

REPRESENTING NATION-STATES IN JUDICIAL FORUMS



WORLD DOMINATION

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In the course of the Thirty Years' War (1618–1648), approximately eight million people were killed throughout Central Europe, with the forerunner of modern-day Germany experiencing up to a 50% decimation of the population.

But what is most significant about the Thirty Years' War is not only the vast destruction but also the diplomatic outcome: the treaties that were signed ending the war—collectively referred to as the 'Peace of Westphalia' (1648)—laid the foundations for the concept of the nation-state that has existed until today. However, the very nature of this venerable, over 350-year-old doctrine is coming unraveled of late as non-state institutions and organizations, along with global technology actors, redistribute—and indeed usurp—the power once firmly entrenched among the nation-states. We will examine the transformations and trends that are taking place as lawyers represent nation-states before judicial forums.

The Westphalian Order

The nation-state concept that emerged from the Peace of Westphalia posited that global politics is ordered as a system of independent, sovereign states, all of which are equal under international law. And each nation-state has the right to enact and enforce laws with respect to its own borders, its own citizens, and with respect to actions taking place outside the territory but having an objective or direct impact within the territory.

In the Restatement 3rd of Foreign Relations Law, these three principles are known as the territorial principle, the nationality principle, and the objective territoriality principle, and form the basis of much of what we call International Law.

The Three Principles and Jurisdiction

Jurisdiction under territorial principle simply means that anything that occurs within a nation's borders is subject to its laws. For example, if a European company builds a factory in an Alabama location, that company will be subject to Alabama's and the U.S.'s laws. Nationality jurisdiction poses more difficult problems whereby the citizens of a nation-state are subject to its own laws while within its borders but at

the same time governed by the sovereign's laws while abroad. One example of this would be the U.S.'s Foreign Corrupt Practices Act (FCPA), barring the bribing of foreign officials, even though it may be an accepted 'manner of doing business', overseas. Under the principle of objective territoriality, acts taking place within the borders of one nation can have a direct impact on another nation. International law authorizes nation-states to make and enforce laws against actors whose conduct has such direct effects. An example of this was the U.S.'s asserting jurisdiction in a lawsuit against Osama bin Laden and his relatives over conduct arising out of the Afghanistan-based Al Qaeda attack on the U.S. on September 11, 2001.

Quite commonly, the very first hurdle that must be overcome in the course of representing a nation-state in any judicial forum is that of establishing the basis for the forum's jurisdiction.

Treaties and Choice of Law

Where a defendant, whether criminal or civil, is neither a U.S. citizen nor located in the U.S., the prosecution of such a person or entity may likely pose a conflict of law and conflict of jurisdiction issues. International treaties have been entered into in order to

Executive Summary

> The Issue

What are the issues surrounding the representation of nation-states before judicial forums?

> The Gravamen

Critical jurisdictional issues based on the three recognized principles of the Restatement 3rd of Foreign Relations Law are typically the first judicial thresholds to be resolved when representing nation-states.

> The Path Forward

The emerging role of—and responsibility of—non-state actors and transnational economic players must be taken into consideration when weighing and strategizing the representation of a nation-state before a judicial body.

resolve such procedural and jurisdictional conflicts and to carve out beforehand which choice of laws will govern. Extradition treaties establish the rules that apply when one nation-state intends to prosecute a person who is located in another country. Such treaties generally give priority to the nation-state that has the greater interest in assuming jurisdiction over the person to be prosecuted.

The Act of State Doctrine

The act of state doctrine provides that U.S. courts will not dispute the validity of an official act of a foreign government fully performed within its own territory. In fact, a foreign country may expropriate private property and yet be immune from a lawsuit in the United States by the owners who were harmed by such expropriation. Frequently, particularly during times of political revolution, foreign governments have seized the assets of U.S. corporations without compensating them for the loss. At times, foreign governments seize all of the property belonging to a particular industry, and at times, it is the assets of private U.S. citizens.

A well-known example of an act of state ruling by the U.S. Supreme Court was in the case of the 1960 expropriation of U.S. sugar companies in Cuba. *Compania Azucarera Vertientes-Camaguey de Cuba (C.A.V.)*, whose stock was principally owned by U.S. citizens, was nationalized, and payment for the sugar sold pursuant to their contracts went to Banco Nacional de Cuba, an arm of the Cuban government. A federal court ruled 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. Furthermore, the expropriation did not provide adequate compensation and was aimed at U.S. interests only, not those of other foreign nationals operating in Cuba. The U.S. Court of Appeals affirmed; however, the Supreme Court reversed, citing the act of state doctrine as applicable to the expropriation, thereby validating the act of a foreign government completely executed within its own country.

