to be made in Amsterdam.

On facts not dissimilar from these, the Illinois courts have found the existence of minimum contacts sufficient to justify long-arm personal jurisdiction under the Illinois statute. Ill.Rev.Stat. Ch. 110, § 17(a)(1). In *Colony Press, Inc. v. Fleeman*, 17 Ill.App.3d 14, 308 N.E.2d 78 (1st Dist. 1974), the court found that minimum contacts existed where the defendant had initiated the negotiations by submitting a purchase order to an Illinois company and the contract was to be performed in Illinois. And in *Cook Associates, Inc. v. Colonial Broach & Machine Co.*, 14 Ill.App.3d 965, 304 N.E.2d 27 (1st Dist. 1973), the court found that a single telephone call into Illinois initiating a business transaction that was to be performed in Illinois by an Illinois agency was enough to establish personal jurisdiction in Illinois. Thus, the Court finds that the Amsterdam court had personal jurisdiction over Automark.

Finally, defendant suggests that it has meritorious defenses which it could not present because of its absence at the judicial proceeding in Amsterdam; specifically, that there was no binding agreement and, alternatively, that its breach was justified by plaintiff's failure to perform his end of the bargain. It is established beyond question, however, that a default judgment is a conclusive and final determination that is accorded the same *res judicata* effect as a judgment after a trial on the merits. Such a judgment may be attacked collaterally only on jurisdictional grounds, or upon a showing that the judgment was obtained by fraud or collusion. Thus, defendant is foreclosed from challenging the underlying merits of the judgment obtained in Amsterdam.

[In a footnote, the court says:] "*Again, even assuming that defendant could attack the judgment on the merits, it has failed to raise any genuine issue of material fact....An affidavit*

by defendant's secretary states only that "to the best of [his] knowledge" there was no contract with anyone in Amsterdam. Yet, there is no affidavit from the party who negotiated and allegedly contracted with plaintiff; nor is there any explanation why such an affidavit was not filed. In the face of the copy of a letter of agreement provided by plaintiff, this allegation is insufficient to create a factual question. Moreover, defendant offers no extrinsic material in support of its allegation of non-performance by plaintiff. Thus, even were the Court to consider defendant's alleged defenses to the contract action, it would grant summary judgment for plaintiff on the merits."

Accordingly, the Court finds that plaintiff is entitled to enforcement of the foreign judgment. Thus, plaintiff's motion for summary judgment is granted. It is so ordered.

CASE QUESTIONS

1. Why do you think Automark did not go to Amsterdam to contest this claim by Koster?
2. Why does the Illinois court engage in a due process analysis of personal jurisdiction?
3. What if the letter of agreement had an arbitration clause? Would the court in Amsterdam have personal jurisdiction over Automark?

Forum non conveniens

Gonzalez v. Chrysler Corporation

301 F.3d 377 (5th Cir. 2002)

[Note: Although the court's opinion was appealed to the Supreme Court, no writ of certiorari was issued, so the following decision stands as good precedent in *forum non conveniens* cases.]

Opinion by E. GRADY JOLLY, Circuit Judge.

In this *forum non conveniens* case, we first consider whether the cap imposed by Mexican law on the recovery of tort damages renders Mexico an inadequate forum for resolving a tort suit by a Mexican citizen against an American manufacturer and an American designer of an air bag. Holding that Mexico—despite its cap on damages—represents an adequate alternative forum, we next consider whether the

district court committed reversible error when it concluded that the private and public interest factors so strongly pointed to Mexico that Mexico, instead of Texas, was the appropriate forum in which to try this case. Finding no reversible error, we affirm the district court's judgment dismissing this case on the ground of forum non conveniens.

In 1995, while in Houston, the plaintiff, Jorge Luis Machuca Gonzalez ("Gonzalez") saw several magazine and television advertisements for the Chrysler LHS. The advertisements sparked his interest. So, Gonzalez decided to visit a couple of Houston car dealerships. Convinced by these visits that the Chrysler LHS was a high quality and safe car, Gonzalez purchased a Chrysler LHS upon returning to Mexico.

