RECENT DEVELOPMENTS

INTERNATIONAL

AMERICAN COMPANY FILES COMPLAINT IN THE UNITED STATES OVER OWNERSHIP OF OIL AND GAS RESOURCES IN THE TIMOR SEA*

The Complaint

Oceanic Exploration Company (a Colorado corporation) and Petrotimor Companhia de Petroleos SARL (a Portuguese corporation controlled by Oceanic) have filed a complaint in the District Court for the District of Columbia for what is described as the theft of one of the world's major hydrocarbon reserves lying off the southern coast of East Timor valued at over US$50 billion. Similar complaints brought against the Commonwealth of Australia in the Full Court of the Federal Court of Australia in 2003 were dismissed as being non-justiciable and outside that court's jurisdiction.[1]

The first named group of multiple defendants in the present proceedings consists of companies of the ConocoPhillips group, which is headquartered in Texas. It is described as the largest contractor with the current Timor Sea Designated Authority and the previous Timor Gap Joint Authority. These are also named as defendants.

The Designated Authority was established under the Timor Sea Treaty done in 2002 between East Timor and Australia, and the Timor Gap Joint Authority was set up under the Treaty done in 1989 between Indonesia and Australia.

Also named as defendants are PT Pertamina and another Indonesian company, and up to 50 "Does" to be identified when known.

Factual background and Common Allegations

The Complaint has the saga from which this lawsuit emanates as beginning in colonial times in 1642 when the Dutch and the Portuguese divided the island of Timor between themselves. Oceanic's application for a concession to explore for petroleum and petroleum equivalents in the Timor Sea south of East Timor was lodged with the Portuguese government in the early 1970s, and a concession was signed in late 1974 over the whole of a 14.8 million acre area in the Timor Sea, despite the existing Australian seabed claim up to the Timor Trough, which is some 40 miles south of East Timor. This large concession area includes almost all of the area of the Joint Petroleum Development Zone under the current Timor Sea Treaty with East Timor and of the conterminous Zone of Co-operation under the 1989 Treaty with Indonesia.

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1 *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* (2003) 197 ALR 461.

Misappropriation of geographic and seismic data of the Timor Sea and other confidential information that was gathered by Oceanic is also alleged, as was the case in the failed Federal Court of Australia proceedings.[2]

Reliance is placed in the Complaint on what is referred to as the "Geneva Convention on the Law of the Sea", but it is not clear whether the intended reference is to the Geneva Convention on the Continental Shelf 1958 or to the 1982 United Nations Convention on the Law of the Sea (UNCLOS). In particular, no reference is made to the express provisions in UNCLOS that allow provisional arrangements to be made by countries with opposing coastlines to set up a joint seabed development authority pending final seabed delimitation.[3]

Serious allegations of personal misconduct are made in the Complaint. The one that has received the most publicity is the allegation that ConocoPhillips bribed Prime Minister Alkatiri of East Timor. The East Timor Prime Minister has publicly rejected this allegation.

As to references to the current situation in the Timor Sea, the main emphasis is on the Bayu-Undan field which is being rapidly developed by ConocoPhillips. The Sunrise Unitisation Agreement between Australia and East Timor is referred to in the Complaint on the basis that part of the Sunrise field is in the area of the Portuguese concession granted to Oceanic.

The Claims Made

In all 10 Claims are made:

(a) *First and Second Claims:* A pattern of racketeering activity is alleged involving acts in violation of the US *Racketeer Influenced and Corrupt Organisations Act*;

(b) *Third Claim:* Breaches of the US *Robinson-Patman Act* are alleged, in particular, preventing Oceanic from obtaining contracts with named entities;

(c) *Fourth Claim:* Breach of the US *Lanham Act* is alleged (reference is made to the Paris Convention for the Protection of Industrial Property to which Australia, Indonesia, Portugal and the United States are parties);

(d) *Fifth Claim:* Misappropriation of trade secrets is alleged against all defendants except the Joint Authority and the Designated Authority;

(e) *Sixth Claim:* This alleges intentional interference with a contract (the concession from Portugal) by all defendants;

(f) *Seventh Claim:* Intentional interference with prospective economic advantage (business relationship and business expectancy are referred to) is alleged against all defendants;

(g) *Eighth Claim:* Conversion, namely of the plaintiffs' oil and natural gas information in the concession area, is alleged against all defendants;

(h) *Ninth Claim:* Unjust enrichment is alleged against all defendants,

(i) *Tenth Claim:* Illegal, unfair and fraudulent conduct is alleged against all defendants.

Damages believed to be not less than US $10.5 billion are claimed which, if valid, would be tripled under US Federal law.

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2 *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* (2003) 198 ALR 269.

