

# NON-JUSTICIABILITY IN AUSTRALIAN PRIVATE INTERNATIONAL LAW: A LACK OF ‘JUDICIAL RESTRAINT’?

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*The involvement of foreign states in domestic courts sits at the intersection between private and public international law. Whilst courts are becoming increasingly prepared to defer underlying notions of sovereignty and territoriality to protect private rights, they remain at times hesitant in adjudicating on matters concerning foreign states. The doctrine of non-justiciability affords protection to both foreign states and the forum executive in determining that courts will not adjudicate on the transactions of foreign states. This article examines the doctrine as adopted in the United Kingdom and applied in Australia, as well as the political question doctrine of the United States and the merits-based approach followed in Canada. The article argues that foreign states are no longer sacrosanct in Australian courts, and a correct understanding of executive certification and the Australian executive’s prerogative in foreign affairs ameliorates the need for the doctrine.*

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## I INTRODUCTION

In a globalised world, where international trade and commerce is unexceptional, so too is the expectation that courts will be at the service of litigants. Be they individuals, multinational corporations or governments, confidence in access to courts when disputes arise is often of great reassurance when parties enter into cross-border transactions. Occasionally, these disputes

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involve issues of concern to states, much as they might concern others not privy to those transactions. Despite this, parties operating on a global stage would rightfully expect their interests and, where necessary, vindication of their private rights, to be prioritised over these concerns on a level playing field in the courts. Any doctrine obstructive of these expectations would require strong justification.

In *Buttes Gas and Oil Co v Hammer (No 3)*,<sup>1</sup> the House of Lords articulated a doctrine of non-justiciability. Pursuant to this doctrine, a court may abstain from adjudication in cases touching on issues involving foreign states on either of two accounts: that there are ‘no judicial or manageable standards’ by which a court can judge those issues; or because adjudication of such issues would cause ‘embarrassment’ to the forum’s executive.<sup>2</sup> The doctrine is one of private international law, but sits uneasily at the intersection with public international law. Whilst courts were once predisposed to uphold notions of state sovereignty and territoriality, they are becoming increasingly reluctant to do so, particularly when the enforcement of private rights is at stake.<sup>3</sup> In this context the doctrine has attracted substantial criticism, which is hardly surprising given that it can render litigation between private parties non-justiciable.<sup>4</sup> Despite these criticisms, this approach has been applied in Australia.<sup>5</sup> In analysing that application, this article doubts the desirability of the doctrine.

It will be argued that the doctrine of non-justiciability, in seeking to protect both the forum executive and the interests of foreign states, undermines private rights and weakens the separation of powers. In so doing, the article will unpack the assumptions underlying Australian courts’ hesitation to adjudicate on matters involving foreign states. This hesitation has manifested itself in the notion that, in the area of foreign relations, the executive and judiciary should speak with ‘one voice’, even if this means that the enforceability of legal claims might rest on executive discretion. It will be argued that a correct understanding of the Australian Executive’s prerogative, including the practice of executive certification, reveals this notion as unsolicited complicity, which, in purporting to uphold the separation of powers, can lead to its flagrant breach. While there are other instances in which the subject matter of a dispute might render it

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<sup>1</sup> [1982] AC 888 (*Buttes*).

<sup>2</sup> *Ibid* 938.

<sup>3</sup> See, eg, *SA General Textiles v Sun and Sand Agencies Ltd* [1978] QB 279; *Ayres v Evans* (1981) 39 ALR 129.

<sup>4</sup> See, eg, J G Collier, ‘Transactions between States — Non-Justiciability — International Law and the House of Lords in a Judicial No-Man’s Land’ (1982) 41 *Cambridge Law Journal* 18; Frederick A Mann, *Foreign Affairs in English Courts* (1986) 27–31, 47–8, 69–71; Eng-Lye Ong, ‘Non-Justiciability in Private International Law: Principle or Discretion?’ (2002) 31 *Common Law World Review* 35, 40–1; Richard Garnett, ‘Foreign States in Australian Courts’ (2005) 29 *Melbourne University Law Review* 704, 724–31; but see I A E Insley and Frank Wooldridge, ‘The Buttes Case: The Final Chapter in the Litigation’ (1983) 32 *International and Comparative Law Quarterly* 62, 78–81.

<sup>5</sup> *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354 (*Petrotimor*); *Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Ltd (No 2)* VSC 341 (Unreported, Dodds-Streeton J, 9 September 2004); *Victoria Aircraft Leasing Ltd v United States* (2005) 190 FLR 351; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 (Unreported, Allsop J, 27 May 2005).

non-justiciable, these will not be investigated;<sup>6</sup> nor will the elusive meaning of justiciability.<sup>7</sup> In cases attracting the application of the doctrine, courts have jurisdiction, but perceive that some issues involving foreign states are of such magnitude that they are not fit for judicial determination.<sup>8</sup>

This article begins by describing how foreign states already play a legitimate role in Australian courts. Then, it examines the doctrine as adopted in the United Kingdom, as well as the political question doctrine of the United States and the merits-based approach of Canada. Next, it explains the prerogative of the Australian Executive, including the use of executive certificates in courts. Finally, in analysing the two strands of the doctrine of non-justiciability, it suggests that these executive certificates can ameliorate a ‘lack of manageable standards’, and that executive ‘embarrassment’ is neither reasonable nor sufficient to deny adjudication. Confidence in the ability to assert private rights should advance in a world of transnational litigation. Accordingly, the attendant influence of foreign state interests must retreat.

## II FOREIGN STATES IN THE CONFLICT OF LAWS

### A *Foreign State Defendants*

The days where foreign states were sacrosanct in court proceedings are times past.<sup>9</sup> Foreign states do not enjoy any special treatment in the application of principles of personal jurisdiction and appropriate forum. Plaintiffs in Australian courts are able to serve proceedings on a foreign state, effected through the Department of Foreign Affairs and Trade.<sup>10</sup> This formality aside, the procedure to authorise service out of jurisdiction over a foreign state is then the same as that which would apply to any defendant situated outside of Australia in cases where prior leave of the court is required.<sup>11</sup>

If there exists a basis for service out,<sup>12</sup> then the court must be persuaded by the plaintiff that it is not a ‘clearly inappropriate forum’ in which to hear the

<sup>6</sup> Non-justiciability is used in a number of other contexts in Australian law: see, eg, Cheryl Saunders, ‘The Concept of Non-Justiciability in Australian Constitutional Law’ in Denis J Galligan (ed), *Essays in Legal Theory* (1984) 29; Chris Finn, ‘The Justiciability of Administrative Decisions: A Redundant Concept?’ (2002) 30 *Federal Law Review* 239.

<sup>7</sup> The term justiciability is not readily defined and is used in a number of senses: see Geoffrey Lindell, ‘The Justiciability of Political Questions: Recent Developments’ in Hoong Phun Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992) 180, 182–91; see also Sir Anthony Mason, ‘The High Court as Gatekeeper’ (2000) 24 *Melbourne University Law Review* 784, 787–8.

<sup>8</sup> See also Lindell, ‘The Justiciability of Political Questions’, above n 7, 183. For a judicial application of this approach, see *Petrotimor* (2003) 126 FCR 354, 410–16 (Beaumont J).

<sup>9</sup> See generally Frederick A Mann, *Studies in International Law* (1973) 420–65.

<sup>10</sup> *Foreign States Immunities Act 1985* (Cth) s 24. Unless the foreign state has agreed on an alternative method of service, all other purported service is ineffective: ss 23, 25.

<sup>11</sup> *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 564 (‘*Voth*’). For common law service out of the jurisdiction, leave is not required: at 564 (Mason CJ, Deane, Dawson and Gaudron JJ).

<sup>12</sup> For common bases for service out of jurisdiction, see Peter E Nygh and Martin Davies, *Conflict of Laws in Australia* (7<sup>th</sup> ed, 2002) 58–75.

case.<sup>13</sup> Whilst the court might consider interests of foreign state defendants in applying this test, those interests are not determinative of the matter, and other relevant factors will be taken into account. These include the connections with the applicable law;<sup>14</sup> the availability of relief in a foreign forum;<sup>15</sup> the location of the parties and the evidence;<sup>16</sup> and any relevant personal or juridical advantages available in the forum.<sup>17</sup> Even if the foreign state defendant applies to seek a stay of proceedings on the basis that the Australian court is clearly inappropriate, the same factors will be weighed in the balance to decide whether one should be granted.<sup>18</sup>

This highlights the role of the courts in adjudicating legitimate disputes involving private litigants. Courts will not deny jurisdiction simply because a foreign state is named as defendant. If these requirements of personal jurisdiction and appropriate forum are satisfied, then a plaintiff is able to proceed with an action against a foreign state in an Australian court.<sup>19</sup> This approach is congruent with the realisation that it is ‘not every impleading of a sovereign that requires judicial restraint or gives rise to a legitimate fear of giving offence’.<sup>20</sup> As with private litigants, foreign states are also legitimate players in the litigation process. Consequently, where jurisdiction exists, the courts should entertain disputes that come before them.

### B Paradoxical Treatment of Foreign Laws and Interests

In certain situations, Australian law excludes the application of foreign laws and interests. Policy considerations in the conflict of laws determine that courts will not allow an assertion of authority by a foreign state within that court’s

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<sup>13</sup> *Voth* (1990) 171 CLR 538; see also *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; *Puttick v Tenon Ltd* (2008) 250 ALR 582. The ‘clearly inappropriate forum’ test has been criticised as ‘internally inconsistent’ and as encouraging forum shopping: see *ibid*, 129–30. See also, Richard Garnett, ‘Stay of Proceedings in Australia: A “Clearly Inappropriate” Test?’ (1999) 23 *Melbourne University Law Review* 30; Geoffrey Lindell, ‘*Regie National des Usines Renault SA v Zhang* — Choice of Law in Torts and Another Farewell to *Phillips v Eyre* but the *Voth* Test Retained for *Forum Non Conveniens* in Australia’ (2002) 3 *Melbourne Journal of International Law* 364, 375–82; but see Peter Prince, ‘Bhopal, Bougainville and OK Tedi: Why Australia’s *Forum Non Conveniens* Approach Is Better’ (1998) 47 *International and Comparative Law Quarterly* 573. In the UK, local proceedings will be stayed where the defendant can show that a foreign tribunal is a ‘more appropriate forum’: *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460, 477–8.

<sup>14</sup> *Voth* (1990) 171 CLR 538, 565–6; *Henry v Henry* (1996) 185 CLR 571, 589.

<sup>15</sup> *Voth* (1990) 171 CLR 538, 558–9.

<sup>16</sup> *Ibid* 570–1.

<sup>17</sup> *Ibid* 564–5.

<sup>18</sup> If the action and parties have little or no connection with the Australian forum, then a stay might be granted. See, eg, *Adeang v The Nauru Phosphate Royalties Trust* (Unreported, Supreme Court of Victoria, Hayne J, 8 July 1992); *Williams v The Society of Lloyd’s* [1994] 1 VR 274; *Bank of America v Bank of New York* [1995] ATPR ¶41-390; *Laminex (Australia) Pty Ltd v Coe Manufacturing Co* (Unreported, Supreme Court of New South Wales, James J, 19 December 1997); *Seerederei Baco Liner GmbH v Owners of Ship ‘Al Aliyu’* [2000] FCA 656 (Unreported, Tamberlin J, 18 May 2000).

<sup>19</sup> It should be noted that, after *Voth*, granting a stay became an exception to the rule: Nygh and Davies, above n 12, 128. See further Garnett, ‘Stay of Proceedings in Australia’, above n 13.

<sup>20</sup> *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2001] 3 WLR 1117, 1203.

territory; to do so would be contrary to the concept of independent sovereignty.<sup>21</sup> In line with this broad policy, Australian courts will not enforce foreign laws that infringe domestic public policy,<sup>22</sup> involve the exercise of foreign governmental power,<sup>23</sup> or are of a penal or revenue-raising character.<sup>24</sup>

However, courts have become increasingly willing to compromise this ‘hands-off’ approach in order to differentiate between sovereign power and private rights, thereby prioritising the enforcement of the latter. Accordingly, a penal law involving punishment or retribution will not be enforced,<sup>25</sup> but one involving private rights, in particular the right of compensation, might be.<sup>26</sup> Likewise, an action will not necessarily be refused if private debts are being sought for the mere fact that the majority of these debts are owed to a foreign state which might benefit financially from judgment in the litigant’s favour.<sup>27</sup> In these instances, courts recognise that the desire to exclude foreign sovereign power, and the maintenance of the principle of state sovereignty, should not hinder the vindication of private rights.

Despite these refusals to enforce foreign state interests, and the priority afforded to private rights, Australian law has remained stubbornly persistent in its maintenance of protection for some forms of foreign state interests. Again, a broader policy is manifest: courts are loath to infringe upon governmental sovereignty. A foreign state defendant can claim immunity from suit over its sovereign (but not commercial) activities, a principle of public international law codified in the *Foreign State Immunities Act 1985* (Cth).<sup>28</sup> Under the act of state doctrine, Australian courts may not pass judgment upon the acts of a foreign state within its own territory.<sup>29</sup> The rationale behind this doctrine is said to be comity based on ‘respect for the independence of every other sovereign state’.<sup>30</sup>

<sup>21</sup> *Government of India v Taylor* [1955] AC 491, 511 (Lord Keith). Related to the notion of independent sovereignty is the concept of comity. At one level, comity is a creature of private international law, developed to govern relations between different courts of foreign countries. It is a recognition ‘which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws’: *Hilton v Guyot*, 159 US 113, 163–4 (1895). However, it has been said that the notion of comity is meaningless and misleading: *Neilson v Overseas Projects Corp* (2005) 223 CLR 331, 363 (Gummow and Hayne JJ). Whilst the concept of comity might be seen to conflict with the idea that courts will not allow the assertion of a foreign state’s power beyond its borders, consideration of the role of comity in private international law is outside the scope of this article. So too is consideration of the enforcement and recognition of foreign judgments, and the role that comity plays in the underlying philosophy that Australian courts generally will not review the merits of foreign judgments.

<sup>22</sup> Nygh and Davies, above n 12, 345–50. For consideration of this, see *Stern v National Australia Bank* [1999] FCA 1421 (Unreported, Tamberlin J, 15 October 1999) [135]–[147].

<sup>23</sup> *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 43 (‘*Spycatcher*’); see also *A-G (New Zealand) v Ortiz* [1984] AC 1, 21 (Lord Denning MR).

<sup>24</sup> *Spycatcher* (1988) 165 CLR 30, 40–1 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ). See further Nygh and Davies, above n 12, 338–41.

<sup>25</sup> *Huntington v Attrill* [1893] AC 150, 156–8.

<sup>26</sup> *SA General Textiles v Sun and Sand Agencies Ltd* [1978] QB 279, 299 (Lord Denning MR); cf *Schemmer v Property Resources Ltd* [1975] Ch D 273, 288 (Goulding J).

<sup>27</sup> *Ayres v Evans* (1981) 39 ALR 129.

<sup>28</sup> *Foreign State Immunities Act 1985* (Cth) ss 3, 9, 11–13, 15.

<sup>29</sup> *Potter v Broken Hill Pty Co Ltd* (1906) 3 CLR 479.