On May 21, 1996, the wife of the plaintiff was involved in a collision with another moving vehicle while driving the Chrysler LHS in Atizapan de Zaragoza, Mexico. The accident triggered the passenger-side air bag. The force of the air bag's deployment instantaneously killed Gonzalez's three-year-old son, Pablo.

Seeking redress, Gonzalez brought suit in Texas district court against (1) Chrysler, as the manufacturer of the automobile; (2) TRW, Inc. and TRW Vehicle Safety Systems, Inc., as the designers of the front sensor for the air bag; and (3) Morton International, Inc., as designer of the air bag module. Gonzalez asserted claims based on products liability, negligence, gross negligence, and breach of warranty. As noted, Gonzalez chose to file his suit in Texas. Texas, however, has a tenuous connection to the underlying dispute. Neither the car nor the air bag module was designed or manufactured in Texas. The accident took place in Mexico, involved Mexican citizens, and only Mexican citizens witnessed the accident. Moreover, Gonzalez purchased the Chrysler LHS in Mexico (although he shopped for the car in Houston, Texas). Because of these factors, the district court granted the defendants' identical motions for dismissal on the ground of forum non conveniens. Gonzalez now appeals.

II. A

The primary question we address today involves the threshold inquiry in the forum non conveniens analysis: Whether the limitation imposed by Mexican law on the award of damages renders Mexico an inadequate alternative forum for resolving a tort suit brought by a Mexican citizen against a United States manufacturer.

We should note at the outset that we may reverse the grant or denial of a motion to dismiss on the ground of forum non conveniens only "where there has been a clear

abuse of discretion.” *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 835 (5th Cir. 1993).

The forum non conveniens inquiry consists of four considerations. First, the district court must assess whether an alternative forum is available. See *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 221 (5th Cir. 2000). An alternative forum is available if “the entire case and all parties can come within the jurisdiction of that forum.” *In re Air Crash Disaster Near New Orleans, La.* on July 9, 1982, 821 F.2d 1147, 1165 (5th Cir. 1987) (en banc), vacated on other grounds sub nom., *Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032, 104 L. Ed. 2d 400, 109 S. Ct. 1928 (1989). Second, the district court must decide if the alternative forum is adequate. See *Alpine View*, 205 F.3d at 221. An alternative forum is adequate if “the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court.” *In re Air Crash*, 821 F.2d at 1165 (internal citation omitted).

If the district court decides that an alternative forum is both available and adequate, it next must weigh various private interest factors. See *Baumgart*, 981 F.2d at 835-36. If consideration of these private interest factors counsels against dismissal, the district court moves to the fourth consideration in the analysis. At this stage, the district court must weigh numerous public interest factors. If these factors weigh in the moving party’s favor, the district court may dismiss the case. *Id.* at 837.

B. 1

The heart of this appeal is whether the alternative forum, Mexico, is adequate. (The court here explains that Mexico is an amenable forum because the defendants have agreed to submit to the jurisdiction of the Mexican courts.) The jurisprudential root of the adequacy requirement is the Supreme Court’s decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981). The dispute in *Piper Aircraft* arose after several Scottish citizens were killed in a plane crash in Scotland. A representative for the decedents filed a wrongful death suit against two American aircraft manufacturers. The Court noted that the plaintiff filed suit in the United States because “[US] laws regarding liability, capacity to sue, and damages are more favorable to her position than are those of Scotland.” *Id.* The Court further noted that “Scottish law does not recognize strict liability in tort.” *Id.* This fact, however, did not deter the Court from reversing the Third Circuit. In so doing, the Court held that “although the relatives of the decedent may not be able to rely on a strict liability theory, and although their potential damage award may be smaller, there is no danger that they will be deprived of any remedy or treated unfairly [in Scotland].” Thus, the Court held that Scotland provided an adequate alternative

forum for resolving the dispute, even though its forum provided a significantly lesser remedy. In a footnote, however, Justice Marshall observed that on rare occasions this may not be true:

At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is “amenable to process” in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.