Is the Trend Post-Westphalian?

Historically, conflicts were strictly between nation-states, and the mechanisms for resolving conflicts—whether they be political, commercial or military—were based on the assumption that nation-states would always be the actors. However, during the past few decades, a variety of non-state institutions and organizations have been formed that undermine that assumption. Organizations such as the UN, EU, the Asian-Pacific Economic Cooperation (APEC), NATO, the African Union, and others now promulgate rules and create jurisdictional bodies that sovereign nation-states may or may not be in agreement with and may or may not benefit from. In fact, such organizations increasingly have the power to usurp nation-state sovereign authority and dictate to them.

Not only are international organizations increasingly becoming authoritarian, but at the same time, the 'interests' of even such extreme non-state actors as ISIS or Boko Haram are being taken into consideration in the course of policymaking—including when and if to pursue judicially— and they are

Action

1 A Knowledge of History:

A knowledge of the history of how the nation-state governance model came to be created and how it has served as the basis for international relations is the first step in understanding how nation-states relate to one another.

2 Foreign Relations Law:

Reference must be made to those treaties and conventions pursuant to which nation-states have agreed to work out their conflicts via various judicial forums.

3 An Act of State:

Understanding how an act of state is defined is a fundamental starting point before contesting the actions of a rival nation-state.

4 Where Jurisdiction Lies:

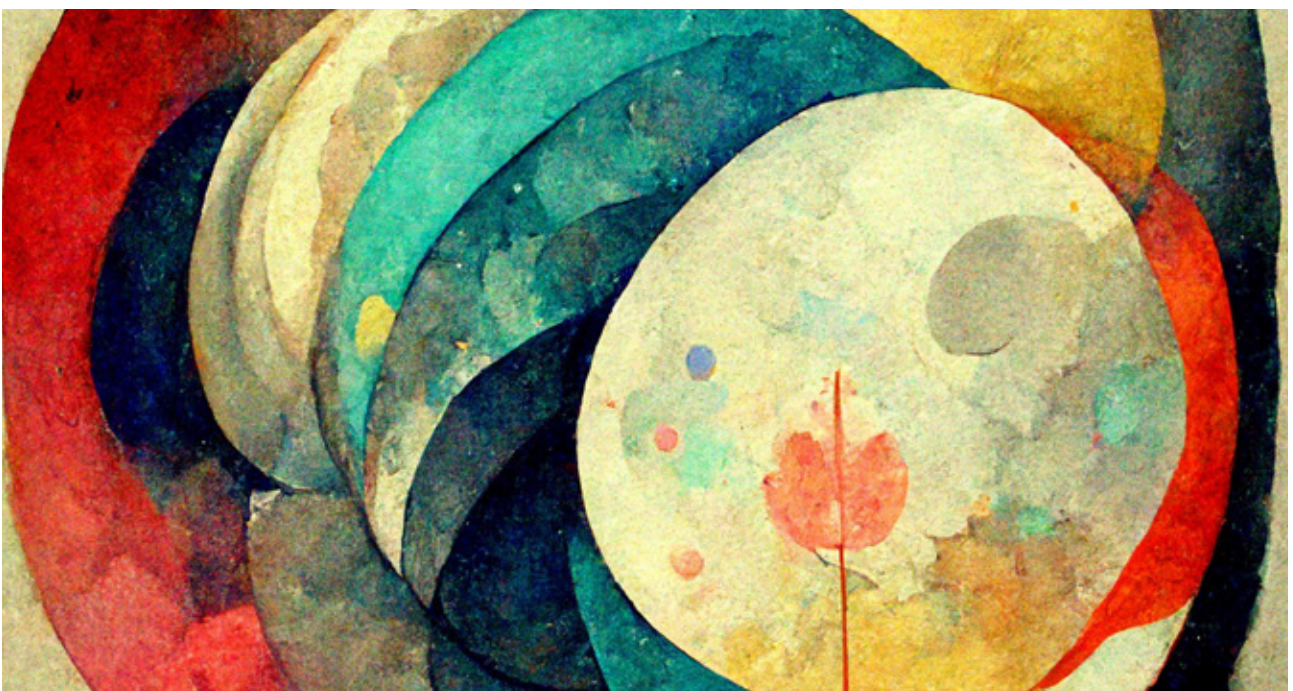
Determining jurisdiction over the person (entity), application of local law over foreign law, and regard for the territorial principle, the nationality principle, and the objective territoriality principle, will be threshold issues in any nation-state representation.

