FOREIGN SOVEREIGN IMMUNITY IN THE CARIBBEAN: A CASE FOR LEGISLATIVE INTERVENTION

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ABSTRACT

It may be taken to be a general principle of Caribbean jurisprudence that foreign states and their agents enjoy certain immunities from the jurisdiction of domestic courts and domestic law enforcement agencies. Clarification of the scope of this immunity is important because of the increasing presence of foreign governmental activity in commercial and economic developmental transactions in the region. Foreign sovereign immunity has not, however, been provided for in the constitution or by the legislature of any independent Commonwealth Caribbean state, (with, possibly, the qualified exception of Belize) and the courts have been left to navigate as best they can through the thorny doctrinal problems to which the subject gives rise. This article surveys the present law as best divined from the sprinkling of potentially relevant constitutional and legislative provisions and common law cases on the subject. This article then considers both the general requirements for legislative intervention as well as recent challenges that strengthen the case for legislative involvement. It echoes what is now a distinct judicial call for amplification of the law by the legislatures in the Caribbean.

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I. INTRODUCTION

Foreign sovereigns and their agents are generally allowed to enter and otherwise act within the territories of Caribbean states. A concomitant of that license is the existence of an immunity from the jurisdiction of the domestic courts and the domestic law enforcement agencies.[1] The justification for this immunity has been widely accepted to be that stated by Chief Justice Marshall in the U.S. Supreme Court decision in *The Schooner Exchange*,[2] namely, "the perfect equality and absolute independence"[3] of sovereigns. This premise was accepted by the English Court of Appeal in *The Parlement Belge*[4] as inducing every state to decline "to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any [foreign] sovereign" or over the property of that sovereign located within its territory.[5] This rationale, loosely translated to mean that an equal has no authority over an equal (*par in parem non habet imperium*), has been repeatedly invoked as the basis for foreign sovereign immunity.[6]

1. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 470 (7th ed. 2008).
2. Schooner Exchange v. McFaddon, 11 U.S. 116 (1812).
3. *Id.* at 138.
4. The Parlement Belge [1880] 5 PD 197.
5. The Parlement Belge [1880] 5 PD 197 at 215.
6. For a discussion of the nature and origin of sovereign immunity, see Tristan Dunford, *The Original Understanding of State Sovereign Immunity,* 32 J. JURIS. 167 (2017). Dunford considers that the belief that sovereign immunity is a common law doctrine that developed under the English feudal system, as well as the belief that sovereign immunity is based on the notion that one who creates the law is superior to the law, are both ill conceived. Instead, Dunford offers the explanation that the concept of the "sovereign" is rooted in the law of nature, wherein people form society for safety in life, liberty and property. Dunford explains "[w]ith the formation of the state comes the need to set up a public authority who prescribes duties of each member of the society and enforces those duties upon the populace. This public authority is the sovereign. For this authority to be effective, it must be given certain duties, rights, and privileges to carry out its work. One of those

There was formerly a rule of absolute immunity,[7] seemingly accepted by the Privy Council,[8] but the twentieth century witnessed a significant expansion in state industrial and trading activities such that to accord them all absolute immunity would give them an unfair commercial advantage. There gradually developed a distinction between acts of government (*jure imperii*), which continued to attract immunity; and acts of a commercial nature (*jure gestionis*), which did not. The seismic shift in Caribbean common law from absolute to restrictive immunity was first announced in the Privy Council decision in *The Philippine Admiral*[9] and was later adopted and placed on clearer doctrinal footing in English common law by the English Court of Appeal in *Trendtex Trading Corp. v. Central Bank of Nigeria*.[10] Within a decade of these two cases the restrictive doctrine of "sovereign" or "state" immunity was codified in legislation in the United States,[11] United Kingdom,[12] Singapore,[13] Pakistan,[14] South Africa,[15] Australia,[16] and Canada.[17]

There has been a dialectical relationship between these developments in domestic law and corresponding changes at international law. The movement from absolute to restrictive immunity was premised on the increasing number of states adopting this evolution in their domestic courts and legislation thus evidencing a development in state practice and *opinio juris* resulting in the change of customary international law. At the treaty level this shift was concretized in two main multilateral conventions: the 1926 Brussels Convention for the Unification of

privileges is sovereign immunity, or immunity from suit for actions committed by the sovereign. Sovereign immunity is granted to sovereigns to allow them to work for the best good of the state." *Id.* at 170.

7. *See, e.g.*, The Parlement Belge [1879] 4 PD 129; The Porto Alexandre [1920] N. No. 1315 at 30, http://www.uniset.ca/other/cs2/1920P30.html; Berizzi Bros. v. The Pesaro, 271 U.S. 562 (1926).

8. *See, e.g.*, Sultan of Johore v. Abubakar [1952] 1 All ER 1261 (citing *The Parlement Belge* with evident approval, though holding, on the facts, that there had been a waiver of immunity by the foreign sovereign).

9. *The Philippine Admiral* [1976] 2 WLR 214 (PC) (U.K.).

10. Trendtex Trading Corp. v. Cent. Bank of Nigeria [1977] QB 529 (U.K.).

11. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976).

12. State Immunity Act 1978, c. 33 (U.K.).

13. State Immunity Act 1979, c. 313 (Sing.).

14. The State Immunity Ordinance 1981, No. 6 of 1981, March 11, 1981 (Pak.).

15. Foreign States Immunities Act 87 of 1981 (S. Afr.), amended by Foreign States Immunities Amendment Act 48 of 1985 (S. Afr.).

16. Foreign States Immunities Act 1985 (Cth) (Austl.).

17. State Immunity Act, R.S.C. 1985, c. S-18 (Can.).

Certain Rules relating to the Immunity of State-Owned Vessels,[18] and the 1972 European Convention on State Immunity.[19] More recently, the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted by the General Assembly on December 2, 2004,[20] embraces the restrictive theory of immunity. Like the 1972 European Convention, the 2004 UN Convention asserts the general rule that states and their property benefit from immunity from adjudicative jurisdiction and then enumerates various exceptions to this basic proposition.[21]

Despite having placed the limitations on the immunity of the territorial state from its own domestic court on a statutory footing during the last seventy-five years, based on the Crown Proceedings Act 1947 of the United Kingdom,[22] Caribbean states have not adopted any express constitutional or legislative provisions on foreign sovereign immunity. Apart from the possibility that the extension of the United Kingdom State Immunity Act 1978 to Belize may mean this Act continues in that jurisdiction under the constitutional savings law clause,[23] there appears

18. International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, Apr. 10, 1926, 176 L.N.T.S. 199; *see also* International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, UKTS No. 15 (1980), Cmnd. 7800.

19. European Convention on State Immunity, May 16, 1972, 1496 U.N.T.S. 181; *see also* European Convention on State Immunity, Oct. 4, 1979, Cm. 7742 (UK).

20. G.A. Res. 59/38 (Dec. 2, 2004).

21. *See* Philippa Webb, *The United Nations Convention On Jurisdictional Immunities Of States And Their Property*, U.N. Audiovisual Libr. of Int'l L. (2019).

22. Crown Proceedings Act 1947, c. 44 (U.K.). The Act abolished aspects of Crown immunity in respect of actions in contract and tort against the Crown. Since then, civil actions may be brought against the Crown in the same way as against any other party. The Act confirmed the common law doctrine of Crown privilege but, by making it, for the first time, justiciable, paved the way for the development of the modern law of judicial review and public interest immunity. Notwithstanding subjection to litigation, there remains some differences between crown proceedings and claims between private parties, especially as to enforcement of judgments. The Crown Proceedings Act of 1947 has been widely adopted throughout the Caribbean. *See* Crown Proceedings Act 1956, c. 121 (Ant. & Barb.); Crown Proceedings Act 1963, c. 68 (Bah.); Crown Proceedings Act 1953, c. 167 (Belize); Crown Proceedings Act 1955, c. 197 (Barb.); State Liability and Proceedings Act 1984, Cap. 7.80 (Dominica); Crown Proceedings Act, Cap. 74 (Gren.); State Liability and Proceedings Act 1984, Cap. 6:05 (Guy.); Crown Proceedings Act 1959 (Jam.); Crown Proceedings Act 1954, Cap. 2.06 (Montserrat); Crown Proceedings Act, Cap. 13 (St. Lucia); Crown Proceedings Act 1955, Cap. 5.05 (St. Kitts & Nevis); Crown Proceedings Act, Cap. 85 (St. Vincent); State Liability and Proceedings Act 1966, Cap. 8:02 (Trin & Tobago). Further, see Gairy v. Att'y General of Grenada [2001] UKPC 30, [2002] AC 167 (appeal taken from Gren.)); Wilmott-Francis v. Cooke (1995) JM 1995 SC 30 (Jam.); Kirvek Mgmt. & Consulting Services Ltd. v. Att'y-Gen. [2002] UKPC 43 (appeal taken from Trin. & Tobago).

23. *See* BCB Holdings v. Att'y Gen. of Belize, [2013] CCJ 5 (AJ), discussed *infra* at p. 35.

to be no relevant legislation adopted by any independent Caribbean state. None of the three multilateral conventions has been accepted by any Caribbean state.

It follows, then, that the broad rules of customary international law adopted as common law continue to operate. By definition, the common law does not contain the means that a statute does of precisely distinguishing agencies that are properly regarded as part of the foreign state and those which are not; or of characterizing governmental acts distinct from commercial acts; or of deciding the circumstances in which there may be execution of judgment against the property of the foreign sovereign; or of deciding when it is permissible to interplead a foreign sovereign without interfering with the executive's power in foreign affairs.

There may also be international uncertainty as to the regional position. None of the multilateral conventions on immunity has been accepted by any Caribbean state. As late as 1980, a survey conducted under the auspices of the International Law Commission[24] was taken to indicate[25] that Caribbean countries such as Barbados and Suriname support the restrictive approach to immunity, but that Trinidad and Tobago continued to adhere to the doctrine of absolute immunity. The latter position was based on the expression by Trinidad and Tobago that it expected that its courts would follow the common law pattern and "adhere to a doctrine of absolute immunity, particularly in relation to in personam actions."[26] Since this was the case, it was "evident that no distinction can be made between the public acts and non-public acts of foreign States."[27] However, the declaration added that, "due regard may be given to recent decisions of other common law jurisdictions whereby the distinction has been made between actus jure imperii and actus jure gestionis."[28] And elsewhere, Trinidad and Tobago had inserted the general preface that, "A Court seized of any action attempting to implead a foreign sovereign or State would apply the rules; of customary international law dealing with the subject."[29] *RBTT Trust*

24. U.N. General Assembly Int'l Law Comm'n, Jurisdictional Immunities of States and their Property, U.N. Doc. A/CN.4/343 (1981) [hereinafter Jurisdictional Immunities].

25. *See* Ian Brownlie, Principles of Public International Law 328–329, nn.26 & 28 (7th ed. 2008). It is worthy of note that this information is not found in the latest edition of the text. *See* James Crawford, Brownlie's Principles of Public International Law (9th ed. 2019).

26. Jurisdictional Immunities, *supra* note 24, at 39.

27. *Id.* at 56.

28. *Id.*

29. *Id.* at 26.

Ltd. v. APUA Funding Ltd.,[30] decided in 2010, would seem to confirm that Trinidad and Tobago has adopted a theory of restrictive immunity.

Suriname also appears to adopt and implement the customary international law on the subject. Van Heemstra[31] advises that the law of Suriname, like that of the Netherlands, embodies the principle of international law that a foreign state is not subject to the jurisdiction of other states regarding the exercise of its independent sovereign power. A marshal must refuse to serve a summons or other legal notice if he has been advised by or on behalf of the Minister of Justice that the service of such notice would violate the obligations of the State of the Netherlands under international law.[32]

There are good reasons for all Members of the Caribbean Community to place foreign sovereign immunity on a statutory basis and to all sing from the same hymn sheet as regards the scope of that immunity. As a capital importing region, the Caribbean has been the subject of increasing penetration by commercial and developmental activities by foreign states and their agencies.[33] The foundational treaty arrangements establishing the Caribbean Community are premised on the creation of a single market and economy[34] regulated (eventually) by a single judicial system.[35] Modern foreign sovereign immunity legislation has been adopted in many Western nations including competitor countries with similar historical antecedents.[36] Furthermore, recent developments in the field would benefit from policy indications from the executive and legislative branches of government.

