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How Does Customary International Law Change? The Case of State Immunity*

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Customary international law (CIL) is a fundamental source of international law. But scholars lack a clear understanding of customary international law, as well as systematic statistical analyses of its workings. Existing theories posit that CIL is a cooperative equilibrium that can be sustained through reciprocity. Yet, CIL lacks institutional features that facilitate reciprocity and is commonly understood to apply universally, even to states that defect or reject a norm. Because the continued existence of CIL depends on state practice, the potential precedential effect of defection encourages cooperation as long as states value the cooperative norm. Consequentially, a state's decision to apply a CIL norm should be a function of the extent to which the norm is practiced in the community of states it interacts with rather than the past behavior of the specific state in an interaction. We test the implications with newly-collected data documenting if and when 121 states switched from absolute to restrictive foreign state immunity. We find no evidence of direct reciprocity. States that most valued absolute immunity and whose defection would most affect others were least likely to defect, but states became more likely to defect as the states whose practice most affected them defected.

Many international legal rules originate in customary international law (CIL): the "general and consistent practice of states followed by them from a sense of legal obligation" (American Law Institute 1986: § 102). CIL remains a fundamental source of international law and is regularly applied in national and international courts. Nevertheless, the vast political science literature on the legalization of international affairs has largely ignored CIL (Hafner-Burton, Victor and Lupu 2012; Shaffer and Ginsburg 2012; Dunoff and Pollack 2013). Empirical and theoretical inquiries emphasize treaties and the consequences of their ratification, even though CIL norms operate alongside treaties and influence their content and interpretation. The legalization literature thus omits one of two fundamental sources of international law.

By contrast, legal scholars write extensively on CIL, mostly from a doctrinal or normative perspective. This approach makes sense given their focus on practical questions, such as how CIL influences cases before domestic and international tribunals. Yet this leaves fundamental positive questions about CIL unanswered. More recently, some legal scholars proposed that CIL norms are just like other forms of international cooperation, in that they function as equilibria in strategic dilemmas where decentralized punishment mechanisms such as reciprocity, retaliation, and reputation support compliance (Goldsmith and Posner 2005; Norman and Trachtman 2005; Guzman 2008).

We argue that this approach cannot explain changes in CIL rules over time and does not adequately account for the distinctive legal and institutional features of CIL. First, the status of a rule as CIL implicates shared legal understandings that shape the interpretation of state behavior. Unlike treaties, CIL rules are non-reciprocal: They apply universally, even to states that do not observe them. If a state that recognizes a rule as CIL systematically discriminates by granting the benefit of that rule only to states that reciprocate, then others would interpret such behavior as a rejection that the rule is CIL. Moreover, CIL lacks the institutional features that treaties use to facilitate reciprocity.

Second, the continued existence of a CIL rule depends on state practice. If many states defect, a rule can lose its CIL status. Compliance and change are thus entwined: A state that violates a CIL rule creates precedent that may lead the rule to change or disappear. Concerns about

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precedent can discourage defection if states value the cooperative norm. A state's decision to uphold a CIL rule depends on the collective behavior of the states it interacts with, not on whether an individual state in an interaction has a track record of cooperation (as tit-for-tat would require).

We examine the implications of this theory with an empirical study of a major change in the CIL rule of sovereign immunity. The traditional rule of absolute immunity holds that states cannot be sued in the domestic courts of other states. Many states have switched to restrictive immunity, in which foreign states can be sued for their private or commercial activities. We collected qualitative and quantitative data on the historical practices of 121 states. Although states could grant absolute immunity only to states that reciprocate, we found no successful examples of discriminatory practices. Instead, states generally followed the same rule for all foreign states and switched their rule of sovereign immunity only once.

Our cross-country regression analysis shows that states with higher exports than imports were less likely to adopt restrictive immunity, but states whose major export destinations had already adopted the new rule became more likely to do so themselves. Exporters are worried about setting a precedent that could lead other states to adopt restrictive immunity. However, such concerns become less consequential as more export destinations adopt restrictive immunity. We find no consistent evidence of reciprocity or alternative diffusion mechanisms, although we observe some support for a constructivist hypothesis, which links rejection of absolute immunity to broader normative changes in the notion of sovereignty.

Our analysis implies that some forms of international cooperation can be sustained by mechanisms other than reciprocity and reputation, even in prisoners' dilemma settings. Reciprocity and reputation require that states examine the past record of another state and decide whether cooperation or defection is the optimal course of action in a particular interaction. In CIL-governed areas, however, state practice determines the existence of the legal rule but not the application of this rule to a specific state. Moreover, concerns about the precedential effects of defections are an important driving force for cooperation. Our theory highlights the importance of shared legal understandings of how CIL works. Shared understandings do not bias states toward norm compliance, but they shape states' inferences about defections and compliance. Consequently, they make some equilibria, such as those based on tit-for-tat, less plausible than others.

Sovereign immunity is interesting in itself. States are regularly sued in foreign courts.[1] Some scholars maintain that new exceptions for grave human rights violations are emerging, following the same logic as the exception for commercial activities. Immunity rules closely map with conceptions of sovereignty, a constitutive principle of the international system that changes over time (Barkin and Cronin 1994). The constructivist paradigm dominates most research on changes in sovereignty. Our analysis bridges rationalist and constructivist work by emphasizing shared legal understandings in the context of strategic dilemmas.

Theory

Traditional Legal Doctrine

Two factors determine the existence of a CIL rule under traditional legal doctrine: state practice and *opinio juris*. State practice consists of acts or omissions by states, including national legislation, executive decisions and practices, domestic judicial decisions, diplomatic acts and protests, and orders to state agents (International Law Association, Soons and Ward 2000). The practice must be general and consistent, reflecting widespread acceptance, though it need not be universal (International Law Association et al. 2000). *Opinio juris* requires that states follow a practice out of a sense of legal obligation. This distinguishes CIL rules from non-legal norms. For example, although developed states provide aid to poorer countries, aid is not governed by CIL and developed states are not legally obligated to offer it.

CIL plays a unique and important role in the international legal system. Unlike treaties, CIL creates legally binding obligations for all states, including those that have not explicitly consented. States cannot withdraw unilaterally from CIL obligations (Bradley and Gulati 2010).[2] Nearly all international courts refer to CIL, including courts whose primary mandate is to implement a particular treaty regime. For example, the WTO has found that "[c]ustomary international law applies generally to the economic relations between the WTO Members" (Korea–Measures Affecting Government Procurement, WTO Doc. WT/DS163/R, para. 7.96 (2000)). Many state constitutions incorporate CIL into their domestic legal order, authorizing its application in national courts (Ginsburg, Chernykh and Elkins 2008; Shelton 2011). In other cases, statutes incorporate specific CIL rules into domestic law. For example, US federal law makes it a crime to commit "piracy as defined by the law of nations."[3]

Since World War II, states have codified CIL in several areas, including diplomatic relations and the law of the sea. Nevertheless, there remain important uncodified CIL rules, including sovereign immunity. CIL continues to influence state behavior even if treaties exist. First, if a treaty rule attains CIL status, it becomes legally binding even for non-parties. For example, the United States and other states have not ratified the Law of the Sea Convention, but accept key provisions as CIL. Second, CIL is a primary source of legal norms for new issues. When continental shelf exploitation and space exploration began, new legal regimes emerged as CIL to govern these areas; treaties later codified these rules (Scharf 2013). A similar process may be underway to govern international cyber warfare (Schmitt 2013). Finally, CIL rules are not hierarchically inferior to treaties. New CIL can override treaties. For example, while the UN Charter only allows the use of force in self-defense or with Security Council authorization, sufficient state practice and *opinio juris* could create an additional CIL exception permitting humanitarian intervention.