....

Citing the language from this footnote, Gonzalez contends that a Mexican forum would provide a clearly unsatisfactory remedy because (1) Mexican tort law does not provide for a strict liability theory of recovery for the manufacture or design of an unreasonably dangerous product and (2) Mexican law caps the maximum award for the loss of a child’s life at approximately \$ 2,500 (730 days’ worth of wages at the Mexican minimum wage rate). Thus, according to Gonzalez, Mexico provides an inadequate alternative forum for this dispute.

B.2

(a) Gonzalez’s first contention may be quickly dismissed based on the explicit principle stated in *Piper Aircraft*. As noted, there the Supreme Court held that Scotland’s failure to recognize strict liability did not render Scotland an inadequate alternative forum. *Id.* at 255. There is no basis to distinguish the absence of a strict products liability cause of action under Mexican law from that of Scotland. *Piper Aircraft* therefore controls. Accordingly, we hold that the failure of Mexican law to allow for strict liability on the facts of this case does not render Mexico an inadequate forum.

(b) Gonzalez’s second contention—that the damage cap renders the remedy available in a Mexican forum “clearly unsatisfactory”—is slightly more problematic. Underlying this contention are two distinct arguments: First, Gonzalez argues that if he brings suit in Mexico, the cap on damages will entitle him to a *de minimis* recovery only—a clearly unsatisfactory award for the loss of a child. Second, Gonzalez argues that because of the damage cap, the cost of litigating this case in Mexico will exceed the potential recovery. As a consequence, the lawsuit will never

be brought in Mexico. Stated differently, the lawsuit is not economically viable in Mexico. It follows, therefore, that Mexico offers no forum (much less an adequate forum) through which Gonzalez can (or will) seek redress. We address each argument in turn.

(b)(i)

In addressing Gonzalez's first argument, we start from basic principles of comity. Mexico, as a sovereign nation, has made a deliberate choice in providing a specific remedy for this tort cause of action. In making this policy choice, the Mexican government has resolved a trade-off among the competing objectives and costs of tort law, involving interests of victims, of consumers, of manufacturers, and of various other economic and cultural values. In resolving this trade-off, the Mexican people, through their duly-elected lawmakers, have decided to limit tort damages with respect to a child's death. It would be inappropriate—even patronizing—for us to denounce this legitimate policy choice by holding that Mexico provides an inadequate forum for Mexican tort victims. In another *forum non conveniens* case, the District Court for the Southern District of New York made this same point observing (perhaps in a hyperbolic choice of words) that “to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation.” *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December, 1984, 634 F. Supp. 842, 867 (S.D.N.Y. 1986), *aff'd* as modified, 809 F.2d 195 (2d Cir. 1987). In short, we see no warrant for us, a United States court, to replace the policy preference of the Mexican government with our own view of what is a good policy for the citizens of Mexico.

Based on the considerations mentioned above, we hold that the district court did not err when it found that the cap on damages did not render the remedy available in the Mexican forum clearly unsatisfactory.

(b) (ii) We now turn our attention to Gonzalez's “economic viability” argument—that is, because there is no economic incentive to file suit in the alternative forum, there is effectively no alternative forum.

The practical and economic realities lying at the base of this dispute are clear. At oral argument, the parties agreed that this case would never be filed in Mexico. In short, a dismissal on the ground of *forum non conveniens* will determine the outcome of this litigation in Chrysler's favor. We nevertheless are unwilling to hold as a legal principle that Mexico offers an inadequate forum simply because it does not make economic sense for Gonzalez to file this lawsuit in Mexico. Our reluctance arises out of two practical considerations.