II. Constitutional Provisions

Caribbean constitutions do not contain any provision on foreign state immunity, although there is an oblique reference to diplomatic

30. RBTT Trust Ltd. v. APUA Funding Ltd., [2010] HC 104 (Trin. & Tobago).

31. Frans J.J. Van Heemstra, *Sovereign Immunity and Judicial Remedies Against the Netherlands Government*, 10 Int'l L. 441, 441–42 (2018).

32. *Id.*

33. *See, e.g.*, Econ. Comm'n for Lat. Am. & the Caribbean, Trade and Investment Flows Between the Caribbean and the Rest of the Hemisphere in the context of the FTAA, at 5, U.N. Doc. LC/C AR/G.664 (2001).

34. *See* Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, July 5, 2001, 2259 U.N.T.S. 293 (entered into force Jan. 1, 2006).

35. *See* Agreement Establishing the Caribbean Court of Justice, Feb. 14, 2001, 2255 U.N.T.S. 319 (entered into force July 23, 2002).

36. *See, e.g.*, State Immunity Act 1979, c. 131 (Sing.), which was enacted on 26th October 1979 and is generally based on State Immunity Act 1978, c. 33 (U.K.).

immunity in the provision that excludes from the acquisition of nationality any person whose parent "possesses such immunity from suit and legal process as is accorded to an envoy of a foreign State."[37] A literal reading of various constitutional provisions would seem to exclude the possibility of foreign sovereign immunity: there is no express exception for sovereign immunity in respect of provisions authorizing the deprivation of personal liberty;[38] charging persons with a criminal office;[39] compulsory possession of property;[40] or allowing non-consensual search of person and property.[41] Happily, Caribbean courts have shown themselves adept at not interpreting these provisions literally; that is, adopting an interpretation that respects the international obligations of the state, thus leaving room for operation of foreign sovereign immunity. The constitutional provisions on the immunities from suit in Dominica,[42] Guyana,[43] and Trinidad and Tobago,[44] emphasize the dignity attachable to the territorial sovereign (Presidents, in these three states) and could provide general guidance on the immunities to be accorded to the foreign sovereign.[45]

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37. *See, e.g.*, Constitution of Barb. Nov. 29, 1966, L.R.O. 2002 § 4; Belize Constitution Mar. 1, 2017, CAP 4, § 24(a); Constitution of the Commonwealth of Dominica Nov. 3, 1978, L.R.O. 1/1991 § 98; Constitution of the Cooperative Republic of Guy. Oct. 6, 1980, Cap. 1:01, § 43(a); Constitution of Jam. Jul. 25, 1962, § 3(a); Constitution of the Republic of Trin. & Tobago Aug. 1, 1976, § 17(2). These provisions are to be read in conjunction with the quite detailed statutory regimes on diplomatic immunities: *see* Diplomatic Immunities and Privileges Act, 1966 c. 18, § 4(2) (Barb.); Diplomatic Privileges and Consular Conventions Act, 2003 c. 23, § 3 (Belize); Privileges and Immunities (Diplomatic, Consular and Int'l Org.) Act, 1994 c. 17:01 § 9 (Trin. & Tobago) (referring to Part IV of the Fifth Schedule).

38. *See, e.g.*, Constitution of Barb., *supra* note 37, § 13; Belize Constitution, *supra* note 37, § 5; Constitution of the Commonwealth of Dominica, *supra* note 37, § 3; Constitution of the Cooperative Republic of Guy., *supra* note 37, § 139; Constitution of Jam., *supra* note 37, § 14; Constitution of the Republic of Trin. & Tobago, *supra* note 37, § 4(a).

39. *See, e.g.*, Constitution of Barb., *supra* note 37, § 18; Belize Constitution, *supra* note 37, § 6; Constitution of the Commonwealth of Dominica, *supra* note 37, § 8; Constitution of the Cooperative Republic of Guy., *supra* note 37, § 144; Constitution of Jam., *supra* note 37, § 16; Constitution of the Republic of Trin. & Tobago, *supra* note 37, § 4(a).

40. *See, e.g.*, Constitution of Barb., *supra* note 37, § 16; Belize Constitution, *supra* note 37, § 17; Constitution of the Commonwealth of Dominica, *supra* note 37, § 6; Constitution of the Cooperative Republic of Guy., *supra* note 37, § 142; Constitution of Jam., *supra* note 37, § 15; Constitution of Trin. & Tobago, *supra* note 37, §§ 4(a) & 4(c).

41. *See, e.g.*, Constitution of Barb., *supra* note 37, § 17; Belize Constitution, *supra* note 37, § 9; Constitution of the Cooperative Republic of Guy., *supra* note 37, § 143.

42. Constitution of the Commonwealth of Dominica, *supra* note 37, § 27.

43. Constitution of the Cooperative Republic of Guy., *supra* note 37, § 182.

44. Constitution of Trin. & Tobago, *supra* note 37, § 38.

45. *E.g.*, the Constitution of the Commonwealth of Dominica, *supra* note 37, § 27(1) prohibits the instituting of criminal proceedings against a sitting President and prohibits civil proceedings in respect of acts or omissions done in the President's private capacity.

III. Legislation

There are no unambiguous legislative provisions on foreign sovereign immunity in the independent Caribbean. The implicit references to diplomatic immunity in the constitutions could be important in that legislation on diplomatic immunities and privileges is liberally sprinkled with references to "sovereign" and "sovereign power" and "foreign sovereign power." These terms do not specifically provide for foreign sovereign immunity, but they do make clear that diplomatic and consular representatives enjoy immunity by virtue of being representatives of foreign sovereign. Hence the incident of foreign sovereign immunity should follow *a fortiori*. Further, where there does exists legislation on sovereign immunity, there are normally provisions making clear that, subject to any necessary modifications, the provisions in the statute on diplomatic immunity shall apply to "(a) a sovereign or other head of State; (b) members of his family forming part of his household; and (c) his private servants."[46]

The closest that the Caribbean comes to having legislation on sovereign immunity is through the United Kingdom State Immunity (Overseas Territories) Order 1979[47] which extends the provisions of the United Kingdom State Immunity Act 1978 to five territories: Belize (then a colony), British Virgin Islands, Cayman Islands, Montserrat, and Turks and Caicos, with certain adaptations and modifications. There is every reason to believe that the Act continues in force for the last named four countries which are all still overseas territories of the United Kingdom. Belize, alone among the five listed territories, became independent, achieving that status on September 21, 1981.

An examination of the pages of the published laws of Belize does not indicate that the Sovereign Immunity Act 1978 is presented as part of the laws of independent Belize. This is not, however, conclusive because Section 134 of the independence Constitution provides for the saving of "existing laws." In the words of Section 134(1) existing laws "shall . . . continue in force on and after Independence Day and shall then have effect as if they had been made in pursuance of this Constitution but they shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution."[48] The purport of this

46. *See, e.g.*, State Immunity Act 1978, § 20(1) (U.K.).

47. State Immunities (Overseas Territory) Order 1979, SI 1979/458 (U.K.).

48. Belize Constitution, *supra* note 37, § 134(1).

provision clearly cannot be frustrated by the simple fact that a "saved" law does not appear in the published laws of the state.

Section 134(1) was the subject of intense judicial scrutiny by the Caribbean Court of Justice ("CCJ") in *BCB Holdings v. Attorney-General of Belize*, where it was decided that the 1980 Arbitration Ordinance (which also does not appear in the published Laws of Belize) had been saved.[49] The Court characterized the colonial 1980 Arbitration Ordinance as "having effect" immediately before Independence Day and was therefore "saved" as existing law by Section 134(1) subject to any amendment necessary to bring it into conformity with the 1981 Constitution.[50] Similar reasoning is entirely possible regarding the 1978 Sovereign Immunity Act, although absence of the Act from the pages of the published law and its non-invocation in litigation during the forty years of independence, are rather puzzling.

As extended by the Order of 1979, the U.K. Act of 1978 makes clear and definitive provisions on sovereign immunity, which are the basic prototype on which the United Nations Convention of 2004 is based.[51] Section 1 expresses the general rule that a foreign state is immune from the jurisdiction of local courts except as provided in subsequent provisions of the Act.[52] Subsequent sections provide that the foreign state is not immune where it has submitted to jurisdiction;[53] in respect of commercial transactions,[54] (which are then carefully defined);[55] in respect of certain employment contracts;[56] in respect of death, personal injury, or damage to property;[57] in respect of interest in immovable property;[58] and in respect of Admiralty proceedings.[59] The legislation contains a comprehensive definition of the components of a "state" that enjoy immunity.[60] Any claim by the foreign state to immunity under the Act must be tried as a preliminary matter in favor of the claimant and against the foreign state before the action can proceed to the merits.[61]

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49. BCB Holdings v. Att'y Gen. of Belize, [2013] CCJ 5, ¶ 77 (appeal taken from Belize).
50. *Id.* ¶ 66.
51. *See* Webb, *supra* note 21.
52. State Immunity Act 1978, § 1 (U.K.).
53. *Id.* § 2.
54. *Id.* § 3.
55. *Id.* § 3(3).
56. *Id.* § 4.
57. *Id.* § 5.
58. *Id.* § 6.
59. *Id.* § 10.
60. *Id.* § 14.
61. J.H. Rayner Ltd. v. Dept. of Trade and Indus. and Related Appeals [1990] 2 AC 418 at 516 (HL).

IV. Common Law

Commonwealth Caribbean countries inherited the common law of foreign sovereign immunity in *The Philippine Admiral* which cited with approval, although then distinguished *The Schooner Exchange* and *The Parlement Belge* as not deciding the issue of whether absolute or restrictive immunity was applicable.[62] The doctrine of restrictive immunity adopted in *The Philippine Admiral* was probably "saved" as existing law and continued up to and through independence by the various savings law clauses in Caribbean constitutions.[63] Without the specific guidance of legislation, and without referring to the savings law provisions, Caribbean courts appear to have taken for granted the application of the doctrine of restrictive immunity. For the reasons foreshadowed above, this does not solve all the theoretical and functional problems encountered in litigation. The following survey of all available Caribbean cases on the subject is illustrative.

A. *Teemal v. Guyana Sugar Corp. (1982)*[64]

The case of *Teemal v. Guyana Sugar Corp.* ("Guysuco") seems to have been the first to discuss sovereign immunity in an independent Caribbean state. A cabinet directive required Guysuco to withhold increments payable to the plaintiff who then sued for breach of his employment contract.[65] In finding for the plaintiff the High Court made clear that this was "a case of domestic law and not of international law or foreign policy whereby the state can invoke the doctrine of 'sovereign or state immunity.'"[66] Having so held, the court, nevertheless, allowed itself to embark on an extensive review of foreign state immunity. It considered the important and then recent decision of *I Congreso Del Partido*[67] tried in the Admiralty Court in England by Robert Goff J. The court expressed itself as being particularly indebted to the

62. The Philippine Admiral [1976] 2 W.L.R. 214 (PC), ¶¶ 224–26.

63. Savings law clauses in the constitution are to be distinguished from savings law clauses in schedules to the constitution. *See* Justice Winston Anderson, The rule of law and the Caribbean Court of Justice: taking *jus cogens* for a Spin, 21 Oxf. Univ. Commw. L.J. 4 (2021), https://doi.org/10.1080/14729342.2021.1888207.

64. Teemal v. Guyana Sugar Corp., [1982] HC 14 (Guy.), https://app.justis.com/case/teemal-v-guyana-sugar-corporation-ltd/overview/aXednXudm5ydl.

65. *Id.* ¶ 103.

66. *Id.* ¶ 112.