<sup>30</sup> *Underhill v Hernandez*, 168 US 250, 252 (1897) (Fuller CJ); cited with approval by the High Court of Australia in *Spycatcher* (1988) 165 CLR 30, 40–1.

Pursuant to the *Moçambique* rule,<sup>31</sup> most Australian courts will not exercise jurisdiction in relation to an action involving title or trespass to foreign land.<sup>32</sup> Further, Australian courts give effect to governmental expropriations of assets situated in a foreign state, even where no compensation is provided.<sup>33</sup>

Collectively, these doctrines of abstention offer foreign states elements of protection not available to others in the litigation process. This gives rise to a paradoxical state of affairs: courts recognise the legitimacy of establishing jurisdiction over foreign state defendants, and the need to vindicate private rights, but might subsequently allow deference to foreign states to subordinate those very rights that gave rise to jurisdiction in the first place. Whilst at times courts are prepared to defer underlying notions of sovereignty and territoriality to defend private rights, subsequent indifference is apparent in the application of these doctrines of abstention.

Putting this paradox to one side, it appears that courts are becoming increasingly willing to attenuate this irregularity. The principle of restrictive state immunity has transformed foreign state immunity from 'absolute' to its displacement in relation to commercial activity.<sup>34</sup> Pursuant to this restriction, foreign states taking part in commercial transactions are placed on the same footing as private litigants.<sup>35</sup> There have also been attempts to find exceptions to the act of state doctrine. In *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*,<sup>36</sup> the House of Lords held that, as well as in cases where the application of this doctrine would be contrary to English public policy<sup>37</sup> (such as a grave infringement of human rights),<sup>38</sup> acts amounting to a clear breach of public international law should not be recognised.<sup>39</sup> In a similar vein, there have been palpable attempts to cut down the expropriation rule in relation to cases involving discriminatory expropriation of assets.<sup>40</sup> The High Court of Australia has also suggested that it may review the status of the *Moçambique* rule in an appropriate case.<sup>41</sup> Aside from these attenuations, Australian courts even have

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<sup>31</sup> *British South Africa Co v Companhia de Moçambique* [1893] AC 602.

<sup>32</sup> This rule has been abolished by statute in New South Wales: *Jurisdiction of Courts (Foreign Land) Act 1989* (NSW) s 3.

<sup>33</sup> *Spycatcher* (1988) 165 CLR 30, 41, 50; *Re Helbert Wagg & Co Ltd* [1954] Ch 323, 346 (Upjohn J)

<sup>34</sup> *Foreign State Immunities Act 1985* (Cth) ss 9, 11–13, 15. See also *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529; Nygh and Davies, above n 12, 148–56.

<sup>35</sup> One commentator has argued that foreign state immunity should be replaced either in whole or in part with a flexible discretionary test of personal jurisdiction and appropriate forum. See Richard Garnett, 'Should Foreign State Immunity Be Abolished?' (1999) 20 *Australian Year Book of International Law* 175; Richard Garnett, 'State Immunity Triumphs in the European Court of Human Rights' (2002) 118 *Law Quarterly Review* 367, 373; Garnett, 'Foreign States in Australian Courts', above n 4, 714.

<sup>36</sup> [2002] 2 AC 883.

<sup>37</sup> *Ibid* 1108 (Lord Hope).

<sup>38</sup> *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249, 277–8 (Cross LJ).

<sup>39</sup> *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1108–10 (Lord Hope), cited with approval in the Federal Court of Australia in *Petrotimor* (2003) 126 FCR 354, 372 (Black CJ and Hill J); see also *Hicks v Ruddock* (2007) 156 FCR 574, 583–4 (Tamberlin J).

<sup>40</sup> *Anglo-Iranian Oil Co Ltd v Jaffrate* [1953] 1 WLR 246 ('*The Rose Mary*'); see also *Williams and Humbert Ltd v W and H Trade Marks (Jersey) Ltd* [1986] AC 368, 429–30.

<sup>41</sup> *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 520 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

the power to issue an anti-suit injunction to restrain a party from suing in another forum: an indirect interference with a foreign court's processes.<sup>42</sup>

The increasing rate of litigation combined with greater expectations of litigants has rendered the traditional 'hands-off' approach of the courts to matters involving state sovereignty unsustainable. Judicial disguising of the key tenets of public international law behind private international law may have passed unnoticed when transnational litigation was uncommon. However, in a world where international trade and commerce is ubiquitous, it has become ever apparent that courts should be at the service of litigants, and political influence should not affect the fulfilment of private rights.

The rising number of cross-border conflicts increases the probability that the protections afforded will be manipulated by defendants. Whilst they might hope, at this intersection of private and public international law, that courts will cower behind political concerns, the choice between reverence of governmental sovereignty and the upholding of private rights is not as stark as it might once have been. In light of this, the foundations of these doctrines of abstention are by no means impermeable. To the extent that deference to the interests of foreign states affords protection in litigation, courts should be willing to remove this shield where it is not warranted.

### C *The Separate Doctrine of Non-Justiciability*

It is important not to view these protections afforded by the courts as positioned within a single colossal doctrine of abstention in this paradoxical haze. The merger of the act of state doctrine and the doctrine of non-justiciability has been evident in England,<sup>43</sup> despite Lord Wilberforce's concerns to keep them separate from and 'not as a variety' of each other.<sup>44</sup> In Australia, courts have considered whether the act of state and non-justiciability doctrines are not entirely separate, but rather 'interrelated'<sup>45</sup> — one a manifestation of the other.<sup>46</sup>

It is unhelpful to treat the two doctrines as such merely because of the presence of issues concerning foreign states. Whilst this might determine that the doctrines fall within the same paradigm, they are distinct in terms of their operation, inquiry, and consequence.<sup>47</sup>

The act of state doctrine operates in respect of legislative and executive acts, directing its inquiry towards the nature and site of the act in question, with the consequence that the court must treat an act of a foreign government within its own territory as valid (subject to certain exceptions).<sup>48</sup> In one case, an attempt in

<sup>42</sup> *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 391–3. See further Trevor C Hartley, 'Comity and the Use of Antisuit Injunctions in International Litigation' (1987) 35 *American Journal of Comparative Law* 487.

<sup>43</sup> See, eg, *Kuwait Airways Corp v Iraqi Airways Co* [1995] 1 WLR 1147, 1166 (Lord Goff); *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [2000] 1 AC 61, 102 (Lord Lloyd), 106–7 (Lord Nicholls); *R v Bow Street Metropolitan Stipendiary Magistrate and Others; Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 286 (Lord Phillips).

<sup>44</sup> *Buttes* [1982] AC 888, 931.

<sup>45</sup> *Hicks v Ruddock* (2007) 156 FCR 574, 582 (Tamberlin J).

<sup>46</sup> *Petrotimor* (2003) 126 FCR 354, 369 (Black CJ and Hill J).

<sup>47</sup> See also Ong, above n 4, 41–4.

<sup>48</sup> See above nn 38–39 and accompanying text.

England by former owners to reclaim goods confiscated in Russia by the Soviet Government was not permissible, because the acts of state occurred in that state's jurisdiction and could not be questioned by English courts.<sup>49</sup> In another, a ship whose title was transferred by the Ukrainian Government to itself by decree could not be used to satisfy an unpaid contractual claim against the former owner of the ship, because the court could not review the transfer as an act of the Ukrainian Government within its own territory.<sup>50</sup>

The doctrine of non-justiciability applies to issues such as disputes over territorial boundaries; directs its inquiry towards the nature of those issues and what their resolution would involve; and has the consequence of a court refusing to adjudicate because those issues exist. In one case, the court would not determine a dispute involving two oil companies operating in an area of contested sovereignty, because resolution of that dispute might have involved determining the boundaries of sovereign nations.<sup>51</sup>

Whilst the doctrine of non-justiciability might be seen as part of a package of foreign state protections, including foreign state immunity and act of state, consideration of the doctrine in isolation is justified because it exists on its own accord and, as these examples illustrate, it has a unique operation. Applications of the doctrine of non-justiciability have by themselves, without recourse to other doctrines of abstention, resulted in courts refusing to adjudicate cases.<sup>52</sup> Some commentators have advocated the abolition of the act of state doctrine,<sup>53</sup> and if this is to occur with greater ease, it is essential to keep the two doctrines conceptually separate. As will be shown, the doctrine of non-justiciability exists as a separate principle in an area where Australian courts have exhibited unprincipled approaches to abstention from adjudication.

### III TRANSACTIONS OF FOREIGN STATES IN DOMESTIC COURTS

#### A Comparative Approaches

Given the scarcity of autochthonous case law and commentary on the doctrine of non-justiciability in Australia,<sup>54</sup> it is appropriate to consider how similar

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<sup>49</sup> *Aksionairnoye Obschestvo A M Luther v James Sagor & Co* [1921] 3 KB 532.

<sup>50</sup> *Lloyd Werft Bremerhaven GmbH v Owners of the Zoya Kosmodemyanskaya* [1997] FCA 379 (Unreported, Tamberlin J, 15 May 1997).

<sup>51</sup> *Buttes* [1982] AC 888.

<sup>52</sup> See, eg, *ibid*; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 (Unreported, Allsop J, 27 May 2005).

<sup>53</sup> See, eg, Mann, *Studies in International Law*, above n 9, 420; Garnett, 'Foreign States in Australian Courts', above n 4, 722.

<sup>54</sup> Mention is made of the doctrine in Peter E Nygh, *Conflict of Laws in Australia* (6<sup>th</sup> ed, 1995) 129–30, where Nygh argued that if the doctrine 'exists at all', its application should be confined to transactions of a sovereign character, and not extend to mere commercial transactions between states. However, the following edition of that book contains no mention of the doctrine: Nygh and Davies, above n 12. It is uncertain whether this omission should be read as an affirmation that, in those authors' opinion, the doctrine does not exist. Other textbooks similarly make no mention of the doctrine: see Martin Davies, Sam Ricketson and Geoffrey Lindell, *Conflict of Laws: Commentary and Materials* (1997); Michael Tilbury, Gary Davis and Brian Opeskin, *Conflict of Laws in Australia* (2002); Reid G Mortensen, *Private International Law in Australia* (2006). In contrast, the doctrine is acknowledged and illustrated in the leading English textbook: Sir Lawrence Collins (ed), *Dicey, Morris and Collins, The Conflict of Laws* (2006) vol 2, 116–18.

doctrines operate in other jurisdictions. This part considers three approaches: first, the doctrine as espoused by the House of Lords in *Buttes* and applied in the UK; second, the political question doctrine of the US; and third, the merits-based approach of Canada, where no such doctrine of abstention exists.

### 1 *UK: The Doctrine of Non-Justiciability*

Before exploring the application of the doctrine of non-justiciability in the UK, reference to the facts of *Buttes* is necessary. The case involved two oil companies, *Buttes Gas and Occidental*, operating in the Persian Gulf under the territorial seas of Sharjah and Umm Al Qaiwain. In February 1970, Occidental found oil in an area of contested sovereignty between these two emirates and Iran. After intervention by the UK Government, including a display of military force, the ruler of Umm Al Qaiwain accepted a decree published by the ruler of Sharjah in April 1970. This decree was backdated to September 1969 and purported to extend Sharjah's territorial waters to include the contested area. After the ruler of Umm Al Qaiwain terminated the concession of Occidental, its chairman made a public statement accusing *Buttes* of using improper methods and colluding with the ruler of Sharjah. *Buttes* sued in defamation. Occidental pleaded justification and counterclaimed for damages for fraudulent conspiracy by *Buttes* and the ruler of Sharjah. After a lengthy litigation battle,<sup>55</sup> which also took place in the US (discussed below), the House of Lords stayed Occidental's defence and counterclaim and held *Buttes* to an agreement to withdraw its claim.<sup>56</sup>

Lord Wilberforce delivered the leading judgment with which all other members of the House agreed.<sup>57</sup> His Lordship decided that there was an 'effective and compelling' principle already in existence in English law, 'not ... of discretion, but ... inherent in the very nature of the judicial process'.<sup>58</sup> Following this principle, a domestic court deciding the issues in the *Buttes* litigation 'would be in a judicial no-man's land'.<sup>59</sup> The court would have to determine the boundaries between Sharjah, Umm Al Qaiwain and Iran; whether Sharjah had breached international law; and, if Occidental had rights to explore the contested area in the first place, whether it had been deprived of those rights. Their Lordships did not seek the advice of the UK Government on the issue of territorial recognition. Instead, Lord Wilberforce was concerned to avoid bringing the transactions of four sovereign states — which after the use of force and through diplomacy had been brought to a 'precarious settlement' — into the realm of judicial inspection.<sup>60</sup> On this basis, his Lordship enunciated and applied a doctrine of non-justiciability so that the House could avoid such scrutiny.<sup>61</sup>

<sup>55</sup> *Buttes* [1982] AC 888, 919–22; see also *Buttes Gas and Oil Co v Hammer* [1971] 3 All ER 1025; *Buttes Gas and Oil Co v Hammer* [1975] QB 557; *Buttes Gas and Oil Co v Hammer (No 3)* [1981] QB 223.

<sup>56</sup> *Buttes* [1982] AC 888, 938.

<sup>57</sup> The other concurring members of the House were Lord Fraser, Lord Russell, Lord Keith, and Lord Bridge.

<sup>58</sup> *Buttes* [1982] AC 888, 932.

<sup>59</sup> *Ibid* 938.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid*.

Lord Wilberforce relied on a hotchpotch of cases, which are hardly convincing to support ‘a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states’.<sup>62</sup> These cases are either readily explicable on other grounds,<sup>63</sup> or fall within the category of acts of state.<sup>64</sup> Lest this disparate collection be taken as evidence of the doctrine’s existence for over three centuries, the approach of Lord Wilberforce in ‘carry[ing] the doctrine of non-justiciability into a wider area of transactions in the international field’ should be seen for what it is: the first time an English court rendered non-justiciable a dispute based on a wide notion of judicial restraint in private international law.<sup>65</sup> Whilst some commentators advocated a confined interpretation of *Buttes* to its facts,<sup>66</sup> treatment of the decision has led to a distinctly separate doctrine.

Following *Buttes*, English courts utilised a wide application of the doctrine to justify the denial of adjudication. In refusing to allow an action to be brought by private creditors against certain member states of the International Tin Council (an organisation formed by treaty),<sup>67</sup> the House of Lords propounded the viewpoint that issues arising from transactions between states ‘are not issues upon which a municipal court is capable of passing’.<sup>68</sup> Taken to its logical extreme, on this view any case involving transactions of foreign states would attract the application of the doctrine, even in a dispute between private litigants. In *Westland Helicopters Ltd v Arab Organisation for Industrialisation*,<sup>69</sup> *Buttes* was cited as authority for the proposition that the determination of an issue of public international law, the result of which would likely affect foreign sovereign states, is not justiciable by English courts.<sup>70</sup> *Buttes* was relied upon as authority for a ‘broad’ principle of non-justiciability.<sup>71</sup> These augmentations of the doctrine based on this novel concept of ‘judicial restraint’ in private international law were not a welcome development for non-state litigants.

Fortunately, this initial extension has been confined and narrowed. In *R v Secretary of State for the Home Department, Ex parte Launder (No 2)*,<sup>72</sup>

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<sup>62</sup> Ibid 932–4.