First, the plaintiff's willingness to maintain suit in the alternative (foreign) forum will usually depend on, *inter alia*, (1) whether the plaintiff's particular injuries are compensable (and to what extent) in that forum; (2) not whether the forum recognizes some cause of action among those applicable to the plaintiff's case, but whether it recognizes his most provable and compensable action; (3) similarly, whether the alternative forum recognizes defenses that might bar or diminish recovery; and (4) the litigation costs (i.e., the number of experts, the amount of discovery, geographic distances, attorney's fees, etc.) associated with bringing that particular case to trial. These factors will vary from plaintiff to plaintiff, from case to case. Thus, the forum of a foreign country might be deemed inadequate in one case but not another, even though the only difference between the two cases might be the cost of litigation or the recovery for the plaintiff's particular type of injuries. In sum, we find troublesome and lacking in guiding principle the fact that the adequacy determination could hinge on constantly varying and arbitrary differences underlying the "economic viability" of a lawsuit.

Second, if we allow the economic viability of a lawsuit to decide the adequacy of an alternative forum, we are further forced to engage in a rudderless exercise of line drawing with respect to a cap on damages: At what point does a cap on damages transform a forum from adequate to inadequate? Is it, as here, \$2,500? Is it \$50,000? Or is it \$100,000? Any recovery cap may, in a given case, make the lawsuit economically unviable. We therefore hold that the adequacy inquiry under Piper Aircraft does not include an evaluation of whether it makes economic sense for Gonzalez to file this lawsuit in Mexico.

C.

Having concluded that Mexico provides an adequate forum, we now consider whether the private and public interest factors nonetheless weigh in favor of maintaining this suit in Texas. As noted, the district court concluded that the public and the private interest factors weighed in favor of Mexico and dismissed the case on the ground of forum non conveniens. Our review of this conclusion is restricted to abuse of discretion. See *Alpine View*, 205 F.3d at 220.

The district court found that almost all of the private and public interest factors pointed away from Texas and toward Mexico as the appropriate forum. It is clear to us that this finding does not represent an abuse of discretion. After all, the tort victim was a Mexican citizen, the driver of the Chrysler LHS (Gonzalez's wife) is a Mexican citizen, and the plaintiff is a Mexican citizen. The accident took place in Mexico. Gonzalez purchased the car in Mexico. Neither the car nor the air bag was designed or manufactured in Texas. In short, there are no public or private interest

factors that would suggest that Texas is the appropriate forum for the trial of this case.

III.

For the foregoing reasons, the district court's dismissal of this case on the ground of forum non conveniens is

AFFIRMED.

CASE QUESTIONS

1. How can an alternative forum be "adequate" if no rational lawyer would take Gonzalez's case to file in a Mexican state court?
2. To what extent does it strike you as "imperialism" for a US court to make a judgment that a Mexican court is not "adequate"?

Act of State

W. S. Kirkpatrick Co., Inc. v. Environmental Tectonics Co.

493 U.S. 400 (1990)

Justice Scalia delivered the Court's opinion.

In 1981, Harry Carpenter, who was then Chairman of the Board and Chief Executive Officer of petitioner W. S. Kirkpatrick & Co., Inc. (Kirkpatrick) learned that the Republic of Nigeria was interested in contracting for the construction and equipment of an aeromedical center at Kaduna Air Force Base in Nigeria. He made arrangements with Benson "Tunde" Akindele, a Nigerian Citizen, whereby Akindele would endeavor to secure the contract for Kirkpatrick. It was agreed that in the event the contract was awarded to Kirkpatrick, Kirkpatrick would pay to two Panamanian entities controlled by Akindele an amount equal to 20% of the contract price, which would in turn be given as a bribe to officials of the Nigerian government. In accordance with this plan, the contract was awarded to petitioner W. S. Kirkpatrick & Co., International (Kirkpatrick International), a wholly owned subsidiary of Kirkpatrick; Kirkpatrick paid the promised "commission" to the appointed Panamanian entities; and those funds were disbursed as bribes. All

parties agree that Nigerian law prohibits both the payment and the receipt of bribes in connection with the award of a government contract.

Respondent Environmental Tectonics Corporation, International, an unsuccessful bidder for the Kaduna contract, learned of the 20% “commission” and brought the matter to the attention of the Nigerian Air Force and the United States Embassy in Lagos. Following an investigation by the Federal Bureau of Investigation, the United States Attorney for the District of New Jersey brought charges against both Kirkpatrick and Carpenter for violations of the Foreign Corrupt Practices Act of 1977 and both pleaded guilty.

