

International regulation and practice of responsibility of the state as a participant in private international law

Kodirjonov Azizbek Murodjonovich

Master's student in International Business Law at the University of World Economy and Diplomacy, Uzbekistan

Received: 03 January 2025; **Accepted:** 05 February 2025; **Published:** 07 March 2025

Abstract: The notion of state responsibility in private international law embodies a complex dimension that interweaves traditional public international law principles with the realities of cross-border transactions and disputes involving non-state actors. Historically, the doctrine of state responsibility arose as a mechanism by which one state could hold another accountable for breaches of international obligations, particularly in contexts where diplomatic protection served as the primary avenue for individual claimants seeking remedies for wrongful acts.

Keywords: Foreign direct investment, cross-border commercial transactions, human rights norms.

Introduction: The notion of state responsibility in private international law embodies a complex dimension that interweaves traditional public international law principles with the realities of cross-border transactions and disputes involving non-state actors. Historically, the doctrine of state responsibility arose as a mechanism by which one state could hold another accountable for breaches of international obligations, particularly in contexts where diplomatic protection served as the primary avenue for individual claimants seeking remedies for wrongful acts. Over time, however, global developments—including the rise of foreign direct investment, the diversification of cross-border commercial transactions, and the deepening recognition of human rights norms—catalyzed a re-examination of the role of states as direct participants in what had previously been viewed as private or commercial legal realms. As a result, states came to be seen not merely as sovereign enforcers of domestic law but also as actors that themselves could be held accountable within foreign judicial and arbitral forums. This transition has been neither seamless nor uniform, as states often invoke sovereign immunity and other jurisdictional defenses to limit the extent to which they can be sued in foreign courts. Yet, in the contemporary order, various international conventions, national statutes, and arbitral rules have carved out exceptions and frameworks that allow private parties to bring claims against states. Hence,

the evolving contours of state responsibility in private international law reflect both the enduring principle of sovereignty and the practical demands of cross-border justice.

The historical development of international regulation concerning the state's responsibility in private international law can be traced to the shifting notions of sovereign immunity, which at one time stood almost as an absolute bar to any legal proceedings against a state in foreign courts. With states increasingly participating in commercial transactions, the traditional doctrine of absolute immunity yielded to a more restrictive approach, sometimes codified in domestic statutes and international agreements. The restrictive doctrine draws a line between a state's public or sovereign acts (*acta jure imperii*) and its commercial or private acts (*acta jure gestionis*). Through this distinction, courts in many jurisdictions began asserting the power to exercise jurisdiction over foreign states when the legal dispute emerged from a transaction that appeared essentially commercial rather than governmental in character. The impetus behind this doctrinal shift was the pursuit of fairness in commercial dealings and the recognition that states acting as market participants should not be given undue advantage merely by virtue of their sovereign status. However, debates persist regarding how precisely to classify borderline activities, such as government procurement, public infrastructure

projects, or state-owned enterprises engaged in global trade, which often blur the lines between the purely public and the distinctly commercial realms. As a result, while the restrictive theory of immunity has become a cornerstone of many legal systems, its implementation continues to spawn litigation and theoretical controversy over how to demarcate state functions versus private conduct.

A major catalyst in expanding the scope of state responsibility in private international law has been the proliferation of bilateral and multilateral investment treaties, which establish explicit legal protections for foreign investors vis-à-vis host states. These treaties frequently contain provisions allowing investors to initiate arbitration proceedings directly against the host state if the latter is alleged to have breached its treaty obligations, such as protection against unlawful expropriation or a failure to provide fair and equitable treatment. The best-known framework for such disputes is the International Centre for Settlement of Investment Disputes (ICSID), a specialized arbitration institution operating under the auspices of the World Bank. By granting direct investor–state arbitration, ICSID and similar mechanisms circumvent the once-central principle that only states could invoke the liability of other states in international settings. This development underscores a broader conceptual shift: no longer is it solely the home state that espouses an investor’s claim, as private entities now possess the standing to pursue legal action in their own capacity. Consequently, this interplay of investment law and private international law highlights how the protective umbrella once reserved exclusively for inter-state disputes has been extended to individual claimants, thus anchoring the idea that states, when acting in a manner contrary to agreed-upon standards, can be held directly accountable by private parties. Nonetheless, critics have voiced concerns that investor–state arbitration may unduly constrain a country’s regulatory autonomy by subjecting sovereign policy choices—particularly those related to health, environment, or public welfare—to intense arbitral scrutiny.