[1] The U.S. Department of Justice estimates that "[a]t any given time, foreign lawyers … represent the United States in approximately 1,000 lawsuits pending in the courts of over 100 countries." http://www.justice.gov/civil/commercial/foreign/c-ofl.html.

[2] Most authorities hold that a state that persistently objects while a new CIL rule is emerging is not bound by it. However, the doctrine is rarely applied (American Law Institute 1986: § 102 cmt.d) and its validity is disputed (Charney 1985).

[3] 18 U.S. Code § 1651.

Rational Choice Theories

Some legal scholars draw on rational choice approaches, often modeling CIL as a repeated Prisoner's Dilemma (PD) (Goldsmith and Posner 2005; Norman and Trachtman 2005; Guzman 2008). The sovereign immunity case illustrates this model. At the end of the nineteenth century, states widely accepted absolute sovereign immunity as a binding CIL rule, exempting other states from the jurisdiction of their domestic courts. Domestic courts had to dismiss any lawsuits against a foreign state. In the late nineteenth century, some scholars started advocating restrictive immunity (Institut de droit international 1891; Harvard Research on International Law 1932). This alternative doctrine distinguishes between sovereign and private or commercial acts. States have immunity for sovereign acts, but not for private and commercial acts.

The absolute immunity rule can be costly. States derive domestic political and economic benefits from compensating plaintiffs harmed by the commercial activities of a foreign state. Yet, states also benefit economically from the protection of immunity.[4] This tension produces a typical PD payoff structure. Each state benefits from absolute immunity abroad but incurs costs when applying immunity domestically. Therefore, each state prefers to practice restrictive immunity (or deprive other states of immunity altogether) while encouraging other states to practice absolute immunity.[5]

Rational choice accounts explain the stability of CIL rules by modeling a cooperative equilibrium sustained by decentralized punishment strategies. States have incentives to comply because they expect other states to respond negatively to their defection. Other states can withhold the benefit of the CIL rule to the defecting state (reciprocity), inflict other costly sanctions (retaliation), or update their assessments of a state's reliability as a cooperative partner (reputation) (Guzman 2008). A state that breaches another state's immunity can thus lose its own immunity, face economic sanctions, or develop a reputation for breaching international law. These mechanisms require that states only punish defectors and (except for the reputation factor) only punish as long as needed to induce cooperation.

The Limits of Reciprocity

Direct reciprocity is the most efficient mechanism for ensuring cooperation in a repeated PD (Axelrod and Keohane 1985; Keohane 1989). Yet, reciprocity clashes with several fundamental features of CIL.

First, while treaties and their accompanying institutions commonly facilitate reciprocity (Axelrod and Keohane 1985:250), CIL offers few such advantages. For example, the WTO agreements include detailed rules in which states affected by a treaty breach can impose countermeasures, such as restricting imports from the defector. The WTO also provides an independent dispute resolution mechanism to adjudicate the breach and determine permissible countermeasures, thus limiting uncertainty and escalation risks. These features are not equally available for CIL. The UN's International Law Commission drafted basic rules that purport to regulate the imposition by states of countermeasures against breaches of international law, including CIL (International Law Commission 2001). Yet, these rules are controversial: The ILC did not codify them in a treaty, and their authority as CIL is contested. They do not provide the detail and institutional support that facilitates retaliation or mitigates escalation risks. There is rarely an international court or tribunal with jurisdiction to adjudicate breaches of a general CIL rule and authorize countermeasures.

Second, shared legal understandings of CIL shape actors' expectations in ways that conflict with reciprocal strategies. Treaties create rights and obligations only among states that ratify the treaty. By contrast, "customary law rules and obligations…by their very nature, must have equal force for all members of the international community."[6] A state that recognizes a CIL rule must extend the resulting rights and obligations to all states, not just to those that reciprocate (Lauterpacht 1951). If states share the belief that a rule is CIL, they should expect other states to apply it on a non-discriminatory basis. This does not mean that states always implement the most cooperative norm. Rather, like common law, legal understandings provide a common logic that shapes how states' actions are interpreted (Hadfield and Weingast 2012). A state that discriminates among other states in applying immunity signals that it rejects the rule's status as CIL.

States accompany their practice with statements of *opinio juris* to invoke shared legal understandings of CIL. The legal obligation inherent in CIL also extends a role to courts and other legal actors. This further complicates reciprocal strategies. Executives may instruct courts what CIL norm to implement, but in well-functioning legal systems, judges usually reject instructions that violate legal understandings, such as "apply absolute immunity except against country B." Following these instructions would reject absolute immunity as CIL or admit the illegality of a state's decision to withhold immunity. These constraints make states more likely to defect by deviating permanently from absolute immunity. A state's executive branch can advise domestic courts on how a CIL rule has changed. The US Department of State, for example, issued the Tate Letter in 1952 that established restrictive immunity as US policy. Alternatively, a statute can instruct domestic courts to follow the new policy. Or courts themselves can decide that a CIL rule has changed by surveying evidence of practice and *opinio juris*. In all three scenarios, the new policy becomes entrenched in the domestic legal system and applies to all foreign states in the future.

None of these considerations prohibits retaliation. States can retaliate in response to a breach of immunity as they can in response to any unfavorable action. However, retaliatory measures are not available to all states, they are costly, they risk escalation, and they pose collective action problems. CIL status does little to surmount these difficulties. Reputation remains important in specific settings, such as international lending (Tomz 2007). Yet, it is not clear that reputations travel across issue areas, or that states develop consequential reputations by generally adhering to international law (Downs and Jones 2002; Brewster 2009).

[4] Waiving immunity could aid a state's commercial activities abroad. The absolute immunity doctrine allows this via contracts or treaties.

[5] Immunity before a state's own courts is governed by a different body of law.

[6] North Sea Continental Shelf (Germany/Denmark, Germany/Netherlands), 1969 ICJ 3, 39 (Feb. 20).

The Role of Precedent

An important element of the shared understanding of CIL is that the existence of a rule depends on prevailing state practice. This is not true of treaties or domestic statutes, which derive their validity from formal ratification and remain legally binding despite violations. By contrast, if many states defect from a CIL rule, the rule can change or lose its status as CIL. Indeed, defections drive major transformations in CIL rules: "Nations forge new law by breaking existing law, thereby leading the way for other nations to follow" (Charney 1985:21).

CIL's institutional limitations strengthen the link between defection and change. Many treaties have flexibility mechanisms that allow limited defection without exiting the regime (Koremenos 2005; Helfer 2013). For example, the WTO allows members to derogate from particular obligations for environmental or health reasons. By contrast, while the ILC rules provide rudimentary flexibility mechanisms for CIL, these mechanisms are much more restrictive, cannot be easily customized, and usually do not have a third-party arbiter. Some common treaty flexibility mechanisms, such as withdrawal, sunset, and amendment clauses, are simply unavailable.

It is rare for a state to admit it is breaching a CIL rule and invoke exceptional circumstances or offer compensation. Instead, states usually attempt to hide or deny breaches. If this is not possible, then defection challenges the CIL rule itself. States that switched to restrictive immunity virtually never admitted to breaching CIL. Instead, these states argued that the CIL rule of absolute immunity had changed, or had never truly existed. Defections set a precedent by creating state practice and *opinio juris* that weaken the old rule. States must therefore consider that violating a CIL rule may undermine the continued existence of that rule. This matters especially for states that benefit most from the rule and whose defection would seriously affect the rule's endurance. Such states may continue observing the rule despite free-riding by others, because they prefer imperfect compliance to the outright disappearance of the rule.

