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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* Peter Little, Barrister and Solicitor of the Supreme Court of Victoria. Lecturer, Law School, The University of Melbourne.

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).

and brought him to the US to be criminally prosecuted for the murder. This individual was later released by the US and he is now suing the Mexican policeman under the ATCA.

One of the key issues in the *Alvarez* case is whether the ATCA may be used by foreign victims as the basis for lawsuits alleging violations of serious human rights abuses. (In this case, the violations were transborder abduction and arbitrary arrest and detention).

On 1 December 2003, the US Supreme Court accepted the case without comment. This is unusual. The DOJ has urged the court to declare that ATCA should not be used, and in fact was never intended to be used, to enable foreign victims to sue in US federal courts.

Interestingly, nearly 20 years ago, the DOJ submitted a brief in another case[10] supporting the use of ATCA for human rights claims. However, now in an earlier brief in the *Unocal* case[11], and again in its 2003 brief in the *Alvarez* case, the DOJ is urging the US Supreme Court to reject the ATCA as the basis for human rights claims.

The International Chamber of Commerce ("ICC") has joined with major American business groups[12] by filing amicus curiae briefs with the court, are calling on the US Supreme Court to clarify the ATCA and return it to its "proper jurisdictional role". The ACTA according to the ICC and others has been misconstrued to provide a private right of action where Congress envisaged none when it adopted the law.

Australia's Involvement

Australia, too, is involved. In a joint brief filed on 23 January 2004, together with the United Kingdom and Switzerland, the Australian government argued that it would like human rights violations to be dealt with fairly and promptly in the appropriate locations. It concluded that the US is not the right location and that there is no implied right of action under the ATCA[13]. Australia urged the court to restrict the ATCA to cases which:

(i) Have an appropriate connection with the US; or
(ii) Involve activities by US nationals.

Australia reasoned that to bring a cause of action in the US courts against foreign nationals for conduct in foreign land would:

- Interfere fundamentally with other nations' sovereignty;
- Complicate international and local efforts to halt and punish human rights violations and thereby weaken the "the law of nations" that the ATCA was intended to uphold;
- Undermine political efforts to foster development of the rule of law and good governance[14];
- Interfere with Australia's dispute-resolution choices; and
- Australian corporations and individuals are likely to be threatened with large damages claims.

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10 *Filartiga v Pena-Irala* 630 F.2d 876 (2d Cir. 1980).

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

12 In addition to ICC and USCIB, signatories include the US Chamber of Commerce, the National Foreign Trade Council, the National Association of Manufacturers and the United States Council for International Business ("USCIB") which is ICC's affiliate in the US.

13 Specifically the question was, "Whether an implied right of action under U.S. law based on extraterritorial jurisdiction over entirely foreign actors and situations is provided by the ATS or consistent with international law?"

14 The government argues that human rights, in the long run, more likely to be protected by building stronger democratic and legal institutions.

The Result

The *Alvarez* case presents several legal questions, and the US Supreme Court has a number of alternatives. It can:

- Preserve victims' right to sue for human rights violations by focusing on other questions before the court;
- Decide to clarify the scope of human rights abuses that fall under ATCA;
- Address the specific facts of the *Alvarez* case and rule on the question of whether transborder abduction is or is not a violation of the law of nations;
- Examine whether the US government is liable to the plaintiff under another law, such as the *Federal Tort Claims Act*, which under some circumstances waives the sovereign immunity the government generally enjoys from lawsuits; and
- Reject the DOJ's position and hold that ATCA does, indeed, create a cause of action for human rights abuses.

The *Alvarez* case is scheduled to be heard this year. Many are interested in the result.

TENDER PROCEDURES*

Pratt Contractors Ltd v Transit New Zealand (Privy Council [2003] UKPC 83 1 December 2003)

Tender – Preliminary contract – Procedures – To act fairly doesn't mean a requirement to act judicially

Background

The case was an appeal from the New Zealand Court of Appeal regarding what are the requirements for a preliminary "procedural" contract arising from the issue of a request for tenders for a roading contract.

Facts

Transit New Zealand requested tenders for a contract to realign State Highway 1. Pratt Contractors was unsuccessful. Pratt Contractors argued that the terms of the request for tenders gave rise, immediately upon submission of the tender, to a preliminary contract which contained express and implied terms as to the method by which Transit would select the successful tenderer and that Transit acted in breach of these terms.

Judgment

The Privy Council agreed with the Court of Appeal that the request for tenders did not incorporate Transit's manual of competitive pricing procedures. The requirement to act fairly meant all the tenderers had to be treated equally. Transit was permitted to appoint members of the tender evaluation team who had views about the tenderers, whether favourable or adverse. The obligation of good faith and fair dealing did not mean that the tender evaluation team had to act judicially.

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* David Quigg, LLB(Hons) LLM, and Matt Yates, LLB BA, Quigg Partners, Wellington, New Zealand.