67. I Congreso Del Partido (1981) 2 All ER 1064; *see* I Congreso Del Partido (1983) 1 AC (HL) 244.

landmark authority of *Trendex Trading Corp v. Central Bank of Nigeria*[68] which, by way of analogy, illustrated the binding sanctity of contractual agreements freely entered not only between individuals, but also between individuals and corporations controlled by the state.[69] The Court then ended by stating that it was "abundantly clear . . . that the doctrine of sovereign or state immunity which is now a restricted one does not arise in the particularly circumstances of this case because . . . what we have to consider here is a question of domestic law and not international law and/or foreign policy."[70]

B. *Rambachan v. Trinidad and Tobago Television Co. (1985)*[71]

This case concerned whether the Trinidad and Tobago Television ("TTT"), which was a private body (as distinct from the state or a public body endowed with coercive powers), was amenable to an action for breach of the constitutional right to freedom of expression in relation to an allegation that it had curtailed political speech.[72] Adopting the American concept of "state action," Judge Deyalsingh held that the Government had a duty to uphold the fundamental rights and freedoms and could not simply shift the burden to others who may not be required by law to honor such rights and freedoms and who may not even be inclined to do so.[73] In these "exceptional" circumstances the court ordered TTT to prepare and present for the court's approval a statement of policy regarding political broadcasting taking into consideration the guidelines and findings it had suggested.[74] On the way to this decision, the Judge dealt with the suggestion that the reasoning in *Trendtex*, as to whether the Central Bank of Nigeria was to be considered in international law as a department of the Federation of Nigeria for purposes of sovereign immunity, could be applied to the issue before him.[75] Rejecting that analogy, the Judge indicated that sovereign immunity fell within the field of international law which, he observed, was "of no little difficulty and is even now in the process of changing with changing circumstances."[76]

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68. I Congreso Del Partido [1977] 1 All ER 881, 897-99.

69. *Id.* ¶ 119.

70. *Id.* ¶ 120.

71. Rambachan v. Trin. & Tobago Co., [1985] HC 8 (Trin. & Tobago), https://app.justis.com/case/rambachan-v-trinidad-and-tobago-television-company-ltd-et-al/overview/aXednXitm0Cdl.

72. *Id.* ¶ 1.

73. *Id.* ¶ 45.

74. *Id.* ¶ 163.

75. *Id.* ¶ 33–37.

76. *Id.* ¶ 38.

C. *Government of Venezuela v. Fakhre (1986)*[77]

In *Government of Venezuela v. Fakhre* the Court of Appeal of the Eastern Caribbean Supreme Court was forced to determine whether to apply the restrictive doctrine or the doctrine of absolute immunity in relation to an action against Venezuela for breach of a tenancy agreement.[78] The contract of tenancy had been entered into on August 20, 1982, between the appellant by its then Chargé d'Affaires Mr. Romulo Nucette Hubner and the respondents.[79] The premises consisted of a building located at Grand Anse in the district of St. George's which was to serve as Venezuela's Grenada Venezuela Cooperation Center.[80]

On February 13, 1985, the respondents initiated an action alleging that clauses 4 and 5 of the tenancy agreement had been breached in that, *inter alia*, the appellant had parted with possession of the premises without their prior consent.[81] The respondents purported to terminate the agreement.[82] Venezuela filed a defense on March 21, 1985, which denied the breaches and the respondents' right to rescind the agreement.[83] On June 12, 1985, Venezuela's counsel addressed a letter to the Registrar of the High Court claiming immunity from suit on behalf of his client and asking that the proceedings be stayed as his client did not submit to the jurisdiction of the court.[84] On October 23, 1985, the Chief Justice made an order refusing the application for a stay on the ground that the defendant was not immune from suit and ordered the action to go to trial.[85] The appellants appealed to the Court of Appeal.

The Court of Appeal dismissed the appeal.[86] Justice Liverpool stated that a glance through the cases revealed by the time England had finally accepted the restrictive doctrine of sovereign immunity, "all the leading trading nations" (he specifically cited United States, Canada, West Germany, France, Belgium, and Holland) had already adopted it.[87] The learned Justice of Appeal then continued:

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77. Gov't of Venez. v. Fakhre, [1986] CA 13 (Gren.), https://app.justis.com/case/government-of-venezuela-v-fakhre-et-al/overview/aXednXado0adl.

78. *Id.* ¶ 9.

79. Id. ¶ 2.

80. *Id.*

81. *Id.* ¶ 3.

82. *Id.*

83. *Id.* ¶ 4.

84. *Id.* ¶¶ 4–5.

85. *Id.* ¶ 6.

86. *Id.* ¶ 43.

87. *Id.* ¶ 38.

> Lord Cross informs us in *The Phillipine Admiral* (at p.93) that according the Tate letter the countries of the world were then fairly evenly divided between those whose courts adhered to the absolute theory, and those which adopted the restrictive, theory had there was no doubt that in the last twenty years the restrictive theory had steadily gained ground; and that a list compiled by reference to the various text on international law and put before their Lordships by agreement between the parties, revealed, that there were then comparatively few countries outside the Commonwealth which could have been counted as adherents of the absolute theory. Since then we know that Zimbabwe and South Africa have crossed to the other side.[88]

Having accepted the applicability of restrictive immunity, the court dismissed the appeal and remitted the matter for trial in the normal manner,[89] thus giving rise to several important points.

First, and unfortunately, nowhere in the judgment is the doctrinal basis for accepting restrictive sovereign immunity explored. It appears to follow from the key reference to English law that the court placed considerable importance on the acceptance of the restrictive theory by the English courts. The assumption most likely would have been that English common law was somehow relevant to the application of the doctrine by the Eastern Caribbean Court of Appeal on an appeal from Grenada. On the other hand, the judgment also emphasized the growing popularity of the restrictive theory among the states of the World and particularly, the Commonwealth.[90] The implication here appears to be that customary international law had embraced the restrictive theory and that Eastern Caribbean Court of Appeal was constrained to apply it, presumably by a process of adoption akin to that adopted in *Trendtex*. This is a matter of speculation, however, since in the end the court simply concluded that it was "both right and timely to hold that the restrictive doctrine of sovereign immunity should be applied in Grenada."[91]

Secondly, the court observed that neither side had suggested that the court should seek the assistance of the Government of Grenada in ascertaining which theory of sovereign immunity the Government

88. *Id.*
89. *Id.* ¶ 43.
90. *Id.* ¶ 38.
91. *Id.* ¶ 43.

favored.[92] This harkened back to the old practice crystallized by Lord Cave in *Duff Development Co. v. Kelantan Government*[93] who said that as regards state immunity: "It is the duty of the Court to accept the statement of the Secretary of State thus clearly and positively made as conclusive upon the point."[94] However, it was acknowledged in *Duff* that in the absence of a clear statement of the position from the Government, the court would have to decide for itself whether a defendant had the benefit of state immunity, based on the evidence before it.[95] In the instant case, the Venezuelan letter to the court Registrar had as an attachment a diplomatic note dated June 7, 1985, from the Ministry of External Affairs in Grenada to the Embassy of Venezuela in Grenada. That note asserted that "The Government of Venezuela is a sovereign government recognized as such by the Government of Grenada and entitled to all the privileges and immunities pertaining thereto."[96] But clearly this was of very little assistance in in resolving the issue before the court; as Liverpool JA said, the note could ". . . not be interpreted as having attempted [to clarify the issue]; because if that was the case, I would have expected it to have condescended to much more precise particulars than it did."[97]

Third, the court was referred by the respondents to the Diplomatic Privileges Ordinance, which provides that the law relating to the immunities and privileges as to person, property, servants of sovereign diplomatic agents, or the representatives of foreign powers for the time bring in force in England shall, in so far as the same is applicable, have effect and be enforced in Grenada.[98] On the strength of this it was loosely canvassed whether the Diplomatic Privileges Act 1964 of the United Kingdom which brought into force in that country the Vienna Convention on Diplomatic Relations of 1961; and the State Immunity Act, 1978, which similarly brought force into the European Convention on State of 1972; applied to Grenada by virtue of this provision.[99] The court refused to pass on these matters leaving them to be dealt with in the normal manner in the trial of the action.[100]

92. *Id.* ¶ 41.
93. Duff Dev. Co. v. Kelantan Gov't [1924] AC (HL) 797 (Eng.).
94. *Id.* ¶¶ 808–09.
95. *Id.* ¶¶ 808–09.
96. *Id.* ¶ 5.
97. *Id.* ¶ 41.
98. Diplomatic Privileges Ordinance, (Cap. 96) § 2 (Gren.).
99. *See* Kelantan Gov't, [1924] AC (HL) 797, at ¶ 43 (Eng.).
100. *Id.* ¶ 43.

Fourth, having accepted the restrictive theory of immunity the court expressed agreement with the Chief Justice that the contract between the parties in the present case was to be regarded as an act of a private law character and therefore not one in respect of which sovereign immunity could be invoked.[101] This may have sufficed on the facts in issue but clearly does not provide any general assistance in deciding the definitional problem. Had the discussion concerning the applicability of the UK Sovereign Immunity Act 1978 been pursued, an affirmative decision on that point could have led to greater resolution of the conceptual issue of the basis for the distinction between governmental and commercial acts.

D. *Panacom International Inc. v. Sunset Investments Ltd. (1994)*[102]

In this case, two contracts were executed in France between Panamanian Armament Co. ("PAC') and Libya to sell and install equipment and appliances for the contract price of US$15,282,000.[103] On December 15, 1981, PAC purported to assign its rights under the two contracts to the appellant and, on 11 October 1983, Roxanne Moller-Fernu (professing to act on behalf of the appellant) purported to assign the appellant's assigned its rights to Sunset Investments Ltd. ("Sunset").[104] On March 18, 1988, and on September 27, 1988, Singh J., sitting in the High Court of Justice of St Vincent and the Grenadines, made two successive orders which became the subject of an appeal.[105]

By the first order, the appellant was granted leave to serve notice of a writ indorsed with a statement of claim against Libya and to effect service on Libya out of the jurisdiction.[106] In the statement of claim the appellant claimed a declaration that the assignment to Sunset was a nullity and a declaration that Libya was indebted to the appellant in the sum of US$13,500,000 with interest thereon at the rate of 10 per cent *per annum* from 13 April 1987 until payment.[107] By the second order, the appellant was authorized to enter judgment against the respondents (Sunset and Libya) as prayed for in the statement of claim.[108] These orders were, on 2 December 1992, set aside by Judge Hewlett

101. *Id.* ¶ 41.
102. Panacom Int'l Inc. v. Sunset Invs. Ltd. [1994] 47 W.I.R. 139 (Gren.).
103. *Id.* ¶ 141.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* ¶ 142.
108. *Id.*

Acting (sitting in the High Court) and the appellant appealed.[109] Libya also filed a notice contending that the judgment should be varied in so far as it declared that Libya had submitted to the jurisdiction of the court and had thereby waived its right to foreign state immunity.[110]

As regards the Libyan claim to immunity the Court of Appeal held that the contracts or transactions out of which the appellant's claims against Libya arose were private commercial contracts or transactions performed *jure gestionis* and that, under the restrictive doctrine of foreign state immunity applicable in St Vincent and the Grenadines, Libya did not enjoy any immunity from suit in the courts of that country in respect of those claims.[111] However, the appeal was dismissed on the basis that the case was not a proper one for service out of the jurisdiction as the local court not having a real and substantial connection with the action was not the *forum conveniens*.[112]

The judgment of the court was delivered by the Chief Justice, Sir Vincent Floissac. The Chief Justice noted that most of the nations of the world had adopt the restrictive doctrine of immunity under which the immunity of a foreign State is restricted to claims arising out of acts performed or properties held by the foreign State "*jure imperii*" (i.e., under public law and in the exercise of the foreign State's sovereign authority).[113] That immunity no longer extended "to claims arising out of acts performed or properties held by the foreign State '*jure gestionis*' i.e., under private law and within or in the course of the foreign State's commercial or mercantile activities with private individuals or otherwise than in the exercise of sovereign authority."[114] He expressly cited *The Philippine Admiral* and *Trendtex Trading Corp.* as authority for this change and expressed the interesting opinion that, "In view of the prevalence of the restrictive doctrine of foreign state immunity, unless a State expressly disavows the doctrine and does so by treaty, legislation, official statement of policy or otherwise, the State must be presumed to have elected to adopt the doctrine."[115]

From one perspective, this was evidently a novel approach to the question of adoption of the restrictive doctrine of immunity and one that placed the evidential burden on the state to disprove the adoption of a change of customary international law. It may, however, be justified

109. *Id.*
110. *Id.*
111. *Id.* ¶ 150.
112. *Id.* ¶ 148.
113. *Id.* ¶ 142.
114. *Id.*
115. *Id.* ¶ 6.

by reference to the principle of the persistent objector. According to established international law doctrine, a customary rule is binding, and a state cannot exempt itself unilaterally from the obligations arising under that rule. A state that does not wish to be bound by a new rule can only exempt itself by consistently and clearly objecting to the rule from the time of the rule's emergence. This "persistent objector" principle is justified on the positivist approach to international law under which states are only bound by virtue of their consent,[116] but the principle does not apply to those rules of customary international law that are regarded as *jus cogens*.[117] The novelty of what appears to be the possible application of the persistent objector principle in *Panacom* was that it was applied by a domestic court in determining whether an international rule applied to its own state, whereas the domestic court is a part of the state.