The case of sovereign immunity illustrates this logic. When deciding whether to allow plaintiffs to sue foreign governments, states must consider the benefits and costs of defecting from CIL, including the danger of encouraging other states to defect. This latter component depends on the value of the norm to that state and the probability that its defection will affect others (as well as a discount factor). The norm's value depends on the likelihood that a state will be drawn into future disputes. States with a high export rate and many state-owned enterprises, for example, are likely to be involved in more disputes. The norm's value also depends on how many of its export partners practice absolute immunity. As more partners abandon the norm, the less valuable it is in protecting the state from liabilities abroad. The probability of affecting others increases when the state itself is a major importer, because its defection detracts from the value other states ascribe to the absolute immunity norm.

Powerful states' defections from a CIL rule generally have a greater impact on other states' incentives for continued compliance. Therefore, these states should be more concerned about precedent setting when deciding whether to comply. This insight contradicts reciprocity-based accounts, in which powerful states have fewer incentives to comply because they are less vulnerable to punishment. Our insight complements traditional theories, which recognize that states with highly salient practices in a given issue-area play a disproportionate role in CIL change (International Law Association 2000).

The prospect that defection will undermine a rule may make cooperation under CIL more absolute than under treaties. Yet, cooperation remains more fragile in CIL, because even a few defections can trigger the unraveling of a rule. For example, until the middle of the twentieth century, states generally accepted the 3-mile rule regarding the breadth of the territorial sea as CIL (Heinzen 1959). The early defectors were states that wanted to protect their coastal fisheries against exploitation by long-range fishing vessels (Charney 1985). Major naval powers like the United States, the U.K., and Japan did not develop reciprocal strategies. These states initially tried to enforce the 3-mile rule with retaliatory actions. When this strategy proved too costly, defections accumulated and new norms developed: a 12-mile rule for the territorial sea and a 200-mile exclusive economic zone.

For a CIL norm to remain stable, states must value its continued existence. Although continued valuation is a necessary condition, it is not a sufficient condition. If states discount the future sufficiently or have imperfect foresight, we may witness the dismantling of a norm everyone would prefer to uphold. CIL might have been more stable when the world contained fewer states, given that precedential concerns become more diluted in a larger group. Fear of such unraveling may lead states to codify widely accepted norms. Indeed, ongoing UN efforts to codify restrictive immunity suggest that most states prefer that sovereign immunity not erode further.

Implications for Sovereign Immunity

Our theory yields several observable implications. First, we should observe few if any instances of targeted reciprocity. States should apply the same doctrine—absolute or restrictive—to all foreign states at any given time. As a result, states that defect by adopting restrictive immunity may be able to practice it domestically while enjoying absolute immunity abroad. This stands in contrast to theories that predict states will enforce CIL rules through targeted reciprocity.

Second, states should make their decisions to switch based on the behavior of other states that affect their payoffs, rather than on the past practices of the state they interact with. If most of a state's export partners have already switched to restrictive immunity, there is little benefit in persisting with absolute immunity. This also suggests that large importers should be more concerned that their defection will influence others.

Third, like other rational choice theories, we expect that a state's own preference for absolute or restrictive immunity matters. States that engage in much commercial activity abroad, including through state-owned enterprises, are particularly attached to absolute immunity and thus more concerned about setting negative precedent. Conversely, states may find absolute immunity less tolerable when imports play a larger role in their economies, as absolute immunity shields more foreign economic activity from legal accountability.

Constructivist Approaches

Change in CIL can also be understood from a constructivist perspective. Some constructivists argue that legal norms are special because they share characteristics that other norms do not have, such as universality, non-retroactivity, and formal rulemaking processes (Franck 1990; Brunnée and Toope 2010). Similarly, we argue that common legal understandings of CIL shape beliefs about how others are likely to behave. Unlike constructivists, however, we do not claim that shared understandings grant legal norms special legitimacy and "compliance pull" (Chayes and Chayes 1995, Franck 1990). Instead, shared understandings inform actors about the type of equilibrium strategies others are playing. These strategies include both compliant and non-compliant behavior.

Some constructivists go further to argue that states follow norms because they internalize them (Meyer, Boli, Thomas and Ramirez 1997; Goodman and Jinks 2004). These arguments suggest that CIL defines standards of appropriate behavior that actors follow without much conscious reflection. It is less clear how CIL change occurs in this context. Constructivist literature on normative change ascribes an important role to norm entrepreneurs (Finnemore and Sikkink 1998). While some scholars advocated restrictive immunity, they mostly wrote specialized articles and reports, unlike human rights entrepreneurs (such as antislavery advocates) that actively mobilized support for normative change. Nevertheless, declining support for absolute immunity may follow broader changes in conceptions of sovereignty. The observable implication is that states that voluntarily accept other intrusions on their sovereignty, such as compulsory jurisdiction of international legal bodies, will also be more likely to adopt restrictive immunity. Such a mechanism could operate alongside the one we propose.

Our theory emphasizes that CIL norms diffuse because states respond to changing material incentives. There are also plausible diffusion mechanisms that emphasize social influence (for example, Linos 2006; Simmons, Dobbin, and Garrett 2007). States may be disproportionally influenced by states within their geographic neighborhood or by states with shared heritages, such as a shared colonial past (Simmons and Elkins 2004). Other scholars emphasize that legal practices spread much more quickly among countries with shared legal origins (for example, Spamann 2009). While we are not aware of applications of these more general diffusion theories to CIL or sovereign immunity, the mechanisms are plausible. For example, national courts' decisions to adopt restrictive immunity routinely cite prior decisions from other states, as do lawmakers engaged in sovereign immunity reform. Such actors may simply copy practices from familiar legal systems, neighboring states, or former colonizers, rather than engage in conscious reflection about interests and precedent. We compare these diffusion patterns as potential alternatives to our argument that diffusion operates primarily through observing the behavior of export partners.

Data

Description

For each state and each year, our newly constructed data set records whether that state practiced absolute or restrictive immunity. It also specifies whether the change occurred by court decision, legislation, or otherwise. For states whose practice changed by court decision, it identifies the defendant state where that information is available. Change in CIL requires both state practice and *opinio juris*. This is relatively straightforward in the case of sovereign immunity in that most changes took the form of court decisions or legislative amendments accompanied by statements expressing the belief that restrictive immunity had become CIL. Thus, the nature of the evidence circumvents the problems posed by other CIL rules where evidence of practice and *opinio juris* has to be identified separately and is often not contemporaneous.

The 2011 state-year database from the Correlates of War Project (2011) (COW) determines the population. We limit our analysis to countries for which we have complete information on the dependent variable, thus excluding countries where we lack information on when they switched to restrictive immunity (for example, Cameroon) or verification that they continue to practice absolute immunity (for example, Syria). We have full information for 74% of state-year observations. We were able to identify 70% of state-year observations as either absolute or restrictive immunity. The remaining 4% are excluded because their practices are not independent.

Sources

The data are based on primary and secondary sources. First, we reviewed surveys of state practice. These include official surveys prepared by the League of Nations (1927), the US State Department (1949, 1952, 1963), the Asian-African Legal Consultative Committee (1960), the UN International Law Commission (1982), the Australia Law Reform Commission (1984), and the Council of Europe (2006). We also consulted surveys that private organizations and individual scholars conducted.

