

ACT OF STATES DOCTRINE AND SOVEREIGN IMMUNITY: INTERPRETATION AND APPLICATION

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ABSTRACT

Sovereign immunity is a legal doctrine that protects sovereign states and their entities from lawsuits without explicit consent. This principle is based on the idea that states must be protected to maintain their autonomy and functionality, while also balancing accountability and the need for states to operate without constant legal challenges. In 1812, the case of Schooner Exchange v. M'Faddon established the concept of absolute sovereign immunity, stating that foreign states and their vessels have immunity from the jurisdiction of host state courts. To address the inflexibility of sovereign immunity, the U.S. enacted the Restrictive Sovereign Immunity Act of 1976, which narrowed immunity and allowed lawsuits against foreign states in specific commercial activities. The Act of State Doctrine is another legal principle that prevents courts from adjudicating the validity of public acts committed by foreign governments within their territories. For example, the case Callejo v. Bancomer demonstrated the application of the Act of State Doctrine, with the court refraining from passing judgment on the actions of a foreign government. These legal doctrines shape the international legal landscape, providing a framework for state interactions, maintaining order, and allowing limited legal recourse in specified circumstances.

MAIN TEXT

Have you ever had a neighbour who peeks into your house to find out what all the noise is about? Or have you ever had someone ask you about your GPA and judge you for choosing Arts? Most of us hate it when people pry into our business and would like to tell them to mind their own business and move on. However, the problem is having the courage to do so often feels impossible. It would be ideal if there were a law that could prevent our neighbours and relatives from interfering in our lives and creating unnecessary competition among family members. While such a law may seem like a far-fetched idea at the personal level, we do have laws at the national level that prevent such interference and allow us to live in peace.

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Sovereign immunity is a legal principle that allows independent countries to safeguard their internal affairs and maintain their integrity. This concept prohibits courts of one sovereign nation from taking legal action against a foreign government or its agents. In essence, it provides immunity to foreign countries from lawsuits or legal proceedings in another country's courts. According to Section 1604 of the Foreign Sovereign Immunities Act of 1976, '*A foreign State shall be immune from the jurisdiction of the courts of the United States*', subject to some limitations and exceptions.¹

It is a principle of international law that one country cannot question or challenge the actions of another country without the consent of the concerned country. This principle is known as sovereign immunity, and it serves two purposes:

1. It protects a country from interference by other countries.
2. It prevents a country from challenging the actions of another country.

The doctrine of Sovereign immunity was first established in the case of *Schooner Exchange v McFaddon*². The vessel was seized by Napoleon Bonaparte's order and docked in Philadelphia. The vessel's owners filed a lawsuit in the United States Court, claiming that the seizure was illegal. However, the lower court of the United States held that it didn't have any jurisdiction to take cognizance of the matter, which was later upheld by the Supreme Court of the United States. According to the Court's ruling, a foreign Sovereign's public vessel is exempted from the country's jurisdiction, as long as it is at peace with the United States and behaves in a friendly manner.

It is worth noting that the concept of Sovereign immunity was once considered absolute, which created a lot of obstacles in the functioning of international law. Many countries used Sovereign immunity as a shield to engage in private or commercial activities and avoid liability that arose during their transactions. Since the doctrine prevented the courts from taking jurisdiction of matters involving the actions of a Sovereign State, many States took unfair advantage of this to cover up their unscrupulous transactions under the guise of sovereign immunity. As a result, the courts were rendered powerless in such matters.

¹ Foreign Sovereign Immunities Act [1976], sec 1604.

² *Schooner Exchange v McFaddon* [1812].

In the case of *Victory Transport, Inc. v Comisaria General*,³ the defendant, a part of the Spanish Ministry of Commerce, hired a vessel owned by the Plaintiff to transport wheat from the US to Spain. The defendant claimed Sovereign immunity when the plaintiff sued them for breach of contract. The defendant asserted that as it was a branch of the Spanish Ministry of Commerce, it was within the purview of the immunity. The Court rejected this argument and held that the defendant did not have any sovereign immunity.