3 UNCLOS, Articles 74.3 and 83.3.

Justiciability a Major Issue

As mentioned above, Petrotimor, initially filed similar claims in the Federal Court of Australia and the Court found that it had no jurisdiction to determine the validity of the grant of concession by the Portuguese Government, and the consequence of this non-justiciability was that the Federal Court had no jurisdiction. In particular, reference was made to the decision by the House of Lords in *Buttes Gas and Oil Co v Hammer (No 3),*[4] which concerned competing concessions granted by competing states over an oil rich area. Such issues were held to be non-justiciable. Lord Wilberforce said (at 938):

> "there are … no judicial or manageable standards by which to judge these issues, or to adopt another phrase … the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force and to say that at least part of these were 'unlawful' under international law.
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> …this counterclaim cannot succeed without bringing to trial non-justiciable issues."

Reference was also made by the Federal Court to the principle applied by the High Court of Australia in *Potter v Broken Hill Proprietary Co Ltd*[5] that domestic courts will not enforce rights granted by a foreign sovereign.

It therefore remains to be seen what position will be taken in the proceedings that have now been commenced in the US District Court by Oceanic. Interestingly, Griffith CJ, in the *Potter Case*, relied upon what was said by Fuller CJ of the United States Supreme Court in *Underhill v Hernandez*:[6]

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

The concern US judges have expressed in ruling on the conduct of a foreign state is understandable. Thus reference has been made to the prudential concern that doing so may interfere with Executive and Congressional Foreign Policy efforts. The record shows that in the United States a number of cases involving operations of mining and resources corporations overseas have been dismissed because of non-justiciability on grounds such as:

- the Act of State exemption
- international comity
- involvement of political issues

In some cases, the US Government itself has intervened by including filing motions to dismiss.

It therefore seems clear that non-justiciability will be a major or even a decisive issue in these proceedings. In that connection, the fact that the arrangements that were made for setting up the Joint Authority and then the Designated Authority in the Timor Sea, in accordance with the UNCLOS provisions referred to above relating to provisional arrangements pending permanent

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4 (1982) AC 888.
5 (1906) 3 CLR 470.
6 168 US 250 (1897).

seabed delimitation, may be of relevance. Those arrangements as between Australia and East Timor date back to 1999, when the United Nations Transitional Administration in East Timor was directly involved. Under those arrangements, the first phase of the Bayu-Undan petroleum project in what was then Area A of the Zone of Co-operation was approved in February 2000.

IS THIS THE BEGINNING OF THE END OF THE ALIEN TORT CLAIMS ACT AND HOW IS AUSTRALIA INVOLVED?*

The Alien Tort Claims Act ("the ATCA") allows those who have suffered international human rights and other abuses to sue their perpetrators in US courts.

Based on a request from US Department of Justice ("the DOJ"), the US Supreme Court agreed to hear a case in 2004 that will have a significant impact on the ATCA, which is considered by some as the key legal tool for protecting human rights. By agreeing to hear *Sosa v Alvarez-Machain, et al*[1] ("the *Alvarez* case"), the US Supreme Court will have the opportunity to preserve the act as it is or read it down or destroy it. The DOJ has been very active and if its argument is successful, the court will hold the ATCA does not grant victims a right to sue for human rights abuses.

The Alien Tort Claims Act

The ATCA, a federal law dating back to 1789, states that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"[2]. Victims who are unable to obtain retribution in their own countries have been using the ATCA since 1979 to sue for human rights abuses in US federal courts.

While the ATCA was initially used to sue foreign governmental officials, victims and lawyers recognised the potential of the law applied to corporations. A number of multinational corporations, including Texaco[3], Dow Chemical[4], Union Carbide[5], Talisman[6], Shell[7], Rio Tinto[8] and Unocal[9] have been sued under ATCA for murder, torture, toxic harm, genocide, enslavement, and rape associated with their work in various countries including Ecuador, India, the Sudan, Nigeria, Bougainville and Burma.

The *Alverez* Case

In the *Alvarez* case, a Mexican policeman, operating on behalf of the US Drug Enforcement Agency ("DEA"), kidnapped a Mexican citizen accused of helping to kill an American DEA agent

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1 *Sosa v Alvarez-Machain et al*, 331 F.3d 604 (9th Cir. 2003).

2 28 U.S.C. §1350 (1994).

3 *Aguinda v Texaco*, 303 F.3d 470 (2d Cir. 2002).

4 *Castro Alfaro v Dow Chemical*, 786 S.W.2d 674 (1990), *rehearing overruled*, 33 Tex Sup J 453 (1990), *cert denied*, 498 U.S. 1024 (1991).

5 *Bano v Union Carbide*, 273 F.3d 120 (2d Cir. 2001).

6 *Presbyterian Church of Sudan v Talisman Energy*, Inc, 244 F. Supp 2d 289 (S.D.N.Y. 2003).

7 *Wiwa v Royal Dutch Petroleum Co*, 226 F.3d 88 (2d Cir. 2000), *cert denied*, 532 U.S. 941 (2001).

8 *Sarei & et al v Rio Tinto & et al* (Case No.: CV 00-11695 MMM) 221 F Supp 2d 1116 (C.D. Cal. 2002).

9 *Doe v Unocal Corp*, 963 F Supp 880 (C.D. Cal. 1997).