ARTICLES

WHAT ARE THE CONSEQUENCES OF THE *ALIEN TORT CLAIMS ACT* (US) ON MINING AND PETROLEUM CORPORATIONS OPERATING IN THIRD WORLD STATES IN THE ASIAN PACIFIC REGION?

PART II: NON-JUSTICIABILITY ISSUES

Peter Little*

In a continuation from the first article on the Alien Tort Claims Act (US) (ATCA), this article identifies and examines the issues involved when a party to an ATCA claim seeks to have the case dismissed on grounds of non-justiciability, such as: (a) The Act of State Doctrine; (b) The Political Question Doctrine; and/or (c) The Doctrine of International Comity.

These grounds will be discussed within the context of Sarei & Ors v Rio Tinto & Anor.

The extent of the US Government's involvement in a Motion to Dismiss an ATCA complaint is extraordinary. As a result, under the present US Government, if a mining and resources corporation is sued pursuant to ATCA, that corporation has a very good chance of dismissing the complaint. Whereas, by contrast, a plaintiff has a heavy burden to ensure the complaint is adequately pleaded and can proceed.

A. INTRODUCTION

This is the second of a series of three articles in which the *Alien Tort Claims Act (US)*[1] ("ATCA") is discussed and analysed by examining two cases, being *Beanal v Freeport-McMoRan, Inc*[2] ("*Beanal*") and *Sarei v Rio Tinto, plc*[3] ("*Sarei*"). These cases involve claims arising from mining operations in Third World states in the Asian Pacific region[4] and they highlight the inherent exposed legal risk for mining and petroleum corporations operating in the region.

The ATCA grants Federal District Court jurisdiction to hear "…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"[5].

The first article gave an introduction to the ATCA with an explanation of some of the more important issues that arise from its application. Some actionable international legal norms[6] were

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

1 28 U.S.C. § 1350.

2 *Beanal v Freeport-McMoRan, Inc.,* 969 F. Supp. 362.

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

4 Bougainville and Irian Jaya.

5 28 U.S.C. § 1350. The full text is, "The district courts shall have original jurisdiction on 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".

identified and discussed by examining the judgment in *Beanal*. As a result, it was possible to evaluate the evolution of customary international law and what it may mean to mining and petroleum corporations.

In *Beanal*, Mr Beanal's claim against Freeport-McMoran Inc and Freeport McMoran Copper and Gold, Inc. ("Freeport") was for alleged environmental abuses, human rights abuses and cultural genocide resulting from Freeport's operation of an open pit copper, gold and silver mine in Irian Jaya, Indonesia. Mr Beanal's claim linked the environmental damage to the violation of human rights[7].

This article focuses on some of the main political and practical issues that arise under the ATCA including an examination of the non-justiciability questions. These issues will be identified, examined and discussed by using *Sarei*[8] as a case study.

In *Sarei*, the plaintiffs were residents of the Papua New Guinea island of Bougainville[9], and their ATCA class action arose out of claims of environmental and human rights abuses against Rio Tinto Ltd, who operated a copper and gold mine on Bougainville. The plaintiffs alleged that:

(i) They were unlawfully dispossessed of their land;

(ii) The defendants caused massive environmental damage, and

(iii) In the effort to keep the mining operations open for Rio Tinto, the PNG government committed human rights abuses, including war crimes, crimes against humanity and environmental harms by an unlawful medical blockade[10].

The third, and final, article will deal with the issue of *forum non conveniens,* personal jurisdiction, the future of the ATCA and possible novel causes of action that could be argued against mining and petroleum corporations working in Third World states. As the third article covers the possible causes of action for alleged breaches of international environmental law, it, by default, also examines possible breaches of other areas of international law.

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6 Ie. Customary International Law or Laws of Nations.

7 As discussed in the first article in (2003) 22 ARELJ 211, the court in April 1997 dismissed the complaint and subsequently struck out Mr Beanal's second and third amended complaints. Then on 29 November 1999 the appeals court affirmed the lower court's dismissal of the complaint finding that Mr Beanal failed to state a claim under the ATCA for either genocide and/or international human rights violations. The court ruled that the environmental treaties and agreements cited by the plaintiff were not sufficient sources of international law to support an ATCA claim.

8 What is unique about *Beanal* and *Sarei* is that for the first time the cause of action included breaches of international environmental law.

9 One of the plaintiffs, Alexis Sarei, subsequent to the civil war moved from Bougainville to the US and has become a US resident.

10 In July 2001, the US District Court denied Rio Tinto's motion to dismiss on grounds of *forum non conveniens* and that the plaintiff failed to state a claim but the court left open the issue of justiciability pending receipt of an opinion of the US Department of State concerning the effect of the action on US foreign policy interests. In a November 2001 letter, the Department of State told the court the continued adjudication of the action would risk a potentially serious adverse impact on the Bougainville peace process, and therefore it is likely to impact on the United States' foreign relations with a friendly country. In March 2002, based on the State Department's opinion, the court conditionally dismissed almost all claims under the political question doctrine. Initially the dismissal was conditioned on the PNG government submitting written consent to allow the claim to be pursued in PNG, but in June 2002, Judge Morrow removed the condition and made the order final. The plaintiffs appealed the dismissal to the Ninth Circuit.

In this article, the actions and impact of the US Department of State will be examined by analysing the non-justiciability questions that would dismiss an ATCA complaint. The non-justiciability questions revolve around three principles being:

1. The Act of State Doctrine;
2. The Political Questions Doctrine; and
3. The Doctrine of International Comity.

The Department of State has a significant impact on the continuance or otherwise of ATCA cases, and at present, the department's policy is to actively intervene to have as many of the cases as possible dismissed. This gives defendants a significant advantage. However, the views of the US Government, or the wishes of the state where the tort occurred, will change according to the government of the day and therefore may change in favour of plaintiffs in the future.