<sup>63</sup> *Blad v Bamfield* (1674) 3 Swans 604. Mann explains this case as an example of the former use by the Lord Chancellor of the power to grant injunctions and a reluctance to allow juries to try questions of foreign and international law: Mann, *Studies in International Law*, above n 9, 424.

<sup>64</sup> *Duke of Brunswick v King of Hanover* (1848) 2 HLC 1; *Secretary of State of Council of India v Kamachee Boye Sahaba* (1859) 15 ER 9; *Underhill v Hernandez*, 168 US 250 (1897); *Cook v Sprigg* [1899] 1 AC 572; *Oetjen v Central Leather Co*, 246 US 297 (1918); *Luther v Sagor* [1921] 3 KB 532; *Princess Paley Olga v Weisz* [1929] 1 KB 718.

<sup>65</sup> *Buttes* [1982] AC 888, 933. Mann’s feelings about this case were revealed in a handwritten note on his own copy of *Foreign Affairs in English Courts*: ‘It was the House of Lords which lacked “judicial restraint”!’: Lawrence Collins, ‘Foreign Relations and the Judiciary’ (2002) 51 *International and Comparative Law Quarterly* 485, 510.

<sup>66</sup> See, eg, Lindell, ‘The Justiciability of Political Questions’, above n 7, 241–2; Mann, *Foreign Affairs in English Courts*, above n 4, 27.

<sup>67</sup> *International Organisations (Immunities and Privileges of the International Tin Council) Order 1956* (UK); *International Tin Council (Immunities and Privileges) Order 1972* (UK).

<sup>68</sup> *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 519 (Lord Oliver).

<sup>69</sup> [1995] QB 282.

<sup>70</sup> Ibid 292, 304–5 (Colman J).

<sup>71</sup> Ibid 292.

<sup>72</sup> [1998] QB 994.

examination of the internal authority of the chief executive of the Hong Kong Special Administrative Region, including his relations with the mainland Chinese Government, did not render non-justiciable a matter relating to extradition.<sup>73</sup> Similarly, at the trial stage of *Kuwait Airways Corp v Iraqi Airways Co*,<sup>74</sup> it was said that *Buttes* does not lead to an assumption that issues concerning foreign states are ‘automatically’ non-justiciable.<sup>75</sup> The Court of Appeal affirmed this judgment, and said that ‘in essence, the principle of non-justiciability seeks to distinguish disputes involving sovereign authority, which can only be resolved on a state-to-state level, from disputes which can be resolved by judicial means’.<sup>76</sup> Despite political sensitivities in a dispute between private litigants, a court can determine issues relating to it.<sup>77</sup> On appeal, the House of Lords agreed that the doctrine of non-justiciability is not a ‘categorical rule’.<sup>78</sup> On this view, notwithstanding the presence of issues of international law, courts should continue to hear cases on their merits. Despite traditional conflict of laws policy not to infringe the concept of independent sovereignty, these decisions evince a change in priorities where private rights are at stake, without any such infringement occurring.

Further evidence of this change was apparent in another case again involving Occidental in the English Court of Appeal, although, in this instance, the other party was a foreign state and not a company.<sup>79</sup> The Court construed a bilateral investment treaty not incorporated in English law as involving a ‘deliberate attempt to ensure for private investors the benefits and protection of consensual arbitration’.<sup>80</sup> An arbitration conducted under the terms of the treaty did not lead to a ‘lack of manageable standards’ to prevent adjudication, as the doctrine of non-justiciability was held not to be an absolute rule.<sup>81</sup> Here, the Court accorded prioritisation to the enforcement of private rights, rather than place the case in the ‘too hard’ basket and rely on ‘judicial restraint’ simply because the facts raised issues pertaining to public international law.

According with this trend, the doctrine of non-justiciability was not applied in *Re AY Bank Ltd (in liq)*.<sup>82</sup> That case involved several Balkan states and the liquidation of a bank incorporated in England in 1980 to encourage financial activities with the Socialist Federal Republic of Yugoslavia (‘SFRY’). Following the SFRY’s breakup, an Agreement on Succession Issues (‘ASI’) was concluded

<sup>73</sup> Ibid 1003–4 (Simon Brown LJ).

<sup>74</sup> [1999] CLC 31.

<sup>75</sup> Ibid 62 (Mance J).

<sup>76</sup> *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2001] 3 WLR 1117, 1203 (Henry, Brooke and Rix LJ).

<sup>77</sup> Ibid.

<sup>78</sup> *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1101 (Lord Steyn).

<sup>79</sup> *Republic of Ecuador v Occidental Exploration and Production Co* [2006] QB 432.

<sup>80</sup> Ibid 457. The designated seat of arbitration was London, which gave rise to rights enforceable in an English court under the *Arbitration Act 1996* (UK) c 23.

<sup>81</sup> *Republic of Ecuador v Occidental Exploration and Production Co* [2006] QB 432, 461. In further litigation the Republic of Ecuador applied to have the award made by arbitrators in favour of Occidental set aside for lack of substantive jurisdiction. This application was refused: *Ecuador v Occidental Exploration and Production Co* [2006] EWHC 345 (Comm); aff’d [2007] EWCA Civ 656.

<sup>82</sup> [2006] EWHC 830 (‘AY Bank’).

between successor states, and was subsequently binding after its registration with the United Nations.<sup>83</sup> Issues relating to proof of debt arose between those states and the Bank following the latter's voluntary liquidation. The High Court of England and Wales held that these were justiciable issues. They involved the application of English law and were issues of private law, because they affected the rights of both the Bank and other unsecured creditors.<sup>84</sup> This would not involve interpretation or enforcement of the ASI and so the case was an example of an area to which the doctrine of non-justiciability did not extend.<sup>85</sup>

These latter decisions are encouraging. The message the English courts are giving is clear: they will not tolerate slavish adherence to a doctrine unreasonably destructive of private rights. Instead, preference is accorded to the role of the courts in providing a forum for the resolution of disputes rather than reversion to traditional concerns of sovereignty and territoriality. Where private international law reaches the fringes of public international law, no longer will the derogation of private interests be permitted without cause. Whilst the seismic force of *Buttes* continues to reverberate — largely due to optimistic litigants striving to escape judicial accountability — this trend indicates that judicial reliance on the doctrine of non-justiciability appears to be in decline in the UK.<sup>86</sup>

## 2 US: *The Political Question Doctrine*

In the US, certain cases have been said to involve 'political questions' that are non-justiciable, as they are not a 'case or controversy' as defined in art 3 of the *US Constitution*. It is imperative to appreciate the context in which this doctrine has developed and is utilised. Whereas *Buttes* was decided in a case touching on issues concerning several foreign states, the political question doctrine has developed as a reaction to both internal and external circumstances. This recognition helps explain the greater width of the political question doctrine vis-à-vis the doctrine of non-justiciability. Whilst there is an argument that the political question doctrine comes from English precedent,<sup>87</sup> the following shows it to be premised upon concerns different from the contemporary *Buttes* doctrine.

The first articulations of the political question doctrine were evident at the turn of the 19<sup>th</sup> century. The US Supreme Court held that policy considerations in foreign relations make certain issues inappropriate for judicial hearing,<sup>88</sup> and questions of a political nature, or questions falling to the executive, are not to be decided in court.<sup>89</sup> However, those statements were not comprehensive, and

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<sup>83</sup> *Agreement on Succession Issues*, signed 29 June 2001, 2262 UNTS 253 (entered into force 2 June 2004) annex C.

<sup>84</sup> *AY Bank* [2006] EWHC 830 [57] (Sir Andrew Morritt).

<sup>85</sup> *Ibid.*

<sup>86</sup> See also Garnett, 'Foreign States in Australian Courts', above n 4, 727.

<sup>87</sup> Frankfurter J believed this to extend as far back as the 15<sup>th</sup> century: see *Coleman v Miller*, 307 US 433, 460 (1939), citing *Duke of York's Claim to the Crown* (1460) 5 Rot Parl 375.

<sup>88</sup> *Ware v Hylton*, 3 US 199 (1796).

<sup>89</sup> *Marbury v Madison*, 5 US 137, 170 (1803) (Marshall CJ).

uncertainty prevailed in respect of what the doctrine entailed.<sup>90</sup> In *Coleman v Miller*,<sup>91</sup> the US Supreme Court recognised that the doctrine was both part of the separation of powers as well as a limitation on judicial decisions.<sup>92</sup> Finally, in *Baker v Carr*,<sup>93</sup> Brennan J delivered a much needed modern restatement of a doctrine now felt to be ‘primarily a function of the separation of powers’.<sup>94</sup> Despite attempted reformulations, *Baker* remains the leading authority on the political question doctrine.<sup>95</sup>

Unlike in *Buttes*, the litigation in *Baker* did not involve foreign states or external considerations. Rather, the case concerned the alleged failure of the State legislature of Tennessee to follow its constitutional provisions on the apportionment of legislative districts.<sup>96</sup> The majority, led by Brennan J, felt that the case was not improper for trial.<sup>97</sup> Frankfurter J in dissent and joined by Harlan J,<sup>98</sup> vociferously stated that the case was ‘masquerading’ as a legal claim and was not justiciable ‘by virtue of the very fact that a federal court is not a forum for political debate’.<sup>99</sup> Frankfurter J was adamant that the courts, ‘possessed of neither the purse nor the sword’,<sup>100</sup> must remain completely detached from ‘political entanglements’ and abstain ‘from injecting [themselves] into the clash of political forces in political settlements’.<sup>101</sup> On this view, the role of the courts in hearing disputes would often be compromised — a very wide interpretation of judicial restraint.

Despite different results, Brennan and Frankfurter JJ did not disagree in the nature of the existence of the political question doctrine. In his Honour’s judgment, Brennan J pointed out that ‘it is [an] error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance’.<sup>102</sup> In his Honour’s view of cases that would fall outside the province of the courts, six factors are identifiable, the presence of one or more of which could render a case non-justiciable:

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<sup>90</sup> See also Maurice Finkelstein, ‘Judicial Self-Limitation’ (1924) 37 *Harvard Law Review* 338, 363; Melville Fuller, ‘Political Questions’ (1925) 38 *Harvard Law Review* 296, 302–6; Walter Dodd, ‘Judicially Non-Enforceable Provisions of Constitutions’ (1931) 80 *University of Pennsylvania Law Review* 54; Charles Post, *The Supreme Court and Political Questions* (1936).

<sup>91</sup> 307 US 433 (1939).

<sup>92</sup> *Ibid* 454–5 (Hughes CJ).

<sup>93</sup> 369 US 186 (1962) (*‘Baker’*).

<sup>94</sup> *Ibid* 210–11. See also *Texas Association of Concerned Taxpayers Inc v US*, 772 F 2d 163, 165 (1985); *Langenegger v US*, 756 F 2d 1565, 1570 (1985).

<sup>95</sup> See, eg, *Goldwater v Carter*, 444 US 996, 998 (1979) (Powell J):

the doctrine incorporates three inquiries: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?

<sup>96</sup> *Baker*, 369 US 186, 187–93 (1962).

<sup>97</sup> *Ibid* 226 (Brennan J); 241 (Douglas J, concurring), 251 (Clark J, concurring), 265 (Stewart J concurring).

<sup>98</sup> *Ibid* 330 (Harlan J).

<sup>99</sup> *Ibid* 297 (Frankfurter J).

<sup>100</sup> *Ibid* 267 (Frankfurter J).

<sup>101</sup> *Ibid*.

<sup>102</sup> *Ibid* 211 (Brennan J).

- 1 a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
- 2 a lack of judicially discoverable and manageable standards for resolving it; or
- 3 the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or
- 4 the impossibility of a court's undertaking independent resolution without expressing lack of the respect due [to] coordinate branches of government; or
- 5 an unusual need for unquestioning adherence to a political decision already made; or
- 6 the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>103</sup>

These factors are broad in scope, and could cover a wide range of cases. Since this pronouncement, there has been heavy criticism of the doctrine.<sup>104</sup> Some have suggested that it is in decline,<sup>105</sup> although some have advocated its retention.<sup>106</sup> Notably, many decisions, both pre- and post-*Baker*, on the political question doctrine involved considerations internal to the US. Many cases have no bearing on nor have any relation to transactions involving foreign states,<sup>107</sup> or to the extent that they do, this has often been in respect of attempts to alter the foreign policy of the US Government.<sup>108</sup> Whilst at times application of the doctrine may arise in relation to issues concerning foreign states, it is clear from these six factors that support for judicial restraint in private international law is not the political question doctrine's *raison d'être*.

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<sup>103</sup> Ibid 217.

<sup>104</sup> See, eg, Michael E Tigar, 'Judicial Power, The "Political Question Doctrine," and Foreign Relations' (1970) 17 *UCLA Law Review* 1135; Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 *Yale Law Journal* 597; Martin H Redish, 'Judicial Review and the "Political Question"' (1985) 79 *Northwestern University Law Review* 1031; Jonathan I Charney, 'Judicial Deference in Foreign Relations' (1989) 83 *American Journal of International Law* 805. Criticism has also been levelled at the doctrine in the Supreme Court of Canada. In *Operation Dismantle v The Queen* [1985] 1 SCR 441, 469–70 ('*Operation Dismantle*'), Wilson J said that Brennan J's statement in *Baker* was not helpful in determining when the six factors come into play. Her Honour said that past decisions of the US Supreme Court were highly embarrassing to those in the executive or legislature: see, eg, *Marbury v Madison*, 5 US 137, 170 (1803); *US v Nixon*, 418 US 683 (1974).

<sup>105</sup> See, eg, R Brook Jackson, 'The Political Questions Doctrine: Where Does It Stand after *Powell v McCormack*, *O'Brien v Brown*, and *Gilligan v Morgan*' (1973) 44 *University of Colorado Law Review* 477; Rachel E Barkow, 'More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy' (2002) 102 *Columbia Law Review* 237.

<sup>106</sup> See, eg, Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962) 183–98; J Peter Mulhern, 'In Defense of the Political Question Doctrine' (1988) 137 *University of Pennsylvania Law Review* 97; Jesse H Choper, 'The Political Question Doctrine: Suggested Criteria' (2005) 54 *Duke Law Journal* 1457.

<sup>107</sup> See, eg, *Powell v McCormack*, 395 US 486 (1969); *Gilligan v Morgan*, 413 US 1 (1973); *Consumers Union of US Inc v Periodical Correspondents' Association*, 515 F 2d 1341 (1975); *Metzenbaum v Federal Energy Regulatory Commission*, 675 F 2d 1282 (1982); *McIntyre v O'Neill*, 603 F Supp 1053 (1985); *Davis v Bandemer*, 478 US 109 (1986).

<sup>108</sup> See, eg, *Atlee v Laird*, 347 F Supp 689 (1972); *Holtzman v Schlesinger*, 414 US 1321 (1973); *Goldwater v Carter*, 444 US 996 (1979); *Ramirez de Arellano v Weinberger*, 745 F 2d 1500 (1984); *Lowry v Reagan*, 676 F Supp 333 (1987); *Made in the USA Foundation v US*, 242 F 3d 1300 (2001).

