

FOREIGN STATES IN AUSTRALIAN COURTS

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[The increase in transnational litigation before Australian courts has also seen a rise in the number of cases involving foreign states. While a number of doctrines currently exist in Australian law that protect the interests of foreign states from adjudication, their combined effect has been to frustrate the vindication of private rights. Principles of personal jurisdiction and appropriate forum, where private and public interests may be weighed against each other in the decision to adjudicate, offer a more balanced and equitable solution.]

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I INTRODUCTION

With the increased volume of transnational litigation before Australian courts, there is likely to be greater involvement of, and impact upon, the interests of foreign states. Such interests may be implicated in various ways before domestic courts: the case may involve the law of that country, an act of its executive government or an action by or against the foreign state. More indirectly, an Australian court may be asked to pronounce upon a treaty, or an agreement to which that foreign state is a signatory, in litigation between wholly private parties. Australian courts have recognised and developed a range of doctrines, the broad purpose of which is to protect the interests of foreign states from adjudication by the courts of other countries. The object of this article is to assess the utility of, and justification for, such doctrines.

II BACKGROUND: THE DOCTRINES OF ABSTENTION

The first doctrine of relevance to foreign states is ‘foreign state immunity’ or ‘sovereign immunity’, whereby a state is immune from the jurisdiction of an Australian court when sued as a defendant. As will be noted more fully below, the scope of this doctrine has narrowed in recent years from a position of ‘absolute’ immunity, where a foreign state could never be impleaded before an Australian court, to the current ‘restrictive’ view, whereby immunity can only be

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generally claimed where the foreign state is engaged in sovereign, as opposed to commercial, activity.¹ This doctrine exists as a principle of public international law and has been codified in the *Foreign States Immunities Act 1985* (Cth) ('*FSIA*'). While there have been few Australian cases decided so far involving immunity, the number is likely to grow in the future, possibly raising some difficult problems of interpretation — in particular, the 'commercial transaction' exception to immunity.

Another principle created by common law courts to protect foreign state interests is the 'act of state' doctrine. Pursuant to this doctrine, an Australian court may not adjudicate upon the acts of a foreign state within its own territory.² While this doctrine sounds simple, its precise content and field of application remains unclear both in Australia and in other common law countries. In particular, there is a serious question as to whether the doctrine is required at all, given that, unlike state immunity, it is not found in civil law countries,³ nor is it a principle of public international law.

Yet another doctrine that may have the effect of shielding the acts of foreign states from adjudication in an Australian court is that known as 'non-justiciability'. Pursuant to this principle, an Australian court may not review the acts or transactions of foreign states where there are no 'manageable judicial standards' to resolve the issues, or where adjudication would cause embarrassment to the Australian executive.⁴ The content and rationale of this doctrine is also highly controversial, with the focus not being simply to protect the interests of the foreign state but also the executive of the forum state in conducting foreign policy. Again, this doctrine is unknown in civil law countries and in public international law.

Hence, the picture presented by this series of doctrines of 'abstention' in Australian law is one of great deference to foreign state interests. A key issue to consider is whether it is now time for Australian courts to treat foreign states more akin to fellow players in the litigation process rather than a unique species worthy of exemption from ordinary adjudication. As transnational litigation increases in volume and intensity, the influence of concepts such as territorial sovereignty and state interests should proportionately diminish to allow the full vindication of private rights and the free flow of international trade and commerce. Where cross-border litigation was rare and exceptional, little harm was done to private litigants by the preservation of unique protections for states — but these are harder to justify today. Arguably, then, doctrines that continue to confer special treatment upon states must be closely scrutinised and clearly justified to be worthy of retention.

¹ *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 ('*Trendtex*').

² *A-G (UK) v Heinemann Publishers Pty Ltd* (1988) 165 CLR 30, 40 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ) ('*Spycatcher*').

³ F A Mann, *Foreign Affairs in English Courts* (1986) 164, 175, as cited in *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 371 (Gummow J).

⁴ *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354 ('*Petrotimor*').

III PERSONAL JURISDICTION AND APPROPRIATE FORUM

Principles of personal jurisdiction and appropriate forum applied by Australian courts can also, in a sense, be seen as a form of ‘protection from adjudication’ for foreign states. Yet there is a critical difference between these principles and the doctrines of abstention mentioned above. In the case of personal jurisdiction and appropriate forum, the same rules, by and large, apply to *all* foreign defendants before Australian courts.

Service of process on a foreign state must be effected through the diplomatic channel — that is, by sending the writ to the Australian Department of Foreign Affairs and Trade for transmission to the foreign state,⁵ unless the state has agreed to accept an alternative method of service.⁶ Once this has been done, the plaintiff, to secure jurisdiction, must show that a basis for service outside the jurisdiction under the relevant Australian state, territory or federal rules of court is established. This is the same procedure employed to authorise service upon *any* defendant located outside Australia. A basis for service out will normally exist where there is a connection between the cause of action and the Australian forum — such as, in a contract action, that the contract was made or breached there, governed by the law of the forum, or involved a submission to the jurisdiction of its courts;⁷ or, in the case of torts, that the place of the tort, or the place of damage arising from the tort, was the forum.⁸

In addition, the Australian court must be persuaded by the claimant that it is not a ‘clearly inappropriate forum’ before it will accept jurisdiction.⁹ Such a test is a discretionary principle that allows the court to consider a wide range of factors before jurisdiction will be exercised, such as the location of the evidence and the parties, the applicable law, the sensitivity of the subject matter to the foreign state, and whether the plaintiff will obtain justice in the courts of the foreign state.¹⁰ There is therefore significant scope for the interests of foreign states to be considered in the decision whether or not to adjudicate but, instead of such interests being determinative, they are weighed in the balance against other factors.¹¹

A major question to be considered in this article is whether it is preferable for Australian courts to rely simply and exclusively upon principles of personal jurisdiction and appropriate forum in actions involving foreign states, in place of the other doctrines of abstention. A proper determination of this issue can, however, only be made after a more detailed analysis of these doctrines in foreign state cases.

⁵ *FSIA* s 24.

⁶ *FSIA* s 23; *Vitascope Pty Ltd v Republic of Nauru* (Unreported, Supreme Court of New South Wales, Giles CJ Comm D, 29 August 1997).

⁷ See generally P E Nygh and Martin Davies, *Conflict of Laws in Australia* (7th ed, 2002) 58–63.

⁸ *Ibid* 63–6.

⁹ *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538. Alternatively, the foreign state defendant may seek a stay on this ground if the state appears to contest jurisdiction.

¹⁰ *Ibid*; *Spiliada Maritime Corp v Consulex Ltd* [1987] 1 AC 460; *Lubbe v Cape plc* [2000] 4 All ER 268; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.

¹¹ Richard Garnett, ‘State Immunity Triumphs in the European Court of Human Rights’ (2002) 118 *Law Quarterly Review* 367, 372.

IV THE ABSTENTION DOCTRINES IN DETAIL

A Foreign State Immunity

As noted above, foreign state immunity in Australia is now governed almost exclusively by the *FSIA*. The *FSIA* creates a rule of immunity in any case where a ‘foreign State’ (that is, the executive government and departments of the state)¹² or ‘separate entity’ of such state (that is, an ‘agency or instrumentality’ of the state, such as a wholly-owned trading corporation)¹³ is sued in an Australian court. The purpose of the *FSIA* is broadly to give effect to the public international law principle of restrictive state immunity, whereby foreign states are entitled to retain their immunity in the case of sovereign acts but not private or commercial conduct.¹⁴ Consequently, the immunity rule is subject to a list of exceptions, such as commercial transactions,¹⁵ employment contracts¹⁶ (but not those involving diplomatic or consular officers),¹⁷ personal injury or property damage¹⁸ and intellectual property rights.¹⁹ Immunity can also be waived by a state agreeing to submit to the jurisdiction of the forum, either by prior agreement or by entering an appearance to contest the merits.²⁰

The *FSIA* also requires, in some cases, a territorial connection with Australia before immunity will be removed — for example, the employment contract must have been made or performed in Australia²¹ or the personal injury or property damage must have been caused by an act or omission occurring in this country.²² Such an approach reveals an overlap with the principles of personal jurisdiction referred to earlier. For example, in the case of contracts, the bases for service outside the jurisdiction under the rules of court of Australian states and territories are that the contract was made or breached in the forum, governed by local law, or contains a submission to the jurisdiction of the forum.²³ Such a provision largely renders unnecessary the required territorial links in the employment contract exception and the waiver of immunity provision. In the case of torts, the bases for service out of the jurisdiction are that the tort was committed in the forum or damage was suffered there.²⁴ While the ‘damage’ ground of personal jurisdiction is more liberal than the relevant provisions in the immunities

¹² *FSIA* s 3(3)(c).

¹³ *FSIA* s 3(1)(a).

¹⁴ Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) ch 7. For the principle of restrictive state immunity, see *Trendtex* [1977] QB 529.

¹⁵ *FSIA* s 11.

¹⁶ *FSIA* s 12.

¹⁷ *FSIA* ss 12(5)(a), (b).

¹⁸ *FSIA* s 13.

¹⁹ *FSIA* s 15.

²⁰ *FSIA* s 10.

²¹ *FSIA* s 12(1).

²² *FSIA* s 13.

²³ See Nygh and Davies, above n 7, 58–63.

²⁴ *Ibid* 63–6.

legislation — at least in claims for personal injury or property damage²⁵ — in many cases, an Australian court would be expected to stay its proceedings where confronted by a foreign tort, on the ground that it would be a ‘clearly inappropriate forum’.²⁶ Hence, it is arguable that a similar result will often be reached to that occurring under the immunity legislation — the forum refuses to adjudicate. It can therefore be seen that the immunity and personal jurisdiction inquiries duplicate each other to an extent, which raises a question as to the need for the immunity doctrine.

