

INTERNATIONAL LAW OUTLINE

Jurisdiction

In the U.S.:

- Congress has power to regulate conduct performed outside U.S. territory but has to expressly state it in the statute (as they're presumed to apply only domestically)
- Intent can be shown by language in the statute, or all available evidence of the meaning of the statute (text, structure, legislative history)
- Presumption that any act of Congress should not be construed to violate the law of nations; US courts are usually interested in whether the law is compatible with extraterritorial jurisdiction of states that is permissible under int'l law

Permissible Bases of Jurisdiction Under Int'l Law:

- Generally, jurisdiction is based on state's link to persons and conduct- the stronger the link, the more likely jurisdiction is granted
- **5 kinds of jurisdictional principles:**
 - **Territorial principle:** Conduct occurring in a state's own territory or conduct occurring outside its territory but which has or is intended to have "substantial" effects within its territory
 - **Nationality principle:** Jurisdiction over a state's nationals and over conduct the a state's nationals even when the nationals or conduct is outside the territory of the state
 - Nationality can be acquired by birth, natl'y of parents, both, naturalization
 - Ppl can have dual nationality
 - Corporation has natl'y of state where its incorporated
 - If not incorporated in state, need genuine link in order to have jurisdiction (nationality of owners of substantial # of shares, location of management office, principal place of business)
 - Vessel has nationality of state in which its registered and whose flag it flies (regardless of owner's nationality)

- **Passive personality principle:** Jrsdctn over acts committed abroad on grounds that they injure a national of the claiming state
 - Is not good enough for ordinary torts/crimes
 - Usually applied to terrorist activities and organized attacks on nationals b/c of natl'y
- **Protective principle:** Jrsdctn over conduct outside its territory that threatens its *security* (e.g., counterfeiting money, fabricating visas,) as long as conduct is generally recognized as criminal by states in int'l community
- **Universality principle:** Jrsdctn over conduct outside state's territory if that conduct is universally dangerous to states and their nationals
 - E.g., terrorist acts, piracy on high seas, slave trade, genocide, crimes against humanity, war crimes
- Can have combinations of principles for jurisdiction
- Even if int'l law permits jurisdiction, it totally up to state whether to actually do it or not
- Even if state has enacted statute asserting jrsdctn, that exercise is unlawful under int'l law if it is unreasonable
- Factors for unreasonableness (Nutshell, pp. 214-215)
- Other considerations of US courts are whether there are conflicting laws b/w the state where act committed and U.S. (*Hartford Fire Ins. Case*)
- International comity is when there are two states that may validly claim jurisdiction over certain states/conduct; when one State is deemed to have a greater interest, the other state voluntarily forbears in order to let the other state prevail

Jurisdiction to Prescribe, Adjudicate, and Enforce:

- Under int'l law, a state is subject to limitations on its jurisdiction to *prescribe* (to make its law applicable to activities, relations, or status of persons, or the interest of persons to things, whether by legis. act, exec. act/order, by rule/regulation, or by judgment of court)
 - Often called "subject-matter" jrsdctn
- This prescription must fit under one of the 5 principles of jurisdiction AND be reasonable
- A state is subject to limitations on its jrsdctn to *adjudicate* (to subject persons or things to the

- process of its courts or administrative tribunals, whether criminal or civil, whether or not state is a party in the case)
- o Often called "personal jurisdiction"
 - State can only exercise jrsdctn to adjudicate where its reasonable (different from prescriptive reasonableness)
 - Must look to see if link b/w state and person/thing at the time jrsdctn is asserted
 - Relevant links include:
 - o Whether person/thing is in territory of state
 - o If person is national of, domiciled in, or resides in state
 - o If person, natural or juridical, has consented to exercise of jrsdctn or has regularly carried on business in the state
 - In according due process to such defendants, need to consider the "minimum contacts" for business (Nutshell, pp. 219-220)
 - State is subject to limitations on jrsdctn to *enforce* (to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through courts or by use of executive, administrative, police or other non-judicial action)
 - Enforcement of measures can include production of documents, criminal sanctions (fines/imprisonment), sanctions for failure to comply with judicial or admin. order
 - Generally, state must FIRST have jurisdiction to prescribe regarding a matter before it seeks to enforce its law relating to that matter
 - Int'l law requires that in order to employ enforcement measures against a person outside its territory, state must:
 - o Give person rsbl notice of charges/claims against him
 - o Person given opportunity to be heard
 - o When enforcement through state courts, only if state has jrsdctn to adjudicate
 - If enforcement is to be exercised by state's law enforcement officers, they may only exercise their functions in the territory or another state with that state's consent (But see *US v. Alvarez-Machain*)

