紀　林繁

学位の種類　博士（法学）
学位記番号　法博第１３０号
学位授与年月日　平成２９年９月２５日
学位論文題目　A Study on Commercial Transaction Proceedings in Which State Immunity Cannot Be Invoked
（国家免除が援用できない商業的取引の裁判手続に関する研究）

論文審査委員（主査）教 授　植木　俊哉
准教授　西本准教授
教授　柳　华文
教授　廖　凡

## 論文内容の要旨

The principle of State immunity is recognized as a customary international law by States practice. Initially, the respondent State was entitled to the right to immunity in any litigation. However, with the development of society, sovereign States increasingly participate in the field of autonomy of private law, and the traditional dichotomy between civil society and political nation are facing challenge. This causes the principle of State immunity heading for a relativism tendency. In point of fact, ‗no sovereignty no immunity‘ has increasingly become a shared understanding of international community. In the context of restrictive principle of State immunity, the commercial transaction is the most typical case of non-immunity from proceedings of adjudication and enforcement. It is very significant to recognize the law of State immunity and design a reasonable law system of State immunity by studying the exception to immunity of commercial transactions.

Regarding the content, the dissertation includes 6 chapters.

Concretely, the Chapter 1 is a introduction to the principle of State immunity. It gives a general account for the concept, characteristics, theoretical foundation, functions it

serves and the developments of State immunity. Then, it introduces current development of State immunity in practice and the restrictive doctrine of State immunity. At last, it introduces the role of commercial transactions in regime of State immunity, and emphasizes the significance of commercial transaction to restrictive State immunity.

The Chapter 2 primarily gives the account of ‗commercial transaction' which is generally regarded as the pivot of restrictive doctrine of State immunity. At first, it introduces the approaches to define commercial transaction. From its definition, the term commercial transaction has somewhat abstractness, so in some legislation, it is apt to be clarified by enumeration. Meanwhile, in view of complexity of commercial transaction in practice, neither nature approach nor purpose approach can be an advisable method to determine commerciality readily. Taking the UN *Convention on Jurisdictional Immunities of States and Their Property* as a reference, the context approach may be a better criterion to identify what is commercial transaction. Finally, it demonstrates why the rule ‗non-immunity in commercial transactions' constitutes a customary international law from the perspectives of ‗State practice' and ‗*opinio juris*'.

The Chapter 3 analyzes the structure of the commercial transaction proceedings concerning State immunity, that is, a private party filed a lawsuit against a State before courts of another State. The root cause of the regime of State immunity is that a State is not entitled to exercise jurisdiction over another State according to the principle of sovereign equality. If a State is engaged in transactions in the same manner as a private person, it cannot invoke sovereign immunity in litigation, and then that litigation becomes an international civil litigation. This chapter examines the subject matter of international civil litigation from the perspective of plaintiff, defendant and the third party, and focuses on the analysis of ‗State' as the defendant. Finally, it also discusses the relationship between State and State enterprise.

The Chapter 4 mainly discusses the cases to exercise jurisdiction to adjudication. As mentioned, in proceedings relating to commercial transaction, the courts of a State may exercise jurisdiction over another State. The establishment of adjudicatory jurisdiction shall be divided into two stages: in the first place, the court of forum State must confirm whether the immunity of a foreign State has been excluded in international level; and then, the court of forum State shall confirm whether it has general jurisdiction by jurisdictional connections of its procedural law in national level. Waiver of immunity,