Quite apart from issues of duplication and overlap, the doctrine of foreign state immunity has also raised difficult questions of interpretation — particularly in the application of the commercial transaction exception, as can be seen from a recent Victorian decision and earlier English cases (interpreting a similar statutory provision) on the subject.

In *Victoria Aircraft Leasing Ltd v United States*,²⁷ the Victorian Court of Appeal had to consider an action to recover an aircraft that had been sold to a Nauruan government entity pursuant to a loan guaranteed by Eximbank, a United States government agency. The defendant argued that the plaintiff’s claim was defeated because of an agreement entered into between the Nauruan and United States governments. Under the alleged agreement, Nauru agreed to assist in the defection of a North Korean scientist to the United States, to cooperate with the United States in investigating the involvement of Nauruan organisations in the transfer of money for the purposes of international terrorism, and to reform Nauru’s laws to prevent money laundering and the production of false Nauruan passports. In exchange for these promises, Nauru alleged, the United States would provide Nauru with funds to assist it in its loan repayments to Eximbank and ensure that Eximbank gave Nauru additional time to comply with its obligations.

A third party notice was issued against the United States, which applied to have it set aside on the ground of foreign state immunity. The key question for the Court was whether the alleged agreement between Nauru and the United States was a ‘commercial transaction’ within s 11 of the *FSIA*, which provides:

- (1) A foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction.
- (2) Subsection (1) does not apply:
 - (a) if all the parties to the proceeding:
 - (i) are foreign States ...
- (3) In this section, *commercial transaction* means a commercial, trading, business, professional or industrial or like transaction into which the foreign

²⁵ Note that a commercial tort would likely fall within the *commercial transaction* exception and therefore not require establishment of any further territorial link under the *FSIA* for immunity to be overcome.

²⁶ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 596 (Gleeson CJ, McHugh, Gummow and Hayne JJ); cf *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.

²⁷ (2005) 218 ALR 640 (*Victoria Aircraft Leasing*).

State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes:

- (a) a contract for the supply of goods or services;
- (b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and
- (c) a guarantee or indemnity in respect of a financial obligation ...²⁸

The trial judge found that the agreement did not fall within the scope of the commercial transaction exception²⁹ and a unanimous Court of Appeal agreed.³⁰ First, as a matter of statutory interpretation, the Court of Appeal found that sub-s (3)(b) ‘contemplates a loan or like transaction’.³¹ It

does not extend to a promise to influence the creditor to give his debtor extra time to pay or refrain from exercising rights under a security nor ... to a promise to pay money which could be used by the recipient to repay a debt to another.³²

Sub-section (3)(c) is ‘concerned with a guarantee of the performance of another’s obligation [but] ... does not embrace a promise to prevent a creditor exercising rights under a security’.³³

Second, the Court said, even if an aspect of the transaction fell within one of the limbs of sub-s (3), ‘the transaction viewed as a whole’ was not encompassed by the provision.³⁴ Each of the promises alleged to have been made by Nauru and each of the actions alleged to have been performed in reliance on representations allegedly made by the United States ‘concerned governmental functions of Nauru’ — in particular, ‘activities relating to its diplomatic and foreign relations, national security, intelligence, terrorism and the reform of banking laws and passport abuse’.³⁵ While the United States had allegedly promised to assist Nauru with its repayments under the loan, the context in which this offer was made was ‘as part of a package or program of assistance in return for political favours’.³⁶ The vagueness and lack of specificity as regards the time of the alleged promises of the United States also suggested that they were ‘political arrangements between states’ rather than binding commercial obligations.³⁷

On balance, it seems hard to disagree with the Court’s conclusion, although it does suggest that difficult issues may lie ahead: in particular, what degree or level of ‘commerciality’ is required before a transaction will fall within s 11(3)?

²⁸ (Emphasis in original).

²⁹ *Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Ltd* (2004) 185 FLR 48.

³⁰ *Victoria Aircraft Leasing* (2005) 218 ALR 640, 646 (Buchanan JA, Callaway JA and Williams AJA agreeing).

³¹ *Ibid* 645 (Buchanan JA).

³² *Ibid*.

³³ *Ibid*.

³⁴ *Ibid*.

³⁵ *Ibid* 646 (Buchanan JA). Callaway JA agreed that it was insufficient for an agreement to fall within s 11(3) if one element was commercial, such as for the provision of finance; characterisation of the agreement as a whole was required: at 642.

³⁶ *Ibid* 646 (Buchanan JA).

³⁷ *Ibid*.

Since most agreements with states are likely to have at least some ‘governmental’ aspect (for example, relating to a sovereign purpose), it is troubling that the mere presence of such an element may be enough to establish immunity. Australian courts will have to be careful to ensure that the philosophy of restrictive immunity upon which the *FSIA* is based — which allows suits against foreign states where they engage in commercial transactions — is not easily circumvented.

Evidence that the characterisation of acts as commercial or governmental is likely to continue to cause problems can be found in the English decisions on the equivalent provision, s 3(3) of the *State Immunity Act 1978* (UK) c 33 (*‘SIA’*).

*Kuwait Airways Corp v Iraqi Airways Co*³⁸ concerned an action in England against the Iraqi state-owned airline for the seizure of civilian aircraft from Kuwait airport after the invasion of Kuwait in 1990 and their subsequent retention and use by the Iraqi airline. Before the second series of events occurred, the Iraqi Government had issued an executive decree, Resolution 369 of the Revolutionary Command Council (*‘Resolution 369’*), which purported to dissolve the Kuwaiti airline and vest all its assets (including the aircraft) in the Iraqi airline. The Iraqi airline sought to claim immunity from jurisdiction for both acts, which required the House of Lords to consider whether the particular acts were commercial in nature.

The first set of acts considered was the seizure and removal of the aircraft, which all judges agreed were governmental acts.³⁹ In performing these acts, the Iraqi airline was merely acting as an instrument of government policy, which had been to seize certain Kuwaiti property during the invasion. The airline therefore was immune from suit for these acts. However, the Court split on the characterisation of the subsequent acts — that is, the treatment of the aircraft by the Iraqi airline as part of its fleet and their use on internal, commercial flights. The majority judges concluded that such acts were private or commercial and not sovereign.⁴⁰ In their view, the critical factor was the issuing of the executive decree, after confiscation and removal to Iraq of the aircraft, that purported to dissolve the Kuwaiti airline and vest all its assets in the Iraqi airline.⁴¹ The majority felt that the effect of this decree was to change the character of the subsequent acts — namely the retention and use of the aircraft — from governmental acts to private or commercial acts. These subsequent acts became, as a result of the decree, ‘fresh acts of conversion’.⁴² The fact that the earlier act of seizure by the airline was governmental did not matter since, applying the test from *I Congreso del Partido*,⁴³ what had to be focused on was the specific act in question. The majority here found that the acts of retention and use were acts that could have been performed by a private party.⁴⁴

³⁸ [1995] 3 All ER 694 (*‘Kuwait Airways’*).

³⁹ Ibid 709 (Lord Goff), 717 (Lord Mustill), 720 (Lord Slynn).

⁴⁰ Ibid 711 (Lord Goff, Lords Jauncey and Nicholls agreeing), 719 (Lord Mustill dissenting), 721–2 (Lord Slynn dissenting).

⁴¹ Ibid 711 (Lord Goff).

⁴² Ibid 710.

⁴³ [1983] AC 244 (*‘Congreso’*).

⁴⁴ *Kuwait Airways* [1995] 3 All ER 694, 711 (Lord Goff, Lords Jauncey and Nicholls agreeing).

In a powerful dissent, Lords Mustill and Slynn concluded that the acts of retention and use could not in any way be described as ‘commercial’ or private. In reality, these acts were part of an entire transaction of events pursuant to the invasion and it was artificial to focus on individual stages and attempt to characterise them separately, as required by *Congreso*.⁴⁵ It is implicit in these judges’ comments that, in some cases, an approach which examines the overall transaction must be taken in determining whether certain activity is commercial or sovereign.

It is interesting to note that the approach of the dissenting judges in *Kuwait Airways* — looking at the entire context of the transaction in determining whether the commercial exception applied — is closer to the view taken by the Victorian Court of Appeal in *Victoria Aircraft Leasing*. The majority in *Kuwait Airways*, on the other hand, suggested that if a specific aspect of a wider transaction could be classified as commercial, then immunity would be lost for that part of the transaction. It is suggested therefore that the problem of distinguishing commercial and non-commercial acts is likely to remain awkward, particularly since many transactions with states will exhibit both private and sovereign aspects.⁴⁶ Focusing on the transaction as a whole or on a specific aspect may produce different and seemingly arbitrary results.⁴⁷

Moreover, when considering the utility of the immunity doctrine it is also worth noting that the current law allows Australian courts little scope for weighing competing interests (especially the interests of private parties) in deciding whether to exercise jurisdiction. Either a matter falls within the scope of an exception such as the commercial transaction exception or it does not. No other factors such as the location of the evidence or whether the plaintiff would have any real prospect of obtaining relief in the foreign state’s own courts (assuming the forum court barred adjudication) are considered. Such a narrow inquiry has the potential to produce unjust results for private claimants.

Such injustice is particularly obvious in a number of recent English cases involving actions against foreign states for human rights violations. The problem here derives from the wording of the personal injury exception to immunity, which applies only where the injury was ‘caused by an act or omission in the United Kingdom’.⁴⁸ Section 13 of the *FSIA* is in almost identical terms. In a number of cases, individuals have complained of torture by foreign state officials, with such acts having allegedly occurred in the foreign state’s own territory, not in the state of adjudication. Given the clear territorial limitation to the personal injury exception, such claims would appear to be barred under the acts.

⁴⁵ Ibid 719 (Lord Mustill), 722 (Lord Slynn).

⁴⁶ Hazel Fox, ‘The Commerciality of the Spoils of War’ (1996) 112 *Law Quarterly Review* 186, 187–8.