As a result, potential defendants, such as mining and petroleum corporations are, at this stage[11], unlikely to pay compensation under the ATCA because of the non-justiciability questions. This is because:

- The US Department of State has a significant impact on the outcome of the interpretation of the non-justiciability questions because of low threshold requirements. The department does not have to substantiate in court its conclusions to its opinions, and accordingly, can orientate the court to take particularly wide interpretation of what is a political questions;
- The US Department of State under the current government administration has been extremely pro-active in a number of hearings to have them dismissed;
- Of the stated future intentions of the Department of State[12];
- The court has very limited ability to question the executive branch of government and as some parts of the non-justiciability questions are discretionary. According, it will be different for plaintiffs to find grounds to appeal in this area;
- The non-justiciability questions are the most difficult legal challenges for plaintiffs to overcome;
- The non-justiciability questions are the easiest for the defendants to substantiate in a Motion to Dismiss hearing; and
- If the non-justiciability questions are substantiated, they have the ability of dismissing all claims.

Notwithstanding the potential of a successful outcome, significant resources of a corporation will be consumed and its good corporate image will be affected in the legal process[13].

As a number of issues will be explained and explored via an analysis of *Sarei*, it is necessary to provide the background to the case.

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11 It is only possible to say, "at this stage" as the role of the US Department of State is so significant and its perspective will change in the future with any change of White House administration.

12 Refer to note 149.

13 Arguably, the US foreign policy within the Department of State does not change too much except in certain and limited areas. There is always a change of focus and direction with a change of government but the nature of the change is unlikely to have a significant impact on the US Department of States' view of the major countries around the world. The Department of State will get involved if the case impacts on the United States' foreign policy. However, almost all countries in the world, what they do, and what others do to them are in United States' foreign policy interests.

B. SAREI & ORS v RIO TINTO & ANOR

Alexis Sarei is one of the many plaintiffs, who are current and former residents of the island of Bougainville in Papua New Guinea ("PNG"). On 2 November 2000, they filed a class action against Rio Tinto plc and Rio Tinto Limited ("Rio Tinto")[14] under the ATCA. In their complaint, the plaintiffs alleged that Rio Tinto's mining operation on Bougainville destroyed the island's environment, harmed the health of its people, and incited a ten-year civil war, during which thousands of civilians died or were injured. They assert that Rio Tinto is guilty of war crimes, crimes against humanity, as well as racial discrimination and environmental harm that violated international law[15].

Specifically, the plaintiffs alleged that, during the ten-year struggle for independence, PNG, at the behest of its joint venture partner, Rio Tinto, committed atrocious human rights abuses and war crimes[16]. The plaintiffs claimed, and this is relevant later in this article, that in April 1990, the PNG Government allegedly imposed a blockade on Bougainville to isolate the island and force the revolutionaries to surrender[17]. The plaintiffs asserted Rio Tinto conspired with PNG to impose the blockade, and advocated that it should be maintained because it believed the tactic would allow PNG to win the war and reopen the mine[18]. A top Rio Tinto official purportedly encouraged continuation of the blockade to "…starve the bastards out some more, [so] they [would] come around"[19]. The plaintiffs also alleged the blockade "…prevented medicine, clothing and other essential supplies from reaching the people [of Bougainville] …"[20]. It was estimated by the Red Cross in central Bougainville that the blockade caused the death of more than 2,000 children in its first two years of operation[21]. The plaintiffs further contended that, as time passed, the number of

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14 Rio Tinto plc and Rio Tinto Limited shall be referred to as simply Rio Tinto.

15 The general description of the claims made by the plaintiffs are as follows:

Counts	Claims
I	Crimes against humanity
II	War Crimes
III	Violation of the right to life, health and security of the person
IV	Racial discrimination
V	Cruel, inhuman and degrading treatment
VI	Violation of international environmental rights
VII	Consistent pattern of gross violations of human rights

Issues Claims	I	II	III	IV	V	VI	VII
Was there a lack of subject matter jurisdiction?	No	No	Yes	No	Yes	Yes	Yes*
Was there a failure to state a claim upon which relief could be granted?	No	No	Yes	No	Yes	Yes	Yes*

16 Sarei, above n 3 at 14.

17 Ibid. at 12-13.

18 Ibid.

19 Ibid. at 12.

20 Ibid.

21 Ibid. at 12.

deaths from preventable diseases grew, and as of 1997 an estimated 10,000 Bougainvilleans died as a result of the blockade[22].

Rio Tinto moved to dismiss the complaint arguing that issues raised were nonjusticiable under the act of state doctrine and/or political question doctrine and or doctrine of international comity[23].

1. Motion to Dismiss a Claim

It is not uncommon for defendants in an ATCA action to file a Motion to Dismiss requesting the judge to dismiss the complaint[24]. The Motion to Dismiss is an interlocutory proceeding to dismiss either in whole or part the claim and is filed before the parties spend considerable time and expense dealing with matters leading to trial, like discovery[25]. In Australia, we normally see such a motion when there is either no invalid or insufficient cause of action.

In an ATCA action, the Motion to Dismiss is filed by the defendants and provides arguments why the claims, in whole or part, should be dismissed. A Motion to Dismiss for lack of subject matter jurisdiction, for example, may either attack the allegations of the complaint or the existence of the subject matter jurisdiction in fact[26]. If raised, the plaintiffs bear the burden of demonstrating to the court that the court has subject matter jurisdiction to hear the action[27].

A Motion to Dismiss hearing cannot be a mini-trial[28]. Accordingly, it can be difficult to determine to what extent the judge will hear evidence pertaining to the allegations[29]. Normally, a judge will shy away from this difficulty and err on the side of the plaintiffs and accept, for the purpose of the interlocutory hearing that the plaintiffs' allegations in the complaint are true[30]. However, because the ATCA requires the plaintiffs to plead a "violation of the law of nations" as a jurisdictional threshold, the court requires a more searching review of the pleadings to establish jurisdiction[31].

Obviously, this hearing is subject to the complaint being properly pleaded. This is not always the case and it is not uncommon for the plaintiffs to file many amended versions[32]. The pleadings in the

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22 Ibid. at 13.

23 By way of note, Rio Tinto also argued the court lacked subject matter jurisdiction and the plaintiffs failed to state a claim upon which relief can be granted. They were successful on counts III, V, VI and partly on VII.

24 The comments in this article in relation to court procedure deal only with an ATCA claim.

25 The defendants can bring a Motion to Dismiss an ATCA complaint under Rule 12(b)(1) of the US Federal Rules of Civil Procedure for lack of subject matter jurisdiction and/or Rule 12(b)(6) of the US Federal Rules asserting a failure to state a claim upon which relief can be granted. This is a technical problem in the US as the ATCA is both a jurisdictional and a substantive statute. That is, the court may exercise subject matter jurisdiction over the action only if it finds the plaintiffs' complaint adequately alleges a violation or violations of the laws of nations. Accordingly, the analyses to determine the application to dismiss under Rules (b)(1) and Rule (b)(6) merge.