The Court in the above judgement followed the doctrine of restrictive sovereign immunity which says, a court shall have jurisdiction over the acts of a foreign country when such an act involves private or commercial transactions. In simple terms, when a country is involved in any private (non-sovereign) or commercial activity, it will expose itself to civil, criminal or tortious liability, as the case may be, by any other foreign Court that is competent to try such a matter.

The Foreign Sovereign Immunities Act of 1976 is a legislative enactment in the United States that codified the doctrine of restrictive sovereign immunity. This doctrine was introduced to regulate non-sovereign and commercial activities at an international level, in response to the growing commercial-trade relations among nations. The aim was to bring in restrictions to monitor commercial activities and prevent unfair exploitation by providing a forum to address such acts. The Court in the above-mentioned case of *Victory Transport, Inc. v Comisaria General*, stated that acts other than public acts are not immune from getting challenged. Immune public acts include:

1. Internal administrative acts,
2. Legislative acts,
3. Acts concerning the armed forces,
4. Acts concerning diplomatic activities,
5. Public loans.⁴

Aside from the acts mentioned above, any such action by one country is subject to challenge and may be adjudicated by a foreign court. Section 1605 of the Foreign Sovereign Immunities Act of 1976 conveys that, '*A foreign State is not immune from the jurisdiction of the Courts of the United States when-*

³ *Victory Transport, Inc v Comisaria General* [1964].

⁴ *Ibid*

1. *Foreign State has waived its immunity (whether express or implied),*
2. *Act of the Foreign State is a commercial activity,*
3. *Property in connection with a commercial activity is situated in the United States*⁵

At times, people tend to confuse the doctrine of Sovereign Immunity with the Act of States Doctrine. However, it is important to note that the former is a jurisdictional principle while the latter is an adjudicating principle. Sovereign Immunity prevents a case from reaching the court whereas the Act of States Doctrine allows the matter to be entertained in a foreign Court of law but prohibits the court from adjudicating the legality of public acts of a foreign Government carried out within its territory (foreign Country). A foreign court cannot decide on the legality of public acts of a foreign government. A question before the foreign court, whether preliminary or incidental, which involves deciding over the legality of public acts of a foreign government is not allowed.

The Act of State Doctrine is a common law rule which precludes adjudication by a Court on the legality of public acts of a foreign government carried out within the foreign country. In the case of *Underhill v Hernandez.*, the court said that no Court of law shall sit in the adjudication of the public acts of another Government and that Every Sovereign nation ought to respect the independence of every other Sovereign nation.⁶

In another case of *Alfred Dunhill of London, Inc. v Republic of Cuba.*, In the past, the Cuban government nationalized the business and assets of five cigar manufacturers. To run the business on behalf of the government, they appointed Interventors - people who could take care of the business and assets. Some importers imported Cuban cigars and paid the Interventors, assuming that they were authorized to collect the money. However, the importers made the payment after the nationalization, while they imported the cigars before the act. The former owners of the cigar business filed a case against the plaintiff and two other importers, stating that they were entitled to receive the payment, not the Interventors because the money was due to them pre-intervention. The Interventors claimed their right over the payment amount. The court ruled that the Interventors have the right over the unpaid dues post-intervention, but they cannot claim any right over the pre-intervention amount. At the same time, the importers asked the Interventors to repay the money. The Interventors refused, stating that any repayment obligation was a debt situation in Cuba and that their refusal to pay was an act of state not

⁵ Foreign Sovereign Immunities Act [1976], sec 1605.