⁴⁷ A case in which both the entire transaction and its individual component parts were found to be ‘commercial’ and so within the ambit of s 11(3) was *Adeang v Nauru Phosphate Royalties Trust* (Unreported, Supreme Court of Victoria, Hayne J, 8 July 1992). In that case, an injunction had been sought to restrain the payment of moneys or provision of security by a Nauruan government entity for the purchase of an Australian airline. Unlike *Victoria Aircraft Leasing*, there was no uniquely sovereign or political aspect or purpose to the transaction.

⁴⁸ *SIA* s 5.

Claimants have recently attempted a number of strategies to circumvent this restriction. One argument that has been raised is that there is an *implied* exception to immunity in the legislation for human rights violations in breach of customary international law, such as torture and state-sponsored assassination. However, both English⁴⁹ and Canadian⁵⁰ courts have consistently rejected this argument on the basis that Parliament intended to cover the field exhaustively in immunity law by its enactment of express exceptions. Further, the European Court of Human Rights has held that while the practice of torture is prohibited in customary international law, there is insufficient evidence in public international law to show that states are not entitled to immunity for the performance of such acts.⁵¹ Consequently, an English court, in granting immunity to a foreign state in a civil action for torture, was acting consistently with international law and so could not place the United Kingdom in breach of art 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,⁵² which provides for the right of access to court. A Canadian court applied this reasoning⁵³ to reach the same conclusion in respect of the similarly worded art 14(1) of the *International Covenant on Civil and Political Rights*.⁵⁴

This discussion appears to paint a bleak picture for victims of human rights violations — particularly since they have, in practice, few alternative means of recovery such as suing in the courts of the foreign state defendant or persuading their state of nationality to bring a claim for diplomatic protection. Fortunately, in a very recent decision of the English Court of Appeal — which is currently listed for appeal to the House of Lords — there may be the possibility of some relief at hand.

In *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*,⁵⁵ the Court drew a distinction between actions against the foreign state itself as a named defendant and actions against individual employees or officials of the state, with immunity only applying in the first case. Where the action was brought against the state itself, a sovereign or head of state, the government of the state or a government department, immunity was said to arise *ratione personae* — that is, by reason of the entity itself being personally impleaded. However, the Court noted, *individual employees or officials of the state* are not included in the definition of ‘foreign state’ under the *SIA*.⁵⁶ For the state to be able to claim immunity in respect of actions against such persons, the subject-matter of the action must relate to ‘state conduct’ under customary international law.⁵⁷ The Court found, after an exhaustive analysis of international practice — in particular art 14(1) of the *Convention against Torture and Other Cruel, Inhuman or*

⁴⁹ *Al-Adsani v Government of Kuwait* (1996) 107 ILR 536.

⁵⁰ *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675 (‘*Bouzari*’); *Arar v Syrian Arab Republic* (Unreported, Ontario Superior Court of Justice, Echlin J, 28 February 2005).

⁵¹ *Al-Adsani v United Kingdom* (2001) 11 Eur Court HR 79.

⁵² Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

⁵³ *Bouzari* (2004) 71 OR (3d) 675, 694 (Goudge JA).

⁵⁴ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁵⁵ [2005] QB 699 (‘*Jones*’).

⁵⁶ *Ibid* 750 (Mance LJ), 759 (Lord Phillips MR).

⁵⁷ *Ibid* 755 (Lord Phillips MR).

*Degrading Treatment or Punishment*⁵⁸ (which requires states to ensure legal redress to victims of torture) and supportive dicta in speeches of the House of Lords in the Pinochet litigation⁵⁹ — that torture cannot be considered an exercise of a state function.⁶⁰ Consequently, there can be no vicarious liability of the state for such acts, which are the personal responsibility of the individuals and therefore do not attract immunity.⁶¹

However, the Court found that this conclusion did not mean that such an action would automatically proceed in an English court. Resolution of this question will depend upon satisfaction of the principles of personal jurisdiction, including the rules for service out of the jurisdiction and the doctrine of *forum non conveniens*.⁶² Rather than simply determining whether the forum court has jurisdiction over a foreign state on the basis of a relatively narrow immunity inquiry, such a test looks at the entire circumstances of the case to assess whether jurisdiction is appropriate. Matters such as the location of evidence, the governing law of the transaction, whether the claimant would be denied justice in the foreign court and the degree of sensitivity of the subject-matter to the foreign state may all be considered under this test.

In other words, scope exists for weighing the foreign state's legitimate concerns about sovereignty against the individual's claim to redress. The immunity inquiry, by contrast, looks at the matter wholly through the prism of whether one of the narrow exceptions to immunity exists, with the result that private rights and interests are given little weight. While it is true that the ordinary principles of personal jurisdiction also apply in actions against foreign states, in practice a finding of immunity precludes such an inquiry — in particular the examination of other factors which may be highly relevant to jurisdiction such as whether the plaintiff will obtain redress at all.

The decision of the Court of Appeal in *Jones*, while admittedly limited to the situation where employees or officials of a foreign state are impleaded as opposed to the state itself, is nevertheless to be welcomed in its recognition that the immunity doctrine is too narrow a vehicle to accommodate all the competing interests in a jurisdictional inquiry. As the Court noted, existing English law principles of personal jurisdiction and appropriate forum have sufficient flexibility to perform the task so there is no need to introduce a radically new test.⁶³ In

⁵⁸ Opened for signature 26 June 1987, 1465 UNTS 112 (entered into force 26 June 1987).

⁵⁹ *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [2000] 1 AC 61, 109 (Lord Nicholls), 115 (Lord Steyn); *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 3]* [2000] 1 AC 147, 203 (Lord Browne-Wilkinson), 262 (Lord Hutton), as cited in *Jones* [2005] QB 699, 729–34 (Mance LJ).

⁶⁰ *Jones* [2005] QB 699, 752 (Mance LJ), 758 (Lord Phillips MR).

⁶¹ One writer has described the distinction drawn by the Court between a claim against the foreign state itself and one against its officials in terms of the scope of immunity granted as 'undefensible'. According to this view, there is no reason in principle why the 'state functions' test should also not apply where the state is itself directly impleaded in a torture action: see Hazel Fox, 'Where Does the Buck Stop? State Immunity from Civil Jurisdiction and Torture' (2005) 121 *Law Quarterly Review* 353, 354, 356–7. While this comment has force, it seems likely that the clear wording of the *SLA* would have deterred the Court of Appeal from taking such a bold step. The House of Lords, on appeal in *Jones*, may feel less constrained.

⁶² *Jones* [2005] QB 699, 750–1 (Mance LJ).

⁶³ *Ibid* 751.

fact, quite apart from doing better justice between the parties, disregarding immunity will help combat the problem of overlap in jurisdictional principles applicable to claims against foreign states.

An important question for this article is whether the approach in *Jones* could be adopted by an Australian court if such an action were brought here. While under the *FSIA* ‘foreign State’ is defined in very similar terms to the *SIA*, the Australian legislation goes further by expressly including individuals (other than Australian citizens) within the definition of ‘separate entity’ of the foreign state, where they are ‘agencies or instrumentalities’ of the state.⁶⁴ By contrast, under the *SIA* it is not clear whether an individual is a separate entity but, even if they are, for such a person to claim immunity they must have exercised ‘sovereign authority’ of the state — in other words, a state function.⁶⁵ As the *Jones* case shows, torture does not fall within this category. However, under the *FSIA*, separate entities are entitled to immunity on exactly the same basis as foreign states with no additional requirement that they have exercised a state function.⁶⁶ Consequently, an individual will be entitled to immunity unless one of the express exceptions in the *FSIA* applies, which, as noted above, does not include torture or human rights abuses occurring outside Australia.

Hence, unless an Australian court were prepared to find an implied exception to immunity in the *FSIA* for such acts (which both the English and United States courts have refused to do in respect of their statutes), victims of human rights abuses by foreign states may be left without a remedy. This would be a very unfortunate consequence since the decision of the Court of Appeal in *Jones* offers an illuminating and groundbreaking way forward for resolving disputes involving foreign states — not simply in its more liberal treatment of human rights claims, but in its willingness to replace the blanket doctrine of state immunity with a more flexible discretionary test of personal jurisdiction and appropriate forum. Given that Australian law has a broad, discretionary approach to jurisdiction, akin to the English model, serious consideration should be given to replacing foreign state immunity in whole or in part with such a position, both for reasons of justice to private claimants and to overcome the problem of duplication of doctrines mentioned earlier.⁶⁷

B *The Act of State Doctrine*

As mentioned above, the foreign act of state doctrine provides that Australian courts will not adjudicate upon the acts of a foreign state performed within that state’s own territory. The doctrine has been accepted and applied in England⁶⁸

⁶⁴ *FSIA* s 3(1)(a).

⁶⁵ *SIA* s 14(2)(a).

⁶⁶ *FSIA* s 22.

⁶⁷ Such a view has previously been advocated by the present author: see Garnett, ‘State Immunity Triumphs in the European Court of Human Rights’, above n 11, 373; Richard Garnett, ‘Should Foreign State Immunity Be Abolished?’ (1999) 20 *Australian Yearbook of International Law* 175.

⁶⁸ *A-G (NZ) v Ortiz* [1984] AC 1, 21–4 (Lord Denning MR).

and the United States⁶⁹ for almost 100 years and in Australia its status has been largely undisputed.⁷⁰ Indeed, the relatively scant Australian literature on the topic has generally either ignored the doctrine⁷¹ or subsumed it within the principle of non-justiciability.⁷²

Yet among English writers, both the context and justification of this rule have been hotly contested. It has been noted that, unlike foreign state immunity, the act of state doctrine is not a rule of public international law but a creation of Anglo-American law with no equivalent in any civil law country.⁷³ While the commonly cited rationale for the rule is ‘respect for the independence of every other sovereign state’⁷⁴ — in other words, comity toward foreign states — it seems odd and perhaps overly generous that our courts would adopt such a posture in respect of countries whose courts would not do likewise.⁷⁵ Hence, unlike foreign state immunity, the value of the act of state doctrine, in terms of maintaining good relations between states through reciprocal comity, would seem to be questionable.⁷⁶

⁶⁹ *Underhill v Hernandez*, 168 US 250 (1897) (‘*Underhill*’).