26 *Thornhill Publishing Co. v General Telephone & Electronics*, 594 f.2d. 730, 733 (9th Cir. 1979).

27 *Kokkonen v Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

28 The court may not resolve genuinely disputed facts where the question of jurisdiction is dependent on the resolution of factual issues going to the merit. *Valdez v United States*, 837 F.Supp. 1065, 1067 (E.D. Cal. 1993), affirmed, 56 F. 3d 1177 (9th Cir.1995) ("*Valdez*").

29 This also assumes the jurisdictional questions are not intertwined with the merits. However, in the context of actions arising under the ATCA, the jurisdictional issues are almost always intertwined with the merits of the plaintiffs' claim.

30 *Valdez,* above n 28 at 1065, 1067. *Sarei*, above n 3 at 18.

31 *Kadic v Karadzic*, 70 F.3d. 232, 238 (2d. Cir. 1995) ("*Kadic*").

32 In the *Sarei* case, the plaintiffs are up to their third amended complaint. However, the District Court refused to accept this third amended complaint and this refusal also forms the basis of the appeal to the

complaint, as a result, are extremely detailed to ensure a court can make a determination at an interlocutory stage for a Motion to Dismiss. The courts to date have been quite liberal in accepting amended complaints. Accordingly, the courts are unlikely to dismiss the case because it is inappropriately pleaded[33]. Such a result, will only delay the case and use up resources of both parties. However, the trend of interlocutory challenges and requests for amended complaints will continue at least into the foreseeable future.

C. NON-JUSTICIABILITY AND THE ATCA

One of the most noteworthy developments for the ATCA has nothing to do with subject matter jurisprudence. It is the application, and more importantly, the weight given by the court of the non-justiciability questions raised by the defendants.

As a result of the non-justiciability questions, the intervention of the US Department of State has a significant impact on the determination of many ATCA cases. The subject and personal jurisdictional questions are complex, detailed and, for certain claims, difficult to throw out at any interlocutory hearing. However, these procedural and evidentiary difficulties[34] do not exist at a non-justiciability questions hearing. In addition, under a non-justiciability application, it is also easier to dismiss the whole complaint than attempt to dismiss the complaint by arguing a lack of jurisdiction for each claim in the complaint.

The non-justiciability questions are primarily questions concerning:

1. The Act of State Doctrine;
2. The Political Question Doctrine; and
3. The Doctrine of International Comity.

In determining whether the act of state, political question or international comity doctrines apply, the court is to:

1. Ascertain the relevant foreign policy impact of adjudicating the case from the executive branch of government (ie. A Statement of Interest is filed by the executive branch of government, which provides this information); and
2. Assess whether adjudication of the claims before it will unduly interfere with that policy[35].

As the non-justiciability questions revolve around areas outside the courts' authority and given the need to evaluate the applicability of these doctrines, the courts obtain opinions from the US Department of State as to the effect a case may have on the United States' foreign relations and/or policy.

In *Sarei*, for example, the District Court Judge Margaret M Morrow sought the opinion of the Department of State "…as to the effect, if any, that adjudication of [the Sarei] suit may have on the foreign policy of the United States"[36]. Just over two months later the Attorney General, acting on

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Ninth Circuit Civil Appeals Court. The appeals' court was scheduled to hear the *Sarei* appeal in September 2003 and as at date of writing this article a judgment has not been reported.

33 Within limits.

34 Such as the rules of evidence and interpretation as to the existence or otherwise of customary international laws.

35 *Sarei,* above n 3 at 91-98.

36 Letter dated 31 October 2001 from William H Taft IV, Legal Adviser to the Department of State to Honorable Robert D McCallutfl, Assistant Attorney General, Civil Division, US Department of Justice ("the Letter"). By way of note, the court informed the parties of its desire to contact the Department of

behalf of the Department of State, filed a Statement of Interest in the case[37]. The Statement of Interest attached a letter from William Taft IV, the Legal Adviser to the Department of State dated 31 October 2001, which explained the Department of State's views on the effects that continued adjudication of the action would have on the conduct of US foreign relations ("the Letter").

Such a request would appear unusual in common law western democratic courts. However, for ATCA cases this is not uncommon. In both *Kadic v Karadzic*[38]and *Doe I v Unocal Corp*[39], the courts obtained views from the Department of State. In *Kadic*, for example, the solicitors for the plaintiffs wrote to the Secretary of State to oppose reported attempts at the time that Karadzic was to be granted immunity from suits in the US. The department's reply indicated that Karadzic was not immune from such a suit[40]. Then in another case a few years later in *National Coalition Government of the Union of Burma v Unocal, Inc.*[41], the court invited the Department of State to express its views concerning the potential ramifications of the litigation on US foreign policy.

In conducting this analysis the court puts itself in a position where it would have to accept, *prima facie*, a conclusive type of statement from the executive branch of government on US foreign policy as evidence of its view on that subject[42]. The court would be reluctant to assess whether the government's foreign policy is wise or unwise or whether it is based on misinformation or faulty reasoning. It could not put itself in a position to judicially assess government policy.

One obvious question is what is the court to do with the Statement of Interest. This was dealt with in *Unocal II*, when the court said: "In light of the foregoing evidence proffered by Unocal, and particularly the Statement of Interest submitted by the United States, the Court takes *judicial notice*[43] of the fact that the United States conducts diplomatic relations with SLORC as the current government of Burma"[44] (emphasis added).

The obvious corollary question is, what weight will be given to the Statement of Interest by the courts in determining the non-justiciability questions. This is answered by examining the three doctrines that make up the basis of the non-justiciability questions.

State and provided the parties an opportunity to express their views on the matter. Needless to say, the parties disagreed as to the content but not the fact that the court should seek the Department of State's views.

37 The judge then allowed the parties to file submissions addressing the applicability of the act of state, political question and international comity doctrines following the receipt of the Statement of Interest.

38 *Kadic,* above n 31 at 232.