Another, and perhaps more orthodox, way of understanding the statement of the Chief Justice was that it was a clear call for assistance from the executive and legislative branches of state. His statement that as the State of St Vincent and the Grenadines had not officially repudiated the restrictive doctrine by treaty, legislation, or official statement of policy, and that it "must therefore be presumed that the State has joined or is content to be associated with the family of nations in adopting the restrictive doctrine"[118] could well have been an effort in judicial sophistication and subtlety. If it was, the point may have eluded those to whom it was directed.

Having determined the applicability of the restrictive doctrine, the Chief Justice turned to the question of whether the restrictive doctrine of foreign state immunity immunized Libya from the claims made against it in this case. He held that it did not.[119] The claims against Libya arose out of commercial contracts, which were contracts for the sale of goods (i.e., equipment and appliances).[120] The contracts were not transactions between a foreign state and another state but were

116. *See* the decisions of the International Court of Justice in the Asylum case, Colombian-Peruvian Asylum Case (Colom. v. Peru), Judgment, 1950 I.C.J. 6 (Nov. 20); and the Fisheries Case, (U.K. v. Nor.), 1951 I.C.J. 3 (Dec. 18).

117. *See* Domingues v. United States, Case 12.285, Inter-Am. Comm'n H.R., Report No. 62/02, doc. 5 rev. ¶ 1 at 913 (2002) (noting the Inter-American Commission on Human Rights rejected an attempted assertion of the persistent objector defense on the ground that the prohibition against the juvenile death penalty to which the United States objected was not merely customary international law but *jus cogens*, norms from which no derogation was permitted).

118. *See* Sunset Invs. Ltd., [1994] 47 W.I.R. 139 (Gren.).

119. *Id.* ¶ 143–44.

120. *Id.*

transactions between a foreign state and a private company.[121] Consequently, the claims arise under private law and not under public law: "Libya's governmental or political reasons for entering into these commercial contracts or transactions cannot convert these contracts or transactions from private acts under private law to public acts under public law."[122] As Libya's contracts or transactions (out of which the appellant's claims against Libya arise) were private commercial contracts or transactions or private acts performed "*jure gestionis*," Libya did not enjoy any immunity from the jurisdiction of the courts of St Vincent and the Grenadines with respect to those claims; no question arose as to waiver of immunity by submission to the jurisdiction of the local court because there was no immunity to waive.[123]

Evidently, the court adopted the "nature" rather than the "object" of the transaction test for distinguishing governmental from commercial acts. In so doing, the court expressly adopted the following statement by Lord Bridge in *I Congreso del Partido*:[124]

> It does seem to me that two propositions can be derived from the relevant authorities which may often, and do in this case, provide a useful guide in deciding whether or not a claim to sovereign immunity can be sustained. First, if a sovereign State voluntarily assumes a purely private law obligation, it cannot, when that obligation is sought to be enforced against it, claim sovereign immunity on the ground that the reason for assuming the obligation was of a sovereign or governmental character. Example: State A, orders uniforms for its army from a supplier in State B; when sued for the price in the courts of State B, State A cannot claim immunity on the ground that the maintenance of its army is a sovereign function. This is really elementary. But it leads on logically to the second proposition that, having assumed a purely private law obligation, a sovereign State cannot justify a breach of the obligation on the ground that the reason for the breach was of a sovereign or governmental character. Example: State A, having ordered uniforms for its army from a supplier in State B, repudiates the contract; when sued in the courts of State B for damages, State A cannot claim immunity on the ground that, since the placing

121. *Id.*

122. *Id.* ¶ 143.

123. *Id.* ¶ 144.

124. I Congreso Del Partido, [1981] 2 All ER 1064, 1082-83 (Eng.).

> of the contract, a Government of a new political complexion has made a sovereign decision, pursuant to a policy of total disarmament, to disband its army.

E. *Tullow DRC BV v. Capri Kat Ltd. (2010)*[125]

In this case, Judge Bannister made passing reference to sovereign immunity. The Judge had to consider whether to continue an interim injunction restraining the defendants from exercising or assigning rights granted to them by the Republique Democratique du Congo ("RDC") pursuant to a production sharing agreement ("Defendants' PSC") dated May 5, 2010, under which the Defendants were granted rights to survey and explore for oil over an area known in the Albertine Graben.[126] The injunction had been granted to the claimants who claimed that the exercise of the Defendants' PSC would unlawfully interfere with their own contractual rights to explore and exploit oil resources in the same area granted earlier by the RDC.[127]

The exercise of the rights to explore and exploit oil in the RDC required the approval of the President of the State.[128] The President had not approved the grant of the license to the claimants but had, on June 18, 2010, issued a decree in favor of the Defendants' PSC.[129] In discharging the injunction, Judge Bannister considered that to enjoin the Defendants from performing their PSC would be indirectly interfering with the expressed will of the President of a sovereign state.[130] The judge noted that there were arbitration proceedings taking place elsewhere between the parties but offered that the President was not a party to the arbitration "and in any event has sovereign immunity."[131]

F. *RBTT Trust Ltd. v. APUA Funding Ltd. (2010)*[132]

This was an appeal from the judgment of Judge Rajnauth-Lee (now a Judge of the CCJ) whereby the learned Judge granted summary

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125. Tullow DRC BV v. Caprikat, Ltd., [2010] 11 JBVIC 1901 (Virgin Is.), https://app.justis.com/case/tullow-drc-bv-tullow-oil-plc-v-caprikat-ltd-foxwhelp-ltd-eastern/overview/c5eZn2idnYWca.

126. *Id.* at 1.

127. *Id.*

128. *Id.* ¶ 9.

129. *Id.* ¶ 10.

130. *Id.* ¶ 27.

131. Tullow DRC BV v. Caprikat, Ltd., [2010] 11 JBVIC 1901, ¶ 15 (VI), https://app.justis.com/case/tullow-drc-bv-tullow-oil-plc-v-caprikat-ltd-foxwhelp-ltd-eastern/overview/c5eZn2idnYWca.

132. RBTT Trust Ltd. v. APUA Funding Ltd., [2015] Civ. App. No. 94 (Trin. & Tobago), http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2010/mendonca/CvA_10_94DD06nov2015.pdf.

judgment in favor of the Respondent, RBTT Trust Limited ("respondent") against the appellants APUA Funding Limited (APUA Funding) and the Government of Antigua and Barbuda ("Government") (together, "appellants").[133] The summary judgment was in respect of a 2004 bond transaction arranged by RBTT Merchant Bank Limited ("Merchant Bank") for the purpose of refinancing existing facilities held or arranged at the Merchant Bank.[134] Payment of the bonds, in the aggregate value of US$16,500,000.00, was secured by, *inter alia*, a guarantee and indemnity dated March 12, 2004, given by the Government in favor of the respondent on behalf of itself and as trustee for the bondholders and by a security agreement.[135] Under the guarantee and indemnity, the Government, to induce the bondholders to purchase the bonds, irrevocably and unconditionally guaranteed, *inter alia*, to pay to the trustee on demand, all monies and liabilities which were then or at any time thereafter due and owing or incurred to or in favor of the trustee and the bondholders under or in connection with the bonds, the trust deed and the other security instruments which included the security agreement.[136]

A dispute arose between the parties when, in breach of its contractual obligation, APUA Funding failed to make deposits into the debt service account established under the terms of the security agreement.[137] APUA Funding defended this failure by alleging that the issue of the bonds was unlawful and that all the transactions connected with it were therefore call into question.[138] The trustee demanded payment from APUA Funding and then from the Government under the guarantee and indemnity.[139] One ground on which the Government defended before Judge Rajnauth-Lee was that the Government was an independent and sovereign state and had not given its consent to be sued by the respondent and accordingly could not be sued in the jurisdiction of Trinidad and Tobago.[140] The judge found this point to be without merit and before the Court of Appeal the point was not pursued and was, indeed, expressly abandoned.[141]

133. *Id.* ¶ 1.
134. *Id.*
135. *Id.*
136. *Id.* ¶ 3.
137. *Id.* ¶ 6.
138. *Id.* ¶ 9.
139. *Id.* ¶ 8.
140. *Id.* ¶ 16.
141. *Id.* ¶ 17.

In the High Court, Judge Rajnauth-Lee had considered the defense[142] that because the Government represented an independent sovereign state, it could not be sued by RBTT Trust in Trinidad and Tobago without its consent as required by law and no such consent had been, or was being, given.[143] On the other hand, counsel for RBTT Trust countered by submitting firstly, that having regard to the Civil Proceedings Rules, 1998, as amended, the Government must be deemed to have submitted to the court's jurisdiction by filing a defense; and secondly, that this case fell within the exception to the sovereign immunity rule from the willingness of states to enter commercial or private law transactions with individuals.[144]

As regards the first ground, the CPR Part 9.7 sets out the procedure available to a defendant who wishes to dispute the court's jurisdiction to try a claim.[145] The CPR Parts 9.7(1) and (3) stipulate that a defendant who wishes to make an application to the court for an order declaring that it has no jurisdiction must do so within the period for filing a defense.[146] The CPR Part 9.7(5) provides that if a defendant enters an appearance and does not make an application within the period for filing a defense, he is treated as having accepted that the court has jurisdiction to try the claim.[147] Judge Rajnauth-Lee considered the argument by the defense that the failure of the Government to comply with CPR Part 9.7, was not fatal because the Government had taken the point of jurisdiction in its defense.[148]

The learned judge distinguished the English case of *SSQ Europe S.A. v. Johann & Backes OHG*[149] on which the defense had relied. In that case the defendant had filed an acknowledgement of service and drafted a defense and counterclaim and raised a challenge to the jurisdiction of the English court.[150] The defendant's German lawyer had filed an acknowledgement of service and drafted a defense and counterclaim which complied with German rules of procedure and raised a

142. RBTT Trust Ltd. v. APUA Funding Ltd., [2010] HC 96 (Trin. & Tobago), http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/rlee/2007/cv_07_02269DD16apr2010.pdf.

143. *Id.* ¶ 96.

144. *Id.* ¶ 97.

145. *Id.* ¶ 98; *see also* The Civil Proceedings Rules, Rule 9.7 (1998) (Trin. & Tobago).

146. *See* The Civil Proceedings Rules, Rule 9.7 (1998) (Trin. & Tobago).

147. *See* The Civil Proceedings Rule, 9.7(5) (1998) (Trin. & Tobago).

148. APUA Funding Ltd., [2015] Civ. App. No. 94, ¶ 99-105 (Trin. & Tobago); *see also* The Civil Proceedings Rules, Rule 9.7 (1998) (Trin. & Tobago).

149. SSQ Europe S.A. v. Johann & Backes, [2002] 1 Lloyd's Rep. 465 (Eng.).

150. APUA Funding Ltd., [2010] Civ. App. No. 94, ¶ 101-05 (Trin. & Tobago).

challenge to the jurisdiction of the English court.[151] Four days later, the time for making an application to challenge the jurisdiction of the Court under the English rules expired and thereafter, the claimant entered default judgment against the defendant.[152] The application by the defendant for the default judgment to be set aside and the issue of jurisdiction to be tried, was granted by the English court because the claim was not an unsubstantial claim and an important issue of jurisdiction was being raised, where the parties were not on an equal footing.[153] Further, the claimant was never in any doubt the defendant was intent on pursuing its challenge to the jurisdiction of the English court notwithstanding service of the defense and counterclaim; there was no "unequivocal conduct which would be interpreted by a disinterested bystander as amounting to an abandonment of the jurisdictional objections."[154]

By way of contrast the Judge found that the RBTT case was "a wholly different situation" and agreed with the plaintiff that by its conduct, the Government must be deemed to have submitted to the jurisdiction of the Court.[155] This decision is certainly consistent with established common law principles, illustrated in the Privy Council decision in *Sultan of Johore v. Abubakar,*[156] that the foreign sovereign may submit to the jurisdiction of local courts. However, it was not always clear that the common law rules as to what constituted submission applied to foreign sovereigns as they applied to private individuals. The decision, for example, that a private individual who entered an appearance to protest the court's jurisdiction could thereby be taken to have submitted to the jurisdiction of the court[157] could hardly apply to foreign states. The jurisprudential considerations justifying a finding of submission by an

151. *Id.* ¶ 102.