⁷⁰ *Potter v Broken Hill Pty Co Ltd* (1906) 3 CLR 479 (‘*Potter*’); *Spycatcher* (1988) 165 CLR 30, 40 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ); *Dagi v Broken Hill Pty Co Ltd [No 2]* [1997] 1 VR 428 (‘*Dagi*’); *Petrotimor* (2003) 126 FCR 354; *Ali v Commonwealth* [2004] VSC 6 (Unreported, Bongiorno J, 23 January 2004); *McCrea v Minister for Customs and Justice* (2004) 212 ALR 297. A possible exception to this unanimity of opinion is the judgment of Gummow J in *Re Diftfort; Ex parte Deputy Commission of Taxation* (1988) 19 FCR 347, 371, who notes academic criticism of the doctrine and states that ‘it has not yet been necessary finally to decide if any such doctrine exists in this form in Australia.’ The decisions since 1988, however, confirm that the doctrine is now established in Australian law.

⁷¹ In the two major Australian texts on private international law, the act of state doctrine is only mentioned briefly: see Nygh and Davies, above n 7, 342; Edward Sykes and Michael Pryles, *Australian Private International Law* (3rd ed, 1991) 282. A fuller treatment of the topic is made in the Australian casebook: Michael Tilbury, Gary Davis and Brian Opeskin, *Conflict of Laws in Australia* (2002) 132–7. Davies has also discussed the doctrine elsewhere: see Martin Davies, ‘*Kuwait Airways Corp v Iraqi Airways Co: The Effect in Private International Law of a Breach of Public International Law by a State Actor*’ (2001) 2 *Melbourne Journal of International Law* 523.

⁷² James Crawford and W R Edeson, ‘International Law in Australian Law’ in K W Ryan (ed), *International Law in Australia* (2nd ed, 1984) 71, 82–5; Geoffrey Lindell, ‘The Justiciability of Political Questions: Recent Developments’ in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992) 180, 239–42; Geoffrey Lindell, ‘Judicial Review of International Affairs’ in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (1997) 160, 192–5.

⁷³ Interestingly, Canadian courts seem reluctant to apply the doctrine. In *Crown Resources Corp SA v National Iranian Drilling Co* (Unreported, Ontario Superior Court of Justice, Greer J, 14 September 2005), the Court allowed a claim to proceed in respect of a confiscation of property by a foreign government entity on its territory, expressly stating that the act of state doctrine would not be applied.

⁷⁴ *Underhill*, 168 US 250, 252 (Fuller CJ) (1897), cited with approval by the High Court in *Spycatcher* (1988) 165 CLR 30, 40–1 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ).

⁷⁵ See Mann, *Foreign Affairs in English Courts*, above n 3, 181.

⁷⁶ Some writers have however defended the judicial restraint inherent in the rule in that it reflects ‘internationalism’ and ‘comity’ on the part of English courts: see Nelson Enonchong, ‘Public Policy in the Conflict of Laws: A Chinese Wall around Little England?’ (1996) 45 *International and Comparative Law Quarterly* 633, 654–7.

In the United States, an alternative rationale has been proposed for the act of state doctrine that is not based on comity or respect for state sovereignty. According to American courts, the basis of the doctrine is the separation of powers and the fact that the judiciary, by pronouncing on acts of a foreign state within its territory, is intervening in the conduct of foreign policy by the executive branch of the forum government.⁷⁷ This rationale has never been explicitly referred to by an Australian or English court but may explain at least in part the doctrine's endurance, since courts in common law systems are often concerned to avoid intrusion into the domain of the executive branch.

However, it will be argued in this article that the act of state doctrine no longer serves any useful or legitimate purpose. Either it duplicates existing methods of jurisdictional control and regulation in cases involving foreign states or, more seriously, it is a source of injustice and denial of private rights.

Taking the duplication point first, a number of writers and courts have noted that many of the early cases on the act of state doctrine could have been decided in exactly the same way by the application of existing choice of law principles.⁷⁸ Many such decisions involved 'actions to try torts committed in that State or to ascertain the title to movables once situated there'.⁷⁹ In both types of case, application of Anglo-Australian common law choice of law rules for foreign torts (the *lex loci delicti*)⁸⁰ and for the acquisition of title to foreign situated movables (the *lex situs*)⁸¹ would likely yield the same outcome, as will be seen below. Moreover, under a choice of law approach, application of the foreign law is clear and logical, whereas when the act of state doctrine is employed, the foreign law seems to be applied by the forum court almost by default, because the court will not adjudicate the matter. Therefore, both for reasons of eliminating duplication and achieving greater certainty in the law, there may be a case for dispensing with the act of state doctrine.

The leading English case on the topic is *AM Luther Co v James Sagor & Co*,⁸² which involved goods confiscated in Russia by the Soviet government and subsequently sought to be reclaimed by their former owners through an action in England. The English courts, after repeating the mantra that the acts of a foreign state in relation to property and persons within its jurisdiction may not be questioned in England, gave judgment for the defendant. According to the Court of Appeal, the plaintiff, by claiming title to the goods, was seeking to impeach the title that had been conferred by the Soviet act of confiscation, which was impermissible.⁸³ However, had the common law choice of law rule applied — that is, that title to goods is governed by the law of the country where

⁷⁷ *Banco Nacional de Cuba v Sabbatino*, 376 US 398 (1964).

⁷⁸ See Mann, *Foreign Affairs in English Courts*, above n 3, 167; G C Cheshire, P M North and J J Fawcett, *Private International Law* (13th ed, 1999) 118; Tilbury, Davis and Opeskin, above n 71, 137.

⁷⁹ *Re Diftort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 371 (Gummow J).

⁸⁰ *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.

⁸¹ *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248, 257 (Evershed MR, Denning and Romer LJ).

⁸² [1921] 3 KB 532 ('*Luther v Sagor*').

⁸³ *Ibid* 545–6 (Bankes LJ), 555–6 (Scrutton LJ).

the goods are situated at the time such title is acquired (the *lex situs*) — the same result would have followed, as the defendant acquired its title under Soviet law.⁸⁴

A similar approach can be seen in the more recent Australian decision *Lloyd Werft Bremerhaven GmbH v Owners of the Zoya Kosmodemyanskaya*.⁸⁵ That case concerned an attempt to arrest a ship to satisfy an unpaid contractual claim for work done on another ship. The defendant successfully argued that it was no longer the owner of the vessel on the basis that the Ukrainian government by decree had transferred title in the ship to itself. For the Court to inquire into the validity of the transfer would be to review the acts of the state on its territory, which was impermissible. Once again, though, application of the *lex situs* would have yielded the same result: the foreign law would have been admitted to deny the plaintiff's claim.

The same point can be seen in the United States case *Underhill* — often cited as the foundation of the act of state doctrine — where the plaintiff sued in tort for various acts performed against him in Venezuela. The court there found the action non-admissible on the ground that it involved review of a foreign state's conduct within its territory.⁸⁶ Yet since there was evidence that such acts would not, in any event, have given rise to tortious liability under Venezuelan law, there was strictly no need to rely on the act of state doctrine to preclude adjudication. Hence, even if Venezuelan law had been admitted, it is likely that the plaintiff would have had no claim.

However, application of the act of state doctrine will not produce the same result as applying common law choice of law rules in every case. Suppose, for example, the plaintiff in *Underhill* had been the victim of an assault and such acts were prohibited by Venezuelan law. Whereas under Australian choice of law rules the forum court would apply Venezuelan law to give the plaintiff relief (subject to public policy), under the act of state doctrine the court would be disabled from pronouncing upon the matter at all, leaving the plaintiff with no remedy, effectively allowing the defendant to escape the application of its own law. It seems hard to justify such a denial of private rights if, as discussed above, foreign state immunity or general jurisdictional principles provide adequate scope for the protection of a state's sensitive matters. Why should the foreign state be allowed the benefit of yet another exculpatory doctrine?

Fortunately, there is some evidence that English courts are beginning to favour application of their choice of law rules over the act of state doctrine. For example, it is now strongly arguable that an English court may review the constitutionality and validity of a foreign state's acts or laws where such a question arises incidentally in proceedings between private parties — for example, to enforce a contract governed by foreign law, where such law allows judicial review.⁸⁷ According to this view, preference is given to the choice of law

⁸⁴ See also *Princess Paley Olga v Weisz* [1929] 1 KB 718.

⁸⁵ [1997] FCA 379 (Unreported, Tamberlin J, 15 May 1997).

⁸⁶ 168 US 250, 252 (Fuller CJ) (1897).

⁸⁷ *Buck v A-G (UK)* [1965] Ch 745; *Dubai Bank Ltd v Galadari [No 5]*, *The Times* (London), 20 June 1990; Maik Martin, 'Constitutional Review of Foreign Law in English and German Courts: A Comparative Study' [2002] *Oxford University Comparative Law Forum* 5 <<http://ouclfiuscomp.org/articles/martin.shtml>>. However, an English court cannot entertain a suit whose

rules applied by the forum court to the particular transaction, with little or no regard paid to the fact that the forum court is reviewing the acts of a foreign state on its territory. In essence, then, the principle operates as an exception to, or an exclusion of, the act of state principle.