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

40 Later the court wrote to the Department of State to inquire whether the US government wishes to offer any further views concerning any of the issues raised in the case. A Statement of Interest was filed in response indicating there was none, but the reply also gave the judge an opportunity to conclude that the Government's reply was necessary. *Kadic*, above n 31 at 250.

41 *National Coalition Government of the Union of Burma v Unocal, Inc.* 176 FRD at 329 (CD Cal 1997) ("*Unocal II*").

42 In a process easily understood within most common law western democratic constitutional constraints, the right to create foreign relation policies by the US Government is given by the US Constitution to the executive and legislative departments of government and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. *Oetjen v Central Leather Co.,* 246 US 297 (1918) at 302.

43 A statement by a duly authorised official of the Department of State as to the policy of the executive branch of the government, either at the present time or in the past is subject to judicial notice, and is binding on the District Court. *United States v State of Alaska*, 236 F. Supp. 388 at 394.

44 *Unocal II*, above n 41 at 352.

1. The Act of State Doctrine

The act of state doctrine will prohibit a court from adjudicating the claims and applies when the outcome of a case depends on the official action by a foreign sovereign state. As it is normally the defendants who rely on the act of state doctrine, they have the onus of proving it applies[45]. A court will find a claim in a complaint is barred by the act of state doctrine only if it:

1. Is an official act of a foreign sovereign state;
2. Is performed within that state's own territory; and
3. Seeks relief that would require the court to declare the foreign sovereign state's act invalid[46].

The conceptual idea is that every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one state are very reluctant to sit in judgment on the acts done by the government of another in its own territory. The doctrine shows the concern the court has in regard to adjudicating the conduct of a foreign state and its reluctance to interfere with the foreign state's executive branch foreign policy decisions. This was recently supported in *Unocal II* when the court said: "The act of state doctrine embodies the purely prudential concern that judicial inquiry into the validity of a foreign nation's sovereign acts may interfere with Executive and Congressional foreign policy efforts"[47]. Arguably, the doctrine is designed to prevent judicial pronouncements on the legality of the acts of foreign states which could embarrass or impede the executive branch of government in the conduct of its foreign affairs.

In *Banco National de Cuba v Sabbatino*[48] ("*Sabbatino*"), the test the US Supreme Court used to determine whether the act of state doctrine bars a particular claim in a complaint, which is a balancing one, is,

> "…the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the court can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, … for the political interest of this country may, as a result, be measurably altered"[49].

The party asserting the act of state doctrine bears the burden of providing some evidence that the government acted in its sovereign capacity and the nature of the government's interest in that act[50]. If the asserting party meets this burden, then the courts must determine whether the factors set forth in *Sabbatino* (ie. international consensus, impact on foreign relations and the continued existence of

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45 "The burden of proving acts of state rests on the party asserting the applicability of the doctrine", *Lui v Republic of China*, 892 F.2d at 1432 (9th Cir. 1989); *Unocal II*, above n 41 at 350.

46 *Roe III v Unocal Corp.*, 70 F. Supp.2d 1073 at 1076 (C.D. Cal. 1999) ("*Roe III*").

47 *Unocal II*, above n 41 at 349-50.

48 *Banco National de Cuba v Sabbatino* 376 U.S. 398 (1964).

49 Ibid. at 428.

50 If the party asserting the doctrine fails to meet this threshold burden of establishing the applicability of the act of state doctrine then it is unnecessary to proceed to an analysis of the *Sabbatino* factors. *Forti v Suarez-Mason*, 672 F.Supp 1531 and 1546 (N.D. Cal. 1987).

the government) support or undermine the application of the act of state doctrine to bar the other parties' claim[51].

In *Sarei*, Rio Tinto asserted that the act of state doctrine bars the environmental claims and racial discrimination claims[52]. Specifically, Rio Tinto contended that because the Copper Agreement[53], which regulated the relationship between Rio Tinto and PNG, is codified as PNG law and therefore "…the plaintiffs cannot prevail on their environmental claims without establishing that [PNG's] official conduct over more than 30 years in licensing and regulating mining operations on Bougainville violate the law of nations"[54].

Firstly, it is important to distinguish between when a government is acting in its public capacity as a sovereign state and when it is acting in a commercial or private capacity. This is important because before an act of state immunity can apply, the act in question must be a public act and not a commercial one. The plaintiffs, in *Sarei*, tried to argue that all the wrongful acts were done by Rio Tinto and not PNG but given the *Copper Act*, PNG, according to the court, acted in a public or governmental manner[55]. It has been long accepted that granting a concession to exploit natural resources entails an exercise of powers which is peculiar to a sovereign[56] and it is not a commercial act.

The court then turns to the *Sabbatino* factors to determine if the act of state doctrine applies. As noted above, these factors include:

1. The degree of consensus concerning the area of international law in question;
2. The implications of the issues on US foreign relations; and
3. Whether the government that engaged in the challenged act of state continues in existence.

(i) The degree of consensus concerning the area of international law in question

There is no consensus regarding the alleged environmental harm tort (except under UNCLOS[57]). Whereas there is considerable consensus regarding a racial discrimination claim[58]. Accordingly, the court found the first factor weighs against applying the act of state doctrine to bar adjudication of

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51 *Unocal II*, above n 41 at 351-54.

52 It is important to note that the court dismissed the plaintiffs' racial discrimination and most of their environmental claims for lack of subject matter jurisdiction. This was the first part of Rio Tinto's Motion to Dismiss. These issues were covered in the first article and are therefore not discussed in this article.

53 In 1967, Bougainville Copper Limited ("BCL") (a PNG company and a majority-owned subsidiary of Rio Tinto Ltd.) entered into a formal agreement with the PNG government concerning the development of certain mineral deposits in Bougainville, which was ultimately codified as the *Mining (Bougainville Copper Agreement) Act of 1974 ("*the *Copper Act"*). So that it could operate the mine, the Australian Colonial Administration granted BCL leases over 12,500 hectares of Bougainville land. The *Copper Act*, *inter alia*, regulated the disposal of waste from mining operations, and vested in PNG's Department of Minerals and Energy, the power to control and monitor pollution generated by the mine.

54 *Sarei*, above n 3 at 100.

55 Ibid. at 103. "A contract whereby a foreign state grants a private party a license to exploit the state's natural resources is not a commercial activity, since natural resources, to the extent they are affected with a public interest are goods in which only the sovereign may deal".