Second, we researched the domestic law and practice of states not exhaustively covered in surveys. We searched major compilations of domestic court decisions on international law, and international law journals published in English, French, and German. We supplemented these sources by searching national and regional reports of court decisions, including published court reporters, judicial Web sites, and electronic databases. We also searched numerous secondary sources.

Coding Rules

We followed several principles to enhance the reliability and validity of our assessments. First, we required at least one official source indicating a country's sovereign immunity practice. Thus, we only included in the "absolute immunity" category countries for which evidence is available. Similarly, when determining whether and when states changed to restrictive immunity, we required an official source that indicated a change in practice.

Second, we defined the date of change as the date after which restrictive immunity has been practiced consistently by the state. In many countries, the change occurred through a decision of the highest court, a statutory amendment, or government guidance. In some countries, lower courts rendered decisions favoring restrictive immunity despite prior higher authority supporting absolute immunity. We did not treat such lower court decisions as changing the state's practice if they contradicted prior higher authority until they were confirmed by the higher court.

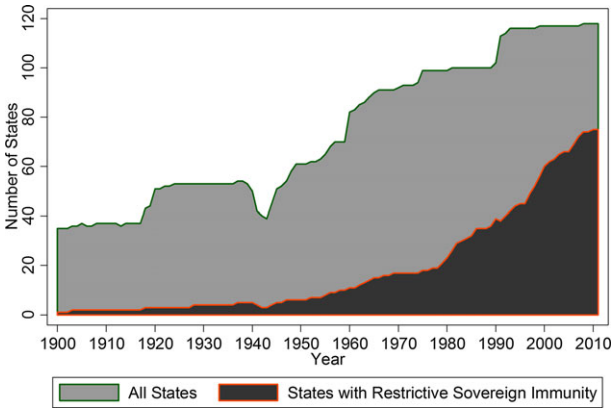

FIG 1. The Rise of Restrictive Sovereign Immunity

Qualitative Findings

Overall Trends

Figure 1 shows the number of countries that practiced restrictive immunity in each year since 1900, against the overall number of states in our analysis. The first states started to defect from absolute immunity in the late nineteenth and early twentieth century. In a well-known 1903 decision, the highest Belgian civil court allowed a company to pursue a case against the Netherlands under a contract to expand a train station. Belgium has consistently practiced restrictive immunity since, but the Netherlands practiced absolute immunity until 1947. Italy (1886), Switzerland (1918), Egypt (1920), and Greece (1928) also adopted the restrictive doctrine. Nevertheless, in 1939, most states still applied absolute immunity.

In 1952, the US State Department issued the Tate Letter, in which it declared that "it will hereafter be the Department's policy to follow the restrictive theory ... in the consideration of requests of foreign governments for a grant of sovereign immunity" (U.S. Department of State 1952). The Letter justified the change through an extensive review of foreign practice showing that several states had already switched and more were likely to follow. It also relied on policy arguments, claiming that absolute immunity unduly favored state-owned enterprises, was inconsistent with the U.S.'s policy of allowing itself to be sued in its courts, and was unfair given increasing state commerce. Congress eventually codified restrictive immunity in 1976.

Other countries such as the Netherlands, Austria, Germany, and France also adopted restrictive immunity. The trend, however, played itself out slowly and was far from universal. In particular, the USSR and China became increasingly vocal in protesting exercises of jurisdiction against them and resisted UN efforts to codify restrictive immunity (Boguslavsky 1979; Osakwe 1982; Memorandum Presented by Mr. Nikolai A. Ushakov, UN Doc. A/CN.4/371 1983). Some developing states also resisted restrictive immunity. The U.K. and Commonwealth states were also holdouts, until the former adopted restrictive immunity in 1977. The trend then accelerated substantially from 1980 to 2000. In 2011, 75 of the 118 countries in our study practiced restrictive immunity.

In 2004, the UN General Assembly adopted a Convention that embraced restrictive immunity, but it is not yet in force (United Nations Convention on Jurisdictional Immunities of States and Their Property, Dec. 2, 2004, UN Doc. A/59/508). Russia and China have signed but not yet ratified. In recent Hong Kong court proceedings, the Chinese government stated that "until now China has not yet ratified the Convention, and the Convention itself has not yet entered into force ... After signature of the Convention, the position of China in maintaining absolute immunity has not been changed, and it has never applied or recognized the so-called principle or theory of 'restrictive immunity'" (Democratic Republic of the Congo v. FG Hemisphere Associates LLC, Court of Final Appeal, June 8, 2011, para. 202). Likewise, civil courts in Russia continue to apply absolute immunity.

Figure 2 illustrates the geographic spread of restrictive immunity. Darker shades indicate countries that switched earlier. White countries are those for which we lack sufficient information.

Most of the earliest defectors—Italy, Belgium, Switzerland, and Greece—are small, capitalist states.[7] This finding supports our theory, as these states should expect their behavior to have relatively little impact on norm stability. The finding is inconsistent with theories of reciprocity, retaliation and reputation, as small states should be more concerned about these enforcement mechanisms. By contrast, great powers like the U.K. and the United States adhere to absolute immunity for several more decades.

Reciprocity and Retaliation

There are virtually no instances of reversal to absolute immunity.[8] States appear not to discriminate among foreign states for political reasons, with two limited exceptions. First, in the years following the Tate Letter, US courts relied on the State Department's advice as to whether specific acts by foreign states should be classified as commercial. This situation was considered aberrant, and in 1976, the FSIA abolished the Department's role in immunity determinations.[9] Second, in the 1920s and 1930s, French courts applied restrictive immunity to the Soviet trade delegation while continuing to apply absolute immunity to other states (Hamson 1950).

States also did not apply immunity on a reciprocal basis by discriminating between defendant states based on the doctrine they have themselves adopted. In a 1952 decision, the House of Lords expressly rejected reciprocity, stating: "The question is, what is the law of nations by which civilized nations in general are bound, not how two individual nations may treat one another" (Dolfuss Mfg. v. Bank of England, [1952] A.C. 582, 613.) A leading scholar observed: "There are only very few countries which have applied, in some respects, the principle of specific reciprocity to questions of immunity" (Lauterpacht 1951: 246). Thus, early adopters of restrictive immunity enjoyed absolute immunity abroad. In a 1921 case, the Italian Ambassador to the United States claimed immunity for an Italian state-owned commercial ship. The Supreme Court disregarded the plaintiff's reciprocity

[7] Early Egyptian decisions supporting restrictive immunity came from the Egyptian mixed courts. Although they applied Egyptian law, they were based on Western legal models, were composed mostly of Western judges, and heard cases involving foreigners (Brinton 1931).

[8] Romania adopted restrictive immunity during the interwar period, then reverted to absolute immunity after World War II. Austria also adopted restrictive immunity in the 1920s, then abandoned it before reaffirming it in 1950.

[9] Fox (2008: 221).