A further problem with the act of state doctrine is that it is capable of arbitrary and conflicting results on the same set of facts, as can be seen from the cases *Potter* and *Petrotimor*. To understand this point and the two decisions, it should first be noted that apart from the act of state principle and the other doctrines of jurisdictional control and abstention discussed in this article, there is also the *Mozambique* rule.⁸⁸ Pursuant to this principle, an Australian court will not entertain a suit in which title or trespass to foreign land is involved. While this doctrine has been abolished in New South Wales,⁸⁹ it remains part of the common law,⁹⁰ although the High Court has suggested that it may review the doctrine's status in the future.⁹¹ The doctrine was referred to in *Potter* to prevent an action being brought to adjudicate rights under a patent granted by a foreign state. The plaintiff had sued for infringement of the patent but the Court refused to allow the action to proceed, on the basis that intellectual property rights were analogous to land and so non-justiciable in a court outside the country where such rights were granted.⁹² Yet the key point to note for present purposes is that the Court *also* referred to the act of state principle as a further ground for refusing to adjudicate.⁹³ So, not only was a patent deemed to be 'foreign land', but the process by which it was granted was an act of state which was unreviewable in the forum.

However, on closer analysis, it is suggested that application of the act of state doctrine could have in fact led to precisely the *opposite* result. Why could the High Court not, for example, have *admitted* the foreign patent action on the basis that to do otherwise would be showing disrespect for the acts of a foreign state within its own territory by excluding its laws? This point therefore identifies a major conundrum at the core of the act of state doctrine: is there greater respect for a foreign sovereign in admitting its laws or excluding them? It does not seem

only purpose is to challenge directly the validity of a law of a foreign state; *Buck v A-G (UK)* [1965] Ch 745. For an early comment in support of this 'choice of law' view, see F A Mann, *Studies in International Law* (1973) 449. Such a view appears not to have been adopted by North J of the Federal Court of Australia in *McCrea v Minister for Customs and Justice* (2004) 212 ALR 297, 304. The Court there had to determine whether the applicant should be extradited to Singapore, but refused to allow him to challenge the validity under Singapore law of the undertaking given by the Singaporean government that he would not face the death penalty. According to the Court, such a plea would require it to 'inquir[e] into the validity of the acts of a sovereign nation [within its territory]': at 304. The Full Federal Court affirmed North J's decision on other grounds: *McCrea v Minister for Customs and Justice* [2005] FCAFC 180 (Unreported, Black CJ, Finkelstein and Finn JJ, 30 August 2005).

⁸⁸ *British South Africa Co v Companhia de Moçambique* [1893] AC 602.

⁸⁹ *Jurisdiction of Courts (Foreign Land) Act 1989* (NSW) s 3.

⁹⁰ *Dagi* [1997] 1 VR 428.

⁹¹ *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 520 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁹² *Potter* (1906) 3 CLR 479, 493–4 (Griffith CJ), 502 (Barton J), 507–8 (O'Connor J).

⁹³ *Ibid* 496–7 (Griffith CJ).

that this conflict has been adequately appreciated, especially since in *Potter* the result was that private rights were not recognised.⁹⁴

Unfortunately, the same tendency in the act of state doctrine was apparent in the recent decision of the Full Federal Court in *Petrotimor*. The *Petrotimor* case concerned an action by a Portuguese company against the Australian government for expropriation of its rights to prospect and develop petroleum resources in the Timor Sea, north of Australia. Petrotimor had been granted a concession to prospect by the Portuguese government in 1974, when it was then the administering colonial power in East Timor. In 1989, Australia entered into the *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*⁹⁵ with Indonesia and, pursuant to the Treaty, granted permits to the Phillips companies to prospect in areas covered by the Portuguese concession. The claimant argued, in effect, that entering into the Treaty and granting conflicting concessions amounted to a constructive expropriation of its rights.

The Full Court unanimously dismissed the plaintiff's action, although for different reasons. Relevant to the present discussion, Black CJ and Hill J found the plaintiff's claim barred, in part on the basis that it involved review of an act of the Portuguese government on its territory — namely, the grant of Petrotimor's concession. According to these judges, it was an 'essential ingredient' of Petrotimor's claim for expropriation that it had a valid concession at the time of entry into the *Timor Gap Treaty* which, as a result of the Treaty, was expropriated.⁹⁶ Hence, a necessary preliminary question was to determine the validity of Petrotimor's concession granted by the Portuguese government under Portuguese law, which the Court refused to do due to the act of state doctrine.⁹⁷

Once again it is not at all clear why the opposite result could not equally be reached by application of the act of state doctrine: that is, the Court would have to *accept* the validity of the Portuguese concession because to do otherwise would involve showing a lack of comity and recognition for Portuguese acts within its borders. Just as in *Luther v Sagor*, where the Soviet decree was recognised out of concern for the sovereignty of a state within its own borders, why could the Portuguese law not be similarly recognised? Once again there appears this profound illogicality in the act of state doctrine, with the only consistency being that private rights were denied vindication in each case.

The relationship between the act of state doctrine and state immunity reveals a further troubling aspect to the act of state doctrine. The doctrine has a potentially broader application than the immunity doctrine in that it may apply in a suit

⁹⁴ The other point to observe in *Potter* is again the issue of duplication of doctrines of abstention: if the *Mozambique* rule (again a well-established principle in civil and common law countries — unlike the act of state doctrine) was apt to resolve the case, why was there any need in that decision to rely upon the act of state doctrine?

⁹⁵ Opened for signature 11 December 1989, [1991] ATS 9 (entered into force 9 February 1992) (*Timor Gap Treaty*).

⁹⁶ *Petrotimor* (2003) 126 FCR 354, 368.

⁹⁷ *Ibid* 369.

between private parties as well as in a suit against a foreign state directly. However, it is in this latter context that the act of state doctrine can have particularly unfortunate consequences.

As was mentioned above in the discussion on foreign state immunity, it is now widely accepted that the doctrine of restrictive immunity applies in customary international law, with such an approach given effect to in the *FSIA*.⁹⁸ As was noted, an important exception to immunity is where the foreign state has engaged in a commercial transaction. However, suppose an Australian party entered into a contract to purchase potatoes from a separate entity of State X, but, prior to the goods being shipped, State X had a change of government and passed laws that invalidated all contracts for the export of foodstuffs on the ground of general famine within the population. Suppose an Australian court, looking at the transaction as a whole (as seemingly required by *Victoria Aircraft Leasing*) found that the commercial transaction exception applied. It may nevertheless be possible that an Australian court would refuse to admit the claim on the basis that to do so would require an adjudication or examination of State X's law purporting to invalidate the contract. Consequently, the finding of non-immunity would be largely overridden by the act of state exclusion.

To show that this problem is not merely theoretical, attention should be drawn to the decision of the Supreme Court of Victoria in *Dagi*. One of the claims brought by the Papua New Guinean plaintiffs against Broken Hill Pty Co Ltd ('BHP') was to enforce an agreement entered into by the company with the Papua New Guinean government to conduct mining operations in Papua New Guinea, which included a promise to compensate Papua New Guinean residents for any losses suffered. The plaintiffs argued that the government held the contractual rights on trust for them and that, by failing to enforce the agreement against BHP, had committed a breach of trust enabling the claimants to sue BHP itself.

The Court found that such a claim could not proceed, in part because to do so would involve reviewing the acts of a foreign state on its territory — namely, whether the government had committed a breach of trust by not enforcing the contract with BHP.⁹⁹ However, such an argument again shows the inconsistency of operation between the foreign state immunity and act of state doctrines. It is at least arguable that, had the Papua New Guinean government been sued directly by the claimants, no immunity could have been claimed because the contract to conduct the mining operations in Papua New Guinea was a commercial transaction. Why then should the act of state doctrine operate to effectively reinstate immunity for the foreign state or, worse (as in this case), defeat a private party's claim against another private party merely because the (non-immune) acts of a foreign state are indirectly involved? Again, the act of state doctrine is seen as inconsistent with, and undermining of, the restrictive immunity doctrine by giving much wider protection to foreign state conduct than public international law requires.

⁹⁸ See above n 14 and accompanying text.

⁹⁹ [1997] 1 VR 428, 453 (Byrne J).

A similar outcome may occur in the case of a contract of employment between an Australian national and State X, entered into in Australia but to be performed in State X and involving, for example, work as a doctor in a state-owned hospital. If the state chose to summarily dismiss the employee on the ground, for example, of state security, the fact that immunity would not bar the suit in Australia would be of little consolation if the act of dismissal rendered the whole claim non-adjudicable. There are likely to be other examples where the act of state principle is likely to undermine the restrictive immunity doctrine.

However, on a more positive note, there is also an exception to the act of state doctrine that is likely to assume greater significance in the future, namely where the foreign sovereign's acts are deemed to be contrary to public policy of the forum, such as where they contravene fundamental human rights or principles of public international law more generally, those acts will not be excluded from adjudication. The recent strong affirmation of this principle by the House of Lords suggests a further limitation on the scope of the act of state doctrine and is accordingly welcome.

In *Kuwait Airways Corp v Iraqi Airways Co [Nos 4 and 5]*,¹⁰⁰ the Court had to consider the confiscation of a number of aircraft belonging to Kuwait Airways ('KAC') during the Iraqi invasion of Kuwait. The planes were flown back to Kuwait and incorporated into the fleet of Iraqi Airways ('IAC'). As noted above, the Iraqi government passed Resolution 369, which dissolved KAC and transferred all its assets, including the seized aircraft, to IAC. It will be recalled that in the first stage of the litigation, the House of Lords found that IAC was not entitled to state immunity for the retention and use of the planes in Iraq, on the basis that such acts were done in consequence of the vesting of title to the planes in IAC by Resolution 369.¹⁰¹ In the latter stage of the case, IAC again drew attention to Resolution 369, arguing that KAC's claim for conversion should be rejected on the basis that it involved adjudication upon the acts of Iraq within its own territory.

