Washington and Lee Law Review Online

Volume 73 | Issue 1 Article 13

8-15-2016

United States Courts and Imperialism

David H. Moore

United States Courts and Imperialism

David H. Moore*

Abstract

When U.S. Courts adjudicate transnational matters, they risk two forms of judicial imperialism. The first—unilateral imperialism—involves adjudication by a single state at the expense of multilateral forms of resolution or global governance. The second—sovereigntist imperialism—threatens the sovereignty of other states who might wish to resolve the controversy themselves. The risk of imperialism may lead U.S. courts to hesitate to adjudicate transnational claims. In Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism," *Professor Hannah Buxbaum highlights that in addition to facing involuntary adjudication in U.S. courts, foreign states voluntarily sue in U.S. courts as well. The phenomenon of foreign states as plaintiffs, she argues, undermines concerns for imperialism and counsels in favor of U.S. judicial resolution of transnational matters.*

Buxbaum's focus on foreign states as plaintiffs is an important contribution. The implications of the focus, however, are more circumscribed than her article might suggest. The fact that foreign states occasionally sue in U.S. courts means that adjudication of transnational claims by U.S. courts does not always constitute unilateral imperialism. Rather, suits by foreign states may be a form of global governance. When it comes to concerns for sovereigntist imperialism, by contrast, foreign invocation of U.S. jurisdiction fails to undermine the sovereignty concerns that arise when U.S. courts adjudicate against the will of foreign states. First, the typical claims foreign states assert as plaintiffs themselves show respect for sovereignty. Second, consent matters, and in nonconsensual cases sovereignty concerns

* Associate Dean of Academic Affairs and Research and Wayne M. and Connie C. Hancock Professor of Law, Brigham Young University, J. Reuben Clark Law School.

continue to exist. Third, notions of reciprocity do not automatically justify involuntary adjudication due to foreign state invocation of U.S. jurisdiction. More is needed to conclude that the phenomenon of foreign states as plaintiffs justifies adjudication against the will of those states.

Table of Contents

Resolution of transnational controversies in U.S. courts risks two forms of judicial imperialism. First, adjudication of transnational controversies in the courts of one country—the United States—threatens unilateral rather than multilateral governance of transnational matters. This *unilateral imperialism* elevates governance by a single state over multilateral approaches to governance. Second, the exercise of U.S. sovereignty to resolve transnational controversies threatens the sovereignty of other states that share ties to a controversy and might wish to exercise their sovereignty to resolve the controversy themselves. This *sovereigntist imperialism* elevates the sovereignty of one state over that of others.[1] The risk of either form of imperialism, but especially the sovereigntist version, may

1. Both forms of imperialism are international in nature. That is, both focus on the international impacts of U.S. adjudication, whether for global governance or for the co-equal sovereignty of other states. Judicial resolution of transnational matters might also present a domestic form of imperialism as courts exercise authority reserved to the political branches. Buxbaum makes brief reference to this form of imperialism, but focuses on international imperialism. *See* Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism"*, 73 WASH. & LEE L. REV. 653, 705–06 (2016) (noting separation of powers concerns arising from judicial resolution of transnational matters). This response maintains that focus as well.

lead U.S. courts to hesitate to resolve transnational matters like domestic matters by, for example, invoking the political question or act of state doctrine or applying a strong presumption against extraterritoriality. In *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism*,"[2] Professor Hannah Buxbaum explores the phenomenon of foreign states bringing suit in U.S. courts to argue that charges of judicial imperialism leveled at U.S. courts are overblown such that U.S. courts should be more receptive to transnational litigation.

Buxbaum makes an important contribution. Notions of judicial imperialism are predominately informed by a paradigmatic scenario in which U.S. courts exercise jurisdiction against the actual or presumed will of other states. Against this paradigm, Buxbaum reminds that other states also invoke the jurisdiction of U.S. courts. The engagement of foreign states with U.S. courts is thus broader than the paradigmatic case intimates. This is an important insight. Yet the implications of this insight are more limited than Buxbaum suggests, especially when it comes to the sovereigntist brand of judicial imperialism.