Respondent then brought this civil action in the United States District Court of the District of New Jersey against Carpenter, Akindele, petitioners, and others, seeking damages under the Racketeer Influenced and Corrupt Organizations Act, the Robinson-Patman Act, and the New Jersey Anti-Racketeering Act. The defendants moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that the action was barred by the act of state doctrine.

The District Court concluded that the act of state doctrine applies “if the inquiry presented for judicial determination includes the motivation of a sovereign act which would result in embarrassment to the sovereign or constitute interference in the conduct of foreign policy of the United States.” Applying that principle to the facts at hand, the court held that respondents suit had to be dismissed because in order to prevail respondents would have to show that “the defendants or certain other than intended to wrongfully influenced the decision to award the Nigerian contract by payment of a bribe, that the government of Nigeria, its officials or other representatives knew of the offered consideration forewarning the Nigerian contract to Kirkpatrick, that the bribe was actually received or anticipated and that but for the payment or anticipation of the payment of the bribed, ETC would have been awarded the Nigerian contract.”

The Court of Appeals for the Third Circuit reversed.

...

This Courts’ description of the jurisprudential foundation for the act of state doctrine has undergone some evolution over the years. We once viewed the doctrine as an expression of international law, resting upon “the highest considerations of international comity and expediency,” *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-304 (1918). We have more recently described it, however, as a consequence of domestic separation of powers, reflecting “the strong sense of the

Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder” the conduct of foreign affairs, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964). Some Justices have suggested possible exceptions to application of the doctrine, where one or both of the foregoing policies would seemingly not be served: an exception, for example, for acts of state that consist of commercial transactions, since neither modern international comity nor the current position of our Executive Branch accorded sovereign immunity to such acts...or an exception for cases in which the executive branch has represented that it has no objection to denying validity to the foreign sovereign act, since then the court should be impeding no foreign-policy goals.

We find it unnecessary, however, to pursue those inquiries, since the factual predicate for application of the act of state doctrine does not exist. Nothing in the present suit requires the court to declare invalid, and thus ineffective as “a rule of decision for the courts of this country,” the official act of a foreign sovereign.

In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official acts of a foreign sovereign performed within its own territory....In *Sabbatino*, upholding the defendant’s claim to the funds would have required a holding that Cuba’s expropriation of goods located in Havana was null and void. In the present case, by contrast, neither the claim nor any asserted defense requires a determination that Nigeria’s contract with Kirkpatrick International was, or, was not effective.

Petitioners point out, however, that the facts necessary to establish respondent’s claim will also establish that the contract was unlawful. Specifically, they note that in order to prevail respondent must prove that petitioner Kirkpatrick made, and Nigerian officials received, payments that violate Nigerian law, which would, they assert, support a finding that the contract is invalid under Nigerian law. Assuming that to be true, it still does not suffice. The act of state doctrine is not some vague doctrine of abstention but a “principle of decision binding on federal and state courts alike.” As we said in *Ricaud*, “the act within its own boundaries of one sovereign State...becomes a rule of decision for the courts of this country.” Act of state issues only arise when a court *must* decide—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine. This is the situation here. Regardless of what the court’s factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires.

* * *

The short of the matter is this: Courts in the United States have the Power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that; in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid: That doctrine has no application to the present case because the validity of no foreign sovereign act is at issue.

The judgment of the Court for the Third Circuit is affirmed.

CASE QUESTIONS

1. Why is this case not about sovereign immunity?
2. On what basis does the US court take jurisdiction over an event or series of events that takes place in Nigeria?
3. If the court goes on to the merits of the case and determines that an unlawful bribe took place in Nigeria, is it likely that diplomatic relations between the United States and Nigeria will be adversely affected?