The House of Lords, while acknowledging that only 'very narrow limits must be placed on any exception to the act of state rule',¹⁰² went on to find that the rule would not apply where application would be contrary to English public policy.¹⁰³ Authority already existed for the view that foreign acts or laws based on racial discrimination or grave infringements of human rights would not be enforced or recognised in England, on the basis that they amounted to violations of public policy.¹⁰⁴ However, the House of Lords went further by saying that acts amounting to a flagrant or fundamental breach of public international law should similarly not be recognised. Here, the United Nations Security Council had not only condemned the Iraqi invasion of Kuwait in its resolutions, but had also

¹⁰⁰ [2002] 2 AC 883 (*Kuwait Airways [Nos 4 and 5]*).

¹⁰¹ See above nn 38–44 and accompanying text.

¹⁰² *Kuwait Airways [Nos 4 and 5]* [2002] 2 AC 883, 1108 (Lord Hope).

¹⁰³ *Ibid.*

¹⁰⁴ *Oppenheimer v Cattermole* [1976] AC 249.

required member states to protect the assets of the Kuwait government.¹⁰⁵ There was thus a clear breach of international law as evidenced by the strong international consensus on the issue.

While it may be difficult in later cases to assess which breaches of international law are fundamental, such as would enliven the public policy exception, and which are only minor,¹⁰⁶ the House of Lords has unmistakably shown a willingness to restrict the scope of the act of state doctrine and consequently give private rights more protection and recognition. The House of Lords judgment has received wide endorsement in academic commentary, particularly for its elevation of international law rules and 'universal values' above the sovereignty concerns underlying the act of state doctrine.¹⁰⁷

In *Jones*,¹⁰⁸ the English Court of Appeal can be seen to be lending further momentum to this view by its approval of United States authority in which the act of state doctrine has been held inapplicable in cases of torture. In *Kadic v Karadzic*,¹⁰⁹ the United States Court of Appeals for the Second Circuit doubted that 'acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterised as an act of state.'¹¹⁰ Once again, the Court is suggesting that breaches of 'fundamental' laws operate at a higher level than the act of state doctrine and should be given precedence.

While the present writer concedes that there remains some argument for the retention of foreign state immunity, given its well-established position in public international law, no similar claim can be made for the act of state doctrine. Not only is it not mandated by international law, but it is duplicative of other principles, is confusing, arbitrary in its application and a source of real injustice to private claimants. Abolition of the doctrine would be a major step forward.¹¹¹

C Non-Justiciability

Apart from foreign state immunity and the act of state doctrine, there exists a third basis by which actions against foreign states may be restrained in Australian courts. This principle is known as the doctrine of non-justiciability and appears to have been 'invented' by Lord Wilberforce in *Buttes Gas & Oil Co v Hammer [No 3]*.¹¹² To understand the principle, some reference to the facts and decision in *Buttes* is required.

¹⁰⁵ SC Res 660, UN SCOR, 45th sess, 2932nd mtg, UN Doc S/Res/660 (1990); SC Res 661, UN SCOR, 45th sess, 2933rd mtg, UN Doc S/Res/661 (1990); SC Res 662, UN SCOR, 45th sess, 2934th mtg, UN Doc S/Res/662 (1990).

¹⁰⁶ Davies, above n 71, 533–4.

¹⁰⁷ See, eg, Li-Ann Thio, 'English Public Policy, the Act of State Doctrine and Flagrant Violations of Fundamental International Law: *Kuwait Airways Corp v Iraqi Airways Co* (2002)' (2003) 18 *Connecticut Journal of International Law* 585.

¹⁰⁸ See above nn 55–7 and accompanying text.

¹⁰⁹ 70 F 3d 232 (2nd Cir, 1995).

¹¹⁰ *Ibid* 250, cited in *Jones* [2005] QB 699, 740 (Mance LJ).

¹¹¹ One distinguished commentator advocated such a position over 60 years ago: see Mann, *Studies in International Law*, above n 87, 420.

¹¹² [1982] AC 888 ('*Buttes*').

The case concerned two oil companies — Buttes Gas and Occidental — which were granted concessions to explore and exploit the seabed under the territorial seas of Sharjah (in the case of Buttes) and Umm Al Qaiwain ('UAQ') (in the case of Occidental). In February 1970, Occidental located oil in an area, the sovereignty of which was contested, between the two Emirates and Iran. Both companies considered that they were entitled to exploit the area, and in April 1970 the ruler of Sharjah published a decree backdated to September 1969 that purported to extend Sharjah's territorial waters to include the contested site and hence expand Buttes' concession. The United Kingdom government, which at that time conducted the foreign relations of the Emirates, then intervened and a settlement was reached, under which Occidental's concession was terminated by UAQ's ruler. The chairman of Occidental then made a public statement accusing Buttes of having colluded with the ruler of Sharjah to backdate the decree to acquire for itself the benefit of the disputed location. Buttes sued the chairman and Occidental for defamation and Occidental pleaded justification and also counter-claimed for damages for conspiracy by Buttes and the ruler of Sharjah.

The House of Lords held that Occidental's defence and counter-claim must be stayed on the ground that they raised non-justiciability issues. In that event, the plaintiff also agreed to withdraw its claim. Lord Wilberforce, with whom the other members of the House of Lords agreed, held that there exists, apart from the act of state doctrine, 'a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states' which is based on 'judicial restraint or abstention' and is not discretionary but 'inherent in the very nature of the judicial process.'¹¹³ The idea here is that domestic courts are not empowered to adjudicate on the transactions of foreign states because there are 'no judicial or manageable standards' by which such courts could judge these issues.¹¹⁴ Consequently, even where such an issue arose in litigation between private parties, the court would be obliged to abstain from adjudication.

In the *Buttes* case, the House of Lords would have been required to determine whether Occidental had acquired a right to explore the contested area, which would also have required the Lords to determine the boundary of the continental shelf between both Emirates and Iran. The Lords would also have had to consider how Occidental had been deprived of those rights and, in particular, whether the acts of Sharjah were in breach of international law. According to Lord Wilberforce, these were not matters upon which a domestic court could pass judgment:

the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were 'unlawful' under international law.¹¹⁵

While 'lack of manageable standards' was identified as the primary basis of the rule of non-justiciability, at another point in his speech Lord Wilberforce

¹¹³ *Ibid* 931–2.

¹¹⁴ *Ibid* 931.

¹¹⁵ *Ibid* 938.

adverted to another ground: the risk of embarrassment to the amicable relations between governments if the acts of a sovereign state were examined by the courts of another.¹¹⁶ This basis identifies a rationale similar to that underlying the act of state doctrine: the need for comity between states, and also the reluctance of courts to trespass on matters of foreign policy for fear of alienating the executive branch. It is unclear to what degree the ‘embarrassment to the executive’ aspect formed part of the basis of the decision in *Buttes*, since the United Kingdom government made no submissions to the House of Lords as to its views on the matters for decision or the likely impact of adjudication upon its conduct of foreign policy. However, the involvement of the United Kingdom government in the negotiations surrounding the dispute certainly led some writers to suggest that the Lords were deterred by possible adverse executive reaction.¹¹⁷ Consequently, it would have been preferable for the Lords to seek the advice of the government on certain matters before declining to adjudicate.¹¹⁸

The House of Lords judgment in *Buttes* has attracted great controversy in relation to both the ‘lack of manageable standards’ and ‘embarrassment to the executive’ criteria. Taking the ‘lack of manageable standards’ issue first, on one view of this test, it would mean that the mere appearance of an issue of public international law involving a foreign state would require a court to abstain from adjudication.¹¹⁹ In a House of Lords case decided shortly after *Buttes*, the Lords appeared to adopt this wide view of the principle.

In *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry*,¹²⁰ the House of Lords refused to allow an action to be brought by private creditors against a number of states who were members of the International Tin Council, an organisation formed by treaty. The primary reason for the Lords’ decision was that an unincorporated treaty gives rise to no rights or obligations in an English court but, unhelpfully, the Lords also relied on the *Buttes* case as authority for the view that transactions of foreign states *generally* are not justiciable.¹²¹ As has been argued, however, if a lack of manageable standards exists whenever the transaction of a foreign state appears, a court could never adjudicate upon a matter involving a foreign state party.¹²² In effect, the principle of absolute state immunity would be rehabilitated through the non-justiciability doctrine — a result that has patently not occurred in English law.

Moreover, such a view would be in conflict with the principle that rules of public international law form part of English law in certain circumstances. For example, customary international law is directly incorporated into English law

¹¹⁶ *Ibid.*

¹¹⁷ See, eg, Lawrence Collins, ‘Foreign Relations and the Judiciary’ (2002) 51 *International and Comparative Law Quarterly* 485, 507–8.

¹¹⁸ See Mann, ‘Foreign Affairs in English Courts’, above n 3, 70.

¹¹⁹ J G Collier, ‘Transactions between States — Non-Justiciability — International Law and the House of Lords in a Judicial No-Man’s Land’ [1982] *Cambridge Law Journal* 18, 21.

¹²⁰ [1990] 2 AC 418 (*Tin Council*).

¹²¹ *Ibid* 519 (Lord Oliver).

¹²² See Crawford and Edson, above n 72, 84.

without the need for legislative adoption,¹²³ and unenacted treaties are a source of aid in interpreting statutes¹²⁴ and developing the common law.¹²⁵ While such cases may not involve adjudication upon the acts of a foreign state directly, they certainly contradict the view that the mere existence of an issue of public international law will be sufficient to present a lack of manageable standards for a domestic court. In any case, a domestic court pronouncing upon a matter of public international law will inevitably have an impact on foreign states, if only because all states are bound by public international law.