Immunities From Jurisdiction

Persons Accorded Immunity:

- Int'l law gives immunity to foreign diplomatic personnel and property from proceedings before nat'l courts or other authorities
- Persons deemed diplomats by the sending state are also immune from their acts/omissions in the exercise of her diplomatic/official functions, and criminal or civil process in the receiving state
- Vienna Convention on Diplomatic Relations ratified by more than 180 states (incl. US) giving receiving states affirmative duties to protect each diplomat from attack and to give diplomatic property proper facilities and protect those facilities (e.g., US court refusing case where embassy was behind in rent payments)
- Diplomats not exempt from jurisdiction of sending state, and sending state may also expressly waive immunity of the diplomatic personnel
- VC on Consular Relations also prohibits arrest/detention of consular officers except for grave crimes and under court order; consular officers not subject to judicial jurisdiction when exercising consular functions but may have to give evidence in court; sending state can also expressly waive this immunity
- Int'l civil servants employed by int'l organizations also enjoy immunities: from personal arrest, protection of papers/documents/courier bags, alien registration acts, other personal immunity
- Since UN headquarters are in the U.S., some immunities/privileges outlined in the US-UN bilateral agmt.
- US statute codifying VCDR states President may (on basis of reciprocity) specify privileges and immunities for diplomats which are either more/less favorable than those outlined in the VC (other provisions on Nutshell pp. 229)
- Head of state immunity can be raised as a defense; US courts defer to executive branch's decision whether the defense should be accorded or not; such immunity can be waived by individual's government (e.g., Pinochet case)

State Immunities:

- Doctrine of absolute immunity used to prevail but now has given way to restrictive immunity theory
- State Dept. used to issue immunity for public acts of a foreign government, not where it involved commercial acts of a foreign govt. which could equally have been carried on by private parties (e.g. buying bullets); if executive branch made no determination, the judicial branch would determine if the conduct was "governmental" or "commercial" (5 factor test in Nutshell pp. 235-236)
- Issues arose with implementing this kind of restrictive immunity so the FSIA came into existence
- FSIA provides sole basis for obtaining jrsdctn over a foreign state in US courts
 - o Grants subj-matt jrsdctn for any "non-injury civil action against a foreign state"
 - o Grants personal jrsdctn if court has jrsdctn under §1330(a) and service of process made
 - o Foreign state means any political subdivisions, agencies, or instrumentalities (separate legal person, corporate or otherwise) but is judgment against subdivision, is only to the subdivision, not whole government
 - o FSIA operates UNDER treaties/agreements of the US that may set out certain immunities expressly with certain countries

Exceptions to FSIA Immunity Case (burden of proof on P to show immunity shouldn't be granted):

- 1) **Waiver**- If foreign state expressly or implaiely waives its immunity
 - Explicit could be treaty/contract/statemnt by official; implicit might occur if state agrees to arbitration with another state knowing the US can compel enforcement/agrees the law of another state will govern one of its contracts
 - Sovereign immunity also may be waived by failure to raise it as a defense in the first responsive pleading
- 2) **Commercial Activity exception**- Sate is not immune if commercial activity is the base of State's actions; conduct may be regular conduct or an individual transaction as long as the *nature* is the determining factor (§1603(d))