Another dimension where the international regulation of state responsibility intersects with private international law is found in cases dealing with grave violations of human rights or humanitarian norms. While historically, human rights claims were addressed predominantly through inter-state procedures, or in certain instances through regional human rights courts, there has been an increasing attempt to bring such claims before domestic courts, especially under “universal jurisdiction” doctrines or through statutes such as the Alien Tort Statute in the United States.

These legal pathways, though not always successful, demonstrate a growing willingness among some jurisdictions to entertain lawsuits against foreign officials—or, in rare cases, foreign states themselves—when alleged human rights abuses are deemed egregious and contrary to fundamental international standards. Questions of sovereign immunity and act-of-state doctrines often loom large in these proceedings, as courts struggle to balance the imperative of upholding peremptory norms with the risk of diplomatic fallout and the need to respect foreign sovereignty. Moreover, in certain legal systems, attempts are made to draw parallels between the commercial exception to immunity and particularly grave transgressions of international law, positing that such acts should not be accorded protection under the principle of sovereignty. Nevertheless, the extent to which this reasoning is accepted varies significantly across jurisdictions, making it uncertain whether human rights claims against states will be recognized in domestic courts on a consistent basis.

Central to the evolution of state responsibility in private international law is the question of attribution, which entails determining when conduct can be legally imputed to the state rather than being regarded as the autonomous actions of private entities or officials acting *ultra vires*. The International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts prescribe a framework under which conduct carried out by organs of the state, or by persons or entities empowered to exercise elements of governmental authority, is considered an act of the state, thereby rendering the state internationally responsible if such conduct violates an international obligation. However, real-world scenarios frequently pose intricate factual and legal dilemmas, such as when state-owned companies or paramilitary forces operate in tandem with official governmental organs without a clear demarcation of authority. Domestic courts handling disputes that involve alleged wrongdoing by a foreign state-owned entity must examine multiple factors: the degree of control exerted by the government, the corporate structure of the entity, and the nature of the activity undertaken. Such nuanced inquiries highlight the interplay between public international law standards of attribution and the domestic legal norms governing corporate or tort liability, resulting in cases where courts must reconcile potentially divergent conceptual frameworks. In so doing, national judges often seek guidance from international jurisprudence, academic writings, or comparative case law to navigate the borderline realms of private and public conduct, mirroring the broader trend toward legal hybridity in transnational disputes.

A concomitant aspect that arises once attribution is established is the need to determine the nature of the obligation allegedly breached and whether it is enforceable at the domestic level. While public international law conceptualizes obligations primarily in terms of treaties and custom, private international law disputes might hinge on a wider array of sources, including domestic statutes, contractual undertakings, or bilateral investment treaties. Some jurisdictions take the stance that only specific, clearly defined international obligations, often codified in domestic legislation, can be judicially enforced by private claimants.

Others adopt a broader perspective, permitting courts to recognize and apply treaty obligations or customary norms if they are sufficiently precise and intended to create rights for individuals. This divergence in approach is further complicated by the possibility that the breach involves a jus cogens norm, such as the prohibition on torture or genocide, which some courts deem to override immunity defenses due to its peremptory status. On the other hand, not all jurisdictions have embraced such an exception, leaving the enforceability of peremptory norms uncertain in lawsuits against states. Thus, the question of whether and how international obligations filter into domestic legal practice is not merely academic but pivotal for determining whether private actors can actually hold states to account for internationally wrongful acts.

Building upon these foundational concepts, scholars and practitioners frequently highlight the centrality of reparation—be it in the form of restitution, compensation, or satisfaction—as a key remedy under international law principles of responsibility. From the vantage point of private international law, however, the emphasis often shifts toward the question of practical enforcement.

Even when a court or arbitral tribunal determines that a foreign state has breached its duties and awards damages, the claimant's success depends heavily on whether the judgment or award can be executed against the state's assets. Many states continue to adhere to comprehensive immunity from execution, a principle that restricts or altogether prohibits the attachment of assets belonging to foreign governments. This protective shield is typically justified on grounds of comity and the need to preserve diplomatic relations, especially if the assets in question are used for sovereign, public purposes. In response, certain claimants have sought to target state-owned enterprises on the theory that such entities function as alter egos of the sovereign. Nevertheless, courts have been reluctant in some jurisdictions to conflate commercial entities with the state itself, unless there is

a compelling showing of complete control or lack of distinction in financial dealings. As a result,

the mismatch between a theoretical finding of responsibility and the realistic ability to enforce a judgment underscores an ongoing tension in the international legal order, wherein states retain formidable defenses that may hinder effective remedies for harmed private parties.

The practice of states in litigation and arbitration reveals a variety of strategic responses to claims of responsibility within private international law forums.