A more limited interpretation of ‘transactions of foreign states’ giving rise to a lack of manageable standards is therefore required. There is a strong body of opinion among writers that the test should only be satisfied where the relevant rule of public international law is unclear or difficult to determine.¹²⁶ Hence, in the *Buttes* case itself, it was perfectly understandable that an English court would hesitate before adjudicating upon questions of national boundaries between states — especially where the executive government had not offered an opinion on the issue because, for example, the matter was under diplomatic negotiation.¹²⁷ Domestic courts are likely to find it difficult to resolve questions of title to territory, particularly where the issue is accompanied by the use of force by states. However, the mere fact that a court has to determine whether a foreign state has infringed the terms of a treaty should no longer, by itself, be an automatic bar to adjudication. If a domestic court can apply the terms of a treaty to a fact situation not involving a foreign state, the presence of such an entity — either as a defendant or in the background to a dispute entirely between private parties — should not alter the position.¹²⁸ In such a case, the interests of private parties deserve priority of recognition.

Hence, a more limited view of ‘transactions of foreign states’ giving rise to a ‘lack of manageable standards’ is advocated. Support for this view can be found in more recent English decisions, in particular, the decision of the House of Lords in *Kuwait Airways [Nos 4 and 5]*. In that case, it will be recalled, the House of Lords rejected IAC’s argument that its acts of retention and use of the aircraft in Iraq were unreviewable due to the act of state doctrine. The Lords held that such a principle did not apply where the acts of the foreign state were in breach of clear and fundamental rules of public international law as articulated by the United Nations Security Council. The same reasoning was used to defeat the further argument of non-justiciability; there could be no ‘lack of manageable standards’ where the relevant international law norm (the prohibition on the use of force) formed part of the *Charter of the United Nations*, had the character of *jus cogens* and was supported by ‘universal consensus on the illegality of Iraq’s

¹²³ *Trendtex* [1977] QB 529, 553–4 (Lord Denning MR).

¹²⁴ See, eg, *R v Secretary of State; Ex parte Brind* [1991] 1 AC 696.

¹²⁵ *Malone v Metropolitan Police Commissioner [No 2]* [1979] Ch 344.

¹²⁶ See, eg, Eng-Lye Ong, ‘Non-Justiciability in Private International Law: Principle or Discretion?’ (2002) 31 *Common Law World Review* 35; Hazel Fox, *The Law of State Immunity* (2002) 494; Collins, above n 117, 507–8.

¹²⁷ Collins, above n 117, 507–8.

¹²⁸ See Lindell, ‘The Justiciability of Political Questions’, above n 72, 241.

aggression'.¹²⁹ The non-justiciability principle did not require the judiciary to 'shut their eyes to a breach of an established principle of international law committed by one state against another when the breach is plain and indeed acknowledged.'¹³⁰

The House of Lords judgment in *Kuwait Airways [Nos 4 and 5]* represents a great departure from the wariness towards public international law evident in *Buttes* and *Tin Council*. Henceforth, where the international law principles are clear, 'fundamental' and easy to apply, there can be little objection to adjudicating a matter simply because it involves a transaction of foreign states. Hopefully courts in later cases will not see *Kuwait Airways [Nos 4 and 5]* as an exceptional case with unusual facts, but one marking a new liberal period in the treatment of claims against foreign states involving international law issues.

Three recent English decisions suggest a trend in this direction. In *Abbasi v Secretary of State for Foreign and Commonwealth Affairs*¹³¹ and *Jones* the Court of Appeal held, respectively, that claims against foreign states for breaches of 'fundamental human rights'¹³² and for violations of 'universally recognised norms of international law'¹³³ are not barred by the non-justiciability rule. Manageable standards were said to exist in the norms themselves¹³⁴ and also in the fact that the court must perform an analogous task in other contexts — for example, where a court has to determine whether an applicant for asylum has a well-founded fear of persecution if removed to another country.¹³⁵ Claims for violations of human rights may therefore be added to the list of fundamental norms of international law which are now justiciable.

More recently, in *Occidental Exploration & Production Co v Republic of Ecuador*,¹³⁶ the English Court of Appeal had to consider a challenge to an arbitration award based on a lack of jurisdiction of the arbitrators where the arbitration had been conducted under the terms of a bilateral investment treaty ('BIT') that was not incorporated in English law. The defendant objected that the applicant's jurisdictional challenge would require the Court to interpret the BIT in breach of the rule against non-justiciability. The Court rejected this argument, noting first that the principle of non-justiciability was not an absolute rule.¹³⁷ Moreover, the rule did not apply for two reasons. The first was because of the 'special character' of a BIT, which created an enforceable arbitration agreement between an investor who was a national of a state party, and the other state party.¹³⁸ Such an agreement is recognised under English principles of private

¹²⁹ *Kuwait Airways [Nos 4 and 5]* [2002] 2 AC 883, 922 (Lord Steyn).

¹³⁰ *Ibid* 903 (Lord Nicholls).

¹³¹ [2002] EWCA Civ 1598 (Unreported, Lord Phillips MR, Waller and Carnwath LJ, 6 November 2002) ('*Abbasi*').

¹³² *Ibid* [1] (Lord Phillips MR).

¹³³ [2005] QB 699, 740 (Mance LJ).

¹³⁴ *Ibid* 740, 749.

¹³⁵ *Abbasi* [2002] EWCA Civ 1598 (Unreported, Lord Phillips MR, Waller and Carnwath LJ, 6 November 2002) [53] (Lord Phillips MR).

¹³⁶ [2005] EWCA Civ 1116 (Unreported, Lord Phillips MR, Clarke and Mance LJ, 9 September 2005).

¹³⁷ *Ibid* [31] (Mance LJ).

¹³⁸ *Ibid* [32].

international law and, because the designated seat of arbitration was London, gave rise to enforceable rights under the *Arbitration Act 1996* (UK) c 23 in an English court. So, because the BIT involves a ‘deliberate attempt to ensure for private investors the benefits and protection of consensual arbitration’, domestic courts should give effect to this goal by not applying the *Buttes* principle of abstention.¹³⁹

Secondly, the Court felt there was nothing in the subject matter of the dispute in the present case (namely the jurisdiction of the arbitral tribunal or the substance of the investors’ claims) that raised anywhere near the same difficulties of adjudication as were presented in *Buttes*. There was therefore no ‘lack of manageable standards’ present to deter the Court.¹⁴⁰

The second strand of the *Buttes* principle — that is the risk of embarrassment to the executive — also raises difficult problems, if only because courts can be expected to defer to their own government on sensitive matters such as foreign policy and national security. Yet it is a real risk that the width of this principle could be used to exclude any matter involving a foreign state on the basis that the action has even a slight concern to the executive. Such an outcome would obviously be injurious to private rights and again operate as a form of immunisation of foreign state activity. Fortunately, in the English decisions since *Buttes*, the question of embarrassment has only been raised once and rejected.

In *Kuwait Airways [Nos 4 and 5]*, IAC argued that the House of Lords should abstain from adjudication on the basis that the matters were non-justiciable. As noted above, the principal reason for rejection of this plea was that there was no ‘lack of manageable standards’, given the clear and unambiguous statement of international law by the Security Council.¹⁴¹ However, this fact also destroyed any argument of embarrassment to the United Kingdom executive; it had supported the Security Council’s position as a permanent member and so could be expected to have no objection to the Lords adjudicating the matter. It is hoped that the executive maintains a liberal posture in future English cases involving adjudication upon the acts of foreign states.

Having considered the position in England and concluded that the non-justiciability doctrine is quite clearly in decline, an examination must now be made of the Australian decisions to see if a similar trend is present. A first point to note is that although it has been suggested by writers¹⁴² that the High Court clearly endorsed the non-justiciability principle in *Spycatcher*, consideration of the judgment shows that although *Buttes* was cited, it appears to have only been in reference to the act of state doctrine, rather than non-justiciability as such.¹⁴³

¹³⁹ Ibid.

¹⁴⁰ Ibid [42].

¹⁴¹ See above nn 100–7 and accompanying text.

¹⁴² See, eg, Lindell, ‘Judicial Review of International Affairs’, above n 72, 192.

¹⁴³ *Spycatcher* (1988) 165 CLR 30, 40 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ).

However, what is clear is that in later decisions Australian courts have enthusiastically endorsed the non-justiciability principle, although at times in a disturbingly broad way.

For example, in *Minister for Arts, Heritage and Environment v Peko-Wallsend* — a case not involving review of acts of a foreign state — two judges of the Federal Court referred to *Buttes* as authority for the view that ‘issues arising out of international relations have widely been regarded as non-justiciable’.¹⁴⁴ Obviously, on this view, any action at all involving a foreign state could be excluded from adjudication, which would be highly unjust to private claimants in Australian courts.

Similar expansionist tendencies can be seen in *Dagi* and *Petrotimor*. In *Dagi*, it will be recalled that the Supreme Court of Victoria refused to admit a claim by Papua New Guinean residents against BHP because it would have required determination of whether the Papua New Guinean government had committed a breach of trust within its territory and so engaged the act of state doctrine. Furthermore, Byrne J said:

In a case such as the present where the beneficiaries are residents of a foreign State with whose interests it may be supposed the sovereign of that State is concerned qua sovereign, it is in my opinion an area where this court should abstain from entering upon.¹⁴⁵

Buttes was cited as authority for this proposition, which suggests that in every case where the interests of both a foreign state and its residents are involved, no suit is admissible. It is frankly hard to see why such facts alone create a ‘lack of manageable standards’ or embarrassment to the Australian executive in terms of the *Buttes* principle (especially in the absence of evidence from the executive). Obviously, the Court is again taking a much broader view of the *Buttes* abstention doctrine, in a similar manner to the Federal Court in *Peko-Wallsend*.

Non-justiciability was also a basis for the Federal Court refusing to adjudicate the claim in *Petrotimor*. It will be recalled that the plaintiff Portuguese company’s claim was for expropriation of its rights as a concession-holder by the Australian government’s entering into the *Timor Gap Treaty* with Indonesia and granting concessions to other companies, in conflict with the plaintiff’s concession. As noted above, the Court rather dubiously relied upon the act of state doctrine to defeat the plaintiff’s claim, but it also relied on the *Buttes* principle.