20.6 Summary and Exercises

Summary

International law is not like the domestic law of any one country. The sovereign, or lawgiver, in any particular nation-state has the power to make and enforce laws within its territory. But globally, there is no single source of law or law enforcement. Thus international law is a collection of agreements between nation-states (treaties and conventions), customary international law (primarily based on decisions of national court systems), and customary practice between nation-states. There is an international court of justice, but it only hears cases between nation-states. There is no international court for the resolution of civil disputes, and no regional courts for that purpose, either.

The lack of unified law and prevalence of global commerce means that local and national court systems have had to devise ways of forcing judgments from one national court system or another to deal with claims against sovereigns and to factor in diplomatic considerations as national judicial systems encounter disputes that involve (directly or indirectly) the political and diplomatic prerogatives of sovereigns. Three doctrines that have been devised are sovereign immunity, act of state, and *forum non conveniens*. The recognition of forum-selection clauses in national contracting has also aided the use of arbitration clauses, making international commercial-dispute resolution more efficient. Arbitral awards against any individual or company in most nations engaged in global commerce are more easily enforceable than judgments from national court systems.

In terms of regulating trade, the traditional practice of imposing taxes (tariffs) on imports from other countries (and not taxing exports to other countries) has been substantially modified by the emergence of the General Agreement on Tariffs and Trade (GATT) rules as now enforced by the World Trade Organization (WTO). The United States has a practice of regulating exports, however, to take into account national security and other foreign policy considerations. For example, the Export Administration Act of 1985 has controlled certain exports that would endanger national security, drain scarce materials from the US economy, or harm foreign policy goals. The US secretary of commerce has a list of controlled commodities that meet any of these criteria.

EXERCISES

1. Assume that the United States enters into a multilateral treaty with several third-world countries under which then-existing private claims to molybdenum and certain other minerals in the United States are assigned to an international agency for exploitation. When the owner of a US mine continues to dig for ore covered by the treaty, the Justice Department sues to enjoin further mining. What is the result? Why?
2. A foreign government enters into a contract with a US company to provide computer equipment and services for the intelligence arm of its military forces. After the equipment has been supplied, the foreign government refuses to pay. The US company files suit in federal court in the United States, seeking to attach a US bank account owned by the foreign government. The foreign government claims that the US court has no jurisdiction and that even if it does, the government is immune from suit. What is the result?
3. Would the result in Exercise 2 be any different if the US company had maintained its own equipment on a lease basis abroad and the foreign government had then expropriated the equipment and refused to pay the US company its just value?
4. The Concentrated Phosphate Export Association consists of the five largest phosphate producers. The Agency for International Development (AID) undertook to sell fertilizer to Korea and solicited bids. The association set prices and submitted a single bid on 300,000 tons. A paid the contract price, determined the amounts to be purchased, coordinated the procedure for buying, and undertook to resell to Korea. The Justice Department sued the association and its members, claiming that their actions violated Section 1 of the Sherman Act. What defense might the defendants have? What is the result?
5. Canada and Russia have competing claims over fishing and mining rights in parts of the Arctic Ocean. Assuming they cannot settle their competing claims through diplomatic negotiation, where might they have their dispute settled?

SELF-TEST QUESTIONS

1. International law derives from
 - a. the US Constitution
 - b. the common law
 - c. treaties
 - d. customary international law
 - e. c and d

2. Foreign nations are immune from suit in US courts for governmental acts because of
 - a. the international sovereign immunity treaty
 - b. a United Nations law forbidding suits against foreign sovereigns
 - c. the Foreign Sovereign Immunities Act
 - d. precedent created by the US Supreme Court

3. A foreign government's expropriation of private assets belonging to a nonresident is
 - a. a violation of international law
 - b. a violation of the US Constitution
 - c. permitted by the domestic law of most nation-states
 - d. in violation of the act-of-state doctrine

4. Arbitration of business disputes is
 - a. frowned upon by courts for replacing public dispute resolution with private dispute resolution
 - b. permissible when a country's laws permit it
 - c. permissible if the parties agree to it
 - d. a and b
 - e. b and c

SELF-TEST ANSWERS

1. d
2. a
3. c
4. e