References have been made to *Baker* in the High Court of Australia, however not in cases involving private international law. Rather, they have been in relation to Senate approval of legislation,<sup>109</sup> and the level of judicial scrutiny applicable to acts of the executive and legislature.<sup>110</sup> That these Australian references to the political question doctrine took place in cases concerning internal political considerations serves as a reminder that the political question doctrine has a wider application than the doctrine of non-justiciability, and is not confined to cases involving foreign states.<sup>111</sup>

An analysis of the application of the political question doctrine in a private international law context is providentially provided by the same set of facts on which the House of Lords created its doctrine of non-justiciability. Apart from the action in the UK, which culminated in *Buttes*, Occidental also launched two sets of lawsuits in the US.

The first set, brought in California, alleged conspiracy and unlawful interference in respect of the decree made by the Ruler of Sharjah.<sup>112</sup> However, the Court granted a motion to dismiss the suits by reference to the act of state doctrine: the Court would not make inquiries ‘into the authenticity and motivation of the acts of foreign sovereigns’ because those would be ‘the very sources of diplomatic friction and complication that the act of state doctrine aims to avert’.<sup>113</sup> Lord Wilberforce in *Buttes* described these lawsuits as ‘closely similar’ allegations to those made in England,<sup>114</sup> yet in *Buttes*, the act of state doctrine was held to be inapplicable.<sup>115</sup>

The second set of suits were brought three years later and based on similar allegations, but the claims made related to the tortious conversion of cargoes of oil extracted and shipped from the area of disputed sovereignty and imported into the US. Summary judgment against Occidental was granted.<sup>116</sup> This was affirmed by the Fifth Circuit Court of Appeals on the basis that the case would involve ‘resolution of a territorial dispute between sovereigns’, a political question upon which the Court was ‘powerless’ to adjudicate.<sup>117</sup>

In so doing, the Court of Appeals seems to have relied upon all of the six *Baker* factors.<sup>118</sup> First, resolution of the ownership of disputed foreign lands is

<sup>109</sup> *Victoria v Commonwealth* (1975) 134 CLR 81, 135 (McTiernan J, in dissent) (*‘Petroleum and Minerals Authority Case’*). For analysis of this judgment, see Lindell, ‘The Justiciability of Political Questions’, above n 7, 201–2.

<sup>110</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 138–43 (Brennan J); see also *Richardson v Forestry Commission* (1988) 164 CLR 261, 296 (Mason CJ and Brennan J). See also *Thorpe v Commonwealth of Australia (No 3)* (1997) 144 ALR 677, 692 (Kirby J).

<sup>111</sup> For an analysis of *Baker* and its potential application to Australia in respect of these internal matters, see Mason, above n 7, 787–96.

<sup>112</sup> *Occidental Petroleum Corp v Buttes Gas and Oil Co*, 331 F Supp 92 (1971); aff’d *Occidental Petroleum Corp v Buttes Gas and Oil Co*, 461 F 2d 1261 (1972).

<sup>113</sup> *Occidental Petroleum Corp v Buttes Gas and Oil Co*, 331 F Supp 92, 110 (1971).

<sup>114</sup> *Buttes* [1982] AC 888, 935.

<sup>115</sup> *Ibid* 930–1.

<sup>116</sup> *Occidental of Umm al Qaywayn, Inc v A Certain Cargo Laden aboard Dauntless Colocotronis*, 396 F Supp 461 (1975).

<sup>117</sup> *Occidental of Umm al Qaywayn Inc v A Certain Cargo of Petroleum Laden aboard the Tanker Dauntless Colocotronis*, 577 F 2d 1196, 1203 (1978).

<sup>118</sup> *Baker*, 369 US 186, 217 (1962).

constitutionally entrusted to the executive.<sup>119</sup> Second, judicial or manageable standards are lacking in the determination of sovereignty.<sup>120</sup> Third, in the absence of an executive decision on the sovereignty of the area, judicial determination is impossible without an executive policy decision.<sup>121</sup> Fourth, deciding the case would reflect a lack of respect for the executive, because the State Department had included a letter in an amicus brief, which indicated the importance of neutrality in the Middle East.<sup>122</sup> Fifth, by implication, the political decision had been made not to declare whom the US regarded as sovereign. Finally, and again by implication, there existed the potentiality of embarrassment from multifarious pronouncements by various departments on the question of recognition, given that the State Department had not yet made a declaration in respect of sovereignty but might be expected to do so in the future — especially if the Court's decision were to be perceived as detrimental to US foreign policy.

This reasoning reveals twofold deference to the US Executive and to foreign states, and has been criticised for violating the protection of private rights.<sup>123</sup> Here, the Court was well aware of the opinion of the executive, unlike the House of Lords in *Buttes*. Yet, to the extent that this approach accords with the tradition in the US under its unique separation of powers, and judicial deference to the executive, it may have been nothing out of the ordinary. Indeed, the Supreme Court denied writs of certiorari in both this and the earlier set of proceedings.<sup>124</sup>

With these decisions in mind, the political question doctrine can be referenced to the doctrine of non-justiciability in the UK. In *Buttes*, Lord Wilberforce relied upon *Baker* to suggest that the doctrine of non-justiciability was one 'starting in English law, adopted and generalised' in the law of the US.<sup>125</sup> On the basis that similar litigation on the same issues had also taken place in the US, Lord Wilberforce decided 'to follow the Fifth Circuit Court of Appeals' in its decision and render the matter non-justiciable.<sup>126</sup> Most extraordinarily, his Lordship felt that

the ultimate question [of] what issues are capable ... of judicial determination must be answered in closely similar terms in whatever country they arise ... When the judicial approach to an identical problem between the same parties has been spelt out with such articulation in a country, one not only so closely akin to ours in legal approach, the fabric of whose legal doctrine in this area is so closely interwoven with ours ... spelt out moreover in convincing language and reasoning, we should be unwise not to take benefit of it.<sup>127</sup>

This makes clear that the response of the House of Lords in *Buttes* was predicated upon reliance on the political question doctrine. However, to rely on

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<sup>119</sup> *Occidental of Umm al Qaywayn Inc v A Certain Cargo of Petroleum Laden aboard the Tanker Dauntless Colocotronis*, 577 F 2d 1196, 1203 (1978).

<sup>120</sup> *Ibid* 1205.

<sup>121</sup> *Ibid* 1204.

<sup>122</sup> *Ibid*.

<sup>123</sup> Anne Martragono, 'Act of State and Political Question Doctrines: Judicial Prudence or Abdication?' (1979) 11 *Lawyer of the Americas* 205.

<sup>124</sup> *Occidental Petroleum Corp v Buttes Gas and Oil Co*, 409 US 950 (1972); *Occidental of Umm al Qaywayn Inc v Cities Service Oil Co*, 442 US 928 (1979).

<sup>125</sup> *Buttes* [1982] AC 888, 932.

<sup>126</sup> *Ibid* 938.

<sup>127</sup> *Ibid* 936–7.

this reasoning to avoid being ‘unwise’ was an unconventional approach. The political question doctrine serves a unique function within the US’ constitutional separation of powers, a fact his Lordship acknowledged but nonetheless ignored.<sup>128</sup> Lord Wilberforce’s utopian vision of a world where the justiciability of cases would be the same in whatever country they arose might be a tantalising outlook for those involved in multi-jurisdictional operations. However, in a world where that is simply not the case, it is regrettable that his Lordship in this reverie did not consider a merits-based approach, which now reflects the position in Canada. Had his Lordship done so, the House of Lords may have been less hesitant in adjudicating on a matter between two private parties.

### 3 *Canada: A Merits-Based Approach*

In *Operation Dismantle*,<sup>129</sup> a case factually similar to one which attracted the operation of the political question doctrine in the US,<sup>130</sup> the Supreme Court of Canada rejected the application of a doctrine of abstention and instead questioned its suitability. The Court was unanimous in dismissing an appeal against a decision to strike out a statement of claim which alleged that the Canadian executive’s decision to allow the US to test cruise missiles in Canada increased Canada’s likelihood as a target for nuclear attack, thereby violating the right to life, liberty and security of the person under the *Canadian Charter of Rights and Freedoms*.<sup>131</sup> There were two approaches to the case, but both acknowledged the question presented to the Court was by no means non-justiciable.<sup>132</sup> It is of note that there is no mention of *Buttes* in the judgment. This might be considered disappointing, given the relative temporal proximity of the decisions, or it might be seen as an omission tantamount to disapproval.

Wilson J explicitly rejected the political question doctrine. Instead of resorting to a doctrine of abstention, her Honour said the focus should be on ‘whether the courts *should* or *must* rather than on whether they *can* deal with such matters’.<sup>133</sup> In so doing, Wilson J criticised Brennan J’s approach in *Baker*, and held that courts should not too eagerly relinquish their judicial review function simply because a case involves a ‘weighty’ matter of state.<sup>134</sup> On this approach, it is not open to a court to abdicate jurisdiction ‘on the basis that the issue is inherently non-justiciable or that it raises a so-called political question’.<sup>135</sup> Rather, the principles of the separation of powers, responsible government and the rule of law obviate the need for a doctrine of abstention.<sup>136</sup>

<sup>128</sup> Ibid 936; cf *R v Foreign Secretary; Ex parte World Development Movement Ltd* [1995] 1 WLR 386.

<sup>129</sup> [1985] 1 SCR 441.

<sup>130</sup> See *Greenham Women against Cruise Missiles v Reagan*, 591 F Supp 1332, 1336, 1338 (1984); aff’d *Greenham Women against Cruise Missiles v Reagan*, 755 F 2d 34 (1985).

<sup>131</sup> *Canadian Charter of Rights and Freedoms* s 7, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11.

<sup>132</sup> *Operation Dismantle* [1985] 1 SCR 441, 459, 472.

<sup>133</sup> Ibid 467 (Wilson J) (emphasis in original).

<sup>134</sup> Ibid 471.

<sup>135</sup> Ibid 472.

<sup>136</sup> Ibid 491.

The majority judgment, delivered by Dickson J, dismissed the appeal on its merits.<sup>137</sup> His Honour felt that the appellants could never prove the causal link between the government's decision to permit testing and the increased likelihood of nuclear war. Foreign policy decisions of other nations were thought not to be capable of prediction 'to any degree of certainty approaching probability' and thus would remain speculative.<sup>138</sup> However, the judgment subjects the claims to reasoned analysis as opposed to outright dismissal based on some far-reaching notion of judicial restraint. For example, whilst the allegation that development of the cruise missile would lead to an escalation of the nuclear arms race was found to be speculative and based on assumptions on the reaction of foreign powers, the judgment suggests that it could equally be alleged that development of the cruise missile might compel foreign powers to negotiate agreements that would de-escalate the nuclear arms race.<sup>139</sup> To strengthen Wilson J's argument, the joint judgment stated in obiter that there is 'no doubt that disputes of a political or foreign policy may be properly cognizable by the courts'.<sup>140</sup> Therefore, *Operation Dismantle* should be viewed as a rejection by the Supreme Court of Canada of the political question doctrine, and by implication, of the doctrine of non-justiciability.<sup>141</sup> It typifies a refusal to allow suppression of the judicial function simply because a matter involving foreign states is before the court.<sup>142</sup> The net result of this approach does not suffer the same setbacks as the other two doctrines of abstention. Rather, this proactive approach is accordant with the expectation of contemporary litigants having open access to the courts. The Canadian judiciary did not manoeuvre public international law concepts of sovereignty and territoriality into private international law. Instead, the Supreme Court was eager to maintain access to the courts for private litigants, as well as disavow potential complicity between two branches of government to usurp the judicial function. Judicial consideration of the merits-based approach of *Operation Dismantle*, which has not yet occurred in Australian courts, is necessary.

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<sup>137</sup> The judgment of Dickson J was delivered on behalf of Estey, McIntyre, Chouinard and Lamer JJ.

<sup>138</sup> *Operation Dismantle* [1985] 1 SCR 441, 452 (Dickson J).

<sup>139</sup> *Ibid* 453.

<sup>140</sup> *Ibid* 459.

<sup>141</sup> See further *Reference Re Canada Assistance Plan* [1991] 2 SCR 525, 545 (Sopinka J): 'That there is a political element embodied in the question [before the Court] ... may well be the case. But that does not end the matter'. See also *Vancouver Island Peace Society v Canada* [1994] 1 FC 102.

<sup>142</sup> The Canadian decision of *Operation Dismantle* is similar to the German case of *NATO-Doppelbeschluß*: BVerfG (Germany) 2 BvR 1714/83, 16 December 1983 (1984) 66 BVerfGE 39. There, the complaint before the German Federal Constitutional Court was that the chances of a Soviet nuclear strike against Germany were increased by the West German Government's agreement to allow North Atlantic Treaty Organization forces to deploy weapons with nuclear warheads on West German territory. Similar to the judgment of Dickson J in *Operation Dismantle*, the Court did not dismiss the claims outright as non-justiciable. Instead, the Court considered the claims, and ultimately held that causality could not be found: at 59. For discussion of other German decisions in this area, see Thomas M Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (1992) 107–25.

B *Australian Considerations*

In Australia, the doctrine of non-justiciability is far from an area of settled black-letter law.<sup>143</sup> Notably, it has never been specifically applied by the High Court. In *Spycatcher*, the High Court refused to uphold a claim of the UK Government on the basis that it was an attempt to enforce foreign governmental power, which it described as an ‘associated rule’ of the act of state doctrine.<sup>144</sup> That both commentators<sup>145</sup> and judges<sup>146</sup> have misinterpreted *Spycatcher* as an explicit application and endorsement of the doctrine of non-justiciability highlights the aforementioned confusion surrounding its differences with, and separate existence from, the act of state doctrine. The act of state doctrine operates in respect of legislative and executive acts, inquiring about the nature and site of the act in question, whereas the doctrine of non-justiciability applies to issues and what their resolution would involve. In *Spycatcher* it is evident that the High Court did not apply the doctrine of non-justiciability; mention of ‘judicial restraint or abstention’ was explicitly in relation to the act of state doctrine.<sup>147</sup>

It is clear, however, that there has been broad endorsement of the idea that Australian courts should not interfere with the executive’s conduct of foreign relations. *Buttes* itself has been cited as authority for the proposition that issues arising out of international relations have ‘widely’<sup>148</sup> or ‘generally’<sup>149</sup> been regarded as non-justiciable. *Buttes* has even been cited as authority for the proposition that the hearing of cases involving residents of a foreign state is an area courts ‘should abstain from entering upon’.<sup>150</sup> Support for this movement to abstain from adjudication in matters involving foreign states might stem from misconceptions of the judicial role within the Australian constitutional system: that adjudicating in cases involving issues which might be of concern to foreign states interferes in Australia’s foreign affairs and usurps executive power.

<sup>143</sup> *Hicks v Ruddock* (2007) 156 FCR 574, 600 (Tamberlin J).

<sup>144</sup> *Spycatcher* (1988) 165 CLR 30, 48 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ). However, this decision has been subject to criticism as a policy disaster: see Frederick A Mann, ‘*Spycatcher* in the High Court of Australia’ (1988) 104 *Law Quarterly Review* 497.

<sup>145</sup> For example, in one textbook, *Buttes* is used as the authority on the act of state doctrine, but no discussion is had on the doctrine of non-justiciability. See Tilbury, Davis and Opeskin, above n 54, 132–7. See also Geoffrey Lindell, ‘Judicial Review of International Affairs’ in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (1997) 160, 192.