⁶ *Underhill v Hernandez* [1897].

subject to question in American Courts. The court rejected the arguments of the Interventors, and the importers' payment was set off to the repayment of the former owners, as it was not an Act of States principle.⁷

But where does the doctrine of Sovereign immunity and the Act of States intersect? Is there a need for a commercial activity exception to the Act of States doctrine? In the leading case of *Callejo v Bancomer*, Willian and Adelfa Callejo, who reside in the United States, purchased a Certificate of Deposit (CD) from Bancomer, a Mexican private bank, through its branch in New York City, paying in US dollars. In 1982, Mexico experienced a severe economic recession due to a decline in world oil prices, despite being engaged in oil trading. To stabilize the situation, Mexico opted for a loan and invested in domestic industries. However, Mexico later found itself unable to repay the loan. The Mexican government then declared that it would only repay the debt in Mexican currency. On August 13, 1982, the government issued a decree that prohibited the use of foreign currency as legal tender and required all domestic obligations to be paid with Mexican currency at the prevailing market exchange rate. The Mexican government issued two significant decrees, one of which involved nationalizing all private banks, including Bancomer, and another requiring the repayment of USD-denominated CDs and other debt obligations in Mexican currency at a fixed rate of exchange.

A complaint was filed by Callejos alleging a breach of contract against Bancomer for not repaying the face value of the CDs. However, the District Court dismissed the claim, stating that Bancomer was an instrumentality of the Mexican Government, and the Mexican Government based the complaint on the issuance of exchange control regulations. This was considered a sovereign activity rather than a commercial one. Therefore, Bancomer was immune from prosecution under the Foreign Sovereign Immunities Act of 1976.

The dismissal was challenged in the fifth circuit decision, which took jurisdiction of the case by applying the commercial activity exception. However, the court refused to adjudicate the plaintiff's claims, citing the Act of States doctrine as a barrier. The court stated that adjudicating the Callejos' claims would necessarily question the Mexican government's regulations, and hence the court applied the Act of States doctrine to affirm the dismissal of the case.⁸

⁷ *Alfred Dunhill of London, Inc. v Republic of Cuba* [1976].

⁸ *Callejo v Bancomer* [1985].

In the situation described, when the State of Mexico nationalized all the private banks in the country, it prevented foreign courts from intervening. While the Doctrine of Sovereign Immunity prohibits foreign courts from taking jurisdiction over a sovereign nation, the Act of State Doctrine allows foreign courts to take jurisdiction. However, the latter doctrine prevents the courts from deciding whether the act of a foreign government is legal or not. Both doctrines play a crucial role in International Law as they help protect the sovereignty of each nation while also creating a forum for adjudication if a sovereign nation commits illegal or unfair acts and uses these doctrines as a shield.

CONCLUSION

The interplay between sovereign immunity and the Act of State Doctrine is a crucial element in international law. It affects state interactions and legal proceedings. These doctrines have evolved historically and still have contemporary applications that adapt to the changing demands of the global stage.

Sovereign immunity promotes international relations and protects states' autonomy. The varied interpretations and applications of these principles globally reveal the nuanced character of international law, reflecting the diverse perspectives of nations and their legal systems.

Moreover, the impact of sovereign immunity and the Act of State Doctrine on international trade and commerce goes beyond traditional diplomatic relations. The intricacies of these doctrines have implications for businesses, influencing the dynamics of cross-border transactions and legal disputes involving states.

It is essential to stay vigilant regarding legislative changes and proposals that could reshape the parameters of sovereign immunity when navigating the ever-evolving landscape of international law. The adaptability of legal frameworks to contemporary challenges highlights the resilience of these doctrines in addressing the complexities of a rapidly changing global order.

In essence, the examination of sovereign immunity and the Act of State Doctrine reveals a delicate balance between accountability and the need for states to operate without undue hindrance. These doctrines play a pivotal role in maintaining order, fostering cooperation, and addressing the complexities of our interconnected world.

REFERENCES

1. Foreign Sovereign Immunities Act [1976],
2. Schooner Exchange v McFaddon [1812].
3. Victory Transport, Inc v Comisaria General [1964].
4. Underhill v Hernandez [1897].
5. Alfred Dunhill of London, Inc. v Republic of Cuba [1976].
6. Callejo v Bancomer [1985].