152. *Id.*

153. *Id.* ¶ 103.

154. *Id.*

155. *Id.* ¶105.

156. Sultan of Johore v. Abubakar [1952] 1 All ER 1261, ¶ 4 (PC) (Eng.) (holding the foreign sovereign had initiated proceedings in England and that this submission to the original court bound him to accept the jurisdiction on appeal and, therefore, he was disentitled to a stay of proceedings as he had waived his immunity).

157. Harris v. Taylor [1915] 2 KB 580, ¶ 2 (Eng.) (interpreting Denning L.J. in Re Dulles Settlement Trusts as suggesting that someone could be taken to have "voluntarily submitted to the jurisdiction of a court when he has all the time been vigorously protesting that it has jurisdiction."); Contra Henry v. Geopresco Int'l Ltd. [1975] 3 W.L.R. (Roskill, L.J., dissenting) (disagreeing with Lord Denning's approach in Henry v Geopresco (Roskill, L.J., dissenting)). *See generally* Winston Anderson, Caribbean Private International Law 169–74 (Sweet & Maxwell, eds.) (2014).

individual are very different from those justifying a finding of submission by a foreign state.[158] However, the decision under review suggests that under the CPR there may be no difference in the procedural rules determining submission by the foreign sovereign as in deciding submission by private individuals.

As to the second ground, the Judge examined the cases of *Playa Larga v. I Congreso Del Partido*[159] (House of Lords) and *Trendtex Trading Corp. v. Central Bank of Nigeria*[160] (English Court of Appeal) and concluded that these authorities required the court to evaluate the whole context of the case in determining whether the restrictive doctrine of sovereign immunity applied.[161] She agreed with the plaintiff's submission that it was in the interest of justice for individuals having commercial or private transactions with states to allow them to bring such transactions before the court.[162] The Judge continued:

> The instant case involves essentially the raising of finance by the issue of bonds. In my view, it does not involve a challenge to or any inquiry into any act of sovereignty or governmental act. I adopt the dicta of the Court of Appeal in *Trendtex*, that the modern principle of restrictive sovereign immunity in international law, giving no immunity to acts of a commercial nature, is consonant with justice, comity and good sense. If a government department goes into the marketplaces of the world and buys boots or cement – a commercial transaction – that government department should be subject to all the rules of the marketplace. Further, Lord Denning M.R. made the point that where there is a straightforward commercial transaction, as was the letter of credit in *Trendtex*, it was not open to the Government of Nigeria to claim sovereign immunity in respect of it. This case involves essentially the raising of finance by the issue of bonds and as such does not involve a challenge to or any inquiry into any act of sovereignty or governmental act.[163]

158. *See* Henry v. Geopresco Int'l Ltd. [1975] 3 W.L.R. (Eng.) (discussing the doctrine of the absolute equality of sovereigns gave rise to the notion that a one state has no jurisdiction over another state unless the latter voluntarily submitted to jurisdiction; whereas a private individual who "intermeddles" with the jurisdiction of the local court may be deemed to have thereby submitted to it).

159. I Congreso Del Partido, [1983] 1 A.C. 244 (Eng.).

160. Trendtex Trading Corp. v. Central Bank of Nigeria [1977] QB 529 (Eng.).

161. *Id.* at 106.

162. *Id.*

163. *Id.*

G. *Caribbean Examinations Council v. Industrial Disputes Tribunal (2015)*[164]

This case involved an application by the Caribbean Examinations Council ("CXC") for judicial review of the decision by the Industrial Disputes Tribunal ("IDT") the second respondent had been unfairly dismissed.[165] Judge Dunbar (ag) upheld CXC's argument that it was immune from the jurisdiction of the IDT and quashed the finding of unfair dismissal.[166] Unfortunately, perhaps, the Judge ventured beyond considerations of CXC's institutional immunity and into the realm of sovereign immunity. He stated that no case law had been brought to the court's attention that supported the application of restrictive sovereign immunity but that "even if it were accepted that the concept of restrictive immunity has developed in international customary law, employment is a *jure imperii* function, closely connected with the main purpose of the CXC, and the immunity should therefore not be restricted."[167]

H. *Vargas v. OECS (2017)*[168]

The case of *Vargas v. OECS* is among the most recent to mention sovereign immunity but did so in the context of demonstrating that the doctrine was irrelevant to the proceedings. Ms. Vargas made claims against the Organization of Eastern Caribbean States ("OECS") and Maxine Nestor damages for breach of contract and defamation.[169] The OECS, an international organization, filed an acknowledgement of service and then applied to the court, under the Civil Procedure Rules 9.7(1), for a declaration that the court has no jurisdiction to try the claim against it since it enjoys immunity from suit and legal process.[170] In response, Ms. Vargas contended that the Revised Treaty, instruments, and Acts, properly interpreted, do not provide the immunity from suit or legal process claimed by the OECS.[171]

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164. Caribbean Examinations Council v. Indus. Disputes Tribunal, No. 2013 HCV003761, (JMSC Civ. 44, Mar. 17, 2015), https://app.justis.com/case/caribbean-examinations-council-v-industrial-disputes-tribunal/overview/aXadn2qdm5udl.

165. *Id.* ¶ 5.

166. *Id.* ¶ 130.

167. *Id.* ¶ 129.

168. Vargas v. Org. of E. Caribbean States, No. SLUHCV2017/0264 (High Ct. of Justice Mar. 5, 2018) (St. Lucia), https://www.eccourts.org/barbara-vargas-v-organisation-of-eastern-caribbean-states-et-al/#!.

169. *Id.* ¶ 1.

170. *Id.* ¶ 2.

171. *Id.* ¶ 3.

The Court found that it had jurisdiction to hear and determine the claim as to whether the OECS had breached its contract with Ms. Vargas since it had expressly waived any immunity from suit in that contract.[172] As to whether it had jurisdiction over the defamation claim, the court examined the relevant provisions of the Treaty, the statute incorporating the treaty, the Vienna Convention on Diplomatic Relations 1961 and concluded that, without more, they do not confer on the OECS immunity from suit or legal process.[173]

Of relevance to the present discussion was the reaction of the court to what it perceived as the OECS's claim to state immunity. The court referred to the statement by Judge Bingham, in *Standard Chartered Bank v. International Tin Council*,[174] that international organizations do not enjoy sovereign status at common law and accordingly they were not entitled to sovereign or diplomatic immunity, except where such immunity was granted by legislative instrument, and then only to the extent of such grant. The court repeated the outline provided by Judge Bingham on the evolution of sovereign immunity, including the rationale presented by Chief Justice Marshall in *The Schooner Exchange v. M'Faddon*, which was then refined by Lord Brown-Wilkinson in *R v. Evans*.[175] The court expressed that it was clear from these authorities that "what international organizations enjoy is not sovereign or state immunity but rather organizational immunity. The nature and extent of that organizational immunity depends on the enactment conferring the immunity."[176]

V. Legislating for Wide Application

Specific solutions have been found in the handful of Caribbean cases in which problems of foreign sovereign immunity have arisen. However, legislation would provide certainty and security for the wide application by the courts across the various issues that could arise in the subject. Five such groups of issues may be identified, and this list is by no means exhaustive.

172. *Id.* ¶ 4.

173. *Id.* ¶ 29. (finding that the OECS would have enjoyed full immunity from suit and legal process but for the fact that the Governor-General's Order was lacking).

174. Vargas, [2018] HCJ, ¶ 27 (St. Lucia); *see also* Standard Chartered Bank v. Int'l Tin Council [1986] 3 All ER 257 (Eng.).

175. Vargas, [2018] HCJ, ¶ 27 (St. Lucia); *see also* Regina v. Bow Street Magistrate [1999] 2 WLR 827 (Eng.).

176. Vargas, [2018] HCJ, ¶ 29 (St. Lucia).

Firstly, the fact of legislation would provide a secure doctrinal basis for judicial application of sovereign immunity. None of the cases considered in the preceding survey engaged in any original exploration of the jurisprudential rationale for applying foreign sovereign immunity. Most appeared to have drawn a straight line from acceptance of restrictive immunity in United Kingdom law to acceptance in Caribbean law without distinguishing between decisions of the Privy Council and those of English courts. The unstated assumption appears to be that restrictive immunity has been accepted through the process of adoption, as elaborated upon by Lord Denning M.R. in *Trendtex*. This assumption rests on the tricky requirement of ascertaining a change in customary international law and the juridical penetration of customary international law into domestic law. Far more acceptable is the adoption of legislation that defines the jurisdiction of Caribbean courts in suits against foreign states and the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property.[177]

Secondly, if the legislation adopts the restrictive doctrine of immunity, it can provide specific statutory direction as to the political subdivision, agency or instrumentality of the foreign state that enjoys immunity and are therefore presumed immune from the jurisdiction of Caribbean courts and may not be forced to submit to the jurisdiction of those courts unless a specific exception applies. The problem of deciding whether an entity is so closely associated with the foreign state as to enjoy the immunity attributable to that state has not yet troubled courts in the Caribbean but is a common conundrum in international litigation. In recent times the Privy Council has had to consider whether a state-owned corporation involved in government projects and providing funding for government activities enjoyed immunity in Jersey,[178] and accepted that a Turkish company owned by Turkey was not an organ of state but rather a separate entity not entitled to immunity in Jersey.[179] These problems were resolved by reference to the U.K. Sovereign Immunity Act 1978, which was extended to Jersey by the 1979 Order.[180] Recent landmark decisions of the Full Federal Court and the High Court of Australia which have provided clarification to

177. *See* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 for an example of legislation that, if enacted, would benefit Caribbean states.

178. *See* La Générale des Carrières et des Mines v. FG Hemisphere Associates LLC [2012] UKPC 27, 410.

179. *See* Boru Hatlari Ile Petrol Taşima v. Tepe Insaat Sanayii [2018] UKPC 31, [3] (appeal taken from Eng.).

180. State Immunities (Overseas Territory) Order 1979, *supra* note 47.

the question of when an entity of a foreign State will be protected by immunity from suit in Australian courts have all relied for guidance on the Australian Foreign States Immunities Act 1985.[181]

Thirdly, legislation can provide specific distinctions between acts that are governmental (*jus imperii*) and those that are commercial (*jus gestionis*). Thus far Caribbean courts have applied rather rough analytical tools, most inherited from Lord Denning's decision in *Trendtex*, to make commonsense distinctions between the two. In this way, alleged breaches of a tenancy agreement,[182] a contract for the sale and installation of equipment,[183] and security guarantees for a bond issue[184] have all been characterized as falling on the commercial activity side of the divide. In *RBTT*, Judge Rajnauth-Lee expressly adopted the "descent into the marketplace" and the "straightforward commercial transaction" test from *Trendtex* as determinant of whether immunity attached.[185]

Nonetheless, difficult questions could arise as to whether a particular activity or transaction resulted from the exercise of sovereign authority by the foreign state. These questions can be largely eliminated by legislation which defines "commercial transaction" to which immunity will not attach. Such definition will cover all contracts and financial transactions; the purpose for which the goods or services are contracted, or the fact that only a governmental entity could have concluded the

181. *See* Austl. Competition & Consumer Comm'n v. PT Garuda Indonesia Ltd. [2010] 269 ALR 98 (motion); *see also* PT Garuda Indonesia Ltd. v. Austl. Competition & Consumer Comm'n [2011] 277 ALR 67 (appeal); *see also* PT Garuda Indonesia Ltd. v. Austl. Competition & Consumer Comm'n [2012] *247 CLR 240* (appeal).

182. Gov't of Venez. v. Fakhre, [1986] CA 13 (Gren.), https://app.justis.com/case/government-of-venezuela-v-fakhre-et-al/overview/aXednXado0adl.

183. *See* Panacom Int'l Inc. v. Sunset Invs. Ltd. [1994] 47 WIR 139 (St. Vincent) (appeal).

184. RBTT Trust Ltd. v. APUA Funding Ltd., [2015] Civ. App. No. 94 (Trin. & Tobago), http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2010/mendonca/CvA_10_94DD06nov2015.pdf.