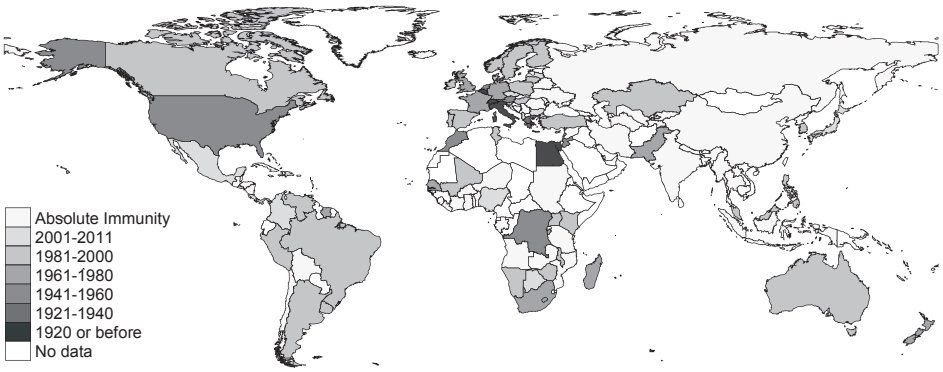

FIG 2. Geographic and Temporal Variation in Adoption of Restrictive Immunity

argument and granted immunity (Berizzi Brothers Co. v. Steamship Pesaro, 271 U.S. 562 (1925)).

Even in rare cases where legislation or case law refers to reciprocity, courts rarely apply this principle. Soviet absolute immunity legislation provided that, where the USSR was not afforded similar protection abroad, the Council of Ministers could order countermeasures (Osakwe 1982:13). In practice, this provision was never applied (Bykhovskaya 2008:146). Likewise, Chinese courts have never denied immunity for lack of reciprocity (Jin & Jingsheng 1988:165; Lijiang 2007:79–80). Similarly, although Polish courts insisted from the 1930s to 2000 that sovereign immunity was reciprocal, we have not found any case where they actually denied immunity on this basis. Thus, in a 1987 case, the Polish Supreme Court rejected a reciprocity argument to deny immunity to Austria, although that country had adopted restrictive immunity more than 30 years before (Maria B v. Austrian Cultural Institute in Warsaw, 82 I.L.R. 1.)

In some instances, states that followed absolute immunity entered into bilateral or small multilateral treaties to adopt restrictive immunity. For example, several states ratified a 1926 treaty renouncing immunity for state-owned commercial ships (International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships, Apr. 10, 1926, 179 L.N.T.S. 199). The Soviet Union entered into several bilateral treaties waiving immunities to facilitate its commercial relations with important partners (Osakwe 1982). This illustrates that when states wanted reciprocity, they turned to treaties.

There is also scant evidence of retaliatory measures. According to Lauterpacht, there were no persistent protests against early adopters (Lauterpacht 1951:227–28). The Soviet Union, faced with several cases in which creditors attempted to attach its trading ships in foreign ports, adopted the practice of asserting immunity, having it rejected by the court, posting bond to satisfy the judgment, and issuing a diplomatic protest (Osakwe 1982: 49). In a high-profile case brought by US holders of defaulted railway bonds from the Qing era, China refused to appear and delivered a diplomatic protest (Qi 2008). In sum, absolute immunity states did not typically rely on reciprocity or retaliation, but instead responded by reaffirming the doctrine in their own practice, lodging diplomatic protests, and resisting attempts to codify restrictive immunity.

Our data on the cases in which domestic courts first applied restrictive immunity to a foreign state support the relative unimportance of reciprocity and retaliation. We have 60 cases where we know the identity of the defendant state. There are no instances where country A pursued a case against country B just after country B defected from the absolute immunity norm in a case against country A. The first ten cases that applied restrictive immunity and 23 of the first 25 cases were all against states that practiced absolute immunity.

Precedential Concerns

By contrast, there is evidence that states acknowledged prevailing state practice and the potential precedential effect of their own decisions. These concerns appear most prominently in decisions from the great powers. In early decisions adopting absolute immunity, courts articulate a generally acceptable rule consistent with sovereignty and equality of states. Thus, in 1849, the highest French court justified its decision by stating: "If each state is sovereign, it is on the condition that it respect the sovereignty of others" (Lambeje et Pujol Case 1849). Later, when considering whether to switch to restrictive immunity, this court expressed concern about precedent. Thus, in 1918, the US Secretary of State suggested that the Attorney General advise courts to apply restrictive immunity in the case against Italy described above. The US Attorney General refused, arguing that this would set a harmful precedent for the immunity of the United States and its own ships (Wheaton Digest Vol. 2: 429–30). A 1951 U.K. government report expressed similar concerns.

In contrast, early adopters of restrictive immunity do not typically express concern that their decisions might undermine the norm. Court decisions in Italy, Belgium, Switzerland, Egypt, and Greece simply adopt the policy they consider fairer to the plaintiffs. Later, however, the accumulation of restrictive immunity precedents began to affect the decisions of all states, including great powers. The English decision adopting restrictive immunity is illustrative:

> Seeing this great cloud of witnesses, I would ask: is there not here sufficient evidence to show that the rule of international law has changed? What more is needed? Are we to wait until every other country save England recognize the change? Ought we not to act now? (Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] Q.B. 529 (C.A.): 556)

Likewise, today's holdouts appear conscious of the increasing futility of following absolute immunity. Indeed, scholars have urged China and Russia to adopt restrictive immunity, arguing that since their major trade partners have already done so, Russia and China are exposed to

lawsuits abroad while foreign states are unfairly protected against Russian and Chinese plaintiffs (for example, Qi 2008:330). This may explain their recent decisions—along with India—to sign the UN Convention.

Regression Analysis

Method and Variables

We apply regression analysis to examine whether the factors identified in our theory correlate in the expected ways with earlier and later adoptions of restrictive immunity. The dependent variable $y_{i,t}$ takes the value 0 if state i practices absolute immunity at time t and 1 if it practices restrictive immunity. At that moment, the observation drops from the data set. This is a survival model that models the probability that in any given year a country departs from absolute immunity (Beck, Katz and Tucker 1998).

$$P(y_{i,t} = 1|x_{i,t}) = h(t|x_{i,t}) = \frac{1}{1 + e^{-x_{i,t}\beta + h_t}}. \quad (1)$$

h_t is the baseline hazard of changing policies. $x_{i,t}$ is a matrix of independent variables. First, we expect that the more of a state's export partners shift to restrictive immunity, the more likely it is that a state will also shift. The variable Export Market Diffusion measures the proportion of states that have shifted to restrictive immunity, weighted by their respective importance as an export market for state *i*. Historical trade data come from the COW bilateral trade data set (Barbieri, Keshk and Pollins 2009).

Second, large exports increase potential exposure abroad and thus the value of upholding absolute immunity. By contrast, large import volumes imply greater foreign economic activity within national boundaries and should thus increase the value of restrictive immunity. We estimated models that include the natural logs of the values of Imports and Exports in constant dollars (and separately as proportions of GDP). Yet, the correlation between imports and exports is 0.95, so our preferred models include a single variable: the natural log of the proportion of exports to imports.[10] Countries that export more relative to their imports should switch later.

Third, countries that have a large share of the world's imports should be more cautious about switching as their decisions have a larger precedential effect. We include an indicator Major Importer if a country has at least 5% of the proportion of world imports. We expect the coefficient on this variable to be negative. We also estimate models that include the share of world imports.

Fourth, the variable Target takes the value 1 if a country was targeted in a lawsuit in another country that broke a precedent of absolute immunity.[11] If punishing defectors motivated countries, then we would expect them to become more likely to switch after having been a target of a lawsuit. Our theory and the patterns we documented in the qualitative section lead us to suspect otherwise.

All models include GDP per capita. Wealthy capitalist countries should be more likely to switch as the state starts playing a smaller role in the economy relative to private actors. Unfortunately, we have no good measure of the strength of the private sector across countries for this time span. GDP per capita could plausibly affect outcomes through other channels. For example, foreign states could simply hold more assets in wealthy countries. Thus, we are cautious interpreting this variable.