I. Relative Frequency

As an initial matter, claims by foreign states as plaintiffs "constitute a small percentage of all litigation involving foreign sovereign parties."[3] Indeed, searching the Westlaw "cases" database (which includes cases that predate the Founding) as well as the "trial court documents" database (which generally contains only documents from 2000 onward), Buxbaum finds fewer than 300 claims by foreign states in U.S. courts.[4] The more common contexts in which foreign states engage with U.S. courts are "(1) when a foreign government is the defendant in a U.S. court . . . ; (2) when a claim requires a U.S. court to scrutinize

2. While Buxbaum speaks of suits by foreign governments, I find it more natural to speak in terms of suits by foreign states, although such suits will be brought by the recognized governments of those states.

3. Buxbaum, *supra* note 1, at 659. This is due in part to limitations on foreign state standing to sue in U.S. courts. *See id.* at 659–65.

4. *See id.* at 653–54, 666 (discussing these Westlaw findings). Buxbaum explains that "these data are necessarily incomplete," but represent "as full a set as possible of claims brought by foreign governments." *Id.* at 666.

actions taken by a foreign government within its own borders . . . ; and (3) when a U.S. court seeks to apply U.S. law to persons or conduct within a foreign government's borders . . . ."[5] In all these cases, the risk of a U.S. court infringing on the sovereignty of a foreign state or engaging in unilateral rather than multilateral resolution of the dispute is real.

The risk may be reduced if foreign states accept U.S. adjudication in these cases. In all three of the more common contexts in which foreign states interact with the U.S. judiciary, foreign states may accede to U.S. adjudication. For example, when a foreign state appears as a defendant in U.S. courts, the state may waive its immunity.[6] Similarly, a state may consent to the application of U.S. law to actors and events within its borders.[7] The incentives that may lead a state to waive immunity or consent to U.S. exercise of prescriptive jurisdiction may differ from the incentives that lead a state to sue in U.S. courts. A state might waive jurisdictional immunity, for example, long before a suit materializes in order to secure a favorable business deal. Yet these situations are also relevant to an assessment of foreign states' comfort with U.S. adjudication. In this regard, *Foreign Governments as Plaintiffs* provides an insightful starting point for a broader analysis of the ways in which foreign states welcome the involvement of U.S. courts in transnational matters.[8]

II. Respect for Sovereignty When Foreign States Sue as Plaintiffs

When it comes to the cases in which foreign states sue as plaintiffs, these cases reflect concern for sovereignty. Foreign

---

5. *Id.*at 655 (emphasis added) (footnotes omitted).

6. *See* Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(1) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity either explicitly or by implication . . . .").

7. *See, e.g.*, RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. k (Tentative Draft No. 2, 2016).

8. *See* Buxbaum, *supra* note 1, at 659 (noting additional situations in which foreign states consent to U.S. adjudication, while focusing on the phenomenon of foreign states as plaintiffs).

states bring roughly five types of claims in U.S. courts.[9] Three types—"[c]laims related to assets located within the territory of the United States,"[10] "[c]laims for monetary relief in connection with commercial activity in the United States or involving U.S. counterparties,"[11] and "[r]equests for judicial assistance in connection with foreign judicial or arbitral proceedings"[12]—echo the international law rule that states have sovereign authority to regulate "persons, property, and conduct within [their] territory."[13] Whether or not these claims directly present questions of U.S. jurisdiction to prescribe, lodging these claims in U.S. courts demonstrates respect for the sovereignty of the United States over its territory and people. Similarly, requests to support foreign arbitral or judicial proceedings generally rely on treaties to which the United States has consented or statutes the United States has enacted in its sovereign discretion.[14] These requests often ask the United States to perform tasks that would be an infringement of sovereignty for another state to attempt within U.S. territory, such as gather evidence.[15]

A fourth (and relatively uncommon) type of claim—"[c]laims for injunctive relief following alleged treaty violations by a U.S. municipality or state, or by the federal government"[16]—also demonstrates respect for U.S. sovereignty. As with claims to support foreign proceedings, these claims rely on treaties to which the United States has consented. Bringing these claims in U.S. courts allows the United States, rather than a foreign or even international tribunal, to assess the legality of U.S. conduct and alter its ways. The fifth set of claims—"[c]laims for monetary relief for damages suffered in connection with unlawful conduct occurring within the foreign state"—invites the United States to

---

9. *Id.* at 666–67.