185. *See id.* at 106. A similar approach is taken in respect of the immunity enjoyed by the Caribbean sovereign in its own state. Awich, J. delivered as follows:

> "Also of some consideration in this application on the issue of injunctive relief against the respondent is the fact that the respondent voluntarily, with opened eyes, entered into commercial agreements in the course of which it surrendered any sovereign immunity it might otherwise have, and agreed to arbitration. Fundamental in this regard as well, in my view, is that when a government goes to the market place and enters into commercial transaction it would lie ill in its mouth to take refuge under the cloak of some feudal concepts of privilege and exemptions as evidently contained in sections 19 (1) (a) and (b) of the Crown Proceedings Act and as contended for the respondent as disabling this Court from granting the relief sought against it."

See Att'y Gen. of Belize and Carlisle Holdings Ltd., at 32 (S. Ct. Belize, Feb. 21, 2005), https://app.justis.com/case/attorney-general-of-belize-v-carlisele-holdings-ltd/overview/aXeZm4iZm3ydl.

contract or loan becomes irrelevant. A contract for the supply of cement for an army barracks, or for the supply of military equipment and technicians to train soldiers how to use it, or a loan to or by a government would all be dealt with in the statutory definition.[186] The pattern of most legislation on the subject is to provide for general immunity and then to subject that immunity to a list of exceptions which mostly accords with the doctrine of restrictive immunity.[187] The scheme of legislating for general immunity and then for exceptions to it means that it will be for the claimant against the state to prove that the case falls within one or other of the listed exceptions.

Fourthly, legislation may provide clarity on when and how the foreign sovereign is deemed to have waived immunity. The approach in Caribbean courts is to treat this question by assimilating the position of the foreign sovereign to that of a private party. However, the jurisprudential justification for foreign sovereign immunity counsels that this may not necessarily be the correct approach. Special care is normally taken in legislation to ensure that the foreign state has genuinely submitted to the jurisdiction of domestic courts. For example, Section 2(3) of the UK Act of 1978 provides that a foreign state is deemed to have submitted if (a) it has initiated the proceedings; or (b) if it has intervened or taken any step in the proceedings.[188] However, the potentially wide birth of the latter provision is reduced by subsections (4) and (5) which make clear that the intervening or the taking of steps does not constitute submission if such was (i) only for the purpose of claiming immunity; or (ii) asserting an interest in property in circumstances such that the state would have been entitled to immunity if the proceedings had been brought against it; or (iii) to any step taken by the state in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.[189]

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186. *See* D. J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 322 (Sweet & Maxwell eds., 6th ed. 2004).

187. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94–583, 90 Stat. 2891 (1976). A foreign state (including a political subdivision, agency, or instrumentality of the foreign state) is presumed immune from the jurisdiction of U.S. courts and may not be forced to submit to the jurisdiction of those courts unless a specific exception applies. The FSIA then provides for nine exceptions to sovereign immunity. A similar pattern is presented by the U.K. Act of 1978 which provides for general immunity in section one and then the list of exceptions in sections 2–11. State Immunity Act 1978, c. 1, 2–11 (U.K.).

188. State Immunity Act 1978, § 2(3) (U.K.).

189. *Id.* § 2(4)–(5).

Fifthly, amenability to jurisdiction does not necessarily mean that a judgment given in those proceedings can be enforced against the property of the foreign sovereign. Quite separate considerations apply to the permissibility of enforcement. The relevant common law rules are underdeveloped and unclear and would greatly benefit from legislative intervention. Statutes providing for foreign sovereign immunity tend to provide broad immunity from attachment of property subject to exceptions. For example, the Australia Act of 1985 provides that the property a foreign state is not subject to any process or order (whether interim or final) of the courts of Australia for the satisfaction or enforcement of a judgment, order or arbitration award or, in Admiralty proceedings, for the arrest, detention or sale of the property.[190] There then follows a list of exceptions to this broad principle such as where the foreign state waives immunity from execution;[191] execution, in specified circumstances, against commercial property;[192] and immovable property.[193] This follows similar but more elaborate provisions made in the US Act of 1976.[194]

Sixthly, it is unclear whether reciprocity is relevant under the customary international law of sovereign immunity. A court might therefore be hard pressed to deny immunity on the ground that the foreign state does not accord similar immunity to the court's own state. As in the field of the recognition and enforcement of foreign judgments where Caribbean courts have never thought it necessary to investigate what reciprocal rights of enforcement are conceded by the foreign state,[195] so too in the field of foreign sovereign immunity. However, the legislature may, if it wishes, provide that sovereign immunity is to be granted on a reciprocal basis; as has been done in the passage of legislation to restrict the recognition and enforcement of foreign judgments based on reciprocity.[196]

Section 15 of the U.K. Act is headed "Restriction and extension of immunities and privileges" and provides as follows:

> (1) If it appears to Her Majesty that the immunities and privileges conferred by this Part of this Act in relation to any State—

190. Foreign States Immunities Act 1985 (Cth) § 30 (Austl.).

191. *Id.* § 31.

192. *Id.* § 32.

193. *Id.* § 33.

194. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94–583, §§ 1609–11, 90 Stat. 289 (1976); State Immunity Act 1978, c. 33 (U.K.).

195. Sweet & Maxwell, *supra* note 157, at 238–39.

196. *Id.*

(a) exceed those accorded by the law of that State in relation to the United Kingdom; or
(b) are less than those required by any treaty, convention or other international agreement to which that State and the United Kingdom are parties,

Her Majesty may by Order in Council provide for restricting or, as the case may be, extending those immunities and privileges to such extent as appears to Her Majesty to be appropriate.

(2) Any statutory instrument containing an Order under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.[197]

Such a provision could well have work to do in the Caribbean context. There have been several cases in which the issue of the immunity of Caribbean states have been litigated in foreign courts with differing results. Three situations may be identified. (1) Reciprocity does not come into consideration where the decision goes in favor of the Caribbean state. (2) Issues of reciprocal treatment do not arise where the foreign judgment goes against the Caribbean state but on clear and generally acceptable grounds. (3) Reciprocity issues could arise in those cases where control of economic or other policy is at stake and the Caribbean state is adamant of its entitlement to immunity.

A. *Foreign Decisions In Favor of Caribbean Immunity*

Chisholm & Co. v. Bank of Jamaica[198] illustrates the first type of case, where the foreign court upholds the immunity of the Caribbean state. An action was brought by the plaintiffs in United States federal court for *quantum meruit* and other relief against Defendants Bank of Jamaica and its former governor, Horace George Barber.[199] The Plaintiffs had provided services to Defendants in obtaining lines of credit to finance the export of U.S. products and claimed that Defendants had failed to pay commissions for those services, and that Defendants have interfered with the Plaintiffs' relationship with the Export-Import Bank of the United States ("Eximbank") and with the Small Business

197. State Immunity Act 1978, c. 15 (U.K.).
198. Chisholm & Co. v. Bank of Jamaica, 643 F. Supp. 1393 (S.D. Fla. 1986).
199. *Id.* at 1397.

Association of Jamaica ("SBA").[200] In response the Defendants claimed that their actions were protected by sovereign immunity, since the Bank of Jamaica was wholly owned by the Government of Jamaica.[201]

District Judge, Edward B. Davis, began his analysis by noting that the Defendants' claim that their actions were protected by sovereign immunity,

> . . . are now controlled by the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. Sections 1602-1611 (1976), which grants foreign states immunity from suit in federal and state court, subject to certain exceptions. Before the FSIA, decisions about sovereign immunity were made on an *ad hoc* basis by the courts with the advice of the executive branch. The statute was enacted "to free the Government from the case-by case diplomatic pressures, to clarify the governing standards, and to assur [e] litigants that . . . decisions are made on purely legal grounds and under pressures that insure due process.[202]

The judge then went on to dismiss the plaintiffs' contention that the Defendants' activity fell within the exception to sovereign immunity outlined in Section 1605, the "commercial activity" exception. For that exception to apply, the activity had to be in some sense commercial and related to the United States in one of three ways–it was carried on in the United States by the foreign state; or it was based on an act performed in the United States; or based on activity outside the United States that had a direct effect in the United States.[203] The Bank's instructions relating to imports and exports fell within the sovereign authority to regulate the Jamaican economy. Furthermore, the acts all took place in Jamaica; even if they were commercial in nature, their relationship to the United States was minimal and therefore did not justify jurisdiction under the FSIA.[204]

200. *Id.* at 1397.
201. *Id.* at 1398.
202. *Id.* at 1398-99.
203. *Id.* at 1401.
204. *Id.*

In *Frank v. Commonwealth of Antigua and Barbuda,*[205] the United States Court of Appeals considered whether the district court was correct to assume jurisdiction over Antigua and Barbuda in respect of the claims related to that state's involvement with the Stanford Ponzi scheme.[206] The involvement was allegedly constituted by Antigua and Barbuda knowingly providing Stanford and his businesses a safe harbor from regulatory scrutiny. The district court determined that it had jurisdiction over the suits under both the commercial activity and waiver exceptions of the Foreign Sovereign Immunities Act.[207]

The USCA reversed in part, holding that the commercial activity exception did not apply.[208] Under FSIA, the commercial exception applied when "the action is based . . . upon an act" outside the territory of the United States, in connection with a commercial activity of the foreign state elsewhere, and that act causes a "direct effect" in the United States.[209] It was held that the action of Antigua and Barbuda challenged in the suit did not cause direct effect in the United States since the financial loss to American investors involved in Stanford's Ponzi scheme was not an "immediate consequence" of Antigua's actions.[210]

Aerotrade Inc. v. Republic of Haiti[211] was decided shortly before the passage of the FSIA and might now require reconsideration in the light of that enactment. Two Florida corporations commenced an action against the Republic of Haiti to recover damages for goods sold and delivered to the defendant and services rendered.[212] They applied for and were granted an order of attachment against the funds on deposit at the First National City Bank of New York to the credit of Banque Nationale de la Republique d'Haiti upon the allegation that Banque was wholly owned by, and the alter ego of, the Republic of Haiti.[213] Haiti moved to dismiss the complaint upon the grounds, *inter alia*, that it was entitled to sovereign immunity with respect to plaintiffs' claim.[214] In support of its claim of sovereign immunity, Haiti contended, and the court accepted that the subject matter of the contract sued upon was

205. Frank v. Ant. & Barb., 842 F.3d 362 (5th Cir. 2016).
206. *Id.* at 365.
207. *Id.* at 370–71.
208. *Id.* at 370.
209. *Id.* at 368.
210. *Id.* at 368–69.
211. Aerotrade, Inc. v. Republic of Haiti, 376 F. Supp. 1281 (S.D.N.Y. 1974).
212. *Id.* at 1282.
213. *Id.* at 1282.
214. *Id.* at 1282.

military procurement for its air, land and naval forces.[215] The plaintiffs argued that "it does not necessarily follow that the procurement of supplies such as helicopters or boats will be utilized for a public purpose or in connection with the armed forces of a government."[216]

The court reflected that since the well-known Tate letter was issued, the U.S. government had adhered to a policy under which the rule of absolute sovereign immunity is relaxed in favor of a restrictive theory of sovereign immunity as to private acts or commercial transactions (*jure gestionis*) and is continued as to a foreign government's public and governmental functions (*jure imperii*).[217] The court focused on the fact that the contract before it was for goods and equipment for the armed forces of Haiti and concluded that these fell within one of the categories of public or political acts which attracted immunity.[218] Once that fact was established it was largely irrelevant how the equipment was used after its delivery. To pursue the subject matter of the transaction into the foreign country and to inquire whether in fact the materials were being used solely and only for the armed forces would be an unwarranted intrusion into the internal affairs of a foreign government.[219] Haiti was therefore entitled to sovereign immunity.

B. *Foreign Decision Against Caribbean Immunity on Uncontroversial Grounds*

GDG Acquisitions LLC v. Government of Belize,[220] represents the second type of case, that is, where immunity is denied on grounds which are clear and universally accepted and the Caribbean state has no real cause for complaint. The Plaintiff was a Belizean Company, which sued the Government of Belize (the "Government") for $10 million for

215. *Id.* at 1283.

216. Aerotrade, Inc. v. Republic of Haiti, 376 F. Supp. at 1284 (S.D.N.Y. 1974).

217. *Id.* at 1282–83.

218. *Id.* at 1284–85.