- Courts look to whether govt was acting as regulator of a market (is not commercial) or as a player in the market (is commercial)
 - "Direct effect" requirement: Claim must be based on the commercial activity, not just related to it (e.g., commercial transactions performed in whole/part in the US, import-export transactns involving sales to or purchases from concerns in the US, business torts happening in the US, indebtedness occurring in foreign state which negotiates or executes a loan agmt in US)
- 3) **Expropriation exception:** State is not immune in an action in which rights in property taken in violation of int'l law are at issue and the property is present in the US in connection with a commercial activity carried on in the US by the foreign state
 - Contemplates suits involving property that was nationalized or confiscated by foreign govt without compensation
 - 4) **Tort Exception:** State not immune from tort actions involving money damages where the tort occurred in the US, incl. persona injury, death, and loss or damage to property cause by tortious act or omission of foreign state or its agents
 - 5) **Arbitration exception:** Not immune when action is brought to enforce any agreement made by the foreign state with a private party to submit to arbitration differences which may arise with respect to define legal relationship concerning subject matter capable of settlement by arbitration under US law
 - 6) **Terrorist state exception:** Permits civil suits for monetary damages against foreign states that cause personal injury or death by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or provision of material support or resources for such acts; claimant or victim must have been a US national when the act occurred and the state must be the one designated by the Sec. of State as sponsor of terrorism
 - 7) **Counterclaims exception:** If foreign state brings an action in US court, the state is not immune from jurisdictn of US courts over any counterclaim arising out of the same transaction or occurrence that is the subject of the original claim, to the extent that the CC does not seek relief exceeding the amount of the original claim (can do so but will not recover on it)

Extent of Liability:

- If foreign state not entitled to immunity from jurisdiction, it is generally liable to same extent as if it were a private party
- But foreign state only subject to punitive damages in cases falling under terrorist exception, and punitive damages may be awarded in wrongful death action where the law of the State in which the act occurred provides only punitive damages

Attachment and Execution:

- Even if foreign state not immune from suit in US, its assets are presumed immune from attachment or execution, unless two conditions are met
- Two conditions:
 - Property must be for commercial purposes (and cannot be central bank or military)
 - Attach/exec. must fit within several secondary requirements in FSIA §1610
 - Claimant may attach/execute against property of foreign govt if they have waived their immunity from attach/exec or if attach/exec based on order confirming arbitral award

Act of State Doctrine:

- Is a rule of judicial self-restraint in allowing state governments to do as they wish in their own territory
- This rule frequently involved with cases of foreign governments in US Courts but can be relevant in ANY case where validity of foreign govt's act, taken in its own territory, is at issue (can be a defense for a foreign state defendant)
- *Sabbatino* case established SC's opinion that US courts will not pass on validity of State's act in its own territory in the absence of a treaty or clear agmt. regarding controlling legal principles, even if the P alleges the taking of land violated customary int'l law
- **Exceptions to the doctrine (tho inconsistent):**
 - **When Congress directs-** E.g., Hickenlooper Amdt. allowing suit where claim of title or other rights in property brought by any party or foreign state based upon confiscation or other taking by an act of state in violation of int'l law (and happening after Jan. 1, 1959)

- **When State Dept. advises**- Where State Dept, advises courts (by letter maybe) that judicial abstentions need not apply to certain cases (only minority recognizes this exceptn)
- **Treaty exception**- AofS doctrine applicable where there is insufficient consensus on application of int'l law rule but not where such consensus exists like in a treaty
- **Extraterritorial Govt. Action**- Where foreign govt. seeks to affect property outside the govt's territory; could be credits, debits, securities
- **Commercial Activities**- Does not apply to foreign govt's commercial acts even if done in their own territory; can only have such suits where US jurisdiction falls under the 5 kinds
- **Where validity of act not in question**- Where the issue in the case is not whether the foreign govt's acts in its country are valid or not
- **Counterclaims exception**- Cannot apply AofS doctrine as a defense to a counterclaim (if State files claims against US and US files CC)
- **Human rights cases**- AofS doctrine not applicable to dismiss cases alleging human rights violations by a foreign govt in its territory