10. *Id.* at 666. Some of these claims extend to property located outside the United States and thereby reach beyond invocation of U.S. territorial sovereignty. *Id.* at 669.

11. *Id.* at 666.

12. *Id.*

13. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 212 (Tentative Draft 2, 2016).

14. Buxbaum, *supra* note 1, at 670–71, 677.

15. *Id.* at 670–71.

16. *Id.* at 666, 673.

exercise sovereign power in situations where it otherwise might not, such as where foreign defendants acted within the territory of the suing state.[17] To the extent that these claims seek enforcement of U.S. law,[18] they are consistent with the international law principle that a state may exercise its sovereignty to consent to the application of another state's law beyond what international law would otherwise allow.[19]

In short, respect for sovereignty is evident in the five categories of claims that foreign states pursue as plaintiffs in U.S. courts.[20] Consequently, the fact that foreign states invoke U.S. jurisdiction may, on balance, strengthen rather than undermine concerns for sovereigntist imperialism.

III. Invocation Versus Imposition

At a minimum, foreign states' occasional invocation of U.S. jurisdiction has little or no direct bearing on concerns for sovereigntist imperialism. The same is not true when it comes to concerns for unilateral imperialism. Consensual interactions between foreign states and U.S. courts reveal—as Buxbaum usefully highlights in the context of foreign states as plaintiffs—that what might at first blush appear to be unilateralism is in fact multilateral use of U.S. courts. In this way, Buxbaum's focus on foreign states as plaintiffs shows that U.S. adjudication of transnational claims is not always unilateral imperialism but global governance. Yet this insight is qualified. As Buxbaum notes, developing states may resort to U.S. courts because they

---

17. *Id.* at 667, 675–77. Buxbaum includes in this fifth set claims against U.S. corporations, *id.* at 675–76, a form of suit discussed previously. *See supra* text accompanying note 11.

18. *See* Buxbaum, *supra* note 1, at 675 (noting that "some [foreign states] assert claims pursuant to foreign law, while others are brought under U.S. law[,] including various forms of regulatory law").

19. *See, e.g.*, RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. k (Tentative Draft No. 2, 2016).

20. This does not mean that the United States always exercises its sovereignty to assist foreign states with their claims. Even when foreign states seek U.S. adjudication, U.S. courts may decline to oblige, including based on imperialism concerns. *See* Buxbaum, *supra* note 1, at 696–98 (discussing situations in which U.S. courts have refused to adjudicate claims by foreign state plaintiffs).

lack the ability to resolve transnational matters on their own.[21] Theirs is not so much an attempt to promote multilateral governance but to find a substitute unilateralism.

The focus on foreign states as plaintiffs has less force when it comes to illuminating (or undermining, as Buxbaum hopes) concerns over sovereigntist imperialism. Consent is critical in identifying whether U.S. adjudication is a form of sovereigntist imperialism.[22] Consensual adjudication does not infringe on another state's sovereignty. At the same time, the existence of consensual adjudication does not automatically alter the imperialistic nature of nonconsensual adjudication.[23]

Consider an analogy from the use of force. In 1781, a French naval fleet dispelled a British fleet and blockaded the Chesapeake Bay, pressuring Lord Cornwallis to surrender at Yorktown and precipitating British recognition of the United States as an independent sovereign.[24] Less than two decades later, the French navy and French privateers seized American vessels in an undeclared quasi war with the United States.[25] In both the Revolutionary War and the Quasi War with France, the United States engaged with French naval power. Yet in the

---

21. *See id.* at 696 ("Many of the claims by developing countries [in U.S. courts] . . . suggest the need to supplement local resources in various ways.").

22. *See id.* at 714 & n.264 (noting the importance of consent in determining whether U.S. adjudication threatens foreign sovereignty).

23. Buxbaum's suggestion that consensual adjudication should reduce concerns for nonconsensual adjudication is strongest in the context of "claims in which foreign governments seek remedies such as treble damages and punitive damages that they have, in other contexts, criticized as violating their own public policies." Buxbaum, *supra* note 1, at 678. Yet the implications of this rare opportunistic behavior are uncertain. The most sovereignty-respecting response would be to allow foreign states to pursue remedies to which they object when imposed involuntarily. More reasonably, U.S. courts might refuse to grant the remedies foreign states seek rather than conclude that foreign state pursuit of the remedies justifies their award against the will of foreign states in other suits.