56 Ibid.

57 United Nations Convention on the Law of the Sea.

58 It has been noted that the Restatement (Revised) of Foreign Relations Law, § 428, Comment 4, at 8 (Tent. Draft No. 4, 1983) identifies *jus cogens* norms and prohibit genocide, slavery, murder or causing disappearance of individuals, prolonged arbitrary detention and systematic racial discrimination ("*Restatement (Revised)*").

the plaintiffs' racial discrimination claims but weighs in favour of applying the doctrine to the plaintiffs' environmental tort claim.

(ii) The implications of the issues on US foreign relations

In this factor, the court must evaluate the implications on the US foreign relations if the case is adjudicated. In *Unocal II*, the US Supreme Court indicated that if the impact on the foreign relations of the international issues presented is small, the justification for the application of the act of state doctrine is commensurately weak[59]. That is, what is the likely impact on international relations that would result from judicial consideration of the foreign sovereign's act? If the adjudication would embarrass or hinder the executive in the realm of foreign relations, the court should refrain from inquiring into the validity of the foreign state's act[60].

This is where the Department of State's Statement of Interest applies. In *Sarei*, the department believed the continued adjudication of the case would negatively impact United States' foreign relations with the PNG government. Mr William Taft IV in the Letter specifically stated:

> "The success of the Bougainville peace process represents an important United States foreign policy objective as part of our effort at promoting regional peace and security. In our judgment, continued adjudication of the claims identified by Judge Morrow in her August 30 letter would risk a *potentially serious adverse impact* on the peace process, and hence on the *conduct of our foreign relations*"[61] (emphasis added)[62].

The court took a literal interpretation of the Letter and concluded that the continued adjudication of the lawsuit will negatively impact on the United States' foreign relations with PNG[63].

The court was at pains to note the key inquiry for its purpose was to determine whether there would be an impact on the United States' foreign relations; not whether the position adopted by the US was well-founded or factually accurate. Further, it was noted the plaintiffs did not cite, and the court could not find, a single case in which a court permitted a lawsuit to proceed in the face of an expression of concern such as that communicated in the Letter by the Department of State[64].

(iii) Whether the government that engaged in the challenged act of state continues in existence

The final *Sabbatino* factor is whether the government allegedly responsible for the challenged act of state is still in existence. In *Sabbatino*, the court remarked the balance of relevant considerations might shift if the government, which perpetrated the challenged act of state, is no longer in existence[65]. As the PNG Government has not changed, this factor also favours application of the act of state doctrine.

While the judge in her evaluation of the factors in *Sarei* concluded two of the three factors supported the application of the act of state doctrine to bar continued adjudication of the plaintiffs'

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59 *Unocal II*, note 41 at 354.

60 *Allied Bank International v Banco Credito Agricola de Cartago*, 757, F.2d 516 at 520-21.

61 Refer to the Letter, above n 36.

62 He also added that on 30 August 2001 (the same date that the judge dated her letter to the Department of State) the PNG government and representatives of Bougainville signed a peace agreement and he concluded that this peace agreement will take sustainable effort to implement. He also concluded it would be difficult to maintain a delicate balance in the years ahead, and countries who participated in the peace process, particularly PNG, expressed their concern that litigation of the action might disrupt the peace effort.

63 *Sarei*, above n 3 at 109.

64 Ibid. at 111.

65 *Sabbatino*, above n 48 at 428.

environmental tort and racial discrimination claims in the US, she made an extra comment concerning the importance of the impact of the United States' foreign relations when balancing the factors. She wrote the "…'touchstone' or 'crucial element' [in the Sabbatino analysis] is the potential for interference with our foreign relations"[66]. Accordingly, the Letter is extremely important in the determination of the application of the act of state doctrine.

Interestingly, the alleged war crimes and crimes against humanity that involve alleged illegal acts committed by the PNGDF[57] during the civil uprising on Bougainville, cannot receive the act of state immunity where the commands of the military do not involve acts of legitimate warfare. Legitimate orders given by military commanders during wartime are commonly viewed as official sovereign acts[68] and an order given by a military officer has traditionally been viewed as an official act of a sovereign for purposes of the act of state doctrine[69]. Accordingly, if the court determines the military officer acted on behalf of a recognised government and if the lawsuit turns on a challenge to the officer's order, then the act of state doctrine bars adjudication of the matter. However, this is for a legitimate act of warfare.

The question before the court in *Sarei* was whether the blockade would ultimately be shown to be a legitimate act of welfare or, as alleged, a war crime or crime against humanity. However, based on the comments above, the court is required to accept the veracity of the allegations when determine the act of state doctrine. Accordingly, subject to the truth or otherwise of the allegations, the war crimes and crimes against humanity cannot be deemed to be official acts of state and therefore the court did not find the necessary proprietary threshold had been met and therefore the doctrine could not be applied.

Such an approach is consistent with standard practice. That is, a claim arising out of an alleged violation of human rights (for example, a claim by a victim of torture or genocide) would (if otherwise sustainable) probably not be defeated by the act of state doctrine defence since the accepted international law of human rights contemplates external scrutiny of such acts[70].

The only significant limiting factors are if the corporation was acting together with the state, whether the state was acting as a state or in a commercial way in relation to its conduct, and if so, were the actions legitimate. If the answers are in the affirmative then the *Sabbatino* factors apply and the court is likely to request an opinion from the Department of State.

It is evident the Department of State is willing to provide an emphatic opinion without much detail. It is also evident the courts will not only not question it, but will give it significant weighting in determining if the act of state doctrine applies. Such a decision leaves little grounds for appeal, as the court will not question the reasoning behind the opinion.

This doctrine gives the party asserting the doctrine in an ACTA case a significant advantage.

2. The Political Question Doctrine

The political question doctrine was created to prevent the justiciability of certain issues. Obviously, questions, which in their nature are political, cannot be determined in a court[71]. There is, however, a difference between political questions and political cases. This doctrine is invoked in situations

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66 *Sarei*, above 3 at 113.

57 Papua New Guinea Defence Force.

68 *Sarei*, above n 3 at 106.

69 *Roe III*, above n 46 at 1079.

70 *Restatement (Revised)* above n 58.

71 *Sarei*, above n 3 at 113.

where trying the matter can present difficulties that implicate sensitive matters of diplomacy and which are historically reserved to the jurisdiction of the political branches of government[72]. If this doctrine applies the claims are non-judiciable. Further, the same separation of powers principles that underlie the act of state doctrine also underlie the political question doctrine[73].