At times, states rely on jurisdictional challenges, arguing that the forum is not appropriate or that the matter should be resolved under the auspices of an international tribunal specifically designed to handle investor–state or interstate disputes. This tactic can be seen where treaties include exclusive dispute resolution clauses, obliging parties to refer controversies to arbitration rather than domestic courts. Further, states might invoke the act-of-state doctrine, particularly in jurisdictions where it is recognized, contending that certain sovereign acts taken within their own territory are not justiciable in a foreign court. Conversely,

in scenarios where states genuinely wish to engage with private claimants, either to settle disputes amicably or to maintain a reputation for respecting the rule of law, they may waive immunity or agree to subject themselves to a particular forum in contractual clauses. Such waivers reflect a pragmatic balancing of state interests in attracting foreign business and preserving flexibility in governmental decision-making. The overall panorama is one of procedural complexity: claimants must be mindful of the legal labyrinth that includes immunity defenses, forum selection clauses, the act-of-state doctrine, and the interplay between domestic laws and international treaties. Each variable can dramatically alter the outcome, illuminating why international regulation of state responsibility continues to be both conceptually rich and practically challenging for litigants.

Moreover, the role of comity and public policy exceptions in private international law adds another layer of intricate deliberation, as courts weigh the respect owed to foreign sovereignties against the imperative of upholding fundamental principles of justice. Comity, understood as a doctrine of mutual deference among states, can lead a court to dismiss or stay proceedings out of recognition for another nation's judiciary or legal processes. In contrast, a public policy exception may drive a court to assert jurisdiction despite immunity claims if the acts in question offend deeply held norms or moral

imperatives of the forum state. This tension is especially pronounced when allegations involve heinous conduct, such as crimes against humanity, war crimes, or systematic violation of human rights. Some jurisdictions have carved out discrete exceptions to immunity in cases involving serious international crimes, reasoning that extending immunity to such acts would run counter to the fundamental values protected by the international community. Yet, the practical application of these exceptions differs widely among legal systems, reflecting the absence of a universal consensus. Although there is an ongoing discussion about whether a peremptory norm (*jus cogens*) should categorically override sovereign immunity, no settled global rule has emerged, leaving national courts with significant discretion in deciding whether to allow or deny suits against foreign states for grave violations.

Beyond domestic litigation, the practice of state responsibility in private international law is prominently displayed in the realm of international arbitration. Investor–state arbitration, anchored in bilateral investment treaties or multilateral frameworks like the Energy Charter Treaty, permits foreign investors to bypass local courts and directly initiate claims against host states. In these contexts, arbitrators draw upon principles of both public international law—such as the fair and equitable treatment standard—and private law doctrines, particularly when interpreting investment contracts or assessing damages. The outcomes of such arbitrations can be significant, with multimillion or even multibillion-dollar awards imposed on states found to have violated treaty obligations. These awards are typically enforceable in multiple jurisdictions under international conventions such as the ICSID Convention or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Nonetheless, the system has ignited debates about transparency, consistency, and legitimacy, as arbitral decisions can effectively constrain a state’s ability to regulate in domains like environmental protection or public health. Critics argue that the heightened risk of liability might deter governments from adopting robust regulatory measures, while supporters maintain that the arbitration regime merely ensures states adhere to internationally recognized standards of fair treatment, thereby promoting economic stability and investor confidence. Such debates underscore how state responsibility, once viewed primarily through the lens of inter-state diplomacy, now resonates powerfully in the private international law arena, shaping both legal theory and economic policy.

An equally significant yet sometimes overlooked factor

in the international regulation of state responsibility is the principle of good faith, which undergirds much of international and transnational legal practice. Good faith obligations guide the interpretation and performance of treaties, ensuring that states neither exploit legal loopholes nor frustrate the legitimate expectations of their treaty partners or private counterparties. In private international law disputes, the invocation of good faith can influence how courts or arbitral tribunals assess whether a government’s actions were fair, transparent, and proportionate. For instance, an abruptly enacted environmental regulation, even if non-discriminatory on its face, might be viewed as violating fair and equitable treatment if introduced without proper notice or consultation, thereby undermining the legitimate business expectations of a foreign investor. In these scenarios, the principle of good faith acts as a normative lens through which a state’s conduct is evaluated, transcending formalist arguments that might otherwise shield the state behind claims of policy prerogative. This approach promotes a measure of predictability and fairness in cross-border dealings, as states are encouraged to reconcile their sovereign powers with the reliance interests of private parties. Ultimately, while good faith remains somewhat malleable and subject to case-by-case interpretation, it cements the premise that states do not operate in a legal vacuum when dealing with private actors; they are instead bound by minimum standards of conduct that resonate both in public international law and in domestic legal orders.