Similar to Elkins, Guzman, and Simmons, we also examine plausible alternative diffusion mechanisms (Elkins, Guzman and Simmons 2006). The first, Global Restrictiveness Trend, measures the global proportion of states that have shifted to restrictive immunity. This variable captures the hypothesis that states respond to overall trends in state practice, as reflected in the traditional theory of CIL. Since this overall trend also affects Export Market Diffusion, this is a potential confounder.

The second, Contiguous States Diffusion, measures the proportion of states that have shifted to restrictive immunity among contiguous states.[12] This captures the idea that states are more responsive to states in their immediate neighborhood.

Third, we examined whether states were more sensitive to switches in states with which they share a colonial history. Colonial History measures whether a country gained independence from a colonial power since 1920 (Hensel 2009). Former Colonizer Diffusion measures whether the country from which it gained independence has adopted restrictive immunity. Common Colonizer Diffusion measures the proportion of states with which a state shares a former colonizer that have adopted restrictive immunity.

Fourth, judges and other officials may follow precedent from other states whose legal system they are familiar with. Legal Origin Diffusion is the proportion of states that have adopted restrictive immunity among those with which the state shares legal origins.[13]

Export Market Diffusion is moderately correlated with the Global Restrictiveness Trend (.57) and Legal Origin Diffusion (.53) but only weakly with the others (<.32), suggesting that the various conceptually plausible diffusion mechanisms are empirically distinguishable.

We also include individual country-level control variables as robustness checks. First, democracies may face greater political pressure to allow legal remedies against foreign states. Democracy is based on historical regime type data from the POLITY data set, which measures the level of democracy on a scale of −10 to 10.

Second, rejection of absolute immunity may be a by-product of broader changing ideas about the protections that sovereignty grants to a state. This has become most apparent in the realm of human rights. Human Rights Jurisdiction measures temporal and cross-sectional variation in the extent to which states have delegated authority to international legal institutions over their internal affairs. States that fully accept the jurisdiction of the International Criminal Court and the UN committees on torture, civil and political rights, discrimination against women, racial discrimination, and disability rights receive the maximum score. States that make reservations to their commitments obtain partial scores.[14]

Third, countries where the government has a large share of economic activity should be more exposed to potential liability for commercial activities. Therefore, they should be less likely to deviate from absolute immunity,

[10] Substantive results are the same without taking the natural log.

[11] Note that we only have this information for precedent breaking lawsuits.

[12] Contiguity is defined as a land or river border or up to 24 miles of water (Stinnett, Tir, Schafer, Diehl and Gochman 2002).

[13] Data is from Klerman, Mahoney, Spamann and Weinstein (2011).

[14] For details, see Voeten (2012). The scores are weighted for the importance of the commitment.

especially when they export a lot. Unfortunately, government control over the economy is difficult to measure. We include the Government consumption share of PPP converted GDP per capita as a proxy and interact this with export income per capita. Historical economic and population data are from Angus Madisson. For analyses that start in 1950, we use the Penn World Tables.

Fourth, the debate on restrictive immunity has an ideological dimension. Members of the Socialist bloc were most vocal in resisting restrictive immunity. Scholars have estimated state positions in ideological conflict using ideal point estimation applied to United Nations General Assembly (UNGA) roll-call votes. The first dimension consistently separates the Western liberal states from the Eastern bloc during the cold war and from assorted states that rejects Western-style liberalism thereafter (Voeten 2000). We use the most recent version, which adjusts ideal point estimates for agenda changes (Bailey, Strezhnev, and Voeten 2013). This measure, UN Ideology, is available from 1946 onwards.

Fifth, restrictive immunity expands the jurisdiction of domestic courts. Thus, more independent courts may be more likely to switch to restrictive immunity. On the other hand, scholars argue that states with independent legal institutions are less likely to violate international legal commitments because they value their reputation for upholding the law (Kelley 2007). There are various imperfect indicators for Judicial Independence available for different groups of countries in different periods. Linzer and Staton (2012) applied a measurement model to these indicators in order to construct a new measure with greater coverage that is less susceptible to measurement error. Finally, Communist countries always adhere to absolute immunity. Given this, we cannot control for communism, but we estimate the model with and without Communist countries.

All independent variables are entered as one-year lags. The models presented in the tables are estimated using a logit specification with robust standard errors clustered on countries. Time enters as a third degree Hermite polynomial from entry into the data set. We include a separate year trend to account for temporal increases in restrictive immunity practices. All results are robust to higher degree time polynomials and to estimating a Cox proportional hazard model. For robustness, we also estimated a GEE model with AR(1) correction for autocorrelation, a logit model with random effects for countries, and a rare event logit model (King and Zeng 2001). The main results are robust in all of these models. The analysis starts in 1900, but the key findings are robust starting in 1850 and 1946. All models include regional dummies,[15] although the findings are robust to their exclusion. Table 1 offers descriptive statistics.

Table 1. Descriptive Statistics

Variable	*Mean*	*SD*	*N*
Restricted	0.01	0.11	4,394
Target	0.08	0.27	4,394
Export Market Diffusion	0.23	0.24	4,336
Global Restrictiveness Trend	0.16	0.09	4,394
Contiguous States Diffusion	0.13	0.23	4,394
Legal Origin Diffusion	0.22	0.18	4,394
Colonial History	0.28	0.45	4,394
Former Colonizer Diffusion	0.1	0.3	4,394
Common Colonizer Diffusion	0.08	0.17	4,394
Export/Import Proportion	0.63	0.23	4,388
Major Importer	0.29	0.46	4,394
GDP per Capita	0.99	0.88	4,338
Polity	0.94	7.21	4,389
Human Rights Jurisdiction	7.7	13.5	4,296
UN Ideology	0.08	1	3,229
Government Consumption	0.4	0.27	3,023
Judicial Independence	0.63	0.23	4,388
Latin	0.25	0.43	4,394
West Europe	0.16	0.37	4,394
East Europe	0.13	0.34	4,394
Africa	0.19	0.39	4,394
Middle East	0.06	0.24	4,394
Asia	0.18	0.38	4,394

Results

Table 2 presents the main results. The models range from a simple model to increasingly more control variables (and fewer observations). To facilitate substantive interpretation, the table presents average marginal effects. The coefficients are small as we are explaining an outcome that is rare in any given year.

The findings are for the most part consistent with our theoretical expectations. First, Export Market Diffusion consistently has a positive and significant correlation with the probability of switching to restrictive immunity.[16] This includes all models estimated for robustness that are not shown in the table. This effect is substantively important. Figure 3a plots the substantive effect based on the second model. The annual probability of switching more than doubles as the weighted proportion of export partners that have shifted goes from 0% to 50%. Thus, the evidence is consistent with the argument that states are more likely to shift to restrictive immunity when their most important export partners do so.

Second, countries where exports dominate imports are much less likely to switch. Figure 3b shows that this effect is substantial. Similar results obtain when we estimate models with imports and exports included separately (available upon request): High Imports are associated with higher annual probabilities of switching to restrictive immunity, whereas high Exports exhibit a correlation in the opposite direction. The effects are substantial. On average, a country with one standard deviation more imports is 2.3% points more likely to switch to restrictive immunity in a given year. Based on models 4 and 5, a state with one standard deviation more exports is 2.7% points less likely to switch to restrictive immunity each year. These correlations are consistent with the incentives we outlined in the theory.