The Court’s application of *Buttes* was not altogether clear. On the one hand, it emphasised that merely having to interpret the terms of a treaty (in this case art 6 of the *Geneva Convention on the Continental Shelf*)¹⁴⁶ and to determine the extent of Australia’s claim to the contested area, while ‘extremely difficult’, was not non-justiciable.¹⁴⁷ Presumably the Court felt that consideration of the terms of a treaty did not, by itself, raise a ‘lack of manageable standards’ in the terms of *Buttes*. This view is encouraging because it suggests that an Australian court

¹⁴⁴ (1987) 15 FCR 274, 307 (Wilcox J, Bowen CJ agreeing) (*Peko-Wallsend*’).

¹⁴⁵ *Dagi* [1997] 1 VR 428, 453 (Byrne J).

¹⁴⁶ Opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964).

¹⁴⁷ *Petrotimor* (2003) 126 FCR 354, 370 (Black CJ and Hill J).

will not abstain from adjudication merely because the transactions of states, or public international law questions more generally, are involved.

Such a view is consistent with the recent trend in Australian cases to rely upon unincorporated treaties to interpret ambiguous legislation,¹⁴⁸ develop the common law,¹⁴⁹ or interpret administrative discretions.¹⁵⁰ As argued earlier when examining the English decisions, if international law instruments may be used for such purposes, it seems hard to argue that the mere presence of a foreign state in the background to the litigation should immediately create a lack of manageable standards where none previously existed.

The Federal Court in *Petrotimor* then went on to apply the second limb of *Buttes* — risk of embarrassment to the executive — to deny adjudication. However, unlike *Buttes*, evidence from government officials was admitted to show that any consideration of the question of Australia's territorial boundaries in relation to the continental shelf under international law would not only cause embarrassment between Australia and Portugal, but also between Australia and East Timor.¹⁵¹ While it was argued above that the mere presence of a public international law question involving a foreign state should not have been sufficient to exclude adjudication, once the views of the executive were made known and expressed in strong terms, it was almost inevitable that the Court would abstain. Unlike in *Buttes*, where the Court may have been influenced by possible adverse reaction from the executive, here the concern was clearly articulated.

Finally, the Court rejected the view that *Kuwait Airways [Nos 4 and 5]* pointed in favour of adjudication: the decision was plainly distinguishable, according to the Court, because of the fundamental breaches of international law involved in that case.¹⁵² This justification seems curious. It is true that *Kuwait Airways [Nos 4 and 5]* was distinguishable from *Petrotimor*, but surely for the much simpler reason that the forum's executive in *Kuwait Airways [Nos 4 and 5]* expressed no objection to adjudication. No doubt this was due in part to the unanimity of attitudes on the United Nations Security Council to Iraq — there was simply no scope for 'embarrassment' in *Kuwait Airways [Nos 4 and 5]*.

The defence of non-justiciability was also recently raised in *Victoria Aircraft Leasing*. It will be recalled that this case involved an action by a United States party to recover an aircraft leased to the Nauruan government. The Nauruan government purported to join the United States government as a third party but, as noted above, the United States was able to claim foreign state immunity. At

¹⁴⁸ *Dietrich v The Queen* (1992) 177 CLR 292, 307 (Mason CJ and McHugh J).

¹⁴⁹ *Ibid* 321 (Brennan J); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 499 (Mason CJ and Toohey J).

¹⁵⁰ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1. However, an undertaking given by a foreign state to the Australian government pursuant to an unincorporated extradition treaty not to execute a person may not be challenged in an Australian court. Such an undertaking does not create a 'legally enforceable obligation', and so a 'lack of manageable standards' exists: see *McCrea v Minister for Customs and Justice* [2005] FCAFC 180 (Unreported, Black CJ, Finkelstein and Finn JJ, 30 August 2005) [19].

¹⁵¹ *Petrotimor* (2003) 126 FCR 354, 370 (Black CJ and Hill J).

¹⁵² *Ibid* 372.

first instance, the trial judge also upheld an argument that the claim against the United States was non-justiciable on the basis that the allegations raised ‘could embarrass the court or prejudice the relationship between Australia and each of the foreign states’.¹⁵³ Such allegations concerned ‘international issues which were subject to international treaties and obligations including intelligence, international security, national interest, anti-corruption, anti-money laundering and anti-terrorism’.¹⁵⁴

While it is true that such matters may be embarrassing to the states involved, that may be the case when any transaction of a foreign state is subjected to scrutiny. It is suggested that the trial court in *Victoria Aircraft Leasing* may have been unwise to accept this assertion at face value in the absence of clear guidance from the Australian government (as in *Petrotimor*). However, given that the United States was found to be immune in any event from the jurisdiction of the Court, the conclusion on non-justiciability was strictly obiter.

Interestingly, however, in subsequent proceedings the defendant Nauruan corporation sought to rely on the Court’s finding of non-justiciability to defeat the plaintiff’s claim. While both the trial court¹⁵⁵ and the Court of Appeal¹⁵⁶ confirmed that the defendant’s defence and counter-claim raised non-justiciable issues, there was an insufficiently clear connection between the issues and the plaintiff’s claim to justify a stay of the action. The trial court conducted a much more thorough investigation of the justiciability issue in the second hearing than it had in the earlier proceeding, concluding instead that the counter-claim raised issues that were not ‘susceptible of resolution by reference to judicial standards’.¹⁵⁷ The Court of Appeal agreed with the trial judge’s analysis, finding that issues relating to the ‘subject-matter of the negotiations between Nauru and the United States’¹⁵⁸ would be raised, as well as questions such as

whether Nauru [had] adequately reformed its banking regime and appropriately co-operated with the United States in detecting and dealing with the activity of terrorists, and whether the United States’ plan to facilitate the defection of a North Korean scientist ... was in fact implemented ... All such matters would take the court into uncharted waters in [which] there are no judicial standards’.¹⁵⁹

Note that both the trial court and the Court of Appeal made no reference to concerns of embarrassment to the executive, which is appropriate given that the views of the executive had not been sought and so any reliance on such a criterion could only have been speculative. The application of the ‘lack of manageable standards’ test would appear justified here, given the highly politi-

¹⁵³ *Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Ltd* (2004) 185 FLR 48, 59 (Dodds-Streton J).

¹⁵⁴ *Ibid* 58.

¹⁵⁵ *Wells Bank National Association v Victoria Aircraft Leasing Ltd [No 2]* [2004] VSC 341 (Unreported, Dodds-Streton J, 9 September 2004).

¹⁵⁶ *Victoria Aircraft Leasing Ltd v United States* (2005) 218 ALR 640.

¹⁵⁷ *Wells Bank National Association v Victoria Aircraft Leasing Ltd [No 2]* [2004] VSC 341 (Unreported, Dodds-Streton J, 9 September 2004) [110] (Dodds-Streton J).

¹⁵⁸ *Victoria Aircraft Leasing Ltd v United States* (2005) 218 ALR 640, 647 (Buchanan JA).

¹⁵⁹ *Ibid* 647–8 (Buchanan JA).

cised nature of the issues and the impossibility of resolving such matters according to legal principles in domestic courts.

Nevertheless, both the trial and appeal courts, despite finding the defendant's pleadings non-justiciable, allowed the plaintiff's claim to proceed. In this case, the plaintiff's claims were unconnected with the issues raised by the defendant: the plaintiff was simply seeking recovery under the contract of loan and mortgage and, strictly speaking, the United States or any conduct by it was irrelevant. The Court of Appeal had some sympathy with the defendant in that it would have to meet the plaintiff's case without being able to rely on the Nauru–United States transaction. However, any such unfairness was outweighed by the injustice to the plaintiff, who had no 'responsibility' for, and 'played no part in the dealings between Nauru and the United States'.¹⁶⁰ Any allegation against the United States could not therefore be laid against the plaintiff.

The Court's judgment is to be commended, particularly in its determination to confine the scope of the non-justiciability plea. What was essentially a claim by a private party, according to principles of private law, should not be obstructed by concerns arising from foreign state interests. So, while non-justiciability was justifiably found in relation to the issues involving the United States government, it would have been unfair to use such a finding to decline adjudication in insufficiently related litigation.

To conclude on non-justiciability, it suffers from some of the same problems as the act of state doctrine in that it duplicates other doctrines of abstention, has the potential to shield much foreign state activity from domestic adjudication at the expense of private claimants, and is not required by public international law. However, on balance, the doctrine appears justified where the matters before the court are not easily susceptible to resolution by a domestic court given their highly politicised nature or because they are the subject of pending diplomatic negotiations. Furthermore, in the Australian constitutional system of government, the tradition of separation of powers is strong, with the responsibility for conduct of foreign policy clearly residing with the executive branch. Consequently, where real, as opposed to speculative, harm to the interests of the executive is expressed, a court will legitimately hesitate before adjudicating. However, it should be mindful of the impact on private rights in taking such a course.

V CONCLUSION

As mentioned at the outset of the article, in a world of increasing cross-border adjudication involving private parties, government entities and non-government organisations, strong justification must be made for retaining rules which favour one player over others. As has been argued, the doctrines of foreign state immunity, act of state, and non-justiciability combine to confer a powerful protection on foreign states from Australian court review, often at the expense of private parties' rights. Principles of personal jurisdiction and appropriate forum, by contrast, provide much wider scope for accommodating the interests of

¹⁶⁰ Ibid 649.

diverse parties in transnational litigation and for achieving much greater equality between the parties, as was noted most recently by the English Court of Appeal in *Jones*. Australian law would therefore be enhanced by removing the defences of foreign state immunity and act of state, although non-justiciability should be retained for exceptional cases. One thing is clear though: the time of the 'sacrosanctity'¹⁶¹ of foreign states is over — domestic courts must accept that they have a duty to decide cases presented before them and as part of that duty they must strive equitably to take into account all interests in the litigation.

¹⁶¹ Mann, *Studies in International Law*, above n 87, 420.