219. *See id.* at 1285 ("This was not a case where the nature of the contracts entered into by plaintiffs with the Republic of Haiti was in doubt. Plaintiffs knew a sovereign government was a party to the contracts; they knew that the subject matter of their transactions involved military equipment for Haiti's armed forces; they knew that in the event of a claimed breach of their agreements the defendant had the right to assert a plea of sovereign immunity. In such circumstances the actual uses to which the foreign country may have put the equipment are irrelevant. There may be cases where the terms of the contract are so ambiguous or the nature of the commodities involved so general, or where the identity of the contracting party is in such doubt that further inquiry, such as the actual use to which the foreign sovereign put the items, would be justified in order to decide the issue. But this is not such a case.").

220. GDG Acquisitions, LLC v. Gov't of Belize, 849 F.3d 1299 (11th Cir. 2017).

breach of contract for failing to rent in Florida.[221] The lease agreement had included a provision stating, *inter alia*, that the Government waived its sovereign immunity.[222] Nonetheless, the Government moved to dismiss the Plaintiff's action in district court, asserting, *inter alia*, foreign sovereign immunity, and international comity.[223]

The district court granted the motion to dismiss on other grounds but did not address foreign sovereign immunity. The Eleventh Circuit vacated the dismissal and remanded the case.[224] On remand, the district court denied the Government's motion to dismiss holding, *inter alia*, that the waiver of sovereign immunity exception under FSIA was satisfied and thus, Belize could be sued in a United States court.[225] The appeal by the Government to the Eleventh Circuit was dismissed in relatively short order.[226]

C. *Foreign Decision Against Caribbean Immunity on Disputed Grounds*

The third and most difficult type of case is very well represented by *BCB Holdings Ltd. v. Government of Belize*.[227] The Plaintiffs had obtained an arbitration award for over $40m against the Government of Belize from the London Court of International Arbitration in London, England.[228] An attempt to enforce the award in Belize ultimately failed when the Caribbean Court of Justice, Belize's final appellate court, held that enforcement would be contrary to the public policy of Belize.[229] The Plaintiffs' petition to the U.S. District Court for the District of Columbia for enforcement was opposed by Belize on numerous grounds, including that the final judgment rendered by the CCJ refusing to enforce the award was *res judicata* and that international comity barred enforcement. The court rejected this argument, explaining that only the country in which an award was made, referred to as

221. *Id.* at 1302.
222. *Id.* at 1303.
223. *Id.* at 1304.
224. *Id.*
225. *Id.* at 1312.
226. *Id.* at 1312.
227. BCB Holdings Ltd. v. Gov't of Belize, 232 F. Supp. 3d 28 (D.D.C. 2017).
228. *Id.* at 29.
229. *Id.* at 30. *See* BCB Holdings Ltd. v. Att'y General of Belize [2014] 2 LRC 81, 102–103, https://app.justis.com/case/bcb-holdings-ltd-the-belize-bank-ltd-appellants-v-the-attorney/fulltext-judgment/aXednZCdnZqdl. The writer is a sitting member of the Caribbean Court of Justice.

the primary jurisdiction, may set it aside.[230] All other member-countries of the New York Convention were designated as secondary jurisdictions; the refusal of one secondary jurisdiction to enforce an award did not preclude other secondary jurisdictions from enforcing it. As England was the primary jurisdiction the CCJ decision did not prevent the District Court from enforcing the Petitioners' award. Accordingly, the court confirmed the award and entered judgment for the Petitioners.[231]

Belize appealed this decision to the Court of Appeals for the D.C. Circuit, which affirmed the decision of the District Court in its entirety.[232] The United States Supreme Court then denied Belize's petition for certiorari,[233] and the Petitioners filed a motion for an order authorizing enforcement of the judgment. Whilst the motion was pending, Belize demonstrated its policy objection to the enforcement of the award by legislating to prevent the Petitioners from taking any steps to enforce their judgment from the District Court. Legislation introduced on January 27, 2017 in the Belizean Parliament criminalized efforts to enforce foreign judgments against Belize in any country outside Belize;[234] violations were punishable by a significant fine and/or terms of imprisonment not exceeding two years.[235] The Act authorized the granting of an injunction restraining persons from commencing, intervening in, or continuing any proceedings for enforcement of a foreign judgment, whether in or outside Belize, where a competent court in Belize had declared such foreign judgment unlawful, void or otherwise invalid.[236] Other legislation introduced on the same day, made it an offence for a person, whether in Belize or outside Belize, to institute, intervene in or to seek the conduct of proceedings in any foreign state in relation to proceedings from which the Central Bank of Belize or its property was immune.[237] That immunity was conferred by Section 3 of

230. BCB Holdings Ltd. v. Gov't of Belize, 110 F. Supp. 3d 233, 246 (D.D.C. 2015), *aff'd* 650 F. App'x 17 (D.C. Cir. 2016). Enforcement granted. 232 F. Supp. 3d 28 (D.D.C. 2017).

231. 110 F. Supp. 3d at 251.

232. BCB Holdings Ltd. v. Gov't of Belize, 650 F. App'x 17, 18 (D.C. Cir. 2016).

233. *See id.* at 20.

234. The Crown Proceedings (Amendment) Act 2017, § 3 29A–B (Belize), provides that: "Where it has been determined by a court in Belize, that a foreign judgment is unlawful, void or otherwise invalid, a person who, whether in or outside of Belize, and whether by the institution of proceedings or otherwise, enforces or attempts to enforce the foreign judgment commits an offence."

235. *Id.* § 3 29B(2).

236. *Id.* § 3 29B(3).

237. The Central Bank of Belize (International Immunities) Act 2017, §§ 1, 3, 4, 13 (Belize).

the Act, which immunizes the property of the Central Bank of Belize from proceedings for attachment, arrest, or execution in any foreign court.[238] Both statutes were enacted by the Belizean legislature on January 31, 2017.

Unsurprisingly, the U.S. District Court granted the motion to authorize enforcement of its judgment. On February 6, 2017, a week after the Belizean Parliament had acted, the District Court determined that the Government of Belize has been given all the required notice and that a reasonable period has elapsed following the entry of judgment.[239] The Court therefore ordered that the Petitioners could seek attachment or execution of Government of Belize property to satisfy this Court's judgment pursuant to FSIA in the jurisdictions where such attachment or execution was appropriate.[240]

The clearly expressed policy position of the Government of Belize was to intervene in the efforts by the Plaintiffs to enforce the judgment of the US courts and by extension the London Award.[241] This obviously constituted the most direct attack on the enforcement of award but clearly was not productive of the result sought by the Government. Surely, with an appropriately worded provision in legislation (and there is a strong view that such a provision may have been then available to the Government of Belize through adoption of the United Kingdom State Immunity Act 1978), another route to realizing the same objective would have been for Belize, by order, to restrict the immunities and

238. *Id.* § 3.

239. BCB Holdings Ltd. v. Gov't of Belize, 232 F. Supp. 3d 28, 34 (D.D.C. 2017).

240. *See* id. at 36 (the Court denied the Petitioners' Motion for Anti-Suit Injunction and for Temporary Restraining Order against Belize. The denial was 'without prejudice').

241. *See id.* at 32. he US District Court quoted the (then) Prime Minister as stating:

> On January 27, 2017, the day when the two statutes criminalizing efforts to enforce the judgment was passed, the Prime Minister of Belize stated in a speech to the Belize Parliament that the statutes are intended to interfere with Petitioners' efforts to enforce this Court's judgment against the GOB: "Well, not to put too fine a point on it, and in fact, to speak to circumstances that we're all already familiar with, we had thought it prudent to do this because of the fact that the Ashcroft Concerns, BSDL, BCB Holdings, Ltd., which I gather is now trading—has changed its name to Caribbean Investment Holdings, Ltd.—and The Belize Bank, Ltd. have obtained final judgment in the United States on arbitral awards given against the government of Belize and in favor of BSDL, Belize Bank, Ltd., and BCB Holdings, Ltd. Last Tuesday, those entities filed a motion in the District Court in Washington, D.C., filed an application to be allowed to enforce those judgments against the government of Belize. Notwithstanding that certainly in one case, as all Belize, and indeed now all the world knows, the final judgment flies completely in the face of the decision of our highest court, the CCJ, which decision says that that arbitral award is unenforceable, because it is repugnant to public policy, and it is void and illegal."

privileges it accorded to the United States on the basis that those immunities and privileges accorded by the U.S. to Belize were less than those required by convention to which both states were parties. This would be an indirect method targeting the foreign state itself with the hope of achieving the strongly held policy position but would seem to have been available instead of the (probably) unprecedented the criminalizing the efforts of the Plaintiffs to enforce the judgment in their favor.

VI. Legislative Response to Recent Developments

Foreign sovereign immunity is a dynamic field which regularly throws up new problems and issues for resolution. Since the flurry of passage of legislation in the 1970s and 1980s, several issues have arisen that could benefit from new legislative intervention. Three such issues of particular significance for Caribbean states are the following: (a) the increasing concern regarding immunity from enforcement; (b) the overlap between foreign state immunity and the "act of state" doctrine; and (c) the relationship between foreign sovereign immunity and the doctrine of *jus cogens*. These issues are considered here in outline only.

A. *Impunity from Enforcement*

Enforcement of judgments and awards against the property of a foreign sovereign has always attracted particular care and attention. A waiver of immunity as regards jurisdiction does not necessarily imply a waiver of immunity as regards enforcement. A finding of jurisdiction by a court does not necessarily imply that judgment based on that jurisdiction is automatically enforceable against the property of the foreign state. Legislation on foreign sovereign immunity makes it very clear that the regime of jurisdiction is separate and distinct from the regime of enforcement.

A recent article by Kelsey Rose, in *Annuaire canadien de droit international*[242] reviewed modern cases from Canada, Australia, the United Kingdom, and the United States on the way to concluding that the current burden on creditors to disprove immunity from execution against the property of foreign states is excessively onerous. Immunity from enforcement often meant impunity from liability. Rose suggests that, in the Canadian context, adjusting the evidentiary burden on parties to an execution immunity dispute would improve the ability of creditors

242. Kelsey A. Rose, *When Immunity Means Impunity: Lessons for Canada from Recent Cases on State Immunity from Execution*, 55 Can. Y.B. Int'l L. 335 (2017).

to obtain fair payment from debtor states, without infringing state sovereignty.

Even as that article was going to press there came the developments in *BCB Holdings Ltd. v. Government of Belize*, fully detailed above.[243] This decision of the U.S. District Court, which allows enforcement in any and every New York Convention state in which the defendant state has assets, is a useful but not complete answer to the problem of impunity from enforcement. It is not available, for example, where enforcement does not rest on an New York Convention award. The proposed solution of adjusting the burden of proof would seem to be a policy decision which, given the subject matter, is best considered within the decisional province of the legislature.

B. *Foreign Immunity and Act of State*

Foreign sovereign immunity overlaps with but is different from the "act of state" doctrine. While both proceed from the same premise of mutual respect for the equality of sovereign states, state immunity extends *personal* immunity to foreign states and their officials for acts done in their official capacity and is regarded by public international law as an incident and requirement of sovereign equality. The "act of state" doctrine is not a personal but a *subject matter* immunity, wholly created by English common law, to prevent litigation which impugns the acts of foreign states, even where those states and their officials are not parties to the litigation and have not been indirectly impleaded.[244]

In the recent decision by the Supreme Court of Canada ("SCC") in *Nevsun Resources Ltd. v. Araya*,[245] the argument that the "act of state" doctrine precluded the institution of the claim for damages was dismissed by a majority of 7 to 2. Justice Abella, who delivered the leading judgment, traced the origin of the doctrine to the seventeenth century case of *Blad v. Bamfield*[246] and noted that in modern times the doctrine had become the subject of significant criticism both because it was expanded to apply to a range of situations which were quite distinct

243. BCB Holdings Ltd. v. Gov't of Belize, 232 F. Supp. 3d at 39 (D.D.C. 2017).

244. Per Lord Sumption in Belhaj v. Straw [2017] UKSC 3, [2017] AC 964, [200]. In Singapore, the rationale behind the act of state doctrine is to disallow the Singapore courts from adjudicating on the domestic acts of another state because that would "imperil the amicable relations between governments and vex the peace of nations." Maldives Airports v. GMR Malé Int'l Airport Pte [2013] SGCA 16 [25] (citing the U.S. Supreme Court in Oetjen v. Central Leather Co., 246 U.S. 297 (1918)).