whether express or implied, constitutes the grounds for exercising jurisdiction.
The Chapter 5 mainly introduces the cases to exercise jurisdiction to enforcement. By virtue of absolute nature of immunity from enforcement, the court of requested State may take measures of constraint only if the appointed elements by law are satisfied. Generally, waiver of immunity may lead to the taking of measures of constraint. On condition that State property is specifically in use or intended for use by a State for commercial purposes and is in the territory of the forum State, the court of requested State is permitted to take execution measures against that property. However, from perspective of constitutional law, specific categories of property assuming sovereign functions, even used for commercial transactions, cannot be executed.
The Chapter 6 demonstrates the legitimacy of State immunity by expounding its procedural values. Then, it presents the recent development of the law of State immunity, especially in the field of commercial transaction, and introduces China‘s attitude towards State immunity. With the development of international law, the fairness and justice of international law have received more attention. Despite the procedural values, the legitimacy of claim of State immunity in the field of commercial transaction is going to decline. By weighing the pros and cons, this chapter points out Chinese Government shall adopt restrictive principle of State immunity in line with the development of international law, and establish the rule that _State immunity cannot be invoked in commercial transactions‘. Ultimately, it explains the necessity of legislation on State immunity and presents the outlook and scheme of China‘s legislation.

## 論文審査結果の要旨

本論文は、国際法の理論上も、また国際経済と国内裁判の実務上も非常に重要な意義を有する国家免除に関する諸問題について、特に商業的行為に関する国家免除の否定という制限的免除主義の実質的核心を構成する原則の内容に分析の焦点を当てつつ、詳細に検討を行ったものである。本論文で取り上げられた検討素材は、歴史的にも空間的にも非常に幅広く、本論文は国家免除に関する本格的な包括的研究として大きな学問的意義を有するものであると評価できよう。また、各論点の整理の仕方や分析方法等もバランスが取れており、論旨の展開も明瞭で全体がよくまとめられている点も高く評価することができる。

もっとも、本論文において残された課題や問題点がないわけではない。確かに、急速な経済成長を遂げ世界第 2 位の経済大国となった中国が、これまでは外国企業による投資の受入国としての立場から国家免除について絶対免除主義の立場を支持する政策を採用してきたが、今後は中国企業が外国や外国政府に対して投資を行う場合がますます増えるため、その結果として絶対免除主義ではなく制限免除主義を採ることが中国の「国益にかなう」場面が増えることは事実であろう。他方で、中国がこれまで制限免除主義の採用に踏み切れなかった理由は、そのような経済的な「損得勘定」だけだったのであろうか。その背景には、さまざまな複雑な社会的要因や歴史的・文化的要因、さらには国際政治的な要素等が混在していたのではなかろうか。中国政府は国際的な潮流に沿って制限免除主義を採用すべきでありそれが中国の国益にもかなう、という筆者の結論は、やや単純に過ぎる感が拭えず、さらに複雑で多様な要因等の深い分析が必要であるように感じられる。また、中国との関係で国家免除の問題を考える場合、本稿の中でも検討が加えられている国有企業の位置づけは実質的に非常に重要な問題であり、国有企業の定義やその免除をめぐる諸問題等に関しては、実務の観点からもさらに掘り下げた検討が望まれるところである。

他方で、本論文における筆者の研究は、ある種の「中国特殊論」に絡み取られることなく、極めて客観的で学問的な視点から、国家免除に関する諸問題に関して国際水準の実証的かつ包括的な分析を展開したものであり、その学問的意義と国際的価値は高く評価することができる。国際社会の現状とグローバル化した経済活動の実態を踏まえた場合、飛躍的な経済発展を遂げつつある中国が国家免除に関して国際社会の一般的潮流である制限免除主義の立場を採用することは、極めて大きな国際的な意義と影響があるものと考えられる。筆者が本論文で示したこの方向性は、国際法学の学問的観点からも極めて重要な意義を有するものであり、本論文が提示した結論は、国家免除といった国際社会の基本的構造に起源を有する法制度がどのような形で全世界的な普遍性を有するものとして 21 世紀に存在しうるのか、という根源的な問いに対して 1 つの重要な示唆を与えるものでもあろう。

また、本論文において明確に示された筆者の卓越した研究能力は、筆者が近い将来においてさらに優れた研究成果を発表し、アジアを代表する国際法研究者として大成するであろうことを十分に示すものと考えられる。

以上により、本論文は、博士（法学）の学位を授与される水準に十分達してい

るものと認められる。