<sup>146</sup> See, eg, *Petrotimor* (2003) 126 FCR 354, 370 (Black CJ and Hill J).

<sup>147</sup> *Spycatcher* (1988) 165 CLR 30, 40–1; see also Garnett, ‘Foreign States in Australian Courts’, above n 4, 727.

<sup>148</sup> *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 307 (Wilcox J, Bowen CJ concurring).

<sup>149</sup> *Gamogab v Akiba* (2007) 159 FCR 578, 586 (Kiefel J).

<sup>150</sup> *Dagi v Broken Hill Pty Co Ltd (No 2)* [1997] 1 VR 428, 453 (Byrne J). Cf *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, 436 (Moore J): ‘In an era of international commerce and global human engagement, it may not be necessary for courts to be overly cautious about exercising jurisdiction in relation to foreigners’. It is submitted that this latter proposition is more reflective of the realities of contemporary transnational litigation.

1 *Executive Prerogative in Foreign Affairs*

It is not doubted that responsibility for the conduct of foreign affairs falls under the power of the executive.<sup>151</sup> It may be that cautionary treatment of foreign states, and in particular, endorsement of the doctrine of non-justiciability, is related to a judicial disinclination to encroach upon the executive's constitutionally mandated role.<sup>152</sup> The boundaries of executive power have not often been pronounced upon by the High Court, at least not by comparison to cases on judicial or legislative power,<sup>153</sup> which might be one of the reasons executive power has often been seen as 'something of a mystery'.<sup>154</sup> In line with this uncertainty, an explanation for this preference not to hear cases involving foreign states might be seen as a judicial predilection to avoid 'assum[ing] the functions' of an executive branch whose powers have not been readily susceptible to unambiguous demarcation.<sup>155</sup>

However, this predilection should not result in courts regarding matters touching on foreign relations as 'beyond [judicial] cognisance'.<sup>156</sup> At a basic level, issues arising in foreign relations may give rise to a matter involving the interpretation of constitutional executive power, which would confer standing on a plaintiff pursuant to Ch III of the *Australian Constitution*.<sup>157</sup> In *Hicks v Ruddock*,<sup>158</sup> Tamberlin J said it was 'arguable' that when considerations of constitutional limitations on executive power are engaged, then the necessity for 'judicial or manageable standards' would necessarily be satisfied.<sup>159</sup> In other words, a case would be justiciable by the courts.

In the UK, the source of the power to conduct foreign relations (normally) resides in the residue of the prerogatives of the Crown, which are examined in relation to executive action.<sup>160</sup> By contrast, in Australia the source of the power

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<sup>151</sup> *Australian Constitution* s 61; *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 643–4 (Latham CJ).

<sup>152</sup> See, eg, *McCrea v Minister for Customs and Justice* (2004) 212 ALR 297, 301 (North J): 'the conduct of international relations in Australia is a function undertaken by the executive arm of government. The constitutional separation of powers means that the judiciary has no direct function in the conduct of international relations'.

<sup>153</sup> George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421, 423–33.

<sup>154</sup> *Ibid* 421–2. Indeed, the first book devoted to the executive power of the Federal Government did not appear until 1983: see George Winterton, *Parliament, the Executive, and the Governor-General: A Constitutional Analysis* (1983).

<sup>155</sup> *Re Citizen Limbo* (1989) 92 ALR 81, 82 (Brennan J):

It is essential to understand that courts perform one function and the political branches of government perform another. One can readily understand that there may be disappointment in the performance by one branch or another of government of the functions which are allocated to it under our division of powers. But it would be a mistake for one branch of government to assume the functions of another in the hope that thereby what is perceived to be an injustice can be corrected.

<sup>156</sup> *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 373 (Gummow J); *Baker*, 369 US 186, 211 (1962) (Brennan J).

<sup>157</sup> *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369.

<sup>158</sup> (2007) 156 FCR 574.

<sup>159</sup> *Ibid* 584 (Tamberlin J).

<sup>160</sup> See, eg, *Attorney-General v Nissan* [1970] AC 179, 237; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 418 (Lord Roskill). See also Peter Cane, 'Prerogative Acts, Acts of State and Justiciability' (1980) 29 *International and Comparative Law Quarterly* 680.

to conduct foreign relations is enumerated in the *Constitution*,<sup>161</sup> of which the High Court is guardian.<sup>162</sup> English decisions on non-justiciability therefore must be 'viewed with some care' before they are treated as applicable in Australia.<sup>163</sup> Furthermore, these judicial concerns to hear cases touching on issues involving foreign states might be overcome by the correct use of executive certificates.

## 2 *Executive Certificates*

In any case before an Australian court, the executive may issue a certificate, either under common law<sup>164</sup> or on a statutory basis,<sup>165</sup> to inform the court of the status of a factual situation falling within the executive's prerogative powers of recognition.<sup>166</sup> These 'facts-of-state'<sup>167</sup> pertain to the executive's prerogative in foreign affairs where the executive's attitude to certain facts is determinative of their legal character or effect.<sup>168</sup> These include the executive's attitude in relation to the extent of foreign territory and boundaries,<sup>169</sup> existence of a state of war,

<sup>161</sup> *Australian Constitution* s 61.

<sup>162</sup> *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 368–9 (Gummow J).

<sup>163</sup> *Ibid* 368 (Gummow J).

<sup>164</sup> *Frost v Stevenson* (1937) 58 CLR 528 ('*Frost*'). Section 145 of the proposed uniform evidence legislation would retain the current common law position: see also Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (2<sup>nd</sup> ed, 2004) 41. This has been adopted in Victoria: see *Evidence Act 2008* (Vic) s 145. However, the common law foundations for the conclusiveness of executive certificates have not been consistent: see, eg, *Mighell v Sultan of Johore* [1894] 1 QB 149, 161 (Kay LJ); *Foster v Globe Venture Syndicate Ltd* [1900] 1 Ch 811, 813–14 (Farwell J); *Commonwealth Shipping Representative v Peninsular and Oriental Branch Service* [1923] AC 191, 212 (Lord Sumner); *Duff Development Co v Government of Kelantan* [1924] AC 797, 805–6 (Viscount Cave), 813–15 (Viscount Finlay), 820 (Lord Dunedin), 823–4 (Lord Sumner), 830 (Lord Carson); cf *Engelke v Musmann* [1928] AC 433, 443 (Lord Buckmaster).

<sup>165</sup> There are various purported standards of conclusiveness for certificates issued on statutory basis. Some certificates are 'evidence of the facts': see, eg, *Diplomatic Privileges and Immunities Act 1967* (Cth) s 14(2); *Diplomatic and Consular Missions Act 1978* (Cth) s 6(2); *Public Order (Protection of Persons and Property) Act 1971* (Cth) s 21(2). Other certificates are 'prima facie evidence of': see, eg, *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) ss 11(2), 11(3), 11(3A); *Crimes (Internationally Protected Persons) Act 1976* (Cth) s 14(2); *Extradition Act 1988* (Cth) s 52. Other certificates are purportedly 'conclusive evidence of the matters stated': see, eg, *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) s 11(1). On the conclusiveness of executive certificates, see also *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423.

<sup>166</sup> *Frost* (1937) 58 CLR 528; *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 368 (Gummow J). See also Mann, *Studies in International Law*, above n 9, 403; Sir Francis Vallat, *International Law and the Practitioner* (1966) 54; William R Edeson, 'Conclusive Executive Certificates in Australian Law' (1976) 7 *Australian Year Book of International Law* 1; Elizabeth Wilmshurst, 'Executive Certificates in Foreign Affairs: The United Kingdom' (1986) 35 *International and Comparative Law Quarterly* 157; Colin Warbrick, 'Executive Certificates in Foreign Affairs: Prospects for Review and Control' (1986) 35 *International and Comparative Law Quarterly* 138.

<sup>167</sup> The term 'facts-of-state' has been used in this context by several commentators: see, eg, Mann, *Foreign Affairs in English Courts*, above n 4, 23; Geoffrey Sawer, 'Australian Constitutional Law in Relation to International Relations and International Law' in D P O'Connell (ed), *International Law in Australia* (1966) 35, 49.

<sup>168</sup> See also Edeson, above n 166, 16.

<sup>169</sup> *Frost* (1937) 58 CLR 528, 549 (Latham CJ); cf *Anglo-Czechoslovak and Prague Credit Bank v Janssen* [1943] VLR 185.

belligerency, or neutrality;<sup>170</sup> the existence of a foreign state;<sup>171</sup> and the identity of those constituting the government of recognised foreign states, including diplomatic officials claiming diplomatic immunity.<sup>172</sup> However, these categories should not be regarded as closed.<sup>173</sup>

Courts have on occasion ignored the fact that not all matters involving foreign relations necessarily fall under conclusive executive certification. In *Petrotimor*, it was said that ‘it may be accepted that generally in matters involving foreign relations the Court may rely upon a certificate from the Executive and that certificate would be conclusive’.<sup>174</sup> With respect, this statement is misleading. It is quite simply incorrect where statute has ousted those powers. Further, the executive’s viewpoint may not be relevant in a matter involving the interpretation of private contractual arrangements.<sup>175</sup> Certainly, in matters of constitutional interpretation, a certificate cannot be conclusive — the High Court has shown it is averse to allow its role of judicial review of the constitutionality of government actions to lose force through executive certification.<sup>176</sup>

The role of executive certificates within Australian courts has not garnered much academic attention,<sup>177</sup> and further work on this area is to be encouraged.<sup>178</sup> At the outset, two caveats to executive certification should be observed. First, they must not be used as an executive attempt to interfere with the judiciary or usurp judicial power.<sup>179</sup> This includes refraining from doing the job of the court by drawing legal conclusions from the facts stated. Second, their use must not lead to cases being decided simply in accordance with the executive view as to what is ‘politically expedient’.<sup>180</sup>

With these caveats in mind, an understanding of the function of executive certificates should assuage judicial concerns about encroaching onto the executive’s prerogative in foreign affairs. The practice of executive certification

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<sup>170</sup> *Shaw Savill and Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344, 356 (Starke J), 364 (Dixon J) (*‘Shaw Savill’*); cf *Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Co Ltd* [1939] 2 KB 544.

<sup>171</sup> *Shaw Savill* (1940) 66 CLR 344, 364 (Dixon J). This includes whether and at what dates a government is recognised, either de facto or de jure: Sawyer, ‘Australian Constitutional Law’, above n 167, 49. In the absence of executive certification, criteria have been used by courts in relation to the recognition of foreign governments: *Republic of Somalia v Woodhouse, Drake and Carey (Suisse) SA* [1993] QB 54; *Sierra Leone Telecommunications Co Ltd v Barclays Bank* [1998] 2 All ER 821.

<sup>172</sup> *Shaw Savill* (1940) 66 CLR 344, 364 (Dixon J); *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 368 (Gummow J).

<sup>173</sup> Sawyer, ‘Australian Constitutional Law’, above n 167, 50.

<sup>174</sup> *Petrotimor* (2003) 126 FCR 354, 370 (Black CJ and Hill J).

<sup>175</sup> *Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Co Ltd* [1939] 2 KB 544. See also *Jolley v Mainka* (1933) 49 CLR 242. In that case, a question arose as to whether Papua New Guinea, a mandated territory of Australia at the time in which jurisdiction was recognised, could be said to be ‘otherwise acquired’ by it. The High Court answered in the affirmative without recourse to the views of the executive.

<sup>176</sup> See, eg, *Chow Hung Ching v The King* (1948) 77 CLR 449, 466–7 (Latham CJ); *Bonser v La Macchia* (1968) 122 CLR 177, 193 (Barwick CJ), 207 (Kitto J).

<sup>177</sup> Recent examples that consider executive certification in Australia are Edeson, above n 166; Mason, above n 7, 793–4.

<sup>178</sup> In the US, the adoption of a mandatory certification procedure for the courts has been suggested: David A Katz, ‘Foreign Affairs Cases: The Need for a Mandatory Certification Procedure’ (1980) 68 *California Law Review* 1186.

<sup>179</sup> *Engelke v Musmann* [1928] AC 433, 451 (Lord Phillimore).

<sup>180</sup> *The Philippine Admiral* [1977] AC 373, 399 (Lord Cross).

requires an explanation for the courts' willingness to decide a case even where the executive chooses not to exercise its prerogative power to certify a fact-of-state.<sup>181</sup> This might occur, for example, where a matter is subject to diplomatic negotiations. It is understandable that courts would not want to prejudice those negotiations. Therefore, if there are any ambiguities, a renewed inquiry of the executive might be made to clarify any doubts.<sup>182</sup>

However, once these avenues have been exhausted a court must reach a decision as to how to proceed where the executive remains silent or ambiguities remain. In view of this, executive certificates are by no means a panacea to what are undeniably complex issues. Rather than the view that executive silence should be seen as a negative response to the question posed,<sup>183</sup> it is submitted that the court should then use the next method of 'best evidence' to find the answer.

In still hearing the relevant matter, the court would not be exercising executive prerogative power, but would simply be exercising its judicial power to determine controversies between litigants. If the executive will not certify a fact-of-state because diplomatic negotiations are underway, private litigants would find it unreasonable to wait until those negotiations come to resolution, at some indeterminate point in time, for a judicial hearing of their dispute. The 'best evidence' approach prioritises the interests of private litigants over notions of judicial restraint in the face of executive silence. The courts must strive to avoid what might be perceived from outside as a form of complicity between arms of government leading to the denial of a litigant's right to have their case heard,<sup>184</sup> especially seeing as private parties cannot oust the operation of the doctrine of non-justiciability by consent.<sup>185</sup> Allowing executive silence to determine whether effective access to the courts is maintained is unacceptable (and the subject of further discussion below).<sup>186</sup>

When faced with a choice between abstention from adjudication because of an executive failure to certify a fact-of-state, and the enforcement of private rights, the judiciary should prefer the latter. To suggest otherwise, as an example of the next 'best evidence', that Australian courts cannot adjudicate on cases involving instruments of public international law without knowledge of the executive's view is at odds with the development of Australian law.<sup>187</sup> The 'best evidence' approach is in harmony with the direction the law has taken in differentiating between sovereign and private interests in the conflict of laws, the tendency leaning towards prioritisation of the latter. This approach seems to have been

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<sup>181</sup> Mason, above n 7, 793.

<sup>182</sup> See, eg, *Civil Air Transport Inc v Central Air Transport Corporation* [1953] AC 70, 86; cf *GUR Corporation v The Trust Bank of Africa Ltd* [1986] 3 WLR 583, 604; *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853, 873, 879.

<sup>183</sup> Cf Warbrick, above n 166, 149.

<sup>184</sup> For examples of situations that may be perceived as such, see Benedetto Conforti, *International Law and the Role of Domestic Legal Systems* (1993) 18–20.

<sup>185</sup> *Occidental Exploration and Production Co v Republic of Ecuador* [2006] QB 432, 467.

<sup>186</sup> *Spycatcher* (1988) 165 CLR 30, 47 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ). See further below Part IV(B)(1) on the 'one voice' principle.