To determine whether the plaintiffs' claim raises the political questions doctrine, the court must consider the following factors ("the *Baker v Carr* factors"), and if one of these factors is inextricably involved in the case, the doctrine applies and the court should dismiss the claim:

1. The existence of any textually demonstrable constitutional commitment of the issue to a coordinate political department;
2. A lack of judicially discoverable and manageable standards for resolving the claims;
3. The impossibility of deciding without an initial, non-judicial, policy determination;
4. The impossibility of a court's undertaking independent resolution without expressing a lack of respect for the coordinate branches of government;
5. An unusual need for unquestioning adherence to a political decision already made; and
6. The potentiality of embarrassment from multifarious pronouncements by various departments on one question[74].

In *Sarei*, Rio Tinto argued this doctrine should apply and the court should decline to exercise jurisdiction over the complaint because "…matters of war and peace and the legitimacy of foreign governments are quintessential political questions"[75]. It would appear that notwithstanding that Congress enacted the ATCA, which gives the federal courts the jurisdiction over claims within its ambit, it does not prevent the court applying the political question doctrine.

As this is close to the act of state doctrine and given most ATCA actions are going to involve foreign policy by its inherit nature, these doctrines are always going to be closely related in their application. In *Sarei*, the analysis the court used to explain the act of state doctrine was applied to the political question doctrine, which favoured the dismissal the claims on political question as well.

Almost by way of a secondary factor, Morrow J stated: "The Court has also considered the *Baker v Carr* factors and finds that they support invocation of the political question doctrine"[76]. Without a detailed explanation she concluded that:

> "Were the court to ignore this statement of position [Secretary of State Albright promised America would do all it could to help the PNG government resolve the civil war in Bougainville[77]] and deny the motion to dismiss and retain jurisdiction over this action, it would surely express a lack of the respect for the coordinate branches of government and cause the potentiality of embarrassment from multifarious pronouncements by various departments on one question"[78].

Accordingly, she invoked the 4th and 6th *Baker v Carr* factors.

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72 *Kadic*, above n 31 at 248-49.
73 The act of state doctrine is the foreign relations equivalent of the political question doctrine.
74 *Baker v Carr*, 369 US at 217 (1962).
75 *Sarei,* above n 3 at 115.
76 Ibid. at 117.
77 Ibid. at 117 – 118.
78 Ibid.

As the PNG Government's pre-war and wartime conduct needed to be examined, the court would have been required to assess whether the hearing of the merits of the complaint would have an impact on the future of the peace agreement[79]. Accordingly, Morrow J found the political question doctrine applied to each of the plaintiffs' causes of action as the court would have been required to make a judgment on the US Government's foreign policy[80].

It is possible to argue that whenever indigenous peoples of one country file a class action claim against a multinational organisation, such as a mining and resources corporation, in the US under the ATCA, there will, by default, be an impact on the United States' foreign policy with that state, and therefore, in that situation, it will always involve a diplomatic difficulty and the political question doctrine could be invoked.

Accordingly, from a practical perspective this doctrine is going to be very relevant for each claim brought against a mining and resources corporation operating in a Third World state. As part of a due diligence, when investigating the potential of operating in such a country, a mining and resources corporation should analyse the diplomatic relationship between that state and the US, and this analysis should include any public comments the US has made in relation to its foreign policy towards that state.

The final non-justiciability question concerns the doctrine of international comity.

3. The Doctrine of International Comity

The doctrine of international comity[81] is defined as, "…the recognition which one nation allows within its territory to the legislative, executive or judicial acts or another nation"[82]. In practical terms it means courts sometimes take into account the laws or interests of a foreign state and decline to exercise the jurisdiction it otherwise has. Unlike the other above-mentioned doctrines, international comity is a discretionary doctrine. It is not a rule of law but is one of practice, convenience and expediency. The party asserting the application of the doctrine bears the onus of proof.

Courts adjudicating ATCA cases are often reluctant to make discretionary findings, especially given the number of plaintiffs involved, the nature of the claims involved and the impact on the states involved. Accordingly, they refer to guiding factors to provide some basis of a decision. Morrow J, in *Sarei*, referred to Section 403 of the *Restatement (Third) of the Foreign Relations Law of the United States* ("the *Restatement*"), which provides that "…a state may not exercise jurisdiction to a prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable"[83].

It is still unclear whether there needs to be a conflict between the domestic and foreign laws as a threshold requirement before invoking international comity grounds or is it only a factor relevant to the comity analysis under the particular facts of the case. In her judgment, Morrow J appeared to

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79 The PNG Government was involved because the plaintiffs' lawsuit claimed human rights violations and atrocities against PNG soldiers or other government officials. The case is premised on the assertions that the Bougainvilleans were forced to revolt because of environmental pollution and damage to personal health caused by the mine. As a result, thousands of the island's residents died because the blockade deprived them of access to needed medical supplies and the PNG soldiers tortured, raped and pillaged the Bougainvilleans.

80 As stated in the Statement of Interest.

81 It is sometimes called, "comity of nations".

82 *Hilton v Guyot*, 159 US 113 at 164 (1895).

83 Restatement (Third) of the Foreign Relations Law of the United States ("the *Restatement*"), § 403(1).

have relied on Justice Blackmun's comments in *Societe Nationale Industrielle Aerospatiale v US District Court for the Southern Dist of Iowa:* [84],

> "As in the choice of law analysis, which from the very beginning has been linked to international comity, the threshold question in a comity analysis is whether there is in fact a true conflict between the domestic and foreign law. When there is a conflict, a court should seek a reasonable accommodation that reconciles the central concerns of both sets of laws. In doing so, it should perform a tripartite analysis that considers the foreign interests, the interests of the US, and the mutual interests of all nations in a smoothly functioning international legal regime"[85].

In *Sarei*, the threshold requirement involves an analysis of three questions:

1. Whether there is a conflict of laws?
2. Whether PNG's interests should be taken into account? and
3. Whether the US' interests favour exercising jurisdiction?

(i) Whether there is a conflict of laws?