24. *See, e.g.*, CHARLES LEE LEWIS, ADMIRAL DEGRASSE AND AMERICAN INDEPENDENCE xi, 201–02 (2014) (discussing the significance of the French naval victory and of the Battle of Yorktown); RICHARD M. KETCHUM, VICTORY AT YORKTOWN 214, 238–40 (2004) (discussing Cornwallis's surrender in response to the siege from the army on land and French Navy at sea).

25. *See, e.g.*, Douglad Kroll, *Quasi War*, *in* INTERNATIONAL ENCYCLOPEDIA OF MILITARY HISTORY 1069 (James C. Bradford ed., 2006) (discussing French actions against the U.S. during the Quasi War).

Revolutionary War, the engagement was invited; in the Quasi War, the engagement was imposed. In the Revolutionary War, France came to the aid of U.S. sovereignty; in the Quasi War, France interfered with U.S. sovereignty.

Foreign states' engagement with U.S. judicial power is similar. Sometimes foreign states invoke U.S. judicial power to assist them in disputes with the United States or other entities. More frequently, foreign states involuntarily face U.S. adjudication. In both situations, foreign states engage with U.S. judicial power. But the fact that both scenarios involve interaction with U.S. judicial power does not mean that they reflect on foreign state sovereignty in the same way. One scenario occurs by invitation, the other by imposition. One respects sovereignty; the other diminishes sovereignty. Just as the fact that an invitation to France to use naval power to aid the United States does not lessen the aggressiveness of subsequent French plundering of U.S. vessels, the invocation of U.S. judicial power by foreign states does not lessen the threat to sovereignty posed by involuntary exercise of U.S. judicial power over foreign states.

IV. Reciprocity and its Limits

The threat to sovereignty presented by involuntary adjudication might be justified by notions of reciprocity, but that conclusion does not flow inevitably from the observation that foreign states sometimes invite U.S. adjudication. Reciprocity is a nuanced principle. For instance, reciprocity may justify burdens only when a certain threshold of benefits is received. Or reciprocity may have to bow to other values. The Foreign Sovereign Immunities Act (FSIA), for example, eliminates foreign states' immunity when the foreign state sues as plaintiff, but only in that particular suit and only as to counterclaims that are transactionally related to the claims of the foreign state, seek remedies that are not different in form or amount from what the foreign state seeks, or would qualify for an exception to immunity under some other provision of the FSIA.[26]Similarly, whether or

26. 28 U.S.C. § 1607(a)–(c). The relevant portion of the Foreign Sovereign Immunities Act reads,

In any action brought by a foreign state, or in which a foreign state

not the Due Process Clause applies to foreign states, the Clause protects a defendant to whom it applies from expansive assertions of personal jurisdiction even if the defendant has invoked the power of U.S. courts as a plaintiff in other cases.[27] As these examples illustrate, receipt of judicial benefits does not necessarily justify judicial burdens. Consistent with this principle, the fact that foreign states sometimes invoke U.S. jurisdiction as plaintiffs does not immediately justify U.S. adjudication against the will of those states. More is needed to conclude that the sovereignty concerns that accompany involuntary adjudication are warranted by foreign states' occasional invocation of U.S. jurisdiction. *Foreign Governments as Plaintiffs* stops short of providing that additional justification.

V. Conclusion

At the end of the day, Buxbaum exposes an important dimension of foreign state engagement with U.S. courts—foreign states' voluntary invocation of U.S. jurisdiction as plaintiffs. The exercise of U.S. jurisdiction in such cases, it turns out, may be a form of global governance rather than unilateral imperialism. When it comes to concerns for sovereigntist imperialism, however, foreign invocation of U.S. jurisdiction fails to undermine the sovereignty concerns that arise when U.S. courts adjudicate contrary to the will of foreign states. In those cases, sovereignty concerns, absent more, continue to counsel against U.S. adjudication of transnational matters.

> intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim . . . for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or . . . arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or . . . to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

Id.

27. *See generally* U.S. CONST. amend. V; *id.* amend. XIV, § 1.