<sup>187</sup> See, eg, *Dietrich v The Queen* (1992) 177 CLR 292, 307 (Mason CJ and McHugh J), 321 (Brennan J); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 ('Lam').

applied by the High Court in the case of *Ffrost*,<sup>188</sup> decided over four decades before the decision in *Buttes*. In *Ffrost*, the executive had not provided a certificate in relation to a question involving territorial recognition. Notwithstanding, Latham CJ held that '[the] court must therefore do the best it can to reach a conclusion upon the question upon such material as is available', despite the fact that no certificate had been requested from the executive.<sup>189</sup>

Rather than decline to determine a private dispute because of state interests, courts should apply the law as they would in any other case and follow the Canadian merits-based approach. Courts should only allow the application of legal principles to defeat a plaintiff's claim instead of acquiescently relying on 'judicial restraint'. This occurred in the Supreme Court of Canada in *Operation Dismantle*, where it will be recalled that the plaintiff's case failed, but only after the claim was subjected to judicial analysis and it was ultimately found that causation was not sufficiently made out. This merits-based approach is a more appropriate outcome for those seeking judicial resolution of disputes. It is also congruent with the expectation of contemporary litigants that they will have access to courts when disputes arise. Litigants should expect that their claims might only fail for sound legal reasons, and not because courts make the decision to abstain from adjudication.

It is the failure to use, and the misuse of, executive certificates which has on occasion led to courts judging matters to be non-justiciable for want of manageable standards on concerns not to infringe the executive's role. In *Buttes*, the central issue that concerned the House of Lords was a boundary dispute between states and the question as to whether Sharjah had extended its territorial limits. The House of Lords approached the matter without recourse to an executive certificate (which had been neither requested nor provided).<sup>190</sup> It would be expected that this certificate could have been given as, at the time in question, the responsibility for the foreign relations of Sharjah and Umm Al Qaiwain rested with the UK.<sup>191</sup> At the interlocutory stage of proceedings, deciding the matter in the absence of the executive's view on this fact-of-state was, according to Mann, an approach 'without precedent', involving 'a denial of justice [and] a refusal to try the case on the basis of evidence to be obtained from the only available source'.<sup>192</sup> Commentators have suggested that an executive certificate in *Buttes* would have made the matter conclusive.<sup>193</sup>

In this light, the result in the seminal case on the doctrine of non-justiciability is based on a failure to recognise the correct function of executive certification. Had the executive provided a certificate, the doctrine could not have been applied. Rather, the case could have been decided in line with the UK Government's view on territorial boundaries at the time of the dispute. If the

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<sup>188</sup> (1937) 58 CLR 528.

<sup>189</sup> *Ffrost* (1937) 58 CLR 528, 549 (Latham CJ). This approach has been criticised by Mann: see Mann, *Studies in International Law*, above n 9, 399.

<sup>190</sup> *Buttes* [1982] AC 888, 930.

<sup>191</sup> Mann, *Foreign Affairs in English Courts*, above n 4, 28.

<sup>192</sup> *Ibid* 48.

<sup>193</sup> See, eg, David L Jones, 'Act of Foreign State in English Law: The Ghost Goes East' (1982) 22 *Virginia Journal of International Law* 433, 458; Mann, *Foreign Affairs in English Courts*, above n 4, 27. On this basis, Mann hoped that *Buttes* 'will remain the wholly exceptional incident which future generations of lawyers are likely to lament'.

executive had refused to exercise its prerogative power, then the executive would have done so at its peril, and the Court should have proceeded with the next best evidence available, which might have included interpretation of instruments of public international law. To avoid friction between arms of government, it is submitted that courts should encourage the use of executive certificates but, where none is issued after a judicial request, courts should proceed to hear a dispute on its merits rather than invoke 'judicial restraint' to decline adjudication.

#### IV AUSTRALIAN APPLICATION OF THE DOCTRINE OF NON-JUSTICIABILITY

##### A *Lack of Manageable Standards*

Under the first strand of the doctrine of non-justiciability, courts will not adjudicate upon cases involving the transactions of foreign states where there are 'no judicial or manageable standards' by which courts can judge related issues.<sup>194</sup> Again, public international law principles of sovereignty and territoriality are embraced to avoid the hearing of disputes. For example, a case might involve private operations taking part on disputed boundaries between states. Courts fear that applying the law to a dispute arising out of those operations as a result of those disputed boundaries will infringe upon the executive's prerogative in foreign affairs, and offend the sovereignty of those foreign states. Therefore, it is felt that there are 'no judicial or manageable standards' by which to judge those issues.

This strand of the doctrine is circular. Abstention occurs because those standards are said not to exist, but it is because of the need to abstain that no standards can exist. This lack of clarity is compounded by the fact that there are many grey areas in the law where precedent may be lacking. Yet, when there is an element involving foreign states, it seems to be acceptable under the premise of the doctrine of non-justiciability for courts to abdicate for want of 'manageable standards'. Fortunately, there have been few situations in Australian courts where a 'lack of manageable standards' has led to judicial abstention.

A 'lack of manageable standards' was found to exist by the trial court and the Victorian Court of Appeal in *Victoria Aircraft Leasing*.<sup>195</sup> A US security trustee sought on behalf of Eximbank, an independent agency of the US Government, to recover an aircraft leased to the Nauruan Government. The defence and counterclaim were that the obligations owed were not enforceable due to an alleged agreement between Nauru and the US. Under this agreement, it was alleged that Nauru agreed to assist the US in pursuit of certain foreign policy agendas, including anti-terrorism measures and assistance in the defection of a North Korean scientist; in return, the US would provide assistance to Nauru on a broad range of matters largely related to Nauru's financial problems, including a

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<sup>194</sup> *Buttes* [1982] AC 888, 938.

<sup>195</sup> *Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Ltd (No 2)* VSC 341, (Unreported, Dodds-Streeton J, 9 September 2004); *Victoria Aircraft Leasing Ltd v US* (2005) 190 FLR 351. The High Court of Australia refused special leave to appeal: see Transcript of Proceedings, *Victoria Aircraft Leasing v US* (High Court of Australia, Crennan, Hayne and Heydon JJ, 16 December 2005).

guarantee on retention of the aircraft.<sup>196</sup> However, the Nauruan Government failed in their endeavour to join the US as a third party, as the US Government was able to claim foreign state immunity in the proceedings.

At first instance, Dodds-Streton J found that issues raised in the defence and counter-claim would require the Court to consider ‘uncertain and sensitive matters of espionage, intelligence, national security and diplomacy [and] high level dealings between ... two foreign sovereign nations’.<sup>197</sup> These issues were felt not ‘to be susceptible of resolution by reference to judicial standards available to an Australian court’.<sup>198</sup> Similarly, the Victorian Court of Appeal felt that, in addition to a lack of ‘manageable standards’ on a transaction involving ‘questions which a municipal court of this country is not equipped to judge’,<sup>199</sup> to embark upon an inquiry on the alleged agreements between Nauru and the US ‘would involve the court in a dispute of a kind that can only be resolved on a State to State level’;<sup>200</sup> one that would be ‘properly dealt with by diplomacy rather than litigation in municipal courts’.<sup>201</sup> Nevertheless, both Dodds-Streton J and the Court of Appeal refused to grant a stay of the proceedings, as there was not a sufficient connection between these non-justiciable issues and the claims of the trustee.<sup>202</sup> Two points can be made on this application and its confinement.

First, it was not necessary to make findings regarding any so-called ‘lack of manageable standards’. Eximbank was an independent agency of the US Government<sup>203</sup> — the Court of Appeal even admitted that it would be ‘unfair to visit upon Eximbank the alleged sins of the US’.<sup>204</sup> At trial, evidence relating to the US and its conduct would not have been relevant, as the security trustee had ‘played no part in the dealings between Nauru and the US’,<sup>205</sup> and Eximbank was ‘under no general duty to obey the directions of the government’.<sup>206</sup> If the obligations in question did not involve the US Government, then it necessarily follows that any agreements made between Nauru and the US were not relevant to the case in line with basic principles of privity of contract.<sup>207</sup> Hence, it is quite frankly astounding that such in-depth consideration of the doctrine took place, as there was no need to consider its applicability. That Nauru and the US would have taken an interest in the outcome of the case did not determine that the

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<sup>196</sup> *Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Ltd* (2004) 185 FLR 48, 53–6.

<sup>197</sup> *Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Ltd (No 2)* VSC 341, (Unreported, Dodds-Streton J, 9 September 2004) [110].

<sup>198</sup> *Ibid.*

<sup>199</sup> *Victoria Aircraft Leasing Ltd v US* (2005) 190 FLR 351, 359 (Buchanan JA).

<sup>200</sup> *Ibid.*

<sup>201</sup> *Ibid* 361 (Buchanan JA).

<sup>202</sup> *Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Ltd (No 2)* VSC 341 (Unreported, Dodds-Streton J, 9 September 2004) [110]–[123]; *Victoria Aircraft Leasing Ltd v US* (2005) 190 FLR 351, 360–1 (Buchanan JA).

<sup>203</sup> *Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Ltd* (2004) 185 FLR 48, 50–1, citing *Export Import Bank Act 1945* (US), 12 USC § 635 (2007).

<sup>204</sup> *Victoria Aircraft Leasing Ltd v US* (2005) 190 FLR 351, 361 (Buchanan JA).

<sup>205</sup> *Ibid* 360.

<sup>206</sup> *Ibid* 361.

<sup>207</sup> Related arguments were referred to in *Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Ltd (No 2)* VSC 341 (Unreported, Dodds-Streton J, 9 September 2004) [193]–[201].

courts should have felt obliged to invoke the doctrine merely because of their lingering presence.

Second, given that a ‘lack of manageable standards’ was found to exist, it was apposite for the Court to confine its irrelevant findings and to allow the case to proceed. This decision resembles the recent UK decision of *AY Bank*.<sup>208</sup> In that case, it will be recalled that issues relating to the insolvency of a bank and proof of debt between the successor states to the SFRY were confined and ruled justiciable. They involved the application of English law and affected the rights of both the Bank and unsecured creditors as a matter of private law. These confinements of the doctrine are to be applauded, as they emphasise the importance of the vindication of private rights over cautionary deference to foreign states. However, *Victoria Aircraft Leasing* remains an unfortunate case in so far as it gives support for application of the doctrine simply because the facts involve foreign states, however unconnected they are to the legal questions subject to decision.

A ‘lack of manageable standards’ also formed part of the decision in *Petrotimor*. In 1974, Petrotimor had been granted a concession by the Portuguese Government, then the administering power in East Timor, to prospect resources in the Timor Sea. In 1989, Australia and Indonesia entered into the *Timor Gap Treaty*,<sup>209</sup> which concerned the area between East Timor and Australia. Pursuant to the Treaty, companies were granted permits to prospect in areas of the Timor Gap, including those within the alleged Portuguese concession. Petrotimor argued this amounted to a constructive expropriation of its rights.

The Full Court of the Federal Court was unanimous in dismissing Petrotimor’s action. The court sought refuge behind both the act of state doctrine and the doctrine of non-justiciability to refuse to determine the validity of Petrotimor’s concession. Black CJ and Hill J said that whilst the task of interpreting a treaty on continental shelves<sup>210</sup> and determining the extent of Australia’s claim to the area in question would be ‘extremely difficult’,<sup>211</sup> the issue before the Court was ‘whether the question is justiciable, not whether it is difficult’;<sup>212</sup> hardly groundbreaking jurisprudence.

Astonishingly, their Honours then immediately relied on this proposition that they had discredited to decline adjudication. Rather than identify a ‘lack of manageable standards’, their Honours instead placed nonchalant reliance on the concept of judicial restraint: ‘[i]n our view, to the extent that *Buttes* requires judicial restraint to be exercised in an appropriate case, the present is such an appropriate case’.<sup>213</sup> In other words, despite the presence of ‘manageable standards’ where questions of public international law arise — including consideration of terms of a treaty — courts, by virtue of the doctrine, should

<sup>208</sup> [2006] EWHC 830 (Ch).

<sup>209</sup> *Treaty between Australia and the Government of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, opened for signature 11 December 1989, [1991] ATS 9 (entered into force 9 February 1991).

<sup>210</sup> *Geneva Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964), art 6.

<sup>211</sup> *Petrotimor* (2003) 126 FCR 354, 370 (Black CJ and Hill J).

<sup>212</sup> *Ibid.*

<sup>213</sup> *Ibid* 372. Beaumont J acknowledged in obiter that ‘there is no absolute rule’ on judicial restraint: at 429.

abstain from adjudication. Their Honours also relied on the ‘embarrassment’ strand of the doctrine (the subject of discussion below). On this view, ‘lack of manageable standards’ is simply a euphemism for ‘judicial restraint’, which can be exercised where issues of concern to foreign states are present. The impact that the application of this approach would have on private rights is alarming.

In *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*,<sup>214</sup> the applicant environmental organisation applied to the Federal Court for service out on the respondent Japanese Whaling company,<sup>215</sup> which was conducting whaling operations in Antarctic waters with a permit from the Japanese government. Humane Society sought a declaration that the company had breached provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) by whaling within the waters comprising the Australian Antarctic Exclusive Economic Zone,<sup>216</sup> as well as injunctive relief restraining such conduct in the future.<sup>217</sup> After several interlocutory proceedings, such a declaration was made and an injunction was granted.<sup>218</sup> However, the application to serve out was refused at first instance.<sup>219</sup>

There, Allsop J took the views of the executive into account to refuse service out of jurisdiction. His Honour said that considerations in the case involved ‘political judgments’ and were ‘lacking legal criteria permitting judicial assessment’.<sup>220</sup> These judgments included whether Japan would view enforcement of an injunction against the whalers as a breach of international law by Australia, or whether making a declaration and granting an injunction would best serve ‘Australia’s long term national interests’, including ‘Australia’s claims to sovereignty in Antarctica’ and the ‘diplomatic balance underlying the *Antarctic Treaty*’.<sup>221</sup> These ‘political judgments’ were, according to his Honour, ‘peculiarly within the field of the Executive Government’.<sup>222</sup> Another ground for refusing service out was concern that any injunction would be futile,<sup>223</sup> which was ‘deeply intertwined with powerful non-justiciable considerations, tending to make it inappropriate’ to allow service out.<sup>224</sup> Most remarkably, Allsop J was primarily concerned not to enforce Australian law, but to avoid ‘placing the Court at the centre of an international dispute ... which course or eventuality the

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<sup>214</sup> [2004] FCA 1510 (Unreported, Allsop J, 23 November 2004).

<sup>215</sup> *Federal Court Rules 1976* (Cth) O 8.

<sup>216</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 229, 229A, 229B, 229C, 229D, 230.

<sup>217</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510 (Unreported, Allsop J, 23 November 2004).

<sup>218</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3 (Unreported, Allsop J, 15 January 2008).

<sup>219</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, 433 (Black CJ and Finkelstein J). Moore J dissented. His Honour would have granted leave but for one consideration, that injunctive relief against the whaling company would be futile: at 436–8.

<sup>220</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 (Unreported, Allsop J, 27 May 2005) [24].

<sup>221</sup> *Ibid* [19].

<sup>222</sup> *Ibid* [24].

<sup>223</sup> *Ibid* [33]–[35].

<sup>224</sup> *Ibid* [38].