In 1995 the PNG government passed the *Compensation (Prohibition of Foreign Proceedings) Act 1995*[86] ("the *Compensation Act*"), which prohibited the taking or pursuing in foreign courts legal proceedings in relation to compensation claims arising from mining projects and petroleum projects in PNG. While the plaintiffs argued there is no conflict between the US and PNG laws, clearly there is a conflict between the ATCA and the *Compensation Act*.

This situation is somewhat similar to the *In re Nazi Era Cases Against German Defendants Litigation*[87]. There, the German Parliament passed the *German Foundation Law*, which prohibited victims who had suffered various types of injury during the Nazi regime from pursuing court action for reimbursement but a number of cases had already been filed. However, after the passing of the German Foundation Law, the victims were to seek compensation from a foundation established for this purpose. The US and several other governments had participated in negotiations leading to the resolution and the US undertook to file Statements of Interest in the pending cases advising US courts of its foreign policy interests in the Foundation being treated as the exclusive remedy for World War II and Nazi era claims against German companies, and concomitantly, in current and future litigation being dismissed[88]. In that case, the court first examined whether a true conflict existed between German and US law. Noting that, "…what is required to establish a true conflict is an allegation that compliance with the laws of both countries would be impossible", it concluded

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84 *Societe Nationale Industrielle Aerospatiale v US District Court for the Southern Dist of Iowa*, 482 US (1987).

85 Ibid. at 555.

86 This act, according to the PNG government, expressly protects the human rights of PNG citizens, while encouraging and protecting the interests of foreign companies whose participation and investment is vital to improving the living standards and welfare of all Papua New Guineans. The Act prohibits and makes it a criminal offence for citizens to undertake or pursue legal proceedings in a foreign court over compensation claims arising from mining or petroleum projects in PNG. It does so within the constitutional framework which ensures that citizens can pursue their legitimate right through the PNG legal system.

87 *In re Nazi Era Cases Against German Defendants Litigation*, 129 F.Supp.2d. (DNJ 2001) ("*In re Nazi Era Cases*").

88 Ibid. at 380.

that, "…the Foundation … could only function if all pending litigation in the United States ceased" and that it could "…envision no clearer conflict of law" [89].

(ii) Whether PNG's interests should be taken into account?

This was clearly expressed in a document from Robert Igara, PNG's Chief Secretary to Government to the US Department of State dated 17 October 2001 in which he provided a statement of the Government of Papua New Guinea's position concerning the *Sarei* class action.

The document stated, *inter alia*:

> "Litigation of the kind envisaged by the writ of summons in the above case strikes at the heart not only of the Compensation (Prohibition of Foreign Proceedings) Act 1995 but of the legitimate, democratic institutions which made it, as well as those which are responsible for its application and enforcement. The case, therefore, has potentially very serious social, economic, legal, political and security implications for Papua New Guinea. It has the potential to give rise to strong adverse effects on many different aspects of Papua New Guinea's international relations, especially its relations with the United States.
>
> It is therefore with respect that the Government of Papua New Guinea requests the United States Department of State to draw these most serious implications to the urgent attention of the United States' District Court.
>
> In so doing, the Papua New Guinea Government draws attention to the doctrine of the comity of nations … the present case clearly fails to meet the requirements in Section 403 of the Restatement (3rd) of the Foreign Relations Law of the United States; it goes against the precedent cases cited; and it violates the fundamental principles of comity of nations"[90].

The tone and directness in this document is interesting especially when compared to normal diplomatic dialogue between states[91].

It is not surprising Morrow J believed the interests of PNG should be taken into account. Otherwise, it would make the concept of international comity meaningless. Given the main conceptual purpose of international comity was to afford consideration and respect to the laws and interests of foreign sovereign nations, not to take into account PNG's interests would be absurd.

(iii) Whether the United States' interests favours exercising jurisdiction?

Once again the Statement of Interest has an impact here. As Morrow J stated, "Based on the opinion expressed in the Statement of Interest, the court concludes that the United States' interests are aligned, or at least not inconsistent, with those of PNG, in a way that suggests it would be appropriate to refrain from exercising jurisdiction in this case"[92].

Once again, the court was reluctant to examine the executive arm of government. Morrow J's determination is strengthened by other similar type of cases. In *re Nazi Era Cases Against German Defendants Litigation*, the District Court held, it

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89 Ibid. at 387.

90 *Sarei*, above n 3 at 127.

91 By way of note only, prior to the hearing on Rio Tinto's Motion to Dismiss, the court received correspondence from Francis Damem, PNG's Attorney General dated 3 July 2001, in which he declined to comment on the propriety of adjudicating plaintiffs' claim in the US, noting the case involved claims by PNG citizens against a private party, Rio Tinto, that PNG was not a party, and that PNG did not wish to interfere. Damem subsequently withdrew the letter, stating that it had not been his place to offer the opinion and that it did not reflect the official position of the PNG government.

92 *Sarei*, above n 3 at 130.

> "…must generally make appropriate findings as to whether giving effect to a foreign judicial act would be prejudicial to the interests of the United States, and exercise its discretion in determining whether it will recognise foreign proceedings based on those findings … the Court's take of determining whether dismissal would result in prejudice is simplified by the Statement of Interest that have been filed by the United States. The government has plainly demonstrated to the Court that not giving effect to a foreign judicial act [in this case the German Foundation Law] would be prejudiced to the overriding foreign policy interests of the United States, and accordingly should be avoided"[93].

In *Re World War II Era Japanese Forced Labor Litigation*[94] the court also concluded that: "The State Department represents one of the two political branches with the exclusive authority to handle the country's foreign affairs, and thus it is in a good position (and certainly better position than this court) to determine if that power has been intruded upon"[95].

Accordingly, the threshold requirement for application of the international comity doctrine is met.

Then it is necessary to determine the existence or otherwise of the doctrine in *Sarei* by taking into account the other relevant factors, which include:

1. The link of activity to the territory of the regulating state (ie. the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory);
2. The connection between the regulating state and the person principally responsible for the activity to be regulated or between that state and those to whom the regulation is designed to protect;
3. The character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
4. The existence of justified expectations that might be protected or hurt by the regulations;
5. The importance of the regulation to the international political, legal, or economic system;
6. The extent to which the regulations are consistent with the traditions of the international system;
7. The extent to which another state may have an interest in regulating the activity; and
8. The likelihood of conflict with regulation by another state[96].