Third, the Major Importer dummy consistently has a negative association with shifting to restrictive immunity (as predicted), but it is not statistically different from zero. The variable is significant if we exclude GDP per Capita from the model. Similar findings obtain when we replace the dummy with the Proportion of World Imports. Thus, although the qualitative evidence suggests that relatively smaller trading states switched first, the

[15] Western Europe, Eastern Europe, Latin America, Africa, Asia, and Middle East.

[16] The two-sided p-value is .08 in model 4 where many observations drop out due to limited data availability. In all other models we estimated, the p-value is below .05.

Table 2. Logit Regressions on Switches to Restrictive Immunity

VARIABLES	*(1)*	*(2)*	*(3)*	*(4)*	*(5)*
Target	−0.097	0.14	−0.063	−0.091	0.025
	(0.57)	(0.61)	(0.68)	(0.69)	(0.68)
Export Market Diffusion	1.48**	1.64**	1.73**	1.47*	1.62**
	(0.68)	(0.72)	(0.78)	(0.87)	(0.82)
Export/Import Proportion	−1.87**	−2.08***	−2.18**	−2.06**	−2.00**
	(0.76)	(0.77)	(0.91)	(0.93)	(0.86)
Major Importer	−0.59	−0.67	−0.46	−0.36	−0.34
	(0.46)	(0.48)	(0.50)	(0.50)	(0.53)
GDP per Capita	1.18***	1.20***	1.02***	0.93***	1.09***
	(0.25)	(0.26)	(0.31)	(0.32)	(0.37)
Polity	0.017	0.0054	−0.017	−0.023	0.015
	(0.025)	(0.026)	(0.027)	(0.027)	(0.051)
Human Rights Jurisdiction		0.027**	0.024*	0.023*	0.024**
		(0.012)	(0.012)	(0.013)	(0.012)
UN Ideology			0.22	0.36	0.36
			(0.23)	(0.27)	(0.26)
Government Consumption				−0.047	
				(0.038)	
Judicial Independence					−1.15
					(1.55)
Regional Dummies	Yes	Yes	Yes	Yes	Yes
3rd Degree Polynomial Time Trend	Yes	Yes	Yes	Yes	Yes
Observations	4,394	4,297	3,155	2,895	2,727

(Notes. Robust standard errors clustered on countries. Constant omitted.
***$p < .01$, **$p < .05$, *$p < .1$.)

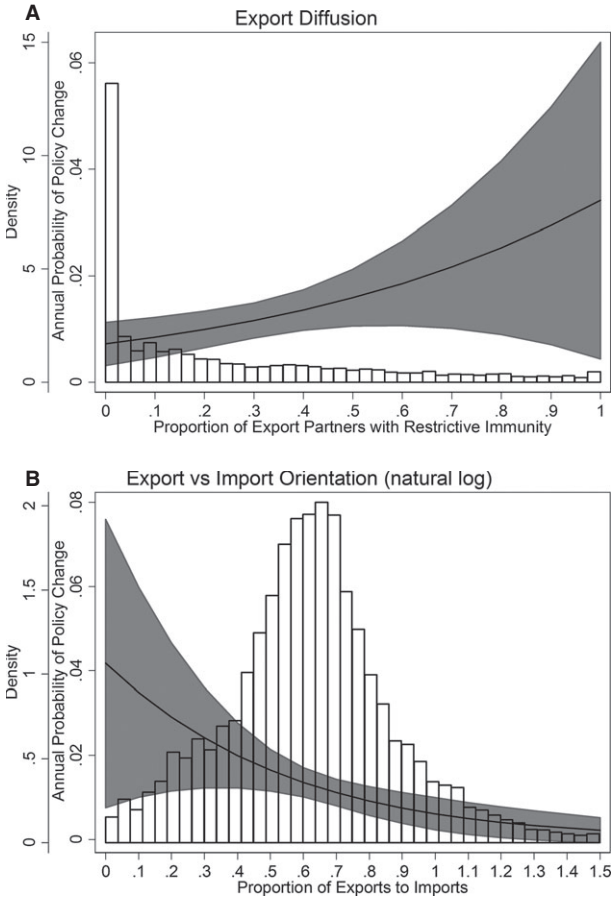

Fig 3. (a) Annual Probabilities of Switching by Export Market Diffusion (b) Annual Probabilities of Switching by Export/Import Proportion

models estimated here do not offer robust statistical evidence for that proposition.

Fourth, countries that were targeted in a lawsuit that broke a precedent of absolute immunity were not more likely to deviate from absolute immunity. The coefficient on Target is insignificant in all specifications we estimated, and the sign is inconsistent.

Fifth, GDP per capita is consistently positively and significantly correlated with moves toward restrictive immunity. A plausible interpretation is that countries with stronger private sectors have more to gain and less to lose from restrictive immunity. Yet, as argued above, there are other plausible narratives consistent with this correlation.

Sixth, Human Rights Jurisdiction consistently has a positive and significant correlation with the likelihood that states switch to restrictive immunity. This suggests that states that are more likely to accept non-absolute interpretations of sovereignty are also more likely to switch away from absolute immunity. One word of caution is that this variable equals zero for all states until the 1950s given that there were simply no international human rights institutions. The effects are less clearly different from zero in models 3–5, which are estimated on post-1946 data. Nevertheless, the estimated effects are substantial. In model 3, a country that scores 40 on the 100-point scale is twice as likely to switch each year as a country that scores 0 (no delegation). Thus, the hypothesis that changing ideas of sovereignty contribute to the change in CIL ought to be taken seriously. Interpretation of this variable is particularly difficult because unobserved fundamental drivers of acceptance of these ideas (such as the strength of private actors vis-à-vis the state) may drive both human rights delegation and rejection of absolute immunity. It is reassuring that the effect of export market diffusion and export/import proportion are robust to the introduction of this variable.

Table 3. Alternative Diffusion Mechanisms (Average Marginal Effects)

Variables	*(1)*	*(2)*	*(3)*	*(4)*	*(5)*
Target	0.247	0.172	0.153	0.146	0.232
	(0.621)	(0.612)	(0.610)	(0.612)	(0.619)
Export Market Diffusion	1.626**	1.642**	1.607**	1.700**	1.538**
	(0.704)	(0.677)	(0.649)	(0.662)	(0.614)
Global Restrictiveness Trend	−0.0455	−2.744			
	(5.582)	(5.110)			
Contiguous States Diffusion	−0.185		−0.227		
	(0.417)		(0.430)		
Legal Origin Diffusion	−0.139			−0.929	
	(1.492)			(1.269)	
Colonial History	1.708				1.735*
	(1.040)				(0.965)
Former Colonizer Diffusion	−0.308				−0.322
	(0.539)				(0.526)
Common Colonizer Diffusion	−3.400				−3.498*
	(2.082)				(1.847)
Export/Import Proportion	−1.896**	−1.973***	−2.011***	−1.995***	−1.886**
	(0.748)	(0.750)	(0.744)	(0.747)	(0.741)
Major Importer	−0.506	−0.593	−0.599	−0.624	−0.520
	(0.513)	(0.504)	(0.510)	(0.503)	(0.504)
GDP per Capita	1.202***	1.216***	1.256***	1.228***	1.193***
	(0.248)	(0.253)	(0.245)	(0.243)	(0.244)
Human Rights Jurisdiction	0.0269**	0.0281**	0.0245**	0.0269**	0.0268***
	(0.0112)	(0.0116)	(0.0104)	(0.0107)	(0.0102)
Regional Dummies		yes	yes	yes	yes
3rd Degree Polynomial Time Trend		yes	yes	yes	yes
Observations		5,937	5,937	5,937	5,937

(*Notes.* Robust standard errors clustered on countries in parentheses. Constant omitted from table.
***$p<0.01$, **$p<0.05$, *$p<0.1$.)