being given a place at the table, even while defined as banned organizations and pursued by Western as well as European, and African nation-states. Further erosion of the Westphalian global polity is occurring by way of the increasing influence and dominance of 'nation-state-like' economic giants such as Google, Facebook and the emerging AI technocracies.

There are those who argue that the emergence of such powerful non-state actors signals the end of the Westphalian Order and that, accordingly, the nation-state model and its recourse to judicial forums will be replaced by a system of globalization. And that model may, in fact, end up more resembling a neo-medievalism than anything envisioned at the Peace of Westphalia.

**“EVERY NATION –
EVERY NATION –
MUST HONESTLY
ACKNOWLEDGE ITS
RESPONSIBILITIES TO
ITS CITIZENS AND
ASK IF THE CURRENT
INTERNATIONAL
ORDER SERVES THE
GOOD OF ITS PEOPLE
AS WELL AS IT
COULD. AND IF NOT,
WE MUST ASK HOW
WE CAN RIGHT IT.”**

— MICHAEL R. POMPEO, FORMER
SECRETARY OF STATE



Further Reading

1. https://saylordotorg.github.io/text_business-law-and-the-legal-environment-v1.0-a/s55-03-important-doctrines-of-nation-.html
2. <https://www.bostonreview.net/articles/beyond-the-nation-state/>
3. <https://chass.usu.edu/international-studies/aggies-go/nation-states>
4. <https://tlblog.org/act-of-state-doctrine/>
5. <https://www.jstor.org/stable/684864>





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After receiving his Juris Doctor degree from The John Marshall Law School in Chicago, Mr. Brochin served as an Administrative Law Judge with the Illinois Department of Labor for six years where he presided over cases dealing with job separation issues and matters pertaining to contested Unemployment Insurance claims. He also co-wrote the agency's administrative rules, and periodically served as a 'ghost writer' for Board of Review decisions.

Following that position, he was Director of Development for a Chicago-area non-profit college where he was responsible for High Net Worth donations to the institution. For the next eighteen years he practiced as a solo practitioner attorney with an emphasis in the fields of Real Estate law and Commercial Contracts transactions, and was an agent for several national title insurance agencies.

In 2003 he was recruited to head up a U.S. title insurance research office in Israel, a position he held for four years, and between 2007-2017 he participated in litigation support for several high-profile cases. He has taught Business Law as a faculty member of the Jerusalem College of Technology, and has authored a wide variety of legal White Papers and timely legal articles as a professional legal content writer for GPL clients. Separate from his legal writing, he has co-authored academic articles on Middle East security topics that have been published in peer-reviewed publications.



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William Anderson is Managing Director and Head of Law & Compliance. He leads the GreenPoint practice in providing regulatory, legal, and technology solutions to law firms, legal publishers, and in-house law departments around the world, overseeing our team of experienced US attorneys and data and technology experts. Will has over 25 years' experience working with corporations to improve the management of their legal and corporate compliance functions. Will began his legal career as a litigator with a predecessor firm to Drinker, Biddle LLP. He then served as in-house counsel to Andersen Consulting LLP, managing risk and working with outside counsel on active litigation involving the firm.

Will has leveraged his legal experience interpreting regulations and appearing before federal (DOJ, SEC, FTC) and state agencies (NYAG) to oversee research and other areas at Bear Stearns. In this capacity, he counseled analysts on regulatory risk and evolving compliance requirements. Will also consulted on the development of a proprietary tool to ensure effective documentation of compliance clearance of research reports. Will then went on to work in product development and content creation for a global online compliance development firm pioneering the dynamic updating of regulated firms' policies and procedures from online updates and resources. Will holds a Juris Doctorate with High Honors from the Washington University School of Law in Saint Louis and is admitted to state and federal bars. He lives in Pawling, NY, with his wife and daughter.



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