As the alleged conduct about which the plaintiffs complain occurred in PNG, and all residents except Mr Sarei are current PNG residents, and Rio Tinto are not residents of PNG but have conducted significant business there for a number of years, the first two factors suggest it would be unreasonable for the court to exercise jurisdiction.

As the environmental claims arise from the right of PNG to exploit its own natural resources and as this right is within a sovereign's control (as noted above) it has a high expectation it will be permitted to regulate the activity without outside inference. Accordingly, all factors warrant the

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93 *In re Nazi Era* Cases, above n 87 at 387.
94 *Re World War II Era Japanese Forced Labor Litigation*, 164 F.Supp.2d (N.D. Cal. 2001).
95 Ibid. at 1176.
96 *Restatement* above 83 at § 403(2).

court not to exercise its jurisdiction[97] in relation to the environmental claims which also applied to the racial discrimination claim.

However, there is no international comity for the war crimes and crimes against humanity because such crimes do not come within the *Compensation Act*[98]. Therefore, there is no conflict with PNG law and the threshold requirement for the application of the doctrine has not been met.

What has not been properly emphasised, at least in *Sarei*, is the fact that this doctrine is discretionary. Arguably, the fact that Rio Tinto is accused of war crimes and crimes against humanity would work in favour of the court retaining the jurisdiction. This does not sit easily with the acceptance of the international comity in relation to alleged international environmental harm claims. They, too, have resulted in numerous deaths and extremely serious injuries on a large scale. It is possible the environmental claims can be so egregious that it will be classified as a crime against humanity and therefore will be blocked.

D. CONCLUSION

Notwithstanding that plaintiffs in an ATCA claim have a significant problem ensuring they satisfy the subject matter jurisdiction threshold to allow the case to continue, the jurisprudence has developed since *Filartiga v Pena Irala*[99] to the extent that some areas of ATCA law are clearly settled. Now plaintiffs are making novel claims such as alleged breaches of international environmental law to test the limits of the established areas.

These legal issues are within the control of the plaintiff. Non-justiciability questions, on the other hand, are not within the control of the plaintiff and are arguably within the control of the defendants.

Unlike examining the subject matter jurisdictional issues, where the court will, *prima facie*, accept the allegations contained in the complaint to be true, the non-justiciability questions require brief statements of opinions from government bodies, which cannot be examined or cross-examined and therefore require limited identification of legal principle and jurisdictional interpretation and conclusion.

It is possible for defendants who have significant investment in many states around the world, and are connected to the United States, such as many mining and resources corporations, to be closely connected with the executive branch of government of many governments. Accordingly, they can work to have their views heard. Further, there would be very few states that would not impact on the United States' foreign policy if a multi-million dollar ATCA class action involving hundreds of plaintiffs was adjudicated.

It is evident from the courts previous acceptance and interpretation of the Statements of Interest that they will indirectly give considerable weight to the significance of any opinion by the Department of State. The courts to date have neither questioned the comments made by the Department of State nor tested the veracity of the conclusions or opinions provided. They have

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97 This approach was also followed in *Aguinda v Texaco, Inc.*, 142 F.Supp. 534 (SDNY 1996) ("*Aguinda II*"). In that case, the court determined that after a full review of the underlying record, it found itself obliged to dismiss the ATCA action on the same grounds of international comity. By way of note, they also dismissed the case on the grounds of *forum non conveniens*.

98 The *Compensation Act* prohibits the filing of claims in foreign courts that arise out of mining or petroleum projects in PNG.

99 *Filartiga v Pena Irala*, 630 F.2d. 876 (2d Cir. 1980).

also not asked for a detailed explanation and they have accepted the simple conclusions[100]. As a result, parties to an ATCA complaint do not adequately know the limits of the significance of arguing the non-justiciability questions.

Further, by examining the comments from the Department of State, it is possible to trace the increase intervention in the cases by the department. There is one thing giving an opinion as to the impact of the case will have on the United States' foreign relations with another state, but it is another thing when the executive branch of government directs the judiciary on how to determine the case. In a recent statement provided to the court the Department of State via the US Justice Department filed an *amicus curiae* brief seeking the court not only to dismiss the claims but also reconsider its approach to the interpretation to the ATCA[101].

The Department of State is continuing its determination to impact on the adjudication of ATCA cases. In a speech on 9 September 2003 Mr Taft, Legal Adviser to Department of State indicated he did not believe Congress intended for the ATCA to also allow for the creation of a cause of action. In is clear Mr Taft echoed the view that was clearly supported in a recent Statement of Interest which indicated, *inter alia*, that the ATCA, "…which is a simple grant of jurisdiction, cannot properly be construed as a broad grant of authority for the courts to decipher and enforce their own concepts of international law"[102].

In addition, when determining whether to dismiss a complaint the court will also take into account comments made by the state in which the torts are alleged to have occurred. A Third World state which is reliant on the investment expenditure of a mining and resources corporation, such as PNG, can have a significant input, albeit indirectly, in those comments.

As a result, arguing the non-justiciability questions gives defendants an advantage. It is not surprising, therefore, to see defendants quickly filing Motions to Dismiss in ATCA cases. Almost every case, by default, will have a problematic non-justiciable question due to the act of state doctrine, political question doctrines and doctrine of international comity[103].

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100 It is the same for comments made from foreign states, where the tort is to have allegedly occurred.

101 *Doe v Unocal Corp*, 2002 WL 31063976 (9th Cir (Cal.) September 18, 2002 ("*Unocal IV*"). In this case, Burmese villagers have brought action against Unocal, a California oil company for international human rights violations perpetrated by the Burmese military junta. The plaintiffs' allege the violations were committed in furtherance and for the benefit of Unocal's pipeline project in Burma pursuant to a joint venture-type relationship between Unocal and the Burmese military dictatorship.

102 8 May 2003, *amicus curiae* brief of the United States in *Unocal IV,* ibid, Nos. 00-56628 (9th Cir).

103 For example: *Kadic*, above n 31 at 249, *Abebe-Jira v Negewo*, 72 F.3d 844, 848 (11th Cir. 1996); *Tel-Oren v Libyan Arab Republic*, 726 F.2d at 801-5; *Roe III*, above 46 at 1076; *Iwanowa v Ford Motor Co.*, 67 F.Supp.2d at 485- 89 and *Unocal II*, above n 41 at 349-57.