There is no consistent evidence that more democratic countries shifted earlier. UN Ideology, Judicial Independence, and Government Consumption did not have a significant correlation with shifting to restrictive immunity in any model we estimated. Among the regional dummies, the coefficient on Eastern Europe is consistently negative and significant, reflecting that this region was long dominated by Communist states. If we drop the Communist states from the analysis, the significance of the regional indicator vanishes, but it does not affect the other coefficients.

We also tested whether major power behavior is influential not through market power but because major powers, such as the permanent five members of the UN Security Council, have a special status in the international system. We constructed an indicator that measures how many of the P-5 (France, UK, USA, USSR/Russia, China) had switched toward restrictive immunity. This indicator was never significantly different from zero and its inclusion did not affect the other coefficients of interest.

Table 3 examines alternative diffusion mechanisms. In every regression, the coefficient on Export Market Diffusion remains positive and statistically significantly different from zero. The sizes of the coefficients are roughly similar to those in Table 2. Moreover, the country-specific correlates of switching to restrictive immunity are also consistent with those found in Table 2.

No diffusion variable is consistently significant in the expected direction and all have the incorrect sign once Export Market Diffusion is included. There is some evidence that countries with a colonial history are somewhat faster to switch. Yet, this finding is not robust and does not reflect a diffusion mechanism.

Our empirical strategy does not allow for causal identification. Yet, the pattern of correlations, in conjunction with qualitative evidence from the previous section, supports the observable implications from our theory and challenges theories emphasizing reciprocity.

Conclusion

CIL's distinctive legal and institutional characteristics shape cooperation in ways that complicate reciprocal strategies. Unlike treaties, CIL is not a contract whose benefits and obligations apply only to members, and it lacks institutionalized features that facilitate reciprocity. Additionally, because CIL's continued validity depends on state practice, compliance and change are entwined: A state's defection may lead the rule to unravel. While these features weaken reciprocity, they do little to strengthen retaliation and reputation, which suffer from well-recognized limitations. Yet, concerns about the precedential effects of defection sustain cooperation: States may comply with CIL to avoid undermining a rule they value.

Our evidence derives from historical cases of sovereign immunity. Table 4 contains the list of states and their practices. We found no direct evidence of reciprocity or effective retaliation. Qualitatively, states generally followed the same policy for all foreign states, switched from absolute to restricted immunity only once, and justified their decisions by referring to prevailing state practice. Early defectors from absolute immunity were small coun-

Table 4. Sovereign Immunity Practice

Country	*Date*
Restrictive	
Italy	1886
Belgium	1903
Switzerland	1918
Egypt	1920
Greece	1928
Netherlands	1947
Austria	1950
United States of America	1952
Morocco	1956
Jordan	1958
Congo (D.R.C.)	1960
Senegal	1962
Germany	1963
Burundi	1964
Madagascar	1965
Lebanon	1967
France	1969
Suriname	1975
United Kingdom	1977
Singapore	1979
South Africa	1979
Cape Verde	1980
Cyprus	1980
New Zealand	1981
Pakistan	1981
Vanuatu	1981
Canada	1982
Denmark	1982
Turkey	1982
Kenya	1983
Malawi	1984
Philippines	1985
Australia	1986
Spain	1986
Zimbabwe	1986
Brazil	1989
Tonga	1989
Malaysia	1990
Namibia	1990
Ireland	1992
Norway	1992
Finland	1993
Uganda	1993
Argentina	1994
Venezuela	1994
Peru	1995
Israel	1997
Portugal	1997
South Korea	1997
Uruguay	1997
Lithuania	1998
Panama	1998
Tunisia	1998
Fiji	1999
Kazakhstan	1999
Sweden	1999
Federated States of Micronesia	2000
Luxembourg	2000
Mali	2000
Poland	2000
Hungary	2001
Slovenia	2001
El Salvador	2002
Botswana	2003
Mexico	2003
Monaco	2004
Taiwan	2004
Costa Rica	2006
Dominican Republic	2006
Japan	2006
Colombia	2007
Latvia	2007
Nigeria	2007
Bulgaria	2008
Czech Republic	2008
Albania	2010

Absolute	
Andorra	Moldova
Angola	Montenegro
Armenia	Mozambique
Bangladesh	Myanmar
Belarus	Nicaragua
Benin	Niger
Bolivia	North Korea
Burkina Faso	Romania
Chile	Russian Federation
China	Sao Tome and Principe
Cote D'Ivoire	Serbia
Estonia	Slovakia
Gabon	Sri Lanka
Ghana	Sudan
Guatemala	Tajikistan
Guinea Bissau	Tanzania
Honduras	Thailand
Iceland	Togo
India	Turkmenistan
Indonesia	Ukraine
Iran	Uzbekistan
Kyrgyzstan	Zambia
Liberia	

tries whose decisions had little expected precedential effect. Our regression analyses show that states with higher exports than imports were less likely to defect, but states became more likely to defect as more of their export destinations did. We also found that acceptance of restrictive immunity correlates with a state's submission to international human rights oversight.

Our findings have the greatest implications for CIL rules that, like sovereign immunity, resemble prisoners' dilemmas. While prisoners' dilemmas do not capture all CIL rules, some of our conclusions apply to other types of CIL. For example, many human rights CIL rules are not PDs: A state does not have incentives to deprive its citizens of religious freedom or fair trials because other states do (Simmons 2009). Yet, the main features of CIL apply: There is no targeted reciprocity, and states cite the precedential effects of defection when they consider whether to abandon a human rights CIL rule. Some important CIL rules are not implemented by legal actors but by the executive or the military, which may be less constrained in enforcing reciprocity. However, the fundamental features of CIL we describe are relevant to the expectations of other states no matter who implements a given rule. Thus, precedential concerns likely play some role along the entire spectrum of CIL.

These precedential concerns may also help explain treaty compliance. In principle, treaties are less vulnera-

ble to desuetude than CIL, because their legally binding quality rests on formal adhesion rather than state practice. Even when states breach a treaty, flexibility and countermeasures provisions ensure that these breaches do not undermine the treaty's continued existence and that the defector faces political costs. A state that no longer desires the rights and obligations of the treaty can simply withdraw from it. Nevertheless, some treaties may be more vulnerable to desuetude. For instance, the Convention Against Torture establishes a universal prohibition with no exceptions, and withdrawal is politically costly. However, it does not provide enforcement mechanisms, and incentives for other states to punish violations are weak. As for CIL, precedential concerns may discourage defection: Repeated violations could make the Convention a dead letter, undermining a valued universal norm. Indeed, such precedential concerns are frequently invoked by states facing the choice to torture. More generally, precedential concerns strongly matter for treaties that depart from the traditional models of reciprocal bargaining.

Our two key contributions are to offer a positive theory of how CIL differs from treaties and non-legal norms and to provide a first empirical analysis of change in a CIL rule. Our broader aim is to bring CIL into the interdisciplinary literature on international law. Theoretically, greater attention to CIL matters not only because CIL rules are still important, but also because much of international law has developed as CIL and continues to do so. Greater attention to CIL could also benefit empirical studies not only because it expands the scope of international law to be investigated, but also because CIL may interact with treaties. For example, if certain treaty norms have become CIL, measuring the effect of ratifying treaties on state behavior may understate the broader impact of international law. The theoretical and empirical literature on international law has become increasingly sophisticated over time. There is no good reason why it should continue to ignore CIL, one of the main pillars of international law.

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