Australian Government believes not to be in Australia's long term national interests'.<sup>225</sup>

In so doing, Allsop J dared to suggest that judicial power was not being usurped by the executive. For all intents and purposes, Allsop J took the executive's views into account as if they were certifying a fact-of-state.<sup>226</sup> The submission put on behalf of the Attorney-General was said not to 'purport to direct this Court in any way in the exercise of the judicial power ... in the Court's role as the third, and independent, arm of government'.<sup>227</sup> Accordingly, there was no 'question of abrogation, or usurpation, of the judicial power or function'.<sup>228</sup> However, the judgment contains a clear example of this interference: the submissions suggested that the case would best be resolved through a 'more appropriate pursuit of diplomatic solutions'.<sup>229</sup> These submissions could only have been made to attempt to persuade the Court not to allow service out so as to circumvent potential tension with the Japanese Government.<sup>230</sup> The two caveats to the use of executive certificates were thereby breached. The refusal to grant service out was politically expedient for the executive, and in following the executive's recommendation without recourse to established legal principle, judicial power seems to have been usurped, despite Allsop J's unconvincing claims to the contrary.

On appeal, the majority of the Federal Court found that Allsop J erred in refusing leave, 'even if the pursuit of the claim was contrary to Australia's foreign relations'.<sup>231</sup> The Full Court made two observations. First, exclusively political dimensions of disputes are non-justiciable, because courts lack competence to resolve exclusively political disputes and issues which will involve the application of non-judicial norms.<sup>232</sup> Second, those dimensions are not relevant where Parliament has provided for the justiciability of an action in an Australian court.<sup>233</sup> This latter proposition is logical, as to find otherwise would be to suggest that the making of laws by the Australian Parliament cannot harm Australia's foreign relations, but the enforcement of those laws can. However, the former proposition is less than satisfactory. The Court did not explain what an 'exclusively political dimension' might entail, nor what type of 'non-judicial norms' could not be applied. This seems to be an extension of the first strand of the doctrine of non-justiciability.

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<sup>225</sup> Ibid [35].

<sup>226</sup> Ibid [24]:

The views of the Executive Government are relevant. The views concern subject matters which are within the province of the democratically elected Government of this country ... they are about considerations that are peculiarly within the field of the Executive Government, as involving political judgments (using that phrase in the broad sense) and lacking legal criteria permitting judicial assessment.

<sup>227</sup> Ibid [17].

<sup>228</sup> Ibid [23].

<sup>229</sup> Ibid [16].

<sup>230</sup> Cf *Engelke v Musmann* [1928] AC 433, 451 (Lord Phillimore).

<sup>231</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, 430 (Black CJ and Finkelstein J).

<sup>232</sup> Ibid 430 (Black CJ and Finkelstein J), 434–5 (Moore J); cf *Japan Whaling Assn v American Cetacean Society*, 478 US 221, 230 (1986).

<sup>233</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, 430 (Black CJ and Finkelstein J), 434–5 (Moore J).

Under this view, included within a ‘lack of manageable standards’ are disputes that have an ‘exclusively political dimension’, although uncertainty will prevail in future cases as to what this might entail. With respect, such an augmentation to the first strand of the doctrine is unhelpful. Cases before courts are not to be decided on the basis of difficulty,<sup>234</sup> or of their political sensitivity, but based on an application of the relevant law to the facts before the court.

To conclude on ‘lack of manageable standards’, these cases illustrate the circular proposition which this strand of the doctrine of non-justiciability supports. Most closely displayed by *Petrotimor*, judicial abstention occurs because ‘judicial or manageable standards’ are said not to exist, but it is because of the decision to abstain that no standards can exist. This conflicts with the notion that Australian courts can adjudicate on cases involving instruments of public international law.<sup>235</sup> That these cases fail to identify precisely where ‘manageable standards’ are lacking indicates that broader policy considerations are likely at work. These might include judicial hesitation to tread on the executive’s prerogative in foreign affairs, and inclination to heed concepts of sovereignty and territoriality. However, the executive’s prerogative can be accommodated through the use of executive certificates, and courts have already acknowledged, and must continue to recognise, that the enforcement of private rights in private international law is no longer to be subsumed by politics. Any ‘lack of manageable standards’, which results largely from judicial refusal to investigate those standards, is not sufficient to justify obstruction of the expectations of litigants in having access to courts when disputes arise.

### B *Executive Embarrassment*

Equally, if not more problematic, is the second strand of the doctrine. In cases involving issues concerning foreign states that might create ‘embarrassment’ for the forum executive’s conduct of foreign relations, courts should exercise ‘judicial restraint’ and abstain from adjudication.<sup>236</sup> Whilst not employed in *Buttes*,<sup>237</sup> it has since been used to deny the hearing of cases.

The idea of ‘embarrassment’, as adopted by Lord Wilberforce, seems to come from the political question doctrine in the US.<sup>238</sup> However, as already seen, these two doctrines are different in their foundation, rationale and application. The mere fact that ‘embarrassment’ is one of the *Baker* factors of the political question doctrine was, on its own, not sufficient for the House of Lords to transplant it into the doctrine of non-justiciability without any further explanation. If ‘embarrassment’ is a legal criterion, it is not a fact-of-state capable of executive certification. The ‘one voice’ principle might mandate that

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<sup>234</sup> *Petrotimor* (2003) 126 FCR 354, 370 (Black CJ and Hill J).

<sup>235</sup> See, eg, *Dietrich v The Queen* (1992) 177 CLR 292, 307 (Mason CJ and McHugh J), 321 (Brennan J); *Lam* (2003) 214 CLR 1; cf *McCrea v Minister for Customs and Justice* (2005) 145 FCR 269, 274–5. In *Lam*, Black CJ, Finkelstein and Finn JJ held that in relation to a person to be extradited from Australia, a Singaporean Government undertaking made pursuant to an unincorporated extradition treaty was not challengeable in an Australian court, as no legally enforceable obligation was created.

<sup>236</sup> *Buttes* [1982] AC 888, 934, 938.

<sup>237</sup> *Ibid* 938.

<sup>238</sup> *Baker*, 369 US 186, 217 (1962) (Brennan J): ‘the potentiality of embarrassment from multifarious pronouncements by various departments on one question’.

the judiciary and the executive should speak in unison on foreign affairs, but that is hardly a sufficient basis upon which to deny the vindication of private rights. Before considering judicial application of the ‘embarrassment’ strand of the doctrine, it seems appropriate to scrutinise this ‘one voice’ principle.

### 1 *The One Voice Principle*

As mentioned at the outset, a legal principle, which denies a judicially sanctioned resolution of a dispute, must be theoretically sound. Australian law purports to exclude foreign sovereign power from Australian courtrooms,<sup>239</sup> but deferring to consideration of foreign states based on notions of embarrassment in foreign relations is equivalent to violation of this principle. As Lord Greene MR said, ‘the fear of the embarrassment of the Executive [is not] a very attractive basis upon which to build a rule of ... law’,<sup>240</sup> all the more so when fundamental principles are at stake. Application of the ‘embarrassment’ strand to deny adjudication is based on a misconception of both the executive’s prerogative in foreign affairs and its reconciliation with the role of the courts.

The idea that in the area of foreign relations, the executive and judiciary should speak with ‘one voice’, centres on the notion that the executive and judiciary should not be in conflict on issues relating to foreign affairs. This idea succumbs to fears that judicial pronouncements on cases touching on international relations can bring the executive into disrepute in the eyes of foreign states. This principle has broad support in both the UK<sup>241</sup> and the US.<sup>242</sup>

It has been acknowledged in the English Court of Appeal that some do not subscribe to the ‘one voice’ principle in regards to the recognition of states, but rather see the concern of the executive as the *external* consequences of recognition with respect to other states, and the concern of the courts on the *internal* consequences with respect to private parties.<sup>243</sup> In other words, whilst the executive is able to take into account the consequences of recognising a state, the issue before the court is how that recognition affects the rights and liabilities of private litigants, and it is not within the court’s prerogative to grant recognition to a foreign state on its own accord.<sup>244</sup> To be sure, the judiciary and the executive serve very different purposes in government.

<sup>239</sup> Australian courts will not enforce foreign laws that involve the exercise of foreign governmental power: see *Spycatcher* (1988) 165 CLR 30, 43. Nor will they enforce laws that are of a penal or revenue-raising character: see *Spycatcher* (1988) 165 CLR 30, 40–1.

<sup>240</sup> *Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Co* [1939] 2 KB 544, 552 (Lord Greene MR). Mann has admitted to being ‘greatly impressed’ by this comment in what he described as a ‘remarkable spirit of judicial independence’: see Mann, *Foreign Affairs in English Courts*, above n 4, 58, n 55.

<sup>241</sup> See, eg, *Taylor v Barclay* [1828] 2 Sim 213, 221 (Shadwell J); *Foster v Globe Venture Syndicate* [1900] 1 Ch 811, 814 (Farwell J); *The Arantzazu Mendi* [1939] AC 256, 264 (Lord Atkin); *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853, 961 (Lord Wilberforce); *Adams v Adams* [1971] P 188; *Re Westinghouse Uranium Contract* [1978] 1 AC 547, 617 (Lord Wilberforce), 651 (Lord Fraser).

<sup>242</sup> See, eg, *Williams v The Suffolk Insurance Co*, 38 US 415, 430 (1839); *Baker*, 369 US 186, 211, 281 (1962); *Goldwater v Carter*, 444 US 996, 1000 (1979); *Dickson v Ford*, 521 F 2d 234, (1974).

<sup>243</sup> *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1977] 1 QB 205, 217 (Lord Denning MR).

<sup>244</sup> Cf *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853.

In this light, the inquiry narrows in on what role domestic courts play in international relations. In *Thorpe v Commonwealth*,<sup>245</sup> the plaintiff sought inter alia a declaration that the Commonwealth ought to move the UN General Assembly for an advisory opinion from the International Court of Justice on the rights of indigenous Australians. In setting aside the application for want of jurisdiction, Kirby J said that the orders sought pertained to matters that

the Australian Constitution reserves to the Executive Government of the Commonwealth ... upon which the Australian Government speaks to the international community *with a single voice*. That voice is the voice of the Executive Government chosen from the Parliament elected by the people of Australia. *It is not the voice of this court.*<sup>246</sup>

This highlights two main points. First, operating under the *Australian Constitution*, it is not for courts to exercise the prerogative of the executive. Second, that is not to say that the judiciary must speak in unison with the executive, but rather the judiciary must not speak at all. Taking this further, the comment might imply that in cases that might be of concern to foreign states, any judgment given is not promulgated to the international community at large, or to be interpreted by the international community as being the policy of the Australian Executive. Rather, such a judgment is simply a determination of a dispute between litigants in harmony with the obligation of the courts to decide cases before them according to the law. This might take place when the executive fails to certify a fact-of-state and a court follows the next 'best evidence' approach and hears a dispute on its merits.

This questions the need for a 'one voice' principle. Under this line of reasoning, the judiciary is not able to speak in certain matters pertaining to foreign affairs for the very reason that it does not have the prerogative to do so. It is only for the executive to speak to the international community in these instances. Whilst it remains the task of the judiciary to apply the law, judicial pronouncements are not to be equated with executive policy. This is a far less dogmatic approach and one which promotes the enforcement of private rights over political concerns.

In *Spycatcher*, the High Court dismissed the UK Government's claim, despite the fact that the Australian Executive supported it. In so doing, the joint judgment said that

the notion that effective access to the courts should depend on a decision of the Executive is as unacceptable as the related notion that the enforceability of a claim should depend on an Executive decision that the claim should be able to succeed.<sup>247</sup>

The enforcement of private rights should not depend on an executive decision as to whether the judicial relief sought should be obtained.<sup>248</sup> Rather, the correct use of executive certificates preserves the constitutionally entrenched position of both the executive and the judiciary without infringing the separation of powers.

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<sup>245</sup> (1997) 144 ALR 677.

<sup>246</sup> Ibid 693 (Kirby J) (emphasis added).

<sup>247</sup> *Spycatcher* (1988) 165 CLR 30, 48 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ)

<sup>248</sup> Ibid 47.

When the executive does not issue a certificate, this should not render a case non-justiciable. Instead, access to the courts must be maintained, and with it one of the key tenets of the rule of law.

While purporting to uphold the separation of powers, the ‘one voice’ principle is instead an affront to fundamental principles of our legal system. One of the key tenets of the rule of law is that the law be maintained by an independent judiciary, which protects the rights of citizens.<sup>249</sup> The ‘one voice’ principle offends this concept. To hold that where the views of the executive on facts-of-state are unknown, the judiciary cannot determine the outcome of a dispute before it, is subversive of the role of the courts, and promotes complicity amounting to an egregious breach of the separation of powers. On this approach, the enforceability of a claim rests on executive discretion whether or not to make those views known.<sup>250</sup>

## 2 *Judicial Notions of Embarrassment*

With this conceptualisation of the ‘one voice’ principle in contemplation, any factors relevant to determining embarrassment must be found in judicial applications of this strand of the doctrine. A wide application of the ‘embarrassment’ criterion could render any matter involving a foreign state non-justiciable on the basis that the executive might feel embarrassed in some way or form.<sup>251</sup> In *Petrotimor*, the joint judgment stated that ‘international relations can be controversial and the outcomes of a court adjudication might well create embarrassment for the government’.<sup>252</sup> This may be true, but many issues before courts can be controversial, and judicial rulings might create embarrassment for many parties not themselves involved in the proceedings. This, alone, should not be sufficient to deny adjudication. Reversion to a non-interventionist approach in cases that might be of concern to foreign states seems based on the notion that they are still sacrosanct in Australian courts, which is patently not the case. Again, political concerns are accorded unnecessary precedence.

One of the grounds used by the Federal Court to deny adjudication in *Petrotimor* was based on the potential scope of embarrassment to the executive. An executive certificate had been issued, and was held to speak for the executive’s official position.<sup>253</sup> There was concern that consideration of Australia’s territorial boundaries under international law would prejudice Australia’s position in ongoing negotiations over those boundaries.<sup>254</sup> Exchange of diplomatic notes between Australia and Portugal had taken place, illustrative of ‘just how considerable the embarrassment *could* be’ between those two states, as well as ‘the *possible* embarrassment’ between Australia and East Timor on its

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<sup>249</sup> Andrew Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> ed, 1959) 195–6.

<sup>250</sup> Cf *Spycatcher* (1988) 165 CLR 30, 47 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ).

<sup>251</sup> See also Garnett, ‘Foreign States in Australian Courts’, above n 4, 727.

<sup>252</sup> *Petrotimor* (2003) 126 FCR 354, 369 (Black CJ and Hill J).

<sup>253</sup> *Ibid* 399–401 (Beaumont J).

<sup>254</sup> *Ibid* 370 (Black CJ and Hill J), 400 (Beaumont J).

becoming independent.<sup>255</sup> On the basis of executive certification, the Court held that embarrassment ‘*could* be caused to Australia’s diplomatic relations’.<sup>256</sup> This language, whilst speculative, is not pure conjecture, given that Portugal had made clear how it would feel about an Australian court determining Petrotimor’s rights. Hence, a political decision to deny adjudication, based on notions of territoriality and deference to Portuguese concerns, denied judicial resolution of the issue at hand.