In practical terms, the application of these principles and doctrines varies greatly across regions and legal systems, reflecting differences in legislative frameworks, judicial philosophies, and geopolitical interests. Some countries have enacted sophisticated statutes—often styled as “State Immunity Acts”—which codify the restrictive approach to immunity and provide clear guidance on issues such as service of process on foreign governments, attachment of assets, and recognition of foreign judgments or arbitral awards. Other jurisdictions continue to rely on common law evolution or broad constitutional provisions, leaving significant discretion to the judiciary. Meanwhile, on the international plane, harmonization efforts—such as the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property—have sought to formalize a global standard, although not all major powers have ratified this instrument. Consequently, a mosaic of practices persists, with states often adopting positions that best align with their strategic interests, whether to shield themselves from external liabilities or to

facilitate claims by domestic businesses against foreign governments.

This disparate landscape underscores that the international regulation of state responsibility, far from being settled, remains an arena of active negotiation and contestation. As private international law continues to expand its ambit—driven by innovations in global commerce, technology, and social values—it seems likely that the frameworks governing state responsibility will continue to adapt and possibly converge, albeit unevenly, to address emerging challenges and imperatives.

Looking to the future, several trends point to further complexity and refinement in this field. Firstly, as global challenges like climate change, pandemics, and cyber threats intensify, states are adopting new regulatory measures—often with cross-border effects—that can implicate the rights and interests of individuals and corporations in foreign jurisdictions. These evolving regulatory landscapes may spur novel claims alleging state responsibility for harms caused by inadequate environmental protections, data breaches, or public health policies.

Secondly, the proliferation of digital platforms and decentralized finance complicates traditional notions of territorial jurisdiction and state control, potentially reshaping how courts and arbitral tribunals ascertain attribution and causation in cross-border disputes. Thirdly, the influence of human rights norms continues to expand, raising the possibility that domestic courts might become more receptive to tort claims against foreign states in cases involving systematic abuses, notwithstanding sovereign immunity defenses. As a corollary, normative debates about the role of *jus cogens* will likely intensify, with some scholars and practitioners positing that the gravity of certain violations should automatically strip states of immunity. Finally, any evolution in state responsibility frameworks will also hinge upon political will, as international treaties and conventions require ratification and consensus-building among states with divergent legal traditions and strategic priorities.

CONCLUSION

In conclusion, the international regulation and practice of responsibility of the state as a participant in private international law epitomize the blending of public and private legal spheres, highlighting the ways in which sovereignty, once jealously guarded and deemed absolute, can be balanced with the need for redress when governmental actions cause harm to foreign investors, businesses, or individuals. The doctrinal building blocks—ranging from the restrictive theory of immunity to investor–state arbitration, from human

rights litigation to the principle of good faith—reveal a nuanced tapestry of legal norms that govern how and when states can be called to account in settings traditionally reserved for private-party disputes. While these developments offer powerful tools for addressing international wrongdoing, they also generate concerns about the potential erosion of sovereign prerogatives and the perceived legitimacy of imposing liability on states outside conventional interstate channels. The practice in courts and tribunals across the globe suggests that there is no one-size-fits-all solution to these dilemmas.

Instead, each jurisdiction navigates a complex interplay of statutes, case law, and treaties, as well as diplomatic and policy considerations. Consequently, the legal architecture governing state responsibility in private international law continues to evolve, guided by the shifting currents of economic globalization, human rights advocacy, and international cooperation. The ultimate challenge and opportunity lie in forging a delicate equilibrium, one that respects the dignity of states while ensuring that injured parties do not face insurmountable barriers to achieving meaningful redress.

REFERENCES

- Briggs, A. (2021). *The Conflict of Laws*. Oxford University Press.
- Brownlie, I. (2008). *Principles of Public International Law*. Oxford University Press.
- Collins, L. (Ed.) (2005). *Essays on State Immunity*. Oxford University Press.
- Crawford, J. (2013). *State Responsibility: The General Part*. Cambridge University Press.
- Dicey, A. V., Morris, J. H. & Collins, L. (2012). *The Conflict of Laws*. Sweet & Maxwell.
- Dickinson, A., Lindsay, R., & Loonam, J. P. (Eds.) (2004). *State Immunity: Selected Materials and Commentary*. Oxford University Press.
- ICSID Convention (1965). International Centre for Settlement of Investment Disputes.
- Shaw, M. N. (2017). *International Law*. Cambridge University Press.