245. Nevsun Resources Ltd. v. Araya, 2020 Can LII 37919 (Can. S.C.C.).

246. Blad v. Bamfield (1674) 36 ER 992, 3 Swans 604, 606–07 (Den.).

and different in law, and because of the large number of exceptions that developed to its applicability.[247] It was for these reasons Lord Wilberforce described the doctrine in *Buttes Gas and Oil Co. v. Hammer*[248] as "a generally confused topic," while Justice Jagot in the Australian case of *Habib v. Commonwealth of Australia*[249] labeled it "a common law principle of uncertain application."

These criticisms were also the springboard for the SCC to take a fresh look at the doctrine. It reviewed the cases on the subject and determining that no Canadian case had ever directly applied the doctrine, the court came to the radical conclusion that although part of English common law, the doctrine did not form part of the common law of Canada. The majority then held that:

> [57] While the English common law, including some of the cases which are now recognized as forming the basis of the act of state doctrine, was generally received into Canadian law at various times in our legal history, as the preceding analysis shows, Canadian jurisprudence has addressed the principles underlying the doctrine within our conflict of laws and judicial restraint jurisprudence, with no attempt to have them united as a single doctrine. The act of state doctrine in Canada has been completely absorbed by this jurisprudence.
>
> [58] To now import the English act of state doctrine and jurisprudence into Canadian law would be to overlook the development that its underlying principles have received through considered analysis by Canadian courts.
>
> [59] The doctrine is not part of Canadian common law, and neither it nor its underlying principles as developed in Canadian jurisprudence are a bar to the Eritrean workers' claims.[250]

This is an important finding but there are two major challenges to Caribbean courts adopting this approach. Firstly, on the practical side, a thorough review of Caribbean and Privy Council case-law would be necessary to ascertain the extent to which the English "act of state"

247. Nevsun Resources Ltd., 2020 CanLII at 485–88.

248. Buttes Gas and Oil Co. v. Hammer (No. 3) [1981] UKHL J1029-1, [1981] 3 All ER 616, [1982] AC 888 (U.K).

249. Habib v. Commonwealth [2010] FCAFC 12, 51 (Austl.).

250. Nevsun Resources Ltd., 2020 CanLII at 491.

doctrine has been incorporated as part of Caribbean common law. This is a complicated task because there are multiple sovereign jurisdictions with still rudimentary forms of case-law reporting. Further, the review is not simply a matter of ascertaining whether the doctrine was mentioned in a case on the way towards a final decision but, rather, whether it constituted the *ratio* of the case. The difference is evident from *IPOC International Growth Fund Ltd. v. LV Finance Group Ltd.*[251] the only readily discoverable Caribbean case to discuss the "act of state" doctrine. Delivering the judgment of the court, Justice Rawlins (now Sir Hugh Rawlins) accepted that, "under the law of the British Virgin Islands, acts of state cannot be the subject matter of an inquiry by the courts or by an arbitral tribunal established by private parties,"[252] but then held that the doctrine was inapplicable because the tribunal "was not sitting in judgment on the validity of acts done by an official of the Russian government in his official capacity within Russia."[253]

Further again, aside from the case-law, there will also have to be a review of statute-law. It is entirely possible for legislation to have incorporated and made the English "act of state" doctrine applicable locally. In *Nevsun*, the SCC accepted that the act of state doctrine had been adopted in British Columbia by virtue of what is now Section 2 of the Law and Equity Act RSBC 1996, which recognized that the common law of England as it was in 1858 is part of the law of British Columbia; the court then decided that Canadian jurisprudence had developed in ways inconsistent with the evolution of the doctrine.[254] Whether this solution is possible where the statute provides for the incorporation of English law "as from time to time amended"[255] must be open to doubt.

Secondly, on the theoretical side, it remains debatable whether the rules of private international law are sufficient to answer one of the important issues addressed in the act of state doctrine, that is, the justiciability of passing on a claim that a foreign state had breach public international law. As Judge Côté painstakingly explained in his

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251. IPOC Int'l Growth Fund Ltd. v. LV Finance Group Ltd., Civil Appeal No. 30 of 2006 (Ct. of App., June 18, 2007) (VI) (per Rawlins, J.A.).

252. *Id.* ¶¶ [40], [42] (quoting the decision of the High Court Judge and affirming that the Judge had correctly applied the principles of the act of state doctrine).

253. *Id.* ¶ [42].

254. The minority considered that although the doctrine had been received into the law of British Columbia in 1858, "the principles animating early cases such as *Blad* and *Duke of Brunswick* should be reflected through the lens of the modern doctrine of justiciability." Nevsun Resources Ltd., 2020 CanLII ¶ [293].

255. Mills v. Mills, S.C. Bah., Divorce and Matrimonial Side, 200/1975, 23 April 1976 (Knowles, C.J.).

dissenting judgment in *Nevsun*, the forum's private international choice of law rules may be applied to decide that a foreign state's domestic law will not be applied because that law breaches the forum court's domestic policy,[256] and application of the forum court's domestic policy may be triggered if the domestic law of the foreign state constituted a serious violation of international law.[257] Those considerations are, however, distinct from the direct adjudication of the lawfulness of a foreign state's actions which the act of state doctrine forbids. In the leading case of *Buttes Gas and Oil Co. v. Hammer*,[258] Lord Wilberforce drew a sharp distinction between choice of law rules and the rules on justiciability, stating:

> It is one thing to assert that effect will not be given to a foreign municipal law or executive act if it is contrary to public policy, or to international law (*cf Re Helbert Wagg & Co Ltd* [1956] 1 All ER 129, [1956] Ch 323) and quite another to claim that the courts may examine the validity, under international law, or some doctrine of public policy, of an act or acts operating in the area of transactions between states.[259]

Following *Blad*, *Duke of Brunswick* and other authorities, Lord Wilberforce went on to hold that private law claims which turn on a finding that a foreign state has acted in a manner contrary to public international law are not justiciable by an English court:

> It would not be difficult to elaborate on these considerations, or to perceive other important interstate issues and/or issues of international law which would face the court. They have only to be stated to compel the conclusion that these are not issues on which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which it can be said have not been drawn to the attention of the court by the executive), there are . . . no judicial or manageable standards by which to judge these issues, or, to adopt another phrase (from a passage not quoted), the court would be in a judicial

256. Nevsun Resources Ltd., 2020 CanLII at 543 (2020) (citing Oppenheimer v. Cattermole [1975] 1 All ER 538, [1976] AC 249).

257. *Id.* (citing Kuwait Airways Corp. v. Iraqi Airways Co. (No. 3) [2002] UKHL 19, [2003] 1 LRC 430, [2002] 2 AC 883.

258. Buttes Gas and Oil Co. v. Hammer (No. 3) [1981] UKHL J1029-1, [1981] 3 All ER 616, [1982] AC 888 (U.K.).

259. *See id.* at 628, [1982] AC at 931.

> no man's land: the court would be asked to review transactions in which four foreign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law.[260]

As evident in Lord Wilberforce's comments, non-justiciability is ultimately animated by the constitutional separation of powers. The forum court refrains from passing judgment on alleged internally wrongful acts of foreign states because such judgment could have unforeseeable and grave impacts on the conduct of international relations which is within the sole purview of the executive. Failure to abide by the dictates of the separation of powers could also expose nationals to litigation and danger abroad and undermine the forum state's reputation as an attractive place for international trade and investment.[261] These reasons vote strongly in favor of a legislative response to clarity the standing of the "act of state" doctrine in the Caribbean.

C. *Jus cogens*

The majority of the European Court of Human Rights ("ECtHR") in *Al-Adsani v. United Kingdom*,[262] rejected the existence of a rule in international law denying immunity to states in respect of civil claims for damages for alleged torture committed outside the forum state.[263] However, a strong dissenting opinion argued that the interplay of the *jus cogens* rule on prohibition of torture and the rules on state immunity meant that "the procedural bar of State immunity is automatically lifted" and that the distinction made by the majority between civil and criminal proceedings was "not consonant with the very essence of the operation of the *jus cogens* rules."[264]

There is no consistent position on whether contravention of rules of jus cogens renders foreign sovereign immunity inapplicable. In *R v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (Nos 1, 2 and 3)*[265] the House of Lords ruled that Pinochet, as a former head of

260. *Id.* at 633, [1982] AC at 938.

261. Nevsun Resources Ltd. v. Araya, 2020 CanLII 37919, ¶ [300] (Can. S.C.C.).

262. Al-Adsani v. U.K., 2001-XI Eur. Ct. H.R.App. No. 79.

263. *Id.* ¶ 61.

264. *Id.* at 112–13, Joint Dissenting Opinion of Judges Rozakis and Caflisch (joined by Judges Wildhaber, Costa, Cabral Barreto & Vajic).

265. R v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 1) [2000] 1 AC 61 (HL); R v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2)

state, was not entitled to immunity from prosecution for the crimes of torture and could therefore be extradited to Spain to face those charges. That decision was criticized on the basis that even though prohibition on torture was a norm of *jus cogens*, it had not been shown that the abrogation of immunity was such a norm.[266] And it is the case that several of the Law Lords who thought that Pinochet's immunity had been abrogated, denied that the *jus cogens* status of the prohibition on torture was enough, by itself, to affect that abrogation.[267]

In *Ferrini v. Germany*,[268] the Italian Supreme Court of Cassation held that claims for compensation for material and moral injuries suffered at the hands of German armed forces in 1944-1945 could not be precluded by the law on state immunity since that law was superseded by higher ranking norms of *jus cogens*. That decision, which was heavily criticized by the House of Lords in *R v. Jones*,[269] which held that removal of immunity from criminal prosecution does not necessarily follow from breach of *jus cogens*. This approach was endorsed by the ICJ in *Jurisdictional Immunities of the State case (Germany v. Italy)*;[270] the World Court concluded that "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is *accused* of serious violations of international human rights law or the international law of armed conflict."[271]

It may well be, therefore, that the current position is that the removal by domestic courts of foreign immunity cannot be legitimated on ground of the importance of substantive *jus cogens* norms violated but rather must be established by a separate procedural rule of jus cogens to that effect. At least where there is a mere accusation rather than proof or conviction of violations. The principle of sovereign equality and its derivative sovereign immunity cannot be overridden unless the community of states so agree. Or, of course, legislation so requires. Professor Brownlie has said that *jus cogens* is a vehicle that rarely leaves

[2000] 1 AC 119 (HL); R v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 3) [2000] 1 AC 147 (HL).

266. Jack L. Goldsmith & Curtis A. Bradley, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129 (1999).

267. *See* Bow Street Metropolitan Stipendiary Magistrate (No. 3) [2000] 1 AC. 204–05 (Lord Browne-Wilkinson).

268. Sez. un. 11 Marzo 2004, n. 5044/04,128 ILR 658 (It.).

269. R v. Jones [2006] UKHL 16.

270. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. 99 (Feb. 3).

271. *Id.* ¶ 91(emphasis added).

the garage. The legislature could well decide it is time to take the vehicle for a spin.[272]

VII. Conclusion

It has been well over 100 years since the common law affirmed the seminal importance of foreign sovereign immunity in the legal system[273] and almost 50 years since it revolutionized the law to restrict that immunity to governmental acts only, rendering commercial acts justiciable before the courts.[274] That change in the law has in many Western countries become codified in legislation and a United Nations Convention of 2004 has globalized the movement from absolute to restrictive immunity. Starting 60 years ago most Caribbean colonies have become sovereign independent states, recognized as entitled to immunity in foreign courts and granting immunity to foreign states in Caribbean courts. However, the rules under which Caribbean courts grant foreign sovereign immunity remain largely the arcane rules of the common law unvisited and unrevised by parliament despite the obvious interest of the executive in policymaking in inter-state relations, and despite quietly sophisticated judicial calls for legislative reform. It is to be hoped that with this publication that call is no longer quiet.

272. *See generally* Justice Winston Anderson, *The rule of law and the Caribbean Court of Justice: taking jus cogens for a spin*, 21 Oxf. Univ. Commw. L.J. (2021).

273. *See* Schooner Exchange v. McFaddon, 11 U.S. 116 (1812).

274. Philippine Admiral v. Wallem Shipping Ltd. [1975] UKPC 21, [1976] 2 WLR 214.