This illustrates the scenario already referred to where the executive fails to certify a fact-of-state. The executive certificate supplied here was not in reference to territorial recognition (a certifiable fact), but on embarrassment (not a certifiable fact). It is understandable that the executive would not announce its position on territorial boundaries, given that diplomatic negotiations had been taking place for quite some time. Here, given that it could not be known when or if those negotiations would come to fruition, and the enforcement of private rights was at stake, *Petrotimor* was one of those cases in which the court should have used the next ‘best evidence’ available to decide the dispute.<sup>257</sup> This would have more closely followed the merits-based approach of Canada. This is preferable to applying the doctrine of non-justiciability, where a private litigant’s rights go unenforced; instead, that litigant is left with the sentiment that those rights have been sacrificed to fulfil a political agenda.

Courts have already demonstrated that reverence to governmental sovereignty is not as paramount as it once might have been. Moreover, in *Petrotimor*, if Portugal and East Timor had taken offence to this judicial pronouncement, that would have been based on their belief in the ‘one voice’ principle. If this were of such concern, then the executive would have had opportunity to make it clear to those states that the Australian Government cannot undermine the independence of the Australian judiciary nor dictate its decisions. Any dispute that subsequently arose between Australia and a foreign state could be taken to an appropriate forum. This would not have been a judicial pronouncement on foreign policy, nor on the executive’s recognition of continental shelf boundaries, but a statement that Australian courts jealously guard the separation of powers and do not allow politics to interfere in their decision-making processes.

In *Victoria Aircraft Leasing*, neither the trial judge nor the Victorian Court of Appeal referred to concerns of the embarrassment of the executive, and the executive’s views were not sought. However, at first instance Dodds-Streeton J said in obiter that a claim raised against the US ‘could embarrass the court or prejudice the relationship between Australia and each of the foreign states’,<sup>258</sup> given that its subject matter included issues relating to international relations. These were very broadly characterised by her Honour as ‘intelligence, international security, national interest, anti-corruption, anti-money laundering

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<sup>255</sup> Ibid 369 (Black CJ and Hill J) (emphases added).

<sup>256</sup> Ibid 370 (emphasis added).

<sup>257</sup> See, eg, *Frost* (1937) 58 CLR 528, 549 (Latham CJ).

<sup>258</sup> *Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Ltd* (2004) 185 FLR 48, 59 (Dodds-Streeton J).

and anti-terrorism'.<sup>259</sup> That was not relied upon subsequently; as will be recalled, foreign state immunity was conferred on the US.

Yet this provides another example of broad judicial endorsement and application of the second strand of the doctrine. The executive had not provided its views on embarrassment; however, even if they had been provided, they would not have been relevant considerations to render the matter non-justiciable. It would be anathematic to the rule of law to decline to hear the case because it was feared to do otherwise would cause embarrassment to a party not privy to the proceedings.

At first instance in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*,<sup>260</sup> reliance was placed on the executive's consideration of Australia's 'long term national interests' in refusing service out of jurisdiction. Allsop J felt that allowing service out against the Japanese Whaling company would help to promote an international dispute between Australia and Japan.<sup>261</sup> It is by no means certain what factors are included in deciding Australia's 'national interest', but by implication, embarrassment to the executive would be against it. On this view, adjudication could be refused for the reason that hearing a case would be contrary to the 'national interest'.

The majority in the Federal Court held that 'exclusively political dimension[s]' of disputes are non-justiciable, but did not offer guidance as to whether 'national interest' is an 'exclusively political dimension', which falls within the ambit of the doctrine of non-justiciability.<sup>262</sup> In any case, such an incredibly wide interpretation of the second strand of *Buttes* should be discouraged. An all-encompassing concept such as 'national interest' is a very broad interpretation of 'embarrassment' and favours the interests of the executive over private litigants to an intolerable degree. There may be many cases heard daily in Australian courts that are against the 'national interest', but the necessity for judicial independence determines that such cases do not even verge on the fringe of adequacy to deny adjudication.

Perhaps with thoughts of judicial independence in contemplation, Moore J, in the appeal, said that to allow the potential political repercussions of a case (which would presumably include embarrassment to the executive) to influence the decision whether to grant leave to serve proceedings denies the court's role in the Australian system of government. His Honour said that

courts must be prepared to hear and determine matters whatever their political sensitivity either domestically or internationally. To approach the matter otherwise, is to compromise the role of the courts as the forum in which rights can be vindicated whatever the subject matter of the proceedings.<sup>263</sup>

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<sup>259</sup> Ibid 58.

<sup>260</sup> [2005] FCA 664 (Unreported, Allsop J, 27 May 2005)

<sup>261</sup> Ibid [35]:

Futility will be compounded by placing the Court at the centre of an international dispute (indeed helping to promote such a dispute) between Australia and a friendly foreign power which course or eventuality the Australian Government believes not to be in Australia's long term national interests.

<sup>262</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, 430 (Black CJ and Finkelstein J).

<sup>263</sup> Ibid 435 (Moore J).

This serves as a reminder that more is at stake in application of the doctrine of non-justiciability than the political sensitivities of the executive or foreign states. To decline adjudication based on these political sensitivities is to sanction complicity between two arms of government and allow parliamentary sovereignty to trump the authority of judges to determine the meaning of the law — a direct departure from the rule of law.<sup>264</sup>

The ‘embarrassment’ strand was the basis of the dissenting judgment of Kiefel J in *Gamogab v Akiba*.<sup>265</sup> A Papua New Guinean national sought joinder to a native title claim in the Federal Court claiming traditional rights and interests of his islander group over that claim in the Torres Strait. At first instance, French J refused joinder based on concerns that the proceedings would agitate matters in relation to the boundaries between Australia and Papua New Guinea,<sup>266</sup> which were the subject of a treaty.<sup>267</sup> The majority overturned this decision on appeal,<sup>268</sup> and remitted the matter for reconsideration.<sup>269</sup> However, Kiefel J in dissent would have refused joinder by applying the doctrine of non-justiciability on the basis of these political concerns.

The approach of Kiefel J places reliance on executive ‘embarrassment’ and, in so doing, shows this strand of the doctrine to be an impractical test. Despite, on appeal, the Commonwealth supporting the Papua New Guinean national in his application for joinder, Kiefel J held that ‘it is the nature of the question for the Court which renders it non-justiciable’.<sup>270</sup> Under this line of reasoning, it is not the *reality* of embarrassment that determines the justiciability of a case.<sup>271</sup> Instead, if the ‘prospect’ of embarrassment is ‘real’,<sup>272</sup> then ‘an appreciation of the nature and limits of the judicial function’ determines that such cases are non-justiciable.<sup>273</sup> This seems to suggest that where the executive implies that it does not expect embarrassment in foreign relations to ensue when a court proceeds to hear a case, courts must nevertheless abstain from adjudication because the prospect of embarrassment may appear at some future time. This embarrassment seemingly could only arise from alteration of government policy, either as a result of a change in government or a realignment of foreign policy.

It is tenuous for courts to predicate their decisions — and to deny private litigants their access to the courts — on the *prospect* of changes in executive

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<sup>264</sup> Cf Dicey, above n 249, 407; Geoffrey Walker, *The Rule of Law* (1988) 159.

<sup>265</sup> *Gamogab v Akiba* (2007) 159 FCR 578.

<sup>266</sup> *Akiba on behalf of the Torres Strait Regional Seas Claim People v Queensland (No 2)* [2006] FCA 1173 (Unreported, French J, 8 September 2006) [46]–[49].

<sup>267</sup> *Treaty with the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, Including the Area Known as Torres Strait, and Related Matters*, signed 18 December 1978, [1985] ATS 4 (entered into force 15 February 1985).

<sup>268</sup> *Gamogab v Akiba* (2007) 159 FCR 578, 591–6 (Gyles J, Sundberg J concurring).

<sup>269</sup> *Akiba on behalf of the Torres Strait Regional Seas Claim People v Queensland (No 3)* [2007] FCA 1940 (Unreported, French J, 7 December 2007). French J again refused joinder, however on the basis that the applicant failed to do more than assert an interest in the claim area.

<sup>270</sup> *Gamogab v Akiba* (2007) 159 FCR 578, 589 (Kiefel J).

<sup>271</sup> *Ibid.*

<sup>272</sup> *Ibid.*

<sup>273</sup> *Ibid.*

policy.<sup>274</sup> Whilst the executive is not able to certify embarrassment, the fact that matters may still be rendered non-justiciable based on the ‘prospect’ of embarrassment, notwithstanding executive refutations of such claims, reveals this to be an unworkable test. Under such a test, courts can reach opposite conclusions to those the executive of the day would have reached, which might thereby frustrate the policy of the executive in foreign affairs — ironically, the very outcome the test seeks to preclude. In this respect, the dissent of Kiefel J, whilst a peculiar approach, is beneficial to demonstrate that this strand of the doctrine is inherently flawed.

Another troubling aspect of this strand is that it remains to be seen precisely how ‘embarrassment’ can be quantified. It is not certain whether there are degrees of embarrassment; whether embarrassment must be real, or whether speculation suffices; or whether the embarrassment must be to the forum’s executive, or to a foreign state, or to both. Furthermore, foreign states ought to be aware, at least at a basic level, of the nature of Australian democracy and its separation of powers: that the Australian Executive does not control judicial outcomes. On this basis it seems feeble to suggest that a judicial outcome might cause embarrassment to the executive on a matter that was not within its control.<sup>275</sup> This is by no means a promotion of the politicisation of the judiciary. It is simply a reminder that judicial independence is fundamental to Australian governance.

Moreover, the fact that the doctrine of non-justiciability does not exist in many jurisdictions means that ‘embarrassment’ can never itself be an objective criterion.<sup>276</sup> It is not logical that an Australian court hearing a case involving a foreign state, in which recourse is not had in its courts to a similar doctrine of non-justiciability, might bring ‘embarrassment’ to the Australian executive when a court in that foreign state would have had no hesitation in hearing an identical case.<sup>277</sup> At present, this ‘embarrassment’ strand of the doctrine is unworkable, has the potential to lead to complicity between separate arms of government, and increases the potential for the corrosion of private rights in the face of political concerns.

## V CONCLUSION

Ultimately, if courts are to continue to endorse the doctrine of non-justiciability, further materialisation of this threat has the potential to obstruct confidence and certainty in the expectation of access to the courts for those involved in cross-border transactions. In attempting to avoid interference with the executive’s prerogative, courts may be doing just that: excessive deference to foreign states, created through concerns not to infringe their

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<sup>274</sup> *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 467 (1964) (White J).

<sup>275</sup> See also Jones, above n 193, 473.

<sup>276</sup> See also Conforti, above n 184, 20.

<sup>277</sup> The different approaches taken by courts in the US, Canada, and Germany in similar cases discussed in the preceding analysis illustrates this lack of objectivity. See *Greenham Women against Cruise Missiles v Reagan*, 591 F Supp 1332, 1336, 1338 (1984); aff’d *Greenham Women against Cruise Missiles v Reagan*, 755 F 2d 34 (1985); cf *Operation Dismantle* [1985] 1 SCR 441; *NATO-Doppelbeschluss* BVerfG (Germany) 2 BvR 1714/83, 16 December 1983 (1984) 66 BVerfGE 39.

sovereignty nor frustrate the executive's foreign policy, compromises the sovereignty of the forum, the very thing that the executive is bound to protect.

Unlike other examinations of the doctrine, this article has sought to advocate an approach that avoids dichotomising considerations, such as the rule of law and the separation of powers,<sup>278</sup> or the interests of private litigants and those of the wider public,<sup>279</sup> into 'competing' and mutually exclusive concepts.<sup>280</sup> In any case, these considerations are complementary. The denial of adjudication in Australian cases for either a 'lack of manageable standards' or on fears of executive 'embarrassment' stands as a warning of the risk of the damage the doctrine can inflict on private litigants. Perhaps more disconcertingly, the cases display the risk of derogating the basic duty of the courts to maintain the separation of powers and uphold the rule of law.

This article raises difficult questions at the crossroads between private and public international law. Foremost, it throws doubt on the appeal of the doctrine of non-justiciability and its concomitant notion of judicial restraint. Despite perceived difficulties, this article offers some pragmatic answers to problems the doctrine raises.

First, foreign states are no longer sacrosanct in Australian courts, and private international law should continue to develop to accord priority to private rights over deference to foreign states. Courts have become increasingly willing to prioritise the enforcement of private rights over the pursuit to exclude foreign sovereign power. Doctrines of abstention, premised on traditional notions of sovereignty and territoriality, require strong justifiability in a world where transnational litigation is not uncommon. The doctrine of non-justiciability, in its present form, will be manipulated by defendants to the detriment of meritorious plaintiffs until courts recognise that unnecessary deference to foreign states is subordinating private rights without due cause.

Second, the foundations of *Buttes* were not strong, predicated on a misunderstanding of the political question doctrine of the US, and perhaps for this reason the doctrine's application in the UK is in decline. The political question doctrine can be applied in cases involving purely internal considerations within the US and having no relation to transactions of foreign states, whereas the doctrine of non-justiciability in the UK was created solely to support judicial abstention in cases of private international law. Consideration of the Canadian merits-based approach is warranted. Access to the courts for private litigants must be maintained. Courts should only allow the application of legal principles to defeat a plaintiff's claim, rather than acquiescent reliance on 'judicial restraint' and reversion to a 'hands-off' approach in cases that might be of concern to foreign states.

Third, judicial uncertainty to adjudicate on cases involving foreign states is unfounded, and a correct understanding of the Australian executive's prerogative to certify facts-of-state ameliorates any 'lack of manageable standards'. If the executive fails to certify a fact-of-state, or ambiguities remain in the certificate's interpretation, courts should use the next 'best evidence' to hear the matter before the court and follow a merits-based approach. At present, abstention

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<sup>278</sup> See, eg, Lindell, 'Judicial Review of International Affairs', above n 145, 161.

<sup>279</sup> See, eg, Ong, above n 4, 35, 36.

<sup>280</sup> Lindell, 'Judicial Review of International Affairs', above n 145, 161.

occurs because 'manageable standards' are said not to exist, but it is because courts are deciding to abstain that no standards can exist, which is at odds with the development of common law precedent. Adjudicating in cases involving issues that might be of concern to foreign states does not usurp executive power and, as such, does not interfere in Australia's foreign affairs. Judicial disinclination to encroach upon the executive's constitutionally mandated role is an unsatisfactory reason to leave private litigants without a forum for judicial resolution of their disputes.

Finally, the 'one voice' principle is dubious, and the 'embarrassment' strand of the doctrine is an unworkable test with the potential to undermine the sovereignty of the forum. The idea that the executive and judiciary should speak with 'one voice' in foreign relations amounts to a breach of the separation of powers. If the 'one voice' principle is adhered to, then in cases where the executive opts not to make its views known on certifiable facts-of-state, the judiciary is not able to determine the outcome of the dispute before it, which determines that the enforceability of the claim rests on executive discretion. Moreover, the 'one voice' principle is unfounded, because judicial pronouncements should not be equated with executive policy. Further, under the present test, courts can reach opposite conclusions to those the executive would have reached, thereby frustrating the executive's policy and resulting in the very outcome this strand of the doctrine strives to avoid.

Together, these arguments highlight that there are strong reasons to doubt the desirability of the doctrine of non-justiciability. They unpack assumptions underlying judicial hesitation to adjudicate in cases that might be of concern to foreign states. At the intersection between private and public international law, the judiciary must prioritise of private rights over political concerns and maintain access to the courts.